

Foreign Nationals & Immigration Issues

Ross Fischer
Municipal Judge, City of Woodcreek
City Attorney, City of Seguin

Today's Objectives

- ▶ Examples of local immigration-related issues
 - ▶ Vienna Convention on Consular Notifications
 - ▶ ICE Holds
- 

“Thousands of cities in America are crying out for relief from the burden of illegal immigration. Small towns like mine can no longer wait for Washington.”

Mayor Lou Barletta
Hazleton, Pennsylvania

“The federal government is not doing their job of securing our borders, and that’s clear. By them not doing their job, it’s making it hard on us.”

Sheriff Tim Gobble
Bradley County, Tennessee

Local Immigration Initiatives

- ▶ “Immigration Ordinances”
 - *Prince William County, Va.* Adopted measure requiring public library and parks to verify citizenship before providing services. Also directed police to determine status of anyone thought to be violating a local ordinance. (Police: “Huh?”)

Local Immigration Initiatives

- ▶ *Cherokee County, GA and Escondido, CA.*
Investigate and fine those landowners renting to undocumented workers.
 - ▶ *Chesapeake, VA and Beaufort County, SC.*
Suspend business licenses of those hiring undocumented workers.
- 

Local Immigration Initiatives

- ▶ *287(g) Program.* Georgia and Florida LEOs have received training from ICE on how to access ICE hold information

Not so fast...

- ▶ *Hazleton, PA.* Local ordinance sought to fine landlords who rented to undocumented workers and to suspend business licenses of employers who hired such workers. (Federal Court ruled pre-empted by feds.)
- ▶ *Farmers Branch, TX.* Ordinance requiring landlords to verify tenants' legal status invalidated by federal judge. But, that ruling triggered a newer ordinance that would require a tenant to get a rental license from the City, who would verify the applicant's legal status.

Judicial concerns with controversial ordinances

▶ Ethical considerations

- Judges don't write ordinances
 - Insulate yourself from the political nature of these measures
 - Canon 1: Uphold the integrity and independence of the judiciary
- 

Judicial Conduct and Ordinances

▶ Know your limits

- A judge can't enjoin enforcement of an ordinance
- Canon 3B(2): A judge shall be faithful to the law...
- What do you do if you think an ordinance is unconstitutional?
 - Invalidate by finding the defendant “not guilty”

Vienna Convention

▶ What is it?

- Vienna Convention on Consular Relations (VCCR), Established 1963, Effective 1967
- Article 36 VCCR requires that a foreign national be offered the opportunity to have his country's consulate notified that he is facing criminal action.
- Here is the State Department's convenient chart for notification:

Consular Notification Process

“YES”

“Are you a US citizen?”

“NO”
Includes ALL NON-US CITIZENS, regardless of immigration status

STOP.
(No CNA Issue)

“What is your nationality?”

If Country is on Special Rule List

1. Inform detainee of his/her right to communicate with consulate, and that you must inform consulate of arrest/detention
2. Inform the nearest consulate **without delay**
3. Make record of notification in case file

If Country *NOT* on Special Rule List

Inform detainee **without delay** of his/her right to communicate with consulate, and ask: “Do you want your consulate notified of your arrest/detention?”

“NO”

1. Make a note of this in the case file
1. Do **NOT** inform the consulate

“YES”

1. Make a note in file (or use fax confirmation)
2. Inform consulate **without delay & note in case file**

IN ALL CASES:

- Detainee may communicate with consular officer and may request consular access at any time (whether previously declined or not)
- Consulate may have access to detainee regardless of whether detainee requests it
- Do not inform consulate about detainee’s refugee or asylum status

VCCR Caselaw: *“How cute...a treaty!”*

- ▶ Caselaw:
- ▶ Violation of VCCR will not exclude evidence, as treaty does not create a judicial remedy [Federal: *Sanchez-Llamas v. Oregon*; State: *Rocha v. State*]
- ▶ Although VCCR creates an international obligation, it is not a binding, domestic law, unless Congress passes implementing legislation [*Medellin v. Texas*]

If big, fancy courts don't care... Why should I?

▶ Legal Reasons:

- First of all, because no case or court has relieved a magistrate of the **obligation** to provide the VCCR Notifications; and
- Second, remember the Supremacy Clause of the U.S. Constitution:
 - "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

If big, fancy courts don't care... Why should I?

▶ Practical Reasons

- Avoid legal challenges & litigation from:
 - Defendants
 - Their home countries
 - Advocacy groups
- Avoid investigations and complaints by:
 - Commission on Judicial Conduct
 - Media

If big, fancy courts don't care... Why should I?

- ▶ Finally, because of the Golden Rule:
 - American tourists
 - Service-members
 - Peace Corps volunteers
 - Exchange students
 - Spring-breakers
 - Anyone relying on the protection of U.S Consulate

Administering the VCCR...

- ▶ What clues might lead a judge to suspect that he is dealing with a foreign national?
 - Inability to speak English
 - No valid identification
 - What else?

 - Ask the defendant if they are a U.S. citizen?
 - If they answer “no”, ask where they are from.
 - Then begin the process...
- 

What must the judge do?

- ▶ Determine citizenship *on the record*.
- ▶ Mandatory vs. Optional Notification
 - If from an optional country, offer to notify the consulate. Make the offer in writing, in both English and the national's language. Have the person accept or decline in writing. If he accepts, notify the consular office "without delay".
 - If from a mandatory country, notify consular office "without delay."
 - **Permitting a phone call is not enough!**

Practical matters...

- ▶ What does “without delay” mean?
- ▶ Pad the file, with a copy of:
 - A determination of citizenship
 - The offer in English and native language
 - The written acceptance or refusal
 - If accepted, the notice faxed to the consulate, with confirmation of delivery
- Documenting your efforts will help keep you out of trouble.

Ethical Consideration

- ▶ Canon 3B(5): A judge shall perform his duties without bias or prejudice.
 - Status is irrelevant
 - “Foreign National” includes those here legally or illegally – it doesn’t matter.
 - If not a naturalized citizen, they get the VCCR warnings.
 - Those with a green card or permanent legal alien status are foreign nationals and must be given the opportunity to notify their consular authority.

For the forms, go to...

- ▶ “The Magistrate’s Guide on the Vienna Convention on Consular Notification” by the Texas Attorney General’s Office, at:
 - www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf
 - It has a full list of countries, translated forms, and specific instructions

Now for the Cool part – ICE

- ▶ What is ICE?
 - Immigration and Customs Enforcement
 - Part of the Department of Homeland Security
 - Formerly INS and Customs
- Where is ICE?
 - Everywhere, even in the Travis County Jail
 - Office of Detention and Removal Operations (DRO) is charged with the enforcement of federal immigration laws.

What is an “ICE Hold”?

- ▶ Aka “ICE Detainer”
 - Request from ICE to local jurisdictions to detain a foreign national for transfer to and investigation by ICE.
 - Indicates that federal immigration authorities have questions about the citizen status of a person, and requests that the local authority notify ICE before the named person is released.
 - “Requests” as opposed to “orders”

What does an ICE hold mean?

- ▶ Could mean a lot of things:
 - Illegally present
 - Wanted for a federal investigation
 - Does not mean they are necessarily facing criminal prosecution.
 - An ICE hold requests notification of a prisoner's release and disposition of criminal charges. What does that mean in a practical sense?
- 

“Illegal” versus “Criminal”

- ▶ **Improper Entry** – Federal crime for entering U.S. at an improper time/place, or using fraudulent means; not an ongoing offense.
 - ▶ **Illegal Presence** – A civil matter, subjecting the offender to deportation rather than criminal prosecution; an ongoing offense
- 

Any duty to report?

- ▶ Does a municipal judge have a duty to report someone here illegally to ICE?
- ▶ What does it mean to be here illegally?
 - Unlawful entry? (criminal)
 - Overstay VISA? (civil)
 - Violate terms of entry? (civil)
- ▶ Beware Canon 3B(5), which requires performance of judicial duties without bias or prejudice. Don't jump to conclusions; after all, you are a judge.

What did we learn?

- ▶ Increased municipal efforts to regulate immigration will impact municipal judges.
 - ▶ Municipal judges have distinct responsibilities under the Vienna Convention on Consular Notification.
 - ▶ The impact of ICE holds on municipal judges.
 - ▶ Enough immigration law and judicial ethics to keep you out of trouble (and out of the newspaper).
- 

THE END

Questions about immigration law?

Don't ask

Ross Fischer

rfischer@ci.seguin.tx.us

(830) 401-2775

