

MEMORANDUM

Memorandum to: Mayor and Board of Aldermen
From: Mike Brough
Subject: Arrests to enforce ICE detainers
Date: May 2, 2006

At the Board's request, I have investigated the circumstances surrounding the recent incident in which a Carrboro police officer stopped an individual for a stop light violation and, after conducting a routine records check with the National Crime Information Center ("NCIC"), learned that the Immigration and Customs Enforcement agency (ICE) had issued an "immigration detainer" on the individual who had been stopped. The officer called the 24-hour number for ICE and confirmed that the individual stopped was the person named on the immigration detainer. The officer then took the individual before a magistrate, who issued a "Magistrate's Order for Fugitive." The individual was then confined in the Orange County Jail and transferred to ICE later the same day.

I have researched the law in this area and have spoken with Kevin Smith, with Smith Rodgers & Strickland, the law firm the town has retained to assist in matters of criminal procedure. I have also spoken with Ms. Joan Friedland, an attorney with the Washington office of the Immigration Law Center. My conclusion is that, while the officer in question did absolutely everything he should have done on the occasion in question, the law in this area is sufficiently unclear as to the police department's responsibilities in such matters that the Board could legitimately direct that a different procedure be followed in the future.

Mr. Smith spoke with Tom O'Connell, Resident Agent In Charge in the Raleigh office of ICE. Mr. O'Connell's position is that, under the circumstances described above, the officer is *required* to take the person into custody and do exactly what the officer did in this instance. Mr. O'Connell cites the attached federal regulation (8 C.F.R. 287.7) as authority for this position. I do not agree with this contention.

In the first place, there is a great deal of dispute among courts and legal commentators as to whether states even have the authority to authorize local governments to enforce the non-criminal provisions of federal immigration statutes. Notably in this regard, there is only one statute that provides such authorization. 8 U.S.C. 1252c states that "to the extent permitted by relevant State and local law, State and local law enforcement officials authorized to arrest and detain an individual who (1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction...." Even this statute has two important limitations: (1) the federal authorization only applies to

the extent the state has authorized such enforcement, and (2) the statute merely authorizes and does not require such local enforcement.

Second, the federal regulation cited by Mr. O'Connell does not, in my judgment, support the conclusion that local police departments are required to take persons into custody to enforce immigration detainers. The regulation itself states that such detainers are issued pursuant to "sections 236 and 287 of the [Immigration and Nationality] Act. I have reviewed these sections (now codified as 8 U.S.C. 1226 and 8 U.S.C 1357) and can find nothing in them that supports Mr. O'Connell's interpretation. More importantly, the regulation itself states in subsection (a) that "[a] detainer serves to advise another law enforcement agency that the Department seeks custody of an alien *presently in the custody* of that agency, for the purpose of arresting and removing the alien." [Emphasis added]. An individual who has been stopped for a routine traffic violation has not been arrested and is not in the custody of the police officer. See also subsection (d), which uses the term "maintain custody," again suggesting that the intent of the regulation is to deal with situations where an individual is already in custody.

Third, and most significantly, even if Mr. O'Connell's interpretation of this regulation were correct, this still would not empower our police officers to arrest an individual for reasons not authorized under North Carolina law. N.C.G.S. 15A-401 specifies the circumstances under which local police officers are authorized to arrest people. Suffice it to say that the statute does not authorize the arrest of an individual for committing non-criminal violations of federal immigration statutes. And in my view (confirmed by my conversation with Kevin Smith), there is little doubt that taking a person into custody on the basis of an immigration retainer constitutes an arrest. The federal government could enact legislation mandating that states either authorize local governments to assist in the enforcement of immigration laws or risk losing federal funds, and such legislation has been debated in recent sessions of Congress, but it did not pass. Until the State amends North Carolina law to authorize or require local police officers to enforce federal non-criminal immigration laws, I believe that the better view is that local governments in this state do not have the authority to do so.

As indicated above, I have spoken with Mr. Smith, and our views are not really that different. On the basis of Mr. O'Connell's interpretation of the above cited federal regulation, he stated that his firm would support the authority of the police department to do exactly what our officer did in the recent incident. I could make the same argument. However, for the reasons explained above, I do not believe that the regulation *compels* our officers to take persons into custody solely on the basis of outstanding immigration retainers, and in any event the authority to do so is very questionable. Under these circumstances, the Board could choose to follow the example of other cities and establish a policy for the police department to follow in this uncertain area.

If the Board chooses to establish a policy in this area, I recommend that it be narrowly stated, such as that provided in the attached resolution.

ATTACHMENT B

8 C.F.R. § 287.7 Detainer provisions under section 287(d)(3) of the Act.

(a) *Detainers in general.* Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) *Authority to issue detainers.* The following officers are authorized to issue detainers:

- (1) Border patrol agents, including aircraft pilots;
- (2) Special agents;
- (3) Deportation officers;
- (4) Immigration inspectors;
- (5) Adjudications officers;
- (6) Immigration enforcement agents;
- (7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and
- (8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the BCIS.

(c) *Availability of records.* In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours,

excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

[62 FR 10392, Mar. 6, 1997; **68 FR 35273**, June 13, 2003, effective June 13, 2003]

ATTACHMENT C

A RESOLUTION ESTABLISHING A POLICY THAT THE CARRBORO POLICE
DEPARTMENT WILL NOT SEEK TO ARREST PERSONS WHOSE ONLY KNOWN
VIOLATION OF LAW IS OR MAY BE A CIVIL IMMIGRATION VIOLATION
Resolution No. 123/2005-06

WHEREAS, in Section 15A-401 of the North Carolina General Statutes, the General Assembly has specified the circumstances under which law enforcement officers may arrest persons, with or without an arrest warrant; and

WHEREAS, the list of circumstances under which a person may be arrested does not include an arrest of persons whose only known violation of law is or may be a civil violation of federal immigration statutes;

NOW THEREFORE, the Carrboro Board of Aldermen resolves:

Section 1. It shall be the policy of the Carrboro Police Department not to arrest or take into custody persons whose only known violation of law is or may be a civil immigration violation.

Section 2. This resolution shall become effective upon adoption.