Guidance to Law Enforcement: Authority Under Illinois and Federal Law to Engage in Immigration Enforcement

June 7, 2017
Guidance to Local Law Enforcement on Authority Under Illinois and Federal Law to Engage in Immigration Enforcement Activities

On January 25, 2017, President Donald Trump issued an Executive Order entitled “Enhancing Public Safety in the Interior of the United States.” 1 This guidance is intended to provide a summary of the Executive Order; explain how the authority of local and state law enforcement to enforce federal immigration law is limited; and provide guidance to municipalities and local law enforcement about how the Order may affect any existing policies. 2

I. Purpose

Local law enforcement 3 in Illinois is dedicated to protecting the communities it serves. Promoting public safety requires the assistance and cooperation of the community so that law enforcement has the ability to gather the information necessary to solve and deter crime. Law enforcement has long recognized that a strong relationship with the community encourages individuals who have been victims of or witnesses to a crime to cooperate with the police. The trust of residents is crucial to ensure that they report crimes, provide witness statements, cooperate with law enforcement and feel comfortable seeking help when they are concerned for their safety.

Building this trust is particularly crucial in immigrant communities where residents may be reluctant to engage with their local police department if they are fearful that such contact could result in deportation for themselves, their family or their neighbors. This is true of not only undocumented individuals who may be concerned about their own immigration status, but also U.S. citizens who may be worried about their parents, their children or other members of their family who immigrated to the United States.

Police officers will be hindered in protecting public safety if violent crimes go unreported or witnesses withhold information. 4 For the safety of the community and to effectively carry out their responsibilities, local law enforcement have an interest in making sure that their policies and conduct do not create barriers that discourage or prevent cooperation from the immigrant community and their families.

II. Immigration Enforcement Generally

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2 On May 31, 2017, the Illinois General Assembly passed the Illinois TRUST Act, Senate Bill 31, which clarifies that the authority of state and local law enforcement to enforce federal civil immigration law or cooperate with federal authorities on immigration enforcement is limited. This guide is consistent with the TRUST Act as currently drafted.
3 Throughout this guidance, “local law enforcement” is used to describe state and local law enforcement agencies such as municipal police departments, sheriffs’ offices, Illinois State Police and other non-federal law enforcement authorities, including campus police departments of public and private higher education institutions.
Immigration is a matter of federal law. Although some provisions of federal immigration statutes are criminal, deportation and removability are matters of civil law. The role of local law enforcement in enforcing the civil portions of immigration law is limited. Local law enforcement officers are permitted to enforce federal civil immigration law only in those limited circumstances where state and federal law authorize them to do so. There are only two circumstances where local law enforcement has been permitted by federal law to engage in immigration enforcement:

- Local law enforcement is permitted to arrest and detain an individual who has already been convicted of a felony and was deported, but returned to or remained in the United States after that conviction.

- Local law enforcement may enter into a formal working agreement with the Department of Homeland Security (known as a Section 287(g) agreement) to assist in the “investigation, apprehension, or detention of aliens in the United States.”

To date, no Illinois law enforcement agency has entered into such agreement and, pursuant to federal law, it may only do so to “the extent consistent with State and local law.”

Even in those instances where federal law allows enforcement of immigration law, there is no express or inherent authority under Illinois law that permits state or local law enforcement to enforce federal immigration law.

Under federal law, no state or local law or policy may prohibit any government entity or official from sharing information about the immigration status of an individual with federal authorities. As will be discussed further below, this federal law does not require local law enforcement to share citizenship or immigration status information with federal authorities in any circumstances; all data sharing by local law enforcement is voluntary.

III. Executive Order 13768 of January 25, 2017

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6 See Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (discussing the distinction between criminal and civil federal immigration law).
7 Id.
9 8 U.S.C. § 1357(g) (Section 287(g) of the Immigration and Nationality Act).
10 Id.
11 See People v. Lahr, 147 Ill.2d 379, 382, 589 N.E.2d 539 (Ill. 1992) (recognizing that the authority of local police officers to effectuate an arrest is dependent on the statutory authority given to them by the political body that created them); Gonzalez v. City of Peoria, 772 F.2d 468 (9th Cir. 1983) (requiring that state law grant local police the “affirmative authority to make arrests” under the specific provisions of the Immigration and Nationality Act that they sought to enforce).
Executive Order 13768 (“the Order”) addresses those jurisdictions that have limited the ability of local law enforcement to share information about the citizenship and immigration status of individuals with federal immigration authorities. Specifically, the Order authorizes the Attorney General of the United States and the Secretary of the Department of Homeland Security to “ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes.” Under the Order, the Secretary has the authority and discretion to designate a jurisdiction as a “sanctuary jurisdiction.” The Order does not define “sanctuary jurisdictions” although a memo issued by U.S. Attorney General Jeff Sessions clarified that “the term ‘sanctuary jurisdiction’ will refer only to jurisdictions that willfully refuse to comply with 8 U.S.C. 1373” by prohibiting law enforcement or other government employees from sharing information about individuals’ immigration status with federal authorities. The memo further clarified that the Order is only intended to affect grants from the Department of Justice and Department of Homeland Security that explicitly reference compliance with 8 U.S.C. §1373 as a condition of the grant.

The Order also revokes the Obama Administration’s priorities for enforcement, known as the Priority Enforcement Program (PEP), and revives an earlier program called Secure Communities. Under PEP, U.S. Immigration and Customs Enforcement (ICE) agents were directed to seek a transfer of an undocumented immigrant in the custody of state or local law enforcement only if the alien posed a demonstrable risk to national security or was convicted of specific criminal offenses. Under the Secure Communities program reinstated by the Order, the Secretary of Homeland Security will prioritize removal of individuals who have been convicted of any criminal offense, have been charged with any criminal offense, have committed acts which constitute a chargeable criminal offense, have engaged in fraud in connection with any matter before a governmental agency, have abused any program for the receipt of public benefits, are subject to a final order of removal or pose a risk to public safety or national security.

Local law enforcement should anticipate increased enforcement efforts by federal authorities under these broader priorities. This may include an increase in the number of ICE detainer requests issued to local law enforcement following NCIC background checks for individuals in the custody of local law enforcement. However, these federal priorities do not create or expand any authority for local law enforcement to enforce federal immigration law.

14 Id. at 8801 (Sec. 9(a)).
IV. Authority of Local Law Enforcement to Engage in Enforcement of Federal Civil Immigration Law is Limited to Specific Circumstances

Local law enforcement’s role in the enforcement of immigration law is limited. Specifically, local law enforcement is not required to engage in immigration enforcement; has no authority to detain an individual pursuant to a federal administrative warrant; has no authority to detain an individual pursuant to an ICE detainer request; and is under no affirmative legal obligation to share any information about individuals in its custody with federal immigration authorities. Importantly, local law enforcement officers cannot arrest an individual for violation of a federal law without a warrant unless state law has granted them authority to do so, and Illinois law has not authorized local law enforcement to arrest an individual for violating federal immigration law.

a. Federal law does not require local law enforcement agencies to participate in enforcement of federal civil immigration law.

Any requests by the federal government to participate in immigration enforcement activities must be viewed as requests for voluntary cooperation. As a result, local law enforcement bears the responsibility for the consequences of its decision to comply with such a request. The federal government cannot require local law enforcement to enforce federal law. On the contrary, any authorization from the federal government for local law enforcement to enforce federal law is only effective if it is accompanied by authority under state law. Consequently, any requests from federal immigration authorities – such as ICE or U.S. Customs and Border Protection (CBP) – for assistance from local law enforcement to detain an individual or requests for access to individuals held by local authorities should be viewed as requests, rather than obligations.

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18 Arizona v. United States, 132 S. Ct. 2492, 2509-10 (2012) (“Authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law”) (citing United States v. Di Re, 332 U.S. 581, 589 (1948)); see also Immigration and Naturalization Act 8 U.S.C. § 1252c (authorizing State and local law enforcement officials to arrest and detain an alien who is illegally present and has been previously convicted of a felony “to the extent permitted by relevant State and local law”).
19 725 ILCS 5/107-2 (describing the circumstances for arrest by law enforcement).
20 See Villars v. Kubiatowski, 45 F.Supp.3d 791, 801-803 (N.D. Ill. 2014) (denying motion to dismiss claims against village police department for detaining individual post-bond); Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014) (finding that county was liable for unlawful detention pursuant to ICE detainer).
21 Printz v. United States, 521 U.S. 898, 923-24 (1997) (finding that the 10th Amendment prohibits the federal government from compelling the States to enact or administer a federal regulatory program).
22 Arizona, 2492 at 2509-10.
As discussed above, there are only two circumstances where federal law has permitted – not required – local law enforcement to enforce federal immigration law: (1) pursuant to a 287(g) agreement; and (2) when an individual has returned to the United States after being convicted of a felony and deported. Jurisdictions interested in engaging in such conduct should understand that Illinois law has not authorized local law enforcement to engage in enforcement of federal civil immigration law and that they may face civil liability for doing so.

b. Local law enforcement has no authority under Illinois law to arrest an individual solely based on information that he or she is unlawfully present in the United States.

Generally, local law enforcement officers cannot arrest an individual for violation of a state or federal law without a warrant unless state law has granted them authority to do so.\[24\] Illinois law only permits arrest by local law enforcement if the officer has an arrest warrant, has reasonable grounds to believe a warrant has been issued or has reasonable grounds to believe that the individual is committing or has committed a criminal offense.\[25\]

Whether an individual is lawfully present in the United States is a question of federal civil immigration law.\[26\] Being unlawfully present in the United States is not a criminal offense, and thus unlawful presence alone does not produce probable cause to find that an individual has committed an offense under Illinois law.\[27\] The fact that a person may be subject to deportation is not a lawful reason for arrest or detention without a court order.\[28\]

Thus, without an arrest warrant issued by a judge, Illinois law does not authorize local law enforcement to arrest an individual on the sole basis that the person is unlawfully present in the United States.\[29\] This is true even if an officer is aware that an administrative warrant has been issued for an individual. Therefore, Illinois officers do not have legal authority to arrest or detain an individual based solely on their immigration status.

c. Local law enforcement has no authority under Illinois law to arrest an individual based on an ICE administrative warrant.

\[24\] Miller v. United States, 357 U.S. 301, 305 (1958) (noting that the lawfulness of a warrantless arrest for violation of federal law by state peace officers is “to be determined by reference to state law”).


\[26\] See Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) (discussing the difference between civil and criminal provisions of the INA).

\[27\] Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”).

\[28\] Id.; see also Galarza v. Szalczyk, 745 F.3d 634, 641 (3d Cir. 2014) (“The [INA] does not authorize federal officials to command state or local officials to detain suspected aliens subject to removal.”); Morales v. Chadbourne, 793 F.3d 208, 217-18 (1st Cir. 2015) (new seizures as a result of an ICE detainer must be supported by probable cause).

\[29\] Arizona, 2492 at 2505.
Neither federal nor state law authorizes local law enforcement officers to arrest an individual pursuant to an ICE administrative warrant. Local law enforcement officers may learn that an individual is subject to an administrative warrant when performing a criminal background check in the FBI’s NCIC database. ICE administrative warrants are prepared by ICE employees, but are not approved or reviewed by a judge. By themselves, ICE administrative warrants do not suggest that an individual has committed a criminal offense, nor do they constitute probable cause that a criminal offense has been committed. Furthermore, administrative warrants issued by ICE authorize only U.S. Department of Homeland Security (DHS) or ICE agents to arrest the individual, not local law enforcement. Thus, any arrest by local law enforcement solely based on an administrative warrant issued by ICE does not constitute an arrest pursuant to a criminal warrant or a finding of probable cause.

d. Local law enforcement has no authority under Illinois law to detain individuals pursuant to a federal immigration detainer request.

DHS and ICE issue “Immigration Detainers” or “Hold Requests” when they have identified an individual in the custody of local law enforcement who may be subject to a civil immigration removal proceeding. An Immigration Detainer is a notice from federal authorities that an individual in the custody of local law enforcement may be subject to civil immigration proceedings, and it asks the local agency to detain the individual for up to an additional 48 hours past his or her release date to allow federal authorities to assume custody. Federal courts have concluded that ICE detainers are voluntary requests and state and local law enforcement are not required to honor the requests – and in fact may be open to liability if they do so – because ICE detainers do not constitute individualized probable cause that would be sufficient justification for local law enforcement to detain an individual. Furthermore, any detention of an individual after his or her normal release date is considered a new arrest and must be based on probable cause that

31 8 U.S.C. § 1357; see also U.S. v. Abdi, 463 F.3d 547, 551 (6th Cir. 2006) (describing the process to obtain an ICE administrative warrant).
33 Illinois law authorizes peace officers to arrest an individual only when a warrant has been issued for a criminal offense – not a civil offense. 725 ILCS 5/107-2.
34 See 8 C.F.R. § 287.7; U.S. Immigration and Customs Enforcement, Policy No. 10074.2 “Issuance Of Immigration Detainers by ICE Immigration Officers,” (March 24, 2017).
35 See United States v. Abdi, 463 F.3d 547, 551 (6th Cir. 2006).
36 Galarza v. Szalczyk, 745 F.3d 634, 645 (3d. Cir. 2014); Moreno v. Napolitano, 2016 WL 5720465 (N.D. Ill. September 30, 2016) (holding that ICE’s practice of issuing detainers without individualized determination of probable cause was unlawful).
a crime has been committed. As discussed above, unlawful presence in the United States is not a criminal offense.

On March 24, 2017, ICE issued a new policy establishing that all detainer requests (Form I-247A) will be accompanied by one of two forms signed by an ICE immigration officer: either (1) Form I-200 (Warrant for Arrest of Alien) or (2) Form I-205 (Warrant of Removal/Deportation). These forms are administrative warrants signed by ICE officers that authorize other ICE officers to detain an individual. They are not criminal warrants issued by a court and they do not constitute individualized probable cause that an individual has committed a criminal offense. Similarly, local law enforcement is not authorized to arrest or detain an individual based on the previously issued Form I-247D (Immigration Detainer – Request for Voluntary Action), Form I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) or Form I-247X (Request for Voluntary Transfer). Only federal officers have the authority to arrest an individual for violation of civil immigration law without a criminal warrant. Even if the individual may be subject to removal because he or she was convicted of a criminal offense, the removal proceeding and determination (through an order of removal issued by a civil court) itself is a matter of civil immigration law. Given that Illinois law does not permit a local law enforcement officer to arrest an individual based solely on the issuance of an ICE administrative warrant, any prolonged detention based on immigration status similarly is unauthorized under Illinois law and could subject the agency to liability.

A local law enforcement agency can be held liable for detaining an individual beyond his or her normal release date in response to an ICE detainer request. The Illinois and federal constitutions prohibit unreasonable searches and seizures. Any detention of an individual without a judicial warrant – including prolonging an initial detention – must be supported by probable cause that an individual committed a criminal offense, which is not satisfied by the existence of an ICE administrative warrant.

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40 Id. at 2505-06; 8 U.S.C. § 1357.
42 Santos v. Frederick Cnty. Bd. Of Comm’rs, 725 F.3d 451, 464-65 (4th Cir. 2013); see also Villars v. Kubiatowski, 45 F.Supp.3d 791, 801-803 (N.D. Ill. 2014) (denying motion to dismiss claims against village police department for detaining individual post-bond); Galarza v. Szalczyk, 745 F.3d 634, 645 (3d. Cir. 2014) (finding that county was liable for unlawful detention pursuant to ICE detainer).
44 Santos, 725 F.3d at 464-65; see also Villars, 45 F.Supp.3d at 801-803; Galarza, 745 F.3d at 645; see also People v. Hyland, 2012 IL App (1st) 110966 (finding that investigative alert was not sufficient to support a probable cause for arrest).


e. Local law enforcement is permitted, but not required, to share information with federal immigration authorities.

Federal officials may request information from local law enforcement agencies about individuals in their custody in order to enforce federal civil immigration laws.\(^\text{45}\) This may include names of individuals in custody, normal release dates, court dates, home address or other identifying information. Local law enforcement is not required to respond to these information requests.\(^\text{46}\) Similarly, local law enforcement agencies are not required to inquire about an individual’s citizenship or immigration status or to collect this information.\(^\text{47}\)

While local law enforcement and other government agencies are not prohibited from sharing or receiving citizenship information, they are not required to do so.\(^\text{48}\) Law enforcement agencies should consider whether sharing information about individuals in their custody may diminish their relationship with immigrant communities by deterring individuals from reporting information about a crime or appearing as a witness if these individuals are concerned that their information will be shared with ICE or other federal authorities.\(^\text{49}\) Any laws or policies regarding the sharing of information with federal authorities should take into consideration their impact on perceptions of trust and confidentiality by the community and how they might affect relations between the community and law enforcement.

\(^{45}\) 8 U.S.C. § 1373.
\(^{46}\) Id.; see also Arizona v. United States, 132 S. Ct. 2492, 2508 (2012) (noting that Congress has “encouraged the sharing of information about possible immigration violations”).
\(^{47}\) Law enforcement should be aware that all fingerprint information submitted to the FBI for criminal background checks will be provided to ICE for comparison to its records.
\(^{48}\) See Prinzt v. United States, 521 U.S. 898, 935 (1997) (holding that 10th Amendment prohibits the federal government from commandeering state employees to administer federal scheme).
\(^{49}\) See City of New York v. United States, 179 F.3d 29, 34 (2d Cir. 1999) (discussing police department interests in confidentiality of information).
V. Summary

- Law enforcement agencies should not arrest any individual on the sole basis that they are undocumented. Arrests may only be made when law enforcement have an arrest warrant or probable cause that a criminal offense has been committed.

- Local law enforcement agencies may be acting beyond their authority under state law and may be in violation of constitutional protections if they detain an individual beyond his or her normal custody release date pursuant to an ICE detainer.

- Local law enforcement agencies should consider whether any internal policies regarding sharing immigration status information with federal immigration authorities will promote trust and confidentiality in their communities.

- Local law enforcement agencies should consider requiring all officers to identify the jurisdiction they represent when engaging with community members or knocking on doors to encourage transparency and cooperation and to avoid any concern or confusion about whether the officers work for federal immigration authorities.