



Wisconsin

207 East Buffalo Street, Ste 325
Milwaukee, WI 53202
(414) 272-4032
aclu-wi.org

August 9, 2018

Sheriff Richard R. Schmidt
Milwaukee County Sheriff's Office
821 West State Street, Room 107
Milwaukee, WI 53233

Re: Your County's Policies Regarding Immigration Detainer Requests

Dear Sheriff Richard R. Schmidt,

Last year we wrote you regarding the immigration-related policies in use in your Department and asked your Department to provide us with public records. We have now produced a report which looks at the immigration enforcement policies of sheriff's departments across the State of Wisconsin and have enclosed a copy of that report for your review.

One particular concern which arose out of our research was the fact that almost no counties in Wisconsin have appropriate policies involving ICE detainers. Honoring ICE detainers which are not accompanied by a warrant signed by a judicial officer violates the Fourth Amendment and exposes your department to liability.

ICE detainers are documents which ask local jails to hold individuals for up to an additional 48 hours after their state-law custody has ended. Detainers are generally issued using Form I-247A and are often accompanied by other paperwork. As ICE itself has acknowledged, they are purely voluntary; you have no obligation to hold anyone for ICE.

Holding people based on ICE detainers exposes you to the risk of steep financial liability and protracted litigation. The Trump administration has changed several of ICE's detainer practices, but none of them reduce your litigation risk or give you any additional arrest authority. Detainers also impose detention costs that ICE does not reimburse, undermine trust between immigrant communities and your agency, and facilitate the Trump administration's increasingly inhumane deportation policies. As a result, hundreds of jurisdictions across the country have limited their participation in ICE's detainer program.¹

This letter explains why your Department should do the same. It also explains why none of ICE's recent changes does anything to protect you from the risk of liability when you hold people on immigration detainers.

¹ See Immigrant Legal Resource Center, *National Map of Local Entanglement with ICE*, Jan. 25, 2018, <https://www.ilrc.org/local-enforcement-map>.

I. Holding People on ICE Detainers Exposes You to Legal Liability.

The federal courts have consistently held that local agencies and officials can be sued for effectuating ICE detainers. First, courts agree that extending a person's detention based on an ICE detainer constitutes a new arrest.² Second, courts agree that a local agency violates the Fourth Amendment if it makes a detainer arrest without sufficient probable cause.³ Third, courts agree that because detainers are fully voluntary, local officials can be held liable for damages when they effectuate a detainer without probable cause.⁴ As a result, police and sheriffs across the country have paid millions of dollars in damages, settlements, and attorney's fees for detainer arrests.

The threat of liability is just as serious, if not more so, under the Trump administration. Detainer-related lawsuits have continued to impose major legal costs in recent months.⁵ And the federal government has consistently refused to reimburse these costs. The administration has made several changes to its detainer policies, but none of its changes eliminates the financial risks local officials face when they hold people on ICE detainers, as described below. Regardless of ICE's new policies, local officials can still be held liable under the Fourth Amendment anytime they extend a person's detention without probable cause.

² *Morales v. Chadbourne*, 793 F.3d 208, 217-18 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *9-10 (D. Or. Apr. 11, 2014); see also *Lunn v. Massachusetts*, 477 Mass. 517 (2017).

³ *Morales*, 793 F.3d at 217 & n.3 (explaining that "courts have uniformly held that probable cause is required" to hold someone a detainer).

⁴ *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (explaining that the county "was free to disregard the ICE detainer" and was therefore liable for its own actions); *Miranda-Olivares*, 2014 WL 1414305, at *4-8 (same).

⁵ For a small sample of recent cases, see *Roy v. County of Los Angeles*, No. 12-cv-9012, 2018 WL 914773 (C.D. Cal. Feb. 7, 2018) (ruling in favor of a class of thousands of noncitizens held on detainers seeking damages against Los Angeles County, which had paid \$255,000 to settle one named plaintiff's detainer claim); *Goodman v. Arpaio*, 2:16-cv-04388 (D. Ariz. settled 2018) (Maricopa County settles detainer lawsuit for \$30,750 in damages and \$50,000 in attorney's fees); *Cisneros v. El Paso County*, No. 18-cv-30549 (Colo. D. Ct. Mar. 19, 2018) (ruling that county sheriff had no authority under state law to arrest based on civil immigration detainer); *Palacios-Valencia v. San Juan County*, No. 14-cv-1050 (D.N.M. settled 2017) (San Juan County pays \$350,000 to settle detainer class action lawsuit, pays named plaintiffs \$25,000 and \$15,000 to settle their claims); *Gomez-Maciel v. Coleman*, No. 17-cv-292 (E.D. Wash. settled 2017) (City of Spokane settles detainer lawsuit for \$49,000); *Figueroa-Zarceno v. City and County of San Francisco*, No. 17-cv-229 (N.D. Cal. settled 2017) (San Francisco pays \$190,000 settlement to person unlawfully turned over to ICE); *Lunn*, 477 Mass. 517 (holding that police had no authority under state law to hold people on ICE detainers). See also American Civil Liberties Union, *Recent ICE Detainer Damages Cases* (2018), <https://www.aclu.org/fact-sheet/recent-ice-detainer-damages-cases-2018>.

A. You Do Not Have Authority to Execute an I-200 Administrative Warrant.

In April 2017, ICE adopted a new practice of issuing administrative warrants (DHS Form I-200) alongside detainers.⁶ Nothing in its new policy reduces your risk of liability when you hold people for ICE.

First, an I-200 administrative warrant does not give you the authority to arrest anyone. By law, only trained immigration officers can execute them.⁷ And in fact, the I-200 form itself specifies that only a trained “immigration officer” may execute it.⁸ An I-200 thus does not give you any arrest authority, even on its own terms.

Second, and even more fundamentally, I-200 forms are not actually “warrants” under the Fourth Amendment. For an order to count as a “warrant” under the Fourth Amendment, it needs to be issued by a neutral magistrate. But I-200s are issued by ICE officers, not magistrates.⁹ Thus, an I-200 cannot excuse you or your agency from complying with the Fourth Amendment’s probable cause requirement. For that reason, multiple courts have held that local law enforcement can be sued for detaining a person based on an I-200 administrative warrant.¹⁰

ICE has suggested that the inclusion of an administrative arrest warrant cures the constitutional flaws that courts have identified in the detainer process. That is misleading. In reality, ICE’s new practice of issuing I-200s responds to a different legal problem with detainers. A 2016 court decision held that under federal law, for *ICE itself* to have arrest authority, it needed to issue an I-200.¹¹ To comply with the ruling, ICE began issuing administrative

⁶ U.S. Imm. & Customs Enforcement, Policy Number 10074.2, Mar. 24, 2017, <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>.

⁷ *Id.* § 287.5(e)(3) (listing the “immigration officers” who may execute I-200s, all of whom must have “completed basic immigration law enforcement training”); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1255-56 (E.D. Wash. 2017) (holding that an I-200 form did not provide any arrest authority to local officers), *vacated as moot*, 716 Fed. App’x 741 (9th Cir. 2018).

⁸ See DHS Form I-200 (2016), <https://bit.ly/2zxOVRy>.

⁹ 8 C.F.R. § 287.5(e)(2) (listing enforcement officers who can issue I-200 administrative “warrants”); see *El Badrawi v. Dep’t of Homeland Sec.*, 579 F. Supp. 2d 249, 275-76 (D. Conn. 2008).

¹⁰ *Santos v. Frederick Cty. Bd. of Com’rs*, 725 F.3d 451, 463-65 (4th Cir. 2013) (local agency violated Fourth Amendment rights by arresting based on I-200 form); *Ochoa*, 266 F. Supp. 3d at 1255-56; *Figuroa-Zarceno*, No. 17-cv-229 (N.D. Cal. *settled* 2017) (city pays \$190,000 settlement to person transferred to ICE based on administrative warrant).

¹¹ *Jimenez Moreno v. Dep’t of Homeland Security*, 213 F. Supp. 3d 999, 1004-09 (N.D. Ill. 2016). ICE does not need an I-200 if it determines that the person is a flight risk, but ICE never makes a flight risk determination when it issues detainers. See 8 U.S.C. § 1357(a)(2).

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warrants. But that case, and ICE’s resulting policy change, did not address *local* liability for holding people on detainers—or the constitutional violations that courts across the country have found.

Third, ICE has said that its April 2017 policy was a break from prior practice, and therefore from earlier court decisions, because ICE now claims probable cause when it issues detainers. That is incorrect. ICE has claimed probable cause for detainers since at least 2012.¹² But those longstanding claims of probable cause have never prevented local agencies from facing serious financial liability for effectuating ICE detainers.¹³

In short, ICE’s April 2017 policy does not change anything about your arrest authority or financial liability when you hold people for ICE.

B. Intergovernmental Service Agreements (IGSAs) Do Not Eliminate Liability.

There have been suggestions in the press and elsewhere that the existence of Intergovernmental Service Agreements (IGSAs or IGAs) cure the legal and constitutional problems with detainers. They do not.

IGSAs are contracts under which ICE and other federal agencies rent bed space to house federal prisoners in local jails. ICE uses IGSAs to pay for the costs of renting jail space, which include “clothing, medical care, necessary guard hire,” “construction, physical renovation,” and similar expenses.¹⁴ In other words, under an IGSA, a local jail may house prisoners for ICE who were previously arrested by ICE and placed in ICE custody.

Under an IGSA contract, ICE uses Form I-203 to keep track of its prisoners that are held in local jails. These I-203s simply register the date and time that inmates are either booked into or released from rented jail space; they are used to keep track of prisoners and determine reimbursement amounts.

¹² See DHS Form I-247 (2012), <https://bit.ly/2la2nDH>. The 2012 detainer form used the phrase “reason to believe,” which is equivalent to probable cause in the immigration context. See *Morales*, 703 F.3d at 216. The I-247 detainer form has used the words “probable cause” since 2015. <https://bit.ly/2pzQxUh>.

¹³ See, for example, *Davila v. Northern Regional Police Department*, No. 13-cv-70 (M.D. Pa. *settled* 2015) (Allegheny County pays \$25,000 and agrees to stop holding people on detainers); *Uroza v. Salt Lake Cty.*, No. 11-cv-713 (D. Utah *settled* 2014) (Salt Lake County settles detainer case for \$75,000); *Valdez-Sandoval v. Walcher* (Colo. 2014) (Arapahoe County pays \$30,000 to settle detainer case before lawsuit is filed).

¹⁴ 8 U.S.C. § 1103(a)(11)(A)-(B); 18 U.S.C. § 4013; Department of Justice Appropriation Acts of 2001, Pub. L. No. 1106-553, § 119.

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IGSA contracts do not give you any authority to arrest for immigration violations, and they do nothing to limit your liability for effectuating detainers. Neither IGSA contracts themselves nor the statutes authorizing them say anything about arrest authority. With or without an IGSA, when you hold a person on a detainer, you are making a new arrest under the Fourth Amendment, because *you* are the officer ensuring that the detainee is “not free to leave.”¹⁵ You therefore remain liable if you effectuate an ICE detainer without probable cause. Neither an IGSA nor an I-203 changes this.

In fact, the federal government agrees that IGSA do not authorize local officers to make immigration arrests. As ICE recently explained in a legal filing, a prisoner is only held pursuant to an IGSA “after ICE takes physical custody.” If ICE seeks an individual set to be released from state charges, it can only book him into IGSA custody “*after* ICE effects [the] arrest.”¹⁶ In other words, according to ICE itself, the IGSA does not give you any authority to detain a person on your own. An internal ICE policy document submitted in court filings says the same thing.¹⁷

Federal and state courts also agree that IGSA do not protect you from liability. As recent cases demonstrate, neither an IGSA nor an I-203 does anything to reduce a local agency’s legal risks when it holds a person on a detainer.¹⁸

C. Basic Ordering Agreements (BOAs) Do Not Eliminate Liability.

ICE has recently introduced a new mechanism to temporarily rent bed space for immigration detainees, called a Basic Ordering Agreement. While ICE has implied these agreements solve the legal problems with detainers, in fact they are just more of the same.

¹⁵ *United States v. Mendenhall*, 446 U.S. 544, 554 (1984) (characterizing an arrest as an action that leads “a reasonable person” to believe “that he was not free to leave”); see *California v. Hodari*, 499 U.S. 621, 626 (1991) (emphasis omitted) (arrest occurs either through the “application of physical force to restrain movement” or an arrestee’s “submission to the assertion of authority”).

¹⁶ Statement of Interest of the United States, *Tenorio-Serrano v. Driscoll*, No. 3:18-cv-8075, Dkt. 41, at 7, 32-33 (D. Ariz. filed May 19, 2018) (emphasis altered).

¹⁷ See Supplemental Exhibit G, *Cisneros v. Elder*, No. 2018-cv-30549 (El Paso D. Ct., Colorado) (filed March 19, 2018) (explaining that an ICE agent must be “physically present” “onsite at a jail” to effect an immigration arrest and book a detainee back into jail pursuant to an IGSA bed rental agreement); *id.* (stating that “there is no way” for an ICE agent to effectuate an immigration arrest “via facsimile or electronic transmission of any kind”).

¹⁸ See *Ochoa*, 266 F. Supp. 3d at 1253 (holding that arrest was illegal despite an IGSA); *Cisneros*, at 2-3 & n.1 (same).

Like IGSAs, BOAs do nothing to change your liability for ICE detainees. A BOA is an agreement where ICE pays a local jail \$50 for each detainee the jail effectuates.¹⁹ Like an IGSA, a BOA contract does not claim to provide any authority for a local official to make an immigration arrest.²⁰ And the \$50 payment cannot and does not negate the Fourth Amendment's probable cause requirement. With or without a BOA in place, local officials remain liable for effectuating detainees that lack probable cause.²¹

D. No Court Decisions Have Eliminated Liability.

As explained above, local law enforcement officials have faced serious liability for effectuating ICE detainees in recent years. The few cases that states and localities have won do not change the legal risks that police and sheriffs face when they hold people for ICE.

For instance, in *El Cenizo v. Texas*, the court did not question any of the principles listed above on pages 1-2.²² The court made clear that local officials could still be liable in individual cases for detentions that lack probable cause. As the court explained, "this case does not involve whether probable cause existed in a particular instance." Where probable cause does not exist, liability remains. The Court simply held that the plaintiffs could not show that a Texas detainee statute was unconstitutional in every possible circumstance. Therefore, in *El Cenizo*, it was "not enough for the plaintiffs to demonstrate" that holding people on ICE detainees "will often cause Fourth Amendment violations."²³

Both before and after *El Cenizo*, local law enforcement officials have continued to lose detainee cases. In March 2018, a Colorado court ruled that a sheriff had no authority to hold people on ICE detainees.²⁴ In February 2018, a federal judge ruled that Los Angeles County had violated thousands of people's rights by holding them on ICE detainees.²⁵ And in 2017, scores of law enforcement agencies settled or lost lawsuits for holding people on detainees.²⁶

¹⁹ Dep't of Homeland Security, *ICE, 17 Florida Sheriffs Announce New Enforcement Partnership*, Jan. 17, 2018, <https://bit.ly/2BeBTv0>.

²⁰ Nor do the statutes or regulations addressing BOAs. See, for example, 48 C.F.R. § 16.703.

²¹ For further discussion, see <https://www.aclu.org/fact-sheet/faq-ices-new-enforcement-partnerships-florida>.

²² *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018).

²³ *Id.*

²⁴ *Cisneros v. El Paso County*, No. 18-cv-30549 (Colo. D. Ct. Mar. 19, 2018).

²⁵ *Roy v. County of Los Angeles*, No. 12-cv-9012, 2018 WL 914773 (C.D. Cal. Feb. 7, 2018).

²⁶ See *supra* footnote 5.

II. Effectuating ICE Detainers Is Bad Policy.

There are many other reasons not to participate in ICE's detainer program, as hundreds of jurisdictions across the country have recognized. Even apart from lawsuits and damages liability, detainers are expensive and harm public safety.

A. Detainers Are Expensive.

Even without the legal risk, effectuating detainers means paying the substantial cost of incarcerating hundreds (if not thousands) of people in your jail for additional days, and those costs quickly pile up. Holding a single person in jail can cost between \$100 and \$250 per day.²⁷ When a local jail arrests on a detainer, ICE typically does not reimburse the extra detention costs.²⁸ Jails that hold people on ICE detainers are therefore donating their own officer time, jail space, and associated costs (food, security, maintenance) to ICE, free of charge—rather than using those resources to advance local law enforcement priorities.

These costs add up over time. ICE has issued more than a million detainers in the last decade, which means that many law enforcement agencies receive several thousand requests per year.²⁹ Each detainer asks for up to 48 hours of extra detention, but because it deters the person from posting bail as a practical matter, an ICE detainer typically doubles the amount of time a person spends in pre-trial detention.³⁰ As a result, detainers can cost local agencies and taxpayers millions of dollars per year. For instance, detainers cost Miami-Dade County \$12.5 million per year; they cost the State of Colorado \$13 million per year; and according to its own

²⁷ Assoc. Press, *At \$75,560, Housing a Prisoner in California Now Costs More than a Year at Harvard*, June 4, 2017 (finding that it costs \$200 per day to house prisoners in California), <https://lat.ms/2qXtKIn>; Edward F. Ramos, *Fiscal Impact Analysis of Miami-Dade's Policy on "Immigration Detainers"*, at 7 (2013) (estimating that detainers cost Miami-Dade County \$12.8 million in one year, counting both the 48 hours of extra detention and inmates' inability to post bond because of detainers), <https://bit.ly/2iDr5Hd>; Florida Immigrant Coalition, *The Cost of Complicity*, at 4 (Feb. 2018) (\$230 per day), <https://bit.ly/2xIqFvv>.

²⁸ An IGSA does not change this, because as ICE itself has explained in legal filings, "the IGSA is not triggered" until "an immigration officer . . . arrests the detainee," *Tenorio-Serrano Statement of Interest*, *supra* note 16, at 3-4, which only occurs "after ICE takes physical custody," *id.* at 7. And even under a BOA, the federal government only pays a small fraction of detention costs: \$50 per detainer, or \$25 per day if the person remains in local custody for the full 48 hours.

²⁹ For detainer data by state and jail, see Syr. Univ., *Latest Data: Immigration and Customs Enforcement Detainers* (2017), <http://trac.syr.edu/phptools/immigration/detain/>.

³⁰ See Andrea Guttin, Imm. Pol'y Ctr., *The Criminal Alien Program*, at 12-13 (Feb. 2010), <https://bit.ly/2LqX9AN>; Aarti Shahani, *New York City Enforcement of Immigration Detainers*, at 3-4 (Oct. 2010), <https://bit.ly/2mOrVES>; Judith A. Greene, *The Cost of Responding to Immigration Detainers in California*, at 2-3 (Aug. 22, 2012), <https://bit.ly/2NPvWV2>.

Commission on Jail Standards, the State of Texas pays \$60.8 million each year holding people on detainees.³¹

B. Detainers Harm Public Safety.

Detainers deter immigrant communities from cooperating with your agency. When police and sheriffs transfer people to ICE for deportation, it discourages immigrants—along with their U.S.-citizen children, neighbors, co-workers, and friends—from reporting crimes and serving as witnesses. These residents are effectively denied police protection, because they understandably fear that any interaction with the police could tear apart their family or lead to their own deportation.

These effects have been well documented. Law enforcement leaders all over the country have explained that attaching immigration consequences to police interactions makes ordinary police work more difficult.³² In a recent study, a majority of prosecutors, judges, and police officers reported that ramped-up immigration enforcement makes it harder to protect local communities from crime.³³ Indeed, since the Trump administration took office, crime reporting has plummeted amongst Latinos in multiple cities.³⁴ And academic studies have confirmed that immigrants avoid local authorities who act as a pipeline to the deportation system.³⁵

³¹ Ramos, *supra* note 19; Kathy White & Lucy Dwight, *Misplaced Priorities: SB90 and the Costs to Local Communities*, Colo. Fiscal Inst., Dec. 1, 2012, <https://bit.ly/2kOxxhv>; Texas Comm'n on Jail Standards, *2015 Annual Report*, at 12, Feb. 1, 2016, <https://bit.ly/2syvqT5>.

³² See, for example, Nat'l Imm. Law Ctr., *Local Law Enforcement Leaders Oppose Mandates to Engage in Immigration Enforcement* (August 2013), <https://bit.ly/2J929st> (dozens of law enforcement leaders criticizing police-ICE entanglement); Dep't of Justice, *The President's Task Force on 21st Century Policing Guidebook*, at 18 (May 2015) (recommending that ICE not issue detainer requests to local jails), <https://bit.ly/2G8S75v>; William J. Bratton, *The LAPD Fights Crime, Not Illegal Immigration*, L.A. Times, Oct. 27, 2009, <https://lat.ms/2LXm8IE>.

³³ Rafaela Rodrigues et al., *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims*, May 3, 2018, <https://bit.ly/2jvGfAr>; see also Am. Civil Liberties Union, *Freezing Out Justice* (2018) (summarizing the results), <https://www.aclu.org/report/freezing-out-justice>.

³⁴ See, for example, Rob Arthur, *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, FiveThirtyEight.com, May 10, 2017, <https://53eig.ht/2rjgs40>; Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. Times, June 3, 2018, <https://nyti.ms/2Lk35ad>; James Queally, *Fearing Deportation, Many Domestic Violence Victims Are Steering Clear of Police and Courts*, L.A. Times, Oct. 9, 2017, <https://lat.ms/2gqs93>.

³⁵ See, for example, Marcella Alsan & Crystal S. Yang, *Fear and the Safety Net: Evidence from Secure Communities*, Harvard Law School, May 2018, <https://bit.ly/2kN47QJ>; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Ctr. for Am. Progress, Jan. 26, 2017, <https://ampr.gs/2kxOchX>.

ICE has tried to minimize those disturbing patterns by claiming that its detainers only target people with serious criminal records. But ICE's own data shows that this is false. The vast majority of detainers are issued against people with little to no criminal record.³⁶ Indeed, *two-thirds* of the people ICE targeted for deportation in recent months have no criminal convictions of any kind.³⁷ The administration is therefore wrong when it claims that detainers protect public safety by helping remove violent offenders. In reality, ICE detainers are indiscriminately issued against almost anyone who comes into contact with local police, instilling fear in immigrant communities and undermining the trust and cooperation that are essential for effective policing.

* * *

After you and your legal counsel review this letter, we hope you will agree that your Department should not be holding people on ICE detainers. We therefore urge you to maintain any current policies to that effect, and to adopt new ones where necessary. We would be pleased to discuss our position further and ask that you schedule a meeting or provide the ACLU a written response to this letter by September 15, 2018.

Sincerely,



R. Timothy Muth
Staff Attorney

³⁶ Syr. Univ., *Few ICE Detainers Target Serious Criminals*, Sept. 17, 2013 (half of all detainers targeted people with no convictions of any kind; over 80% had either no convictions or non-violent ones only), <http://trac.syr.edu/immigration/reports/330/>.

³⁷ John Bowden, *ICE Arrests of Immigrants with No Criminal Convictions Rises: Report*, TheHill.com, May 18, 2018, <https://bit.ly/2rSjwmK>; Assoc. Press, *Deportation Officers Are Increasingly Arresting People with No Crime Records*, Feb. 26, 2018, <https://nbcnews.to/2Clh3bn>; Niraj Warikoo, *Michigan Non-Criminal Immigrant Arrests, Deportations Soar Under Trump*, Detroit Free Press, Mar. 20, 2018, <https://on.freep.com/2DEhxxj>.

