



July 13, 2017

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David A. Clarke, Jr.
Sheriff, Milwaukee County
821 W. State St.
Milwaukee, WI 53233-1488

Dear Sheriff Clarke:

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

You have made it clear in your public statements that you seek to involve the Milwaukee County Sheriff's Department in immigration enforcement within the county. We are writing to inform you of legal concerns associated with that involvement.

The enforcement of immigration laws is a role assigned to the federal government under Article 1, Section 8 of the Constitution, and you have no obligation under federal law to participate in such enforcement. Below, we provide key reasons that an increasing number of states and localities across the nation have opted – even before President Trump announced his mass deportation plans – to leave the immigration enforcement business to the federal government and focus their resources on local matters.¹ We also provide background information on why your decision to honor ICE detainers and to seek to participate in the 287(g) program can and will lead to a range of negative consequences, likely including Constitutional violations, for your office and Milwaukee County.

Principal Reasons to Decline Involvement in Federal Immigration Enforcement

- *Local Law Enforcement/Community Relations* – To effectively protect public safety, local law enforcement needs cooperation from local communities. Local residents serve as witnesses, report crime, and otherwise assist law enforcement. The foundation for this cooperation can often be destroyed when

¹ Recent reaction from law enforcement leaders to Trump Administration policies captures this same sentiment: <https://www.theguardian.com/us-news/2017/mar/01/police-chiefs-letter-trump-deportation-immigrants>, and even prior to the Trump Administration, localities had expressed clear reservations in this area – see, for example, the 2013 Statement from the Major Cities Chiefs Association: <http://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/MCCAPC130821.pdf>.



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local police are viewed as an extension of the immigration system.² Survivors of domestic violence refrain from reporting offenses; individuals with key information about burglaries or escapees from county jails fail to contact the police or Sheriff's department. In fact, as immigration enforcement has expanded, willingness of immigrant communities to interact with law enforcement has declined.³ These outcomes are not limited to the undocumented population. Many undocumented immigrants have U.S. citizen spouses and children. And because even U.S. citizens and immigrants with legal status often fall victim to mistakes by ICE, their views toward local law enforcement officials who make immigration enforcement a priority can sour as well.⁴

- *Local Priorities* – Local law enforcement agencies, including sheriffs' departments, have traditional priorities that include responding to emergencies, patrolling neighborhoods and streets and highways to prevent crime and apprehend those who violate state and local laws, facilitating certain functions of the court system, and numerous other duties. Sheriffs in Wisconsin have the additional duty of maintaining safe and secure jails to hold those accused of crimes or serving time for misdemeanor offenses. Time spent engaging in federal immigration enforcement detracts from performance of these core duties. Immigration enforcement does not advance local priorities, because it commonly targets individuals who pose no threat to public safety.⁵ Traditional police work designed to solve serious crimes should not be displaced by efforts to identify and arrest people who may have overstayed a visa.⁶
- *Fiscal Considerations* – Immigration enforcement is expensive.⁷ Milwaukee County has estimated that your decision to honor ICE detainer requests in your jail is costing the county nearly \$1 million each year.⁸ The federal government does not reimburse the cost of your detention of immigrants, and Milwaukee County may end up incurring millions of dollars in added expenses as a result. These costs come through additional detention expenses, overtime payments for personnel, and litigation costs.⁹

² See, e.g., the University of Illinois at Chicago report from May 2013: https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

³ See, e.g., <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation>.

⁴ Data over a four year period analyzed by Syracuse Transactional Records Access Clearinghouse revealed that ICE had placed detainers on 834 U.S. citizens and 28,489 legal permanent residents. TRAC, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, <http://trac.syr.edu/immigration/reports/311/>.

⁵ Transactional Records Access Clearinghouse (TRAC), *Who Are the Targets of ICE Detainers?*, Feb. 20, 2013 ("In more than two out of three of the detainers issued by ICE, the record shows that the individual who had been identified had no criminal record—either at the time the detainer was issued or subsequently."), <http://trac.syr.edu/immigration/reports/310/>.

⁶ Few ICE Detainers Target Serious Criminals, TRAC Immigration, <http://trac.syr.edu/immigration/reports/330/> (Mar. 2, 2017).

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

⁸ Affidavit of Margaret Daun, Milwaukee County Corp. Counsel, dated June 27, 2017, enclosed in M, ¶ 11.

⁹ A study by Justice Strategies of Los Angeles' compliance with ICE detainers indicated that the program cost the county over \$26 million per year: <http://www.justicestrategies.org/publications/2012/cost-responding-immigration-detainers-california>.

- *Legal Exposure* – Local jurisdictions that participate in immigration enforcement often end up in court over constitutional violations. (See Bad Idea #2, below.) Local police acting upon ICE detainer requests face liability for unlawful detentions in violation of the Fourth Amendment and the Due Process Clause. They have also been sanctioned by courts for violating prohibitions against racial profiling, especially under 287(g) “taskforce” agreements such as the one you seek to obtain with ICE.¹⁰

Bad Idea #1: Asking about an Individual’s Immigration Status

While local agencies are required to share certain information with federal immigration authorities, there is no affirmative duty to *collect* that information. Therefore, the Sheriff’s Department has no obligation to ask an individual about his/her immigration status.

Local law enforcement agents are not permitted to act as immigration agents without specific federal authorization.¹¹ To date, no Wisconsin agency has received such authorization.¹² This means that a Wisconsin law enforcement officer may not extend an investigatory stop by inquiring into an individual’s civil immigration status.¹³ For example, an officer may not prolong a stop by asking questions about a person’s national origin, language abilities, or travel history. Nor may an officer prolong a stop in order to give ICE officials extra time to arrive to investigate an individual’s immigration status.

In addition, questioning persons about immigration status is fraught with the risk of racial profiling. For example, it is not uncommon for local law enforcement to primarily (or exclusively) question only Latino persons about their immigration status, not white non-Hispanic appearing persons. This has repeatedly led to legal liability.¹⁴

Bad Idea #2: Complying with ICE Detainers

As you know, an “ICE detainer” is *NOT* the same as a warrant. Instead, it is a written *request* that local law enforcement detain an individual for an additional 48 hours after he/she would otherwise be released. Detainers have been used to provide ICE additional time to examine an individual’s immigration status, decide whether to take the individual into custody, and/or facilitate transfer into federal custody. These detainers are typically issued without a judicial warrant supported by probable cause. In consequence, once the traditional basis for criminal detention has lapsed, continued detention violates the Fourth Amendment’s bar

¹⁰ Letter from ACLU, to Bruce Friedman, Senior Policy Advisor, Office for Civil Rights and Civil Liberties, Dep’t of Homeland Sec. (Mar. 15, 2016), *available at* <https://www.aclu.org/letter/aclu-letter-dhs-crcl-re-287g-renewals-march-2016>.

¹¹ *Arizona v. United States*, 567 U.S. 387, 408 (2012) (“Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.”).

¹² <https://www.ice.gov/factsheets/287g>

¹³ *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (“While the seizures of the named plaintiffs based on traffic violations may have been supported by reasonable suspicion, any extension of their detention must be supported by additional suspicion of criminality. Unlawful presence is not criminal.”).

¹⁴ *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009); *Murillo v. Musegades*, 809 F. Supp. 487 (W.D. Tex. 1992).

on detentions without probable cause. Federal courts around the nation have held local law enforcement agencies liable for unconstitutional detentions under ICE detainers.¹⁵ For example, a county in Oregon was found liable for violating the Fourth Amendment for detaining an individual pursuant to an ICE detainer request.¹⁶ As a result of the lawsuit, the county was ordered to pay over \$100,000.¹⁷ As the leader of the Milwaukee County Sheriff's Department, if you *choose* not to demand a judicial warrant on probable cause from ICE in order to hold a person in your jail beyond the time there is no state-law justification for holding them, you may bear the consequences and the liability for the federal government's mistakes.

Most often, ICE's detainers are merely the beginning of an investigation into someone's status, and that investigation often goes nowhere. ***The vast majority of ICE detainer requests are not signed by a judge, and you cannot assume that any crime has been committed based on a detainer or that ICE has even gotten its facts right.*** In a four year period, the Obama Administration placed detainer requests on 834 U.S. citizens—who are categorically *not* subject to removal—according to government data.¹⁸ Given the Trump Administration's pledge to expand ICE personnel¹⁹ and heighten focus on immigration enforcement,²⁰ it is inevitable that these types of mistakes will increase. Involvement with ICE in these practices unquestionably places your law enforcement agency at risk of liability – at a level greater than ever before – for which ICE will not provide indemnification.²¹

Again, it is important to note that ***ICE detainer requests are voluntary, not mandatory.*** Many other jurisdictions refuse to honor them unless supported by a judicial warrant.²² Localities that maintain this requirement are protecting their interests and the public fisc, as well as promoting adherence to the Constitution. They are not violating any law, most certainly not 8 U.S.C. § 1373, which President Trump referenced in his Executive Order. The Tenth Amendment of the Constitution protects you from being compelled to perform the functions of the federal government, and when you uphold the Fourth Amendment by declining to honor ICE detainers that are not supported by a judicial warrant, ICE can still carry out its role through a range of authorities and federal capabilities.

Bad Idea #3: Participation in 287(g) Program

The Milwaukee County Board has urged you not to seek to participate in the 287(g) program. Despite that, you sent a letter dated March 8, 2017, to ICE asking to participate in the 287(g) program. The 287(g) program is the most

¹⁵ <https://www.aclu.org/other/recent-ice-detainer-cases?redirect=recent-ice-detainer-cases>.

¹⁶ *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

¹⁷ *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2015 WL 5093752 (D. Or. Aug. 28, 2015).

¹⁸ TRAC, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, (TRAC report based on data provided by ICE) <http://trac.syr.edu/immigration/reports/311/>.

¹⁹ <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

²⁰ <http://www.sfchronicle.com/bayarea/article/Trump-s-new-priorities-expose-more-immigrants-10949458.php>.

²¹ For example, earlier this month the ACLU of Florida filed suit against Miami-Dade County for illegally holding a U.S. citizen of Honduran origin pursuant to an ICE detainer request. *Creedle v. Gimenez*, No. 1:17-CV-224777 (M.D. Fla. 2017).

²² See, e.g., the clear recommendation from the Kentucky Association of Counties from September 2014: <http://www.aclu-ky.org/wp-content/uploads/2014/09/kaco-memo.pdf>.

extensive form of local entanglement in federal immigration enforcement. It effectively transforms local police into federal immigration agents – but without the same level of training that federal agents receive, and without federal funds to cover all of the expenses incurred by the local jurisdiction. 287(g) agreements often involve the full spectrum of negative results outlined above (diversion from core responsibilities, deterioration in community trust, negative fiscal impact, and legal exposure). Indeed, the DHS Inspector General has documented the challenges encountered in the 287(g) program, noting, for example, that “claims of civil rights violations have surfaced in connection with several [law enforcement agencies] participating in the program.”²³ The public became more fully aware of these problems through the unconstitutional implementation²⁴ of a 287(g) program in Maricopa County under Sheriff Joe Arpaio, who was subject to lawsuits and criminal contempt proceedings and subsequently voted out of office.

Because of all of its negative consequences, we urge you to cease any efforts to participate in the 287(g) program. The ACLU will closely monitor your actions for constitutional violations if such an agreement between you and ICE is ever consummated.

Recommendation: Place Local Communities and the Constitution First

In order to preserve the Constitutional rights of all persons in the United States, the ACLU strongly recommends the adoption of policies that place the communities of Milwaukee County first and limit involvement in federal immigration enforcement. This includes not questioning persons about their immigration status, requiring judicial warrants in order to honor ICE detainers and declining to participate in the 287(g) program, as well as avoiding other forms of engagement in federal immigration enforcement that lead to many of the same problems (e.g. notifying ICE of an individual’s release date or home address, which can itself prolong someone’s detention and sow distrust in the community). As you know, the County Board of Milwaukee County has affirmatively expressed this intention in Substitute Resolution 16-738, adopted February 2, 2017. We urge you to adopt policies which are consistent with that resolution, rather than directly at odds with the an action of the County Board.

We believe, and evidence has shown, that such a decision is in the best interest of local communities. The Constitution protects states and localities from being compelled to perform federal functions; and choosing to engage in federal immigration enforcement results in clear, negative consequences to public safety and local resources, and increases liability risk. ***It is fully consistent with federal law for state and local law enforcement to avoid engagement in federal immigration enforcement.***

We understand that the Trump Administration has threatened to strip federal funds from jurisdictions that decline to direct their personnel and resources toward federal immigration priorities – a set of jurisdictions the Administration has lumped under the characterization of “sanctuary jurisdictions.” However, one court has

²³ [DHS OIG Report on 298\(g\)](https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

²⁴ *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009).

already issued a nation-wide preliminary injunction against the threat to strip funds²⁵, and the Administration will continue to encounter substantial constitutional hurdles, if it attempts to follow through on that pledge.

We will continue to monitor developments in Milwaukee County, and take action to support or challenge your policies and practices, as needed. To enable us to further understand your interactions with ICE and detentions of immigrants, an open records request is attached.

Sincerely,

A handwritten signature in black ink, reading "R. Timothy Muth". The signature is written in a cursive style with a large, sweeping initial "R" and a long, horizontal stroke extending to the right.

R. Timothy Muth
Volunteer Staff Attorney
tmuth@aclu-wi.org

²⁵ *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 1459081, at *3 (N.D. Cal. Apr. 25, 2017).

OPEN RECORDS REQUEST

Pursuant to Wis. Stat. §§ 19.31 *et seq.*, you are hereby requested to provide the records listed below which are within the custody or control of the Office of the Sheriff

In this request, the term “records” includes all email, documents, reports, and all other information recorded in any form whatsoever, including, but not limited to, papers, digital electronic media (such as computer discs, hard drives, CDs, jump drives, and tape backup), and analog recording media (such as audio and video tape recordings). Also included are records which may be stored on internet servers accessible to you (“the cloud”).

If any material responsive to this request is deemed to be exempt from disclosure, identify the material withheld and specify the asserted basis for the exemption. Please release all segregable portions of otherwise exempt material.

Documents requested under the public records law must be produced “as soon as practicable and without delay.” Wis. Stat. § 19.35(4)(a). The Wisconsin Department of Justice policy is that 10 days is ordinarily a reasonable time for response to an open records request. Wisconsin Department of Justice, *Wisconsin Public Records Law Compliance Outline* at 13 (Aug. 2010).

You are requested to provide the documents without charge pursuant to Wis. Stat. § 19.35(3)(e). The ACLU of Wisconsin Foundation is a not-for-profit charitable and educational organization dedicated to the protection of civil liberties and government accountability, and waiving fees is in the public interest. Should you decline to waive the charges and the expenses exceed \$50, please contact me so that we may discuss how to proceed.

RECORDS REQUESTED

1. Policies or procedures of the Office of the Sheriff regarding the collection, dissemination or use of immigration status information related to persons arrested, detained, or held in the county jail by the Sheriff or his deputies.
2. Policies or procedures of the Office of the Sheriff regarding responses to detainer requests received from United States Immigrations and Customs Enforcement (“ICE”).
3. Communications between the Office of the Sheriff and ICE regarding participation in the Delegation of Authority Program pursuant to section 287(g) of the Immigration and Naturalization Act (the “287(g) program”).
4. Policies or procedures of the Office of the Sheriff regarding the access of ICE agents to persons detained in the county jail for questioning or interviews.
5. All reports, summaries, analyses, or other documents concerning the number of persons held at your County Jail and the length of their detentions where the reason for their detention is an immigration detainer or hold received from ICE on dates between January 1, 2016 and the present.
6. All responses and subsequent communications between the Office of the Milwaukee County Sheriff and ICE related to the March 8, 2017 letter from Sheriff David Clarke to Thomas Homan concerning participation in the 287(g) program.

7. All notes, memoranda, correspondence or other documents related to the “discussions with regional ICE officials” referred to in the March 8, 2017 letter.
8. All documents relating to the “research” concerning the 287(g) program and the discussions with state and regional ICE officials regarding “its potential implementation” referred to in the March 8, 2017 letter.
9. All materials related to training, procedures, practices, or policies followed by deputies of the Milwaukee County Sheriff for interaction with foreign nationals or immigrants.