Trumping Home Rule and the Sanctuary Jurisdictions



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What Is a Civil Immigration Detainer?

- A civil detainer is a document issued by the U.S. Department of Homeland Security (through Immigration and Customs Enforcement "ICE") of notice to assume custody of an individual who is allegedly removable under the immigration laws and is in the custody of another law enforcement agency. *See* 8 C.F.R. § 287.7.
- The detainer asks local law enforcement agencies:
  - To inform Federal immigration authorities prior to the release of the allegedly removable individual, and
  - To hold individual for up to 48 hours.
- ICE does not reimburse municipalities for the costs of detainer compliance or indemnify municipalities in the event of legal challenges over their application.

The Civil Detainer Form (Form 1-247D)

- Beginning in April 2017, ICE now uses a new standard form for civil immigration detainers called Form I-247D.
  - This form consolidates four different forms DHS previously used.
- The form includes:
  - A request for notice to DHS about the release of a suspect from custody and for local authorities to detain the subjects for up to 48 hours pending a transfer of custody.
  - The basis for probable cause to believe that an individual is removable from the United States.
- ICE's new policy also provides that immigration detainers should be served with either a warrant for arrest (I-200) or a warrant for removal (I-205) signed by an immigration judge.

DEPARTMENT OF HOMELAND SECURITY (DHS)

IMMIGRATION DETAINER – REQUEST FOR VOLUNTARY ACTION

Subject ID: Event #:	File No: Date:
TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (DHS Office Address)

Name of Subject: _____

Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT *(mark at least one option in subsection A and one option in subsection B, or skip to section 2)*:

A. THE SUBJECT IS AN IMMIGRATION ENFORCEMENT PRIORITY BECAUSE HE/SHE:

- ☐ has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to national security;
- ☐ has been convicted of an offense of which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or is at least 16 years old and intentionally participated in an organized criminal gang to further its illegal activities;
- ☐ has been convicted of an offense classified as a felony, other than a state or local offense for which an essential element was the alien's immigration status;
- ☐ has been convicted of an aggravated felony, as defined under 8 U.S.C. § 1101(a)(43) at the time of conviction;
- ☐ has been convicted of a "significant misdemeanor," as defined under DHS policy; and/or
- ☐ has been convicted of 3 or more misdemeanors, not including minor traffic offenses and state or local offenses for which immigration status was an essential element, provided the offenses arise out of 3 separate incidents.

B. PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON:

- ☐ a final order of removal against the subject;
- ☐ the pendency of ongoing removal proceedings against the subject;
- ☐ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- ☐ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE SUBJECT TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION.

- ☐ Upon completion of the proceeding or investigation for which the subject was transferred to your custody, DHS intends to resume custody of the subject to complete processing.

IT IS THEREFORE REQUESTED THAT YOU:

- Serve a copy of this form on the subject and maintain custody of him/her for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. **This request takes effect only if you serve a copy of this form on the subject, and it does not request or authorize that you hold the subject beyond 48 hours. This request arises from DHS authorities and should not impact decisions about the subject's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.**
- As early as possible prior to the time you otherwise would release the subject, please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-6020.
- Notify this office in the event of the subject's death, hospitalization or transfer to another institution.

☐ If checked: Please cancel the detainer related to this subject previously submitted to you on _____ (date).

_____ (Name and title of Immigration Officer)

_____ (Signature of Immigration Officer)

Notice: If the subject is taken into DHS custody, he or she may be removed from the United States. If the subject may be the victim of a crime or you want the subject to remain in the United States for a law enforcement purpose, please notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing, or faxing a copy to _____.

Local Booking/Inmate #: _____ Est. release date/time: _____ Date of latest criminal charge/conviction: _____

Latest offense charged/convicted: _____

This Form I-247D was served upon the subject on _____, in the following manner:

☐ in person ☐ by inmate mail delivery ☐ other (please specify): _____.

_____ (Name and title of Officer)

_____ (Signature of Officer)

DHS Form I-247D (5/15)

For Information Only

Potential Legal Issues With Civil Detainers

Civil detainer requests raise several potential legal issues, which have resulted in court decisions addressing their potential scope and force.

- 10th Amendment: Do the detainer requests unconstitutionally coerce states and municipalities to administer federal law?
- 4th Amendment: Is detention based only on a *civil* immigration detainer an unreasonable seizure?
- State-law authority: Does state law provide a basis for local authorities to detain an individual suspected of violating federal civil immigration laws? *See Lunn v. Commonwealth* (Mass. 2017).

10th Amendment Issues

- Courts have recognized that *if* civil immigration detainers were mandatory, they would violate the 10th Amendment. *See, e.g.*, *Galarza v. Szalcyzk*, 745 F.3d 634 (3d Cir. 2014).
- As a result, civil detainers are—and must be—requests to local officials to act, rather than commands. The Federal Government (including the current Administration) has taken this position:
  - Form I-247D indicates that it is a "request for voluntary action."
  - The Federal Government has also repeatedly and recently affirmed this position : "According to federal regulations . . . an immigration detainer is a request—not a directive—for other Federal, State, local, or tribal law enforcement agencies to inform DHS of a pending release date for the alien in question, and to hold the alien up to 48 hours to allow ICE to assume custody." *Lunn* Amicus Brief 5.
- The voluntary nature of the requests still leaves open, however, questions about whether federal funds could be tied to cooperation.

4th Amendment Issues

- Civil detainer requests are different from ordinary criminal warrants in ways that have potential legal significance:
  - They are directed to a civil infraction—violation of the immigration laws, supporting removal—rather than suspected criminal activity.
  - Civil detainers must be supported by probable cause, as the current request form makes clear. But the probable cause finding is made by an immigration judge who is part of the Executive Branch, rather than a neutral magistrate as is required for a criminal warrant.

4th Amendment Issues (continued)

- Some courts have held that extended detentions supported *only* by ICE civil detainer requests. *See, e.g.*, *Mercado v. Dallas Cnty., Tex.*, 229 F. Supp. 3d 501 (N.D. Tex. 2017).
  - One effect of the voluntary nature of civil detainers is that litigants make seek to hold state or local officers liable for unlawful detentions. Courts have rejected "the Federal Government made me do it" defenses.
- The Federal Government takes the position that not all of the requirements for criminal detention under the 4th Amendment apply in the immigration context. It asserts that detention is justified as an "administrative arrest."

State-Law Authority To Detain Based on a Civil Detainer Request

- Questions have also been raised about whether there is a basis under *state* law for state and local officials to enforce civil immigration detainers.
- The Massachusetts Supreme Judicial Court recently held that state law does not provide state authorities to make arrests "at the request of Federal immigration authorities, pursuant to a civil immigration detainer, solely because the Federal authorities believe the person is subject to civil removal." *Lunn*, slip op. at 3.
- The Federal Government filed an amicus brief and argued that states have inherent authority to assist in enforcing federal immigration law.

State and Municipal Responses

- Some states have developed “Trust” Acts or even more ambitious “Sanctuary State” Bills that limit cooperation with ICE detainers.
  - Some laws only allow local officials to respond to civil detainer requests as to individuals convicted of certain criminal offenses (*e.g.*, California and Connecticut), while others require court-issued warrants to support immigration detention (Illinois).
  - California legislature recently adopted “Sanctuary State” legislation referred to as the “California Values Act.” The law would bar state and local law enforcement agencies from detaining an individual based on an ICE civil detainer request.
- Many municipalities have also adopted ordinances restricting law enforcement cooperation with ICE detainers.

State and Municipal Responses: The Texas SB 4 Litigation

- In May 2017, Texas enacted a law intended to preempt local sanctuary city laws. The law has several provisions, including one that requires local law enforcement officials to honor civil detainer requests.
- Pre-enforcement facial challenges were brought to the law. In August 2017, a Federal District Court in San Antonio granted a preliminary injunction against enforcement of five central provisions of the statute, including a provision that requires all law enforcement officers to comply with ICE detainer requests (subject to narrow exceptions).
  - The District Court held that the plaintiffs were likely to succeed in their 4th Amendment challenge to this part of the law.
  - The District Court reasoned that probable cause as to removability under the immigration laws is distinct from probable cause that a suspect has comitted criminal offense, and that local law-enforcement officers lack authority to make the former judgment.
    - Moreover, although some detainer requests may also convey information of criminal conduct, SB 4 precludes local law-enforcement officers from making individualized probable cause determinations.

State and Municipal Responses: The Texas SB 4 Litigation (continued)

- The State Defendants have filed an appeal, and they obtained a partial stay pending appeal from the Fifth Circuit, including as to the provision concerning civil detainers.
  - The United States filed an amicus brief in support of the State Defendants position.
- The plaintiffs subsequently filed a cross-appeal. Oral argument is currently scheduled for November 7, 2017.

Federal Actions Concerning Civil Detainers

- The Sanctuary Cities Executive Order (E.O. 13,768) references civil detainer requests, but the effect of this reference has been debated in litigation.
  - The District Court in the San Francisco litigation concluded that language in the E.O. "raises the reasonable concern that a state or local government may be designated a sanctuary jurisdiction, and subject to defunding, if it fails to honor ICE detainer requests."
  - By contrast, the Federal Government has taken the position that the E.O. only authorized the withholding of funds for willful non-compliance with 8 U.S.C. § 1373. And the Government has not indicated that non-compliance with civil detainer requests, standing alone, would violate Section 1373.
  - New conditions imposed on Byrne JAG funding have concerned access to state correctional facilities and sharing information about prisoner release dates, but they have not purported to require compliance with civil detainer requests generally.

Federal Actions Concerning Civil Detainers (continued)

- The E.O. directed DHS to provide weekly reports of “criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.”
  - But DHS has suspended publication of these reports in order to “analyze and refine” its reporting methodologies.

Biography



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Brian Burgess is a partner in the firm's Litigation Department and Appellate Litigation Practice. His work focuses on appellate matters and complex civil litigation in federal courts, and he has experience in a wide range of areas including antitrust law, administrative law (with a particular focus on FDA litigation), constitutional law, intellectual property and financial services litigation. In 2017, Mr. Burgess was named to Benchmark Litigation's "Under 40 Hotlist."

Prior to joining Goodwin, Mr. Burgess served as a law clerk to Associate Justice Sonia Sotomayor of the Supreme Court of the United States. He previously worked in the Department of Justice as a special assistant to the Solicitor General.