



## Briefing Paper: Constitutional Deficiencies of Immigration Detainers<sup>1</sup>

The purpose of this briefing paper is to provide an overview of key constitutional problems with immigration detainers and a summary of recent court decisions relevant to Maryland state and local practices. In the past few months, three federal courts have issued decisions upholding challenges to the constitutionality of detention on the sole basis of an immigration detainer and finding that counties are liable in damages in § 1983 lawsuits arising out of such detention.<sup>2</sup> In response, dozens of jurisdictions in Oregon, Colorado, Washington, Pennsylvania and elsewhere have announced that they will no longer honor ICE detainers, and many more are currently revising their policies.<sup>3</sup>

At this time, Maryland's state and local detention facilities virtually all have a policy or practice of responding to every immigration detainer request they receive by detaining the individual named in the request without a court order, a judicial warrant, or any other lawful basis.<sup>4</sup> We would urge officials to seriously reconsider their policies and practices in this regard, since they may run afoul of

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<sup>2</sup> *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014); *Galarza v. Szalczyk*, 2014 U.S. App. LEXIS 4000 (3d Cir. March 4, 2014); *Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084 (D. R.I. Feb. 12, 2014).

<sup>3</sup> For some recent press coverage, see, e.g., Julia Preston, *Sheriffs Limit Detention of Immigrants*, NY Times April 18, 2014, available at [http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html?\\_r=3](http://www.nytimes.com/2014/04/19/us/politics/sheriffs-limit-detention-of-immigrants.html?_r=3); Goznia Woznjacka, *Oregon Ruling Spurs Halt on Immigration Detainers*, Associated Press, April 17, 2014, available at [http://www.huffingtonpost.com/2014/04/17/oregon-immigration\\_n\\_5170829.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/2014/04/17/oregon-immigration_n_5170829.html?view=print&comm_ref=false); Nancy Lofholm, *Colorado counties closing jails to federal immigration prisoners*, Denver Post, April 30, 2014, available at [http://www.denverpost.com/news/ci\\_25662812/colorado-counties-closing-jails-federal-immigration-prisoners](http://www.denverpost.com/news/ci_25662812/colorado-counties-closing-jails-federal-immigration-prisoners); Jason Hoppin, *Santa Cruz County reverses course on immigration holds*, May 12, 2014, Contra Costa Times, available at [http://www.contracostatimes.com/localnews/ci\\_25749023/santa-cruz-county-reverses-course-immigration-holds](http://www.contracostatimes.com/localnews/ci_25749023/santa-cruz-county-reverses-course-immigration-holds).

<sup>4</sup> In April 2013, the ACLU of Maryland collected information on detainer policies and practices in Maryland through a public records request under the Maryland Public Information Act. The results are discussed in greater detail in our November 2013 report, *Restoring Trust: How Immigration Detainers in Maryland Undermine Public Safety Through Unnecessary Enforcement*, available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland-Detainer%20Report.pdf>.

Fourth Amendment and procedural due process rights of detainees and as a result, may expose state and local agencies to significant liability.

### I. What Is An Immigration Detainer?

An immigration detainer (also known as an ICE hold, ICE detainer, or immigration hold) is an unsworn paper form (DHS Form I-247) issued by an immigration enforcement agent to a state or local law enforcement agency. *See* 8 C.F.R. § 287.7. The form requests that the receiving agency detain the named person for an additional 2 to 5 days (48 hours exclusive of weekends and holidays) after the date he or she is otherwise eligible for release. Immigration detainers are frequently issued because an ICE agent wishes to investigate whether a person may be deportable. They are also regularly issued in error against U.S. citizens.<sup>5</sup> They do not represent a finding of a person's immigration status and are not reviewed by a judge or neutral magistrate before being sent to the receiving agency.

Immigration detainers are not judicial warrants.<sup>6</sup> As discussed, they are not issued or reviewed by a judge or neutral magistrate; do not require any oath or affirmation by the issuing official; and do not require probable cause or any other clear legal standard of suspicion. As such, they do not meet the Fourth Amendment requirements for arrest and detention.<sup>7</sup>

Immigration detainers are also very different from criminal detainers.<sup>8</sup> Criminal detainers do not purport to request or authorize additional time in custody. They are issued when a detainee has *pending criminal charges* in another jurisdiction.<sup>9</sup> Detainees against whom a criminal detainer is lodged are also provided with a prompt procedural mechanism for disputing or resolving those pending charges. By contrast, immigration detainers purport to authorize additional time in custody, are lodged when there are no pending immigration proceedings, and lack any mechanism by which the person named in the detainer may challenge the extended detention. As such, unlike criminal detainers, they meet neither the

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<sup>5</sup> *See* Syracuse Transactional Records Access Clearinghouse (TRAC), “ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents,” *available at* <http://trac.syr.edu/immigration/reports/311/> (between 2008 and 2012, ICE lodged detainers against at least 843 U.S. citizens and over 28,000 lawful permanent residents).

<sup>6</sup> *See, e.g., Buquer v. Indianapolis*, 797 F.Supp.2d 905, 911 (S.D. Ind. 2011) (“A detainer is not a criminal warrant but rather a voluntary request...”); *Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084 (D. R.I. February 12, 2014) at \*48 (“Warrants are very different from detainers...”).

<sup>7</sup> *See* Section II, *infra*, for a discussion of the Fourth Amendment and procedural due process dimensions of detention on the sole basis of an immigration detainer.

<sup>8</sup> Criminal detainers are governed by the Interstate Agreement on Detainers, C.R.S. §§ 24-60-501 to 507 or the Uniform Mandatory Disposition of Detainers Act, C.R.S. §§ 16-14-101 to 108.

<sup>9</sup> *See U.S. v. Mauro*, 436 U.S. 340, 343-44 (1978).

Fourth Amendment standards for detention nor the procedural due process protections guaranteed by the Fourteenth Amendment.<sup>10</sup>

*In sum:*

- *Immigration detainers are not warrants or criminal detainers.*
- *They are unsworn paper forms issued by a single agent without judicial review or a showing of probable cause.*
- *They purport to authorize additional detention time but provide no mechanism for challenging the basis of this detention.*

## II. Fourth Amendment and Procedural Due Process Standards Applicable to Immigration Detainers

The Fourth Amendment requires warrants of arrest to be issued “upon probable cause, supported by Oath or affirmation,”<sup>11</sup> and by a *neutral* magistrate<sup>12</sup> in order to ensure that the “impartial judgment of a judicial officer will be interposed between the citizen and the police.”<sup>13</sup> In contrast, immigration detainers are issued without a probable cause finding and are not judicially approved. Instead, they are unsworn documents issued by the same immigration enforcement officials who make the arrests.<sup>14</sup> Thus, they do not qualify as valid warrants of arrest under the Fourth Amendment.

Indeed, detention on the sole basis of an immigration detainer falls far short even of the Fourth Amendment standard for *warrantless* arrest. Under that standard, warrantless arrest and detention requires probable cause *and* a prompt probable cause hearing *before a neutral magistrate* within *at most* 48 hours of arrest (*inclusive* of weekends and holidays).<sup>15</sup> As previously discussed, immigration detainers are frequently issued without probable cause and on their face authorize detention beyond the strict 48-hour time limit. Most importantly, they do not provide for a probable cause hearing before a neutral magistrate or make any provision for judicial review, rendering even detention within the 48-hour time period unlawful.<sup>16</sup> For all these reasons, immigration detainers do not provide a sufficient legal basis for detention.

The Due Process Clause of the Fourteenth Amendment requires that any deprivation of liberty be accompanied by notice and an opportunity to contest the

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<sup>10</sup> See Section II, *infra*.

<sup>11</sup> U.S. Const. Amend. IV.

<sup>12</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

<sup>13</sup> *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

<sup>14</sup> Compare 8 C.F.R. § 287.7 (b) (listing immigration officials who may issue detainers) with 8 C.F.R. § 287.5(c)(1) (listing immigration officials who may make arrests).

<sup>15</sup> See *McLaughlin*, 500 U.S. 44, 56-57. The only exception to the 48-hour rule is “a bona fide emergency or other extraordinary circumstance” which the government has the burden to demonstrate. *Id.* at 57. Note also that even a hearing within the 48 hours may be unreasonable under certain circumstances. 48 hours is simply the outer limit of what may be considered a reasonable delay. *Id.* at 56-57.

<sup>16</sup> *Id.*

validity of the detention.<sup>17</sup> Moreover, detention in the absence of a clear legal standard is by definition arbitrary and lacking in due process. Immigration detainers purport to authorize the detention of the person named in the form without requiring probable cause or any legal standard of suspicion. They do not provide any mechanism by which to contest the basis for the detention or any avenue for administrative appeal. And, detainees who are held on the basis of an immigration detainer frequently are not provided with adequate notice of the basis for their detention.<sup>18</sup> For all these reasons, detention on the basis of an immigration detainer violates the procedural due process rights of the detainee.

*In sum:*

- *Because they are unsworn documents issued without a showing of probable cause or judicial review, detention on the sole basis of an immigration detainer violates individuals' Fourth Amendment rights.*
- *Because persons named in an ICE detainer do not have a mechanism by which to challenge the basis for their detention and often do not even receive notice of the reason for their detention, detention on the sole basis of an immigration detainer violates their right to procedural due process under the Fourteenth Amendment.*

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### III. Summary of Recent Court Decision

Three recent federal court decisions have confirmed that detention on the basis of an immigration detainer violates the Fourth Amendment rights of detainees. This section provides brief summaries of those cases.

- *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014).

In April 2014, a federal district court in Oregon found that Clackamas County had violated the constitutional rights of Ms. Miranda-Olivares by detaining her without probable cause when it chose to hold her on the sole basis of an immigration detainer request (Form I-247). The court held that the County was liable for damages. Ms. Miranda-Olivares was arrested on a minor criminal charge, and ICE issued a detainer the following day. Family members were prepared to post bail, but jail officials said that posting bail would not result in release because the jail would continue to detain her on the ICE detainer. As a result, Ms. Miranda-Olivares spent two weeks in jail until her criminal charges were resolved. After that, the jail held her for an additional day then transferred her to ICE custody. The court found that Clackamas County had violated Ms. Miranda-Olivares's Fourth Amendment rights by detaining her after she was eligible for pre-trial release upon posting bond and for 19 hours after she became eligible for release from criminal custody.

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<sup>17</sup> See *Matthews v. Eldridge*, 424 U.S. 319 (1976).

<sup>18</sup> While the new Form I-247, revised in response to litigation and advocacy, requires that a copy of the form be provided to the person detained on its basis, on information and belief, in Maryland detainees are frequently not provided with a copy of the form and do not receive adequate notice of the basis for their renewed detention.

Within days of this decision, dozens of counties in Oregon, Colorado, and Washington State adopted no-hold policies.

➤ *Galarza v. Szalczyk*, 2014 U.S. App. LEXIS 4000 (3d Cir. March 4, 2014).

In March 2014, the Third Circuit found that ICE detainers are not binding orders but are instead discretionary requests, and that Lehigh County can be held liable for violating Mr. Galarza's Fourth Amendment and procedural due process rights when it kept him in jail on an ICE detainer for 3 days after he posted bail. The court held that the County cannot use the ICE detainer as an excuse for the violation, since it was free to disregard it. In this case, ICE wrongfully issued an immigration detainer against Mr. Galarza, who is a U.S. citizen. The jail held him for 3 days after he posted bond on the sole basis of this detainer. When Mr. Galarza sued the jail, the County argued that it was obligated to comply with ICE detainers and attempted to disclaim responsibility for the violation of his constitutional rights. The Third Circuit squarely disagreed.

As a result of this decision, the Mayor of Philadelphia issued an executive order effectively ending compliance with ICE holds. Lehigh County also announced that it will no longer comply with ICE holds.<sup>19</sup>

➤ *Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084 (D. R.I. Feb. 12, 2014).

In February 2014, a federal district court in Rhode Island also held that a jail could not escape liability by claiming that it was compelled to honor ICE detainers. The court held that the Rhode Island Department of Corrections (RI-DOC) could be held liable for violating Ms. Morales's Fourth Amendment and procedural due process rights when it continued to detain her on the sole basis of the ICE detainer for 24 hours after a state court judge ordered her released on her own recognizance. The RI-DOC argued that it could not be held liable because the immigration detainer was facially valid and analogous to a warrant. The court rejected that argument, explaining that an immigration detainer does not provide the legal authority of a warrant.

#### IV. Conclusion

While these cases deal with individuals in Oregon, Pennsylvania, and Rhode Island, the legal reasoning, premised on the Fourth Amendment and on the procedural deficiencies of immigration detainers, is equally applicable here in Maryland. Our state and local agencies have a policy or practice of detaining

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<sup>19</sup> The Lehigh County Executive cited the *Galarza* decision as a basis for the revision, stating: "In choosing to leave the county holding the bag in the courtroom, ICE inflicted a financial penalty on Lehigh County taxpayers, and this administration is choosing to prevent any recurrence." Samantha Marcus, *Lehigh County will ignore federal immigration requests*, The Morning Call, May 14, 2014, available at [http://articles.mcall.com/2014-05-14/news/mc-lehigh-county-immigration-detainers-20140514\\_1\\_ernesto-galarza-szalczyk-ice-agent](http://articles.mcall.com/2014-05-14/news/mc-lehigh-county-immigration-detainers-20140514_1_ernesto-galarza-szalczyk-ice-agent)

individuals solely on the basis of an ICE detainer, without requiring that the detention be supported by probable cause and without requiring judicial review. We believe this policy or practice is unconstitutional and can only be remedied by a requirement that all detention requests be accompanied by a judicial warrant.<sup>20</sup>

In addition to the constitutional concerns outlined above, it should be noted that in Maryland, immigration detainers are used overwhelmingly against members of the Latino community, at a rate that is vastly disproportionate to their share of the Maryland foreign-born population.<sup>21</sup> And, they are issued mostly against individuals charged with traffic violations or other minor offenses.<sup>22</sup> Within the immigrant community, the knowledge that any contact with state or local law enforcement may become a direct pipeline into deportation proceedings significantly deters victims and witnesses of crime from coming forward or collaborating with the police. Absence of community trust in law enforcement significantly undermines public safety and is yet another policy consideration that weighs in favor of disentangling our local facilities from ICE enforcement efforts.

For all these reasons, we believe it is critical for Maryland state and local law enforcement agencies to revise their current policies and practices and to immediately stop detaining people on the sole basis of an immigration detainer request.

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<sup>20</sup> Note that ICE administrative warrants (Form I-200) do not meet this requirement since they also are not judicially reviewed. The Fourth Circuit recently found that state and local officials do not have the authority to stop, search, arrest, or detain anyone on the sole basis of these civil administrative warrants. *See Santos v. Frederick County*, 725 F.3d 451 (4th Cir. 2013).

<sup>21</sup> *See* ACLU of Maryland Report, *Restoring Trust: How Immigration Detainers in Maryland Undermine Public Safety Through Unnecessary Enforcement* (November 2013), available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland-Detainer%20Report.pdf>.

<sup>22</sup> *Id.*