

Third Circuit Ruling May Discourage Jails from Assisting Immigration Enforcement

By Edward Sweeney*

In *Galarza v. Lehigh County* (Civil Action No. 10-cv-6815), the Court has ruled that detainers issued to jails by Immigration and Customs Enforcement (ICE) are “requests,” not binding orders, and that jails carrying out such detainers are not shielded from liability when there are defects or other problems with the ICE request. The ruling may come as a surprise to local corrections agencies that routinely honor federal immigration detainers as they would honor detainers from other jurisdictions. Typically jails are not responsible for evaluating the underlying circumstances or evidence for a detainer, but instead, once the individual is in custody, to simply advise the issuing authority that the subject is now available for custody or action, and to hold the subject person for a reasonable time pending transfer. That assumption is no longer a safe one when it comes to immigration detainers, at least for now.

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The issue: Was a local jail liable for a federal agency's mistake?

Galarza v. Lehigh County was brought by the American Civil Liberties Union (ACLU), and is one of a number of challenges to the authority of Immigration and Customs Enforcement (ICE) to use local jails to enforce federal immigration law. It was the ACLU who developed the line of argument that ICE detainers are “requests” and, therefore, government entities that choose to honor them do so at their own risk. The plaintiff, Ernesto Galarza, was arrested along with three others by local police and detained on drug-related charges. Two of his codefendants were citizens of the Dominican Republic, and the third was a citizen of Honduras. Galarza posted his bail, but before he was released local ICE officials issued an immigration detainer under Homeland Security Regulations, 8 CFR 287.7. On the authority of the ICE detainer, the plaintiff was held in the jail from Friday evening through the following Monday. (The federal ICE detainer reads, “Temporary detention at Department request. Upon a determination by the

Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.”) Galarza was released on Monday evening after ICE agents interviewed him and determined he was indeed a U.S. citizen. The ACLU filed a federal civil action against ICE, the arresting police agency, and Lehigh County. The action against Lehigh County asserted that a detainer from ICE is not mandatory, and since the county chose to honor the detainer, it was culpable along with ICE for what turned out to be an erroneous detention. What makes the case somewhat different from other challenges to ICE enforcement is that Lehigh County followed to the letter the associated procedures outlined in the Code of Federal Regulations: Galarza had been detained initially on a drug offense and he was released within the 48-hour period provided for under the ICE detainer. This set of facts makes it the perfect case

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to resolve whether or not enforcement of the detainer is required, and if the subject county can be held liable for an erroneous detainer.

On March 30, 2012, District Court Judge James Knoll Gardner, in the U.S. District Court for the Eastern District of Pennsylvania, dismissed the civil action against Lehigh County, finding that the county's policy of detaining a person in accordance with the Immigration Detainer was constitutional and consistent with federal statutes and regulations; that 8 CFR 287.7, under which the Detainer was issued, requires county jail officials to hold the person named in the detainer; and that the plaintiff was not detained in violation of the time limitations set forth in the Detainer. The arresting police agency and ICE were not dismissed, and subsequently settled. Plaintiff appealed the dismissal against Lehigh, however, and the Third Circuit agreed to hear the case. The Court heard oral arguments in October 2013. Because no federal court had addressed this question previously, a fifty-seven

page amicus brief was also submitted by national law professors and scholars in support of Galarza and reversal.

No help from Department of Justice.

At this point, one might have expected the federal Department of Justice to join the suit defending Lehigh County jail. The ACLU has used cases like this to discourage local jails across the country from honoring ICE detainers and several large local jurisdictions have already decided to no longer cooperate in enforcing ICE detainers. Since Galarza had been detained on a criminal drug charge and he was released timely, the county seemed to have a strong position; ICE attorneys might have been expected to argue to preserve the local jail option as an enforcement tool. Instead, ICE provided no legal assistance, and between 2008 and 2013 greatly back peddled on the interpretation of "request/shall maintain custody" by issuing a new detainer form and memorandums detailing new notification procedures. (The Department of Homeland Security has made no formal changes to the language used in 8 CFR 287.7.) The Third Circuit handed down a

2 -1 ruling in favor of the Galarza and the ACLU on March 4, 2014. The majority of the Court, Judges Fuentes and Cowen, ruled that the federal detainer is indeed just a request and as such the county jail is accountable for the associated detention decision. The court focused its consideration around the Tenth Amendment; essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials. They ruled that a conclusion that a detainer, issued by a federal agency, is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment; given this, Lehigh County was free to disregard the ICE detainer, and it therefore cannot use as a defense that its own policy did not cause the deprivation of Galarza's constitutional rights. Circuit Judge Barry, who wrote the dissenting opinion, stated that to consider these detainers as mere requests "has enormous implications and will have, I predict, enormous ramifications." The court returned the case to the lower court for further action and Lehigh County is now weighing its options. ■



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