

THE ALL-IN-ONE GUIDE TO

DEFEATING ICE HOLD REQUESTS

(a.k.a. Immigration Detainers)

APPENDIX 1

GENERAL AND COUNTY SPECIFIC FACT SHEETS
FOR MEETINGS WITH PUBLIC OFFICIALS



ALL IN ONE GUIDE TO DEFEATING ICE HOLDS

APPENDIX 1 : GENERAL AND COUNTY SPECIFIC FACT SHEETS AND QUESTIONS FOR A FIRST MEETING WITH PUBLIC OFFICIALS.

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IMMIGRATION HOLDS (DETAINERS)
ARE VOLUNTARY FOR LOCAL LAW ENFORCEMENT

LEGAL AUTHORITIES

Federal Regulations

“A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.”

8 C.F.R. § 287.7(a)

Court Rulings

“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.’ Id. § 287.7(a). The detainer automatically expires at the end of the 48-hour period. Id.”

Buquer v. City of Indianapolis, 797 F.Supp.2d 905 (S.D. Ind. 2011)

Statements from ICE

In an email from a Deputy Chief of Staff of ICE to an unidentified inquiry, the Deputy wrote:

“> Is an ICE detainer a request or a requirement?

“Answer: It is a request. There is no penalty if they don't comply.

We sent in a cleared email to the Hill (12/20/2010 to the House Judiciary Committee) the following:

An ICE detainer expresses to a LEA that ICE has an interest in an alien being held. The detainer is a **request** that the LEA advise ICE prior to release of the alien in order for ICE to arrange to assume custody. In situations when gaining immediate physical custody is either impracticable or impossible the LEA shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays to allow ICE to assume custody. ICE derives its detainer authority from several federal statutes and regulations as well as ICE's general authority to detain aliens subject to removal. The pertinent regulatory provision mandates that the LEA maintain custody of the alien, per the terms described above.”

<http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.017695.pdf>

In a letter from David Venturella to Santa Clara County Counsel in 2010, ICE said:

“ICE views an immigration detainer as a request that a law enforcement agency maintain custody of an alien who may otherwise be released for up to 48 hours (excluding Saturdays, Sundays, and holidays). This provides ICE time to assume custody of the alien.”

<http://media.sjbeez.org/files/2011/10/4-ICE-response-to-SCC.pdf>

In notes from a Congressional Briefing for the Congressional Hispanic Caucus on October 28, 2010, ICE stated that local law enforcement are not required to submit to hold requests, and some jurisdictions do not.

“Question: Often times a person is arrested and never convicted or convicted of a minor offense, so can ICE not check prints or not initiate action in a case until a conviction is handed down by a court?

“ICE response: Under SC prints are checked as part of the criminal background check process, so it is automatic, and often times there is a pre-existing conviction upon which action can be taken so early identification is key. In cases where the charge under which the person is being held may be so serious that they would not be released, ICE can wait for the criminal prosecution to be completed before a Detainer is issued in the case. Also, local LE are not mandated to honor a detainer, and in some jurisdictions they do not.”

<http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.020612.pdf>

Conclusions from Legal Analysts

“There is no statutory or regulatory requirement that the County comply with a detainer’s notification or information sharing provisions...[W]e have serious doubts about whether ICE could make detainers mandatory under any circumstances due to the Tenth Amendment to the U.S. Constitution, which forbids the federal government from "commandeering" state or local officials to implement federal policy objectives. . . . Thus, County Counsel believes that there is no obligation for the County to hold individuals for 48 hours or more pursuant to immigration detainers.”

-- Miguel Marquez, Santa Clara County Counsel, *Memo to Santa Clara Board of Supervisors*, Sept. 1, 2010

“This interpretation [that ICE detainers are not mandatory] is consistent with constitutional prohibitions against the federal government enacting laws directing states to participate in the administration of a federally enacted regulatory scheme. It is our opinion, based on this recent clear authority from the federal courts, that ICE detainers may be treated by the Sheriff as requests for cooperation, not as orders with which they are required to comply.”

--Patrick T. Driscoll, Deputy State's Attorney, *Memo to Jesus Garcia, Cook County Commissioner*, Jul. 26, 2011

“The proposal that is before us today deals strictly with the New York City Department of Corrections and its relationship with ICE. It would prohibit Corrections from using any department resources -- defined as “department facility, space, buildings, land, equipment,

personnel or funds” -- to honor a civil immigration detainer by either: A) holding an individual beyond the time they would otherwise be released; or B) notifying federal immigration authorities about an individual’s release.... This proposal, by and large, creates a practice that is consistent with the stated goal. It is also consistent with the goals of my office’s Immigrant Affairs Program. I therefore fully support the passage of the legislation as proposed.”

-- Cyrus R. Vance Jr., New York County District Attorney, Testimony Before the Committee on Immigration, Monday, October 3, 2011

“The term “detainer” may be misleading. In the criminal context, a detainer is issued by a law enforcement agency after pending charges have been approved by a judge. In the immigration context, a detainer [] is not a warrant issued or approved by a judge. It is a non-binding request, issued by an administrative ICE officer.”

--Aarti Shahani, Justice Strategies, New York City Enforcement of Immigration Detainers Preliminary Findings, October 2010

“DOC has the legal authority to determine when it will hold an individual subject to a detainer issued by ICE. There is an ambiguous federal regulation, 8 C.F.R. § 287.7, that contains language which may be read to require DOC to hold individuals on civil immigration detainers. However, even assuming *arguendo* that the regulation purports to preempt DOC’s discretion, the federal regulation is necessarily trumped by the anti-commandeering doctrine. Under that doctrine, the Tenth Amendment dictates that the federal government cannot require DOC to use its local resources in furtherance of a federal objective and DOC has several legitimate local interests in declining to honor ICE detainers including, *inter alia*: avoiding the fiscal burden such detainers impose upon the City, fostering immigrant communities’ cooperation with local police, and promoting the unity of New York families.”

-- Immigration Justice Clinic, Benjamin N. Cardozo School of Law, Memo re NYC’s discretion not hold detainees subject to immigration detainers, April 16, 2010

ICE HOLDS: COSTLY AND DANGEROUS A FACT SHEET FOR POLICY MAKERS



An immigration detainer, or ICE hold, is a request from Immigration and Customs Enforcement (ICE) to local law enforcement officials. It asks local officials to detain an individual in their custody for 48 hours longer than they otherwise would, in order to facilitate transfer to ICE.

ICE holds are the linchpin of a number of programs of police-ICE collaboration, including 287(g), “Secure Communities,” and the Criminal Alien Program.

ICE regularly issues holds for any person booked into jail who ICE considers to be potentially deportable, regardless of the booking charge. This means that, for an undocumented person, being booked for a minor offense, which would normally result in a few hours in jail, may instead lead to months of detention followed by deportation.

ICE holds are not mandatory. As confirmed by federal courts and ICE itself, ICE holds are “requests.”¹ Local officials can—and do—decline to submit to ICE holds.²

Unlike arrest warrants, ICE holds are not required to meet any standard of proof.³ ICE’s current practice is to issue ICE holds without requiring a finding of probable cause that an individual is deportable.

ICE makes mistakes. In a number of high-profile cases, US citizens and lawful residents have been issued ICE holds.⁴ Data suggest that these mistakes may not be isolated occurrences, but instead reflect a pattern of wrongful detentions and arrests.⁵ In many cases, it is the local government that must pay for litigation that arises from unlawful ICE holds.⁶

Local governments bear the high costs of facilitating deportations by submitting to ICE holds. The economic cost of ICE holds goes well beyond the (not-negligible) cost of holding individuals for an extra 48 hours and bearing the liability for potential lawsuits. In practice, individuals with ICE holds rarely post bail, because doing so would result in immediate transfer to ICE. So they serve much more time in jail than others with similar charges. A study in New York found that individuals with ICE holds spent an average of 73 more days in jail than similarly situated individuals without ICE holds.⁷ The city foots the bill.

CONSTITUTIONAL LIMITS ON ICE HOLDS

The federal government could not force localities to submit to ICE holds even if it wanted to. A federal command that local officials use their own money and resources to detain individuals for suspected violations of federal civil immigration laws would constitute unconstitutional “commandeering” of local officers by the federal government.⁸

MORE AND MORE CITIES ARE REFUSING TO SUBMIT TO ICE HOLD REQUESTS

Cook County in Illinois and San Francisco and Santa Clara County in California have all passed ordinances either declining to submit to hold requests or limiting the situations in which they will submit.⁹

ICE HOLDS UNDERMINE COMMUNITY POLICING

When local law enforcement agencies submit to ICE holds, it undermines community policing. Through ICE holds, the local police department becomes the gateway to deportation proceedings. This blurs the line between local police and federal immigration enforcement. The effect is to increase fear and decrease trust between police and immigrant communities – exactly what community policing strategies seek to avoid.

NOTES

- ¹ See, e.g., *Buquer v. City of Indianapolis*, --- F. Supp. 2d. ---, 2011 WL 2532935 (S.D. Ind. 2011) (“A[n immigration] detainer is not a criminal warrant, but rather a voluntary request”); ICE FOIA 2674.020612, Congressional Briefing (“Local LE are not mandated to honor a[n immigration] detainer, and in some jurisdictions they do not.”).
- ² See, e.g., Cook County Code, Ch. 46 Law Enforcement, Sec. 46-37; Santa Clara Board Policy 3.54 Relating to Civil Immigration Detainer Requests.
- ³ See Form I-274 Immigration Detainer – Notice of Action (stating that a detainer may be issued upon the “initiat[ion]” of an “investigation” into an individual’s deportability).
- ⁴ See, e.g., National Immigration Forum, Immigration Detainer Backgrounder at <http://www.immigrationforum.org/images/uploads/2010/DetainersBackgrounder.pdf> (listing detainer-related civil rights lawsuits, including suits brought by wrongfully detained US citizens).
- ⁵ See Aarti Kohli, Peter L. Markowitz and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, Oct. 2011 (finding that approximately 3,600 US citizens have been arrested by ICE through the Secure Communities program).
- ⁶ See National Immigration Forum, Immigration Detainer Backgrounder, *supra*, note 4.
- ⁷ Aarti Shahani, Justice Strategies, *New York City Enforcement of Immigration Detainers* (Oct. 2010), available at <http://www.justicestrategies.org/sites/default/files/publications/JusticeStrategies-DrugDeportations-PrelimFindings.pdf>.
- ⁸ See *Printz v. United States*, 521 U.S. 898, 925-35 (1997); Memorandum from Miguel Marquez, Santa Clara County Counsel, Sept. 1, 2010, available at <http://media.sjbeez.org/files/2011/10/5-PSJC-memo-9-1-10.pdf> (“We have serious doubts about whether ICE could make detainers mandatory under any circumstances due to the Tenth Amendment to the US Constitution, which forbids the federal government from “commandeering” state or local officials to implement federal policy objectives.”).
- ⁹ See Cook County Code, Ch. 46 Law Enforcement, Sec. 46-37; Santa Clara Board Policy 3.54 Relating to Civil Immigration Detainer Requests; see also Brent Begin, *San Francisco County jail won’t hold inmates for ICE*, San Francisco Examiner, May 5, 2011.

Civil Detainer Policy 3.54 Fact Sheet

- 1) The Board's policy has no impact on how the County deals with crime. For every individual booked into County custody on criminal charges, the courts impose and oversee appropriate punishment.
- 2) The criminal justice system has adequate safeguards to protect public safety and those safeguards will remain in place.
- 3) The Board did not vote to release anyone into the community who is not otherwise eligible to be released. Inmates are only released from custody once they have served their time and have earned their freedom. Or, while charges are pending, a judge may determine that it is safe to release an inmate on bail or on their own recognizance until they are ordered to appear in court.
- 4) This policy ensures that everyone in our system is treated equally. United States citizens charged with crimes are released on bail every day. There is no justifiable reason to treat people's criminal cases differently just because they are suspected of having civil immigration issues.
- 5) Immigration enforcement is ICE's job. The County has no authority to enforce civil immigration laws.
- 6) Immigration detainer requests are not mandatory and the County is not legally required to honor them. Requests to impose a civil immigration hold are faxed to the Department of Corrections without any information regarding why the hold is being requested and we receive no information from ICE about whether these individuals are ultimately deported.
- 7) Doing ICE's job erodes the County's trust and credibility in the community. If the County is seen as an extension of ICE, people are less likely to report crime or to serve as witnesses. This applies not only to people with immigration issues but to U.S. citizens who may have undocumented family members or other reasons to fear becoming an ICE target.
- 8) Unlike warrants, civil detainer requests that are issued by ICE have not been approved by a judge. When the County receives a request from ICE, all it typically says is "Investigation has been initiated to determine whether this person is subject to removal from the United States." The County is not given any information about whether the person is here illegally or why ICE wants to investigate them.
- 9) ICE has many other ways of investigating persons of interest. It is not necessary to spend County resources doing ICE's job.
- 10) The Board has made a policy decision to limit County entanglement with civil immigration enforcement because Secure Communities has been shown to cast too broad a net, detainees impose significant costs on the County's already overburdened criminal justice system, and the reasonable alternative is to leave questions of immigration enforcement where they belong: with the Federal government.

The Immigration Detainer Compliance Amendment Act of 2011

Fact Sheet

Prepared by a coalition of concerned community-based and legal organizations¹

What is the Immigration Detainer Compliance Amendment Act of 2011?

The Act is a common-sense measure to save the District dollars, keep families together, uphold basic principles of fairness, and restore public trust between local police and the immigrant community.

- *Leaving immigration enforcement to the federal government:*
The Act limits D.C.'s involvement with federal immigration enforcement by restricting the circumstances when local jails may exercise immigration detainers. An immigration detainer is a request made by federal immigration authorities to a local law enforcement agency to hold an individual after he would otherwise be released for transfer to the immigration detention and deportation system. A detainer is not a warrant or a judicial order; it indicates only a possible civil immigration violation. Immigration and Customs Enforcement itself maintains that detainers are merely requests that are not binding on local jurisdictions.
- *Protecting D.C.'s budget:*
The Act requires the federal government to reimburse the District for all costs associated with an immigration detainer before the District will comply with any detainer requests.
- *Setting priorities:*
The Act ensures that local jails will not facilitate deportation for D.C. residents with only minor or old criminal convictions. It provides that local jails will only hold individuals for transfer to the immigration detention and deportation system if they are currently in custody because of a conviction for one of a specified set of crimes or if they have been convicted of such a crime within recent years.
- *Protecting D.C.'s youth:*
The Act ensures that D.C.'s youth under the age of 21 will not be funneled into the immigration detention and deportation system from local jails.

What will the Act mean for D.C.?

- *Making D.C. safer for citizen and non-citizen residents:*
When D.C. residents see local police and local jails delivering their loved ones into the hands of federal immigration enforcement, they lose trust in the police and the criminal justice system. They become afraid to report crime or to serve as witnesses. This is true not only for non-citizens but for the many D.C. residents who are U.S. citizens but have close family members who are not. ICE has many ways apart from the detainer process to investigate and apprehend persons of interest. It's bad policy for D.C. to do the federal government's job when it means placing our own communities at risk.

¹ For more information or with questions, please contact Sarahi Uribe at the National Day Laborer Organizing Network at Sarahi@ndlon.org and Paromita Shah at the National Immigration Project at Paromita@nationalimmigrationproject.org.

- *Cutting costs:*
The Act will not cost the District any federal funding and, in fact, will save the District an estimated hundreds of thousands of dollars that it now spends on compliance with non-binding detainer requests. The federal government has stated unequivocally that it will not reimburse localities for the steep costs associated with exercising immigration detainers. Our local jails should not be doing the federal government's job on the local taxpayer's dime.
- *Letting the criminal justice system do its job:*
The Act will ensure that citizens and non-citizens alike are treated equally by the District's criminal justice system. The Act does not interfere with the safeguards already put in place by the criminal justice system to protect public safety. The Act does not allow for the release of any individual into the community who would not otherwise be released because he has served his time or been ordered released on bail or recognizance by a criminal court judge.
- *Keeping D.C.'s families together:*
In the first six months of 2011, the federal government deported nearly 50,000 parents of United States citizen children. By handing D.C. residents over to a broken immigration detention and deportation system, D.C. is shattering its own communities and leaving the spouses and children of deported breadwinners reliant on public benefits.

Why is the Act important now?

- *Secure Communities will be implemented in D.C. by 2013.*
When this happens, many individuals who would be released directly from arraignment today will instead be held in local jails under immigration detainers. Localities across the country report the number of detainers in local jails increasing exponentially after the implementation of Secure Communities. For example, in Los Angeles detainers increased seven fold. The District is already paying a steep price for its cooperation with federal immigration enforcement in actual dollars as well as the erosion of public safety. When Secure Communities is implemented this price tag will skyrocket.

What amendments should be made to the current version of the Act?

- The Act's restrictions should extend to the D.C. Metropolitan Police Department. When Secure Communities is implemented, detainer requests will be made not only to local jails but to police precincts as well. It doesn't make sense for local jails to be restricted in their actions but not the police.
- As a matter of budget and principle, D.C. should only comply with detainers for those convicted of serious criminal offenses. As the Act is currently worded, those convicted of some misdemeanor offenses would fall within the Act's scope and be vulnerable to transfer to immigration detention and deportation proceedings. Sections 7(b)(2)(B)(i), (ii), and (iii) should be amended to refer to individuals with a conviction for which a sentence of imprisonment of three years or longer has been imposed, excluding suspended sentences.
- The Act should require the D.C. MPD to remove "place of birth" from its booking form and for DOC to do the same on its detention classification form. This information is not necessary for any legitimate law enforcement function.

Cook County Ordinance Regarding ICE Detainers FACT SHEET

A Cost-Saving Public Safety Measure Proposed by Commissioner Jesus Garcia

What the Ordinance Does

The ordinance, set for a vote on Wednesday September 7th, will require the federal government to reimburse Cook County for placing 48-hour immigration “holds” on undocumented immigrants that it wishes to interview. If passed, Cook County will not honor these holds until there is a plan for reimbursement.

Why this Ordinance is Important

There is strong unity for this ordinance. Sheriff Dart, States Attorney Alvarez, President Preckwinkle, and a coalition of business, labor, legal, faith and community leaders have worked together to find a sensible solution to this problem. Cook County is following the lead of counties across the country, including border states like California and New Mexico.

This ordinance makes us safer. When local police get involved in federal immigration enforcement it erodes the trust between police officers and law-abiding immigrants; fewer people are willing to report crimes and serve as witnesses. Most important, every dollar we spend on federal immigration violators is a dollar we could be spending on going after dangerous criminals.

We must end this unfunded mandate and honor Cook County taxpayers. Currently, Cook County is forced to pay \$15.7 million annually to do the federal government’s job of immigration enforcement. Cook County tax dollars should go to Cook County services, especially at a time when our County is strapped for cash.

This ordinance protects families. Many of the people getting caught up in immigration enforcement are hard-working children and families of U.S. citizens, who pose no danger. The Obama administration has said it wants to prioritize its efforts on dangerous criminals – this bill furthers that effort by requiring the federal government to use its discretion on who it wants to hold.

This bill does not violate any federal law and it does not stop ICE from doing its job. The Federal courts themselves have held that ICE detainers are not criminal warrants, and may even violate the Constitution (*Buquer v. City of Indianapolis*).

How we Protect Public Safety

This ordinance offers 5 safeguards against the release of dangerous criminals:

- 1) Cook County judges and prosecutors can and do hold suspected criminals who pose a danger to society on no bond – meaning they have no way to get free before their trials.
- 2) Once a criminal has been convicted, they go to state prison where ICE can and does put detainers on prisoners and deport them after they serve their time.
- 3) To add an extra level of safety, our measure gives Sheriff Dart discretion to hold someone if he perceives any “legitimate law enforcement purpose.”
- 4) Additionally, ICE still has the authority to arrest anyone they suspect of immigration violations. Even if someone bonds out, ICE still has the right to detain them at their own cost.
- 5) Finally, the ordinance makes it clear that ICE can have Cook County hold someone on a detainer – so long as they pay the \$142.80 per day to use County facilities.

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Backgrounder: Civil Immigration Detainer Policy in King County

Immigration Landscape in King County

- **Approximately 19% of King County residents are foreign-born and 32% of children in King County have at least one parent who is foreign born.** ¹ While there are no specific Census numbers, we are aware that a large number of residents live in households with an undocumented immigrant or someone who is in the process of addressing their immigration status. This creates tremendous fear around enforcement of immigration laws in an environment that has yet to see comprehensive immigration reform.
- **In November 2009, the County committed to fostering an environment of inclusiveness and trust between the County and all of its residents, and to build public safety through this trust.** Ordinance 2009-0393 ensures that the County will not inquire about immigration status as part of its vital task to maintain public health and community safety for all.

Community Safety Requires Trust

- **Stepped-up ICE enforcement activities continue to erode trust and negatively impact community policing efforts.** The King County Sheriff's office has reported that, in spite of the County's adoption of a policy ensuring that the County will not inquire about immigration status, there is still deep mistrust in the community given active local immigration enforcement efforts by ICE.
- **Casting a wide net means long-rooted community members, parents, workers, and young adults get stuck in the net.** The wide net cast by ICE has involved large numbers of non-criminal and low-level offenders, rather than focusing efforts on the most serious and dangerous offenders. Since 2008, ICE has deported over 40,000 immigrants stopped by local law enforcement agencies for common traffic violations.² San Francisco County Sheriff Mike Hennessey likens this policy to the destructive use of gillnetting, "when you throw a big net into the ocean to look for a certain type of fish but you pick up everything with it."³
- **The uniform honoring of detainer requests drives undocumented community members further into the shadows as they cannot be sure that a routine trip to work or the grocery store won't end in deportation.** Legal researchers from UC Berkeley performed an in-depth analysis of a small town in Texas that signed onto an ICE program, which involved local law enforcement screening individuals and referring them to ICE. They found that "discretionary arrests of Hispanics for petty offenses" soared.⁴ The funneling of everyday hardworking members of the immigrant community into detention centers because they have a tail light out or commit other minor offenses has become all too common place due to the uniform honoring of ICE detainers.
- **It is the responsibility of local entities to ensure trust exists with the immigrant community.** When advocates questioned the Assistant Director of Secure Communities David Venturella on what ICE would do to help with issues around community trust he explicitly stated that it is the local community's responsibility: "Local police have the responsibility to alleviate the fears of

immigrants living in their communities through their community policing initiatives and efforts.”⁵

- **When King County uniformly honors ICE detainers, it undermines the spirit and effectiveness of Ordinance 2009-0393.** The effect is to increase fear and decrease trust between police, public officials, and immigrant communities—exactly what Ordinance 2009-0393 was designed to avoid.

Impact on Families

- **There is severe impact on families and communities across the County as a result of harsh immigration enforcement.** In particular, the effect on children and youth is severe when a parent is separated from them because of suspected civil immigration violations. Separation causes negative effects on children, both psychologically and economically.
- **Some children even end up in foster care.** When both parents are separated, the County must intervene and such children often spend extended time in the dependency system, resulting in significant costs for the County. A recent report on the impact of immigration on children conservatively estimates that there are at least 5,100 children currently in foster care whose parents have either been detained or deported.⁶

Detainers—Too Much to Ask⁷

- **Detainers are the dragnet. While less visible than other types of enforcement programs, indiscriminate honoring of ICE detainers is as damaging to community trust and as devastating to immigrant families as any enforcement program.** A detainer request from ICE, if honored by the jails, immediately applies a hold to the named inmate. A hold is requested regardless of the level of crime or if they’ve even been convicted and prevents their release, even if bond is posted or a State court judge orders the inmate released on his or her own recognizance. When the County chooses to honor the ICE hold, it will end up detaining the inmate for up to 48 hours after his or her sentence is finished or criminal proceedings are completed so that ICE may assume custody. Individuals are frequently held unlawfully in jail beyond the time authorized by a detainer. There are pending and settled lawsuits from across the country, including in WA State, around the issue of unlawful detention on immigration detainers.
- **Detainers are requests—counties do not have to honor them.**⁸ Neither State nor Federal law requires the County to honor civil detainer requests. The County has the discretion to honor detainers only in cases that present a public safety risk to the community.
- **Immigration detainers are not like warrants.** Unlike warrants, civil detainer requests that are issued by ICE have not been approved by a judge and are not required to meet any standard of proof. The County is not given any information about whether the person is here illegally or why ICE wants to investigate them.
- **Detainers impact lawful permanent residents and refugees.** ICE issues detainers not only against individuals it claims are undocumented but also against long-time permanent residents (green-card holders) and refugees.

- **Immigration detainers have resulted in the prolonged detainment of U.S. Citizens.** Because detainers can be requested during the booking process it does not even mean that the individual has committed a crime as charges may be dropped or the person may be found not guilty. Additionally, a detainer does not mean that an individual is deportable or does not qualify for relief.

Counties Are Creating Detainer Policy That's Right for Their Community

- **Detainer reform policies have now been implemented in several counties:** Cook County, IL; Santa Clara County, CA; San Francisco County, CA; Taos County, NM; and San Miguel County, NM.⁹
- **It is up to local communities and states to determine the standards and procedures for what detainer policy and information sharing should look like.** According to ICE, "Each state and even the local government set their own law and procedures that govern law enforcement and an overarching federal standard would undermine their authority. . . For instance in the states of Virginia and Texas Class-C misdemeanors are not offenses for which prints are provided to federal authorities."¹⁰
- **It is the responsibility of the criminal justice system to develop public policy that strengthens community safety while ensuring that justice is served equally to all residents.** Santa Clara Supervisor Shirakawa, Chair of the County's Public Safety and Justice Committee, recently stated in reference to the County's revised detainer policy: "The criminal justice system has adequate safeguards to protect public safety, and those safeguards will remain in place. . . What this policy does is ensure that everyone in our system is treated equally. . . The board's decision is good public policy. If the county is seen as an extension of ICE, the county loses the community's trust."¹¹
- **Detainer reform ensures that the message is clear that the county government prioritizes community safety** of the entire community and values keeping children and their parents together. Only honoring detainers for those convicted of serious felonies, means the lines of communication are kept open with the immigrant community (and their native born spouses, children, and friends) and everyone can report witnessing crimes, emergencies, or domestic violence incidents without fear of reprisal or family separation.

¹ American Community Survey 2005-2009 pooled data & American Community Survey 2010.

² ERO Removals by Criminal Charge Category for FY 2001-2011 YTD. Note: Number cited is "other traffic offences" FY 2008-2011 YTD.

³ February 2011. American Civil Liberties Union Foundation of Northern California. [Costs and Consequences: The High Price of Policing Immigrant Communities](#).

⁴ September 2009. Gardner, T. & Kohli, A. The Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity. [The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program](#).

⁵ October 29, 2010. Venturella, David. *Memorandum re: CHC Briefing Notes, 10/29/10*. U.S. Immigration Customs Enforcement Secure Communities.

⁶November 2011. Applied Research Center. [*Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System.*](#)

⁷For resources on detainees see:

2010. National Immigration Forum. [*Backgrounder: Quick Information on Detainers*](#)

2010. Immigration Policy Center. [*Detainers: A Comprehensive Look*](#)

2010. National Immigration Law Center. [*Immigration Detainers: A Fact Sheet for Policy Makers*](#)

⁸January 26, 2011. Department of Homeland Security. *Memorandum re: Detainee Deaths, Domestic Violence, Detainer Policy, 1/26/11.* Department of Homeland Security, U.S. Immigration Customs Enforcement.

⁹October 31, 2011. Foley, Elise. *The Huffington Post.* "[DHS Documents: Local Police Not Required to Hold Undocumented Immigrants for U.S. Government.](#)"

¹⁰October 29, 2010. Venturella, David. *Memorandum re: CHC Briefing Notes, 10/29/10.* Department of Homeland Security, U.S. Immigration Customs Enforcement, Secure Communities.

¹¹November 4, 2011. Shirakawa, George. *Silicon Valley Mercury News.* Op-Ed: "[Santa Clara County's Decision on Immigrant Detainers is Morally Right and Good Public Policy.](#)"

QUESTIONS FOR LAW ENFORCEMENT ON ICE HOLDS

These are a few general questions to ask decision makers to assess the level of involvement your police or jail has with ICE holds or detainers. These questions can apply to the Department of Corrections, the Police Department, and the Sheriff. These questions can be raised when meeting with law enforcement as well as local elected who may have oversight of the jail or law enforcement or can find ways to request this information on your behalf.

QUESTIONS

1. Do you have any written agreements with the Department of Homeland Security, Immigration and Customs Enforcement, Customs and Border Protection, or U.S. Marshal Services regarding collaboration on immigration enforcement? This might involve sharing information or access to databases, contracts to house or transport detainees, or joint task forces.
2. Do you give ICE access to booking or other case information, office space, or allow interviews with inmates, or otherwise interact with inmates while in County custody?
3. What is the average length of stay for inmates in this facility? At what point in the criminal justice process are inmates brought into or out of this facility? Who is in charge of admitting or releasing inmates?
4. What is your current policy on responding to ICE holds (also known as ICE detainers)? Do you comply with every ICE hold? Or does you exercise discretion to not comply with ICE holds in certain circumstances? How long do you hold someone subject to an ICE hold after they would otherwise be released?
5. How much does it cost [the County] to submit to ICE holds? Does [the County] receive reimbursement for these costs? What are the primary cost drivers? What are the sources for reimbursement?
6. Do you allow people with ICE holds to post bail? Do you detain them after posting bail?
7. How many ICE holds were issued on detainees in this facility in 2011? How do you keep records on ICE holds?
 - How many immigration detainees are turned over to ICE on a weekly or monthly basis?
 - How many more days, on average, does a person with an ICE hold spend in [county] custody than a person without an ICE hold? How do ICE holds affect bail prices, and what impact does this have on the average time in [county] custody?
 - What is the cost of holding a person for one day in county custody?

TO: Members of the District of Columbia Council
FROM: Concerned Community Groups
DATE: October 11, 2011
RE: Fiscal implications of legislation limiting local cooperation with ICE

The Council is considering taking up legislation that would limit harsh federal immigration enforcement initiatives in the District. These FAQs will address the fiscal implications of such legislation. The bottom line is as follows: First, the proposed legislation will not threaten any federal funding currently received by the District. Second, the legislation will remedy the flawed policy currently in place of cooperation between local law enforcement agencies and ICE, a policy that is likely costing the city more than \$1,000,000 annually and will only become more costly when Secure Communities becomes active in the District.

This memo will answer the following questions:

- 1) Will the proposed legislation threaten any federal funding currently received by the District of Columbia?
- 2) What is SCAAP funding?
- 3) Will the proposed legislation preclude the District from receiving SCAAP funding?
- 4) Will the District be missing out on funds it would have received as a full participant in Secure Communities?
- 5) Does D.C.'s current policy of cooperation between local law enforcement agencies and federal immigration enforcement place a fiscal burden on the District?
- 6) Aren't many of these fiscal concerns addressed by D.C. DOC's letter to the City Council regarding Intergovernmental Agreement 160-00-0016?
- 7) Does cooperation between local law enforcement agencies and ICE entail costs beyond just the DOC budget?
- 8) Without a change in policy, how will implementation of Secure Communities impact the District fiscally?

With questions regarding any of these issues, or for a copy of the draft legislation or other related materials, please contact Paromita Shah at paromita@nationalimmigrationproject.org, Sarahi Uribe at sarahi@ndlon.org, or Mackenzie Baris at mbaris@dclabor.org.

1) Q: Will the proposed legislation threaten any federal funding currently received by the District of Columbia?

A: No. As a rule, D.C. Department of Corrections (DOC) – and not the federal government – pays the costs associated with holding individuals in DOC custody in order to facilitate transfer to U.S. Immigration and Customs Enforcement (ICE) custody. Recently, in response to a request by the County Counsel of Santa Clara County, California on this very issue, ICE’s Assistant Director for Secure Communities explicitly stated that, “ICE does not reimburse localities for detaining any individual until ICE has assumed actual custody of the individual.”¹

2) Q: What is SCAAP funding?

A: The federal State Criminal Alien Assistance Program (SCAAP) is a federal reimbursement program for correctional officer salary costs. SCAAP funding is available to reimburse states and localities for a limited amount of costs arising from the incarceration of certain categories of undocumented individuals in their jails. D.C. received slightly more than \$426,000 in SCAAP funding in fiscal year 2010.²

3) Q: Will the proposed legislation preclude the District from receiving SCAAP funding?

A: No, it will not. SCAAP funding is in no way tied to the policies at issue in the proposed legislation and receipt of funding is not contingent on cooperation with federal immigration enforcement programs.³ Thus, the proposed legislation will not affect the District’s eligibility to receive SCAAP funding.

- It is also worth noting that SCAAP funding covers only a small fraction of the costs that fall within the program’s purview. First, reimbursement is only available for costs associated with a narrow category of inmates – undocumented immigrants with at least one felony or two misdemeanor convictions incarcerated for at least four consecutive days.⁴ Second, even within that category, the only costs eligible for reimbursement are correctional officer salary costs, calculated using a low per diem formula. In 2010, for example, the reimbursement rate was only \$30.62 per day per inmate.⁵ This is less than one quarter of the actual daily cost of detention in D.C. DOC, which is \$127.78 per day.⁶

¹ National Immigration Forum, “Immigrants Behind Bars: How, Why and How Much?” Mar. 2011.

² D.C. Department of Corrections Performance Evaluation, Mar. 2, 2011, p. 38.

³ Bureau of Justice Assistance, State Criminal Alien Assistance Program 2011 Guidelines, pp. 1-3.

⁴ *Id.* at pp. 2-3.

⁵ *Id.* at p. 5.

⁶ This figure was calculated on the basis of public testimony by Thomas P. Hoey, Interim Director of DOC, at the Sept. 23, 2011 Public Hearing on D.C. DOC Population Management at District Detention Facilities before the D.C. City Council Committee on Public Safety and the Judiciary. Interim Director Hoey testified that the City saves \$4.6 million dollars for every 100 beds reduced annually, which divides out to \$127.78 per inmate per day.

4) Q: Will the District be missing out on funds it would have received as a full participant in Secure Communities?

A: No. There is absolutely no federal funding tied to Secure Communities for participating localities.

5) Q: Does D.C.'s current policy of cooperation between local law enforcement agencies and federal immigration enforcement place a fiscal burden on the District?

A: Yes. The costs associated with the current policy of cooperation between the city's law enforcement agencies and federal immigration enforcements are wide ranging. Because DOC and MPD have not been forthcoming with relevant data, it is difficult to estimate the exact costs of DOC's current cooperation with ICE. However, based on what we do know and data emerging from other localities across the country, we estimate the price tag runs more than \$1,000,000 annually.

- Costs associated with holding inmates under ICE detainers: Regulations provide that local law enforcement agencies may only hold an individual on an ICE detainer for 48 hours after he would otherwise be released.⁷ The threshold costs of exercising ICE detainers in local jails, therefore, are those associated with holding inmates for an added 48 hours while waiting for ICE action. These costs, however, represent only the tip of the iceberg for two reasons. First, we believe, and local public defenders confirm, that D.C. DOC often holds individuals on detainers long beyond the 48 hour period allowed by law. Neither DOC nor MPD have provided meaningful responses to informational requests regarding compliance with the 48 hour rule.⁸ Second, statistics consistently show that individuals with ICE detainers remain in pre-trial custody longer than those without. In New York City, for example, a recent study found that non-citizens with an ICE detainer spent an average of 73 days longer in DOC custody than those without a detainer.⁹ Similarly, in Travis County, TX, the average length of stay for non-citizen defendants with ICE detainers is more than three times longer than the general population.¹⁰ Inmates with ICE detainers remain in pre-trial detention longer than those without because the detainer precludes them from release on bail or from participating in treatment programs that offer an alternative to incarceration.

⁷ 8 C.F.R. § 287.7.

⁸ In oral testimony before the D.C. City Council on Sept. 23, 2011, DOC Interim Director Hoey was unable to answer questions by Councilmember Phil Mendelson regarding how many inmates were regularly held in DOC custody in excess of the 48 hours permitted. As discussed in response to question 6 below, a letter sent by Interim Director Hoey to Councilmember Mendelson in August 2011 only raised further questions by citing to an Intergovernmental Agreement that in no way addresses the frequency with which the 48 hour rule is violated in DOC facilities. Furthermore, this coalition has still not received a response to written questions submitted to MPD Chief Cathy Lanier in January 2010 inquiring into what policies, if any, are in place to prevent violations of the 48 hour rule.

⁹ Aarti Shahani, "New York City Enforcement of Immigration Detainers, Preliminary Findings," Justice Strategies, October 2010.

¹⁰ Andrea Guttin, "The Criminal Alien Program: Immigration Enforcement in Travis County, Texas," Immigration Policy Center, Feb. 2010, p. 12.

- These direct costs may currently run the District more than \$1,700,000 annually: In fiscal year 2010, DOC reportedly held 185 individuals under an ICE detainer.¹¹ Holding each of these individuals for an additional 48 hours beyond their release date, as allowed by regulation, would cost the city a baseline of approximately \$47,000 per year.¹² As discussed above, however, this amount is almost certainly under-inclusive. If we take the statistic recently reported out of New York City that individuals with detainers are held in DOC custody for an average of 73 days longer than those without, and apply that average to D.C., we can estimate an annual cost of more than \$1,700,000.
- Additionally, D.C. DOC is financially liable for ICE’s violations of the 48 hour rule: If ICE does not pick up an inmate within 48 hours of the time he would otherwise have been released, D.C. DOC bears liability for every subsequent hour that he remains in DOC custody. This liability is not merely speculative. New York City was recently held responsible to the tune of \$145,000 when a deported immigrant sued the City on allegations that he had been held on an ICE detainer longer than the 48 hours allowed by law.¹³ Washington D.C. is already facing a class action lawsuit for detaining inmates – citizens and non-citizens – longer than it is legally authorized to do so,¹⁴ and paid out \$12 million when an over-detention lawsuit was settled in 2005.¹⁵

6) Q: Aren’t many of these fiscal concerns addressed by DOC’s recent letter to the City Council regarding Intergovernmental Agreement 160-00-0016?

A: No. In an August 2011 letter to Councilmember Mendelson, D.C. DOC Interim Director Hoey stated that DOC holds individuals on ICE detainers beyond 48 hours pursuant to Intergovernmental Agreement (IGA) 160-00-0016 and bills ICE for the costs of this detention. Nothing in this letter answers the question of whether and how often DOC violates the 48 hour rule. In fact, this letter raises more concerns than it addresses. The IGA referenced by Interim Director Hoey is a housing agreement, not a custody transfer agreement. If DOC is relying on this agreement to justify incarcerating individuals beyond 48 hours merely on the basis of an ICE detainer, it does so in legal error.

- The issuance of an ICE detainer is merely a request by ICE to DOC to hold an individual for 48 hours beyond when he would otherwise be released so that ICE may assume custody. The IGA referenced by Interim Director Hoey does not give ICE the authority to claim it has automatically “assumed custody” over an individual held under a detainer merely because these 48 hours have elapsed. The law is very clear that an ICE detainer does not constitute ICE custody. ICE must take affirmative steps such as issuing a warrant or charging document in order to assert physical custody over an individual.¹⁶ The Board of Immigration Appeals and federal courts have held that an ICE detainer is

¹¹ D.C. Department of Corrections Performance Evaluation, Mar. 2, 2011, p. 38.

¹² This figure was calculated assuming a cost to DOC of \$127.78 per inmate per day. See footnote 6 above for the origin of this statistic.

¹³ \$145,000 was the figure reached through settlement in Harvey v. City of New York, No. 07-0343 (E.D.N.Y., June 12, 2009).

¹⁴ Barnes, et al. v. District of Columbia, C.A. No. 06-315 (RCL) (U.S.D.C.).

¹⁵ Bynum v. District of Columbia, C.A. No. 02-956 (RCL) (U.S.D.C.).

¹⁶ INA § 236(a); 8 CFR § 236.1(b).

merely an administrative request; it is not a warrant and does not constitute custody.¹⁷ Unless and until ICE takes the affirmative steps required by law to assume custody, individuals held in DOC facilities under ICE detainers remain in DOC custody. During this time, the costs of housing as well as the liability for over-detention fall to DOC. ICE's own regulations state that ICE does not "incur any fiscal obligation" as the result of issuance of a detainer until "actual assumption of custody" by ICE.¹⁸

7) Q: Does cooperation between local law enforcement agencies and ICE entail costs beyond just the DOC budget?

A: Yes. The policy of cooperation currently in place tears families apart and burdens the public welfare system.

- When D.C. residents are handed over to ICE from D.C. jails for detention and deportation, families are left behind.¹⁹ Studies and common sense confirm that when a family breadwinner is deported, his spouse and children left behind suffer severe financial hardship. A recent study found food hardship and housing instability to be common among families where one parent had recently been deported.²⁰ These families increasingly relied on public benefits including cash welfare, food stamps, supplemental nutrition programs, and free and reduced-price school meals.²¹ This increased reliance impacts not only federally funded public benefits but locally provided benefits as well.
- The costs of separating families through local policies that facilitate deportation play out over generations. Children and adolescents face elevated risk patterns when a mother-father home is transformed into a single parent home due to one parent's deportation. Studies show, for example, that adolescents in father absent households face elevated incarceration risks²² and are more likely to engage in illicit drug use.²³

¹⁷ Matter of Sanchez, 20 I. & N. Dec. 223, 225 (BIA 1990) (holding that the issuance of an immigration detainer does not constitute assumption of custody). The federal Circuit Courts of Appeal have affirmed Sanchez, holding that an ICE detainer is not sufficient to constitute custody. See U.S. v. Xulam, 84 F.3d 441, 444 (D.C. Cir. 1996); Zolicoffer v. US DOJ, 315 F.3d 538, 540-41 (5th Cir. 2003); Campillo v. Sullivan, 853 F.2d 593, 596 (8th Cir. 1988); Garcia v. Taylor, 40 F.3d 299, 303 (9th Cir. 1994); and Orozco v. INS, 911 F.2d 539, 541 (11th Cir. 1990).
¹⁸ 8 CFR § 287.7(e).

¹⁹ Human Rights Watch estimates that 1,012,734 husbands, wives, sons, and daughters were separated due to crime-based deportations between 1997 and 2007. "Forced Apart (By the Numbers)," Human Rights Watch, Apr. 2009, pp. 4-5.

²⁰ Id. at pp. 30-31.

²¹ "Facing our Future: Children in the Aftermath of Immigration Enforcement," Urban Institute, Feb. 2010, p. 36.

²² The odds of incarceration are more than three times as high for youth in mother-only households as mother-father households. Cynthia C. Harper and Sara S. McLanahan, "Father Absence and Youth Incarceration," *Journal of Research on Adolescence*, 14(3), (2007), p. 382.

²³ One study found 6.2% of adolescents in mother-father homes reporting illicit drug use, compared to 7.9% in mother-only homes and 14.9% in father-only homes. John P. Hoffmann and Robert A. Johnson, "A National Portrait of Family Structure and Adolescent Drug Use," *Journal of Marriage and Family*, Vol. 60 No. 33 (Aug. 1998), p. 637.

8) Q: Without a change in policy, how will implementation of Secure Communities impact the District fiscally?

A: The costs discussed in this memo will skyrocket when Secure Communities is implemented.

- When Secure Communities is implemented in D.C., the number of individuals impacted by the District's current policy of local cooperation with ICE will increase dramatically. This is because many individuals who would currently be released directly from arraignment will instead be held in DOC custody on ICE detainers. This pattern is currently playing out in localities across the country as Secure Communities becomes active. After Secure Communities was implemented in Santa Clara, California, for example, the County Counsel reported that each week between two and five people were held in the local jail on DOC detainers after arrest charges for which they would previously have received a citation and been released.²⁴ If Secure Communities is implemented in D.C. without changes to our current policy, each of the costs discussed in this memo will increase drastically.

²⁴ National Immigration Forum, "Immigrants Behind Bars: How, Why and How Much?" March 2011.

The following is a sample script of faith-based organizers meeting with a Sheriff about their local policies on ICE hold requests and cooperation with ICE. It could be helpful for preparing for meetings, starting a discussion about messaging, or giving allies a sense of what you are working on. The role play assumes that this group has already had a meeting with this Sheriff and that a lot of information gathering has already happened. This role play is a one on one, but in your meetings we encourage you to have multiple people from the community participating in the dialogue with the Sheriff.

Faith Leader: Thanks so much for taking the time to meet with us today Sheriff. We are coming here today because we are really concerned about the impact that our counties participation in immigration enforcement is having on our community. We are seeing countless numbers of families being torn apart through deportation. Trust in the police has almost entirely eroded and our local police are now seen as immigration agents. As people of faith from Visitation Catholic Church, we must stand up for the common good, human dignity and love for one's neighbor. Immigration enforcement at the local level is at odds with all of these values.

Sheriff: I am aware of the effect of our relationship with the community and we care about building trust with the community. But, I want to be clear, I am not enforcing immigration laws. We are not going out into the community to look for people who are undocumented. I am confident that we are not doing routine profile stops due to perceived undocumented status.

Faith Leader: We know how much you value trust with the community and how you want to do the right thing to build that trust. Although the police force is never explicitly mandated to enforce immigration law, the current immigration enforcement paradigm enables it to happen anyway. As soon as someone is in your custody, for any reason, ICE will then issue an ICE hold for which someone may be deported. As long as this process is in place, the police will be seen as immigration enforcers, because they have become the first link in the process of deportation.

Sheriff: We have a long history of responding to ICE holds and when ICE, a federal law enforcement agency, asks us to do something we do it. We are obligated to hold people with ICE holds and turn them over to ICE.

Faith Leader: This is a common misconception. ICE holds are not like criminal warrants, they are merely requests and therefore, compliance is not mandatory. Some localities around the country such as Santa Clara, CA and Chicago, IL have passed county resolutions that say Sheriff departments will not submit to such requests. These policies have been instrumental in rebuilding the trust you said you value so much. Would you consider adopting a policy like this for our county?

Sheriff: Look, you have to understand that my job is to protect public safety. And as soon as someone breaks a law and is at my jail then I'm willing to work with ICE. I simply cannot be releasing dangerous criminals onto the streets.

Faith Leader: We hear and appreciate your concern, but we want to make it clear that not submitting to ICE hold requests does not interfere with public safety. ICE hold requests are not issued based on someone's dangerousness, but rather on the potential that someone might be removable from the U.S. for a civil immigration violation. The criminal justice system has existing mechanisms in place to ensure public safety and we should rely upon them. On the other hand, not submitting to ICE hold requests will help rebuild trust which will ultimately improve public safety as people grow more willing to call and cooperate with the police. This kind of policy also helps to keep families and communities together which is hugely beneficial to our county. Could we share stories with you about how not submitting to ICE hold requests could have prevented great distress for our leaders?

Sheriff: This is a difficult issue. I am aware that there may be victims out there caught up in the immigration system. Please bring them to my attention and I will look at these cases.

Faith Leader: We will be sure to be in touch with you. Thanks again for your time. We look forward to working with you on this issue to do what is best for our entire county.