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The Circumstances In Which an Officer May Ask Questions Concerning Alienage

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Summary

This report provides a short overview of the circumstances in which a law enforcement officer may ask questions concerning alienage. Generally, any officer may freely ask someone questions about his or her alienage status so long as the individual can refuse to answer. However, if questioning is sufficiently coercive, it can rise to the level of a Fourth Amendment seizure, which, depending on the circumstances, requires either probable cause or reasonable suspicion to justify. This report does not discuss custodial interrogations.

Introduction

This report discusses the circumstances in which a law enforcement officer may question an individual about his alienage status without running afoul of a constitutional protection. It provides background on the legal framework governing these interrogations and discusses the salient legal issues that may arise. As a general rule, an officer may freely ask an individual questions concerning his alienage status so long as the individual can refuse to answer. It is only when the circumstances surrounding the questioning cease to be consensual and become coercive that the encounter becomes a "seizure" and triggers the Fourth Amendment prohibition against unreasonable searches and seizures. This report does not discuss custodial interrogations.

Background On The Fourth Amendment

All persons, including aliens, enjoy Fourth Amendment protections.[1] The Fourth Amendment mandates that searches and seizures of persons, houses, papers, and effects

[1] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Wong Wing v. United States, 163 U.S. 228 (1896).

conducted by the government must be reasonable.[2] Reasonableness means that justification is required prior to conducting a Fourth Amendment search or seizure.[3] The degree of justification required varies depending on the circumstances, though in most cases a search or seizure conducted without a warrant supported by probable cause[4] is presumed unreasonable.[5] However, an officer can conduct a "stop and frisk" if there is a reasonable suspicion[6] that the suspect is planning or has committed a crime.[7] Nonetheless, not all encounters between law enforcement officers and individuals constitute a "seizure" which would trigger Fourth Amendment protections.

In order to determine whether a Fourth Amendment seizure has occurred, courts look at the totality of circumstances and ask whether a reasonable person would believe he was free to leave the encounter with the officer.[8] When one cannot leave the presence of the police for reasons unrelated to police coercion (e.g., the seizure occurs on a bus), the test is whether a reasonable person would feel free to decline the officer's requests.[9] While traditional arrests are almost always Fourth Amendment seizures,[10] such seizures may also include brief detentions, such as a "stop," that fall short of an arrest.[11]

Consensual Encounters Are Not Fourth Amendment Seizures

Asking someone to identify himself does not in itself constitute a Fourth Amendment seizure.[12] However, if a person refuses to answer questions regarding his identity, detaining the person in order to continue questioning would fall under Fourth Amendment

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[2] U.S. Const., Amend. IV.

[3] Camara v. Municipal Court, 387 U.S. 523 (1967).

[4] "Probable cause to search exists where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).

[5] Katz v. United States, 389 U.S. 347, 357 (1967).

[6] Reasonable suspicion is a less rigorous standard of cause than probable cause. Reasonable suspicion means "[a] particularized and objective basis for suspecting the person stopped of criminal activity." *See Ornelas*, 517 U.S. at 696.

[7] Terry v. Ohio, 392 U.S. 1 (1968).

[8] United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.")

[9] Brendlin v. California, 127 S. Ct. 2400 (2007) citing Florida v. Bostick, 501 U.S. 429, 435-436 (1991) ("[W]hen a person has 'no desire to leave' for reasons unrelated to the police presence, the 'coercive effect of the encounter' can be measured better by asking whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'").

[10] Dunaway v. New York, 442 U.S. 200, 212-216 (1979).

[11] United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

[12] INS v. Delgado, 466 U.S. 210, 216 (1984). *See also* Florida v. Royer, 460 U.S. 491 (1983) ("Interrogations relating to one's identity or a request for identification by the police does not by itself constitute a Fourth Amendment seizure.").

protections.[13] Thus, determining whether there is a Fourth Amendment seizure turns on whether the questioning is consensual or coercive.

It is important to stress that an officer's questioning may still be consensual without telling the individual that he is free not to respond.[14] The fact that most individuals answer police questions without being told they are free not to respond does not render these encounters any less consensual.[15] In order for an encounter with an officer to rise to the level of a Fourth Amendment seizure, the encounter must be so intimidating that a reasonable person would have believed he was not free to leave if he had refused to respond to the officer's query.[16]

The leading case on this issue is *INS v. Delgado*.[17] In *Delgado*, Immigration and Nationalization Service (INS) agents conducted a surprise inspection of a worksite in order to determine whether undocumented aliens were present among the employees.[18] After entering the worksite, the INS posted agents at all the exits, proceeded to approach employees, and asked them questions regarding their citizenship status.[19] If an individual did not provide a credible reply or admitted he was an alien, he was asked to show his immigration papers.[20] In the meantime, the employees continued with their work and were free to walk around the worksite.[21] The Court held that there was no Fourth Amendment seizure of the workforce because the workers could not have had a reasonable fear that they would be detained within the worksite if they attempted to leave.[22] The Court concluded that the possibility of the employees being questioned if they sought to leave the worksite should not have resulted in any reasonable apprehension that they would be detained.[23] Therefore, the employees were subjected to consensual encounters rather than Fourth Amendment seizures.[24]

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[13] *See* Brown v. Texas, 443 U.S. 47 (1979) (finding a Fourth Amendment seizure when two officers physically detained the defendant in order to determine his identity after the defendant refused the officer's requests to identify himself).

[14] *Delgado*, 466 U.S. at 216.

[15] *Id.* ("While most citizens respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.").

[16] *Id.* ("Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.").

[17] 466 U.S. 210.

[18] *Id.* at 211-212.

[19] *Id.* at 212.

[20] *Id.* at 213.

[21] *Id.*

[22] *Id.* at 219.

[23] *Id.*

[24] *Id.* at 220.

From *Delgado*, it appears that an officer may ask questions regarding alienage so long as, in the totality of circumstances, a reasonable person would have felt free to decline to answer. Otherwise, there is a seizure, and it must be shown to be reasonable in order to pass constitutional muster. Some lower courts have declined to distinguish questions regarding alienage from more general questions about identification, and have held that questioning someone about his or her alienage status does not trigger Fourth Amendment concerns.[25] Though these cases deal almost exclusively with immigration officers, the analysis of whether a Fourth Amendment seizure has occurred would appear similar when state and local officers are involved.[26]

Situations That Are Fourth Amendment Seizures

Though officers have broad leeway to ask questions when the encounter is consensual, if the encounter becomes sufficiently coercive, it will rise to the level of a Fourth Amendment seizure which an officer must justify by some cause or suspicion. There is no bright line that separates a consensual encounter from a coercive encounter; the distinction depends on the totality of the circumstances. Because of this, there are several situations in which there can be a Fourth Amendment seizure that falls short of a traditional arrest.

Refusal To Answer. A refusal to respond to a question concerning alienage cannot be the sole basis to support a Fourth Amendment seizure. If an officer attempts to compel an answer, there is a possibility that a seizure may take place. For example, in *Brown v. Texas*, the defendant was standing in an alley when a pair of police officers asked him for identification.[27] After the defendant refused to identify himself, he was arrested for violating a state provision requiring individuals to identify themselves to police when lawfully stopped.[28] The Supreme Court ruled that this situation rose to the level of a seizure and was unsupported by the reasonable suspicion that the Fourth Amendment required.[29] From this case, it is clear that a refusal to provide identification is not enough on its own to support a Fourth Amendment seizure.[30] Even if an arrest is effected because of a refusal to answer, it would appear that a suspected undocumented alien may not be compelled to answer when arrested for violating a criminal provision of the INA because of the Fifth Amendment prohibition against self-incrimination.[31]

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[25] United States v. Angulo-Guerrero, 328 F.3d 449 (8th Cir. 2003); Zepeda v. INS, 753 F.2d 719 (9th Cir. 1983).

[26] *But see* INA § 287(a)(1) (empowering immigration officers to interrogate without warrant any person believed to be an alien as to his right to be in the United States).

[27] 443 U.S. at 48.

[28] *Id.* at 49.

[29] *Id.* at 51-52.

[30] *Accord* Hiibel v. Sixth Judicial Court of Nevada, 542 U.S. 177 (2004).

[31] It should be noted that the Fifth Amendment prohibition against self-incrimination extends only to criminal violations, while illegal presence within the United States is generally a civil violation.

Inquiry which results in an arrest. Generally, a law enforcement officer may use information obtained in a consensual interrogation to provide the reasonable suspicions needed to support a "stop" of a suspect.[32] Likewise, federal immigration officers can also use reasonable suspicions arising from a consensual interrogation to support a brief detention of a suspected undocumented alien. This is because of their statutory authorization to arrest aliens for illegal presence within the United States.[33] However, it is not clear whether state or local officers can conduct a "stop" after obtaining information that would give rise to a reasonable suspicion of illegal presence since they do not have the same statutory authorization to detain suspected undocumented aliens as federal immigration officers.

The Difference Between Federal and State or Local Officers

When an officer takes additional steps to compel an individual to answer questions concerning alienage by detaining him, the Fourth Amendment imposes "some minimal level of objective justification" in order to validate the detention effected for the questioning.[34] It would seem that a "minimal level of objective justification" would vary depending on whether the questioning officer was either a federal immigration officer or a state or local officer.

Federal Immigration Officers. A federal immigration officer has statutory authorization to interrogate and arrest undocumented aliens without warrant.[35] Due to this authorization, immigration officers who have reasonable suspicions that a suspect is in the United States without legal status may detain the person for further questioning, and if probable cause should arise, to arrest the individual.

State or Local Officers. Though federal immigration officers can detain a suspected undocumented alien with only reasonable suspicions of illegal presence, state and local officers lack federal statutory authorization to do so. In most cases, state and local officers may only detain individuals and then question them about alienage when the detention is conducted during exercise of law enforcement duties, such as during an arrest

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[32] *See* United States v. Springer, 946 F.2d 1012, 1017 (2d Cir. 1991) (reasonable suspicion to detain individual who gave contradictory responses to consensual questions and implausibly denied ownership of suitcase); United States v. Winfrey, 915 F.2d 212, 216-17 (6th Cir. 1990) (reasonable suspicion to detain individual when consensual encounter revealed traveled under variation of surname, had large sum of cash, and no documentation relating to alleged business purpose of trip); United States v. Sterling, 909 F.2d 1078, 1083-84 (7th Cir. 1990) (reasonable suspicion to detain individual who did not have identification and provided implausible explanation for travel during consensual questioning); United States v. Delaney, 52 F.3d 182, 184-85 (8th Cir. 1995) (reasonable suspicion to detain individual who appeared nervous and disavowed knowledge of bag he checked when consensual questioning revealed traveling under false name); United States v. Kopp, 45 F.3d 1450, 1454 (10th Cir. 1995) (reasonable suspicion to detain individual when consensual questioning of two persons in car revealed inconsistent and implausible stories).

[33] *See* INA § 287(a)(2).

[34] *Delgado,* 466 U.S. at 216-217.

[35] *See* INA § 287(a)(1), (2).

for a state or local criminal violation.[36] Moreover, it has been traditionally understood that state and local officers may only enforce the criminal provisions of the Immigration and Nationality Act (INA) since the pervasive regulatory scheme that constitute the civil provisions of the INA appear to evince a congressional intent to preclude state enforcement.[37] This would seem to mean that unless there is a suspicion that the suspect committed a criminal violation of the INA, suspicion of illegal presence alone may not be sufficient grounds for a state or local officer to detain a suspected undocumented alien.[38] Under this theory, unless the state or local officer was detaining a suspect for violating either a criminal provision of the INA or for violating some state or local law, the officer most likely cannot detain the suspect for further questioning if the only basis for doing so is a suspicion that the suspect is an undocumented alien.[39]

An alternative theory posits that states have "inherent authority" to enforce both the criminal and civil provisions of the INA. This theory is relatively new, and has some support in case law.[40] It has also been endorsed by the Department of Justice in an Office of Legal Counsel opinion.[41] However, no federal court has expressly held that state or local officers may enforce civil provisions of the INA. It is clear that under either theory, a state or local officer may detain someone for further questioning for either a suspected violation of a criminal provision of the INA or for a suspected state or local offense. However, until there is further guidance from the federal courts, it is an open question as to whether state or local officers have the authority to detain individuals of suspected civil violations of the INA.

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[36] United States v. Salinas-Calderon, 728 F.2d 1298, 1301, n.3 (10th Cir. 1984) ("A state trooper has general investigative authority to inquire into possible immigration violations.").

[37] Gonzalez v. City of Peoria, 722 F.2d 468, 474-75 (9th Cir. 1983) ("We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration."). *See also* INA § 274(c) (authorizing "officers whose duty is to enforce criminal laws" to make an arrest for violating a provision of INA § 274, which imposes criminal penalties for certain proscribed activities).

[38] Dep't of Justice, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 1996 OLC Lexis 76 at 2 (February 5, 1996). Subsequently withdrawn by a 2002 OLC Opinion. *See* fn. 41.

[39] *Id.*

[40] *See Salinas-Calderon*, 728 F.3d at 1301, n.3 (claiming that state troopers have general investigatory authority to inquire into possible immigration violations without distinguishing between criminal or civil violations); United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999) (holding that a provision of the INA did not preclude any preexisting enforcement power already in the hands of state or local officers without stating whether enforcement of civil immigration provisions was a preexisting power); Lynch v. Cannatella, 810 F.2d 1363 (5th Cir. 1987) ("No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws.").

[41] Dep't of Justice, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, (April 3, 2002), [http://www.fairus.org/site/DocServer/OLC_Opinion_2002.pdf?docID=1041].