

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

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FEATURED TOPIC

The Consequences of Immigration Detainers and Challenges to Their Use



An overview of DHS detainer practices, constitutional challenges, and what defense counsel need to know to protect clients and avoid unintended consequences.

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How We Support Mandated Defense Counsel

- Immigration advisals on pleas and dispositions
- Assistance communicating advisals to clients
- Language access support & interpreter referrals
- Help identifying a client's immigration status
- Written or oral advisals for courts or prosecutors
- CLEs on immigration consequences of crimes
- Participation in case conferences
- Referrals to deportation defense counsel

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Policy Update

DHS Seeks Access to Nationwide Child Support Database

Proposal would allow DHS to use a federal child support database for immigration enforcement, raising legal concerns. (pp. 6-7)

Enforcement Update

Cuban Nationals Are Being Removed Despite Common Misconceptions

Recent data shows removals and transfers increasing, despite the widespread belief that deportation is unlikely. (pp. 7-8)

Case Watch

Habeas Litigation Surges Nationwide

More than 24,000 federal lawsuits challenge immigration detention, signaling a major shift in defense strategy. (pg. 8)

The Consequences of Immigration Detainers and Challenges to Their Use

By Sophie Feal, Managing Attorney, WNYRIAC, Legal Aid Bureau of Buffalo

The WNYRIAC is funded by the NYS Office of Indigent Legal Services to support mandated criminal, appellate, and family defense providers in the 7th and 8th Judicial Districts. Following *Padilla v. Kentucky*, defense counsel must advise non-citizen clients on potential immigration consequences before a plea. We provide no-cost support to help attorneys meet these obligations.

What Is an Immigration Detainer?

Detainers are the means by which the Department of Homeland Security (DHS) apprehends non-citizens involved in the criminal justice system. A detainer is a request by DHS to local law enforcement agencies to continue to hold an individual currently in their custody when ICE intends to assume custody. It also indicates that DHS has determined that probable cause exists that the subject of the detainer is removable from the U.S. Federal immigration law at 8 U.S.C. §1103(a) contains express authority for issuing detainers. These administrative documents, identified as I-274A, are often referred to as ICE detainers or holds and request that local law enforcement continue to hold a non-citizen for up to 48 hours even if they may otherwise be released, and notify DHS of the non-citizen's imminent release. In the past, detainers were usually lodged by ICE and ICE was the agency that picked up the non-citizen from local custody. More recently, however, we have seen CBP appear.

“Honoring a detainer request from DHS is voluntary and local law enforcement can decide whether or not to comply.”

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While the government’s website states that detainees are lodged “after officers or agents establish probable cause to believe that an alien is removable — typically after a court has convicted them of one or more crimes — and typically when the alien poses a public safety or national security threat,” this is not accurate. Detainers may be lodged while a client is in pre-trial custody and remain in effect regardless of the outcome of the criminal case. They may not be automatically lifted if a plea to a non-deportable offense is accepted, even when the client has lawful immigration status. There is no judicial review of DHS’s determination.

Legal Challenges and Liability Risks

Honoring a detainer request from DHS is voluntary and local law enforcement can decide whether or not to comply. In Western New York, every local law enforcement agency appears to comply with detainers even though they are merely administrative documents, and not judicial arrest warrants. The District Court for the E.D.N.Y. found that the

Suffolk County Sheriff’s Office (SCSO) lacked the legal authority to detain non-citizens for civil immigration violations since it had had no reasonable belief, much less probable cause for the detention. The plaintiffs contended that, for many years, it was the policy of the SCSO to blindly honor these detainers and the sheriff would frequently detain individuals for civil violations of removability without doing an independent analysis of probable cause. *Orellana-Castaneda v. County of Suffolk*, No. 2:17-cv-04267 (E.D.N.Y.).

Consequently, the plaintiffs pursued Fourteenth Amendment due process claims and damages at trial. In January 2025, the federal jury unanimously found that the County had violated the clients’ rights and ordered the County to pay \$75 million for its Fourth Amendment and New York Constitution violations and another \$37 million for procedural due process violations.

The State Attorney General’s Office also issued the following statement in January of last year: “State law bars state and local law enforcement officers from arresting and detaining individuals for civil immigration violations alone—even

if federal immigration authorities have issued a detainer or administrative arrest warrant. Arrests and detention by state or local law enforcement agencies in reliance on an administrative arrest warrant or detainer alone are invalid because those documents are not judicial warrants issued by courts, and do not provide probable cause to believe an individual has committed a crime or offense. It is immaterial that the administrative arrest warrants and detainers are signed by federal immigration authorities, and may use words like ‘probable cause.’ A determination of whether the LEA has probable cause to further detain an individual will turn on all the facts and circumstances, not simply words that federal immigration authorities place on their forms.” See [here](#).

Years earlier, a habeas proceeding was filed requesting the immediate release of a non-citizen from Suffolk County. *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 35-6, 88 N.Y.S.3d 518 (2018). The non-citizen had been detained by the SCSO notwithstanding the termination of the state criminal action against him. The

Appellate Division, Second Department, determined that the SCSO’s detention of individuals pursuant to the detainer requests constituted an arrest and seizure under New York law and the Fourth Amendment of the U.S. Constitution. *Id.* at 39-40, 41. In addition, the Second Department found that such arrests were not based on probable cause of a crime, but rather probable cause of removability. *Id.* Finally, the Second Department determined that New York law did not allow New York officers to make arrests for civil immigration law violations. *Id.* 43-44, 46. Accordingly, the Second Department held that “the narrow issue in this case is whether New York law permits New York state and local law enforcement officers to effectuate civil immigration arrests, and not whether federal civil immigration officers have the authority to effectuate such arrests. Nor do we decide any issues under federal law deputizing state and local law enforcement officers to act as federal immigration officers.

Determining only the narrow issue before us, we conclude that the Sheriff’s policy, issued on December 2, 2016, directing the retention of prisoners, who

would otherwise be released, pursuant to ICE detainers and administrative warrants is unlawful, ... Illegal presence in the country, standing alone, is not a crime.” See *Wells*, 168 A.D.3d 31, 40, 88 N.Y.S.3d 518 (2018) (citing *Melendres v. Arpaio*, 695 F3d 990, 1000-1001 [9th Cir 2012]). It is a civil violation that subjects the individual to removal. *Id.* (citing 8 USC § 1227 [a] [1] [B])).

Historically, there has been no neutral oversight of the probable cause for the detainer arrest. In *Gonzalez v. ICE*, No. 13-cv-04416 (C.D. Cal.), plaintiffs challenged various detainer practices, including the agency’s reliance on error-ridden databases to generate these requests. The Settlement Agreement in this case prohibits DHS from issuing certain immigration “detainers” without establishing a process for neutral review of probable cause comparable to what is required by the Fourth Amendment. Currently, ICE offices under the Settlement Agreement can only issue a “Request for Advance Notification of Release,” which does not request or authorize law enforcement to hold someone in custody for immigration purposes. The Gonzalez Settlement

Agreement took effect on March 4, 2025 and applies to New York State, except for the boroughs of NYC. See [here](#) for more information. [Here](#) are more examples of lawsuits filed regarding DHS’s detainer practices.

Within 48 hours of an arrest, immigration officers must then decide whether to charge the non-citizen with removal by issuing a Notice to Appear. 8 C.F.R. §287.3(d). The Notice to Appear is filed with an immigration court and starts the person’s removal proceedings.

If a non-citizen is not charged with being removable from the United States, they must be released from detention. See 8 U.S.C. § 1226(a).

Practice Pointers for Defense Counsel

It is very important that a defense attorney know whether or not a detainer has been lodged against their non-citizen client so they can act accordingly. Here are some important points:

- DHS may learn about the client’s arrest when they are fingerprinted by local police. The police or sheriff

share fingerprint data and other arrest information with DHS. Police may also call ICE directly if they suspect the client is not a U.S. citizen.

- A detainer states that the non-citizen must be released after 48 hours if they are not picked up by DHS. However, local law enforcement might mistakenly believe that they may continue to hold someone until DHS arrives.
- When a detainer has been placed on a client, if they pay bail, are ROR'd, their charges are dismissed, or they are otherwise released from local custody, the detainer may be enforced. If the client is not deportable, it is advisable to negotiate with DHS to have the detainer lifted before the client seeks release. An immigration attorney may be able to assist with that. It is critical to remember that DHS officers are not lawyers who fully understand the many nuances of immigration law and what renders non-citizens deportable. As such, they may not recognize that a non-citizen is not deportable and may still take them into custody unless the detainer is lifted by the appropriate authorities.
- If a client pays bail and then are picked up by DHS pursuant to a

detainer, they may forfeit the bail money.

- We have heard reports of non-citizens who are taken into DHS custody and are not returned for further appearances before the local court. Consider this carefully before advising the client to pay a bail. The client may then face a bench warrant for failure to appear.

DHS Seeks Access to Nationwide Child Support Database

The Department of Homeland Security is requesting access to the Federal Parent Locator Service for purposes of immigration enforcement. This database is currently used to find people who owe child support. It contains the name, address, Social Security number, employer, and salary or wages of almost every employed person in the country, as well as the equivalent details for anyone listed in state unemployment systems. It exists so that if someone owes child support, the government can pursue them for it even if they've changed jobs or moved to another state. Opponents say granting access to DHS for immigration enforcement, violates a federal law that explicitly limits its use to determining and collecting child

support payments and a handful of other narrow purposes. Turning the child support data over to Homeland Security “would be disastrous for child support enforcement” and “would ruin the foundation of the child support program,” said Vicki Turetsky, who was commissioner of the Office of Child Support Enforcement at the U.S. Department of Health and Human Services (HHS) from 2009 to 2016. Turetsky said that if this were to happen, many employers, fearful of ICE arrests of their employees or workplace raids, would consider no longer reporting new hires to the government. This in turn would degrade the ability of the system to find parents who owe payments to their kids, she said.

As of today, the request remains under consideration at HHS, which maintains the database. You can read more [here](#).

Cuban Nationals Remain Subject to Removal

Cuban nationals often believe they cannot be deported from the United States given the historical lack of diplomatic relations between the two countries. This is untrue. Cubans who

have been ordered removed are often in the US under orders of supervision requiring them to report regularly to ICE. When they report, they may be taken into custody for repatriation. A report published by Human Rights First on deportations states that, “Under the first year of the second Trump administration, there were 12 removal flights to Cuba – matching the number of flights conducted over the last year of the Biden administration. Removal flights to Cuba have taken place at a pace of one flight per month since they resumed in April 2023 following a pause during the pandemic. In 2025, the Trump administration removed at least 1,379 Cuban nationals on U.S. deportation flights. In addition to flights, between January 20 and December 31, 2025, 3,753 Cubans were removed to Mexico across the U.S.-Mexico land border. According to local reporting, 4,883 Cubans were removed from the United States in 2025. While the number of removal flights remained the same from 2024, the number of Cubans removed in 2025 increased by a staggering 630 percent from 2024 when the Biden administration removed 669

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Cuban nationals. Notably, between December 2025 and January 2026, 55 Cuban nationals were transferred from U.S. detention centers to Guantanamo Bay on ICE Air shuffle flights. On February 2, 2026, they were returned to detention centers in the United States, and on February 9, they were removed to Cuba on the scheduled monthly removal flight. In 2025, all U.S. removal flights to Cuba originated in Alexandria, Louisiana, 58 percent of which connected through Miami, Florida prior to removal; all flights landed at José Martí International Airport in Havana.”

For more information on deportation flights in general, see [here](#).

Habeas Litigation Surges Nationwide

The practice of immigration law has been transformed. "Since January 2025, lawyers across the country have flooded the courts' dockets with more than 24,400 federal lawsuits challenging the detention of immigrants as unlawful and seeking their release. That's more than during the three previous administrations **combined**," according to a *ProPublica* analysis of immigration-related habeas cases. Read more [here](#).

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