



Despite political talking points, experts agree it's not unlawful for sheriffs to serve ICE detainees

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Legal and constitutional experts agree: ICE detainees are constitutionally permitted instruments to enforce immigration law, and local police can lawfully honor them.

But they must be executed voluntarily if there is not a state law requiring local law enforcement to cooperate with federal immigration officials.

Some disagreement remains about the constitutional particulars among different federal courts. And the experts interviewed for this story concur that there is plenty of confusion about arrest warrants and detainees. A warrant is issued for criminal activity, and a detainer is specifically for an immigration violation that could lead to removal from the country.

The issue has been a sizzler in North Carolina. The General Assembly passed **House Bill 370** requiring sheriffs' departments to honor ICE detainees. Noncompliance could be punished by a sheriff's removal from office.

A few sheriffs in urban jurisdictions said they would not serve the detainees, and Gov. Roy Cooper vetoed the bill, calling it unconstitutional.

"This legislation is simply about scoring partisan political points and using fear to divide North Carolina," Cooper said in his veto message. If implemented, the bill would weaken law enforcement "by mandating sheriffs to do the job of federal agents, using local resources that could hurt their ability to protect their counties," Cooper said.

"We support the bill high-priority, and we do regret the governor's veto," said Eddie Caldwell, N.C. Sheriffs' Association executive vice president and general counsel. He acknowledged some association members oppose H.B. 370.

Each sheriff is a constitutionally elected officer with individual opinions, he said, "and we certainly respect that."

Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute, said detainees are unquestionably constitutional.

However, he said, no arm of the federal government can force state officials to cooperate on serving them because state and federal governments are dual sovereigns with separate sources of power. The same principle surfaced in states that legalized marijuana refusing to carry out federal laws against the drug.

“If the state takes no position and gives no instruction to local law enforcement about whether to cooperate or not to cooperate then it’s whatever the local sheriff or police chief sets policy for the department,” Shapiro said. Those decisions can be political.

But states can pass laws that trump local decisions because local governments are creations of the state, and are subject to state rules and laws. Ultimately a sheriff must follow state law unless there is a federal constitutional defect, which is not the case with ICE detainers and H.B. 370, Shapiro said.

“On these sorts of hot-button political issues people go to extremes on both sides,” said Shawn Fields, who teaches immigration law at Campbell University School of Law.

“On one extreme people will say these ICE detainers are illegal altogether. I just want to emphasize that’s not true,” Fields said. “It’s just the way that they are applied pose real constitutional problems.”

The chief concern is violations of the Fourth Amendment, which requires probable cause to make a criminal arrest, Fields said.

ICE detainers are also subject to the Fourth Amendment. They can run afoul of its requirements because they ask local law enforcement officials to keep a subject in custody for up to 48 hours beyond the time they would otherwise be released, Fields said. That could stretch out even longer because weekends are not figured into the 48 hours.

“The Constitution and Supreme Court case law clearly says this new seizure has to be justified by probable cause under the Fourth Amendment,” Fields said.

Caldwell said in November 2018 the N.C. Court of Appeals ruled in *Chavez v. Carmichael* that honoring an ICE detainer is lawful under existing state law. He thinks the most current version of H.B. 370 also is constitutional. It requires that a person subject to a detainer be taken before a judicial official without unnecessary delay, and the judicial official must order the subject to be held in custody.

Fields contends probable cause is nuanced. It requires that the person be a noncitizen, and subject to removal at the time the detainer is issued due to a criminal conviction.

“That’s one major constitutional problem with these ICE detainers, is it presumes a lot of the time that someone’s been convicted of an offense when they’ve only been arrested,” Fields said. Another problem is a 2012 Supreme Court ruling in *Arizona v. United States* that said it is not unlawful for an undocumented immigrant subject to removal to remain in the country. That is a civil matter.

“So law enforcement can’t just pick people up on immigration violations and hold them for ICE detainers,” Fields said.

Conversely, he said, many undocumented noncitizens arrested by law enforcement for some independent criminal activity may have a history of aggravated felony convictions, for example, “and they clearly are subject to removal at that time.”

John Dinan, a politics professor at Wake Forest University whose research focuses on constitutional law, said some federal district court rulings have lent support to lawsuits advancing the claim that it is unconstitutional on 4th and 14th Amendment grounds for local law enforcement officers to honor ICE detainees.

But U.S. Senior District Judge Glen Conrad reached a **different conclusion** in an opinion released July 15 in a Virginia case. Virginia, like North Carolina, is covered by the Fourth U.S. Circuit Court of Appeals.

Conrad concluded that neither the Fourth Circuit nor any other Circuit Court has determined that it would violate the U.S. Constitution for local officials to honor ICE detainees and administrative warrants, Dinan said.

“In fact, in a ruling issued last year concerning a Texas law that is similar to the North Carolina bill in that it requires law enforcement officials to honor ICE detainees, the Fifth Circuit Court **determined** that the Texas law did not violate the U.S. Constitution, and could be implemented,” Dinan said. “The U.S. Supreme Court has not issued any opinion to the contrary.”