



Legislative Analysis

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

Analysis of NCIC Provisions in the Gang Deterrence and Community Protection Act of 2005 (H.R. 1279)

On May 11, the House passed a bill with troubling immigration related provisions known as the Gang Deterrence and Community Protection Act of 2005 (H.R. 1279). Below is an analysis of provisions that relate to the National Crime Information Center (NCIC) database.

Sections 117 and 119: Mandates Entering Immigration Information Into the National Crime Information Center: Together, these sections mandate the Department of Homeland Security to provide the National Crime Information Center (NCIC) of the Department of Justice information on “any and all” aliens with a final order of removal, those who have signed a voluntary departure agreement, or those who have overstayed a temporary visa. Such information must be provided to the NCIC even if the alien never received notice of a final order of removal and even if the alien has already left the country. These sections require DHS to provide immigration information that is overbroad, in flux, and harmful to the accuracy of the NCIC database.

Aliens With Final Orders of Removal: Every alien with a final deportation order is not a “criminal” or even “illegal.” They include people who may have left the U.S., applied for immigration relief, or been granted legal status in the United States. Inputting every person with a final order of removal on the record, without regard to their legal status and whether or not they have left the country, corrupts the database with information that is neither “criminal” nor accurate. And without a guarantee that DHS will update this information in the NCIC (for example, when someone re-enters the country legally), the inaccuracy of the data and likelihood of local police making unlawful arrests will be enshrined for years to come.

Take the case of Nancy from Sri Lanka. Nancy came to the U.S. on a tourist visa, allowed it to expire, and then applied for asylum. She was placed in removal proceedings but never received the notice of her court date, because DHS sent the notice to the wrong address. Even though Nancy provided her current address to DHS, the database had not yet been updated. As a result, Nancy was ordered removed “in absentia.” (People who do not appear for a hearing can be automatically ordered removed “in absentia.” This often happens when the person has moved or for other reasons does not receive the notice of the hearing date and location.) The government later learned that the court notice was not properly delivered to Nancy, and as a result held a new hearing to entertain her asylum claim. Nancy was eventually granted asylum. Under this section Nancy’s name would still appear in the NCIC database based on the faulty removal order, and if she came into contact with state or local police she could face arrest for her name appearing in NCIC.

Aliens Who Signed a Voluntary Departure Agreement: Aliens who sign voluntary departure agreements are not necessarily “illegal” or “criminal.” In fact, people with serious criminal convictions are not even eligible to receive “voluntary departure.” Contrary to popular belief, “voluntary departure” is not a deportation order and in fact is a benefit aliens get in lieu of deportation. In addition, some people are granted “voluntary departure” without ever being placed in removal proceedings.

Take the case of Pedro from Mexico. He walked many miles and risked his life to cross the Mexico-U.S. border into the U.S. Pedro worked 12 hours a day picking strawberries for a farmer in Indiana. After four months, Pedro was placed in removal proceedings because he entered the United States without inspection. The immigration judge decided to give him “voluntary departure” instead of an order of deportation. Pedro left the United States pursuant to his voluntary departure order. Eventually, Pedro was able to get a U.S. employer to sponsor him for a visa so that he could enter and work legally. (The reason people like Pedro choose voluntary departure in lieu of a removal order is so that they can return to the U.S. on a legal visa.) Under this section, Pedro’s name would still appear in the NCIC database even though he left the U.S. on time and will re-enter the U.S. on a new, valid visa. He would risk arrest by state and local police for being included in NCIC, although the arrest would be unlawful.

Aliens With a “Visa Overstay”: This section would render millions of people subject to NCIC entry and potential arrest based on minor paperwork problems that are often in the process of being fixed. Overstaying a temporary visa is a civil immigration law violation, and not in the purview of state and local police to enforce. Civil immigration violations are “civil” for a reason, namely because they do not rise the level of activity that would endanger public safety or homeland security.

Figuring out who has “overstayed” his visa is a complex process and at the very least involves proper training in immigration law as well as access to individual case histories, which state and local police will not have. One example of a “civil” immigration violation is a student who maintains less than full-time status—most would agree that serious criminals pose a greater threat to society than foreign students who take nine credits instead of twelve for one semester. Other examples of “civil” immigration violators include tourists who apply for employment during a visit to the United States, or temporary workers who stay in the United States after being laid off by a U.S. employer. Clearly, these are not the areas where state and local police should focus their precious resources. Under this section, every nine-credit student, laid-off employee, or working tourist could appear in the NCIC database.

Also, this provision would be a nightmare to implement. Immigration status for those here on temporary visas can be dependent upon different factors that can change frequently. For example, some people are here on multiple entry visas, meaning they have a visa that's valid for six years but they can only remain in the US for thirty days at a time (or some other time frame). Would DHS determine someone overstays the visa on day thirty-one or after six years? Or say a temporary visitor is here for vacation and a problem arises where she needs to extend her stay. If DHS has not adjudicated her extension application in time, and she stays beyond the authorized duration, she would appear to be out of status. Will she be put into NCIC? Will she be taken out of NCIC when her visa extension is granted? What about the student who picks up a new course and is no longer out of status? Will DHS actually go back and delete her name from the NCIC? This provision skews state, local, and federal law enforcement priorities to focus on people who have committed no criminal act.

Taken together, these provisions greatly expand the role of state and local police to enforce civil immigration laws by co-opting and corrupting a criminal database law enforcement officers rely on in their daily work. These provisions’ enactment and implementation will spawn a chilling effect among immigrants in our communities, who will fear every contact with state and local authorities could turn into an opportunity for immigration status scrutiny and their potential deportation. Even people with legal immigration status or whose paperwork is being remedied will have cause to fear contact with state and local police.