

Local Government Obligations Under the Immigration Reform and Control Act of 1986

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Background

- ▶ The Immigration Reform and Control Act (IRCA), also known as the Simpson–Mazzoli Act, was enacted in 1986 after a period of frustration with the Immigration and Naturalization Act, which had been in existence since the 1950s.
- ▶ Most of the present system of immigration control and enforcement dates from the 1986 Act.
- ▶ The Antiterrorism and Effective Death Penalty Act of 1996 made minor changes to the system.
- ▶ The Patriot Act (2002) made no changes but transferred the functions of the INS to the Homeland Security Department.
- ▶ INS became “Immigration and Customs Enforcement” (ICE).

Background

- ▶ One area where local government frequently interacts with the federal immigration laws is the area of incarceration and detention.
- ▶ As a result, the Santa Fe County Adult Detention Facility (SFCADF) has extensive experience with federal immigration laws but since 2008 has had a very low level of cooperation with ICE concerning the identification, interview or detention of aliens.
- ▶ This minimal level of cooperation has periodically provoked criticism of the SFCADF and its policies.

Background

- ▶ Purpose of this presentation is to put a legal context on this issue.

Background

- ▶ What is required and what is optional?

Background

- ▶ The obligation of a local government to detain a person pursuant to a detainer issued by ICE is not optional.
- ▶ The obligation to cooperate with an inquiry directed at the immigration status of a person is not mandatory, but it is unlawful to prohibit or restrict communication between local officials and ICE concerning the immigration status of any person.

Detainers – Background

What is a detainer?

A detainer is a notice to a federal, state or local law enforcement agency to temporarily detain a person being held by a law enforcement agency after a person is scheduled to be released so that Immigration and Customs Enforcement may assume custody of that person.

Detainers – Authorization

- ▶ Detainers are authorized by federal law, specifically 8 U.S.C. § 1226(a)(a) (“... an alien *may* be arrested and detained pending a decision on whether the alien is to be removed from the United States ...”).
- ▶ An alien *may* also be arrested pending a decision of whether the alien is to be removed and released on bond or parole pending disposition. 8 U.S.C. § 1226(a)(2)(A).

Detainers – Criminal Aliens

- ▶ Detainer *shall* be issued for any criminal alien (“The Attorney General *shall* take into custody any alien who [has committed certain enumerated crimes].”).
- ▶ Among crimes that this section applies to are crimes for which the alien has been sentenced to a term of imprisonment for at least one year, crimes of moral turpitude (e.g. fraud), any aggravated felony, high speed flight from an immigration checkpoint, serious crimes involving drug addiction or abuse, firearms offenses, domestic violence, child abuse, violation of protective orders, trafficking (human and drugs), security and identification issues, terrorist activities and many other offenses.

Detainers – Regulations

- ▶ ICRA permits the United States Attorney General and the Department of Homeland Security to promulgate regulations in support of activities under the immigration statutes. 8 U.S.C. § 1357(a) (“Under regulations prescribed by the Attorney General, an officer or employee of [ICE] may ... execute and serve any order, warrant, subpoena, summons or other process issued under the authority of the United States [so long as regulations are promulgated that describe in detail which officers possess this authority.]”).

Detainers

- ▶ 8 C.F.R. § 287.7, first promulgated in 1987, serves that function.
- ▶ Describes which officers may exercise authority described in 8 U.S.C. § 1357(a), including border control officers, immigration enforcement agents, deportation officers and others chosen by the Assistant Secretary for ICE (among others).

Detainers

- ▶ Mechanics:
- ▶ An authorized immigration officer may issue a Form I-247, Immigration Detainer—Notice of Action.
- ▶ May be issued to any federal, state or local law enforcement agency.
- ▶ Issuance of the form requires local authorities to detain the person who is the subject of the form pending further action by ICE.

Detainers

Detainers have several purposes:

1. Notification: “The detainer is a *request* that [the] agency advise [DHS] prior to release of [an alien in custody], in order for [DHS] to arrange to assume custody ...” 8 C.F.R. § 287.7(a).

Detainers

Detainers have several purposes:

2. Temporary detention: “Upon a determination by [DHS] 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 not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by [DHS].” 8 C.F.R. § 287.7(d).

Detainers

Detainers have several purposes:

3. Information: Local law enforcement agencies *may* provide “documentary records and information available from that agency that reasonably relates to the alien’s status in the United States” or that tends to show that an alien has been convicted of a crime or committed some other act “that renders the alien inadmissible or removable.” 8 C.F.R. § 287.7(c).

Detainers

- ▶ The obligation to detain upon receipt of a detainer is not optional (“upon issu[ance] of a detainer ... such agency *shall* maintain custody of the alien ...). 8 C.F.R. § 287.7(d).
- ▶ Notification and information sharing are not requirements, and the SFCADF has not, since 2008, notified ICE of a release or shared information with ICE concerning incarcerated persons.

Detainers –SFCADF

- ▶ ICE reviews the intake records of the SFCADF daily to determine whether persons of interest to ICE are incarcerated in the facility.
- ▶ Once a person of interest is identified and ICE verifies that the person consults its databases and determines the person meets its criteria, a detainer is issued to SFCADF.
- ▶ SFCADF holds the person no more than 48 hours after the normal release date and notifies ICE that it is holding the person.
- ▶ ICE assumes custody of the person, and its normal process for processing persons under its custody proceeds.

Prosecutorial Discretion

- ▶ ICE has discretion whether to issue a detainer.
- ▶ Recent guidelines issues by ICE show that ICE intends to focus its discretion on aliens who pose a danger to national security or are a risk to public safety.
- ▶ First priority under the new guidelines will be aliens suspected of terrorism or espionage or who pose a danger to national security.

Prosecutorial Discretion

- ▶ Also given priority are persons convicted of crimes, “with a particular emphasis on violent criminals, felons and repeat offenders;” “persons not younger than 16” who participate in “organized criminal gangs;” persons subject to outstanding warrants; and aliens who pose a “serious risk to public safety.”

Prosecutorial Discretion

- ▶ Also given priority are Level 1 and Level 2 offenders defined by the Secure Communities Program, which include aliens convicted of aggravated felonies, two or more crimes punishable by more than one year in prison, and aliens convicted of three or more misdemeanors.

Prosecutorial Discretion

- ▶ Numerous factors are to be considered, including “the circumstances of the person’s arrival in the United States,” the person’s “ties and contributions to the community,” including relevant family relationships, the person’s “ties to the home country,” whether the person has “a U.S. citizen or permanent resident spouse, child or parent,” as well as numerous other factors.

The Fine Line

- ▶ 8 U.S.C. § 1373(a) (1996) (IRCA) states that a “... local government entity or official *may not prohibit, or in any way restrict*, any governmental entity or official from sending to, or receiving from [ICE] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”
- ▶ 8 U.S.C. § 1644 (1996) states that “... no ... local government entity *may be prohibited, or in any way restricted*, from sending to or receiving from [ICE] information regarding the immigration status, lawful or unlawful, of an alien in the United States.”

Reimbursement – Detainers

- ▶ SFCADF is partially reimbursed for holding persons pursuant to detainers. Last fiscal year, the County received over \$75,000 from USDOJ.

Are Detainers Constitutional?

- ▶ *Printz v. United States*, 521 U.S. 898 (1997).
- ▶ *Printz* concerned the “Brady Bill” which required local law enforcement agencies to administer the handgun registration requirements of that law.
- ▶ It was held unconstitutional by the United States Supreme Court on the grounds that Congress was without authority to “compel the States to enact or enforce a federal regulatory program ... or circumvent that prohibition by conscripting the State’s officers directly.”
- ▶ Detainers are the only mandatory aspect of IRCA and do not require a local officer to enforce a federal regulatory program. ICE enforces the program, through its personnel.
- ▶ It is likely that detainers are constitutional under *Printz*.

Are Detainers Lawful?

Questions have periodically been raised whether 8 C.F.R. § 287.7(d) applies absent a cooperative agreement or other relationship with ICE:

- ▶ The structure of immigration statutes shows that duty of local government to adhere to 8 C.F.R. § 287.7(d) exists independently of an agreement.
- ▶ While 8 U.S.C. § 1357(g)(1952, as amended) authorizes the United States to enter into an agreement with a local government to apprehend aliens, this is independent of the responsibility of local governments to detain aliens as ordered by the appropriate government officials.

Conclusions

- ▶ The obligation of a local government to detain pursuant to a detainer issued by ICE is not optional.
- ▶ The obligation to cooperate with an inquiry directed at the immigration status of a person is not mandatory, but it is unlawful to prohibit or restrict communication between local officials and ICE concerning the immigration status of any person.
- ▶ Enforcement guidelines recently promulgated by ICE clarify when a detainer will be issued, and discretion to issue a detainer will be exercised according to priorities established by ICE, with top priority assigned to issues of national security and persons with significant criminal convictions.
- ▶ A cooperating local government is reimbursed for its expenses detaining persons pursuant to 8 C.F.R. § 287.7(a).