ACLU
AMERICAN CIVIL LIBERTIES UNION of MICHIGAN

MIRC
Michigan Immigrant Rights Center

Immigration & Local Law Enforcement

AN UPDATE ON THE LAW

June 2016

ISSUE BRIEF

Immigration and Local Law Enforcement: An Update on the Law

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I. Introduction

Local police play a critical role in protecting and serving Michigan's immigrant communities. However, local police confront particular challenges in this area: they must comply with legal requirements in the immigration field that are complex and can change frequently, leaving local law enforcement exposed to potential legal liability. At the same time, relationships between immigrant communities and law enforcement are all too often frayed, in part because some police agencies engage in practices that lead to community distrust. Some of those practices are also illegal.

In response to these concerns, the American Civil Liberties Union (ACLU) of Michigan and the Michigan Immigrant Rights Center (MIRC) have developed this Issue Brief to answer common questions that local law enforcement agencies face in their relationships with immigrant communities.

II. Why Police Should Care About Relationships with Immigrant Communities

Police cannot perform effectively without community trust and engagement. Victims and witnesses of crime—whether they are U.S. citizens, lawfully present, or undocumented—will be unwilling to cooperate with local and state police if they perceive that law enforcement agents are not there to protect their rights, but are instead a proxy deportation agency engaged in profiling immigrant communities.

Immigrants who come into contact with law enforcement through traffic stops or other routine matters have often been living and working peacefully in the United States, sometimes for years. Immigrants understand that any encounter with the police—whether it's a traffic stop, participation in an investigation, or requesting help from the police—can lead to computer checks of themselves or family and friends. It is no surprise, then, that many people in immigrant communities are afraid to call the police because they fear immigration consequences for themselves or their family members. For example, a recent study confirmed that many Latinos—both documented and undocumented—fear even minimal contact with the police, with almost half expressing reluctance to report a crime or cooperate with a criminal investigation.[1]

When immigrants fear the police, crime goes up and law enforcement's ability to address it goes down. The Major Cities Chiefs Association has explained:

> **Without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear. Such a divide between the local**

> police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes . . . .[2]

This chilling effect is particularly troubling in the case of crime victims, who, when reporting to police, must overcome not only their fear of the perpetrator, but also the additional fear that reporting the crime could lead to immigration consequences for the victim or their family. As former Manhattan District Attorney Robert Morgenthau explained,

> [B]y far the most severe consequence of the city's cooperation with federal immigration officials is the lack of trust in law enforcement that it creates among the public. A spouse, for example, may be reluctant to report abuse if she fears that the consequence will be deportation of the father of her children. When immigrants perceive the local police force as merely an arm of the federal immigration authority, they become reluctant to report criminal activity for fear of being turned over to federal officials.[3]

In sum, the best practices in policing are for local agencies to avoid becoming entangled in federal civil immigration enforcement. These best practices also help protect local law enforcement from liability for civil rights violations, which can easily occur when local police venture into federal immigration enforcement. We therefore encourage you to focus on building relationships with immigrant communities that make everyone safer, rather than sowing fear that any contact with police could lead to deportation.

III. Why Police Should Not Engage in Immigration Enforcement

While we encourage local law enforcement agencies to learn about immigration policy, it is critical to understand that immigration law is extremely complex, and that local and state police can easily run afoul of the law if they take actions based on speculation regarding an individual's legal status. Given the complexity of immigration law, and the danger that local law enforcement officers who are untrained in those complexities will impermissibly rely on race, religion or national origin when investigating immigration status, law enforcement agencies can best reduce their risk of liability by avoiding involvement in immigration matters and leaving enforcement of federal immigration law to federal immigration officials.[4]

The ACLU and MIRC have received numerous complaints about local police agencies that have violated the law by attempting to engage in immigration enforcement. Those complaints typically involve targeting drivers of color for minor traffic violations and then turning the vehicle's occupants over to immigration authorities; making stops based solely on suspicion that a person is undocumented; and prolonging otherwise legal stops to investigate a person's immigration status. All of those practices are illegal.

RACIAL PROFILING AND PRETEXTUAL STOPS

Racial profiling by law enforcement is unconstitutional because targeting minorities on account of race or (perceived) national origin deprives these individuals of equal protection under the laws within the meaning of the Fourteenth Amendment to the U.S. Constitution. For example, targeting drivers of color (e.g. Latinos, Arabs) based on their race, even if a citation or arrest would otherwise be supported by probable cause, violates the rights of those drivers to equal protection and is therefore against the law.[5]

STOPS MAY NOT BE BASED ON SUSPICION OF UNLAWFUL IMMIGRATION STATUS

The Supreme Court recently reaffirmed that an immigrant is not committing a crime merely by being unlawfully present in the United States: "As a general rule, it is not a crime for a removable alien to remain present in the United States."[6] Lack of proper immigration status is a violation of *civil* immigration law. Moreover, many people who are present without authorized immigration status may in fact be eligible to obtain lawful status, and some may even have obtained lawful status without being aware of this status change.[7]

Ordinarily, local and state law enforcement can only make a stop or arrest for criminal violations. As the Supreme Court has explained, "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."[8] Because police must have reasonable suspicion of a crime to make a stop, and because unlawful presence is not a crime, local law enforcement officers generally cannot detain, much less arrest, someone simply because they believe the person is in the United States unlawfully.[9] The responsibility for making civil immigration arrests lies with federal agents.

STOPS MAY NOT BE EXTENDED TO ASK ABOUT IMMIGRATION STATUS

Suspecting or even knowing of immigration status violations is also insufficient to justify extending a stop or detention.[10] A stop is only lawful so long as inquiries unrelated to justification for the stop "do not measurably extend" its duration.[11] The Supreme Court has explained that extending a state-law based detention for purposes of awaiting federal verification of immigration status "would raise constitutional concerns."[12] The Sixth Circuit has also found that suspicion of unlawful immigration status is not a valid basis to continue custody because such status is not a crime.[13]

IV. Why ICE Detainers Have Changes and What Police Should Do in Response

Several federal courts have recently found that counties can be held liable if they hold an individual on an Immigration and Customs Enforcement (ICE) detainer in violation of the Fourth Amendment, even when the county has been requested to do so by ICE.[14] Partly in response to these cases, the

Department of Homeland Security (DHS) has issued a memo that signals a significant shift in the way DHS interacts with local law enforcement, including the way in which ICE detainers are used.[15]

MAJOR CHANGES TO ICE DETAINERS

1. **Secure Communities has been terminated, and a new program called the Priority Enforcement Program (PEP) has been created.** Under PEP, as under Secure Communities, ICE will still access fingerprints through the biometric data submitted to the FBI during bookings by state and local law enforcement agencies. The use of this database means that, in any interaction with local law enforcement, community members who pose no threat to public safety will still be at risk of being swept up into the deportation system, which will only continue to erode trust between local law enforcement and the community. Under PEP, there are two primary types of forms DHS may issue to local law enforcement— the notification form (DHS Form I-247N) and the detainer form (DHS Form I-247D).

2. **DHS will now generally issue "requests for notification", rather than "detainers."** The DHS memo states that in order "to address the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment, [the DHS Secretary is] 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 (*i.e.*, requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority)."[16] The new "voluntary notification requests" (DHS Form I-247N) do **not** ask local police to hold individuals beyond their normal release dates. Instead, local police are asked to notify ICE prior to the individual's release. Nothing requires localities to respond to ICE's requests for notification of release dates. Given the federal court decisions referenced by the DHS memo, detaining an individual pursuant to a I-247N notification request would likely constitute an even clearer violation of the Fourth Amendment than detention based on a detainer.

3. **ICE will issue voluntary "ICE detainer requests", but is only supposed to do so under "special circumstances."** The new detainer form, Form I-247D, makes clear that such requests are entirely voluntary and asks local police to hold the individual no more than 48 hours. ICE policy is to issue detainers only in "special circumstances," although it is not clear what that means. Nothing requires localities to respond to ICE's requests for detention, and furthermore, requiring local law enforcement to comply with a detainer would violate the 10th Amendment to the United States Constitution.[17]

RECOMMENDATIONS FOR LOCAL POLICE RESPONSES TO ICE DETAINER AND NOTIFICATION REQUESTS

1. **The safest course for local law enforcement agencies is to never rely on ICE detainers as a basis for prolonging an inmate's detention past the inmate's normal release date.** Although ICE changed its detainer policies in response to federal court decisions challenging the constitutionality of the prior approach, the revised detainer program does not cure the problems those courts found.[18] Issues with the new program include:

   A. PEP fails to provide for a *judicial* determination of probable cause. ICE detainers and warrants are all issued administratively by ICE officials.[19] Unlike criminal warrants, ICE detainers and warrants are not reviewed by a judge.[20]

   B. PEP does not comply with the statutory limits on ICE's arrest authority set out in 8 U.S.C. § 1357(a)(2), which limit ICE's authority to arrest without a warrant. Warrantless arrests require not only a "reason to believe" the individual is in the U.S. in violation of immigration laws *but also* that the individual "is likely to escape before a warrant can be obtained."[21] Moreover, if a warrantless arrest is made, the individual must "be taken without delay for examination" by an immigration official with authority to determine if that individual has the right to be in the United States.[22] *Id.* PEP does not provide for the required prompt review.

   Because aspects of the new program may still be subject to constitutional challenge, state and local law enforcement agencies that hold people based on ICE detainer requests are unnecessarily exposing themselves to significant potential liability, not to mention undermining community trust.

2. **Because ICE detainers impose significant costs on local law enforcement that are not reimbursed by the federal government, local police can save money by not becoming entangled with detainer requests.** ICE has stated that it "is not responsible for incarceration costs of any individual against whom a detainer is lodged until 'actual assumption of custody [by ICE].'"[23] In a recent academic study, researchers estimated that complying with ICE detainers "cost local governments nearly $3 million in jail costs alone in 2011," in part because ICE detainers lengthened average jail stays.[24] Many local law enforcement agencies in Michigan are struggling with budget cuts and overcrowding in jails. Because local law enforcement agencies bear the cost of ICE detainers, we urge you to stop expending scarce local law enforcement resources on civil immigration detainer requests.

3. **Inmates who have an ICE "detainer request" or an ICE "notification request" should be treated exactly like other inmates for the purposes of release, bail, work assignments, diversion, custody classifications, etc.** Indeed, the ICE detainer form (I-247D) and notification form (I-247N) both emphasize that such jail decisions should not be impacted by the existences of a detainer or notification request. For example, jail staff should never tell a person that bond is not available because the individual has an ICE detainer.

4. **Localities should refrain from responding to ICE notification requests or do so in very limited circumstances.** Immigrant communities will continue to fear the police if every law enforcement contact could result in notification to ICE and subsequent deportation. Localities have no legal obligation to respond to notification requests, and refraining from doing so furthers community policing efforts, advances public safety, and strengthens ties between law enforcement and immigrant communities.

5. **Police should use appearance tickets where appropriate, rather than booking individuals on minor offenses.** A major reason that immigrants fear police is that the most minor infraction can result in deportation. When police arrest, book and fingerprint a person, the individual's fingerprints will automatically be sent to immigration authorities. By using appearance tickets, rather than making arrests, for offenses like driving without a license, local police can help ensure that they are not seen as proxy deportation agents.

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[1] *See* Nik Theodore, "Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement," University of Illinois at Chicago (May 2013), *available at*: https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

[2] Major Cities Chiefs Immigration Committee, Recommendations for Enforcement of Immigration Law by Local Police Agencies, at 6 (adopted by Major Cities Chiefs, June 2006), *available at:* http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

[3] Robert Morgenthau, "The Police and Immigration: New York's Experience," Wall Street Journal (May 19, 2010), *available at*: http://online.wsj.com/news/articles/SB10001424052748703460404575244533350495138.

[4] For a detailed discussion of the law in this area, see Immigrant Legal Resource Center, *Immigration Enforcement Authority for Local Law Enforcement Agents* (2015), *available at:* http://www.ilrc.org/files/documents/lea_immig_faqs_post_announce.pdf.

[5] *See Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002) ("[U]nequal treatment based upon [] race or ethnicity during the course of an otherwise lawful traffic stop [is] sufficient to demonstrate a violation of the Equal Protection Clause."); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Latino ancestry alone cannot create reasonable belief that a person is in the United States unlawfully).

[6] *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012). *See also United States v. Meza-Rodriguez*, 798 F.3d 664, 673 (7th Cir. 2015) ("unlawful presence in the country is not, without more, a crime"); *Carcamo v. Holder*, 713 F.3d 916, 922 n.5 (8th Cir. 2013) (quoting *Arizona v. United States* that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) ("mere unauthorized presence in the United States is not a crime").

[7] For example, an individual may have derived citizenship when he or she was a minor from a parent who naturalized, or may have been born abroad to U.S. citizen parent(s) and unknowingly acquired citizenship.

[8] *Arizona v. United States*, 132 S. Ct. at 2505. Lower federal courts have interpreted *Arizona* as precluding local law enforcement officers from arresting individuals solely based on known or suspected *civil* immigration

violations. *See, e.g., Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464 (4th Cir. 2013), cert. denied, 134 S. Ct. 1541, 188 L. Ed. 2d 557 (2014) (emphasis added).

[9] The Supreme Court specifically struck down a law that authorized state law enforcement to arrest of individuals who they believed to be removable. *Arizona v. United States*, 132 S. Ct. at 2506 (finding "authorizing state officers to decide whether an alien should be detained for being removable . . . violates the principle that the removal process is entrusted to the discretion of the Federal Government").

[10] *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 976 (D. Ariz. 2011) aff'd sub nom. *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (finding the practice of holding individuals on the basis on suspected immigration status violated the Fourth Amendment); *Ortega-Melendres v. Arpaio*, 989 F. Supp. 2d 822, 906 (D. Ariz. 2013) adhered to, No. CV-07-02513-PHX-GMS, 2013 WL 5498218 (D. Ariz. Oct. 2, 2013), modified by and clarified by *de Jesus Ortega Melendres v. Arpaio*, No. CV-07-2513-PHX-GMS, 2014 U.S. Dist. LEXIS 60435 (D. Ariz. Apr. 29, 2014) (finding "detaining a [vehicle's] passenger while running his or her identification through [] database is not 'reasonably related in scope' to the traffic infraction and therefore requires independent reasonable suspicion"); and *United States v. Alvarado*, 989 F. Supp. 2d 505, 522 (S.D. Miss. 2013), appeal dismissed (Apr. 4, 2014) (holding that a prolonged traffic stop based on an officer's "hunch" that passengers in the car were in the country illegally violated the plaintiff's 4th amendment rights).

[11] *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015).

[12] *Arizona v. United States*, 132 S. Ct. at 2509.

[13] *See United States v. Urrieta*, 520 F.3d 569, 578 (6th Cir. 2008) ("Under the Fourth Amendment, even the briefest of detentions is too long if the police lack a reasonable suspicion of specific criminal activity.").

[14] For example, in *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014), a federal court in Oregon held that the county had violated the constitutional rights of Ms. Miranda-Olivares and was liable for damages because the county detained her without probable cause when it chose to hold her based on an ICE detainer. In light of *Miranda-Olivares* and similar decisions, any law enforcement agency that holds an individual beyond his or her release date without a judicially administered warrant demonstrating probable cause that the individual is eligible for removal exposes the agency to liability for violating the Fourth Amendment. *See also Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (concluding that detention pursuant to an immigration detainer "for purposes of mere investigation is not permitted"), *aff'd in part, dismissed in part on other grounds*, 793 F.3d 208 (1st Cir. 2015); *Moreno v. Napolitano*, 2014 U.S. Dist. LEXIS 136965 (N.D. Ill. Sept 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's detainer procedures violate probable cause requirements); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 807 (N.D. Ill. 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE detainer issued "without probable cause that Villars committed a violation of immigration laws"); *Uroza v. Salt Lake City*, 2013 U.S. Dist. LEXIS 24640, at *17-20 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on immigration detainer without probable cause), 2014 U.S. Dist. LEXIS 127110 at *16-24 (D. Utah Sept. 10, 2014) (denying federal government defendants' motion for summary judgment, finding plaintiff's claim for declaratory judgment as to whether ICE's issuance of 'hold requests' in the absence of probable cause, "in particular merely to investigate a person's immigration status…violates the Fourth and Fifth Amendments" is not moot, despite no longer being subject to an ICE hold); *Makowski v. United States*, 27 F. Supp. 3d 901, 918 (N.D. Ill. 2014) (concluding that plaintiff states a plausible false imprisonment claim against the U.S. where he was held on a detainer without probable cause).

[15] Department of Homeland Security Memo Re Secure Communities (Nov. 20, 2014), *available at:* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

[16] *Id.*, at 2.

[17] *Galarza v. Szalczyk* 745 F.3d 634, 644 (3d Cir. 2014) (finding that it "would violate the anti-commandeering doctrine of the Tenth Amendment" if "a federal detainer filed with a state or local LEA is a command to detain an individual on behalf of the federal government").

[18] For a detailed analysis of the legal problems with the revised detainers, see Coalition Letter to DHS Secretary Jeh Johnson regarding PEP, *available at* https://www.aclu.org/letter/letter-dhs-regarding-implementation-ices-new-priority-enforcement-program-pep.

[19] 8 C.F.R. § 287.7(a); 8 C.F.R. § 287.5(e)(2). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971) (finding that a warrant issued by an executive agency without a neutral magistrate is invalid); *Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014); *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed February 12, 2014); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014).

[20] Neither 8 C.F.R. § 287.7(a) regarding ICE detainers nor 8 C.F.R. § 287.5(e)(2) regarding ICE administrative warrants, specify the requisite legal standard for issuance. *See also United States v. Abdi*, 463 F.3d 547, 551 (6th Cir. 2006) (explaining ICE policies only require the factual and legal basis for an arrest be presented, unless the arrest is based on a national security threat.).

[21] 8 U.S.C. § 1357(a)(2), also allows for arresting an individual actually "entering or attempting to enter the United States [in his presence]."

[22] The Supreme Court has recognized that because there is more "limited authority" for warrantless immigration arrests, such arrests differ substantially from ordinary criminal arrests." *Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012).

[23] Letter from David Venturella, ICE Assistant Director, to Miguel Márquez, County Counsel of Santa Clara County, California, at 3 (undated, 2010), cited in Florida Watchdog, "New report claims ICE program strains local budgets," Sept. 11, 2013, *available at* https://immigrantjustice.org/sites/immigrantjustice.org/files/Detainers%20-%20ICE%20response%20to%20Santa%20Clara.pdf.

[24] *See* Katherine Beckett *et al.*, "Immigration Detainer Requests in King County, Washington: Costs and Consequences," at 3-4, University of Washington (Mar. 26, 2013), *available at*: https://immigrantjustice.org/sites/immigrantjustice.org/ files/Detainer%20Cost--King%20County%20WA.pdf (studying the cost of enforcing detainers in King County, WA). Often, in jurisdictions that hold individuals in response to detainers, individuals are unable to post bail (e.g. where a bail bondsmen assumes the individual will be transferred to ICE and deported), which can result in days to months more in jail.