COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

SUFFOLK, SS. NO. SJC-12276

COMMONWEALTH OF MASSACHUSETTS,
Respondent-Appellee,

v.

SREYNUON LUNN,
Petitioner-Appellant.

ON RESERVATION AND REPORT FROM A SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AND THE SUFFOLK COUNTY SHERIFF

MAURA HEALEY
Attorney General

Jessica V. Barnett (No. 650535)
Deputy Division Chief
Criminal Appeals Division
Sara A. Colb (No. 680972)
Assistant Attorney General
Civil Rights Division
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200
jessica.barnett@state.ma.us
sara.colb@state.ma.us

Allen H. Forbes (No. 554688)
Special Assistant Attorney General
General Counsel
Suffolk County Sheriff's Department
200 Nashua Street
Boston, Massachusetts 02114
(617) 704-6685
AForbes@scsdma.org

March 20, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Other Federal Cases

Supreme Judicial Court Cases

Other State Cases

U.S. Constitutional Provisions

Massachusetts Constitutional Provisions

Federal Statutes

Federal Regulations

Massachusetts Statutes

Miscellaneous

QUESTIONS PRESENTED

1. Whether compliance with ICE detainers by a state court is voluntary.

2. Whether a state court has authority to detain a person solely based on an ICE detainer.

3. Whether detaining a person solely based on an ICE detainer violates the person's federal or state constitutional rights.

STATEMENT OF THE CASE

This case arises on reservation and report by order of the single justice. It raises significant questions regarding the circumstances under which a Massachusetts court may detain an individual pursuant to an "ICE detainer." Although the questions are moot as to the petitioner here, the single justice reserved and reported them to the full Court, noting that they are likely to recur and evade the Court's review in future cases.

Overview Of ICE Detainers

U.S. Immigration and Customs Enforcement ("ICE") is charged with enforcing the federal immigration laws. SAF ¶ 1.[1] ICE is a component of the U.S. Department of Homeland Security ("DHS"). *Id.* ¶ 2. Through ICE, DHS submits requests to Massachusetts courts and other law enforcement agencies ("LEAs") to

[1] The petitioner's Record Appendix will be cited as "RA [page #]." The parties' Statement of Agreed Facts, set forth at RA 1 to 15, will be cited as "SAF ¶ [#]."

continue to hold persons for up to forty-eight hours after they would otherwise be released from state custody. *Id.* ¶ 3; RA 16-19 (DHS Forms I-247D and I-247X). These requests are commonly referred to as "ICE detainers." *Id.* DHS may also lodge requests for notification of the release of an individual, without requesting any additional detention by the LEA. *Id.* ¶ 5; RA 20 (DHS Form I-247N).

Consistent with the federal regulations governing detainers, DHS Forms I-247D, I-247X, and I-247N[2] call for the signature of a DHS "Immigration Officer," not a neutral magistrate. *Id.* ¶ 12. Among other things, the forms call for the requesting officer to fill in information about the subject of the detainer, to check relevant boxes asserting a basis for the detainer, and to sign and date the form. *Id.* ¶ 12; RA16-19. The forms do not call for the signing officer to swear to the form's contents. *Id.*

ICE detainers are not typically accompanied by affidavits, warrants, or other supporting materials. *Id.* ¶ 13. Once lodged, the detainer travels with the subject as he is transferred between state custodians. *Id.* ¶ 10. DHS generally does not serve a copy of the

[2] DHS Forms I-247D, I-247X, and I-247N were issued under the now-discontinued Priority Enforcement Program ("PEP"). SAF ¶ 7. The forms are likely to change to address new immigration enforcement priorities, but as of the date this brief was finalized, DHS had yet to issue new forms. SAF ¶ 6.

detainer directly on the subject, SAF ¶ 16, and although DHS Form I-247D requests that the LEA provide the subject with a copy, R.A. 16, LEAs in Massachusetts commonly do not do so. SAF ¶ 16. Policies and practices vary from one LEA to another as to whether, or under which circumstances, to comply with ICE detainers. *Id.* ¶ 19.

The Petitioner's Detention Pursuant To An ICE Detainer

On October 24, 2016, the petitioner, Sreynuon Lunn, was arraigned in the Central Division of the Boston Municipal Court ("BMC") on a charge of unarmed robbery. SAF ¶ 40. At the time of arraignment, DHS had lodged an ICE detainer (DHS Form 1-247D) against him. *Id.* ¶ 41; RA 35. The docket indicates that the petitioner was "held" on the detainer. SAF ¶¶ 42, 46.

As of mid-January 2017, the petitioner was in the custody of the Suffolk County Sheriff's Department (the "Sheriff"), awaiting trial on the unarmed robbery charge. *Id.* ¶ 48. When made aware that a prisoner is the subject of an ICE detainer, the Sheriff's practice is to notify ICE when the prisoner's release is pending, but not to detain the prisoner beyond the time that he would normally be released from state custody. *Id.* ¶ 20. While held in Suffolk County, the petitioner declined to post bail because of his belief that he would be held on the ICE detainer. *Id.* ¶ 49.

On February 6, 2017, the Sheriff's deputies transported the petitioner to the BMC for a trial date. *Id.* ¶ 50. The Commonwealth answered not ready for trial, and the BMC dismissed the charges for want of prosecution. *Id.* ¶ 51. At this time, counsel for the petitioner notified the court of the ICE detainer and asked that he be "released and not held" on the detainer. *Id.* ¶ 52. The court declined to take action on the detainer, and the petitioner remained in the custody of the BMC. *Id.* ¶¶ 55, 57. At this point, the petitioner was held solely on the basis of the ICE detainer. *Id.* ¶ 57. Several hours later, ICE agents arrived at the court and took custody of the petitioner. *Id.* ¶ 58. At no time following the dismissal of the state criminal charge did the Sheriff regain custody of the petitioner. *Id.* ¶ 59.

The Instant Petition Pursuant to G.L. c. 211, § 3

The following day, the petitioner filed a petition for relief pursuant to G.L. c. 211, § 3, challenging the court's authority to detain him pursuant to the ICE detainer. RA 50-70. Although the case is now moot as to the petitioner, the single justice reserved and reported it to the full court because it "raises important, recurring, time-sensitive issues that will likely evade the full court's review in future cases." RA 71.

SUMMARY OF ARGUMENT

This case raises serious questions about the authority of state courts to assist the federal government with matters of civil immigration enforcement. Specifically, this case raises the question of whether Massachusetts law authorizes state courts to continue to detain an individual, after he or she is otherwise eligible for release from state custody, based solely on an ICE detainer. The answer to that question is "no." However, that does not prevent state and local law enforcement from working cooperatively with ICE in a number of other ways to identify and detain individuals who pose a particular threat to public safety.

As a threshold matter, compliance with ICE detainers by state courts and other LEAs is voluntary, not mandatory. The ICE detainer form indicates that it is a "request" by the federal agency, and ICE has repeatedly taken the position that compliance is voluntary. Moreover, a fair reading of the applicable statute and regulations makes clear that detainers are voluntary. Perhaps most importantly, a requirement by DHS or ICE that LEAs comply with ICE detainers would likely constitute unconstitutional commandeering in violation of the Tenth Amendment. Pp. 7-15.

Because ICE detainers are properly viewed as requests from the federal government for assistance,

rather than commands, the question of whether a given LEA has the authority to comply with a detainer request is primarily a question of state law. Pp. 15-19. Massachusetts law does not authorize state courts or other LEAs to detain an individual *solely* on the basis of an ICE detainer, without more. Such detention qualifies as a warrantless arrest for a federal civil immigration violation. Although Massachusetts statutes do allow warrantless arrests for certain specified civil violations, LEAs have no authority under state law to arrest individuals for civil immigration violations. Pp. 19-30.

Because LEAs lack authority under state law to make such arrests, the Court need not reach the serious state and federal constitutional concerns posed by ICE detainers. LEA enforcement of ICE detainers raises serious questions under the Fourth Amendment and article 14, and the Due Process Clause and article 12. The U.S. Supreme Court has long held that the Fourth Amendment applies to non-citizens and has also implicitly assumed that it applies in civil deportation proceedings; other lower courts have concluded that ICE detainers unsupported by probable cause do violate the Fourth Amendment; and there are significant procedural due process concerns given the lack of notice and opportunity to be heard regarding the detainer. As indicated above, this Court should

avoid reaching such serious constitutional questions where the lack of arrest authority under state law is dispositive of this case. Pp. 30-41.

In short, the Court should clarify that it is unlawful for an LEA to detain a person at ICE's request unless: (1) the ICE detainer is accompanied by a warrant issued by a neutral and detached magistrate; (2) there is probable cause that the person has committed a state or federal felony; or (3) there is probable cause that the person has committed a misdemeanor involving breach of the peace in an LEA officer's presence that is continuing, or merely paused, at the time of arrest. These limitations do not affect or cast into doubt the many other ways in which federal and state law enforcement agencies cooperate for the aim of public safety, up to and including holding an individual if the statutory and constitutional requirements for a valid arrest are met. Pp. 41-45.

ARGUMENT

I. ANY COMPLIANCE WITH ICE DETAINERS BY STATE COURTS OR OTHER LAW ENFORCEMENT AGENCIES IS VOLUNTARY AND MUST BE AUTHORIZED BY STATE LAW.

A. ICE Detainers Are Voluntary, Not Mandatory.

As a threshold matter, any compliance with ICE detainers by state courts or other LEAs is voluntary, not mandatory. This view is supported by the fact that: (1) the ICE detainer form indicates that it is

voluntary, and ICE has taken the position that they are voluntary; (2) the better reading of the applicable statute and regulations indicates that ICE detainers are voluntary; and (3) any such mandatory requirement would violate the Tenth Amendment. Accordingly, this Court should join numerous others by ruling that a state or local LEA receiving an ICE detainer is under no obligation to hold the subject.

1. ICE detainers, on their face, are voluntary "requests" for assistance.

ICE detainers request, but do not demand, that an LEA hold a person until ICE can take custody. The plain language of DHS Form I-247D, issued against the petitioner here, indicates that compliance was optional. The detainer's heading states "IMMIGRATION DETAINER - REQUEST FOR VOLUNTARY ACTION." RA 35; *see also* RA 16 (blank form I-247D). After providing space for an immigration officer to identify the subject of the detainer and the basis for its issuance, Form I-247D states: "IT IS THEREFORE REQUESTED THAT YOU . . . maintain custody of him/her for a period NOT TO EXCEED 48 HOURS . . ." *Id.* (emphasis in original). The related Form I-247X contains similar language, indicating that it is a request for voluntary action. RA 19 (containing heading, "REQUEST FOR VOLUNTARY TRANSFER," and stating that "DHS REQUESTS YOUR COOPERATION AS FOLLOWS . . ."). No language in either

detainer form commands the recipient to hold the subject.[3]

Consistent with this language, since at least 2014, ICE has taken the position that its detainers are merely requests and that other law enforcement agencies are not required to enforce them. *See* SAF ¶ 8; RA 21-22. ICE has taken a similar position in recent litigation. *See* RA 31; *see also Galarza v. Szalcyk*, 745 F.3d 634, 640 (3d Cir. 2014) (discussing ICE policy statements and litigation statements dating back to 1994 construing ICE detainers as requests rather than mandatory). ICE's position, as the issuing agency, that its detainers are voluntary "is entitled to great weight." *Finkelstein v. Bd. of Reg.*

---

[3] An earlier iteration of the ICE detainer form that was in use under the prior Secure Communities program bore a different heading, namely, "IMMIGRATION DETAINER- NOTICE OF ACTION," but the body of that document also indicated that compliance was optional: "IT IS REQUESTED THAT YOU: maintain custody of the subject for a period . . ." *See* DHS Form I-247, available at https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf. PEP displaced Secure Communities from late 2014 to early 2017. *See M*emorandum of Jeh Johnson, dated November 20, 2014, available at https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. Under PEP, and at all times relevant to this action, ICE used Forms I-247D and I-247X to request detention of individuals such as the petitioner. *See* SAF ¶¶ 3-4; RA 16-19. Secure Communities was reinstated by Executive Order No. 13768 on January 25, 2017. *See* 82 F.R. 8799, 2017 WL 388889 (Pres.). As noted above, ICE has not yet designated the form its detainers will take under the newly-reinstituted Secure Communities Program. SAF ¶ 6.

in Optometry, 370 Mass. 476, 478 (1976); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

2. Federal law makes clear that ICE detainers are voluntary.

The view that ICE detainers are voluntary, not mandatory, is supported by the federal statute and regulations authorizing the issuance of detainers.

Section 287(d) of the Immigration and Naturalization Act ("INA"), codified at 8 U.S.C. § 1357(d), provides in pertinent part:

> **(d) Detainer of aliens for violation of controlled substances laws.** In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if [certain prerequisites are met, . . .] the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

(Emphasis added.)

Notably, although § 1357(d) commands that the U.S. Attorney general "shall . . . take custody" of aliens as to whom a detainer has issued once they are not "otherwise detained," the statute does not purport to require (or to authorize ICE officials to require) state or local LEAs to hold the subject of a detainer beyond the time that he or she would otherwise be released from custody.

The relevant federal regulations lead to a similar conclusion. It provides in pertinent part:

> **§ 287.7 Detainer provisions under section 287(d)(3) of the [INA].**
>
> **(a)** ***Detainers in general.*** Detainers are issued pursuant to sections 236[4] and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A 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. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
>
> [. . .]
>
> **(d)** ***Temporary detention at Department request.*** Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

8 C.F.R. § 287.7 (emphasis added).

Consistent with ICE's position that detainers are voluntary, § 287.7(a) describes a detainer as a "request" that "serves to advise" state and local LEAs that ICE seeks custody of a person. Although § 287.7(d) uses the mandatory language "shall maintain

[4] Section 236 of the INA, codified at 8 U.S.C. § 1226, governs the arrest, detention, and release of aliens by federal officials during removal proceedings.

custody," that command is best interpreted as applying only to the duration of detention, limiting it to "a period not to exceed 48 hours." In *Galarza*, 745 F.3d at 640, the Third Circuit reached that conclusion in addressing the interplay between parts (a) and (d) of § 287.7. Noting that part (a) applies to all detainers in general, the *Galarza* court determined that parts (a) and (d) both define detainers as requests. In that context, the use of the word "shall" relates only to the regulation's time limit on detention. *Id.* at 640; *accord Mercado v. Dallas C'nty*, No. 3:15-CV-3481-D, 2017 WL 169102, *9 (N.D. Tex. Jan. 17, 2017). The relevant federal statute and regulations thus support the conclusion, reached by numerous courts,[5] that ICE detainers are voluntary.

3. A contrary conclusion would be in conflict with the Tenth Amendment.

A contrary conclusion, that federal law authorizes ICE to command state and local LEAs to enforce ICE detainers, should be rejected for the additional reason that it would conflict with anti-commandeering principles under the Tenth Amendment. That amendment provides that all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Interpreting

[5] *See* cases cited, *infra*, note 7.

that provision, the Supreme Court has held that any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" contravenes States' sovereignty. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981); *see also Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down provisions of the Brady Act that required state officials to conduct background checks on prospective gun purchasers); *New York v. United States*, 505 U.S. 144, 161 (1992) (striking down federal law requiring states to "take title" to radioactive waste produced by private manufacturers).

The Third Circuit has held that immigration detainers, if viewed as commands to state agencies, would violate the Tenth Amendment. *See Galarza*, 745 F.3d at 643-44 (holding that in light of *Printz*, 521 U.S. at 898, and *New York*, 505 U.S. at 144, "a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow . . . would violate the anti-commandeering doctrine of the Tenth Amendment."); *see also Miranda-Olivares v. Clackamas C'nty*, No. 3:12-CV-02317-ST, 2014 WL 1414305, *6 (D. Or. Apr. 11, 2014) ("[A] conclusion that Congress intended detainers as orders for municipalities . . . would raise potential violations of the anti-commandeering principle.").

No less than the provisions struck down in *Printz* and *New York*, construing ICE detainers as commands to the Commonwealth's law enforcement agencies would infringe on the Commonwealth's sovereignty and improperly redirect its resources. Pursuant to 8 C.F.R. § 287.7(e), the federal government may not incur financial responsibility for the any costs state LEAs incur in voluntarily complying with ICE detainers. Thus, state and local LEAs would necessarily bear the cost of holding individuals on the basis of detainers, creating an additional burden on custody and administrative staff. *See Galarza*, 745 F.3d at 644 (noting that a "command to detain federal prisoners at state expense is exactly the type of command that has historically disrupted our system of federalism"). If a state government could be forced to implement such a federal program, the state would be "put in the position of taking the blame for its burdensomeness and its defects," *Printz*, 521 U.S. at 930, including the burden of any legal liability should a court deem the detention unlawful.[6] For all

[6] A number of class actions have been commenced by detainees claiming civil rights violations arising from their detention pursuant to an ICE detainer. *See, e.g., Roy v. C'nty of Los Angeles*, Nos. CV 12-09012-BRO (FFMx), CV 13-04416-BRO (FFMx), 2016 WL 5219468, *21 (C.D. Cal. Sept. 9, 2016) (granting in part motion for class certification); *Onadia v. City of New York*, 44 N.Y.S. 3d 882 (January 19, 2017) (allowing motion for class certification).

of these reasons, this Court should join the numerous courts that have construed ICE detainers as voluntary, not mandatory.[7]

B. LEA Compliance With ICE Detainer Requests Must Be Authorized By State Law.

The Tenth Amendment considerations discussed above also make clear that any compliance with ICE detainers by state courts or other LEAs must be authorized by state law. As one commentator has pointed out, "[i]f Congress could constitutionally require state officers to enforce federal law and chose to do so, then certainly a court would not need to inquire whether the state has also authorized the state officers to perform the mandated activity." Jay T. Jorgensen, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 B.Y.U. L. Rev. 899, 910 n.65 (1997). But where *Printz* and its progeny prohibit the federal government from

---

[7] *See, e.g., Galarza*, 745 F.3d at 645; *Flores v. City of Baldwin Park,* No. CV 14-9290-MWF, 2015 WL 756877, *4 (C.D. Cal. Feb. 23, 2015); *Moreno v. Napolitano*, No. 11 C 5452, 2014 WL 4911938, *5 (N.D. Ill. Sept. 30, 2014); *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011); *Miranda-Olivares*, 2014 WL 1414305, at *4-8; *Fernandez v. Roden*, No. CIV.A. 13-11222-JLT, 2014 WL 347616, at *4 (D. Mass. Jan. 29, 2014); *Lucatero v. Haynes,* No. 1:14-cv-255-FDW, 2014 WL 6387560, *2 (W.D.N.C. Nov. 14, 2014); *Mercado*, 2017 WL 169102, at *9; *see also Morales v. Chadbourne*, 793 F.3d 208, 212 (1st Cir. 2015) (describing an immigration detainer as "a *request* from ICE to another law enforcement agency to detain a non-citizen up to 48 hours . . .") (emphasis added).

commandeering state officers to implement federal programs, state law sets the limits on the authority of state and local LEAs. *See Miller v. United States*, 357 U.S. 301, 305 (1958) (reaffirming that the scope of state and local law enforcement officers' authority to arrest is determined by state law) (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948)); *Commonwealth v. Craan*, 469 Mass. 24, 33 (2014) ("While State law *may* authorize local and State police to enforce Federal criminal statutes, it need not do so.") (emphasis in original).

In the immigration context, the primacy of federal law requires courts to conduct a two-part analysis: (1) is state or local enforcement pre-empted by federal law; and (2) if not, is state or local enforcement authorized by state law? *See id.* at 33 n.10 ("Of course, State law may authorize local enforcement of Federal statutes only if not preempted by Federal law."); *see also Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (holding that although federal law did not pre-empt state enforcement of INA's criminal provisions, local police officers could not enforce INA's misdemeanor criminal "entry" provision because they lacked authority under state

law to make warrantless misdemeanor arrests); Jorgensen, 1997 B.Y.U. L. Rev. at 910 & n.65.

With respect to the first question, the Supreme Court most recently addressed pre-emption in the area of immigration law in *Arizona v. United States*, 132 S. Ct. 2492 (2012). There, the Court struck down several provisions of Arizona's controversial S.B. 1070, including a provision that purported to authorize state officers to arrest without a warrant a person "the officer has probable cause to believe" has committed an offense that makes the person removable. *Id.* at 2505. In holding the provision pre-empted, the Court noted that "[t]he federal statutory structure instructs when it is appropriate to arrest an alien during the removal process." *Id.* at 2505. Those circumstances did not include a warrantless arrest by state officers based on probable cause of removability. *Id.* at 2506. However, the Court left open "whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law." *Id.* at 2509. Here, this Court need not resolve the issue of pre-emption because, as discussed below, even assuming that an explicit federal "request" in the form of an ICE detainer brings this case outside the scope of pre-

emption found in *Arizona*,[8] the second prong of the inquiry, regarding state-law arrest authority, is not met here.

With respect to the second prong, perhaps reflecting differences in the underlying state law, federal circuit courts of appeals have taken varying approaches to determining what constitutes adequate state authority to arrest. *Compare Gonzales*, 722 F.2d at 475 (after considering pre-emption, court should inquire whether state law grants "affirmative authority" to state or local officers to make arrests for violations of federal law); *with United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001) (if not pre-empted, state and local authorities have implicit powers to investigate and make arrests for federal immigration violations absent state or local law "to the contrary"); *see also* George Bach, *State Law to the Contrary? Examining Potential Limits on the Authority of State and Local Law Enforcement to Enforce Federal Immigration Law*, 22 Temp. Pol. & Civ. Rts. L. Rev. 67, 73-74 (Fall 2012) (contrasting the approaches of the Ninth and Tenth Circuits and noting

[8] *See Arizona*, 132 S. Ct. at 2507 ("There may be some ambiguity as to what constitutes [permissible] cooperation under federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable *absent any request, approval, or other instruction* from the Federal Government.") (emphasis added).

that the Seventh, Fifth, and First Circuits have "touched upon [the issue] only in passing").

At the core of either formulation is the precept that an examination of state and local law is necessary to determine whether LEAs have authority to enforce federal immigration laws. And, of course, this Court is not bound by any federal construction of what state law permits. Here, as discussed below, an examination of Massachusetts law reveals that state courts and other LEAs lack authority to arrest individuals for federal civil immigration violations.

II. MASSACHUSETTS LAW DOES NOT AUTHORIZE DETENTION SOLELY ON THE BASIS OF AN ICE DETAINER.

Compliance with an ICE detainer based only on an assertion of probable cause to believe that the subject of the detainer is a removable alien constitutes a warrantless arrest for a suspected civil immigration violation. Because state law does not grant Massachusetts LEAs authority to make such arrests, they may not, without more, detain a person solely on the basis of an ICE detainer.

A. Detention Solely On The Basis Of An ICE Detainer Constitutes A Warrantless Arrest.

The type of temporary hold requested via ICE detainers constitutes a warrantless arrest under state law.[9] Under Massachusetts law, an "arrest" occurs

[9] The law of arrest is relevant only if a temporary hold constitutes an "arrest" under Massachusetts law. "All arrests are seizures under the Fourth Amendment

where there is (1) actual or constructive seizure or detention of the person, (2) performed with intention to effect an arrest, and (3) so understood by the person detained. *See Commonwealth v. Cook*, 419 Mass. 192, 198 (1994); *see also* The American Law Institute, Code of Criminal Procedure, § 18 (1931) (defining "arrest" as "the taking of a person into custody that he may be forthcoming to answer for the commission of any offense"). The test is an objective one. *See Commonwealth v. Duguay*, 430 Mass. 397, 400-01 (1999) ("[T]here is no arrest unless a reasonable person on the scene would perceive that the defendant[][was] being forcibly detained.") (quotations omitted; alterations in original).

Here, it is undisputed that the petitioner was actually and intentionally detained by court officers and that a reasonable person in the petitioner's shoes would have understood himself to be so detained. *See* SAF ¶¶ 50-57. Consequently, he was under arrest for purposes of state law.

---

and art. 14, but not all seizures are arrests." 30 Mass. Prac. § 3:11 n.1. For example, where the police place an "incapacitated" person into "protective custody" pursuant to G.L. c. 111B, § 8, this does not constitute an arrest, although it is a seizure in the constitutional sense. *Commonwealth v. O'Connor*, 406 Mass. 112, 120 n.7 (1989). In *O'Connor*, this Court upheld such a seizure as reasonable under article 14 where "there was probable cause to conclude the defendant was incapacitated." *Id.*

Moreover, even though the petitioner was initially in custody pursuant to the state criminal complaint, *see* SAF ¶¶ 48-50, the prolonging of that detention beyond the time he would have otherwise been released from state custody (accounting for any reasonable administrative delays), for the express and sole purpose of transferring him to ICE custody to answer for suspected immigration violations, *see* SAF ¶¶ 57-58, qualifies as a new arrest that must be authorized under state law, as well as comply with any state and federal constitutional protections regarding such seizures. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (a legitimate seizure "can become unlawful if it is prolonged beyond the time reasonably required" to achieve its purpose); *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes . . ."); *Miranda-Olivares*, 2014 WL 1414305, at *9-11 (distinguishing between "administrative delays" and "investigative delays" following a court order to release an individual, and holding that continued detention due to "investigative delays" constitutes a new seizure that "must meet the clearly defined reasonable seizure standards of the Fourth Amendment"); *Mercado*, 2017 WL 169102, at *5 (holding

that plaintiffs alleged a plausible claim for violation of the Fourth Amendment by alleging that they were "detained for up to 48 hours after they were otherwise eligible for release, without probable cause to believe that a different criminal offense had been or was being committed").

Moreover, detention solely on the basis of an ICE detainer constitutes a warrantless arrest because Forms I-247D and I-247X do not meet the definition of an arrest warrant. An arrest warrant is "an order in writing, issued by a judge or other competent authority in the name of the Commonwealth [or other sovereign], directed to the proper officer, naming a person charged with a crime [or other violation] and commanding the officer to arrest and bring before the court the person named therein." 30 Mass. Prac. § 3:18.[10] The issuing authority for an arrest warrant

---

[10] Massachusetts law authorizes various officers to issue warrants for arrest in a number of different contexts. *See, e.g.*, G.L. c. 276, § 21 (judges may issue criminal arrest warrants); G.L. c. 218, § 33 (clerks may issue criminal arrest warrants, search warrants, summonses); G.L. c. 215, § 34A (probate judges may issue warrants for contempt for failure to obey child support order); G.L. c. 276, § 26 (judges may issue warrants for failure to appear and abide orders as contempt); G.L. c. 276, § 12 (Governor may issue warrants for extradition); G.L. c. 127, § 149 (parole board may issue warrants for parolees upon revocation of parole); G.L. c. 279, § 3 (chief probation officer may issue warrants for probationers upon probable cause of probation violation); *see also* G.L. c. 218, § 37 (judges and clerks may issue summonses for witness or defendant in criminal or juvenile case). The petitioner here does not

need not be a judge, but it must be a neutral and detached magistrate[11] capable of assessing probable cause. *North v. Russell*, 427 U.S. 328, 337 (1976); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) (noting that a warrant provides the safeguard of "an objective predetermination of probable cause").

Here, as discussed above, ICE detainers do not command LEAs to bring an individual before a court. Rather, they are requests for the LEA to hold an individual for the purpose of transferring him to ICE custody. SAF ¶¶ 3-4; RA 16-19; *see also Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011) (noting that "a detainer is not a criminal warrant, but rather a voluntary request"), and cases cited, *supra*, note 7. In addition, ICE detainers are issued by immigration officers, not neutral magistrates. SAF ¶ 11; 8 C.F.R. 287.7(a). Thus, it is undisputed by the parties that ICE detainers are

---

challenge the authority of LEAs to arrest pursuant to a duly-authorized warrant.

[11] Probation warrants are an exception to this. *See* G.L. c. 279, § 3 (authorizing chief probation officers to arrest or to issue temporary warrants for the arrest of probationers upon probable cause of a probation violation). As this Court has observed, "[a] probationer has only a conditional liberty interest," as the "Commonwealth has already met its burden of proving beyond a reasonable doubt the person's guilt on the underlying crime." *Commonwealth v. Wilcox*, 446 Mass. 61, 64-65 (2006).

not warrants.[12] *See* Pet. Br. at 5 ("The detainer is unaccompanied by any judicially issued warrant. . ."). For these reasons, seizures of an individual pursuant to an ICE detainer are properly analyzed as warrantless arrests.

B. Massachusetts Law Does Not Authorize Warrantless Arrests For Civil Immigration Violations.

Under Massachusetts law, the scope of arrest authority in general, and warrantless arrest authority in particular, differs for different types of law enforcement officers.[13] The facts of this case

---

[12] ICE detainers also should not be confused with criminal detainers that Massachusetts LEAs are obligated to honor under the Interstate Agreement on Detainers ("IAD"). The IAD is a "congressionally sanctioned interstate compact within the Compact Clause, U.S. Const., Art. I, § 10, c. 3 . . .," *Carchman v. Nash*, 473 U.S. 716, 719 (1985), which the Commonwealth has enacted into law. *See* St. 1965, c. 892, § 1, art. IV(c), codified at G.L. c. 276, App. § 1-1. Although the IAD was entered into voluntarily by the Commonwealth, its provisions are now binding federal law. *Carchman*, 473 U.S. at 719; *see also Commonwealth v. Copson*, 444 Mass. 609, 610-11 (2005) (summarizing the provisions of the IAD). The same is not true of a voluntary ICE detainer. *See supra*, Section I. In addition, under the IAD, the subject of a criminal detainer must receive "prompt" notice of the detainer's "source and contents" and of "his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based." IAD, Art. III(c). The detainer itself must be supported by proper identification and a certified copy of the underlying charging document, *see* IAD, Art. V(b)(1)-(2), and the request must be approved and transmitted by a court, *see* IAD, Art. IV(a). ICE detainers have none of these procedural safeguards. *See* SAF ¶¶ 11-17.

[13] *See, e.g.*, G.L. c. 276 § 23 & G.L. c. 218, § 37 (any person authorized to serve criminal process); G.L. c. 221, § 70A, in conjunction with Trial Court

implicate the particular authority of state courts and court officers. When court officers are "in or about" the courthouse to which they are assigned, they may exercise police powers, so an inquiry into the authority of police to make warrantless arrests is relevant. G.L. c. 221, § 70A; *see also* Trial Court Administrative Directive No. 1-83 (Oct. 3, 1983)).

Police officers in Massachusetts have the authority to arrest an individual, without a warrant, upon probable cause that the person has committed a felony. *See* 30 Mass. Prac. § 3:48 (citing *Maryland v. Pringle*, 540 U.S. 366, 369-70 (2003); *Commonwealth v. Grise*, 398 Mass. 247, 249 n.2 (1986); *Julian v. Randazzo*, 380 Mass. 391, 395 (1980)).[14] With respect to misdemeanors, police officers have the authority to arrest an individual without a warrant upon probable cause that the person has committed a given misdemeanor only if (1) it is committed in the officer's presence, (2) it involves a breach of the peace, and (3) it is still continuing (or merely

---

Administrative Directive No. 1-83 (Oct. 3, 1983), & G.L. c. 218, § 37 (court officers); G.L. c. 37, § 11 (sheriffs and deputy sheriffs); G.L. c. 37 § 5 (special sheriffs); G.L. c. 41, § 94 (constables); G.L. c. 41, § 98 (police officers of cities and towns); G.L. c. 279, § 3 & G.L. c. 218, § 37 (probation officers).

[14] *See also* G.L. c. 276, § 10A (authorizing the warrantless arrest of fugitives from justice for felonies committed in another state).

interrupted) at the time of arrest.[15] *See* 30 Mass. Prac. § 3:49 (citing G.L. c. 276, § 28; *Commonwealth v. Gorman*, 288 Mass. 294 (1934)).

Courts have long presumed that state arrest authority for criminal violations includes the authority to arrest for federal crimes, if not pre-empted. *See, e.g.*, *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (Hand, J.) (holding that New York statute providing that "a peace officer may, without a warrant, arrest a person, . . . for a crime, committed or attempted in his presence" authorized state police to make warrantless arrests for federal crimes); *see also Di Re*, 332 U.S. at 588-90 (holding that, absent an applicable federal statute, state law determines whether state officer has authority to arrest for federal crime). Indeed, this Court has noted that, as a general rule, "local police are not precluded from enforcing federal statutes" but that "State law may authorize local enforcement of Federal statutes only if not preempted by Federal law." *Craan*, 469 Mass. at 33 & n.10; *see also* Section I.B., *supra* (discussing the pre-emption analysis in *Arizona*, 132 S. Ct. 2492).

---

[15] For some misdemeanors (also known as "past" misdemeanors), by statute, an officer may arrest upon probable cause, without the requirement that the offense be committed in the officer's presence. *See* List of "Past" Misdemeanors, *infra*, at Add. 38.

Thus, consistent with the state-law statutory arrest authority discussed above, and in the absence of any federal pre-emption, court officers in or about the courthouse may arrest without a warrant for federal immigration-related felonies;[16] and for federal immigration-related misdemeanors, so long as the misdemeanor (1) is committed in the officer's presence, (2) involves a breach of the peace, and (3) is still continuing (or merely interrupted) at the time of arrest.[17]

By statute, police officers are also authorized to arrest individuals for certain civil violations,[18] or to detain individuals for non-criminal conduct in specific situations affecting public safety or public

---

[16] Immigration-related felonies include: willful failure to depart, 8 U.S.C. § 1253(a); illegal reentry after exclusion, 8 U.S.C. § 1326; and smuggling aliens, 8 U.S.C. § 1324. Federal law expressly grants authority for state officers to detain previously-deported felons for purposes of transferring them to federal custody, 8 U.S.C. § 1252c; and authority for state officers to arrest for smuggling aliens, 8 U.S.C. § 1324.

[17] Immigration-related misdemeanors include: illegal entry, 8 U.S.C. § 1325(a); failure to register, 8 U.S.C. § 1306(a); and failure to carry proof of registration, 8 U.S.C. § 1304(e). It is not clear that any of these involves a breach of the peace, and at least some are unlikely to be committed in the officer's presence or to be ongoing at the time of arrest.

[18] *See, e.g.*, G.L. c. 90, § 21 (authority to arrest for certain civil traffic infractions); G.L. c. 272, § 82 (authority to arrest for civil violations of G.L. c. 272, § 81, regarding mistreatment of transported animals).

policy.[19] However, as the petitioner correctly notes, Pet. Br. at 18 n.4, although the General Laws are "peppered" with statutes authorizing arrest for specific offenses, none appears to authorize arrests, warrantless or otherwise, for federal civil immigration violations. Pet. Br. at 18. Thus, it is undisputed by the parties that Massachusetts law does not authorize state courts or other LEAs to arrest for federal civil immigration violations.[20] *See id.*

"As a general rule, it is not a crime for a removable alien to remain present in the United States." *See Arizona*, 132 S. Ct. at 2505 (citing *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). In this case, the detainer requested that the petitioner be held based on probable cause "THAT THE SUBJECT IS A REMOVABLE ALIEN . . . BASED ON: . . . a final order of removal against the subject . . . [and] biometric confirmation of the subject's identity and a

---

[19] *See, e.g.*, G.L. c. 111B, § 8 (authority to place "incapacitated" persons into "protective custody"); G.L. c. 123, § 12 (authority to detain where "failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness"); G.L. c. 276, § 49 (authority to commit material witnesses to jail upon "refus[al] to recognize").

[20] Federal civil immigration violations include: illegal presence, 8 U.S.C. § 1227(a)(1); overstaying an expired visa, 8 U.S.C. § 1227(a)(1); failure to depart under a removal order, 8 U.S.C. § 1324d; obtaining a visa by a fraudulent marriage, 8 U.S.C. § 1227(a)(1)(G); becoming a public charge, 8 U.S.C. § 1227(a)(5); and having a criminal conviction that qualifies for removal, 8 U.S.C. § 1227(a)(2).

record's check of federal databases that affirmatively indicate . . . that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law." RA 35. Because Massachusetts LEAs lack authority to conduct warrantless arrests for civil immigration violations, the detainer, by itself, did not provide a basis for state officers to detain the petitioner.

Even if the Legislature were to enact a statute authorizing warrantless arrests for federal civil immigration violations, it would be largely preempted. *See Arizona*, 132 S. Ct. at 2507 ("Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances"). As the petitioner points out, federal law does not specifically authorize state officers to make warrantless arrests for civil immigration violations. Pet. Br. 22-26. In fact, ICE agents themselves may only make such arrests if the individual "is likely to escape before a warrant can be obtained for his arrest." *Arizona*, 132 S. Ct. at 2505-07; *see also Buquer*, 797 F. Supp. 2d at 918-19 (enjoining Indiana statute that would permit state law enforcement to arrest based on a detainer and/or removal order as exceeding authority granted to state

law enforcement and exceeding ICE's own warrantless arrest authority).

In sum, Massachusetts LEAs lack authority to make arrests for federal civil immigration violations. On this basis alone, without any need to reach state or federal constitutional issues, this Court should hold that Massachusetts law precludes detaining persons solely on the basis of an ICE detainer that itself is based on an assertion of probable cause of civil removability.

III. ICE DETAINERS RAISE SERIOUS CONSTITUTIONAL CONCERNS.

This Court has recognized that it has a "duty to avoid unnecessary decisions of serious constitutional issues." *Beeler v. Downey*, 387 Mass. 609, 613-14 (1982); *accord Commonwealth v. Guzman*, 469 Mass. 492, 500 (2014); *cf. In re Santos*, 461 Mass. 565, 566 (2012) ("[W]e must interpret statutes wherever possible to avoid constitutional doubts . . ."). Here, by resting its decision on the lack of state-law arrest authority, this Court may avoid the serious constitutional questions raised by ICE detainers, including under the Fourth Amendment and article 14 of the Massachusetts Declaration of Rights, as well as under the Due Process Clause of the Fourteenth Amendment and article 12 of the Massachusetts Declaration of rights.

A. ICE Detainers Raise Serious Doubts Under The Fourth Amendment And Article 14.

For over one hundred years, the U.S. Supreme Court has recognized that the federal constitution's protections extend to non-citizens.[21] *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *see also Lopez-Mendoza*, 468 U.S. at 1032 (implicitly assuming that Fourth Amendment applied to civil deportation proceeding and considering whether exclusionary rule barred admission of evidence); *I.N.S. v. Chadha*, 462 U.S. 919, 940-41 (1983) ("The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."). Accordingly, lower federal courts that have addressed the issue have uniformly held that seizures pursuant to an ICE detainer implicate the Fourth Amendment.[22]

---

[21] It should be noted some individuals detained pursuant to ICE detainers are later shown to be U.S. citizens. *See, e.g., Morales*, 793 F.3d at 211; *Mendoza v. U.S. Imm. & Customs Enf't*, 849 F.3d 408, 412 (8th Cir. 2017); *Mendia v. Garcia*, No. 10-cv-03910-MEJ, 2016 WL 2654327, *1 (N.D. Cal. May 10, 2016).

[22] *See, e.g., Morales*, 793 F.3d at 211; *Mendia*, 2016 WL 2654327, at *6; *Villars*, 45 F. Supp. 3d at 802-03; *Orellana v. Nobles C'nty*, Civil No. 15-3852 ADM/SER, 2017 WL 72397, *7 (D. Minn. Jan. 6, 2017); *Miranda-Olivares*, 2014 WL 1414305, at *11; *Galarza v. Szalczyk*, Civil Action No. 10-cv-06815, 2012 WL 1080020, at *9-14 (E.D. Pa. March 30, 2012); *Mercado*, 2017 WL 169102, at *6-7; *Uroza v. Salt Lake C'nty*, No. 2:11CV713DAK, 2013 WL 653968, *4-5 (D. Utah Feb. 21, 2013).

Article 14 of the Massachusetts Declaration of Rights, like the Fourth Amendment, protects the people of this state from unreasonable searches and seizures by the government; indeed, it provides even greater protection than its federal counterpart. *See Jenkins v. Chief Justice of the Dist. Ct. Dept.*, 416 Mass. 221, 229 n.16 (1993) ("It is by now firmly established that, in some circumstances, art. 14 affords greater protection against arbitrary government action than do the cognate provisions of the Fourth Amendment.").[23]

Broadly speaking, under the Fourth Amendment and article 14, detention of an individual, beyond a brief stop, must be supported by probable cause. *See generally Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.") (quotations omitted); *Commonwealth v. Jackson*, 464 Mass. 758, 761 (2013) ("A lawful arrest requires the existence of probable cause to believe that the individual arrested is committing or has committed a

[23] *See also, e.g., Commonwealth v. Blood*, 400 Mass. 61 (1987) (holding warrantless surveillance with one-party consent violates article 14, despite contrary rule under Fourth Amendment); *Commonwealth v. Upton*, 394 Mass. 363, 373 (1985) (holding article 14 imposes a more stringent test for determining probable cause).

criminal offense."). Accordingly, numerous federal courts have held that detention pursuant to an ICE detainer must be supported by probable cause.[24]

Here, DHS Forms I-247D and I-247X call for the issuing officer to make an assertion of probable cause of removability in executing the form. RA 16, 19. In this case, ICE checked boxes indicating that "PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN . . . BASED ON: . . . a final order of removal against the subject . . . [and] biometric confirmation of [his] identity and a record's check of federal databases that affirmatively indicate . . . that [he] either lacks immigration status or notwithstanding such status is removable under U.S. immigration law." RA 35. Conducting a warrantless arrest on this basis raises serious constitutional questions.

First, because Massachusetts LEAs lack authority to arrest for civil immigration violations, probable cause of civil removability would not be sufficient to justify an arrest. *See supra*, Section II.B.; *Commonwealth v. LeBlanc*, 407 Mass. 70, 75 (1990) ("The requirement that a police officer have lawful authority when he deprives individuals of their liberty is closely associated with the constitutional

[24] *See, e.g.*, *Morales*, 793 F.3d at 211; *Mendia*, 2016 WL 2654327, at *6; *Orellana*, 2017 WL 72397, at *7; *Miranda-Olivares*, 2014 WL 1414305, at *11; *Mercado*, 2017 WL 169102, at *6-7; *Uroza*, 2013 WL 653968, *4-5.

right to be free from unreasonable searches and seizures.").

Second, even if probable cause of a civil violation were sufficient, reliance upon a bare assertion of probable cause by an ICE officer, unaccompanied by any supporting documentation or sworn statements, would raise serious constitutional questions. *Cf. Galarza*, 745 F.3d at 637 (vacating an order granting defendants' motion to dismiss claims that detention pursuant to ICE detainer violated due process, noting that "[t]he detainer was accompanied by neither a warrant, an affidavit of probable cause, nor a removal order"). Although a state officer may rely on assertions of probable cause by other officers or agencies in some circumstances,[25] it is not clear that the bare assertions made here would qualify for such treatment. *See Pringle*, 540 U.S. at 371 (probable cause requires reasonable grounds for belief of guilt, which must be "particularized with respect to the person to be searched or seized"). This is

[25] *See, e.g., Whitely v. Warden, Wyo. State Penitentiary*, 401 U.S. 560 (1971) (police officers entitled to rely upon radio bulletin and "to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause"); *Commonwealth v. Quinn*, 68 Mass. App. Ct. 476, 480-81 (2007) (applying collective knowledge doctrine where "officers were engaged in a cooperative effort"); G.L. c. 276, § 23A (officers not liable for arrest in good-faith reliance on warrant within Warrant Management System or Criminal Justice Information System).

especially so where the probable cause requirement under article 14 is more stringent than the federal rule. *See Commonwealth v. Upton*, 394 Mass 363, 374 (1985) (rejecting the "totality of the circumstances test" articulated by the U.S. Supreme Court in favor of the more stringent standard requiring a showing of the basis of knowledge and veracity of information being set forth in support of probable cause)*; cf. In re Consalvi*, 376 Mass. 699, 702 (1978) (holding that although a judicial finding of probable cause must precede interstate rendition, the asylum state was not constitutionally required to "find probable cause anew" or to "review the adequacy" of the demanding state's determination, so long as "documents submitted by the demanding State demonstrate that 'a judicial officer or tribunal there had found probable cause'") (quoting *Ierardi v. Gunter*, 528 F.2d 929, 931 (1st Cir. 1976)).

Third, serious constitutional questions arise from the fact that federal immigration arrests are generally warrantless, and there are no express provisions for prompt review by a neutral magistrate. *See* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 Geo. L.J. 125, 127, 156-58 (November 2015). Although removal proceedings are civil in nature, not criminal, U.S. Supreme Court precedent supports a conclusion that detainees subject

to such "regulatory" detention are entitled to prompt review of probable cause by a neutral and detached magistrate. *See United States v. Salerno*, 481 U.S. 739 (1987) (classifying pre-trial detention of criminal defendants as "regulatory"); *see also Gerstein v. Pugh*, 420 U.S. at 114 (neutral review of probable cause required for criminal pre-trial detainees); *C'nty of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (neutral review of probable cause must occur within 48 hours).[26] [27] State law is even more protective of criminal pre-trial detainees, requiring neutral review of probable cause to occur within twenty-four hours. *Jenkins*, 416 Mass. at 232-38.

---

[26] *But cf. Reno v. Flores*, 507 U.S. 292, 302 (1993) (approving a system of warrantless arrests without automatic, timely hearings before a judge for class of juvenile aliens, while noting that "[t]he 'freedom from physical restraint' invoked by respondents is not at issue in this case. Surely not in the sense of shackles, chains, or barred cells . . . Rather, the right at issue is the alleged right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution").

[27] Moreover, detentions for a period less than 48 hours are not insulated from review for reasonableness under the Fourth Amendment. *C'nty of Riverside*, 500 U.S. at 56; *accord Villars*, 45 F. Supp. 3d at 801 ("*County of Riverside* did not grant law enforcement officials carte blanche to detain criminal suspects for forty-eight hours after their arrest."). Unreasonable reasons for delay include "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." 500 U.S. at 56.

Here, as discussed above, ICE detainers are not issued with the oversight of neutral magistrates; rather, they are prepared by rank and file ICE officials. See 8 C.F.R. § 287.7(b). Compounding the absence of any judicial oversight in issuing a detainer is the fact that the subject of a detainer may not be brought before a neutral magistrate for an extended period after he is transferred to ICE custody. *See* Kagan, 104 Geo. L. J. at 156-58. While this raises serious questions under the Fourth Amendment, it is arguably of even more concern under Massachusetts law. "[A]rticle 14 guarantees that control over one's liberty will rest solely in the hands of the judiciary, whose function it is to guarantee that sufficient grounds to justify such deprivation exists." *Jenkins*, 416 Mass. at 233.

For all of these reasons, detaining an individual based solely on a general assertion of probable cause of civil removability, made by an ICE officer, with no provision for prior (or prompt subsequent) review of that determination by a detached and neutral magistrate, raises serious constitutional questions under the Fourth Amendment and article 14.

B. ICE Detainers Raise Serious Doubts Under The Due Process Clause And Article 12.

If this Court finds that detention pursuant to ICE detainers implicates the Fourth Amendment and

article 14, a separate due process analysis may be unnecessary. *See C'nty of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.") (quotation omitted).

Here, in the context of ICE detainers, several courts have held that the Fourth Amendment provides the proper framework for analysis and declined to analyze duplicative due process claims. *See, e.g., Mendoza v. U.S. Imm. & Customs Enf't*, 849 F.3d 408, 421 (8th Cir. 2017) (affirming dismissal of due process claims regarding detention pursuant to ICE detainer where such claims were "explicitly covered under the Fourth Amendment analysis"); *Orellana v. Nobles C'nty*, Civil No. 15-3852 ADM/SER, 2017 WL 72397, *8 (D. Minn. Jan. 6, 2017) (declining to analyze due process claims separately where claims were "fairly encompassed" by the Fourth Amendment); *Mercado*, 2017 WL 169102, at *11 (declining to analyze due process claim where the Fourth Amendment covered the type of conduct alleged); *see also* Kagan, 104 Geo. L. J. at 170 (observing that in the context of ICE detainers, "[t]he Fourth Amendment [and article 14] offer[] the most applicable guidepost to the types of

safeguards required while balancing the exigent needs of law enforcement.").

However, if this Court were to eschew an analysis under the Fourth Amendment and article 14, the seizure of individuals pursuant to ICE detainers would nonetheless raise serious concerns under the Due Process Clause and article 12. It is well established that non-citizens in immigration proceedings are entitled to due process. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); *id.* at 695 (holding that Congress's plenary power over immigration "is subject to important constitutional limitations") (citing *Chadha,* 462 U.S. at 941–942, and *The Chinese Exclusion Case,* 130 U.S. 581, 604 (1889)).

In a due process analysis, it is the weight of the interest at stake that determines what process is due. *Zadvydas*, 533 U.S. at 694. Immigration detention implicates liberty interests comparable to those at stake for criminal pre-trial detainees. *Id.* at 690 ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.") (citing *Foucha v. Louisiana,* 504 U.S. 71, 80 (1992)). In fact, for some, the consequences of

deportation could be viewed as worse than imprisonment. *See Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (recognizing that "deportation is a particularly severe penalty") (quotations omitted).

Here, procedural due process arguably requires, at a minimum, notice to the subject of the detainer and an opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it.") (quotations omitted); *Paquette v. Commonwealth*, 440 Mass. 121, 131 (2003) ("A fundamental requisite of 'procedural' due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). *But cf. Demore v. Kim*, 538 U.S. 510, 521 (2003) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.") (quoting *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976)); *id.* at 528 ("[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.").

It is undisputed here that although the petitioner became aware that an ICE detainer was

lodged against him, he was not provided with a copy of the detainer, nor a meaningful opportunity to challenge it prior to his transfer to ICE custody.[28] SAF ¶¶ 17, 43. This case thus raises serious questions of procedural due process, which this Court need not reach.

IV. STATE-LAW LIMITATIONS ON COMPLIANCE WITH ICE DETAINERS DO NOT UNDERMINE PUBLIC SAFETY OR FEDERAL-STATE COOPERATION IN LAW ENFORCEMENT.

For the reasons discussed above, this Court should rule that, under Massachusetts law, courts and other LEAs may detain an individual at ICE's request only if: (i) the request is accompanied by an arrest warrant issued by a detached and neutral magistrate; (ii) there is probable cause that the person has committed a state or federal felony; or (iii) there is probable cause that the person is committing a state or federal misdemeanor in the officer's presence, involving breach of the peace. Such a clarification of the law may require some LEAs to re-assess their current policies and practices, and ICE will have to rely on other means to advance its immigration

[28] There are, of course, certain situations in which a court may detain an individual without a trial in the exercise of the court's inherent powers. *See Wilcox*, 446 Mass. at 69 (discussing bail revocation and contempt proceedings). But there is nothing here to suggest the BMC was exercising its inherent powers. *See* SAF ¶¶ 52-56 (indicating that after hearing from the petitioner's counsel, the court "decline[d] to take any action on the detainer"). Nor is there any basis in historical precedent to suggest that such a power would apply in these circumstances.

enforcement objectives. Complying with state law will not, however, jeopardize public safety or undermine federal-state cooperation in law enforcement.

According to available data, many individuals who have been subject to ICE detainers do not have serious criminal records. Nationwide data show that nearly half of the detainers the agency issued from FY 2003 through November 2015 were for individuals with no criminal convictions at all.[29] And approximately 30% of detainers were issued for individuals whose most serious criminal conviction was designated by ICE as a "Level 2" or "Level 3" offense (generally property crimes and misdemeanors).[30] The data in Massachusetts are similar.[31]

---

[29] *See* Syracuse University Transactional Records Access Clearinghouse ("SU TRAC"), *Few Ice Detainers Target Serious Criminals* (September 17, 2013), http://trac.syr.edu/immigration/reports/330/; and data available at SU TRAC, *Tracking Immigration and Customs Enforcement Detainers*, http://trac.syr.edu/phptools/immigration/detain/.

[30] Derived from data available at SU TRAC, *Tracking Immigration and Customs Enforcement Detainers*, http://trac.syr.edu/phptools/immigration/detain/.

[31] During the same time period, forty-five percent of detainers issued in Massachusetts were for individuals with no criminal convictions at all, and at least fifteen percent were issued for individuals whose most serious criminal conviction was designated by ICE as a "Level 2" or "Level 3" offense (generally property crimes and misdemeanors). Derived from data available at SU TRAC, *Tracking Immigration and Customs Enforcement Detainers*, http://trac.syr.edu/phptools/immigration/detain/.

Moreover, federal, state, and local authorities retain a broad set of tools to protect public safety. First, federal law provides that ICE may arrest and detain aliens while awaiting a removal decision under certain circumstances, *see* 8 U.S.C. § 1226(a), including arrests without a warrant where ICE has "reason to believe" that the suspected removable alien "is likely to escape before a warrant can be obtained." 8 U.S.C. § 1357(a)(2).[32] Thus, if a serious offender is in state custody, ICE, with adequate notice, may take custody of that person when the period of state incarceration ends, without the need for any detainer, and if the individual presents a flight risk, may do so without a warrant.

In the normal course of booking procedures, ICE is notified when someone in DHS's immigration database is taken into state custody, and ICE may reach out to the relevant LEA then or later. No state law precludes an LEA from engaging in active communication and information-sharing with ICE, including notifying ICE of the imminent release of an individual subject to a detainer or notification request (whether I-247D, -X, -N, or some other form is used).

[32] Federal courts have consistently interpreted the "reason to believe" standard as equivalent to the Fourth Amendment's "probable cause" standard. *See Morales*, 793 F.3d at 208 (citing cases).

Second, to the extent ICE believes it cannot assume custody over an individual immediately following his or her incarceration by an LEA, it may issue a request for detention that is supported by an arrest warrant issued by a detached and neutral magistrate. It may also, as part of a cooperative investigation, assist the LEA in obtaining sufficient information to establish probable cause of the commission of a felony, which would support a warrantless arrest by the LEA.

For their part, consistent with local needs and priorities, LEAs may choose to cooperate with federal immigration enforcement efforts in a variety of ways. They may conduct investigations on their own, or jointly with federal authorities, into suspected criminal activity. *See Craan*, 469 Mass. at 34 (noting that "examples of cooperation between Federal and State law enforcement authorities are legion in our case law"). As noted above, they may also notify ICE when an individual subject to a detention or notification request is soon to be released. In conjunction with state proceedings, *i.e.*, at arraignment or during the bail determination or review process, the LEA may raise an individual's immigration status (as distinguished from the mere existence of a detainer) to the extent that it is relevant, in the particular case, to the risk of flight.

The critical point is that while the federal government has primary responsibility for immigration enforcement, *see Arizona*, 132 S. Ct. at 2505-07, our system of federalism gives state and local law enforcement agencies substantial autonomy over how they protect the public and expend limited taxpayer resources. They are in the best position to assess the needs of their local communities. That includes determining whether cooperating with ICE under certain circumstances will serve the interests of effective law enforcement or undermine those interests by eroding the trust of immigrant communities and causing fewer victims and witnesses to come forward. Clarifying the limits on the authority exercised by state and local law enforcement, and recognizing the responsibility of state and local officials to determine how best to protect public safety and to facilitate trust with the communities they serve, will advance the system of dual sovereignty that is "central to the constitutional design." *Id.* at 2500.

CONCLUSION

For the foregoing reasons, the Court should hold that state and local law enforcement agencies in the Commonwealth lack authority under state law to detain persons solely on the basis of an ICE detainer that itself is based solely on an assertion of probable cause of civil removability.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL

_____
Jessica V. Barnett (No. 650535)
Deputy Division Chief
Criminal Appeals Division
Sara A. Colb (No. 680972)
Assistant Attorney General
Civil Rights Division
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200
jessica.barnett@state.ma.us
sara.colb@state.ma.us

Allen H. Forbes (No. 554688)
Special Assistant Attorney General
General Counsel
Suffolk County Sheriff's Department
200 Nashua Street
Boston, Massachusetts 02114
(617) 704-6685
AForbes@scsdma.org

Date: March 20, 2017

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

_____
Jessica V. Barnett (No. 650535)

STATUTORY ADDENDUM

CONTENTS

U.S. Constitutional Provisions

Massachusetts Constitutional Provisions

Federal Statutes

Federal Regulations

Massachusetts Statutes

U.S. CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. IV

The 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.

U.S. Const. Amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. Amend XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS CONSTITUTIONAL PROVISIONS

Mass. Decl. of Rights, art. XII

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty,

or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Mass. Decl. of Rights, art. XIV

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

FEDERAL STATUTES

List of Selected Immigration Violations

Felonies:

- Willful failure to depart, 8 U.S.C. § 1253(a);
- Illegal reentry after exclusion, 8 U.S.C. § 1326;
- Smuggling aliens, 8 U.S.C. § 1324;

Misdemeanors:

- Illegal entry, 8 U.S.C. § 1325(a);
- Failure to register, 8 U.S.C. § 1306(a);
- Failure to carry proof of registration, 8 U.S.C. § 1304(e);

Civil Violations:

- Illegal presence, 8 U.S.C. § 1227(a)(1);
- Overstaying an expired visa, 8 U.S.C. § 1227(a)(1);

- Failure to depart under a removal order, 8 U.S.C. § 1324d;
- Obtaining a visa by a fraudulent marriage, 8 U.S.C. § 1227(a)(1)(G);
- Becoming a public charge, 8 U.S.C. § 1227(a)(5);
- Having a criminal conviction that qualifies for removal, 8 U.S.C. § 1227(a)(2)

TITLE 8 OF THE UNITED STATES CODE

CHAPTER 12 IMMIGRATION AND NATIONALITY

SECTION 1226 Apprehension and detention of aliens

a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

(b) Revocation of bond or parole

The Attorney General at any time may revoke a bond or parole authorized under subsection (a), rearrest the alien under the original warrant, and detain the alien.

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who--

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of Title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall

take place in accordance with a procedure that considers the severity of the offense committed by the alien.

(d) Identification of criminal aliens

(1) The Attorney General shall devise and implement a system--

(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed.

(2) The record under paragraph (1)(C) shall be made available--

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

(B) to officials of the Department of State for use in its automated visa lookout system.

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

(e) Judicial review

The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

SECTION 1227 Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201(i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was

changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182(g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a(c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is

seeking admission as an immediate relative or under section 1153(a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub.L. 104-208, Div. C, Title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009-723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182(a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if--

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien

establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who--

(i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility

directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who--

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of Title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of Title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional

pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of Title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate--

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of Title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of Title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) [now 50 U.S.C.A.§ 3801 et seq.] or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.) [now 50 U.S.C.A. § 4301 et seq.]; or

(iv) a violation of section 1185 or 1328 of this title, is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that

involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182(a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted--

(i) under section 1306(c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of Title 18 (relating to fraud and misuse of visas, permits, and other entry documents), is deportable.

(C) Document fraud

(i) In general

An alien who is the subject of a final order for violation of section 1324c of this title is deportable.

(ii) Waiver authorized

The Attorney General may waive clause (i) in the case of an alien lawfully admitted for permanent residence if no previous civil money penalty was imposed against the alien under section 1324c of this title and the offense was incurred solely to assist, aid, or support the alien's spouse or child (and no other individual). No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this clause.

(D) Falsely claiming citizenship

(i) In general

Any alien who falsely represents, or has falsely represented, himself to be a citizen of the United States for any purpose or benefit under this chapter (including section 1324a of this title) or any Federal or State law is deportable.

(ii) Exception

In the case of an alien making a representation described in clause (i), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such representation.

(4) Security and related grounds

(A) In general

Any alien who has engaged, is engaged, or at any time after admission engages in--

(i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,

(ii) any other criminal activity which endangers public safety or national security, or

(iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is deportable.

(B) Terrorist activities

Any alien who is described in subparagraph (B) or (F) of section 1182(a)(3) of this title is deportable.

(C) Foreign policy

(i) In general

An alien whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States is deportable.

(ii) Exceptions

The exceptions described in clauses (ii) and (iii) of section 1182(a)(3)(C) of this title shall apply to deportability under clause (i) in the same manner as they apply to inadmissibility under section 1182(a)(3)(C)(i) of this title.

(D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing

Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

(E) Participated in the commission of severe violations of religious freedom

Any alien described in section 1182(a)(2)(G) of this title is deportable.

(F) Recruitment or use of child soldiers

Any alien who has engaged in the recruitment or use of child soldiers in violation of section 2442 of Title 18 is deportable.

(5) Public charge

Any alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.

(6) Unlawful voters

(A) In general

Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable.

(B) Exception

In the case of an alien who voted in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such violation that he or she was a citizen, the alien shall not be considered to be deportable under any provision of this subsection based on such violation.

(7) Waiver for victims of domestic violence

(A) In general

The Attorney General is not limited by the criminal court record and may waive the application of

paragraph (2)(E)(i) (with respect to crimes of domestic violence and crimes of stalking) and (ii) in the case of an alien who has been battered or subjected to extreme cruelty and who is not and was not the primary perpetrator of violence in the relationship--

(i) upon a determination that--

(I) the alien was acting is[3] self-defense;

(II) the alien was found to have violated a protection order intended to protect the alien; or

(III) the alien committed, was arrested for, was convicted of, or pled guilty to committing a crime--

(aa) that did not result in serious bodily injury; and

(bb) where there was a connection between the crime and the alien's having been battered or subjected to extreme cruelty.

(B) Credible evidence considered

In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

[. . .]

SECTION 1252c Authorizing State and local law enforcement officials to arrest and detain certain illegal aliens

(a) In general

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law,

State and local law enforcement officials are authorized to arrest and detain an individual who--

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation

The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) is made available to such officials.

SECTION 1253 Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who--

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

(2) Exception

It is not a violation of paragraph (1) to take any proper steps for the purpose of securing cancellation of or exemption from such order of removal or for the purpose of securing the alien's release from incarceration or custody.

(3) Suspension

The court may for good cause suspend the sentence of an alien under this subsection and order the alien's release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as--

(A) the age, health, and period of detention of the alien;

(B) the effect of the alien's release upon the national security and public peace or safety;

(C) the likelihood of the alien's resuming or following a course of conduct which made or would make the alien deportable;

(D) the character of the efforts made by such alien himself and by representatives of the country or countries to which the alien's removal is directed to expedite the alien's departure from the United States;

(E) the reason for the inability of the Government of the United States to secure passports, other travel documents, or removal facilities from the country or countries to which the alien has been ordered removed; and

(F) the eligibility of the alien for discretionary relief under the immigration laws.

[. . .]

SECTION 1304 Forms for registration and fingerprinting

[. . .]

(e) Personal possession of registration or receipt card; penalties

Every alien, eighteen years of age and over, shall at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him pursuant to subsection (d). Any alien who fails to comply with the provisions of this subsection shall be guilty of a misdemeanor and shall upon conviction for each offense be fined not to exceed $100 or be imprisoned not more than thirty days, or both.

[. . .]

SECTION 1306 Penalties

(a) Willful failure to register

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, and any parent or legal guardian required to apply for the registration of any alien who willfully fails or refuses to file application for the registration of such alien shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed $1,000 or be imprisoned not more than six months, or both.

[. . .]

SECTION 1324 Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who--

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs--

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A) (ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A) (i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

(C) It is not a violation of clauses[1] (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs--

(A) be fined in accordance with Title 18 or imprisoned not more than one year, or both; or

(B) in the case of--

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against

the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry, be fined under Title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

(3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

(B) An alien described in this subparagraph is an alien who--

(i) is an unauthorized alien (as defined in section 1324a(h)(3) of this title), and

(ii) has been brought into the United States in violation of this subsection.

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if--

(A) the offense was part of an ongoing commercial organization or enterprise;

(B) aliens were transported in groups of 10 or more; and

(C)(i) aliens were transported in a manner that endangered their lives; or

(ii) the aliens presented a life-threatening health risk to people in the United States.

(b) Seizure and forfeiture

(1) In general

Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture.

(2) Applicable procedures

Seizures and forfeitures under this subsection shall be governed by the provisions of chapter 46 of Title 18 relating to civil forfeitures, including section 981(d) of such title, except that such duties as are imposed upon the Secretary of the Treasury under the customs laws described in that section shall be performed by such officers, agents, and other persons as may be designated for that purpose by the Attorney General.

(3) Prima facie evidence in determinations of violations

In determining whether a violation of subsection (a) has occurred, any of the following shall be prima facie evidence that an alien involved in the alleged violation had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law:

(A) Records of any judicial or administrative proceeding in which that alien's status was an issue and in which it was determined that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(B) Official records of the Service or of the Department of State showing that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(C) Testimony, by an immigration officer having personal knowledge of the facts concerning that alien's status, that the alien had not received prior official authorization to come to, enter, or reside in the United States or that such alien had come to, entered, or remained in the United States in violation of law.

(c) Authority to arrest

No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws.

(d) Admissibility of videotaped witness testimony

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.

(e) Outreach program

The Secretary of Homeland Security, in consultation with the Attorney General and the Secretary of State, as appropriate, shall develop and implement an outreach program to educate the public in the United

States and abroad about the penalties for bringing in and harboring aliens in violation of this section.

SECTION 1324d Civil penalties for failure to depart

(a) In general

Any alien subject to a final order of removal who--

(1) willfully fails or refuses to--

(A) depart from the United States pursuant to the order,

(B) make timely application in good faith for travel or other documents necessary for departure, or

(C) present for removal at the time and place required by the Attorney General; or

(2) conspires to or takes any action designed to prevent or hamper the alien's departure pursuant to the order, shall pay a civil penalty of not more than $500 to the Commissioner for each day the alien is in violation of this section.

(b) Construction

Nothing in this section shall be construed to diminish or qualify any penalties to which an alien may be subject for activities proscribed by section 1253(a) of this title or any other section of this chapter.

SECTION 1325 Improper entry by alien

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading

representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.

[. . .]

SECTION 1326 Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a), in the case of any alien described in such subsection--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony

(other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

(c) Reentry of alien deported prior to completion of term of imprisonment

Any alien deported pursuant to section 1252(h)(2)[2] of this title who enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be incarcerated for the remainder of

the sentence of imprisonment which was pending at the time of deportation without any reduction for parole or supervised release. Such alien shall be subject to such other penalties relating to the reentry of deported aliens as may be available under this section or any other provision of law.

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that--

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

SECTION 1357 Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or 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 and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests--

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

[. . .]

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a

violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

[. . .]

FEDERAL REGULATIONS

8 C.F.R. 287.7

SECTION 287.7 Detainer provisions under section 287(d)(3) of the Act.

(a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A 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. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) Authority to issue detainers. The following officers are authorized to issue detainers:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the USCIS.

(c) Availability of records. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

MASSACHUSETTS STATUTES

MASSACHUSETTS GENERAL LAWS

CHAPTER 211 THE SUPREME JUDICIAL COURT

SECTION 3 Superintendence of inferior courts; power to issue writs and process

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation,

the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

List of "Past" Misdemeanors With No "In Presence" Requirement

- Failure to register as a sex offender, G.L. c. 6, § 178P;
- Violations of constitutional rights, G.L c. 12, § 11J;
- Operating under the influence of alcohol, drugs, G.L. C. 90, § 24;
- Possession with intent (class D), G.L. c. 94C, § 32C (via G.L. 94C, § 41);
- Possession with intent (class E), G.L. c. 94C, § 32D (via G.L. 94C, § 41);
- Unauthorized possession of a controlled substance, G.L. c. 94C, § 34 (via G.L. 94C §41);
- Knowingly being present where heroin is found, G.L. c. 94C, § 35 (via G.L. 94C, § 41);
- Conspiracy to violate the Controlled Substance Act, G.L. c. 94C, § 40 (via G.L. 94C, § 41);
- Unlawful possession of a stun gun, G.L. c. 140, § 131J;

- Violation of an order to vacate, G.L. c. 208, § 34C (via G.L. c. 209A, § 6);
- Domestic assault & battery, G.L. c. 265, § 13A (via G.L. c. 209A, § 6);
- Domestic A&B on an intimate partner, G.L. c. 265, § 13M;
- Violation of a temporary or permanent vacate, restraining, or no-contact order, G.L. c. 209A, § 6;
- Any misdemeanor concerning abuse or harassment, G.L. c. 258E, § 8;
- Violation of harassment prevention order G.L. c. 258E §8 Violation of Harassment Prevention Order
- Shoplifting, G.L c. 266, § 30A;
- Identity fraud – falsely obtaining ID with intent to defraud, G.L. c. 266, § 37(e);
- Theft/Mutilation of library materials/Failure to return, G.L. c. 266, § 99A (via G.L. c. 266, § 100);
- Tagging, G.L. c. 266, § 126B;
- Possession of motor vehicle with altered VIN, G.L. c. 266, § 139(c);
- Removal of a license plate of another, G.L. c. 266, § 139(c);
- Theft of Public Records, G.L. c. 266, § 145;
- Unlawful possession of ammunition, G.L. c. 269, § 10(h);
- Unlawful possession of a non-large capacity firearm, G.L. c. 269, § 10(h);
- Unlawful possession of a non-large capacity rifle, G.L. c. 269, § 10(h);
- Unlawful possession of a non-large capacity shotgun, G.L. c. 269, § 10(h);
- Unlawful videotaping of nude or partially nude person, G.L. c. 272, § 104;
- "Upskirting" law, G.L. c. 272, § 105.