

DETAINER DISCRETION:

Limiting Local Entanglement with Federal Immigration Authorities

“[T]he most severe consequence of the city’s cooperation with federal immigration officials is the lack of trust in law enforcement that it creates among the public. A spouse, for example, may be reluctant to report abuse if she fears that the consequence will be the deportation of the father of her children.”

—Robert Morgenthau, former District Attorney, New York City¹

THE PROBLEM

Around the country, municipalities are unnecessarily spending precious resources to hold people in local jails because they have been issued immigration detainers. These detainers are requests from Immigration and Customs Enforcement (ICE) to local law enforcement agencies asking that individuals be held by local authorities for 48 hours beyond the time they would otherwise be released. In some cases, detainers will request that local authorities notify ICE of the place and time at which a person of interest to ICE will be released from local custody. Often people subject to detainers have committed no crime (no charges are brought or they are dismissed) or they have committed a very low-level or status-based crime (driving without a license). Nevertheless, the mere fact of an encounter with law enforcement can lead to deportation, because of automatic fingerprint sharing between local and federal criminal justice databases through the Priority Enforcement Program (PEP).²

The impact on communities is immense. Entanglement of local law enforcement with immigration authorities erodes trust between immigrant communities and the police, causing families to be less likely to report crime or cooperate in police investigations. Cities, strapped for revenue, spend millions of dollars holding immigrants for ICE without a legitimate public

safety justification. Because detainers are merely administrative forms, and are not obtained with any judicial oversight, localities that hold a person in custody for ICE on the strength of a detainer request also risk being found liable for violations of the Fourth Amendment of the US Constitution.³

THE SOLUTION

Some municipalities have responded to the negative economic and human rights impact of immigration detainers by enacting innovative detainer discretion policies (also sometimes referred to as sanctuary city policies). These policies direct local law enforcement to refuse to follow detainer requests under certain circumstances. Such policies help to ensure that local criminal justice resources are conserved for their intended purpose, and that immigrant communities are protected from the mass deportation dragnet.

POLICY ISSUES: More than 300 cities and counties along with five states (Illinois, California, Connecticut, Vermont, and Oregon) have laws or policies limiting compliance with detainers to some extent.⁴ Localities have used a wide range of approaches to detainer policy, too various to explain in detail here, but the strength of a policy depends largely on how it addresses a few key issues:

SCOPE: The gold standard for detainer policies is to draw a bright line between the criminal justice process and the civil immigration process and not honor any detainers. Several cities and counties, including **Cook County, IL**, and **Santa Clara County, CA**, have policies of this type. The mechanism for achieving a total ban on detainer compliance in many jurisdictions is to prohibit the expenditure of any state or local resources on the enforcement of immigration law. This prevents compliance with detainers and also prevents other kinds of local cooperation with deportation. Other policies

allow for detainer compliance in a small subset of cases, usually when the affected individual has a past conviction for one of a number of designated criminal offenses. The Connecticut TRUST Act, for example, allows law enforcement to comply with detainer requests for individuals who have felony convictions, appear in the federal terrorism or gang databases, or pose some other risk to public safety. Increasingly, states and localities are moving away from these types of carve-outs, in part because the fact of a prior conviction (or of suspicion of gang or terrorist activity) does not cure the constitutional defects with detainers described above. Jurisdictions that have policies with exclusions of this type still risk being held liable for violations of the Fourth Amendment.

Ideally a detainer discretion policy should apply to all government agencies and offices. Where a policy targets law enforcement exclusively, it is important to ensure that the policy covers both the police department (in some places there may be more than one local agency engaging in policing) and the corrections department — or whatever local entity has jurisdiction over the jails.

4TH AMENDMENT REQUIREMENTS: A number of federal and state court cases have found local jurisdictions financially liable for holding individuals in custody on the basis of ICE detainers. In response, a number of cities and counties, including **New York City** and **Philadelphia**, have enacted policies requiring ICE to obtain a judicial warrant before local law enforcement will comply with any detainer request. Essentially, the warrant requirement in a local detainer policy is just a restatement of the independent federal constitutional requirement that local law enforcement have probable cause to detain someone. Requiring a warrant to support a detainer request does not create any new detention authority for ICE. In the jurisdictions with policies like this, there have only been a handful of instances where ICE has been able to present a local law enforcement agency with a judicial warrant to support a detainer request. A warrant requirement is not the only way to ensure that local law enforcement is acting constitutionally with respect to detainers, but for jurisdictions that are not able or willing to enact a complete ban on detainer compliance, it is one of the simplest mechanisms.

DATA: NYC's detainer policy also includes extensive quarterly public reporting requirements. Some of the reporting categories that localities should consider requiring are: the number of individuals held pursuant to immigration detainers, the types and numbers of convictions those individuals have, and the amount of federal financial assistance received for the purposes of holding immigrants on detainers. Such reporting require-

ments can help fill significant information gaps regarding the impact and costs of ICE holds on local municipalities and immigrant communities. Reporting requirements are especially important in jurisdictions that do not have a set policy against compliance with detainers.

BEYOND DETAINERS: Detainers are only one way that ICE co-opts local law-enforcement resources for deportation. ICE also conducts interviews inside local jails in order to identify people with potential immigration issues, contracts with local jails for bed space, and enters into formal agreements with counties to deputize local police to serve as immigration officers. States and localities interested in limiting their complicity with the federal mass-deportation agenda should identify all mechanisms of collaboration and set their sights beyond detainer discretion: expanded policy language can further limit the full range of ICE activity within the criminal justice system. Language prohibiting the expenditure of any local resources on immigration enforcement, described above in relation to the policies in Cook County and Santa Clara, is one way to accomplish that.

LANDSCAPE AND RESOURCES

The **Immigrant Legal Resource Center** has a wide range of resources relating to immigration detainers and immigration enforcement more generally. The **National Immigration Law Center** regularly publishes legal and policy materials related to immigration enforcement and detainer discretion. The **National Day Laborer Organizing Network** (NDLON) has been active in a number of local and state campaigns related to ICE holds and has a website with useful resources focused on community organizations. The **Center for Popular Democracy (CPD)** supports a number of local and state detainer discretion campaigns and can provide assistance with policy development, bill drafting, and campaign strategy. CPD released a toolkit in 2017 designed to support local policy makers and advocates in the creation of policy to limit cooperation between local governments and ICE. The toolkit includes a model detainer discretion policy.

Co-authored by the National Immigration Law Center

