

AUSTIN KNUDSEN



STATE OF MONTANA

May 21, 2025

Gallatin County Commission
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(Via email)

Re: Authority of Gallatin County to Enter into Intergovernmental Agreement

Dear Gallatin County Commissioners:

It has come to my attention that County Attorney Cromwell issued a “legal opinion” on April 24, 2025 (the “Cromwell Opinion”), contending that Gallatin County should not enter into an intergovernmental services agreement (the “IGSA”) with U.S. Immigrations and Customs Enforcement (“ICE”) based on purported constitutional, legal liability, operational, taxpayer, and other policy concerns. The Cromwell Opinion is fundamentally flawed and contrary to Montana public policy for multiple reasons, and I feel compelled to respond given the critical public safety issues at stake for Montana.

As an initial matter, the Cromwell Opinion consists primarily of political objections to enforcing our nation’s immigration laws rather than actual legal analysis. The American people, however, spoke loudly and clearly in November 2024. They sent Donald Trump back to the White House to secure our border, remove dangerous criminals and drugs from our streets, and end sanctuary jurisdictions. Montanans were likewise clear that they wanted their state and federal officials to *support* President Trump’s agenda, not undermine it.

At its core, the Cromwell Opinion is an endorsement of the disastrous open border policies of the Biden administration. My office fought back against these destructive policies for four long years, and I refuse to stand by as feckless left-wing prosecutors

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attempt to subvert the will of the people and put dangerous criminals back on the streets.

These horrors aren't hypothetical. Montana communities were devastated as the Biden administration allowed dangerous criminal to reside in our country illegally and the cartels to traffic drugs from the southern border with impunity. The State Crime Lab reports 262 fentanyl-linked deaths in Montana during Joe Biden's four years in office. One hundred percent of the illicit fentanyl seized on the streets of Montana is trafficked across the border.

In one Gallatin County operation conducted in March, three illegal immigrants were arrested on drug-related charges and methamphetamine, cocaine, cash, and four vehicles were seized. I echo Gallatin County Sheriff Springer's words: "This operation illustrates the long-term detrimental effects felt locally of unsecure borders and the need for strong community collaboration and enforcement amongst all of the cultural communities in Gallatin County."¹ And earlier this year, the Eastern Montana High Intensity Drug Trafficking Area seized 4,900 carfentanil pills in Billings, two short hours from Gallatin County. Carfentanil is 100 times more potent than fentanyl, making it even more dangerous and deadly.²

It is critical that the Commission ignore Ms. Cromwell's flawed "opinion" and work in partnership with ICE to detain dangerous criminals here in our country illegally.

I. The Cromwell Opinion Ignores Critical Facts About What the IGSA Actually Entails and Why the IGSA is Critical for Public Safety in Montana

Because the actual facts at issue are highly inconvenient for the predetermined, political conclusions of the Cromwell Opinion, it is not surprising that the opinion does not even analyze the IGSA or provide any context about this and similar agreements. Even a basic recitation of key facts shows that the Cromwell Opinion is wildly off base.

- The IGSA is an agreement with a federal law enforcement agency to provide limited detention bed space (10 beds) to house individuals for short periods (72 hours or less), so that they can be transported by law enforcement for hearings in front of immigration judges in Salt Lake City and Las Vegas, or other lawful removal proceedings.
- Without agreements like the IGSA, it would be extremely difficult for ICE to do its job and lawfully remove aliens from our communities—particularly

¹ <https://nbcmontana.com/news/local/drug-bust-in-bozeman-leads-to-arrests-and-major-narcotics-seizure>

² <https://dojmt.gov/montana-department-of-justice-warns-of-increased-presence-of-carfentanil-in-billings/>

aliens with criminal convictions and arrests whom ICE determines require detention prior to removal. Not removing these individuals means keeping them in our state indefinitely, and this will gravely harm public safety. It also creates terrible incentives for individuals to come to our state illegally knowing that there will never be any meaningful enforcement of the immigration laws even if they commit crimes while they are here.

- ICE (or other federal law enforcement agencies such as the U.S. Marshals) have approximately 90 such agreements for “non-dedicated” detention facilities throughout the country to facilitate the transport of individuals for legitimate federal law enforcement purposes. In fact, there are already two such agreements in other Montana counties.
- Given the large geographic size and dispersed population of Montana, it is important for federal law enforcement to be able to use short-term detention facilities in different parts of the state, so that they do their job of removing aliens—particularly criminal aliens—from the country in compliance with the immigration laws.

II. The Cromwell Opinion Ignores that Montana Public Policy is to Cooperate with ICE Detainers, and the IGSA Is Necessary For ICE to Follow Through with Detainers and Remove Aliens with Criminal Records from Our State

When it comes to removing aliens with criminal convictions from Montana, the *only* option is for state and local law enforcement to cooperate with ICE and other federal law enforcement. The Cromwell Opinion’s references to state sovereignty and the Tenth Amendment ring hollow because the Supreme Court has repeatedly held that immigration enforcement is a uniquely federal function. *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012). Therefore, the alternative to cooperation is not state sovereignty; it is releasing aliens from jail back into our communities, where they can commit additional crimes. That is unacceptable and contrary to the mandate issued by the American people in November 2024.

As this letter explains, state and local law enforcement cooperate, among other ways, 1) through 287(g) agreements with ICE and 2) by complying with the state law mandate to detain aliens in jails for up to 48-hours so that ICE can take custody. However, if ICE lacks the logistics to practically remove aliens following a detainer, the process will break down. ICE will not be able to take custody of individuals, and state and local jails will instead be forced to release aliens from jail back into Montana communities. The IGSA is therefore necessary so that ICE can do its job.

A. The Montana Supreme Court Expressly Stated that State and Local Law Enforcement May Act Pursuant to 287(g) Agreements with ICE to Facilitate Immigration Detainers

The Montana Supreme Court stated in *Ramon v. Short* that a Sheriff has authority to detain an alien if he is doing so pursuant to federal authority conferred in a 287(g) agreement. 2020 MT 69 ¶ 42, 399 Mont. 254, 272-73, 460 P.3d 867, 878, *abrogated in part by* 2021 Mont. Laws ch. 207, § 1 (H.B. 223) (enacting MCA § 27-16-801). Ramon was being detained based on his arrest for a Montana state-law crime and had also been issued a Form I-247A detainer by ICE, which stated that ICE had determined probable cause that Ramon was a removable alien. *Id.* at 261 ¶ 4. The Court considered whether a Montana law enforcement officer has authority to honor such a detention request and expressly concluded that an officer *would* have authority if he was acting pursuant to a Section 287(g) agreement. With respect to federal authorization, the Court stated that Congress established four circumstances “in which state officers may perform the functions of an immigration officer.” *Id.* ¶ 41 (citing *Arizona*, 567 U.S. at 408-09). The first—and relevant here—is “where there is an agreement in place between the federal government and state government (known as a ‘287(g) agreements’), at the expense of the state, allowing ‘authorized’ state officers who have ‘received adequate training’ to ‘perform a function of an immigration officer.’” *Id.* at ¶ 42 (citing 8 U.S.C. § 1357(g)). Given this conclusion, Montana law is clear that if a law enforcement officer is acting pursuant to a 287(g) agreement, the officer has authority to conduct a civil arrest and detain an individual.

Recognizing the importance of 287(g) agreements, both the Montana Department of Justice (“MTDOJ”) and local law enforcement, including in Gallatin County, have entered into such agreements—which only make sense if ICE can follow-through and actually process aliens for removal. The MTDOJ’s agreement includes the power to serve and execute warrants of arrest for immigration violations under INA § 287(a) and 8 C.F.R. § 287.5(e)(3).³ It also includes the power and authority to take and maintain custody of aliens arrested by ICE, or another State or local law enforcement agency on behalf of ICE (8 C.F.R. § 287.5(c)(6)), and the power and authority to take and maintain custody of aliens arrested pursuant to the immigration laws and transport (8 C.F.R. § 287.5(c)(6)) such aliens to ICE-approved detention facilities. The *Ramon* court specifically contemplated that Montana law enforcement officers could enter into this type of agreement. The Court recognized “‘situations where States participate in a joint task force with federal officers, provide operational support in

³ <https://dojmt.gov/wp-content/uploads/2025/02/287g-Task-Force-MOA-MTDOJ-signed-ICE-Signed.pdf>.

executing a warrant, or allow federal officials to gain access to detainees held in state facilities.” *Ramon* at ¶ 48 & n.8 (citing *Arizona*, 567 U.S. at 410).

In addition to these joint task force agreements, ICE also enters into jail enforcement models. Gallatin County has already entered into such a 287(g) agreement with ICE in January 2020.⁴ Under that agreement, the Sheriff’s office has federal authority to serve and execute warrants of arrest for immigration violations under 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.5(e)(3) on designated aliens in the Gallatin County Sheriff’s Office jails and correctional facilities. The Sheriff’s office also has authority to serve warrants of removal on designated aliens in the Gallatin County Sheriff’s Office jails and correctional facilities. Under this 287(g) agreement, an alien may be held in the jails and correctional facilities for up to 48 more hours, but shall be released following that.

One of the many illogical parts of the Cromwell Opinion is when it praises Gallatin County’s 287(g) program without recognizing that the program, and others like it throughout the state, will not be effective if ICE cannot do its job and pick up aliens who have been detained. Agreements under 287(g) only make sense if ICE can follow through. Otherwise, ICE will not be able to take custody following a detainer, and aliens that state and local law enforcement expend scarce resources to apprehend or detain will simply be released back into communities.

B. Even without a 287(g) Agreement, Montana State Law Requires Detention of Individuals in Jails for Up to 48 hours if Requested by an ICE Detainer

The Legislature also acted in 2021 to amend state law and abrogate *Ramon*’s holding that Montana state law itself does not provide a basis for a civil arrest. The Legislature enacted MCA § 27-16-801, entitled “immigration detainer request—arrest authority and duty to arrest.” It provides in subsection (1) that “[a] public safety officer ... who is in possession of an immigration detainer request issued by a federal immigration agency shall arrest a person who is already in custody and the subject of an immigration detainer request.” The law has an exception where the law enforcement officer is “presented with credible evidence that the person is a citizen of the United States or has lawful immigration status in the United States.” MCA § 27-16-801(4). It also provides that a public safety officer may not meet the duty in this section by maintaining custody of a person subject to detainer for longer than 48 hours, excluding weekends and holidays, beyond when the person would otherwise have been released from custody. MCA § 27-16-801(5).

⁴ https://www.ice.gov/doclib/287gMOA/287gWSO_GallatinCoMT_01-22-2020.pdf

Just as with 287(g) agreements, this statute will be ineffective if ICE lacks the logistical ability to take custody following a detainer. In that scenario, aliens that state and local law enforcement expend scarce resources to detain will simply be released back into communities.

III. The Detention Agreement Contemplated by ICE and Gallatin County Is Lawful and Commonplace

Contrary to the Cromwell Opinion, detention of aliens under ICE authority is not constitutionally questionable; instead, it is clearly lawful and necessary for ICE to do its job. ICE’s website explains that “[a]fter ICE arrests and processes individuals for administrative immigration violations or Customs and Border Protection (“CBP”) and other state, local and federal law enforcement partners turn them over to ICE, officials may detain them while their immigration cases are pending or release them under a form of supervision.”⁵

The Ninth Circuit has recognized that federal officials have broad power and discretion to “detain[] [aliens] pending a decision on whether the alien is to be removed from the United States,” and “detention is mandatory for certain categories” of aliens. *United States v. California*, 921 F.3d 865, 873 (9th Cir. 2019) (quoting 8 U.S.C. § 1226(a), (c)); *see also Arizona*, 567 U.S. at 407-08. The court reiterated that “Congress has directed federal officials to detain noncitizens in various circumstances during immigration proceedings.” *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 751 (9th Cir. 2022) (en banc) (citing 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(2)(A), 1226(a), (c)(1), 1231(a)(6)).

To carry out this duty, ICE must rely on state and local facilities and private facilities. “ICE does not build or operate its own detention facilities. Instead, ICE contracts out its detention responsibilities to (1) private contractors, who run facilities owned either by the contractor or the federal government, and (2) local, state, or other federal agencies.” *Geo Grp., Inc.*, 50 F.4th at 751. And federal law expressly contemplates and authorizes this. DHS “shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal,” which might include the “purchase or lease of [an] existing prison, jail, detention center, or other comparable facility suitable for such use.” *California*, 921 F.3d at 873 (quoting 8 U.S.C. § 1231(g)). Federal law also expressly “permit[s] agreements with states and localities ‘for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention.’” *Id.* (quoting 8 U.S.C. § 1103(a)(11)). In sum, in order to carry out her duty to “arrange for appropriate places of detention for aliens detained pending removal or a decision on removal,” 8 U.S.C. § 1231(g)(1), the DHS Secretary

⁵ <https://www.ice.gov/statistics>

has “both ‘responsibility’ and ‘broad discretion’ ... ‘to choose the place of detention for deportable aliens.’” *Geo Grp., Inc.*, 50 F.4th at 751 (citing 8 U.S.C. §§ 1225(b)(1)(B)(ii), (b)(2)(A), 1226(a), (c)(1), 1231(a)(6)).

Finally, there are many examples of states and localities reaching agreement to house aliens being detained. The latest data, as of September 9, 2024, lists “authorized non-dedicated facilit[ies].”⁶ It shows two facilities in Montana. The Cascade County Jail is authorized for over-72-hour detentions and is governed by the NDS 2019 standards.⁷ The Yellowstone County Jail is authorized for under-72-hour detentions and is governed by the ORSA NDS 2019 standards.⁸ Both of these facilities are governed by intergovernmental agreements with the U.S. Marshalls Service. It does not appear that there are any “dedicated” ICE facilities in Montana.⁹

* * *

The Montana Department of Justice stands ready to assist you in keeping our streets safe from drugs and violent criminals. Please don’t hesitate to contact me if you need additional assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Austin Knudsen", with a stylized flourish at the end.

AUSTIN KNUDSEN
MONTANA ATTORNEY GENERAL

⁶ <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ice.gov%2Fdoclib%2FfacilityInspections%2FdedicatedNonDedicatedFacilityList.xlsx&wdOrigin=BROWSELINK>

⁷ See *id.* at Row 14.

⁸ *Id.* at Row 96

⁹ See *id.*, click on tab titled “ICE Dedicated Facilities.”