

# What Immigration Can And Cannot Do

Immigration<sup>1</sup> has the authority to enforce our nation's immigration laws. However, their authority is limited by the U.S. Constitution, the Immigration and Nationality Act and its regulations, and by internal practice. The ability of the local and state police to enforce the immigration law is even more limited.

## THE LIMITS OF INS AUTHORITY

1) CONSENSUAL QUESTIONING - Immigration can ask questions of a person if they have a "reasonable suspicion, based upon specific, articulable facts," that that person is not a US citizen. By itself, a person's ethnic appearance and inability to speak English is not reasonable suspicion; foreign dress or grooming, a high concentration of aliens in the area, or a tip from an informant is.

If Immigration walks up a person, the only question that person must answer is their name. The person has the right to refuse to answer any other questions and to walk away from the officer. If the person walks away, the officer cannot do anything else unless the officer has a legal basis to detain them (see 2 below). However, if the person runs away, the officer has the right to detain them.

2) DETENTION -Immigration cannot stop a car, or detain a person in some other way, unless they have a "reasonable suspicion, based on specific, articulable facts," that that person is not a U.S. citizen and is in the U.S. illegally. Immigration cannot detain a person solely because of their skin color, inability to speak English, farmworker status and/or their out of state car. A specific tip, erratic driving or running away from agents, or the employee's false immigration papers, obtained from an employer during an audit, do give the agents the right to detain.

Detentions of persons based solely upon ethnic appearance are clearly illegal. As a Federal Court in California stated in a 1994 opinion:

Racial oppression is one of the most serious threats to our notion of fundamental fairness. Reliance on the use of race or ethnicity as a shorthand for likely illegal conduct is repugnant under any circumstances.

Gonzalez-Rivera v. INS, 22 F.3rd 1441, 1449 (9th Cir. 1994); also see Almeida-Amaral v. Gonzales, 461 F.3rd 231 (2<sup>nd</sup> Cir. 2006).

3) ARREST - Immigration can arrest a person if they have an arrest warrant, or if they have probable cause to believe a person is not a US citizen, is in the U.S. illegally, and is likely to escape before a warrant can be obtained.

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<sup>1</sup> All references in this article to Immigration are to agencies of the Department of Homeland Security, including the Border Patrol.

4) SEARCHES OF DWELLINGS - Immigration cannot come into a dwelling unless they have a search warrant, or unless the occupant gives them permission to enter. A landlord cannot give Immigration permission; neither can the employer where the employer provides the housing. To get permission, Immigration must knock at the door and identify themselves before they come in.

5) FARM OPERATIONS - Immigration cannot enter a farm or "other outdoor agricultural operation" to question a person suspected of being an alien unless they have either the consent of the owner or a warrant.

6) MANNER OF QUESTIONING - Immigration cannot force a person to answer questions. They also cannot threaten, or trick a person into answering questions by promising that things will be better if the person answers. Use of "third degree" methods is also prohibited.

7) USE OF FIREARMS - Immigration cannot use their weapons unless they believe that a person is going to kill or seriously hurt them or some other person. "Warning shots" are expressly prohibited.

8) BEHAVIOR - According to the Border Patrol Manual, Border Patrol agents must treat everyone with courtesy and kindness. They cannot be arrogant or unpleasant. If in plainclothes, they must identify themselves before doing anything else. If asked, they must show identification.

#### THE LIMITS OF POLICE AUTHORITY

State and local police can only enforce the criminal provisions of immigration law. Under the immigration law, it is a crime to enter the U.S. illegally, but it is not a crime to enter the U.S. legally and remain longer than permitted. Thus, the police cannot detain or arrest a person unless they satisfy the same standard as Immigration (see 2 and 3 above) AND they also have reason to believe that the person entered the U.S. illegally.

You can call Wally Ruehle at Legal Aid (585) 295-5761 if you have any questions about this article or if you are aware of any incidents of Immigration or police misconduct.