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FAIRNESS IN LAW ENFORCEMENT: COLLECTION OF DATA

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THE WHITE HOUSE

WASHINGTON

June 9, 1999

MEMORANDUM FOR THE SECRETARY OF THE TREASURY
THE ATTORNEY GENERAL
THE SECRETARY OF THE INTERIOR

SUBJECT: Fairness in Law Enforcement: Collection of Data

We must work together to build the trust of all Americans in law enforcement. We have great confidence in our Federal law enforcement officers and know that they strive to uphold the best principles of law enforcement in our democratic society. We cannot tolerate, however, officers who cross the line and abuse their position by mistreating law-abiding individuals or who bring their own racial bias to the job. No person should be subject to excessive force, and no person should be targeted by law enforcement because of the color of his or her skin.

Stopping or searching individuals on the basis of race is not effective law enforcement policy, and is not consistent with our democratic ideals, especially our commitment to equal protection under the law for all persons. It is neither legitimate nor defensible as a strategy for public protection. It is simply wrong.

To begin addressing the problem of racial profiling, Federal agencies should collect more data at all levels of law enforcement to better define the scope of the problem. The systematic collection of statistics and information regarding Federal law enforcement activities can increase the fairness of our law enforcement practices. Tracking the race, ethnicity, and gender of those who are stopped or searched by law enforcement will help to determine where problems exist, and guide the development of solutions.

I therefore direct you to design and implement a system to collect and report statistics relating to race, ethnicity, and gender for law enforcement activities in your department. Specifically, you shall:

(1) develop a proposal within 120 days, in consultation with the Attorney General, for a system of data collection and an implementation plan for a field test of that system, including the law enforcement agency components, sites, data sets, training, and other methods and procedures to be included in the field testing. You shall implement field tests within 60 days of finalizing their proposals;

(2) to the extent practicable, collect data that is sufficiently detailed to permit an analysis of actions relevant to the activities of the included law enforcement agencies by race, ethnicity, or gender. Such actions may include traffic stops, pedestrian stops, a more extensive inspection or interview than that customarily conducted with entrants to the United States, requests for consent to search, or warrantless searches. Data acquired pursuant to this memorandum may not contain any information that may reveal the identity of any individual; and

(3) provide to the Attorney General a summary of the information collected during the first year of your field test, including civilian complaints received alleging bias based on the race, ethnicity, or gender of the complainant in law enforcement activities; your process for investigating and resolving such complaints; and the outcomes of any such investigations. The Attorney General shall report to me, in consultation with relevant agency heads, on the results of the field tests with: (i) an evaluation of the first year of the field test; (ii) an implementation plan to expand the data collection and reporting system to other components and locations within the agency and to make such system permanent; and (iii) recommendations to improve the fair administration of law enforcement activities.

In addition, within 120 days of the date of this directive, you shall provide a report to me on your training programs, policies, and practices regarding the use of race, ethnicity, and gender in your law enforcement activities, along with recommendations for improving those programs, policies, and practices.

William J. Clinton



Office of the Attorney General
Washington, D.C. 20530

November 15, 1999

The President
The White House
Washington, DC 20500

Dear Mr. President:

In response to your June 9, 1999, Executive Memorandum, I am submitting a report on the Department of Justice's (DOJ) training programs, policies, and practices regarding the use of race, ethnicity, and gender in its law enforcement activities.

As stated in the report, the guarantee of equal protection under the law to all persons is one of the most fundamental principles of our democratic society. To protect this essential right, federal law enforcement agencies must adopt policies that ensure fairness in their activities.

Given the importance of the issue of the use of race, ethnicity, and gender in federal law enforcement activities and the need to achieve a coordinated resolution of the complex legal and policy issues that the matter presents, the Department of Justice will establish a working group, headed by the Deputy Attorney General, to further evaluate current policies and training related to the use of race, ethnicity, and gender in DOJ law enforcement agencies and make recommendations as appropriate.

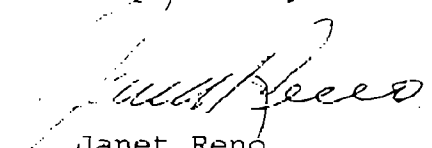
The working group will evaluate existing agency materials and data collected from the Department's field tests to:

- (1) Develop policy recommendations with respect to the use of race, ethnicity and gender in all agency law enforcement activities;
- (2) Expand and strengthen the training provided by Department law enforcement agencies to federal, state, and local law enforcement concerning the use of race, ethnicity and gender; and
- (3) Ensure that the law enforcement agencies are appropriately supervising and monitoring their agents, employees and operations for any impermissible use of race, ethnicity or gender.

The President
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We expect to conclude this review and make recommendations for reforms, as appropriate, soon after the receipt of interim results from the data collection effort.

Respectfully,



Janet Reno

Enclosure

**DEPARTMENT OF JUSTICE REPORT
POLICIES, PRACTICES AND TRAINING ON USE OF RACE, ETHNICITY AND
GENDER IN FEDERAL LAW ENFORCEMENT ACTIVITIES**

I. INTRODUCTION

On June 9, 1999, the President issued a Memorandum entitled, "Fairness in Law Enforcement: Collection of Data," directing the Department of the Treasury, the Department of Justice, and the Department of the Interior to: (1) collect data from all levels of Federal law enforcement tracking the race, ethnicity and gender of persons stopped or searched by law enforcement; and (2) provide a report on training programs, policies, and practices regarding the use of race, ethnicity, and gender in Federal law enforcement activities, along with recommendations for improving those programs, policies, and practices.

The guarantee of equal protection under the law to all persons is one of the most fundamental principles of our democratic society. In order to protect this essential right, Federal law enforcement agencies must adopt policies that ensure fairness in their activities. Federal law enforcement officers are prohibited from discriminating on the basis of race, ethnicity, religion, gender, and disability in performing their law enforcement duties.

Illegal activity transcends racial or ethnic parameters. The fact that a person is African-American, Hispanic, Asian, or of another racial or ethnic minority group is not a reason for law enforcement to suspect that person of wrongdoing. There is universal recognition, in both policy and case law, that a law enforcement officer may not rely on race or ethnicity as the sole basis for law enforcement action such as a traffic stop, pedestrian stop, or request for consent to search. At the same time, where a law enforcement officer has information linking specific criminal activity to an individual whose race, ethnicity or other identifying characteristic is known, that information is appropriately used to identify and locate that individual.

The challenge for law enforcement is (1) to develop policies and training programs enabling law enforcement officers to determine when information relating to the race or ethnicity of persons engaged in past or current illegal activities may be used in law enforcement operations; (2) to supervise and monitor law enforcement activities to ensure that these policies are implemented in the field; and (3) to identify and remedy those situations where race or ethnicity is inappropriately used to target individuals.

Recognizing the damaging effects that the impermissible use of race, ethnicity, or gender has on individuals and the community and recognizing the vital importance of instilling trust of law enforcement in all Americans, the Department of

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Justice has begun a review of our programs, policies, and practices to determine how these programs could be improved to ensure the fair enforcement of the laws. The Department of Justice has committed to an ongoing process, described more fully below, that will involve an extensive evaluation of current practice with regard to the use of race, ethnicity, and gender in law enforcement and recommendations for reforms to policies and training.

This report describes the policies, practices and training programs of the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the Federal Bureau of Prisons (BOP), the Immigration and Naturalization Service (INS), and the United States Marshals Service (USMS) as they relate to the use of race, ethnicity and gender. This report also includes recommendations for the evaluation of existing policies, the evaluation and enhancement of training programs, and the development of interim policies and guidance for law enforcement officers.

In response to the first part of the June 9 Memorandum, the Department of Justice has submitted a separate report that describes the methods the various agencies will employ to collect the requested data. The Department of the Treasury and the Department of the Interior have each submitted separate reports detailing their data collection plans and respective programs, policies and practices pursuant to the June 9, 1999, Memorandum. The data collected by the Department of Justice will be analyzed as part of the Department's ongoing policy review process.

II. AGENCY MISSIONS, POLICIES, AND TRAINING

A. Drug Enforcement Administration

Mission

The DEA is responsible for enforcing the provisions of the controlled substances and chemical diversion and trafficking laws and regulations of the United States. DEA creates, manages, and supports law enforcement programs -- domestically and internationally -- aimed at reducing the supply of and the demand for controlled substances. It investigates and prepares cases for prosecution against significant trafficking organizations and their members involved in the cultivation, production, smuggling, distribution and diversion of controlled substances in or destined for illegal trafficking in the United States.

Among DEA's responsibilities is the coordination of drug investigations and drug intelligence collection with foreign

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governments; training of Federal, state, local, and foreign officials in drug law enforcement; coordination and cooperation with Federal, state, and local drug law enforcement agencies in joint investigations, supply reduction programs, and other mutual efforts; and participation in the national supply and demand reduction strategy.

Operation Jetway is a Special Enforcement Operation established in 1993, with DEA as the lead agency, to provide uniform, standardized training and statistical analysis to federal, state, and local drug interdiction units working at airports, bus stations, train stations, and parcel facilities nationwide. The primary goals of the *Jetway* program are (1) to ensure that interdiction units are afforded training in accepted interdiction techniques, within the confines of current law; and (2) to increase the effectiveness of interdiction efforts on both a national and international scale. DEA agents personally participate in *Jetway* interdiction actions on the ground.

Operation Pipeline is a highway drug interdiction program that is led and implemented by the nation's state and local law enforcement agencies, with support from DEA's El Paso Intelligence Center. The program is composed of three elements: training, real-time communications, and analytic support. Each year, state and local highway officers conduct dozens of three-day training schools across the country for other highway officers. The DEA coordinates *Operation Pipeline* training through the DEA's El Paso Intelligence Center. The course content of each *Pipeline* school is individually tailored by the lead instructor-officer, who uses a basic training curriculum designed by the DEA. DEA agents do not personally participate in *Operation Pipeline* interdiction actions.

Policies and Practices

DEA conducts investigations to determine which individuals or organizations are manufacturing and trafficking in illicit drugs. DEA's policy is to develop cases against drug traffickers based on evidence of violations of the federal narcotics laws, irrespective of the race, ethnicity, or gender of any given trafficker. DEA does not have a written policy on the use of race, ethnicity or gender in its law enforcement activities.

DEA investigations often reveal drug source and transit areas, trafficking routes, and trends and may also identify the race or ethnicity of individuals suspected of drug trafficking. Where an individual is specifically identified as a suspect in an investigation, racial and ethnic identifiers are used to assist

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law enforcement in locating and identifying the suspect. Investigations may also identify particular criminal organizations that are involved in drug trafficking. When investigative and intelligence activities collect information on the race or ethnicity of persons involved in such criminal activity, that information is given to the investigator who, in turn, can use that information as part of an investigation.

In addition, DEA prepares intelligence reports based upon its investigations. If investigative activity indicates that members of a particular ethnic group are frequently involved in the trafficking of a particular drug at a particular time, that information is included in the intelligence report. These reports are used internally, as well as shared with other federal, state, and local law enforcement agencies for use in their investigations. Also, intelligence reports disseminated to state and local law enforcement by the DEA could contain information received identifying the race or ethnicity of a specific alleged drug trafficker.

Training

DEA agents are trained to identify and articulate specific factors that distinguish individuals involved in smuggling contraband from other members of the traveling public. While there is no "national drug courier profile," there are patterns of activities, methods, and characteristics that may indicate criminal activity. For example, with respect to an airline passenger, these may involve details regarding the passenger's ticket and how it was purchased, characteristics of the passenger's luggage, excessive nervousness, and evidence suggesting the passenger may be smuggling contraband internally.

Operation Jetway training focuses on (1) legal issues in transportation interdiction investigations; (2) drug trafficking trends and key characteristics that are shared by drug traffickers; and (3) effective use of investigative tools and intelligence sources. The Jetway courses use a lesson plan that has been approved by the Office of Chief Counsel and DEA Training in Quantico. Course instruction includes constitutional law, search and seizure with regard to both consensual encounters and detentive stops, drug courier indicators and concealment methods. During Operation Jetway training, agents/officers are taught that race, religion, ethnic origin, gender, or age are not indicators of criminal activity. Moreover, when agents/officers intend to temporarily detain a person, they are taught that they must be able to identify and articulate specific factors which,

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when viewed collectively, give reasonable suspicion that an individual is involved in smuggling contraband.

Similarly, *Operation Pipeline* instructors and prosecutors teach that highway officers are not to detain a motorist based on race, ethnicity, gender, or age. Instead, officers are taught that they must be able to identify and articulate specific factors which, when viewed collectively, give the officer reasonable suspicion that an individual has engaged in criminal activity. Attached as Appendices 7-10 are excerpts from *Operation Jetway* and *Pipeline* training materials.

In addition to the *Operation Jetway* and *Operation Pipeline* training, DEA incorporates ethics and integrity sessions into its basic training programs and its in-service training courses. The agency's Standards of Conduct states that "no employee may discriminate against any other employee, applicant for employment, or person dealing with DEA on official business because of race, color, religion, national origin, sex, age, or handicap." Aside from *Operation Jetway* training, however, standard training for DEA agents does not address the use of race, ethnicity or gender in law enforcement activities.

B. Federal Bureau of Investigation

Mission

The mission of the Federal Bureau of Investigation ("FBI") is to investigate violations of federal criminal law; to protect the United States from foreign intelligence and terrorist activities; to provide leadership and law enforcement assistance to federal state, local, and international agencies; and to perform these responsibilities in a manner that is responsive to the needs of the public and is faithful to the Constitution of the United States.

Policies and Practices

FBI policy prohibits the discriminatory use of race, ethnicity, or gender in law enforcement, and the Bureau incorporates its policy into its training programs. In conducting criminal investigations, the FBI typically gathers facts at crime scenes to determine the likely perpetrators. To identify those responsible for criminal activity, the FBI elicits and documents descriptive information, which may include the race, ethnicity, gender, age, size, and distinguishing characteristics of the criminal offender. Depending on the nature of the crime, the characteristics may include tattoos or

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other physical markings, DNA, voice tone, inflection, and manner of speech, and the type of clothing, car, and jewelry possessed by the perpetrator. In short, the FBI collects and analyzes all relevant information that will assist in identifying correctly those who have committed criminal acts, including, where available, the race and ethnicity of suspects.

In situations in which the FBI lacks suspect-specific descriptive information, the FBI uses violent crime analysis as an essential investigative tool. This analysis — based on behavioral, psychological and forensic data — may include a description of the likely gender, race, ethnicity, or age of potential suspects. The FBI uses that descriptive information to pursue investigative leads and identify those responsible for the activity under investigation. Violent crime analysis is used to develop a behavioral composite of an unknown offender after analyzing the facts and circumstances surrounding the commission of a specific criminal act, usually a violent crime such as a homicide. Although the behavioral composite may include the likely gender, race, ethnicity or age of the offender, it is based on the evaluation of the specific crime that has occurred and the physical evidence at the crime scene. The analysis is not used as a predictor of future criminal activity of any individual or group.

The FBI does not investigate suspects without proper predication. Predication is defined as facts and circumstances that would provide a reasonable basis to suspect that an individual has engaged in or is engaged in conduct which is a violation of federal criminal laws. In the context of ongoing investigations, levels of predication vary depending on the intrusiveness and sensitivity of the investigative technique being contemplated. Before initiating a new investigative technique, such as wiretapping or surveillance, the FBI evaluates all of the facts and circumstances to determine whether use of the technique is appropriate. With respect to national security investigations, intelligence gathering involves a range of sophisticated investigative techniques, which are used to identify individuals and their affiliations. Illicit activities uncovered in the course of intelligence gathering may be used to predicate national security investigations. The FBI does not permit interdiction based on racial, ethnic, or gender factors in national security investigations.

Training

The FBI attempts to ensure that its investigators do not discriminate on the basis of race, ethnicity, or gender, by

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providing a number of training and awareness courses to its employees.

The FBI has instituted a training program for incoming Special Agents at the FBI Training Academy in Quantico. Developed by the Law Enforcement Ethics Unit (LEEU) within the FBI's Office of Professional Responsibility (OPR), this program entails sixteen hours of instruction as part of the overall training of new agents. The program is based on a concept known as the "Golden Thread," which emphasizes basic human rights and constitutional principles, such as equal rights for all individuals.

As part of this specific training program, and throughout the entire training period, New Agent Trainees examine poor police practices and police corruption. The trainees are given examples that enable them to explore the pressures they may face in controlling crime in a manner consistent with due process. The training program emphasizes that law enforcement officers who use their power for improper purposes and base their actions on the race, ethnicity, or gender of individuals are unacceptable representatives of the FBI and will be subject to discipline, including dismissal.

It is not only new FBI agents who receive training on the impropriety of discriminating on the basis of race, ethnicity, or gender. As part of an eleven-week training program offered at Quantico, the FBI instructs veteran state and local law enforcement officers on the impropriety of taking official action, including traffic stops or courier profiling, on the basis of race, ethnicity and gender. LEEU provides similar instruction (through seminars and conferences) to FBI senior managers and law enforcement officers throughout the United States and overseas.

All FBI employees at GS-13 and above, whether in special agent or support positions, are evaluated annually on the basis of their performance in eradicating workplace discrimination. The FBI requires that the performance appraisals of these employees include an evaluation of the extent to which they have acted to increase the recruitment of minorities, decrease discrimination on the basis of race, ethnicity, and gender, and improve the workplace environment for all FBI employees.

The training programs and other institutional measures described above illustrate the steps that the FBI has taken to ensure that FBI Special Agents and employees act in a manner that is consistent with the commitment to fairness and integrity.

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C. Federal Bureau of Prisons

Mission

The mission of the Federal Bureau of Prisons ("BOP") is to protect society by confining federal offenders in the controlled environments of prison and community-based facilities that are safe, humane, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.

Policies and Practices

The BOP monitors gang activity within its facilities for security reasons. This entails identifying and tracking various gangs and gang members. Identification is based on objective criteria such as tattoos and use of symbols, rather than race or ethnicity. While gang membership and affiliation may cross racial and ethnic groupings, some gangs self-identify based on distinctions such as race, ethnicity, and national origin. However, when the BOP monitors activity by such gangs, it is based solely upon disruptive behavior.

Based on research conducted by the BOP regarding federal inmates, female inmates differ from male inmates in the following ways: the frequency and severity of their prison violence; their demographic, offense, and criminal history composition; the prison environments in which they are confined; and background characteristics that predict prison violence. For these reasons the BOP maintains gender-specific classification systems. The most significant difference between male and female inmates is with respect to security level classifications. Women are classified into three security levels: minimum, low, or high; in addition to these three security levels, men can also be classified as medium security. The reason for this distinction is that most of the females previously classified as medium or high security were classified at that level because of offenses in which they often played a secondary or peripheral role to a co-offender who was male. Since the separation of male and female classification systems in June 1994, the overwhelming majority of female inmates have been classified as low or minimum security. Only a small number, most often 40 or fewer, are currently classified as high security.

Training

Given that the BOP does not base any of its law enforcement activities on race or ethnicity, the BOP does not conduct training specifically directed toward the prevention of racial

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profiling. However, as the BOP manages an extremely diverse inmate population, racial sensitivity and diversity management are significant concerns for the agency. Accordingly, the BOP conducts extensive training on diversity management, which includes race, ethnicity, and gender issues.

Staff receive diversity management training during the Introduction to Correctional Techniques at the Federal Law Enforcement Training Center (FLETC), which is required for all new primary law enforcement employees, and optional for new employees in secondary law enforcement positions. Diversity management principles are again emphasized during Annual Refresher Training, required for all employees, which serves to remind staff of key policies, procedures, and agency philosophy. A large number of national BOP training seminars also have a session on diversity management. During these training sessions, the BOP also places a strong emphasis on its recently revised and enhanced policy on sexual abuse prevention. Lastly, all BOP institutions, Regional Offices, and Central Office have Affirmative Action Committees which sponsor programs to help educate staff about the contributions and achievements of all Americans. These programs are designed to enhance communication and understanding among staff and with the inmate population.

D. Immigration and Naturalization Service

Mission

The mission of the INS is to provide for the lawful entry of persons into the United States, and to assist applicants who are eligible for permanent residence or naturalization. At the same time, INS deters illegal immigration by controlling the nation's borders and apprehending and removing those who violate the immigration laws.

It is the responsibility of the INS to ensure appropriate documentation of aliens at entry and to deny entry to those who are not legally admissible, whether they attempt to enter through ports-of-entry or undetected across the border. The INS is also responsible for deterring illegal entry and stay, including enforcement of the criminal provisions of the immigration laws against individuals who act or conspire to promote such entry and stay. Further, it is the responsibility of the INS to detect, apprehend, and remove those noncitizens whose entry was illegal, whether undocumented or fraudulent, and those found to have violated the conditions of their stay.

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Policies and Practices

Every mission decision by Immigration Officers involves a determination of nationality. The legislative authority for activities of the INS is the Immigration and Nationality Act of 1952 (INA), as amended. A number of court decisions also guide INS practice. The INA requires Immigration Officers at the border or port of entry to inspect all aliens seeking admission to or transit through the United States. See INA Section 235(a)(3). In addition, the statute provides broad authority to Immigration Officers to interrogate, without a warrant, any alien or person believed to be an alien as to his or her right to be or remain in the United States.

Under the Fourth Amendment, certain immigration encounters are considered "seizures" and thus must be justified by a "reasonable suspicion." These kinds of encounters include stops of vehicles by Border Patrol agents ("roving patrol" stops) and pedestrian stops where persons are detained by immigration officers. "Reasonable suspicion" has been defined as specific, articulable facts together with rational inferences that reasonably warrant the suspicion that a law which the officer has the authority to enforce has been violated. INS policy allows officers to use apparent ethnicity as one factor among many in a "totality of the circumstances" that support reasonable suspicion and thus justify the officer's intervention. This practice is supported by Supreme Court case law. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975). INS policy prohibits the sole reliance on apparent ethnicity or foreign appearance for Fourth Amendment encounters. This policy is applied nationwide.

Reasonable suspicion must be based on multiple factors and not on any one factor alone. Among the many factors that may be used by INS officers and agents as "articulable facts" are:

(1) place and time of the encounter; (2) demeanor of individuals stopped and their reactions to the presence of INS Officers; (3) appearance/dress/grooming showing signs of either an immediate border crossing or of the individual not being lawfully in the United States; (4) speech; (5) information from outside sources such as intelligence reports or tips; (6) rational inferences from officers' previous experience and training; (7) in case of vehicular stops, characteristics of the vehicle (e.g., appearance, occupancy, speed of travel, etc.); and (8) ethnic appearance.

What is crucial in making an officer's suspicion well-founded is not the presence of any specific factor, or the number of factors

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involved, but that the whole picture yields a reasonable suspicion that justifies the officer's intervention.

Other types of immigration encounters do not require a predicate finding of "reasonable suspicion" under the Fourth Amendment. For example, INS maintains fixed traffic checkpoints, where agents make a brief inquiry as to the immigration status of the occupants of the vehicle. People stopped at these checkpoints also may be selectively referred to a secondary inspection area for further inquiry. See United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Reasonable suspicion is also not required for inspections at ports-of-entry or consensual interviews at the worksite. See INS v. Delgado, 466 U.S. 210 (1984). While it may not be required by law, INS policies require reasonable suspicion for worksite encounters where INS agents are selecting employees for questioning. While INS policy and training curricula do not specifically address the proper use of ethnicity for encounters that do not rise to the level of detentive stops, agents are guided by INS policies that require a suspicion based on articulable facts, viewed as part of a totality of circumstances.

Through the collection and analysis of intelligence from internal and external sources, INS develops useful information on the sources, traffic routes, and destination points of illegal immigrants. Additionally, shared case information and leads may provide information on the businesses that allegedly have employed undocumented workers. This intelligence information sometimes includes the identification of an individual's or group's ethnicity.

Training

The INS trains its officers on how to identify and articulate rational factors for stops and searches, and on the different levels of suspicion that are required by the Fourth Amendment and case law. The training includes instruction on INS policy that allows the use of "ethnic appearance" as one factor among many in a totality of circumstances, but prohibits the use of ethnicity as the sole factor for stops and searches. See Appendices 1-6.

Immigration Officer Academy

The Immigration Officer Academy is responsible for the basic training of all Deportation Officers, Immigration Agents, Immigration Inspectors, and Immigration Special Agents. All trainees receive eight hours of instruction in INS Statutory Authority focusing on section 235 and, in greater detail, section

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287 of the INA. Trainees are taught that under section 235 all applicants for admission are to be inspected by Immigration Officers at the port-of-entry for the purpose of establishing admissibility to the United States. Also explained and discussed is an INS officer's authority to stop, board, and search a vehicle at the port-of-entry.

Topics of instruction under INA section 287 include: authority to interrogate without a warrant; authority to arrest without a warrant for both administrative and criminal violations; authority to search a conveyance without a warrant within a reasonable distance of the border; authority to enter private lands, but not dwellings, within 25 miles of the border for the purpose of preventing the illegal entry of aliens; and the prohibition against entering a farm without a warrant or the consent of the owner, to question a probable alien as to his or her right to be in the United States, unless evidence exists that the persons has just crossed the border. Under section 287(a) (1), emphasis is placed on the need to use the authority to interrogate judiciously, based on some articulable facts.

Additional areas of instruction on INA section 287 include: a review of legal precedent that clarifies proper use of ethnicity in traffic stops and the reasonable suspicion requirement for detentive stops. At the conclusion of the course on statutory authority, trainees are shown a portion of the video entitled "Fourth Amendment Issues at the Worksite" which provides instruction by the INS Office of General Counsel on lawfully executed searches and seizures.

Officers are also trained on the three levels of encounters with the public (consensual encounter, investigative stop, and arrest) and the corresponding degrees of suspicion or probable cause which are required to take action. Emphasis is placed on the statutory obligation to conduct investigative stops only on reasonable suspicion of a criminal or administrative offense that falls within the officer's jurisdiction.

In addition to the core instruction on statutory authority, Special Agents, Immigration Agents, and Deportation Officers receive training on Alien Encounters and False Claims to United States Citizenship. This class equips trainees with effective techniques to use when encountering and questioning aliens during the course of an investigation.

The Behavioral Science Division (BSD) of the Federal Law Enforcement Training Center (FLETC) offers additional courses and laboratories related to cultural diversity to all INS personnel except Adjudication Officers. The understanding of and respect for cultural differences is essential to an officer's ability to

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interpret, predict, and ultimately control the behavior of those aliens with whom he comes in contact. The BSD courses teach several ways to recognize and overcome the principal barriers to intercultural communications. All officers are trained to demonstrate professionalism when identifying themselves, to develop rapport based on mutual respect, to understand verbal and nonverbal communications, and to utilize proper methods and techniques when dealing with victims and witnesses.

Border Patrol Academy

The Border Patrol Academy is responsible for both entry-level training for new Border Patrol Agents and for the advanced training of journeyman Border Patrol Agents at the GS-9 and GS-11 levels. New agents receive intensive instruction on statutory authority. This course of instruction explains to the Border Patrol Agent trainee the bases for making traffic and pedestrian stops, including ethnic appearance, vehicle characteristics, proximity to the border, abnormal behavior, demeanor, speech, attire, and many others. The curriculum stresses that pedestrian and "roving patrol" traffic stops based solely on race or ethnicity are illegal. The agents are taught that the required degree of suspicion must be based on a combination of articulable facts, one of which may be ethnic appearance. Similarly, trainees are taught that the referral of vehicles to secondary inspection at a traffic checkpoint may be premised on the lowest level of suspicion (where few articulable facts are required) that illegal aliens are being transported in the vehicle. Constitutional law and relevant court decisions are discussed with emphasis not only on the Fourth, but also on the Fifth and Sixth Amendments. In addition, the curriculum of FLETC devotes 3 hours to officer liability and criminal sanctions relating to violations of an individual's constitutional rights.

The first duty station for all Border Patrol Agents is on the southern border. Therefore, Border Academy trainees receive extensive training in Spanish and cultural sensitivity and diversity issues. Discussions are held on prejudice, ethnocentrism, language barriers, and ignorance of cultural norms. Several other courses that address discrimination and intercultural issues are taught at the Academy. Among these are Ethics and Conduct, Sexual Harassment, Communications for Border Patrol, Victim and Witness Awareness, Authority (i.e., the appropriate use of authority), EEO, and Officer Liability. In relation to civil and constitutional rights, trainees are taught that, except for very limited exceptions, foreign nationals who have entered the United States are afforded the same rights and protections guaranteed to United States citizens.

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The Border Patrol Academy also offers separate journeyman level training at the GS-9 and GS-11 agent grade. Every year, 750-800 journeyman agents receive this type of training at the Academy. Each program lasts 8 days and contains a block of instruction entitled "Legal Updates." This segment, taught by INS attorneys, includes a review of recent legal developments, the identification and discussion of civil lawsuits alleging illegal stops, and instruction on the relative importance to attach to a variety of factors when making roving patrol stops.

E. United States Marshals Service

Mission

The Marshals Service's mission is to find and apprehend fugitives. It is also responsible for protecting federal judicial officers and others who are subject to threats, and transporting detainees for the federal courts and aliens for the INS.

Policies and Practices

The Marshals Service engages in few non-suspect specific encounters. When presented with warrants issued by federal courts, the race, ethnicity and gender of the subject is predetermined.

The Marshals Service does not operate its own detention facilities. It assumes custody of arrestees detained by the Federal courts and, if a conviction results, delivers such persons to the Bureau of Prisons. In addition to relying on the BOP, the USMS relies on private and local jails near each Federal courthouse to house the detainees. Consequently, the Marshals Service does not have policies for classifying detainees according to ethnic gangs or by using other ethnic classifications.

The Marshals Service has developed several policies that distinguish between male and female detainees in housing and transportation. Male and female detainees are kept in separate holding cells at courthouses. On air flights, female and male detainees may be transported together, but for their safety, female detainees must be under visual surveillance of a female guard or Deputy U.S. Marshal at all times. In ground transportation, female and male detainees are normally transported separately. If they must be transported together, every effort is made to separate them in the vehicle and to have a female guard or female Deputy U.S. Marshal accompany a female detainee. If no Marshals Service matron or female Deputy U.S.

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Marshal is available, female personnel are requested from local law enforcement agencies. If female detainees must be transported by only male Deputy U.S. Marshals, a Marshals Service log book must have an entry before the trip of the time of departure, the odometer reading on the vehicle, the persons in the vehicle, and the estimated time of arrival at the destination.

Training

The USMS trains its employees in general terms that, apart from suspect specific information, race and ethnicity are not to be considered in carrying out official duties. Deputy Marshals are instructed during basic training not to rely on non-suspect specific information about race and ethnicity.

III. RECOMMENDATIONS

Given the importance of the issue of the use of race, ethnicity, and gender in federal law enforcement activities and the need to achieve a coordinated resolution of the complex legal and policy issues that the matter presents, the Department of Justice will establish a working group, headed by the Deputy Attorney General, to further evaluate current policies and training with regard to the use of race, ethnicity, and gender in DOJ law enforcement agencies and make recommendations as appropriate.

The working group, which will include representatives from the Department's law enforcement agencies and the Civil Rights Division, will evaluate existing agency materials as well as results from the data collection field tests as they become available in order to:

- (1) Develop policy recommendations with respect to the use of race, ethnicity and gender in all agency law enforcement activities. This will include an examination of the appropriate use of intelligence reports and when information obtained as part of a law enforcement investigation is specific enough to warrant the use of a racial or ethnic identifier. This will also include an analysis by the INS to determine if some factors are more accurate than others in predicting alienage;
- (2) Expand and strengthen the training provided by Department law enforcement agencies to federal, state, and local law enforcement concerning the use of race, ethnicity and gender; and

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- (3) Ensure that the law enforcement agencies are appropriately supervising and monitoring their agents, employees and operations for any impermissible use of race, ethnicity or gender.

We expect to conclude this review and make recommendations for reforms, as appropriate, soon after the receipt of interim results from the data collection effort.

In the interim, the Department's law enforcement agencies will take the following steps to enhance training, establish interim policies where gaps exist, and provide guidance to their officers.

- (1) The INS will issue interim policy guidance that clarifies that ethnicity cannot be the sole or determinative factor in the decision to conduct any encounter — including those not requiring "reasonable suspicion" under the Fourth Amendment. This will result in a consistent agency policy with regard to all encounters.
- (2) Each agency will review its training materials to ensure that all new, incumbent, line, and supervisory agents and analysts receive training on the agency's policies with regard to the use of race and/or ethnicity in all law enforcement activities. This will include a review of the training provided to state and local law enforcement to better ensure that officers trained by federal agencies are not basing their law enforcement activities on race or ethnicity.
- (3) The Department of Justice will explore ways to promote data collection on race, ethnicity, and gender of people stopped or searched by state and local law enforcement officers trained by Department agencies. This data collection will assist state and local law enforcement officers in complying with principles of non-discrimination.



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

October 8, 1999

The President
The White House
Washington, DC 20500

Dear Mr. President:

On June 9, 1999, you issued a directive, entitled *Fairness in Law Enforcement: Collection of Data*, instructing the Secretary of the Treasury, the Attorney General, and the Secretary of the Interior to design and implement a system to collect and report statistics relating to race, ethnicity, and gender for law enforcement activities. The directive also required each of the three Departments to submit, within 120 days, a report to you on existing training programs, policies, and practices regarding fairness in law enforcement, an implementation plan for a field test of the data collection system, and recommendations for improving current programs, policies, and practices.

Enclosed is the report prepared by the Department of the Treasury in accordance with your directive. As discussed in the report, Treasury and its law enforcement bureaus have longstanding policies aimed at ensuring that employees do not target persons for inspection, investigation, or other law enforcement activity on any impermissible basis such as race, national origin, or gender. Our data collection field test includes two components of Treasury law enforcement bureaus: the Secret Service Uniformed Division, Foreign Missions Branch in Washington, D.C. and the United States Customs Service, Passenger Operations, at five inbound airports of entry including Chicago, O'Hare International Airport, New York JFK International Airport, Los Angeles International Airport, Newark International Airport, and Miami International Airport.

These two components were selected because of the volume and frequency of their contact with the public. The other Treasury law enforcement bureaus, the Bureau of Alcohol, Tobacco, and Firearms, the Federal Law Enforcement Training Center, and the Internal Revenue Service, Criminal Investigation Division, do not generally perform traffic or pedestrian stops. Therefore, they do not have a basis to gather a significant amount of the information requested in your Directive.

The Secret Service will collect the required data on traffic and pedestrian stops through the use of contact cards and maintain the data in a Microsoft Access or similar database. The Customs Service will collect the required data and maintain the information in the Treasury Enforcement Communication System Database on persons stopped and searched in the inbound personal processing units at the five selected ports of entry. The field test is scheduled to begin on December 1, 1999, and will provide statistical information to assist our bureaus in refining their policies and training to prevent prohibited discriminatory actions.

DEPARTMENT OF THE TREASURY
REPORT ON FAIRNESS IN LAW ENFORCEMENT
October 1999

INTRODUCTION

On June 9, 1999, President Clinton issued a Directive, entitled *Fairness in Law Enforcement: Collection of Data*, directing the Secretary of the Treasury, the Attorney General, and the Secretary of the Interior to design and implement a system "to collect and report statistics relating to race, ethnicity, and gender for law enforcement activities." To gain a better understanding of actual practices, the Presidential Directive mandates that the Treasury, Justice and Interior Departments each develop a proposal "for a system of data collection and an implementation plan for a field test of that system." President Clinton also instructed each of the three Departments to "provide a report on the training programs, policies, and practices regarding the use of race, ethnicity, and gender in law enforcement activities, along with recommendations for improving these programs, policies, and practices." These reports are to be submitted to the President within 120 days of the Presidential Directive. This report responds to that requirement.

TREASURY'S IMPLEMENTATION OF THE PRESIDENTIAL DIRECTIVE

Treasury and its law enforcement bureaus prohibit their employees from selecting persons for inspection, investigation, or other law enforcement activity on any impermissible basis such as their race, national origin, or gender. This policy is communicated to employees by Treasury and bureau management and is part of the training Treasury bureau personnel receive. Personnel who violate this policy are subject to disciplinary action.

Although Treasury and its bureaus' policies against discriminatory practices are longstanding, no comprehensive study has been done on how these policies are followed in the field. In accordance with the Presidential Directive, Treasury has designed a data collection field test to gain a better understanding of actual practices. As outlined in the Directive, the data collected is to "be sufficiently detailed to permit an analysis of actions relevant to the activities of the included law enforcement agencies by race, ethnicity, or gender." The data acquired is not to contain any information that may reveal the identity of any individual. The Presidential Directive also provides that each Department must implement field tests within 60 days of finalizing the data collection proposal. Treasury's field test is scheduled to begin on December 1, 1999, and will conclude on December 31, 2000.¹ At the conclusion of the one-year field test, Treasury and Interior will provide the Attorney General with a summary of the information collected which will include "civilian complaints received alleging bias based on the race, ethnicity, or gender of the

¹ Although Treasury's field test period for purposes of the Presidential Directive begins on December 1, 1999, Customs has already begun collecting the relevant data.

complainant in law enforcement activities; the process for investigating and resolving such complaints; and the outcome of any such investigations.”

As discussed in more details below, Treasury’s field test will provide a statistical snapshot of traffic stops and pedestrian stops conducted by the Secret Service and the more extensive inspections or interviews of entrants to the United States conducted by the Customs Service. This data, in turn, will assist Treasury and all of its bureaus in refining their policies and training to prevent racial profiling and other prohibited discriminatory actions.

Methodology

The Department of the Treasury’s Office of Enforcement convened a working group to formulate Treasury’s data collection project and field testing plan. The working group was comprised of at least one representative from each of the Treasury law enforcement bureaus who have expertise in data collection, computer systems, and stop and search issues. The working group reviewed bureau policies and training curricula, and developed a proposal for a data collection field test.

PART I: DATA COLLECTION PROPOSAL

Treasury’s data collection proposal will allow for the review of the law enforcement activities of two components of law enforcement bureaus: the United States Secret Service Uniformed Division, Foreign Missions Branch, and the United States Customs Service, Passenger Operations, at five inbound air ports of entry.²

Treasury’s proposal will enable the Secret Service and the Customs Service to collect data on the race,³ gender, and ethnicity on such actions as traffic stops, pedestrian stops, and more extensive inspections or interviews than are customarily conducted with entrants to the United States.

² The other Treasury law enforcement bureaus, the Bureau of Alcohol, Tobacco, and Firearms, the Federal Law Enforcement Training Center, and the Internal Revenue Service, Criminal Investigation Division, do not generally perform traffic or pedestrian stops. Therefore, they do not have a basis to gather a significant amount of the information requested in the President’s Directive.

³ The Department of the Treasury will use the six combined minimum racial categories as outlined in the Office of Management and Budget’s (OMB) October 1997 order revising the Statistical Policy Directive 15 on the classification of Federal data on race and ethnicity. The combined racial categories are American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or other Pacific Islander, and White.

UNITED STATES SECRET SERVICE

The Secret Service field test will consist of data collection on traffic and pedestrian stops within the Uniformed Division, Foreign Missions Branch. Uniformed Division officers (hereafter "officers") will record the reason(s) for the stop and data on the race, gender, and ethnicity based on their own observation.

Field Test Area: The Uniformed Division is organized into three branches: the Foreign Missions Branch, Naval Observatory, and the White House Branch. The Foreign Missions Branch has approximately 100 officers who are responsible for the protection of foreign diplomatic missions and personnel in the metropolitan area of the District of Columbia. Foreign Missions officers conduct patrols that cover Northwest Washington, D.C., and a small portion of Montgomery County, Maryland. The patrol boundaries extend from Constitution Avenue to East/West Highway in Montgomery County. Officers assigned to the Foreign Missions Branch provide protection through vehicle patrols, foot patrols, and fixed posts. It is in providing protective coverage for diplomatic locations in the District of Columbia and the surrounding metropolitan area that the officers come in contact with the public.

Authority: Title 18, United States Code, Section 3056, is the primary enabling statute that allows the Secret Service to perform its protective mission and conduct investigations. The statute authorizes the officers and agents of the Secret Service to execute warrants issued under the laws of the United States, carry firearms, and make arrests without a warrant for any offense against the United States committed in their presence.

Title 3, United States Code, Section 202, provides the officers with law enforcement authority similar to the District of Columbia's Metropolitan Police Department.⁴ This statute charges the Uniformed Division with protecting the Executive Mansion and grounds in the District of Columbia, any building in which Presidential offices are located, the Treasury Building and grounds, the President and his or her immediate family, foreign diplomatic missions located in the metropolitan area of the District of Columbia, the temporary official residence of the Vice President and grounds in the District of Columbia, the Vice President and members of his or her immediate family, foreign diplomatic missions located in metropolitan areas (other than in the District of Columbia), and foreign diplomatic missions located in such areas in the United States, its territories and possessions, as the President, on a case-by-case basis, may direct. The statute also enables the officers to make traffic stops and arrests.

⁴ Secret Service's powers closely correspond to those of the Metropolitan Police Department of the District of Columbia, but relate to the Secret Service's mandated protective responsibilities.

Project Description: Secret Service Uniformed Division officers are authorized to make a traffic or pedestrian stop when, in their view, an individual is suspected of committing, has committed, or is about to commit any felony or misdemeanor prosecutable by the U.S. Attorney. It is the policy of the Uniformed Division that its officers shall, in situations justifying such action and within constitutional limits, exercise the authority to stop and frisk. This authority, when properly used, has been identified as an effective police procedure. Officers are not allowed to abuse this procedure, to harass persons, or to cause them undue discomfort, embarrassment, or inconvenience. Furthermore, officers may not make these stops on an impermissible basis such as race or gender.

Once officers make the stop, they must establish radio contact with the Foreign Missions Branch Control Center. The officer must communicate the following information: identification of unit(s) conducting the stop, license number and description of subject vehicle, reason for conducting the stop, location where stop is initiated, location where vehicle stops (if different from where initiated), number and description of occupants, and general or specialized support needed (criminal records check).

If these stops result in an arrest, this information is gathered and tracked through the Uniformed Division's case tracking system. For purposes of this project, the officers will also gather data on these contacts with the public that do not result in an arrest.

Data Collection: Where a stop has been made, but no arrest occurs, officers will be required to complete a contact card⁵ after each traffic or pedestrian stop. They will record the person's name⁶, race, gender, ethnicity, and reason for the stop. The individuals stopped will not be required to provide any information; rather, the officers will record the race, ethnicity, and gender based upon their own observations. This process was deemed appropriate to prevent the traffic or pedestrian stop from escalating into a confrontational situation. This process may produce some errors in demographic data, but is warranted to avoid unnecessary intrusion.

The officers will also indicate the reason for the stop, the location of the stop, and the reporting officer's name, unit, and section. For the purpose of this proposal, "Stop and/or Search" will mean any individual who is detained, asked to produce proof of identity, and is subjected to a name search and/or records check through the appropriate law enforcement databases. "Stop and/or Search" will not include those individuals who are subjected to a cursory stop and/or interview, such as an individual who is stopped for the purpose of permitting a motorcade to proceed, nor will it include contacts initiated by the citizen. Under those circumstances the contact card will not be completed.

⁵ The Secret Service uses the same contact card used by the District of Columbia's Metropolitan Police Department. It allows the law enforcement officer to indicate the type of stop (pedestrian, vehicle or bicycle), the location of the stop, the race and gender of the subject, and a justification for the stop or contact.

⁶ The person's name will be recorded on the contact card only for responding to potential complaints by citizens, but will not be transferred or maintained in the database.

At the end of each shift, officers will be required to turn in the contact cards to their shift supervisor. The shift supervisor will forward the contact cards to the Deputy Chief's staff office and the administrative lieutenant⁷ will be responsible for entering the information into a Microsoft Access or similar database. Each contact card will be cross-referenced with the communication base radio log, when necessary. This process allows the shift supervisor to address any inconsistencies between the contact card and the communication radio log. For example, if an officer reports four traffic stops and turns in only three contact cards, the shift supervisor will request the additional contact card from the officer.

Data Compilation: All information on stops and arrests resulting from traffic or pedestrian stops will be retained in Microsoft Access or a similar database program for statistical purposes only. As indicated above, the administrative lieutenant's staff will be responsible for entering the data into the system. These statistics will only be disseminated to the appropriate requesting agencies. The database will not include personal identification;⁸ however, the card file will be cross-referenced with a number in the database to verify accuracy and facilitate the investigation of any citizen complaint.

Complaint Activity: Any complaints that arise during this field test will be handled through the normal complaint processing channels. The current process allows for a citizen to file a complaint with the Director of the Secret Service through the Public Affairs Office. The Public Affairs Office determines the appropriate office to address the complaint, e.g., Inspection Division or Chief or Deputy Chief of the Uniformed Division. If complainants are not satisfied with the response, they may contact the Department of the Treasury. The Department of the Treasury contacts the Secret Service for additional information, provides the complainant with a response, and takes appropriate action, if that is deemed necessary.

The Deputy Chief, Foreign Missions Branch will be responsible for tracking and maintaining all complaints related to this data collection project. In addition, based on the data collected, the Deputy Chief, Foreign Missions Branch will identify any significant trends and potential concerns.

UNITED STATES CUSTOMS SERVICE

The Customs Service's field test will consist of data collection on the inbound personal search process at five air ports of entry: Chicago O'Hare International Airport, New York JFK International Airport, Los Angeles International Airport, Newark International Airport, and Miami International Airport. Customs inspectors (hereafter "inspectors")

⁷ The administrative lieutenant is located in the Deputy Chief's Office.

⁸ If the officer makes an arrest, the person's name will be included in the database.

will record data on the race, gender, and citizenship on passengers subjected to a personal search.

Field Test Area: The Passenger Operations Branch, which will serve as the test area for the Customs Service, is responsible for the passenger enforcement process. The Passenger Operations Branch's principal mission is to increase seizures of contraband while facilitating passenger traffic flow. With the ever-increasing number of passengers entering the United States and increased pressure to meet its interdiction responsibilities, while still minimizing disruptions to passengers and commercial traffic, Customs uses a passenger enforcement selectivity process as an important and necessary aspect of its drug interdiction mission. The passenger enforcement process enables inspectors to determine which passengers should receive closer attention. It identifies the potential risk of incoming flights and their passengers in order to determine the level of examination needed.

Authority: Title 19, United States Code, Section 1581 et seq., gives inspectors the authority to search, inspect, and/or examine all persons, luggage, and merchandise discharged or unladen from a carrier arriving in the United States from a foreign destination. It also enables inspectors to conduct searches of persons at the border to detect the presence of contraband. Inspectors use training, experience, subject-matter expertise, information and intelligence related to smuggling trends, and analysis of recent seizures to determine who, among the over 450 million people arriving at the borders each year, should be searched.

Project Description: The Customs Service, which voluntarily initiated such a procedure prior to the Presidential Directive, will continue to collect the required data on persons stopped and searched in the inbound personal processing units at the five selected ports of entry. The personal search data on international travelers is collected and analyzed by the Passenger Data Analysis Team. The team monitors personal searches, analyzes local and national trends, uncovers any potential problems, and reports critical areas of concerns to Customs management. The Passenger Data Analysis Team identifies potential areas of risk using a four-step process. The team will also use these steps when working with port offices to develop local passenger compliance and enforcement strategies. The four steps are: (1) identify potential risks in passenger compliance; (2) analyze and assess risks to fully comprehend issues; (3) prescribe action to mitigate the risks; and (4) track and follow-up progress action plan.

Data Collection: Inspectors use the Personal Search Worksheet to record information on any personal search⁹ for later transcription into Treasury Enforcement Communications

⁹ It is important to note that personal searches are conducted in private rooms or areas away from the view of the general public. Those personal searches that require moving a person to a medical facility for a medical examination require the approval of the port director or person designated to act in his/her absence, provided they are grade GS-13, and after consultation with Customs Counsel.

System (TECS). Inspectors are responsible for entering the data into TECS prior to the end of their shift. When the search results in a seizure and/or arrest, the worksheet becomes part of the seizure documentation. When no enforcement action results, the worksheet will be retained locally for 2 years and 3 months from the date of the search.

The TECS report includes data elements such as race¹⁰, gender, and citizenship, as well as detailed narratives regarding the circumstances surrounding the search and/or detention. Inspectors are required to ensure that times are recorded accurately, including specific start-stop times for completing various steps or types of searches (e.g., "patdown", partial body, and drive time to and from the medical facility).

The TECS report contains the objective and articulable facts that support the particular search or detention. Inspectors complete as much information as possible concerning the description of the person and circumstances surrounding the search, including factors that not only led to a "patdown," but also those factors that led from a "patdown" to a more intrusive search.

Inspectors obtain supervisory approval of all records of personal searches entered into the TECS database. Supervisors certify that the TECS report contains all required information and that sufficient details exist regarding the circumstances surrounding the search. Where details are missing or unclear, the supervisors coordinate with the inspectors to finalize the report.

Port directors ensure that TECS reports pertaining to personal searches are reviewed bi-annually to determine personal search effectiveness at the port, including whether there may be any improprieties in the conduct of these searches. Where reports indicate that effectiveness has decreased or that improprieties exist in the conduct of searches, the port directors assess whether corrective action is needed. In addition, supervisors are required to take remedial action for deficiencies.

Data Compilation: The Customs Service has implemented significant changes to its computer system that will improve the data integrity for all personal searches. For example, race, gender, and citizenship, which were existing data fields, have now become mandatory fields. In addition, Customs has added new mandatory data fields, such as port of departure, port of embarkation, port director and chief counsel notification, reasons for the search, and the referring officer for the search. These changes to the computer system will allow the Customs Service to better identify who they search by

¹⁰ The individuals stopped will not be required to provide any information; rather, the inspectors will record the race, ethnicity, and gender based upon their own observations.

race, gender, and citizenship, and provide the ability to do statistical and trend analyses by ports of entry and Customswide. The computer enhancements will also allow the Customs Service to conduct trend analysis on all personal searches by source country and transit country for targeting purposes. More importantly, the Customs Service will be able to perform trend analysis to identify potential concerns.

Complaint Activity: During the data collection field test, all complaints on personal searches will be handled through the newly established Customer Satisfaction Unit (CSU). The CSU ensures that complaints are correctly addressed and that passengers receive appropriate feedback. The CSU also has responsibility for providing current information to senior management and analyzing trends within the complaint system. If complainants are not satisfied with the response, they may contact the Department of the Treasury. The Department of the Treasury contacts the Customs Service for additional information, provides the complainant with a response and takes appropriate action, if such action is deemed necessary.

PART II: POLICIES, PROCEDURES AND TRAINING

The Presidential Directive also requests a report on "training programs, policies, and practices regarding the use of race, ethnicity, and gender" in "law enforcement activities, along with recommendations for improving those programs, policies, and practices." Accordingly, Part II of this report describes the relevant Treasury and bureau policies relating to fairness in law enforcement, as well as an overview of how such policies are implemented. It also discusses the training programs Treasury and its bureaus have in place to train law enforcement personnel on the relevant policies. While only particular offices within the Customs Service and the Secret Service were discussed in Part I as part of the field test, all Treasury law enforcement bureaus are impacted by policies, procedures, and training programs, and therefore are discussed in this section.

Policies

As discussed in more detail below, Treasury and its bureaus have issued a number of policies related to fairness in law enforcement issues. In addition to these specific policies, policies in other areas may be relevant. In particular, Treasury and its bureaus, like all executive branch employees, are required to follow the *Standards of Ethical Conduct for Employees of the Executive Branch*, issued by the United States Office of Government Ethics, and the *Office of Personnel Management Employee Responsibilities and Conduct Regulations*. Additionally, Treasury has issued its own *Department of the Treasury's Employee Rules of Conduct*, which includes an explicit ban on discrimination or harassment of persons on the basis of that person's race, color, national origin, religion, sex, sexual orientation, age, or disability. Similarly, the Bureau of Alcohol, Tobacco, and Firearms (ATF), the Customs Service, the Internal Revenue Service, Criminal Investigation Division (IRS-CID), and the Secret Service each have their own policies prohibiting discrimination and sexual harassment. Finally, following a policy

review completed by Treasury's Office of Enforcement in April 1996, the Treasury Department issued a *"Policy on Off-Duty Conduct, Bias-Motivated Conduct, and Membership or Participation in Hate Groups by Law Enforcement"* to ensure that all law enforcement personnel are aware of Treasury's expectations regarding off-duty and on-duty conduct. That policy specifically addresses issues regarding integrity, professionalism, and public trust.

Specific Policies Related to Fairness in Law Enforcement

Secret Service: On August 26, 1997, former Director Lewis Merletti issued a memorandum to all Secret Service employees entitled *"Professional Behavior in the Secret Service."* This memorandum reaffirms the Secret Service's policy of maintaining a professional work environment that is reflective of high-caliber employees. The Director reminded Secret Service employees that they should be professional and courteous when dealing with fellow employees and the public.

Further, the memorandum establishes Secret Service's "zero tolerance" discrimination policy and it holds managers and supervisors accountable to react to and properly address reports of inappropriate actions that come to their attention. It further advises all employees that they will be held accountable for any inappropriate behavior that occurs within their areas of responsibility.

Customs Service: Inspectors performing searches and seizures of persons and property at the border, the functional equivalent of the border, or extended border must adhere to the policies set forth in the Personal Search Handbook (CIS HB #3300-04A).

The goal of the Handbook is to assist inspectors in performing their enforcement duties in a manner that will ensure personal integrity and will also permit officers to perform a professional service for the public. Customs policies, procedures, and training all reinforce that the Constitution guarantees the protection of an individual's right against unreasonable searches and seizures. Customs Service employees are trained to be diligent in their efforts to protect those rights while still accomplishing their enforcement mission. Treasury and the Customs Service prohibit the abuse of constitutional or statutory authority by Customs personnel. Customs Service personnel are made aware of the limits of their authority and are required to use that authority judiciously, conscientiously, and courteously.

To ensure that this occurs, the Department of the Treasury and the Customs Service are committed to improving the passenger enforcement process. While serving as the Under Secretary of Enforcement, Raymond W. Kelly tasked the Office of Enforcement's Office of Professional Responsibility (OPR) with assessing passenger enforcement targeting and reviewing inspector training to ensure that targeting does not discriminate on the basis of

race, color, national origin, ethnicity, religion, gender, or sexual orientation. During the course of OPR's review, Mr. Kelly was nominated and confirmed as the Commissioner of Customs, and the review continued under Under Secretary James E. Johnson. Prior to the issuance of the OPR report, Commissioner Kelly implemented a number of recommended changes, including mandating more intensive training for all new inspection personnel to include improved communication and intercultural skills, providing comment cards for passengers to provide feedback on Customs' services, and establishing a Customer Satisfaction Unit to process passenger complaints. In addition, Commissioner Kelly has established two committees, one internal and one external,¹¹ to review the procedures used in personal searches. Commissioner Kelly has tasked the committees to review the criteria used to identify passengers for more intrusive inspections, as well as analyze the search data to determine if the Customs Service is correctly selecting the high-risk passenger.

The *Personal Search Handbook* outlines the procedures for conducting personal searches. Under a new policy recently introduced by Commissioner Kelly, there may be as many as ten steps involved in a personal search, which can range from a "patdown"¹² to more intrusive searches.¹³ As the personal search becomes more intrusive, the inspector must receive increasingly higher levels of supervisory approval.¹⁴ Additionally, at any point during the personal search process, the inspector and supervisor can consult with the Office of Chief Counsel. Thus, while a supervisor may approve a "patdown", a port director must approve a medical examination. An inspector, however, may terminate the secondary inspection at any time without supervisory approval.¹⁵

ATF: ATF employees are held to the highest standards and the bureau tolerates no illegal discrimination. On July 10, 1999, Director Magaw issued the Conduct and Responsibility Brief. This brief requires that employees' actions be beyond reproach and withstand public scrutiny both personally and professionally. Employees are expected to conduct themselves in a professional manner. On July 7, 1998, Director John Magaw issued a policy statement on employee professionalism. The ATF policy statement on professionalism states, "ATF employees are expected to conduct themselves in a professional manner." In addition, the policy states that all employees are responsible for

¹¹ Constance Newman, Under Secretary for the Smithsonian Institution, chairs the external committee (the Customs Personal Search Review Commission).

¹² A "patdown" is defined as "a search for contraband or other merchandise hidden on a person's body." In accordance with Customs' policy, all "patdown" personal searches require at least one "articulable fact" before the supervisor will authorize the search.

¹³ If, after the patdown, the inspector continues to have reasonable suspicion that the person has contraband or other merchandise concealed on the body, a more intrusive (non-routine) personal search will be permitted with supervisory approval. More intrusive personal searches include a partial body search, the x-ray search, body cavity search, and detention for a monitored bowel movement (MBM).

¹⁴ The Office of Chief Counsel must be consulted before movement to a medical facility.

¹⁵ At any stage in the secondary inspection process, any person involved in a personal search, who is detained two hours after a personal search has begun, will be afforded the opportunity to have someone notified by the Customs Service personnel of their delay in Customs.

maintaining the highest professional standards in the way they act and present themselves to their clients and their colleagues. This policy governs the behavior of employees within and outside of the workplace. To ensure that these high standards are attained and maintained, ATF also has a vigorous integrity and inspection program overseen by its Office of Inspection. Each component of ATF is audited on a regular basis. In addition, allegations of misconduct are investigated and, if substantiated, the bureau's Professional Review Board institutes disciplinary action.

IRS-CID: On April 28, 1999, Commissioner Charles Rossotti issued the *Reform and Restructuring Act of 1998 (RRA98) Section 1203 Procedural Handbook*, which provides guidance on the fair treatment of employees, taxpayers, and taxpayer representatives. The Handbook states that "IRS is committed to treating employees, taxpayers, and taxpayer representatives fairly and equitably without regard to their sex, age, race, color, national origin, religion, or disability." The Handbook also mandates termination of any employee who engages in discrimination or other types of unfair law enforcement practices. It is the responsibility of the supervisor to discuss the contents of the RRA98 with all employees.

Procedures

Treasury bureaus ensure employees understand and follow Treasury and bureau policies, including those outlined above, through communication, inspection, and discipline.

Communication: The bureaus ensure that employees are aware of and understand all applicable policies by having employees certify their awareness of certain policies, such as Customs' requirement that its inspectors certify that they have received a copy of the *Personal Search Handbook*. They also accomplish this goal by issuing management memoranda and statements to employees reinforcing and clarifying bureau policy, such as the Secret Service's requirement that each supervisor must remind employees of the written conduct standards during employee mid-year performance appraisals.

Inspection: All bureaus place responsibility for ensuring compliance with bureau policies on managers and supervisors. Managers are held accountable through management inspections. ATF and Customs employ self-inspection processes to help monitor compliance. For example, Customs has established its Self-Inspection Program (SIP) to verify that the Customs mission is "performed in the most effective and efficient way." The SIP allows supervisors to evaluate their success in managing, assessing, and reporting on the conditions of their individual operations. The major focus of the SIP for managers and the Management Inspections Division (MID) are areas susceptible to vulnerability and corruption, mission performance, resource utilization, and internal and external relations.

As part of the SIP, at least semi-annually, supervisors execute Self-Inspection

Worksheets (SIWs) for all areas over which they have delegated authority. SIWs have been tailored to assess particular areas of Customs' operations, including, where appropriate, passenger processing and other issues relating to fairness in law enforcement. The SIWs for Airport and Seaport Passenger Operations, for example, ask if the responding office has certified its personal search procedures for the reporting period.

Each core area examined is found to be either "Acceptable" or "Needs Improvement." Reporting supervisors and next level supervisors certify their findings and are responsible for taking corrective action where necessary. The results of the inspections are channeled through the appropriate chain of command and ultimately to the Assistant Commissioners and the Commissioner.

Program level supervisors and managers are tasked with analyzing the results of self-inspections as a quality control measure and making program modifications in response to substantive findings. In addition, program managers must intervene in areas where critical deficiencies have been identified. Finally, the Customs Service has also appointed program coordinators for each major office within the Customs Service. They manage and oversee the SIP and coordinate with MID.

Discipline: All Treasury law enforcement bureaus discipline employees who violate bureau policies. Such discipline may range from verbal counseling to dismissal, depending upon the particular circumstances of the violation.

Training

Treasury and its law enforcement bureaus also have training programs in place to ensure that all employees are aware of Treasury and bureau policies. In January 1999, in conjunction with a review of the Customs Service's Office of Internal Affairs by the OPR, all of the Treasury law enforcement bureaus were asked to provide an accounting of the ethics and related training broadly categorized as "professionalism" provided to law enforcement officers (LEOs). LEOs were identified as individuals who are authorized to make arrests and carry firearms and badges in the performance of their duties. The bureaus were asked to include basic and in-service level training courses.

The courses listed under the broad professionalism category exemplify the integration of ethics and integrity throughout the LEO's training process. Professionalism, as defined in this report, includes ethical conduct and integrity, as well as the related principles of honesty, respect, quality, impartiality, and selflessness. In addition, other principles related to professionalism, such as sexual harassment prevention, interpersonal awareness, corruption prevention, use of force, cultural diversity, and civil rights, are also introduced and continuously reinforced throughout all phases of training.

FLETC: The Federal Law Enforcement Training Center (FLETC) is responsible for providing law enforcement training for over 70 Federal agencies. In addition to

providing training to the Treasury law enforcement bureaus, other participating organizations include the United States Park Police, the Immigration and Naturalization Service, and the Border Patrol. FLETC, with facilities located in Georgia and New Mexico, primarily trains Federal LEOs, but also provides state, local, and international LEOs with training tailored to their special needs.

All Treasury law enforcement bureaus receive basic training at FLETC. Additionally, most of the Federal organizations conduct some or all of their advanced and in-service law enforcement training operations at FLETC, and over twenty have established on-site offices to oversee their training programs. Three of Treasury's law enforcement bureaus - IRS-CID, ATF, and the Customs Service - conduct their bureau-specific training at FLETC; while the Secret Service performs its bureau-specific training at its facility in Beltsville, Maryland.

For the purpose of this report, FLETC provides two courses of interest to all Federal LEOs - the *Criminal Investigator Training Program* (CITP) and the *Mixed Basic Police Training Program* (MBPTP). The CITP course, an in-depth study of basic law enforcement concepts and techniques, has an overall instructional period of 367 hours, 6% of which is devoted to the area of professionalism. Among the subjects taught within the professionalism area are human behavior, modern investigative technology, cultural sensitivity, civil rights, anti-corruption, sexual harassment prevention, and use of force. The over 70 participating organizations are eligible to participate in this course.

MBPTP is a study of basic law enforcement concepts of importance to the LEO and has an overall instructional period of 342 hours, of which 8.4% is dedicated to discussions of professionalism. During the MBPTP, new officers also receive training offered by the Behavioral Science Division, stressing the importance of individual awareness and responsibility for ethical conduct within the law enforcement occupation. In addition, several topics similar to those taught in the CITP course, such as civil rights and the Federal Torts Claims Act, are also discussed. Among the agencies participating in the MBPTP are the Capitol Police, U. S. Supreme Court Police, and the Secret Service, Uniformed Division.

Secret Service: The Secret Service offers two orientation-level training courses outlining agency requirements. These two courses also include discussions on ethics, interpersonal awareness, and the minimum standards of conduct required by all LEOs.

Secret Service provides advanced training for new officers in the Uniformed Division, as well as special agents. The new officers complete the *Uniformed Division Officer Training Course*, which discusses professionalism as it relates to the mission and activities that Secret Service Uniformed Division Officers perform. This course has a total of 500 instructional hours, of which 12% is dedicated to the professionalism subjects of ethics and integrity. New Secret Service special agents complete the *Special Agent Training Course*, with an instructional period of 550 hours of which 20% is dedicated to

aspects of professionalism. As part of their overall instruction, special agents and inspectors are informed that Secret Service does not target persons or groups for investigation based on their race, color, national origin, gender, sexual orientation, or political or religious affiliation, but rather for known or suspected criminal activity.

On-the-job training and advanced in-service training programs supplement classroom study. The Secret Service offers in-service training to all LEOs during the term of their careers. One example of the courses offered is the *Leadership and Organizational Behavior* course. This course focuses on such subjects as ethics, integrity, moral dilemmas, and employee responsibility. Over 20% of the course is dedicated to subjects that would be considered professionalism. Secret Service also offers to all employees a course entitled *Conference on Employee Diversity Issues*. This 40-hour course discusses key issues facing management and non-management employees in the area of mixing cultures on the job.

Customs Service: The Customs Service does not have a new employee orientation course. However, new inspectors and investigators must successfully complete basic training before they are sworn in and allowed to perform inspectional or investigative functions.

The *U.S. Customs Service Integrated Training Program* (USCSI) is specialized training that FLETC and the Customs Academy provide jointly for the Customs Service. Included in this 11-week program is an examination of cross-cultural communications. Professionalism is discussed with respect to victim/witness assistance, carrying and use of firearms, and employee conduct and responsibilities. Prior to the appointment of Raymond W. Kelly as Commissioner of Customs, these and similar subjects related to professionalism were allotted 5.2% of the entire program time. Upon his appointment as Commissioner, Mr. Kelly mandated that all inspectors and special agents receive extensive training on interpersonal communication, cultural interaction, confrontation management, personal search policy, and passenger enforcement selectivity. These training courses, totaling 40 hours of instruction, have now become integral parts of the USCSI. Refresher training in these topics is currently being conducted at the 38 airports handling the largest passenger volume. The USCSI now has over 20% of its instructional hours dedicated to professionalism.

The Customs Service's Internal Affairs training staff presents an 8 hour program of ethics reinforcement and anti-corruption training to all students attending USCSI. In addition to familiarizing new inspectors with the code of conduct, this curriculum focuses on two additional areas: (1) directing students' attention on the ethical issues and challenges of attending their professional responsibilities; and (2) providing them the analytical tools necessary to preserving their integrity.

The goal of the USCSI course is to prepare inspectors to perform their duties in a manner

that will ensure personal integrity and will also permit inspectors to perform a professional service for the public. During this course, inspectors who perform searches and seizures are taught that they must adhere to the policies set forth in the Personal Search Handbook.¹⁶

The *Customs Basic Enforcement School* (CBES) which includes the Criminal Investigator's Training Program consists of a total of 720 hours of criminal investigator training. Of these 720 training hours, 31 hours are specifically dedicated to the review of the professional and ethical requirements of Federal service. In addition, ethical and professional standards are included in most of the numerous blocks of instruction throughout the entire 17-week program.

Customs provides several courses at the in-service level for its employees. Of particular interest are: *Customs Supervisory School*, *Special Field Agent Seminar* (SAFS), *Sector Enforcement Specialists*, *Senior Inspector*, and the *Technical Enforcement Officers*. With the exception of SAFS, the training courses are taught in part by the Customs Internal Affairs Training Staff at the Customs Academy and consist of a total of 400 hours, 6% of which is dedicated to professionalism training. The training that is provided at this level to career employees, as well as those entering or already in supervisory positions, serves to reinforce the corruption prevention material taught at the basic level of training. SAFS is a 40-hour course taught by the Southern Police Institute. Included in this course is 4 hours of discussion of the code of values that guides agents' choices and actions.

ATF: There are three basic training programs related to the overall subject of fairness in law enforcement and professionalism: *CORE Training*, *New Professional Training*, and *Supervising in ATF*.

CORE training is a 3-day orientation program provided to all professional series employees and currently includes 4 hours of training dedicated to ethics, integrity, sexual harassment, and equal employment. This program places special emphasis on the issue of discrimination and specifically informs employees that they may not discriminate or harass other employees, applicants for employment, or other persons dealing with the bureau, on the basis of race, color, religion, national origin, sex, sexual orientation, age, or disability. One of the fundamental purposes of *CORE* training is to instill in the new employee the concept of professionalism and the need to treat all people in a fair and impartial manner.

New Professional Training (NPT) is a 13-week basic training course for new special agents and a 9-week basic training course for new inspectors. During the NPT course, special agents and inspectors learn the laws and regulations enforced by ATF, investigative techniques, and policies and procedures. Professionalism and integrity are

¹⁶ See section on Fairness In Law Enforcement Policies for further discussion of the *Personal Search Handbook*.

central themes and are continually reinforced throughout the training programs. As part of their overall instruction, special agents and inspectors are informed that ATF does not target persons or groups for investigation based on their race, color, national origin, gender, sexual orientation, or political or religious affiliation, but rather for known or suspected criminal activity.

Supervising in ATF is a 2-week training program design to teach new ATF supervisors how to apply the principles of professionalism and integrity as first-line supervisors. The program currently includes 8 hours of integrity, ethics, and related training.

IRS-CID: IRS-CID new employee orientation course focuses on the core values of professionalism including ethics, respect, honesty, quality, and selflessness, and uses group activities and role-playing scenarios.

The IRS-CID advanced level course, *Special Agent Investigative Techniques*, provides training in tax law and investigative techniques and serves as a re-introduction to the core values model introduced at the basic level. The core values model provides IRS agents with a sense of the attributes necessary for becoming successful Federal LEOs. While ethics and integrity are the crux of the model, other values such as honesty, respect, and selflessness are emphasized as well throughout the course.

IRS-CID offers numerous in-service training courses and requires that its agents receive continuing professional education each year. One course is of particular interest, the *New Group Manager Orientation Program*, which discusses ethics and integrity in managing employees, employee performance, and discipline issues in a fair and ethical manner, responsibility and accountability as a manager, ethical choices as a manager, and prevention of sexual harassment. Over 50% of a combined total of 24 hours is dedicated to professionalism training.

RECOMMENDATIONS

The Presidential Directive also requests recommendations for improving the training programs, policies, and practices of Treasury and its bureaus. Accordingly, this section of the report addresses these issues. The recommendations are as follows:

- (1) That at the conclusion of the field test, Treasury and its law enforcement bureaus review and analyze the data collected from the projects being conducted by the Secret Service and the Customs Service and, based on this review and analysis, make any necessary changes to Treasury or bureau policies and procedures.
- (2) That the bureaus ensure that specific professionalism training, as defined by this report, is provided at the start of the LEOs' federal employment. All Treasury law enforcement bureaus should have new employee orientation courses in order to instill the core values of professionalism within all LEOs at the beginning of their careers. This

orientation will also allow LEOs to identify with their bureau, its mission, vision, values, and expectations. Specifically, the bureaus should look to the IRS course, which utilizes role-play, group scenarios, and other group-oriented activities, as an adequate model when reevaluating their orientation-level training courses.

(3) That FLETC conduct a formal curriculum review conference every 2 to 3 years for the Criminal Investigators Training Program and Mixed Basic Police Training Program. FLETC should continue its practice of periodically reviewing courses offered to the new LEOs to ensure those specific training subjects within the area of professionalism, diversity, sensitivity, interpersonal awareness, EEO issues, sexual harassment, ethics, and cultural diversity are conducted in a uniform, comprehensive, and timely manner. Individual subjects may be reviewed any time at the request of FLETC or a participating organization.

(4) That the bureaus continue to ensure that specific training on diversity, sensitivity, interpersonal awareness, EEO issues, sexual harassment, ethics, and integrity are provided. Professionalism training must continue throughout an individual's career and should focus on the specific areas evidencing a need for improvement or reassessment. The training officers should conduct an annual review of current policy and procedures on professionalism and ensure that all lesson plans are current. The review should also ensure that all LEOs are receiving sufficient hours dedicated to professionalism subjects. All training should be provided in a timely manner and with the highest possible level of quality necessary to meet the challenges of today's LEO.

CONCLUSION

As discussed in this report, Treasury and its law enforcement bureaus have longstanding policies aimed at ensuring that their employees do not target persons for inspection, investigation, or other law enforcement activity on any impermissible basis such as their race, national origin, or gender. Treasury and its bureaus also have put in place processes to ensure that such policies are complied with and that if violations do occur appropriate disciplinary steps are taken.

As the President's Directive recognizes, however, the Federal Government must continue to search for ways to ensure that its law enforcement officials do not engage in unlawful profiling based on race, gender, ethnicity, or any other prohibited forms of discriminatory conduct. Through Treasury's field test, it will develop a better understanding of how its policies are applied by Secret Service and Customs Service personnel in making traffic stops and pedestrian stops, and in conducting more extensive inspections and interviews than customary with entrants to the United States. This understanding should not only enable Treasury to provide the data needed to respond to the President's Directive, but also to enhance its policies, procedures, and training aimed at preventing discriminatory activities by its personnel. As recommended in this report, Treasury and all its relevant bureaus will review and analyze the data collected during the field test and then, if

necessary, revise their policies, procedures, and training to reflect what was learned through the data collection.

As the President has made clear, there is simply no room in Federal law enforcement for discriminatory conduct based on race, ethnicity, and gender. Indeed, the President's commitment that all members of the public be treated fairly by Federal law enforcement personnel is clear, longstanding, and consistent. The Treasury Department shares this commitment, and dedicates itself to achieving the President's goals. The information presented in this report is but one aspect of the Department's effort to ensure, in both word and practice, that its commitment to fairness in law enforcement is reflected not only in formal policies and procedures, but also in all of its day-to-day operations.

United States Department of the Interior

Fairness in Law Enforcement: Collection of Data

The Department of the Interior (DOI) as opposed to the Departments of Justice and Treasury is not a law enforcement agency. The DOI is a land management agency composed of 8 bureaus, five of which have a law enforcement component in order to meet our legislated mandate to protect public lands, Indian lands, cultural, historical and natural resources, and parks and to protect fish and wildlife and their habitats as well as our employees, residents, contractors, and visitors. As use and visitation has increased in those areas administered by the DOI, our law enforcement programs have become larger and more pro-active.

The Office of Managing Risk and Public Safety (MRPS) is responsible for the design, implementation and coordination of this program. The mission of the MRPS Law Enforcement and Security Team is to ensure the Secretary of the Interior's responsibilities for effective Departmental law enforcement and security policies. The Team has primary responsibility for policy direction, evaluation, inspection, and support of law enforcement and security programs Department-wide. Team members represent the Secretary in interagency law enforcement and security matters and facilitate intra-agency coordination and cooperation.

In formulating the Fairness in Law Enforcement: Collection of Data plan (plan) the mission and authority of the various bureau's law enforcement components were reviewed as potential participants and/or eliminated. A description of the bureau law enforcement programs and the rationale for our decisions follow:

Bureau of Indian Affairs

The Bureau of Indian Affairs Office of Law Enforcement Services (OLES) writes that their mission "is to uphold the constitutional sovereignty and customs of Tribes, while protecting the rights of all people; to protect life and property; ensure employment suitability and to promote and preserve peace within Indian country. This office is responsible for the overall management of the BIA Law Enforcement Program, and has primary responsibility for the investigation of crimes which occur in Indian country. By the end of this calendar year the OLES expects to have a law enforcement program with approximately 424 Police Officers and Criminal Investigators. Because of their mission and legislative authority, the overwhelming number of people BIA law enforcement deals with on a daily basis are Indians. The decision was made to remove this component from consideration.

Bureau of Land Management

The Bureau of Land Management employs 206 law enforcement officers (56 special agents and 150 rangers) and describe their mission as "tasked with providing visitor and resource protection services in support of all BLM program areas. BLM officers conduct high-priority investigations and enforcement actions that focus on resource protection and public health and safety, with the goal of ensuring compliance with both Federal criminal laws and land use regulations on public lands under BLM's management jurisdiction. BLM law enforcement is also committed to reducing illegal drug activities on public lands, at the direction of the Office of National Drug Control Policy. The BLM focuses its efforts on reducing marijuana cultivation and illicit drug lab manufacturing, both of which pose a direct threat to the land, its natural resources, and legitimate land users. Bureau of Land Management law enforcement officers patrol approximately 264 million acres of public land, but have no General Authority legislation. After consideration of this component's mission, staffing, responsibilities and authorities, it was removed from consideration.

Bureau of Reclamation

The mission of the Bureau of Reclamation is "to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public."

The Bureau of Reclamation presently has a law enforcement program only at Hoover Dam. The law enforcement authority for Hoover Dam, an American Icon, was ceded by the General Services Administration when the dam was turned over to the Department of the Interior. The law enforcement component is a 14 person Police Department. The decision was made to remove this small component from consideration.

U. S. Fish and Wildlife Service

The U. S. Fish and Wildlife Service has two law enforcement components. The Division of Law Enforcement presently has 218 Special Agents responsible for specific law such as the Lacey Act, Endangered Species Act, CITES, and other laws, treaties and regulations. Their jurisdiction extends to all property, regardless of ownership, within the United States and territories. The Division of Refuges presently has 686 "commissioned" refuge officers. Of these only 70 are full time law enforcement officers. The remaining commissioned refuge officers are collateral duty officers whose primary duties range from tractor operator to resource management specialists and biologists. Because neither component of the U. S. Fish and Wildlife Service has General Authorities legislation, the decision was made to remove these components from consideration.

Participating Components

National Park Service

The "Organic Act" of August 25, 1916, states that "the Service thus established shall promote and regulate the use of Federal areas known as national parks, monuments and reservations... by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The National Park System of the United States comprises 378 areas covering more than 83 million acres in 49 States, the District of Columbia, American Samoa, Guam, Puerto Rico, Saipan, and the Virgin Islands. These areas are of such national significance as to justify special recognition and protection in accordance with various acts of Congress.

The National Park Service "General Authorities Act" of 1976 states: "The Committee intends that the clear and specific enforcement authority contained in this subsection, while necessary for the protection of the Federal employees so involved, will be implemented by the Secretary, to ensure that law enforcement activities in our National Park System will continue to be viewed as one function of a broad program of visitor and resource protection."

The National Park Service law enforcement program today consists of two separate and distinct, but interrelated components. Approximately 2200 National Park Rangers and Special Agents provide law enforcement protection for the majority of the 378 National Park Areas. They are for the most part, a full service law enforcement agency with additional expertise in many other skills, such as emergency medical services and search and rescue. These law enforcement personnel make hundreds of thousands of law enforcement contacts each year. For this reason, it was decided that this component should be a part of this study and program.

The United States Park Police force is the oldest uniformed Federal Law Enforcement agency in the U. S. Its lineage traces to 1791. The United States Park Police is primarily responsible for National Park Service areas in Washington, DC, New York, NY and San Francisco, CA. Additionally, officials at the rank of Captain are assigned to 6 of the 7 NPS regional offices and in other areas as Law Enforcement Advisors to the National Park Service law enforcement program. They are a full service police agency with internationally recognized expertise in Presidential and dignitary protection and in the handling of high-profile national events and celebrations and crowd control during extremely large gatherings and demonstrations. The present staff consists of 645 officers. These law enforcement officers also make hundreds of thousands of law enforcement contacts each year. It was decided that this component should be a part of this study and program.

Designated Sites

The MRPS in consultation with the National Park Service and the U. S. Park Police designated the following sites for the first year test and study:

In the Pacific West Region: Lake Mead National Recreation Area, NV/AZ, and Yosemite National Park, CA.

In the Intermountain Region: Grand Canyon National Park, AZ, and Glen Canyon National Recreation Area, AZ, UT.

In the Midwest Region: Jefferson National Expansion Memorial, St. Louis, MO, and Indiana Dunes National Lake Shore, IN.

In the Southeast Region: Natchez Trace Parkway, MS/TN, and the Blue Ridge Parkway, VA/NC.

In the Northeast Region: Valley Forge National Historical Park, PA, and Delaware Water Gap National Recreation Area, PA/NJ.

In the National Capitol Region: The Baltimore Washington Parkway patrolled by U. S. Park Police officers.

Due to the lack of significant visitation and law enforcement contacts, the decision was made to remove the Alaska Region from site consideration.

The proposed sites represent high visitation areas where there are exceptionally active law enforcement programs.

Data Sets

The DOI will utilize those codes developed and agreed to in consultation with the Departments of Justice and Treasury and approved by the Attorney General. The DOI proposes to collect the information by hard copy, paper forms. The form DOI proposes to use is attached for your consideration. The U. S. Park Police Planning and Development unit has drafted a General Order is presently drafting a General Order which we propose to utilize in the collection of data. Both NPS components have reviewed the form and concur that it will capture the necessary information. One important consideration discussed at both meetings we attended is that in identifying race and ethnicity, we will use officer perception vs. questioning those individuals with who there is a law enforcement contact. For all contacts which result in a search, warrant, and/or arrest, we will question the subject concerning the required information.

Training

PRESENT

All permanent employee, DOI commissioned and sworn law enforcement officers are trained at the Federal Law Enforcement Training Center (FLETC) administered by the Department of the Treasury. Seasonal employees who are commissioned must have completed one of 13 NPS approved academies. Included in the training received is the clear message that racial profiling is wrong and against Federal government policy.

PLANNED

The MRPS in consultation with those bureaus which have a law enforcement program and the FLETC will develop an orientation briefing on racial profiling and the collection of data. All officers, rangers and special agents assigned to the designated sites will be trained and participate in this program. All law enforcement contacts will require the completion of that attached form. Additionally, the MRPS will develop and implement a 1 hour discussion of Racial Profiling, which will be a mandatory core requirement of all DOI in-service training.

Reporting

The DOI will conduct the field test using hard copy, paper only. The final DOI report will be placed in whatever format is required by the Attorney General, in order that we might submit a report which is compatible with the Justice and Treasury reports.

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
UNITED STATES PARK POLICE
FIELD CONTACT FORM

Date	Time	☐ A.M. ☐ P.M.	Case #
Location			

Operator/Subject Name	Last	First	Middle
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Drivers License No/SSN

Current Address

City/Town	State	Zip Code
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Birthdate	Race	Ethnicity	Sex	Weight	Height	POB
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VEHICLE DESCRIPTION

Vehicle Lic.No.	State	Year /Make	Body Typ	Color
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OFFICER OBSERVATIONS

Officer Signature	Badge	Worksite
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Supervisor Signature

ATTACHMENTS

- 1) INS Commissioner Memorandum on the Apprehension of Aliens in Worksite Enforcement Operations, 12-31-96
- 2) Excerpts from: INS Field Manual for Employer Sanctions, 1987
- 3) Excerpts from: INS Investigator's/Special Agent's Handbook, 1980-81
- 4) Immigration Officer Academy, Basic Training, Statutory Authority for Special Agents, Immigration Inspectors, Immigration Agents and Deportation Officers, Lesson Plan, 1997
- 5) Border Patrol Academy, Basic Training, Statutory Authority, Lesson Plan, 1997
- 6) Border Patrol Academy, Advanced Training, Legal Update, Teaching Materials
- 7) DEA Operation Jetway Lesson Plan
- 8) DEA Operation Jetway Intelligence Bulletin
- 9) DEA Operation Pipeline/Convoy Agenda and Lesson Plan
- 10) DEA Intelligence Bulletin: Operation Pipeline
- 11) Excerpts from: FBI National Academy, MS381, Ethics in Law Enforcement

Memorandum



CO 274A-P

Subject	Date
Apprehension of Aliens in Worksite Enforcement Operations	DEC 31 1996

To
Regional Directors
District Directors
Chief Patrol Agents
Officers in Charge (Except Foreign)

From
Office of the Commissioner

60 The laws, regulations, and policies that govern enforcement actions by the Immigration and Naturalization Service (INS) require us to maintain the highest standards for our treatment of all persons, including those suspected of violations of the Immigration and Nationality Act. These standards govern the Service's responsibilities toward suspected unauthorized aliens encountered during the course of worksite operations. Just as we recognize the need to distinguish wilful violators from employers who have made good faith efforts to comply with the law, we must exercise care and caution in our efforts to identify and apprehend unauthorized aliens. To the greatest extent possible, officers should make determinations of status at the worksite.

As we implement the INS priority for worksite enforcement, instances have arisen of apprehending and detaining persons lawfully in this country who are authorized to work. This guidance is intended to assist in preventing such instances from occurring and to establish clear standards and principles for handling worksite operations. Our officers must make difficult judgments under a variety of pressing circumstances. We need to sustain high standards concerning probable cause for arrests and plan operations in a manner that enhances officers' ability to make determinations of alienage and lawful status in the field. This memorandum provides guidelines to be followed when planning operations and reinforces standards for questioning aliens, brief investigative detention, and making arrests. Finally, it reinforces standards that ensure that worksite enforcement operations are carried out in a non-discriminatory manner.

Planning of Operations

When organizing worksite operations, supervisors should ensure all participating agents are fully prepared, to the maximum extent possible, to execute their assigned responsibilities during the enforcement activities. Entry into the worksite should be conducted in a manner

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that minimizes disruption of the legitimate activities of the workplace. Preparation should include the following steps:

Fully brief all participating agents and supporting personnel, in order to ensure that potential problems are discussed and resolved;

Arrange for a point-of-contact at the field office to assist timely with record checks called in from the worksite, particularly in the case of asylum or adjustment claimants who may not appear in the Central Index;

Assign a sufficient number of agents to the operation to ensure the ability to conduct interviews at the worksite and allow for such actions as escorting an employee to another area of the business or to his or her vehicle to retrieve documents;

Schedule operations in a manner that permits officers to spend sufficient time at the worksite to complete checks to the extent possible, while ensuring prompt processing of any persons arrested.

Additional steps may include special arrangements for immediate record check assistance in large-scale operations and establishing a point-of-contact for community groups during the operation to minimize the potential for miscommunication.

If a person removed from the worksite is found to be authorized to work, an officer should inquire whether the employee wants the Service to contact the employer with this information, and follow up promptly on such requests. Where feasible and reasonable, the Service should assist with the authorized employee's return to the worksite. Authorized aliens should be reminded of their duty to carry their registration documents.

Standards for Questioning Aliens

The first encounter between Immigration and Naturalization Service officers conducting a workplace enforcement action and employees is likely to be a consensual encounter. INS officers have the statutory authority to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. §

¹ Service regulations define "interrogation" as "questioning designed to elicit specific information" 8 C.F.R. § 287.8(b). The regulations add that "[a]n immigration officer, like any other person, has the right to ask questions of anyone as long as the immigration officer does not restrain the freedom of an individual, not under arrest, to walk away." *Id.*

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1357(a)(1). This authority to ask questions does not give INS officers the right to detain any person for questioning.

As noted in the Arrest Manual,² "INS officers should address questions to individuals in a way that promotes cooperation. To this end, they should identify themselves as INS officers and perform their duties in a professional manner." As long as a reasonable person in the position of the person questioned would believe that he or she is free to leave, based on the totality of the circumstances, a Fourth Amendment seizure has not occurred and no probable cause or reasonable suspicion need be established.

Judicial determinations as to when a consensual encounter becomes a Fourth Amendment seizure have been very fact-specific. Relevant factors have included the content, time, and manner of the questioning; the number of officers involved; whether there is any physical contact or restraint; whether there is any display of weapons; whether the person's documents or other property are held by the officer; and whether the person is moved.

Standards for Brief Investigative Detention

A brief investigative detention (known as a "Terry stop") does not amount to an arrest, and requires a lesser showing that the person committed the offense than does an arrest. The INS regulations state that an immigration officer may briefly detain a person for questioning if the officer has a reasonable suspicion, based on specific articulable facts, that the person "is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States." 8 CFR 287.8(b)(2). A brief investigative detention should be limited in duration and nature to that which is necessary to confirm or dispel the reasonable suspicion that led the officer to make the stop.

Standards for Making Arrests

An arrest occurs when a reasonable person in the suspect's position would understand the situation to restrain his or her freedom of movement to a degree that the law associates with formal arrest. All Service officers are expected to maintain familiarity with the laws, regulations, and policies governing arrests, including applicable policy and regulation governing advisals of rights (e.g., Lopez procedures). Section 287(a)(2) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1357(a)(2), allows any authorized INS officer to arrest any alien in the United States without a warrant "if he has reason to believe that the

² The Law of Arrest, Search and Seizure for Immigration Officers II-2 (M-69) (1993) ("Arrest Manual")

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alien so arrested is in the United States [in violation of any law or regulation . . . regulating the admission, exclusion, or expulsion of aliens] and is likely to escape before a warrant can be obtained for his arrest."¹

The Fourth Amendment to the U.S. Constitution requires that all arrests be supported by probable cause. The references in section 287 of the Act and accompanying regulations to officers having "reason to believe," or "reasonable grounds to believe," that persons have committed offenses do not lessen the probable cause requirement.

The Arrest Manual gives the following advice regarding probable cause:

Probable cause is knowledge or trustworthy information of facts and circumstances which would lead a reasonably prudent person to believe that an offense has been committed or is being committed by the person to be arrested. Probable cause is more than mere suspicion or the observation of behavior that is merely suspicious, but there does not have to be absolute certainty of guilt. In determining whether probable cause was present at the time of an arrest, courts consider the totality of the circumstances as viewed by a reasonable prudent officer coupled with the officer's training and experience. Pertinent factors include: personal knowledge or observation by the officer; information contained in official communication to the officer; information from reliable informants, victims, or witnesses; actions and appearance of the suspect(s); criminal reputation of the suspects; inconsistent and unpersuasive answers to routine questions; and possession, disposal, or concealment of evidence.

Officers must, therefore, take all necessary steps to establish probable cause prior to making arrests of aliens at the workplace. The circumstances of all arrests should be documented on Form I-213, Report of Investigation, or memorandum, as appropriate.

Claims to Lawful Status

A situation that is likely to arise is an INS officer's encounter with persons who claim in the course of a consensual conversation to be U.S. citizens, Lawful Permanent Residents, or within some other category of authorized alien. Of course, a mere statement that a person is lawfully in the United States is not conclusive. An officer may pursue consensual questioning of a person suspected to be an alien and may ask to see the person's documents.

To move from a consensual encounter to a brief investigative detention, an officer must have reasonable suspicion that the person is an alien illegally in the United States or has committed an offense otherwise within the enforcement authority of the Service. To arrest

¹ Regulations at section 287.8(c)(2)(ii) state that, "A warrant of arrest shall be obtained whenever possible prior to the arrest."

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the person, the officer must have probable cause that the person is an alien illegally in the United States or has committed an offense otherwise within the enforcement authority of the Service, and must believe that the person is likely to escape before the officer could obtain a warrant for the arrest. The failure of an alien to produce documentation of status may, depending on the circumstances, be a relevant fact in an officer's determination that reasonable suspicion or probable cause exists as to the alien's illegal status. Such failure must be considered with other factors, as discussed below under "Avoiding Discrimination."

Adult work-authorized aliens are required by Section 264(e) of the Act to carry their registration documents. A claim of authorized alien status, combined with a failure to produce confirmatory documentation, establishes probable cause that the alien has violated section 264(e), absent unusual circumstances, such as that the alien appears to be a minor.⁴ Nevertheless, officers are reminded that enforcement of this provision of law is not a priority of the Service.⁵ Our enforcement focus must be on aliens who are in this country illegally or who have violated their terms of admission.

As mentioned, every effort should be made to determine the person's status at the workplace.

Avoiding Discrimination

To ensure that operations are not carried out in a discriminatory fashion, officers are reminded of the guidance provided in the Immigration Officer's Field Manual for Employer Sanctions (M-278) (1987) concerning reasonable suspicion of illegal alienage in the workplace:

The courts have held that in pursuing investigations of illegal aliens, INS officers must be able to articulate specific facts which, when taken together, form the basis for reasonable suspicions of alienage and unlawful status in the United States. In order to be reasonable, suspicions may be based on a variety of different observations. Those that the courts have accepted include:

- Officers' knowledge of high concentrations of aliens in the area;
- The industry or type of employment site involved;
- Informers' tips;

⁴ Different post-arrest requirements apply to persons arrested for criminal offenses, such as 264(e), than to persons arrested for illegal immigration status. For example, officers must give Miranda warnings before interrogating any person arrested for a criminal offense.

⁵ Officers should be aware of any policies the local U.S. Attorney's office may have established with respect

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Excessive nervousness or studied nonchalance of employees in the presence of federal officers at the workplace;
Foreign manners of dress or grooming;
Apparent inability to speak English;
Employee statements or admissions; and
Inferences and deductions of the officer as a trained observer.

Service officers need to be aware that by itself, mere foreign appearance, based on ethnic characteristics or language, does not constitute a reasonable suspicion of alienage. It may, however, be considered in combination with other specific articulable facts -- particular characteristics or circumstances which the officer can, if called upon, describe in words -- such as those listed above.

In particular, INS officers engaged in worksite enforcement operations must continue to ensure that the constitutional rights of persons with whom they come into contact are respected. The consequences of failing to do so can include -- depending on the circumstances -- the exclusion of evidence, criminal or civil liability of the officer, civil liability of the United States, or agency disciplinary action.

This policy does not affect the scope of authority of Service officers under the Act, but is directed to the operational implementation of that authority. Enforcement personnel are expected to exercise sound judgment and discretion while performing their duties. Please ensure that all enforcement officers within your office are reminded of their responsibilities and statutory authority when making arrests and conducting field operations.



Doris Meissner
Commissioner

cc Regional Counsels

FIELD MANUAL FOR EMPLOYER SANCTIONS

IV. ENFORCEMENT PROCEDURES

IV-A. INVESTIGATIONS PROGRAM

While investigations may be performed to determine whether an employer has violated either the verification requirements or the substantive prohibitions of IRCA, priority should be given to investigation of violations of the prohibitions against knowingly hiring or continuing to employ unauthorized aliens.

Officers must bear in mind that investigations may lead to prosecution for either civil or criminal violations. For this reason, if subpoenas or warrants are needed, it will be necessary to assess whether civil or criminal procedures are more appropriate to the potential violations involved.

IV-A-1. Basis for Initiation: Leads and Articulable Facts

As noted, investigations must be based upon leads and articulable facts pertaining to employer conduct after November 6, 1986. While employer conduct prior to November 7, 1986, may not constitute the sole basis for an investigation, officers may use that information in determining whether a lead has sufficient merit to justify opening an investigation.

All field offices are familiar with proven strategies for developing leads for employer cases, as those techniques traditionally have been used to identify employers of illegal aliens for purposes of enforcing Section 242 of the Act.

IV-A-1-a. Articulable Facts with respect to Suspected Unlawful Status

The courts have held that in pursuing investigations of illegal aliens, INS officers must be able to articulate specific facts which, when taken together, form the basis for reasonable suspicions of alienage and unlawful status in the United States. In order to be reasonable, suspicions may be based on a variety of different observations. Those that the courts have accepted include:

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- Officers' knowledge of high concentrations of aliens in the area;
- The industry or type of employment site involved;
- Informers' tips;
- Excessive nervousness or studied nonchalance of employees in the presence of federal officers at the workplace;
- Foreign manners of dress or grooming;
- Apparent inability to speak English;
- Employee statements or admissions; and
- Inferences and deductions of the officer as a trained observer.

Service officers need to be aware that by itself, mere foreign appearance, based on ethnic characteristics or language, does not constitute a reasonable suspicion of alienage. It may, however, be considered in combination with other specific articulable facts--particular characteristics or circumstances which the officer can, if called upon, describe in words--such as those listed above.

To recap, reasonable suspicion, therefore, is a legal standard which must be met by officers in their interrogation of suspected undocumented aliens. These are met by the articulable facts described above.

IV-A-1-b. Leads from Government Agencies

Records maintained by other government agencies are a particularly fruitful source of leads. Field offices are encouraged to ensure that sanctions enforcement agents aggressively pursue the initiation of leads through contact with their counterparts in field offices in these agencies. Agents are encouraged to review the records of these agencies to determine compliance and enforcement efforts undertaken toward employers by them after November 6, 1986. Agents should determine from these records whether there is evidence of concurrent INS violations. Indicators which may reveal the presence of an unauthorized workforce include failure to pay minimum wage, failure to pay Social Security (FICA), or failure to pay unemployment (FUTA) or other taxes. Agencies with which contacts might be made include the following:

Section IV-2

CHAPTER 4-9

AREA CONTROL INVESTIGATIONS

AUTHORITY

Authority for investigators performing Area Control Investigations is derived from section 287 of the Act. The seemingly broad powers specified in section 287, particularly those concerning the conditions under which a person suspected of being an alien may be interrogated, detained, and arrested, must be exercised in a manner consistent with existing court precedent. It no longer suffices to say that a given action is legal simply because a literal reading of a particular section of law appears to permit it. Investigators must be prepared to give articulable, reasonable explanations for all enforcement actions. Furthermore, because the powers, operational methods, and procedures of the Service are now being more closely scrutinized and challenged than ever before, the Service's actions are being questioned and contested by the public, the media, and the courts. It is essential that investigators know about all precedent court decisions and the attendant impact of such decisions upon their authority to enforce the immigration laws.

Virtually any stop by an investigator is governed by individuals' rights under the Fourth Amendment to the Constitution to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." Therefore, investigators must be acquainted with the decisions limiting general police authority to detain suspects and with those decisions defining the unique authority granted Service officers to deal with aliens who may be illegally in the United States. The Law of Search and Seizure for Immigration Officers (M-69), and Chapters 1-2 - "Jurisdiction", 5-1 - "Searches and Seizures", and 5-2 "Arrests" contain exhaustive guidelines on the topic of authority, and the brief discussion in this chapter is not to be considered a substitute for complete familiarity with those sources. However, several of the more important concepts of case law deserve mention in this chapter.

Questioning Suspects

Miranda v. Arizona, 384 US 436 (1966), while best known as the decision mandating a formal warning of an arrestee's rights to silence, representation by counsel, and awareness of the consequences of self-incrimination in criminal proceedings, the "Miranda" decision also clarifies the extent to which a person may be questioned short of an arrest. Accosting a person and making inquiries as to willingness to discuss a matter under investigation does not constitute a deprivation of freedom of action, but further interrogation may lead to a temporary forcible detention without actually effecting an arrest ("Arrest" being

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defined as "the actual or constructive seizure or detention of a person performed with the intention to effect an arrest and so understood by the person detained").

Search of Suspects

Terry v. Ohio, 392 US 1 (1967), provides that interrogation may involve some measure of brief restraint and search short of arrest in situations where the officer reasonably believes that the individual he or she has stopped may be armed and dangerous, in order to guarantee his or her own safety and that of others. The court ruled that if something feels like a weapon in the course of a "frisk," that item may be checked without probable cause for arrest. The area within a suspect's reach may also be searched for the same reason. Such a search is reasonable within the terms of the Fourth Amendment, and weapons so seized are admissible into evidence at subsequent proceedings. This ruling usually affects immigration officers when a brief search for weapons is conducted incident to an arrest, or during the "clean-up" phase of an Area Control operation when allowing aliens access to their personal property.

Reasonable Suspicion

The courts have ruled that immigration officers can approach a pedestrian for the purpose of questioning concerning his or her right to be in the United States if that person is suspected of being an alien; but temporary, forcible detention to conduct further interrogation of a person must be based on a reasonable suspicion that the person is an alien illegally in the United States [Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977)]. More stringent criteria apply to stops of persons in automobiles, in that even an initial approach for the purpose of questioning can only be accomplished through a limited detention of the vehicle and its occupants. Therefore, a vehicular stop, except at a fixed traffic checkpoint, can be made only if an officer first suspects the vehicle contains aliens illegally in the United States.

Vehicular Stops

In U.S. v. Brignoni-Ponce, 422 US 873 (1975), the Supreme Court held that the "roving patrol" stop of a vehicle ("roving patrol" is broadly defined as the stop of a vehicle by Service officers at any location other than a traffic checkpoint or port of entry, and relates to all vehicular patrol functions and traffic observation activities, including area control) at a location other than the border or its functional equivalent, and the questioning of its occupants merely because they appeared to be of Mexican descent, violated the Fourth Amendment. The "suspicion" that leads an officer to make such a decision must be arrived at by use of specific "articulable facts," rather than gut feelings or curi-

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osity. These articulable facts, as defined in Brignoni-Ponce and Illinois Migrant Council v. Pilliod, are dealt with at length in the next section of this chapter.

Other limits on an investigator's authority include formal legal recourse for individuals whose rights have been violated, and the use of the Exclusionary Rule [Rule 41(e), Federal Rules of Criminal Procedure] in Federal prosecutions. The Exclusionary Rule bars from use any evidence secured through unreasonable search and seizure. Its purpose is to deter overzealous law enforcement officers from invading the right to privacy by prohibiting the use of the fruits of such an invasion. It also applies to evidence obtained in violation of other constitutional and statutory rights, e.g., the Sixth Amendment right to counsel, the Fifth Amendment privilege against self-incrimination, and Fifth and Fourteenth Amendment rights to due process of law, and the requirement of prompt arraignment under Rule 5(a) of the Federal Rules of Criminal Procedure. [NOTE: The Department of Justice has made a policy determination that the Exclusionary Rule does not apply to civil proceedings, such as deportation hearings, although the Court of Appeals for the First Circuit has held that illegally seized evidence is inadmissible in deportation proceedings. Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977).]

In summary, a strict reading of section 287 of the Act indicates that investigators can question anyone in the United States whom they believe are aliens. Since there are millions of aliens in the United States and there are many less Service investigators, it only makes sense to concentrate the investigators' efforts on those aliens they believe to be illegal. The courts have coined the term "articulable facts" and applied that term to those indicators which the investigator consciously or unconsciously notes when observing any individual. The investigator must be able to voice those "articulable facts" if called upon to do so.

ARTICULABLE FACTS

As mentioned in the authority section of this chapter, it is necessary by virtue of the decisions in United States v. Brignoni-Ponce and Illinois Migrant Council v. Pilliod for investigators to have "reasonable suspicion" based on articulable facts that an individual is an alien before they may stop and question aliens about their right to be in or remain in the United States. A list of articulable facts as set forth in the Brignoni-Ponce case are as follows:

- (1) Character of the area;
- (2) Proximity to the border;

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- (3) Usual patterns of traffic on the particular road;
- (4) Previous experience with alien traffic;
- (5) Information about recent illegal border crossings in the area;
- (6) Driver's behavior such as erratic driving or obvious attempts to evade investigators;
- (7) Aspects of the vehicle itself (e.g., certain station wagons with large compartments for fold down seats or spare tires).
- (8) The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the investigators may observe persons trying to hide;
- (9) Trained investigators can recognize the characteristic appearance of persons who are from foreign countries relying on such factors as mode of dress and haircut (e.g., Mexican appearance is a relevant factor, but standing alone it does not justify stopping all Mexican-Americans).

The following list does not purport to be an all-inclusive list of "articulable facts". As mentioned above, investigators must draw on their experiences and recognize the unique nature of operations in the area they are stationed. Note also that the term "articulable facts" has never been used in the singular, and one "fact" should not be expected to stand alone:

- (1) Information from informants, contacts or other sources;
- (2) Foreign appearing visage: Chinese, Indian, Mexican, etc.;
- (3) Speech - inability to speak English, or to speak English less than fluently with a marked accent;
- (4) Clothing: obvious foreign dress or all new clothing of U.S. manufacture;
- (5) Wearing several layers of clothing;

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- (6) Footwear and accessories: illegal aliens who adopt American dress are often loath to give up favored native items such as sandals, ponchos, bracelets, rings, necklaces, etc.;
- (7) Fads that may develop among foreign nationals, such as: distinctive watch bands, hair styles, neck wear, catchwords;
- (8) Engaged in activities known for their attraction to, or participation by illegal aliens, e.g., tree planting in the Northwest, bridge painters in the East, grooms at certain race tracks, laborers on highway construction or cement workers;
- (9) Being conscious of their illegal status, such aliens will be prone to over-react when observed or spoken to by a stranger or police officer, e.g., rapidly looking away or turning away to avoid eye contact, nervousness exhibited by fumbling for non-existent or unnecessary items, hands shaking, lips or chin quivering often accompanied by frequent licking of the lips as the mouth dries, fright indicated by face being pale, perspiring, shaking, breathing hard or fleeing, attempting to leave the area either hastily or with exaggerated nonchalance or otherwise avoiding the investigator by moving into a crowd, stepping into a booth in a rest room, boarding a bus or taking a cab, etc.; or
- (10) Driving older model cars in poor condition--fully occupied and usually all men or all women.

OBJECTIVES OF AREA CONTROL INVESTIGATIONS

Area Control Investigations are to be conducted only on the basis of specific leads and complaints, and should be concentrated on locating employed aliens at their places of employment. Consistent with these guidelines, the main objectives are:

- (1) To locate aliens illegally in the United States as soon as possible after the illegal entry or violation of status has occurred;

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- (5) Personnel lists (obtained through cooperation, subpoena, or informants) of employees who are not citizens of the United States and for whom no record of lawful admission exists;
- (6) Observations of employees as they enter or leave the premises by investigators who can articulate their suspicions of why the employees may be illegally in the United States; or
- (7) Copies of leads provided by the public or other agencies. Once the search warrant is obtained, it should be served on the owner or responsible party. A thorough search may then be conducted for all persons named on the warrant. While the warrant usually permits access to the entire grounds, the operation nevertheless should be conducted in a professional manner showing due respect to the property rights of others.

Selective Interrogation

While section 287 of the Act authorizes immigration officers to interrogate any alien or person believed to be an alien about his or her right to be or remain in the United States, this authority has to be used in a reasonable and professional manner. Whether interrogating a person on the street or in a business, the investigator must be able to articulate reasons for believing a person to be an alien. It is an acceptable practice to concentrate on interviewing those persons appearing to be, for example, Mexicans, if the information which is being worked reports only Mexicans; but the investigator should remember that aliens of other nationalities identifiable by articulable characteristics should also be questioned.

Clean Up Operations

At the completion of the operation the owner, manager or a responsible employee should be advised of the results and arrangements made for wages to be given to the aliens or for a company employee to come to the detention facility to pay off the aliens. A less desirable alternative would be to provide the aliens with the name and address of the company in order to write for their wages, but only if all other efforts fail. Failure of an employer to pay must be reported to the alien's consulate. An effective collections program, coupled with removal of the apprehended aliens by use of voluntary departure (Forms I-274 and I-274A),

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CHAPTER 5-1

SEARCHES AND SEIZURES

DEFINITIONS

Border Search

Investigators do not need probable cause to make a border search of any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States. They do not need probable cause to search, at the border or its functional equivalent, any person seeking admission into the United States, if they have reason to suspect that such a search would disclose that grounds exist for exclusion from the United States.

Degrees of Suspicion

Mere Suspicion

At the border or its functional equivalent, an investigator needs **only mere suspicion** to justify a search and comply with the requirements of the Fourth Amendment. This is because the person is attempting to enter the United States from abroad and may reasonably be required to demonstrate that the person and his or her belongings are entitled to enter the United States.

Reasonable Suspicion of Alienage

Reasonable suspicion of alienage is the degree of suspicion that an investigator must have before constitutionally stopping and questioning a pedestrian or a person in a factory, restaurant, or similar establishment. This suspicion must be based on more than ethnic physical appearance, e.g. Mexican or Chinese ancestry. This reasonable suspicion must be based on "specific articulable facts", particular characteristics or circumstances which the investigator can describe in words, such as foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from a reliable informant.

Reasonable Suspicion that Alien is Illegally in the United States

Before an investigator may constitutionally detain a pedestrian or a person in a factory, restaurant, or similar establishment, the investigator must have reasonable suspicion that the person is an alien and is illegally in the United States. This higher degree of suspicion arises generally after initial questioning on the basis of suspicion of alienage alone and also involves specific articulable facts.

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Reasonable Suspicion that a Vehicle Contains Aliens Illegally in the United States

An investigator, before constitutionally stopping a vehicle to question its occupants, must reasonably suspect that the vehicle contains aliens illegally in the United States. This suspicion may be based on factors similar to those described above as well as on features of the vehicle such as fold-down seats, spare tire compartments where a person could be concealed, a large number of passengers, an unusually heavy load, or evasive actions on the part of its occupants.

Probable Cause

Probable cause is the degree of suspicion which an investigator must have before constitutionally searching a vehicle (except at the border or its functional equivalent, or incident to the arrest of an occupant of the vehicle) and before making an arrest. An investigator has probable cause to arrest or search if evidence and circumstances which would lead a reasonable person to believe that an offense has been or is being committed are known by the investigator.

Functional Equivalent of the Border

A checkpoint established at the point marking the intersection of two or more roads extending from the border without any major intervening crossroad, may be determined to be the functional equivalent of the border. Interior airports at which nonstop flights arrive from abroad are also considered to be the functional equivalent of the border (See the M-69 for further clarification).

Authority to Search and Seize

Investigators have statutory authority without a warrant to:

- (1) Search persons and personal effects of applicants for admission [see section 287(c)];
- (2) Board and search conveyances in which they believe aliens are being brought into the United States [see 235(a)];
- (3) Enter private lands within 25 miles of the border for purposes of patrolling the border to prevent illegal entry of aliens [see 287(A)(3)];
- (4) Arrest aliens who in the investigator's presence or view are entering or attempting to enter the United States in

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violation of the immigration laws, or are reasonably believed to be in the United States in violation of the immigration laws [see section 287(a)(2)];

- (5) Arrest persons reasonably believed to have committed felonies contrary to the immigration laws if there is a likelihood that the person will escape before a warrant can be obtained [see section 287(a)(4)]; and
- (6) Seize vessels, vehicles, or aircraft used to bring in, transport, or conceal aliens who are not entitled to enter or reside in the United States [see section 274(b)].

Investigators also have statutory authority to execute any warrant or other process issued by any officer under any laws regulating the admission, exclusion, or expulsion of aliens [see section 287(a)(4)].

By statute, an investigator has authority without a warrant, and within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, craft, conveyance or vehicle. Within a distance of 25 miles from any such external boundary the investigator has authority without warrant to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. The power to stop conveyances for the purpose of searching them is necessarily implied. By statute, the investigator also has specific authority to conduct warrantless searches of persons, and their personal effects, when those persons are seeking admission to the United States if the investigator has reasonable cause to suspect that grounds exist for exclusion from the United States.

By regulation, the phrase "within a reasonable distance" in the foregoing paragraph ordinarily means any distance not exceeding 100 air miles from any external boundary, or any shorter distance which may be fixed by the district director. The investigator shall ascertain the local district office's rules in this latter respect.

The authority to board and search vessels and vehicles referred to above may be used as to all conveyances only in those districts having border patrol operations. In other districts (unless prior Central Office approval is obtained), it shall be used only with respect to aircraft and vessels within the territorial waters of the United States. This authority derives from section 287(a)(3) the Immigration and Nationality Act.

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However, further authority to board and search conveyances stems from section 235(a) of the Immigration and Nationality Act. Under that section the investigator, provided there is reason to believe aliens are being brought to the United States in the conveyance, may board and search without limitation as to the distance from the boundaries within which this power is exercised. This latter power may be exercised in all districts as to all types of conveyances.

In addition to the above stated powers of searches and seizures, Supreme Court decision Almeida-Sanchez v. United States, 413 U.S. 266 (1973), authorizes the issuance of a search warrant for a person as opposed to a thing (property). This type of search warrant may be developed into a valuable investigative tool, especially in Area Control operations. Use of the search warrant shall be confined to cases where it is deemed essential. An application for a search warrant should be sought only as a last resort where there is a reasonable basis, supported by substantial and solid evidence, for the suspicion of the presence of illegal aliens. (See Appendix 4-9A for example of an affidavit for a search warrant.)

FOURTH AMENDMENT

The Fourth Amendment to the Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. That protection applies to Federal and state government action. Evidence obtained as the result of an illegal search and seizure is not admissible in a Federal prosecution. This is so if the evidence is improperly secured by a Federal officer.

An arresting investigator may make a reasonable search of both the person arrested and the premises where the arrest is made. As to what constitutes a reasonable search, the facts and circumstances in an individual case will govern. In Chimel v. California, [395 U.S. 752 (1969)], the Supreme Court held that, without a search warrant, any search incident to a lawful arrest may extend only to the arrestee's person and the area within immediate reach from which the person might gain possession of a weapon or destructible evidence. Recognizing that its prior decisions in United States v. Rabinowitz, 339 U.S. 56 (1950), and Harris v. United States, 331 U.S. 145 (1947), construed the area within the arrestee's control much more broadly and "would allow the searches and seizures in this case," the Court announced that those decisions "are no longer to be followed." The Court reviewed its prior decisions in the area and concluded that the only reasonable justifications for conducting a search incident to an arrest are (1) to find and remove any weapons that the arrestee might use in resisting arrest or in effecting an escape, and (2) to find and seize any evidence which the arrestee might seek to conceal and destroy. Accordingly, the Court held that such a search must be limited to "the arrestee's person and the area 'within immediate

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control"--construing that phrase to mean the area from within which the person might gain possession of a weapon or destructible evidence," or "the area within his reach." The Court noted, however, that when a person in a vehicle is arrested, the vehicle may be searched without a warrant because of the danger of its removal during any delay to obtain a search warrant. This vehicle search must be contemporaneous with the arrest, or it could be attacked at a later date in a court proceeding. The Supreme Court has ruled that search of a suspect's hotel room without the person's permission or search of the person's automobile at a time or place remote from arrest cannot be considered as "incidental to the arrest" and violates the Fourth Amendment [Stoner v. California (376 U.S. 483 (1964)) and Preston v. United States (376 U.S. 364 (1964))]. This should be borne in mind in connection with the search of premises or automobiles for the purpose of securing evidence in cases under the jurisdiction of this Service as well as violations which may be incidentally encountered by investigators when enforcement responsibility lies with some other agency.

SEARCH

Frisk

An investigator may frisk--i.e. pat down the outer clothing of--a person who has been stopped for questioning if the investigator believes that the individual may be armed and dangerous, in order to guarantee the investigator's own safety and that of others. If the investigator feels something which may be a weapon, the investigator may reach inside the person's outer clothing to remove it. A limited search of this type may be made without probable cause for arrest and without the absolute certainty that the person is armed. The investigator may also search the area within the subject's reach for the same purpose. Such search is reasonable within the terms of the Fourth Amendment. Any weapons seized as a result of such a limited search, and/or any other object seized which feels like a weapon but which turns out not to be one, is admissible into evidence at subsequent proceedings. A frisk for weapons is justified if made on the basis of a tip from an informant.

Strip and Body Cavity Searches

Strip searches are only performed when probable cause exists to believe that weapons or documentation are being secreted by the person arrested. A strip search is always conducted by an officer of the same sex.

Body cavity searches are only performed under the most extreme circumstances. When performed, they are always performed by a physician, with an officer of the same sex present. A body cavity search is only made when there is specific information that weapons, documentation or other contraband are being secreted by the arrestee.

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Some things to remember regarding frisks and searches are that a frisk is conducted prior to an arrest, and that the person frisked may not necessarily be arrested. The primary concern in this instance is that the officers fear for their safety from the individual that is to be frisked.

A strip search and a body cavity search are conducted only after a lawful arrest. The strip search requires probable cause and the body cavity search requires probable cause and specific information.

If there is any question that the investigators cannot resolve concerning these kinds of searches, they should contact the United States Attorney having jurisdiction.

Search Incident to Legal Arrest

When a person has been legally arrested and is in custody, a complete search may be made of the person pursuant to the arrest. Such a search, even though made without a search warrant, does not violate the subject's Fourth Amendment rights. This type of search may be made regardless of whether or not the investigator suspects that the subject may be armed and dangerous.

The purpose of this type of search is two-fold. First, it is performed to protect the investigator and others and to insure that the prisoner retains no means for escape, and second, it is made to prevent the destruction of evidence of the offense for which the subject was arrested. A search pursuant to an arrest for deportation is analogous to and no more limited than a search pursuant to an arrest for crime, as the need for proof is equally great.

An investigator, in taking a person into custody, should search the person for weapons of a dangerous or illegal nature and divest the person of such weapons. The investigator should also obtain from the person any evidence of nationality and any documents issued by the Service. Any weapons seized, possession of which is a violation, shall be turned over to the agency having enforcement jurisdiction. Any other potentially dangerous items, possession of which is not a violation of law, shall be retained under appropriate safeguards while the violator is in custody and, as personal property, delivered either to the owner on departure or to officials of the appropriate foreign government if the delivery is coincidental with the physical deportation of the alien. Under no circumstances may a weapon or other property taken from a violator become the property of an investigator. If released from custody, documents other than evidence of nationality or lawful status in the United States should be returned to the person. If the warrant of arrest is cancelled, all documents should be returned to the alien.

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If the person is arrested inside a house, only that area which is within the person's reach may ordinarily be searched pursuant to a lawful arrest without a search warrant. If arrested outside or near a house, the house may not constitutionally be searched except in special circumstances, even where there is probable cause to search the house. Some exceptions are consent, response by the investigator to an emergency, hot pursuit of a fleeing felon (this seldom applies to an alien illegally in the United States), evidence in the process of destruction, or evidence about to be removed from the jurisdiction. Another exception, at least in the Fifth Circuit, gives officers the right to conduct a quick and cursory check of a residence when they have reasonable grounds to believe that there are other persons present inside the residence who might present a security risk. This is true whether the initial arrest was made inside or outside the residence. The purpose of this cursory search is to check for persons, not things, and the search is only justified when it is necessary to allow the officers to carry out the arrest without fear of violence.

Extent of Vehicle Search

At the border or its functional equivalent, investigators may board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States. Elsewhere, i.e. at those check-points which are not the functional equivalent of the border, and on roving patrol, any search of the vehicle for persons, objects, or substances which are not in plain view must be based on consent freely given, probable cause, or a valid search warrant. Probable cause may be supplied by information from or nervous behavior of the vehicle's occupants; persons, objects, or substances in plain view; or, the smell of marijuana. In the absence of exigent circumstances, officers are required to obtain a warrant before searching luggage taken from an automobile which was properly stopped and searched for aliens or contraband.

Entering Private Lands

The second clause of section 287(a)(3) of the Immigration and Nationality Act gives immigration officers access, without warrant, to private lands but not dwellings, within 25 miles from any external boundary of the United States, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. Section 287.1(f) of 8 CFR defines "patrolling the border to prevent the illegal entry of aliens" to mean conducting such activities as are reasonable and necessary to prevent the illegal entry of aliens into the United States.

Most of the decided cases in which private property has been entered do not involve open lands at the border but rather involve investigations in buildings in urban areas, portions of which are open to the public, such as restaurants, factories, and hospitals. According to Service policy, these buildings are not encompassed

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by the grant of authority in section 287(a)(3) even if they are located within 25 miles of an external boundary. Although investigators do not need permission to enter the public areas of these buildings, it is advisable to request permission to enter. Moreover, consent or a search warrant is needed to search the nonpublic areas of these establishments unless there are exceptional circumstances.

Trespass

From time to time an investigator or police officer is said to have trespassed on private property, and it is alleged that a search or seizure made under those circumstances is unlawful. The lawfulness of the search or seizure depends on whether or not it is reasonable under the Fourth Amendment to the Constitution, i.e. whether or not a warrant is required, and, if so, whether the warrant is valid and a proper search is made pursuant to the warrant. Regarding any alleged trespass, the courts have held either that it is not a trespass at all if the officer enters private property in the performance of duty and acts within the scope of authority, or that, if the officer is engaged in the performance of duty, trespass is justifiable and therefore of no consequence. Within 25 miles of any external boundary of the United States, entry onto private lands, but not dwellings, is specifically authorized by statute. An entry under these circumstances would not be a trespass.

Beyond 25 miles from any external boundary, entry onto private lands by immigration officers is not specifically authorized by statute. There is, however, considerable case law holding that the Fourth Amendment does not apply to entry onto so-called "open fields," by a law enforcement officer in the performance of official duties. The term "open fields" has been construed as applicable to private lands, not including dwellings, which are beyond the curtilage (an area of domestic use immediately surrounding a dwelling and usually, but not always, fenced in with the dwelling).

The protection which the law affords an investigator is predicated upon the assumption that the investigator is acting strictly within the scope of his or her employment, is engaged in the performance of official duties, and has identified himself or herself as an immigration officer to the person in charge of the location. The following are some instances in which an investigator would be considered to be acting within the scope of his authority by entering onto private lands more than 25 miles from any external boundary: (1) the purpose is to serve a warrant of arrest or deportation on an alien who the investigator has reason to believe is there; (2) the investigator has definite information that an alien in the country in violation of law is on the land and is likely to abscond before an arrest warrant can be obtained; or (3) the location is one which is notorious for the presence of aliens who are in the United States in violation of law.

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Investigators questioning persons in any location except the border, or the functional equivalent of the border must adhere to Service policy as set forth in this chapter concerning the questioning of pedestrians.

Entering Dwellings or Business Establishments

Warrantless Search

Only under very special circumstances is the search without a search warrant of a house (or apartment, hotel room, business office) justifiable and hence not a violation of the Fourth Amendment, which guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. This is a most precious right, and the general requirement that a search warrant be obtained is not lightly to be dispensed with.

When a person is lawfully arrested just outside his or her house and there is probable cause to search the house, the house may not constitutionally be searched without a search warrant unless there is special justification. Even when a person is arrested inside his or her house, a complete search of the house may not constitutionally be made without a search warrant. Generally, only the arrested person and the area within the person's reach and immediate control may be searched: (1) to prevent the arrested person's escape, (2) to protect the arresting officer and others against the possible use of weapons, or (3) to prevent the concealment or destruction of evidence. There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs--or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less.

Consent

A search warrant is not required, however, nor is probable cause, if a person legally entitled to do so consents to the search. In this regard, a hotel clerk or manager may not effectively consent to the search of a hotel guest's room until the guest has checked out and abandoned possession of the room, nor will the landlord's consent to a search of the tenant's rented house make such a warrantless search constitutional. While employers may consent to a search of work areas, they may not consent to the search of occupied dormitories or cottages which they may provide for their workers. However, a party with common authority over the premises may effectively consent to a search, as where a woman who shared a bedroom with the arrested party consented to a search of their bedroom and to the rest of the house where they lived with the woman's parents and child.

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Consent to a search must be voluntary, and the burden is on the Government to prove that consent was freely and voluntarily given. For this purpose the investigator should ask the person whose consent is requested to sign Form I-214S, "Consent to Search Premises." If the person denies consent, or consents to the search orally but refuses to sign the form, that should be noted by the investigator on the form.

There is no requirement that the person whose consent for the search is requested be advised of his right to refuse to allow the search without a warrant. As long as it is not coerced by threats or force, or granted only in submission to a claim of lawful authority, the person's consent is valid, and the resulting search is reasonable.

A search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.

Probable Cause

The search of a house, therefore, is justified by a search warrant or the consent of a person entitled to give consent, or in exceptional circumstances such as the following, by probable cause alone: (1) the investigators are responding to an emergency, (2) they are in hot pursuit of a fleeing felon (this seldom applies to an alien illegally in the United States), (3) evidence is in the process of being destroyed, (4) evidence is about to be removed from the jurisdiction.

It is Service policy that even if an investigator has an administrative arrest warrant, if consent to enter a dwelling is denied, the investigator will not force an entry in order to execute the arrest warrant. In Payton and Riddick v. New York, decided on April 15, 1980, the Supreme Court stated that, "For Fourth Amendment purposes, a (felony) arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within". When executing a Federal search warrant the investigator should be aware of authority under 18 U.S.C. 3109 concerning breaking doors or windows for entry.

An investigator who has reason to search a dwelling, a curtilage area or the nonpublic areas of a commercial building, should, in the absence of consent, seek an appropriate search warrant based on probable cause to believe that violators or evidence of the violation of the civil or criminal provisions of the immigration laws are on the premises.

As a practical matter, Chimel v. California means that where a contemporaneous search of an arrestee's premises is desired, a search warrant must be obtained at the same time as an arrest warrant. In an emergency situation where an arrest upon probable cause must be made without a warrant and a search of the premises is desired, one investigator should proceed to seek a search

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warrant while another remains at the premises, cognizant of authority to arrest any confederate without a warrant upon reasonable grounds to believe that evidence is being destroyed in violation of 18 U.S.C. 2232. Contemporaneously with any arrest, a search should be made of the surrounding area for other persons who might reasonably be expected either to interfere with the arrest by force or to attempt the destruction of evidence.

When it is desired to conduct a search of premises, not incident to an arrest made on the premises to be searched, for the purpose of obtaining documents or other evidence, consent to search should be obtained on Form I-214S, "Consent to Search Premises". The policy of the Service, established for the protection of its personnel, is that officers will not enter or break into any premises to conduct a search for evidence without having first obtained either consent to search or a search warrant. As previously stated, officers who seek to make an arrest, whether for a criminal or administrative violation, and to conduct a search for evidence shall not effect entry into a dwelling or nonpublic premises by: (1) opening a closed but unlocked door; (2) opening a locked door by use of a passkey; (3) forcing open a chain lock on a partially open door; or (4) breaking down a door, without having first obtained consent to search or a search warrant.

What may be Searched for and/or Seized

Investigators may search only for those items particularly described in their search warrant or, in the case of a warrantless search, for weapons and for instrumentalities, fruits of the crime, and evidence of the offense for which the arrest was made. They may seize these items, and evidence of the commission of any other crime or offense, when it is discovered in the course of a lawful search.

Search with a Search Warrant for Persons

Effective August 1, 1979, Rule 41 of the Federal Rules of Criminal Procedure was amended to add the search of persons as well as property with a search warrant. A search warrant may now be issued by a Federal magistrate, a Federal judge or by a judge of a state court of record within the district wherein the property or person sought is located, upon request of a Federal law enforcement officer or an attorney for the Government.

A warrant may be issued under this rule to search for and seize any property that constitutes evidence of the commission of a criminal offense, contraband, the fruits of crime or things otherwise criminally possessed or persons for whose arrest there is a probable cause or who is unlawfully restrained. Oral testimony of the requester is needed to issue the warrant based on probable cause that the grounds and needs exist for the warrant.

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The warrant shall be valid for 10 days from issue date for daytime service, unless specifically stating another service time. It will also designate a Federal magistrate to whom it shall be returned.

Seizure of Property

As noted above, Service documents such as border crossing cards, etc., in possession of an arrested alien, may ordinarily be taken from the arrestee. When investigators can establish that they are making lawful arrests, they can seize that which has evidentiary value in immigration proceedings. The right of Service investigators to seize property not of interest in immigration proceedings but of evidentiary value in narcotic and espionage cases has also been upheld when incident to a lawful immigration arrest (see Abel v. United States, 362 U.S. 217 (1960) and United States of America v. Juvenal Martinez No. 28107, decided August 7, 1963). Discretion should be exercised in taking possession of any other property, paper, record, or document, even with the consent of the person having custody of such property. If such consent is refused, resort may be had to the subpoena process to obtain the property or document.

When taking physical possession of property or papers described above, care should be exercised so that the actual possession and custody of such paper or property in unchanged form can be established from the time possession thereof is taken until the property or document is used as evidence. Consideration should always be given to the advisability of procuring copies or photostats of documentary material. A record of any property, papers, books, or documents, the possession of which is taken during an investigation, shall be maintained. The record shall identify with particularity the property taken and it or any report prepared covering the matter shall set forth in detail the circumstances under which the property was taken or surrendered. While in custody of this Service, wherever feasible, the material shall be maintained in a property envelope securely contained in the relating Service file. Such property shall be returned (after any evidentiary requirements are satisfied), if practicable, to the person from whom obtained at the earliest possible time and an appropriate receipt shall be obtained.

AM 2798.120 requires that pens, pencils, knives, nail files and similar objects taken from aliens be placed in a clear plastic envelope along with the string portion of an executed Form I-77. These envelopes are to be used only for items which could be used as weapons or tools, or to deface walls and furniture. The envelopes are not to be used to house money or valuables.

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Evidence of a Suspected Offense

The proper object of the search without warrant pursuant to an arrest is evidence of the offense for which the subject was arrested. Such evidence--for example, fraudulent birth certificates found in the trunk of an automobile--may, of course, be seized.

Evidence of other Offenses

It is proper to seize evidence of the commission of any crime or offense when it is discovered in the course of a lawful search, even if it is evidence of an offense other than the one for which the person was arrested. An example of this would be controlled substances found in the trunk of an automobile pursuant to a legal search of that trunk for an illegal alien.

Seizure of Conveyances

Officers designated by the Attorney General are given the authority under section 274(b) INA to seize for forfeiture any vessel, vehicle, or aircraft which is used in the commission of a violation of section 274(a) of the Act, unless the owner can establish that the unlawful act was committed by a person who had illegally acquired possession of the vessel, vehicle, or aircraft, or that the owner, master, or other person in charge of the conveyance was not, at the time of the alleged illegal act, a consenting party. Any conveyance subject to seizure under this legislation may be seized without a warrant if there is probable cause to believe the conveyance has been used in violation of section 274(a) and circumstances exist where a warrant is not constitutionally required.

Vehicle Seizure Guidelines

Upon taking into custody a vehicle, vessel or aircraft used in the commission of a violation of section 274, the seizing investigator should establish positive ownership of the vehicle through local or state agencies. It is also a good practice to inventory and photograph the vehicle to reflect any damage to the vehicle or absence thereof.

The provisions of section 274(b) allow for the temporary holding of a vehicle for 72 hours, without cost or liability to the Government, to establish ownership and to develop facts as to whether or not the conveyance is subject to seizure. This temporary holding is not to be construed as a seizure.

Vehicles may be seized and forfeited even though no finding of guilt has been obtained against the owner.

Consult section 274, 8 CFR 274 and OI 274.1 through 274.16 for full seizure instructions and forms to be utilized.

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IMPROPER ACTIONS

Unreasonable Seizures

The following actions by investigators, unless freely and voluntarily consented to by a person entitled to give consent, constitute unreasonable seizures and therefore are violations of the Fourth Amendment, which guarantees the people's security against unreasonable searches and seizures:

- (1) Except at the border or its functional equivalent or at permanent checkpoints, to stop a person for interrogation concerning his or her right to enter or be in the United States on less than a reasonable suspicion, based on specific articulable facts involving more than mere ethnic appearance that the person is an alien;
- (2) To detain, i.e., temporarily forcibly restrain, a person (such as a pedestrian, an employee on the job), on less than a reasonable suspicion, based on specific articulable facts, that the individual is an alien illegally in the United States;
- (3) On roving patrol or at a temporary checkpoint, to stop a car--which amounts to temporary forcible restraint or detention--on less than a reasonable suspicion, based on specific articulable facts, that the car contains aliens illegally in the United States;
- (4) To arrest a person on less than probable cause to believe that he or she is present in or entering the United States illegally; and
- (5) During a frisk to seize an object not reasonably believed to be a weapon.

Unreasonable Searches

The following actions undertaken by investigators without search warrants, unless freely and voluntarily consented to by a person entitled to consent, constitute unreasonable searches, thereby violating the Fourth Amendment to the Constitution; and anything seized in the course of an unreasonable search has been unreasonably seized, also in violation of the Fourth Amendment.

- (1) To make a search incident to an unlawful stop, unlawful temporary detention, or unlawful arrest;

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- (2) To frisk a person who has not been arrested on less than a reasonable suspicion that he or she may be armed and dangerous;
- (3) To search a person who is not under arrest--although there is probable cause to arrest and/or to search--beyond what is necessary to prevent the destruction of evidence;
- (4) Except at the border or its functional equivalent, to search without probable cause the car of a person not arrested; and
- (5) To search a house unless:
 - (a) A person is arrested while inside the house, and then only that area of the room in which the arrest takes place which is within the reach and immediate control of the arrestee may generally be searched;
 - (b) The investigator is responding to an emergency;
 - (c) The investigator is in hot pursuit of a fleeing felon (seldom applies to an alien illegally in the United States);
 - (d) Evidence is in the process of being destroyed; or
 - (e) Evidence is about to be removed from the jurisdiction.

Trespass

The fact that an investigator may have trespassed on private property in the course of making a search or seizure does not necessarily render that search or seizure unreasonable for purposes of the Fourth Amendment. For example, generally something which is in plain view is not considered to be the subject of a search.

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CONSEQUENCES OF IMPROPER ACTION

Exclusion of Evidence

Criminal Prosecution

The Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Any evidence secured through an unreasonable search or seizure may be barred from use in Federal and state prosecutions. The Fourth Amendment guarantees the people's right to privacy, and the exclusionary rule has been fashioned by the courts to guarantee that right. Its purpose is to deter overzealous law enforcement officers from invading the right to privacy by prohibiting the use of the fruits of such an invasion in court. Indeed, convictions based on unlawful searches and seizures are regularly reversed on the basis of the exclusionary rule.

The exclusionary rule applies to evidence obtained in violation of other constitutional and statutory rights as well, e.g. the Sixth Amendment right to counsel, the Fifth Amendment privilege against self-incrimination, the Fourteenth Amendment rights to due process of law, and the requirement of prompt arraignment under Rule 5(a) of the Federal Rules of Criminal Procedure.

Administrative Cases

The Department of Justice has made a policy determination to argue that evidence discovered during an unconstitutional search, although inadmissible in criminal proceedings, is admissible in civil proceedings, including deportation proceedings. Although the Department is taking this position in litigation, it in no way condones illegal searches. On the contrary, officers who conduct unconstitutional searches may still be subject to criminal prosecution, civil suit, and disciplinary action. If there is any doubt as to the legality or propriety of a proposed plan of action, the safest course to follow is to obtain advance instructions from the district director or the regional office by telephone or by wire where prompt action is imperative.

Only the Court of Appeals for the First Circuit has decided the question as to whether the exclusionary rule is applicable to deportation proceedings as well as to criminal prosecutions. It held that illegally seized evidence is inadmissible in deportation proceedings.

Validity of Proceedings

If it is determined that a search or seizure has been made in violation of the law or Constitution, that fact alone will not necessarily invalidate the proceedings from which the evidence may be excluded. If there is untainted evidence--not illegally seized and not derived from an illegal search or seizure--upon which to base a conviction or order of deportation, the proceedings are valid and need not be terminated.

Immigration Officer Academy
Basic Training

Foe- SA, II; IA, DO

INSTRUCTOR GUID

STATUTORY AUTHORITY HOURS 7-8

IX. Section 287 (cont.) Powers of Immigration Officers and Employees

A. Section 287(a)(1)



OH 21

1. ***"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;"***
2. An interrogation is questioning designed to elicit a statement against the interest of the subject.
3. For INS purposes, an interrogation would be used to:
 - a. Determine if the individual is an alien, and
 - b. Determine whether the individual, if an alien, is in the U.S. in violation of law either administrative or criminal.
4. There is ***implied authority*** in Section 287(a)(1) to detain an alien in order to interrogate if the Immigration Officer can state articulable facts why the alien should be interrogated.
5. Articulable facts can be based on:
 - a. Suspicion which is generated through a combination of impressions, and
 - b. Perceived facts which break the characteristic pattern of conduct and appearance of the majority of law-abiding individuals in a given area.

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INSTRUCTOR GUID

6. Section 287(a)(1) does not provide for an Immigration Officer to go out on the street and ask everyone what right they have to be in the United States. This authority must be used judiciously based on some articulable facts which could include but are not limited to:
- a. General observations about the location - Is it known for its attraction to illegal aliens?
 - b. Speech.
 - c. Appearance/Dress as being "out of place" or looking as though the individual has just traveled.
 - d. Demeanor and reactions to the presence of Officers.
 - e. Vehicle- does it ride heavily? Does it appear passengers are slouching down to avoid detection? etc.
7. *Generally, there is not sufficient reasonable suspicion to interrogate an individual if only one of the previously mentioned criteria exist with no other considerations. For example:*
- a. In U.S. v. Brignoni-Ponce, (1975) roving Border Patrol agents stopped a vehicle near the border and questioned the occupants about their citizenship and immigration status. *The only basis for the stop was the apparent Mexican ancestry of the occupants.* 422 U.S. 873
85 S.Ct. 2574
 - b. The Supreme Court ruled that a roving patrol could stop a vehicle only if aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contained illegal aliens. Apparent Mexican ancestry was a relevant factor in obtaining reasonable suspicion, but standing alone was insufficient to stop the individuals.

INSTRUCTOR GUID

B. Section 287(a)(2)



OH 22

1. ***Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;"***
2. The following immigration officers who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the arrest power of section 287(a)(2) INA:
 - a. Border Patrol Agents, including aircraft pilots
 - b. Special Agents
 - c. Deportation Officers
 - d. Immigration Inspectors
 - e. Supervisory and managerial personnel who are responsible for supervising these Officers
3. In order to arrest without a warrant under Section 287(a)(2), the Immigration Officer must believe the alien is likely to abscond before a warrant of arrest can be obtained.
4. Once arrested, the alien shall be taken without delay for examination before a Service Officer having the authority to examine aliens as to their right to enter or remain in the U.S.

A complete list of officers is found in 8 CFR § 287.5(c)(1).

A complete list of training courses that satisfy the requirements of "basic law enforcement training" is found in 8 CFR § 287.1(g).

INSTRUCTOR GUID

5. According to 8 CFR § 287.3, the Service Officer conducting the examination must be an Officer other than the arresting Officer. Although the regulations do not stipulate the exact personnel for this, in practice it is generally at least at the Supervisory Special Agent or Supervisory Patrol Agent level where this examination of the warrantless arrest will occur.
6. An alien arrested under 287(a)(2) must be advised of the reason for the arrest and to the right to obtain counsel although they do not have the right to counsel at government expense. The alien will be provided by the Officer with a list of free legal service programs in the district where the proceedings will be held.
7. If the alien invokes his right to counsel, the only information an Immigration Officer can ask of the alien is what is called "booking information" such as name, date of birth, sex, color of hair and eyes, height, weight, U.S. address, etc.
8. Arrests under 287(a)(2) can also be made with arrest warrants, in the case where the alien is not likely to abscond or absent exigent circumstances. In these situations, an arrest warrant must be issued by one of the authorized Immigration Officers found in 8 CFR § 287.5(e)(2).

c. **Section 287(a)(4)**



1. ***"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States;"***

OH 23

INSTRUCTOR GUID

2. In contrast to Section 287(a)(2) which allows for the warrantless arrest of an administrative violation related to the INA, Section 287(a)(4) provides for the warrantless arrest of any person involved in a felony related to the INA.
3. The violation must be a felony which is generally punishable by imprisonment and/or a fine. Examples include but are not limited to:
 - a. 18 USC 911 - False Claim to United States Citizenship
 - b. 8 USC 1324 - Bringing In and Harboring Certain Aliens (alien smuggling)
 - c. 8 USC 1326 - Reentry of Deported or Removed Alien
4. The person arrested may be an alien or a U.S. citizen.
5. The following immigration officers who have successfully completed basic immigration law enforcement training are authorized and designated to exercise the arrest power conferred by section 287(a)(4) of the Act:
 - a. Border Patrol Agents, including aircraft pilots
 - b. Special Agents
 - c. Deportation Officers
 - d. Immigration Inspectors
 - e. Supervisory and managerial personnel who are responsible for supervising the activities of these officers.
6. Because 287(a)(4) deals with a criminal matter, the Miranda Warning must be given to the arrested individual.
7. The individual arrested without a warrant must be taken without unnecessary delay before a United States Magistrate.

A complete list of officers is found in 8 CFR § 287.5(c)(2).

A complete list of training courses that satisfy the requirement of "basic law enforcement training" is found in 8 CFR § 287.1(g).

INSTRUCTOR GUID

8. Arrests under 287(a)(4) can also be made with arrest warrants, in the case where the alien is not likely to escape or absent exigent circumstances. In these situations, an arrest warrant must be issued by a Federal District Court Judge or United States Magistrate.

D. Section 287(a)(5)



1. ***"Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant to make arrests for any offense against the United States, if the offense is committed in the officer's or employee's presence, or for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony, if the officer or employee is performing duties relating to the enforcement of the Immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest...."***

OH 24

Section 287(a)(5) allows Immigration Officers to make warrantless arrests for criminal violations other than immigration violations.

This section of authority is commonly known as "General Arrest Authority".

2. In order for an Immigration Officer to make an arrest without a warrant for a felony as provided in 287(a)(5), the following elements must be met:

8 CFR § 287.5(c)(4)(i)

- a. The Immigration Officer has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony.
- b. The Immigration Officer is performing duties relating to the enforcement of the immigration laws at the time of arrest.
- c. There is a likelihood of the person escaping before a warrant can be obtained for his or her arrest.
- d. The Immigration Officer has been certified as successfully completed basic immigration law enforcement training in exercising arrest power in accordance with § 287.8(c).

As found in Section 287(a)(5) INA, this "General Arrest" training along with the categories of officers and employees who will be eligible to be put into effect with regulations.

INSTRUCTOR GUI

3. The Miranda Warning must be given prior to any custodial interrogation for a criminal offense.
4. Section 287(a)(5) also authorizes an officer or employee to carry a firearm, and to execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States.

E. Section 287(a)(3)



OH 25

1. *Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States."*

2. 8 CFR § 287.5(b) lists the immigration officers who are authorized to patrol the border under section 287(a)(3) INA:

Complete list is in 8 CFR § 287.5(b)

- a. Border Patrol Agents, including aircraft pilots
- b. Special Agents
- c. Immigration Inspectors (seaport operations only)

3. The above listed Officers have the statutory authority to board and search any of the above conveyances within the distance guidelines if they have requisite suspicion which is reasonable suspicion based on articulable facts that illegal aliens are being brought into the United States.

8 CFR § 287.1(a)(c)

- a. Reasonable distance generally means within 100 air miles of an external boundary of the United States.

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INSTRUCTOR GUID

- b. Territorial waters are 12 nautical miles.
- 4. The term "patrolling the border" means "...to prevent the illegal entry of aliens into the United States ...conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States..."
- 4. Although 8 CFR § 287.5(b) lists several Immigration Officers who are eligible to use this authority, it is primarily a Border Patrol Agent function.
- 5. Among many of the Border Patrol operations where this authority is used are:
 - a. "line watch" particularly in areas between designated ports of entry where aliens attempt to cross illegally
 - b. bus stations or train stops to check alienage
 - c. other known areas of illegal aliens for example, areas where day laborers congregate in search of employment or staging areas
 - d. This authority could also be exercised by Border Patrol Agents at their checkpoints throughout the United States.
- 6. This section also gives these Immigration Officers the authority to enter onto private lands but not dwellings within 25 miles from the border for the purpose of patrolling the border [as provided in 8 CFR § 287.1(c)] only.
 - a. If a Border Patrol Agent observes an alien effect an illegal entry and that alien enters onto private lands within twenty-five miles to evade capture, then that Agent has authority under Section 287(a)(3) to enter onto that private land to apprehend that alien.
 - b. Also, if a Border Patrol Agent does not observe an entry but observes fresh footprints leading from the border onto the private land, then he

INSTRUCTOR GUID

can enter onto the private land in order to apprehend the alien pursuant to Section 287(a)(3).

- c. Under Section 287(e) an officer or employee may not enter onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or remain in the United States.
- d. The Immigration Reform and Control Act of 1986 (IRCA 1986) eliminated "Farm and Ranch Check" as a duty performed regularly by Border Patrol Agents and Special Agents, but does not bar agents from entering on any private land as long as the purpose is to patrol the border and not to perform "Farm and Ranch Check".

F. Section 287(b)

1. ***"Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this Act and the administration of the Service; and any person to whom such oath has been administered... under the provisions of this Act, who shall knowingly or willfully give false evidence or swear... to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621, title 18, United States Code."***
2. Section 287(b) is similar to Section 235(d)(3) except that the latter uses the terms "the privilege of any alien" rather than "the privilege of any person" found in 287(b).
3. Section 287(b) also contains a criminal charge for perjury under Title 18 USC 1621.

X. Use of Force**A. Non-deadly Force**

1. Non-deadly force is any use of force other than that which is considered deadly force under 8 CFR § 287.8(a)(2).
2. Non-deadly force may be used only when a designated Immigration Officer has reasonable grounds to believe that such force is necessary.
3. An Immigration Officer shall always use the minimum non-deadly force necessary to accomplish the Officer's mission and shall escalate to a higher level of non-deadly force only when such higher level of force is warranted by the actions, apparent intentions, and apparent capabilities of the suspect, prisoner, or assailant.

8 CFR § 287.8

Examples include:
Non-lethal control techniques and devices such as defensive tactics, blocks, kicks, strikes, pressure points, baton, OC spray, etc.

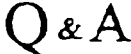
B. Deadly Force

1. Deadly force is any use of force that is likely to cause death or serious bodily harm.
2. Deadly force may be used only when a designated Immigration Officer has reasonable grounds to believe that such force is necessary to protect:
 - a. the Immigration Officer or
 - b. other persons from the present danger of death or serious bodily harm

Service-approved firearm

Border Patrol Academy- Basic Training**Instructor Guide****Lesson Plan Overview**

Course	Statutory Authority
Lesson	Suspicion and it's levels.
Field Performance Objectives	Trainee will be able to determine the appropriate actions in a given case, including the requisite degrees of suspicion, and articulate the facts that led him to take those actions.
Interim (Training) Performance Objectives	Upon conclusion of today's lesson the trainee will be able to: 1. Define suspicion and explain how it is used as justification for our actions. 2. Recall (list) the three basic categories of suspicion with attendant objects of suspicion, if necessary, and give an example of what actions may be taken for each.
Instructional Methods	Lecture, class discussion, visual aids
Training Aids	Overhead projector

Icon Legend (Those used in this lesson are highlighted)					
					
Show Overhead Transparency	Conduct Exercise	Play Videotape	Distribute Handout	Conduct Quiz	Question and Answer Period

Student Materials/	Student Study Aid, M-69
References	BPHB
Instructional Equipment	Overhead projector

Presentation

References

STATUTORY AUTHORITY**LESSON PLAN - DAY #6****SUSPICION (P/C)**

- I. Quiz #1 (10 Minutes)
 - A. Administer quiz
 - B. Collect the quizzes and then review them.
- II. Introduction
 - A. Review previous lesson
 - B. Motivation
- III. What is Suspicion?
- IV. How is Suspicion Developed?
- V. Degrees of Suspicion
- VI. Review Pre-Class Assignment S-6
- VII. Summary/restatement of objectives
 - A. Restate Objectives
 - B. Conclusion

Presentation

References

NAME _____ SESSION _____ DATE _____

STATUTORY AUTHORITYPRE-CLASS ASSIGNMENT S-6

1. The degree of suspicion a Border Patrol Agent normally must have before searching a vehicle or before making an arrest. PROBABLE CAUSE S/A Appendix C, pp3
2. At a checkpoint (not a functional equivalent of the border) Patrol Agents may search a vehicle only on the basis of CONSENT, PROBABLE CAUSE or A SEARCH WARRANT. M-69, pp III-11
3. Generally, a vehicle may be stopped by a roving patrol and occupants questioned as to citizenship if there is "reason to believe" that the vehicle contains aliens illegally in the U.S. M-69, pp III-II-11/12/13.
4. A suspicion that is sufficiently strong to cause an intelligent and prudent man to believe that it has the appearance of truth defines reasonable suspicion. S/A, Appendix C, pg. 1
5. "Particular characteristics or circumstances which an officer can describe in words," defines: ARTICULABLE FACTS. S/A, Appendix C, pp 1
6. Temporary forcible restraint, usually for the purpose of further interrogation describes detention not amounting to arrest (forcible detention) M-69, pp II-1/2
7. The degree of suspicion that a Border Patrol Agent must have before he/she may constitutionally stop and question a pedestrian. reasonable suspicion of alienage, BPHB 17-12
8. The degree of suspicion that a Border Patrol Agent must have before he/she may constitutionally detain short of arrest for further questioning, a pedestrian. reasonable suspicion that a person is an alien illegally in the U.S. M-69, pp II-2 BPHB 17-13
9. A frisk is a limited form of search.
10. "Implies a belief or opinion based upon facts or circumstances which do not amount to proof," defines: suspicion. S/A, Appendix C, pp1

Presentation

References

- I. Quiz # 1 (10 minutes)
- A. Administer quiz in class.
 - B. After quiz sheets have been collected quickly review the quiz questions.

II. Introduction

- A. Review previous lesson over implied and delegated authorities.

B. Motivation

Over the past few hours you have seen that as Border Patrol Agents we have ample authority to do those things normally involved in everyday law enforcement. We may stop people or conveyances, question people, search people or property, detain or arrest people, seize evidence, and take statements; many of these actions are permissible without prior approval (i.e., a warrant). Clearly, all of these things infringe upon the right and freedom of people.

But, as has been pointed out before, citizens and aliens alike are constitutionally protected against unreasonable searches, seizures, arrests, etc. To balance the need to enforce the law with this freedom, our actions must have a sound basis. The actions that make up the intrusion must be reasonable. Our actions cannot be exercised capriciously, but must be based on suspicion that a crime has been or is being committed, and that a particular person has committed or is committing the crime or administrative violation.

"A Workable Approach to Search and Seizure," Judge J. Ryan, Superior Court, Orange County, California (1989)

PresentationReferences

Even today the courts continue to discuss the issue of how much suspicion is necessary to act, and often even the courts cannot agree. But general guidelines have been established by court decisions and interpretations which we can examine and apply to our enforcement activities.

III. What is suspicion?

- A. Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to convincing proof.
- B. The courts have used a number of terms to describe the various degrees of suspicion necessary before a border patrol agent may take "official action." Some of those terms are:

Black's Law Dictionary
p. 1616

1. mere suspicion
2. founded suspicion
3. reasonable suspicion
4. articulable suspicion
5. reasonable warranted suspicion
6. reason to believe
7. probable cause

- C. Several of these terms only differ slightly, if at all. For purposes of this course, with the exception of "little or no suspicion" required in the case of consensual questioning or stopping vehicles at permanent checkpoints, we have combined the above terms which are only minutely different and will discuss them in three basic categories:

1. mere suspicion
2. reasonable suspicion
3. probable cause

Presentation

References

- D. For the most part, well defined definitions of the aforementioned "suspicion" terms are nonexistent. The meanings are nebulous and subject to the continually changing moods of the courts. The courts always reserve the right to decide if a border patrol agent acted reasonably based upon sufficient facts and reasonable inferences drawn therefrom.

IV. How is suspicion developed?

- A. The building blocks of suspicion are articulable facts. These are particular characteristics or circumstances which an officer can describe in words.
- B. In general, suspicion of varying degrees is generated through a combination of impressions and perceived facts which tend to break the characteristic patterns of conduct and appearance of the majority of law abiding individuals and vehicles in, and passing through, a given area. (Things out of the ordinary).

"A Workable Approach to Search and Seizure"
Judge John J. Ryan,
Superior Court, Orange
County, California
1989.

- C. The days when an officer could base his actions on a "hunch" or a "gut feeling" are gone. An experienced officer's belief that a crime has been committed is not enough. He must be able to put into words his reasons for such belief.

- D. Articulate Facts may be generated from the following, for example:

1. general observations
 - a. location and characteristics of the area;
 - b. date, time, or season;
 - c. and activity.

Presentation	References
2. individuals	
a. ethnic facial characteristics or other physical features; b. speech; c. attire; d. and demeanor.	
3. vehicle characteristics	
a. driver; b. passengers; c. size; d. and age/condition	
4. other	
a. proximity to border; b. abnormal patterns; c. previous encounters; d. intelligence information; e. and officer experience.	

V. Degrees of suspicion:

- A. Mere suspicion: the lowest level of suspicion; it requires few articulable facts, and associated actions are very limited.

Do not cover mere suspicion as presented on page III-3 of the M-69 here.

1. At a permanent traffic checkpoint all vehicles may be routinely stopped and occupants questioned without specific suspicion (INA 287(a)(3)). Also to engage in casual conversation (consensual) at any location requires no suspicion.

NOTE: Cover Martinez-Fuerte using Appendix G #38

Border searches will be addressed in hour 11.

PresentationReferences

2. Beyond this routine stopping at checkpoints, with only mere suspicion that aliens are present, a vehicle may be referred to secondary for an additional brief questioning of the occupants.
3. Martinez-Fuerte applies, generally, only to permanent checkpoints. Permanent checkpoints are:
 - a. operated with some regularity.
 - b. of some strategic importance.
 - c. operated as other permanent checkpoints.
4. The agent on point has wide discretion in the selection and referral of motorists to secondary inspection areas. The Supreme Court has reasoned that although secondary referrals might be made largely on the basis of apparent Mexican ancestry, the intrusion would be sufficiently brief that the court could perceive no Constitutional violation. Any detention beyond these two brief periods must be based on consent or a higher level of suspicion.
5. Keep in mind this is just for questioning of the occupants as to alienage, not to search.

B. Reasonable Suspicion (likely is): A suspicion that is sufficiently strong as to cause an intelligent and prudent man to believe that it has the appearance of truth. The object of your reasonable suspicion determines what you may do. For example:

1. With reasonable suspicion of alienage (foreign nationality) you may stop a pedestrian for brief questioning.

RE: Terry v. State of Ohio
Appendix G #31

Presentation	References
a. This applies to anywhere in the U.S.	
b. Note that only suspicion that the person is <u>an alien</u> is necessary, not <u>necessarily an illegal alien</u> .	
c. This suspicion must be based on more than ethnic appearance alone, even though this appearance may be included in your articulable facts.	Nicasio v. INS, 595 F. Supp. 19 (E.D. Wash. 1984).
d. This is less intrusive than a detention and implies the cooperation of the person questioned. If the suspect refuses and walks away, the refusal alone cannot be the basis for detaining him. However, if the questioning develops additional articulable facts, together with any reasonable inferences therefrom that the alien is in the U.S. illegally, the officer may make a forcible detention as discussed below.	United States v. Ervin 803 F 2d 1505 (9th Cir. 1986)
2. With reasonable suspicion of <u>illegal alienage</u> you may forcibly detain, short of arrest, for further questioning a pedestrian or person in a factory, restaurant or similar establishment.	Au Yi Lau v. United States Appendix G #3
a. this suspicion may have been developed after an initial stop as described in #1 above.	
b. The duration of the detention and permissible scope of the detention will be discussed later, but generally a brief period of time at the location of initial encounter is contemplated.	

Presentation	References
c. This brief detention is for investigative purposes only, and unless additional articulable facts are developed to raise the level of suspicion to that necessary for an arrest, the suspect must be released.	
d. The general standard for a forcible detention is that the officer be able to articulate facts that made him believe the person detained was involved in some activity not consistent with innocent behavior.	"A Workable Approach to Search and Seizure," Judge John J. Ryan, Superior Court, Orange County, CA 1989.
3. With reasonable suspicion that a vehicle contains an alien or aliens who may be in the United States illegally, or that the vehicle is involved in a controlled substance violation, you may stop the vehicle for investigation while on "roving patrol."	Cover <u>Brignoni-Ponce</u> using Appendix G #32.
a. In the first instance you are acting as an immigration officer and may stop the vehicle to question occupants briefly to determine citizenship or lawful immigration status.	
b. In the latter instance you are acting under your DEA authority and may stop the vehicle briefly and question the occupants to satisfy your suspicion.	
c. Since the courts consider all vehicle stops forcible detentions (detention encounters [M-69 terminology]); this is the degree of suspicion required away from the border to stop a vehicle on roving patrol or, within the 9th circuit, at a temporary traffic checkpoint. Brignoni-Ponce brought the suspicious circumstances requirement of forcible detentions to vehicle stops.	M-69, p. II-3

PresentationReferences

INSTRUCTOR NOTE: Cover U.S. v. Cortez using background addendum and stress that:

- d. The whole picture (totality of circumstances), and those inferences drawn by the trained officer may be used as a basis for reasonable suspicion. This concept places new weight on officer experience, but officers should be cautioned that inferences drawn from their experience must still be articulable. U.S. v. Cortez Appendix G #35
- 4. With reasonable suspicion that a person is armed and/or dangerous you may frisk for weapons a person temporarily detained (forcible detention) for investigation. BPHB 16-17 Appendix 17-B M-69 p. II-2
 - a. This is generally a pat down of the outer clothing.
 - b. Must be limited to a search for weapons.
 - c. The frisk must be conducted in a reasonable manner.
 - d. Also area within immediate control may be searched.

NOTE A 1993 Supreme Court decision allows law enforcement officers to seize contraband during a frisk if the following conditions are met:

- 1. the officer is conducting a lawful "Frisk" under the guidelines of the "Terry" decision; and
- 2. the contour and mass of the object (contraband) makes its identity immediately apparent. (Plain feel rule) Minnesota v. Dickerson Appendix G #16

PresentationReferences

This is a favorable decision to law enforcement. This decision eliminates the requirement that agents be able to articulate their reasons for believing that the item they were seizing was a weapon, when in fact it turned out to be contraband, before the courts would admit into evidence in a criminal proceeding.

- C. Probable Cause (believe it is): Exists where the facts and circumstances within the knowledge of arresting officers and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in believing that an offense has been committed (in case of arrest), or that property could be found in a particular place or on a particular person (in the case of search warrants).

Carroll v. United States,
Appendix G #7

In practical terms this means that probable cause exists when the magistrate (in cases with warrant) or the police officer (in cases without warrant) find it more probable than not that the suspect committed a crime, or that particular items can be found in a certain place.

RE: "Criminal
Procedure and
Evidence," del Carmen,
Rolando, Harcourt
Brace Jovanovich,
1978.

1. Probable cause (P/C) is the basis for all arrests. With P/C you may obtain a warrant of arrest for:
 - a. deportable aliens;
 - b. criminal immigration violators;
 - c. and criminal controlled substances violators.

Presentation	References
2. With P/C you may <u>arrest without warrant</u>: a. Deportable aliens <u>likely to abscond</u>. b. Aliens illegally entering the United States in your presence or view. c. Persons you believe are guilty of committing felony immigration violations who are <u>likely to abscond</u>. d. Persons you believe are guilty of committing <u>any federal offense</u> in your presence who are <u>likely to abscond</u>. e. This also includes arrest without warrant for: (1) Felony or misdemeanor CSA or CSIEA violations committed in your presence;	Statutory Authority INA 287(a)(5)(A)
3. When no arrest has been made but <u>you have P/C</u> to believe evidence of a crime is present, you may <u>search</u> a person without warrant only to the extent necessary to prevent the destruction of evidence. A vehicle may also be searched pursuant to the vehicle exception (to be discussed further in hour 10.) a. The search must be reasonable and be limited in scope to nature of your P/C (the object of the suspicion).	NOTE: Cover <u>U.S. v. Ortiz</u> emphasizing the need for P/C even at check points. Appendix G #39

Presentation	References
b. Searches without warrant in other pre-arrest situations may only be made under special circumstances to be discussed later.	Appendix G #39

VI. Review Pre-Class Assignment S-6

VII. Summary/restatement of objectives.

A. Restate objectives

B. Conclusion:

In the next few classes we will elaborate on the individual actions we have mentioned. Now that we know we have the authority to arrest if we possess the requisite suspicion, we must understand exactly what an arrest is. We will begin to define more precisely some of the terms we have been using: arrest, detention, search, interrogation, etc.

APPENDIX C

DEFINITIONS AND EXPLANATIONS OF PERTINENT
TERMS RELATING TO STATUTORY AUTHORITY

A thorough understanding of definitions and explanations for the following terms is absolutely necessary. These terms are often used in court decisions and the course material presented.

1. ARTICULABLE FACTS

Particular characteristics or circumstances which an officer can describe in words.

"Articulate Facts" are the building blocks of our degrees of suspicion.

In general, suspicion of varying degrees is generated through a combination of impressions and perceived facts which tend to break the characteristic patterns of conduct and appearance of the majority of law abiding individuals and vehicles in, and passing through, a given area.

2. SUSPICION

The act of suspecting. Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to proof.

3. REASONABLE SUSPICION

A suspicion that is sufficiently strong to cause an intelligent and prudent man to believe that it has the appearance of truth.

4. PROBABLE CAUSE

The degree of suspicion that an officer must have to believe that an offense within his jurisdiction has been, or is being, committed before he may constitutionally search a vehicle and before he may make an arrest.

Evidence and circumstances which would warrant a person of reasonable caution to believe that an offense has been, or is being, committed.

5. PERMANENT CHECKPOINT

A checkpoint of continuing strategic importance operating on more or less coordinated basis with other checkpoints. It must be used with some regularity and when operational, it functions in much the same manner as other permanent checkpoints.

6. **ROVING PATROL**

All vehicular patrol functions and traffic observation activities.

7. **ROVING PATROL STOP**

The stop of a vehicle by Service officers at any location other than a traffic checkpoint or port of entry.

8. **DWELLING-PLACE**

Some permanent abode or residence in which one has the intention of remaining. Not synonymous with "Domicile", but has a more restrictive meaning.

May include a house, apartment or room.

9. **IMMIGRATION OFFICER**

The term Immigration Officer means:

Any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof. 101(a)(18) INA

10. **REASONABLE DISTANCE**

"The term 'reasonable distance', as used in Section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director...." 8 CFR 287.1(a)(2)

11. **PATROLLING THE BORDER**

The term "patrolling the border to prevent illegal entry of aliens into the United States" as used in Section 287 of the INA means:

Conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States. 8 CFR 287.1(c)

12. **EXTERNAL BOUNDARY**

"The term 'external boundary', as used in Section 287(a)(3) of the Act, means the land boundaries and the coastline of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending out 12 nautical miles.

8 CFR 287.1(a)(1) (The 3 mile limit remains in effect for naturalization purposes)

13. **CONSENT**

Agreement, approval, acquiescence

14. **ADMINISTRATIVE PROCEEDING**

A proceeding in or before an administrative body, as distinguished from a proceeding in a court. Not for the purpose of punishment.

15. **CRIMINAL PROCEEDING**

A proceeding in court in the prosecution of a person charged or to be charged with the commission of a crime, contemplating the conviction and punishment of the person charged or to be charged.

16. **PRIMA FACIE EVIDENCE**

Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient.

17. **IMMIGRATION JUDGE**

An attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240.

NOTE: The term "special inquiry officer" is no longer valid.

18. **NOTORIOUS FOR THE PRESENCE OF ALIENS**

A geographic area, farm, ranch, business, etc. proven over a period of time to have illegal aliens living in it, working in it, or passing through it.

19. **HOT PURSUIT**

The immediate pursuit of a suspect for whom probable cause to arrest exists. Hot pursuit into a residence exists as an exception to the Fourth Amendment only in the case of serious felony violations. Service policy dictates that hot pursuit is not authorized into a dwelling when the subject is wanted for an immigration violation only.

APPENDIX D

OPERATIONAL GUIDELINES
FOR
INS ENFORCEMENT OFFICERSVEHICLE STOPS, QUESTIONING, AND SEARCHING AND
RELATING PEDESTRIAN ENFORCEMENT ACTIONS

The powers, operational methods, and procedures of Service officers are now being more closely scrutinized and challenged than, perhaps, ever before. We are being questioned and contested by the public, the media, and in the courts. It is essential, therefore, that enforcement officers know about all important court decisions which have been brought to their attention and the attendant impact of such decisions upon their authority to enforce the Immigrations laws.

It no longer suffices to say that a given action is legal simply because a literal reading of a particular section of law appears to permit it.

Officers must be prepared to give articulable reasonable explanations for all enforcement actions, pedestrian or vehicular, i.e., stopping questioning, detaining, searching, etc. Previously we had cause to believe that immigration officers could stop and search any vehicle for aliens at a traffic checkpoint within 100 air miles of the border, or in fact, anywhere, if it was believed that aliens were being brought in. Now we are told by the courts that these and other related interpretations are oversimplifications, the EVERY STOP is governed to some extent by the 4th. amendment.

Over the past few years, several Supreme Court decisions have dealt with questions concerning the power of the Service officers to make vehicle stops and attendant interrogations and searches. While these decisions relate specifically to vehicular situations, the enforcement principles contained in them apply to corresponding actions in other kinds of situations.

In Almeida-Sanchez v. U.S., 413 U.S. 266 (1973), the Supreme Court held that the warrantless search of an automobile at a location other than the border or the "functional equivalent" thereof, made without probable cause or consent, following a roving patrol stop, violated the 4th. amendment to the Constitution.

A "roving patrol stop" has been broadly interpreted to include the stop of a vehicle by Service officers at any location other than a traffic checkpoint or port of entry. "Roving patrol" relates to all vehicular patrol functions and traffic observation activities.

In U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975), the Supreme Court ruled that the roving patrol stop of a vehicle at a location other than the border or its "functional equivalent", and the questioning of its occupants merely because they appeared to be of Mexican decent, violated the 4th. amendment.

The Court explained in Brignoni-Ponce that before any such stop can be adjudged lawful, the officer must be aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicle contains aliens who may be illegally in the country.

In U.S. v. Ortiz, 422 U.S. 891 (1975), the Supreme Court ruled that a checkpoint search of a vehicle trunk, away from the border or its "functional equivalent," without probable cause or consent, violated the principles of the 4th. Amendment

In U.S. v. Martinez-Fuerte et al, No. 74-1560, decided July 6, 1976, the Supreme Court ruled that the routine stopping of a vehicle for brief questioning of the occupants at a reasonably located border patrol checkpoint is constitutional. The Court also held that such motorists may be selectively referred to secondary areas for further limited inquiry.

The Court reasoned that the public interest in making such stops outweighs the constitutionally protected interests of the private citizen.