



COMMONWEALTH of VIRGINIA

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The Honorable Robert G. Marshall
Member, Virginia House of Delegates
P.O. Box 421
Manassas, Virginia 20108-0421

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether Virginia law enforcement officers, under present state law, may conduct investigations into the immigration status of persons stopped or arrested by law enforcement and, specifically, whether Virginia officials presently have the same authority as Arizona officers under a recently enacted Arizona statute, and, further, whether that authority extends to Virginia state park personnel and local zoning officials.

Response

It is my opinion that Virginia law enforcement officers, including conservation officers, may, like Arizona police officers, inquire into the immigration status of persons stopped or arrested; however, persons tasked with enforcing zoning laws lack the authority to investigate criminal violations of the law, including criminal violations of the immigration laws of the United States.

Background

You note that Arizona recently enacted the "Support Our Law Enforcement and Safe Neighborhoods Act" ("Act").¹ The Act contains a number of provisions and prohibitions concerning illegal aliens. Most germane to your inquiry, the Act directs police officers to make a "reasonable attempt, when practicable, to determine the immigration status of a person" who is arrested or in custody "except if the determination may hinder or obstruct an investigation."² This provision applies only if the person is already lawfully stopped, detained or arrested in connection with the enforcement of some law *other* than immigration law.³ Furthermore, law enforcement officers specifically are directed not to "consider race, color or national origin . . . except to the extent permitted by the United States or Arizona

¹ Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 211.

² *Id.* at § 11-1051(B).

³ *Id.*

Constitution.”⁴ Under the Act, the immigration status of an alien is determined by (1) “a law enforcement officer who is authorized by the federal government to verify or ascertain an alien’s immigration status;” or (2) an agent of Immigration and Customs Enforcement (“ICE”).⁵

Applicable Law and Discussion

A prior opinion of this Office addresses whether state and local officers in Virginia have the authority to detain and arrest individuals who have violated a criminal law of the United States, including a criminal violation of the immigration laws of the United States.⁶ The opinion concluded that law enforcement officers in Virginia in fact have the authority to arrest persons for criminal violations of immigration laws.⁷ Indeed, it would be most surprising if state and local officers lacked the authority, where appropriate, to arrest individuals suspected of committing federal crimes such as bank robbery, kidnapping or terrorism. State and local officers are not required to stand idly by and allow such criminals to proceed with impunity. The same holds true with criminal violations of the immigration laws.

Due to the uncertainty in the law, however, the 2007 opinion counseled against arrests for civil violations of federal immigration laws.⁸ That uncertainty is present on two levels. As a matter of state law, the authority of police officers to arrest for civil violations is restricted by statute.⁹ Sheriffs are not so limited, but neither does the Code expressly authorize sheriffs to make arrests for civil violations of federal immigration laws.¹⁰ The 2007 opinion further noted that federal law is unclear regarding the authority of state law enforcement to arrest for civil violations of immigration laws.¹¹ The opinion concluded that, absent an agreement between the federal government and a state or local law enforcement agency authorizing arrests for *civil*, as opposed to criminal, violations of immigration laws, known as a § 287(g) agreement,¹² state officers should refrain from making arrests for civil violations until the law is clarified.¹³ There has been no clarification or change in the law since that opinion was issued that would suggest a different conclusion at the present time.

⁴ *Id.* at § 11-1051(B).

⁵ *Id.* at § 11-1051(B).

⁶ *See* 2007 Op. Va. Att’y Gen. 108, 109.

⁷ *Id.* at 109-114.

⁸ *See* 8 U.S.C.S. 1326 (LexisNexis 2010).

⁹ *See* VA. CODE ANN. § 15.2-1704 (2008).

¹⁰ *See* VA. CODE ANN. §§ 15.2-530; 15.2-1609 (2008) (providing general authority of sheriff). Certain Code sections expressly call upon sheriffs to perform civil duties. *See, e.g.*, VA. CODE ANN. § 55-237.1 (sheriffs to oversee removal of personal property from premises pursuant to an eviction).

¹¹ *See* 2007 Op. Va. Att’y Gen. 108, 110-12 (noting conflicting pronouncements on the issue from federal courts and from the United States Department of Justice).

¹² *See* 8 U.S.C.S. 1357(g)(1) (LexisNexis 2010).

¹³ *Id.* at 114.

The previous opinion, which dealt with the authority of state and local officers to *arrest* for federal immigration violations, does not answer your more specific question: whether Virginia officers have the legal authority to *inquire* about the legal status of persons who are stopped or arrested in a manner similar to that contemplated by the Arizona Act. The new Arizona law does not purport to grant new powers to law enforcement officers in Arizona; nor does it suggest the absence of authority by police officers in Virginia. The Arizona law expressly leaves the determination of an alien's immigration status to ICE or to a federally authorized law enforcement officer. Virginia law enforcement officers have the authority to make the same inquiries as those contemplated by the new Arizona law. So long as the officers have the requisite level of suspicion to believe that a violation of the law has occurred, the officers may detain and briefly question a person they suspect has committed a federal crime.¹⁴ Furthermore, the United States Supreme Court has found that so long as the questioning does not prolong a lawful detention, police may ask questions about immigration status.¹⁵

It also should be noted that under Article 36 of the Vienna Convention on Consular Relations, state and local officers are *required* to advise foreign nationals of their right to speak with a consular officer when those persons are arrested and held for longer than a short period of time.¹⁶ It is difficult – if not impossible – to effectively provide that advice, mandated by treaty, without making an inquiry into the nationality of a person who is in custody.

You also ask about the authority of state park personnel to conduct inquiries about immigration status. The authority conferred on the Director of the Department of Conservation and Recreation does not include the general authority granted to police officers to prevent and detect crime, apprehend criminals, safeguard life and property, preserve peace, or to enforce state and local laws, regulations and ordinances.¹⁷ On the other hand, conservation officers, appointed by the Director of the Department of Conservation and Recreation, are “law enforcement officers” and are given the authority “to enforce the laws of the Commonwealth and the regulations of the Department.”¹⁸ These officers can, like local law enforcement officers and officers of the State Police, arrest for “any crime” committed in their presence or for felonies not committed in their presence.¹⁹ Nothing in Virginia or United States law prohibits conservation officers from inquiring about criminal violations of the immigration laws and, where appropriate, making an arrest.

Local zoning officials, however, are not vested with the same general authority to investigate and enforce violations of the criminal laws.²⁰ Zoning ordinances are designed to promote the health, safety,

¹⁴ See, e.g., *Adams v. Williams*, 407 U.S. 143, 145-46 (1972). *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005).

¹⁵ *Muehler v. Mena*, 544 U.S. 93, 100-01 (2005).

¹⁶ Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. A brief investigative detention would not trigger the right.

¹⁷ Compare VA. CODE ANN. § 10.1-301 (2006) (establishing duties of the Director of the Department of Conservation and Recreation) with § 15.2-1704 (broadly providing that local police officers are responsible “for the prevention and detection of crime”).

¹⁸ Section 10.1-117 (2006).

¹⁹ VA. CODE ANN. § 19.2-81(A)(8) and (B) (2008).

²⁰ See § 15.2-2299 (2008) (specifying enforcement authority of zoning officers).

convenience or general welfare of the public and to plan for the future development of communities.²¹ Zoning ordinances, moreover, are civil in nature and carry civil penalties.²² Persons who refuse to abate a violation are subject to only misdemeanor punishment.²³ In addition, certain cities may rely on volunteers to enforce zoning requirements, further demonstrating the generally civil nature of zoning enforcement.²⁴ Therefore, local zoning officials lack the authority to investigate criminal violations of federal immigration statutes and do not possess the authority to arrest for such violations. Of course, persons tasked with zoning enforcement can, like any responsible citizen, report to the proper authorities any suspected violations of the law, including immigration violations, that they encounter while performing their duties.

Conclusion

Accordingly, it is my opinion that Virginia law enforcement officers, including conservation officers, may, like Arizona police officers, inquire into the immigration status of persons stopped or arrested; however, persons tasked with enforcing zoning laws lack the authority to investigate criminal violations of the law, including criminal violations of the immigration laws of the United States.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
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²¹ See §§ 15.2-2200, 15.2-2283 (2008).

²² See § 15.2-2209 (2008).

²³ Section 15.2-2286(A)(5) (Supp. 2008).

²⁴ See § 15.2-1132 (2008).