

## New Hampshire State Police

### Fair and Impartial Policing Appendix

February, 2019

This appendix provides law and guidance concerning interaction between the New Hampshire State Police and aliens<sup>1</sup>, agents of U.S. Customs and Border Protection, and agents of U.S. Immigration and Customs Enforcement.

#### **Overview of Federal-State Cooperation in Immigration Enforcement**

The federal government has broad powers with respect to immigration enforcement. Congress has assigned immigration enforcement authority principally to agencies within the U.S. Department of Homeland Security (“DHS”), including U.S. Immigration and Customs Enforcement (“ICE”) and U.S. Customs and Border Protection (“CBP”).

Congress has specified which aliens may be removed from the United States and the procedures for doing so. *Arizona v. United States*, 567 U.S. 387, 396 (2012). Removal is a civil, rather than criminal matter. *Id.*

As a matter of federal law and longstanding practice, states have played an important role in the enforcement of federal immigration laws. Indeed, the United States Supreme Court has observed: “Consultation between federal and state officials is an important feature of the immigration system.” *Arizona*, 567 U.S. at 411. *See also Guidance on State and Local Governments’ Assistance In Immigration Enforcement and Related Matters* (U.S. Department of Homeland Security), p. 1 (“DHS has long viewed state and local governments as valuable partners that can serve a helpful role in assisting DHS in fulfilling its responsibilities with respect to immigration enforcement.”).

That cooperation can take one of several forms. Although the state can enter into formal agreements with the United States Attorney General authorized under 8 U.S.C. § 1357(g), the New Hampshire State Police has no such agreement on which to rely. However, “Congress has made clear that no formal agreement or special training needs to be in place for state officers to communicate with the [Federal Government] regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States.” *Arizona*, 567 U.S. at 411-12 (citing 8 U.S.C. § 1357(g)(10)(A)).

Another statute also makes it clear that no formal agreement is necessary to “cooperate ... in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. § 1357(g)(10)(B). Further, federal law authorizes local law enforcement

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<sup>1</sup> Under federal law, the term “alien” means “any person not a citizen or national of the United States.” 8 U.S.C. 1101(a)(3).

officers to assist in the enforcement of certain immigration-related crimes. For example, local law enforcement officers may:

- Arrest illegally present aliens who have “previously been convicted of a felony in the United States and deported or left the United States after such conviction.” 8 U.S.C. § 1252c(a).
- Arrest individuals for bringing in, transporting, or harboring aliens who are not lawfully present in the United States. 8 U.S.C. § 1324(c).

It must be emphasized that the New Hampshire State Police lacks the legal authority to enforce non-criminal civil violations of federal immigration law.

### **ICE Detainers**

An ICE detainer is not issued for an alien who has been temporarily stopped or detained, but not arrested, by a state or local law enforcement agency. Instead, an ICE immigration officer would not consider issuing a detainer unless and until a deportable alien had been arrested for a non-immigration criminal offense and booked into custody by state or local authorities.

**Therefore, any detainer the immigration officer issues is directed to the pretrial detention, correctional, or other facility holding the deportable alien in its custody.**

An ICE detainer issued to a federal, state, or local law enforcement agency therefore serves three purposes: (1) it notifies the law enforcement agency that ICE intends to assume custody of a deportable alien who is in the agency’s custody; (2) it requests that such agency advise DHS “as early as practicable” before the agency releases the alien, in order for DHS to arrange to assume custody of that person; and (3) it requests that the agency maintain custody of the deportable alien for up to an additional 48 hours, excluding Saturdays, Sundays, and holidays, to enable transfer of the alien to the custody of DHS. 8 C.F.R. § 287.7(a) and (d). The detainer automatically expires 48 hours after the time the deportable alien would otherwise be eligible for release.

**Insofar as the State Police do not operate detention or correctional facilities, troopers would likely not have occasion to decide whether or not to honor an ICE detainer request to extend custody over a deportable alien who has been arrested and booked for a violation of New Hampshire law. Instead, that decision rests with the correctional facility holding the deportable alien in custody.**

## Specific Guidance

### **1. May a trooper stop a motor vehicle solely on the basis of personal identifiers such as the occupants' perceived immigration status?**

No. A lawful motor vehicle stop may only be conducted upon reasonable suspicion that the driver, or other occupants, “has committed or is about to commit a crime.” *State v. McKinnon-Andrews*, 151 N.H. 19, 22 (2004). A trooper may not use actual or perceived racial, ethnic, cultural, or other such personal identifiers as the sole basis for developing reasonable suspicion or grounds for a traffic stop. See *New Hampshire Department of Safety Division of State Police Fair and Impartial Policing Order*, Section IV(1)(d) (“Prohibition of Bias Policing”).

It bears emphasizing that State and federal constitutional protections apply to everyone within the United States, regardless of immigration or citizenship status. Thus, anyone present within the New Hampshire’s borders has the same basic civil rights as citizens do.

### **2. Can a trooper arrest or otherwise detain an individual solely upon probable cause that the individual is an undocumented alien?**

No. It is well established that a law enforcement officer may arrest a suspect only if the officer has probable cause to believe that the suspect is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 51 (1979); see also RSA 594:10. Generally, it is not a federal crime for a removable alien to remain present in the United States. Being “removable” is a civil matter, and thus the suspicion that an individual has committed a civil immigration violation does not, by itself, give law enforcement officers probable cause to believe the individual is engaged in criminal activity. For further guidance in this regard, consult the *New Hampshire Department of Safety Division of State Police Fair and Impartial Policing Order*, Section IV(2) (“Matters Relating to Immigration and Citizenship Status”).

### **3. If a trooper is conducting a lawful traffic stop, can the trooper ask about the driver’s or a passenger’s immigration status?**

An individual’s presence in the United States without proper documentation or authority, standing alone, is not a criminal violation. Thus, mere suspicion of those facts does not entitle a trooper to extend the scope of a motor vehicle stop by asking questions related to immigration status.

This is because the scope of a traffic stop must be carefully tailored to its underlying justification, must be temporary, and must last no longer than is necessary to effectuate the purpose of the stop. Whether a roadside detention is a lawful investigatory stop or exceeds constitutionally permissible limits depends upon the facts and circumstances of each case. *State*

*v. Blesdell-Moore*, 166 N.H. 183, 187 (2014). An otherwise valid stop can metamorphose into an unlawful and unconstitutional seizure if it is overly prolonged or intrusive. *State v. Michelson*, 160 N.H. 270, 274 (2010).

The New Hampshire Supreme Court has identified the following factors relevant to determining whether a law enforcement officer has exceeded the permissible boundaries of a traffic stop when the officer asks questions during the course of stop:

(1) whether the question is reasonably related to the initial justification for the stop; (2) whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question; and (3) whether in light of all the circumstances, the question impermissibly prolonged the detention or changed its fundamental nature.

*McKinnon-Andrews*, 151 N.H. at 24.

As suggested above, an expansion of the scope of the stop is constitutionally permissible if the trooper has a reasonable and articulable suspicion that other criminal activity is afoot. *State v. Hight*, 146 N.H. 746, 748-49 (2001).

However, if a trooper develops reasonable suspicion of criminal activity other than the violation of law which precipitated the motor vehicle stop, and the immigration status of the suspect is relevant to the investigation, the trooper may ask about an individual's immigration status. Human trafficking, for example, is a crime which can implicate immigration status. *See* RSA 633:7; *see, e.g., State v. Gayton*, 882 N.W.2d 459, 479 (Wis. 2016) (*Bradley, J., concurring*) (observing that undocumented immigrants are sometimes human trafficking victims).

For additional guidance regarding circumstances under which a trooper may ask an individual about his or her immigration status, see *New Hampshire Department of Safety Division of State Police Fair and Impartial Policing Order*, Section IV(3) ("Inquiries Concerning Citizenship Status").

#### **4. Under what circumstances during a lawful traffic stop may a trooper request identification from passengers?**

It is permissible to ask passengers for identification when they themselves are suspected of a crime or motor vehicle violation, or when the driver is arrested or otherwise incapable of driving and a passenger consents to driving the car.

The following additional guidance is provided: During a traffic stop, both the driver and passengers in the vehicle are seized for constitutional purposes. *State v. Robbins*, 170 N.H. 292,

296 (2017). The New Hampshire Supreme Court relies on the three-part *McKinnon Andrews* test, cited above, to determine whether it is permissible during a lawful traffic stop to ask a passenger for identification and to run a check based on that identification. With regard to the second factor of the test—“whether the law enforcement officer had a reasonable, articulable suspicion that would justify the question”—the essential question is, does the trooper have reasonable grounds for requesting a passenger’s identification?

The New Hampshire Supreme Court has answered that question only once, in *State v. Robbins*. There, the court held that the officer’s reasonable, articulable concerns for his safety justified both his request for identification from each of the car’s three passengers and subsequently running warrant checks on each. The *Robbins* court did not address the third *McKinnon-Andrews* factor—“whether in light of all the circumstances, the question impermissibly prolonged the detention or changed its fundamental nature.” The court did note, however, that it took the officer a total of about seven to nine minutes to complete the identification-related tasks: less than one minute to obtain names and dates of birth from the passengers, less than three minutes to run the checks, and between three and five minutes to confirm with dispatch that the warrant for the defendant’s arrest was active.

It is never permissible to request identification based solely on an individual’s actual or perceived race, ethnic background, or other protected-class characteristic. *See also New Hampshire Department of Safety Division of State Police Fair and Impartial Policing Order*, Section IV(1) (“Prohibition of Biased Policing”).

**5. Under what circumstances during a lawful traffic stop may a trooper rely on federal resources such as ICE or CBP?**

Subject to the considerations discussed in #3 and #4 above, a trooper should use whatever tools, including relying on federal database resources, reasonably necessary under the circumstances to determine an individual’s identity or the validity of driving credentials issued by a jurisdiction other than the United States. Such resources include the ICE Law Enforcement Support Center, which may be reached at (603) 394-5911 and Customs and Border Patrol, which may be reached at (603) 422-0910.

After arrest, troopers attempting to verify an individual’s immigration status or the validity of foreign identification credentials may contact federal authorities through State Police dispatch, the ICE Law Enforcement Support Center, or Customs and Border Patrol.

This appendix was created and intended specifically for the NH State Police. This appendix is **not** intended to be a model document for other law enforcement agencies. Use by any other party is at the other party’s own risk. A law enforcement entity should consult with its own legal counsel to address its own particular situation in the creation or adoption of any document related to Fair and Impartial Policing.