



September 26 2017

The Honorable Scott H. Jenkins  
Sheriff  
Culpeper County Sheriff's Office  
14023 Public Safety Court  
Culpeper, VA 22701

**Re: Application for Delegated Authority Pursuant to 287g**

AMERICAN CIVIL  
LIBERTIES UNION OF  
VIRGINIA  
701 E. FRANKLIN ST.  
SUITE 1412  
RICHMOND, VA 23219  
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Dear Sheriff Jenkins:

It is our understanding that you have chosen to apply for a 287g for the Culpeper County Jail which will require you to enter into a Memorandum of Agreement (MOA) with U.S. Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (copy of model MOA enclosed). If the application is accepted, certain of your deputies would be trained and delegated authority to enforce civil immigration laws in the Jail. As the introductory paragraph in the standard form of the MOA enclosed says, "it is the intent of the parties that these delegated authorities will enable the [your office] to identify and process for removal, under ICE supervision, aliens in [your] jail/correctional facilities who fall within ICE's **civil** immigration enforcement priorities."

In your March 13, 2017 letter to ICE seeking approval to participate in the 287g program, you said that you believed that entering into an MOA would enable the Sheriff's office to "participate with ICE in identifying criminal illegal aliens who pose a risk to the citizens of Culpeper County." That statement reflects a fundamental misunderstanding of the purpose of the 287g program and confusion about your office's responsibilities under state and federal law and about how the 287g program works.

First, the 287g program is specifically about enforcement of civil, not criminal, violations of federal immigration law. As Section II of the enclosed standard MOA states: "Section 287g of the Immigration and Nationality Act (INA), ... authorizes the Secretary of DHS to enter into written agreements with a State or any political subdivision of a State so that qualified personnel can perform certain functions of an immigration officer." The program is not just about "criminal aliens" either from the point of view of alleged immigration violations (which may not be criminal) or from the point of view of alleged violations of state or local law for which they may have been arrested but not yet tried or convicted, and, thus, are not criminals until proven so.

Without the 287g program authority, your office has **no** authority to enforce civil immigration law (visa requirements, for example) and very limited authority to

enforce criminal violations of immigration law.<sup>1</sup> Volunteering to accept 287g authority to enforce civil immigration laws is a significant departure from your office's public safety mission and is much more than a matter of "paperwork."

Under Sections VI and VII of the standard 287g MOA, employees in your department would be trained to become "immigration officers" under the supervision and control of ICE officers with respect to immigration enforcement functions. Pursuant to the Standard Operating Procedure that is Appendix D to the enclosed standard MOA, these officers would have the authority to identify and process for immigration violations any "removable alien" or "those aliens who have been arrested [not convicted] for violating a Federal, state or local offense." They would have the authority to "serve [administrative ICE] warrants of arrest for immigration violations [civil or criminal]." They would have the authority to "administer oaths and to take and consider evidence ... to complete required alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review." They would have the authority to prepare charging documents for ICE supervisory review. They would have the authority to issue immigration detainers, requests for transfer and other forms for processing aliens. And, they would have the authority to detain and "transport arrested aliens subject to removal to ICE-approved detention facilities." Some or all of these individuals could be "guilty" only of civil immigration law violations and many would have committed no crime under local, state or federal law.

Second, volunteering to perform the federal government's job of enforcing civil immigration law will impose significant additional costs that must be borne by local taxpayers and will not be reimbursed by the federal government. The individuals serving as ICE officers pursuant to a 287g agreement in your office may or may not have time to perform other duties. If they do not, there is a cost in lost productivity of having people on your staff unavailable to do local functions because they are working for ICE. Moreover, as the Section IX of the enclosed standard MOA makes clear, your office will be "responsible for personnel expenses, including but not limited to, salaries and benefits, including overtime, local transportation, and official issue material." This is true for the period while your employees are being trained by ICE. In addition, the MOA says that your office will be responsible to cover "the costs of all [of your personnel's] travel, housing, and per diem affiliated with the training required for participation" in the 287g program. The MOA goes on to say in the same section that ICE "may" issue a travel order to reimburse the direct costs incurred when attending training but that it is up to ICE to determine if that is to happen.

Beyond personnel costs, Section IX of the MOA makes clear that your office is responsible for the costs of upgrading computer cabling and power to accommodate ICE installed software and hardware, the costs of phone and internet service, and the

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<sup>1</sup> <http://www.oag.state.va.us/files/Opinions/2007/07-086-Stolle-Albo.pdf>

costs of administrative and office supplies and security equipment. It also specifies that you will provide free space to ICE supervisory employees.

Finally, you will receive no reimbursement for detaining anyone pursuant to orders entered by the delegated ICE officers in your employ, unless you execute an optional Inter-Governmental Services Agreement (IGSA) as described in Section V of the MOA pursuant to which you may be paid a fee to detain persons for immigration purposes on behalf of the federal government or to provide transportation of “incarcerated aliens” who have completed their sentences to a “facility or location designated by ICE.” Detention under an IGSA pursuant to orders entered by your own employees could be for periods beyond 48 hours, converting your jail into a temporary ICE detention facility. While we know that the federal reimbursement for such detentions can be higher than state payments, it does not always cover the costs of detention. We hope that there isn’t a financial reason why you have applied for a 287g agreement and that it is not a precursor to your entering into an IGSA providing for payments to your agency.

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State law already requires your office to check the immigration status of every person admitted to custody at the Culpeper County Jail.<sup>2</sup> Section 19.2-83.2 requires you or one of your officers in charge of the facility to “inquire as to whether the person (i) was born in a country other than the United States, and (ii) is a citizen of a country other than the United States,” and to make “an immigration alien query to the Law Enforcement Support Center” of ICE and to report the results of the query to LIDS.<sup>3</sup> When that inquiry is made to ICE, they are alerted to the presence of that individual in your jail, and ICE may take action to obtain a criminal warrant where possible or issue a civil detainer/administrative warrant and seek transfer of the person to the agency’s custody up to 5 days before their criminal sentence is ended as is authorized by state law.<sup>4</sup>

No state or federal law requires any further action on your part relative to the immigration status of any person in your jail. If ICE wants to seek custody of an individual for either a criminal or civil violation of federal immigration laws, it has ample notice and time to act. Our state “check on admission” and check again upon conviction and commitment requirements give ICE ample notice. Our state statutes authorizing transfer to ICE custody and early release up to 5 days before end of their

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<sup>2</sup> This is just one of several reporting requirements that ensures that ICE will have notice of persons in the country without authority or persons here on visas or with other legal status who are being held in jail or prison for violations of state or local laws. In addition to the “check on admission” requirement, parole officers are required to report under Section 19.2-294.2 regarding persons convicted of felonies and jail and correctional officers must inquire and report regarding citizenship status when a person is convicted and committed,

<sup>3</sup> Your office is required to make this same inquiry and report regarding anyone “committed” to your jail after trial. Section 53.1-218 of the Code of Virginia.

<sup>4</sup> Section 53.1-220.2 of the Code of Virginia. General authority to transfer prisoners to ICE prisoners convicted of certain acts is at 53.1-220.1.

state or local sentence give ICE ample opportunity to take custody of someone before they are released.

We do not believe that you can be a department with delegated ICE agents on your staff (over whom you have no supervisory control) who are charged with enforcement of federal immigration laws and expect to maintain the constructive relationships with the immigrant community that are necessary to effective community policing and to keeping everyone in Culpeper County safe. Contrary to the representation in your letter to ICE, volunteering to help the Federal government enforce federal civil immigration laws will make your County residents less safe by impeding your ability to build and maintain effective relationships with members of the immigrant community in the County.

Accordingly, we strongly encourage you to withdraw your application for a 287g jail agreement, and not to volunteer your department to take on the federal government's job of enforcing immigration laws, particularly at a time when the laws themselves are badly broken and in need of comprehensive reform.

Please let me know if I can provide any further clarity about the 287g program and the unwarranted financial and other costs and obligations it would impose on your department and Virginia and Culpeper taxpayers.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Claire Guthrie Gastañaga". The signature is fluid and cursive, with the first name "Claire" being the most prominent.

Claire Guthrie Gastañaga

Enclosure

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