

# Frequently Asked Questions About Detainer Discretion

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## 1) What is an immigration detainer?

An immigration detainer is a request by Immigration and Customs Enforcement (ICE) that a jail or law enforcement agency detain a person for an additional 48 hours after the time he or she is supposed to be released.<sup>1</sup> A detainer is not a warrant or a judicial order; it only indicates a possible civil immigration violation and allows ICE to pick up any person it believes may be deportable.

## 2) Are immigration detainers mandatory?

Immigration detainers are NOT mandatory. According to the Tenth Amendment and case law, requests such as this are not mandatory in nature.<sup>2</sup> ICE as well as state and local governments in places like Cook County, Santa Clara County, New York City, San Francisco, Santa Fe, and the state of Connecticut have acknowledged that civil immigration detainers are merely requests and that state and local governments have discretion as to whether to comply with them.

## 3) What about that “shall” language in the regulation?

The correct way to interpret 8 C.F.R. § 287.7(d), as federal courts and ICE itself have implicitly acknowledged, is that the “shall” language defines the maximum number of hours that someone with an immigration detainer may be held. The “shall” language does not require local agencies to hold someone in the first place.<sup>3</sup>

## 4) How long are immigration detainers effective for?

48 hours. This excludes holidays and weekends.<sup>4</sup>

## 5) Would an immigration detainer discretion policy save my city money?

In all likelihood, yes. Contact Sonia Lin, Cardozo School of Law Immigration Justice Clinic, at (212) 790-0213 or [slin@yu.edu](mailto:slin@yu.edu) for more information on how to calculate savings.

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<sup>1</sup> See 8 C.F.R. § 287.7.

<sup>2</sup> See, e.g., *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905, 911 (S.D. Ind. 2011) (“A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency ‘advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody.’ . . . The detainer automatically expires at the end of the 48-hour period.”). See also *Printz v. United States*, 521 U.S. 898, 935 (1997) (Under Tenth Amendment, “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”); *New York v. United States*, 505 U.S. 144, 161 (1992) (relying on Tenth Amendment principles to hold that “Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program’”).

<sup>3</sup> See 8 C.F.R. § 287.7; see also Notes from ICE Oct. 2010 Briefing to Congressional Hispanic Caucus, ICE 2010FOIA 2674.020612 (“Local LE [law enforcement] are not mandated to honor a[n] ICE] detainer, and in some jurisdictions they do not.”); DHS/ICE Emailed Q&A, Jan. 26, 2011, ICE 2010FOIA 2674.017695 (“Q: Is an ICE detainer a request or a requirement? Answer: It is a request. There is no penalty if they [local law enforcement agencies] don’t comply.”).

<sup>4</sup> See 8 C.F.R. § 287.7(d).

**6) Won't an immigration detainer discretion policy cause us to lose our SCAAP reimbursement?**

No. SCAAP only reimburses for a very small amount of your expenses, and only for a very limited class of detainees.<sup>5</sup> For a jurisdiction to receive SCAAP money, the detainee has to either have a felony or two misdemeanor convictions. And the money only covers certain costs incurred during the 48-hour period, and even then only reimburses a relatively small proportion of the costs—in FY 2010, the number was just 29.52 percent<sup>6</sup>—because Congress has consistently not appropriated enough money. ICE is in essence asking localities to foot the bill for these additional 48 hours.

**7) Will the federal government cut off our SCAAP reimbursement if we pass an immigration detainer discretion policy?**

Very unlikely. That hasn't happened in any jurisdiction. Nor has the federal government cut off any other federal funding in cities with immigration detainer discretion policies.

**8) Am I exposing my city to liability for even complying with the 48-hour hold request because it is unconstitutional to do so under the Fourth Amendment, or because immigration detainees are not statutorily authorized for non-drug cases?**

Maybe. These legal issues have yet to be finally resolved by the courts. Lawsuits have been filed in Illinois,<sup>7</sup> California, and Connecticut<sup>8</sup> that bring Fourth Amendment claims against jurisdictions for complying with immigration detainer requests, on the theory that immigration detainees are unlawful, unsupported by probable cause or sworn evidence, and provide no legal authority for continued detention. Lawsuits also allege that immigration detainees exceed ICE's statutory authority.<sup>9</sup> In addition, courts have awarded significant damages to individuals who were mistakenly held for longer than 48 hours on immigration detainees. It is the local city or county that had custody over the individual that is responsible for paying damages arising from such litigation, not ICE.

**9) Hasn't ICE adopted a prosecutorial discretion policy, so they won't issue immigration detainees against people without serious crimes?**

We can't rely on ICE's prosecutorial discretion policy<sup>10</sup> to protect our residents. First of all, it is not binding on ICE. They can always elect to bring a deportation case if they want to. Second, it has not been shown to have reduced the number of deportation cases.<sup>11</sup> Third, it is not easy to convince ICE to exercise prosecutorial discretion. Prosecutorial discretion is definitely a positive development but it's not a solution.

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<sup>5</sup> See FY 2011 SCAAP GUIDELINES, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE 2-3 (2012), available at [https://www.bja.gov/Funding/11SCAAP\\_Guidelines.pdf](https://www.bja.gov/Funding/11SCAAP_Guidelines.pdf); see also FY 2011 SCAAP Awards (2012), available at <https://www.bja.gov/Funding/11SCAAPAwards.pdf>.

<sup>6</sup> See FY 2011 SCAAP GUIDELINES, *supra* note 5 at 5.

<sup>7</sup> See *Jimenez Moreno v. Napolitano*, No. 11- 05452 (N.D. Ill. filed Aug. 11, 2011).

<sup>8</sup> See *Brizuela v. Feliciano*, No. 3:12-cv-00226-JBA (D. Conn. filed Apr. 13, 2012).

<sup>9</sup> *But see Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, 644 F. Supp. 2d 1177, 1198 (N.D. Cal. 2009) (rejecting statutory authorization claim).

<sup>10</sup> See John Morton, ICE Director, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

<sup>11</sup> TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE AT SYRACUSE UNIVERSITY, HISTORIC DROP IN DEPORTATION ORDERS CONTINUES AS IMMIGRATION COURT BACKLOG INCREASES (Apr. 24, 2012), available at <http://trac.syr.edu/immigration/reports/279> (reporting that less than 4% of recent closed cases are attributable to the prosecutorial discretion policy).

**10) What happens to people if we decide not to comply with immigration detainers placed on them?**

Those people will be treated like any other person in local custody. If they post bail or are otherwise eligible for release from criminal custody, they will be released.

**11) Can't ICE just go pick those people up though? ICE has already issued a detainer against them so they are in the system.**

Correct. If ICE wants to apprehend someone, they can do so with their *own* personnel and resources.

**12) How do I respond to accusations that we are letting criminals back out on the street?**

A detainer discretion policy doesn't change anything about how your jurisdiction punishes crime. When someone is due to be released from your custody, that is because a court or local law enforcement official has determined that he or she should be allowed to go free at that time. If, after receiving due process of law, a person is determined to be dangerous, he or she will still be incarcerated and punished just the same as ever. But people will not be subjected to additional incarceration and punishment based solely on a civil immigration detainer that is issued by ICE with no standard of proof.

**13) How does not responding to immigration detainers benefit us?**

Declining to use local government resources to funnel local residents into a broken immigration detention and deportation system will result in restored trust between local law enforcement and the immigrant community. That trust is what makes community policing possible and effective. A immigration detainer discretion policy also keeps families intact and reduces local and state spending.

**14) Won't this law be largely useless because Secure Communities is going to begin operation nationwide in 2013?**

The federal Secure Communities program automatically forwards to ICE all fingerprints that local law enforcement agencies send to the FBI, but it does not stop states and localities from exercising discretion not to hand over local residents to ICE. If SCOMM is activated in your jurisdiction, immigration detainer discretion becomes even *more* important in the effort to ensure that your residents receive due process and are treated fairly.