ICE WARRANTS AND LOCAL AUTHORITY

What is an ICE administrative warrant and what legal authority does it confer?

In March 2017, Immigration and Customs Enforcement (ICE) issued a new policy regarding immigration detainers and administrative immigration warrants, or "ICE warrants."[1] The policy directs that all ICE detainers shall be accompanied by immigration warrants signed by an authorized ICE officer.

An "ICE warrant" is not a real warrant. ICE warrants are administrative forms issued by ICE officers, without any review by a judge.[2] An ICE warrant is similar to an ICE detainer, although it derives from different federal regulations. Neither an ICE detainer nor an ICE warrant provides authority for a local law enforcement agency to arrest or detain someone for civil immigration violations.

This advisory analyzes the legal authority of ICE warrants, with specific regard to their meaning for local law enforcement officers.

I. What is an ICE Warrant?

An "ICE warrant" is a form issued by certain immigration officers that names an allegedly deportable non-citizen and directs various federal immigration enforcement agents to arrest that individual.[3] ICE can issue an arrest warrant at the same time as, or after, they issue a Notice to Appear for removal proceedings.[4] ICE warrants are administrative warrants that "do not grant the same authority as a criminal search or an arrest warrant."[5] Unlike criminal warrants, an ICE warrant is not reviewed or issued by a neutral magistrate. Further, it does not confer authority to enter private spaces to execute an arrest or search.[6] An ICE warrant does not compel any local law enforcement officer to take action of any kind; it is exclusively directed to ICE agents.[7]

Federal regulations authorize immigration warrants to be generated at any time following the issuance of a Notice to Appear for removal proceedings.[8] The Notice to Appear itself does not authorize arrest, and is not reviewed by a judge until much later in removal proceedings. The sufficiency or validity of the warrant or the arrest action is never reviewed by a judge at all. The implementing regulations for ICE warrants focus on which agents have authority to issue or execute a warrant, and what training is required for them before receiving that authority.[9] All of the officers authorized to issue and execute administrative arrest warrants are federal agents, not local law enforcement officers or agencies.

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[1] See Immigration and Customs Enforcement Policy Number 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers, (March 24, 2017) *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. ICE also provided a revised detainer form and updated immigration warrant forms, *available at* https://www.ice.gov/detainer-policy. An immigration detainer is a request from federal immigration authorities to a local, state or federal law enforcement agency to provide them with notice prior to releasing the subject of the detainer, in order for ICE to arrange to take custody. 8 CFR § 287.7(a).

[2] 8 C.F.R. § 287.5(e).

[3] See 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."). *See also* 8 C.F.R. § 287.5(e) (listing the various categories of immigration officials authorized to issue or execute immigration warrants). ICE warrants may be referred to as removal warrants or arrest warrants. An I-200 arrest warrant is for an allegedly deportable immigrant who does not already have a removal order against her, while an I-205 is issued subsequent to a removal order. A blank sample ICE warrant is available on ICE's website at: https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF. (An I-203 or I-203a is an order to detain or release the person. This is described in the ICE Detention Standards for purposes of making preliminary custody and bond determinations. This document is administrative and has no legal force, and is unlikely to affect local law enforcement unless they contract with ICE for immigration detention.)

[4] 8 C.F.R. § 236.1.

[5] Letter from Karin Lang, ICE Office of Congressional Relations, to Congresswoman Zoe Lofgren, March 14, 2007. Karin Lang's letter refers to ICE warrants on Form I-205, which are based on an order of removal by an Immigration Judge.

[6] *See See v. City of Seattle*, 387 U.S. 541 (1967) (holding that administrative entry to areas not open to the public may only be compelled through the warrant procedure); *El-Badrawi v. Dep't of Homeland Security*, 579 F. Supp. 2d 249, 275 (D. Conn. 2008) ("That is why, as a matter of federal constitutional law, search warrants issued exclusively by executive officials involved in an investigation are ignored for Fourth Amendment purposes.").

[7] *See* 8 C.F.R. § 287.5.

[8] 8 C.F.R. § 236.1. *See also* 8 C.F.R. § 287.8(c).

[9] 8 C.F.R. § 287.5(e).

II. Implications of ICE Warrants for Local Law Enforcement Agencies

ICE warrants do not generally provide a basis for a local or state law enforcement officer or agency (LEA) to arrest or detain an individual. This includes prolonging the detention of someone who is subject to an ICE detainer and/or ICE warrant but who would otherwise be released. Federal courts have ruled that holding an individual beyond the conclusion of their criminal case constitutes a new seizure that must meet Fourth Amendment requirements.[10] Additionally, such a seizure must be within the lawful authority of the local agency under state law.[11] ICE warrants cannot meet these requirements. First, "ICE warrants" are not constitutionally valid warrants because they are not reviewed by a judge or neutral magistrate. Second, no legal authority contemplates local or state officers executing an administrative ICE warrant, even if it were constitutionally valid. Third, ICE warrants are for civil immigration arrests, and local law enforcement agencies lack authority to arrest or detain individuals for civil immigration violations.[12]

A. ICE Warrants Do Not Satisfy Requirements of the Fourth Amendment

An "ICE warrant" is not a real warrant. Unlike the warrant requirements of the Fourth Amendment, ICE warrants are issued by the immigration enforcement agency itself, without any review by a neutral magistrate.[13] Federal courts have repeatedly found that such warrants do not meet basic Fourth Amendment requirements, and therefore actions taken on the basis of such warrants are evaluated as if there were no warrant at all.[14]

For local law enforcement to detain an individual pursuant to an ICE warrant may violate the Fourth Amendment, and in addition could constitute false imprisonment under state law. In *Coolidge v. New Hampshire*, the U.S. Supreme Court held that a warrant issued by the attorney general was invalid, specifically because the attorney general was in charge of prosecution and therefore he could not be a neutral and detached magistrate.[15] ICE warrants, issued by agents of the Department of Homeland Security, similarly lack any imprimatur of neutral or detached findings to support probable cause for arrest. The District of Connecticut found that seizure based on an immigration warrant should nonetheless be evaluated as a warrantless arrest, because an ICE warrant is issued by an agent, not a judge.[16]

B. There is No Authority for Local Law Enforcement Officers to Execute ICE Warrant

An ICE warrant does not confer any arrest authority to a local law enforcement officer. Federal regulations allow a specific list of *federal* immigration agents to execute immigration arrest warrants.[17] This does not include any local law enforcement agents or delegate arrest authority to such officers. Rather, the list of officers empowered to execute such warrants is specifically enumerated and limited to federal immigration officials.[18] The U.S. Supreme Court noted in *Arizona v. United States* that only authorized, trained immigration agents execute such warrants.[19] Local law enforcement officers generally lack any authority to detain someone on the basis of an ICE warrant.

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[10] *Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *Gonzales v. Peoria*, 722 F.2d 468 (9th Cir. 1983) ("The chief of police expressed the conviction that 'detaining' persons in custody for suspected violations of the Act is different from arresting them. There is no constitutional distinction between these procedures."); *Melendres v. Arpaio,* 695 F.3d 990, 1000 (9th Cir. 2012); *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015); *Miranda-Olivares v. Clackamas Co*., No. 3:12-cv-02317-ST (D.Or. April 11, 2014).

[11] *See United States v. Di Re,* 332 U.S. 581, 589 (1948). *See also Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012).

[12] *Arizona v. United States,* 132 S. Ct. 2492, 2506 (2012).

[13] 8 C.F.R. § 287.5(e).

[14] *Coolidge v. New Hampshire*, 403 US 443 (1971) (finding a warrant issued by the Attorney General to be invalid because he was not a neutral magistrate); *Johnson v. United States*, 333 U.S. 10 (1948) (Fourth Amendment protection consists in requiring that those "inferences be drawn b y a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."); *El-Badrawi v. Dep't of Homeland Security*, 579 F. Supp. 2d 249, 275 (D. Conn. 2008) ("The law places a high premium on arrest warrants because such warrants are issued by neutral magistrates who provide an independent check on executive discretion.") (*citing Coolidge v. New Hampshire*, 403 US at 449 (1971)).

[15] *Coolidge v. New Hampshire*, 403 US 443 (1971).

[16] *El-Badrawi v. Dep't of Homeland Security*, 579 F. Supp. 2d 249, 275 (D. Conn. 2008) ("No neutral magistrate (or even a neutral executive official) ever examined the warrant's validity. Under Connecticut tort law (and federal constitutional law), the arrest must therefore be treated as warrantless.")

[17] 8 C.F.R. § 287.5(e). Under 8 USC § 1357(g), the "287(g) program," a law enforcement agency may enter into a formal memorandum of agreement with DHS, under which local officrs are deputized to perform certain federal immigration enforcement functions. These agreements designate the specific functions authorized for local officials, which may include arrests based on immigration warrants.

[18] 8 C.F.R. § 236.1(b)(1). *See also Arizona v. United States,* 132 S. Ct. 2492, 2506 (2012).

[19] *Arizona v. United States,* 132 S. Ct. 2492, 2506 (2012). Furthermore, at the time of arrest even with a warrant, the regulations at 8 C.F.R. § 287.8(c)(2)(iii). direct "the designated immigration officer" to "identify himself or herself as an immigration officer who is authorized to make the arrest" and state the reason for the arrest. Local law enforcement agents have no way of doing this because they are not immigration officials.

C. Local Law Enforcement Officers Have No Civil Immigration Enforcement Authority

ICE warrants are issued for civil violations of immigration law, not criminal charges. Local law enforcement agencies do not have authority to arrest or detain someone for civil immigration violations.[20] The Supreme Court said in *Arizona v. United States* that "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."[21] While ICE agents may arrest individuals on the basis of administrative warrants,[22] it does not follow that local law enforcement agents may do so, because the existence of an ICE warrant or of an immigration violation does not provide any arrest authority to local officers.[23] State and local law enforcement powers derive from state laws.[24] And state laws do not grant local officers power to arrest for immigration violations; they authorize arrest for state, and sometimes federal, criminal violations.[25] Therefore ICE warrants, which are issued on the basis of civil immigration violations, are not a basis for arrest by local law enforcement officers.

III. ICE Detainers Combined with ICE Warrants Do Not Affect LEA Authority

Neither an ICE detainer nor an ICE warrant meets Fourth Amendment standards or provides legal authority to local law enforcement officers outside of their own state authority. The combination of both these documents together does not change the legal analysis for local law enforcement agencies. The reason ICE has begun issuing administrative immigration warrants along with detainers is to meet its own legal obligations, not because an ICE warrant provides different authority for local officials than an ICE detainer.

Federal courts have found that ICE was issuing detainers in excess of its own statutory authority. The Immigration and Nationality Act authorizes ICE to arrest a person without a warrant if they have probable cause that the person is subject to removal, *and* if they have determined that the person is likely to escape before a warrant can be obtained.[26] ICE detainers cause a warrantless arrest and therefore ICE must also meet these requirements in order to issue a detainer. Because ICE was causing warrantless arrests and never evaluating the risk of escape, the courts ruled that ICE was violating the statute and the resulting detainers were legally invalid.[27]

In response, ICE has begun issuing administrative warrants with its detainers, so that the arrest is now supported by an ICE warrant. If there is a warrant, ICE does not need to show likelihood of escape before a warrant can be obtained, because the warrant has been obtained already. However it is not clear that an ICE warrant, as opposed to a valid judicial warrant, is legally sufficient in this context. The courts did not yet evaluate whether an administrative ICE warrant, which is not reviewed by a judge, is sufficient to overcome the problem of ICE's arrest authority. Since an ICE warrant is effectively just another form signed by an ICE officer, much like a detainer, it seems unlikely that this formalistic change has any meaningful legal impact. Fundamentally, these changes are about ICE's own exercise of law enforcement authority, and do not affect the analysis for local law enforcement agencies.

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[20] *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012); *see also Melendres v. Arpaio,* 695 F.3d 990, 1000 (9th Cir. 2012) ("detention beyond the duration of the initial traffic stop must be supported independently by reasonable suspicion of criminality"); *Santos v. Frederick County Bd. of Com'rs*, 725 F.3d 451, 464-65 (4th Cir. 2011) (holding that local officers' lack of authority for immigration arrests extends to brief investigatory detentions).

[21] *Id.*

[22] *Arizona v. United States*, 132 S. Ct. 2492, 2505-6 (2012).

[23] *See Arizona v. United States*, 132 S. Ct. 2492, 2505-6 (2012) (noting that in all instances of administrative warrants, the law provides that they be executed by immigration officers with training in enforcement of immigration law); *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983) (local or state law enforcement officers can only make arrests for criminal violations of federal immigration law, not civil violations, as are charged in an ICE warrant); *Santos v. Frederick County Bd. Of Com'rs*, 725 F.3d 451, 465-66 (4th Cir. 2013) (local arrest based on civil immigration warrant violated the Fourth Amendment).

[24] *United States v. Di Re,* 332 U.S. 581, 589 (1948).

[25] See *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 918 (S.D. Ind. 2011) (enjoining section of state law that "authorize[d] state and local law enforcement officers to effect warrantless arrests" based on ICE detainers, because permitting arrests "for matters that are not crimes" would contravene the Fourth Amendment); *People ex rel Swanson v. Ponte*, No. 14652, --- N.Y.S.2d ---- (2014), 2014 N.Y. Slip Op. 24304 ("There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature."); *Mercado v. Dallas County*, No. 3:15-cv-3481 (N.D.Tx. Jan. 17, 2017);

[26] 8 USC § 1357(a).

[27] *Jimenez-Moreno v. Napolitano*, No. 1:11-cv-05452, Docket Entry 230 at 16-17 (N.D. Ill. Sept. 30, 2016) ("The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)."); *Orellana v. Nobles County*, No. 0:15-cv-03852 (D. Minn. Jan. 6, 2017).

IV. Conclusion

Generally, ICE warrants are not valid warrants and do not confer authority on local law enforcement to detain someone for civil immigration violations. There is no requirement for a local officer to take action based on an ICE warrant, because such action is outside their legal authority. An ICE warrant provides no probable cause of a crime, and generally no authorization for state and local law enforcement to make an arrest. An ICE warrant also does not change the constitutionality or authority of a local agency to hold someone on an ICE detainer. Detention in local custody pursuant to an ICE warrant opens the local custodian to liability for unlawful imprisonment.