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Immigration Detainers: Legal Issues

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Summary

An "immigration detainer" is a document by which U.S. Immigration and Customs Enforcement (ICE) advises other law enforcement agencies of its interest in individual aliens whom these agencies are detaining. ICE and its predecessor, the Immigration and Naturalization Service (INS), have used detainers as one means of obtaining custody of aliens for removal proceedings since at least 1950. ICE's implementation of the Secure Communities program in the period between 2008 and 2014 raised numerous questions about detainers. This program relied upon information sharing between various levels and agencies of government to identify potentially removable aliens. Detainers were then issued for some of these aliens. However, the Obama Administration's announcement on November 20, 2014, that it is replacing the Secure Communities program with a new Priority Enforcement Program (PEP) may moot certain questions, since detainers are to be used differently with PEP than with Secure Communities.

Prior to 1986, the Immigration and Nationality Act (INA) did not explicitly address detainers, and the INS appears to have issued detainers pursuant to its "general authority" to guard U.S. borders and boundaries against the illegal entry of aliens, among other things. However, in 1986, Congress amended the INA to address the issuance of detainers for aliens arrested for controlled substance offenses. After the 1986 amendments, INS promulgated two regulations, one addressing the issuance of detainers for controlled substance offenses and the other addressing detainers for other offenses. These regulations were merged in 1997 and currently address various topics, including who may issue detainers and the temporary detention of aliens by other law enforcement agencies. There is also a standard detainer form (Form I-247) that allows ICE to indicate that it has taken actions that could lead to the alien's removal, and request that another agency take actions that could facilitate such removal (e.g., notify ICE before the alien's release).

Some commentators and advocates for immigrants' rights have asserted that, because the INA addresses only detainers for controlled substance offenses, ICE's detainer regulations and practices are beyond its statutory authority insofar as detainers are used for other offenses. However, a federal district court in California found otherwise in its 2009 decision in *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*.

Some have also suggested that a federal regulation—which provides that law enforcement agencies receiving immigration detainers "shall maintain custody of the alien for a period [generally] not to exceed 48 hours"—means that states and localities are required to hold aliens for ICE. Prior versions of Form I-247 may also have been construed as requiring compliance with detainers. However, in its recent decision in *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit rejected this view. Instead, it adopted the same interpretation of the regulation that the Department of Homeland Security (DHS) has advanced, construing it as prescribing the maximum period of any detention pursuant to a detainer, rather than mandating detention.

In addition, questions have been raised about who has custody of aliens subject to detainers, and whether the detainer practices of state, local, and/or federal governments impinge upon aliens' constitutional rights. Answers to these questions may depend upon the facts and circumstances of particular cases. For example, courts have found that the filing of a detainer, in itself, does not result in an alien being in federal custody, although aliens could be found to be in federal custody if they are subject to final orders of removal. Similarly, holding an alien pursuant to a detainer when there is not probable cause to believe the alien is removable could be distinguished from holding an alien when there is probable cause, or when the alien is subject to a removal order.

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An "immigration detainer" is a document by which U.S. Immigration and Customs Enforcement (ICE) advises other law enforcement agencies of its interest in individual aliens whom these agencies are detaining.[1] The standard detainer form (Form I-247) allows ICE to indicate that it has taken certain actions that could lead to the alien's removal (e.g., determining that there is reason to believe the alien is removable, initiating removal proceedings). The form also allows ICE to request that the other agency take certain actions that could facilitate such removal (e.g., holding the alien temporarily, notifying ICE prior to releasing the alien).[2]

ICE and its predecessor, the Immigration and Naturalization Service (INS), have used detainers as one means of obtaining custody of aliens for purposes of removal proceedings since at least 1950.[3] However, ICE's implementation of the Secure Communities program in the period between 2008 and 2014 raised numerous questions about detainers.[4] This program relied upon information sharing between various levels and agencies of government to identify potentially removable aliens.[5] Detainers were then issued for some of these aliens. The Department of Homeland Security (DHS) emphasized that it prioritized "criminal aliens," those who posed a threat to public safety, and repeat immigration violators for removal through Secure Communities,[6] and the former Director of ICE further instructed that, among "criminal aliens," the focus was to be upon those convicted of "aggravated felonies," as defined in the Immigration and Nationality Act (INA);[7] those convicted of other felonies; and those convicted of three or

[1] 8 C.F.R. §287.7(a). An "alien" is any person who is not a citizen or national of the United States. INA §101(a)(3), 8 U.S.C. §1101(a)(3). Detainers have allegedly been issued for U.S. citizens, and resulted in citizens being held so that ICE could investigate their removability or assume custody. *See, e.g.*, Morales v. Chadbourne, No. 12-301 M, Complaint for Injunctive and Declaratory Relief and Monetary Damages (D. R.I., filed April 24, 2012). However, federal law does not purport to authorize the issuance of immigration detainers for U.S. citizens, and the legal issues raised by such cases are outside the scope of this report.

[2] *See, e.g.*, U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (12/12), *available at* http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

[3] DHS also obtains custody of aliens for removal purposes through other means. In some cases, ICE has custody because ICE personnel arrested the alien for an immigration violation. In other cases, the alien is transferred to DHS custody without the issuance of a detainer. For example, an alien could be arrested upon his or her release from state or local custody by state or local personnel participating in the 287(g) program, or an "Order to Detain" (Form I-203) could be lodged with a local jail that also holds prisoners on behalf of ICE pursuant to an inter-governmental service agreement (IGSA). *See, e.g.*, Ricketts v. Palm Beach County Sherriff, 985 So. 2d 591, 592 (Fla. Dist. Ct. App. 2008) (transfer of custody by means of Form I-203); Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 127-29 (2007) (discussing arrests by personnel participating in the 287(g) program). The 287(g) program relies upon specially trained state and local officers to perform specific functions relative to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision. *See generally* CRS Report R42057, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, by (name redacted) and (name redacted).

[4] In particular, Secure Communities was seen to result in the issuance of more detainers for aliens at earlier stages in criminal proceedings than was the practice previously. *See, e.g.*, Brizuela v. Feliciano, No. 3:12CV226, Memorandum of Law in Support of Motion for Order to Show Cause and Leave to Propound Precertification Discovery Requests, at 7 (filed D. Conn., February 22, 2012) ("Immigration detainers are an integral part of the Secure Communities program; indeed, the program depends on immigration detainers to work."); Nat'l Day Laborer Organizing Network v. U.S. ICE, No. 1:10-cv-3488, Declaration of Ann Benson in Support of Plaintiffs' Opposition to Defendants' Motion for Stay (filed S.D.N.Y., November 18, 2011) ("The belief among the advocacy community is that if a local jurisdiction refuses to honor detainer requests, then the consequences of Secure Communities can be averted.").

[5] *See, e.g.*, U.S. ICE, Secure Communities: The Basics, *available at* http://www.ice.gov/secure_communities (last accessed: April 29, 2015).

[6] *Id*.

[7] As used here, "aggravated felony" includes specific offenses or types of offenses listed in Section 101 of the INA. *See* INA §101(a)(43), 8 U.S.C. §1101(a)(43) (listing murder, rape, or sexual abuse of a minor; illicit trafficking in controlled substances or firearms; and "crimes of violence" for which the term of imprisonment is at least one year, (continued...)

more misdemeanors.[8] However, there were reports of detainers issued for persons who were not convicted of any offense, or whose sole offense was a misdemeanor.[9] As a result of these and related reports, several jurisdictions adopted policies of declining immigration detainer requests for at least some aliens.[10] Several lawsuits were also filed challenging the detainer practices of state, local, or federal governments.[11]

The Obama Administration's announcement on November 20, 2014, that it is replacing the Secure Communities program with a new Priority Enforcement Program (PEP) could effectively resolve certain of these questions and concerns about detainers.[12] PEP is like Secure Communities in that it "will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks."[13] However, with PEP, detainers are to be issued only for aliens who have

(...continued)

among other offenses).

[8] John Morton, Director, U.S. ICE, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens, March 2, 2011, *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf. The priorities that Mr. Morton articulated appear to have remained in effect until November 20, 2014, when they (along with the Secure Communities program) were replaced. *See* U.S. Dep't of Homeland Security, Secretary Jeh Charles Johnson, Secure Communities, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (discontinuation of the Secure Communities program); U.S. Dep't of Homeland Security, Secretary Jeh Charles Johnson, Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (superseding the March 2, 2011, memorandum on civil immigration enforcement priorities).

[9] *See, e.g.*, Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy, *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf. These comments were made in response to changes in ICE's detainer policy proposed in 2010. Critics of Secure Communities also alleged that state and local officials held aliens longer than the 48 hours (excluding weekends and federal holidays) purportedly authorized by the detainer form and regulations, and that the program resulted in racial profiling and negatively affected community policing strategies. *See, e.g.*, *id.*; William Fisher, U.S. Sheriff Abused Immigration "Detainer," Lawsuit Charges, Inter Press Service, April 23, 2010, *available at* http://www.ipsnews.net/2010/04/us-sheriff-abused-immigration-detainer-lawsuit-charges/.

[10] *See, e.g.*, California Assembly Bill No. 4, enacted October 5, 2013, *available at* http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20131005_chaptered.pdf (permitting law enforcement officers to honor immigration detainers only in certain circumstances (e.g., the individual has been convicted of a "serious or violent felony")); *Connecticut Adopts Law to Limit Immigration Detainers*, NEW HAVEN REGISTER NEWS, June 6, 2013, *available at* http://www.nhregister.com/general-news/20130626/connecticut-adopts-law-to-limit-immigrant-detainers-2 (honoring detainers only for "immigrants who have felony convictions, belong to gangs, show up on terrorist watch lists, are subject to deportation orders or meet other safety risks"); Policy for Responding to ICE Detainers, September 7, 2011, *available at* http://cookcountygov.com/ll_lib_pub_cook/cook_ordinance.aspx?WindowArgs=1501 (amending Section 46-37 of the Cook County, Illinois, Code).

[11] *See, e.g.*, Morales v. Chadbourne, Complaint, *supra* note 1; Brizuela v. Feliciano, No. 3:12-cv-00226, Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief (filed D. Conn., February 13, 2012); Moreno v. Napolitano, No. 1:2011cv05452, Complaint for Injunctive and Declaratory Relief and Petition for a Writ of Habeas Corpus (filed N.D. Ill., August 11, 2011); Uroza v. Salt Lake County, No. 11-0713, First Amended Complaint for Declaratory Judgment and Monetary Damages (filed D. Utah, March 26, 2011); Galarza v. Szalczyk, No. 10-6815, Complaint (filed E.D. Pa., November 19, 2010).

[12] Secure Communities, *supra* note 8, at 2.

[13] *Id*. at 2. Specifically, the fingerprints of persons arrested by state and local officers are sent to the FBI's Integrated Automatic Fingerprint Identification System (IAFIS), which then sends them to ICE's Automated Biometric Identification System (IDENT). This system automatically notifies ICE personnel whenever the fingerprints of persons arrested by state and local officers match those of a person previously encountered and fingerprinted by immigration officials. ICE personnel then review other databases to determine whether the person is in the United States illegally or otherwise removable, and may issue detainers for aliens who appear to be removable. DHS has taken the position that (continued...)

been *convicted of* (rather than just *arrested for*) certain offenses that are among ICE's priorities for civil immigration enforcement.[14] Further, with PEP, detainers are generally to be used only to request that state and local law enforcement officials *notify* ICE prior to the alien's release or transfer to another institution, not to request that state and local officials *detain* aliens beyond the point when they otherwise would be released for the state or local offense so that ICE may assume custody.[15] Any detainers issued to request detention (as opposed to notification) must generally specify that (1) the alien is subject to a final order of removal, or (2) "there is other sufficient probable cause to find that the person is a removable alien."[16]

By way of background, this report surveys the various authorities governing immigration detainers, including the standard detainer form (Form I-247) sent by ICE to other law enforcement agencies. The report also discusses key legal issues raised by immigration detainers, including (1) whether DHS's detainer regulations and practices are within its statutory authority; (2) whether states and localities are required to comply with immigration detainers; (3) who has custody of aliens subject to detainers; and (4) whether detainer practices violate aliens' constitutional rights. In considering these topics, it is important to note that Form I-247 and DHS's detainer practices have changed several times since 2010,[17] including as a result of the actions announced by the Obama Administration on November 20, 2014.[18] Among other actions,

(...continued)

this sharing of information "fulfills a 2002 Congressional mandate for the FBI to share information with ICE, and is consistent with a 2008 federal law that instructs ICE to identify criminal aliens for removal." U.S. ICE, Secure Communities: The Secure Communities Process, *available at* http://www.ice.gov/secure_communities/ (last accessed: April 29, 2015). Others have questioned whether this sharing of information is authorized by federal law. *See, e.g.*, Brizuela v. Feliciano, Memorandum of Law, *supra* note 4, at 7 (asserting that ICE has "failed to identify adequate legal authority" for Secure Communities). However, one federal district court has found that the sharing of information regarding a U.S. citizen—which resulted in the erroneous issuance of an immigration detainer for him—did not violate the Privacy Act. Makowski v. United States, 27 F. Supp. 3d 901 (N.D. Ill. 2014).

[14] Secure Communities, *supra* note 8, at 2. Specifically, aliens must have been convicted of an offense listed in the priority 1(a), (c), (d), or (e), or priority 2(a) or (b), categories as given in the November 20, 2014, memorandum on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants. *See* Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, *supra* note 8. These "priority" categories include: (1) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; (2) aliens convicted of offenses of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. §521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang; (3) aliens convicted of offenses classified as a felony in the convicting jurisdiction (other than a state or local offense for which an essential element was the alien's immigration status); (4) aliens convicted of an "aggravated felony," as that term was defined in INA §101(a)(43) at the time of the conviction; (5) aliens convicted of three or more misdemeanor offenses (other than minor traffic offenses or state or local offenses for which an essential element was the alien's immigration status), provided that the offenses arise out of three separate incidents; and (6) aliens convicted of "significant misdemeanors," such as offenses of domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; driving under the influence; or offenses for which the individual was sentenced to time in custody of 90 days or more.

[15] Secure Communities, *supra* note 8, at 2.

[16] *Id*.

[17] *See infra* notes 47-50 and 82-87 and accompanying text.

[18] For further discussion of the November 20, 2014, actions, see generally CRS Report R43798, *The Obama Administration's November 2014 Immigration Initiatives: Questions and Answers*, by (name redacted); CRS Legal Sidebar WSLG1125, The Obama Administration's Announced Immigration Initiative: A Primer, by (name redacte d); CRS Report R43852, *The President's Immigration Accountability Executive Action of November 20, 2014: Overview and Issues*, coordinated by (name redacted).

the Administration announced the discontinuance of the Secure Communities program, which had arguably prompted many recent questions regarding immigration detainers.[19]

Background

ICE and its predecessor, the INS, have long issued detainers for potentially removable aliens, although the case law mentioning such detainers may provide only a partial picture of INS's practices, in particular.[20] For example, in a 1950 decision, a federal district court addressed a challenge to the legality of a deportation order for an alien who was the subject of an immigration detainer requesting his delivery "to the custody of the immigration authorities at the time sentence is fulfilled in the state institute."[21] Later, in a 1975 decision, the Board of Immigration Appeals, the highest administrative body for interpreting and applying immigration laws, heard an alien's challenge to the conditions under which federal prison authorities held him, allegedly as the result of an immigration detainer which requested that the prison notify INS at least 30 days prior to his release.[22] Between them, these two cases illustrate INS's use of detainers to request that a law enforcement agency transfer an alien to INS custody at the completion of the alien's criminal sentence and notify INS prior to the alien's release. However, they do not indicate whether INS used detainers for other purposes, such as to request that a person be held after he or she would otherwise have been released for any criminal offense so that INS could investigate the person's removability and/or take custody.

The Immigration and Nationality Act (INA) did not expressly address the issuance of detainers prior to 1986. However, the INS appears to have issued detainers prior to this date pursuant to various powers and responsibilities delegated to it by the INA. Specifically, the INA (1) grants the Attorney General (currently the Secretary of Homeland Security) "the power and duty to control and guard the borders and boundaries of the United States against the illegal entry of aliens;"[23] (2) establishes certain categories of aliens who are barred from admission to the United States, or may be removed from the United States after their admission;[24] and (3) generally grants

[19] *See, e.g.*, Brizuela v. Feliciano, Memorandum of Law, *supra* note 4, at 7 (arguing that "Secure Communities [would] automatically result in an immigration status check for every individual arrested anywhere in the state, no matter how minor the charges against the individual or their eventual disposition. Those status checks will enlarge the total pool of individuals against whom detainers will be lodged."); Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 176 (2008/2009) (suggesting that, with Secure Communities, ICE only needed state and local assistance in obtaining custody of removable aliens, not in identifying them).

[20] The first reference to "immigration detainers" in federal regulations appears to have been in 1962, when the Department of Justice issued regulations addressing the parole of prisoners subject to deportation. *See* Dep't of Justice, Prescribing Regulations of the United States Board of Parole and Youth Correction Division of the Board, 27 *Federal Register* 8487 (August 24, 1962). Later regulations also refer to "deportation detainers." *See, e.g.*, Dep't of Justice, Bureau of Prisons, Control Custody, Care, Treatment, and Instruction of Inmates, 47 *Federal Register* 47168 (October 22, 1982).

[21] Slavik v. Miller, 89 F. Supp. 575, 576 (W.D. Pa. 1950) (also noting that "a detainer has been lodged for the body of the petitioner at the time that the fulfillment of the state sentence has expired").

[22] *In re* Lehder, 15 I. & N. Dec. 159 (BIA 1975). As a general matter, aliens are to complete any criminal sentence imposed upon them prior to removal. *See* 8 U.S.C. §1226(c)(1) (providing that the Secretary of Homeland Security is to take certain deportable aliens into custody "when the alien is released").

[23] INA §103(a)(5), 8 U.S.C. §1103(a)(5).

[24] INA §212, 8 U.S.C. §1182 (grounds of inadmissibility); INA §237, 8 U.S.C. §1227 (grounds for removal).

immigration officials broad discretion as to their enforcement priorities.[25] The INS cited all these provisions, among others, as authority when it ultimately promulgated regulations governing the issuance of detainers, as discussed below,[26] and it seems to have consistently viewed these provisions as broadly authorizing its detainer practices.[27] Neither INS nor ICE appears to have relied upon the "inherent authority" of law enforcement to issue detainers, although at least one jurisdiction has recognized such authority.[28]

Then, in 1986, Congress enacted the Anti-Drug Abuse Act, which, among other things, amended Section 287 of the INA to address the issuance of detainers for aliens arrested for "violation[s] of any law relating to controlled substances."[29] Section 287 generally specifies the powers of immigration officers and employees[30] and, as amended, provides that

> [i]n the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—
>
> (1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,
>
> (2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of the facts concerning the status of the alien, and
>
> (3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue

[25] INA §242, 8 U.S.C. §1252 (limiting judicial review of certain decisions made by immigration officers and immigration judges).

[26] *See infra* notes 32-34 and accompanying text.

[27] *See, e.g.*, Dep't of Justice, INS, Enhancing the Enforcement Authority of Immigration Officers, 59 *Federal Register* 42406 (August 17, 1994) ("[Some] commentators stated that the authority for issuance of detainers in §§242.2(a)(1) and 287.7(a)(1) of the proposed rule was overly broad because the authority to issue detainers is limited by section 287(d) of the Act to persons arrested for controlled substance offenses. This comment overlooked the general authority of the Service to detain any individual subject to exclusion or deportation proceedings. *See* 8 U.S.C. §1225(b), 1252(a)(1). The detainer authority of these sections of the proposed rule were promulgated pursuant to this general authority. The statutory provision cited by the commentators places special requirements on the Service regarding the detention of individuals arrested for controlled substance offenses, but does not delimit the general detainer authority of the Service.").

[28] *See, e.g.*, Hicks v. Gravett, 849 S.W.2d 946, 948 (Ark. 1993) (noting that a lower court had found that a sheriff has inherent authority to lodge a detainer requesting that a federal prison hold the plaintiff to serve his state sentence when he completes his federal sentence). The appellate court affirmed the judgment of the lower court without reaching this issue. However, it did find that the plaintiff's mandamus action failed, in part, because he could not establish a "specific legal right" whose performance could be ordered by the court based on his assertion that no statute authorized the sheriff to issue detainers. *Id*.

[29] P.L. 99-570, §1751(d), 100 Stat. 3207-47 to 3207-48 (October 27, 1986). Section 287 of the INA is codified at 8 U.S.C. §1357(d). The act did not define the term "controlled substance" for purposes of Section 287, although it did for other sections of the INA. *See* Dep't of Justice, INS, Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole Judicial Recommendations Against Deportation Proceedings to Determine Deportability of Aliens in the United States: Apprehension, Custody, Hearing, and Appeal Field Officers; Powers and Duties: Interim Rule with Request for Comments, 52 *Federal Register* 16370 (May 5, 1987). However, INS promulgated regulations that define this term, for purposes of Section 287, to mean "the same as that referenced in the Controlled Substances Act, 21 U.S.C. 801 et seq., and shall include any substance contained in Schedules I through V of 21 CFR 1308.1 et seq." 8 C.F.R. §287.1(f).

[30] *See generally* 8 C.F.R. §287.5 (defining which immigration officers may exercise specific powers).

> such a detainer. If a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.[31]

After the 1986 amendments, the INS amended its regulations to address the issuance of detainers. The INS initially promulgated two separate regulations, one (codified in 8 C.F.R. §287.7) governing detainers for controlled substance offenses and another (codified in 8 C.F.R. §242.2) governing detainers for other offenses.[32] The final versions of these two regulations were virtually identical,[33] and in 1997, the two regulations were merged into one.[34] This regulation is located at 8 C.F.R. §287.7, the former location of the regulation governing detainers for controlled substance offenses. However, it notes that detainers "are issued pursuant to sections 236 and 287" of the INA.[35] Section 236 authorizes or requires the detention of certain aliens pending their removal,[36] while Section 287 generally specifies the powers of immigration officers and employees (as well as expressly authorizes the issuance of detainers for controlled substance offenses).[37]

These detainer regulations currently provide that "[a]ny authorized immigration officer may at any time issue a Form I-247 … to any other Federal, State, or local law enforcement agency,"[38] and identify specific personnel authorized to issue detainers (e.g., deportation officers; immigration inspectors).[39] These personnel are the same personnel who are authorized to make warrantless arrests for violations of federal immigration law under certain conditions, as discussed below.[40] In addition, the regulations:

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[31] INA §287(d)(1)-(3), 8 U.S.C. §1357(d)(1)-(3).

[32] Dep't of Justice, INS, Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole Judicial Recommendations Against Deportation Proceedings to Determine Deportability of Aliens in the United States: Apprehension, Custody, Hearing, and Appeal Field Officers; Powers and Duties: Final Rule, 53 *Federal Register* 9281 (March 22, 1988).

[33] Specifically, the two final regulations differed in terms of (1) whether they included a definition of "conviction," and (2) the authorities cited for their promulgation. The regulation governing the issuance of detainers for offenses not involving controlled substances included a definition of "conviction" and cited as authority for its promulgation INA §242 (currently §239) (requiring that deportation proceedings be begun "as expeditiously as possible" after an alien's conviction for a deportable offense); INA §103 (powers of the Attorney General (later Secretary of Homeland Security)); INA §212 (grounds of inadmissibility); INA §237 (grounds for removal); INA §242 (judicial review of orders of removal); and a provision on adjustment of status that was subsequently repealed. The regulation governing the issuance of detainers for controlled substance offenses, in contrast, did not contain a definition of "conviction" and cited as authority for its promulgation INA §287; INA §103 (powers of the Attorney General (later Secretary of Homeland Security)); INA §212 (grounds of inadmissibility); INA §235 (inspection by immigration officers); INA §236 (apprehension and detention of aliens); INA §237 (grounds for removal); and INA §242 (judicial review of orders of removal). The interim version of these regulations had differed in additional ways. *See* 52 *Federal Register* at 16370.

[34] Dep't of Justice, INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 *Federal Register* 10312, 10392 (March 6, 1997).

[35] 8 C.F.R. §287.7(a).

[36] In particular, Section 236(a) authorizes the arrest and detention of an alien, on a warrant issued by the Secretary of Homeland Security, pending a decision on whether the alien is to be removed from the United States, while Section 236(c) requires the detention of aliens who are inadmissible or removable because they have committed certain criminal offenses. *See* INA §236(a) & (c), 8 U.S.C. §1226(a) & (c).

[37] *See supra* note 30 and accompanying text.

[38] 8 C.F.R. §287.7(a).

[39] 8 C.F.R. §287.7(b)(1)-(8).

[40] *See infra* note 145 and accompanying text.

- require that other agencies requesting the issuance of a detainer provide DHS with "all documentary records and information" related to the alien's status;
- limit the period for which aliens may be held at DHS's request so that DHS may assume custody to 48 hours (excluding weekends and federal holidays);[41] and
- specify that DHS is not financially responsible for an alien's detention unless it issues a detainer for, or assumes custody of, the alien.[42]

The standard detainer form (Form 1-247) has apparently been in use since at least 1984,[43] and has been amended several times, including in response to criticisms of the Secure Communities program.[44] This form enables ICE to notify another agency that it has (1) determined that an individual is an alien subject to removal based on certain grounds specified on the form (e.g., a prior felony conviction), or otherwise noted by immigration officials; (2) initiated removal proceedings and served a Notice to Appear or other charging document on the alien; (3) served a warrant of arrest for removal proceedings; or (4) obtained an order of deportation or removal for the alien.[45] It also allows ICE to request that the other agency take one or more of the following actions:

> Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from ... custody to allow DHS to take custody of the subject. ...
>
> Provide a copy to the subject of th[e] detainer.
>
> Notify [DHS] of the time of release at least 30 days prior to release or as far in advance as possible.
>
> Notify [DHS] in the event of the inmate's death, hospitalization or transfer to another institution.
>
> Consider this request for a detainer operative only upon the subject's conviction.
>
> Cancel the detainer previously placed by [DHS] on _____(date).[46]

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[41] This provision is implicated in many of the legal questions surrounding current detainer practices. For example, there is some question as to whether the regulation "requires" states and localities to comply with immigration detainers. *See infra* "Are States and Localities Required to Comply with Immigration Detainers?". There are also questions about what authority underlies the apparent seizures of aliens' persons contemplated by this provision. *See infra* "Are Aliens Seized in Violation of Their Constitutional Rights?".

[42] 8 C.F.R. §287.7(c)-(e).

[43] Office of Justice Assistance, Research & Stats., State Reimbursement Program for Incarcerated Mariel-Cubans, 49 *Federal Register* 38719 (October 1, 1984).

[44] *See infra* notes 47-50 and accompanying text.

[45] U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action (12/12), *supra* note 2. Prior versions of Form I-247 indicated that ICE had initiated an investigation to determine whether the alien is subject to removal, rather than has reason to believe the alien is subject to removal. *See, e.g.*, U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (6/11) (copy on file with the author). However, DHS changed this language with the apparent intent of addressing Fourth Amendment concerns. *See infra* "Are Aliens Seized in Violation of Their Constitutional Rights?".

[46] U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action (12/12), *supra* note 2 (emphasis in original).

The option of requesting that a copy of the detainer be provided to the alien who is the subject of the detainer was added in June 2011,[47] in response to concerns that aliens who were subject to detainers were not always aware of this fact.[48] The option of requesting that the detainer be considered operative only upon the alien's conviction was also added in June 2011,[49] because of criticism that ICE has issued detainers for aliens whose charges were dismissed, or who were found not guilty.[50]

ICE also issued guidance and made other changes pertaining to its use of detainers in response to certain criticisms of the Secure Communities program.[51] First, in August 2010, ICE issued an interim policy on detainers that prohibited immigration officers from issuing detainers unless a law enforcement agency "exercised its independent authority to arrest the alien,"[52] as well as discouraged officers from "relying" on the hold period purportedly authorized by the detainer form and federal regulations.[53] Then, in December 2011, ICE established a toll-free hotline that detained individuals could call if they believed they were U.S. citizens or victims of a crime.[54] Later, in December 2012, ICE issued guidance that detainers were to be issued only when the subject of the detainer was reasonably believed to be an alien subject to removal from the United States and met certain other criteria.[55]

Most recently, on November 24, 2014, when announcing that DHS was discontinuing the Secure Communities program, the Secretary of Homeland Security directed that detainers are generally to be issued only for aliens who have been *convicted of* (rather than just *arrested for*) certain offenses that are among ICE's priorities for civil immigration enforcement.[56] Further, the Secretary directed that detainers are generally to be used only to request that state and local law

[47] Immigration Detainer—Notice of Action (6/11), *supra* note 45.

[48] *See, e.g.*, Moreno v. Napolitano, Complaint, *supra* note 11, at ¶ 22 ("The I-247 detainer form does not require notice of the immigration detainers to the Plaintiffs/Petitioners."); Morales v. Chadbourne, Complaint, *supra* note 1, at ¶ 45 (noting that the plaintiff in this case was not aware that a detainer had been lodged against her until she was arraigned for a state offense).

[49] Immigration Detainer—Notice of Action (6/11), *supra* note 45.

[50] *See, e.g.*, Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy, *supra* note 9, at 1 ("Issuance is often based on mere arrests for less serious crimes including minor misdemeanors rather than after convictions for serious crimes which pose a threat to public safety.").

[51] *Id*. Whether there is sufficient evidence of individuals' removability may help determine whether any seizure of the alien's person that may result when the alien is held pursuant to a detainer is permissible under the Constitution. *See infra* "Are Aliens Seized in Violation of Their Constitutional Rights?".

[52] U.S. ICE, Interim Policy Number 10074.1: Detainers, August 2, 2010, at §4.1 (copy on file with the author). In addition, this policy specifically notes that officers shall not issue detainers for aliens who have been temporarily stopped by a law enforcement agency (e.g., in a roadside or *Terry* stop). The alleged issuance of detainers for aliens who had been temporarily stopped, but were not arrested, by law enforcement was among the issues raised in the *Committee for Immigrants Rights of Sonoma County v. County of Sonoma* litigation, discussed below. *See infra* notes 70-74 and accompanying text. ICE further amended Sections 4.2 and 4.5 of this interim policy in December 2012. *See* John Morton, Director, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems, Dec. 21, 2012, *available at* https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

[53] Interim Policy Number 10074.1, *supra* note 52, at §4.4.

[54] DHS, U.S. ICE, News Release: ICE Establishes a Hotline for Detained Individuals, Issues New Detainer Form, December 29, 2011, *available at* http://www.ice.gov/news/releases/1112/111229washingtondc.htm.

[55] Guidance on the Use of Detainers, *supra* note 52. These criteria included (1) having been convicted of or charged with certain offenses (e.g., felony offenses); (2) engaging in certain illegal conduct (e.g., illegally reentered after a previous removal); or (3) posing a "significant risk" to national security, border security, or public safety.

[56] Secure Communities, *supra* note 8, at 2. For further discussion of these priorities, see *supra* note 14.

enforcement officials *notify* ICE prior to the alien's release or transfer to another institution.[57] They are generally not to be used to request that state and local officials *detain* aliens beyond the point when they would otherwise be released unless the detainer specifies that (1) the alien is subject to a final order of removal, or (2) "there is other sufficient probable cause to find that the person is a removable alien."[58]

The issuance of a detainer for an alien begins a process that could result in the removal of the alien, although ICE does not pick up or attempt to remove all aliens for whom it issues detainers.[59] ICE issued 270,988 detainers in FY2009 and 201,778 detainers in the first eleven months of FY2010 (both years in which the Secure Communities program was operational).[60] It is unclear, however, how many individuals subject to detainers were ultimately removed.[61] It is also unclear how many of these detainers resulted in an alien being held by state or local authorities beyond the time when he or she would otherwise have been released from custody.[62]

Legal Issues

Numerous questions about detainers were raised in the period between March 2008, when the Secure Communities program began, and November 2014, when the Obama Administration announced it is discontinuing the Secure Communities program and replacing it with a new Priority Enforcement Program (PEP).[63] These questions include (1) whether DHS's detainer regulations and practices are beyond its statutory authority; (2) whether states and localities are required to comply with immigration detainers; (3) who has custody of aliens subject to detainers; and (4) whether detainer practices violate aliens' constitutional rights.[64] This report discusses each of these questions individually below. However, it is important to note that certain questions may have less salience after the discontinuance of Secure Communities than they did while Secure Communities was operational. In particular, certain questions about holds of aliens pursuant to

[57] Secure Communities, *supra* note 8, at 2.

[58] *Id*.

[59] Moreover, even when ICE institutes removal proceedings, the alien could be eligible for relief from removal, or successfully contest his or her removability. *See, e.g.*, Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 10 (noting that the alien plans to apply for relief from removal, contest his removal, and seek judicial review of any order of removal).

[60] Moreno v. Napolitano, Complaint, *supra* note 11 at ¶ 28. More current figures do not appear to be available. *Cf.* Christopher N. Lasch, *Preempting Immigration Detainer Enforcement under Arizona v. United States*, 3 WAKE FOREST J. L. & POL'Y 281, 287 n.30 (2013) (basing an estimate of 250,000 detainers per year on ICE's Criminal Alien Program, but noting that other ICE programs may also result in the issuance of detainers).

[61] Some of these detainers appear to have been issued for citizens, who are not subject to removal, and certain individuals have reportedly been subject to multiple detainer requests. *See, e.g.*, Morales v. Chadbourne, Complaint, *supra* note 1.

[62] One petition filed in 2012 challenging state and local detainer practices stated that, "[o]n information and belief, on a single day in December 2011, … there were approximately 130 pretrial detainees and approximately 360 post-conviction detainees" in Connecticut Department of Correction custody with immigration detainers lodged against them. Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 30.a. However, the petition did not indicate how many of these persons were being held solely on the basis of a detainer.

[63] *See* Secure Communities, *supra* note 8, at 2.

[64] These are arguably the major issues that have been raised by the cases filed to date. Individual cases have, however, raised additional issues that are outside the scope of this report. *See, e.g.*, Morales v. Chadbourne, Complaint, *supra* note 1 (alleging that the plaintiff was the victim of intentional torts and negligence, and that she was denied equal protection of the law because her information was reported to ICE "solely on the basis of her place of birth, foreign-sounding name, Hispanic appearance, and/or English language ability").

detainers may have been mooted by the Obama Administration's announcement that ICE will generally request such holds only "in special circumstances" when the alien is subject to a final order of removal, or when there is other sufficient probable cause to believe that the alien is removable.

Are ICE's Detainer Regulations and Practices Within Its Statutory Authority?

Because the INA only addresses detainers for controlled substance offenses,[65] several plaintiffs and commentators have asserted that ICE's detainer regulations and practices exceed its statutory authority and, thus, are unlawful.[66] In particular, those making this argument note that (1) these regulations and practices entail the issuance of detainers for offenses that do not involve controlled substances; and (2) ICE personnel are generally the ones determining whether to issue a detainer.[67] Both things are, they assert, contrary to Section 287 of the INA, which they take to mean that ICE is *only* to determine whether to issue a detainer for an alien arrested for a controlled substance offense *if and when* requested to do so by a "Federal, State, or local law enforcement officer" or "another official."[68] Federal immigration authorities, in contrast, have taken a broader view of their authority, issuing detainers for offenses that do not involve controlled substances without a request from a non-immigration officer. In particular, the INS seems to have taken the position that holds are permissible pursuant to its general authority to make warrantless arrests for immigration violations, discussed below, and not Section 287's detainer provisions.[69]

The only court to have ruled on this issue to date—the U.S. District Court for the Northern District of California—found that DHS's detainer regulations are within DHS's statutory authority in its 2009 decision in *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*.[70] In so finding, the court reviewed DHS's regulations in light of the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*, which established a two-step test for judicial review of an agency's construction of a statute which it administers: (1) Has

[65] *See supra* notes footnote 29-31 and accompanying text.

[66] *See, e.g.*, Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy, *supra* note 9, at 12; Moreno v. Napolitano, Complaint, *supra* note 11. This argument would suggest that either (1) INS lacked authority to issue detainers for any offense prior to 1986, when Congress granted it authority to issue detainers for controlled substance offenses, or (2) INS had authority to issue detainers for any offense prior to 1986, but Congress impliedly repealed this authority by expressly authorizing the issuance of detainers for controlled substance offenses. *See Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, *supra* note 19, at 191-92 (further suggesting that the detainer provisions in Section 287 would have been superfluous if INS had "general authority" to issue detainers).

[67] *See, e.g.*, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, *supra* note 19, at 177.

[68] They further note that immigration officers do not constitute "Federal law enforcement officers" or "another official," as those terms are used in Section 287, and so cannot be the ones to request that ICE determine whether to issue a detainer. *Id*. at 187-89 (resorting to canons of statutory interpretation, as well as the legislative history of the Anti-Drug Abuse Act of 1986, in asserting that "another official" means another officer like the arresting officer, not an immigration officer).

[69] *See infra* note 146 and accompanying text.

[70] 644 F. Supp. 2d 1177 (N.D. Cal. 2009). Certain of the plaintiffs' claims not based on the use of detainers survived the defendants' motion to dismiss and subsequent motion for reconsideration, and have since been settled. *See generally Committee for Immigrant Rights*, No. C 08-4220 RS, 2011 U.S. Dist. LEXIS 63726 (N.D. Cal., June 16, 2011).

Congress directly spoken to the precise question at issue, and (2) If not, is the agency's reasonable interpretation of the statute consistent with the purposes of the statute?[71] Applying *Chevron*, the court first found that the DHS regulations were not "facially invalid," or contrary to the unambiguously expressed intent of Congress. According to the court:

> The fact that §[287] does not expressly authorize ICE to issue detainers for violations of laws other than laws relating to controlled substances hardly amounts to the kind of unambiguous expression of congressional intent that would remove the agency's discretion at Chevron step one. Rather, the court finds that because Congress left a statutory gap for the agency to fill, Chevron step two requires the court to defer to the agency's reasonable interpretation of the statute so long as the interpretation is consistent with the purposes of the statute.[72]

The court further found that DHS's regulations are "consistent with the purpose of the statute" and "not contrary to the discernible intent of Congress … [g]iven the broad authority vested in the Secretary of Homeland Security to establish such regulations as she deems necessary for carrying out her authority to administer and enforce laws relating to the immigration and naturalization of aliens."[73] Here, the court specifically noted that the detainer provisions in Section 287 of the INA are to be construed "simply [as] placing special requirements on officials issuing detainers for a violation of any law relating to controlled substances, not as expressly limiting the issuance of immigration detainers solely to individuals violating laws relating to controlled substances."[74]

The question of whether DHS's detainer regulations and practices are beyond its statutory authority has, however, persisted despite the *Committee for Immigrants Rights* decision. For example, at least one suit filed against DHS in the early 2010s alleges that the government's "application of the immigration detainer regulations and issuance of detainers … exceeds [its] … statutory authority."[75] It remains to be seen whether and how other courts might address such arguments and what significance, if any, they might attach to the legislative history of the 1986 amendments, which was apparently not considered by the California district court. Although this history is sparse, a statement by the sponsor of the 1986 amendments read on the floor in the House could be construed as indicating that these amendments were intended to expand—rather than restrict—the use of detainers by requiring immigration officers to at least consider issuing detainers when requested to do so by other law enforcement officers. According to this statement, the amendments responded to complaints from state and local officers that INS did not "issue judgment on a suspect's citizenship fast enough to allow the authorities to continue to detain

[71] 644 F. Supp. 2d at 1196 (quoting *Chevron*, 467 U.S. 837, 842-43 (1984)). If Congress has spoken directly to the issue, "that is the end of the matter," and the second step does not factor into the analysis. *Id*. However, when Congress has not spoken directly to the issue, courts typically defer to an agency's reasonable interpretation of its governing statute, and may substitute their own interpretation of the statute only where the agency's interpretation is unreasonable or contrary to the discernible intent of Congress. *Id*.

[72] *Id*. at 1198.

[73] *Id*.

[74] *Id*. at 1199. The court also noted the incongruity of permitting the issuance of immigration detainers for controlled substance offenses, but not for "violent offenses such as murder, rape and robbery."

[75] Moreno v. Napolitano, Complaint, *supra* note 11, at ¶¶ 37, 39. *See also* Brizuela v. Feliciano, Petition, *supra* note 11, at 1. The plaintiffs in *Moreno*, at least, still maintained their challenge to whether ICE's detainer practices are within its statutory authority as recently as September 2014. *See* No. 11 C 5452, 2014 U.S. Dist. LEXIS 138576, at *2 (N.D. Ill., Sept. 30, 2014) (noting that the plaintiffs allege, among other things, that "the issuance of the detainers [in their cases] exceed ICE's statutory authority [under the INA]").

him," and sought to compel INS to take "the necessary actions to detain the suspect and process the case."[76]

Are States and Localities Required to Comply with Immigration Detainers?

Questions as to whether states and localities are required to honor immigration detainers[77] seem to have arisen primarily from a DHS regulation which states that:

> [u]pon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall* maintain custody of the alien for a period [generally] not to exceed 48 hours ... in order to permit assumption of custody by the Department.[78]

This regulation uses the word "shall," and "shall" has been construed as indicating mandatory action when used in other contexts.[79] Thus, the argument has been made that its use here means that states and localities are required to hold aliens whenever DHS issues a detainer calling for them to be held.[80] However, others—including DHS—have taken the position that the regulation's mandatory language applies only to the period of any detention pursuant to an immigration detainer, and does not require detention at DHS's request.[81]

Earlier versions of the standard detainer form (Form I-247) may also have contributed to the view that compliance with immigration detainers is required. Indeed, the version of Form I-247 used between 1997 and 2010 expressly stated that federal regulations "required" recipients to hold aliens for up to 48 hours (excluding weekends and federal holidays) so that ICE could assume

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[76] CONG. REC., September 11, 1986, pg. H-22981 (statement of Representative Ackerman read by Representative Smith) ("My amendment … addresses local law enforcement complaints concerning the INS' inability to issue a judgment on a suspect's citizenship fast enough to allow the authorities to continue to detain him. … [It] requires the INS to respond quickly to an inquiry by a local law enforcement agency and make a determination as to the status of the suspect. If the individual is determined to be an illegal alien, *the INS must take the necessary actions to detain the suspect and process the case*.") (emphasis added).

[77] *See, e.g.*, Cal. Dep't of Justice, Cal. Justice Information Servs. Div., Responsibilities of State and Local law Enforcement Agencies Under Secure Communities, December 4, 2012, *available at* https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf (noting inquiries from localities as to whether they must comply with immigration detainers).

[78] 8 C.F.R. §287.7(d) (emphasis added).

[79] *See, e.g.*, Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' ... normally creates an obligation impervious to judicial discretion."); Rastelli v. Warden, Metro. Correctional Center, 782 F.2d 17, 23 (2d Cir. 1986) ("The use of a permissive verb—'may review' instead of 'shall review'—suggests a discretionary rather than mandatory review process.").

[80] *See, e.g.*, Press Release, Judicial Watch Files Response in Lawsuit over Cook County, IL, Sheriff's Refusal to Honor ICE Immigration Detailers, June 10, 2013, *available at* http://www.judicialwatch.org/press-room/press-releases/judicial-watch-files-response-in-lawsuit-over-cook-county-il-sherriffs-refusal-to-honor-ice-immigration-detainers/ (noting litigation wherein private persons are challenging a local policy of not complying with immigration detainers on the grounds that federal regulation requires compliance with such detainers).

[81] *See, e.g.*, Moreno v. Napolitano, No. 11-CV-05452, Defendants' Answer, at ¶ 24 (filed N.D. Ill., Dec. 27, 2012) ("Defendants Deny the allegation ... that the regulation cited on the I-247 form, which is a legally authorized request upon which a state or local law enforcement agency permissibly may rely, imposes a requirement upon the [law enforcement agency] to detain the individual on ICE's behalf.").

custody.[82] This form was amended in August 2010 to indicate that ICE "requested"—rather than "required"—that aliens be held.[83] However, DHS further amended Form I-247 in December 2011, in a way that certain affected parties allege created confusion as to whether compliance with detainers is requested or required.[84] Specifically, as amended in December 2011, Form I-247 stated that

> This *request* flows from federal regulation 8 C.F.R. §287.7, which provides that a law enforcement agency "*shall* maintain custody of an alien" once a detainer has been issued by DHS.[85]

This language was, however, only used until December 2012, when ICE amended the detainer form yet again to indicate that "detainer request[s] derive[] from federal regulation," without quoting the text of that regulation.[86] Some jurisdictions may also have taken DHS's statements that they were required, at that time, to participate in the Secure Communities program to mean that they must honor detainers issued in conjunction with that program.[87] (DHS announced the discontinuance of the Secure Communities program on November 20, 2014.)

The only federal appeals court to have addressed the issue found that states and localities are not required to comply with immigration detainers. Specifically, in its March 4, 2014, decision in *Galarza v. Szalczyk*, a majority of the reviewing three-judge panel of the U.S. Court of Appeals for the Third Circuit found that the word "shall" in DHS's detainer regulation prescribes the maximum period of any detention, instead of requiring states and localities to hold aliens for DHS.[88] The majority did so, in part, because it construed other language in 8 C.F.R. §287.7 as

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[82] *See, e.g.*, U.S. Dep't of Justice, Immigration Detainer—Notice of Action, Form I-247 (Rev. 4-1-97) (copy on file with the author) ("Federal regulations (8 C.F.R. 287.7) *require* that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for INS to assume custody of the alien.") (emphasis added).

[83] *See* U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action, Form I-247 (08/10) (copy on file with the author) ("Under Federal regulation 8 C.F.R. §287.7. DHS *requests* that you maintain custody of this individual.") (emphasis added).

[84] *See, e.g.*, Moreno v. Napolitano, Complaint, *supra* note 11, at ¶ 24.

[85] U.S. Dep't of Homeland Security, Immigration Detainer—Notice of Action, DHS Form I-247 (12/11) (copy on file with the author) (emphasis added).

[86] Immigration Detainer—Notice of Action (12/12), *supra* note 2.

[87] *See, e.g.*, Mickey McCarter, *ICE to States: Participation in Secure Communities Mandatory*, HOMELAND SECURITY TODAY, August 8, 2011, *available at* http://www.hstoday.us/channels/dhs/single-article-page/ice-to-states-participation-in-secure-communities-mandatory/3cbcc9927ec1a8893859890f6bc14dff.html (reporting that ICE has determined that a memorandum of agreement (MOA) between ICE and a state is "not required to activate or operate Secure Communities for any jurisdiction," and that all MOAs between ICE and states have been terminated). "Requiring" states and localities to honor immigration detainers may be distinguished from "requiring" states and localities to participate in Secure Communities. The information sharing between the FBI and DHS that underlies Secure Communities is a matter of federal law, and jurisdictions that object to being "required" to participate in Secure Communities probably could not successfully challenge this information sharing on Tenth Amendment grounds. However, jurisdictions could avoid some effects of the sharing of information between the FBI and DHS by not submitting fingerprint data to the FBI, or declining to honor some or all immigration detainers. *See, e.g.*, Michele Waslin, Counties Say No to ICE's Secure Communities Program, But Is Opting Out Possible? *available at* http://immigrationimpact.com/2010/10/01/counties-say-no-to-ices-secure-communities-program-but-is-opting-out-possible/ (reporting that some jurisdictions have considered not submitting fingerprints to the FBI in certain cases); Policy for Responding to ICE Detainers, *supra* note 10 (policy of generally declining to honor ICE detainers).

[88] 745 F.3d 634 (3d Cir. 2014). One judge dissented primarily because the federal government was not a party to the case and "ha[d] not been heard on the seminal issue in this appeal." *Id.* at 645-46. The dissenting judge also expressed concern that giving states and localities discretion as to whether to honor immigration detainers could enmesh them in (continued...)

unambiguously describing detainers as "requests."[89] However, the majority also noted that, if the regulation were seen as ambiguous, DHS's interpretation would "hold persuasive weight," and that DHS and the INS have historically viewed detainers as requests, not commands.[90] The majority also noted other federal court decisions that, while not directly addressing whether states and localities are required to comply with immigration detainers, characterized detainers as requests.[91]

The Third Circuit majority also cited the doctrine of constitutional avoidance in support of its interpretation, noting that "[e]ven if there were any doubt about whether immigration detainers are requests and not mandatory orders to local law enforcement officials, settled constitutional law clearly establishes that they must be deemed requests."[92] Specifically, the majority found that the Tenth Amendment's anti-commandeering principle, as articulated by the Supreme Court in *New York v. United States*[93] and *Printz v. United States*,[94] means that federal officials cannot require states and localities to detain aliens for them. According to the majority, if states and localities were required to detain aliens for DHS, they would have to "expend funds and resources to effectuate a federal regulatory scheme," something found to be impermissible in *New York* and

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(...continued)

determining whether DHS had reason to believe particular aliens are removable, apparently on the theory that states and localities could face liability for holding aliens if DHS did not, in fact, have reason to believe the alien is removable. *Id*.

[89] *Id*. at 640 (noting that §287.7(d) is titled "Temporary detention at Department request" and that §287.7(a) provides that "[t]he detainer is a request").

[90] *Id*. at 641-42 (citing a 1994 rulemaking, a 2010 policy memorandum and a briefing for the Congressional Hispanic Caucus, ICE's current "Frequently Asked Questions" website, and the litigating posture of DHS and the INS in cases dating back to 1988).

[91] *Id*. at 640-41 (citing *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013) (federal immigration officials issuing detainers to local law enforcement "asking the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released"); *Liranzo v. United States*, 690 F.3d 78, 82 (2d Cir. 2012) ("ICE issued an immigration detainer to [jail] officials requesting that they release Liranzo only into ICE's custody"); *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009) (detainers as "request[s] that another law enforcement agency temporarily detain an alien"); *United States v. Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004) ("detainer . . . serves as a request that another law enforcement agency notify the INS before releasing an alien from detention"); *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) (procedure under §287.7 "an informal [one] in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person's death, impending release, or transfer to another institution").

[92] *Id*. at 642-43.

[93] 505 U.S. 144 (1992) (striking down a provision of federal law which required states to "take title" to radioactive material if they could not arrange for its disposal within a specified period on Tenth Amendment grounds).

[94] 521 U.S. 898 (1997) (invalidating provisions of the Brady Handgun Violence Prevention Act that compelled local authorities in certain states to conduct background checks on persons applying to purchase guns on anti-commandeering grounds). *But see* Reno v. Condon, 528 U.S. 141, 151 (2000) (finding no violation of the Tenth Amendment where Congress regulates state activities directly, as opposed to requiring "States in their sovereign capacities to regulate their own citizens"). Conditioning federal funding upon compliance with immigration detainers would probably not be seen as raising Tenth Amendment issues. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987) (upholding a federal law which conditioned receipt of federal highway funds upon a state's agreeing to raise the minimum drinking age to 21). However, the federal government has historically paid states and localities for holding aliens, rather than given them grant funding for doing so. *See, e.g.*, Office of the Inspector Gen., Audit Div., Dep't of Justice, Immigration and Naturalization Service Institutional Removal Program, Audit Report 02-41, September 2002, at 17-19, *available at* http://www.usdoj.gov/oig/reports/INS/a0241/final.pdf (noting that "SCAAP [State Criminal Alien Assistance Program] funds represent a reimbursement of costs borne by state and local governments to incarcerate illegal aliens … and therefore grant conditions would be inappropriate").

Printz.[95] Further, according to the majority, such a requirement would be "exactly the type of command that has historically disrupted our system of federalism" by obscuring which level of government is accountable for particular policies, as was also noted in *New York* and *Printz*.[96]

The Third Circuit's decision could potentially resolve the uncertainty as to whether compliance with immigration detainers is mandatory,[97] as well as the related debate over whether state and local policies of declining to honor detainers for at least some aliens are preempted by federal law.[98] However, while the Third Circuit's Tenth Amendment concerns, in particular, seem well founded, those who view compliance with immigration detainers as mandatory may continue to assert that compliance with immigration detainers is required based on district court decisions from other jurisdictions, which are not bound by the Third Circuit's decision.[99] For example, at least one district court outside the Third Circuit has expressly rejected the view that the word "shall" in 8 C.F.R. §287.7(d) prescribes the maximum period of any detention, instead of requiring the alien be detained.[100]

Who Has Custody of Aliens Subject to Detainers?

The term "custody" is generally understood to "encompass[] most restrictions on liberty" resulting from a criminal or other charge or conviction, including arrest or supervised release.[101] Custody is not determined solely by where a person is detained, and the entity by whom the person is physically detained is not necessarily the entity that would be found to have "technical" or legal custody of the person.[102] Who has custody of a detained alien can be significant for purposes of any habeas corpus challenge to the legality of the detention,[103] and potentially also

[95] 745 F.3d at 644 (noting, among other things, that "[t]here is no meaningful distinction between the Brady Act provisions and the regulation at issue here which would, according to Lehigh County, require state and local governments to spend public funds in order to detain suspects on behalf of the federal government for the 48-hour period.").

[96] *Id*.

[97] *See, e.g.*, Responsibilities of State and Local law Enforcement Agencies Under Secure Communities, *supra* note 77.

[98] *See* Judicial Watch Files Response in Lawsuit, *supra* note 80.

[99] Rios-Quiroz v. Williamson County, 2012 U.S. Dist. LEXIS 128237, at *11 (M.D. Tenn., September 10, 2012); Moreno v. Napolitano, 2012 U.S. Dist. LEXIS 170751, at *14 (N.D. Ill., November 30, 2012) (describing the language in DHS regulations stating that state and local law officers "shall maintain" custody of an alien at ICE's request as "mandatory language"). The language in *Moreno* arguably reflected the procedural posture of the case, which required that "all reasonable inferences [be] drawn in favor of the plaintiff," and the plaintiffs subsequently conceded that detainers are not mandatory. *Id*. at *14-*15 (N.D. Ill., November 30, 2012); *Moreno*, 2014 U.S. Dist. LEXIS 138576, at *13-*14 In yet another case, a federal district court in California noted the differences of opinion among the federal district courts as to whether immigration detainers are mandatory, but found that it "need not reach th[is] issue." Rodriguez v. Aitken, 2013 U.S. Dist. LEXIS 92478, at *7 n.2 (N.D. Cal., July 1, 2013).

[100] *Rios-Quiroz*, 2012 U.S. Dist. LEXIS 128237, at *11.

[101] Pack v. Yusuff, 218 F.3d 448, 454 n.5 (5th Cir. 2000).

[102] *See, e.g.*, Chung Young Chew v. Boyd, 309 F.2d 857, 865 (9th Cir. 1962) (finding that, once INS has issued a warrant for the alien, the lodging of a detainer with the state currently holding the alien results in the Service gaining "immediate technical custody"); Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 14 (distinguishing between physical and legal custody).

[103] Aliens have sometimes also attempted to bring mandamus suits seeking to compel the federal government to assume custody over them after a detainer has been issued. However, such actions typically fail. *See, e.g.*, Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995) (affirming the district court's denial of an alien's mandamus action seeking an expedited deportation hearing); Perez v. INS, 979 F.2d 299, 301 (3d Cir. 1992) (an alien who has been ordered deported, but is still serving a federal sentence, cannot "by mandamus or any other medium compel INS to deport her prior to the (continued...)

for determining whether any "hold" that may have occurred as a result of the issuance of an immigration detainer was authorized. The writ of habeas corpus has historically "served as a means of reviewing the legality of Executive detention,"[104] and detained aliens could challenge the fact, duration, or execution of their detention by federal, state, or local law enforcement.[105] Successfully maintaining a habeas action depends, in part, upon determining who has custody. Federal courts will generally find that they lack jurisdiction if the alien against whom the detainer is lodged is in state custody,[106] while state courts will find that they lack jurisdiction if the alien subject to the detainer is in federal custody.[107] Who has custody could also be relevant in determining whether any "hold" of the alien that results from the issuance of a detainer is authorized.[108] For example, assuming that holds are made pursuant to ICE's general authority to make warrantless arrests—rather than the detainer statute, regulations, or form[109]—questions could arise as to whether state and local officers who are not acting pursuant to a 287(g)

(...continued)

completion of her custodial sentence").

[104] Rasul v. Bush, 542 U.S. 466, 474 (2004) (citing *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). *See also* Harris v. Nelson, 394 U.S. 286, 292 (1969) ("There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law.").

[105] *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (characterizing challenges to the basic fact or duration of imprisonment as the "essence of habeas"). Challenges to the conditions of confinement, in contrast, generally cannot be maintained as habeas suits, although they could be brought on other grounds. *See, e.g.,* Cohen v. Lappin, 402 Fed. App'x 674, 675 (3d Cir. 2010) (affirming the district court's dismissal of the petitioner's claim that an ICE detainer was "adversely impacting his custody level and security designation" on the grounds that claims that do not challenge the basic fact or duration of imprisonment are not actionable as habeas suits). The court noted, however, that certain claims could be filed pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), in cases where a federal law enforcement agency has custody. Alternatively, where the state has custody, certain claims could be brought pursuant to 42 U.S.C. §1983. *But see infra* note 133 and accompanying text (noting that certain claims may not be maintained on due process grounds because persons do not have protected liberty or other interests in the conditions of their confinement).

[106] *See, e.g.*, Orozco v. U.S. INS, 911 F.2d 539 (11th Cir. 1990) (finding that the alien against whom the detainer was lodged was in state custody, rather than INS custody). For more on this case, see *infra* notes 117-118 and accompanying text.

[107] *See, e.g.*, Baez v. Hamilton County, Ohio, No. 1:07cv821, 2008 U.S. Dist. LEXIS 2982 (S.D. Ohio, January 15, 2008) (case moot because alien had been taken into ICE custody). A habeas action could also be found to be moot because the alien has been released. *See, e.g.*, Lemus v. Holder, 404 Fed. App'x 848 (5th Cir. 2010); Lopez-Santos v. Arkansas, No. 5:08-vb-05030-JLH (W.D. Ark. 2008) (cited in *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, *supra* note 19, at 180-181 n.98). However, at least one federal district court has adopted the petitioners' view that such claims are not moot, at least not when raised in a class action, because the claims are "capable of repetition yet evading review." *See Moreno*, 2012 U.S. Dist. LEXIS 170751, at *20 ("Each year ICE issues hundreds of thousands of I-247 detainers. ... This makes it likely that a constant class of persons will be subject to an I-247 detainer similar to Moreno and Lopez.").

[108] Even under the November 20, 2014, guidance, ICE could still issue detainers to request that aliens convicted of certain offenses be held after they would otherwise be released for the state or local offense so long as (1) the alien is subject to a final order of removal, or (2) there is other sufficient probable cause to believe the alien is removable. *See* Secure Communities, *supra* note 8, at 2.

[109] *See infra* notes 144-151 and accompanying text.

agreement have authority to detain an alien found to be in state custody.[110] Such questions could, however, potentially be avoided if the alien were found to be in DHS custody.[111]

Whether DHS, or a state or local government, is seen as having custody of an alien for whom a detainer has been issued appears to depend upon how detainers are characterized, as well as the facts and circumstances of the case. Courts in numerous jurisdictions have held that the filing of a detainer, in itself, does not result in an alien being in federal custody.[112] However, these courts have generally viewed detainers as administrative devices, designed to give states and localities notice of ICE's intentions.[113] Thus, their decisions probably cannot be read to mean that an alien for whom a detainer has been issued is never in federal custody.[114] For example, in *Mohammed v. Sullivan*, the U.S. Court of Appeals for the Eighth Circuit affirmed the district court's dismissal without prejudice of the petitioner's habeas petition because "the filing of an INS detainer with prison officials does not constitute the requisite 'technical custody' for purposes of habeas jurisdiction."[115] The petitioner here was serving a sentence for several drug-related offenses when INS filed a detainer that resulted in a more restrictive security and custody classification being applied. However, the court found that he was not in INS custody for purposes of his challenge to this re-classification.[116] Similarly, in *Orozco v. U.S. INS*, the U.S. Court of Appeals for the Eleventh Circuit found that the "filing of a detainer, standing alone, did not cause [the petitioner] to come within the custody of the INS" for purposes of a habeas proceeding.[117] The detainer in this case indicated that INS had initiated an investigation to determine whether the petitioner was removable, and the court found that "merely lodging" a detainer with such a notice did not result in INS custody.[118]

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[110] *See, e.g.*, Arroyo v. Judd, No.:8:10-cv-911-T-23TBM, 2010 U.S. Dist. LEXIS 77087, at *5 (M.D. Fla., July 30, 2010) ("[T]he regulation providing for a forty-eight-hour detainer, *8 C.F.R. §287.7*, delegates no authority to the defendants. This regulation is a federal regulation governing a federal agency.").

[111] State and local officials could potentially be found to have acted as agents of the federal government in holding an alien. *See, e.g.*, Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 489 (1973) ("[Because] the Alabama warden acts … as the agent of the Commonwealth of Kentucky in *holding* the petitioner pursuant to the Kentucky detainer, we have no difficulty concluding that petitioner is 'in custody.'") (emphasis in original).

[112] *See, e.g.*, *Orozco*, 911 F.2d at 541; Zolicoffer v. United States Dep't of Justice, 315 F.3d 538 (5th Cir. 2003); Campos v. INS, 62 F.3d 311, 314 (9th Cir. 1995); Prieto v. Gluch, 913 F.2d 1159, 1162-64 (6th Cir. 1990); Mohammed v. Sullivan, 866 F.2d 258, 260 (8th Cir. 1989); Campillo v. Sullivan, 853 F.2d 593 (8th Cir. 1988); Cohen v. Lappin, 402 Fed. App'x 674 (3d Cir. 2010).

[113] *See, e.g.*, Giddings v. Chandler, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) ("Filing a detainer is an informal procedure in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person's death, impending release, or transfer to another institution."); Fernandez-Collado v. INS, 644 F. Supp. 741, 743 n.1 (D. Conn. 1986) ("The detainer expresses only the intention of the Service to make a determination of deportability if and when the subject of the notice becomes available at a later time."); *In re* Sanchez, 20 I. & N. Dec. 223, 225 (BIA 1990) (characterizing an immigration detainer as "merely an administrative mechanism to assure that a person subject to confinement will not be released from custody until the party requesting the detainer has an opportunity to act"). The *Fernandez-Collado* court, in particular, took the position that, "[s]ince a sentenced inmate cannot be deported while imprisoned, the I.N.S. has absolutely no occasion to consider release or custody of the petitioner until after his release from his current confinement." 644 F. Supp. at 744.

[114] *But see* Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 8 ("[An immigration detainer] does not establish federal custody by DHS or any other agency over the subject of the detainer.").

[115] *Mohammed*, 866 F.2d at 260.

[116] *Id*. The court here did not address the question of whether conditions of custody can be challenged in habeas suits. *See supra* note 105 and accompanying text.

[117] 911 F.2d at 541. The court did, however, recognize the possibility that the filing of a detainer could result in INS custody for purposes of a habeas action in certain circumstances. *Id*. at 541.

[118] *Id*.

In certain cases, however, the court has found that an alien is, or at least could potentially be, in federal custody because of the filing of an immigration detainer. For example, in *Galaviz-Medina v. Wooten*, the U.S. Court of Appeals for the Tenth Circuit found that an alien subject to a deportation order and serving a sentence with the federal Bureau of Prisons was in INS custody as a result of an immigration detainer lodged against him.[119] According to the court, while the lodging of the detainer, in itself, did not result in INS custody, the deportation order "establishe[d] conclusively the INS's right to custody following the expiration of his current term."[120] Thus, because the "INS ha[d] a more concrete interest in this alien,"[121] the court found that he was in INS custody. Similarly, in *Vargas v. Swan*, the U.S. Court of Appeals for the Seventh Circuit rejected the INS's attempt to characterize a detainer as "an internal administrative mechanism" which would not support a finding that the alien was in INS custody.[122] Instead, the court remanded the case for a determination as to whether the jurisdiction receiving the detainer would treat it as a simple notice of INS's interest in a prisoner, or as a request to hold the inmate after his criminal sentence is completed so that INS could take him into custody.[123]

Do Detainer Practices Violate Aliens' Constitutional Rights?

Aliens within the United States, including aliens who are unlawfully present, enjoy certain protections under the U.S. Constitution. Among other things, they have been found to be entitled to the protections of the Fourth and Fifth Amendments because they are encompassed by the usage of the word "person" in those amendments.[124] The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[125] while the Fifth Amendment provides that "[n]o person shall be … deprived of life, liberty, or property, without due process of law."[126] For purposes of the Fourth Amendment, a "seizure" occurs when a person's "freedom to walk away" has been restrained.[127] Similarly, "[f]reedom from imprisonment—from government custody, detention, or other forms

[119] 27 F.3d 487, 493 (10th Cir. 1994). *See also Chung Young Chew*, 309 F.2d at 856.

[120] 27 F.3d at 493.

[121] *Id*. at 494.

[122] 854 F.2d 1028, 1030 (7th Cir.).

[123] *Id*. at 1032-33. *See also id*. at 1032 ("[F]or Vargas to be deemed in custody pursuant to the INS detainer, *the effect of the detainer* here must be that Wisconsin places a hold on Vargas.") (emphasis added). *See also* Orito v. Powers, 479 F.2d 435, 437 (7th Cir. 1973) (finding that a state detainer filed with a federal correctional institution resulted in state custody because it requested that the inmate be "held" for state officials).

[124] *See, e.g.*, Silesian Am. Corp. v. Clark, 332 U.S. 469 (1947) (Fifth Amendment); Bilokumsky v. Tod, 263 U.S. 149 (1923) (Fourth Amendment). While the Fourth and Fifth Amendments protect persons only in their dealings with the federal government, the Fourteenth Amendment provides for similar protections in dealings with state or local governments. *See generally* U.S. CONST., amend. XIV, §1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment limits state and local conduct); Wolf v. Colorado, 338 U.S. 25 (same). Aliens who have not yet entered the territorial jurisdiction of the United States, in contrast, are generally not entitled to such protections. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950).

[125] U.S. CONST., amend. IV.

[126] U.S. CONST., amend. V & amend. XIV, §1.

[127] Terry v. Ohio, 392 U.S. 1, 16 (1968) ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."). *See also* Vohra v. United States, No. SA CV 04-00972 DSF, 2010 U.S. Dist. LEXIS 34363, at *25 (C.D. Cal. February 4, 2010) ("Plaintiff was kept in formal detention for at least several hours longer due to an ICE detainer. In plain terms, he was subjected to the functional equivalent of a warrantless *arrest*.").

of physical restraint—lies at the heart of the liberty" that is protected by the Due Process clause of the Fifth Amendment.[128]

In considering whether the detainer practices of federal, state, and/or local governments infringe upon aliens' constitutional rights, courts would probably look at the specific actions taken pursuant to individual detainers, as well as ICE's reasons for issuing the individual detainers, rather than considering detainers in the abstract. Arguments can be made that the mere lodging of a detainer can negatively affect aliens' criminal cases and/or sentences, regardless of the actions that ICE requests of state or local officials.[129] For example, an alien subject to a detainer could be denied bond,[130] or given a more restrictive custody or security designation,[131] because of the detainer. Nonetheless, despite such effects, certain actions pursuant to a detainer would not appear to entail a seizure of the alien's person,[132] or a protected liberty interest (e.g., notifying ICE prior to releasing an alien, or in the event of the alien's transfer or death).[133] Holding a person who otherwise would have been released, in contrast, could be said to result in a seizure of that person[134] and, as such, would implicate protected liberty interests.[135] Such a hold is arguably the equivalent of a new arrest[136] and thus requires independent authority. The authority underlying the initial arrest would not, in itself, permit the hold.[137]

[128] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[129] *See, e.g.*, Am. Civil Liberties Union et al., Letter to Assistant Secretary John T. Morton, June 23, 2010, *available at* http://www.aclu.org/files/assets/Detainers_revised.pdf ("Detainers affect and interfere with every aspect of an individual's state criminal case, from bail to eligibility for treatment, social services, and detention alternatives.").

[130] In some jurisdictions, aliens against whom detainers have been lodged are categorically ineligible for bond in criminal proceedings. *See, e.g.*, United States v. Rice, No. 3:04CR-83-R, 2006 U.S. Dist. LEXIS 40737 (W.D. Ky., June 19, 2006); United States v. Magallon-Toro, No. 3:02-MJ-332, 3-02-CR-385-M, 2002 U.S. Dist. LEXIS 23362 (N.D. Tex., December 4, 2002). Other jurisdictions reject this categorical approach. *See, e.g.*, United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111-12 (D. Minn. 2009). However, even in jurisdictions where the categorical approach is rejected, the presence of an immigration detainer may still be one of the factors used in bail determinations. *See, e.g.*, United States v. Salas-Urenas, No. 11-3182, 2011 U.S. App. LEXIS 14941 (10th Cir., July 19, 2011) (affirming district court decision ordering an alien's pre-trial detention that was based, in part, on the existence of an ICE detainer); United States v. Loera Vasquez, 413 Fed. App'x 42, 43 (10th Cir. 2011) (same).

[131] *See, e.g.*, *Mohammed*, 866 F.2d at 260.

[132] For example, requesting that state or local law enforcement notify ICE at least 30 days prior to the release of a person who is being held on other grounds would generally not be found to entail a "seizure" of the person, even if the filing of the detainer results in the person's security classification being changed by the state or locality.

[133] *See, e.g.*, Nasious v. Two Unknown B.I.C.E. Agents at the Arapahoe County Justice Center, 366 Fed. App'x 894, 896 (10th Cir. 2010) (finding that the plaintiff did not have "a protected liberty interest in being housed in a community corrections facility"); Borrero v. Wells, No. CV 309-096, 2010 U.S. Dist. LEXIS 85353 (S.D. Ga., May 25, 2010) (plaintiff lacked a protected liberty interest in housing assignments, transfer to another facility, and participating in rehabilitative programs).

[134] *See, e.g.*, Galarza v. Szalczyk, No. 10-cv-06815, 2012 U.S. Dist. LEXIS 47023, at *30-*31 (E.D. Pa., Mar. 30, 2012) ("[T]he Amended Complaint alleges that Mr. Galarza would have been released on bail three days prior to his actual release but for the immigration detainer issued by defendant Szalczyk. Therefore, the immigration detainer caused a seizure of Mr. Galarza.").

[135] *Id*. at *51 ("[T]he immigration detainer issued by Officer Szalczyk prevented plaintiff's release. Thus, the immigration detainer deprived plaintiff of his liberty.").

[136] *Cf.* Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 46.

[137] *See, e.g.*, *Makowski*, 27 F. Supp. 3d at 919 ("The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause.") (internal punctuation and citations omitted).

However, while holds pursuant to detainers would appear to involve seizures of the alien's person and protected liberty interests, they could still be found to be constitutional, depending upon the grounds for the hold. ICE can use Form I-247 to request holds on various grounds, including (1) a determination that there is reason to believe an individual is an alien subject to removal; (2) the initiation of removal proceedings; (3) a warrant of arrest for removal proceedings; and (4) a removal order.[138] Different grounds could potentially raise different issues. For example, for various reasons explained below, a hold based upon a warrant of arrest for removal proceedings, or a removal order, could be found to raise different issues than a hold based on ICE's determination that there is reason to believe an alien is removable. Arrests pursuant to warrants are presumptively reasonable, and ICE has broad authority to detain aliens for removal. In contrast, authority to hold aliens based on a belief they are removable appears to be more limited.[139]

Are Aliens Seized in Violation of Their Constitutional Rights?

The Fourth Amendment does not prohibit all "seizures" of persons, only those that are "unreasonable."[140] Seizures that are made pursuant to a warrant—including warrants of arrest for removal proceedings—are presumptively reasonable.[141] In contrast, those "conducted outside the judicial process without prior approval by a judge or magistrate, are *per se* unreasonable…[,] subject only to a few specifically established and well-delineated exceptions."[142] One such exception is where a law enforcement officer has sufficient reason to believe the person arrested

[138] *See* Immigration Detainer—Notice of Action (12/12), *supra* note 2. Prior versions of Form I-247 indicated that ICE had initiated an investigation to determine whether the alien is subject to removal. *See supra* note 45.

[139] It should also be noted that, even if particular practices were found to violate an alien's constitutional rights, ICE would not necessarily be barred from removing the alien because of these violations. Aliens whose constitutional rights are violated could be entitled to release as a result of a habeas action, or monetary damages for the violation of their rights. In addition, if requested to do so, a court could enjoin state, local and/or federal governments from holding aliens pursuant to a detainer in the future, or declare that particular detainer practices are unconstitutional. However, the fact that the alien whose rights were violated was in the United States illegally would not necessarily be suppressed in any removal proceedings brought against that alien. *See, e.g.*, Pac-Ruiz v. Holder, 629 F.3d at 777-78 (declining to suppress all statements and documentation regarding an alien's national origin and citizenship obtained by ICE as a result of his warrantless arrest on the grounds that the exclusionary rule generally does not apply in civil deportation hearings). For example, in *Pac-Ruiz v. Holder*, the court relied on the precedent of *INS v. Lopez-Mendoza*, wherein the Supreme Court held that the "exclusionary rule"—which requires that evidence obtained in violation of certain constitutional rights be excluded from a person's criminal trial—does not apply in immigration proceedings absent "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." 468 U.S. 1032, 1046 (1984). Since *Lopez-Mendoza*, the federal courts of appeals have differed as to the appropriate standard for applying the exclusionary rule. *Compare* Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018-19 (9th Cir. 2008) (holding that the exclusion of evidence in immigration court turns upon whether the agents committed the violations deliberately, or by conduct that a reasonable officer should have known would violate the Constitution) *with* Kandamar v. Gonzalez, 464 F.3d 65, 71 (1st Cir. 2006) (requiring "specific evidence of … government misconduct by threats, coercion or physical abuse"). In addition, the government has historically declined calls for it to categorically forego removal proceedings against aliens whose constitutional rights have been violated. *See, e.g.*, 53 *Federal Register* at 9281 (declining to adopt a suggestion that INS not assume custody of or remove an alien whose civil rights may have been violated by an illegal or unconstitutional detention by law enforcement officials).

[140] U.S. CONST., amend. IV.

[141] *See, e.g.*, Mitchell v. United States, 258 F.2d 435, 437 (D.C. Cir. 1958) ("A search warrant is based upon a judicial determination of the present existence of justifying grounds.").

[142] Horton v. California, 496 U.S. 128, 133 n.4 (1990).

has committed a felony.[143] Congress has granted immigration officers similar authority as to immigration offenses. Specifically, Section 287(a) of the INA provides that

> [a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General [currently the Secretary of Homeland Security] shall have power *without warrant* … to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any … law or regulation [governing the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.[144]

The listing of officers and employees who are authorized to make warrantless arrests pursuant to Section 287(a) is the same as that of officers and employees who are authorized to issue detainers,[145] and the INS, at least, appears to have taken the position that a detainer placed pursuant to 8 C.F.R. §287.7 "is an arrest" pursuant to Section 287(a) of the INA.[146] Other provisions of immigration law authorizing or requiring the detention of aliens have also been cited as authority for ICE's detainer practices, including Sections 236 and 241 of the INA.[147] Section 236(a) authorizes the arrest and detention of any alien, on a warrant issued by DHS, pending a decision on whether the alien is to be removed,[148] while Section 236(c) requires the detention of aliens who are inadmissible or removable because they have committed certain criminal offenses.[149] Section 241(a)(2), in turn, requires the detention, during the removal period,

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[143] *See, e.g.*, Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed."); United States v. Watson, 423 U.S. 411, 417-24 (1976); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

[144] INA §287(a)(2), 8 U.S.C. §1357(a)(2).

[145] *Compare* 8 C.F.R. §287.5(c) (power and authority to arrest) *with* 8 C.F.R. §287.7(b) (authority to issue detainers).

[146] *See, e.g.*, INS, *The Law of Arrest, Search, and Seizure for Immigration Officers* (1993), *available at* http://www.scribd.com/doc/21968268/ICE-M-69-Law-of-Arrest-January-1993 ("A detainer placed under this subsection [i.e., 8 C.F.R. §287.7] is an arrest which must be supported by probable cause."); Anne B. Chandler, *Why Is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMP. & INT'L L. 209, 224 n.57 (2008) (characterizing a hold pursuant to a detainer as a warrantless arrest pursuant to 8 U.S.C. §1357(a)(2) made by a federal officer who determines there is reason to believe that the person detained is an alien who may be removable and who is likely to escape before a warrant is obtained).

[147] *See, e.g.*, Interim Policy Number 10074.1, *supra* note 52, at §5.1.

[148] INA §236(a), 8 U.S.C. §1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."). *But see* Pierre v. Sabol, 2012 U.S. Dist. LEXIS 66231 (M.D. Pa., May 11, 2012) (finding that detention in excess of 20 months pursuant to Section 236(a) was unduly prolonged, entitling the alien to a bond hearing before an immigration judge where the government has the burden of showing the alien is a flight risk or a danger to the community); CRS Legal Sidebar WSLG524, How "Mandatory" Is the Mandatory Detention of Certain Aliens in Removal Proceedings?, by (name re dacted) and (name redacted).

[149] INA §236(c)(1), 8 U.S.C. §1226(c)(1) ("The Attorney General shall take into custody any alien who (A) is inadmissible by reason of having committed any offenses covered in section 1182(a)(2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense."). Specifically, Section 236(c) has been found to authorize detention for a reasonable amount of time, after which authorities must make an individualized inquiry as to whether continuing detention is necessary. *See, e.g.*, Leslie v. Attorney General of the United States, 678 F.3d 265 (3d Cir. 2012) (finding (continued...)

of aliens found to be inadmissible or deportable on criminal and related grounds, or due to terrorist activities.[150] In addition, at least some commentators would construe Section 287(d) of the INA to authorize the detention of aliens arrested for controlled substance offenses.[151]

Whether holds pursuant to an ICE detainer would be found to be authorized by one of these authorities if the alien were found to be in ICE custody has not been definitively settled by the courts. As discussed above, some commentators have asserted that the provisions of the INA addressing the issuance of detainers for controlled substance offenses and the regulations implementing them are the sole authority for holds pursuant to detainers.[152] If this argument were adopted by the courts, then holds pursuant to detainers of aliens who were not arrested for controlled substance offenses could be found to be impermissible. However, even if other authorities were found to be generally applicable, questions could be raised as to whether the holds of particular aliens were authorized pursuant to these authorities. For example, for a warrantless arrest to be permissible pursuant to Section 287(a) of the INA, there must be (1) "reason to believe" that the alien is (a) in the United States in violation of immigration law and (b) likely to escape before a warrant can be obtained for his or her arrest; and (2) the alien must be taken "without unnecessary delay" before an immigration officer having authority to examine aliens as to their right to enter or remain in the United States.[153]

"Reason to believe" an alien is in the United States in violation of immigration law has generally been construed to mean that there is probable cause to believe that the alien is in the country in violation of the law.[154] Probable cause, in turn, "exists where the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has

(...continued)

that it was unreasonable to detain the petitioner for four years pursuant to Section 236(c) of the INA without making such a determination); Diop v. ICE/Homeland Security, 656 F.3d 221, 233 (3d Cir. 2011) (determination of what constitutes a reasonable time is a "fact-dependent inquiry that will vary depending on individual circumstances").

[150] INA §241(a)(2), 8 U.S.C. §1231(a)(2) ("During the removal period, the Attorney General shall detain the alien. Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3)(B) or deportable under section 237(a)(2) or 237(a)(4)(B).").

[151] *See supra* note 67-68 and accompanying text.

[152] *See, e.g.*, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, *supra* note 19, at 191-92.

[153] Several courts have recently opined that holds pursuant to detainers are not necessarily permissible just because the detainer form has been marked to indicate that there is probable cause to believe the alien is removable. Instead, these courts have suggested, there must have been actual "analysis to determine whether there was probable cause to believe that the individual in question was subject to removal from the United States." *Moreno*, 2014 U.S. Dist. LEXIS 138576, at *24-*25; *see also* Uroza v. Salt Lake County, No. 2:11CV713DAK, 2014 U.S. Dist. LEXIS 127110, at *19-*20 (D. Utah, Sept. 10, 2014) ("[E]ven if the language of the current detainer form demonstrates probable cause [i.e., ICE has checked the box indicating there is probable cause to believe an alien is subject to removal], Uroza alleges that ICE's practice of issuing the Form I-247 without first conducting an investigation as to immigration status and flight risk has not changed. Uroza alleges that federal agents still do not undertake a factual investigation sufficient to provide probable cause as to immigration status before issuing the [detainer] form.").

[154] *See, e.g.*, Contreras v. United States, 672 F.2d 307, 308 (2d Cir. 1982) (plaintiffs conceding that INS has authority to make warrantless arrests when there is probable cause to believe that an alien is present without authorization, provided that certain conditions are met); Babula v. INS, 665 F.2d 293, 298 (3d Cir. 1981) ("We hold that under section 1357(a)(2) and section 287.3, "arrest" means an arrest upon probable cause, and not simply a detention for purposes of interrogation."); Tejeda-Mata v. INS, 626 F.2d 721, 724-25 (9th Cir. 1980) ("A warrantless arrest … requires probable cause for belief of illegal alienage."); Murillo v. Musegades, 809 F. Supp. 487, 500 (W.D. Tex. 1992) ("The INS is held to the standard of 'probable cause' when one of its Agents arrests an individual without a warrant.").

been or is being committed."[155] Given this definition, questions could be raised about whether ICE in fact had probable cause to believe that individual aliens were removable based on the information available at the time the detainer was issued (e.g., the alien's immigration status and the offense(s) for which he was arrested or convicted).[156] Moreover, some jurisdictions require an individualized assessment of factors such as ties to the community (e.g., family, home, job) and attempts to flee in determining whether there is reason to believe that an alien is likely to escape before a warrant is obtained for his or her arrest,[157] and a court could find a hold placed without any consideration of these factors is impermissible. Moreover, even when there is reason to believe an alien is unlawfully present and likely to escape before a warrant can be obtained, the arresting officer must generally bring the alien before another immigration officer having authority to examine aliens as to their right to enter or remain in the United States within a "reasonable time" after arrest.[158] ICE regulations provide for some flexibility in determining what constitutes a reasonable time by providing that a determination as to whether to bring formal removal proceedings against the alien will generally be made within 48 hours of arrest, "except in the event of an emergency or other extraordinary circumstance[,] in which case a determination will be made within an additional reasonable period of time."[159] However, in the case of particularly long holds, ICE could be found to have failed to bring individual aliens before an immigration officer within a reasonable time.[160]

Additional questions may arise if an alien held pursuant to an immigration detainer is found to be in state custody, not DHS custody. Key among these questions is whether there must be some basis in state law for any action taken by a state or locality pursuant to an immigration detainer, or whether federal law provides the requisite authority for state and local actions. Some jurisdictions

[155] Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364 (2009) (internal citations omitted).

[156] *Cf. Vohra*, 2010 U.S. Dist. LEXIS 34363, at *28-*29 (finding that ICE lacked probable cause to believe an alien was present without authorization, in part, because his name was not in the database listing legal aliens).

[157] *See, e.g.*, Araujo v. United States, 301 F. Supp. 2d 1095, 1101 (N.D. Cal. 2004) (finding that the government could not demonstrate that the alien was likely to escape before a warrant could be obtained given that he was living with his wife, had filed an application to adjust status to lawful permanent resident, and otherwise had not evidenced an intention to flee); Pearl Meadows Mushroom Farm, Inc. v. Nelson, 723 F. Supp. 432, 449 (N.D. Cal. 1989) (finding that there was no likelihood of flight where the aliens arrested without a warrant "were long-term employees, had roots in the community, and family with proper immigration status," among other things). *But see* United States v. Cantu, 519 F.2d 494, 497 (9th Cir. 1975) (finding that the likelihood of escape was a serious threat because the aliens were at all times highly mobile, traveling in a car along an interstate).

[158] 8 C.F.R. §287.3(a). Some critics of current detainer practices have noted that, when law enforcement officers enforcing criminal law make a warrantless arrest, they must bring the inmate before a neutral magistrate for a probable cause hearing within 48 hours. *See, e.g.*, Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 47. However, courts have generally found that this requirement does not apply to warrantless arrests for immigration violations, which are, instead, governed by Section 287(a) of the INA and its implementing regulations. *See, e.g.*, Salgado v. Scannel, 561 F.2d 1211 (5th Cir. 1977) (rejecting the petitioner's assertion that an affidavit establishing that he was an alien who had entered the United States illegally that was executed after his warrantless arrest should be suppressed since he was arrested without a warrant and was not taken before a neutral magistrate).

[159] 8 C.F.R. §287.3(d). ICE regulations also require that aliens arrested without a warrant generally be advised of the reason for their arrest and the right to be represented at no expense to the government. *See* 8 C.F.R. §287.3(c).

[160] *See, e.g.*, *Pac-Ruiz*, 629 F.3d at 780 ("[A] regulatory violation can result in the exclusion of evidence if the regulation in question serves a purpose of benefit to the alien and the violation prejudiced interests of the alien which were protected by the regulation."); *Babula*, 665 F.2d at 298 (noting that, had further questions been asked prior to giving the warnings required by Section 287.3, the conduct of the INS agents could have been found to have violated the rights of the petitioners). *But see* Avila-Gallegos v. INS, 525 F.2d 666 (2d Cir. 1975) (reversal of deportation order properly denied, notwithstanding defects in arrest procedure under Section 287(a)(2), where hearing testimony alone was sufficient to support an order of deportation); *In re* Bulos, 15 I. & N. Dec. 645 (1976) (defect in arrest procedure under Section 287(a)(2) is cured if the resulting deportation order is adequately supported).

have suggested that there must be some basis in state law for any state or local action,[161] and that the federal regulations and forms do not provide the requisite authority.[162] Other jurisdictions, in contrast, appear to have adopted the position that the detainer regulations and/or Form I-247 suffice to authorize state and local actions.[163] However, even in jurisdictions taking the latter view, questions could be raised about whether specific actions taken pursuant to immigration detainers are, in fact, authorized under federal law. For example, in two recent decisions, federal district courts found actual or potential violations of the Fourth Amendment when states or localities held aliens pursuant to immigration detainers so that ICE could investigate the alien's removability.[164] In so finding, both courts characterized such "holds" as "investigatory delays," which are generally seen to run afoul of the Fourth Amendment.[165] Neither court purported to address whether federal law authorizes ICE to hold aliens in order to investigate their removability. However, the courts' findings suggest that these courts, at least, would not view holding an alien in order to investigate his or her removability as authorized by federal law,

[161] *See, e.g.*, Arroyo v. Judd, No. 8:10-cv-911-T-23TBM, 2010 U.S. Dist. LEXIS 77087 (M.D. Fla., July 30, 2010) ("[T]he regulation providing for a forty-eight-hour detainer, *8 C.F.R. §297.7*, delegates no authority to the defendants. This regulation is a federal regulation governing a federal agency."); Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 60 (noting that, because of the state's practice of honoring immigration detainers, people are being held without any basis in state law).

[162] Requiring authority in state law for any holds pursuant to detainers could also raise questions regarding the role of states and localities in enforcing federal immigration law. The Supreme Court's 2012 decision in *Arizona v. United States* found that a provision of Arizona law that authorized state officers to make a "unilateral decision … to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government" was preempted by the federal law. 567 U.S.—(2012), 2012 U.S. LEXIS 4872, at *37 (June 25, 2012). However, insofar as immigration detainers are seen as requests from the federal government, states and localities would not appear to be barred from complying with them—even without a state or federal statute that expressly authorizes states or localities to do so—as a result of the *Arizona* decision. *But see Preempting Immigration Detainer Enforcement under Arizona v. United States*, *supra* note 60, at 307 ("Under *Arizona*, a local jurisdiction's policy of honoring some immigration detainers and not others, because it vests discretion in local officials over the decisions to detain a suspected immigration violator, 'violates the principle that the removal process is entrusted to the discretion of the Federal Government' and allows the locality 'to achieve its own immigration policy.'").

[163] *See, e.g.*, Ochoa v. Bass, 181 P.3d 727, 733 (Okla. Crim. App. 2008) ("Once the forty-eight (48) hour period granted to ICE, by 8 C.F.R. §287.7(d) …, for assumption of custody had lapsed without ICE taking any action on its detainers, the state no longer had authority to continue to hold Petitioners.").

[164] Miranda-Olivares v. Clackamas County, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340 (D. Or., Apr. 11, 2014) (finding a violation of the Fourth Amendment where a county denied an alien release on bail for which she otherwise qualified, and held her an additional day after her release from state charges, because she was the subject of an immigration detainer requesting that she be held so that ICE could investigate her removability); Morales v. Chadbourne, 996 F. Supp. 2d 19 (D. R.I. 2014) (finding that the Fourth Amendment claim of a naturalized U.S. citizen who was held pursuant to a detainer so that ICE could investigate her removability had been sufficiently pled to withstand a motion to dismiss).

[165] *See Morales*, 996 F. Supp. 2d at 29 ("The fact that an investigation had been initiated is not enough to establish probable cause because the Fourth Amendment does not permit seizures for mere investigations."); *Miranda-Olivares*, 2014 U.S. Dist. LEXIS 50340, at *28-*29 (similar). *See also Makowski*, 27 F. Supp. 3d at 919 (concluding that the plaintiff has alleged a plausible claim for false imprisonment against the United States given that the government apparently lacked probable cause to issue a detainer for the plaintiff); Villars v. Kubiatowski, No. 12 CV 4586, 2014 U.S. Dist. LEXIS 61697, at *34 (N.D. Ill., May 5, 2014) (declining to dismiss Fourth Amendment claims concerning an ICE detainer issued "without probable cause that [the alien] committed a violation of immigration laws"); *Moreno*, 2014 U.S. Dist. LEXIS 138576 (denying the government's motion for judgment on the pleadings on plaintiffs' claim that ICE's detainer practices violate probable cause requirements); Uroza v. Salt Lake County, No. 2:11CV713DAK, 2013 U.S. Dist. LEXIS 24640, at *13 (D. Utah, Feb. 21, 2013) (quoting *Arizona v. United States*,—U.S.—, 132 S. Ct. 2492, 2509 (2012), to the effect that "[d]etaining individuals solely to verify their constitutional status would raise constitutional concerns"); *Galarza*, 2012 U.S. Dist. LEXIS 47023, at *28 (denying ICE agent's claim of qualified immunity where the plaintiff—who was, in fact, a U.S. citizen—alleged that a detainer was issued without probable cause to believe he was an alien subject to removal).

regardless of whether ICE or the state or locality is "responsible" for the hold. (Section 287 of the INA does not purport to authorize such holds,[166] and DHS no longer includes the option of requesting a hold so that ICE may investigate the alien's removability on its detainer form.)[167] These courts also did not opine on the permissibility of holds pursuant to immigration detainers for purposes other than investigating the alien's removability (e.g., holds when there is probable cause to believe the alien is removable).[168]

Do Detainers Result in Aliens Being Deprived of Liberty Interests Without Due Process of Law?

The Fifth Amendment's guarantee of procedural due process operates to ensure that the government does not arbitrarily interfere with certain key interests (i.e., life, liberty, and property).[169] However, procedural due process rules are not meant to protect persons from the deprivation of these interests, per se. Rather, they are intended to prevent the "*mistaken or unjustified* deprivation of life, liberty, or property," by ensuring that the government uses fair and just procedures when taking away such interests.[170] The type of procedures necessary to satisfy due process can vary depending upon the circumstances and interests involved. In *Mathews v. Eldridge*, the Supreme Court announced the prevailing standard for assessing the requirements of due process, finding that

> [i]dentification of the specific dictates of due process generally requires consideration of three distinct factors: *first*, the private interest that will be affected by the official action; *second*, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and *finally*, the Government's interest, including the function involved and the administrative and fiscal burdens that the additional or substitute procedural requirements would entail.[171]

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[166] Section 287(a)(1) of the INA does authorize immigration officers to "interrogate any alien or person believed to be an alien as to his right to be or remain in the United States." *See* 8 U.S.C. §1357(a)(1). However, this provision has generally not been construed as permitting immigration officers to seize aliens, or those perceived to be aliens, for purposes of such an interrogation. *See, e.g.*, Murillo v. Musegades, 809 F. Supp. 487, 498 (W.D. Tex. 1992) ("Questioning with reasonable suspicion of alienage is permissible so long as the INS Agent does not restrain the individual, and the individual reasonably believes he or she is free to walk away.").

[167] *See* Immigration Detainer—Notice of Action (12/12), *supra* note 2.

[168] The cases to date—*Galarza, Miranda-Olivares*, *Morales*, *Moreno*, and *Villars*—have involved detainers which requested that persons be held so that ICE could investigate whether they are aliens subject to removal. Other uses of detainers were not at issue. For example, the plaintiff class in *Moreno* expressly excludes aliens who were not held after they would otherwise have been released as the result of an immigration detainer. It also excludes aliens who were held pursuant to a detainer issued based on a notice to appear or other charging document initiating removal proceedings, a warrant of arrest for removal proceedings, or an order of deportation or removal. *See* 2014 U.S. Dist. LEXIS 138576, at *7. Similarly, in *Uroza*, the court specifically noted that it "finds no basis for concluding that the [detainer] Form as a general matter exceeds statutory power [as to warrantless arrests] in every instance." 2013 U.S. Dist. LEXIS 24620, at *11.

[169] Several cases challenging detainer practices have also alleged that these practices infringe upon aliens' rights to substantive due process, as well as procedural due process. *See* Brizuela v. Feliciano, Petition, *supra* note 11, at ¶ 55 (alleging that freedom from physical restraint is a fundamental liberty interest that cannot be infringed unless the infringement is narrowly tailored to serve a compelling government interest); *Uroza*, 2014 U.S. Dist. LEXIS 127110, at *8-*11 (declining the federal government's motion to dismiss the plaintiff's substantive due process claims on the grounds that they are based on the same facts as his Fourth Amendment claim).

[170] Carey v. Piphus, 435 U.S. 247, 259 (1978).

[171] 424 U.S. 319, 335 (1976) (emphasis added).

Although the requirements of due process may vary depending on the particular context, the government must provide persons with the ability to contest the basis upon which they are to be deprived of a protected interest. This generally entails notice of the proposed deprivation and a hearing before an impartial tribunal.[172] Additional procedural protections, such as discovery of evidence or an opportunity to confront adverse witnesses, may also be required in certain circumstances to minimize the occurrence of unfair or mistaken deprivations of protected interests.[173]

Whether the practices of local and/or federal governments could be found to violate aliens' due process rights under the test established by *Mathews* would, thus, appear to depend upon the aliens' and the government's interests, as well as existing and potential procedural safeguards. Loss of freedom, such as would result when an alien who would otherwise have been released is held pursuant to a detainer, has historically been seen as carrying significant weight for purposes of due process,[174] although some courts have suggested that the liberty interests of at least certain aliens who entered or remained in the United States in violation of immigration law may be entitled to less weight.[175] On the other hand, the government has been recognized as having some significant interests in the detention of at least certain aliens. For example, in *Demore v. Kim*, the Supreme Court recognized the government's interest in detaining deportable aliens "during the limited period necessary for their removal proceedings" so as to ensure that they do not flee and, thus, evade removal.[176] Similarly, in *Carlson v. Landon*, the Court recognized that detention of certain aliens furthers the government's efforts to protect the safety and welfare of the community.[177] Both these interests have been expressly recognized by the courts in upholding, at

[172] *See, e.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (describing notice of a proposed deprivation of a protected interest as "[a]n elementary and fundamental requirement of due process"); *Mathews*, 424 U.S. at 333 ("[S]ome form of hearing is required before an individual is finally deprived of a ... [protected] interest."); *In re* Murchison, 349 U.S. 133, 135 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

[173] *See* Congressional Research Service, Constitution of the United States: Analysis and Interpretation, Fourteenth Amendment: Rights Guaranteed: The Requirements of Due Process, *available at* http://www.crs.gov/conan/default.aspx?doc=Amendment14.xml&mode=topic&s=1&t=5|1|3.

[174] *Zadvydas*, 533 U.S. at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.") In *Zadvydas*, the Supreme Court suggested that a statute permitting the indefinite detention of aliens whose removal has been ordered "would raise a serious constitutional problem."

[175] *See, e.g.*, Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999) (upholding the constitutionality of Section 236(c) of the INA because the petitioner's legal right to remain in the United States ended once he conceded that he was an aggravated felon and, thus, any liberty interest he may have previously had was minimal); Avramenkov v. INS, 99 F. Supp. 2d 210 (2000) ("[B]ecause the Petitioner is almost certainly going to be removed from the country, no significant liberty interest is implicated by §236(c). In addition, the risk of erroneous deprivation is slight in light of the Petitioner's aggravated felony conviction and the fact that he does not dispute this conviction. Consequently, additional procedural safeguards would be of little value to a criminal alien, such as the Petitioner here, whose removal from the country is a virtual certainty.").

[176] 538 U.S. 510, 523-25 (2003) (upholding the constitutionality of Section 236(c) of the INA, which requires that certain aliens be detained for the period necessary for their removal proceedings, without providing for individualized determinations as to whether the aliens presented a flight risk). In *Demore*, the Court specifically distinguished *Zadvydas* (which addressed detention of aliens subject to removal orders, as opposed to aliens currently in removal proceedings) on the grounds that the aliens challenging their detention following final orders of deportation were ones for whom removal was "no longer practically attainable," and the detention was "indefinite" and "potentially permanent." For more on how certain federal appellate courts have construed Section 236(c) subsequent to the *Demore* decision, see CRS Legal Sidebar WSLG524, *How "Mandatory" Is the Mandatory Detention of Certain Aliens in Removal Proceedings?*, by (name redacted) and (name redacted).

[177] 342 U.S. 524, 538 (1952). *See also* Hermanowski v. Farquharson, 39 F. Supp. 2d 148, 157-58 (D. R.I. 1999) (collecting cases and, particularly, discussing the Court's decision in *Carlson*).

least in certain circumstances, the constitutionality of provisions of the INA authorizing or requiring the detention of certain aliens pending a decision on their removability or removal proceedings, as previously discussed.[178]

Because there are potentially significant interests involved on the part of the alien *and* the government, the procedural safeguards associated with the issuance of detainers could play a significant role in the court's analysis of any claim that aliens held pursuant to immigration detainers have been deprived of their liberty without due process of law.[179] The nature of these procedural safeguards has evolved over the years, however, as the federal government has amended its detainer form and practices (largely in response to criticism of the recently discontinued Secure Communities program).[180] In particular, Form I-247 was amended in June 2011 to include the option to request that a copy of the detainer be provided to the alien who is the subject of the detainer.[181] Previously, advocates for immigrants' rights had noted that persons subject to detainers were not always aware that detainers had been lodged against them.[182] Even with the June 2011 amendments, however, aliens only have notice of an ICE detainer *after* it has been issued, not *prior* to its issuance. In addition, in December 2011, ICE established a toll-free hotline that detained individuals can call if they believe they are U.S. citizens or victims of a crime.[183] This hotline can be seen as responding to criticisms that state and local officials have impinged upon the rights of aliens subject to detainers by using the issuance of a detainer as grounds for holding an alien in excess of 48 hours.[184] The hotline would apparently give certain aliens the opportunity to contest the issuance of a detainer for them. However, there does not appear to be any formal procedure associated with calls to this hotline, and whatever procedure there might be occurs *after* the issuance of a detainer. Whether these procedural safeguards are adequate to protect against erroneous deprivations of persons' liberty rights remains to be seen. It is also unclear what weight, if any, a court might accord to the fact that persons whom ICE seeks to remove from the United States generally receive a Notice to Appear and have their cases heard before immigration judges prior to their removal. These procedures have generally been seen as providing due process to the individuals involved, although it is unclear whether a court would view the existence of due process in future removal proceedings as sufficient to protect against deprivations of aliens' liberty interests prior to the commencement of such proceedings.[185]

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[178] *See supra* notes 149-151 and accompanying text.

[179] *See, e.g.*, Moreno v. Napolitano, Complaint, *supra* note 11, at ¶¶ 22-23; Uroza v. Salt Lake County, First Amended Complaint, *supra* note 11, at ¶ 31; Brizuela v. Feliciano, Petition, *supra* note 11, at ¶¶ 43-49. Whether the claim is brought against the federal, or a state or local, government could also be significant, since states and localities may have fewer procedural safeguards associated with their detainer practices than the federal government. *But see Connecticut Adopts Protocols for Dealing with Ice's Secure Communities Program*, *supra* note 10 (noting the adoption of a protocol whereby state officers determine whether certain conditions are satisfied before holding a person pursuant to an ICE detainer (e.g., whether ICE has issued an arrest warrant for the alien, whether there is an outstanding deportation order, etc.).

[180] *See, e.g.*, Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy, *supra* note 9, at 10-12.

[181] Immigration Detainer—Notice of Action (6/11), *supra* note 45.

[182] *See supra* note 48 and accompanying text.

[183] ICE Establishes a Hotline for Detained Individuals, *supra* note 54.

[184] *See, e.g.*, Uroza v. Salt Lake County, First Amended Complaint, *supra* note 11, at 68.

[185] *But see* Souleman v. Sabol, No. 3:09-cv-1981, 2010 U.S. Dist. LEXIS 24258 (M.D. Pa., March 16, 2010) (finding that the petitioner "has received all the process that is due to him" given that he has had "several chances" to present evidence at removal hearings, had the opportunity to challenge his detention and release on bond before an immigration judge, and will have the opportunity to challenge his detention in upcoming hearings).

Conclusion

Numerous questions about immigration detainers have been raised recently as a result of the Secure Communities program. These questions include (1) whether DHS's detainer regulations and practices are beyond its statutory authority; (2) whether states and localities are required to comply with immigration detainers; (3) who has custody of aliens subject to detainers; and (4) whether detainer practices violate aliens' constitutional rights.

The Obama Administration's recent announcement that it is discontinuing the Secure Communities program and replacing it with a new Priority Enforcement Program (PEP) seems likely to lessen the salience of at least some of these questions. Immigration detainers will still be used with the PEP program, but generally only when an alien has been convicted of (rather than just arrested for) certain "priority" offenses. Further, under PEP, detainers will generally be used only to request that state and local law enforcement officials notify ICE prior to the alien's release from custody for the state or local offense, rather than to request that state and local officials hold the alien for a period of up to 48 hours (excluding weekends and holidays) so that ICE may assume custody. Detainers may, however, continue to be used to request holds in cases where (1) the alien is subject to a final order of removal, or (2) there is probable cause to believe the alien is removable.

Even this more limited use of detainers could continue to raise questions in particular cases, though. Note also that future administrations could adopt different policies as to the use of immigration detainers, and some Members of Congress have recently introduced legislation that could potentially result in increased use of such detainers.[186]

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[186] *See, e.g.*, Michael Davis, Jr. in Honor of State and Local Law Enforcement Act, H.R. 1148, 114th Cong., §111, (authorizing states and localities to issue detainers "allow[ing] aliens who have served a prison sentence under State or local law" to be held until DHS can take custody, as well as to hold "criminal aliens" who are inadmissible or deportable for up to 48 hours (excluding weekends and holidays) in order to effectuate their transfer to federal custody).