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The Honorable Scott A. Surovell
Member, Senate of Virginia
Post Office 289
Mount Vernon, Virginia 22121

Dear Senator Surovell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You have asked that I update my opinion dated January 5, 2015, to the Honorable Ken Stolle ("2015 Opinion"),[1] which addressed the issuance of I-247 immigration detainers by U.S. Immigration and Customs Enforcement (ICE) to request that local and regional law enforcement agencies detain otherwise releasable prisoners. Specifically, you note that ICE now issues an I-200 Warrant for Arrest of Alien[2] along with an I-247A Immigration Detainer,[3] and you ask whether the addition of this warrant requires that the detainer be honored any differently.

Background

The 2015 Opinion concludes that "an ICE detainer is merely a request"[4] and "does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody."[5]

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[1] 2015 Op. Va. Att'y Gen. 3.

[2] The United States Department of Homeland Security publishes Form I-200 entitled, "Warrant for Arrest of Alien." U.S. DEP'T OF HOMELAND SEC., FORM I-200, WARRANT FOR ARREST OF ALIEN (Rev. 09/16), available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF.

[3] The United States Department of Homeland Security publishes Form I-247A entitled, "Immigration Detainer – Notice of Action." U.S. DEP'T OF HOMELAND SEC., FORM I-247A, IMMIGRATION DETAINER – NOTICE OF ACTION (3/17), available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

[4] 2015 Op. Va. Att'y Gen. 3, 3.

In 2017, ICE instituted a policy requiring that each I-247A Immigration Detainer issued by the agency to a federal, state, local, or tribal law enforcement agency (LEA) be accompanied by either a Form I-200 Warrant for Arrest of Alien or a Form I-205 Warrant of Removal/Deportation.[6] You are concerned that local LEAs, including sheriffs operating local jails, may have misunderstood the I-200 Warrant as creating an obligation to detain individuals after they are eligible for release because "ICE calls [the document] a 'warrant.'"

Applicable Law and Discussion

Given the complex intersection of federal, state, and local authority in the enforcement of immigration law, Virginia's Attorneys General have been called on to offer guidance on a number of occasions.[7] In particular, former Attorney General Robert F. McDonnell published an opinion in 2007 advising that absent an agreement with federal authorities, localities should refrain from arresting individuals for civil violations of federal immigration laws.[8] This advice was restated in a 2010 opinion issued by Attorney General Kenneth Cuccinelli[9] and most recently, was found to be in accordance with current law in my 2019 opinion to you and Delegate Alfonso Lopez.[10]

More specific to your inquiry is the 2015 Opinion that concludes that an I-247 Immigration Detainer is a mere request to LEAs to detain a prisoner who is otherwise eligible for release.[11] This opinion is based on the plain language of 8 C.F.R. § 287.7 and relevant federal appellate decisions.[12] In

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[5] *Id.*

[6] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, POLICY NUMBER 10074.2, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS ¶¶ 2.4, 5.2 (eff. April 2, 2017), available at https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf [hereinafter ICE POLICY NUMBER 10074.2]. The policy defines "detainer" as "[a] notice that ICE issues to a federal, state, local, or tribal LEA to inform the LEA that ICE intends to assume custody of a removable alien in the LEA's custody." *Id.* ¶ 3.1. All such detainers must include a Form I-200 Warrant for Arrest of Alien or a Form I-205 Warrant of Removal/Deportation, signed by an authorized ICE immigration officer. *Id* at ¶¶ 2.4, 5.2.

[7] *See, e.g.*, 2019 Op. Va. Att'y Gen. No. 16-045, available at https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1357-2019-official-opinions; 2015 Op. Va. Att'y Gen. 3; 2010 Op. Va. Att'y Gen. 151; 2007 Op. Va. Att'y Gen. 108.

[8] 2007 Op. Va. Att'y Gen. 108, 109, 112-14. Attorney General McDonnell based his advice on the ambiguity of federal law, as well as state law restrictions placed on certain local law enforcement officers in civil matters.

[9] 2010 Op. Va. Att'y Gen. 151, 152.

[10] 2019 Op. Va. Att'y Gen. No. 16-045, available at https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1357-2019-official-opinions.

[11] 2015 Op. Va. Att'y Gen. 3, 4.

[12] *Id.* at 4-5 (citing Galaraza v. Szalczyk, 745 F.3d 634, 635 (3d Cir. 2014) ("8 C.F.R. § 287.7 does not compel state or local [LEAs] to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as requests to [LEAs]."); Ortega v. U.S. Immigration & Customs Enforcement, 737 F.3d 435, 438 (6th Cir. 2013) (noting that federal immigration officials issue detainers to local LEAs "asking the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released"); Liranzo v. United States, 690 F.3d 78, 82 (2d Cir. 2012) (noting that "ICE issued an immigration detainer to [jail] officials requesting that they release Liranzo only into ICE's custody so that he could be removed from the United States"); United States v. A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) (finding that an ICE detainer is not "an order of custody;" it is a "request that another law enforcement agency

fact, the United States Court of Appeals for the Fourth Circuit describes a Form I-247 Immigration Detainer as "a mechanism by which federal immigration authorities *may request* that another law enforcement agency temporarily detain an alien 'in order to permit assumption of custody'" by ICE.[13]

Effective April 2, 2017, ICE published a new policy with a goal of "ensur[ing] ICE's LEA partners may honor detainers."[14] This policy, also referred to as a directive, requires that ICE issue an I-200 Warrant for Arrest of Alien or I-205 Warrant of Removal/Deportation along with an I-247A Immigration Detainer.[15] The United States Attorney General is authorized to issue a warrant to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States"[16] or to take into custody an alien who has already been adjudicated removable.[17] An I-200 Warrant for Arrest of Alien is an administrative warrant, rather than a judicial one, and it is issued for civil, rather than criminal, immigration violations.[18]

An I-247A Immigration Detainer and the accompanying I-200 Warrant for Arrest of Alien state that there is probable cause to believe that the alien is removable from the United States, and the I-247A Detainer requests that the alien be maintained in the LEA's custody.[19] Although ICE maintains that attachment of the warrants "is not legally required [to detain an alien],"[20] ICE explains that it instituted the 2017 policy after a judicial ruling that "detention pursuant to an ICE detainer constitutes a warrantless arrest and that section 287(a)(2) of the INA [Immigration and Nationality Act] only authorizes a warrantless arrest if there is reason to believe the alien will escape before an arrest warrant can be secured."[21] Thus, by attaching the I-200 to the I-247A Detainer, ICE is attempting to remove local LEA concerns regarding whether probable cause exists to detain or arrest an individual for a civil violation of federal immigration law.

Notably, this change in ICE policy was *not* accompanied by a change in federal immigration law or regulations. By its own terms, the policy "provides only internal ICE guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create or diminish any rights, substantive or procedural, enforceable at law or equity by

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notify the INS [Immigration and Naturalization Service] before releasing an alien from detention"); Giddings v. Chandler, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) (describing the procedure under § 287.7 as "an informal [one] in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person's death, impending release, or transfer to another institution")).

[13] United States v. Uribe-Rios, 558 F.3d 347, 350 n.1 (4th Cir. 2009) (emphasis added).

[14] ICE POLICY NUMBER 10074.2, *supra* note 6, ¶ 2.

[15] *Id.* ¶¶ 2.4, 5.2.

[16] 8 U.S.C. § 1226(a).

[17] 8 U.S.C. § 1226(c).

[18] *See* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1243, 1247 (E.D. Wash. 2017), *vacated in part on other grounds, appeal dismissed as moot on other grounds by* 716 Fed. App'x 741 (9th Cir. 2018).

[19] ICE immigration officers are required to "establish probable cause to believe that the subject is an alien who is removable from the United States" before issuing an I-247A detainer to a law enforcement agency. *See* ICE POLICY NUMBER 10074.2, *supra* note 6, ¶ 2.4. An I-247A detainer is only issued to a state or local LEA when the alien has been taken into custody by the LEA. *See id.* ¶ 2.3.

[20] *Id.* ¶ 2.4 n.2.

[21] *Id.* (citing Moreno v. Napolitano, 213 F. Supp. 3d 999 (N.D. Ill. 2016)).

any party in any criminal, civil, or administrative matter."[22] It is this policy that has given rise to your questions concerning the legal effect of the I-200 Warrant for Arrest of Alien.

I. Does the attachment of an I-200 Warrant for Arrest of Alien obligate an LEA to honor an I-247A Immigration Detainer?

By its own terms, the I-200 Warrant for Arrest of Alien cannot be executed by local law enforcement officers whose LEAs have not entered into an agreement with the United States Attorney General pursuant to 8 U.S.C. § 1357(g). Commonly known as "§ 287(g) agreements," these agreements empower state and local law enforcement officers to carry out the functions of a federal immigration officer relating to the investigation, apprehension or detention of aliens, to the extent consistent with state and local law.[23] In performing such a function under a § 287(g) agreement, a local law enforcement officer is "subject to the direction and supervision of the [U.S.] Attorney General"[24] and is deemed "to be acting under color of Federal authority for purposes of determining . . . liability[] and immunity from suit."[25] Additionally, the state or local law enforcement officer must have received adequate training for the enforcement of relevant federal immigration law.[26]

Pursuant to federal regulation, the I-200 Warrant for Arrest of Alien is directed only to "[a]ny immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations."[27] Because the I-247A Immigration Detainer is a mere request and the I-200 Warrant for Arrest of Alien may be executed only by specified immigration officers, I am of the opinion that an I-247A Immigration Detainer accompanied by the I-200 Warrant for Arrest of Alien does not impose on local LEAs an obligation to detain or arrest individuals for civil violations of immigration law, unless the LEA has been authorized and directed to enforce civil immigration law pursuant to a § 287(g) agreement.

II. Do the I-247A Immigration Detainer and the I-200 Warrant for Arrest of Alien provide a local LEA that has not entered into a § 287(g) agreement with authority to detain or arrest an alien for a civil violation of immigration law?

Federal courts throughout the nation, including the United States Fourth Circuit Court of Appeals in *Santos v. Frederick County Board of Commissioners*, have found that state and local LEAs cannot

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[22] *Id.* ¶ 9.

[23] 8 U.S.C. § 1357(g)(1).

[24] 8 U.S.C. § 1357(g)(3).

[25] 8 U.S.C. § 1357(g)(8).

[26] 8 U.S.C. § 1357(g)(2) (providing that a 287(g) agreement shall require that the "officer or employee . . . performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws").

[27] U.S. DEP'T OF HOMELAND SEC., FORM I-200, WARRANT FOR ARREST OF ALIEN (Rev. 09/16), available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF; *see* 8 C.F.R. § 287.8(c)(1) (providing that "[o]nly designated immigration officers are authorized to make an arrest"); *see in accord* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1255-56 (E.D. Wash. 2017) (jail staff not authorized or qualified to execute administrative warrant).

detain or arrest an individual for a civil violation of immigration laws unless acting under color of federal law by virtue of a § 287(g) agreement or other federal authorization.[28] This is largely because law enforcement officers acting under color of state law do not have probable cause to detain or arrest an alien for civil immigration violations.[29] While it is sometimes argued that local LEAs may voluntarily provide "operational support" under 8 U.S.C. § 1357(g)(10) absent a § 287(g) agreement, the majority of federal courts ruling on this issue have concluded that § 1357(g)(10) would not empower a local law enforcement officer to arrest an individual for a civil violation of federal immigration law without the approval, request, or direction of the federal government.[30]

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[28] *See* Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 465 (4th Cir. 2013) ("[A]bsent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law"); Melendres v. Arpaio, 695 F.3d 990, 1001 (9th Cir. 2012) (in the absence of authority pursuant to an agreement under § 1357(g), the sheriff "must enforce only immigration-related laws that are criminal in nature"); C.F.C. v. Miami-Dade Cty., 349 F. Supp. 3d 1236, 1261-62 (S.D. Fla. 2018) (agreeing with *Santos* that "'absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on'" civil violations of federal immigration law); Abriq v. Hall, 295 F. Supp. 3d 874, 880-81 (M.D. Tenn. 2018) (standing alone, detainers do not provide the necessary direction and supervision needed to "seize" an alien for known or suspected civil immigration violations); Lopez–Aguilar v. Marion Cty. Sheriff's Dep't, 296 F. Supp. 3d 959, 977-78 (S.D. Ind. 2017) (state officers may only effect constitutionally reasonable seizures for civil immigration violations when acting under color of federal law, meaning that the state officer has been directed, supervised, trained, certified, and authorized by the federal government); *Ochoa,* 266 F. Supp. 3d at 1255-56 (finding that ICE's administrative warrant "cannot be seen as a request, direction, authorization, or other instruction from DHS" to a local agency).

[29] *See* Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1306-07 (S.D. Fla. 2018) (immigration detainer does not justify seizure of an individual by local law enforcement officers acting under color of state law); *Abriq*, 295 F. Supp. 3d at 880 (officers acting under color of state law lack probable cause to conduct constitutionally reasonable seizures of aliens known or suspected to have committed civil violations of immigration law); *Lopez-Aguilar*, 296 F. Supp. 3d at 974-975 (local law enforcement agencies holding an individual someone pursuant to a detainer—and without separate probable cause that the person has committed a crime—gives rise to a Fourth Amendment claim); *Ochoa*, 266 F. Supp. 3d at 1258-59 ("[L]ocal law enforcement officials violate the Fourth Amendment when they temporarily detain individuals for immigration violations without probable cause."); People ex rel. Wells v. DeMarco, 88 N.Y.S.3d 518, 536 (N.Y. App. Div. 2018) (detention of aliens, who would otherwise be released from prison, pursuant to ICE detainers and administrative warrants is unlawful).

[30] *See Abriq*, 295 F. Supp. 3d at 880 (detention based solely on ICE detainer exceeds the limits of local cooperation under federal law); *Lopez-Aguilar*, 296 F. Supp. 3d at 973 (holding that "federal permission for state-federal cooperation in immigration enforcement does not embrace detention of a person based solely on either a removal order or an ICE detainer . . . [because] [s]uch detention exceeds the 'limited circumstances' in which state officers may enforce federal immigration law"); Lunn v. Commonwealth, 78 N.E.3d 1143, 1159 (Mass. 2017) (finding that state officers were not authorized to arrest individuals for civil immigrations violations under § 1357(g)(10) because "it is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law"); *DeMarco*, 88 N.Y.S.3d at 535-36 (holding that the detention of prisoners who would otherwise be released pursuant to ICE detainers and administrative warrants is not permitted as a cooperative act under the Immigration and Nationality Act if enforcement of civil immigration violations is not authorized by state law).

Conclusion

It is my opinion that the conclusion reached in the 2015 Opinion remains valid. The issuance of an I-247A Immigration Detainer, whether or not accompanied by an I-200 Warrant for Arrest of Alien, does not obligate or authorize local LEAs to detain or arrest individuals for civil violations of immigration laws, unless the LEA has entered into a § 287(g) agreement with federal authorities authorizing and directing such action.

With kindest regards, I am,

Very truly yours,

Mark R. Herring

Mark R. Herring
Attorney General