March 27, 2017

Re: **Law enforcement agency liability for stops and arrests based on suspicion about immigration status or for following ICE detainer requests**

Dear Chief Law Enforcement Official:

The Trump Administration seeks to encourage, if not compel, local jurisdictions to directly support federal immigration enforcement. The American Civil Liberties Union Foundation of Delaware writes to your Police Department to inform you that you have no obligation under federal law to participate. Because cooperation with local law enforcement is damaged when local police are viewed as an extension of the immigration system, an increasing number of states and localities across the nation have opted—even before President Trump announced his mass deportation plans—to leave the immigration enforcement business to the federal government and focus their resources on local matters. Moreover, the choice to participate in immigration enforcement will inevitably lead to legal liability for Delaware law enforcement agencies that investigate, arrest, or detain people based on suspicion about their immigration status or on the basis of an ICE detainer.

Federal law specifies "limited circumstances in which state officers may perform the functions of an immigration officer," such as when a police agency has entered into an agreement pursuant to 8 U.S.C. § 1357(g)—also known as 287(g) agreements.[1] No Delaware agency currently has such an agreement or has met any of the other statutory requirements. In the absence of such authorization, local and state police may not extend an investigatory stop by investigating civil immigration status.[2] Additionally, the Constitution's requirement that arrests and detention must be authorized by a judicial warrant based on probable cause is not satisfied by an ICE detainer alone, which is a request made by ICE that may be followed or declined.[3]

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[1] *See Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

[2] *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) ("While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal.").

[3] *See Galarza v. Szalczyk*, 745 F.3d 634, 637 (3d Cir. 2014) (explaining optional nature of ICE detainers); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) (noting that an ICE detainer "is not a criminal warrant.").

Local police may not prolong a stop or arrest people based on suspicions about civil immigration status

State and local law enforcement agents are not permitted to act as immigration agents without federal authorization that complies with the requirements that have been established by Congress.[4] The reason for these limits is that there are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. The immigration status of any particular person can vary greatly and whether they are in fact in violation of the complex federal immigration regulations is very difficult if not impossible for a patrol officer to determine.[5]

To that end, cooperation agreements are required to contain written certification that officers have received adequate training to carry out the duties of an immigration officer. In the absence of one of these statutory authorizations accompanied by the requisite training and support, state officers are not empowered to decide whether a person should be detained for being removable.

The constitutional duration of an investigatory stop depends on the time reasonably necessary to handle the matter for which the stop was made.[6] Because Delaware law enforcement is not permitted to independently enforce federal immigration law, it cannot extend the period of an investigatory stop to investigate immigration status, such as by asking questions about a person's immigration status, nation of origin, language abilities, or travel history, or by prolonging the stop until ICE officials can investigate.[7]

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[4] *See Arizona*, 132 S. Ct. at 2506 ("Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer."); *Melendres*, 695 F.3d at 1000.

[5] Because of the difficulty and complexity involved in determining someone's immigration status, and the reality that the relevant facts cannot be readily observed by a patrol officer, stops and arrests in attempts to enforce immigration laws often violate state and federal prohibitions on discrimination because they are based on an individual's perceived ethnicity, national origin, or language skills. *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding that stops based on ethnic origin in attempts to enforce immigration law are unconstitutional). Notably, participation in a 287(g) agreement would not protect law enforcement agencies from liability for this kind of profiling.

[6] *See Rodriguez v. United States*, 135 S.Ct. 1609, 1612 (2015) ("[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures.").

[7] *See, e.g., Melendres*, 695 F.3d at 1001 (9th Cir. 2012) ("While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal.").

An ICE Detainer alone is not a constitutional basis for arrest or detention

An ICE detainer (also known as an "ICE hold" or an "immigration hold") is a notice sent by U.S. Immigration and Customs Enforcement ("ICE") to a state or local law enforcement agency or detention facility. The purpose of an ICE detainer is to notify the agency that ICE is interested in a person in the agency's custody, and to request the agency to hold that person for up to 48 hours after the person is otherwise entitled to be released, giving ICE extra time to decide whether to take the person into federal custody and begin administrative proceedings in immigration court.

A detainer is not an arrest warrant. Unlike criminal warrants, which are issued by a judicial officer, ICE detainers are issued by ICE itself, without any authorization or oversight by a judge or any other neutral tribunal. As a result, ICE detainers have been mistakenly issued for people who are U.S. Citizens and other people who are not subject to removal.[8] In Delaware alone, from 2003 to 2015 ICE issued 84 ICE detainers without knowing whether the individual was a U.S. citizen.[9]

Federal regulations provide that "ICE detainers are requests." 8 C.F.R. § 287.7(a) (emphasis added). As the federal courts have confirmed, law enforcement agencies are not required to honor ICE detainers without an accompanying warrant or a court order. Indeed, there are federal statutory requirements for a warrantless immigration arrest that are not satisfied by the presence of an ICE detainer.[10]

Since ICE detainers are merely requests, state and local law enforcement agencies and detention facilities open themselves up to legal liability for making the decision to detain an individual—for any length of time—based solely on an ICE detainer request. The U.S. Court of Appeals for the Third Circuit, which includes Delaware, recently held that local detention facilities can be held liable,

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[8] *See, e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 637 (3d Cir. 2014) (involving the unconstitutional detention of a U.S. citizen of Puerto Rican heritage pursuant to an ICE detainer).

[9] *See* TRAC Immigration, Tracking Immigration and Customs Enforcement Detainers, *http://trac.syr.edu/phptools/immigration/detain/*

[10] *Lopez Orellana v. Nobles Cty.*, 0:15-cv-03852-ADM-SER (D. Minn. Jan. 6, 2017) (citing 8 U.S.C. § 1357(a)(2)) (where no particularized inquiry into individual's likelihood of escaping, a request for detention by ICE provided no lawful basis for continued detention by a county jail); *Jimenez Moreno v. Napolitano*, 1:11-cv-05452 (N.D. Ill. Sept. 30, 2016) (ICE detainers exceed statutory authority because they lack a determination that escape is likely).

alongside ICE and local police, for constitutional violations if a wrongfully detained person decides to sue. Declining a detainer request does not violate any law, most certainly not 8 U.S.C. § 1373, which President Trump referenced in his Executive Order. The Tenth Amendment of the Constitution protects you from being compelled to perform the functions of the federal government, and when you uphold the Fourth Amendment by declining to honor ICE detainers that are not supported by a judicial warrant, ICE can still carry out its role through a range of authorities and federal capabilities.

Conclusion

In order to preserve the Constitutional rights of all persons in the United States, the ACLU of Delaware strongly recommends the adoption of policies that place local communities first and limit involvement in federal immigration enforcement. This includes requiring judicial warrants in order to honor ICE detainers and declining to participate in the 287(g) program, as well as avoiding other forms of engagement in federal immigration enforcement that lead to many of the same problems (e.g. notifying ICE of an individual's release date or home address, which can itself prolong someone's detention and sow distrust in the community). We believe, and evidence has shown, that such a decision is in the best interest of local communities. The Constitution protects states and localities from being compelled to perform federal functions; and choosing to engage in federal immigration enforcement results in clear, negative consequences to public safety and local resources, and increases liability risk.

If you have any questions, please feel free to contact us.

Sincerely yours,

Ryan Tack-Hooper

ADDENDUM

On March 24, 2017, after this letter was prepared, U.S. Immigration and Customs Enforcement (ICE) published a new detainer form (Form 247A) and policy. Neither the new form nor the new requirement of an administrative warrant changes the legal information provided in this letter.

The new policy requires that ICE detainers be issued with administrative forms purporting to be warrants (either Form I-200 or Form I-205). These administrative "warrants" are not judicial warrants for the purposes of the Fourth Amendment. They are issued by ICE supervising officers without any review by a neutral magistrate or judge. 8 C.F.R. 236.1(b). Both the new form and the administrative "warrant" continue to permit ICE agents to simply check a box indicating that they have probable cause based on "other reliable evidence," without any explanation of the basis for that belief.

ICE calls the forms "warrants," and they contain language that commonly appears in warrants ("you are commanded to"), but they are not warrants for constitutional purposes and they are not commands. ICE detainers remain optional and the same Fourth Amendment problems still apply to detainers even when accompanied by an administrative warrant. The new policy and detainer do not protect state and local government officials who hold individuals for ICE without a judicially approved warrant.

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