I. Introduction

This brief memo discusses immigration detainers and how recent federal court decisions have interpreted them. These decisions have major ramifications for the way that local law enforcement must respond to detainers, and require significant changes in historic practices of cooperation with federal immigration authorities.

A. Immigration detainers are not a legally valid basis for detention.

Several federal courts have reviewed the legality of immigration detainers and found major legal and constitutional deficiencies:

1. Federal courts agree that holding someone on a detainer after they have concluded their local or state custody constitutes a new arrest that must meet Fourth Amendment requirements.[1] As discussed further below, most holds pursuant to ICE detainers do not satisfy the Fourth Amendment.

2. An immigration detainer is a voluntary request that does not impose any obligation on the receiving jurisdiction.[2] Therefore a jail cannot evade responsibility for unlawful detention by claiming the federal government obligated them to hold the person on an immigration detainer.[3]

3. A jail must have a warrant or probable cause of a new offense to detain a person after they would otherwise be released from custody.[4] As discussed further below, an immigration detainer is not a warrant, and the initiation of investigation indicated on some detainers does not, federal courts have found, provide a legal basis for detention.[5] Even a few minutes of detention may be a Fourth Amendment violation if there is no sufficient justification for detaining the person or prolonging the stop.[6]

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[1] *See Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) *aff'd in part, dismissed in part*, 793 F.3d 208, 215-216 (1st Cir. 2015); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D.Or. April 11, 2014); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010).

[2] *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (local law enforcement agencies are free to disregard detainers and cannot use them as a defense of unlawful detention); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 40 (D.R.I. 2014), aff'd in part, dismissed in part, 793 F.3d 208 (1st Cir. 2015) ("The language of both the regulations and case law persuade the Court that detainers are not mandatory and the RIDOC should not have reasonably concluded as such."); *Villars v. Kubiatowski*, 45 F.Supp.3d 791, 802 (N.D. Ill. 2014) (federal courts and all relevant federal agencies and departments consider ICE detainers to be requests).

[3] *Id.*

[4] *See, e.g.*, Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification."); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010) ("Plaintiff was kept in formal detention for at least several hours longer due to the ICE detainer. In plain terms, he was subjected to the functional equivalent of a warrantless arrest.").

[5] *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) (finding immigration detainer for investigation is a "facially invalid request to detain"*); Miranda-Olivares v. Clackamas Co*., No. 3:12-cv-02317-ST at *17 (D.Or. April 11, 2014) (holding county liable for unlawful seizure without probable cause, based on an immigration detainer); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010). *See also* Christopher N. Lasch, Federal Immigration Detainers After Arizona v. United States, 46 Loy. L.A. L. Rev. 629, 686 fn. 308 (2013) (explaining how immigration detainers are different from administrative immigration warrants).

[6] *See Rodriguez v. United States*, 135 S.Ct. 1609 (2015); *Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (delaying release to investigate immigration status raises constitutional concerns).

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4. The Northern District of Illinois has ruled that detainers issued out of the Chicago Field Office (covering at least six states and sometimes more) because they exceed ICE's own statutory arrest authority, although a request for a stay of the order revoking all the detainers has been filed, pending an appeal.[7] This holding so far only applies to the Chicago Field Office, but its analysis is national, so any jail holding people on ICE detainers is risking liability for that detention.

5. Local jails and sheriffs have been held liable for unlawful detention and violation of the detainee's Fourth Amendment rights because of unlawful detention based on ICE holds.[8] Moreover, many jails have been held liable or forced to settle with U.S. citizens that they unlawfully held on immigration detainers.[9]

B. As a new arrest, detention on ICE detainers implicates other fundamental constitutional and statutory requirements arising from the Fourth Amendment.

Arrests for suspected violations of federal immigration law, which include detention in a local jail based on an ICE detainer, must meet Fourth Amendment requirements.[10] Because holding someone on an immigration detainer beyond their release date is a new arrest, the various requirements of the Fourth Amendment apply. This includes the requirement of probable cause or a warrant issued by a neutral magistrate, and in the case of a warrantless arrest, the requirement that the detainee be brought before a neutral magistrate within 48 hours of arrest.[11] In addition, the Immigration and Nationality Act provides warrantless civil immigration arrest authority to immigration officials only when the individual is likely to escape before a warrant can be obtained.[12] ICE detainers fail to meet most or all of these basic requirements.

1. Detainer is not a Warrant and Lacks Sufficient Probable Cause

In 2015, ICE changed its detainer forms because of the above court decisions, adding language regarding probable cause to the new I-247D form. Whether the boilerplate checkboxes claiming probable cause can meet the standard of "particularized suspicion" that is central to the Fourth Amendment is still in

[7] *Jimenez-Moreno v. Napolitano*, No. 1:11-cv-05452, Docket Entry 230 at 16-17 (N.D. Ill. Sept. 30, 2016).
[8] *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D.Or. April 11, 2014) (holding county liable for unlawful detention based solely on an immigration detainer). *See also Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. *filed* Jan. 16, 2007) (settled for money damages); *Cacho v. Gusman***,** No. 11-0225 (E.D. La. *filed* February 2, 2011) (same); *Quezada v. Mink*, No. 10-0879 (D. Co. *filed* Apr. 21, 2010) (same); *Ramos-Macario v. Jones*, No. 10-0813 (M.D. Tenn. *filed* Aug. 30, 2010) (same).
[9] *See, e.g., Galarza v. Szalczyk*, No. 10-06815 *10 (E.D. Pa. *filed* Sept. 28 2012), *Mendoza v. Osterberg*, 2014 WL 3784141 (District of Nebraska, 2014); *Castillo v. Swarski*, No. C08-5683 (W.D.Wa. Nov. 13, 2008); *Wiltshire v. United States*, Nos. 09-4745, 09-5787 (E.D. Pa. Oct. 16, 2009); *Jimenez v. United States*, No. 11-1582 (S.D. Ind. filed Nov. 30, 2011).
[10] *See Morales v. Chadbourne*, 793 F.3d 208, 215 (1st Cir. 2015) ("It was thus clearly established well before [plaintiff] was detained in 2009 [on an immigration detainer] that immigration stops and arrests were subject to the same Fourth Amendment requirements that apply to other stops and arrests . . ."). *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975) (Fourth Amendment applies to immigration stops); *Uroza v. Salt Lake Cnty.*, No. 11-cv-713, 2013 WL 653968, at *6 (D. Utah Feb. 21, 2013) ("The proposition that immigration enforcement agents need probable cause to arrest pursuant to 8 U.S.C. § 1357(a)(2) and in accordance with the Fourth Amendment has been established in the Tenth Circuit since 1969.").
[11] *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 116 n. 18, 117 (1975).
[12] 8 U.S.C. § 1357(a); *Arizona v. United States*, 132 S.Ct. 2492, 2505-07 (2012).

question.[13] ICE officials have admitted in recent depositions that ICE has not changed its procedures for determining if or when to issue a detainer.[14]

Certainly there is still no procedure under which a detainer is based on oath or affirmation and reviewed by a neutral magistrate, as is required under the Fourth Amendment to issue a valid warrant.[15] Therefore, immigration detainers are still not warrants, and any detention based on an immigration detainer is a warrantless arrest.[16] And warrantless arrest authority is limited by both immigration law and the Fourth Amendment.

2. Fourth Amendment Requires Review by a Neutral Magistrate

Bedrock Constitutional principles require that a person arrested without a warrant must be brought before a judge or neutral magistrate within 48 hours.[17] There is no reason that individuals subjected to warrantless arrest based on an immigration detainer would be different.[18] But currently both local agencies and ICE fail to obtain any neutral review of these arrests. Local jails make the arrest and then merely transfer the person to a different enforcement agency: ICE. ICE brings arrested immigrants into its own custody and provides no hearing to review the basis for arrest before a neutral adjudicator of any kind. Rather than a judge, another ICE officer conducts an "examination" of the arrestee, and decides whether to continue to detain the person.[19]

Supreme Court precedent clearly requires an independent or neutral evaluation, not merely a different officer or agency.[20] Therefore, local jails who arrest people on immigration detainers without bringing

[13] *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). *See also Vohra*, 2010 U.S. Dist. LEXIS 34363 at *29 (doubting that an admission of foreign birth and lack of database results showing legal status amounted to probable cause for immigration arrest).
[14] *Gonzalez v. ICE*, No. 12-09012 (C.D. Cal. *filed* July 10, 2013), Deposition of Marc Rapp, Mar. 10, 2016, p. 109.
[15] U.S. CONST. amend. IV (". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *Gerstein v. Pugh*, 420 U.S. 103, 116 n. 18, 117 (1975).
[16] *See Morales*, 996 F. Supp. 2d at 39; *Miranda-Olivares*, No. 3:12-cv-02317-ST at *29; *Vohra*, 2010 U.S. Dist. LEXIS 34363 at *24.
[17] *Gerstein v. Pugh*, 420 U.S. 103, 116 n. 18, 117 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). *See also Arias v. Rogers*, 676 F.2d 1139, 1142-43 (7th Cir. 1982) (finding, pursuant to 8 U.S.C. § 1357(a)(2) and the Fourth Amendment, that subsequent to a warrantless immigration arrest, an arrestee must be brought without unnecessary delay before an immigration adjudicator for a probable cause hearing).
[18] *See Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 918-19 (S.D. Ind. 2011) (preliminary injunction), *affirmed in Buquer*, No. 1:11-cv-00708, 2013 WL 1332158, at *10 (permanently enjoining Indiana state law that allowed local jails to detain based on immigration holds, finding that it violates the Fourth Amendment because, among other reasons, "[t]here is no mention of any requirement that the arrested person be brought forthwith before a judge for consideration of detention or release.").
[19] 8 C.F.R. § 287.3(a). Immigration judges have authority to grant bond, but not to review the basis for the arrest in the manner of a probable cause hearing, or even to review a written statement from ICE about the basis for arrest. Immigration judges do not issue or review immigration detainers.
[20] *Gerstein*, 420 U.S. at 114; *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972) ("[S]omeone independent of the police and prosecution must determine probable cause."); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). *See also Lopez v. City of Chicago*, 464 F.3d 711, 718 (7th Cir. 2006) ("[W]hether the arresting officer opts to obtain a warrant in advance or present a person arrested without a warrant for a prompt after-the-fact *Gerstein* hearing, the Fourth Amendment requires a *judicial* determination of probable cause."); *Crane v. Texas*, 759 F.2d 412, 422 (5th Cir. 1985) (finding Dallas County's capias warrant procedures invalid for lack of issuance "after a determination by a neutral magistrate of probable cause").

them before a judge appear to be violating the inmates' Fourth Amendment rights. It is also doubtful that ICE's own procedures pass Constitutional muster.[21]

3. Detainer Exceeds Statutory Arrest Authority

Arrest on a detainer without a warrant exceeds the statutory arrest authority in the Immigration and Nationality Act.[22] In *Jimenez-Moreno v. Napolitano*, the Northern District of Illinois found: "The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)."[23]

The INA provides that "[a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant— to arrest any alien in the United States, if he has reason to believe[24] that the alien so arrested is in the United States in violation of any such law or regulation *and is likely to escape before a warrant can be obtained for his arrest.*"[25] This requirement of a determination of the risk of escape is not just verbiage. The Supreme Court held officers to this constraint in *Arizona v. United States*, finding that Arizona's enforcement statute was preempted because it purported to give Arizona law enforcement unlimited warrantless arrest authority, exceeding ICE's own warrantless arrest authority, which is limited to situations when there is a likelihood of escape before a warrant can be obtained.[26]

Therefore, under the INA, ICE may only make warrantless arrests when (1) it has probable cause for the arrest and (2) it has determined the subject "is likely to escape before a warrant can be obtained for his arrest."[27] A person detained in a jail is not likely to escape before a warrant can be obtained.[28] They cannot go anywhere. Thus arresting such a person without a warrant exceeds the statutory requirements

[21] *Id.*
[22] *Jimenez-Moreno v. Napolitano*, No. 1:11-cv-05452, Docket Entry 230 at 16-17 (N.D. Ill. Sept. 30, 2016) (ruling that all detainers issued out of the Chicago Field Office are invalid) (stay pending appeal filed Oct. 26, 2016).
[23] *Id.* at 15-16.
[24] Federal courts agree the "reason to believe" in the immigration statutes is the same standard as "probable cause." *Morales v. Chadbourne*, 793 F.3d at 216 (citing cases).
[25] 8 U.S.C. § 1357(a)(2) (emphasis added).
[26] *Arizona*, 132 S.Ct. at 2505-07. (If no federal warrant has been issued, . . . [ICE] officers have more limited authority.").
[27] 8 U.S.C. § 1357(a)(2)"). *See e.g., Jimenez-Moreno v. Napolitano*, No. 1:11-cv-05452 at 2 (holding ICE detainers invalid for exceeding ICE's statutory authority because there was no determination of likelihood of escape); *De La Paz v. Coy*, 786 F.3d 367, 376 (5th Cir. 2015) ("[E]ven if an agent has reasonable belief, before making an arrest, there must also be "a likelihood of the person escaping before a warrant can be obtained for his arrest."); *United States v. Cantu*, 519 F.2d 494, 496-97 (7th Cir. 1975) (holding that the statutory requirement of likelihood of escape in 8 U.S.C. § 1357 "is always seriously applied"); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (holding that the statute requires an individualized determination of flight risk); *Westover v. Reno*, 202 F.3d 475, 479-80 (1st Cir. 2000) (commenting that an immigration arrest was "in direct violation" of § 1357(a)(2) because "[w]hile INS agents may have had probable cause to arrest Westover by the time they took her into custody, there is no evidence that Westover was likely to escape before a warrant could be obtained for her arrest").
[28] *Jimenez-Moreno v. Napolitano*, No. 1:11-cv-05452 at 12-13 ("[I]t goes without saying that a potentially removable alien who is in the custody of an LEA is not likely to evade detention by ICE during the period of custody. Nor can it be the case that, simply by being potentially removable, an alien must be deemed to be likely to evade detention by ICE.")

and limitations for immigration arrests,[29] and local jails who make the arrest by holding a person on an ICE detainer may be liable.

4. Due Process Requires Notice and an Opportunity to be Heard

Finally, a person whose liberty is restrained must have notice and an opportunity to challenge their detention.[30] Holding people on detainers also fails this basic due process requirement. Although immigration detainer forms request the receiving agency to serve a copy of the form on the subject, this is rarely actually done, and many jails lack any procedures to review the validity or the choice to comply with a detainer. But local jails may be liable for due process violations where they fail to provide notice of the lodging of an immigration detainer or an opportunity to challenge it.[31]

II. Jails that continue to detain individuals based on immigration detainers risk liability for Fourth Amendment and Due Process violations.

Although ICE changed the language on their detainer forms in 2015, fundamental problems remain. Detention based on an ICE detainer is still a warrantless arrest and may not be based on probable cause. Because someone in jail is almost by definition unlikely to escape, the arrest exceeds the statutory authority for immigration arrests. There is no review of the basis for the arrest by a neutral magistrate, either before or shortly after the seizure occurs. And the lack of notice of a detainer or a meaningful opportunity to challenge it may violate due process.

Furthermore, ICE does not indemnify or otherwise assist any jail that is sued for unlawful detention at ICE's request.[32] Rather, the changes to the detainer forms in 2015 were designed to shield ICE from further liability. Instead of developing constitutionally adequate procedures to issue warrants when requesting a custody transfer from local jails, ICE changed the wording on its standard detainer form, choosing to encourage local jails to continue enforcing unlawful detainers.

As a result, local jails should avoid holding any individuals on immigration detainers beyond the time that their state custody has ended. There is no legal obligation upon jails to comply with ICE detainers. In contrast, the law appears to forbid it. Jails must uphold the constitutional rights of all inmates in their custody, and therefore should not detain anyone on immigration detainers unless or until they are supported by a valid federal warrant issued by a judge.

[29] *Arizona*, 132 S.Ct. at 2505-07; *Jimenez-Moreno v. Napolitano*, No. 1:11-cv-05452 at 16-17.
[30] *See, e.g., Zinermon v. Burch*, 494 U.S. 113 (1990).
[31] *See Morales v. Chadbourne*, 996 F. Supp. 2d 19, (D.R.I. 2014).
[32] *See* Brief in Opposition to Defendant Wall's Motion for Summary Judgement of Cross-Claim, *Morales v. Chadbourne*, 1:12-cv-00301, Doc. 172, (D. RI. *filed* Nov. 13, 2015) (disclaiming any liability to Rhode Island on cross claim where ICE issued detainer against naturalized U.S. citizen).