



Immigration Detainers: Background and Recent Legal Developments

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The Department of Homeland Security (DHS) has [authority](#) to detain non-U.S. nationals (aliens) who are subject to removal. Within DHS, [Immigration and Customs Enforcement \(ICE\)](#) is mainly 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 a “[detainer](#).” 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. ICE’s practice of issuing detainers has been subject to legal challenge, including on the ground that the continued detention of an alien pending transfer to ICE custody violates the Fourth Amendment’s [protections against unreasonable searches and seizures](#). Relying on the Fourth Amendment, a federal district court in *Gerardo Gonzalez v. ICE* had [enjoined ICE](#) from issuing detainers that are (1) based solely on information obtained from federal databases concerning an alien’s potential removability, and (2) issued to states that do not authorize LEOs to make civil immigration arrests. However, the U.S. Court of Appeals for the Ninth Circuit [reversed and vacated](#) the court’s injunction, effectively permitting ICE to continue its detainer policy pending the outcome of the litigation, but also requiring the agency to provide aliens subject to a detainer with a “prompt probable cause determination” of their removability. The upshot is that while ICE may continue to issue detainers, it must establish the alien’s removability at a hearing before an immigration judge to justify the alien’s continued detention. This Legal Sidebar examines ICE detainers and the litigation in *Gerardo Gonzalez*.

Background on Detainers

Detainers are considered a key tool for immigration authorities to take custody of aliens arrested by state and local LEOs for violating criminal law. 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.

The practice of issuing detainers dates 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

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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 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 no matter if 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 often 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 showing 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 largely 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 legacy [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 that is in the process of being

replaced by the new [Homeland Advanced Recognition Technology System \(HART\)](#); 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 most ICE detainees are based on electronic database checks.

The [Pacific Enforcement Response Center \(PERC\)](#), in the [Central District of California](#), is one of the [main ICE facilities](#) that issues detainees. The PERC issues detainees 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 detainees and conducts no 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. 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 detainer prevented him from getting released 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 individuals 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.

Gonzalez [argued](#), as relevant, that ICE's practice of issuing detainees 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 containing incomplete or inaccurate information about a person's immigration status, leading to the mistaken issuance of detainees against U.S. citizens. Further, he [argued](#) that ICE should have provided a "probable cause determination" of his removability before a "neutral, judicial officer" within 48 hours of his detainer.

The Federal District Court's Decision

In 2019, a U.S. District Court Judge in the Central District of California [ruled](#) that ICE's practice of issuing detainees violates the Fourth Amendment. Noting that the Fourth Amendment's protections apply to immigration-related arrests, the court [held](#) that the databases relied on by ICE to issue detainees fail to establish probable cause of removability because they (1) provide "static, often outdated, information" about an alien's immigration status; (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 also [held](#) that the Fourth Amendment bars state and local LEOs from holding an alien under a detainer unless state law authorizes them to make civil immigration arrests. The court [reasoned](#) that the continued detention of an individual placed under an ICE detainer constitutes a "new arrest" under the Fourth Amendment, and that such arrest was [lawful only if](#) the state and local LEOs had authority to enforce civil immigration laws—a function [typically delegated exclusively](#) to federal immigration officers.

Yet in a separate order, the district court [rejected](#) Gonzalez's claim that ICE should have provided him with a "probable cause determination" at the time of his detainer. The court [ruled](#) that, while detained

individuals in criminal cases are entitled to probable cause hearings within 48 hours of a warrantless arrest, the Fourth Amendment does not require judicial review of ICE's probable cause determinations.

In 2020, the court issued 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 based on detainers.

The Ninth Circuit's Decision

The government appealed the federal district court's injunction to the Ninth Circuit. On September 11, 2020, the Ninth Circuit reversed and vacated the injunction and remanded the case for further proceedings.

The court held that the district court erred in concluding that ICE violates the Fourth Amendment by issuing detainers to state and local LEOs that lack authority to enforce federal immigration laws. The court noted that, in *Virginia v. Moore*, the Supreme Court held that state officers did not violate the Fourth Amendment by arresting an individual for driving with a suspended license and searching him pursuant to that arrest, even though the officers lacked authority under state law to conduct the arrest (as opposed to issuing a citation). In *Moore*, the Ninth Circuit observed, the Supreme Court held that the arrest and ensuing search were constitutionally permissible because the state officers had probable cause that the arrested individual had violated state law by driving with a suspended license. Citing *Moore*, the Ninth Circuit declared that "the constitutionality of a warrantless arrest under the Fourth Amendment does not depend on whether state law authorizes state or local officers to make the arrest, but on whether there is probable cause." Thus, the court held, the lack of state authorization to enforce federal immigration laws does not render an ICE detainer unconstitutional so long as there is probable cause for the detainer.

The Ninth Circuit held that the district court erroneously concluded that the databases ICE relied on to issue detainers failed to show probable cause of removability. The court explained that "the government may rely on a computer database to make a probable cause determination," so long as the database contains "reasonably trustworthy information." Here, the court determined, the district court made "sweeping, categorical conclusions" about the ICE databases' reliability based on its identification of errors in some databases, without assessing the reliability of all the databases or explaining why an evaluation of a particular database was unnecessary. The Ninth Circuit also ruled that the district court's conclusions about the databases' reliability were erroneously informed by the notion that a database is not reliable unless its purpose is to store information to provide probable cause of removability. Additionally, according to the Ninth Circuit, the district court failed to consider the extent to which any flaws in those databases has caused widespread, "systemic error" in the issuance of detainers.

The Ninth Circuit also considered the lower court's conclusion that detention of an alien under an ICE detainer does not require review by "an independent, neutral official" of the agency's removability determination. The Ninth Circuit held that the Supreme Court's holding in *Gerstein v. Pugh*, that the prolonged detention of an individual following a warrantless arrest for a crime requires prompt review by a "neutral and detached magistrate" of whether there is probable cause for the arrest, equally applies to civil immigration arrests (but the Ninth Circuit recognized that *Gerstein* did not necessarily require review by an Article III judge). The Ninth Circuit also determined that, while detentions at the border involve "a distinct set of considerations" that might affect the timing of a probable cause determination, those factors would not apply to the detention of aliens who are already in state or local custody within the United States. Thus, the Ninth Circuit concluded, detention under an ICE detainer normally requires "a prompt probable cause determination" of removability by "a sufficiently detached and neutral executive official" (e.g., an immigration judge) within 48 hours of the detention.

The Ninth Circuit thus [vacated](#) the district court's injunction limiting ICE's practice of issuing detainers, and directed the lower court to reconsider its conclusion that the databases ICE relies on to issue detainers fail to show probable cause. The court also [ordered](#) the district court to reconsider its conclusion that detention under an ICE detainer requires no independent review of the agency's probable cause determination of removability.

Impact of the Ninth Circuit's Decision on Detainers

The district court's injunction in *Gerardo Gonzalez v. ICE* would have restricted ICE's ability to issue detainers for aliens in state and local criminal custody. Given the injunction's application to detainers issued within the [Central District of California](#), where one of the [main ICE facilities](#) that issues detainers is located, the injunction could have limited ICE's ability to issue detainers throughout the United States. Additionally, the court's restrictions on the use of databases could have substantially undercut ICE's ability to identify aliens in state and local custody who are potentially subject to removal. And by barring the issuance of detainers to state and local LEOs who lack civil immigration arrest authority, the injunction could have limited the use of detainers to [only a handful of states and localities](#) (e.g., those requiring compliance with detainers or authorizing agreements with federal immigration authorities).

The Ninth Circuit, however, has [reversed and vacated](#) the injunction, effectively permitting ICE to continue its practice of issuing detainers pending the outcome of the litigation. Given the Ninth Circuit's decision, ICE may still rely on computer databases to identify aliens in criminal custody who are subject to removal, and the agency may issue detainers to state and local LEOs regardless of whether they have authority to enforce federal immigration laws. But on remand, the federal district court is to ultimately assess whether all of the ICE databases are sufficiently reliable, and the extent to which any flaws in those databases have led to erroneous detainer requests. Thus, the district court's findings could result in restrictions on ICE's detainer practices in the future.

Further, the Ninth Circuit held that the detention of an individual under an ICE detainer requires a prompt, probable cause of removability determination by an independent, neutral official—in the same way that warrantless criminal arrests require a probable cause determination by a neutral magistrate. While the Ninth Circuit has [directed](#) the district court consider the extent to which such review is required given that ICE detainers are now [accompanied by](#) administrative arrest warrants, the court's decision could impact ICE's ability to detain individuals believed to be subject to removal by requiring independent review of the agency's removability determination by an immigration judge.

Meanwhile, outside the Ninth Circuit, some courts [have restricted ICE's ability to issue detainers](#) to state and local LEOs, though these rulings are limited to covering detainers issued within those jurisdictions.

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. But 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. The New Way Forward Act (H.R. 5383) would similarly bar state and local LEOs from enforcing federal immigration laws; it would also require, when an alien is arrested without an administrative warrant, prompt hearings before an immigration judge to determine whether there is probable cause of the alien's removability.

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