

Posted 7/18/10

EXTREME MEASURES (PART II)

Turning cops into immigration agents invites misconduct and corruption



By Julius (Jay) Wachtel. Everyone knows that they can be stopped by police for a traffic infraction. What many don't realize is that officers can detain them at length for other reasons, and with far less justification than is required for an arrest. Barring a last-minute decision by a Federal judge, Arizona cops will soon be wielding that authority in an unprecedented way.

A.R.S. § 11-1051B, which takes effect July 29, 2010 provides that in any “lawful contact stop, detention or arrest made by a law enforcement official...in the enforcement of any other law or ordinance of a county, city or town or this state where *reasonable suspicion* exists that the person is an alien...unlawfully present in the United States, a reasonable attempt *shall* be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation” (emphasis added.)

There's nothing new about “reasonable suspicion.” More than forty years ago, in the landmark case of *Terry v. Ohio*, the Supreme Court authorized officers to temporarily detain persons (and, if warranted, to pat them down for weapons) if there was reasonable suspicion that they had committed a crime or were about to do so. However, officers can't simply rely on conjecture; what's needed are “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”

From hot-spot policing to anti-gun patrols, stop and frisk has become a key component of the police arsenal. Since *Terry* a series of Supreme Court (*U.S. v.*

Sokolow, 1989; [U.S. v. Arvizu](#), 2002) and circuit court decisions have continued to grant police considerable leeway in deciding when to make a stop.

As we suggested in “[Too Much of a Good Thing?](#)” the inherent subjectivity of reasonable suspicion stops make them ripe for abuse. Yet until now they’ve always been directed at ordinary crime and ordinary criminals, things that police know something about. So one can imagine what [Arizona POST](#) faced when it was charged with training the state’s cops to take on the role of border police.

POST’s hastily-produced [90-minute instructional DVD](#) begins with excerpts from the speech delivered by Governor Jan Brewer when she signed the controversial measure:

My signature today represents my steadfast support for enforcing the law, both against illegal immigration and against racial profiling...As committed as I am to protecting our state from crime associated with illegal immigration, I am equally committed to holding law enforcement accountable should this statute ever be misused to violate an individual’s rights....

Concerns that Arizona will be accused of racism suffuse the video. Hardly a minute goes by without one of its half-dozen instructors reminding viewers that they must ignore race and ethnicity when considering whether someone is illegally present in the U.S. To underline that point lawyer Beverly Ginn brings up [U.S. v. Montero-Camargo](#), a Ninth Circuit decision which held that Hispanic appearance is irrelevant in a community – in this case, El Centro – whose ethnic composition is substantially Hispanic. (Ginn leaves out the qualification. Neither does she mention that, as the justices readily conceded, [Montero-Camargo](#) contradicts the one Supreme Court case on point, [U.S. v. Brignoni-Ponce](#), which held that “Mexican appearance” can be a factor – just not the only one – in forming reasonable suspicion of illegal entry.)

As one sits through the presentations it’s obvious that applying reasonable suspicion to immigration matters is far from simple. Viewers get clobbered with a voluminous list of indicators ranging from lack of ID (when having ID is required), to voluntarily making incriminating statements, to evading police, being with known illegal aliens or at a place where illegal aliens gather, riding in an overcrowded vehicle, traveling in tandem, providing false, misleading or nonsensical information, difficulty communicating in English, nervousness, and so on.

How many factors will do? Well, viewers must figure that out for themselves. So here’s a question. In two weeks, when the law is scheduled to take effect, will cops be sufficiently “trained” and “experienced” to form reasonable suspicion of illegal presence in the way that the Supreme Court intended?

Originally the bill authorized police to detain likely immigration violators on sight. Yet, having declared an illegal alien emergency and devised a jaw-dropping remedy, legislators apparently had second thoughts. What if their newly-empowered brigadoons run amok? That led them to insert a precondition: yes, suspected immigration violations must be investigated, but only within the context of a lawful detention for an extraneous, non-immigration reason; for example, while writing a ticket for a traffic infraction. One can well imagine all the pretextual stops and dishonest reporting *that* will encourage.

Arizona's law is an ideal platform for other forms of misconduct. To be sure, police can threaten to arrest for many reasons, but even in traffic cases the legal process doesn't end with the cops. Illegal immigrants are caught in a different vise. Letting cops get mixed up in immigration matters will let the unscrupulous few take advantage to line their pockets or worse, with little chance of detection.

Knowing that every police car is a potential deportation machine must be a chilling prospect for victims and witnesses. It's one of the reasons why [Phoenix police chief Jack Harris](#) and [Tucson police chief Roberto Villasenor](#) came out strongly against the law. Naturally, their opposition will make officers think twice before enforcing the measure. That portends serious conflicts down the road, as politicians tug one way and cops another. (Villasenor appears in the POST video, apparently to reassure skeptical officers that whatever happens, the world won't come to an end.)

In our [earlier post](#) we agreed that Arizona needs better border enforcement. Yet transforming street cops into immigration police is a step into the Twilight Zone. ICE doesn't cruise city streets. Their patrols stick close to the border, where on-sight violations (think overloaded, speeding vans) are obvious and concerns about racial profiling seldom arise. Immigration agents work in teams, concentrating on workplace violations and immigrant smuggling rings. And still they get in trouble. One can only wonder what will happen should legions of cops step into the fray.