



FEDERATION FOR AMERICAN
IMMIGRATION REFORM

2015
Border Summit

**Local Government Cooperation
with Federal Immigration
Enforcement Efforts**



THIS MATERIAL IS NECESSARILY GENERAL IN NATURE AS LAWS AND/OR INTERPRETATION OF LAWS VARIES BY STATE AND/OR JUDICIAL CIRCUIT. QUALIFIED LOCAL COUNSEL SHOULD BE CONSULTED BEFORE INITIATING AN ENFORCEMENT ACTIVITY. THIS MATERIAL IS PRESENTED FOR EDUCATIONAL PURPOSES ONLY WITH THE UNDERSTANDING THAT THE PUBLISHER AND AUTHORS DO NOT RENDER ANY LEGAL OR OTHER PROFESSIONAL SERVICES. BECAUSE OF THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PUBLICATION MAY BECOME OUTDATED.

Cooperation Protects Citizens against Crime

The responsibility of governments to their citizens includes the administration of justice — both to prevent crime and to punish lawbreakers. Americans are facing a new threat to their physical safety from international terrorism. Al Qaeda, which was responsible for the deaths of nearly 3,000 residents on September 11, 2001, remains avowedly committed to carrying out further crimes against Americans at home and abroad. And then there exists the new threat from the Islamic State in Iraq and Syria (ISIS). Although the federal government has the responsibility for combating this threat, its capability to do so depends on the cooperation of law enforcement agencies at all levels. Similarly, the capability of federal immigration authorities to stem immigration law violations and to apprehend and remove lawbreakers requires the cooperation of state and local law enforcement agencies.

Failure to cooperate with federal immigration authorities undermines national security efforts and enables terrorists and individuals of national security concern to go unnoticed and carry out their activities unimpeded by immigration law. Reportedly, over half of the 48 individuals convicted or tied to recent terrorist plots in the United States either were themselves illegal aliens or relied upon illegal aliens to get fake identification. Immigration violators participated in the first attack on the World Trade Center, the Los Angeles Millennium bombing plot, the New York subway bombing conspiracy, and the 9/11 terrorist attacks.

The U.S. Immigration and Customs Enforcement (ICE) has just 20,000 employees, only half of which are dedicated to the apprehension and removal of illegal aliens. The cooperation of state and local police forces, which number about **800,000 strong**, is vital to ferreting out those among us who wish to cause us harm. At least five of the 9/11 hijackers were illegal aliens, of which four — ringleader and pilot Mohammed Atta, pilot Hani Hanjour, pilot Ziad Jarrah, and muscle Nawaf al-hazmi — came into contact with state and local law enforcement several times before the attacks for various reasons. If those state and local law enforcement agencies had been working with federal immigration officials, the 9/11 terrorist plot might have been thwarted.

Furthermore, local communities that cooperate with and assist the federal government in its immigration enforcement efforts see a dramatic decrease in illegal immigration and crime. For example, after Arizona got tough on illegal immigration and instituted policies of cooperation with the Department of Homeland Security (DHS), the State experienced a significant decrease in violent crime.¹ Likewise, Prince William County, Virginia experienced a reduction in violent crime (and hit-and-run accidents) after instituting a policy of cooperation with DHS.²

¹ Federal Bureau of Investigation (FBI) crime data registered a major drop from 2005 to 2010 in violent crimes in Arizona — by 14.4 percent compared to a 10.4 percent drop nationally. Property crimes declined more steeply — by 21.4 percent, *i.e.*, more than twice the reduction nationwide of 10.7%. See FAIR, *Recent Demographic*

Federal Law Encourages Local Cooperation

Congress has enacted multiple statutory provisions designed to maximize cooperation between federal, state, and local law enforcement agencies in enforcing immigration laws. For example, 8 U.S.C. § 1357(g) (otherwise known as Section 287(g) of the Immigration and Nationality Act (INA)) authorizes the Secretary of DHS to enter into written agreements with state or local law enforcement agencies whereby state and local law enforcement officers are trained by the federal government in immigration law enforcement and then are deputized to act as immigration agents. Importantly, 8 U.S.C. § 1357(g) also contains a provision that states that a formal agreement with the federal government is not necessary for “any officer or employee” of a state or local agency “to communicate with the [Secretary of DHS] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States,” or “to cooperate with the [Secretary of DHS] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”³

Federal Programs that Facilitate Cooperation

Several programs currently facilitate cooperation between DHS and state and local law enforcement agencies, including—

Asset Forfeiture/Equitable Sharing

“The ICE Asset Forfeiture Program provides funding to state, local, and foreign law enforcement agencies that participate jointly in ICE investigations which lead to seizures and forfeitures. Through the Department of Treasury's Equitable Sharing Program, ICE provides substantial

Change in Arizona: Anatomy of Effective Immigration Reform Legislation, available at <http://www.fairus.org/publications/recent-demographic-change-in-arizona-anatomy-of-effective-immigration-reform-legislation-2012>.

² Center for Survey Research, University of Virginia, *Evaluation Study of Prince William County's Illegal Immigration Enforcement Policy FINAL REPORT 2010*, available at <http://www.pwcgov.org/government/bocs/Documents/13188.pdf>.

³ 8 U.S.C. §§ 1357(g)(10); *see also* 8 U.S.C. § 1373 (prohibits a federal, state, or local government entity or official from prohibiting, or in any way restricting, any government entity or official from sending to, or receiving from, DHS information regarding the citizenship or immigration status, lawful or unlawful, of any individual and prohibits the same from prohibiting or restricting sending or receiving such information, maintaining such information, or exchanging such information with other agencies) and 8 U.S.C. § 1644 (states “no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from [DHS] information regarding the immigration status, lawful or unlawful, of an alien in the United States”).

funds and equipment to state, local, and foreign law enforcement counterparts pursuant to the forfeiture of seized items.

State and local support of federal investigative initiatives is absolutely essential to the ICE mission, and the sharing program has proved invaluable in fostering enhanced cooperation between ICE and state and local law enforcement agencies. In addition to equitably sharing assets, some state and local law enforcement agencies are eligible to receive reimbursement for overtime and other limited investigative expenses associated with these joint investigations.”⁴

For more information on the Equitable Sharing Program and to request a “Guide to Equitable Sharing for Foreign Countries and Federal, State, Local Law Enforcement Agencies,” call your local ICE, Homeland Security Investigations office.

Border Enforcement Security Task Force (BEST)

BEST forces work cooperatively with other law enforcement entities, including state and local law enforcement agencies, to investigate transnational criminal activity along the Southwest and Northern Borders and at our nation's major seaports.⁵ From their inception through August 2013, BEST Units have collectively initiated more than 10,654 cases. These actions have resulted in more than:

- 12,718 criminal arrests
- 7,245 administrative arrests
- 110,711 pounds of cocaine
- 5,517 pounds of ecstasy
- 1,764 pounds of heroin
- 1,036,749 pounds of marijuana
- 6,325 pounds of methamphetamine
- 2,988,561 rounds of ammunition
- 4,657 vehicles
- \$130.2 million in U.S. currency
- 15,062 weapons⁶

Criminal Alien Program (CAP)

CAP provides “ICE-wide direction and support in the biometric and biographic identification, arrest, and removal of priority aliens who are incarcerated within federal, state, and local prisons and jails, as well as at-large criminal aliens that have circumvented identification. It is incumbent upon ICE to ensure that all efforts are made to investigate, arrest, and remove individuals from

⁴ ICE, Asset Forfeiture Branch, *available at* <https://www.ice.gov/asset-forfeiture/>.

⁵ ICE, Investigations, Border Enforcement Security Task Force (BEST), *available at* <http://www.ice.gov/best/>.

⁶ *Id.*

the United States that ICE deems priorities by processing the alien expeditiously and securing a final order of removal for an incarcerated alien before the alien is released to ICE custody. The identification and processing of incarcerated criminal aliens, before release from jails and prisons, decreases or eliminates the time spent in ICE custody and reduces the overall cost to the Federal Government.”⁷

Customs Cross-Designation

This program similar to 287(g) in that it cross-designates local law enforcement officers to give them the authority to enforce United States customs laws and to perform the duties of ICE special agents. After receiving standardized ICE training, the local officials are “authorized to conduct customs searches at the border for merchandise being imported into or exported from the U.S. and to effect seizures and arrests of persons or articles in violation of U.S law.”⁸

Delegation of Immigration Authority—287(g)

This program was established by law in 1996 and its title refers to the provision in the Immigration and Nationality Act that authorizes it. In this program, state and local law enforcement officers are trained by the federal government in immigration law enforcement and then are deputized to act as immigration agents. The 287(g) program consists of two parts — task force agreements and jail agreements. In 2013, the Obama Administration defunded the task force agreements. Currently, 32 law enforcement agencies in 18 states participate in the jail agreements.⁹ As originally designed, the persons locally identified as illegal and deportable aliens were — if confirmed by federal authorities — taken into custody by the federal authorities and put into deportation proceedings. “Since January 2006, the 287(g) program is credited with identifying more than 373,800 potentially removable aliens — mostly at local jails. ICE has trained and certified more than 1,500 state and local officers to enforce immigration law.”¹⁰

Document and Benefit Fraud Task Forces (DBFTFs)

“Document and benefit fraud poses a severe threat to national security and public safety because it creates a vulnerability that may enable terrorists, criminals and illegal aliens to gain entry to and remain in the United States. Document fraud, also known as identity fraud, is the manufacture, sale or use of counterfeit identity documents such as fake driver's licenses, birth certificates, Social Security cards or passports for immigration fraud or other criminal activity. Benefit fraud refers to the misrepresentation or omission of facts on an application to obtain an

⁷ ICE, Enforcement and Removal, Criminal Alien Program, *available at* <http://www.ice.gov/criminal-alien-program/>.

⁸ ICE, Investigations, Customs Cross Designation, *available at* <http://www.ice.gov/customs-cross-designation/>.

⁹ ICE, Newsroom, *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *available at* <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa>.

¹⁰ *Id.*

immigration benefit one is not entitled to, such as U.S. citizenship, political asylum or a valid visa.

To combat this type of fraud, HSI has partnered with federal, state, and local counterparts to create the Document and Benefit Fraud Task Force, a series of multi-agency teams developed to target criminal organizations and beneficiaries behind these fraudulent schemes.

These task forces maximize resources, eliminate the duplication of efforts and produce a strong law enforcement presence. They combine HSI's unique criminal and administrative authorities with a variety of tools and authorities from other law enforcement agencies to achieve focused, high-impact criminal prosecutions and financial seizures.”¹¹

Currently there are 21 Document and Benefit Fraud Task Force locations in the United States: Atlanta, Baltimore, Boston, Buffalo, Chicago, Dallas, Denver, Detroit, Honolulu, Houston, Los Angeles, Miami, Newark, N.J., New York, Orlando, Fla., Philadelphia, Saint Paul, Minn., Salt Lake City, San Francisco, San Juan, Puerto Rico, and Washington, D.C.

Fugitive Operations

“The primary mission of National Fugitive Operations Program (NFOP) is to reduce the fugitive alien population in the United States. The NFOP identifies, locates, and arrests fugitive aliens, aliens that have been previously removed from the United States, removable aliens who have been convicted of crimes, as well as aliens who enter the United States illegally or otherwise defy the integrity of our immigration laws and border control efforts.”¹² ICE relies on the assistance of all federal, state and local law enforcement agencies in this endeavor. In FY 2012, Fugitive Operations teams accounted for more than 37,000 arrests.¹³

Law Enforcement Support Center (LESC)

“The Law Enforcement Support Center is a national enforcement operations facility administered by U.S. Immigration and Customs Enforcement (ICE), the largest investigative agency in the Department of Homeland Security (DHS). The center is a single national point of contact that provides timely immigration status, identity information, and real-time assistance to local, state, and federal law enforcement agencies on aliens suspected, arrested, or convicted of criminal activity. The center protects and defends the United States by sharing timely and relevant ICE information with our law enforcement partners around the world.

¹¹ ICE, Immigration Enforcement, Identity and Benefit Fraud, *available at* <http://www.ice.gov/identity-benefit-fraud/>.

¹² ICE, Enforcement and Removal, Fugitive Operations, *available at* <http://www.ice.gov/fugitive-operations/>.

¹³ *Id.*

Located in Williston, Vermont, the center operates 24 hours a day, 7 days a week, 365 days a year. The primary users of the center are state and local law enforcement officers seeking information regarding aliens encountered in the course of their daily enforcement activities. The center serves as a national enforcement operations center, responding to inquiries from federal, state, and local criminal justice agencies concerning aliens under investigation or arrested.”¹⁴

Operation Community Shield

Through Operation Community Shield, ICE works with law enforcement partners at the federal, state and local level to combat transnational gangs. These gangs, such as the MS-13 gang, often include deportable aliens. “Since the launch of Operation Community Shield, ICE’s Homeland Security Investigations (HSI) and its partners have arrested more than 32,200 gang members and associates, representing more than 2,400 different gangs and cliques. These apprehensions include more than 20,838 criminal arrests and more than 13,370 administrative immigration arrests. Of these, more than 451 arrests were of gang leaders, and more than 14,994 of the arrested suspects had violent criminal histories. Through this initiative, HSI has also seized more than 5,800 firearms.”¹⁵

Operation Firewall

Operation Firewall targets smuggled bulk cash shipments being transported along domestic interstate highways. Under Operation Firewall, ICE has seized more than \$80 million in U.S. currency and negotiable instruments.

Operation Predator

Operation Predator is a program designed to identify, investigate and, as appropriate, administratively deport child predators. ICE routinely coordinates and integrates investigative efforts with law enforcement partners, in order to identify, arrest and prosecute those involved in international pedophilic groups or who derive proceeds from commercial child exploitation ventures. Under Operation Predator, ICE has made more than 8,000 criminal arrests since 2003.

Priority Enforcement Program

“The Department of Homeland Security’s (DHS) Priority Enforcement Program (PEP) enables DHS to work with state and local law enforcement to take custody of individuals who pose a danger to public safety before those individuals are released into our communities. PEP was established at the direction of DHS Secretary Jeh Johnson in a November 20, 2014 memorandum, entitled Secure Communities, that discontinued the Secure Communities program. PEP focuses on convicted criminals and others who pose a danger to public safety.

¹⁴ ICE, Immigration Enforcement, *available at* <http://www.ice.gov/lesc>.

¹⁵ ICE, Investigations, Operation Community Shield/Transnational Gangs, *available at* <http://www.ice.gov/community-shield/>.

PEP begins at the state and local level when an individual is arrested and booked by a law enforcement officer for a criminal violation and his or her fingerprints are submitted to the FBI for criminal history and warrant checks. This same biometric data is also sent to U.S. Immigration and Customs Enforcement (ICE) so that ICE can determine whether the individual is a priority for removal, consistent with the DHS enforcement priorities described in Secretary Johnson's November 20, 2014 Secure Communities memorandum. Under PEP, ICE will seek the transfer of a removable individual when that individual has been convicted of an offense listed under the DHS civil immigration enforcement priorities, has intentionally participated in an organized criminal gang to further the illegal activity of the gang, or poses a danger to national security."¹⁶

Refer to the next page for a chart that describes the differences between the Secure Communities Program and PEP—

¹⁶ ICE, Immigration Enforcement, available at <https://www.ice.gov/pep>.

OFFICE OF ENFORCEMENT AND REMOVAL OPERATIONS
PRIORITY ENFORCEMENT PROGRAM (PEP)



**U.S. Immigration
 and Customs
 Enforcement**

COMPARISON OF SECURE COMMUNITIES AND THE PRIORITY ENFORCEMENT PROGRAM

SECURE COMMUNITIES	PRIORITY ENFORCEMENT PROGRAM
<p>Relied on fingerprint based biometric data submitted during bookings by state and local law enforcement agencies to the FBI for criminal background checks.</p>	<p>Continues to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the FBI for criminal background checks.</p>
<p>Prior to December 21, 2012, the only policy limitations on detainer issuance were that: (1) a law enforcement agency (LEA) had exercised its independent authority to arrest the individual; and (2) the immigration officer had reason to believe that the individual was subject to ICE detention for removal or removal proceedings.</p> <p>Circumstances under which a detainer could be issued were narrowed by a December 12, 2012 policy memorandum, but still included individuals charged, but not yet convicted, of criminal offenses, in addition to individuals with no criminal history, such as individuals with final orders of removal from an immigration judge. Detainers could also be issued in circumstances in which ICE determined an individual posed a significant risk to national security, border security, or public safety.</p>	<p>A November 20, 2014 memorandum from DHS Secretary Jeh Johnson significantly narrows the category of individuals for whom DHS will seek transfer from LEA custody and prioritizes individuals who pose a threat to public safety. Under PEP, ICE will no longer seek transfer of individuals with civil immigration offenses alone, or those charged, but not convicted of criminal offenses.</p> <p>Instead, ICE will seek transfer where a removable individual has been convicted of specifically enumerated crimes, has intentionally participated in criminal gang activity, or poses a danger to national security.</p>
<p>Requested that LEAs detain an individual beyond his or her scheduled release date.</p>	<p>In many cases, ICE will simply request notification of when an individual who falls within the PEP priorities is to be released—rather than issue a request for detention beyond that point.</p> <p>Under PEP, detainers may only be issued in limited circumstances, when ICE indicates on the form that the individual is both a PEP enforcement priority and that there is probable cause to believe that the subject is removable (such as a final order of removal).</p>
<p>Detainer form <u>requested</u> that LEA provide a copy to the individual subject to the detainer.</p>	<p>Detainer form <u>requires</u> that LEA provide a copy to the individual subject to the detainer <u>in order for the request to be effective</u>.</p>
<p>Request to maintain custody was limited to 48 hours, excluding Saturdays, Sundays, and holidays.</p>	<p>Request to maintain custody is limited to 48 hours. Saturdays, Sundays, and holidays are no longer excluded.</p>
<p>Basis for “reason to believe” the subject was removable, and therefore subject to a request for detention, was not disclosed on the detainer form.</p>	<p>Detainer form requires that the basis for “probable cause” that an individual is removable be indicated:</p> <ul style="list-style-type: none"> • final order of removal; • pendency of removal proceedings; • biometric match reflecting no lawful status or otherwise removable; or • statements by the subject to an immigration officer and/or other reliable evidence.
<p>Some ICE detainers were issued with respect to foreign-born individuals who did not have records or a biometric match in ICE databases without any other additional information.</p>	<p>ICE no longer issues detainers in cases of foreign-born individuals who do not have records or a biometric match in ICE databases, without any other additional information. Detainers must include an indication of probable cause and that the individual is an enforcement priority under PEP.</p>

Cooperation with Immigration Detainers

The effectiveness of the programs mentioned above critically depends upon state and local law enforcement agencies honoring immigration detainers. An immigration detainer “serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien.”¹⁷ Through an immigration detainer, ICE can request state and local law enforcement agencies to maintain custody of an alien for up to 48 hours to allow ICE agents time to pick up the alien.¹⁸

Last year, the American Civil Liberties Union (ACLU) sent letters to sheriffs across the country with a thinly veiled threat to sue if they continue to cooperate in immigration enforcement efforts. In the letter, the ACLU tells these sheriffs to stop holding criminal aliens so that federal authorities can assume custody of them and begin the removal process.¹⁹ The letter then conspicuously states, in bold letters set apart from the rest of the text, that any law enforcement agency that continues to do so “may be held liable for damages” under federal law.

The ACLU letter takes direct aim at the immigration detainer. As noted, detainers are critically important to immigration enforcement because it is virtually impossible for ICE to be at the doors of every single jail across the country, 24 hours a day, to assume custody of aliens it wishes to deport when they finish their jail sentences. To be successful in deporting criminal aliens, ICE needs the assistance of state and local law enforcement agencies, both in terms of notification of a pending release and a 48-hour hold. If the local agency does not hold the alien for ICE, it simply releases the criminal back onto the streets.

Sanctuary policies as advocated by the ACLU only create safe havens that facilitate criminal activity, especially in regard to drug- and gang- related crimes, human trafficking, and identity theft. Because of sanctuary policies that prevent local law enforcement from contacting federal immigration officials, many criminal aliens are able to reenter communities and engage in further criminal activity, at the expense and safety of citizens and lawful aliens.

The ACLU’s letter attacks immigration detainers as violating the Fourth Amendment to the U.S. Constitution. The Fourth Amendment to the U.S. Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²⁰

¹⁷ 8 C.F.R. § 287.7(a).

¹⁸ *Id.* at § 287.7(d).

¹⁹ *See, e.g.*, ACLU [Letter](#), May 2, 2014.

²⁰ U.S. CONST., amend. IV.

Although the Fourth Amendment applies to federal government conduct, the U.S. Supreme Court has declared that the protections under the Fourth Amendment also apply to state and local governments through the Fourteenth Amendment.²¹ The Fourteenth Amendment states: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”²²

The Supreme Court has never settled the question as to whether illegal aliens are covered by the Fourth Amendment. Some lower courts have ruled that they are not covered, while some courts have ruled that only previously deported illegal aliens are not covered, and some other courts have ruled that all illegal aliens are covered.

For purposes of the Fourth Amendment, a “seizure” occurs when, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”²³ The Fourth Amendment does not prohibit all “seizures” of persons, only those that are “unreasonable.” Seizures that are made pursuant to a warrant are presumptively reasonable. Seizures “conducted outside the judicial process without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.”²⁴

One of those exceptions is for exigent circumstances. Exigent circumstances are those circumstances that occur when a law enforcement officer believes he or she has probable cause to search or seize an individual and there is no time to obtain a warrant. One such circumstance identified by courts is “a likelihood that the suspect will escape if not swiftly apprehended.”²⁵

In Section 287(a)(2) of the INA, Congress incorporated the escape exception, which states:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation [governing the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest

For decades, DHS (formerly the Immigration and Nationality Service (INS)), has, pursuant to this section and regulations issued under the statute, issued detainers on aliens who are in the custody of state and local law enforcement agencies.

²¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

²² U.S. CONST., amend. XIV, §1.

²³ *INS v. Delgado*, 466 U.S. 210, 213 (1984); *see also Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

²⁴ *Horton v. California*, 496 U.S. 128, 133 n.4 (1990).

²⁵ *Dorman v. U.S.*, 435 F.2d 385, 393-94 (D.C. Cir. 1970) (en banc); *see also United States v. Gordils*, 982 F.2d 64, 69 (2nd Cir. 1992) (citations omitted) (same); and *Creighton v. Anderson*, 922 F.2d 443, 448 (8th Cir. 1990) (same).

Now back to the ACLU letter. In their letter, the ACLU argues that detainers violate the Fourth Amendment unless they are accompanied by a **judicial** determination of probable cause, that is, a judicial warrant. The ACLU letter, however, makes this claim based on a *false* reading of a single federal court decision handed down in April 2014: *Miranda-Olivares v. Clackamas County* (Case No. 3:12-cv-021317-ST).²⁶

In *Miranda-Olivares v. Clackamas County*, an alien, Miranda-Olivares was arrested and jailed on March 14, 2012 for violating a domestic abuse restraining order. The next day, ICE issued a detainer to the county jail, asking it to hold Miranda-Olivares so ICE could assume custody of her upon release. Meanwhile, the family of Miranda-Olivares was ready to post bail (as both parties acknowledge), but the jail told the family if it did she would not be released due to a hold placed on her by ICE. On March 29, Miranda-Olivares, still in the custody of the jail, was convicted of contempt of court (for violating the domestic abuse restraining order) and the court sentenced her to time served, making her immediately eligible for release. The jail, pursuant to the ICE detainer, held Miranda-Olivares for an additional 19 hours, at which time it transferred custody of her to ICE. Miranda-Olivares sued the County, claiming the jail's detention of her beyond the time she could have posted bail, violated the search and seizure provisions found in the Fourth Amendment of the U.S. Constitution.

The federal district court for Oregon ruled in favor of Miranda-Olivares because it found that the alien's continued detention after completion of her sentence for violating the restraining order must be based on probable cause under the Fourth Amendment. **Nowhere in its decision** did the Oregon federal court hold (or even consider the argument) that a statement of probable cause must be accompanied by some sort of judicial approval. Instead, the District Court closely examined the text of the ICE detainer form (Form I-247) to determine if probable cause was evident.

The court determined that, standing alone, the ICE detainer issued with respect to Miranda-Olivares did not demonstrate probable cause. The detainer form offered a list of four options officers could check to serve as the basis for the detainer. The box checked on the form for Miranda-Olivares stated merely that ICE had "initiated an investigation" to determine whether the individual in question was subject to removal. Based on these words, the Court held that "it was not reasonable for the jail to believe it had probable cause to detain Miranda-Olivares based on the checked box on the ICE detainer." The court held that in its view, this checked box did not show that probable cause had been demonstrated on the face of the detainer. Thus the Court found that the jail's detention of Miranda-Olivares past the end of her sentence violated the Fourth Amendment.

²⁶ 2014 U.S. Dist. LEXIS 50340 (D. Or 2014).

This decision is already irrelevant. Since instituting the new PEP program, ICE has revised its detainer form (I-247D). The new form now requires that the basis for probable cause that the individual is removable be indicated:

DEPARTMENT OF HOMELAND SECURITY (DHS)
IMMIGRATION DETAINER – REQUEST FOR VOLUNTARY ACTION

Subject ID: Event #:	File No: Date:
TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (DHS Office Address)

Name of Subject: _____
Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT <i>(mark at least one option in subsection A and one option in subsection B, or skip to section 2):</i>
A. THE SUBJECT IS AN IMMIGRATION ENFORCEMENT PRIORITY BECAUSE HE/SHE:
<input type="checkbox"/> has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to national security;
<input type="checkbox"/> has been convicted of an offense of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is at least 16 years old and intentionally participated in an organized criminal gang to further its illegal activities;
<input type="checkbox"/> has been convicted of an offense classified as a felony, other than a state or local offense for which an essential element was the alien's immigration status;
<input type="checkbox"/> has been convicted of an aggravated felony, as defined under 8 U.S.C. § 1101(a)(43) at the time of conviction;
<input type="checkbox"/> has been convicted of a "significant misdemeanor," as defined under DHS policy; and/or
<input type="checkbox"/> has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents.
B. PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:
<input type="checkbox"/> a final order of removal against the subject;
<input type="checkbox"/> the pendency of ongoing removal proceedings against the subject;
<input type="checkbox"/> biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
<input type="checkbox"/> statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.
2. DHS TRANSFERRED THE SUBJECT TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION.
<input type="checkbox"/> Upon completion of the proceeding or investigation for which the subject was transferred to your custody, DHS intends to resume

As a result, local law enforcement agencies may, without violating the U.S. Constitution, hold an alien for ICE based on the probable cause determination found in the new I-247 detainer form and without judicial approval.²⁷

Legal Authority for Local Enforcement of Immigration Law

Although the regulation of immigration is a federal matter, local law enforcement departments and personnel are not required to turn a blind eye to illegal activity harming their communities, including violations of immigration law. State and local law enforcement officials have the

²⁷ Section 287(a)(2) of the INA, *i.e.*, the section authorizing immigration detainers, has always required probable cause before a detainer could be issued. As a result, state and local law enforcement officers were justified in complying with detainer requests even before the form was amended. The federal district court for Oregon erred in ruling otherwise.

inherent authority to investigate and arrest violators of federal criminal immigration statutes without prior DHS knowledge or approval, as long as they are authorized to enforce federal law in general under state law.²⁸ Examples of such statutes include:

- 8 U.S.C. § 1304(e) (failure to carry alien registration document)
- 8 U.S.C. § 1306(a) (willful failure of alien to register and be fingerprinted)
- 8 U.S.C. § 1325(a) (improper entry by alien)
- 8 U.S.C. § 1325(c) (marriage fraud)
- 8 U.S.C. § 1325(d) (operating a sweatshop)
- 8 U.S.C. § 1324(a)(3) (hiring more than 10 illegally smuggled aliens in one year)
- 18 U.S.C. § 922(g)(5) (possession of firearms and ammunition by certain aliens)
- 18 U.S.C. § 922(d)(5) (selling or giving firearm to certain aliens)
- 18 U.S.C. § 1546 (federal document fraud and false statement crimes)
- 18 U.S.C. §§ 1015(c); 1425; and 1426 (a)-(c), (h) (false birth certificates)
- 18 U.S.C. § 1001 (false statements)
- 18 U.S.C. § 1028 (identification document fraud)
- 42 U.S.C. 408(a)(7) (misuse of social security number)

Several federal statutes also authorize state and local officers to make immigration-related arrests in certain situations. For example, 8 U. S. C. § 1103(a)(10) provides for the extension of “any” immigration enforcement authority to state and local officers in the event of an “actual or imminent mass influx of aliens arriving off the coast, or near a land border”); § 1252c(a) provides authority to arrest criminal aliens who had illegally reentered the country but only after consultation with DHS; and § 1324(c) provides authority to make arrests for transporting and harboring certain aliens.

²⁸ See *Arizona v. U.S.*, 132 S.Ct. 2492, 2509 (2012) (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948)) (finding sovereign states have inherent authority to make arrests for violations of federal law in order to assist the federal government, unless Congress acts to preempt that authority); *Gonzales v. Peoria*, 722 F.2d 468, 475-476 (9th Cir. 1983), *overruled on other grounds*, *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc) (holding that “federal law does not preclude local enforcement of the criminal provisions” of federal immigration law); *Santos v. Frederick County Bd. of Comm’rs*, 725 F.3d 451, 464 (4th Cir. 2013) (citing *U.S. v. Guijon-Ortiz*, 660 F.3d 757, 764 & 764 n.3 (4th Cir. 2011)) (noting the court has “indicated that local law enforcement officials may detain or arrest an individual for criminal violations of federal immigration law without running afoul of the Fourth Amendment, so long as the seizure is supported by reasonable suspicion or probable cause and is authorized by state law”); *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294, 1296 (10th Cir. 1999) (noting that “state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws”); *Lynch v. Cannatella*, 810 F.2d 1363, 1370-71 (5th Cir. 1987) (finding no federal statute precludes state or local law enforcement agencies from taking other action to enforce the nation’s immigration laws); *U.S. v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (recognizing state law enforcement officers’ inherent authority to arrest suspects for federal offenses); and Memorandum from the Office of Legal Counsel to the Attorney General (Apr. 3, 2002), available at http://www.fairus.org/DocServer/OLC_Opinion_2002.pdf (finding states have inherent power, subject to federal preemption, to make arrests for violations of federal immigration law).

Local Police Compliance with Fourth Amendment Protections

A. Consensual Encounter Context

A consensual encounter between a police officer and a private individual does not trigger the Fourth Amendment prohibition against a police seizure of a person without a reasonable suspicion of criminal activity.²⁹ “[M]ere police questioning does not constitute a seizure.”³⁰ Most citizens will respond to a police request. The fact that people do so, and do so without being told they are free not to respond, does not eliminate the consensual nature of the response.³¹

“An initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”³² Circumstances that might indicate a seizure include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer’s request would be compelled.³³

Law enforcement officers do not violate the Fourth Amendment’s prohibition of unreasonable seizures merely by approaching individuals on the street, in other public places, or on public conveyances, and putting questions to them if they are willing to listen. Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means.³⁴ Where bus travelers were briefly detained by INS agents at a scheduled rest stop and not otherwise delayed in their journey, a brief questioning regarding citizenship was a minimal intrusion on the bus travelers’ privacy interests compared, to the government’s substantial interest in controlling illegal immigration.³⁵

When a police officer approaches an individual and asks questions or requests identification, no seizure occurs as long as the officer does not convey that compliance is required.³⁶ A state trooper who approached the driver of a van fueling at a highway truck stop, and who did not show his weapon or touch the driver, but asked for a driver’s license, vehicle registration, and

²⁹ *Florida v. Bostick*, 501 U.S. 429 (1991).

³⁰ *Id.* at 434; *see also INS v. Delgado*, 466 U.S. 210, 216 (1984) (recognizing interrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure).

³¹ *INS v. Delgado*, 466 U.S. 210, 215-217 (1984).

³² *Id.* at 215.

³³ *U.S. v. Perez-Sosa*, 164 F.3d 1082, 1084 (8th Cir. 1998).

³⁴ *U.S. v. Drayton*, 536 U.S. 194, 201 (2000).

³⁵ *U.S. v. Angulo-Guerrero*, 328 F.3d 449, 453 (8th Cir. 2003) (Loken, Chief Judge, concurring.)

³⁶ *U.S. v. Perez-Sosa*, 164 F.3d 1082, 1084 (8th Cir. 1998).

insurance papers had engaged in a consensual encounter, even though he had unsuccessfully used his flashing lights and loudspeaker in a show of force to ask the driver of the van to pull over outside the truck stop.³⁷

During a consensual questioning, a respondent may claim to be a U.S. citizen, lawful permanent resident, or to have some other immigration status authorizing his or her presence in the United States. The former INS recommended that its enforcement officers questioning a person as to citizenship status use a standard format: “*Of what country are you a citizen?*” This awkward format requires the respondent to demonstrate his or her understanding of the English language and to make a “thoughtful” active response.³⁸ A mere response by itself is not conclusive. An officer in this circumstance may then ask to see the person’s documents.

B. Terry Stop or Investigative Detention Context

State and local officers, like their federal counterparts, have authority to stop and detain persons for a brief warrantless interrogation (or “Terry stop”) based on reasonable suspicion that the person has committed a violation of federal law — including federal immigration law.³⁹ To be lawful,

- (i) The officer’s action must be justified by reasonable suspicion at its inception, and
- (ii) The scope of the detention must be reasonably related to the circumstances that justified the interference in the first place.

Reasonable suspicion requires that an officer have a particularized and objective basis, supported by “specific and articulable facts, taken together with rational inferences from those facts,” for suspecting a person of legal wrongdoing.⁴⁰ In determining whether reasonable suspicion exists, courts “look to the totality of the circumstances,” rather than assessing each factor or piece of evidence in isolation.⁴¹ “This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person. Although an officer’s reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.”⁴²

A traffic stop constitutes a seizure and therefore must be “reasonable.”⁴³ A stop is reasonable if it is based on either an observed traffic violation, or a reasonable articulable suspicion that such a

³⁷ *Id.* at 1083.

³⁸ INS Inspector’s Field Manual § 12.3.

³⁹ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁴⁰ *Id.* at 21.

⁴¹ *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002).

⁴² *Id.* at 273-274 (citations and quotation marks omitted).

⁴³ *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

violation has occurred or is occurring.⁴⁴ “The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave. An officer’s inquiries into matters unrelated to the justification for the traffic stop, [the Supreme] Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not extend the duration of the stop.”⁴⁵

A seizure can become unlawful, “if it is prolonged beyond the time reasonably required” to complete the traffic stop.⁴⁶ Whether a particular investigatory stop is too long turns on a consideration of all relevant factors, including “the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes.”⁴⁷ Further, a court should inquire “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”⁴⁸

In a routine traffic stop, a local officer with “reasonable suspicion” can detain an individual to ask a moderate number of questions intended to determine identity and obtain information that would confirm or dispel suspicions.⁴⁹ It is permissible in a determination of identity during a lawful stop to inquire, “Where are you from?” to verify immigration status.⁵⁰

It is essential for local officers to remember that foreign appearance based on ethnic characteristics or language can only be considered *in combination with* other specific circumstances that the officer can describe in words.⁵¹ For example, reasonable articulable suspicion existed where an Oklahoma state patrol officer asked occupants of a van whether they were “legal” based *in part* on their ethnic appearance, where the vehicle had been stopped for an apparent seat belt violation and the occupants were first questioned about their travel plans, and what family or other relationships existed between the passengers.⁵²

“An investigative seizure can continue, even after the initial suspicion has dissipated, if the additional detention is supported by new reasonable suspicion of criminal activity. In other words, reasonable suspicion must exist at all stages of the detention, although it need not be

⁴⁴ *U.S. v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995).

⁴⁵ *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (citations omitted); *see also Rodriguez v. U.S.*, 135 S. Ct. 1609 (2015) (ruling a police seizure justified only by a police-observed traffic violation became unlawful if it was prolonged beyond the time reasonably required to complete the mission of issuing a ticket for the violation).

⁴⁶ *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

⁴⁷ *U.S. v. Sharpe*, 470 U.S. 675, 685 (1985).

⁴⁸ *Id.* at 686; *see also U.S. v. Place*, 462 U.S. 696, 709-10 (1983) (holding 90 minute detention of luggage unreasonable on specific facts of case); *United States v. Vega*, 72 F.3d 507, 514-16 (7th Cir. 1995) (upholding 62 minute stop).

⁴⁹ *Berkemeer v. McCarty*, 468 U.S. 420, 439 (1984).

⁵⁰ *Gomez v. State of Florida*, 517 So. 2d 110 (Fla. 3d DCA 1987).

⁵¹ Meissner, D., INS memo HQQPS 50/19-P, Attachment A-7, May 22, 1998.

⁵² *U.S. v. Favel-Favela*, 41 Fed.Appx.185 (10th Cir. 2002).

based on the same facts throughout.”⁵³ Thus, observations made while investigating a traffic violation or other offense can provide an independent basis for reasonable suspicion that either the driver or his passengers have violated federal immigration laws, which would then permit further detention to investigate the immigration violations as part of the Terry stop procedure.⁵⁴

Implementing a New Local Immigration Law Enforcement Program

FAIR suggests the following general sequence of planning actions for implementing a new immigration law enforcement program in a local jurisdiction:

1. Seek to participate in DHS’s cooperative programs. For instance, apply to DHS for certification and training of designated members of your force as local immigration law enforcement officers under a Section 287(g) cooperative agreement. While (as this memo emphasizes) such formal measures are not obligatory, such an agreement can provide local officers with federal liability protections and immunities. Contact FAIR for further information.
2. Undertake an initial impact assessment of the alien population in your jurisdiction. Contact other local government agencies, community, non-profit and public service organizations and your own intelligence sources to develop a best estimate of the size, distribution, and profile of aliens, both legal and unauthorized, who are present in your jurisdiction. Review your police department’s records to identify locations where arrests of persons who were subsequently identified as illegal aliens have been clustered. Update the database regularly, and brief patrol and supervisory officers on the key findings. Knowledge of prior patterns and violations is an important element for establishing reasonable suspicion.
3. Keep ICE informed of your activities, beginning in the planning stages. Discuss options to integrate your local plan with a RRT (Rapid Response Team) program in your jurisdiction. ICE enforcement officers will appreciate and respond to a “value-added” approach that adds more in capability than it consumes in limited federal resources.
4. Complete budget and legal program reviews with local government and agency legal counsel. Insure that your local government has planned for the costs associated with detention of illegal aliens pending their transfer to federal custody, and taken steps to minimize or shift such costs to the federal government. FAIR can respond to questions from local government officials and their legal counsel regarding technical aspects of immigration law enforcement.
5. Consider hiring a consultant to conduct immigration enforcement training for your agency, perhaps in a cooperative effort with other jurisdictions. Retired senior Border Patrol and INS personnel are available at reasonable cost. FAIR can assist in locating these individuals.

⁵³ *U.S. v. De La Cruz*, 703 F.3d 1193, 1198 (10th Cir. 2013) (citation and quotation marks omitted).

⁵⁴ *U.S. v. Wilson*, 7 F.3d 828, 834 (9th Cir. 1993).

6. Ensure that the public is informed in advance of changes in enforcement policy. If, as is often the case, you determine that the illegal alien population in your jurisdiction is largely composed of a dominant nationality, a communication strategy to inform this community is critical. A successful public information program will also have the effect of deterring illegal aliens from remaining in the jurisdiction, which is the most cost effective solution. In contrast, a sudden, secret crackdown, no matter how well intentioned, will run the risk of generating protests that can cripple a local program.