GUIDANCE MEMORANDUM

Local Enforcement of Federal Immigration Law: Legal Guidance for Maryland State and Local Law Enforcement Officials

December 2018
INTRODUCTION

For some time now, questions have arisen about the extent to which State and local law enforcement officials may, or are required to, assist U.S. Immigration and Customs Enforcement (“ICE”) and the Customs and Border Protection (“CBP”) officials with the enforcement of federal immigration law. In August 2014, our Office issued advice on the “ICE detainers” issued by federal immigration officials when they seek custody of suspected removable aliens.1 In that letter, our Office concluded that (a) compliance with ICE detainers is voluntary, and (b) State and local law enforcement officials are potentially exposed to liability if they hold someone beyond his or her State-law release date without a judicial warrant or probable cause that the detainee has committed a crime.2

In light of recent federal measures designed to restrict immigration and intensify the enforcement of federal immigration laws, we are now updating and supplementing our 2014 guidance. The purpose of this new guidance is to describe for Maryland State and local governments the current legal landscape governing the participation of law enforcement officials in immigration enforcement, and to help those officials make decisions about how to engage with federal immigration officers.

This guidance reaches several legal conclusions for State and local law enforcement agencies (“LEAs”) to consider as they interact with federal immigration law and officials:

1. LEAs face potential liability exposure if they seek to enforce federal immigration laws, particularly if they do so outside the context of a federal cooperation agreement under 8 U.S.C. § 1357(g)(1).

2. LEAs must absorb all costs associated with federal cooperation agreements under 8 U.S.C. § 1357(g)(1). The federal government does

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2 This guidance applies equally to all non-federal law enforcement officers and agencies, whether they operate at the municipal, county, or state level. To distinguish those officers from federal immigration officers, we will sometimes refer to them together as “local” officials, but at other times we will refer to both State and local entities. These differences in nomenclature are not intended to have substantive effect.
not provide reimbursement for these agreements, and the agreements may increase the risk of unconstitutional profiling.

3. LEAs face potential liability exposure if they honor ICE or CBP detainer requests unless the request is accompanied by a judicial warrant or supported by information providing probable cause that the subject of the detainer has committed a crime.

4. State and local officers may not be prohibited from sharing information about a detainee’s citizenship or immigration status with federal immigration officials, but they are not required to do so either.

5. As an overriding principle, the government bears the burden of proving that the detention of someone beyond the person’s State-law release date does not violate the Fourth Amendment and its Maryland counterpart.

AUTHORITIES GOVERNING LOCAL PARTICIPATION IN THE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

A. The Tenth Amendment to the U.S. Constitution

The Tenth Amendment to the United States Constitution limits the federal government’s ability to mandate particular action by states and localities, including in the area of federal immigration law enforcement and investigations. The federal government cannot “compel the States to enact or administer a federal regulatory program,” or compel state employees to participate in the administration of a federally enacted regulatory scheme. The anti-commandeering restrictions of the Tenth Amendment extend not only to states but also to localities and their employees. Voluntary cooperation with a federal scheme does not present Tenth Amendment issues, but the federal government may not

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3 The Tenth Amendment to the United States Constitution provides that “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.”

4 New York v. United States, 505 U.S. 144, 188 (1992) (federal government may not compel states to enact legislation providing for the disposal of their radioactive waste or else take title to that waste); Printz v. United States, 521 U.S. 898, 935 (1997) (federal government may not require state and local law enforcement officers to perform background checks on prospective firearm purchasers).

5 See Printz, 521 U.S. at 904-05 (county); City of New York v. United States, 179 F.3d 29, 34 (2d Cir. 1999) (municipality).
force state or local officials to carry out federal law, either directly or indirectly through the withdrawal of unrelated federal funding.\(^6\)

\begin{quote}
The Tenth Amendment bars the federal government from requiring local law enforcement officials to enforce federal immigration law.
\end{quote}

B. Federal Immigration Laws

1. Information Sharing Under 8 U.S.C. § 1373

Federal law does not require any local governmental agency or law enforcement officer to communicate with federal immigration authorities. Rather, federal law only requires that state and local governments not bar their employees from sharing certain types of information with federal immigration authorities. Specifically, 8 U.S.C. § 1373 provides that state and local governments cannot prohibit employees or entities “from sending to, or receiving from, [federal immigration authorities] information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”\(^7\) In addition, state and local governments may not impose restrictions on “exchanging” information regarding “immigration status” with “any other Federal, State, or local government entity” or on “maintaining” such information.\(^8\)

By its terms, 8 U.S.C. § 1373 applies only to information regarding an individual’s “citizenship” or “immigration status”; it does not apply to other types of information, such as information about an individual’s release, next court date, or address.\(^9\) In addition, § 1373 places no affirmative obligation on LEAs to collect information about an individual’s immigration status. Thus, local governments may adopt policies prohibiting their officers and employees from inquiring about a person’s immigration status except where required by law.

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\(^7\) 8 U.S.C. § 1373(a).

\(^8\) 8 U.S.C. § 1373(b).

\(^9\) As discussed below, the U.S. Department of Justice has indicated that it interprets § 1373 to preclude more than express restrictions on information disclosure. See infra, § C.
Finally, the Tenth Amendment, as discussed above, may further limit § 1373’s reach. Although at least one court has held that § 1373 does not, on its face, violate that Amendment’s anti-commandeering restrictions, the same court indicated that the Tenth Amendment may be read to limit the reach of § 1373 where a state or locality can show that the statute creates “an impermissible intrusion on state and local power to control information obtained in the course of official business or to regulate the duties and responsibilities of state and local governmental employees.”\textsuperscript{10} The Tenth Amendment thus might protect local efforts to keep information confidential—even from the federal government—if such information is “essential to the performance of . . . state and local governmental functions” where those functions would be “difficult or impossible” to perform “if some expectation of confidentiality is not preserved.”\textsuperscript{11} If a local jurisdiction determines, therefore, that the sharing of information about citizenship or immigration status would make it “difficult or impossible” to perform essential governmental functions, the Tenth Amendment might justify a policy of not providing information under § 1373.

**Update:** Cases decided since this guidance was issued have called into question the constitutionality of § 1373. In May 2018, the Supreme Court decided *Murphy v. N.C.A.A.*, in which it ruled that the anti-commandeering principle of the Tenth Amendment applies not only to federal efforts to compel state action, but also efforts to prohibit it. 138 S.Ct. 1461 (2018). Given that the Second Circuit in *City of New York* had drawn a distinction between compelling state action and prohibiting it in upholding the constitutionality of § 1373, see 179 F.3d at 35, the Supreme Court’s rejection of that distinction as “empty,” id. at 1478, suggests that the conclusion reached in *City of New York* may no longer be valid. At least three district courts have already reached that

\textsuperscript{10} *City of New York*, 179 F.3d at 37. The Court rejected the City’s Tenth Amendment argument on the grounds that—based on the record before it—the City kept immigration-related information confidential from the federal government only and made it available to others. Id. The Court expressly declined to reach how the Tenth Amendment would apply to “generalized confidentiality policies that are necessary to the performance of legitimate municipal functions and that include federal immigration status.” Id.

\textsuperscript{11} Id.
Federal law does not require local law enforcement to share with federal officials information about citizenship or immigration status. However, State and local officials may not prohibit such sharing unless maintaining confidentiality is necessary to perform state and local governmental functions.

2. Cooperation Agreements Under 8 U.S.C. § 1357(g)

Section 287(g) of the Immigration and Nationality Act—which is codified at 8 U.S.C. § 1357(g)—enables ICE to enter into agreements with state and local law enforcement agencies and authorize designated local officers to perform immigration-enforcement functions. After an agreement is signed, officers selected by the state or local agency receive federal training on how to access immigration databases, complete immigration forms, and otherwise carry out the functions of federal immigration agents. State and local law enforcement officials “deputized” through one of these agreements perform the same functions performed by federal immigration agents: they have access to federal immigration databases, may interrogate and take into custody noncitizens believed to have violated federal immigration laws, and may lodge “detainers” against alleged noncitizens held in state or local custody.12

A local law enforcement officer deputized under such an agreement functions as a federal officer and is treated as such for purposes of the Federal Tort Claims Act13 and worker’s compensation claims14 when performing functions under the agreement.15 In addition, authorized local personnel enjoy the same defenses and immunities from personal liability for their in-scope acts that are available to ICE officers,16 and may

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12 See § B.3 below (discussing detainers).
14 5 U.S.C. § 8101 et seq.
16 See 8 U.S.C. § 1357(g)(8).
request—but are not entitled to—representation by the Department of Justice in any litigation arising from activities carried out under the agreement.17

With federal authority, however, come federal obligations. When local personnel act under federal authority, they must comply with a variety of different federal standards and guidelines. For example, deputized local officials must comply with the federal government’s rules governing the disclosure of impeachment information about potential witnesses.18 They also must comply with the federal Privacy Act of 1974 and associated regulations and guidelines regarding data collection and use of information.19

The decision to enter into a § 287(g) agreement is purely discretionary; local jurisdictions are not required to do so.20 The federal government, while it encourages such agreements, does not reimburse local jurisdictions for the expenses their officers incur while assisting with federal immigration enforcement activities.21 And providing such assistance with officers who have only limited expertise and training in immigration

17  See 28 C.F.R. § 50.15.

18  See Model § 287(g) Agreement, ¶ XII, available at https://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf; Giglio v. United States, 405 U.S. 150 (1972) (requiring the disclosure of material tending to impeach the character or testimony of the prosecution witness in a criminal trial).

19  See 5 U.S.C. § 552a, 6 C.F.R. §§ 5.20-5.36. A recent Presidential Executive Order reversed the prior Administration’s policy of applying the protections of the federal Privacy Act to undocumented immigrants, though other federal requirements remain in place. See Executive Order No. 13768, § 14.

20  There are a number of policy considerations that are outside the scope of this legal guidance but that jurisdictions might wish to consider before entering into these agreements. For example, the enforcement of federal immigration laws might divert resources from the investigation of local crimes. Formal participation in federal immigration enforcement—particularly by patrol officers—might also discourage immigrant communities from coming forward with information about criminal activity. There are a number of reports describing how the local enforcement of federal immigration law can affect police/community relations. See, e.g., American Immigration Council, “The 287(g) Program: An Overview” (Mar. 15, 2017); Nik Theodore, Department of Urban Planning and Policy, University of Illinois at Chicago, “Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement” (May 2013). In addition, these agreements might discourage immigrant communities from coming forward to testify in court. See Letter from Brian E. Frosh, Attorney General of Maryland, to the Hon. John Kelly, Secretary, Department of Homeland Security et al. (March 2, 2017), at www.marylandattorneygeneral.gov/News%20Documents/Homeland%20Security_Ltr_030117.pdf.

21  See 8 U.S.C. § 1357(g)(1) (stating that the actions of local officials under a cooperative agreement must be carried out “at the expense of the State or political subdivision”).
enforcement risks the type of racial profiling that is unconstitutional, as our Office stated in our 2015 guidance memorandum, “Ending Discriminatory Profiling in Maryland.”

Local law enforcement agencies may, but are not required to, enter into agreements deputizing their officers to exercise federal immigration enforcement powers. The federal government does not provide reimbursement for these agreements, and the agreements may increase the risk of unconstitutional profiling.


When ICE learns that a local law enforcement agency has custody of an individual who might be in the country illegally, it might issue what is commonly referred to as an “immigration detainer.” An immigration detainer advises local law enforcement that ICE is seeking custody of the individual and asks that the local agency hold the individual “for a period not to exceed 48 hours beyond the time when [the subject] would otherwise have been released” in order to allow ICE officials the opportunity to assume custody. Immigration detainers are requests only; local officers are not obligated to honor them.

An LEA’s decision to comply with a detainer request and hold an individual beyond his or her normal release date constitutes a new “seizure.” That new seizure must be justified under the Fourth Amendment and the analogous provisions of Article 26 of the Maryland Declaration of Rights. The requirements of the Fourth Amendment

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22 Guidance Memorandum, “Ending Discriminatory Profiling in Maryland” (Aug. 2015), at http://www.marylandattorneygeneral.gov/Reports/Ending_Discriminatory_Profiling.pdf; see also Santos v. Frederick County Board of Commissioners, 725 F.3d 451, 459 n.2 (4th Cir. 2013) (observing that, while the Fourth Circuit has not addressed the issue, “two other Circuit Courts have indicated that consensual encounters initiated solely based on race may violate the Equal Protection Clause”).


25 See, e.g., Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015); cf. Illinois v. Caballes, 543 U.S. 405, 407 (2005) (noting that a legitimate seizure “can become unlawful if it is prolonged beyond the time reasonably required” to achieve its purpose); see also King v. State,
do not change simply because ICE or CBP has issued a detainer request to an LEA. Therefore, local officials who hold someone solely on the basis of having received a detainer request risk civil liability, including monetary damages and attorneys fees.

In August 2014, our Office issued an advice letter evaluating the extent to which immigration detainers issued on specific grounds might provide a local officer probable cause to detain someone beyond their State-law release date. That evaluation hinged on the “check-boxes” provided on the form used by ICE officials at the time and the extent to which information conveyed through those boxes provided probable cause to believe that the subject had committed a crime.

On March 24, 2017, ICE announced the introduction of a new form—Form I-247A—that officials must use effective April 2, 2017. The new form and the guidance accompanying its introduction make two significant changes to the detainers and the

434 Md. 472, 482-84 (2013) (construing Article 26 in pari materia with the Fourth Amendment); Title 2 of the Criminal Procedure Article, Annotated Code of Maryland (governing the arrest process under Maryland law).


27 See, e.g., Santos v. Frederick County Bd. of Comm’rs, 725 F.3d 451, 464-65 (4th Cir. 2013); Morales v. Chadbourne, 793 F.3d 208 (1st Cir. 2015); Miranda-Olivares v. Clackamas County, No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014); People ex rel. Swenson v. Ponte, 46 Misc.3d 273 (N.Y. Supr. Ct. 2014); see also Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975) (discussing underlying basis of Fourth Amendment’s probable cause requirement). Liability will also depend, of course, on the applicability of other legal principles that govern the tort liability of State and local officials under 42 U.S.C. § 1983 and the State and local tort claims acts. Those issues, however, are beyond the reach of this analysis.

28 ICE has used various versions of form I-247 over the years. See Roy v. Cty. of Los Angeles, 2016 WL 5219468, at *2 (C.D. Cal. Sept. 9, 2016) (describing evolution of the form from October 2010 until 2015). Our analysis focused on form I-247, which was in effect between December 2012 and March 2015.

29 See ICE, Policy No. 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (March 24, 2017).
process by which ICE officials issue them. First, the new immigration detainer form must now be accompanied by one of two administrative warrants: a Warrant for Arrest of Alien (Form I-200), or a Warrant for Removal/Deportation (Form I-205). According to the federal guidance, obtaining an administrative warrant will allow ICE officials to arrest undocumented individuals without having to make an individualized finding that the subject is “likely to escape,” as is required for warrantless arrests under federal immigration laws.\(^\text{30}\) Second, the new immigration form eliminates the multiple check-boxes used on other forms—which described a wide variety of civil and criminal bases for continued detention—and replaces them with just four, each of which is focused purely on the subject’s unauthorized presence in the United States.

As is discussed in greater detail in Appendix A, neither change alters our advice: Local officials may not hold someone beyond their State-law release date in the absence of a judicial warrant or probable cause that the subject has committed a crime. Although the issuance of an administrative warrant might authorize an arrest by a federal official or a local official operating under a § 287 agreement, it would not—by itself—authorize a continued detention under State law. The legality of a continued detention on the basis of a removal order is less clear; while there is some authority that removal orders justify local detentions, there is contrary authority as well.\(^\text{31}\) Given that uncertainty, detaining someone on the grounds that they are the subject of a removal order may result in liability for an unlawful seizure.

As for the check-boxes provided on the new form, none of them gives local officials probable cause to believe that a detainee has committed a crime. Instead, all four boxes relate to the subject’s unauthorized presence within the United States, which


\(^{31}\) See Appendix A at A-2 (contrasting People v. Xirum, 45 Misc. 3d 785 (N.Y. Sup. Ct. 2014) with People ex rel. Swenson v. Ponte, 46 Misc. 3d 273 (N.Y. Sup. Ct. 2014)).
is a civil, not criminal, offense. And, as with the warrant issues discussed in the preceding paragraph, the case law is split as to whether an order for removal—the first of the four check-boxes—justifies a local detention. For these reasons, we recommend that LEAs respond to immigration detainers only when they are accompanied by a judicial warrant, or when further inquiry gives the local official probable cause to believe that a crime—not merely a civil offense—has been committed. Only under those circumstances will a local official have a clear legal basis to hold a detainee beyond his or her State-law release date.

Local law enforcement officials face potential liability if they honor ICE detainers and hold someone beyond their State-law release date unless the detainer is accompanied by a judicial warrant or when the information provided with the detainer form establishes probable cause to believe that the detainee has committed a crime. Illegal presence in the United States is a civil offense and does not provide a clear basis for continued detention.

C. Executive Order No. 13768, “Enhancing Public Safety in the Interior of the United States”

On January 25, 2017, the President of the United States issued Executive Order No. 13768 for the purpose of guiding the actions of federal agencies involved in immigration enforcement. On February 20, 2017, DHS published a memorandum implementing the Executive Order. Together, these materials raise additional issues about the local enforcement of federal immigration law.

33 See Appendix A at A-2.
34 Of course, an individual held beyond his or her State-law release date must be afforded the same due process protections afforded to any other detainee. See, e.g., Maryland Rule 4-212(f) (individual held on warrantless arrest must be given a copy of the charging document “be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest”); see also Form I-247A (stating that the detained individual “must be served with a copy of this form for the detainer to take effect” (emphasis omitted)).
36 Several jurisdictions have challenged the constitutionality of the executive order and, in one case, the court has issued a nationwide injunction blocking its implementation. See County
The Executive Order and the DHS Memorandum both state that the federal government will seek increased cooperation from state and local governments in connection with immigration enforcement.\textsuperscript{37} Both documents also address the § 1373 information-sharing provisions and the 287(g) agreements discussed above. Although neither document may legally alter federal statutory law on those topics, they provide some insight into how broadly the federal government construes those laws.

The Executive Order takes aim at so-called “sanctuary jurisdictions,” which it describes as “jurisdictions that willfully refuse to comply with 8 U.S.C. § 1373.”\textsuperscript{38} The Order grants the U.S. Attorney General and the DHS Secretary authority to (1) designate localities as “sanctuary jurisdictions,” and (2) ensure that jurisdictions so designated are ineligible for federal grants, “except as deemed necessary for law enforcement purposes.”\textsuperscript{39} The Executive Order further directs the U.S. Attorney General to take “appropriate enforcement action” against any jurisdiction that either violates § 1373 or “has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.”\textsuperscript{40}

As discussed above, § 1373 relates only to sharing “information” regarding “citizenship or immigration status”; it does not restrict a locality from declining to share with federal immigration officials other types of information, such as non-public information about an individual’s release, next court date, or address. Nor does § 1373 place an affirmative obligation on local governments to collect information about an individual’s immigration status. An LEA that chooses not to share additional information with federal officials should not run afoul of § 1373 so long as its practices


\textsuperscript{37} See Executive Order No. 13768, § 8; DHS Memorandum § B.

\textsuperscript{38} Executive Order No. 13768, § 9.

\textsuperscript{39} \textit{Id.} The Executive Order also requires certain federal agencies to report information about “sanctuary jurisdictions” and publicize a list of criminal actions committed by immigrants and of jurisdictions that ignored or failed to honor detainer requests with respect to those immigrants. \textit{Id.} ICE has temporarily suspended the publication of the “declined retainer outcome report” after questions were raised about its accuracy. \textit{See} www.ice.gov/declined-detainer-outcome-report.

\textsuperscript{40} Executive Order No. 13768, § 9.
do not prohibit employees from sharing information regarding citizenship or immigration status.

Federal officials have, however, interpreted § 1373 broadly to include not only local rules that restrict the sharing of information about citizenship or immigration status, but any law, rule, or “practice” that has the effect of restricting that sharing. The Executive Order itself directs the U.S. Attorney General to take “appropriate enforcement action” against any jurisdiction that “has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law”\(^{41}\)—a standard that seems to go beyond the narrow information-sharing that § 1373 is designed to protect. The federal government has also stated that a local policy prohibiting law enforcement officials from honoring detainer requests—which are not covered by § 1373—might qualify as a violation of § 1373,\(^{42}\) particularly if it causes local officials to believe that all types of cooperation with federal immigration officials are prohibited.\(^{43}\)

Local jurisdictions would be understandably concerned about the possible loss of federal funding if the U.S. Attorney General were to find that they have violated § 1373 under one of these federal interpretations. The federal government provides Maryland and its local jurisdictions with numerous grants in areas ranging from education and health care to social services and criminal justice, and the loss of federal funding could have significant consequences. Each grant is governed by different regulatory schemes, however, and the specific provisions of those schemes must be reviewed to determine whether they might restrict the federal government’s ability to withhold funding.

Still, there are certain actions that an LEA can take without risking the loss of federal funding. A local jurisdiction’s decision not to enter into a § 287(g) agreement

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\(^{41}\) Id. (emphasis added).

\(^{42}\) See Attorney General Jeff Sessions, Remarks on Sanctuary Jurisdictions (Mar. 27, 2017), available at https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-sanctuary-jurisdictions (citing jurisdictions “refusing to honor [ICE] detainer requests” as examples of conduct that violates § 1373).

\(^{43}\) See United States Department of Justice, Department of Justice Referral of Allegations of Potential Violations of 8 U.S.C. § 1373 by Grant Recipients (May 31, 2016), at 7 n.9 (suggesting that § 1373 also prohibits “actions of local officials” that “result in” employees not providing information to ICE) (available at https://oig.justice.gov/reports/2016/1607.pdf).
cannot be considered a violation of § 1373.\textsuperscript{44} And a local rule, policy, or practice of not cooperating with federal immigration authorities should not violate even the federal government’s view of § 1373 if the local government does not restrict its employees from responding to federal requests for information about a person’s citizenship or immigration status.

Finally, although the federal government has wide latitude to condition its funding to states and localities on their fulfillment of certain conditions, the U.S. Supreme Court has identified limitations on that authority. First, the power to impose funding conditions under the Spending Clause lies with Congress, not the President or the federal agencies he oversees.\textsuperscript{45} Second, Congress cannot use its spending power “to induce the States to engage in activities that would themselves be unconstitutional.”\textsuperscript{46} The federal government thus cannot condition a grant of federal funds on invidiously discriminatory state action, and likely cannot withdraw funds from a state that declines to fulfill detainers that would violate the Fourth Amendment. Third, any funding conditions must be reasonably related to the federal interest in the program at issue.\textsuperscript{47} For this reason, the federal government likely cannot withdraw from so-called “sanctuary jurisdictions” federal funding that is not related to the enforcement of federal immigration laws. Fourth, the funding condition must be stated “unambiguously” so that the recipient can “voluntarily and knowingly” decide whether to accept those funds and the associated

\begin{itemize}
  \item \textsuperscript{44} See 8 U.S.C. § 1357(g)(9) (“Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.”); \textit{see also} Executive Order No. 13768, § 8(b) (directing DHS to enter into § 287(g) agreements “with the consent of State or local officials, as appropriate”); DHS Memorandum at 4 (directing ICE officials to enter into agreements with those LEAs that make such a “request”).
  
  \item \textsuperscript{45} See \textit{County of Santa Clara v. Trump}, No. 17-CV-00485-WHO, 2017 WL 1459081, at *21-22; \textit{see also Dole}, 483 U.S. at 206 (stating that Congress, incident to its power under Article I, § 8, “may attach conditions on the receipt of federal funds”).
  
  \item \textsuperscript{46} \textit{Dole}, 483 U.S. at 210.
  
  \item \textsuperscript{47} In \textit{Dole}, the Supreme Court held that Congress could permissibly withhold 5% of certain highway funds from states that failed to raise their drinking age to 21 because raising the drinking age was “directly related to one of the main purposes for which highway funds are expended,” namely “safe interstate travel.” \textit{Id.} at 208-09.
\end{itemize}
requirements. Accordingly, the federal government may not be able to withdraw federal funding on the basis of an expansive reading of the states’ obligations under § 1373. And finally, the amount of federal funding that a noncomplying State would forfeit cannot be so large that the State would be left with “no real option but to acquiesce” and accept the condition—a limitation that would be implicated should the federal government seek to withdraw all federal funding from a jurisdiction. Depending on the amount and nature of any federal funding cut, states and localities may be able to challenge the defunding on one or more of these grounds.


Although Executive Order No. 13768 threatens local jurisdictions with the loss of federal funds if they “hinder” federal immigration enforcement, local jurisdictions remain free not to enter into § 287(g) agreements or share information with federal immigration officials so long as they do not restrict employees from sharing with federal officials information about a person’s citizenship or immigration status.


50 The Northern District of California, in enjoining the effect of the executive order, concluded that the plaintiff counties were likely to succeed not only on their claims that the executive order violates the Spending Clause and the Tenth Amendment, but also on their claims that the order is vague and fails to comport with the due process principles of the Fifth Amendment. See County of Santa Clara v. Trump, No. 17-CV-00485-WHO, 2017 WL 1459081, at *24-26.
CONCLUSION

Much has changed since 2014, when our Office last provided advice on the local enforcement of federal immigration laws. Some changes have come through the courts, which continue to review the legality of local detentions on the basis of immigration detainers. Other changes have come through federal immigration enforcement policy, which is only now becoming subject to judicial review. These changes have created considerable legal uncertainty surrounding the local participation in the enforcement of federal immigration laws.

In light of this uncertainty, this guidance recommends a few basic principles to guide local law enforcement agencies as they interact with federal immigration law and officials:

1. LEAs face potential liability exposure if they seek to enforce federal immigration laws, particularly if they do so outside the context of a federal cooperation agreement under 8 U.S.C. § 1357(g)(1).

2. LEAs must absorb all costs associated with federal cooperation agreements under 8 U.S.C. § 1357(g)(1). The federal government does not provide reimbursement for these agreements, and the agreements may increase the risk of unconstitutional profiling.

3. LEAs face potential liability exposure if they honor ICE or CBP detainer requests unless the request is accompanied by a judicial warrant or supported by information providing probable cause that the subject of the detainer has committed a crime.

4. State and local officers may not be prohibited from sharing information about a detainee’s citizenship or immigration status with federal immigration officials, but they are not required to do so either.

5. As an overriding principle, the government bears the burden of proving that the detention of someone beyond the person’s State-law release date does not violate the Fourth Amendment and its Maryland counterpart.

Following these principles will allow law enforcement agencies to comply with federal law in a manner that respects the constitutional rights of individuals, protects local agencies and officials from potential legal liability, and allows them to remain faithful to their mission of promoting public safety.