

Okaloosa County Sheriff's Office

Charles W. Morris, Sheriff



Position Paper on Immigration Enforcement

July 13, 2007

1250 N. Eglin Parkway
Shalimar, Florida 32579

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

SUMMARY

Recent news articles describing “Round-Ups” of illegal aliens in a neighboring county have resulted in calls for the Okaloosa County Sheriff's Office to use the same tactics as reported. The Sheriff of that county has issued a statement saying the reports are inaccurate, but it is those reports that have fueled demands for us to use the tactics described. This position paper seeks to explain our enforcement policies and why we will *not* use the tactics described in the news reports.

The Okaloosa County Sheriff's Office is committed to the rule of law and upholding constitutional principles. Basic tenets of the US Constitution and previous rulings by the Supreme Court prevent us from conducting operations described in the reports. Contrary to popular belief, so-called “Illegal Aliens” have the same civil rights as any American. This is a matter of law and is beyond debate.

As partial evidence of the civil rights protection for aliens, the 14th Amendment contains the following clause:

“No State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Note use of the word “person,” not *citizen*.

The rules that prevent us from “rounding up” unauthorized aliens are the same rules that protect you and every other American from unwarranted search and seizure, unlawful detentions, and the “knock in the night” on your front door.

We cannot solve the problems of illegal immigration with simplistic, “feel-good” responses.

The mere unauthorized presence in the U.S. is a civil, not a criminal, violation of U.S. law¹. The removal of aliens not authorized to be in the U.S. is an *administrative* process, not a *criminal* process.

Local law enforcement in Okaloosa County arrests about 500 illegal aliens a year on state charges. These charges most often stem from traffic and document violations.

State and local law enforcement officers have *no legal authority* to arrest people for the *civil* violation of being in the US without authorization. We can only take a

¹ 8 USC 1229c(d)

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

suspected unauthorized alien into custody for an immigration offense when Immigration and Customs Enforcement (ICE) specifically instructs us to do so or when there is federal warrant. To do otherwise would expose the County and the individual deputies to civil rights law suits.

The Federal Government has not posted any ICE agents in Okaloosa County. We have repeatedly asked for more ICE support, and continue to do so.

The Okaloosa County Sheriff's Office has a strong partnership with state and federal law enforcement agencies, and will continue to support them in all matters consistent with the law. We believe that a coordinated local-state-federal law enforcement response is the most effective way to deal with these issues.

LEGAL BACKGROUND

The Immigration and Nationality Act, or "INA," (8 U.S.C. 1101) contains both *criminal* and *civil* enforcement measures. The authority for local law enforcement to enforce immigration laws is limited to the *criminal* provisions, such as when there is a criminal warrant for the arrest of an immigration absconder or a deported alien who has re-entered the U.S. Local law enforcement does NOT have the authority to enforce the civil provisions of the INA, which includes apprehension and removal of unauthorized aliens. In fact, enforcement of the civil provisions of the INA by local law enforcement has been interpreted to be a violation of the alien's constitutional rights².

In 2003 and 2005, members of Congress introduced legislation to extend this authority to local law enforcement, but these attempts have been unsuccessful.³

Under current law, the role of local police in enforcing immigration law is limited to:

1. Questioning a person who has been legally detained on state matters to determine their immigration status.
2. Running database queries through the ICE Law Enforcement Support Center(LESC)
3. Detaining a suspected unauthorized alien *on-scene* for a *reasonable* amount of time if ICE agents will respond to take them into custody.
4. Arresting unauthorized aliens when there is a *criminal* warrant for immigration violations.
5. Conducting joint investigations and providing intelligence on criminal violations of immigration law.

² MDPD Legal Opinion 2-14-07

³ Congressional Research Service, CRS Report for Congress, Mar 2004

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

Simply because a person is not authorized to be here does not make them "deportable." Immigration laws and regulations are very complex, and local patrol officers simply do not have the time or resources to properly determine a person's status as deportable or not deportable during routine law enforcement contacts. Making mistakes about a person's status can be very expensive.

In 1994 the Katy, Texas Police Department participated in an immigration raid with federal agents. Local police detained 80 individuals who were later determined to be in the U.S. legally. These people brought a law suit against the police department, and the city eventually settled the claims out of court.⁴

In many cases, it can take hours or days to properly determine if a person can be arrested for an immigration violation. Detaining a person beyond the time needed by local police to complete state-authorized inquiries, and solely designed to aid in enforcement of federal civil immigration laws, has been viewed by court precedent to be unlawful.⁵

Here are two recent examples where the initial checks showed people were subject to civil immigration arrest, but information obtained days later showed they were NOT subject to arrest.

Case One: A suspect in a criminal investigation was determined to have overstayed their visa by several years. We learned that the Immigration Court had ordered the person deported by a certain date, but the suspect had not reported as ordered. In spite of this, it was determined the suspect could NOT be arrested for the immigration violation because he had filed an appeal, and therefore was not "deportable" until the appeal process was finished.

Case Two: There were initial indications that two suspects had valid visa extensions. When we attempted to verify this through two different federal visa and immigration databases, the records showed the suspects did not have approved extensions. A week later, after checking with still another federal agency, we received confirmation the suspects did have valid extensions.

According to current case law, local police authorities may enforce the criminal provisions of the INA if state law specifically permits them to do so but are precluded from directly enforcing the INA's civil provisions.^{6 7}

Florida State Statutes Section **901.15 When arrest by officer without warrant is lawful**, contains no provisions to arrest for violations of civil immigration law.

⁴ Major Cities Chief Immigration Committee Recommendations, Jun 2006

⁵ Charles Gordon, Et. Al, Immigration Law and Procedure, citing Abel v. US and US v Cruz)

⁶ Gonzalez v. City of Peoria (9th Cir. 1983)

⁷ US v Vasquez-Alvarez (10th Cir. 1999); US v. Salinas-Calderon, (10th cir 1984)

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

In 2002 the State of Florida entered into a Memorandum of Understanding (MOU) with the Federal Government for selected officers to attend immigration enforcement training. This program has been called the "287g" system. Under this MOU, a state or local officer who has been properly certified under the 287g program may, when under the *direct supervision* of a federal immigration agent, enforce immigration law for *counter-terrorism* purposes. The MOU specifically excludes using officers for "routine" immigration enforcement.

Florida State Statutes Section **448.09 Unauthorized aliens; employment prohibited**, makes it unlawful to knowingly hire an unauthorized alien. This is a *noncriminal* infraction under Florida law, punishable by a \$500 fine.

First, this statute may not even be enforceable. After consultation with legal experts, we learned there is a strong possibility this statute conflicts with the Supremacy Clause of the Constitution. Specifically, the Supreme Court has said:

"The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress..."⁸

The Florida law apparently conflicts with certain language in the federal law and, it is argued, therefore preempts areas of law the Federal Government has specifically reserved for itself.

The Federal law also requires 3-day notice to employers before an inspection of employee verification unless a warrant has been obtained for a no-notice inspection.⁹

Even if it is eventually decided the Florida law is within the authority of the state, it is difficult to enforce. There are many plausible defenses. The problem lies in proving the employer knowingly hired an illegal. There is no comprehensive system for employers to verify a persons' legal status, especially if the employee used false identification. Further, the federal rules require an employer:

"Examine the document(s) and, if they reasonably appear on their face to be genuine and to relate to the person presenting them, you must accept them. To do otherwise could be an unfair immigration-related employment practice."⁹

The Social Security Administration's web site for employer verification warns the user not to exclude a person from a job if the number does not verify on the site. The reply to a query does not provide a name match or immigration status – it

⁸ Reno v. Flores, 507 U.S. 292, 305 (1993)

⁹ USDOJ, M-274 Handbook for Employers

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

only states the number is valid or not. The web site further warns the employer that using the data to refuse employment could subject them to legal penalties.

Some have suggested that law enforcement should go to work sites and check the validity of immigrant worker's identification. First, we have no right to "demand your papers" in America unless we have reasonable suspicion to believe you are involved in a crime or, for example, you commit a traffic violation. Second, if you stand on the sidewalk and look at a work site, how do you know which workers are illegals? If you answer, "They look like Mexicans," then the answer is wrong. Should we require the Hispanic veteran who works in construction to prove he is in the US legally? Should we also run Social Security checks on the Puerto Rican contract laborers?

In many cases we found that local contractors were not actually hiring the illegal workers directly, but were using out-of-state labor companies. The records necessary to prove a case against the employer were beyond our reach. These labor companies often have hundreds of employees spread over many states. In such cases, the only way to attack the problem is to work with our federal counterparts.

A \$500 fine is not an effective deterrent when the employer is running a multi-million dollar construction operation. Writing a citation only lets the employer know you are "on to him" and warns him to develop a better way to hide his culpability. We believe it is more effective to develop information on the networks that provide illegal workers and to work with federal authorities to interdict these operations.

The Okaloosa County Sheriff's Office has investigated cases where we believe employers have smuggled and harbored unauthorized aliens, and we reported those cases to federal authorities. Experience shows, however, that it can take months or years of investigation to make a solid case for federal court.

CIVIL RIGHTS ISSUES

Statutes and court rulings require "Reasonable Suspicion" of a crime before an officer can detain and question a person. The authority to temporarily detain a person is based on the officer's authority to eventually arrest that person if, during the detention, the officer develops "Probable Cause" to make the arrest.

Since a local officer in Florida has no legal authority to arrest for a civil violation of immigration law, the officer has no legal authority to detain a person based solely on the belief they have violated a civil provision.

The tactics described in news articles discuss methods where police action is clearly intended to cause people to run at the sight of police. The officers then

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

reportedly chase and detain them for identification checks. If the suspects run through private property, the officers arrest them for trespassing.

There have been numerous court cases discussing detention of suspects because they ran at the sight of police. The courts have ruled that absent other specific facts indicating the person was committing a crime, the police may *not* detain (tackle) a person simply because they ran when they saw the police¹⁰. For example, a person who runs and then throws away an object that appears to be a drug container has shown behavior indicating a crime.

A person who simply runs when the police come around the corner has *not* shown any behavior indicating they have committed a crime. "Running While Mexican" is no more a reason to chase and tackle somebody than "Running While Black" or "Running While Jewish."

Chasing people simply because they "look Mexican" is a clear civil rights violation. Since we know there are many Israeli nationals in Okaloosa County illegally, arbitrarily detaining Mexicans at a construction site is the legal equivalent of sending officers to a synagogue and demanding to see everyone's papers.

The analogy makes these points: First, assuming all Israelis go to synagogues is as invalid as assuming all Hispanics at construction sites are illegal -- many are American-born or are here on work visas. Second, it is never correct to target an entire class or group based on the status or conduct of individuals.

When the original "Stop and Detain" violates court rulings, any arrest for criminal charges (such as finding a false ID during the search) that results from the stop is unlawful. Even if a prosecutor filed on such a case, any defense attorney who passes the bar could get such an arrest thrown out of court.

When police actions are intended to cause a person to break the law, and when there is no evidence of the person's prior intent, it is entrapment. If we followed the example described in the news, a deputy could swerve his car onto the sidewalk just to make you jump into the street, and then cite you for jaywalking.

The only agency that can legally determine a person's legal status is Immigration and Customs Enforcement (ICE). To check a person's status, local police must run a computer query through the LESC. If the person has never been encountered by Immigration (for example, if they successfully sneaked across the border), the computer reply will be "No Record Found." Of course, people born in the U.S., such as Puerto Ricans, are not in the database anyway. Therefore, we cannot arrest or detain somebody simply because no record was found.

¹⁰ For example, see *Robinson v. State*, 1st DCA and *E.B. v. State*, 2nd DCA

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

Status checks are further complicated by the pervasive use of authentic-looking false documents. If the false identification uses the name of a person here legally, then the officer would have no way to know the person is illegal. Even when we arrest suspects on state charges, the national automated fingerprint system does not check the immigration fingerprint database, which is separate from the criminal database.

When we do receive a name reply, it will usually say the person "may" be in the U.S. illegally, and then cautions not to make an arrest solely on the basis of that reply. Even if we had authority to arrest the suspect for the civil violation of being in the U.S. illegally, making an arrest with such ambiguous information would place us (and the individual deputy) at risk for a false arrest law suit. For example, the person may have appeared before the Immigration Court and the Court may have ordered the person not be deported. In that circumstance, arresting the person would be a violation.

RESOURCE ISSUES

Setting priorities is a crucial tenet of management. Neither the Sheriff's Office nor ICE has the necessary resources to end illegal immigration in the region. Therefore, we must make *dangerous* aliens our first priority. These include gang members, organized crime, and those who traffic in guns, drugs, and humans.

The Okaloosa County Sheriff's Office has less than 300 full-time deputies. In 2006 those deputies responded to 177,000 calls for service, or 485 per day, 20 calls per hour.

Before we can determine a person's status, we must make a computer query to the Law Enforcement Support Center. Unlike the nearly instantaneous criminal records check, the total time for an immigration check is usually about 30 minutes.

In the time it takes to get an ambiguous answer on one suspected alien, we received 10 other calls for service for domestic violence, burglaries, drunk drivers, etc.

Even ICE agents cannot arrest a person for civil immigration violations unless there is space in an immigration detention center. The nearest facility is the Wakulla County Jail, where the county contracts with ICE to hold civil detainees. Unfortunately, there are only 28 beds available for that purpose.

Even if Okaloosa County was to build a "Tent Jail" and disregard federal rules, it would cost us \$20,000 a year per unauthorized alien in custody. If we kept an ongoing population of 100 illegals in our "Tent Jail," it would cost Okaloosa

Okaloosa County Sheriff's Office
Position Paper: Immigration Enforcement

County \$2 million a year¹¹. At a time when lower budgets are forcing us to cut manpower, how could we possibly pay those costs?

CONCLUSION

The Florida Sheriff's Association (FSA) established a committee to study immigration issues. That committee, with Sheriff Don Hunter as chairman, issued a set of formal policy recommendations. The Okaloosa County Sheriff's Office supports the FSA's Policy Recommendations on Illegal Immigration, and we continue to urge legislators at appropriate levels to act on these recommendations.

We will continue to work closely with our federal law enforcement partners to build prosecutable cases against priority offenders. We will continue to press the Federal Government to station ICE agents in Okaloosa County.

Law enforcement draws authority for arrest powers from statutes and court rulings. We cannot choose to ignore court rulings, nor can we make up authority the statutes do not give. Emotional and political issues may tempt people to demand us to make it up as we go, but such an approach is dangerous. If we choose to ignore the law for one popular cause, then what is to prevent us from ignoring the law and constitution for the next cause?

Be careful what you ask for – the next target could be you.

¹¹ Estimate is based on the cost incurred by Sheriff Joe Arpaio of Arizona.
http://www.nctimes.com/articles/2005/01/26/news/californian/23_08_311_25_05.txt