



ISSUE IN BRIEF

To embrace and uphold our tradition as a nation of immigrants.

Immigration Law Enforcement by State and Local Police

The enforcement of our nation's immigration laws has historically been a federal duty. Federal legislators set U.S. immigration policies, and federal agencies administer immigrant admissions and removals. While state and local police often work with federal agents on criminal matters, they generally steer clear of the enforcement of administrative/civil immigration laws. In fact, scores of cities, counties, and even states have policies in place that explicitly limit their police departments' ability to coordinate with federal immigration authorities outside of criminal investigations.

As has been historically recognized by the legislature, executive branch, and the courts, state and local police do not have the authority to enforce federal civil immigration laws. Attempting to enforce immigration laws makes local police vulnerable to lawsuits stemming from liability, particularly when they arrest the wrong person or use racial profiling to determine who to scrutinize. Also, enforcement of such complex and ever-changing laws requires not only weeks of training and continuing education, but knowledge of case histories and files that only the Department of Homeland Security (DHS) has. Police simply do not have access to the training and information they would need to take on this kind of administrative enforcement.

Finally, state and local police have long sought to separate their activities from those of federal immigration agents in order to enhance public safety. Why is that? Because when immigrant community residents begin to see state and local police as deportation agents, they stop reporting crimes and assisting in investigations. The fear of deportation for them or their family members often silences them from reporting abuses, making it more difficult for police to effectively do their jobs.

Concern for the impact on public safety has led many police departments to reject policies that would expand their role in federal immigration law enforcement, policies which have been promoted increasingly since the September 11th terrorist attacks. However, legislation passed by the U.S. House of Representatives would compel state and local police to do just that, and would punish those who refuse by denying them reimbursements already owed for assisting in the enforcement of criminal laws. The Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act (H.R. 3137) was added by amendment to the Border Protection, Antiterrorism, and Illegal Immigration Control Act (H.R. 4437) that passed the House in December 2005. The CLEAR Act has been introduced in the U.S. Senate as the Homeland Security Enhancement Act (S. 1362), but has not passed this chamber in any form.

Even though federal legislation is still under consideration, the Department of Justice (DOJ, now the Department of Homeland Security, DHS) and some states have taken steps toward a greater role for police in immigration law enforcement. In 2002, the Justice Department's Office of Legal Counsel (OLC) reversed its long-standing legal opinion regarding the lack of authority state and local police have in enforcing federal civil immigration laws. Based on no new direction from Congress on the matter, and in a 180 degree turn from a 1996 OLC legal opinion and decades of Department policy, the OLC decided that state and local police have "inherent authority" to enforce

all immigration laws. This declaration was highly controversial among police and immigrant advocates, for all of the reasons mentioned above.

Confusion remains regarding the authority of police to make immigration arrests, even while state and local police are perhaps unwittingly assisting DHS in enforcing civil immigration laws because of the 2002 OLC opinion. After this opinion was leaked to the press, the Justice Department (now DHS) began entering the names of some immigration law violators into the National Crime Information Center (NCIC) database, an FBI-controlled database of wanted persons that state and local police access in routine situations, such as traffic stops.

Because of the way the new policy was announced, many police departments across the nation think that this is an anti-terror initiative and that the names being entered into NCIC are of criminals with immigration violations. DHS is actually entering the names of people who are purely civil immigration law violators into the database, and has plans to dramatically expand the numbers and categories of immigration law violators it includes in the NCIC. Arresting or detaining these individuals violates many of the state and local policies in place around the country, which prohibit civil immigration enforcement by police. However, the Justice Department (and now DHS) has been successful in convincing local police that these persons are wanted for nefarious reasons, even though their only “crime” may be an Arabic name and a lapse in immigration status pending approval of their case.

DHS may expand the use of NCIC as an immigration enforcement tool, and the bill that passed the House of Representatives does mandate new categories of immigration violations to be entered into the NCIC. This despite pushback from the FBI’s NCIC advisory board, widespread misconceptions by state and local police about who they are enforcing against, the fact that immigration records are hopelessly inaccurate and corrupting an otherwise functioning database, and before litigation challenging the “inherent authority” assertion can be decided.

The NCIC immigration arrests are happening in all corners of the United States, and rumors about this initiative and the pending federal legislation have been spreading in immigrant communities. Also, some states have entered into Memoranda of Understanding (MOU) with the DHS so that a cache of their police officers can be trained in immigration enforcement and take on additional duties.

While these arrangements are few and far between, they are causing distress in the states where they exist or are under consideration. While on the one hand MOUs are preferred to the NCIC arrests or new federal legislation because they are supposed to be narrowly focused and are already authorized under federal immigration law, on the other hand they tend to have many of the same effects that these other policies would have, such as chilling immigrants’ cooperation with state and local law enforcement in criminal matters.

Immigrant advocates are in the preferable position of favoring good law enforcement policy. Carving out a greater role for state and local police in the enforcement of federal immigration laws will make police less effective in their primary missions: protecting public safety and fighting crime. That is why so many government leaders, police departments, and others have come out in opposition to the CLEAR Act, the bill that unfortunately passed the House in December 2005. This legislation would undermine police roles in ensuring public safety for all community residents,

and would ultimately miss the mark in cleaning up a broken immigration system because it does not address the causes of unauthorized migration.

As President Bush acknowledged in his January 7, 2004 announcement about principles for a new temporary worker program, the answer is reform of our legal admissions system, not round-ups of hard-working, tax-paying immigrants. If we accomplish such reform, he said, “Law enforcement will face fewer problems with undocumented workers, and will be better able to focus on the true threats to our nation from criminals and terrorists. . . . Temporary workers will be able to establish their identities by obtaining the legal documents we all take for granted. And they will be able to talk openly to authorities, to report crimes when they are harmed, without the fear of being deported.”

As President Bush says, immigration reform is a win-win for American families, businesses, workers, and indeed, law enforcement. Instead of band-aid, and even counterproductive, approaches like the CLEAR Act and its Senate companion, the Homeland Security Enhancement Act, we need to enact comprehensive immigration reform.

For a summary of the House bill, the CLEAR Act (H.R. 3137), see:

<http://www.nclr.org/content/publications/detail/34355/>

For a summary of the Senate bill, the Homeland Security Enhancement Act (S. 1362), see:

<http://www.nclr.org/content/publications/detail/34356/>

For a more detailed backgrounder, see:

<http://www.immigrationforum.org/DesktopDefault.aspx?tabid=572> or
<http://www.nclr.org/content/publications/detail/1390/>

For bill status and other information, see:

<http://www.immigrationforum.org>