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SPECIAL REPORT

The Faulty Legal Arguments Behind Immigration Detainers

By Christopher Lasch, Esq. | December 18, 2013

In late June 2012, the Supreme Court struck down three provisions of Arizona's SB 1070 and left a fourth vulnerable to future legal challenge. As has been well documented, the Court's rejection of SB 1070 tipped the balance in favor of federal enforcement and away from state and local enforcement of the immigration laws. But this essay explores a less obvious consequence of the Court's decision: its implications for the viability of a critical federal enforcement mechanism: the immigration "detainer."

An immigration detainer is a piece of paper that federal immigration officials send to state and local jails requesting that they continue holding an individual for up to 48 business hours *after* he or she would otherwise be released, so that agents of U.S. Immigration and Customs Enforcement (ICE) can investigate the person's status and assume custody if necessary. Also known as immigration "holds," detainers are the key enforcement mechanism behind federal enforcement initiatives like the Criminal Alien Program and Secure Communities.

There has been considerable confusion as to whether a detainer is a mere request that ICE be notified of a suspected immigration violator's impending release, or a command by ICE that state or local officials hold a prisoner for ICE beyond the time the prisoner would otherwise be released. Independent of that question, however, the Court's decision in *Arizona v. United States* identifies a more fundamental problem: that detainers may violate the Constitution and federal statutes even when honored on a voluntary basis.

Indeed, detainers are invalid in many instances for the same reason the Supreme Court struck down numerous parts of SB 1070—they permit law enforcement action inconsistent with laws enacted by Congress. Moreover, as Justice Anthony Kennedy's majority opinion also makes clear, the use of immigration detainers raises serious problems under the Fourth Amendment, which requires state and local law enforcement officials to have "probable cause" that a person has violated the law before placing him or her under arrest or extending the period of custody. Ironically, then, even as the *Arizona* decision trumpeted the supremacy of the federal government over immigration enforcement, it also cast doubt on the validity of ICE's central mechanism for obtaining custody of individuals targeted for removal proceedings.

Due to these underlying legal problems, many of the "anti-detainer" measures enacted around the country are well founded. For example, numerous municipalities—including Chicago, New York, and San Francisco—now prevent local jails from honoring immigration detainers unless an arrestee has been charged with or convicted of certain criminal offenses. However, to the extent jurisdictions believe they can selectively honor immigration detainers, they may yet be exposed to civil liability. While legally sound in resisting the notion that the federal government can impose any binding obligation on state and local officials, even selective enforcement of detainers may violate the Constitution and the Immigration and Nationality Act (INA).

Jurisdictions can avoid legal liability by following the lead of Cook County, Illinois, which does not honor immigration detainers under any circumstances. Alternatively, jurisdictions can attempt to enact detainer policies crafted to avoid the aforementioned legal problems, such as requiring probable cause that the subject of a detainer has committed a federal crime. Selective enforcement policies, however, could be preempted as efforts to hijack federal enforcement discretion.

Background

How Immigration Detainers Work

Immigration detainers are the principle mechanism for ICE to obtain custody of suspected immigration violators who are initially arrested by state or local law enforcement officials. When ICE learns a suspected immigration violator is in a state prison or local jail, the agency sends a detainer—or "Form I-247"—requesting that the individual be held in custody for an additional 48 hours after he or she would otherwise be released, excluding weekends and holidays. Thus, once suspected immigration violators are entitled to release (e.g. after posting bail or being acquitted of the charges against them), local agencies that choose to honor detainers continue to hold them in custody.

Unlike criminal arrest warrants, which are based upon probable cause and must be issued by a neutral magistrate, detainers can be issued by virtually any ICE officer and without any proof that an inmate is removable from the country. For years, the Form I-247 itself (see excerpt of December 2011 Form I-247 below) allowed federal immigration officials to issue a detainer after merely “[i]nitiat[ing] an investigation” into whether an arrestee is removable. A complaint alleging detainer illegalities in Los Angeles estimated that 78% of detainers issued to the Los Angeles County Sheriff’s Department had the “[i]nitiating an investigation” box checked. (As discussed below, ICE issued revised detainer guidance, accompanied by a new detainer form, following the *Arizona* decision.)



Although detainers have been issued for decades, their use has become increasingly common since 2008 due to the launch and expansion of the Secure Communities program, which routes to ICE all fingerprints taken by local police. When the fingerprints of a local arrestee generate a “match” in federal databases, ICE determines whether to send a detainer to the arresting agency. From less than 15,000 detainers issued in fiscal year 2007, after the implementation of Secure Communities, immigration officials now issue some 250,000 detainers each year.

As the Secure Communities program has expanded across the country, detainers have become the mechanism by which people arrested for minor offenses—such as traffic violations—are held for transfer to ICE agents. As a result, concerns have been raised that the detainer “tail” will wag the street-level enforcement “dog,” encouraging profiling by police. In addition, due to flawed databases on which ICE agents rely, U.S. citizens have been mistakenly held on immigration detainers. And, although the detainer form only purports to authorize continued detention for 48 hours (excluding weekends and holidays), numerous lawsuits have been filed by arrestees who have been detained beyond this period.

The Supreme Court’s Decision in *Arizona v. United States*

The law known as Arizona SB 1070 was enacted and signed by Gov. Jan Brewer in April 2010. Its legality was quickly challenged in federal court, first by a coalition of civil and immigrants’ rights groups, and later by the Obama administration. The administration’s challenge eventually made its way to the Supreme Court, which agreed to consider whether four provisions of SB 1070 were in conflict with—and therefore “preempted” by—federal immigration laws.

Of the four provisions the Supreme Court agreed to review, two have particular relevance to the validity of federal immigration detainers: Section 2(B), which was upheld by the Court, and Section 6, which was struck down. Although the Court reached different conclusions about their legality, the discussion of each provision revolved around a common theme: namely, that law enforcement officers are constrained by Congress’s enactments and the Constitution when detaining and arresting suspected immigration law violators.

Section 2(B) of SB 1070

Section 2(B), also known as the “show me your papers” provision, imposes two distinct obligations on Arizona law enforcement officers. First, it requires officers to attempt to determine the immigration status of any person they have stopped or detained if “reasonable suspicion” exists that the person is unlawfully present in the United States. Second, it requires officers to determine the immigration status of all persons arrested before they are released, regardless of whether they are suspected of being in the country unlawfully. In both circumstances, officers are required to contact federal immigration authorities to determine whether a person is unlawfully present, not make their own determination.

In upholding Section 2(B), the Court emphasized that on its face, the provision required nothing more than communication between state and federal officials, which it described as “an important feature of the immigration system.” In practice, however, Justice Kennedy recognized that Section 2(B) could potentially result in persons being detained “for no reason other than to verify their immigration status.” If officers subjected arrestees to “prolonged detention” to determine their immigration status, the majority made clear that such detentions would violate the Fourth Amendment, which prohibits law enforcement officers from arresting individuals unless they have probable cause to believe they have broken the law. The Court thus left open the door to future legal challenges to Section 2(B) based on how it is applied in practice.

Section (6) of SB 1070

Meanwhile, Section 6 would have authorized Arizona officers to arrest immigrants *without* a warrant if probable cause existed that they had committed a public offense making them removable from the United States.^[xi] In other words, the provision would have authorized Arizona officers to make warrantless arrests based solely on the suspicion of a civil immigration violation.

In striking down Section 6, the Court held that the provision exceeded the careful statutory structure put in place by Congress in the INA, and was therefore preempted. That statutory structure, the Court observed, included explicit allocation of civil immigration arrest authority to state officials—but in carefully limited circumstances. The Court noted that Congress has authorized “287(g)” agreements whereby state and local officers may be authorized to make civil immigration arrests, but only after adequate training in immigration enforcement.

The Court found that not only did Section 6 exceed the specific civil enforcement ability conferred by Congress upon state and local officers, but also the enforcement ability conferred by Congress on *federal* immigration agents to make warrantless arrests. As Justice Kennedy explained in the majority opinion, the INA generally requires immigration officers to obtain an administrative warrant before making an arrest, unless they have reason to believe a suspected immigration violator is “likely to escape before a warrant can be obtained.” Because Section 6 would have given Arizona officers more authority to make immigration arrests than Congress granted even federal agents, the Supreme Court found it to be inconsistent with the system Congress created, and struck Section 6 down as preempted.

The Effect of *Arizona v. United States* on Federal Immigration Detainers

Although the Supreme Court’s ruling in *Arizona v. United States* did not directly address the legality of detainers, the majority opinion nonetheless makes clear that honoring immigration detainers often violates both the Constitution and the INA. Like Section 6 of SB 1070, detainers are inconsistent with the statutory enactments of Congress. And like Section 2(B), detainers raise substantial Fourth Amendment concerns because of the possibility of prolonged detention based on suspected civil immigration violations. Detainers raise additional constitutional concerns not discussed in the *Arizona* decision because they cause individuals to be held in custody for more than 48 hours without an independent probable cause determination, which is a separate violation of the Fourth Amendment.

How Immigration Detainers Violate Federal Immigration Law

Immigration detainers are inconsistent with the statutory system Congress enacted for immigration enforcement. As noted above, the Court in striking down Section 6 of SB 1070 found that Congress had carefully delineated the civil arrest powers of state and local officers, and of federal immigration officials. Today, federal immigration officials often issue detainers in a manner that exceeds Congress’s grant of arrest authority.

As the *Arizona* Court discussed, federal immigration officials may take persons into custody either (1) pursuant to an immigration arrest warrant or (2) when the person is “likely to escape before a warrant can be obtained.” Although holding an individual in custody solely because of an immigration detainer amounts to a warrantless arrest, federal officials frequently issue detainers without regard to the individual’s likelihood of escape. Indeed, ICE’s practice has included filing immigration detainers that are not accompanied by arrest warrants against individuals who are not scheduled to be released for days, weeks, or even months.

Some might argue that persons in the custody of a law enforcement agency should be presumed flight risks, and therefore likely to escape before a warrant can be obtained. While this argument might have force in a particular case, it sweeps too broadly to justify the issuance of detainers in circumstances where immigration officials clearly *can* obtain a warrant before the prisoner’s release. Indeed, a strong case can be made for the opposite presumption, because individuals who are already in the custody of law enforcement officials are much less likely to be able to flee than those who have not yet been arrested.

Additionally, the issuance of a detainer results in prolonged detention not by federal officials, but by state and local officials. Congress has not authorized state and local officials to arrest suspected immigration violators, except in the narrow circumstances the Court noted in *Arizona*. Just as Section 6 purported to authorize state and local officials to effectuate civil immigration arrests beyond any power Congress had delegated to them or even to federal immigration officials, the issuance of immigration detainers exceeds Congress’s carefully crafted statutory structure.

How Immigration Detainers Raise Substantial Constitutional Questions

Under the Fourth Amendment, state and local law enforcement officials generally cannot take a person into custody without probable cause to believe he or she has committed a crime. As importantly, a person subjected to a warrantless arrest is entitled to a reasonably prompt hearing—generally within 48 hours—before a neutral magistrate.

The Supreme Court’s discussion of Section 2(B) makes clear that holding a prisoner under the sole authority of an immigration detainer implicates the Fourth Amendment’s probable cause requirement. It must be noted that Section 2(B), like an immigration detainer, applies generally to circumstances in which the prisoner is already lawfully in state custody. The Fourth Amendment concern is triggered in both instances when it is proposed that state officials prolong detention on the basis of a suspected civil immigration violation. As noted above, in the case of Section 2(B) the *Arizona* Court avoided this constitutional concern by construing Section 2(B) as requiring an inquiry into immigration status only “during the course of an authorized, lawful detention or after a detainee has been released.” With this construction of Section 2(B), the Court found it need not even consider whether prolonged detention would be justifiable if state officials had reasonable suspicion (or probable cause) to believe an immigration *crime* had occurred.

Like Section 2(B), immigration detainers call for prolonged detention by state and local officials even in the absence of proof that an individual is removable. While DHS's most recent detainer guidance states that immigration officials "should" place a detainer only where there is "reason to believe" an individual is subject to removal, this guidance cannot eliminate the substantial Fourth Amendment concern. First, the guidance is expressed not as a legal position of DHS, but as an enforcement priority. The guidance contains an express disclaimer stating that it does not "limit the legal authority of ICE or its personnel" and does not "create any right ... enforceable at law by any party" The guidance also excludes U.S. Customs and Border Protection (CBP) from its ambit, further emphasizing the document's function as an enforcement priority policy position as opposed to a legal position. The guidance also calls for a six-month review, whereupon "ICE will consider whether modifications, if any, are needed."

There is no guarantee, in other words, that ICE will not continue its practice over the past three decades of issuing detainers based upon nothing more than an *initiated investigation* into whether an individual is subject to removal. Notwithstanding the new detainer guidance, detainers allow state and local officials to do precisely what the Supreme Court said Arizona officers could not do when enforcing Section 2(B): subject individuals to "prolonged detention" solely to determine their immigration status.

A second reason the detainer guidance cannot cure this Fourth Amendment problem is that it requires only "reason to believe" the target of a detainer is removable. Because there is no requirement of reasonable suspicion or probable cause that a *crime* has been committed, the detainer guidance continues to put state and local officials in the position of enforcing federal *civil* immigration law. Blocking Indiana's SB 1070 "copycat" legislation, a federal district court held Indiana's law, authorizing its law enforcement officials to arrest and detain persons subject to immigration detainers, likely violated the Fourth Amendment because it "authorizes the warrantless arrest of persons for matters and conduct that are not crimes." (The *Arizona* decision additionally makes clear that unlawful presence itself is not a crime, and state officials cannot enforce civil immigration law except in the narrow circumstances Congress has authorized.)

Furthermore, even aside from the Fourth Amendment's probable cause requirement, continued custody under the authority of an immigration detainer may violate the Fourth Amendment for a separate reason. The Fourth Amendment requires the subject of a warrantless arrest to be brought before a neutral magistrate within 48 hours of the arrest—including weekends and holidays—for an independent probable cause determination. By contrast, the detainer regulation flatly contradicts this requirement, authorizing prolonged detention for longer than 48 hours (indeed, up to five days over a holiday weekend) without any provision whatsoever for an independent probable cause determination by a neutral magistrate.

Detainer Resistance and its Limitations

In recent years, some jurisdictions have sought to indirectly "opt out" of Secure Communities by limiting the circumstances in which local jails may honor immigration detainers. The foregoing discussion demonstrates the legal validity of this resistance; detainers often exceed Congress's grant of authority, raise substantial constitutional questions, and provide no legal authority for state and local officials to prolong detention of suspected immigration violators. But the majority of anti-detainer ordinances enacted around the country appear to have been motivated not by the legal issues, but by civil rights concerns stemming from the expansion of Secure Communities. Contrary to its stated purpose, Secure Communities does not focus on the removal of noncitizens who have committed serious crimes. Opponents of Secure Communities argue that the program instead encourages racial profiling, diverts local resources from crime control, and makes communities less safe by discouraging immigrants from reporting crimes or cooperating with police.

Resistance to detainers was rooted in these criticisms. For example, years before California adopted statewide legislation limiting detainer compliance, the Santa Clara County, California Board of Supervisors passed a resolution urging the disentanglement of local law enforcement from federal immigration enforcement. The resolution indicated a clear concern for the civil rights of immigrants in Santa Clara County. Its opening paragraph described the county as "home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world." The resolution also expressed the belief of the Board of Supervisors that "laws like Arizona's SB 1070 ... subject individuals to racial profiling" and affirmed the county's commitment to protect all of its residents from "discrimination, abuse, violence, and exploitation ..."

Ultimately, the county adopted a measure prohibiting jails from honoring detainers unless the federal government agreed to pay the costs of detention, and then only if the arrestee was convicted of a felony classified as violent or serious under California law. Likewise, the District of Columbia adopted an ordinance that, among other things, would only allow jails to honor detainers filed against arrestees convicted of dangerous and violent crimes. Similar measures or policies have been enacted in Amherst, Berkeley, Chicago, Los Angeles, New Orleans, New York, and San Francisco, and in several counties as well, such as King County, Washington. On the state level, resistance has occurred in Connecticut and California, and has been proposed in Florida, Massachusetts, and Washington

The civil rights roots of detainer resistance were rendered visible in Cook County, Illinois, which voted in September 2011 to stop complying with detainers altogether. The ordinance in question appeared to be legally rooted in the Constitution's "unfunded mandate" doctrine, allowing the sheriff to honor detainers only if the federal government agreed to reimburse the county for all associated costs. Yet, when ICE Director John Morton offered to reimburse the county for any costs associated with honoring immigration detainers, County Board President Toni Preckwinkle told the press: "Equal justice before the law is more important to me than the budgetary considerations."

Unlike Cook County, which honors no detainers, other jurisdictions that have resisted wholesale compliance with detainers have claimed discretion to honor some detainers and not others. Santa Clara County and the District of Columbia are examples of jurisdictions that have indicated they may honor detainers when they target serious criminal offenders. In December 2012, California's Attorney General Kamala D. Harris issued guidance to law enforcement agencies stating: "Immigration detainer requests are not mandatory, and each agency may make its own decision about whether or not to honor an individual request." Subsequently, California's TRUST Act ratified the idea that California officials have discretion to honor immigration detainers, while limiting the exercise of that discretion.

But jurisdictions that claim a power to honor detainers selectively still confront many of the same legal problems that render immigration detainers invalid under federal law. Local officers honoring detainers are making what amount to civil immigration arrests, in circumstances beyond those specifically authorized by Congress. Even where there is an administrative arrest warrant, state or federal law may be violated by, for example, reliance upon a warrant that is not issued by a judge and not issued upon oath or affirmation. Further, local officers honoring detainers may violate the Fourth Amendment, by prolonging detention without probable cause of a crime having been committed, and by failing to provide prompt judicial review.

To avoid incurring legal liability, jurisdictions can follow the lead of Cook County by declining to honor immigration detainers in all circumstances. Alternatively, state and local jurisdictions can attempt to craft policies preventing local jails from honoring detainers unless authorized by Congress and in compliance with the Fourth Amendment and local law. Selective enforcement policies, however, may be subject to preemption if they interfere with federal immigration enforcement policy.

Conclusion

In *Arizona v. United States*, the Supreme Court made clear that states may not enforce civil immigration law unless explicitly authorized by Congress. But while generally providing a ringing endorsement of federal power, *Arizona* also limits the power of the federal executive to pursue immigration enforcement objectives. The executive branch, like the states, has an obligation to implement “the system Congress created” and none other. The *Arizona* opinion leaves little doubt that immigration detainers do not comport with the system Congress created.

Detainers also raise substantial constitutional questions, including the Fourth Amendment issue raised by prolonged detention—the precise concern raised by the justices concerning implementation of Section 2(B) of SB 1070. It is clear that such detention must comply with the Fourth Amendment; it must be supported by probable cause and meet the independent requirement of prompt neutral review.

Federal immigration detainers cannot support prolonged detention. Those jurisdictions that have resisted immigration detainers have done so with sound legal justification. But some of these jurisdictions simultaneously assert a power to selectively comply with detainers. Given the legal problems attendant to the use of detainers, jurisdictions wanting to honor immigration detainers in some cases must do more than focus on the seriousness of the offense of which arrestees are accused. At a minimum, they must be sure that honoring a detainer in a particular case complies not only with “the system Congress created” for immigration enforcement, but also with state and federal constitutional requirements. By honoring immigration detainers that do not meet these threshold legal requirements, local officials and localities risk civil liability.