Legal Sidebar

May States and Localities Hold Aliens Pursuant to Immigration Detainers?

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As previous Sidebar postings have noted, there have long been questions as to whether states and localities *must* comply with immigration detainers issued by U.S. Immigration and Customs Enforcement (ICE) requesting that they briefly detain persons whom they would otherwise release from their custody so that ICE may assume custody. However, in the wake of recent court decisions, that question would seem to have been replaced by a new question: *may* states and localities hold persons whom they would otherwise release from their custody upon receiving an immigration detainer from ICE asking them to do so?

The preliminary answer—based upon two recent federal district court decisions—would seem to be that states and localities run afoul of the Fourth Amendment if they hold an alien whom they would otherwise have released so that ICE may investigate whether the alien is removable. However, these decisions do not purport to address all uses of immigration detainers, and courts in other jurisdictions, or on appeal, could potentially reach alternate conclusions, perhaps based upon provisions of federal law that authorize ICE to make warrantless arrests under certain circumstances of aliens believed to be unlawfully present.

Immigration Detainers

An "immigration detainer" is a document by which ICE advises other law enforcement agencies of its interest in individual aliens whom these agencies are detaining. Immigration detainers are probably best known for their role in allowing ICE to request that other law enforcement agencies maintain custody of aliens for up to 48 hours (excluding weekends and holidays) after they would otherwise be released so that ICE may assume custody. However, the standard detainer form can also be used by ICE to request that the state or local agency:

- provide a copy of the detainer to the alien;
- notify ICE at least 30 days (when possible) before the alien's release;
- notify ICE of the alien's death, hospitalization, or transfer to another institution;
- consider the request for a detainer operative only upon the alien's conviction; and
- cancel a previously placed detainer.

The standard detainer form can also be used to inform the state or local agency of specific ICE actions as to the alien. In the current version of the standard detainer form, these actions include: (1) determining that there is reason to believe the alien is subject to removal; (2) initiating removal proceedings and serving a Notice to Appeal (NTA) or other charging document; (3) serving a warrant of arrest for removal proceedings; and (4) obtaining an order of deportation or removal for the alien.

Earlier versions of the standard detainer form also permitted ICE to inform other agencies that ICE had initiated an investigation to determine whether the alien is removable from the United States. The recent district court cases both involved detainers where ICE indicated that it had initiated an investigation into the alien's removability and requested that the alien be held until ICE assumed custody; and the courts' holdings could potentially be seen as limited to such uses of detainers, as noted below.

Third Circuit: No Requirement to Comply

Previously, there had been some question as to whether states and localities are required to honor immigration detainers. The view that states and localities *must* honor immigration detainers was based on language on prior versions of the detainer form and in federal regulations, which state that, upon receiving an immigration detainer, a state or locality "shall maintain custody of the alien" for a period of time so that ICE can assume custody. However, in its March 2014 decision in *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit found that federal regulations do not require states and localities to hold aliens at ICE's request, and that construing the regulations as doing so would raise constitutional issues because the federal government could be seen as "commandeering" state and local resources in violation of the Tenth Amendment. No other court of appeals has addressed whether immigration detainers are mandatory, but the Third Circuit's decision is arguably consistent with Supreme Court precedents as to commandeering, at least.

Recent District Court Decisions: Voluntary Compliance Could Violate the Fourth Amendment

Two other decisions—one issued shortly before *Galarza* and the other after *Galarza* —raise different questions by finding actual or potential violations of the Fourth Amendment when aliens were held pursuant to an immigration detainer after they would have otherwise been released. The Fourth Amendment prohibits "unreasonable" searches and seizures, and warrantless seizures are generally seen as "per se unreasonable…[,] subject only to a few specifically established and well-delineated exceptions" (e.g., a law enforcement officer has probable cause to believe the person arrested has committed a felony).

In the more recent of these two decisions, *Miranda-Olivares v. Clackamas County*, the U.S. District Court for the District of Oregon found that the county had violated the plaintiff's Fourth Amendment rights by denying her release on bail for which she otherwise qualified, and by holding her an additional day after her release from state charges. Both parties agreed that the county's policy was to detain aliens whom ICE requested to be held, even if the alien posted bail. It did so regardless of whether the detainer was accompanied by an arrest warrant, a statement of probable cause, or a deportation order.

The court found that this policy, as applied in the plaintiff's case, resulted in an unreasonable seizure, because the county had no probable cause to hold the alien so that ICE could investigate her removability. In so finding, the *Miranda-Olivares* court emphasized that a hold pursuant to a detainer is not a continuation of the initial arrest, but rather constitutes a new seizure and, thus, requires its own finding of probable cause, separate and apart from the finding of probable cause underlying the initial arrest. In particular, the court likened such holds pursuant to detainers to impermissible "investigative delays"—as opposed to potentially permissible "administrative delays"—in releasing a person from custody.

Previously, in its decision in *Morales v. Chadbourne*, the U.S. District Court for the District of Rhode Island had similarly found that the plaintiff's Fourth Amendment claim was sufficient to withstand a motion to dismiss. The court did so on the grounds that probable cause for holding the plaintiff (who was, in fact, a naturalized citizen) was clearly lacking because the detainer indicated that ICE was requesting the hold to investigate the plaintiff's removability. As the court noted, "[t]he fact an investigation had been initiated is not enough to establish probable cause because the Fourth Amendment does not permit seizures for mere investigations."

Implications of the Recent District Court Decisions

Taken together, these two decisions suggest that, even if states and localities are willing to hold aliens at ICE's request, they could run afoul of the Fourth Amendment by doing so, at least if the hold is based on an ongoing investigation of the alien's removability. It is unclear, however, that the courts' reasoning would necessarily be extended to find holds pursuant to detainers to be impermissible when there is an arrest warrant or an order of removal or deportation, for example. The courts also do not appear to have considered certain arguments that could potentially be made that the ability of states and localities to hold aliens pursuant to immigration detainers in some way derives from the federal government's authority to make warrantless arrests of aliens in certain circumstances. Specifically, Section 287(a)(2) of the Immigration and Nationality Act authorizes immigration officers to make warrantless arrests when there is probable cause to believe an alien is present in violation of federal immigration law and is likely to escape

before a warrant can be obtained. The then-Immigration and Naturalization Service (INS), at least, took the view that holds pursuant to detainers are authorized by Section 287(a)(2).

Further developments as to immigration detainers will be tracked in CRS's report on this topic.

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