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11-2-2020

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## Recommended Citation

Helgadottir, Mal, "Ninth Circuit Reversed and Remanded District Court's Ruling that Immigration Detainers Issued Based on Unreliable Databases Violates the Fourth Amendment" (2020). *AELJ Blog*. 251.
https://larc.cardozo.yu.edu/aelj-blog/251

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# Ninth Circuit Reversed and Remanded District Court's Ruling that Immigration Detainers Issued Based on Unreliable Databases Violates the Fourth Amendment

BY MAL HELGADOTTIR/ ON NOVEMBER 2, 2020


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U.S. Immigration and Customs Enforcement ("ICE") issues immigration detainers "to advise another law enforcement agency that the Department seeks custody of an [individual] presently in the custody of that agency, for the purpose of arresting and removing the [individual]."[1] The immigration detainer requests that local law enforcement notify ICE "prior to the release of the [individual], in order for the Department to arrange to assume custody."[2] Immigration detainers have been subject to litigation arising out of Fourth Amendment concerns because detainers are not reviewed by detached neutral judicial officials.[3] To issue an immigration detainer, an ICE officer simply needs to fill out a checkbox form indicating that they have "probable cause" that an individual is removable.[4] The current

detainer form requires ICE officers to support their probable cause determination based on one for the following:

(1) A final order of removal against the [individual]; (2) The pendency of ongoing removal proceedings against the [individual]; (3) Biometric confirmation of the [individual's] identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the [individual] either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and (4) Statements made by the [individual] to an immigration officer and/or other reliable evidence that affirmatively indicate the [individual]either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.[5]

The third category was at issue in *Gonzalez v. Immigr. & Customs Enf't*, where the District Court considered: "(1) whether the exclusive use of biometric confirmation and database checks violates the Fourth Amendment; and (2) whether the issuance of detainers to state and local law enforcement agencies that lack authority for civil immigration arrests violates the Fourth Amendment."[6] In 2019, the United States District Court for the Central District of California issued a permanent injunction "enjoining ICE from issuing detainers to Probable Cause Subclass[7] members based solely on database searches that rely upon information from sources that lack sufficient indicia of reliability for a probable cause determination for removal."[8] The decision was widely celebrated by immigration justice advocates.[9] Amongst other things, the District Court found the "databases on which ICE relies for information on citizenship and immigration status often contain incomplete data, significant errors, or were not designed to provide information that would be used to determine a person's removability" and therefore the practice violated the Fourth Amendment.[10] However, the decision was reversed and remanded in part by the Ninth Circuit on September 11, 2020.[11]

The Ninth Circuit reversed the permanent injunction based on the District Court's following three errors: "(1) . . . incomplete set of reliability findings, (2) . . . legal error in concluding that any database is unreliable due to its intended purpose, and (3) . . . failure to address whether the system of databases on which ICE relies routinely fails to provide sufficiently trustworthy evidence of removability."[12] First, the Ninth Circuit argued that the lower court erred because it "did not make reliability findings for *all* the databases on which ICE relies."[13] Although the District Court identified sixteen databases that ICE relied on, it limited its unreliability findings to only six of those databases.[14] The District Court was not permitted to "make categorical findings of unreliability without actually addressing *each* database on which ICE relies or explaining why an evaluation of a given database was unnecessary."[15] Second, the Ninth Circuit rejected the proposition that "the databases ICE uses are unreliable because no single database used was intended to provide any indication of probable cause of removability,"[16] and the conclusion of the lower court was based on a "fundamental misreading" of *Millender v. County of Los Angeles*.[17] Moreover, the holding in *Millender* "did not suggest that an express admonition not to use a database to make a probable cause determination meant that database purpose more generally determines the reliability of a

database; indeed, we did not address the reliability of the database at all."[18] Third, the Ninth Circuit held the District Court "failed to account for or examine systemic error in its analysis" and that "[a]lthough the court's finding of a Fourth Amendment violation turned on error in individual databases in light of case law concerning individual databases, the fact of such error in individual databases here could not lead to the conclusion that ICE's system of databases routinely fails to provide reasonably trustworthy evidence of removability."[19] The Ninth Circuit conceded that the District Court may "ultimately be proven correct about the unreliability of ICE's system of databases," but because they applied the incorrect legal analysis the case needed to be remanded for further fact finding.[20]

Considering that "[u]nreliability here means that ICE routinely issues immigration detainers without reasonably trustworthy evidence of removability," merely the fact that ICE relieas on at least six unreliable databases is still an unacceptable fact. The average length of detention pursuant to an immigration detainer was forty-four days in 2017 and "individuals detained by federal officials typically do not have their first appearance before an immigration judge for several weeks (or over a month) into their detention."[21] Furthermore, the implications attached to detainers are important because, as mentioned *supra*, immigration detainers are not reviewed by neutral judicial officials. Despite the disappointing result from the Ninth Circuit, further factual findings in the lower court might reveal that all the databases are unreliable. Regardless of the future result, when the stakes are this high, it is troubling that ICE's practice of relying on six faulty databases to determine "probable cause" of removability was not enough evidence for the Ninth Circuit to find a Fourth Amendment violation.

1. 8 C.F.R. § 287.7(a).
2. Id.
3. Morales v. Chadbourne, 793 F.3d 208, 215 (1st Cir. 2015); Hernandez v. United States, 939 F.3d 191, 201 (2d Cir. 2019); Galarza v. Szalzyk, 745 F. 3d 634 (3d Cir. 2014); 8 C.F.R. § 287.7(a) ("Any authorized immigration officer may at any time issue a [detainer], to any other Federal, State, or local law enforcement agency.").
4. Form I-247A, https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf (last visited Oct. 22, 2020) [hereinafter Form I-247A]; but see Michael Kagan, Immigration Law's Looming Fourth Amendment Problem, 104 Geo. L.J. 125, 167 (2015) (discussing that ICE's "probable cause" determination is flawed because it "is to be signed only by an Immigration Officer, not by any neutral magistrate or judge. Thus, DHS appears intent on persisting with a system lacking neutral review and without the requirement for a particularized, non-generic attestation of the basis for probable cause.").
5. Form I-247A.
6. Gonzalez v. U.S. Immigr. & Customs Enf't, 416 F. Supp. 3d 995, 999 (C.D. Cal. 2019).
7. Id. at 1017 (The Probable Cause Subclass is defined as "all current and future persons who are subject to an immigration detainer issued by an ICE agent located in the Central District of California, where the detainer is not based upon a final order of

removal signed by an immigration judge, or the individual is not subject to ongoing removal proceedings and the detainer was issued solely on the basis of electronic database checks.").

8. Id. at 1020.
9. Emma Winger, Federal Court Blocks Error-Prone ICE Deportation Program, Immigration Impact (Oct. 10, 2019), https://immigrationimpact.com/2019/10/10/court-ice-secure-communities/#.X5MPhZNKiHE.
10. Gonzalez, 416 F. Supp. 3d 995, at 1008.
11. Gonzalez v. U.S. Immigr. & Customs Enf't, 975 F.3d 788, No. 20-55175, 2020 WL 5494324 (9th Cir. Sept. 11, 2020)
12. Id. at *820.
13. Id. at *821.
14. Id.
15. Id.
16. Gonzalez v. U.S. Immigr. & Customs Enf't, 416 F. Supp. 3d 995, 1019 (C.D. Cal. 2019).
17. Gonzales, 2020 WL 5494324, at *822; Millender v. County of Los Angeles, 620 F.3d 1016, 1029 n.7 (9th Cir. 2010) (en banc), rev'd and vacated on other grounds by Messerschmidt v. Millender, 565 U.S. 535, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012).
18. Gonzales, 2020 WL 5494324, at *822.
19. Id. at *823.
20. Id.
21. Amici Curiae Brief of Law and History Professors in Support of Plaintiffs'-Cross-Appellants/Appellees, at 12-14, Gonzales v. U.S. Immigr. & Customs Enf't, 416 F. Supp. 3d 995.