



505 Fifth Avenue, Suite 901  
Des Moines, IA 50309-2316  
[www.aclu-ia.org](http://www.aclu-ia.org)

Because Freedom Can't Protect Itself

Bill McCarthy  
Polk County Sheriff  
1985 NE 51st Pl.  
Des Moines, Iowa 50313

April 25, 2014

**RE: Clarification of Law Enforcement Obligations Regarding Immigration Detainers**

Dear Sheriff McCarthy:

The ACLU of Iowa is writing to all county sheriffs in Iowa about important constitutional limits and potential liability issues stemming from local enforcement of U.S. Immigration and Customs Enforcement ("ICE") detainer requests for pre-trial detainees and prisoners in the custody of Iowa county jails.<sup>1</sup> **Recent important federal court decisions clarify that detainer requests issued by ICE provide no independent legal or constitutional authority to detain a person and are non-mandatory. They have already resulted in increased costs and civil liability for local law enforcement agencies throughout the nation who choose to honor them.**

We are writing you to inform you of these significant developments and request that you review your policies and practices and take any necessary steps to revise them in light of the constitutional limits of ICE detainer requests. We would like to assist you in crafting sound detainer policies, and would invite you to contact us by phone or email at a time that would be convenient for you. Please contact Erica Johnson, Immigrants' Rights and Racial Justice Advocate, at [Erica.johnson@aclu-ia.org](mailto:Erica.johnson@aclu-ia.org) and 319-214-3331 (mobile).

**1. ICE detainer requests do not provide independent legal authority to detain a person, exposing counties to liability.**

ICE detainers do not provide independent legal authority to detain someone or extend their detention. The imprisonment of a person for any amount of time, even if only for 48 hours, without any determination that there is probable cause to believe that the person has violated any law, raises fundamental constitutional concerns. Any policy that allows detention without a probable cause finding by a judicial officer is likely to violate the Fourth Amendment and give rise to a claim for damages pursuant to 42 U.S.C. § 1983. In *Maria Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, the federal district court in Oregon found that the county had violated the constitutional rights of Ms. Miranda-Olivares by detaining her without probable cause when it chose to honor ICE's detainer request, and found that the County was liable for damages to Ms. Miranda-Olivares pursuant to 42 U.S.C.

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<sup>1</sup> Every jurisdiction in Iowa participates in ICE's Secure Communities program. As you know, under the Secure Communities program, anytime an individual is arrested and fingerprinted, his or her fingerprints will be electronically run through an immigration database. If the person is a "hit" in the database, it may result in the issuance of an ICE Detainer Request for that person. ICE Detainer Requests are voluntary for local law enforcement regardless of participation in Secure Communities.

Therefore, a clearly constitutional policy would provide that individuals should not be held in custody under ICE detainers unless there has been an independent judicial finding of probable cause to justify detention that extends beyond the custody authorized for the underlying criminal matter. Immigration detainers are routinely used without any judicial determination that a person is in the country illegally, and are frequently applied to people who have committed no immigration violations. ICE detainer requests may be issued simply because an “investigation has been initiated to determine whether this person is subject for removal from the United States.” That basis falls far short of alleging, much less demonstrating, probable cause or any other constitutional standard. To deprive a person of liberty solely because the government seeks to investigate that person’s immigration status, without requiring any concrete showing that there is a legitimate and compelling interest in the person’s detention, offends both the Constitution and fundamental principles of justice. For these reasons alone, local law enforcement jurisdictions should refuse to honor ICE detainer requests.

## **2. ICE detainer requests come with strict legal limits.**

While the constitutionality of a 48-hour detention pursuant to an ICE detainer alone is dubious,<sup>3</sup> there is absolutely no question that a person may not be detained for more than 48 hours, excluding weekends and federal holidays (“48-hour time period”).<sup>4</sup> If ICE has not assumed custody of a person upon the expiration of the 48-hour time period, the prisoner must then be immediately released from custody. There are no exceptions to this rule: failure to release a prisoner promptly upon the expiration

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<sup>2</sup> *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014). The court found that the county violated the Fourth Amendment to the U.S. Constitution when its jail held the plaintiff in custody solely on the basis of an immigration detainer. The plaintiff was arrested for violation of a restraining order, and ICE issued a detainer the following day. Bail was set at \$500, but jail officials on multiple occasions informed family members that posting bail would not result in release, because even after bail was posted, the jail would keep Ms. Miranda-Olivares in custody pursuant to the immigration detainer. After two weeks, she pleaded guilty to the state charge and was sentenced to time served. Because of the detainer, the jail kept her in custody an additional 19 hours, until ICE assumed custody. The plaintiff argued that the county was legally liable for denying her release on bail and also for depriving her of liberty after the time-served ruling, solely on the basis of the immigration detainer.

The county argued that the detainer was an order from the federal government that it was legally obligated to carry out. The court rejected that argument, explaining that the detainer regulation, 8 C.F.R. § 287.7, “does not require LEAs [Law Enforcement Agencies] to detain suspected aliens upon receipt of a Form I-247 from ICE.” *Id.* at \*23. The court further concluded “that the Jail was at liberty to refuse ICE’s request to detain Miranda-Olivares if that detention violated her constitutional rights.” *Id.* at \*23-\*24. The court went on to award summary judgment to the plaintiff, holding that the county imprisoned her without probable cause, in violation of the Fourth Amendment. *Id.* at \*33.

A few days after the court’s ruling, at least 20 Oregon sheriffs announced that they would stop honoring immigration detainers. See the growing list at <http://www.ilgrp.com/iceholds/>.

<sup>3</sup> *Morales v. Chadbourne*, \_\_\_ F.Supp.2d \_\_\_, 2014 WL 554478, \*16 (D.R.I. Feb. 12, 2014) (slip op.) (both federal and state defendants could be liable under the Fourth Amendment for holding plaintiff on an ICE detainer for 24 hours after she should have been released on her own recognizance); *Uroza v. Salt Lake County*, No. 11-0713, 2013 WL 653968, \*4-\*5 (D. Ut. Feb. 21, 2013) (unpub.) (permitting plaintiff’s Fourth Amendment claim to proceed against ICE agent who issued detainer); *Galarza v. Szalczyk et al.*, 2012 WL 1080020, \*13 (E.D. Pa. Mar. 30, 2012) (unpub.) (holding that plaintiff who was detained on an ICE detainer for 3 days after posting bail stated a Fourth Amendment claim against both the issuing ICE agent and a local police detective), rev’d on other grounds at \_\_\_ F.3d \_\_\_, 2014 WL 815127 (3d Cir. Mar. 4, 2014) (slip op.) (holding that the county, too, may be liable alongside ICE for its role in detaining the plaintiff).

<sup>4</sup> 8 C.F.R. § 287.7(d).

of the 48-hour time period may subject the local law enforcement agency to a habeas corpus action for release from confinement and may expose the agency to civil liability for false imprisonment in violation of the detainee's rights. That liability would be incurred in addition to any liability that may arise within the 48-hour period in the absence of probable cause.<sup>5</sup>

For example, in 2013, Orleans Parish, Louisiana paid settlements of \$19,294 and \$10,706;<sup>6</sup> in 2010, the ACLU reached a total \$90,000 settlement relating to a suit with the federal government and the Jefferson County, Colorado sheriff's department because it held a man beyond the 48-hour time period, after he had already completed his criminal sentence, based upon an ICE Detainer Request.<sup>7</sup> Similarly, New York City paid a \$145,000 settlement to a lawful permanent resident in 2009 because Rikers Island had detained him beyond the 48-hour period.<sup>8</sup>

The new I-247 states clearly in several places that local law enforcement should retain custody for a period **NOT TO EXCEED 48 HOURS** (excluding weekends and holidays). If ICE does not take custody within that time period, then the detainer automatically lapses and the person must be immediately released from custody. Holding an individual more than 48 hours on the force of an immigration detainer is illegal, and could expose your agency to significant liability.<sup>9</sup>

**An individual may post bond on state or local charges EVEN IF ICE has issued an immigration detainer.** Law enforcement should never tell an individual that a bond is not available or advisable because of the presence of an ICE detainer. Once a bond has been posted to allow pretrial release on state or local charges, then ICE must take custody within 48 hours or the local law enforcement agency must release the individual. Any additional detention is unlawful and violates pretrial release rules.

### 3. ICE Detainers Are Voluntary, Non-Mandatory Requests

An immigration detainer is a request, not an order.<sup>10</sup> Federal courts have confirmed that under federal law an ICE Detainer Request is completely optional.<sup>11</sup> The federal government cannot compel

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<sup>5</sup> See *Miranda-Olivares v. Clackamas County* (D. Ore. Apr. 11, 2014).

<sup>6</sup> Settlement Order, *Cacho et al. v. Gusman*, No. 11-0225, ¶6 (E.D.L.A. Aug. 9, 2013) at <http://nowcrj.org/wp-content/uploads/2013/08/FINAL-SETTLEMENT-AGREEMENT.pdf> (county paid settlements of \$19,294.12 and \$10,705.88); Northwest Immigrant Rights Project, "Northwest Immigrant Rights Project & Center for Justice Achieve Settlement in Case of Immigrant Detained Unlawfully" (Sept. 17, 2010), at <http://www.nwirp.org/news/viewmediarelease/15>.

<sup>7</sup> See *Luis Quezada v. Ted Mink*, No.10-CV-00879 (D. Colo. filed April 21, 2010).

<sup>8</sup> See Press Release, City Settles Rikers Lawsuit Alleging Violations of Immigrant's Rights (Sept. 1, 2009), available at <http://www.lawso.ucsb.edu/faculty/jstevens/113/harveypressrelease.pdf>.

<sup>9</sup> See, e.g., *Quezada v. Mink*, No. 10-879 (D. Col.) (filed April 21, 2010) (\$50,000 settlement); *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y.) (filed June 12, 2009) (\$145,000 settlement).

<sup>10</sup> ICE Detainer Requests that are given on I-247 forms "request that you maintain custody of this individual for a period not to exceed 48 hours..." (emphasis added). Immigration Detainer – Notice of Action Form I-247 (Rev. 8- 10) (as issued by U.S. Department of Homeland Security).

<sup>11</sup> See *Galarza v. Szalczyk*, No. 12-3991, 2014 WL 815127 (3rd Cir. Mar. 4, 2014) ("... 8 C.R.F. § 287.7 does not compel state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely

your office to detain anyone on its behalf. An ICE Detainer Request is not the same as a criminal detainer, nor does it authorize local law enforcement to honor the request absent probable cause.<sup>12</sup> In fact, the Supreme Court has found that, under the Tenth Amendment to the U.S. Constitution, the federal government is not allowed to command state officers to do federal business.<sup>13</sup>

Current acting director of ICE, Dan Ragsdale, has recently acknowledged that detainers are requests.<sup>14</sup> In the past, both ICE Director John Morton and then-Assistant Director of Secure Communities David Venturella also have made the non-mandatory nature of ICE Detainer Requests clear in policy memos and other public documents.<sup>15</sup>

An ICE detainer is a request, not an arrest warrant. See *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) (“A detainer is not a criminal warrant, but rather a voluntary request....”). This means that it is up to your agency alone to determine if ICE requests for detention are proper. ICE’s issuance of a detainer does not limit your agency’s discretion or expand your agency’s authority regarding the individuals in your custody.

At least 17 jurisdictions nationwide have stopped holding people on ICE detainers entirely, and many more have limited the situations in which they choose to honor ICE detainers in a manner that conforms with that jurisdiction’s public safety goals and priorities. As of the date of this letter, sheriffs in the state of Connecticut, a growing list of counties in Oregon, Orleans Parish, Louisiana, Cook County, Illinois, Taos County, New Mexico, and Santa Clara County, California have all **declined to honor** some if not all ICE detainer requests.<sup>16</sup>

#### **4. An immigration detainer does not indicate anything about an individual’s immigration status.**

It is a common misconception that the issuance of an ICE detainer automatically means that the subject of the detainers is unlawfully present in the United States. That is simply not true. In fact, in most cases, at the time ICE places a “hold” on a person, no immigration judge has yet decided whether that individual will be deported. As you well know, immigration law is exceedingly complex, and when a person finally comes before an immigration judge, that judge may well determine that the person is not deportable, or qualifies for some form of relief as a result, for example, of having a spouse or children who are U.S. Citizens or of having refugee status. Immigration judges determine deportability and relief separately, and a favorable determination on either of those two points would allow a person to remain

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authorizes the issuance of detainers as *requests* to local LEAs.”)(emphasis added); see also *Maria Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST (D. Or. Apr. 11, 2014); *Morales v. Chadbourne*, C.A. No. 12-301-M, 2014 WL 554478 (D. R.I. Feb. 12, 2014).

<sup>13</sup> See *Printz v. United States*, 521 U.S. 898, 925-35 (1997).

<sup>14</sup> See Letter from Daniel H. Ragsdale, Acting Dir., U.S. Immigration and Customs Enforcement, to the Honorable Earl Blumenauer, U.S Representative (Feb. 25, 2014), available at: <http://www.notonemoredeportation.com/wp-content/uploads/2014/02/13-5346-Thompson-signed-response-02.25.14.pdf>.

<sup>15</sup> See John Morton, U.S. Immigration and Customs Enforcement, Interim Policy Number 10074.1, Paragraph 2.1: Detainers (Aug. 2, 2010), available at [http://www.aclunc.org/docs/legal/interim\\_detainer\\_policy.pdf](http://www.aclunc.org/docs/legal/interim_detainer_policy.pdf). See also Letter from David J. Venturella, Executive Director of Secure Communities, to Miguel Márquez, County Counsel for the County of Santa Clara, California, at 3.

<sup>16</sup> A much longer list of jurisdictions may be found at <http://www.ilrc.org/enforcement>.

in the United States. At the time a detainer is issued, an Immigration judge has not decided whether a person is in the United States pursuant to valid legal authorization, much less whether that person will be deported.

Moreover, immigration detainers are often placed on inmates based largely on the person's place of birth, with little investigation of that person's actual citizenship or immigration status. Consequently, detainers are frequently lodged against persons who are not in violation of any immigration laws, including many lawful permanent residents and a smaller number of U.S. citizens. These include immigrants and visa holders who are in compliance with all immigration laws, as well as naturalized citizens. Even U.S.-born citizens have had detainers issued against them.

## **5. Honoring ICE detainer requests wastes your county's public safety dollars.**

**As you may well know, immigration detainers impose significant costs on your agency that are not reimbursed by the federal government.** Although ICE detainers are federal requests asking local law enforcement agencies to hold people for up to 48 hours, the federal government does not typically reimburse local agencies for the costs incurred in holding people for several days beyond when they would otherwise be released. Pursuant to 8 C.F.R. 287.7(e), ICE is not responsible for incarceration costs of any individual against whom a detainer is lodged until "actual assumption of custody." The federal government does sometimes elect to provide limited reimbursement for certain immigrant detainees held post-conviction. However, there is no federal reimbursement available for detention in local jails based on immigration detainers at the pre-trial stage, for detainees who are never convicted, or for detainers applied post-conviction to lawfully-present individuals, such as legal permanent residents, visa-holders, or U.S. citizens.

Additionally, ICE frequently fails to assume custody of individuals for whom it has issued detainers, meaning that local law enforcement agencies have held these individuals for naught. Many local law enforcement agencies in Iowa are struggling with budget cuts and overcrowding in jails. Because immigration detainers are simply requests, not orders, and because local law enforcement agencies bear much or all of the cost of complying with those requests, agencies that cannot afford to hold people without federal reimbursement do not need to expend scarce resources on acquiescing to immigration detainers.

## **Conclusion**

Because unlawful detention could expose your office to significant legal and financial liability, we urge you to seek legal counsel if you have further questions about appropriate immigration detainer policies. Additionally, please feel invited to contact Erica Johnson, Immigrants' Rights and Racial Justice Advocate, at [Erica.johnson@aclu-ia.org](mailto:Erica.johnson@aclu-ia.org) and 319-214-3331 (mobile) if you have any questions regarding this letter. We would be very interested in helping your office develop sound ICE detainer policies.

Thank you for your attention to this important matter.

Sincerely,



Rita Bettis  
Legal Director



# ICE Detainer Requests: Factsheet for Iowa Law Enforcement



Photo: Andy Dean/Fotolia

## WHO ARE WE DETAINING?

### JOHNSON COUNTY

Johnson County received 43 detainer requests from ICE in 2013. The underlying offenses included misdemeanors such as driving under the influence, traffic violations, and trespassing.

### POLK COUNTY

Polk County received 488 detainer requests from ICE in FY2012 and FY2013. 70% of the requests were issued for individuals with no prior convictions of any kind. The requests only covered 20 individuals previously convicted of a serious crime (by ICE's own classification).

### HARDIN COUNTY

Between 2007 and 2010, Hardin County received detainer requests for inmates accused of mostly misdemeanor offenses. Driving under the influence was the most common underlying offense.

### POTTAWATTAMIE COUNTY

Only 1% of the 107 individuals subject to detainers in Pottawattamie County in FY2012 and FY2013 were ever convicted of a serious crime.

### WAPELLO COUNTY

11 of the 15 individuals subject to detainers in Wapello County in FY2012 and FY2013 were never convicted of any crime.

For more information contact Erica Johnson at (319)214-3331 or at [erica.johnson@aclu-ia.org](mailto:erica.johnson@aclu-ia.org)

## Detainers are expensive for law enforcement agencies.

Studies have shown that individuals with detainers spend more days in jail at an average of \$70 to \$80 per night – on the county's dime. A study conducted in King County, Washington found that on average, individuals subject to ICE detainers stay in jail 29.2 days longer than others with similar charges. Similar studies in Travis County, Texas and in New York City had consistent findings. The extra jail days increased costs to King County by nearly \$3 million in 2011. Not honoring detainer requests would save the county \$1.8 million in jail costs each year. Most of the individuals subject to detainers were neither charged nor convicted of a serious crime. Many were transferred to ICE without ever having been charged with any crime at all.

## Law enforcement agencies may face liability.

In *Harvey v. City of New York*, a plaintiff spent 140 days in jail on an ICE detainer, and settled for \$145,000 against the New York Department of Corrections. In *Galarza v. Lehigh County*, a plaintiff was held on a detainer for 3 days after being acquitted, and settled for \$50,000 against the city of Allentown, Pennsylvania.

## Counties can legally disregard ICE detainer requests.

ICE has acknowledged that detainers are not mandatory, and federal courts have confirmed that they are voluntary. Communities, both big and small, have successfully adopted policies to no longer honor ICE detainers. Examples include the city of San Francisco, the town of Mesilla, New Mexico, and Cook County, Illinois, and at least 12 counties in Oregon.

## Detainers are not effective law enforcement tools.

The purpose of detainers is to allow ICE to investigate the immigration status of selected inmates. A detainer request alone does not indicate immigration status or a violation of law. Of the 1,200 inmates who are subject to a detainer each day, only a small fraction have been summoned to appear in an immigration court or are already subject to an order of removal. In fact, in many instances, holds are mistakenly placed on U.S.