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Habeas Relief for Immigration Detainers Gets Put on Ice

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Last Monday, North Carolina's newly-elected sheriffs were sworn into office. A key issue in several of the campaigns was whether the candidates would or would not continue to cooperate with federal immigration enforcement. Incoming Sheriff Garry McFadden announced that he will be ending Mecklenburg County's participation in the U.S. Immigration and Customs Enforcement (ICE) "287(g) program." Incoming Sheriff Gerald Baker in Wake County likewise pledged to end his office's participation in the 287(g) program, and incoming Sheriff Clarence Birkhead in Durham County announced that his office would no longer honor any "detainer requests" from ICE.

Coincidentally, on the same day that those elections were being held, the Court of Appeals decided Chavez v. Carmichael, __ N.C. App. __ (Nov. 6, 2018), which analyzed whether a defendant can challenge immigration detainers in state court on habeas corpus grounds. In addition to answering that central question, the *Chavez* decision also helps to clarify the sometimes-overlooked distinction between the 287(g) program as a whole and ICE detainers in particular, and it points out an important statutory limitation on the extent to which custodial law enforcement agencies may "decline to investigate" the immigration or residency status of a person in custody.

What Is "287(g)" Anyway?

As the Department of Homeland Security explains here, this term refers to Section 287(g) of the Immigration and Nationality Act, which was added in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act, and is now codified in the federal statutes as 8 U.S.C. § 1357(g). Under this program, state and local law enforcement agencies may enter into a Memorandum of Agreement with ICE. Pursuant to the agreement, officers who meet certain eligibility requirements and complete additional training are authorized to "perform immigration law enforcement functions…under the supervision of ICE officers." The particular immigration enforcement functions that the officers are allowed to perform are spelled out in an appendix to the Agreement, and typically include activities such as conducting interrogations, preparing charging documents, serving arrest warrants, and detaining or transporting suspects. The DHS/ICE 287(g) website reports that it currently has 78 such agreements with agencies in 20 states, and it has trained over 1500 state officers to perform immigration enforcement tasks. However, at the time of this writing that list still includes both Mecklenburg and Wake County, so those numbers may be changing soon.

How Do Immigration Detainers Fit Into This?

As Jeff Welty explained in this blog post last year, a detainer is essentially a request issued by ICE, based upon its internal determination that there is probable cause to believe a detained person is in the country unlawfully. The request, usually accompanied by an ICE-issued "administrative warrant," is served on the state agency currently holding the person in custody (e.g., a defendant arrested for a state law offense), asking the agency to continue holding the person for up to 48 hours so that he may be taken into federal custody for removal proceedings, even if the person posts a bond and would otherwise be eligible for release on the underlying state offense. A state or local officer who is cross-designated to perform immigration enforcement functions under a 287(g) agreement could obviously issue such a detainer directly, but the more common scenario involves detainers that are prepared by ICE agents and then served on the local custodial agency, even if that agency does not have a formal 287(g) agreement.

Accurate and current figures about the extent to which agencies across North Carolina honor these detainer requests are hard to find. This summary of data from 2014-2016 reported that ICE took custody of the person in 43.5% of North Carolina cases where a detainer was issued, did not take custody in 56.5% of cases, and received "refusals" in only 0.3% of cases. The election results mentioned above suggest that more recent numbers might look a little different today, but the broader point is simply that some law enforcement agencies honor ICE detainers and some don't.

As Jeff also noted in his earlier post, because these detainer requests and administrative warrants are issued directly by ICE, rather than a judicial official, and because they ask law enforcement agencies to continue detaining a person (on federal, civil, immigration grounds) who would otherwise be eligible for release, some courts and law enforcement agencies around the country have recently taken a harder look at the legal basis for allowing the detention.

Immigration and defense attorneys have also been exploring options for bringing new legal challenges to the practice, which brings us to Chavez v. Carmichael…

Court Rejects Habeas Challenge to ICE Detainers

In *Chavez*, the defendants filed writs of habeas corpus challenging their continued detention by the Mecklenburg County Sheriff's Office on immigration detainers after they had otherwise satisfied the release conditions for their state offenses. The Superior Court granted the writs and ordered their release, and the Sheriff's Office appealed. After addressing and rejecting a couple of preliminary issues regarding mootness and the scope of what could be considered in the record on appeal, the Court of Appeals tackled the central issue of whether the trial court erred by granting them habeas relief.

In a unanimous opinion, the Court of Appeals held that the trial court did err, and the habeas relief should not have been granted. The court rejected the argument that the defendants' release was warranted because state officers are prohibited from enforcing federal civil immigration laws – on the contrary, G.S. 128-1.1(c1) specifically allows local agencies to enter into 287(g) agreements like the ones described above, and Mecklenburg County had such an agreement in place at the time. Pursuant to that agreement, the detention officers were acting as de facto federal officers, and the state court had no ability "to grant habeas relief to individuals detained by federal officers acting under federal authority." Even more broadly, the appellate court held that the state court's "purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters," so the state court had no jurisdiction to hear the writs and they should have been dismissed.

What If There Were No 287(g) Agreement?

The *Chavez* opinion made it very clear that this ruling is not limited to the handful of North Carolina counties that still have a formal 287(g) agreement with ICE:

> **E. State Court Lacks Jurisdiction Even Without Formal Agreement**
>
> Even if the express 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law permits and empowers state and local authorities and officers to "communicate with [ICE] regarding the immigration status of any individual... or otherwise to cooperate with [ICE] in the identification, apprehension,

> ***detention***, or removal of aliens not lawfully present in the United States" in the absence of a formal agreement. 8 U.S.C. § 1357(g)(10)(A)-(B) (emphasis supplied).
>
> A state court's purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration. See U.S. Const. art. I, § 8, cl. 4; U.S. Const. art. VI, cl. 2.; *Nyquist*, 432 U.S. at 10, 53 L. Ed. 2d at 63; *Plyler*, 457 U.S. at 225, 72 L. Ed. 2d. at 804; *DeCanas*, 424 U.S. at 354, 47 L. Ed. 2d at 43.

In other words, with or without a 287(g) agreement, state law enforcement officers are permitted to cooperate with ICE by honoring federal detainers and assisting in the removal of aliens who are unlawfully present, and the state courts have no jurisdiction to hear the defendant's petition to challenge that detainer or order the defendant released.

But That "Cooperation with ICE" is Optional, Right?

Yes… mostly. As noted above, several of the incoming sheriffs campaigned on a pledge to end their agency's participation in immigration enforcement actions, including an end to cooperation with detainer requests. *Chavez,* 8 U.S.C. § 1357(g)(10)(A)-(B), and G.S. 128-1.1 only say that state agency cooperation with ICE is permissible; none of them make that cooperation compulsory.

On the other hand, regardless of any policy adopted by the state agency, there is still a *mandatory* obligation under state law to investigate the immigration or residency status of any person taken into custody for certain offenses. See G.S. 162-62. Under this statute, whenever a person is taken into custody for a felony or DWI offense, the administrator or other person in charge of that facility "shall attempt to determine if the prisoner is a legal resident of the United States by an inquiry of the prisoner, or by examination of any relevant documents, or both." G.S. 162-62(a). If the agency is unable to determine that the person is a legal resident, then the agency "where possible, shall make a query of Immigration and Customs Enforcement of the United States Department of Homeland Security. If the prisoner has not been lawfully admitted to the United States, the United States Department of Homeland Security will have been notified of the prisoner's status and confinement at the facility by its receipt of the query from the facility." G.S. 162-62(b).

So even if the state agency no longer formally "cooperates" with ICE, the mandatory inquiry that happens under G.S. 162-62 will likely put ICE on notice that a person who is not a legal resident or lawfully admitted to the United States is currently in state custody, and give ICE an opportunity to take that person into federal custody and begin removal proceedings.

Where Does That Leave Us?

The answer to that question is probably in the eye of the beholder. As a matter of policy and discretion, there seems to be a trend in this state towards less cooperation with immigration investigation and enforcement actions by state law enforcement agencies. But as a matter of state law and case interpretation, there also appears to be a statutory floor that continues to mandate a certain amount of investigation and consultation with ICE (regardless of agency policy), and a shrinking list of legal means for detainees to challenge their continued detention for immigration-related reasons (if it occurs).

Conflicting trends and views? On a contentious political issue? In North Carolina, of all places?

Who would have ever guessed….