

Detainer Discretion

Limiting Local Cooperation with Federal Immigration Authorities

THE PROBLEM

Municipalities around the country are unnecessarily spending precious resources to hold individuals in custody in their local jails subject to “immigration detainers.” A detainer, or “ICE hold,” is a request from federal Immigration and Customs Enforcement (ICE) asking local law enforcement agents to detain an individual for 48 hours beyond the point at which the criminal justice system has any other reason or authority to hold the person. Often these individuals have committed no crime (the case is dismissed) or they have committed a very low-level or status-based crime (driving without a license). The criminal justice system – which is itself fraught with abuse and unfairness – thereby becomes a pipeline to deportation for thousands, a process that has been exacerbated by the rollout of the federal Secure Communities program (S-Comm), which enables fingerprint and information sharing between the FBI and ICE.³

The impact on communities is immense. Collaboration between local law enforcement and immigration authorities erodes trust between immigrant communities and the police, meaning families are less likely to report crime or cooperate in police investigations. Cities, strapped for revenue, spend millions of dollars holding immigrants for ICE after the resolution of criminal charges.

THE SOLUTION

Municipalities around the country have responded to the human and economic impact of immigration detainers by enacting innovative “detainer discretion” policies, which direct local law enforcement to refuse to honor detainers under certain circumstances. Although immigration detainers are by their nature “requests” and local officials are not required to honor them, municipal detainer policies help to ensure that local criminal justice resources are conserved for their intended purpose and that communities are protected from the harsh consequences of an unjust and error-ridden immigration system.”⁴

POLICY ISSUES: Cities and counties have used a range of



“[One] 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

approaches in developing their detainer discretion policies. **New York City**; **Washington, DC**; **Cook County, IL**; **San Francisco, CA**; **Berkeley, CA**; and **Santa Clara, CA** have all passed ordinances; **Newark, NJ** and **Taos, NM** have internal police department policies; and **Connecticut** and **California** have both enacted state level legislation. Several key issues arise in the context of developing detainer policies:

COVERAGE: 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. **Newark** and **Berkeley** both have policies of this type. Although bright line policies are not always politically possible, the current trend in detainer discretion legislation – as exemplified by **San Francisco’s** Due Process for All ordinance – is to limit exclusions for past criminal convictions to only the most serious offenses. Increasingly, communities recognize that detention and deportation is an unjust, double punishment when an individual has already served his or her sentence for an offense. One way to expand the scope of coverage for detainer policies when a bright line is not possible is to honor requests only when a conviction is recent. For example, in **Washington, DC**, detainers are honored for convictions for “dangerous crimes” and “crimes of violence” (as defined in the DC Code) within 10 years of the detainer request. In

San Francisco the limit is 7 years, and an individual must also have current pending criminal charges for one of a narrow category of serious crimes.

A final issue with respect to coverage is which agencies or entities within the city are covered. In cities where the municipality has jurisdiction over corrections facilities, policies can and should cover the Department of Corrections.

Following the implementation of Secure Communities, the speed with which federal ICE officials are able to communicate with local authorities and “drop” detainees has increased significantly and it has become important to consider policies that cover local police departments as well.

REIMBURSEMENT: The policies in **Washington, DC, Cook County, IL** and **Santa Clara, CA** condition the honoring of detainees wholly or in part on a written agreement with the federal government to reimburse the county fully for the costs associated with holding individuals on immigration detainees. In effect, such policies result in very few detainees being honored because full reimbursement is unlikely.

YOUTH: The policies in **DC** and **Santa Clara** both refuse to honor detainees for individuals below 18 years of age, and in **New York City** detainees are not honored for individuals adjudicated as youthful offenders.

DATA: The **New York City** ordinance includes extensive reporting requirements related to the number of individuals held pursuant to immigration detainees, the types and numbers of convictions those individuals had, and the amount of federal financial assistance received for the purposes of holding immigrants on detainees, among other things. Such reporting requirements are useful to include to overcome the significant information gaps regarding the impact and costs of ICE holds on local municipalities and immigrant communities.

LIMITS ON LENGTH OF CUSTODY: Under federal law, an individual may not be held pursuant to an immigration detainee for more than 48 hours, not including weekends and



“My first encounter with the police was in 2007. I was driving my car and I was asked to stop because my license plate was expired. My record was clean so I was expecting a warning but after many questions about my personal information I was told that I was under arrest because of my migratory status. I was taken to Fairfax county jail and then to Hampton Roads detention where I was detained for 4 months before being deported to my country.”

– Elizabeth, from Virginia.²

holidays. Local detainer policies can shorten the length of time beyond which an individual may not be held, increasing the likelihood that ICE agents will not arrive in time to collect the individual and he or she may be released. **Washington, DC’s** policy, for example, only allows for individuals to be held for 24 hours.

LANDSCAPE AND RESOURCES

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: <http://altopolimigra.com/detainers/>.

The **Center for Popular Democracy** has been supporting local and state detainer campaigns in partnership with NDLON, SEIU Local 32BJ, and other organizations and can provide assistance on policy development, bill drafting, and campaign strategy.

NOTES

1. Robert Morgenthau, *The Police and Immigration: New York’s Experience*, Wall Street Journal (May 19, 2010).
2. Turning the Tide, “The Real Impact of Police-ICE Collaboration.”
3. http://www.ice.gov/secure_communities/
4. 8 C.F.R. 287.7 (2011) (stating that “[t]he detainer is a request that the [local law enforcement] agency advise the Department [of Homeland Security], prior to release of the alien, in order for the Department to arrange to assume custody”). See also *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905 (2011).

Local Progress is a national municipal policy network of local elected officials and partners who want to create more just and equitable cities. Our purpose is to build a broad network to support and learn from each other, share best practices and policies, and develop strategies for advancing shared goals.

The **Center for Popular Democracy** promotes equity, opportunity, and a dynamic democracy in partnership with innovative community-based organizations, elected officials, local and state networks, and progressive unions across the country. We work with our allies to design, pass, and implement cutting-edge state and local policies that deliver tangible benefits for working families.