Institute for
Constitutional Advocacy and Protection
GEORGETOWN LAW

Fact Sheet on State and Local Cooperation with Federal Immigration Enforcement

What cooperation with federal immigration authorities is required by law?

- The Supreme Court has held that because federal immigration law is "the supreme law of the land" and creates "a comprehensive and unified system" for immigration enforcement, federal law preempts states from enforcing their own immigration policy. *Arizona v. United States*, 567 U.S. 387, 399, 401, 408 (2012).
- To maintain federal supremacy while preserving the police powers reserved to the states by the Tenth Amendment against commandeering by the federal government, the Immigration and Naturalization Act (INA) provides for ***voluntary cooperation*** by state and local officials with federal immigration enforcement efforts in limited circumstances and under the direction of the Department of Homeland Security (DHS).
- Under the INA, state and local officials ***may, but are not required to***, communicate with DHS about the immigration status of any person, including whether a person is not lawfully present in the United States. 8 U.S.C. § 1357(g)(10)(A).
- Also under the INA, state and local officials ***may, but are not required to,*** "otherwise cooperate" with DHS "in the identification, apprehension, detention, or removal" of people not lawfully present in the United States. 8 U.S.C. § 1357(g)(10)(B). Cooperation, against the backdrop of federal supremacy, refers to rendering assistance to DHS officers within any parameters set by DHS and under DHS's control and supervision at all times.
- Beyond the communication and cooperation referred to above, state and local officials ***may not*** peform the functions of federal immigration officers absent a written agreement between the state or local government entity and DHS. The most common of these is known as a § 287(g) agreement. 8 U.S.C. § 1357(g)(1). Under a § 287(g) agreement, if certified after training in the enforcement of federal immigration laws, state and local officials may perform certain functions of federal immigration officers, as designated by DHS and under the direction and supervision of DHS. 8 U.S.C. § 1357(g)(2), (3), (5).
    - The performance of immigration enforcement activities by state and local officials is also authorized under 8 U.S.C. § 1103(a)(10), which can be triggered by a declaration that there is a "mass influx of aliens."[1] Such enforcement activities can only be performed with the consent of the state or local government entity and pursuant to a written agreement with DHS that requires training in applicable immigration law enforcement standards and procedures and civil rights law, among other things. 28 C.F.R. § 65.84(a)(3)(vii).
- Federal law makes it clear that state and local governments ***may, but are not required to,*** enter into written agreements with DHS. 8 U.S.C. §§ 1103(a)(10), 1357(g)(9).

[1] On January 23, 2025, Acting Secretary of Homeland Security Benjamin C. Huffman issued a "Finding of Mass Influx of Aliens," consistent with President Donald Trump's Executve Order "Guaranteeing the States Protection Against Invasion." Department of Homeland Security, *Finding of Mass Influx of Aliens* (Jan. 23, 2025), available at https://www.dhs.gov/sites/default/files/2025-01/25_0123_finding-of-mass-influx-of-aliens.pdf.

Does federal law prohibit any restrictions on cooperation with federal immigration authorities?

- Yes. Federal law makes it a crime for a federal, state, or local government entity or official to "prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, [DHS)] information regarding the citizenship or immigration status, lawful or unlawful, of any individual." 8 U.S.C. § 1373(a).
- Federal law also makes it a crime to prohibit or restrict:
    - Sending information regarding the immigration status of any person to DHS, or requesting or receiving such information from DHS;
    - Maintaining such information; or
    - Exchanging such information with any other federal, state, or local government entity. 8 U.S.C. § 1373(b).
- Although state and local jurisdictions cannot prohibit the sharing of information in their possession of "the citizenship or immigration status" of people they encounter, federal law ***does not require*** state and local officials to ask about about the citizenship or immigration status of those they encounter. Indeed, DHS Guidance issued in 2015 states that § 1373 does not provide a state or local officer with authority to investigate an individual's immigration status in order to communicate it to DHS.[2]
- Information "regarding the citizenship or immigration status, lawful or unlawful, of any individual" has been interpreted to apply solely to citizenship and immigration status, and not to any and all information that might be useful to federal immigration officials, such as the release date of those in state or local detention.[3]

Does federal law require state and local officials to detain people pursuant to civil immigration detainer warrants?

- No. Courts have held that, under the Tenth Amendment, federal immigration officials may not compel state and local officials to imprison people suspected of being unlawfully present and subject to removal in the United States.[4]
- In addition, courts have held that when a person is detained on an immigration warrant after the reason for the initial detention ends, the detention is treated as a new seizure for Fourth Amendment purposes.[5] Under the Fourth Amendment, detention by a state or local law enforcement officer must be based on probable cause that a crime has been committed, as found by a neutral and detached judge or magistrate.[6] Immigration warrants are based on probable cause that the person is removable—not probable cause of a crime—and are signed by an Immigration and Customs Enforcement agent, not a neutral and detached judge or magistrate.

This Fact Sheet has been prepared by the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown University Law Center. Visit us at https://www.law.georgetown.edu/icap/. Contact us at reachICAP@georgetown.edu.

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[2] *See* Department of Homeland Security, *Guidance on State and Local Governments' Assistance in Immigraiton Enforcement and Related Matters* (July 16, 2015), available at https://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf.

[3] *See, e.g., United States v. California*, 921 F.3d 865, 891 (9th Cir. 2019), *cert. denied,* 141 S.Ct. 124 (2020) ("[T]he phrase 'information regarding the citizenship or immigration status, lawful or unlawful, of any individual' is naturally understood as a reference to a person's legal classification under federal law.")

[4] *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634, 636 (3rd Cir. 2014) (interpreting immigration detainer as a request to detain, and not a mandate, to avoid commandeering concerns).

[5] *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (9th Cir. 2020).

[6] *See, e.g., Meledres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012); *Lopez-Flores v. Douglas County*, No. 6:19-CV-00904-AA, LEXIS 94847, 2020 WL 2820143, at *6 (D. Or. May 30, 2020); *but see City of El Cenizo v. Texas*, 890 F.3d 164, 189-90 (5th Cir. 2018) (rejecting Fourth Amendment facial challenge to state law that required compliance with immigration detainers even in the absence of probable cause of criminality).