



LAW ENFORCEMENT IMMIGRATION TASK FORCE

A Path to Public Safety:
The Legal Questions around Immigration
Detainers

Executive Summary

So-called sanctuary jurisdictions have caused great controversy. Lost amid the debate is the fact that, whatever their approach toward immigrants, most state and local law enforcement agencies cooperate with the federal government extensively on immigration issues. Yet, federal immigration detainers – requests that local law enforcement detain individuals suspected of being in the U.S. unlawfully – increasingly have become a central, and often misunderstood, area of conflict.

In its recent executive order on interior immigration enforcement, the Trump administration has made clear that so-called sanctuary cities may face the loss of federal grants and could be subject to additional sanctions. Through reinstating the detainer-focused Secure Communities program and creating weekly Declined Detainer Outcome Reports, the administration also has made clear that it expects states and localities will honor immigration detainers.

But these detainers are voluntary and raise significant legal concerns, including constitutional concerns, as recent court and agency actions have clarified. The executive order comes amid a multiyear trend in which more and more jurisdictions have opted against honoring immigration detainers, citing a host of significant legal complications. Given the conflicting directives, state and local law enforcement agencies can easily find themselves stuck in the middle.

Over the past few decades, U.S. Supreme Court decisions have elaborated on an anti-commandeering principle consistent with federalism principles set forth under the U.S. Constitution. This principle prevents the federal government from “commandeering” state and local governments to carry out federal regulatory programs. Mandating that state and local law enforcement agencies and officials honor federal immigration detainers would run afoul of this principle and would be unlikely to withstand legal challenges. In addition, courts have interpreted the regulation governing detainers, 8 C.F.R. § 287.7, to refer to voluntary requests, and the Department of Homeland Security (DHS) has modified language in the relevant detainer forms to emphasize the voluntary nature of detainer requests.

At the same time, multiple recent federal court decisions have raised concerns about detainers’ legality. Because they rarely are accompanied by a warrant or court order, immigration detainers raise significant Fourth Amendment issues, as they request the seizure and/or detention of a person without probable cause to believe that the person has committed a crime.

In response to these rulings, DHS has modified detainer forms repeatedly to specify that federal immigration authorities must demonstrate a stronger basis for holding an individual than merely the desire to conduct an investigation into that individual’s immigration status.

With courts having determined that immigration detainers are not mandatory and are legally dubious, state and local law enforcement agencies can face significant legal liability for honoring them. Localities have incurred significant litigation costs and/or have paid out significant settlements in situations where they detained prisoners pursuant to an ICE detainer that was not accompanied by a warrant or a probable cause determination.

Continued partnerships between state and local law enforcement agencies and federal authorities are essential to protect the public while respecting the civil rights of individuals, but law enforcement agencies should not cut corners. State and local law enforcement can work constructively and cooperatively with the federal government on the basis of mutual trust and respect, including finding workable solutions to the very real problems that surround the legality of immigration detainees.

Introduction

In recent years, and most notably throughout the 2016 election season,¹ so-called sanctuary jurisdictions have been an issue of great controversy. Members of the House and Senate have introduced several bills directed at punishing such jurisdictions² and have held a number of hearings on the subject.³

Lost amid the public debate is the fact that most state and local law enforcement agencies cooperate with the federal government extensively on a host of issues, including immigration issues. Most jurisdictions honor federal detainer requests when accompanied by a warrant or court order, participate in federal task forces, and otherwise engage with federal authorities on a host of issues. Prior to the start of the Trump administration,⁴ a growing number of local law enforcement agencies were participants in the U.S. Department of Homeland Security's (DHS's) Priority Enforcement Program (PEP), providing notification to federal authorities when preparing to release an undocumented prisoner.⁵

However, federal immigration detainees — federal requests to detain individuals suspected of being in the U.S. unlawfully — have increasingly become a central area of conflict. For example, in its recent executive order on interior immigration enforcement, the Trump administration has made clear that it intends for states and localities to regularly honor detainees.⁶ The executive order threatens to strip federal grant funding from “sanctuary

¹ See, e.g., Nick Gass, 'Sanctuary cities' under fire in 2016 campaign, Congress," Politico, July 9, 2015, <http://www.politico.com/story/2015/07/sanctuary-cities-under-fire-in-2016-campaign-congress-119933>.

² 114th Congress: Mobilizing Against Sanctuary Cities Act ([H.R. 3002](#)), Enforce the Law for Sanctuary Cities Act ([H.R. 3009](#)), SAFE Act of 2015 ([H.R. 3073](#)), Stop Dangerous Sanctuary Cities Act ([H.R. 5654](#)); Ending Sanctuary Cities Act of 2016 ([H.R. 6252](#)); Stop Sanctuary Cities Act ([S. 1814](#)), Stop Sanctuary Policies and Protect Americans Act ([S. 2146](#)), Stop Dangerous Sanctuary Cities Act ([S. 3100](#)). 115th Congress: Mobilizing Against Sanctuary Cities Act ([H.R. 83](#)); Stop Dangerous Sanctuary Cities Act ([H.R. 400](#)); No Transportation Funds for Sanctuary Cities Act ([H.R. 824](#)); Stop Dangerous Sanctuary Cities Act ([S. 87](#)).

³ See “Sanctuary Cities: a Threat to Public Safety,” House Judiciary Committee, Subcommittee on Immigration and Border Security, July 23 2015, <https://judiciary.house.gov/hearing/sanctuary-cities-a-threat-to-public-safety/>; “Oversight of the Administration’s Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims,” Senate Judiciary Committee, July 21, 2015, <http://www.judiciary.senate.gov/meetings/oversight-of-the-administrations-misdirected-immigration-enforcement-policies-examining-the-impact-on-public-safety-and-honoring-the-victims>.

⁴ Executive Order: Enhancing Public Safety in the Interior of the United States, § 10(a), January 25, 2017 (“The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP)”), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

⁵ “DHS releases end of fiscal year 2015 statistics,” U.S. Department of Homeland Security, News Release, December 22, 2015, <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics> (as of late 2015, “16 of the top 25 jurisdictions with the largest number of previously declined detainees are now participating in PEP, representing 47 percent of previously declined detainees”).

⁶ Executive Order: Enhancing Public Safety in the Interior of the United States, § 9, January 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

cities”⁷ and creates a weekly Declined Detainer Outcome Report to publicize crimes committed by subjects of rejected detainers as an effort to “better inform the public regarding the public safety threats associated with sanctuary jurisdictions.”⁸

The executive order comes amid a multiyear trend in which more and more jurisdictions, citing legitimate legal and policy rationales, have opted against honoring immigration detainers. While some elected officials have sought to label such cities or counties “sanctuary jurisdictions,” in many cases, that characterization is inaccurate. In recent years, the courts have made clear that detainers carry with them a host of significant legal complications — complications that often prevent jurisdictions from honoring them. Examination of the constitutional, statutory, regulatory framework underpinning immigration detainers make clear that they are voluntary and legally dubious, making it difficult for cities and counties to honor them.

Background

What are immigration detainers?

Federal immigration detainers are issued by federal immigration authorities, typically U.S. Immigration and Customs Enforcement (ICE), to request that other law enforcement agencies hold individuals that are already in custody. When a detainer is issued, the law enforcement agency is asked to hold the individual for a period of time, which, under current regulations, is not to exceed 48 hours until federal immigration authorities can assume custody of the individual.⁹

History of immigration detainers

The Immigration and Naturalization Service (INS), a predecessor agency of DHS, began issuing immigration detainers in the 1950s on an ad hoc basis. Detainers were not expressly provided for by statute or regulation; instead, the INS believed the practice of issuing detainers was consistent with the executive branch’s general authority over the federal immigration system.¹⁰

In 1986, Congress amended the Immigration and Nationality Act (INA)¹¹ to provide for the issuance of detainers in situations where an undocumented immigrant was arrested and

⁷ *Id.* at Sec. 9(a).

⁸ *Id.* at Sec. 9(b).

⁹ 8 C.F.R. § 287.7(d) (law enforcement agency “shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department”).

¹⁰ Kate M. Manuel, “Immigration Detainers: Legal Issues,” Congressional Research Service, May 7, 2015, at p. 4,

<https://fas.org/sqp/crs/homesec/R42690.pdf>.

¹¹ Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101).

detained for controlled substance offenses. Subsequently, INS issued two regulations governing the issuance of detainers: one concerning detainers covered under the 1986 amendments, and the other concerning non-controlled substance-related offenses. In 1997, INS folded them into one combined regulation.¹²

While some have contended that the issuance of immigration detainers outside the realm of controlled substance offenses is unlawful,¹³ the only federal court to directly weigh in on the issue found that the 1986 amendments did not limit the ability of INS/DHS to issue detainers in other contexts. They are consistent with the federal government's inherent control over immigration enforcement policy.¹⁴

1. Secure Communities

Late in the George W. Bush administration, in 2008, DHS launched Secure Communities as a pilot program that utilized existing federal databases to identify undocumented individuals.¹⁵ Rather than having federal authorities identify undocumented criminals living in the community for targeting and arrest, Secure Communities was aimed at identifying and bringing into custody those who were already in the custody of state and local law enforcement.¹⁶ The program, which was expanded during the Obama administration and ran through 2015, sought to leverage state and local law enforcement's existing activity, allowing local law enforcement officers "to enforce the law in exactly the same manner as they did before" the program, with the result of also identifying criminals for deportation.¹⁷

Under the program, once an individual was booked into a local jail, their fingerprints would be run through established federal criminal and immigration databases. If there was a positive identification of an individual who was not documented, a database "hit," ICE and local law enforcement were notified. In most instances, federal immigration authorities could simply issue an immigration detainer asking the locality to hold a detainee who was identified as being undocumented in the program's databases.¹⁸ As a result, the number of federal immigration detainers grew significantly during this time period.

Thousands of immigration detainers were issued pursuant to Secure Communities. During the time the program remained in effect, the program contributed to the identification and

¹² Manuel at pp. 4-6.

¹³ See *id.* at pp. 10-11 (noting that some plaintiffs and analysts have challenged the statutory basis of immigration detainers outside the controlled substance context).

¹⁴ See *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177, 1198 (N.D. Cal. 2009) ("The fact that § 1357 does not expressly authorize ICE to issue detainers for violations of laws other than laws relating to controlled substances hardly amounts to . . . [an] unambiguous expression of congressional intent").

¹⁵ U.S. Immigration and Customs Enforcement, "Secure Communities," Archived Information, <https://www.ice.gov/secure-communities#tab1>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ American Immigration Council, "Secure Communities: A Fact Sheet," November 29, 2011, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>.

removal of hundreds of thousands of individuals,¹⁹ serving as a significant driver of the increase in deportations over that timeframe.²⁰

While DHS contended that Secure Communities was a smart alternative to deputizing state and local law enforcement to directly carry out federal immigration laws and priorities,²¹ critics contended that the program led to racial profiling and undermined community policing.²²

As a result of these concerns, as well as the prospect of civil liability arising from unlawful detentions,²³ a growing number of localities limited their cooperation with DHS over time, ceasing to honor immigration detainers issued under Secure Communities.²⁴ While DHS contended that “[s]tate and local jurisdictions cannot opt out of Secure Communities,” insofar as they could not prevent federal authorities from checking detainees against federal databases,²⁵ the federal government could not force localities to honor immigration detainers, leading hundreds of jurisdictions to curtail cooperation on this front.²⁶

With mounting pressure from states and localities unsatisfied with the Secure Communities framework, DHS Secretary Jeh Johnson announced on November 20, 2014 that the program would be ended and replaced by the Priority Enforcement Program (PEP).

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¹⁹ U.S. Immigration and Customs Enforcement, “Secure Communities,” Archived Information, <https://www.ice.gov/secure-communities#tab1>.

²⁰ See Ana Gonzales-Barrera and Jens Manuel Krogstad, “U.S. deportations of immigrants reach record high in 2013,” Pew Research Center, October 2, 2014, <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/>.

²¹ U.S. Immigration and Customs Enforcement, “Secure Communities,” Archived Information, <https://www.ice.gov/secure-communities#tab1>.

²² See, e.g., American Immigration Council, “Secure Communities: A Fact Sheet,” November 29, 2011, <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (summarizing concerns about Secure Communities).

²³ *Infra*, Part III.

²⁴ Suzanne Gamboa, “Obama Ends Secure Communities Program That Helped Hike Deportations,” NBC News, November 21, 2014, <http://www.nbcnews.com/storyline/immigration-reform/obama-ends-secure-communities-program-helped-hike-deportations-n253541>.

²⁵ U.S. Immigration and Customs Enforcement, “Secure Communities,” Archived Information, <https://www.ice.gov/secure-communities#tab1>.

²⁶ Tim Henderson, “More Jurisdictions Defying Feds on Deporting Immigrants,” The Pew Charitable Trusts, October 21, 2014, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/10/31/more-jurisdictions-defying-feds-on-deporting-immigrants>.

2. The Priority Enforcement Program

As part of the Obama administration's 2014 executive actions on immigration, the November 20, 2014, memorandum²⁷ announced the discontinuation of Secure Communities and its replacement with PEP. Intended "to address the increasing number of federal court decisions that held that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment,"²⁸ PEP differed from Secure Communities in significant ways.

First, in contrast to Secure Communities, PEP was intended to rely primarily on requests for notification of an impending release, as opposed to traditional immigration detainers, which ask localities to physically hold individuals beyond the time they are slated for release.²⁹ Traditional detainers still existed under the new program, under "special circumstances," and, in theory, were to be used infrequently.³⁰ However, in practice, data indicated that the program continued to utilize detainers extensively.³¹

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Second, enforcement actions under PEP were only triggered by previous criminal convictions, whereas under Secure Communities an individual could be flagged for having been charged (but not convicted) of a crime.³²

Third, while DHS maintained that state and local law enforcement's participation in Secure Communities was mandatory, participation in PEP was expressly voluntary.³³ DHS engaged with individual state and local governments to secure their participation in PEP, allowing the jurisdictions to decide in which aspects of the program they would like to participate. While some large jurisdictions opted not to participate in PEP,³⁴ DHS touted obtaining participation from nearly two-thirds of the large jurisdictions that had ceased honoring federal immigration detainers under Secure Communities.³⁵

²⁷ U.S. Department of Homeland Security Secretary Jeh Johnson, "Secure Communities," U.S. Department of Homeland Security, Memorandum, November 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities_0.pdf.

²⁸ *Id.*

²⁹ See *id.* at 2 ("I am directing ICE to replace requests for *detention* (i.e., requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for *notification*") (emphasis in original).

³⁰ See *id.*

³¹ See American Immigration Lawyers Association (AILA) and National Immigrant Justice Center (NIJC), "AILA and NIJC Policy Brief: ICE's Detainer Program Operates Unlawfully Despite Nominal Changes," AILA Doc. No. 17011831 at p. 2, January 18, 2017 (even though PEP was intended to emphasize requests for notification over requests for detention, data indicated that "four of five PEP requests made by ICE officers [were] detainer requests.") (internal citation omitted).

³² See *id.* ("ICE should only seek the transfer of an alien in the custody of state or local law enforcement through the new program when the alien has been *convicted* of an offense . . .") (emphasis added).

³³ See *id.* at 3 (discussing the process of engaging state and local governments about PEP).

³⁴ See "Philadelphia mayor's first act is to rescind cooperation with immigration agency," Fox News Latino, January 5, 2016, <http://latino.foxnews.com/latino/politics/2016/01/05/new-mayor-first-act-to-rescind-philadelphia-cooperation-with-immigration-agency/>.

³⁵ "DHS releases end of fiscal year 2015 statistics," U.S. Department of Homeland Security, News Release, December 22, 2015, <https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2015-statistics> (as of late 2015, "16 of the top 25 jurisdictions

While PEP represented a break from Secure Communities in many ways, some critics have characterized it as a continuation of its much-maligned predecessor.³⁶ Arguing that the transition from Secure Communities to PEP was mostly cosmetic, critics have raised a number of concerns about the program, questioning whether ICE officers and agents were abiding by the changes, whether the continuing involvement of state and local law enforcement fostered fear in immigrant communities, and whether the ongoing use of immigration detainers in “special circumstances” continued Secure Communities’ constitutional shortcomings.³⁷

3. Secure Communities redux

Pursuant to President Trump’s executive action on interior immigration enforcement and DHS Secretary John Kelly’s February 20, 2017, implementation memorandum,³⁸ DHS is ending PEP and reinstating Secure Communities. In addition to reinstating Secure Communities, the Trump administration’s executive order on interior immigration enforcement dramatically expands enforcement priorities to encompass not only those with convictions for “any criminal offense,” whether serious or minor, but also individuals charged with any offenses, individuals who “committed” uncharged acts “constitute[ing] a chargeable offense,” as well as individual who engaged in any fraud or misrepresentation in any official matter.³⁹

Although the specifics of Secure Communities’ return remain unclear, it is likely that, absent significant reforms, a reconstituted Secure Communities will continue to raise the same concerns regarding racial profiling, community policing, and unlawful detention as before.

STATES AND LOCALITIES CAN BE HELD LIABLE FOR HONORING IMMIGRATION DETAINERS

One central point of controversy regarding immigration detainers surrounds the possibility that states or localities will be held liable for honoring them. In determining whether states and localities can be held liable, two questions hold particular relevance:

with the largest number of previously declined detainers are now participating in PEP, representing 47 percent of previously declined detainers”).

³⁶ See, e.g., Immigrant Legal Resource Center, “Life under PEP-Comm,” http://www.ilrc.org/files/documents/life_under_pepcomm.pdf.

³⁷ See *id.*

³⁸ Executive Order: Enhancing Public Safety in the Interior of the United States, § 10(a), January 25, 2017 (“The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP)”), <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>; U.S. Department of Homeland Security Secretary John Kelly, “Enforcement of the Immigration Laws to Serve the National Interest,” Memorandum, U.S. Department of Homeland Security, February 20, 2017, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

³⁹ Executive Order: Enhancing Public Safety in the Interior of the United States, § 5, January 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

- 1) Can localities choose not to honor immigration detainers (*i.e.*, are immigration detainers voluntary)?
- 2) Is it permissible to hold somebody pursuant to an immigration detainer if he or she is otherwise free to leave detention (*i.e.*, are immigration detainers legal?)

The answers to both of these questions involve constitutional considerations. Whether the federal government can require a state to honor an immigration detainer implicates the Tenth Amendment, as well as the federal structure of our constitutional government. And improper detention of an individual implicates the Fourth Amendment and due process concerns.

Moreover, the answers to these questions are intertwined. If immigration detainers are mandatory, it follows that state or local government cannot be held liable for carrying out these federal mandates.⁴⁰ Accordingly, if it is in fact illegal to hold someone pursuant to an immigration detainer, the level of government held responsible for unlawfully detaining the individual is determined by whether state and local governments have discretion in deciding whether to honor the immigration detainer.

Are immigration detainers mandatory?

As described below, the weight of legal authority points to immigration detainers being voluntary. There are significant constitutional and regulatory hurdles that prevent the federal government from making immigration detainers mandatory, raising important questions about the potential liability of states and localities.

1. Mandatory immigration detainers would violate the Tenth Amendment's "anti-commandeering" principle

Federalism principles under the U.S. Constitution limit what Congress can do to mandate that state and local law enforcement carry out federal immigration priorities and programs. The Tenth Amendment to the U.S. Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the

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⁴⁰ See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

people.”⁴¹ Commonly cited by those favoring a small federal government as an important tool restraining federal power, the Tenth Amendment has rarely been used by the U.S. Supreme Court to strike down federal enactments. Indeed, the mid-20th century Court characterized the amendment simply as “a truism that all is retained which has not been surrendered.”⁴²

However, since the early 1990s, the Court has breathed life into Tenth Amendment jurisprudence. In a case striking down a federal mandate requiring states to take possession of low-level radioactive waste, *New York v. United States*,⁴³ the court articulated an “anti-commandeering” principle. In accordance with this principle, the Tenth Amendment requires that the federal government “may not compel the States to enact or administer a federal regulatory program.”⁴⁴

While the Commerce Clause⁴⁵ and Necessary and Proper Clause⁴⁶ provide Congress with far-ranging authority to regulate the national economy and establish the modern regulatory state, *New York v. United States* clarified that this power does not allow the federal government to compel states to carry out specific federal dictates. Principles of federalism and democratic accountability require that voters understand which level of government is responsibility for a particular policy.⁴⁷

Accordingly, the anti-commandeering principle prevents the federal government from ordering state and local officials to carry out certain federal enforcement. It is barred from “commandeering” state governments into directly carrying out federal regulatory programs: “[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”⁴⁸

The holding of *New York v. United States* was extended in *Printz v. United States*.⁴⁹ That facts of that case are particularly relevant to the question of whether the federal government can issue mandatory immigration detainers.

At issue in *Printz* were provisions of a federal statute, the Brady Handgun Violence Prevention Act, that would have required state and local law enforcement officials to conduct background checks on individuals attempting to purchase handguns.⁵⁰ Because the provision

⁴¹ U.S. Constitution, Amendment X.

⁴² *United States v. Darby Lumber*, 312 U.S. 100, 124 (1941).

⁴³ 505 U.S. 144 (1992).

⁴⁴ *Id.* at 188.

⁴⁵ U.S. Constitution, Article I, Section 8, Clause 3 (Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”)

⁴⁶ U.S. Constitution, Article I, Section 8, Clause 18 (“Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”)

⁴⁷ See *Printz v. United States*, 521 U.S. 898, 930 (1997) (“By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes.”).

⁴⁸ *New York*, 505 U.S., at 166.

⁴⁹ 521 U.S. 898.

⁵⁰ See *id.* at 935 (“We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States’ officers directly.”).

at issue would have required that local law enforcement officials carry out handgun background checks, Justice Scalia, writing for the majority, stated that the law sought to “direct the functioning of the state executive” and the provision at issue violated established notions of federalism and dual sovereignty.⁵¹ Scalia concluded that placing such a mandate on local law enforcement “plainly runs afoul of that rule.”⁵²

A mandate on local law enforcement would “plainly run afoul” of the anti-commandeering principle, as it would have the effect of “direct[ing] the functioning of the state executive.

Mandating that state and local law enforcement agencies and/or officials honor federal immigration detainers raises many of the same concerns identified in *Printz*. Like the Brady provisions at issue in *Printz*, an act of Congress or a regulatory action making immigration detainers mandatory would seek to enlist state and local governments “to enact or administer a federal regulatory program.”⁵³ A mandate on local law enforcement would “plainly run afoul” of the anti-commandeering principle, as it would have the effect of “direct[ing] the functioning of the state executive.”⁵⁴

Accordingly, a move to make immigration detainers mandatory would likely be found to offend the anti-commandeering principle and violate the Tenth Amendment.

2. The regulation governing immigration detainers suggests they are voluntary

The regulation governing immigration detainers is 8 C.F.R. § 287.7, which provides that authorized federal immigration officers “may at any time” issue immigration detainers “to any other Federal, State, or local law enforcement agency.”⁵⁵

Suggesting that detainers are voluntary, subpart (a) of the regulation describes a detainer as “a request” that “serves to advise” other law enforcement agency that DHS is seeking custody of an individual in the custody of the other law enforcement agency.⁵⁶ Similarly, the title of subpart (d) “Temporary detention at Department request,” suggests voluntariness.⁵⁷

However, the text of subpart (d) suggests that detainers may be mandatory, stating that the law enforcement agency receiving the detainer “shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by” DHS.⁵⁸

⁵¹ *Id.* at 932.

⁵² *Id.* at 933.

⁵³ See *New York*, 505 U.S. at 188.

⁵⁴ See *Printz*, 521 U.S. at 932-33.

⁵⁵ 8 C.F.R. § 287.7(a)

⁵⁶ *Id.*

⁵⁷ 8 C.F.R. § 287.7(d)

⁵⁸ *Id.*

In two recent key federal court decisions, courts have resolved the tension between the “shall” language in subpart (d), the “request” language in subpart (a), and the title of subpart (d) by interpreting detainer language as voluntary.⁵⁹ Interpreting subpart (d)’s “shall” language to refer to the mandatory nature of a 48-hour time limit for holding an individual under a detainer, both courts read the regulation in a manner that was not contradictory: Immigration detainers were voluntary requests with a mandatory 48-hour time limit.⁶⁰

Moreover, both the Third Circuit and a federal district court in Oregon noted that detainers must be voluntary to avoid running astray of the Tenth Amendment’s anti-commandeering principle.⁶¹

3. Recent changes to the detainer form suggest detainers are voluntary

Changes to the standard immigration detainer form made by DHS over the past several years also suggest that detainers are not mandatory.

Between 1997 and 2010, Form I-247 included language stating that law enforcement agencies receiving detainers were “required” by federal regulations to hold individuals up to 48 hours pursuant to the detainer, leading many observers to assume that detainers were mandatory.⁶²

However, in response to the growing body of law suggesting that the federal government could not compel states and localities to honor detainers, DHS modified the form in August 2010 to state that compliance with the form was “requested,” not “required.”⁶³ A little more than a year later, in December 2011, DHS amended Form I-247 again, creating a degree of confusion by highlighting both mandatory and voluntary language:

This *request* flows from federal regulation 8 C.F.R. §287.7, which provides that a law enforcement agency “*shall* maintain custody of an alien” once a detainer has been issued by DHS.⁶⁴

One year later, in December 2012, DHS amended Form I-247 yet again to state that the detainer “request derives from federal regulation 8 C.F.R. § 287.7”⁶⁵ That version of the form stated that “IT IS REQUESTED” for law enforcement agencies to carry out any of a menu of options that can be checked off by DHS officials, including a request to detain for 48 hours, a

⁵⁹ See *Galarza v. Szalczyk*, No. 12-3991 at *11-*13, slip op. (3d Cir. 2014); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST at *10-*12, slip op. (D. Or. April 11, 2014).

⁶⁰ See *id.*

⁶¹ See *Galarza*, No. 12-3991 at *20-*22; *Miranda-Olivares*, No. 3:12-cv-02317-ST at *10-*11.

⁶² Manuel, “Immigration Detainers: Legal Issues,” at pp. 12-13.

⁶³ *Id.*

⁶⁴ *Id.* (emphasis added by Manuel).

⁶⁵ See *id.*; U.S. Department of Homeland Security, Immigration Detainer – Notice of Action (DHS Form I-247), <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

request for notification of release of a prisoner, a request for notification of the death or transfer for a prisoner, or a cancellation of a previously-issued detainer.⁶⁶

The shift to PEP made explicit the adoption of a non-mandatory detainer framework, with the words “REQUEST” and “VOLUNTARY” appearing in the titles of all three PEP-era forms⁶⁷ and corresponding guidance made clear that none of the forms were mandatory.⁶⁸ Further emphasizing their voluntary nature, the PEP-era detainer and notification forms dropped all references to 8 C.F.R. § 287.7 or other relevant regulations, representing a complete departure from the pre-2010 form language.

The evolution of the language of Form I-247//Form I-247D in recent years, emphasizing the words “request” and “voluntary” language while deemphasizing “required” or “shall,” strongly suggests that DHS is mindful of the controversy over its authority to mandate compliance with detainers. The language of voluntariness, consistent with the line of Supreme Court anti-commandeering cases, appears to be an internal effort by DHS to make clear that state and local law enforcement retained discretion whether or not to honor immigration detainers. Indeed, as noted by the Third Circuit in *Galarza*, the Obama administration recently acknowledged the limits of its authority in this area, stating “ICE has no legal authority to require state o[r] local law enforcement to detain an individual during the 48-hour detention period.”⁶⁹

It remains to be seen how the Trump administration will characterize its authority to require immigration detainers, but the return to Secure Communities and the creation of Declined Detainer Outcome Reports suggest that it is likely to take a more aggressive approach in compelling localities to honor them.⁷⁰ With DHS preparing to replace the PEP-era detainer forms pursuant to Secretary Kelly’s February 20 implementation memorandum,⁷¹ it is an open question how the forms will characterize the voluntariness of detainers.

⁶⁶ U.S. Department of Homeland Security, Immigration Detainer – Notice of Action (DHS Form I-247), <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf> (*emphasis in original*).

⁶⁷ The existing PEP-era forms differentiate between immigration detainers, requests for notification of release, and “voluntary transfer” requests. See U.S. Department of Homeland Security, Immigration Detainer - Request for Voluntary Action (DHS Form I-247D), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF>; U.S. Department of Homeland Security, Request for Voluntary Notification of Release of Suspected Priority Alien (DHS Form I-247N), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247N.PDF>; Request for Voluntary Transfer (DHS Form I-247X), <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247X.PDF>.

⁶⁸ U.S. Immigration and Customs Enforcement, Priority Enforcement Program, Archived Information, <https://www.ice.gov/pep> (describing the forms as “requests” to receiving local law enforcement agencies).

⁶⁹ *Galarza*, No. 12-3991 at *11 (citing a request for admission made by the Office of Immigration Litigation).

⁷⁰ Executive Order: Enhancing Public Safety in the Interior of the United States, §§ 9-10, January 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>.

⁷¹ U.S. Department of Homeland Security Secretary John Kelly, “Enforcement of the Immigration Laws to Serve the National Interest,” Memorandum, U.S. Department of Homeland Security, February 20, 2017 (DHS “shall eliminate the existing Forms I-247D, I-247N, and I-247X, and replace them with a new form to more effectively communicate with recipient law enforcement agencies), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

ARE IMMIGRATION DETAINERS LEGAL?

In his November 20, 2014, memorandum announcing the launch of PEP and ending Secure Communities, then DHS Secretary Jeh Johnson referred to the need for the new program to “address[] the Fourth Amendment concerns raised in recent federal court decisions.”⁷² Acknowledging that courts have found probable cause is a necessary prerequisite for detaining an individual under the Fourth Amendment, PEP was, in theory, intended to be a notification-based system that was no longer grounded in detaining otherwise releasable individuals.⁷³

Neither the Trump administration’s executive order nor Secretary Kelly’s implementation memorandum addresses Fourth Amendment or other legal concerns about Secure Communities. Clarification on these issues would be helpful to law enforcement officials.

1. Changes to immigration detainer forms emphasize the need for probable cause

Over the years, in response to agency and court rulings that clarified the legality and voluntariness of immigration detainers, the text and guidance on immigration detainer forms changed significantly, specifying that federal immigration authorities must demonstrate a stronger basis for holding an individual than merely desiring to conduct an investigation into that individual’s immigration status.

Over time, the language in the various versions of the detainer form (Form I-247/I-247D) has come closer requiring that federal immigration agents meet a standard of proof before a detainer can be issued.⁷⁴ This standard of proof requires ICE agents to demonstrate some basis for holding the individual beyond merely conducting an investigation.

As recently as 2012, Form I-247 only required ICE agents to confirm that ICE had “[i]nitiating an investigation to determine whether this person is subject to removal from

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⁷² U.S. Department of Homeland Security Secretary Jeh Johnson, “Secure Communities,” U.S. Department of Homeland Security, Memorandum at p. 2, November 20, 2014 (listing recent cases finding that detainers raise Fourth Amendment concerns), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities_0.pdf.

⁷³ Critics have noted that PEP continued to rely on the issuance of immigration detainers. See American Immigration Lawyers Association (AILA) and National Immigrant Justice Center (NIJC), “AILA and NIJC Policy Brief: ICE’s Detainer Program Operates Unlawfully Despite Nominal Changes,” AILA Doc. No. 17011831 at p. 2, January 18, 2017.

⁷⁴ *Id.* at 3.

the United States.”⁷⁵ In late 2012, the language of the form was modified, requiring that federal immigration authorities have “reason to believe the individual is an alien subject to removal from the United States,” but making no specific reference to “probable cause.”⁷⁶

With the launch of PEP and the creation of Form I-247D, the form’s language further increased the burden needed to be shown before issuing a detainer form. The new form required ICE to determine (1) that the subject of the detainer was an immigration enforcement priority and (2) that probable cause existed that the subject was a removable alien.⁷⁷

Yet, because ICE does not typically issue detainers accompanied by judicial warrants, even the heightened requirements of Form I-247D raise constitutional and statutory concerns. Critics have argued that the “probable cause” language on Form-247D or the “reason to believe” language of its predecessor have not changed ICE’s practice “in any meaningful way.”⁷⁸ With ICE officials, rather than judges, making the probable cause determination, the new language has limited impact in overcoming immigration detainers’ significant constitutional concerns.

As explained below, the “probable cause” standard of Form I-247D does not entail a probable cause determination by a neutral magistrate and stops short of a requirement that there be “probable cause” that the subject committed a criminal offense. Moreover, it also stops short of the statutory requirement that an immigration officer have “reason to believe” that an alien is “likely to escape” before a warrant can be issued when conducting a warrantless arrest.⁷⁹

2. Immigration detainers raise major Fourth Amendment concerns

Individuals suffering constitutional injuries at the hands of government entities commonly bring “Section 1983 claims”⁸⁰ in federal court to receive redress for their injuries. Section 1983 applies to government conduct under the color of law that has infringed a constitutionally-protected interest. As noted in *Miranda-Olivares*, “municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is

⁷⁵ Immigrant Legal Resource Center, “Revised 2012 ICE Detainer Guidance: Who It Covers, Who It Does Not, and the Problems That Remain,” at pp. 2-3, Practice Advisory, 2013,

http://www.ilrc.org/files/documents/detainer_guidance_plus_addendums.pdf.

⁷⁶ U.S. Department of Homeland Security, Immigration Detainer - Notice of Action (DHS Form I-247),

<https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

⁷⁷ See U.S. Department of Homeland Security, Immigration Detainer - Request for Voluntary Action (DHS Form I-247D),

<https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF>.

⁷⁸ See American Immigration Lawyers Association (AILA) and National Immigrant Justice Center (NIJC), “AILA and NIJC Policy Brief: ICE’s Detainer Program Operates Unlawfully Despite Nominal Changes,” AILA Doc. No. 17011831 at p. 4, January 18, 2017.

⁷⁹ See 8 U.S.C. § 1357(a)(2).

⁸⁰ 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”)

made from among various alternatives by the official or officials responsible for establishing the final policy with respect to the subject matter in question.”⁸¹ In other words, if immigration detainees are voluntary, municipalities may be found liable for violating an individual’s civil rights for honoring them.

The Fourth Amendment bars the arbitrary detention of persons without probable cause the person has committed a crime, stating that “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation . . . and the persons or things to be seized.”⁸²

Because they rarely are accompanied by a warrant or court order, immigration detainees raise significant Fourth Amendment issues, as they request the seizure and/or detention of a person without probable cause to believe that the person has committed a crime. Immigration detainees request the continuing detention of an individual otherwise eligible for release solely because officials suspect the subject has unlawful presence and may be deportable – representing a civil offense, rather than a criminal offense.⁸³ Courts have held that continued detention pursuant to an immigration detainer constitutes a new arrest and implicates the protections of the Fourth Amendment.⁸⁴

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In 2014, a federal district court in Oregon found that the plaintiff’s Fourth Amendment rights were violated when, acting pursuant to an ICE immigration detainer the defendant county continued to incarcerate her for two weeks beyond the time she could have posted bail, and extended her incarceration for 19 hours after the she should have been released pursuant to the terms of her sentence after pleading guilty to a state criminal charge.⁸⁵ Because the plaintiff was held solely on the basis of the immigration detainer that was not accompanied by a warrant and the plaintiff was not charged with a federal crime, no probable cause existed to continue her detention. Finding the continued detention of the individual to be an unlawful deprivation of her liberty without due process, the court found that her detention constituted an illegal seizure under the Fourth Amendment.⁸⁶

⁸¹ *Miranda-Olivares*, No. 3:12-cv-02317-ST at *7 (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469,483 (1986)).

⁸² U.S. Constitution, Amendment IV.

⁸³ Unlawful presence is not a federal criminal offense. See American Civil Liberties Union Civil Rights Project, “Criminalizing Undocumented Immigrants,” Issue Brief, February 2010, https://www.aclu.org/files/assets/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf.

⁸⁴ See *Miranda-Olivares*, No. 3:12-cv-02317-ST at *16-*17.

⁸⁵ *Id.* at *15-*20.

⁸⁶ *Id.* at *19-20.

3. Immigration detainees may violate the INA

Similarly, immigration detainees raise statutory concerns. First, as noted above, some dispute exists as to whether detainees not connected to controlled substance offenses are permitted under the INA, with the consensus being that such detainees are probably within DHS's inherent authority.⁸⁷ Second, and more problematic, are the statutory provisions spelling out when immigration agents can engage in warrantless arrests, which are implicated by the issuance of warrantless immigration detainees.

The INA provides that immigration agents may arrest and detain aliens awaiting a removal decision "on a warrant issued by the Attorney General."⁸⁸ An exception to this requirement exists in 8 U.S.C. § 1357(a)(2), in situations where an immigration agent "has reason to believe" that an individual who is suspected of being a removable alien "is likely to escape before a warrant can be obtained for his arrest."⁸⁹ However, a recent federal court decision held that this exception only applies in situations where there is an individualized inquiry into whether there is probable cause to believe that the particular individual "is likely to escape."⁹⁰

In *Jimenez Moreno*, a federal court rejected the government's argument that a removable alien is a flight risk simply by virtue of being in the custody of a local law enforcement agency.⁹¹ The court made clear that the "reason to believe" language of 8 U.S.C. § 1357(a)(2) (and the now-discontinued Form I-247) "requires the equivalent of probable cause . . . , which in turn requires a particularized inquiry."⁹² Absent such an inquiry, with specific facts and evidence demonstrating the subject of a detainer is likely to escape, "[t]he bottom line is that . . . ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)."⁹³

⁸⁷ See *supra* text accompanying notes 13-15.

⁸⁸ 8 U.S.C. §1226(a).

⁸⁹ 8 U.S.C. § 1357(a)(2).

⁹⁰ See *Jimenez Moreno v. Napolitano*, --F. Supp. 3d --, 2016 WL 5720465, at *3-4 (N.D. Ill. Sept. 30, 2016)

⁹¹ *Id.* at *13-16.

⁹² *Id.* at *13 (internal citation omitted).

⁹³ *Id.* at *15-16.

4. Localities face significant legal liability for honoring detainers without warrants or probable cause

With courts having determined that immigration detainers are not mandatory and having held that honoring a detainer without probable cause can violate the Fourth Amendment and/or federal statutes, state and local law enforcement agencies can face significant legal liability for honoring a detainer. Localities have faced litigation or paid out settlements in situations where they detained prisoners for extended periods of time pursuant to an ICE detainer⁹⁴ or declined to release a prisoner who was set to post bond.⁹⁵ Accordingly, rather than risk putting tens of thousands of taxpayer dollars at risk in damage awards, many states and localities are opting to only honor detainers accompanied by a warrant or probable cause.⁹⁶

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Following the *Miranda-Olivares* decision, the trend against honoring ICE detainers only accelerated, with numerous localities in the Ninth Circuit (which encompasses the Federal

⁹⁴ See, e.g., *Roy, et al. v Los Angeles County*, No. cv-12-9012 (C.D. Cal.) (mediation between parties to set damages after named plaintiff detained for 89 days pursuant to ICE hold) (<https://www.aclu.org/cases/roy-et-al-v-los-angeles-county>); *Committee for Immigrant Rights of*

Sonoma County, et al. v. County of Sonoma, et al., Case No. 08-4220 (N.D. Cal.) (\$8000 settlement agreed upon to compensate two plaintiffs after unlawful detention) (https://www.aclunc.org/sites/default/files/asset_upload_file403_9271.pdf); *Quezada v. Mink*, Civil Action No. 10-CV-00879-REB-KLM (D. Colo.) (plaintiff arrested for a traffic offense received \$40,000 settlement from county that imprisoned him for 47 days pursuant to an ICE detainer) (<http://aclu-co.org/jeffco-sheriff-to-pay-40k-to-settle-claim-of-illegally-imprisoning-colorado-resident/>); *Cacho*

v. Gusman, Civ. No. 11-225 (E.D. La.) (plaintiffs detained three and five months, respectively, under an ICE detainer awarded \$30,000 in settlement with Orleans Parish) (<http://nowcrj.org/wp-content/uploads/2013/08/2-page-backgrounder-FINAL.pdf>); *Harvey v. City of New York*, 07 Civ. 0343 (NG)(LB) (E.D.N.Y.) (immigrant received \$145,000 in damages upon being held for a month on an expired detainer) (<http://www.legalactioncenter.org/sites/default/files/docs/lac/Harvey%20v.%20City%20of%20NY%20Stip%20Dismissal%20and%20Settlement.pdf>); *Arroyo v. Spokane County Sheriff's Office*, Claim No.

10-0046 (June 2010) (Mexican citizen jailed for 20 days on an immigration detainer after a traffic accident received \$35,000 settlement from county) (<https://www.nwirp.org/northwest-immigrant-rights-project-center-for-justice-achieve-settlement-in-case-of-immigrant-detained-unlawfully/>).

⁹⁵ See, e.g., *Galarza v. Szalczyk*, Civil Action No. 10-cv-6815, (E.D. Pa.) (after the Third Circuit ruled in favor of Galarza, Galarza and Lehigh County reached a \$95,000 settlement for his unlawful detention. Galarza also received \$25,000 from the federal government and an additional \$25,000 from the city of Allentown, pursuant to a separate settlement)

(<https://www.aclupa.org/our-work/legal/legaldocket/galarzavszalcyketal/>); *Uroza v. Salt Lake County, et al.* (D. Utah) (college student received \$75,000 settlement after being held for 39 days pursuant to detainer after posting bail) (https://scholar.google.com/scholar_case?case=6834569905503737518&hl=en&as_sdt=6&as_vis=1&oi=scholarr); *Jimenez Moreno, et al. v. Napolitano, et al.*, 11-cv-05452 (N.D. Ill) (ongoing lawsuit over detention of a U.S. citizen pursuant to ICE detainer and detention of non-citizen whose conviction was not grounds for removal) (<http://immigrantjustice.org/sites/immigrantjustice.org/files/Detainer%20Class%20Litigation%20%28April%202014%29.pdf>);

⁹⁶ Sarah Saldaña, "Written testimony of ICE Director Sarah Saldaña for a House Committee on Oversight and Government Reform hearing titled "A Review of the Department of Homeland Security's Policies and Procedures for the Apprehension, Detention, and Release of Non-Citizens Unlawfully Present in the United States (Part II)," House Committee on Oversight and Governmental Reform, March 19, 2015, <https://www.dhs.gov/news/2015/03/19/written-testimony-ice-director-house-committee-oversight-government-reform-hearing> (over 200 jurisdictions decline to honor ICE detainers).

District Court in Oregon) choosing to no longer honor immigration detainees that were not accompanied by a warrant or probable cause.⁹⁷

Conclusion

States and localities elect not to honor detainees *because* federal law makes clear that honoring a detainee that is not accompanied by a warrant or probable cause is unlawful in most situations.

Law enforcement agencies have no business cutting corners. The Fourth Amendment is clear in requiring warrants and a finding of probable cause to seize and hold a person in custody. Federal law is clear that warrantless arrests are only appropriate when there is probable cause that a particular individual is a flight risk. And if such probable cause is lacking, the U.S. Constitution mandates that a person cannot be held.

Of course, this is not to say that state and local law enforcement could not or should not work with federal authorities to make their communities safer. Continued partnerships between law enforcement agencies and federal authorities are essential in protecting the public while respecting the civil rights of individuals. State and local law enforcement seek to work constructively and cooperatively with the federal government on the basis of mutual trust and respect. More dialogue is needed so state and local law enforcement can discuss their concerns with immigration detainees.

⁹⁷ Immigrant Legal Resource Center, "Immigration Detainers Update," at p.1, May 12, 2014, <http://www.ilrc.org/files/documents/immigration-detainers-update-may-2014.pdf> ("since the Oregon decision, at least 50 sheriffs in Oregon, Washington, Colorado, and California have announced that they will no longer hold people based on ICE detainees, because of the risk of liability").