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ARTICLE

DOES THE PRIORITY ENFORCEMENT PROGRAM SOLVE THE CONSTITUTIONAL PROBLEMS WITH ICE DETAINERS?

SIRINE SHEBAYA*

INTRODUCTION

In November 2014, President Obama issued a long-awaited executive action on immigration. The executive action included two critical components: first, a grant of deferred action to qualifying undocumented parents of U.S. citizens and Lawful Permanent Residents and to persons who entered the United States as children; and second, a series of changes to pre-existing enforcement priorities and mechanisms. Although the deferred action component was not implemented and is currently still embroiled in litigation, the administration implemented the new enforcement priorities.

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3. Following Obama’s announcement of executive actions on immigration, Texas and twenty-five other states sued challenging the legality of the expanded deferred action programs. The district court issued an injunction barring the Obama administration from implementing the program, in an opinion that was riddled with misunderstandings of key terms and of immigration law more generally. A divided panel of the Fifth Circuit sustained the district court’s ruling. The Supreme Court challenge ended in a 4-4 tie with no decision, effectively eviscerating Obama’s attempt to provide deferred action to qualifying undocumented immigrants. The enforcement portions of Obama’s executive action, however, were untouched by this litigation and went forward.

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in relatively short order, including—in perhaps the most widely advertised aspect of the executive action—“ending” a much-reviled state-federal collaboration program, Secure Communities, and replacing it with the new Priority Enforcement Program.4

Prior to this change and even to this day, legal analyses of state and local law enforcement collaboration with federal immigration authorities have rightly focused primarily on the legality or constitutionality of immigration detainer requests—meaning, requests from immigration authorities to local law enforcement agencies for continuing detention of immigrants beyond their release date for forty-eight hours, exclusive of weekends and holidays.5 Under the previous system, it had become fairly clear that most, if not all, local detention of immigrants on the sole authority of these administrative requests were unconstitutional.6 But the new system put into play a few different types of notice and hold requests, modifying aspects of the old detainer system that so far have gone largely unanalyzed from a constitutional perspective. So how, if at all, do these changes affect the legal landscape? Has the new system essentially cured the constitutional problems with U.S. Immigration and Customs Enforcement (ICE) detainers issued under the Secure Communities program? Or do these problems persist even under the Priority Enforcement Program? This paper explores and analyzes emerging legal issues relating to the legality of notification and detention requests, concluding that many aspects of these practices continue to run afoul of basic constitutional protections.

as planned. For an excellent analysis of the decision and its implications (as well as an excellent overview of the history of prosecutorial discretion more generally), see Shoba S. Wadhia, Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas, 36 IMMIGR. & NAT’LY L. REV. 94 (2015).


I. A BRIEF OVERVIEW OF CONSTITUTIONAL CHALLENGES TO ICE DETAINERS

Since this topic has received very extensive treatment elsewhere over the past few years, this section will provide only a brief summary of the key constitutional challenges that have been raised against reliance on immigration detainer requests to authorize continued detention of immigrants beyond their release date.

An immigration detainer, also known as an ICE detainer, an ICE hold, an immigration hold, or an ICE hold request, is a paper form sent from federal immigration enforcement authorities to state or local law enforcement agencies requesting that they detain the person named in the detainer for forty-eight plus hours after their scheduled release date—for example, after the end of a sentence, at the time of posting bail, or after the person is acquitted or has charges dismissed. These requests are issued by ICE agents, not by a judge or other neutral magistrate, and are not reviewed by any judicial authority. They are not warrants and, unlike criminal detainers, are also not supported by or based on an underlying warrant in the originating jurisdiction. The requests are not mandatory and merely ask that state and local agencies, at their discretion, continue to detain individuals of interest for ICE’s convenience, so that they may come and arrest them during the additional forty-eight plus hour timeframe after their criminal charges are resolved or they are otherwise set to be released.

The most well-established constitutional problems with detention on the sole basis of an ICE detainer request have stemmed from the fact that, at least under the old regime, such requests did not meet basic Fourth Amendment and due process requirements: they were not based on probable cause, not supported by oath or affirmation, and not reviewed by a judge or neutral magistrate; there was no presentment to a judge or neutral magistrate within forty-eight hours and no notice or mechanism for challenging the basis for the additional detention time. Under the Fourth Amendment, a warrant of arrest authorizing detention must be issued based on probable cause, supported by oath or affirmation of the arresting officer, and reviewed by a judge or neutral magistrate. Thus, arrest on the basis of an ICE detainer is...

7. See Lasch, Litigating, supra note 5; Lasch, Preempting, supra note 5; Lasch, Federal Immigration Detainers, supra note 5.
9. See American Civil Liberties Union of Maryland, supra note 6.
10. See id.
11. See id.
12. Id.
tantamount to a warrantless arrest, which ordinarily has to be justified by exceptional circumstances. But even assuming such exceptional circumstances exist initially, detention on the basis of an ICE detainer does not even meet the basic Fourth Amendment requirements for a warrantless arrest: probable cause and presentment before a neutral magistrate within at most forty-eight hours of arrest—**inclusive** of weekends and holidays.

Moreover, immigration detainer requests under the old system also did not meet due process requirements under the Fifth and Fourteenth Amendments, notably the requirement that any deprivation of liberty be accompanied by notice and an opportunity to contest the validity of the deprivation. In practice, they also, in many places, appeared to violate Equal Protection requirements—with most detainers being issued against Latino or Hispanic origin persons at a rate far disproportionate to their share of the immigrant population, in some cases as a result of well-documented racial profiling by state or local law enforcement authorities. Finally, ICE detainer requests also raised Eighth Amendment concerns insofar as they frequently resulted in denial of bail to persons who would otherwise easily have been released on bond or other conditions.

More than a decade of concerted advocacy and litigation on these issues eventually resulted in a series of federal court decisions recognizing that detention on the sole basis of an ICE detainer request violates the Fourth Amendment. A few jurisdictions, most notably the state of California, also enacted legislation prohibiting or limiting compliance with ICE detainers, both because of legal concerns and because of a sense that such collaboration undermined community trust in local law enforcement and went beyond the role of state and local law enforcement agencies by involving them too intimately in federal immigration enforcement efforts. The federal court decisions especially had a dramatic impact, vitalizing local

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14. See id.
16. See Lasch, Litigating, supra note 5; Lasch, Preempting, supra note 5; Lasch, Federal Immigration Detainers, supra note 5; American Civil Liberties Union of Maryland, supra note 6.
advocacy and resulting in a wave of jurisdictions across the country issuing opinions and policies declining to detain immigrants for ICE on the basis of ICE detainer requests in order to avoid liability for constitutional violations.21 Most jurisdictions began to require ICE either to make a showing of probable cause or to provide a warrant signed by a federal judge in order to continue detention of an individual in their custody who is otherwise scheduled for release.22 By the end of 2014, more than 300 jurisdictions had stopped detaining individuals on the basis of ICE detainer requests, putting a significant wrench in ICE’s interior enforcement activities, especially against immigrants with no significant criminal history.23

II. THE PRIORITY ENFORCEMENT PROGRAM: WHAT HAS CHANGED AND WHAT HAS NOT

In November 2014, due in no small part to the extensive advocacy around immigration detainer reform that had been taking place and as part of a series of immigration executive actions announced by President Obama, the Secretary of the Department of Homeland Security announced the “end” of the Secure Communities program and the start of its replacement with the new Priority Enforcement Program.24 The announced changes were two-fold: first, a series of changes to existing enforcement priorities, and second—at least as presented in the original memorandum—a significantly revised way of using notification and detainer requests to state and local law enforcement agencies.

Although touted as an end to Secure Communities, neither of these changes affected the Secure Communities program, which was always about automatic fingerprint interoperability, such that any fingerprints uploaded to the National Crime Information Center database were automatically forwarded to the Department of Homeland Security (DHS) to be checked for immigration-related matters.25 The result is that anyone fingerprinted on the state or local side—for example, upon booking into a detention facility or at a police station—would still have their information


22. Id.

23. See Immigrant Legal Center Resource, supra note 22.

24. See Johnson, supra note 4 (see opening paragraphs).

transmitted automatically to immigration authorities. Under the Priority Enforcement Program, that system remains firmly in place.

But under the old regime, immigration detainer requests came back indiscriminately, essentially against anybody identified as an immigrant or a person of possible interest to ICE—with so little scrutiny that U.S. citizens, non-deportable Lawful Permanent Residents, and persons without any criminal convictions ended up getting caught in the dragnet. No distinction was made between persons arrested for traffic incidents and persons arrested for the most serious crimes: everyone who could potentially be removable was a subject of interest to ICE. What the Priority Enforcement Program ostensibly would do is change that dynamic. Instead of sending back detainer requests indiscriminately, DHS and ICE would, according to the memorandum, now mostly just request notification of release dates rather than additional detention. In addition, such requests would only be directed at enforcement priorities and would only be issued after conviction. Only in “special circumstances” would immigration authorities issue detainer forms requesting additional detention beyond the release date. The administration issued two new forms: I-247N which requests only notification of release dates, and I-247D which requests forty-eight hours of additional detention.

26. See id.; American Civil Liberties Union of Maryland, supra note 6.
27. See Johnson, supra note 4.
30. See Johnson, supra note 4.
31. Id.
32. Between 2009 and 2012, the detainer form underwent a few changes intended to address some of the major legal challenges that were being litigated. For example, ICE progressively added further detail to the boxes that were checked indicating the reason the subject was being sought by ICE, added a notice requiring that local law enforcement provide a copy of the detainer to its subject, added an 800 number for persons with an immigration detainer to call and challenge the detainer if they believe it was wrongfully issued, etc. With the Priority Enforcement Program, a newer version was issued incorporating all of these changes and ostensibly adding a probable cause requirement for issuance of the form. See Revised 2012 ICE Detainer Guidance: Who It Covers, Who It Does Not, and the Problems That Remain, Immigr. Legal Res. Cnt., https://www.ilrc.org/sites/default/files/resources/detainer_guidance_plus_addendums.pdf (last visited Apr. 21, 2017); Immigration Law Enforcement Authority for Local Law Enforcement Agencies, Immigr. Legal Res. Cnt. (Dec. 2014), https://www.ilrc.org/sites/default/files/resources/lea_immig_faqs_20150318.pdf.
The new enforcement priorities as described in the memorandum are:

anyone convicted of a felony or aggravated felony, anyone with gang-related or terrorism charges or offenses, or attempted unlawful entry (Priority 1); any three misdemeanor convictions, any single “significant” misdemeanor (including Driving Under the Influence, domestic violence-related convictions, or any misdemeanor for which the person served ninety days or more of active jail time), or unlawful entry since January 2014 or “significant abuse” of a visa or of the Visa Waiver Program (Priority 2); and anybody who has been issued a final order of removal since January 1, 2014 (Priority 3).34 Many of the offenses included in this list are very minor,35 and the list also puts on par persons whose offenses are only related to immigration (for example, unlawful entry or a final order of removal) with those convicted of the most serious criminal offenses.36 The memorandum also stated, however, that individual equities should be taken into account in decisions about prosecutorial discretion, especially for Priority 2 and 3 individuals.37

As implementation got underway, moreover, it became clear that detainer requests were being issued routinely and that in at least some jurisdictions, notification forms were not being used at all.38 In meetings with advocates challenging this practice, DHS officials further clarified that “special circumstances” meant only the existence of probable cause of removability—which does not conform with the initial announcement that detainers would only rarely be used.39 At least in theory, however, both notification and detainer request forms were going to be issued only against enforcement priorities, which advocates hoped would mean both a decrease

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35. For example, three simple misdemeanors, which could include simple trespass by a homeless person, minor theft under $100, and other similar offenses.
36. This notably includes individuals who entered the United States fleeing violence in Central America but who were unrepresented and received orders of removal even though they have meritorious cases or who did not appear at their court hearings due to lack of notice and were issued orders of removal in absentia. It also includes persons who cross the border to reunite with family or because they are for one reason or another unable to qualify for asylum but are legitimately fleeing war or violence in their home countries.
37. See Johnson, supra note 4; see also Johnson, supra note 34.
38. Advocates report that this is the case in Los Angeles County, California, in Montgomery County, Maryland, and in other places.
39. See, e.g., Dep’t Homeland Security, Priority Enforcement Program, https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf (stating that DHS will issue detainer request when subject is within enforcement priorities and ICE believes it has probable cause to detain—a far broader description than the original memorandum, which stated it would only issue detainer requests in special circumstances, not for all enforcement priorities). DHS officials confirmed in meetings with advocates that this was in fact their interpretation of the memorandum language around “special circumstances.”
in targeting of immigrants through state and local law enforcement and a
decrease in targeting of immigrants with little or no criminal histories.40

To further confuse matters, DHS then issued and began to use a new
form—Form I-247X—that appears to circumvent entirely the process and
priorities laid out in the executive action memoranda. The administration
announced that this form was intended to facilitate transfer of subjects of
interest who did not necessarily meet enforcement priorities from “cooper-
ing” jurisdictions—meaning, jurisdictions that were willing to continue
routing immigrants to ICE upon any contact with state or local law
enforcement.

So what is the upshot of all of this? What has really changed under the
Priority Enforcement Program? The enforcement grounds have continued
to be quite broad, and practitioners continue to see individuals with no crimi-
nal record or with only minor offenses swept up in the mix.41 Moreover,
asylum seekers entering the country and individuals with no criminal
records, but a final order of removal, have continued to be targets as well.42
However, the enforcement priorities have narrowed somewhat the range of
enforcement targets; the new forms have incorporated some important
changes to be discussed more fully in the next section; detainer use does
appear to have declined; and the timing and circumstances of issuance of
detainer requests has changed, in the sense that such requests are issued
only upon conviction in most cases and only against priority individuals,
except in the case of Form I-247X.43 In addition, the detainer form has now
adopted a bright-line forty-eight-hour time frame, with no exclusions for

40. See, e.g., Press Release, Migration Pol’y. Inst., Revisions to DHS Immigration Enforce-
ment Priorities Could Shield Vast Majority of Unauthorized Immigrants from Deportation (July
orities-could-shield-vast-majority-unauthorized.

sites/default/files/resources/life_under_pepcomm.pdf (last visited Apr. 21, 2017).

42. See, e.g., Jerry Markon & David Nakamura, US plans raids to deport families who
surged across border, WASH. POST (Dec. 13, 2015), https://www.washingtonpost.com/politics/us-
plans-raids-to-deport-families-who-surged-across-border/2015/12/23/0346954-9b9d-11e5-8058-
480b572b4aae_story.html; Press Release, DHS Press Office, Statement by Secretary Jeh C. John-
son on Southwest Border Security (Jan. 4, 2016), https://www.dhs.gov/news/2016/01/04/state-
ment-secretary-jeh-c-johnson-southwest-border-security; Lisa Rein, U.S. Authorities Begin Raids,
s-authorities-begin-raids-taking-121-illegal-immigrants-into-custody-over-the-weekend/?utm_
term=19b54b7e28e8; Wendy Feliz, DHS Begins Raids and Deportations of Central American
Mothers and Children, AM. IMMIGR. COUNCIL (Jan. 4, 2016), http://immigrationimpact.com/2016/
01/04/immigration-raids/; Press Release, American Immigration Council, After Successfully
Delaying the Deportations, Groups Demand Meeting with DHS Sec. Johnson (Jan. 6, 2016), https://
www.americanimmigrationcouncil.org/news/after-successfully-delaying-deportations-groups-de-
mand-meeting-dhs-sec-johnson.

43. See Further Decreases in ICE Detainer Use Still Not Targeting Serious Criminals, TRAC
IMMIGR. (Aug. 28, 2015), http://trac.syr.edu/immigration/reports/402/ [hereinafter Further De-
creases, TRAC IMMIGR.]; Reforms of ICE Detainer Program Largely Ignored by Field Officers,
TRAC IMMIGR. (Aug. 9, 2015), http://trac.syr.edu/immigration/reports/432/ [hereinafter Reforms,
TRAC IMMIGR.].
weekends and holidays, and the forms include clearer language about local discretion, notice requirements, and the fact that the existence of an immigration detainer request should not be used for state or local custody and classification decisions.

Though these changes are not insignificant, much unfortunately has remained the same. Fingerprint Interoperability—in other words, the program formerly known as Secure Communities—remains very much in place. And, as discussed more fully below, there is still no judicial review or presentment to a neutral magistrate accompanying the issuance of detainer forms, and it is doubtful that the new forms fully comply with Fourth Amendment probable cause requirements. Detainer forms are still being issued against individuals with insignificant or no criminal histories, and the prosecutorial discretion consideration of individual equities portion of the memorandum appears to have gone completely by the wayside.

But regardless of the ongoing policy and community-based criticisms of the new system, have the changes incorporated into the Priority Enforcement Program changed the legal landscape in any significant manner? Do the new forms and mechanisms resolve the constitutional problems with ICE detainers? The next section examines each of the forms in turn to analyze this question, concluding that although the problems posed by each of the forms is somewhat different, none of them leave ICE free and clear of ongoing constitutional concerns.

III. CONSTITUTIONAL DIMENSIONS OF THE NEW ICE DETAINER PRACTICES

Each of the three forms—the notification only form (I-247N); the detainer request form (I-247D); and the transfer between cooperating jurisdictions form (I-247X) raises its own distinctive set of legal and practical challenges. This section will explore these challenges and conclude that although some aspects of the old enforcement regime have changed, the new regime remains vulnerable to constitutional challenges.

44. This appears to be an attempt to bring the practices into conformity with the bright-line forty-eight-hour rule articulated in Gerstein. It is insufficient, however, because there is still no presentment to a neutral magistrate within forty-eight hours under this scheme—only pickup by ICE after that time. See Form I-274X: Request for Voluntary Transfer, DEP’T HOMELAND SECURITY, supra note 33.

45. See supra note 33.

46. See infra Part IV.

A. Notification Only (Form I-247N)

The most significant difference between the old regime and the new is the institution of a new practice of seeking only notification of release dates from state and local jurisdictions in certain instances, rather than actively requesting additional detention time. The form itself lists several specific reasons for the request, and hues closely to the enforcement priorities. The question here then is whether simply notifying ICE of a release date may expose state and local authorities to liability for constitutional violations, and whether seeking such notification may expose ICE to the same.

Since information exchanged between law enforcement agencies on its own does not appear to constitute a seizure or a deprivation of liberty, at least under ordinary circumstances, notification requests seem, at least at first blush, to pass constitutional muster. Legal complications arise, however, when considering predictable consequences of this practice and the ways in which it is likely to involve or give rise to unconstitutional practices that could expose both ICE and state and local agencies to liability.

As an initial matter, there is some significant concern that jurisdictions that do not have limited detainer policies will routinely detain individuals for additional time based on notification requests, by force of habit, overzealousness, or because they are not properly trained or alerted to the difference between the two requests. To the extent such additional detention is predictable and tolerated or encouraged by ICE, it could well raise constitutional concerns relating even just to the practice of issuing notification requests.48

Relatedly, just as with Secure Communities, the incentives to racially profile immigrants in order to get them into booking centers and on ICE’s radar remains the same whether the request is for notification or for additional detention time.49 If the catalyst for this racial profiling is to land immigrants into deportation proceedings, then there is no difference whether the request is for additional detention or for notification only. To the extent Fifth Amendment Equal Protection concerns are raised by these practices and the various agencies’ involvement in or condoning of them,

48. Malley v. Briggs, 475 U.S. 335, 343–46, 344 n.7 (1986) (each actor is “responsible for the natural consequences of his actions”; finding that officer who applied for arrest warrant may be liable for resulting arrest if a reasonable officer would have known the application lacked probable cause).

such problems are not cured by the simple fact that notification requests do not involve a request for additional detention time.\footnote{50} Additionally, a practice that appears to be emerging as a response to notification requests in some places is “pre-release” transfer to ICE, or transfer before the release date or even during processing for release.\footnote{51} This practice raises a number of concerns about liability. As an initial matter, state and local jurisdictions may be considered to be on notice that ICE has systematically, at least in the past, issued requests to local jurisdictions without probable cause,\footnote{52} and that none of their requests comply with the Fourth Amendment requirements of judicial review or presentation before a neutral magistrate.\footnote{53} Under these circumstances, a policy of facilitating transfers to ICE without requiring a separate probable cause determination at any point during the agency’s custody of the detainee would expose the transferring jurisdiction to liability, since it would show deliberate indifference to the known prospect that the person’s Fourth Amendment and due process rights are potentially being violated by the receiving agency. Thus, in cases where ICE does not have probable cause to arrest or otherwise violates an arrestee’s constitutional rights, the local agency causally responsible for the transfer could be liable for the violation as well.\footnote{54} This reasoning would seem to apply especially well where a policy of transfer to ICE during state or local custody is put in place specifically in an attempt to circumvent local liability for known constitutional violations by the receiving agency.

Moreover, the act of removing someone from state or local custody and transferring them to another agency likely itself constitutes a new arrest for which the locality would need probable cause of a new crime, and for which all the same Fourth Amendment requirements would apply.\footnote{55} Thus, transfers in the absence of these conditions may also expose the local jurisdiction to liability.

\footnote{50. See \textit{Melendres}, 784 F.3d 1254 (finding racial profiling, equal protection violations by local Sheriff).}
\footnote{51. In Virginia, for example, the state legislature enacted a law mandating such transfers. See \textit{Va. Code § 53.1-220.2}.}
\footnote{53. See supra Parts II & III.}
\footnote{54. See \textit{City of Canton, Ohio v. Harris}, 489 U.S. 378, 388–389 (1989) (municipality may be liable for policies that manifest deliberate indifference to the rights of citizens); \textit{Malley}, 475 U.S. at 343–46, 344 n.7 (each actor is “responsible for the natural consequences of his actions”; finding that officer who applied for arrest warrant may be liable for resulting arrest if a reasonable officer would have known the application lacked probable cause).
\textit{See supra} Parts II & III.}
\footnote{55. \textit{See, e.g.,} \textit{Lee v. City of Los Angeles}, 250 F.3d 668, 677–78, 685 (9th Cir. 2001) (standing for the proposition that transfer on the basis of an out-of-state warrant constitutes a new seizure by the transferring agency); \textit{Anaya v. Crossroads Managed Care Sys.}, 195 F.3d 584, 592 (10th Cir. 1999) (“A legitimate-though-unrelated criminal arrest does not itself give probable cause to detain the arrestee [for a separate civil purpose]”).}
Finally, any pretextual delays in processing a person in order to give ICE time to come and collect the person subsequent to a notification request would be entirely illegal. As with prolonged traffic stop cases, prolonging a person’s detention, even by a matter of minutes or hours, for a purpose unrelated to the original custody—in this case, in order to allow ICE time to come pick them up—would violate the Fourth Amendment.56 This reasoning applies by analogy to pretextual delays in processing a detainee for release once there is no longer any valid state or local reason for detention.

In all these cases, jurisdictions have an obligation to exercise their own discretion because they will bear full responsibility and liability for any constitutional violations that result both from their practices and from ICE practices they participated or cooperated with, and ICE does not indemnify local jurisdictions when they are sued for constitutional violations relating to detention on the sole basis of an administrative ICE request.57

Thus, there are at least some circumstances in which even just notification requests may in practice raise constitutional and local liability concerns.

B. Detention in “Special Circumstances” (Form I-247D), or Detainers

2.0

The next form ICE has issued and begun using to implement the Priority Enforcement Program is the detainer form, Form I-247D. This is the same request for detention that it has used in the past, with two notable differences: first, the request is only for forty-eight hours, not exclusive of weekends and holidays. Second, and more importantly, it includes an explicit probable cause requirement, such that issuing ICE agents must check a box explaining why they believe that probable cause of removability exists in each case. The form also explicitly requires notice to the detainee and provision of a copy of the detainer form.58

56. See, e.g., United States v. DiGiovanni, 650 F.3d 498, 509–11 (4th Cir. 2011) (finding a Fourth Amendment violation where a traffic stop was prolonged for fifteen minutes during which the officer “did not diligently pursue the traditional purposes of a traffic stop” but instead prolonged the detention by asking “numerous questions” about drugs “instead of either completing the warning ticket or beginning the driver’s license check”); Rodriguez v. United States, 135 S. Ct. 1609, 1613 (2015); Santos v. Frederick Cty. Bd. of Comm’rs, 725 F.3d 451, 458 (4th Cir. 2013).


Although initially touted as a form that will only be used in “special circumstances,” administration officials subsequently clarified that they may issue detainers anytime they have probable cause of removability. Needless to say, there is nothing particularly “special” about that circumstance, since ICE believes it has probable cause of removability against anyone it regards as potentially subject to removal from the United States for any reason whatsoever, even when such a person may have a strong challenge to deportation or claim to relief.

DHS and ICE clearly appear to believe that by adding a probable cause of removability requirement, they have addressed the Fourth Amendment concerns established through litigation of detention under the previous forms. The interesting question here, however, is what kind of probable cause is needed to satisfy the Fourth Amendment requirements for arrest and detention by state or local law enforcement agencies. While ICE clearly may seize someone if it has probable cause of removability, the same is not necessarily true for the local holding agency.

In fact, particularly after U.S. v. Arizona, it has become clearer that the requirements for state and local jurisdictions differ significantly from the requirements for federal immigration enforcement agencies, since state and local jurisdictions have no independent authority to enforce civil immigration laws, and since removability is a civil, not criminal matter.59 Thus—as the Maryland Attorney General, for example, concluded in his analysis of this question—state and local law enforcement authorities need probable cause of a new crime in order to effectuate a seizure, which means that probable cause of removability is not sufficient to authorize them to detain anyone past the date they would otherwise be released.60

This means that even if the new detainer form sufficiently discharges ICE’s probable cause obligations, it does not do the same for state and local jurisdictions and continues to leave them liable for Fourth Amendment violations just on that basis alone.

Finally, the new “Detainers 2.0” simply and obviously still do not meet any of the Fourth Amendment judicial review requirements. Since neither oath or affirmation nor review by a neutral magistrate are required for arrest or issuance of an administrative warrant of arrest, detainers still do not meet the Fourth Amendment requirements for a warrant and are unconstitutional for that reason. They further do not meet the Fourth Amendment requirements for a warrantless arrest, which would involve presentment before a neutral magistrate within at most forty-eight hours of arrest.61 The only person before whom an immigrant transferred to ICE will appear is an ICE arresting agent—an employee of the prosecuting agency. Thus, they raise

59. See Lasch, Federal Immigration Detainers, supra note 5.
60. See Letter from Adam Snyder, supra note 21.
the same constitutional concerns that previous iterations of the form raised, since as previously discussed, probable cause has always been one of several requirements for a seizure that complies with the Fourth Amendment. Moreover, there are real questions about whether ICE is applying the appropriate level of scrutiny and due diligence in making its probable cause determinations before issuing these forms. The new detainer forms thus raise very similar or the same constitutional concerns as they did previously, and they may expose both state and local jurisdictions and ICE to liability for constitutional violations.

C. Back to the Twilight Zone (Form I-247X)

Form I-247X is designed to facilitate transfers between “cooperating jurisdictions” and ICE. It essentially represents a return to the old system, where the only requirement is for a “designated DHS official” to believe that removal of the subject of the detainer would serve an important federal interest. Given the stress that DHS Secretary Jeh Johnson and the administration in general have placed on stemming the tide of incoming immigrants along the border, even when they are refugees and asylum seekers, it seems fairly evident that this form is designed to target individuals who do not otherwise meet the enforcement priorities but who may not have authorized immigration status.

By definition, Form I-247X operates only in “cooperating jurisdictions”, bypassing the enforcement priorities and allowing ICE to seek additional detention and transfer of anyone whose removal they seek in jurisdictions that are not inclined to restrict their collaboration with ICE in any way and that are already inclined to route immigrants into deportation proceedings. Unlike both the new detainer form and the notification request forms, it also does not appear to include a post-conviction requirement, thereby raising once again a host of due process concerns relating to the former regime in which persons were held on detainers, denied bail, denied release on bond, or transferred to ICE before the conclusion of their

62. Note also that many advocates have raised concerns that despite what the form says, there is no evidence the right level of due diligence to meet probable cause requirements is being used. In support of this contention see for example Reforms, TRAC IMMIGR., supra note 43. This would raise a separate constitutional concern relating to the existence of probable cause before issuance, which would mirror concerns raised about the previous practice under Secure Communities.

63. See Further Decreases, TRAC IMMIGR., supra note 43; Reforms, TRAC IMMIGR., supra note 43.

64. See, DEP’T OF HOMELAND SECURITY, PRIORITY ENFORCEMENT PROGRAM, supra note 39.

65. See Form I-274X: Request for Voluntary Transfer, DEP’T OF HOMELAND SECURITY, supra note 33.

66. Anecdotal reports seem to validate this concern, although information on use of I-247X is still not widely available.

67. See Form I-274X: Request for Voluntary Transfer, DEP’T OF HOMELAND SECURITY, supra note 33.
criminal proceedings. Their use is also likely to implicate greater equal protection and other ancillary issues (for example, denial of bail) because of prevailing practices in the jurisdictions in which they are used.

This form, therefore, is the clearest manifestation of the degree to which the ostensibly “new” system retains significant vestiges of the old, and as such, does not overcome the Fourth Amendment, due process, or other ancillary constitutional problems posed by the manner in which the Secure Communities program was being implemented. This is especially true of potential uses of Form I-247X, but is also true where detainer forms are issued without sufficient stringency about meeting the specificity and due diligence that a real probable cause determination would require.

IV. CONCLUSION

In its original design and rollout, the Priority Enforcement Program appeared designed to signal a new day in immigration enforcement, where only truly dangerous persons would be targeted, where limited detainer policies would be respected, and where the many legal and policy concerns about the detrimental effects of local collaboration with ICE would be accommodated.

But in implementation, it has turned out to be much different and has imported many of the most serious constitutional problems that plagued the old system. The Priority Enforcement Program never went far enough in the estimation of most advocates, but the way it has been enforced made matters worse by operationalizing a presumption in favor of deportation, by giving no consideration to individual equities in decisions about prosecutorial discretion, and by embracing wholesale a return to the twilight zone of the former regime with the use of Form I-247X as a catch-all exception and the continued implementation of an expansive detainer program with Form I-247D.

Meanwhile, Form I-247N continues the policy and community trust problems that began with the Secure Communities program, and raises its own set of constitutional concerns—due mostly to the fact that it is overlaid on top of a broken criminal justice, policing, and immigration enforcement system, all the flaws of which it imports into the new enforcement priorities.

Thus, although advocates had high hopes, the Priority Enforcement Program does not, at the end of the day, actually solve the constitutional problems with ICE detainers.

68. See supra Part II.

69. Note that even Form I-247X now explicitly requires notice to the subject of the detainer and states that it should not be used in bail, security, and housing determinations. See Form I-274X: Request for Voluntary Transfer, DEP’T HOMELAND SECURITY, supra note 33.