

Immigration Detainers

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Sometimes, after a defendant has been arrested for a crime, an Immigration and Customs Enforcement (ICE) officer will file an immigration detainer with the agency that has custody of the defendant. The detainer asks the agency to notify ICE when the defendant would otherwise be eligible for release -- for example, because the defendant has posted bond, or because the charges against the defendant have been dismissed -- and to hold the defendant for up to 48 hours thereafter to enable ICE to take custody of the defendant. I have often wondered about the authority for holding a defendant pursuant to such a detainer. Recent developments indicate that courts are increasingly wondering about that too.

Background. The current detainer form is [Department of Homeland Security form I-247A](#). Current ICE policy governing the use of detainers is [here](#). In general, an agent may issue a detainer only when the agent believes that there is "probable cause" to believe that the subject of the detainer is a removable alien. The detainer must be accompanied by an administrative "warrant for arrest" or "warrant for removal." Although denominated as warrants, these documents are issued by an ICE officer, not by a judicial official.

Detainers *request* that the custodial agency hold the subject after he or she would otherwise be released, they don't *order* the agency to do so. Agencies that hold inmates often have policies about whether to honor detainers, based on legal concerns and/or on policy preferences. Policies here in North Carolina seem to vary. [This newspaper article](#) states that both Guilford County and Forsyth County decline to honor immigration detainers on Fourth Amendment grounds, but [this one](#) states that Forsyth County *does* honor immigration detainers. [This one](#) suggests that Richmond County honors immigration detainers even though ICE mistakenly thought that it did not. If readers are aware of the policies adopted by their local agencies, please post a comment.

At the beginning of this calendar year, in an apparent effort to encourage agencies to honor detainers, ICE began publishing a weekly [Declined Detainer Outcome Report](#). It listed jurisdictions that declined to honor detainers and highlighted some of the criminal activity in which the subjects of the dishonored detainers had allegedly been involved. However, after issuing a few reports, ICE suspended publication in order to "refine its reporting methodologies." The suspension is supposed to be temporary, so the reports may start up again at some point.

Massachusetts high court rules that there is no legal authority for honoring detainers. There has been an increasing amount of litigation over whether it is lawful to hold a person based on an immigration detainer. Most of the cases concern whether such a detention violates the Fourth Amendment and/or exceeds the authority of a law enforcement officer. Those arguing against the validity of detainers often note (1) that detainers are issued by ICE officers, not neutral judicial officials, and (2) that detainers typically assert only that the subject "is a removable alien," and that being present in the United States while subject to removal is a civil violation, not a criminal one.

These arguments were at the heart of *Lunn v. Com.*, ___ N.E.3d ___, 2017 WL 3122363 (Mass. July 24, 2017). After criminal charges against him were dismissed, Lunn was held for a few hours pursuant to a detainer. He argued that this was an arrest that violated the Fourth Amendment and that exceeded officers' arrest authority under Massachusetts law. The high court of Massachusetts agreed, focusing on the officers' lack of authority. The court reasoned that holding a subject pursuant to a detainer is an arrest; a detainer is not an arrest warrant; officers may

make warrantless arrests only for criminal offenses; and a detainer, at most, alleges a civil violation, not a crime.

There are other recent cases addressing similar claims, and it appears that the arguments against detainers are gaining some traction. *See, e.g., Orellana v. Nobles County*, 230 F.Supp.3d 934 (D. Minn. 2017) (in a civil suit by an individual detained for 10 days pursuant to an immigration detainer, the court stated that detainers “do not categorically provide law enforcement a constitutionally permissible predicate for an arrest,” though it found that detention may be permissible if a warrant is issued or if there is evidence that the subject is likely to escape if not detained); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (in a civil suit by an individual detained for one day pursuant to an immigration detainer, the court ruled that holding a subject pursuant to a detainer is a Fourth Amendment seizure that requires probable cause); *Mercado v. Dallas County*, 229 F.Supp.3d 501 (N.D. Tex. 2017) (in a civil suit by individuals held pursuant to immigration detainers, the court concluded at the motion to dismiss stage that the individuals’ claim “that Dallas County detained them after they were otherwise eligible for release, without probable cause to believe they had committed or were committing a criminal offense . . . plausibly allege[s] a violation of the Fourth Amendment”). *But cf. People v. Xirum*, 45 Misc.3d 785 (Supr. Ct. N.Y., King’s County 2014) (ruling that where a detainer was based on a final order of removal, holding the subject did not violate the Fourth Amendment).

Further reading. I don’t claim any special expertise in this topic -- I’m just curious about it. Folks interested in learning more may be interested in the portion of the *Immigration Consequences* defender manual that addresses detainers, [here](#). *See also Immigration Detainers or Holds Issued Pursuant to 8 C.F.R. § 287.7*, 10 A.L.R. Fed. 3d Art. 1 (2016) (collecting cases on various constitutional challenges to detainers); Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 Geo. L.J. 125 (2015) (stating that there have been “a wave of cases successfully challenging ICE detainers on constitutional grounds,” and describing “a trend in which counties around the country began announcing that they would no longer detain people on the basis of ICE requests”); Alia Al-Khatib, *Putting a Hold on ICE: Why Law Enforcement Should Refuse to Honor Immigration Detainers*, 64 Am. U. L. Rev. 109 (2014) (arguing that holds based on detainers violate the Fourth Amendment and due process, and asserting that honoring detainers “diminishes immigrant communities’ trust in law enforcement, a consequence that threatens public safety”). State Attorneys General have disagreed about detainers, with [Texas](#) concluding that they provide a lawful basis for detention but [New York](#) and [Maryland](#) concluding that normally they do not.