

Federal Appeals Court Finds That Probable Cause Is Required to Hold Aliens Pursuant to Immigration Detainers

09/08/2015

The recent [decision](#) by the U.S. Court of Appeals for the First Circuit in *Morales v. Chadbourne* could complicate current debates about “sanctuary cities,” a term which [some use](#) to describe jurisdictions that decline to honor immigration detainers. An [immigration detainer](#) is a [document](#) whereby U.S. Immigration and Customs Enforcement (ICE) requests that another law enforcement agency take certain actions, which can include holding an alien for up to 48 hours after the alien would otherwise have been released so that ICE may assume custody, or notifying ICE prior to releasing or transferring an alien. [Recent reports](#) that an alien who shot and killed a woman after being released by San Francisco authorities had been the subject of an [immigration detainer](#), which the San Francisco Sheriff [declined to honor](#), have prompted some Members of Congress to [propose measures that encourage states and localities to honor immigration detainers](#) or otherwise cooperate in immigration enforcement.

Overview of the Litigation in *Morales*

The litigation in *Morales* arose from two instances—one in July 2004 and another in May 2009—in which a U.S. citizen, Ada Morales, was held by local or state officials in Rhode Island pursuant to an immigration detainer. Ms. Morales had been born in Guatemala, but immigrated to the United States in the 1980s and was naturalized in 1995. In the more recent of these two incidents, Ms. Morales was held pursuant to a detainer for [24 hours after she would have been released](#) on the state criminal charges, so that ICE could investigate her removability (a practice that ICE has [since abandoned](#)). Ms. Morales asserts that she informed state officials she was a citizen, but was not released until ICE confirmed this. An ICE agent allegedly apologized to Ms. Morales upon her release, but told her that “[it could happen again in the future](#).”

Ms. Morales subsequently filed suit to enjoin various federal and state defendants from holding her pursuant to an immigration detainer in the future. She also sought monetary damages for violations of her Fourth Amendment right to be free from unreasonable seizures, among other things. In response, the federal defendants—who include Mr. Chadbourne—asked the reviewing federal district court to grant them summary judgment on the basis of qualified immunity. Determining whether a defendant is entitled to such immunity [generally entails](#) a two-part analysis, considering (1) whether the facts alleged show that the defendant’s conduct violated a constitutional right, and (2) whether the contours of this right are “clearly established” under the then-existing law so that a reasonable officer would have known that the conduct was unlawful. There [need not be a case directly on point](#) for the contours of a right to be “clearly established,” but existing precedent must have placed the constitutional or other question beyond debate.

The ICE officials’ motion for summary judgment was denied by the district court in [February 2014](#). The officials then filed an interlocutory appeal with the First Circuit. (An interlocutory appeal is a pre-trial appeal.)

First Circuit’s Decision in *Morales*

The First Circuit’s decision in *Morales* reflects the [procedural posture](#) of the case in that certain facts alleged by the plaintiff are presumed to be true, among other things. Nonetheless, the decision is notable in that it establishes, in a way no prior decision has, the legal authority for the issuance of immigration detainers. It is also the first appellate decision to address the Fourth Amendment issues raised by holds pursuant to immigration detainers (previously, the issue has

been addressed at the [district court level](#)).

According to the First Circuit, the [statutory authority for “warrantless \[immigration\] enforcement actions](#), including the issuance of detainers,” derives from Section 287 of the Immigration and Nationality Act (INA). Specifically, Section 287(a) permits immigration officers to arrest without a warrant any alien if there is “reason to believe that the alien ... is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained.” Section 287(d) similarly permits warrantless arrests of aliens charged with controlled substance offenses, if there is “reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States.” As the First Circuit noted, courts have “[consistently held](#)” that the phrase “reason to believe” in Section 287 [must be construed](#), in light of the Fourth Amendment, to mean “probable cause” that a violation has been committed. Thus, the [First Circuit concluded](#) that it was beyond debate, in 2009, that immigration officers needed probable cause to arrest and detain individuals without a warrant to investigate their immigration status.

In so finding, the First Circuit [noted](#) that the Fourth Amendment permits law enforcement officers to stop and question individuals in circumstances where probable cause is lacking, so long as there is reasonable suspicion that an offense has been committed. However, it [also found](#) that “there could be no question in 2009 that detention authorized by an immigration detainer would require more than just reasonable suspicion.” It did so because, in its view, the pre-2009 cases “[clearly show\[ed\] that 48 hours of imprisonment](#)—which is what the detainer requests ...—falls well on the arrest side of the divide.” The First Circuit based this conclusion, in part, on the Supreme Court’s 1983 decision in [United States v. Place](#), wherein the Court indicated that it had never approved the seizure of a person for the “prolonged 90-minute period” involved in that case based solely on reasonable suspicion. The First Circuit also cited a [decision](#) by the U.S. Court of Appeals for the Tenth Circuit wherein that court noted that it had not found any case in any circuit upholding detention for longer than 90 minutes based on reasonable suspicion, as well as a [1971 immigration case](#) which upheld a stop based on reasonable suspicion because it was “minutes rather than hours” in duration.

The First Circuit also rejected the ICE officers’ argument that there were no cases in 2009 which had specifically held that probable cause was required in the “[difficult and unique circumstances](#)” of issuing detainers. In so doing, the First Circuit [opined](#) that there were no such cases because the then-Immigration and Naturalization Service (INS) had stipulated in the 1985 case of [Cervantez v. Whitfield](#) that a detainer “may only be authorized ... when the officer has determined there is probable cause.” The First Circuit also took the view that the issuance of detainers is not complicated by aliens being held pursuant to detainers by state and local officials, not federal ones, because all officers are “[responsible for the natural consequences of \[their\] actions](#),” and the detention of an alien by state or local officials is the “natural consequence” of a federal official issuing an immigration detainer. The court similarly took the view that probable cause [should be easier](#)—not more difficult—to obtain in cases where detainers are issued for aliens who are already being held for state and local offenses than in other cases because immigration officers have access to the aliens and their records.

Implications of the First Circuit’s Decision

The *Morales* decision is only binding precedent within the First Circuit. However, if the court’s reasoning were upheld on any appeal or adopted by other circuits, it would appear to complicate certain efforts to expand or strengthen the use of immigration detainers to hold aliens so that ICE may assume custody. Among other things, the decision suggests that ICE’s ability to resume its prior practice of issuing detainers to request that aliens be held so that ICE can investigate their removability may be limited by the Fourth Amendment. Lengthening the period of holds pursuant to detainers would also appear to raise constitutional issues, because [48 hours](#) has generally been seen as the maximum period of detention reasonable for a warrantless arrest where there is probable cause to believe an offense has been committed.