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IMMIGRATION DETAINERS A Comprehensive Look

What is an immigration detainer and how does it work? Are detainers only placed on unauthorized immigrants? What happens *after* an immigration detainer has expired? What are the consequences of immigration detainers? In order to better understand immigration detainers' function and impact, the Immigration Policy Center (IPC) provides the following Fact Check to shed much needed light on this often misunderstood immigration enforcement tool.

What is an immigration detainer?

An immigration detainer is a tool used by ICE and other Department of Homeland Security (DHS) officials to identify potentially deportable individuals who are housed in jails or prisons nationwide. **An immigration detainer is an official request from Immigration and Customs Enforcement (ICE) to another law enforcement agency (LEA)—such as a state or local jail—that the LEA notify ICE prior to releasing an individual from local custody so that ICE can arrange to take over custody.**¹

Detainers are requests, not commands. They are not arrest warrants and do not provide probable cause for arrest. The presence of a detainer is not indicative of an individual's immigration status. Detainers do not begin deportation proceedings and do not signify whether a person will or will not be deported. Thus, detainers are different than a Notice to Appear (NTA), which is an official civil/immigration filing that commences a removal proceeding against an individual. The immigration detainer document merely states that an "investigation has been initiated to determine whether this person is subject to removal from the United States."² Pursuant to 8 C.F.R. § 287.7(a), any authorized immigration official (or local police officer designated to act as an immigration official through the 287(g) program) can issue a detainer to any other federal, state or local law enforcement agency.

How does ICE identify noncitizens that may be subject to detainers?

Policies vary widely. Generally, when an arrested individual is booked into jail, the local LEA will collect basic information about the individual including place of birth. Through screening programs conducted in conjunction with the local LEA, ICE may use this information to identify foreign-born arrestees for immigration enforcement purposes. In some instances localities have reported that ICE agents or local law enforcement officers rely upon "foreign-sounding" last names, language, or appearance to determine whether individuals are noncitizens who may be subject to detainers.

The agency identifying potential noncitizens varies, based on the relationship between the local jail and ICE. In jails where ICE agents are present,³ ICE agents may use the booking information to make decisions about whom to interview and whether to issue a detainer. If the jail has a 287(g) agreement with ICE,⁴ deputized local law enforcement officers work with ICE to interview arrestees and issue detainers. In cases where the jail has no formal partnership with ICE, local officials may contact ICE with information about persons they believe to be foreign-born, based on booking information or other criteria.

The way information is collected and shared varies among jurisdictions. Some jails inform ICE about foreign-born arrestees, while other jails may share information about all arrestees with ICE. For example, jails that participate in the Secure Communities program.⁵ send the fingerprints of all arrestees to ICE databases, and in the case of a “hit,” ICE issues a detainer. Some jails only allow immigration interviews to take place after a conviction and before release, while others share information with ICE before arrestees are convicted (the Secure Communities program shares information pre-conviction). Finally, some jails only share information about inmates charged or convicted with felonies while others may include misdemeanors.

Is everyone with an immigration detainer “illegal” or a “criminal?”

Not everyone placed under detainer is a “criminal.” As explained above, detainers may be issued when a person is booked into jail, regardless of whether the person is eventually convicted of a crime—the charges may be dropped, or the person may not be found guilty. Immigrants can be subject to a detainer regardless of whether they are in jail for a serious violent crime, for a misdemeanor, or even a traffic violation.

In some cases the police may arrest victims or witnesses to crimes in situations in which it is unclear who the perpetrator is, such as domestic violence cases in which a victim fights back in self-defense. These witnesses and victims may then find themselves subjected to immigration detainers and at risk of deportation.

Not everyone placed under detainer is “illegal.” Immigration detainers are not limited to unauthorized immigrants. Legal immigrants—including long-term legal permanent residents (LPRs, or green card holders) may also be subject to immigration detainers if ICE determines they may be deportable. Immigration law provides that LPRs and other legal visa holders may be deportable for minor violations and misdemeanors, and non-citizens may even be deported retroactively for past criminal convictions.⁶ In other words, an individual arrested for a current traffic violation may be subject to an immigration detainer and may be deported for a prior crime, even when that act was not a deportable offense at the time committed, and even where sentenced time has been served for that offense. Finally, ICE could erroneously issue a detainer for a U.S. citizen if there is an error in its database or if the individual’s name is similar to someone else who is in the database.

What happens when a detainer is issued?

A detainer does not result in immediate transfer of custody. Once ICE issues a detainer, the individual remains in state/local custody until the LEA relinquishes custody. However, the detainer requires that the local LEA with custody over the individual inform ICE when the inmate will be released.

Local LEAs must release an individual once that agency’s jurisdiction ends: when charges have been disposed of through a finding of guilt or innocence; when charges have been dropped; when bail has been secured; or when a convicted individual has served out their sentence. The detainer is an exception, which allows the LEA to retain custody for an additional 48 hours—excluding weekends and holidays—after local jurisdiction ends.

This limited amount of time is granted so that ICE can assume custody of the individual. Federal law provides that an individual cannot be held on a detainer for longer than 48 hours, excluding weekends and holidays. At the end of the 48 hour period, the detainer expires. It is unlawful for someone to be held in custody after the detainer expires.

What happens if ICE does not take custody after 48 hours?

If ICE does not take custody within 48 hours, the detainer automatically lapses, and the state/local law enforcement agency is required to release the individual. A detainer cannot be used to detain a person beyond 48 hours. However, some law enforcement officers who do not understand the law or choose to disregard it, keep the individual in custody for longer than the permitted 48 hours, even when ICE does not assume custody.

A person who is detained beyond the 48 hour time period should immediately inform the local LEA that it is in violation of the law governing detainers. The detained person should also consider filing a *habeas* petition to challenge the continued detention. A *habeas* petition calls upon a state or federal court custom to intervene when the government has unlawfully deprived the individual of his or her liberty.⁷ Practically speaking, filing a habeas petition may result in ICE lifting the detainer, but it could also result in ICE expediting pick up of the individual.

In addition, in some cases, inmates under detainer held longer than 48 hours have successfully obtained civil damages from the detaining authority. A deported immigrant recently obtained a \$145,000 settlement with the City of New York after being held longer than the lawful 48 hours on two separate occasions.⁸

While remedies to unlawful detention exist, many people being held on detainers are not aware of their options. They may not have access to a lawyer or to the courts. In some cases they may not be aware they are being held on a detainer, or for longer than the time period permitted by law.

How can a detainer impact a person's release on bail?

A detainer often affects a person's ability to be released on bail pending criminal charges. Generally, people who are jailed may be allowed to return to their communities before trial if they post bail or a bond to the court. In other cases, they may be released on their own recognizance, without having to pay any money to the court. However, when ICE issues a detainer, the court sometimes considers the detainer an adverse factor when determining a bail amount or whether to set bail at all. In a recent New Jersey case, the prosecutor moved to increase the defendant's bail amount after ICE issued a detainer.⁹ The prosecutor argued that the detainer increased the risk that defendant would not appear at his criminal trial. The trial court agreed and set a new (higher) bail; the New Jersey Supreme Court upheld the trial court's decision on appeal. Furthermore, some cities do not consider arrestees for personal bonds (where no money need be paid) if they are under detainer.

What are other consequences of immigration detainers?

Reports have found that immigrants placed under detainer have substantially longer jail stays than inmates without detainers. This is true not only because they are held for up to 48 hours after local charges have been disposed of, but because ICE-detainer inmates are unlikely to receive bail while awaiting trial. This means that immigrants held on detainers often stay in jail for the duration of the pre-trial period, while similarly situated U.S. citizens would be released on bond. A study of Travis County, Texas, for example, found that immigrants under detainer have consistently stayed in jail three times longer than other inmates.¹⁰

Longer detention periods mean that more local tax dollars are spent on detaining immigrants. While the federal government reimburses local jails for some of the costs of holding "criminal aliens"—through the Department of Justice's State Criminal Alien Assistance Program (SCAAP) and through local contracts

with DHS—these payments are insufficient to cover all costs. SCAAP only covers a portion of the total costs and only reimburses localities for the certain, narrowly-defined, inmates.¹¹ Furthermore, the federal government has consistently aimed to cut SCAAP funding.

Finally, researchers have documented how individuals subject to a detainer are less likely to participate in drug or alcohol treatment programs, or other rehabilitation services. According to a report by the Association of the Bar of the City of New York,¹² these programs often allow defendants an opportunity to enter treatment instead of incarceration. Successful completion of such programs may result in a reduction or dismissal of the initial criminal charges, or may lead to non-incarceratory sentences such as probation. Such programs have also been successful in reducing recidivism and lowering the costs to the criminal justice system.

The increased use of detainers mean that more people are staying in jail for greater periods of time. This increase in total jail days also could contribute to overcrowding, a problem for many local jails around the country. Over-crowding exacerbates issues such as jail discipline and the availability of medical and mental health services, and it may increase the risk of infectious disease spreading to the general population.

Endnotes

¹ 8 CFR 287.7(a) and 8 CFR 287.7(d).

² An immigration detainer must also be distinguished from an interstate detainer which governs the transfer of incarcerated prisoners from one jurisdiction to another. An interstate detainer is part of criminal law, not immigration law.

³ ICE has three major local collaboration programs: the Criminal Alien Program (CAP) through which local law-enforcement agencies collaborate with Immigration and Customs Enforcement (ICE) to identify deportable non-citizens in county jails; Secure Communities, which is a technologically intensive version of CAP; and the 287(g) program, which cross-designates local police officers to act as immigration agents.

⁴ The 287(g) program is a partnership between DHS and local law enforcement agencies in which local law enforcement officers are deputized to enforce federal immigration laws. In the detention, or jail, model deputized officers are located in jails/correctional facilities to perform immigration enforcement functions after individuals are detained by police. See http://www.ice.gov/pi/news/factsheets/section287_g.htm

⁵ The Secure Communities program is another partnership between DHS and local jails. Upon booking, the fingerprints of everyone detained in a participating jail are checked against immigration databases, and DHS takes enforcement action against immigrants they identify as removable. See www.ice.gov/pi/news/factsheets/secure_communities.htm.

⁶ Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.

⁷ The case law remains unsettled regarding whether a court has jurisdiction to grant a *habeas* petition in such cases.

⁸ (*Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009)).

⁹ *State v. Fajardo-Santos*, A-82-08 (N.J. July 8, 2009)

¹⁰ Guttin, Andrea. *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*. Washington, DC: Immigration Policy Center, February 2010. See:

<http://www.immigrationpolicy.org/sites/default/files/docs/Criminal%20Alien%20Program%20021710.pdf>

¹¹ In order to be eligible for SCAAP funding, the county or state must meet several requirements. The institution must have incarcerated a criminal alien for “at least 4 consecutive days during the reporting period.” A “criminal alien” is defined, for the purposes of SCAAP, as a person in the country illegally, who has been convicted of a felony or two or more misdemeanors. The costs for inmates who do not meet these requirements are not reimbursed. SCAAP reimburses both the pre-trial and post-conviction incarceration costs for inmates that are eligible for payment. Further, SCAAP does not necessarily cover the full salary costs of incarcerating undocumented immigrants. While immigrants who can be corroborated as undocumented in ICE’s database are covered at 100 percent, those whose status is indeterminate are reimbursed at only 80 percent of the cost. For these reasons, SCAAP does not reimburse the full cost of incarceration. See <http://www.ojp.usdoj.gov/BJA/grant/scaap.html>.

¹² New York City Bar. “Immigration Detainers Need Not Bar Access to Jail Diversion Programs.” New York: The Association of the Bar of the City of New York, Committee on Criminal Justice Operations, June 2009.