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John W. Jones
Executive Director
Virginia Sheriffs' Association
951 East Byrd Street – Suite 905
Richmond, Va. 23219

Dana Schrad
Executive Director
Virginia Association of Chiefs of Police
880 Technology Park Dr. #100
Glen Allen, Va. 23059

Dean Lynch
Executive Director
VACo
1207 East Main Street
Richmond, Va. 23219

Kimberly A. Winn
Executive Directorp
VML
P.O. Box 12164
Richmond, Va. 23241

Dear colleagues:

For nearly a hundred years, the American Civil Liberties Union has fought to defend the Constitution and this nation's values of liberty and equal treatment. As in prior presidential administrations, we have been keenly focused on aspects of the current administration's agenda that run contrary to that mission. Perhaps in no area have we had more significant concerns than with immigration. We have challenged the president's travel ban on refugees and Muslims and been deeply critical of other aspects of his immigration agenda, especially with regard to interior immigration enforcement, which is this subject of this letter.

Given clear indications that the federal government now seeks to encourage, if not compel, local jurisdictions to directly support federal immigration enforcement¹, the American Civil Liberties Union of Virginia writes to inform you and your members of potential challenges and legal liability associated with your involvement in federal immigration enforcement. We also offer our support in efforts to resist the pressure

¹ Executive Order: Enhancing Public Safety in the Interior of the United States (January 25, 2017); Executive Order: Border Security and Immigration Enforcement Improvements (January 25, 2017); DHS Memoranda: Enforcement of the Immigration Laws to Serve the National Interest (February 20, 2017).

from the administration, and assistance where local law enforcement agencies may seek to refine their policies and practices in this area.

The enforcement of immigration laws is a role assigned to the federal government under Article 1, Section 8 of the Constitution, and you have no obligation under federal law to participate. Below, we provide key reasons that an increasing number of states and localities across the nation have opted – even before President Trump announced his mass deportation plans – to leave the business of immigration enforcement to the federal government and focus their resources on local matters.² We also provide background information on two particularly ill-conceived practices that have led to a range of negative consequences, including Constitutional violations, for local governments.

Principal Reasons to Decline Involvement in Federal Immigration Enforcement

- *Local Priorities* – Local law enforcement has traditional priorities that include responding to emergencies, patrolling neighborhoods to prevent crime, facilitating certain functions of the court system, and numerous other duties. Time spent engaging in federal immigration enforcement detracts from performance of these core duties. Immigration enforcement does not advance local priorities, because it commonly targets individuals who pose no threat to public safety.³ Traditional police work designed to solve serious crimes should not be displaced by efforts to identify and arrest people who may have overstayed a visa.⁴
- *Local Law Enforcement/Community Relations* – To effectively protect public safety, local law enforcement needs cooperation from local communities. Local residents serve as witnesses, report crime, and otherwise assist law enforcement. The foundation for this cooperation can often be destroyed when local police are viewed as an extension of the immigration system.⁵ Survivors of domestic violence refrain from reporting offenses; individuals with key information about burglaries fail to contact the police. These outcomes are not limited to the undocumented population. Many undocumented immigrants have U.S. citizen spouses and children. And because citizens and immigrants with legal status often fall victim to mistakes by ICE, their views toward local officials can sour as well.⁶

AMERICAN CIVIL
LIBERTIES UNION OF
VIRGINIA
701 E. FRANKLIN ST.
SUITE 1412
RICHMOND, VA 23219
T/804.644.8080
WWW.ACLUVA.ORG

² Recent reaction from law enforcement leaders to Trump Administration policies captures this same sentiment: <https://www.theguardian.com/us-news/2017/mar/01/police-chiefs-letter-trump-deportation-immigrants>, and even prior to the Trump Administration, localities had expressed clear reservations in this area – see, for example, the 2013 Statement from the Major Cities Chiefs Association: <http://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/MCCAPC130821.pdf>.

³ Transactional Records Access Clearinghouse (TRAC), *Who Are the Targets of ICE Detainers?*, Feb. 20, 2013 (“In more than two out of three of the detainers issued by ICE, the record shows that the individual who had been identified had no criminal record—either at the time the detainer was issued or subsequently.”), <http://trac.syr.edu/immigration/reports/310/>.

⁴ Few ICE Detainers Target Serious Criminals, TRAC Immigration, <http://trac.syr.edu/immigration/reports/330/> (Mar. 2, 2017).

⁵ See, e.g. the University of Illinois at Chicago report from May 2013: https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

⁶ Data over a four year period analyzed by Syracuse Transactional Records Access Clearinghouse revealed that ICE had placed detainers on 834 U.S. citizens and 28,489 legal permanent residents.

- *Fiscal Considerations* – Immigration enforcement is expensive.⁷ The federal government does not reimburse the cost of most programs and practices, and local jurisdictions can incur millions of dollars in added expenses as a result. These costs come through additional detention expenses, overtime payments for personnel, and litigation costs.⁸
- *Legal Exposure* – Local jurisdictions that participate in immigration enforcement often end up in court and held liable for constitutional violations. Local police acting upon ICE detainer requests have faced liability for unlawful detentions in violation of the Fourth Amendment and Due Process Clause. They have also been sanctioned by courts for violating prohibitions against racial profiling, especially under 287(g) “taskforce” agreements.⁹

Bad Idea #1: Complying with ICE Detainers

AMERICAN CIVIL
LIBERTIES UNION OF
VIRGINIA
701 E. FRANKLIN ST.
SUITE 1412
RICHMOND, VA 23219
T/804.644.8080
WWW.ACLUVA.ORG

An “ICE detainer” is a written request that local law enforcement detain an individual for an additional 48 hours after he/she would otherwise be released, and is used to provide ICE additional time to examine an individual’s immigration status, decide whether to take the individual into custody, and/or facilitate transfer into federal custody. These detainers are typically issued without a judicial warrant supported by probable cause. In consequence, once the traditional basis for criminal detention has lapsed, continued detention violates the Fourth Amendment’s bar on unlawful detentions. Federal courts around the nation have held local law enforcement agencies liable for unconstitutional detentions under ICE detainers.¹⁰ In other words, local law enforcement leaders make a *choice* not to ask for a judicial warrant from ICE, and bear the consequences of the federal government’s mistakes.

Most often, ICE’s detainers are merely the beginning of an investigation into someone’s status, and that investigation often goes nowhere. In a four year period, the Obama Administration placed detainer requests on 834 U.S. citizens — who are categorically *not* subject to removal — according to government data. Given the Trump Administration’s pledge to expand ICE personnel¹¹ and heighten focus on immigration enforcement,¹² it is inevitable that these types of mistakes will increase. Involvement with ICE in these practices unquestionably places law enforcement agencies at risk of liability – at a level greater than ever before – for which ICE will not provide indemnification.

⁷ Edward F. Ramos, [Fiscal Impact Analysis of Miami-Dade’s Policy on “Immigration Detainers](https://immigrantjustice.org/sites/immigrantjustice.org/files/Miami%20Dade%20Detainers--Fiscal%20Impact%20Analysis%20with%20Exhibits.pdf) (2014) (“[T]he annual fiscal impact of honoring immigration detainers in Miami-Dade County is estimated to be approximately \$12.5 million.”), <https://immigrantjustice.org/sites/immigrantjustice.org/files/Miami%20Dade%20Detainers--Fiscal%20Impact%20Analysis%20with%20Exhibits.pdf>.

⁸ A study by Justice Strategies of Los Angeles’ compliance with ICE detainers indicated that the program cost the county over \$26 million per year: <http://www.justicestrategies.org/publications/2012/cost-responding-immigration-detainers-california>.

⁹ Letter from ACLU, to Bruce Friedman, Senior Policy Advisor, Office for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. (Mar. 15, 2016), *available at* <https://www.aclu.org/letter/aclu-letter-dhs-crcl-re-287g-renewals-march-2016>.

¹⁰ <https://www.aclu.org/other/recent-ice-detainer-cases?redirect=recent-ice-detainer-cases>.

¹¹ <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

¹² <http://www.sfchronicle.com/bayarea/article/Trump-s-new-priorities-expose-more-immigrants-10949458.php>.

It is important to note that ICE detainer requests are voluntary, not mandatory. Many localities refuse to honor them unless supported by a judicial warrant.¹³ Localities that maintain this requirement are protecting their best interests, and promoting adherence to the Constitution. They are not violating any law, most certainly not 8 U.S.C. § 1373, which President Trump referenced in his Executive Order. The Tenth Amendment of the Constitution protects local law enforcement from being compelled to perform the functions of the federal government, and when you uphold the Fourth Amendment by declining to honor ICE detainers that are not supported by a judicial warrant, ICE can still carry out its role through a range of authorities and federal capabilities.

Bad Idea #2: Participation in 287(g) Program

Section 287(g) of the Immigration and Nationality Act allows ICE to enter into agreements with local law enforcement that permit designated local police officers to perform federal immigration enforcement functions. There are two principal forms of 287(g) agreements – “task force” models and “jail” models. Under the task force model, local police may interrogate and arrest alleged noncitizens encountered in the field who they believe to be deportable. Under the jail model, local police may interrogate alleged noncitizens in criminal detention who have been arrested on local charges, issue detainers on those believed to be subject to deportation, and begin deportation proceedings.

The 287(g) program is the most extensive form of local entanglement in federal immigration enforcement. It effectively transforms local police into federal immigration agents – yet without the same level of training that federal agents receive, and without federal funds to cover all of the expenses incurred by the local jurisdiction. 287(g) agreements often involve the full spectrum of negative results outlined above (diversion from core responsibilities, deterioration in community trust, negative fiscal impact, and legal exposure). Indeed, the DHS Inspector General has documented the challenges encountered in the 287(g) program, noting, for example, that “claims of civil rights violations have surfaced in connection with several [law enforcement agencies] participating in the program.”¹⁴ The public became more fully aware of these problems through the unconstitutional implementation¹⁵ of a 287(g) program in Maricopa County under Sheriff Joe Arpaio, who was subsequently voted out of office.

ACLU of Virginia Recommendation: Place Local Communities and the Constitution First

In order to preserve the Constitutional rights of all persons in the United States, the ACLU of Virginia strongly recommends the adoption of policies that place local communities first and limit involvement in federal immigration enforcement. This includes requiring judicial warrants in order to honor ICE detainers and declining to participate in the 287(g) program, as well as avoiding other forms of engagement in

¹³ See, e.g. the clear recommendation from the Kentucky Association of Counties from September 2014: <http://www.aclu-ky.org/wp-content/uploads/2014/09/kaco-memo.pdf>.

¹⁴ [DHS OIG Report on 298\(g\)](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

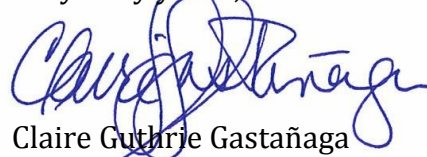
¹⁵ *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009).

federal immigration enforcement that lead to many of the same problems (e.g., notifying ICE of an individual's release date or home address, which can itself prolong someone's detention and sow distrust in the community). We believe, and evidence has shown, that such a decision is in the best interest of local communities. The Constitution protects states and localities from being compelled to perform federal functions; and choosing to engage in federal immigration enforcement results in clear, negative consequences to public safety and local resources, and increases liability risk. It is fully consistent with federal law for state and local law enforcement to avoid engagement in federal immigration enforcement.

The ACLU of Virginia remains a resource for any additional information officials may need on these immigration-related matters. We can also assist in the drafting and development of policies that formalize an appropriate set of rules on these issues (e.g., policies that limit inquiries by police regarding immigration status). We have attached to this letter a set of model provisions/rules that your members should adopt, if they are not already in place [see attachment]. Provisions that have been adopted by jurisdictions around the country along with other support materials are also found in a recent guidelines issued by the New York Attorney General.¹⁶

We understand that the Trump Administration has threatened to strip federal funds from jurisdictions that decline to direct their personnel and resources toward federal immigration priorities – a set of jurisdictions the Administration has lumped under the characterization of “sanctuary jurisdictions.” However, prior court decisions indicate that the Administration will encounter substantial constitutional hurdles, if it attempts to follow through on that pledge. We will continue to monitor developments across the Commonwealth in our role as defender of the Constitution, and take action to support or challenge your policies and practices, as needed.

Very truly yours,



Claire Guthrie Gastañaga
Executive Director

Enclosure

¹⁶ Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions, https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.1.19.17.pdf.