



COMMONWEALTH of VIRGINIA

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September 5, 2024

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The Honorable Michael W. Miller
Sheriff, Bedford County
1345 Falling Creek Road
Bedford, Virginia 24523

Dear Sheriff Miller:

Issue Presented

You ask whether a sheriff is prohibited by law from cooperating with federal immigration authorities by notifying United States Immigration and Customs Enforcement (ICE) officers, after receipt of an ICE-issued detainer related to an inmate in the sheriff's custody, of the release of that inmate in order for ICE to attain custody of the inmate prior to or upon release.

Response

It is my opinion that sheriffs may cooperate with ICE with respect to inmates in their custody who are the subject of an ICE detainer by providing immigration officers prerelease notification of those inmates' scheduled releases.

Applicable Law and Discussion

It is well established that "[t]he office of sheriff is a constitutional office created pursuant to Article VII, § 4 of the Constitution of Virginia (1971), the duties [and powers] of which 'shall be prescribed by general law or special act' of the General Assembly."¹ Your inquiry, however, relates to immigration, which "is an area traditionally regulated by the federal government."² Accordingly, a discussion regarding applicable federal law is warranted.

The United States government "has broad, undoubted power over the subject of immigration and the status of aliens[.]"³ and "[f]ederal governance of immigration and alien status is extensive and complex."⁴ As reflected in the Immigration and Nationality Act (INA),⁵ Congress has "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization' and set 'the terms and conditions of

¹ 1997 Op. Va. Att'y Gen. 144, 144-45.

² *United States v. South Carolina*, 720 F.3d 518, 529 (4th Cir. 2013). "The federal power to determine immigration policy is well settled." *Arizona v. United States*, 567 U.S. 387, 395 (2012).

³ *Arizona*, 567 U.S. at 394. This federal power stems from the United States government's "constitutional power to 'establish an uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations[.]" *Id.* at 394-95 (quoting U.S. CONST. art. I, § 8, cl. 4).

⁴ *Id.* at 395.

⁵ 8 U.S.C. § 1101 *et seq.*

admission to the country and the subsequent treatment of aliens lawfully in the country.”⁶ The law more specially establishes categories of aliens who may not be admitted to the United States, identifies which aliens may be removed from the United States, and sets forth removal procedures.⁷

The INA clearly vests the Secretary of Homeland Security and his delegates (collectively, DHS), which includes ICE,⁸ with “the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens.”⁹ Seeking removal of aliens is among the “enforcement tools” available to DHS,¹⁰ and “ICE officers are responsible ‘for the identification, apprehension, and removal of illegal aliens from the United States.’”¹¹ Among other enforcement activities, ICE officers and other authorized federal employees serving as “immigration officers” are permitted to detain aliens civilly while removal proceedings are pending and while awaiting their ultimate removal.¹² Doing so furthers the federal government’s interests in “ensuring the appearance of aliens at future immigration proceedings” and “preventing danger to the community.”¹³

In contrast to the authority conferred upon federal immigration officers to execute enforcement actions under the INA, Congress has authorized state and local officers to perform the same or similar functions only in specific, limited circumstances.¹⁴ One express method by which local officers can undertake such functions is through a formal arrangement entered into pursuant to Section 287(g)(1) of the INA, which

⁶ Chamber of Com. of U.S. v. Whiting, 563 U.S. 582, 587 (2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)). For instance, “[u]nlawful entry and unlawful reentry into the country are federal [criminal] offenses.” *Arizona*, 567 U.S. at 395 (citing 8 U.S.C. §§ 1325, 1326).

⁷ *Arizona*, 567 U.S. at 395, 396 (citing 8 U.S.C. § 1182). “Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law.” *Id.* at 396 (citing 8 U.S.C. § 1227). Federal law provides and governs the “exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States” and such determinations are made solely by immigration judges. 8 U.S.C. § 1229a.

⁸ 8 C.F.R. § 100.1.

⁹ 8 U.S.C. § 1103(a)(1). *See* 6 U.S.C. § 112(b)(1) (authorizing the Secretary, with some exceptions, to “delegate any of the Secretary’s functions to any officer, employee, or organizational unit of the Department”); *see also* 8 C.F.R. § 2.1 (“All authorities and functions of [DHS] to administer and enforce the immigration laws are vested in the Secretary of Homeland Security. The Secretary . . . may, in the Secretary’s discretion, delegate any such authority or function to any official, officer, or employee of [DHS.]”). Enforcement powers previously resided with the Attorney General but were transferred to DHS in 2002. *Outdoor Amusement Bus. Ass’n, Inc. v. Dep’t of Homeland Sec.*, 983 F.3d 671, 677 (4th Cir. 2020) (citing Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002)). Nonetheless, “the [U.S.] Attorney General retains the authority to administer removal proceedings and decide relevant questions of law.” *Nielsen v. Preap*, 586 U.S. 392, 397 n.2 (2019).

¹⁰ *Casa De Maryland v. U.S. Dep’t of Homeland Sec.*, 924 F.3d 684, 691 (4th Cir. 2019). “[T]he removal process is entrusted to the discretion of the Federal Government.” *Arizona*, 567 U.S. at 409.

¹¹ *Arizona*, 567 U.S. at 397 (quoting DEP’T OF HOMELAND SECURITY, Office of Immigration Statistics, Immigration Enforcement Actions: 2010, p. 2 (2011)).

¹² 8 U.S.C. §§ 1229a, 1231; 8 C.F.R. §§ 1236.1, 1241.2. *See* 8 U.S.C. § 1101(a)(18) (defining “immigration officer” to mean certain federal employees designated “to perform the functions of an immigration officer specified by [applicable law]”); 8 C.F.R. § 1.2 (defining “immigration officer” to mean the enumerated classes of “employees of the Department of Homeland Security”); *see also* 8 U.S.C. § 1357 (setting forth powers of immigration officers); 8 C.F.R. § 287.5 (same).

¹³ *Huanga v. Decker*, 599 F. Supp. 3d 131, 145 (S.D.N.Y. 2022) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)).

¹⁴ *Arizona*, 567 U.S. at 408; *Santos v. Frederick Cnty. Bd. of Comm’rs*, 725 F.3d 451, 463 (2013).

“permits ICE to deputize local law enforcement officers to perform immigration enforcement activities pursuant to a written agreement[.]”¹⁵ In the absence of such an agreement or other specific authorization, nonfederal enforcement power is more limited, and state and local officers lack the full functionality of an immigration officer.¹⁶

Although a Section 287(g)(1) agreement may be the “principal example” of permissible cooperation identified by the U.S. Supreme Court, “consultation between federal and state officials is an important feature of the immigration system” even in the absence of a formal agreement.¹⁷ The INA therefore otherwise permits state and local officers without “immigration officer” status to “cooperate with [federal agencies] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.”¹⁸ The Supreme Court has noted that “[t]here may be some ambiguity as to what constitutes cooperation under the federal law[.]”¹⁹ but it also has highlighted that DHS recognizes “allow[ing] federal immigration officials to gain access to detainees held in state facilities” as an example of permissible cooperation.²⁰

DHS regulations correspondingly authorize ICE officers to issue a detainer to state and local law enforcement agencies when the agency is holding an alien who is subject to removal proceedings.²¹ The detainer advises the receiving law enforcement agency that DHS “seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien[.]”²² and it “request[s] that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.”²³ Accordingly, state and local officials “can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody[.]”²⁴ and ICE detainers facilitate “the orderly administration of federal immigration laws” through “cooperation between local and federal authorities.”²⁵

¹⁵ *United States v. Alas*, 63 F.4th 269, 274 (4th Cir. 2023) (quoting *United States v. Sosa-Carabantes*, 561 F.3d 256, 257 (4th Cir. 2009)), *cert. denied*, 144 S. Ct. 574 (2024). The Fourth Circuit recently explained that, under § 287(g)(1), upon specified conditions being met, “certain qualified state officers and employees specified by the agreement may enforce federal immigration laws.” *Id.* (citing 8 U.S.C. § 1357(g)(1) & (2)). The prescribed agreement form is available at https://www.ice.gov/doclib/detention-reform/pdf/287g_moa.pdf.

¹⁶ *See Arizona*, 567 U.S. at 408; *Santos*, 725 F.3d at 463.

¹⁷ *Arizona*, 567 U.S. at 408, 411-12.

¹⁸ 8 U.S.C. § 1357(g)(10)(B).

¹⁹ *Arizona*, 567 U.S. at 410.

²⁰ *Id.* (citing DEP’T OF HOMELAND SECURITY, Guidance on State and Local Governments’ Assistance in Immigration Enforcement and Related Matters 13–14 (2011)). The *Arizona* Court noted other, specific examples of permissible cooperation as defined under the INA: authorization by the Secretary of DHS in response to an actual or imminent “mass influx of aliens arriving off the coast of the United States”; arrest “in [the] specific circumstance” of a noncitizen who has been convicted of a felony, deported, and returned, only “after consultation with the Federal Government”; and authorization “to arrest for [the federal crime of] bringing in and harboring certain aliens[.]” *Id.* at 408-09 (citing 8 U.S.C. §§ 1103(a)(10), 1252(c), 1324(c)).

²¹ 8 C.F.R. § 287.7(a) (authorizing immigration officers to issue, at any time, “a Form I–247, Immigration Detainer–Notice of Action, to any other Federal, State, or local law enforcement agency”).

²² *Id.*

²³ *Id.*

²⁴ *Arizona*, 567 U.S. at 410 (citing 8 U.S.C. § 1357(d)).

²⁵ *Chiles v. Thornburgh*, 865 F.2d 1197, 1211 (11th Cir. 1989), *cited in* *Gonzalez v. Morris*, No. 20-20359-CV-KING, 2020 WL 13548616, at *2 (S.D. Fla. Feb. 24, 2020).

In Virginia, “[a] sheriff may exercise all powers that are conferred upon him expressly in the law, as well as all powers that are necessarily implied from expressly-conferred powers, and he is free to discharge the duties of his office in the manner he deems appropriate.”²⁶ Per statute, “[t]he sheriff of each county or city shall be the keeper of the jail thereof[,]”²⁷ and he is “charged with the custody, feeding and care of all prisoners confined [therein].”²⁸

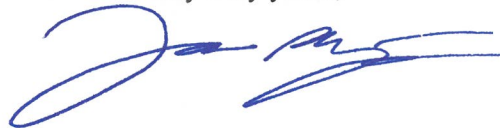
Significant to your inquiry is Virginia Code § 53.1-220.2, which confers specific authority to sheriffs who are “in charge of the facility in which an alien is incarcerated” that is in addition to the general powers granted sheriffs over jails and their inmates. The General Assembly expressly provides in § 53.1-220.2 that the sheriff “may, upon receipt of a detainer from U.S. Immigration and Customs Enforcement, transfer custody of the alien to [ICE] no more than five days prior to the date that he would otherwise be released from custody.”²⁹ Because the ability to transfer custody necessarily involves the authority to communicate with ICE regarding the alien’s release date, I must conclude that the sheriff is permitted to honor an ICE detainer by advising ICE officers of the imminent release of an alien from the sheriff’s custody.³⁰

Conclusion

Accordingly, it is my opinion that no law precludes a sheriff from notifying United States Immigration and Customs Enforcement officers, after receipt of an ICE-issued detainer related to an inmate in the sheriff’s custody, of the release of that inmate in order for ICE to attain custody of the inmate prior to or upon release. On the contrary, it is my opinion that a sheriff is expressly authorized to cooperate with federal officials by providing them prerelease notification as requested by the detainer.³¹

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

²⁶ 2019 Op. Va. Att’y Gen. 96, 96-97 (footnotes omitted).

²⁷ VA. CODE ANN. § 53.1-116.2 (2020).

²⁸ VA. CODE ANN. § 15.2-1609 (2018).

²⁹ Section 53.1-220.2 (2018). The statute further provides that, “[u]pon transfer of custody, . . . the alien shall receive credit for the number of days remaining before he would otherwise have been released.”

³⁰ I note that Virginia law recognizes other situations in which sheriffs can play a cooperative role in the enforcement of federal immigration laws. For instance, sheriffs are required to inquire as to the citizenship of those in custody for felony offenses and then inquire of ICE as to the alien’s status so that results can be reported in turn to other state agencies. VA. CODE ANN. § 19.2-83.2 (2022), *accord* § 53.1-218 (2020). *See also* §§ 19.2-81.6 (2022) & 19.2-82(B) (2022) (setting forth the authority, conditions, and procedures for a sheriff to make arrests of illegally present aliens again in the United States after departure subsequent to a felony conviction).

³¹ The discretion to notify ICE of the release is vested in the sheriff. *See* § 53.1-220.2. Local governing bodies are not authorized to restrict that discretion. *See, e.g.*, 2024 Op. Va. Att’y Gen. No. 24-002, p. 3 (June 17, 2024) (“[S]heriffs, as constitutional officers, are not subordinate to the local government, and their duties are subject only to legislative control by state statute.” (citing *Roop v. Whitt*, 289 Va. 274, 280 (2015))); 1978-79 Op. Va. Att’y Gen. 237, 237 (“As a constitutional officer, the sheriff is not subject to the control and jurisdiction of the governing body.”).