



AILA's Take on Civil Immigration Detainers

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As the linchpin of federal/state enforcement partnerships like Secure Communities, civil immigration detainers have become a pervasive removal tool for the federal government. In just five years the number of detainers issued has [skyrocketed](#), from about 65,000 in FY2007 to over 250,000 in FY2012. The liberty interest at stake with the use of detainers—prolonged detention without a warrant or a prompt hearing—is substantial.

What is a civil immigration detainer?

The civil immigration detainer (I-247) asks state or local police to continue to hold an individual in jail for 48 hours (exclusive of weekends and holidays) beyond the time when they would otherwise be released, in order to facilitate transfer to immigration custody. In many cases, due to confusion and lack of oversight, police hold individuals longer (sometimes months longer). Detainers can be placed by ICE, Customs and Border Protection (CBP), or even by state and local police granted immigration enforcement authority under 287(g) agreements.

Who are the subjects of detainers?

Police encounters of all kinds can result in a detainer being issued, even if the person is never actually charged with or convicted of a crime. Individuals who pose no public safety threat are frequently subject to detainers despite substantial equities, as are individuals (including [juveniles](#)) who are particularly vulnerable and merit special consideration, raising concerns that discretion is not being implemented at the detainer stage.

Detainers have no clear standard of proof. ICE does not even have to state why they believe someone is actually removable at the time of issuance. Consequently, ICE often mistakenly placed detainers on people who are not actually deportable – including U.S. citizens, which has prompted costly litigation as well as concerns as to whether ICE is following its own [policy](#) on investigating claims to U.S. citizenship.

What happens after a detainer is placed?

Most detainees never know that a detainer has been placed on them, because police are not required to provide a copy or other notice. Detainees are often denied bond or access to rehabilitation and diversion programs because of a detainer, requiring these detainees to remain in jail much longer than others similarly situated. In addition, many detainer subjects are held months beyond the 48-hour window (one [lawsuit](#) was brought in New Orleans by two men who had been held three- and six-months beyond the 48-hour window).

There is no clear process for challenging a detainer. Individuals face substantial hurdles to try to get improvidently placed detainers lifted (even if they are U.S. citizens), and often, ICE will not agree to do so.

How do detainers affect communities?

Detainers significantly blur the line between local police and immigration enforcement. This undermines the trust that individuals place in the police, making everyone more afraid to report crimes and the whole community less safe. A [study](#) by the University of Illinois at Chicago found that, in jurisdictions where police engage in immigration enforcement, 44% of Latinos said they would be less likely to call the police if they became a crime victim. As Dayton, Ohio Police Chief Richard Biehl put it, “If we have any group of citizens who are afraid to talk to us or don’t trust us, that’s going to compromise our ability to produce public safety.”

Do police have to honor detainers?

No. ICE [policy](#) is now clear on this, though there was much confusion in the past. Moreover, the U.S. Court of Appeals for the Third Circuit as well as a federal judge in Oregon recently [held](#) that detainers are voluntary requests, not mandates.

Do detainers raise constitutional concerns?

Yes. Given that immigration detainers result in criminal incarceration without a warrant or probable cause and with no judicial review and often no notice, current detainer practices run headlong into the Fourth and Fifth Amendments. ICE's use of detainers also likely exceeds its own statutory authority under the Immigration and Nationality Act, because ICE often issues detainers when it does not have even arrest authority.

Can localities be sued for holding someone solely on a detainer?

Yes. The Third Circuit Court of Appeals held that Lehigh County, Pennsylvania could be [sued](#) for holding someone on an ICE detainer because detainers were voluntary. And in April 2014, a federal judge in Oregon held Clackamas County [liable](#) for violating the Fourth Amendment by holding an individual on a detainer without probable cause. Another federal court held that the Rhode Island Department of Corrections could be [sued](#) for violating a U.S. citizen's Fourth and Fifth Amendment rights by holding her on a detainer.

Key recommendations:

- 1. DHS should clarify that detainers request only notification, not detention.** Detainers are not a valid basis for police to hold someone in jail. "Detaining individuals solely to verify their immigration status would raise constitutional concerns," the U.S. Supreme Court said in striking down much of Arizona's controversial "show me your papers" S.B. 1070. *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012). In fact, the Court's one mention of detainers in this opinion construed them as mere requests for *information* from localities. *Id.* at 2507. As recently as 1983, the immigration detainer form itself requested only *notification* from police before someone was released from custody, not any local detention. Given the seriousness of the liberty interest at stake, DHS should immediately amend the detainer form to clarify that detainers request notification only, not detention.
- 2. DHS should stop the practice of issuing verbal "holds."** In many localities, AILA members report that police detain individuals for future immigration enforcement without a detainer form even being issued. Rather, police rely on a verbal request made by an ICE or CBP officer over the phone. These practices provide even less transparency, even less guidance to police, and even fewer protections to the individual. DHS should clearly state that verbal "holds" are not permitted and provide sufficient oversight and review to hold officers accountable for any violations.
- 3. Local and national leaders should support efforts to restrict detainers in their districts.** For years, states and localities have spent millions of their own tax dollars complying with these requests to incarcerate people who are not public safety threats. Now, localities may even be held [liable](#) for constitutional violations in complying with detainers. After a federal judge in Oregon found a county had violated the Fourth Amendment by holding the plaintiff solely on the basis of the detainer, more than 30 [Oregon counties](#) reacted by refusing to continue honoring them. Similar actions by sheriffs in [Washington](#) and [Colorado](#) then followed. These decisions come on the heels of restrictive local detainer policies in [Miami](#), [Philadelphia](#) and [Baltimore](#), adding to the tide of jurisdictions across the country – including the states of [California](#) and [Connecticut](#) – that have already adopted policies limiting detainers.