

Written Testimony: Colorado House Bill 17-1134

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House Bill 17-1134 proposes to put every public official in Colorado in the service of federal immigration enforcement. The bill suffers from numerous legal infirmities, but my testimony addresses only the legal questions pertaining to those provisions of the bill that target county sheriffs' current policy of not honoring immigration "detainers" that request sheriffs to prolong the detention of prisoners otherwise entitled to release.<sup>1</sup>

It is my studied legal opinion that these provisions of House Bill 17-1134 would result in violations of state and federal statutory and constitutional law.

**Immigration detainers and the origin of so-called "sanctuary" policies in Colorado**

Immigration detainers are requests issued by federal immigration officials to local sheriffs,<sup>2</sup> usually asking the local sheriff to prolong detention of a prisoner beyond the time when the prisoner would otherwise be released.<sup>3</sup>

Detainers were routinely honored in Colorado until three groundbreaking federal court decisions changed the legal landscape dramatically. *Morales v. Chadbourne* (D. R.I. Feb. 12, 2014), *Galarza v. Szalczyk* (3d Cir. March 4, 2014), and *Miranda-Olivares v. Clackamas County* (D. Ore. April 11, 2014) established two bedrock principles that altered sheriffs' understanding of immigration detainers. First, the decisions established that "immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal." (*Galarza*.) While sheriffs previously understood immigration detainers to be mandatory, *Galarza* and *Miranda-Olivares* made clear that sheriffs are in fact at liberty to decline the requests made through immigration detainers—indeed because the decision is up to the local law enforcement agency, the *Galarza* and *Miranda-Olivares* decisions made clear that counties and their officials could be held liable for prolonging the detention of a person based on an immigration detainer.

<sup>1</sup> Proposed § 13-21-1302(5) would outlaw sheriffs' policies that prohibit "or in any way restrict[]" their officers from "cooperating and complying with federal immigration officials," Proposed § 13-21-1302(6)(a), "enforcing federal immigration law," *id.*, or "continuing to detain an individual, regardless of the individual's ability to be released on bail, who has been identified as an illegal alien while in custody for violating any law of this state." Proposed § 13-21-1302(6)(e).

<sup>2</sup> Detainers are currently issued on either DHS form I-247D, I-247X, or I-247N. These forms (attached as Exhibits A, B, and C) were created in May 2015 as part of the "Priority Enforcement Program" ("PEP"), which replaced the "Secure Communities Program" ("SComm") as the Obama administration's main interior enforcement program. Under SComm, which ran from March 2008 to November 2014, all detainers were issued on Form I-247, which went through several changes over the course of the program. President Trump's Executive Order of January 25, 2017, "Enhancing Public Safety in the Interior of the United States," calls for the termination of PEP and reinstatement of SComm. A recent draft memorandum issued by DHS Secretary John Kelly on February 17, 2017 calls for the elimination of forms I-247D, I-247N, and I-247X, and their replacement with "a new form to more effectively communicate with recipient law enforcement agencies."

<sup>3</sup> DHS Form I-247N detainers do not request prolonged detention, but rather ask the sheriff to provide notice to immigration officials of a prisoner's release. These are used rarely; since the introduction of form I-247N, more than 5 in 6 detainers issued to Colorado sheriffs have requested prolonged detention.

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Second, the *Morales* and *Miranda-Olivares* courts held that any detention, based on an immigration detainer, of a prisoner beyond the time she would otherwise be entitled to release, amounts to a new arrest that must be justified independently of the reason for the initial detention and must satisfy the Fourth Amendment's requirements for an arrest.

Shortly after these decisions were announced, Colorado sheriffs, after conducting their own legal analysis, began changing their policies with respect to immigration detainees. By September 2014 all Colorado sheriffs declined requests, made through immigration detainees, to prolong the detention of prisoners who would otherwise be entitled to release.<sup>4</sup> Similar developments were occurring nationally, and by November 2014 the Obama administration, in the face of an "increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment," directed ICE to replace requests for prolonged detention with requests for notification of a prisoner's upcoming release date.<sup>5</sup> ICE has not done so,<sup>6</sup> however, and Colorado sheriffs continue to deny detainees that request prolonged detention.<sup>7</sup>

**Requiring sheriffs' officers to "cooperat[e] and comply with federal immigration officials"<sup>8</sup> will result in violations of state and federal statutory and constitutional law.**

Immigration officials have in the past, and likely will in the future, ask Colorado sheriffs to prolong the detention of prisoners who would otherwise be entitled to release, using detainees. While some detainees now recite that federal officials have probable cause to believe a person has committed a civil immigration violation, recent federal decisions (*Jimenez Moreno v. Napolitano* (N.D. Ill. Sept. 30, 2016); *Orellana v. Nobles County* (D. Minn. Jan. 6, 2017); and *Mercado v. Dallas County* (N.D. Tex. Jan. 17, 2017)) establish that such recitations do not provide authority for local officials to prolong detention.

Additionally, as described in the next section, there exists no authority for Colorado sheriffs to make civil immigration arrests pursuant to detainees.

**Requiring sheriffs' officers to "enforce federal immigration law"<sup>9</sup> will result in violations of state and federal statutory and constitutional law.**

In *Arizona v. United States* (2012), the Supreme Court described the "system Congress created" with the Immigration Nationality Act as one that is comprehensive and specific in allocating immigration arrest authority. The Supreme Court rejected portions of Arizona's SB 1070 as

<sup>4</sup> DEP'T OF HOMELAND SECURITY, DECLINED DETAINER OUTCOME REPORT at 10 (Oct. 8, 2014).

<sup>5</sup> MEMORANDUM, DHS SECRETARY JEH JOHNSON TO ACTING ICE DIRECTOR THOMAS S. WINKOWSKI (Nov. 20, 2014). The draft memorandum of DHS Secretary Kelly, *see supra* note 2, purports to rescind Secretary Johnson's memorandum.

<sup>6</sup> *See supra* note 3.

<sup>7</sup> COUNTY SHERIFFS OF COLORADO, WHAT AUTHORITY DO SHERIFFS HAVE RELATING TO IMMIGRATION LAW? (Dec. 2016).

<sup>8</sup> House Bill 17-1134, Proposed § 13-21-1302(6)(a).

<sup>9</sup> House Bill 17-1134, Proposed § 13-21-1302(6)(a).

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inconsistent with the system Congress created, and noted the very limited circumstances under which local law enforcement is authorized to make civil immigration arrests. Prolonging detention of a prisoner pursuant to an immigration detainer is not one of those enumerated circumstances.<sup>10</sup>

Thus, requiring sheriffs to “enforce federal immigration law” ignores that the INA largely excludes local officials from immigration enforcement. Additionally, there is no *Colorado* authority for such enforcement. Arrest authority is enumerated by statute in Colorado and there is no statutory authority for sheriffs or other peace officers to make civil immigration arrests.

**Requiring sheriffs’ officers to “continu[e] to detain an individual, regardless of the individual’s ability to be released on bail, who has been identified as an illegal alien while in custody for violating any law of this state”<sup>11</sup> will result in violations of state and federal statutory and constitutional law.**

Several of the decisions on immigration detainers have involved plaintiffs who were denied the opportunity for release after posting bail. In *Morales v. Chadbourne*, Ada Morales continued to be detained because of an immigration detainer despite the fact that she was ordered released on a recognizance bond by the state court. And in *Miranda-Olivares v. Clackamas County*, where Ms. Miranda-Olivares did not post the bail amount set by the state court because the jail informed her she would continue to be detained because of an immigration detainer, the federal court held that detaining Ms. Miranda-Olivares beyond the time she would have posted bail violated the Fourth Amendment.

Thus, denying a prisoner the opportunity to post bail and obtain release, or denying release once bail conditions have been satisfied, have been among the constitutional problems with detainers already specifically recognized by federal courts.<sup>12</sup>

### Conclusion

For all these reasons, I believe the provisions of House Bill 17-1134 discussed here run contrary to established Colorado and federal law governing the authority for civil immigration arrests and constitutional prerequisites to prolonging the detention of prisoners otherwise entitled to release.

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<sup>10</sup> Neither is executing an immigration arrest warrant. Such warrants, which are administrative warrants and are not issued by a neutral judge or magistrate, are required by federal law to be “executed by federal officers who have received training in the enforcement of immigration law.” *Arizona* (citing 8 CFR §§ 241.2(b) and 287.5(e)(3)). In short, federal law prohibits local law enforcement from executing immigration warrants.

<sup>11</sup> House Bill 17-1134, Proposed § 13-21-1302(6)(e).

<sup>12</sup> See also *Roy v. County of Los Angeles*, Nos. CV 12-09012-BRO (FFMx) and CV 13-04416-BRO (FFMx), 2016 WL 5219468 (C.D. Cal. Sept. 9, 2016) (certifying one class of plaintiffs who were denied the opportunity to post bond because of immigration detainers and another class of plaintiffs who were denied release on personal recognizance because of immigration detainers).