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Legal Sidebar

Immigration Detainers: Background and Recent Legal Developments

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The Department of Homeland Security (DHS) has broad authority to detain non-U.S. nationals (aliens) who are subject to removal. Within DHS, Immigration and Customs Enforcement (ICE) is primarily responsible for the arrest, detention, and removal of aliens found in the interior of the United States. If an alien whom ICE believes to be removable is in custody by state or local law enforcement officers (LEOs), ICE may take custody of the alien through an "immigration detainer." Under current ICE policy, a detainer requests that state or local LEOs hold an alien in their custody for up to 48 hours after the alien would otherwise be released to facilitate the alien's removal. Recently, a federal district court in *Gerardo Gonzalez v. ICE* ruled that ICE's use of detainers violates the Fourth Amendment's protections against unreasonable searches and seizures to the extent the agency (1) relies entirely on "deficient" federal databases to determine whether an individual in criminal custody is subject to removal and (2) issues detainers to states that do not expressly authorize LEOs to make civil immigration arrests. The district court indicated that the court shall issue an injunction to limit these practices, but is presently considering arguments regarding the injunction's appropriate scope. The injunction could fundamentally restrict ICE's ability to issue detainers to state and local LEOs nationwide, with significant consequences for the agency's efforts to remove aliens who are in state and local criminal custody.

Background on Detainers

Detainers are considered a key tool for immigration authorities to take custody of aliens who have been arrested by state and local LEOs for violations of criminal law. The practice of issuing detainers dates back to at least the 1950s. In 1986, Congress enacted the Anti-Drug Abuse Act, which specifically authorized the use of detainers for aliens who were arrested for violating controlled substance laws, but has not been construed as displacing the generally applicable detainer scheme. Regulations concerning detainers generally and those specific to aliens arrested for drug offenses were eventually merged and codified at 8 C.F.R. § 287.7, which now provides:

> Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the

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> Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

The regulation further instructs that, upon issuance of a detainer, the LEO "shall maintain custody of the alien for a period not to exceed 48 hours" beyond the time when the alien would have otherwise been released (excluding Saturdays, Sundays, and holidays) pending transfer of custody to ICE.

Despite the regulation's instruction that the LEO "shall maintain custody" of the alien, reviewing courts have construed the regulation as being permissive, rather than mandatory. As a result, LEOs *may* (but need not) notify ICE of an alien's release date and hold the alien pending transfer to immigration authorities. Some states and local jurisdictions have restricted compliance with detainers, while others have mandated compliance. In any case, ICE generally issues detainers regardless of whether the state or local LEOs comply with the detainer request.

ICE's detainer practice has changed several times in recent years. In 2008, the Bush Administration implemented the Secure Communities program. Under the program, which used various federal databases to identify aliens in state or local LEO custody for possible removal, ICE would frequently issue detainers to state or local authorities, requesting that they notify ICE about an identified alien's scheduled release date and potentially hold the alien beyond that date so that ICE could obtain custody. But the Obama Administration replaced Secure Communities with the Priority Enforcement Program (PEP) in 2014. While similarly relying on federal databases to identify aliens in state or local LEO custody for removal, PEP differed from Secure Communities in authorizing detainers only for aliens convicted of (not just arrested for) specifically enumerated crimes. These detainers also generally only requested *notification* about an alien's release from state or local custody. State and local LEOs were asked to hold an alien beyond the scheduled release date only in certain circumstances (e.g., when the alien was subject to a final order of removal or there were pending removal proceedings). In 2017, however, the Trump Administration restored the Secure Communities program.

Under ICE's current detainer guidelines, immigration officers "must establish probable cause to believe that the subject is an alien who is removable from the United States before issuing a detainer." The probable cause must be based on (1) the existence of a final order of removal against the alien; (2) the pendency of removal proceedings against the alien; (3) biometric confirmation of the alien's identity and a records match in federal databases indicating that the alien is subject to removal; or (4) the alien's voluntary statements and other reliable evidence showing that the alien is removable. Additionally, the detainer must come with either an administrative arrest warrant or a warrant of removal (if the alien has been ordered removed) signed by an authorized immigration officer.

ICE's detainer policy depends, in significant part, upon information submitted by state and local LEOs to federal authorities about persons whom they arrest. Generally, when state and local LEOs arrest an individual, they fingerprint that person and submit the fingerprints to the FBI. Under Secure Communities, the FBI sends the fingerprints to ICE, which, in turn, runs the fingerprints through multiple federal databases to determine whether the arrested individual is an alien subject to removal. These databases include, for example, the Central Index System (CIS), which provides information about the status of applicants seeking immigration and non-immigration benefits; the Automated Biometric Identification System (IDENT), which maintains biometric and biographic information based on an individual's previous encounters with law enforcement and immigration officers; and the Arrival and Departure Information System (ADIS), which provides arrival and departure information for non-immigrant visitors. Along with the database information, ICE may rely on the alien's statements or other evidence of removability. But the vast majority of ICE detainers are based entirely on electronic database checks.

The Pacific Enforcement Response Center (PERC), located in the Central District of California, is one of the main ICE facilities that issues detainers. The PERC issues detainers 24 hours a day for aliens in

criminal custody within the Central District of California (e.g., Los Angeles) and after-hours for aliens in criminal custody in 42 states nationwide and two U.S. territories. The PERC relies on database searches to issue detainers and does not conduct any other investigation (e.g., interviews) on an alien's removability.

Procedural History in *Gerardo Gonzalez v. ICE*

The case of *Gerardo Gonzalez v. ICE* arose following the arrest of a native-born U.S. citizen (Gonzalez) for a drug offense by Los Angeles police. According to Gonzalez, the Los Angeles authorities mistakenly indicated on his "booking record" that he was born in Mexico. Shortly afterwards, ICE conducted a database inquiry that returned no information about Gonzalez's citizenship or immigration status. Believing that Gonzalez was an alien subject to removal, ICE issued a detainer requesting that Los Angeles authorities hold Gonzalez pending his transfer to ICE custody.

Gonzalez claimed that the ICE detainer prevented him from securing his release on bail pending the outcome of his criminal case. He filed a class action lawsuit in the U.S. District Court for the Central District of California on behalf of any individual subject to an ICE detainer issued in the Central District of California, where the detainer (1) was not based on a final order of removal or the pendency of removal proceedings and (2) was issued solely based on electronic database checks. (Joining the lawsuit was another U.S. citizen who alleged that he was unlawfully held under an ICE detainer after pleading no contest to several criminal charges and being ordered released to undergo drug rehabilitation treatment.)

Gonzalez argued, as relevant, that ICE's practice of issuing detainers violated the Fourth Amendment's protections against unreasonable searches and seizures. He contended that ICE "routinely" lacked probable cause that an individual held under a detainer was subject to removal, and that the agency's actions led to the extended detention of those who would have otherwise been released from criminal custody. In particular, Gonzalez claimed that ICE relied on databases that contained incomplete or inaccurate information about a person's immigration status, resulting in the mistaken issuance of detainers against U.S. citizens.

The Federal District Court's Decision

On September 27, 2019, a U.S. District Court Judge in the Central District of California issued a decision ruling that ICE's practice of issuing detainers violates the Fourth Amendment. Noting that the Fourth Amendment's protections apply to immigration-related arrests, the court determined that "the initial process ICE officials utilize to make arrests and issue detainers must be sufficiently supported by lawful authority and probable cause" to withstand judicial scrutiny. In deciding whether ICE's use of detainers violated the Fourth Amendment, the court considered two issues: (1) whether the federal databases that ICE relies on to issue detainers are "reliable sources of information" to establish probable cause that an alien is subject to removal; and (2) whether state and local LEOs have the legal authority to make civil immigration arrests.

Reliance on Federal Databases to Issue Detainers

The court first addressed whether ICE's reliance on federal databases to issue detainers violates the Fourth Amendment. The court recognized that "[l]aw enforcement agencies may rely on computer databases to establish probable cause if it is reasonable for them to do so." The court, however, concluded that the databases relied on by ICE fail to establish probable cause of an alien's removability because they (1) provide "static, often outdated, information about dynamic facts"; (2) are "incomplete, often missing crucial pieces of information otherwise necessary for making probable cause determinations"; and (3) were "never intended to be used to make probable cause determinations in the immigration context."

The court determined that the databases relied upon by ICE to make detainer requests are "often static and outdated" because they do not necessarily show a person's immigration status at the time a detainer is issued. Instead, they "reflect a person's immigration status at a particular point in time, but fail to reliably show how or whether that status has changed over time." The court observed, for instance, that the CIS, DHS's "central database" for storing information about the status of applicants seeking immigration and non-immigration benefits, is not timely updated—and provides no information about whether an alien obtained U.S. citizenship. According to the court, "[t]he other databases on which ICE relies suffer similar flaws." Thus, the court concluded, "many U.S. citizens become exposed to possible false arrest when ICE relies solely on deficient databases."

The court also determined that the databases are "incomplete" and contain information that "is largely erroneous and fails to capture certain complexities and nuances of immigration law." The court noted, for example, that the ADIS database does not fully record aliens' entries to and from the United States or their periods of authorized stay in the country. Thus, in the court's view, the databases do not accurately reflect whether an alien had lawfully entered the United States or had overstayed a nonimmigrant visa. In addition, according to the court, "a number of immigration and citizenship statuses are either not captured, or captured on databases with dubious reliability." The court also observed that data entered into the systems is "often erroneous," with misspelled names, incorrect nationality, or misclassification of an alien's status, and that the information is unverified.

Finally, the court concluded that the databases are unreliable because they were not intended to establish probable cause of an alien's removability or address the "complexities" of immigration law.

In short, the court declared that "ICE violates the Fourth Amendment by relying on an unreliable set of databases to make probable cause determinations for its detainers."

State Authority to Make Civil Immigration Arrests

The court also considered whether state and local LEOs have the authority to make civil immigration arrests. Previously, the court had determined that the continued detention of an individual otherwise eligible for release from state or local custody pending that individual's transfer to ICE custody constitutes a "new arrest" for purposes of the Fourth Amendment. The court had ruled that such an arrest was lawful only if the state and local LEOs had probable cause that the detained individual committed a criminal offense. The court had observed, however, that the detention of aliens under a detainer was premised on the enforcement of civil immigration laws rather than criminal laws. In its September 27, 2019 decision, the court recognized that state and local LEOs generally lack authority to make civil immigration arrests, a function typically delegated exclusively to federal immigration officers. Thus, the court reasoned, the Fourth Amendment bars state and local LEOs from holding an alien under a detainer unless state law expressly authorizes them to make civil immigration arrests. The court noted, for example, that state and local governments may enter into written agreements with ICE that would enable state and local LEOs to perform immigration enforcement functions when such functions adhere to state and local law. Even so, the court determined, "a detainer itself does not provide the legal authority for a state or local officer to make a civil immigration arrest." Thus, the court held that ICE violates the Fourth Amendment if the agency issues detainers to state and local LEOs in states that do not expressly authorize civil immigration arrests under state law.

The Court's Order

The court stated that it "shall issue" a permanent injunction barring ICE from issuing detainers from its offices within the Central District of California that are (1) based on information obtained solely from electronic databases "that lack sufficient indicia of reliability for a probable cause determination for removal"; and (2) issued to states that lack laws authorizing LEOs to make civil immigration arrests. The

court has not yet issued the permanent injunction, but the parties are litigating the precise scope of the injunction. For instance, the parties are disputing whether the injunction would apply to detainers that come with an administrative arrest warrant, which the government contends would provide state and local LEOs with the "requisite legal authority" to make civil immigration arrests; and whether the injunction would bar the use of databases "in perpetuity," even if ICE corrects the deficiencies found in the databases that cast doubt on the reliability of those databases.

Impact of the Federal Court's Decision

The forthcoming injunction in *Gerardo Gonzalez v. ICE* will restrict ICE's ability to issue detainers for aliens in state and local criminal custody, but judicial restrictions on the use of detainers are not unprecedented. Other lower courts have struck down the use of detainers that request state and local LEOs to hold an alien beyond a scheduled release date, concluding that the LEOs must have probable cause of a criminal offense to detain aliens lawfully under the Fourth Amendment, or that they lack statutory authority under their state laws to detain aliens for civil immigration violations. That said, while these other court decisions restrict ICE's ability to issue detainers in certain jurisdictions, *Gerardo Gonzalez* is noteworthy because of the injunction's potential scope and nationwide impact.

At a minimum, it appears that the *Gerardo Gonzalez* injunction will apply to detainers issued by ICE offices within the Central District of California, where the PERC—one of the main ICE facilities that issues detainers—is located. That facility issues detainers not only for aliens held in criminal custody within that region, but also for aliens in criminal custody in 42 states nationwide and two U.S. territories.

Additionally, based on the court's initial decision, it seems likely that its injunction will bar ICE from issuing detainers based solely on information from federal databases—at least those that rely on information lacking "sufficient indicia of reliability." This is significant because the vast majority of ICE detainers are predicated on electronic database checks. In *Gerardo Gonzalez*, the court found that PERC agents relied on electronic database searches and performed no other investigative measures to determine whether an individual was subject to removal. Thus, because ICE relies heavily—and sometimes exclusively—on database checks to issue detainers, the court's restrictions on the agency's use of databases could substantially undercut ICE's ability to identify aliens in state and local custody who are subject to removal.

Along with the restrictions on the use of databases, the court's injunction could bar ICE from issuing detainers to states with no state law authorizing civil immigration arrests. Given that many states do not authorize state or local LEOs to conduct civil immigration arrests (or otherwise cooperate with immigration authorities), the injunction could limit the issuance of detainers to only a handful of states and localities (e.g., those that require compliance with detainers or authorize written agreements with federal immigration authorities). But the government contends that the issuance of an administrative arrest warrant provides the "requisite legal authority" for state and local LEOs to conduct civil immigration arrests. Accordingly, the government has proposed that the injunction should bar issuance of detainers to states whose laws do not authorize civil immigration arrests *only* when the detainers do not come with administrative arrest warrants.

While the scope of the *Gerardo Gonzalez* injunction could potentially be fairly broad, the court's order would not entirely end ICE's ability to issue detainers. First, the injunction will likely apply only to ICE detainers issued out of the Central District of California and therefore not affect detainers issued from other regions of the United States. Second, the injunction will likely bar detainers based *solely* on information obtained from federal databases without restricting the use of other evidence of removability (e.g., final order of removal, pendency of removal proceedings, statements made by alien). The injunction, in any case, might not preclude the use of databases that cure the structural flaws that led the court to conclude that they are unreliable. And third, while the court's injunction might bar ICE from

issuing detainers to states that do not expressly authorize civil immigration arrests, the ruling will likely only cover detainers issued out of the Central District of California.

Yet because the injunction will apply to entities in the Central District including PERC, which issues many detainer requests throughout the United States and relies on databases to determine an alien's removability, the court's injunction could significantly alter ICE's detainer policy. According to ICE, about 70% of its arrests occur after notification of an alien's impending release from criminal custody. In FY2019 alone, ICE issued more than 160,000 detainers. It contends that obtaining custody of criminal aliens "help[s] ensure that aliens who may pose a threat to our communities are not released onto the streets to potentially reoffend and harm individuals living within our communities." Thus, ICE argues that the court's limitations on its use of detainers "threatens public safety." Immigration advocacy groups, on the other hand, argue that ICE's use of detainers has subjected both U.S. citizens and non-U.S. citizens to "needless unconstitutional arrests at the mere click of a button," and that restrictions on the use of detainers are thus warranted.

Legislative Proposals

In the 116th Congress, bills have been introduced to clarify ICE's detainer authority. For example, the No Sanctuary for Criminals Act of 2019 (H.R.1928) would codify ICE's detainer policy and allow detainers if there is probable cause that an alien is subject to removal. Probable cause would be established if "the individual who is the subject of the detainer matches, pursuant to biometric confirmation or other Federal database records, the identity of an alien who the [DHS] Secretary has reasonable grounds to believe to be inadmissible or deportable." The bill would also permit state and local LEOs to hold an alien for up to 96 hours pending transfer to ICE. Another bill, the Immigration Detainer Enforcement Act of 2019 (H.R.4948, S.2739), would authorize state and local LEOs to hold aliens for up to 48 hours upon issuance of a detainer. On the other hand, the PROTECT Immigration Act (H.R.2729, S.1440) would clarify that only *DHS* has the authority over immigration enforcement, and the bill would bar state and local LEOs from entering into written agreements with ICE that would allow them to arrest or detain an individual subject to removal. This legislation could preclude state and local LEOs from holding aliens under detainers much of the time. As courts continue to address legal challenges to ICE detainers, Congress may consider similar legislative proposals that would clarify the scope and limitations of that authority.

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