

ACLU of Virginia

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August 5, 2010

[Police Chief]
[Address]

Re: Attorney General's Opinion on Law Enforcement Investigations into Immigration Status

Dear Chief ---

On July 30, Virginia Attorney General Kenneth T. Cuccinelli, II, issued an opinion stating that Virginia law enforcement officials may inquire into an individual's immigration status to the same extent as permitted by a recently passed Arizona law. I write to urge you to instruct your officers *not* to engage in such inquiries, outside the scope of a 287(g) agreement.

Arizona's law, commonly known as SB 1070, requires law enforcement officers to attempt to ascertain the immigration status of any person lawfully detained when there is reasonable suspicion to believe that the person may be an undocumented immigrant. The Attorney General's opinion states that Virginia law enforcement officers have the same authority as Arizona's to inquire into the immigration status of a person who has been stopped or arrested. The opinion is ambiguous, rests on an unclear legal foundation, and presents multiple constitutional and public policy problems. It does not provide a sound basis for action by law enforcement agencies.

First, it is important to note that the Attorney General cites no Virginia statute or other state law as the basis for law enforcement's authority to inquire about immigration status. He simply asserts that such authority exists.

Further, the opinion is entirely unclear about the scope of local and state law enforcement's authority to question about immigration status. Although the vast majority of immigration violations are civil in nature, it is uncertain whether law enforcement's alleged authority extends to such violations, or only to criminal violations. The Attorney General apparently recognizes the distinction, citing a prior opinion stating that local law enforcement has the authority to arrest for criminal, but not civil, violations. He also asserts that "[s]o long as the officers have the requisite level of suspicion to believe that violation of the law has occurred, the officers may detain and briefly question a person they suspect has committed a federal *crime*." But in the same breath, the Attorney General states that "Virginia law enforcement officers have the same authority to make the same inquiries as those contemplated by the new Arizona law" -- an authority that extends to *civil* immigration matters.

The Attorney General claims that Article 36 of the Vienna Convention on Consular Relations, which requires officials to notify arrestees of their right to speak to a consular official, makes it "difficult – if not impossible – to effectively provide that advice, mandated by treaty,

without making an inquiry into the nationality of the person who is in custody.” That may be the case, but it is irrelevant. An officer can easily inquire into the *nationality* of a detainee (i.e., what country he is a citizen of) without questioning his *immigration* status (what kind of visa he has, whether he has a green card, etc.).

The Attorney General also does not address – or even acknowledge – the fact that the United States District Court in Arizona recently enjoined the portion of the Arizona’s law that requires officers to inquire about immigration status when they have reasonable suspicion that a lawfully detained person might have an unlawful status. The concerns raised by the court in that case – *United States v. Brewer*, No. CV 10-1413-PHX-SRB (D. Ariz. July 28, 2010) – apply equally here. As the court noted, “[c]ertain categories of [lawfully present] people . . . will not have readily available documentation of their authorization to remain in the United States, thus potentially subjecting them to arrest or detention, in addition to the burden of ‘the possibility of inquisitorial practices and police surveillance.’” Such burdens on lawful residents may undermine “the important federal responsibility to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy,” in violation of the Constitution’s Supremacy Clause.

Additionally, the Attorney General’s opinion provides no guidelines as to when questions about immigration status is justified. Because most police officers have not been trained to enforce immigration law, allowing them to question individuals about immigration status is an invitation for racial profiling and potential Equal Protection violations. It will also have an adverse effect on public safety as immigrants will be less likely to feel safe cooperating with law enforcement in reporting and responding to questions about crimes.

The Attorney General relies on the Supreme Court case *Muehler v. Mena*, 544 U.S. 93 (2005) for the proposition that “so long as the questioning does not prolong a lawful detention, police may ask questions about immigration status.” But that case only holds that such questioning is not a Fourth Amendment violation. It did not address the Supremacy Clause and Equal Protection problems inherent in such inquiries.

For these reasons, law enforcement agencies should not accept the Attorney General’s invitation to investigate immigration status.

Thank you for your attention to this matter. Should you have any questions, or wish to discuss this matter further, please do not hesitate to call me at (804) 644-8080.

Sincerely,

Rebecca K. Glenberg
Legal Director