

## Risks Faced by Idaho's Cities and Counties When Detaining Residents on Civil Immigration Charges

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In the past year, Idaho counties have been thrust headlong into the national controversy over enforcement of federal civil immigration laws by state and local actors. The streets of Jerome County saw major protests over a proposed contract with Immigration and Customs Enforcement (ICE) to house immigrant detainees in the local jail.<sup>1</sup> County commissioners backed away from the deal in the face of fierce opposition from some of the state's largest employers along with many of the county's residents.<sup>2</sup> Canyon County is now facing two separate lawsuits over its policy to detain residents solely on the basis of civil immigration charges.<sup>3</sup> That county is joined by every other jurisdiction in the state in acceding to detention requests from federal immigration officials.<sup>4</sup> Thus other counties may soon face litigation over their detention practices too.

This white paper discusses the scope of authority granted to Idaho's sheriffs and peace officers by state statute, the rights afforded by the state's constitution, and how these laws interact with federal immigration provisions. The paper also discusses the terms offered by ICE to lease space in the Jerome County jail and the costs that this and similar contracts would pass on to county and city administrators. This paper does not call into question the authority of federal immigration officials to arrest individuals for suspected civil violations of the country's immigration laws; Congress clearly provides that power to certain federal officials.<sup>5</sup> Rather, this paper addresses the authority of state, county, and city law enforcement officers to conduct those arrests by agreeing to execute federal detainer requests.

As county and city leaders are urged by federal officials to assist in enforcing civil immigration law, they must also consider the associated risks and costs—ones that federal authorities do not face, but instead fall only on Idaho's local governments.

### I. Federal Laws and Regulations Governing Immigration Detainers

The federal government has confronted frequent challenges to its policy of asking local jails to hold men and women until immigration officials can take custody of them based on possible immigration

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<sup>1</sup> Nathan Brown, *Hundreds Pack Jerome Courthouse to Protest ICE Contract*, MAGIC VALLEY TIMES-NEWS (July 10, 2017), [http://magicvalley.com/news/local/govt-and-politics/hundreds-pack-jerome-courthouse-to-protest-ice-contract/article\\_14a4a55c-89a2-50e0-987c-aa28899f35d6.html](http://magicvalley.com/news/local/govt-and-politics/hundreds-pack-jerome-courthouse-to-protest-ice-contract/article_14a4a55c-89a2-50e0-987c-aa28899f35d6.html); Nathan Brown, *Protesters Oppose Leasing Jail Beds to ICE*, MAGIC VALLEY TIMES-NEWS (July 3, 2017), [http://magicvalley.com/news/local/govt-and-politics/protesters-oppose-leasing-jerome-jail-beds-to-ice/article\\_091183d2-bf16-551f-a6ad-e83f19f4be72.html](http://magicvalley.com/news/local/govt-and-politics/protesters-oppose-leasing-jerome-jail-beds-to-ice/article_091183d2-bf16-551f-a6ad-e83f19f4be72.html).

<sup>2</sup> Mychel Matthews, *Contracts Could Soon Fill Jerome Jail, But It Likely Won't Be from ICE*, MAGIC VALLEY TIMES-NEWS (Jan. 24, 2018), [http://magicvalley.com/news/local/crime-and-courts/contracts-could-soon-fill-jerome-jail-but-it-likely-won/article\\_c5a1dff0-1410-55d1-9010-4a5ede7fb118.html](http://magicvalley.com/news/local/crime-and-courts/contracts-could-soon-fill-jerome-jail-but-it-likely-won/article_c5a1dff0-1410-55d1-9010-4a5ede7fb118.html).

<sup>3</sup> See Complaint, *Padilla-Arrendondo v. Donahue, et al.*, No. 1:18-cv-00025 (D. Idaho Jan. 19, 2018); *Carrera-Garcia v. Kelly, et al.*, No. 1:17-cv-00225 (D. Idaho May 24, 2017).

<sup>4</sup> *National Map of Local Entanglement with ICE*, IMM. RESOURCE LAW CTR. (Jan. 25, 2018), <https://www.ilrc.org/local-enforcement-map>.

<sup>5</sup> See 8 U.S.C. § 1357(a)(2); 8 CFR 287.8(c)(2). See also *infra* notes 17–26 and accompanying text.

violations.<sup>6</sup> In response, the language and procedure associated with these immigration detainers are constantly changing.<sup>7</sup> The federal statutes and regulations, however, remain the same. These provisions specify who has authority to enforce federal immigration laws and limit the circumstances in which state and local officers can share that authority.

#### A. Federal Statutes and Regulations Authorizing Immigration Arrests and Detention

To start, most immigration laws are civil, not criminal.<sup>8</sup> “As a general rule, it is not a crime for a removable alien to remain present in the United States.”<sup>9</sup> Likewise, “removal is a civil, not criminal, matter.”<sup>10</sup> The focus of this paper is requests (known as detainers) from federal immigration officials directed at local officers asking them to hold someone in custody based on allegations of a civil immigration violation. It does not address the scope of local officials to enforce criminal provisions of the immigration laws.

Courts are clear that holding people for immigration purposes, when no state charge justifies that custody, creates a new and independent arrest.<sup>11</sup> This is true when local officials hold immigrants beyond the point required for a state criminal charge or conviction.<sup>12</sup> It is also true when local officials deny immigrants the ability to post bail on state charges because of an immigration detainer.<sup>13</sup> The new arrest—based on federal immigration allegations alone—must therefore be authorized by state or federal law.

Federal laws and regulations set out the specific requirements for these civil arrests. The Immigration and Nationality Act (INA) allows for such arrests (1) when there is an administrative arrest warrant,<sup>14</sup> or (2) when the person is likely to escape before a warrant can be obtained and there is reason to believe the person has violated the federal immigration laws.<sup>15</sup> Both scenarios are governed by a detailed regulatory scheme.<sup>16</sup>

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<sup>6</sup> See, e.g., *Galarza v. Szalczuk*, 745 F.3d 634 (3d Cir. 2014); *Miranda-Olivares v. Clackamas Cty.*, 2014 U.S. Dist. LEXIS 50340 (D. Or. Apr. 11, 2014); *Santoyo v. United States*, 2017 U.S. Dist. LEXIS 106253 (W.D. Tex. June 5, 2017); *Moreno v. Napolitano*, 213 F. Supp. 3d 999 (N.D. Ill. 2016); *Lunn v. Commonwealth*, 477 Mass. 517 (2017); *Ochoa v. Campbell*, 266 F.Supp.3d 1237 (E.D. Wa. July 31, 2017), *appeal filed*, *Ochoa v. Campbell*, No. 17-35679 (9th Cir. filed Aug. 24, 2017); *People ex rel Wells on behalf of Francis v. DeMarco*, No. 2017-12806 (N.Y. App. Div. filed Dec. 11, 2017); *Creedle v. Gimenez*, No. 2017-cv-22477 (S.D. Fla. filed July 5, 2017); *Valerio-Gonzales v. Jarrett*, 2017 Mont. LEXIS 761 (Dec. 12, 2017); *Cisneros v. Elder*, No. 2018-cv-30549 (D.C. El Paso Cty. filed Feb. 27, 2018); *Roy v. City of Los Angeles*, No. 2012-cv-09012-BRO-FFM (C.D. Cal. filed Oct. 19, 2012).

<sup>7</sup> See, e.g., KATE MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES (2015) (detailing changes to detainer request forms through 2015); *Detainer Policy*, IMM. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detainer-policy> (last revised Mar. 29, 2017) (indicating new detainer form I-247A was implemented in April 2017); *ICE, 17 FL Sheriffs Announce New Enforcement Partnership*, IMM. & CUSTOMS ENFORCEMENT (Jan. 17, 2018), <https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership>; Tamara Lush, *Sheriffs, Immigration Officials Unveil Plan to Work Together*, US NEWS (Jan. 17, 2018), <https://www.usnews.com/news/us/articles/2018-01-17/sheriffs-immigration-officials-unveil-plan-to-work-together>.

<sup>8</sup> See, e.g., *Arizona v. United States*, 567 U.S. 387, 396 (2012).

<sup>9</sup> *Id.* at 407.

<sup>10</sup> *Id.* at 396.

<sup>11</sup> See *id.* at 407.

<sup>12</sup> See, e.g., *Galarza*, 745 F.3d at 644–45; *Morales*, 793 F.3d at 217; *Miranda-Olivares*, 2014 U.S. Dist. LEXIS 50340, at \*30–31; *Moreno*, 213 F. Supp. 3d at 1005; *Santoyo*, 2017 WL 2896021, at \*6; *Lunn*, 477 Mass. at 527.

<sup>13</sup> *Miranda-Olivares*, 2014 U.S. Dist. LEXIS 50340, at \*26–32; *Ochoa v. Campbell*, 266 F.Supp.3d 1237 (E.D. Wa. July 31, 2017), *appeal filed*, *Ochoa v. Campbell*, No. 17-35679 (9th Cir. filed Aug. 24, 2017).

<sup>14</sup> 8 U.S.C. § 1226(a).

<sup>15</sup> 8 U.S.C. § 1357(a)(2).

<sup>16</sup> *Arizona*, 567 U.S. at 407–08 (stating that “[t]he federal statutory structure instructs when it is appropriate to arrest an alien during the removal process”).

Only designated immigration officials are authorized to perform immigration arrests, with or without a warrant.<sup>17</sup> This list varies depending on the type of arrest made.<sup>18</sup> For civil violations, the list is limited to border patrol agents, air and marine agents, special agents, deportation officers, customs and border patrol officers, immigration enforcement agents, their supervisors, and other immigration officers who are designated by the top leadership at DHS.<sup>19</sup> This same list of immigration officials, with the addition of detention enforcement officers, are authorized to “execute warrants of arrest for administrative immigration violations.”<sup>20</sup> Neither list includes local law enforcement agents. Further, the officers designated must also complete a basic immigration law enforcement training before they are authorized to make civil arrests.<sup>21</sup> Accordingly, administrative arrest warrants (Form I-200) are directed only to those officers designated in these federal statutes and regulations.<sup>22</sup> The regulations provide the same limitations on who can arrest individuals already subject to a removal order.<sup>23</sup> The corresponding warrant of removal (Form I-205) is likewise directed.<sup>24</sup> Warrantless arrests for civil immigration violations are permissible only by the same list of designated federal officers, only after the same training, and only “when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.”<sup>25</sup> In sum, federal law generally limits civil arrest authority to federal officials.

The federal immigration laws do, however, specify three circumstances in which state officers can perform the arrest functions of an immigration officer. These include “an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border,”<sup>26</sup> the arrest of an individual convicted of a felony who reentered the U.S.,<sup>27</sup> or pursuant to a formal agreement under 8 U.S.C. § 1357(g) (Section 287(g)) between state and federal officials, with the associated requirements for ICE’s training and direction of local officers.<sup>28</sup> As of the date of this paper, none of these circumstances apply to law enforcement agencies in Idaho.

### B. Federal Statutes Addressing General Cooperation Between Federal and Local Officials

Two additional statutes speak generally to the interaction of state and federal officials for purposes of immigration enforcement. The first is 8 U.S.C. § 1373(a) which provides that “[n]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or

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<sup>17</sup> 8 C.F.R. § 287.8(c).

<sup>18</sup> *Id.*

<sup>19</sup> 8 C.F.R. § 287.5(c)(1).

<sup>20</sup> 8 C.F.R. §§ 287.5(e)(3), 236.1(b)(1).

<sup>21</sup> 8 C.F.R. §§ 287.5(c)(1), (e)(3), 287.1(g) (defining the required training).

<sup>22</sup> *Form I-200: Warrant for Arrest of Alien*, IMM. & CUSTOMS ENFORCEMENT, [https://www.ice.gov/sites/default/files/documents/Document/2017/I-200\\_SAMPLE.PDF](https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF) (last visited Mar. 26, 2018) [hereinafter *Form I-200*].

<sup>23</sup> 8 C.F.R. § 241.2(b).

<sup>24</sup> *Form I-205: Warrant of Removal/Deportation*, IMM. & CUSTOMS ENFORCEMENT, [https://www.ice.gov/sites/default/files/documents/Document/2017/I-205\\_SAMPLE.PDF](https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF) (last visited Mar. 26, 2018) [hereinafter *Form I-205*].

<sup>25</sup> 8 C.F.R. §§ 287.8(c)(2)(ii), 287.5(c)(1); 8 U.S.C. § 1357(a)(2). *See also* *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1009 (N.D. Ill. 2016) (explaining that warrantless arrest authority exists only where there is a risk of flight); *Buquer v. City of Indianapolis*, No. 1:11-cv-000708, 2013 WL 1332158, at \*8 (S.D. Ind. 2013).

<sup>26</sup> 8 U.S.C. § 1103(a)(10). This law requires a detailed written agreement between federal and local officials regarding the scope and duration of this authority. 28 C.F.R. § 65.84.

<sup>27</sup> 8 U.S.C. § 1252c(a).

<sup>28</sup> 8 U.S.C. § 1357(g)(1)–(5).

unlawful, of any individual.”<sup>29</sup> This law governs communication between DHS and local jurisdictions with respect to immigration or citizenship status and is the focus of the disputes concerning “sanctuary” jurisdictions.<sup>30</sup> The law does not, however, regulate communication regarding the detention status of an individual, require collection of any immigration information, or require local entities to maintain custody of someone based on immigration status. It therefore creates no independent federal authority for local officials to execute detainers.

The second is 8 U.S.C. § 1357(g)(10)(B). This provision is the final one in the section that permits local officials to enforce the immigration laws through formal agreements that must specify the local officers, the duties, the duration covered by the agreement along with the federal supervisors who must direct these efforts.<sup>31</sup> After laying out the requirements to authorize local officers to engage in immigration enforcement, the last provision states, “Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State . . . to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”<sup>32</sup> Numerous courts, and DHS’s guidance has made clear that this provision does not create an overarching authority for local officials to arrest and detain immigrants because such an interpretation would swallow the INA’s more specific provisions that outline this kind of authorization.<sup>33</sup> Indeed, DHS’s guidance expressly provides that a seizure by a state or local official for possible violations of the immigration laws at the request of DHS immigration officers requires that an “independent state or local law grounds provide a basis for doing so.”<sup>34</sup> Neither general provision in the federal immigration laws grants civil immigration enforcement authority to local officials.

### C. *The Lack of Arrest Authority Inherent in Detainers*

Finally, the detainer itself does not and cannot confer authority on local officials to arrest and take custody of immigrants. Detainers are mentioned only once in the immigration statutes in connection with controlled substance offenses.<sup>35</sup> The law was enacted in 1986 and directs immigration officials to respond to local official’s notifications of individuals arrested for drug charges who they believe are unlawfully present in the U.S. Immigration officials must then decide whether to issue a detainer, and if they do, Congress instructs federal officials to “effectively and expeditiously take custody of the alien” once he is no longer in local custody.<sup>36</sup> At the time Congress enacted the law, the detainer form requested notification of the date of release so that immigration officials could take custody of the person; it did not mandate local officials to

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<sup>29</sup> 8 U.S.C. § 1373(a).

<sup>30</sup> See, e.g., *City of Chicago v. Sessions*, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

<sup>31</sup> 8 U.S.C. § 1357(g)(1)–(8).

<sup>32</sup> *Id.*

<sup>33</sup> *Arizona v. United States*, 567 U.S. 387, 410 (2012); *Lunn v. Commonwealth*, 477 Mass. 517, 535–37 (2017); *Lopez-Aguilar v. Marion Cty Sheriff’s Dep’t*, 2017 U.S. Dist. LEXIS 199543, at \*28 (S.D. Ill. Ind. Nov. 7, 2017); *Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters*, DEPT. OF HOMELAND SECURITY 13–15, <https://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf> (last visited Mar. 26, 2018); *Order Granting Plaintiffs’ Motion for Preliminary Injunction*, *Cisneros v. Elder*, No. 2018-cv-30549 (D.C. El Paso Cty. Mar. 19, 2018). Cf. *City of El Cenizo v. Texas*, 2018 U.S. App. LEXIS 6245, at \*20 (5th Cir. 2018) (declining to find that local enforcement of detainers is conflict preempted in light of 1373(g)(10), and finding state law authority for these arrests in SB4).

<sup>34</sup> *Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters*, *supra* note 33, at 13.

<sup>35</sup> 8 U.S.C. § 1357(d).

<sup>36</sup> *Id.*

continue custody based on immigration charges.<sup>37</sup> The statute reflects that understanding. When the U.S. Supreme Court reviewed this provision in 2009, it described detainers as “requests for information about when an alien will be released from custody.”<sup>38</sup> Further, detainers cannot mandate local officials to hold federal detainees under constitutional principles that prevent the federal government from commandeering state and local governments.<sup>39</sup> As a result, federal officials continue to recognize that immigration detainers are requests, not orders, to local law enforcement agencies.<sup>40</sup>

In the past, local officials were asked to hold individuals on immigration detainers alone. Now, federal policy is to include an administrative warrant of arrest or warrant of removal with a detainer.<sup>41</sup> However, the inclusion of this administrative warrant does not change the authority of local officials to execute those arrests. That arrest power remains limited by federal statute and regulation, and both warrants consequently remain directed at federal officials.<sup>42</sup> Additionally, the U.S. Supreme Court has explained that local law enforcement officers do not have general or inherent authority to arrest individuals based on the suspicion that the person is violating the civil immigration laws. The Court identified the specific circumstances Congress outlined in which local officials are permitted to perform the duties of immigration officers and concluded that local officials have no general arrest authority for civil violations outside those circumstances.<sup>43</sup>

At bottom, Idaho’s local law enforcement officers cannot rely on federal law or inherent authority when holding individuals based on suspected civil immigration violations. The next question is whether Idaho’s state law fills that gap.<sup>44</sup>

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<sup>37</sup> *Vargas v. Swan*, 854 F.2d 1028, 1035 (7th Cir. 1988); *Matter of Lehder*, 15 I. & N. Dec. 159, 159 (BIA 1975); *Prieto v. Gluch*, 913 F.2d 1159, 1164 (6th Cir. 1990).

<sup>38</sup> *Arizona*, 567 U.S. at 410; *see also* *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014).

<sup>39</sup> *Galarza*, 745 F.3d at 644 (“As in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme.”).

<sup>40</sup> *See, e.g.*, Brief of the United States as Amicus Curiae in Support of Neither Party at 22–23, *Commonwealth v. Lunn*, 477 Mass. 517 (2017) (No. SJC-12276); *Faced with Herrera Lawsuit, Trump Lawyer Backs Down on Sanctuary Cities*, CITY ATT’Y OF S.F. (Apr. 14, 2017), <https://www.sfcityattorney.org/2017/04/14/faced-herrera-lawsuit-trump-lawyer-backs-sanctuary-cities/>; ICE’s Opposition to Defendants’ Motion to Consolidate at 6, *Roy v. Cty. of Los Angeles*, No. CV-12-09012-BRO-FFMX (C.D. Cal. July 1, 2015).

<sup>41</sup> ICE Policy No. 10074.2 ¶ 2.4 (Mar. 24, 2017, eff. Apr. 2, 2017).

<sup>42</sup> *See Form I-200*, *supra* note 22 (“To: Any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations.”); *Form I-205*, *supra* note 24 (“To any immigration officer of the United States Department of Homeland Security.”). *See also supra* notes 17–25 and accompanying text.

<sup>43</sup> *Arizona*, 567 U.S. at 407 (“If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.”), 408–10. *See also* *Melendres v. Arpaio*, 695 F.3d 990, 1000–01 (9th Cir. 2012) (concluding that local officers no longer operating under a 287(g) agreement must have reasonable suspicion of a criminal violation to conduct an investigatory stop); *Santos v. Frederick Cty. Bd. of Comm’rs*, 725 F.3d 451, 464–65 (4th Cir. 2013) (stating “[l]ower federal courts have universally—and we think correctly—interpreted *Arizona v. United States* as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations” and citing *inter alia* *Buquer v. City of Indianapolis*, No. 1:11-cv-00708-SEB, 2013 U.S. Dist. LEXIS 45084, at \* 35–38 (S.D. Ind. Mar. 28, 2013)). *Cf. Arizona*, 567 U.S. at 413 (distinguishing the question of whether local officers have inherent authority to enforce federal criminal immigration laws from enforcement of civil violations).

<sup>44</sup> *See* *Lunn v. Commonwealth*, 477 Mass. 517, 535–37 (2017); *Ochoa v. Campbell*, 266 F.Supp.3d 1237 (E.D. Wa. July 31, 2017), *appeal filed*, *Ochoa v. Campbell*, No. 17-35679 (9th Cir. filed Aug. 24, 2017).

## II. Enforcement Authority Granted to Idaho Sheriffs and Peace Officers by State Law

Under the U.S. Constitution, police power is largely reserved for the States.<sup>45</sup> Idaho's constitution and statutes provide sheriffs and peace officers with broad authority to make arrests, but they do not sanction the type of arrests requested in immigration detainers and administrative warrants.

### A. Arrest Authority Provided by Idaho Statutes

Housing someone already arrested by federal officials is distinct from making the initial arrest for violations of federal law. Not only does Idaho law limit the circumstances in which sheriffs can take custody of federal inmates, it also limits the circumstances in which sheriffs and peace officers can arrest Idaho residents. Violations of federal civil law are not among these.

Idaho's Code § 31-2202 states that "the primary duty of enforcing all penal provisions and statutes of the state is vested with the sheriff of each county" and then enumerates the specific duties of the sheriffs.<sup>46</sup> These include "tak[ing] charge of and keep[ing] the county jail and the prisoners therein," "serv[ing] all process and notices in the manner prescribed by law," "arrest[ing] and tak[ing] before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense" as well as "perform[ing] such other duties as are required of him by law."<sup>47</sup> Idaho state police have the same powers as Idaho's sheriffs.<sup>48</sup> In addition, Idaho state police are charged with "enforc[ing] all penal and regulatory laws of the state," "execut[ing] and serv[ing] any warrant of arrest issued by proper authority of the state," or "arrest[ing] without warrant any person committing in their presence or view a breach of the peace or other violation of the laws of the state."<sup>49</sup> These duties include taking individuals into custody under civil law, but only where a court has issued an order to do so.<sup>50</sup> Finally, in addition to the powers expressly granted by statute, sheriffs and peace officers have "by implication such powers as are necessary for the due and efficient exercise of those expressly granted . . . . But no powers will be implied other than those which are necessary for the effective exercise and discharge of the powers and duties expressly conferred and imposed, and where the mode of performance of ministerial duties is prescribed, no further power is implied."<sup>51</sup>

In the wake of recent challenges to immigration enforcement efforts by local agencies, county officials and law enforcement leaders have also suggested that an Idaho statute, enacted pre-statehood, provides the required authority for local officials to detain individuals on allegations of federal immigration violations.<sup>52</sup> This law concerns the reception of federal prisoners and provides that the "sheriff must receive

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<sup>45</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (citing United States v. Morrison, 529 U.S. 598, 618–19).

<sup>46</sup> IDAHO CODE § 31-2202.

<sup>47</sup> *Id.* at §§ 31-2202(6), (8), (10).

<sup>48</sup> IDAHO CODE § 67-2902.

<sup>49</sup> IDAHO CODE § 67-2901(5)(a), (j)–(k).

<sup>50</sup> *See, e.g.*, IDAHO CODE §§ 66-329(5) (commitment of mentally ill persons upon court order), 8-101-08 (authority to arrest for civil actions and court order required), 7-604, 606 (authority to arrest for contempt and court order required), 67-5101 (state jurisdiction for civil and criminal enforcement in Indian country).

<sup>51</sup> Cornell v. Harris, 88 P.2d 498, 500 (Idaho 1939) (citing Burchard v. State, 58 N.D. 841, 845 (1929)).

<sup>52</sup> *See* Nathan Brown, *Jerome Commissioners Say It's ICE's Move on Jail Contract*, MAGIC VALLEY NEWS-TIMES (July 30, 2017), [http://magicvalley.com/news/local/govt-and-politics/jerome-commissioners-say-it-s-ice-s-move-on-jail/article\\_e9cf1682-f1a3-5d41-afa5-889187a93d24.html](http://magicvalley.com/news/local/govt-and-politics/jerome-commissioners-say-it-s-ice-s-move-on-jail/article_e9cf1682-f1a3-5d41-afa5-889187a93d24.html) (quoting Vaughn Killeen, executive director of the Idaho Sheriffs Association, as pointing to Idaho Code § 20-615 and stating that "[i]mmigration holds are federal prisoners and you really don't need a contract . . . just house them and bill ICE \$75 a day. Without the contract the controversy goes away, or at least the significant issue causing the demonstration.") This statute has also been invoked by county officials as the authority under which they hold people on immigration detainers.

and keep in the county jail any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this State; provision being made by the United States for the support of such prisoner.”<sup>53</sup>

Taking custody of federal inmates under Idaho’s law requires an exercise of federal authority in the form of a process or order. State law today defines “process” as “all writs, warrants, summons and orders of courts of justice or judicial officers.”<sup>54</sup> Idaho’s Supreme Court has interpreted that term to encompass judicial orders and the ancillary authority to compel compliance with the enumerated duties delegated to sheriffs.<sup>55</sup> This law does not authorize the execution of immigration detainers by county sheriffs because they lack the necessary process or order. Though the Trump Administration has required ICE officers to include administrative warrants with their detainer requests,<sup>56</sup> the administrative warrant is just that—from an administrative official, not a judge or judicial officer.<sup>57</sup> A warrant signed by an immigration enforcement agent cannot satisfy Idaho’s demand that some kind of court order accompany federal prisoners in order for local officials to take custody of them. An administrative warrant lacks the fundamental characteristics of a court order as it is not issued by a neutral magistrate upon an affidavit of probable cause or presentment of the subject of the warrant.

No state statute authorizes Idaho’s sheriffs and peace officers to make an arrest for a violation of federal civil law alleged by a federal agent. Idaho law cannot authorize serving and enforcing immigration detainers, which contain no judicial order. Further, the arrest of an immigrant upon the request contained in a federal detainer or administrative warrant is a warrantless arrest under Idaho law.<sup>58</sup> Warrantless arrests in Idaho are permitted only “for a public offense committed or attempted” in the presence of a peace officer or for other specified offenses.<sup>59</sup> The Idaho Supreme Court has made clear that a “public offense” means “a criminal offense under Idaho law” and therefore does not include federal immigration violations.<sup>60</sup>

In sum, Idaho’s statutes limit the authority of its peace officers to enforcement activities that involve court orders or violations of state laws. Carrying out civil immigration arrests based on requests from federal administrative officials is unsupported by Idaho’s statutes and case law.

### *B. Limitations Imposed by Idaho’s Constitution*

Article 1, section 17 of the Idaho’s constitution largely tracks the Fourth Amendment in the U.S. constitution,<sup>61</sup> but the Idaho Supreme Court has interpreted the state’s constitution to be “more protective of the rights of Idaho citizens than the United States Supreme Court’s interpretation of the federal constitution.”<sup>62</sup> Specifically, Idaho’s Supreme Court has rejected the “good faith” exception to the exclusionary rule for unreasonable searches and seizures, meaning that police who seize an individual based

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<sup>53</sup> IDAHO CODE § 20-615.

<sup>54</sup> IDAHO CODE § 31-2201.

<sup>55</sup> Hart v. Idaho State Tax Comm’n, 301 P.3d 627, 630 (Idaho 2012) (citing People v. Nash, 1 Idaho 206, 210 (Idaho Terr. 1868)).

<sup>56</sup> See ICE Policy No. 10074.2 (Mar. 24, 2017, eff. Apr. 2, 2017).

<sup>57</sup> 8 C.F.R. § 287.5(e)(2) (listing positions within the Department of Homeland Security authorized to issue immigration warrants).

<sup>58</sup> See IDAHO CODE § 19-507 (defining a warrant as “an order in writing, in the name of the state of Idaho, signed by a magistrate”).

<sup>59</sup> IDAHO CODE § 19-603; State v. Bowman, 124 Idaho 936, 940 (Idaho Ct. App. 1993) (public offense includes misdemeanors); IDAHO CODE § 39-6312(2) (peace officer may arrest without warrant upon probable cause of violation of a protection order). See also IDAHO CODE § 19-510 (defining peace officers).

<sup>60</sup> State v. Villafuerte, 373 P.3d 695, 698 (Idaho 2016).

<sup>61</sup> See IDAHO CONST. art 1, § 17.

<sup>62</sup> State v. Guzman, 842 P.2d 660, 666 (Idaho 1992).

on an unsupported warrant cannot rely on their good faith in the validity of the warrant to avoid the consequences of enforcing a defective warrant.<sup>63</sup> This more protective interpretation of Idaho's constitution is significant in the context of immigration arrests by local officials based on detainers because DHS repeatedly errs in who it detains and deports.<sup>64</sup> Because local officials cannot rely in good faith on the validity of administrative warrants and detainers, they too can become liable for DHS's errors.

Additionally, Article 1, section 6 guarantees release on bail pending criminal conviction with limited exceptions.<sup>65</sup> As Idaho's Supreme Court explains, a criminal defendant has a "right to bail in all but exceptional cases."<sup>66</sup> Idaho's criminal procedure statutes track this constitutional right for individuals detained pre-trial.<sup>67</sup> Preventing an individual from posting a bail bond set by Idaho's Misdemeanor Criminal Rule 13 or a magistrate judge because of an immigration detainer would violate Idaho's constitution, statutes, and court rules.<sup>68</sup>

### C. *The Impact of Detention Contracts on Local Arrest Authority*

Several county jails in Idaho have Intergovernmental Service Agreements (IGSA's) with ICE.<sup>69</sup> ICE is now piloting a project in Florida to enter additional short-term contracts with local detention facilities in an effort to avoid the statutory and constitutional violations a growing number of courts are finding when local entities enforce immigration detainers.<sup>70</sup> These agreements, however, do not change the underlying laws that limit immigration arrest authority for state and local officers.

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<sup>63</sup> *Id.* Idaho's Constitution has been observed to offer broader protection to citizens than the Bill of Rights in the Constitution in more than the Fourth Amendment search-and-seizure context. See Byron J. Johnson, *The Shah of Persia v. the Pope's Decree: Can the Shah of Persia (The United States Supreme Court) Interfere with the Pope's Decree (The Idaho Constitution) As Interpreted by the Idaho Supreme Court?*, 31 IDAHO L. REV. 391 (1995) (discussing Idaho's historical Constitution provisions and comparable Bill of Rights provisions).

<sup>64</sup> These errors include wrongly detaining and deporting U.S. citizens; on average, 150 Americans are mistakenly detained for deportation proceedings every year, but are—alongside noncitizens—not Constitutionally entitled to counsel. Steve Coll, *When ICE Tries to Deport Americans, Who Defends Them?*, NEW YORKER (Mar. 21, 2018), <https://www.newyorker.com/news/daily-comment/when-ice-tries-to-deport-americans-who-defends-them>. See also, e.g., Esha Bhandari, *U.S. Citizen Wrongfully Deported to Mexico, Settles His Case Against The Federal Government*, ACLU (Oct. 5, 2012), <https://www.aclu.org/blog/speakeasy/us-citizen-wrongfully-deported-mexico-settles-his-case-against-federal-government>; Camila Domonoske, *U.S. Citizen Who Was Held By ICE for 3 Years Denied Compensation By Appeals Court*, NPR: THE TWO WAY (Aug. 1, 2017), <https://www.npr.org/sections/thetwo-way/2017/08/01/540903038/u-s-citizen-held-by-immigration-for-3-years-denied-compensation-by-appeals-court>; *U.S. Citizen Sues Government After Being Detained by Immigration Officials for 7 Months*, RUSSIA TODAY: US NEWS (Oct. 22, 2013), <https://www.rt.com/usa/ice-complaint-yost-lawsuit-558/>; Joel Rubin & Paige St. John, *How a U.S. Citizen Was Mistakenly Targeted for Deportation. He's Not Alone*, LA TIMES (Nov. 29, 2017), <http://www.latimes.com/local/lanow/la-me-ice-citizen-arrest-20171129-story.html>; Wendy Feliz, *United States Agrees to Settle Lawsuit Alleging Wrongful Deportation*, AM. IMM. COUNCIL (July 2, 2015), <https://www.americanimmigrationcouncil.org/news/united-states-agrees-settle-lawsuit-alleging-wrongful-deportation>.

<sup>65</sup> IDAHO CONST. art. 1 § 6 ("All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great.").

<sup>66</sup> *State v. Currington*, 700 P.2d 942, 943 (Idaho 1985); *In re France*, 224 P. 433, 435 (Idaho 1924); *In re Schriber*, 114 P. 29, 30 (Idaho 1911).

<sup>67</sup> IDAHO CODE § 19-2903 ("Any person charged with a crime who is not released on his own recognizance is entitled to bail, as a matter of right, before a plea or verdict of guilty, except when the offense charged is punishable by death and the proof is evident or the presumption is great.")

<sup>68</sup> *Currington*, 700 P.2d at 943 ("We note that, where conflict exists between statutory criminal provisions and the Idaho Criminal Rules in matters of procedure, the rules will prevail.").

<sup>69</sup> See, e.g., Nicole Foy, *How Canyon County Collaborates with ICE*, IDAHO PRESS (Mar. 10, 2018), [https://www.idahopress.com/news/local/how-canyon-county-collaborates-with-ice/article\\_c56f641d-2170-520a-bf4f-4e76354ff69e.html](https://www.idahopress.com/news/local/how-canyon-county-collaborates-with-ice/article_c56f641d-2170-520a-bf4f-4e76354ff69e.html).

<sup>70</sup> *FSA Statement on ICE Announcement to Enter into Basic Ordering Agreements with Florida Sheriffs*, FLA. SHERIFF'S ASS'N (Jan. 18, 2018), <https://www.flsheriffs.org/publications/entry/fsa-statement-on-ice-announcement-to-enter-into-basic-ordering-agreements-w>.

Congress created a mechanism that allows the immigration agency to enter into agreements with a State and political subdivisions of a State to hold federal immigration detainees and to provide payment for those services.<sup>71</sup> The federal statute providing contracting authority does not address the authority of local officials to actually arrest individuals for suspected immigration violations, unlike the provision immediately preceding it.<sup>72</sup> Nor does it alter or expand local arrest authority that Congress provided for elsewhere. Rather, the law simply provides a mechanism for the federal government to pay States and localities for housing federal inmates.

### III. The Costs to Counties for Entering Detention Contracts with ICE

Counties and cities not only face potential liability for detaining people based on immigration allegations, they confront a different set of risks and costs associated with signing agreements to hold immigrants for ICE. In the midst of the controversy over opening an ICE detention facility in Jerome County, Governor Butch Otter stated that it is the responsibility of county sheriffs “to protect public safety and defend the constitutional rights of all people” and that “[n]othing in that charge conflicts with contracting with ICE to help enforce our immigration laws, and no outside considerations should keep you from doing so.”<sup>73</sup> County commissioners were also weighing the associated costs. The terms offered by ICE to Jerome County illustrate the contractual expenses that would be incurred by counties on top of the political and economic costs evident in the response by Jerome County residents and employers.

The terms of the proposed contract ICE presented to Jerome County would require continued investments and do not provide a stable source of revenue.<sup>74</sup> The county would be required to ensure that its facility meets DHS’s National Detention Standards and is contingent upon ICE’s need for detention capacity.<sup>75</sup> The county would also have to ensure that the conditions of confinement are appropriate for administrative detention, rather than a lower standard applicable to punitive detention.<sup>76</sup> The contract terms exclude payment for the day an immigrant leaves the facility, effectively rounding down the payment by a full day.<sup>77</sup> Facilities are also required to provide, onsite medical and mental health services, local transportation, and clothing for release at no cost to the detainee and without clear compensation to the facility.<sup>78</sup> Further, the federal government requires the county to assume liability for any damages caused by local officers while fulfilling the ICE agreement and transporting detainees.<sup>79</sup> Finally, the county facility is responsible for

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<sup>71</sup> 8 U.S.C. § 1103(a)(11)(A)–(B).

<sup>72</sup> Compare 8 U.S.C. § 1103(a)(10) (allowing DHS to authorize local law enforcement officers to perform the duties of an immigration officer in the event of a mass influx) with 8 U.S.C. § 1103(a)(11) (2018) (providing for payment and contracting authority for housing federal detainees). See also 8 U.S.C. §§ 1257(g)(1), 1252c(a) (granting arrest and detention authority to non-federal officials in specific circumstances); *Ochoa v. Campbell*, 266 F.Supp.3d 1237, 1253 (E.D. Wa. 2017).

<sup>73</sup> Kimberlee Kruesi, *Idaho Governor Weighs in on Immigration Detention Contract*, ASSOCIATED PRESS (Sept. 15, 2017), [http://magicvalley.com/elko/ap/state/idaho-governor-weighs-in-on-immigration-detention-contract/article\\_43e53918-f905-54ee-bef4-0a309a9e6c4f.html](http://magicvalley.com/elko/ap/state/idaho-governor-weighs-in-on-immigration-detention-contract/article_43e53918-f905-54ee-bef4-0a309a9e6c4f.html).

<sup>74</sup> The proposed contract was produced in response to a public records request and is on file with the author.

<sup>75</sup> Proposed Contract Article II.A.

<sup>76</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (finding that immigrants in civil detention “are entitled to more considerate treatment ... than criminals whose conditions of confinement are designed to punish”). See also *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

<sup>77</sup> Proposed Contract Article III.A.

<sup>78</sup> Proposed Contract Article IV.D, VI.A-I.

<sup>79</sup> Proposed Contract Article XV.B, XVII.C

ensuring access to a federally designated telephone service provider and cannot recoup fees or revenue from those services.<sup>80</sup>

In addition the front investment required, liability for poor conditions and health services can also flow to the county.<sup>81</sup> In New York, a lawsuit brought against Allegany County Jail and the Albany County Correctional Facility was settled for \$750,000 amid claims of that a woman died in immigration custody after receiving insufficient medical care for chronic congestive heart failure.<sup>82</sup> Litigation over wrongful death and unconstitutional conditions also brings costs regardless of the outcome. In Illinois, the company providing health care at the McHenry County Jail settled for at least \$1 million with the family of a woman who committed suicide while in immigration custody at the jail.<sup>83</sup> The lawsuit was originally filed against the McHenry County Sheriff and required defense of county officials. After different lawsuit against a different county was dismissed once all immigrant detainees were removed from the local facility, that county's insurer stated that it would not renew its casualty and property insurance, forcing the county to pay out \$100,000 more in insurance costs.<sup>84</sup>

Moreover, the costs to counties and cities are even greater without formal agreements since federal law requires an agreement in order to provide payment.<sup>85</sup> Further, without an agreement, counties and cities would not have the protection of the IGSA's hold-harmless provisions for ICE's negligent actions or for representation by the U.S. Attorney's Office in claims of unlawful detention.

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Detaining Idaho residents based on federal civil immigration charges places county and city law enforcement officers outside the authority provided by federal immigration law or Idaho state law. Consequently, counties and cities could face sprawling liability for holding residents on immigration detainees alone. Additionally, contracts to house ICE detainees do not fill the void in federal and state authority and present their own costs and risks. Each of these risks must be accounted for as county and city officials determine their policies for immigration-based detention.

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<sup>80</sup> Proposed Contract Article XXIV.D.

<sup>81</sup> See *Belbachir v. City of McHenry*, 726 F.3d 975, 978 (7th Cir. 2013) (describing tort liability imposed under 42 U.S.C. § 1983 “on state and local employees, and sometimes their employer, and sometimes other state and local agents, for violating federal rights...” in the context of an IGSA with ICE).

<sup>82</sup> Brian Quinn, *Wrongful Death Lawsuit Settled for \$750,000*, WELLSVILLE DAILY REP. (Apr. 24, 2016), <http://www.wellsvilledaily.com/news/20160424/allegany-county-attorney-wrongful-death-lawsuit-settled-for-750000>.

<sup>83</sup> Robert McCoppin, *McHenry Jail Suicide Case Settled for At Least \$1 Million*, CHI. TRIB. (Apr. 14, 2014), [http://articles.chicagotribune.com/2014-04-14/news/ct-mchenry-jail-suicide-settlement-met-20140415\\_1\\_hassiba-belbachir-janine-hoft-federal-court](http://articles.chicagotribune.com/2014-04-14/news/ct-mchenry-jail-suicide-settlement-met-20140415_1_hassiba-belbachir-janine-hoft-federal-court).

<sup>84</sup> See Rick Hayes, *County Gets Non-Renewal Notice*, MT. VERNON REGISTER-NEWS (Oct. 3, 2013); Notice of Non-Renewal of Insurance, Letter from Travelers Property Casualty Company of America, Sept. 27, 2013 (copy on file with author via FOIA request).

<sup>85</sup> 8 U.S.C. § 1103(a)(11)(A); see *supra* Section II.D.