

## **Are Sanctuary Practices Hindering ICE's Efforts to Target Criminals? Understanding the Use and Implications of Detainers**

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**Motivation:** U.S. Immigration and Customs Enforcement Agency (ICE) detainers, also referred to as 'immigration holds' or 'ICE holds', have been instrumental in supporting the growing number of deportations in recent years. Using detainers, ICE may request that local law enforcement agencies (LEAs) detain individuals for 48 hours beyond their lawful release date (excluding weekends and holidays).<sup>1</sup> This additional time allows ICE to obtain more information about the arrested immigrant, or to arrange a transfer of custody to begin removal proceedings. Although the detainer lapses after 48 hours and it is no longer legal for authority to detain the prisoner, this is frequently disregarded. In addition, attorneys across the United States report that non-citizens are frequently held much longer.<sup>2</sup> While ICE guidelines state that detainers are mainly issued only for immigrants who pose a serious threat to public safety or national security, it is not uncommon for ICE to issue hold requests for immigrants who are low-level offenders or individuals with no criminal history.<sup>3</sup>

Between 2006 and 2011, ICE detainers grew over 2,000 percent. After their peak in 2011, we are now observing a second upward trend in the use of detainers. In the short period spanning between January 2016 and March 2018, detainer usage has more than doubled.<sup>4</sup> In the 2014 case, *Miranda-Olivares v. Clackamas County*, federal magistrate judge Janice M. Stewart of the United States District Court for the District of Oregon ruled that immigration detainers violate detainees' Fourth Amendment rights, and that they are merely requests not legally binding.<sup>5</sup> Because detainers are not warrants or judicial orders, they are not mandatory. Many law

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<sup>1</sup> The detainer is also used to notify law enforcement agencies of ICE's intention to assume custody of an immigrant or to request information from the law enforcement agency about an immigrant's impending release so ICE can attempt to assume custody before the immigrant is released from custody.

<sup>2</sup> <https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview>, <https://immigrationforum.org/article/quick-information-immigration-detainers/> (Last accessed: January 4, 2019).

<sup>3</sup> See <http://trac.syr.edu/immigration/reports/333/>

<sup>4</sup> <http://trac.syr.edu/immigration/reports/522/> (Last accessed: January 4, 2019).

<sup>5</sup> <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insidenews/posts/ice-detainer-4th-amendment-violation-miranda-olivares-v-clackamas-county> (Last accessed: January 4, 2019).

enforcement agencies have openly resisted observing some of ICE's detainers due to the increased costs associated with holding immigrants beyond their lawful release, the possibility of encroaching on civil rights, and the risk that some detainers are issued to U.S. citizens<sup>6</sup> or to individuals found innocent. For many of these LEAs, the need to ensure effective policing by preserving trust between law enforcement and the immigrant community takes precedence over complying with ICE. As a result, many states, counties, and cities have limited their cooperation with federal immigration authorities, either through the adoption of formal laws or regulations, such as California Trust Act, or through more informal practices such as general prohibition on providing assistance and resources to ICE that have rendered them the label of "sanctuary" cities.

The Trump Administration has denounced the adoption of these so-called sanctuary policies, arguing that refusal to comply with ICE: (1) undermines the agency's ability to remove serious criminal offenders from the United States, and (2) results in unsafe communities where criminals are free to roam the streets. However, much of this discussion has taken place in a vacuum, with little empirical evidence on whether sanctuary policies have, indeed, hindered ICE's ability to remove convicted criminals or the extent to which they make communities less safe. To date, only limited descriptive data has been used to address the question of safety. Specifically, using 2015 data from the Uniform Crime Reports, Wong (2017) computes and compares average crime rates for so-called sanctuary counties and non-sanctuary counties.<sup>7</sup> He documents how sanctuary counties have fewer crimes per 10,000 persons than non-sanctuary counties. Yet, in addition to not knowing whether this finding is still present once we account for standard county-level traits in regression-based analysis, or if it is consistently observed over an extended period of time, we still lack an understanding of whether the adoption of sanctuary policies interfere with ICE's ability to pick up individuals for whom detainers have been issued.

We aim to address this gap in our understanding of how sanctuary policies and practices have: (a) interfered with ICE's ability to pick up individuals for whom detainers have been issued, and (b) placed the communities adopting such practices in greater danger, as captured by the share of detainers ending in serious criminal convictions. To that end, we analyze ICE detainers data at LEAs level and find that sanctuary policies do not seem to interfere with ICE's work. Moreover, areas adopted the sanctuary policies are associated with lower share of convicted individuals, suggesting that these cities might be safer than non-sanctuary cities.

Understanding about the true impact of sanctuary policies is crucial in the current political environment. In March 2017, ICE published the "Declined Detainer Outcome Report" (DDOR),<sup>8</sup> which listed counties that refused to honor detainer requests made by ICE. It warned that counties failing to comply with ICE would lose federal funding. The "name and shame" strategy appears to have gained some ground in a politically divided society. Yet, despite some sporadic cases highlighted by some of the media, we still lack consistent evidence on how sanctuary policies are interfering with ICE's functions or, ultimately, affecting community safety. Learning if sanctuary policies are interfering with ICE's ability to pick up individuals for whom a detainer was sent and, in turn, results in communities sheltering a larger share of criminals would seem essential in

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<sup>6</sup> <http://trac.syr.edu/immigration/reports/311/>

<sup>7</sup> Wong, Tom K. 2017. "The Effects of Sanctuary Policies on Crime and the Economy" *Center for American Progress and National Immigration Law Center Paper, January 26, 2017*. Available at <https://www.nilc.org/wp-content/uploads/2017/02/Effects-Sanctuary-Policies-Crime-and-Economy-2017-01-26.pdf>

<sup>8</sup> ICE abruptly discontinued the report after local jurisdictions identified numerous errors in them.

justifying any withholding of federal funding or in the widespread use of detainers, which may trespass civil liberties in the absence of a criminal conviction.

**Background:** Since 9/11, ICE has relied on a number of programs to amplify ICE's cooperation with local LEAs in order to detain and remove noncitizens. Given that the grounds for deportation depend heavily on criminal conduct, ICE enlists the support of state and local LEAs, who are the first to interact with individuals who have committed criminal offenses.

**A) The Role of State and Local LEAs:** There are several channels through which information collected by local LEAs at the time of an arrest may be shared with ICE. First, information may be shared at the time of the arrest through a 287g program at the local and state levels, which allows state and local LEAs to establish a partnership with the federal government under joint Memorandum of Agreements (MOAs). By signing the latter, state and local LEAs receive federal authority to enforce immigration laws within their jurisdictions. They can, for example, check the Department of Homeland Security (DHS) databases for information on certain individuals, or directly submit data into ICE's database and case management system.

Second, information is shared when an individual is taken into custody after an arrest as in the case of Secure Communities (henceforth, SC). Implemented from 2008 through 2014, and reactivated in 2017, SC allows ICE to check the immigration status and criminal activity of any arrested individual, once LEAs submit fingerprints to an integrated database shared by LEAs, the Federal Bureau of Investigation (FBI), and DHS. At that time, the arrestee's biometric data is likely to be routed through criminal databases supported by the FBI. Under the SC, the FBI automatically sends information, such as fingerprints, to DHS to check it against its immigration databases.<sup>9</sup>

Finally, the Criminal Alien Program (CAP) also provides ICE physical access to local and state jails, as well as to digital access to jails' databases containing fingerprints, booking data, and other personal information that facilitates the identification of deportable immigrants and their transfer to ICE custody.

In sum, all three programs allow ICE to use the local criminal justice system to identify immigrants believed to be deportable. However, because ICE does not have officials stationed at all U.S. jails, its deportation efforts rely heavily on the willingness of local jails to hold immigrants until ICE obtains more information on the suspects or assumes custody.

**B) The Detainer Process:** If ICE has probable cause to suspect an individual is a removable alien, ICE will send a detainer to the respective LEA. A detainer, or "immigration hold", is the notification by ICE to the LEAs of its intent to assume custody of an individual in federal, state, or local custody. The detainer requests: (1) that the LEA notifies ICE as early as possible, before it releases a noncitizen from criminal custody, and (2) that the LEA maintains custody of the noncitizen for an additional 48 hours to allow ICE to assume custody and initiate the removal process. A detainer may be issued as a result of immigration charges, or if the individual was: (1) previously convicted of a felony; (2) previously convicted of 3 or more misdemeanor offenses; (3) previously convicted of one or more misdemeanor offenses; (4) previously convicted of illegal entry; (5) found guilty of immigration fraud; (6) re-entered the United States in an unauthorized capacity after being removed; or (7) posed a risk to national security (Al-Khatib 2014).

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<sup>9</sup><https://www.ice.gov/secure-communities>

Detainers have been informally used to obtain custody of noncitizens and initiate removal proceedings since 1950.<sup>10</sup> In 1986, amendments to the Immigration and Nationality Act (as a result of the 1986 Anti-Drug Abuse Act) formally introduced detainers for immigrants arrested for controlled substance offenses. Shortly after, the Immigration and Naturalization Service amended its regulation to include detainers for controlled substance offenses, as well as other offenses (Manuel 2015). Since then, no new changes have been introduced to the regulation of ICE's detainers, although ICE has modified its use. Between 2008 and 2014, when detainers were at their peak as a result of the SC program, ICE's detainer practices raised several concerns including: (1) the extent to which detainers were beyond ICE's statutory authority; (2) whether state and local authorities were subject to compliance; (3) questions regarding the agency responsible for the custody of the detained immigrant; and (4) concerns regarding the possible violation of immigrants' constitutional rights (Manuel 2015).

ICE has claimed that a detainer is an essential tool in the apprehension and deportation of individuals not authorized to remain in the United States. Using ICE detainers data from TRAC, Figure 1 shows that the number of detainers issued sharply increased since mid-2006 with a peak in 2011, when over 20,000 detainers were issued monthly.<sup>11</sup> Eventually, the use of detainer was largely cut back in 2014, when much more targeted and selective enforcement policies were instituted by the Obama Administration. However, the Trump Administration has revived the widespread use of detainers, and pressured local LEAs to comply, starting a second upward trend in detainer usage.

**Objectives:** In this paper, we examine the following questions:

a) *Do counties that have adopted sanctuary practices interfere with ICE's ability to secure and remove immigrants convicted of serious crimes?* According to ICE, the refusal to honor its detainer requests results in the release of dangerous criminals. For example, ICE conducted a 3-month review of the New York City Police Department (NYPD) and the New York Department of Corrections (NYDOC). It found that, out of 440 detainers issued to both agencies, 40 individuals reoffended and were arrested again.<sup>12</sup> If ICE's arguments are correct, we would expect the share of detainers ending in ICE's custody to be lower in jurisdictions with sanctuary policies, when compared to other jurisdictions.

Figure 1 shows that the share of ICE detainers that end in ICE's custody in counties that have adopted such practices and counties that have not follow distinct trends. Plus, the share ending in ICE custody is, if anything, higher in sanctuary counties. This suggests sanctuary policies may not be interfering with ICE's efforts to the extent that the agency believes.

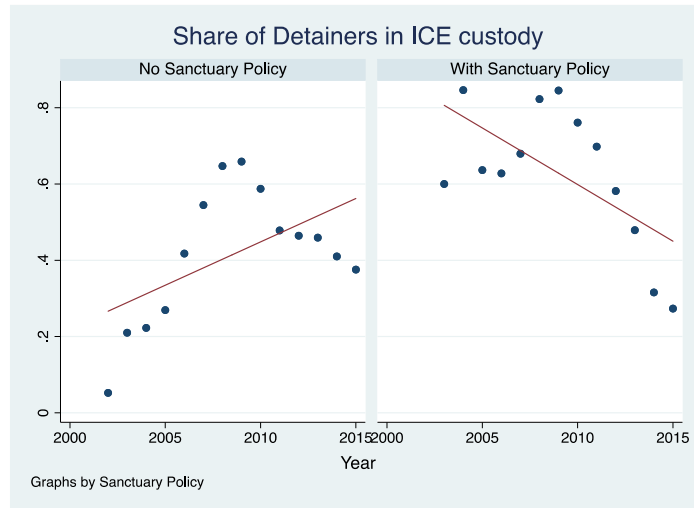
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<sup>10</sup> For examples of the early use of detainers see <https://fas.org/sgp/crs/homsec/R42690.pdf>

<sup>11</sup> TRAC (2017) also reports that detainer usage climbed in the late years of the Bush Administration, and expanded rapidly under the Obama Administration. However, only a small portion of these detainers resulted in actual removals.

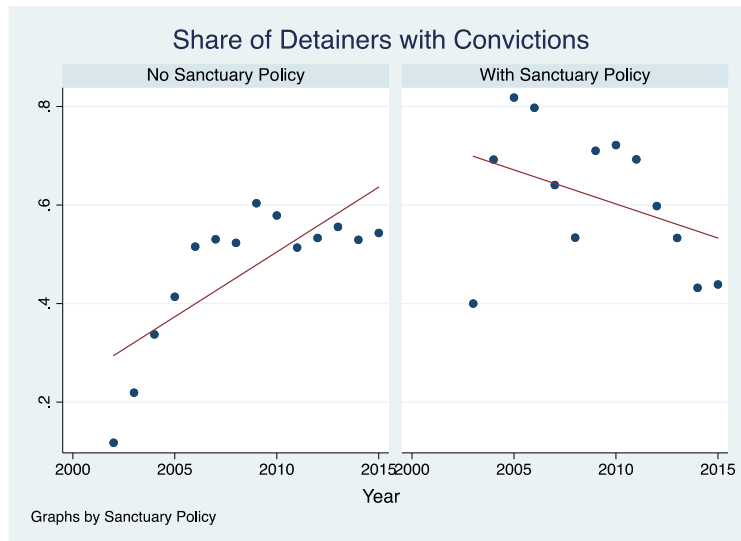
<sup>12</sup> See: <https://www.ice.gov/news/releases/3-month-review-shows-how-new-york-citys-failure-honor-immigration-detainers-leads>

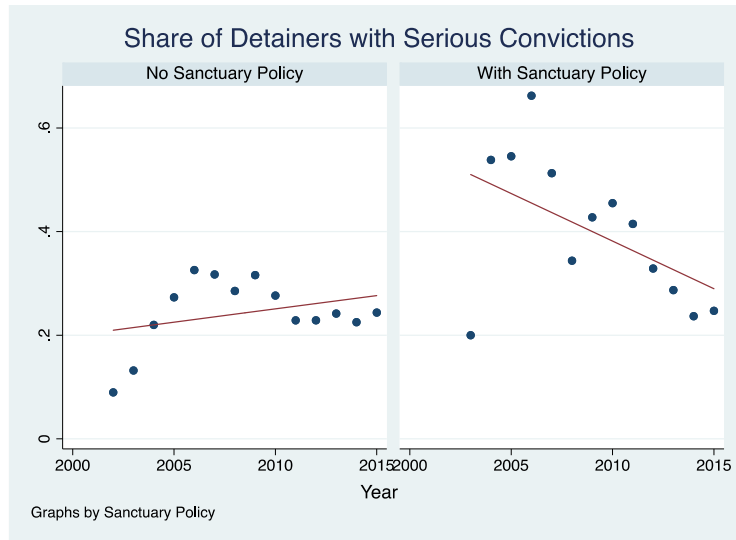
**Figure 1. Share of Detainers in ICE Custody by Type of County**



b) *Are counties with sanctuary policies less safe?* If individuals released are committing crimes, counties with sanctuary policies should have a larger share of convicted criminals relative to other counties. According to the two sets of graphs included in Figure 2, counties that have adopted sanctuary policies have a lower share of detainers ending in convictions, as well as in serious convictions, compared to non-sanctuary counties. Therefore, it is unclear that the adoption of such practices is rendering these counties less safe.

**Figure 2. Shares of Convictions by Type of County**





**Data:** We collect data on the number of detainer requests sent by ICE to each jurisdiction, the number of cases in which ICE assumes custody of the detainees (“picks up”), and the seriousness of the conviction, if existent, for each detainer case for January 2002 through November 2015 from the Transactional Records Access Clearinghouse (TRAC) website. TRAC systematically requests these data from the Executive Office for Immigration Review (EOIR) –a unit within the Department of Justice, under the Freedom of Information Act (FOIA).<sup>13</sup> Data on whether the jurisdiction adopted a sanctuary policy is taken from various online sources, including the National Conference of State Legislatures and the Migration Policy Institute.

We also gather information on a number of county level traits potentially correlated with criminal justice outcomes, including a county’s Hispanic population and foreign-born population composition, educational attainment, median household income, unemployment rate, poverty rate and the new housing permits rate from county censuses and the American Community Survey. Additionally, we control for the level of immigration enforcement in the county by gathering historical data on various immigration enforcement measures including county and state level 287(g) agreements, county participation in Secure Communities (SC), state level omnibus immigration laws, and state level employment verification (E-verify) mandates.

**Methodology:** To assess if the adoption of sanctuary practices hinders ICE’s ability to remove convicted criminals and, in turn, results in less safe communities, we start by estimating the following benchmark model specification:

$$(1) \quad Y_{ct} = \alpha + \beta SP_{ct} + X_{ct}\gamma + \delta_c + \theta_t + \varepsilon_{ct}$$

where  $Y_{ct}$  is either the share of detainers ending in ICE custody when assessing if sanctuary policies interfere with ICE operations; whereas  $Y_{ct}$  stands for the share of detainers ending in any type of criminal conviction and, in particular, criminal convictions when addressing county safety.

<sup>13</sup> Please see <http://trac.syr.edu/aboutTRACgeneral.html> for detailed information on data collection process by TRAC for details.

In all instances, our key regressor is  $SP_{ct}$  taking the value of 1 if county  $c$  had a sanctuary policy in place in year  $t$ . The vector  $X_{ct}$  includes the county's rate of convictions, its immigration enforcement, and the county level controls specified in the Data section.<sup>14</sup> Finally, equation (1) includes county and year fixed-effects ( $\delta_c, \theta_t$ ) addressing time-invariant county-level traits, such as traditionally lower crime rates or years of economic downturns, respectively. We estimate equation (1) by ordinary least squares. Standard errors are clustered at the county level. A number of identification and robustness checks aimed at gauging the lack of pre-existing differential trends across counties with and without sanctuary policies, as well as the overall robustness of our findings, are conducted.

**Policy Relevance and Conclusions:** In March 2017, ICE published the “Declined Detainer Outcome Report” (DDOR), which listed counties that refused to honor detainer requests made by ICE and warned that counties failing to comply with ICE would lose federal funding. Learning whether sanctuary practices are interfering with ICE's ability to pick up individuals for whom a detainer was sent and, in turn, sheltering a larger share of criminals is essential in justifying any withholding of federal funding. Furthermore, it is also important in justifying the use of detainees which may trespass civil liberties in the absence of a criminal conviction.

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<sup>14</sup> In alternative model specifications, in order to address any potential endogeneity concerns, we include these county-level traits as measured at the beginning of the sample period and interacted with a time trend to allow for their temporal variation.