KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2017

The Honorable Joan Huffman, Chair
Senate Committee on State Affairs
P.O. Box 12068
Capitol Station
Austin, TX 78711

Re: Legality of Committee Substitute for Senate Bill 4

Dear Chair Huffman:

On February 1 and 2, your committee held a hearing on the committee substitute for Senate Bill 4 (CSSB 4). In short, the bill would require certain government entities to (1) cooperate with federal authorities in their enforcement of immigration laws, and (2) not prevent peace officers from verifying immigration status. If an entity violates that law, it could potentially (1) have a court forfeit the entity's right to receive state grants funds so long as it remains in violation of the law, and (2) expose the entity to civil liability for inmates it releases that were subject to detainer who later commit felonies.

A number of questions and comments in the hearing focused on such things as whether CSSB 4, as drafted, would be constitutional and whether complying with the bill could result in liability for covered entities for complying with invalid detainers. Our review of the law concludes CSSB 4 is constitutional, there are viable methods for covered entities to avoid liability regarding invalid detainers, and the remainder of the legal concerns are unfounded.

I. Likelihood of Evading Authorities and the Illinois Case of *Moreno v. Napolitano*

Some questions and comments expressed doubt as to the constitutionality of detainers from Immigration and Customs Enforcement (ICE) in light of a recent case in district court in Illinois that detainers lack individualized detail on the likelihood of an inmate to evade immigration authorities. *Jimenez Moreno v. Napolitano*, No. 1:11-CV-05452 (N.D. Ill. Sept. 30, 2016). First, this ruling is not effective in Texas. Second, we fully expect this ruling to be reversed on appeal because the Immigration and Nationality Act (INA) provides for mandatory detention based on specified criteria without an individualized assessment of flight risk. 8 U.S.C. § 1226(c). After all, if (1) the State has convicted an alien of a crime, (2) that alien is deportable, and (3) state or local law enforcement then releases the alien into the interior of the

United States, that alien is likely to evade immigration authorities. Ultimately, if the federal government loses this particular case on appeal, ICE can simply include individualized detail of flight risk or obtain a warrant. Or Congress could modify the INA. Regardless, the Illinois case does not jeopardize the validity of the CSSB 4.

II. Probable Cause and *Mercado v. Dallas County*

Other questions centered around a concept from a recent preliminary decision in a case involving Dallas County. There, Dallas County inmates would have been released but for ICE detainers. *Mercado v. Dallas Cty.*, No. 3:15-CV-3481-D (Jan. 17, 2017). The court held that the county could not have probable cause to hold the inmates from detainers because probable cause is a criminal concept that does not extend to the civil offense in deportation and removal proceedings. But that view cannot be squared with the Supreme Court's holding in *Zadvydas v. Davis* that civil detentions are constitutionally permissible under the INA, so long as there is sufficient justification. 533 U.S. 678, 691 (2001) (holding that detainee has a right to file a habeas corpus petition six-months into post-deportation order confinement to assess whether the detainment is constitutional). In short, the justification of probable cause is required of (and not anathema to) detainers. As such, the individualized probable cause ICE has required of detainers since 1985 is sufficient to avoid constitutional problems with justification.

III. Federal Commandeering

Other questioning centered around whether detainers violate anti-commandeering principles under the Tenth Amendment. They do not. Courts have roundly considered both the language of the INA and the Tenth Amendment to require that detainers are requests—not commands. *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014) ("First, no U.S. Court of Appeals has ever described ICE detainers as anything but requests. Second, no provisions of the Immigration and Nationality Act authorize federal officials to command local or state officials to detain suspected aliens subject to removal."). Thus, detainers are requests, which do not violate anti-commandeering principles.

IV. State Separation of Powers

If the federal government cannot commandeer state and local law enforcement, can the state require law enforcement to comply with federal law without violating state separation of powers principles? Yes. First, even home-rule municipalities (which possess the most power of any local government) cannot violate state law. Second, the state constitution contains a separation of powers clause, which is only violated if one branch of government exercises powers properly attached to another. TEX. CONST. art II, sec. 1. In other words, if one branch micromanages another, or unduly interferes with the office, it could violate separation of powers. The provisions

of CSSB 4 do not remotely involve the level of intrusion into the daily operations of another branch that Texas courts have held to be unconstitutional.[1]

V. County Liability to Inmates

Questions also center on whether counties could be liable to inmates for holding them pursuant to a wrongful detainer. *See Morales v. Chadbourne*, 793 F.3d 208, 211 (1st Cir. 2015) (describing wrongful detainer placed on citizen). Counties can avoid liability by using good faith, which will support qualified immunity/good-faith defenses to 42 U.S.C. § 1983 claims. For example, if an inmate subject to a detainer claims to be a citizen, a sheriff could confirm the inmate's status based on valid, government issued identification. If the inmate proves to be a citizen, the sheriff should release the inmate (absent a state ground to hold the inmate further) and inform ICE of the evidence indicating the wrongful nature of the detainer. That good-faith action should be sufficient to invoke the sheriff's applicable legal defenses and avoid liability. And such an act would still comply with CSSB 4. That language requires officials to "presume" ICE detainers have probable cause and are otherwise valid. Presumptions are rebuttable. If a sheriff reviewed the evidence, as the example above demonstrates, he could rebut the presumption that the detainer had probable cause. That evidence and good faith would prevent the Office of the Attorney General from filing an enforcement proceeding under CSSB 4.

VI. Simultaneously Complying with Federal and State Law

Finally, several comments addressed whether El Paso County deputies could simultaneously comply with both CSSB 4 and a federal court judgment. They can. Discussion at the committee hearing on CSSB 4 indicated that El Paso County deputies were boarding busses and checking immigration status. The resulting lawsuit ended in a settlement. The deputies under the agreement could comply with both the agreement and CSSB 4 for two reasons. First, the document was a settlement agreement between the parties, not a judgment ordered by a court. Parties cannot agree between themselves to trump state law. Second, their agreement was that the sheriff's department would write a "policy that prohibits Sheriff's Department Deputies from *enforcing* civil immigration law" (emphasis added). State and local law enforcement cannot *enforce* federal immigration law (absent borrowed federal authority such as a 287g agreement). But they can *cooperate* with federal authorities as those authorities enforce federal immigration law. El Paso County can simultaneously comply with its settlement agreement, the

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[1] Texas courts have rejected separation of powers challenges to such intrusions as: (1) time limits on the Supreme Court to resolve a case, *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 474 (Tex. 2011); (2) a statute granting exclusive jurisdiction over certain custody disputes to another state, *In re Dean*, 393 S.W.3d 741, 748 (Tex. 2012); and (3) limits on a court's power to punish by criminal contempt, *In re Reece*, 341 S.W.3d 360, 366 (Tex. 2011). *See also* Tex. Att'y Gen. Op. JC-0263 (2000) (discussing separation of powers doctrine as preventing county commissioners from "micro-managing" sheriff's use of county resources).

INA, and CSSB 4.

In short, none of the legal concerns this letter addresses indicate that CSSB 4 is legally invalid. Moreover, CSSB 4 would make great strides to keep communities secure by requiring state and local law enforcement to cooperate with federal agencies as they take care to faithfully execute the immigration laws of the United States.

Very truly yours,

Ken Paxton

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c. The Honorable Dan Patrick
The Honorable Charles Perry