



Arizona State Senate Issue Brief

August 3, 2018

Note to Reader:

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LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS

INTRODUCTION

Federal immigration law prohibits persons from entering the United States (U.S.) illegally and provides penalties for entering or reentering the U.S. illegally. The Immigration and Nationality Act of 1952 was the first codification of immigration and nationality law and is still the basic code. There are civil and criminal violations of immigration law. Civil violations include failing to depart after the expiration of a visitor visa or after the immigrant's student status changes. Criminal violations include illegal entry, reentry after deportation and willfully failing to depart after an order of removal. Currently, federal immigration issues are primarily enforced by the federal government. In exercising its power to regulate immigration, however, Congress is free to delegate to the states, among other things, the activities of arresting, holding and transporting immigrants lacking legal status.

Congress has created opportunities for the participation of state and local officers in the enforcement of federal immigration laws. In 1996, Congress specifically authorized state and local officers, to the extent permitted by relevant state and local law, to arrest immigrants who: 1) were previously convicted of a felony offense; 2) left the U.S. or were deported after the conviction; and 3) are now illegally present in the U.S. Arresting officers must confirm the person's status with immigration authorities, and the person can be held only for such time as it takes for federal authorities to respond and take the person into custody. In addition, U.S. code allows state and local officers to exercise certain federal immigration functions upon the U.S. Attorney General's determination of an emergency due to a mass influx of unauthorized immigrants. Any authority must be expressly given by the Attorney General, with consent by the head of the state or local law enforcement agency, and is limited in scope and time.

Additionally, the U.S. Immigration and Customs Enforcement (ICE) within the U.S. Department of Homeland Security (U.S. DHS) created the Office of State, Local and Tribal Coordination (OSLTC) to build and improve relationships and coordinate activities with state,

local, tribal, law enforcement and community groups. The OSLTC coordinates with ICE headquarters and field offices as they implement various community cooperation programs. These programs include: the equitable sharing program, under which local law enforcement working with ICE in joint investigations may receive a portion of the proceeds of criminal asset seizures; the criminal alien and secure communities programs, which identify incarcerated criminal aliens so they are not released into the community; the National Fugitive Operations Program, in which local law enforcement agencies assist ICE in identifying, locating and apprehending undocumented immigrants; Operation Predator, in which federal, state and local officers identify, arrest and prosecute people involved in international pedophilic groups or who derive proceeds from commercial child exploitation ventures; and programs combating transnational gangs, criminal organizations that threaten border security, document and benefit fraud, bulk cash smuggling by criminal organizations, and counterfeit goods.

OTHER RELEVANT FEDERAL LAWS

ICE is required to respond to inquiries by federal, state or local government agencies seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency, for any purpose authorized by law, by providing the requested verification or status information. The U.S. DHS established the Law Enforcement Support Center, administered by ICE, which answers queries from state and local officials regarding immigration status.

In 1996, Congress passed Section 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act) and Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Immigration Reform Act). This legislation prohibits government entities from limiting employees in communicating with the

Immigration and Naturalization Service (now ICE) regarding the citizenship or immigration status of any individual. Employees also cannot be restricted from maintaining or exchanging such information with another government entity.

The Immigration Reform Act also added Section 287(g). This section authorizes the Secretary of the U.S. DHS to enter into agreements with state and local law enforcement agencies to allow designated officers to perform a function of a federal immigration officer in investigating, apprehending or detaining immigrants lacking legal status in the U.S. This includes the transportation of unauthorized immigrants across state lines to detention centers. The officer or employee must have knowledge of, adhere to and have received adequate training regarding federal immigration laws, and function under the supervision of sworn ICE officers. According to ICE, the agency offers a four-week training program for local officers that includes coursework in immigration law, ICE databases, multi-cultural communication and avoidance of racial profiling. However, pursuant to federal law, such an agreement is not required for an officer or employee to communicate regarding the immigration status of any individual, or otherwise cooperate with federal officials in identifying, apprehending, detaining or removing unauthorized aliens. ICE states that 287(g) programs must, “enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community.”

Similarly, U.S. code also enables federal, state, local and foreign officers who participate in ICE task force operations to be cross-designated as customs officers with authority to enforce U.S. customs law. Officers aid ICE in combating narcotics and human smuggling, money laundering and fraud-related activities.

CASE LAW

Parts of the aforementioned federal statutes were upheld by the U.S. Court of Appeals in 1999. *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999). New York City's Executive Order No. 124, issued by Mayor Koch in 1989, prohibited city employees from voluntarily providing federal immigration authorities information pertaining to the immigration status of any alien. Because the Welfare Reform Act and Immigration Reform Act preempted the Executive Order, the city and its mayor challenged the facial constitutionality of the sections related to the voluntary provision of immigration information to federal officers. Limiting its holding to the facial effect of the federal statutes on Executive Order No. 124, the Court held that because Congress did not compel state and local governments to enact or administer any federal regulatory program and the federal statutes did not alter the city's government, the acts did not violate the Tenth Amendment or the guarantee clause. Therefore, the statutes nullified the Order. The U.S. Supreme Court denied a petition for review of the Court of Appeals' decision, thereby letting the opinion stand.

A U.S. Supreme Court decision indicates that officers may question criminal suspects and detainees about their immigration status in certain circumstances. An occupant of a house at which police were executing a search warrant was detained while the search was in progress, given the fact that the warrant sought weapons and evidence of gang membership. The Court held that the officers needed no independent reasonable suspicion in order to question the occupant, and that because her initial detention was lawful, asking her about her immigration status did not violate her Fourth Amendment rights, as long as the questioning did not prolong her detention (*Muehler v. Mena*, 544 U.S. 93 (2005)).

LOCAL ENFORCEMENT POLICIES

Various municipalities have adopted policies that formally or informally prohibit law enforcement officers from stopping someone for the sole purpose of determining immigration status, arresting a person when the only violation is an infraction of federal immigration law or informing federal immigration authorities, under certain circumstances, of the presence of an undocumented immigrant. These policies are commonly referred to as *sanctuary* policies.

STATE ENFORCEMENT

The Arizona Department of Public Safety (DPS) entered into a Memorandum of Agreement (MOA) with ICE in 2006 for law enforcement officers to receive training that allowed them to enforce provisions of the INA. According to DPS, the MOA defined the scope and limitations of the officers' immigration enforcement authority and required all immigration-related activities by 287(g) trained officers to be supervised by ICE. There were two different models within the DPS program: the task force model used sworn detectives and worked with the ICE Office of Investigations on criminal cases involving illegal immigrants; and the detention model worked under the supervision of ICE's Enforcement and Removal Office to determine alienage of persons brought to them for booking into city, county or state detention facilities. By August 2010, twenty-five DPS officers were certified as task force officers and two were certified as detention officers.¹

In September 2005, the Arizona Department of Corrections (ADC) entered into an agreement with ICE to train certain correctional officers to

¹ In December 2011, the U.S. DHS revoked its 287(g) program with the Maricopa County Sheriff's Office. The following June, the U.S. DHS also rescinded its task force agreements with DPS; the Mesa, Florence and Phoenix police departments; and the Pima, Pinal and Yavapai county sheriffs' offices. However, according to ICE, as of December 2013, it has jail enforcement (detention model) agreements with ADC, the City of Mesa Police Department, and the Pinal and Yavapai county sheriffs' offices.

perform the following functions: 1) interrogate possible aliens and process aliens for immigration violations; 2) serve arrest warrants for immigration violations; 3) administer oaths and take and consider evidence to complete criminal alien processing; 4) prepare charging documents for the signature of ICE officers; 5) issue immigration detainers; and 6) detain and transport arrested aliens subject to removal to ICE-approved detention facilities. As of 2011, ICE had trained a total of 30 correctional officers.

Laws 2011, Chapter 309 allows the state to construct and maintain a secure fence along the Arizona-Mexico border line that is located on private, state or federal property, if permitted. The state launched a website July 20, 2011 to fund the border fence through donations. The website raised \$219,211 between 2011 and 2015, at which time the website was taken down. An additional \$55,663 was collected following 2015. The monies were authorized by the Joint Border Security Advisory Committee to be distributed to the Cochise County Sheriff's Office for public safety equipment used near the border. Laws 2018, Chapter 188 repealed the Border Security Trust Fund.

SENATE BILL 1070

In April 2010, the Arizona Legislature approved and the Governor signed S.B. 1070, which makes various modifications to state immigration law through new statutes and statutory amendments. Changes were made to the legislation a week later in H.B. 2162. Seven lawsuits were subsequently filed challenging the constitutionality of S.B. 1070. Also filed were motions requesting the court to issue a preliminary injunction to enjoin enforcement of S.B. 1070 until the court could make a final determination as to its constitutionality.

In an order dated July 28, 2010, the U.S. District Court for the District of Arizona enjoined the following provisions of S.B. 1070: 1) the requirement for law enforcement officers to make

a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present; 2) the requirement for anyone who is arrested to have the person's immigration status determined before the person is released; 3) the ability of an officer, without a warrant, to arrest a person if the officer has probable cause to believe the person has committed any public offense that makes the person removable from the U.S.; 4) the new offense of failure to apply for or carry an alien registration document; and 5) the ban on unauthorized aliens soliciting, applying for or performing work. *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010). The preliminary injunction was subsequently affirmed by a panel of the Ninth Circuit Court of Appeals. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011).

In 2012, however, the U.S. Supreme Court held that it was improper to enjoin the requirement for officers, under certain circumstances, to inquire about an individual's immigration status before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives (items #1 and #2, previous paragraph, often referred to as sections 2(B) and 2(D)).² However, the ruling stipulates that it, "does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect." Further, the holding specified that the other enjoined provisions are preempted by federal law (items #3 through #5, previous paragraph). *Arizona v. United States*, 132 S. Ct. 2492 (2012).

In 2016, the Arizona Attorney General (AG) issued guidelines for sections 2(B) and 2(D) of S.B. 1070. Pursuant to the guidelines, state laws relating to immigration enforcement neither expand nor limit an officer's ability to approach an individual and engage in a consensual contact.

² The preliminary injunction was officially lifted on September 18, 2012.

During a consensual contact, the officer may inquire about any subject matter. However, the individual contacted does not have to answer questions or produce any identification, but may choose to do so voluntarily. During a lawful stop or detention, if in the course of duty an officer has reasonable suspicion that an individual is unlawfully present in the United States, based on all available facts, except race or ethnicity, the officer must attempt to verify the individual's immigration status by contacting ICE or Customs and Border Protection (CBP) unless doing so would prolong the stop or detention, or the circumstances below apply.

According to the AG guidelines, if an officer has probable cause to believe that an individual has committed a civil immigration violation, the officer has no authority to arrest the individual and shall not detain the individual longer than necessary to complete the state law basis for the contact. If an officer has probable cause to believe that an individual has committed a federal criminal immigration violation, the officer may arrest the individual and contact ICE/CBP to clarify its interest in detaining the individual.

The complete guidelines on S.B. 1070 can be found in the *Additional Resources* section below.

ADDITIONAL RESOURCES

- U.S. Immigration and Customs Enforcement (the office within the U.S. DHS that includes enforcement and investigations)
<http://www.ice.gov>
- U.S. Citizenship and Immigration Services
<http://www.uscis.gov>
- U.S. Customs and Border Protection (the office within the U.S. DHS that includes the Border Patrol)
<http://cbp.gov>
- Communication between government agencies and the Immigration and Naturalization Service (ICE): U.S. Code, Title 8, Chapter 12, § 1373 and Title 8, Chapter 14, § 1644
- Powers of immigration officers and employees: U.S. Code, Title 8, Chapter 12, § 1357
- Arizona's human smuggling law: Arizona Revised Statutes, Title 13, Chapter 23, § 13-2319
- Legislative history for S.B. 1070, including the law, summaries and video archives
http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=1070&Session_Id=93
- *Arizona et al. v. United States*
U.S. Supreme Court Decision
<http://www.supremecourt.gov/opinions/11pdf/11-182b5e1.pdf>
- Ninth Circuit Court of Appeals opinion
http://www.ca9.uscourts.gov/datastore/general/2011/04/11/10-16645_opinion.pdf
- District court order for preliminary injunction and other documents
<http://www.azd.uscourts.gov/azd/courtinfo.nsf/sb+1070+case+information?openview>
- "Determination of Employment Eligibility by Employers"
Arizona State Senate Issue Brief,
www.azleg.gov/briefs.asp
- Attorney General Opinion #I16-010
- Advisory Model Policy for Law Enforcement Applying SB 1070
www.azag.gov/opinions/i16-010