

EXECUTIVE SUMMARY: The Legal Questions Around Immigration Detainers

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Law Enforcement Immigration Task Force | Path to Public Safety

LAURENCE BENENSON Assistant Director for Policy & Advocacy National Immigration Forum

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So-called sanctuary jurisdictions have caused great controversy. Lost amid the debate is the fact that, whatever their approach toward immigrants, most state and local law enforcement agencies cooperate with the federal government extensively on immigration issues. Yet, federal immigration detainers — requests that local law enforcement detain individuals suspected of being in the U.S. unlawfully — increasingly have become a central, and often misunderstood, area of conflict.

In its recent executive order on interior immigration enforcement, the Trump administration has made clear that so-called sanctuary cities may face the loss of federal grants and could be subject to additional sanctions. Through reinstating the detainer-focused Secure Communities program and creating weekly Declined Detainer Outcome Reports, the administration also has made clear that it expects states and localities will honor immigration detainers.

But these detainers are voluntary and raise significant legal concerns, including constitutional concerns, as recent court and agency actions have clarified. The executive order comes amid a multiyear trend in which more and more jurisdictions have opted against honoring immigration detainers, citing a host of significant legal complications. Given the conflicting directives, state and local law enforcement agencies can easily find themselves stuck in the middle.

Over the past few decades, U.S. Supreme Court decisions have elaborated on an anti-commandeering principle consistent with federalism principles set forth under the U.S. Constitution. This principle prevents the federal government from “commandeering” state

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and local governments to carry out federal regulatory programs. Mandating that state and local law enforcement agencies and officials honor federal immigration detainers would run afoul of this principle and would be unlikely to withstand legal challenges. In addition, courts have interpreted the regulation governing detainers, 8 C.F.R. § 287.7, to refer to voluntary requests, and the Department of Homeland Security (DHS) has modified language in the relevant detainer forms to emphasize the voluntary nature of detainer requests.

At the same time, multiple recent federal court decisions have raised concerns about detainers' legality. Because they rarely are accompanied by a warrant or court order, immigration detainers raise significant Fourth Amendment issues, as they request the seizure and/or detention of a person without probable cause to believe that the person has committed a crime.

In response to these rulings, DHS has modified detainer forms repeatedly to specify that federal immigration authorities must demonstrate a stronger basis for holding an individual than merely the desire to conduct an investigation into that individual's immigration status.

With courts having determined that immigration detainers are not mandatory and are legally dubious, state and local law enforcement agencies can face significant legal liability for honoring them. Localities have incurred significant litigation costs and/or have paid out significant settlements in situations where they detained prisoners pursuant to an ICE detainer that was not accompanied by a warrant or a probable cause determination.

Continued partnerships between state and local law enforcement agencies and federal authorities are essential to protect the public while respecting the civil rights of individuals, but law enforcement agencies should not cut corners. State and local law enforcement can work constructively and cooperatively with the federal government on the basis of mutual trust and respect, including finding workable solutions to the very real problems that surround the legality of immigration detainers.