## Legal Sidebar

# Recent Shooting in San Francisco Raises Questions about "Sanctuary Cities" and Compliance with Immigration Detainers

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Recent reports that an alien who shot and killed a woman after being released by San Francisco authorities had been the subject of an "immigration detainer" have raised questions about state and local practices of declining to honor such detainers. In this case, the detainer reportedly requested that local officials notify U.S. Immigration and Customs Enforcement (ICE) prior to releasing the alien so that ICE could take him into custody for removal proceedings. However, ICE's past practice of using detainers to request that states and localities hold aliens for up to 48 hours after they would otherwise have been released for the state or local offense so ICE could investigate their removability (rather than immediately initiate removal proceedings) had prompted some jurisdictions—including San Francisco—to adopt policies of declining to honor immigration detainers in certain cases.

These anti-detainer policies vary among jurisdictions, as illustrated by the three policies most relevant to the San Francisco case, but are generally concerned with "detainers to detain," and not detainers which request that ICE be notified before an alien's release. Neither the federal detainer regulations nor the standard detainer form are generally seen to require states and localities to hold aliens for ICE or to notify ICE before releasing an alien (although other provisions of federal law bar states and localities from restricting the sharing of information about immigration or citizenship status). A federal court of appeals has held that construing federal regulations to require that states and localities hold aliens that would otherwise have been released for ICE would run afoul of the Tenth Amendment's anti-commandeering principles. Requirements to notify ICE upon release of an alien (rather than actually holding the alien) could, however, potentially be viewed differently by courts.

**California TRUST Act**

Under California's TRUST Act, which was enacted on October 5, 2013, and took effect on January 1, 2014, state and local law enforcement officials may detain an alien who is eligible for release from custody pursuant to an "immigration hold"—which is defined as a detainer that requests state and local officials to maintain custody of the alien and notify ICE prior to the alien's release—only if two conditions are met. First, the hold must not violate any federal, state, or local law, or any local policy, a condition which allows any more restrictive local policies to prevail over the terms of the TRUST Act. Second, the alien must have been convicted of certain offenses listed in the Act, which include serious or violent felonies, assault, battery, and use of threats, as those offenses are defined under specific provisions of the California Penal Code. If both these conditions are met, the TRUST Act would permit—but not require—state and local officials to hold aliens pursuant to immigration detainers (although two recent federal district court cases discussed in an earlier Legal Sidebar suggest that such holds may run afoul of the Fourth Amendment even if they are requested by the federal government and authorized under state law). The Act does not address whether state and local officials may honor detainers that do not seek the continued detention of aliens and do not fall within the Act's definition of "immigration holds."

**San Francisco Ordinance No. 204-13**

San Francisco's Ordinance No. 204-13 was similarly amended on September 24, 2013, to restrict the circumstances in which local law enforcement officials may honor immigration detainers. As amended, the ordinance generally bars law enforcement officials from detaining an individual pursuant to an immigration detainer after the individual becomes eligible for release from custody. However, an exception currently provided for in the Act would apparently permit (but

does not require) the detention of certain aliens who had previously been arrested for a "violent felony"—a term which is defined to include any crime listed in Section 667.5(c) of the California Penal Code, among other things—and are arrested for another such offense. For this exception to apply, the prior conviction must have been in the seven years immediately prior to the date of the detainer, and a magistrate must have determined that there is probable cause to believe the individual is guilty of a violent felony *and* ordered the individual to answer to the same pursuant to Section 872 of the Penal Code. In addition, before holding an alien pursuant to this provision, state and local officials must consider evidence of the individual's rehabilitation and evaluate whether the individual poses a public safety risk. The ordinance is silent as to detainers that request state or local actions other than detention of the alien.

**San Francisco Sheriff's Policy**

Announced on May 29, 2014, after the previously noted district court decisions suggesting that holds pursuant to detainers run afoul of the Fourth Amendment, the San Francisco Sheriff's policy provides that the "Sheriff's Department will no longer honor [immigration detainers] unless they are supported by judicial determinations of probable cause or with a warrant of arrest." This statement apparently forecloses any holds—or other actions—pursuant to immigration detainers that are unsupported by the required determination of probable cause or that lack a warrant.

**Relationship between State and Local Anti-Detainer Policies and Federal Law**

Such policies limiting the circumstances in which state and local officials may honor immigration detainers would not appear to be contrary to the prevailing interpretation of the federal detainer regulations or the current detainer form. The detainer regulations do use language that some have opined means that holds pursuant to detainers, at least, are required, stating that "[u]pon a determination by [ICE] to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall* maintain custody of the alien for a period not to exceed 48 hours" (emphasis added). However, the caption of the section containing this language refers to "temporary detention at [ICE] request," and the Executive has taken the position that the regulation is to be construed as requiring that any period of time that a state or locality holds an alien pursuant to a detainer generally be limited to 48 hours, and not as requiring states or localities to hold aliens pursuant to detainers. Several federal courts have similarly characterized detainers as requests or otherwise agreed with the Executive's interpretation here, in part, on the grounds that any purported requirement that states or localities hold aliens for ICE would raise commandeering concerns. Also, the standard detainer form currently states that detainers are "requests."

An argument could, however, potentially be made that anti-detainer policies which purport to restrict state or local officials from sharing certain information about aliens with the federal government run afoul of two federal statutes that expressly bar states and localities from adopting restrictions upon the sharing of information about "immigration status" or "citizenship status" with federal officials. For example, former ICE Director John Morton expressed the view that provisions in the Cook County, Illinois, detainer policy prohibiting county personnel from "expend[ing] their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release date while on duty" run afoul of the federal information-sharing provisions. No court appears to have addressed the merits of this argument, though, and information about aliens' incarceration status or release date could potentially be found to be distinguishable from information about immigration status or citizenship status.

Amending federal law to require that states and localities honor immigration detainers could raise commandeering concerns, at least in cases involving detainers to detain, as the U.S. Court of Appeals for the Third Circuit noted in its 2014 decision in *Galarza v. Szalczyk*, discussed in this prior Legal Sidebar. Obligations to notify ICE prior to releasing an alien could, however, be viewed differently since they do not "require the States in their sovereign capacity to regulate their own citizens ... [or] enact any laws or regulations ... [or] require state officials to assist in the enforcement of federal statutes regulating private individuals," as discussed in CRS Report 43457, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, by Michael John Garcia and Kate M. Manuel. Conditioning federal funds upon compliance with immigration detainers could also be seen as permissible.