

Forcing Our Blues into Gray Areas:

Local Police and Federal Immigration Enforcement



*A Legal Guide for Advocates
Revised and Updated*

Nebraska Appleseed

www.neappleseed.org

Contact: Becky Gould, Executive Director

New Jersey Appleseed

www.njappleseed.net

Contact: Renee Steinhagen, Executive Director

Texas Appleseed

www.texasappleseed.net

Contact: Rebecca Lightsey, Executive Director

Washington Appleseed

www.waappleseed.org

Contact: Sue Donaldson, Executive Director

Appleseed

www.appleseednetwork.org

Contact: Betsy Cavendish, Executive Director;

Eric M. Gutierrez, Immigrant Policy Program Director



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Table of Contents

I. PREFACE	5
II. WHAT’S AT STAKE: IMMIGRATION ENFORCEMENT IN A POST-9/11 WORLD	7
A. The Proper Role of the Police in Enforcing Immigration Laws Is Increasingly the Subject of Local and National Debates	7
B. Local Police Enforcement of Immigration Laws Jeopardizes Public Safety	9
1. Adding Immigration Enforcement to the Duties of Local Law Enforcement Is a Strain on Already Limited Resources	9
2. Federal Immigration Law Is Complex and Technical	9
3. Immigration Enforcement by Police Undermines Their Efforts to Build Trust with Immigrant Communities and May Impede Anti-Terrorism Efforts	10
4. The Safety and Lives of Victims of Domestic Violence, Trafficking, and Other Crimes Are at Risk	10
5. Immigration Enforcement Heightens the Risk of Racial Profiling	11
III. WHERE THE LAW IS AND WHERE IT IS GOING: SOME TRENDS TOWARD INCREASED LOCAL ENFORCEMENT DESPITE LEGAL UNCERTAINTY	13
A. Historically, Local Police Played Only a Limited Role in Immigration Enforcement.	13
1. When Congress First Passed the Immigration and Nationality Act, It Remained Silent on the Role of Local Authorities.	14
2. Interpreting Congress’s Original Silence in the INA, Courts Initially Held That Local Police Could Properly Enforce Only Criminal Provisions of the Immigration and Nationality Act.	15
3. Department of Justice Policy Echoed the Courts: State and Local Authorities Had Minimal Involvement in Immigration Enforcement.	15
B. Some Recent Actions by the Federal Government Have Supported an Expanded Role for State and Local Police in Immigration Enforcement.	17
1. Sweeping Immigration Law Reforms in 1996 Expanded the Ways in Which Local Police Can Be Involved in Immigration Enforcement.....	17
2. Recent Federal Court Decisions Present an Unclear Picture of the Courts’ Views on Local Police Authority in Immigration Enforcement.....	21
a. Tenth Circuit Cases Support an Expanded Role for State and Local Authorities in Immigration Enforcement.....	21
b. A Renewed Preemption Challenge Could Be Made in the Wake of the 1996 Amendments to the INA.	23
c. In the Spring of 2005, the Supreme Court Issued an Opinion Regarding Police Authority to Question Criminal Suspects about Their Immigration Status.	24
3. Despite Legal Uncertainty in the Courts, the Department of Justice in 2002 Announced a New View that States Have “Inherent Authority” to Enforce Both Criminal and Civil Immigration Laws.....	24



Table of Contents: Cont'd

C. Current Homeland Security Policies and State and Local Activity Indicate a Trend Toward Expanded State and Local Involvement in Immigration Enforcement and Increasing Opposition to Such Policies.	27
1. The Expansion of the NCIC Database Has Prompted Increased Arrests for Civil Immigration Violations.	28
2. Faced with Growing Political Pressure, Additional States and Localities Are Likely to Consider Entering into MOUs.	29
3. Some States Are Addressing Local Immigration Issues by Passing State Legislation	32
4. Even Without Entering into MOUs, Many State and Local Authorities Appear to Be Taking a More Aggressive Stance Regarding Their Role in Immigration Enforcement.	32
5. Local Authorities Are Also Facing the Ramifications of Increased Federal Enforcement.	34
6. At the Same Time, Many State and Local Authorities, Governments, and Others Are Beginning to Take a Public Stand Against Such Policies.	35
IV. WHAT ADVOCATES CAN DO: THE CRITICAL NEED FOR LOCAL ADVOCACY	39
A. Know the Community and Assess the Possibilities.....	39
B. “Information Sharing” of a Different Kind: Document the Effects of Policing Policies and Educate the Community.....	40
C. Good Policing for Cities, Counties, and States: Encourage the Adoption of Policies that Set Safe Boundaries on Law Enforcement Activity.....	41
1. The Key Value of a Local Policing Policy Is the Ability to Educate the Community and the Police More Effectively.....	41
2. A Good Policy Should Specifically Address the Role of the Police and the Use of the NCIC Database.....	42
3. While Local Policies Can Generally Prevent Police from Asking About Immigration Status, They Cannot Bar Local Police from Reporting Immigration Violations to Federal Authorities.....	42
4. Careful Use of Terminology Is Important in This Discussion.	43
D. MOUs: Fight Early, But If Defeating the MOU Is Unlikely, Then Seek to Limit Its Negative Impact.....	43
1. Oppose the Execution of an MOU, Especially in the Beginning.	44
2. MOUs Can Come in a Range of Shapes and Sizes, So Get the Most Palatable MOU Possible.....	45
3. MOUs Are Probably Legal But Are Not Obligatory.....	45
E. Lobby Congress.....	46

Preface

As a matter of policy, should local police officers enforce our immigration laws? No. For a number of reasons, enlisting local police in immigration enforcement efforts jeopardizes public safety for all members of the community, immigrants and nonimmigrants alike. Are local police either required by the law to, or prohibited by the law from, enforcing immigration laws?

Put simply, local and state police have no obligation to enforce federal immigration laws.

The laws governing the proper role of the local police in stopping, arresting, questioning, and detaining individuals in an effort to enforce federal immigration law are far from settled, and the policy debate is moving quickly. For decades, as a result of policy directives issued by the federal government itself, it was understood that state and local police could not stop, arrest, or detain individuals for civil violations of the immigration law, such as being present in the United States without authorization.

However, in recent years, the Department of Justice and some members of Congress have encouraged an expanded role for state and local police in immigration enforcement. One arm of the Department of Justice, the Office of Legal Counsel, even went so far as to opine that local police have “inherent authority” to enforce immigration laws – a position that is far from clearly supported by then-existing or present case law. In fact, the Department of Justice kept its newfound position secret from the public and refused to release the memo detailing it until required to do so by court order.

This dramatic shift by some at the federal level has continued. Federal officials have increased the frequency of raids on immigrants, creating tension between local officials and the communities they seek to protect. However, in recognition of the fact that adopting local immigration enforcement policies is misguided and would actually make it more difficult to fight terrorism and crime, an increasing number of police departments, local governments, and others oppose initiatives to either mandate or encourage local police to intervene in federal immigration enforcement efforts.

A few basic points set the law and policy context for this debate:

- (1) Currently, the law is unclear regarding the authority of state and local police to enforce federal immigration law.
- (2) There is a good basis for arguing that the law prohibits state and local police from stopping, arresting, questioning, and detaining individuals in an effort to enforce civil immigration laws.
- (3) At a minimum, even if state and local police do have the legal authority to enforce immigration law, it is optional, which ultimately makes their role a policy, as opposed to a legal, decision.
- (4) Increasing the role of state and local police in immigration enforcement is bad policy. There are compelling public safety, efficiency, and humanitarian reasons for law enforcement and others to take the position that local police should focus on their primary mission: to protect community safety and fight crime. Immigration enforcement should be left to the federal authorities charged with that task.

Although there is no obligation for local and state police to enforce immigration law, plenty of confusion exists over this point. Some states and local law enforcement agencies have entered into memoranda of understanding (MOUs) with federal authorities to assist in immigration law enforcement. Some states are passing legislation to address immigration issues, including legislation to change the role of local law enforcement. Even in jurisdictions without such agreements or laws, community members may encounter local police who mistakenly believe they are required to enforce federal immigration laws.



Preface: Cont'd

However, the federal government has never established that local and state police are required to enforce immigration law. At most, it has asked state and local governments to make the decision. Thus, local officials and decision makers have a choice.

This briefing book describes the legal landscape and policy debate surrounding these issues.

The legal section of this guide will trace the history of legislation and court decisions establishing whether local and state police have the authority to enforce immigration law. As you will see, while Congress did not specifically address the issue when it first passed the Immigration and Nationality Act of 1952, subsequent court rulings and DOJ policy established a division between the enforcement of civil and criminal immigration law. On one hand, state and local police could enforce the criminal provisions of immigration law. On the other, it was commonly understood that state and local authorities could not enforce civil aspects of the immigration law. Thus, local police could not stop, arrest, or detain a person simply because they suspected that the individual might be an undocumented immigrant—being in the United States without papers is a violation of civil immigration law, traditionally the domain of federal authorities.

While the legal status of enforcement authority remains murky, the serious implications for communities are clear. As this guide outlines, many police departments and local governments around the country have opposed state and local police enforcement of immigration laws based on their concerns that it undermines community policing efforts, public safety, and effective counter-terrorism initiatives. The final section of this guide provides suggestions about what advocates can do to help create good policies within their communities. For the sake of effective policing, now is the time for community engagement in these decisions at the local level.



What's at Stake

IMMIGRATION ENFORCEMENT IN A POST-9/11 WORLD

A. The Proper Role of the Police in Enforcing Immigration Laws Is Increasingly the Subject of Local and National Debates.

Article I, Section 8, of the Constitution states that Congress shall have the power to “establish a uniform Rule of Naturalization.”¹ Accordingly, immigration laws traditionally have been enforced primarily by specific arms of the federal government. In the aftermath of the 9/11 attacks and the resulting changes in the political landscape, the debate has increased over whether, and to what extent, the federal government should employ the resources and efforts of local law enforcement agencies to carry out its immigration law mandates.

This issue has become the subject of discussion and debate among lawmakers, law enforcement officials, immigrant communities, victims' rights groups, national security officials, and residents of communities across the United States.² Because of the complexity of the issue and the high stakes for immigrants and non-immigrants alike, local organizations and communities should be educated and involved. Plans and proposals to increase the role of local police in enforcing immigration laws — specifically, in identifying, apprehending, arresting, and detaining individuals who violate immigration laws — have taken several forms at both the state and federal levels, including the following:

- **MOUs.** There are an increasing number of signed written agreements, known as memoranda of understanding (MOUs) or 287(g) agreements,³ between the Department of Homeland Security (DHS) and states, cities, or localities, by which the federal government deputizes specific segments of the local police force to perform certain immigration monitoring and enforcement functions. Local law enforcement agencies in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Massachusetts, North Carolina, New Hampshire, Oklahoma, Tennessee, and Virginia have signed MOUs, and DHS has received inquiries from many agencies nationwide.
- **Federal Legislation.** A number of recent proposals in Congress, such as the CLEAR Act, Comprehensive Immigration Reform Act of 2007,⁴ STRIVE Act,⁵ Border Protection Act,⁶ and Comprehensive Immigration Reform Act of 2006,⁷ would clarify the authority of state and local police to enforce the immigration laws, either requiring or prohibiting their involvement. The Border Protection Act, which passed the House of Representatives in December 2005, would have fully authorized state and local law enforcement personnel to investigate and apprehend undocumented persons for criminal or civil immigration violations. Additionally, the bill would have allowed the federal government to coerce state and local police into enforcing federal immigration laws or risk losing certain federal funding. By contrast, the Comprehensive Immigration Reform Act of 2006, which passed the Senate in May 2006, and the STRIVE Act, which was introduced in the House in March 2007, would clarify that state and local police may enforce only criminal immigration laws. Neither bill would have tied federal funding to a state or locality's participation in immigration enforcement. However, the Comprehensive Immigration Reform Act of 2006 would mandate the inclusion of civil immigration records into

¹ U.S. CONST. art. I, § 8, cl. 4 (“Naturalization Clause”).

² In 2002, when the Department of Homeland Security (DHS) was created, the functions of the Immigration and Naturalization Service (INS) were disaggregated and dispersed to various agencies of DHS. INS no longer exists in its previous form.

³ 287(g) refers to the section of the Immigration and Naturalization Act (INA) that authorizes MOUs.

⁴ Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007).

⁵ Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. (2007) (the “STRIVE Act”).

⁶ Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005) (the “Border Protection Act”).

⁷ Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).



What's at Stake: Cont'd

a database used by police for enforcing the criminal provisions of immigration laws. None of the above three bills has passed both houses of Congress, due largely to opposition from numerous police departments and law enforcement associations, local governments, non-profit organizations, policy institutes, and citizens.⁸ Continued efforts in Congress to expand the role of local police in immigration enforcement are likely in the coming year.

- **State Legislation.** State legislators are introducing bills and resolutions to address immigration issues in their communities. From January to April 2007, more than 1,000 bills and resolutions were introduced, which was more than twice the number of bills introduced in the preceding year.⁹ Among the issues being addressed in these state legislative proposals are the provision of public benefits, the need for documentation of all immigrants, the employment of undocumented immigrants, and the use of local police to enforce immigration laws.
- **DOJ Memo.** Federal government policy is changing. According to a 2002 Department of Justice (DOJ) memorandum – kept secret until a court ordered its release to the public in September 2005 – the DOJ has abandoned its longstanding position setting forth a very limited role for state and local officials in immigration enforcement. Justified by weak legal reasoning, the DOJ's new view is that state and local officials have “inherent authority” under the law to enforce federal immigration laws, both criminal and civil.
- **Expansion of FBI Database.** The FBI's national crime database has been expanded to include individuals with records of certain civil immigration law violations, thereby encouraging police officers across the country to arrest a greater number of immigrants, often without understanding the basis on which they were listed in the database.
- **Increased Local Enforcement.** At the local level, some police are acting as immigration agents, with or without a clear basis in the law for their actions.
- **Interior Enforcement Strategy.** In April 2006, DHS announced its interior enforcement strategy, which set out three goals to “reverse the tolerance of illegal employment and illegal immigration in the United States.”¹⁰ The expansion of interior efforts will likely require officials from the Department's Immigration and Customs Enforcement (ICE) to seek additional assistance from local law enforcement. At a minimum, this new policy threatens to damage the effectiveness of local police.

At the same time, many state and local governments, police departments, and law enforcement associations (as well as some federal legislation, as noted above) oppose efforts to increase participation by states and localities in immigration enforcement. Increasing numbers of police departments across the country have spoken out against policies that would require them to enforce federal immigration law – arguing that this will undermine their community policing efforts, and that everyone's safety is jeopardized when a segment of the community is afraid to go to the police. By mid-2005, ninety-two police departments – and since then additional departments and several major police associations – had opposed such policies. Similarly, sixty-eight state and local government entities had adopted ordinances, resolutions, or policies opposing the expansion of immigration enforcement

⁸ See, e.g., Ali Noorani, *Race, Class, and the Emergence of an Immigrant Rights Movement*, 31-WTR Fletcher F. World Aff. 185, 194 (2007) (describing response by immigrant rights advocates to Border Protection Act); Letter from Jennifer Daskal, Advocacy Director, U.S. Programs, Human Rights Watch, to House Judiciary Committee Members (Dec. 7, 2005), available at <http://brw.org/english/docs/2005/12/09/usdom12188.htm>; A Legislative Analysis of Border Protection, Antiterrorism, and Illegal Immigration Control Act, Drum Major Institute for Public Policy (undated), available at <http://www.drummajorinstitute.org/pdfs/ImmigrationSensenbrenner.pdf>; H.R. 4437 – Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005: An Overview of Provisions that Harm Refugees and Asylum Seekers, Human Rights First (undated), available at <http://www.humanrightsfirst.info/pdf/06301-asy-brf-analysis-br4437.pdf>. For a discussion of law enforcement's opposition to the Border Protection Act, see footnotes 141 to 143 and accompanying text.

⁹ National Conference of State Legislatures, *Overview of State Legislation Related to Immigration and Immigrants in 2007: Introduced January to April 2007* (Apr. 18, 2007), available at <http://www.ncsl.org/programs/immig/2007StateLegislationImmigration.htm>.

¹⁰ Press Release, Department of Homeland Security, *Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior* (April 20, 2006), available at http://www.ice.gov/pi/news/newsreleases/articles/060420washington_2.htm. (Appendix at Tab 54)

duties of local police. The language and scope of these laws vary, but all place self-imposed limits on the particular jurisdiction's authority to participate in immigration law enforcement.¹¹

B. Local Police Enforcement of Immigration Laws Jeopardizes Public Safety.

Why local police should not stop, question, arrest, or detain individuals suspected of violating federal immigration laws is not always immediately apparent to the public. It can be initially attractive to believe that involving local police in immigration enforcement could reduce the likelihood of a terrorist attack or provide an important public service by assisting understaffed federal agents.

But demanding that police act as immigration agents distracts them from their core duties of providing order and protection, weakens community policing initiatives by undermining carefully established trust with community members, discourages crime victims and witnesses from reporting crimes, increases the risk of racial profiling and, through these combined factors, leads to a decline in overall public safety.

The negative effects on public safety affect all members of a community, not just the immigrant population.

1. Adding Immigration Enforcement to the Duties of Local Law Enforcement Is a Strain on Already Limited Resources.

Local and state law enforcement agencies frequently do not have sufficient resources to effectively carry out the primary tasks of criminal and civil law enforcement. Many local police departments and sheriffs oppose immigration enforcement initiatives. Some have publicly stated that they will not proactively enforce immigration laws, or that they oppose coercive efforts such as the Border Protection Act that would require them to undertake immigration enforcement.¹² One reason local police departments oppose immigration enforcement initiatives is that they burden departments that are already under-resourced and under-staffed.¹³ It is important to note that federal funding for 287(g) agreements covers very few costs¹⁴ and that the funding is uncertain.¹⁵

2. Federal Immigration Law Is Complex and Technical.

Local police lack expertise in federal immigration law, which is notoriously complex, extremely technical, and frequently subject to change. Immigration laws have been compared to the tax code in their complexity, and a wide range of factors and documents contribute to the determination of a person's immigration status. Asking the police to assess individuals' immigration status is like asking them to stay abreast of tax law and calculate individuals' refunds as they enforce other laws.¹⁶

¹¹ See Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. Cin. L. Rev. 1373, 1374-75 (2006). (Appendix at Tab 36)

¹² For a list of organizations and police departments that opposed an earlier manifestation of the Border Protection Act, see Appendix at Tab 41.

¹³ See Craig Ferrell, *Immigration Enforcement: Is It a Local Issue?*, *The Police Chief*, Feb. 2004 ("The taxpayers . . . expect the local police department to use the community's resources to address burglaries, robberies, assaults, rapes, murders, and even traffic violations occurring in the communities rather than spend those resources addressing the massive national problem of illegal immigration."). (Appendix at Tab 35)

¹⁴ According to ICE's 287(g) overview fact sheet, funding covers training and information technology expenses. It does not cover officers' salaries or staff time during training or after. Available at www.ice.gov/pi/news/factsheets/factsheet287gprover.htm.

¹⁵ For example, Marshalltown, Iowa, advocates in 2007 were told that ICE had funding for three programs but a total of 67 applications so would base their choice on "highest need." Telephone presentation by Erica Palmer of Iowa Citizens for Community Improvement on national conference call coordinated by Center for Community Change (Sept. 6, 2007). See also Natasha Altamirano, *Virginia's bid for help with illegals nixed*, *Washington Times*, July 30, 2007 ("Federal immigration officials say they lack the resources to fulfill a proposed mandate by Virginia lawmakers to train staff at every state jail to start deportation procedures for illegal aliens.")

¹⁶ Although some initiatives purport to address this concern by funding training (i.e., MOUs with local law enforcement), immigration law is complex and changing. Therefore, attempting to provide adequate training with frequent updates is impractical and the likelihood of police error is high.



What's at Stake: Cont'd

3. Immigration Enforcement by Police Undermines Their Efforts to Build Trust with Immigrant Communities and May Impede Anti-Terrorism Efforts.

The most alarming aspect of police enforcement of immigration law is that it undermines the many community policing initiatives that have developed over the past decade, which are a significant factor in the declining crime rate during that same time.¹⁷ Many local police departments recognize that their effectiveness depends upon developing relationships with the communities that they serve and that they must gain the trust and confidence of the residents they are charged with protecting regardless of immigration status.¹⁸ When immigrants believe that their immigration status may be questioned, they will hesitate to come forward to report a crime or other relevant information.¹⁹

Ironically, one of the main arguments cited in favor of police-immigration enforcement initiatives is that they will make anti-terrorism efforts more effective. The argument has two serious flaws. First, it assumes that persons with immigration law violations are more likely to be terrorists. Second, because the federal government's anti-terrorism initiatives rely on encouraging individuals to report suspicious activity, police enforcement of immigration laws may hinder, rather than assist, law enforcement in its efforts to combating terrorism. Immigrants with information regarding potential terrorist activity may be less likely to contact the police out of fear of being questioned about their own immigration status. Since 9/11, many elected officials, community leaders, and law enforcement professionals, including CIA and FBI counter-terrorism experts, have argued for de-linking immigration and counter-terrorism policies, saying that the immigrant-focused security measures passed after 9/11 have made us less safe.²⁰

4. The Safety and Lives of Victims of Domestic Violence, Trafficking, and Other Crimes Are at Risk.

Immigration enforcement by local police will have a particularly significant impact on domestic violence victims. Years of experience have shown that one of the primary reasons immigrants do not report domestic violence is fear of deportation. New police policies on immigration enforcement would have a severe chilling effect on domestic violence reporting because they will heighten the fear of deportation. In particular, many domestic violence victims rely on their U.S. citizen or lawful permanent resident spouses for their immigration status, but do not know that they may be eligible to legalize their immigration status through provisions of the Violence Against Women Act (VAWA) and other laws. The fact that the same police officers to whom they must report domestic violence also would be responsible for investigating their immigration status will make victims of domestic violence even warier of stepping forward to report crimes.

¹⁷ Cecilia Muñoz & Michele Waslin, *Immigration Duties for Police Officers?*, S.D. Union Tribune, Oct. 7, 2003 at B-7 (observing declines in violent crime as a result of community policing efforts). (Appendix at Tab 111) Substantial evidence from around the country suggests that community policing has lowered crime rates. For example: Francisco Ortiz, former Chief of the New Haven, Connecticut, Police Department, attributes a 60% reduction in crime rates between 1990 and 2007 to the department's adoption of a community policing program. See Hilary Faxon, *Shooting Crime Rate on the Rise*, Yale Daily News, Oct. 3, 2007; see also Ricardo Alonso-Zaldivar, *Crimes Against Latinos Decrease*, L.A. Times, Apr. 8, 2002 at 11a. In 2002, Philadelphia Mayor John Street announced that community policing initiative Operation Safe Streets had resulted in a 15% decrease in serious crime. See Mayor John Street, *Operation Safe Streets Is Working!*, at <http://ework.phila.gov/philagov/radio/prelease.asp?id=51>. According to Senator Joseph R. Biden, moreover, since the federal government drastically cut Community Oriented Policing Services funding to the Philadelphia Police Department in 2003, 600 officers have left, murder has increased by 14.2%, and violent crime by 3.4%. Press release, Joseph R. Biden, Jr., *Abandoning the Front Line: The Federal Government's Responsibility to Help Fight Crime in Our Communities*, Sept. 22, 2006, at <http://biden.senate.gov/newsroom/details.cfm?id=263622&>. Law enforcement agencies across the U.S. have embraced community policing. Over 12,000 police departments use community policing. U.S. Department of Justice, Office of Community Oriented Policing Services, *Mayors, Police Chiefs Turn Spotlight on Success of Community Policing*, at <http://www.cops.usdoj.gov/Default.asp?Item=535>; see also Matthew J. Hickman and Brian A. Reaves, *Community Policing in Police Departments 1997 and 1999*, U.S. Dept. of Justice, Bureau of Justice Statistics (Feb. 2001).

¹⁸ See Niraj Warikoo, *Police Could Get More Power*, Detroit Free Press, June 1, 2004 (quoting Ann Arbor Police Chief stating, "I have a great deal of concern about altering hard-won relationships with immigrant communities . . . Having those communities think we're agents of the federal government — that can do real harm."). (Appendix at Tab 101)

¹⁹ Philip Kretsedemas, *Ironic Title for Murky Legislation*, Miami Herald, Oct. 2, 2003, at A 21 (describing case of Rhode Island immigrant placed in deportation proceedings shortly after serving as a witness in a murder case). (Appendix at Tab 112)

²⁰ For a sampling of opinions on this issue, see the list compiled by the National Immigration Forum, "Immigrants in the Crosshairs: Diverse Voices Speaking Out Against the Backlash," July 2003 at http://www.immigrationforum.org/documents/TheDebate/DueProcessPost911/Quotes_crosshairs.pdf.

Indeed, some of the most egregious forms of organized crime and violence take their heaviest toll on immigrants. In particular, victims of trafficking, such as women and children forced into prostitution or individuals forced to work long hours in slavery-like conditions, are almost always immigrants. They almost always lack legal documentation of their immigration status, either because their traffickers brought them into the U.S. unlawfully, or because their passports have been confiscated. These victims fear going to the police for help because (like domestic violence victims) they believe that they will be deported and/or that their perpetrators will go unpunished once the police learn that they lack documentation.²¹

5. Immigration Enforcement Heightens the Risk of Racial Profiling.

When police are instructed to identify persons whom they have reason to believe have violated immigration laws, it increases the likelihood they will examine with heightened suspicion members of certain ethnic minority groups that are immigrating to the United States in particularly large numbers. Some officers will stop and question people based on their ethnic background or their accent, leading to violations of the rights of U.S. citizens and legal residents whose only offense is “looking foreign.” Racial profiling that results from immigration enforcement will affect citizens and legal residents as well as undocumented immigrants.²² Furthermore, many communities of color already have strained relations with the police, which immigration enforcement by those authorities will likely worsen.

* * *

The following sections summarize the law defining the authority of local police to participate in immigration law enforcement, highlight recent legal developments, and note future trends in the law on this topic. The book concludes by setting forth guidelines and strategies that local advocates may adopt in order to craft effective and positive policing and immigration policies.



²¹ Commentators have argued that local enforcement of immigration law violates undocumented immigrants' right to equal protection by the police. See Lawrence Rosenthal, *Policing and Equal Protection*, 21 *Yale L. & Pol'y Rev.* 53, 73 (2003) (“Under the Equal Protection Clause...the government is obligated to provide effectively equal protection against all threats to public peace and safety.”); Tiffany Walters Kleinert, *Local and State Enforcement of Immigration Law: An Equal Protection Analysis*, 55 *DePaul L. Rev.* 1103 (2006) (arguing that, because the Supreme Court has held that equal protection applies to immigrants, the law enforcement of immigration laws would violate the equal protection clause because undocumented immigrants would effectively forfeit their right to police access and contact).

²² See, e.g., April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 *Ala. L. Rev.* 1149, 1162-63 (2004) (noting “strong opposition to local enforcement of federal immigration laws because of fear of civil rights violations due to racial profiling”).





Where the Law Is and Where It Is Going

SOME TRENDS TOWARD INCREASED LOCAL ENFORCEMENT DESPITE LEGAL UNCERTAINTY

For many years, it was settled law that state and local police should play only a limited role in immigration matters. However, in the past ten years, and especially since the 9/11 terrorist attacks, all three branches of government have shown some movement toward permitting — and, in some cases, actively encouraging — state and local police to play a more active role.

This section first discusses the historical approach that largely limited state and local authority to the enforcement of criminal immigration laws. Then, it surveys recent and rapid changes that have created numerous new avenues for state and local involvement in immigration enforcement. Finally, it reviews current efforts by the Department of Homeland Security to increase information sharing with state and local police and to expand state and local involvement in immigration enforcement.

A. Historically, Local Police Played Only a Limited Role in Immigration Enforcement.

Federal law has never been very clear regarding what role, if any, state and local authorities have in the area of immigration enforcement. Nevertheless, until recently, it was generally understood that state and local police could at most enforce criminal immigration laws, as opposed to civil immigration provisions. Under this criminal/civil division of labor, state and local law enforcement had no authority to detain or arrest someone for being an undocumented immigrant or overstaying his or her visa.

Such civil violations could be enforced only by federal agents, such as Border Patrol and Immigration and Customs Enforcement (ICE) officers. City police officers, county sheriffs, and state troopers, on the other hand, could not arrest someone for civil violations of the immigration laws, which include, for example:

- unauthorized presence in the United States, or what the public generally understands as “being an undocumented immigrant”;
- failure to depart after the expiration of a visa (or a grant of voluntary departure); and
- participation in a stowaway scheme.

Local and state law enforcement officers would, by contrast, possibly be permitted to make arrests for criminal immigration violations such as:

- illegally re-entering the United States after having been ordered deported;²³
- smuggling undocumented individuals into the United States; and
- “willfully” refusing to leave the country after having been ordered deported.

To be sure, the difference between civil and criminal immigration violations—between unauthorized presence and illegal re-entry, for instance—can be hard to grasp. Indeed, the anti-immigration rallying cry, “What part of ‘illegal’ do you not understand?” elides the issue entirely.²⁴

²³ *Illegal entry (entry without inspection, or EWI) is both a crime (a misdemeanor) and a civil infraction. Note, however, that most states do not allow police officers to make warrantless arrests for misdemeanors not committed in their presence. Moreover, nearly half of undocumented immigrants now present in the United States – between 40 and 50 percent – entered legally and overstayed their visas. Modes of Entry for the Unauthorized Migrant Population, Pew Hispanic Center, May 22, 2006, at 1, available at <http://pewhispanic.org/files/factsheets/19.pdf>. (Appendix at Tab 49) As noted, traditionally they would have been subject only to civil penalties.*

²⁴ *See, e.g., Joseph Lelyveld, The Border Dividing Arizona, N.Y. Times, October 15, 2006, at Section 6 (describing placards at an anti-immigration rally bearing the slogan “What Part of Illegal Don’t You Understand?”) (Appendix at Tab 67); Lloyd Benedict, Letter to the Editor, S.D. Union-Tribune, October 11, 2006, at B9 (“Illegal immigration is turning the United States into another Third World country. What part of illegal don’t these bleeding hearts understand?”).*



Where the Law Is and Where It Is Going: Cont'd

But the very intricacy of immigration law justified limiting state and local enforcement of it. By reserving most of the complex legal and regulatory landscape of immigration law to more experienced federal authorities, the criminal/civil division fostered a uniform, if nuanced, policy. It demarcated a limited area suitable for local and state enforcement, and left the rougher terrain for officials better versed in immigration law. Moreover, it ensured that persons arrested by their local law enforcement officials for criminal violations of immigration laws received heightened due process protections.

This division of labor was generally accepted for many years, and it operated, in that time, to drastically limit state and local activity in immigration enforcement. As discussed below, because Congress expressly provided enforcement authority to immigration officers and was silent on the issue of state and local authority in immigration enforcement, the courts and the executive branch fashioned the civil/criminal distinction and relied upon it for several decades.

1. When Congress First Passed the Immigration and Nationality Act, It Remained Silent on the Role of Local Authorities.

Congress has the primary authority to set immigration policy.²⁵ That authority derives from the Naturalization Clause of the U.S. Constitution, which assigns to Congress the power to “establish a uniform Rule of Naturalization.”²⁶

Principles of sovereignty and the relationship of immigration to national security also support the delegation of immigration authority to the federal government. The need for uniform application of immigration laws throughout the country further suggests that authority should rest with the federal government rather than with the states.

Nevertheless, Congress’s exclusive authority to define the laws that govern immigration matters does not necessarily imply exclusive authority to enforce those laws. Under principles of constitutional law, Congress has within its power the authority to deny the states any role in immigration enforcement. Congress has never explicitly done so. However, the statutory scheme may imply preemption of state and local authority. As discussed later, the constitutional doctrine of preemption provides that, under the Supremacy Clause of the Constitution, where Congress demonstrates an intent – whether explicitly or impliedly – to preempt a field of legislation, the states may be precluded from any activity in that legislative arena.

The Immigration and Nationality Act (INA),²⁷ passed in 1952, originally contained no language defining a role for state and local authorities in immigration enforcement. In contrast, the statute expressly authorized only federal immigration officers to arrest and detain noncitizens for both civil and criminal violations of the INA.²⁸ This created uncertainty about whether Congress intended that states be involved in immigration enforcement and, if so, in what capacity. As noted, however, the courts and the executive branch stepped in to resolve that uncertainty by limiting state and local authority to enforcement of criminal immigration laws. And, as discussed below, the logic that historically prevented state and local authorities from enforcing civil immigration laws may now imply that those authorities are preempted from enforcing criminal immigration laws as well.

Since the passage of the INA in 1952, however, Congress has explicitly spoken on small, discrete aspects of this issue. Subsequent laws have allowed specifically for the enforcement of criminal provisions within particular, circumscribed arenas, which supports the position that state and local authority to enforce immigration law is generally preempted unless otherwise expressly established by federal legislation.

²⁵ See, e.g., *De Canas v. Bica*, 424 U.S. 351, 354 (1976) (explaining that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”) (Appendix at Tab 4); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) (emphasizing that the power to regulate immigration “belongs to Congress, and not to the States”); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876); *Smith v. Turner*, 48 U.S. 283 (1849) (“The Passenger Cases”).

²⁶ U.S. CONST. art. I, § 8, cl. 4 (“Naturalization Clause”).

²⁷ *Immigration and Nationality Act*, Pub. L. No. 82-414, 66 Stat. 163, 166 (1952) (codified, as amended, at 8 U.S.C. §§ 1101 et seq. (1995)).

²⁸ 8 U.S.C. § 1357(a)

2. Interpreting Congress’s Original Silence in the INA, Courts Initially Held That Local Police Could Properly Enforce Only Criminal Provisions of the Immigration and Nationality Act.

On rare occasions, the federal courts have considered the scope of state and local police’s role in immigration enforcement. In a 1983 decision, *Gonzales v. City of Peoria*,²⁹ the Court of Appeals for the Ninth Circuit held that there was a place for state and local police in immigration enforcement, but only a narrow one. Under constitutional principles of preemption, where a federal legislative scheme is sufficiently complex and comprehensive, courts may find that Congress did not intend that states play any role in that legislative arena, whether making laws or applying them. The Gonzales court said that the civil provisions of the INA constituted so complex a regulatory scheme that Congress had left no room for state activity in the area.³⁰ By contrast, the court concluded that the criminal provisions were “few in number and relatively simple in their terms,” and that, therefore, Congress did not intend to preclude state enforcement of the criminal provisions of the INA.³¹

The Gonzales ruling stands for the proposition that state and local law enforcement are permitted to enforce the criminal provisions of the federal immigration laws, but not the civil provisions. Although binding only on the states within the Ninth Circuit,³² Gonzales has become the touchstone of the view that the civil/criminal divide should define the scope of state and local law enforcement authority in immigration enforcement.³³ However, the distinction has engendered some controversy, both as a matter of law and as a matter of policy.³⁴

Furthermore, at the time of the Gonzales ruling, there were far fewer criminal provisions in immigration law. Since then, the criminal provisions have become nearly as complex and pervasive as the civil provisions. According to the original logic of the Gonzales ruling, then, it is possible that local enforcement of any immigration law is now preempted.

3. Department of Justice Policy Echoed the Courts: State and Local Authorities Had Minimal Involvement in Immigration Enforcement.

Until 2002, the Department of Justice (DOJ) — and specifically its Immigration and Naturalization Service (INS) — had been responsible for federal enforcement of immigration laws. The DOJ had traditionally taken a cautious view toward the involvement of local authorities. Policy pronouncements spanning three decades reflected a clear view on the part of the DOJ that increased involvement of the states in immigration enforcement matters was not advisable and should not be encouraged.

A 1978 DOJ press release stated, “INS officers are uniquely prepared for this law enforcement responsibility because of their special training, and because of the complexities and fine distinctions of immigration laws.” The DOJ thus reiterated its

²⁹ 722 F.2d 468 (9th Cir. 1983). (Appendix at Tab 5)

³⁰ *Id.* at 474-75 (“We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration.”). In so concluding, the court considered the INA’s civil and criminal provisions independently of one another and evaluated the complexity of the federal laws in each domain.

³¹ *Id.* at 475.

³² The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

³³ It should be noted that, as discussed below, decisions from the Tenth Circuit have suggested that a court may take a broader view of local law enforcement’s authority in immigration enforcement. However, decisions from the Tenth Circuit have never expressly rejected the analysis or holding of *Gonzales*.

³⁴ Some commentators have observed that statutory construction and constitutional preemption principles are not generally applied to portions of a law or legislative scheme and have thus questioned why preemption should not apply as well to the criminal provisions of the INA. See, e.g., Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U.L. Rev. 965, 978 (2004) (concluding that the Ninth Circuit’s parsing of the INA to reach its decision was improper because “[t]he criminal provisions are closely interrelated with the civil provisions and, together, they provide the total immigration regulation scheme”); Linda R. Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 *Hisp. L.J.* 9, 28-29 & n.138 (1994) (statutory construction principles require consideration of the whole statutory scheme in evaluating an individual provision) (citing *King v. St. Vincent Hospital*, 112 S. Ct 570, 574 (1991); *Shell Oil Co. v. Iowa Dept of Revenue*, 488 U.S. 19, 26 (1988); *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941); *United States v. Hartwell*, 73 U.S. 385, 396 (1867)).



Where the Law Is and Where It Is Going: Cont'd

position that “responsibility for enforcement of the immigration laws rests with [INS], and not with state and local police,” and that local police should not detain any person not suspected of a crime solely on the ground that the individual may be deportable.³⁵

Revisions to the DOJ policy in 1983 endorsed state involvement only cautiously. Although the policy clarified that the INS would cooperate with state and local officers who notified immigration officials of suspected violations of immigration law, the policy stopped short of encouraging such efforts. It stated that where “state law authorizes local officers to enforce *criminal* provisions of federal law,” state and local police could use that power to enforce criminal immigration laws, but “[s]uch operations are conducted by local officers under their local authority and will not be directed by the [INS].” It acknowledged that “INS agents and local officers may also engage in joint operations which are expected to uncover violations of both immigration and state laws,” but emphasized that federal agents “will remain responsible for all arrests for immigration violations.”³⁶

In 1996, the DOJ again demonstrated its reluctance to involve state and local authorities in immigration enforcement. In an Office of Legal Counsel (OLC) opinion, the DOJ made clear that “[s]tate and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”³⁷ In making this determination, the OLC relied on the Ninth Circuit’s *Gonzales* decision (discussed in the immediately preceding section), which suggested that the pervasive scheme of federal enforcement of civil immigration law preempted state involvement in those matters. The OLC also relied on an earlier 1989 OLC opinion that concluded the mere existence of a civil deportation warrant did not constitute probable cause that would permit local police to arrest a person for a suspected violation of criminal immigration laws.

Thus, throughout the 1970s, 1980s, and 1990s, both the DOJ and the federal courts held that the proper role for state and local police in immigration enforcement was limited to enforcement of criminal provisions of the INA. Civil immigration enforcement clearly remained the province of the federal government. However, as will be discussed below, in 2002, the DOJ abruptly renounced this position and took the view that states have “inherent authority” to enforce even the civil provisions of immigration law.

* * *

Both law and practice embraced the civil/criminal distinction for many years. It cannot be denied that the distinction between civil provisions (such as unauthorized presence) and criminal provisions (such as illegal entry) may not be readily clear, particularly when a local police officer is suddenly faced with a concrete situation on the street.³⁸ Nevertheless, for many years this distinction was the rule, and it served to shield local law enforcement officers from making these quick, complicated judgment calls.

Recently, some in Congress, some federal courts, and the DOJ appear to be changing their views on state and local involvement in immigration enforcement. As a result, it has become more important than ever for community members, immigrants’ rights groups, and local law enforcement to be informed about the issue.

³⁵ Press Release dated June 23, 1978, Department of Justice, in Vol. 55, No. 31, *Interpreter Releases* 306 (Aug. 9, 1978). (Appendix at Tab 50) This policy did not, however, mention the civil/criminal distinction within immigration law. See also Yanez & Soto, 1 *Hisp. L.J.* at 36.

³⁶ Press Release dated Feb 10, 1983, Department of Justice, in Vol. 60, No. 9, *Interpreter Releases* 172-73 (Mar. 4, 1983). (Appendix at Tab 51)

³⁷ Memorandum from the Office of the Associate Deputy Attorney General, to the United States Attorney, Southern District of California (Feb. 5, 1996) at <http://www.usdoj.gov/olc/immstopo1a.htm>. (Appendix at Tab 22)

³⁸ “Unauthorized presence” applies to a range of scenarios in which a person’s presence in the United States has not been authorized by federal immigration authorities. For instance, unauthorized presence refers to someone who entered the country lawfully and remained here after her visa had expired, as well as to a person who was never inspected at border control. The act of entering the United States is a criminal misdemeanor; however, remaining in the United States afterwards is not. See discussion in section III. A.

B. Some Recent Actions by the Federal Government Have Supported an Expanded Role for State and Local Police in Immigration Enforcement.

The distinction between criminal and civil provisions of the INA for purposes of state and local enforcement may not survive. Congress's 1996 amendments to the INA opened new avenues for federal-state cooperation in immigration enforcement. And more recent legislative efforts to reform immigration laws have demonstrated that some members of Congress believe that responsibility for immigration law enforcement should actually be shifted to the states. In fact, the Border Protection Act, discussed below, would have allowed the federal government to coerce states into enforcing civil immigration laws. In addition, a number of rulings by the Court of Appeals for the Tenth Circuit in recent years are inconsistent with the civil/criminal distinction (although these decisions do not directly address this distinction). However, the direction the courts will ultimately take remains unclear. Finally, as evidenced by the policy shift announced in a 2002 memorandum, the DOJ favors an expansive role for state and local officials in immigration enforcement.

1. Sweeping Immigration Law Reforms in 1996 Expanded the Ways in Which Local Police Can Be Involved in Immigration Enforcement.

There have been two significant waves of immigration reform-related activity in Congress in the last decade. First, in 1996, election-year politics gave rise to a number of compromise anti-crime and immigration reform bills. Then, after the 9/11 terrorist attacks, Congress amended the immigration laws as part of its reorganization of the federal government and creation of the DHS. These two waves of activity are discussed below.

The mid-1990s saw a flurry of activity on immigration reform. In 1994, Congress funded a program to provide federal money to states that incurred costs for apprehending and incarcerating aliens who had committed crimes.³⁹ In doing so, Congress and the Clinton administration bowed to years of escalating pressure from the states — particularly from then-California Governor Pete Wilson and other California politicians, who argued that, by default, the states were playing an increasingly expensive role in apprehending and incarcerating criminal aliens who had illegally re-entered the country.⁴⁰ The pressure continued to escalate through 1996, when Congress implemented further and more sweeping immigration reforms.

Four provisions specifically created or expanded roles for state and local law enforcement.⁴¹ First, Congress gave the states the power to authorize the detention of illegal aliens in certain, limited circumstances. Section 439 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),⁴² codified at 8 U.S.C. § 1252c (Appendix at Tab 18), amended the INA to allow the states to apprehend illegal immigrants who previously had been convicted of crimes. Section 1252c's wording, however, is very narrow: it authorizes state and local law enforcement officials only to arrest and detain an illegal alien who previously had been convicted of a crime and who previously was deported or left the country after that conviction. Moreover, it creates this authority only if state law also allows for it.⁴³ The provision further requires state or local officials to obtain confirmation of the individual's status from federal officials before the detention and prohibits detaining the individual for longer than necessary to complete the handover to federal custody.

Second, Section 372 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)⁴⁴ amended the INA

³⁹ Though the initiative, called the State Criminal Alien Assistance Program (SCAAP), was created in the 1986 Immigration Reform and Control Act, it was not funded until 1994. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 Harv. J.L. & Pub. Pol'y 367, 448-449 (1999). SCAAP is described at <http://www.ojp.usdoj.gov/BJA/grant/scaap.html>.

⁴⁰ Schuck & Williams, 22 Harv. J.L. & Pub. Pol'y at 446-48.

⁴¹ Congress also sought to restrict the ability of local governments to prohibit certain types of immigration reporting by local government entities and officials to immigration officials in a 1996 amendment to the INA. See the discussion in section III.C.2 of this briefing book.

⁴² Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁴³ As discussed below, one circuit court has held that states already had this power and this law was superfluous.

⁴⁴ Pub. L. No. 104-208, 110 Stat. 3009-646 (1996).



Where the Law Is and Where It Is Going: Cont'd

to create rules permitting the INS to “deputize” local officials in case of an immigration emergency. Specifically, the rules permit the U.S. Attorney General to deputize state and local law enforcement officers in the event of a “mass influx” of aliens, provided that the state or local agency consents.⁴⁵

Third, Section 642 of IIRIRA requires local governments to allow their employees to cooperate with federal immigration authorities.⁴⁶ Examined closely, Section 642 does not require local governments to report undocumented persons or to assume responsibility for immigration enforcement. Rather, as explained more fully below, its scope is limited, mandating only that local government employees have the option to make such reports.⁴⁷

Fourth, and most importantly, Section 133 of IIRIRA⁴⁸ – often referred to as Section 287(g) of the INA – authorizes the U.S. Attorney General to enter into written Memoranda of Understanding (MOUs) with state and local authorities to formally involve them in immigration enforcement.⁴⁹ Under the terms of an MOU, “an officer or employee of the State or subdivision” may carry out the function of an immigration officer to investigate, apprehend, or detain aliens “at the expense of the State or political subdivision and to the extent consistent with State and local law.”⁵⁰ The statute also provides that:

- A state or local authority is not required to enter into an MOU.
- When a state or locality chooses to enter into an MOU, the MOU must provide for certification that state and local officers have received adequate training regarding enforcement of federal immigration law.⁵¹
- A state or local officer enforcing immigration law is subject to the direction and supervision of DHS.
- No agreement is required for a state official merely to communicate an individual’s immigration status to DHS, or to cooperate with the Attorney General in the identification, apprehension, detention, or removal of a person not lawfully present in the United States.

The statute does not describe what functions state and local officers may perform. Thus, state and local authorities are free to negotiate the terms of an MOU, should they decide to enter into one at all. As discussed in more detail below, the MOU negotiation process presents an opportunity for advocates to seek to protect their communities.

While the 1996 amendments to the immigration laws were significant and greatly expanded the ways in which state and local authorities may participate in immigration enforcement, none mandated participation. More recently, however, proposals for new legislation demonstrate significant congressional support for a mandatory role. Efforts to reform the nation’s immigration laws in 2007 collapsed. Nonetheless, three bills in particular have garnered significant support in recent terms of Congress. Two of these bills are troubling, and advocates should be prepared to see similar bills before Congress in the future.

⁴⁵ The amendment was codified at 8 U.S.C. § 1103(a)(10). (Appendix at Tab 17) Due to a numbering error in IIRIRA, this section, previously 1103(a)(8), was reassigned to 1103(a)(10).

⁴⁶ 8 U.S.C. § 1373. (Appendix at Tab 20)

⁴⁷ See Pham, *supra* note 11, at 1376.

⁴⁸ 8 U.S.C. § 1357(g). (Appendix at Tab 19).

⁴⁹ As a result of the creation of the DHS in 2002, the MOU process is now under the direction of DHS, not DOJ, and DHS is the federal party to the current MOUs.

⁵⁰ 8 U.S.C. § 1357(g)(1).

⁵¹ The MOUs that are currently in place provide for similar training. For example, the Florida MOU provides that training of officers will include presentations on the cooperative immigration enforcement program, elements of the MOU, scope of officer authority, cross-cultural issues, use of force policy, civil rights law, and liability issues. Additionally, all officers receive “specific training regarding their obligations under federal law and the Vienna Convention on Consular Relations to make proper notification upon the arrest or detention of a foreign national.” Florida MOU at 4. (Appendix at Tab 24)

Introduced by Representative Sensenbrenner (R-Wisconsin), the Border Protection Act⁵² was the manifestation of various bills proposed in Congress, including, most recently, the CLEAR Act.⁵³ Passed by the House in December 2005,⁵⁴ the Border Protection Act would have fully authorized state and local law enforcement personnel to investigate and apprehend undocumented workers.⁵⁵ Hence, the bill would have eliminated the civil/criminal distinction that has long demarcated the division of labor between federal and nonfederal officials. Additionally, the bill would have allowed the federal government to coerce states and localities into participating in immigration enforcement by denying federal incarceration assistance funding to jurisdictions that prohibited their law enforcement personnel from assisting federal immigration authorities.⁵⁶ The threat of withholding federal funds likely would have compelled at least some states to enforce federal (civil and criminal) immigration law. Finally, the Border Protection Act would have provided certain incentives to encourage increased state and local cooperation with immigration enforcement. At federal expense, the bill provides to local jurisdictions a training manual, mandates that training be available to local police (but does not require that police actually undergo it), and awards grants to purchase equipment and technology.⁵⁷

In contrast to the Border Protection Act, the Comprehensive Immigration Reform Act of 2006⁵⁸ would have confirmed the traditional role of nonfederal officials to enforce only the criminal provisions of federal immigration laws. Introduced by Senator Specter



(R-Pennsylvania) and passed by the Senate in May 2006,⁵⁹ the Comprehensive Immigration Reform Act of 2006 would have clarified that state and local law enforcement personnel have the “inherent authority” to investigate and apprehend undocumented individuals for purposes of enforcing criminal immigration laws.⁶⁰ Moreover, the bill would not have tied state and federal authorities’ receipt of federal funding to their participation in immigration enforcement.

Significantly, however, the Comprehensive Immigration Reform Act of 2006 would have required the entry of millions of civil immigration records into the database maintained by the National Crime Information Center (NCIC).⁶¹ As explained more fully in Section III.C.1, the NCIC database is available to almost all law enforcement agencies and can be accessed by police during routine traffic stops.

⁵² *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005*, H.R. 4437, 109th Cong. (2005).

⁵³ *Clear Law Enforcement for Criminal Alien Removal Act of 2007*, H.R. 842, 110th Cong. (2007); *Clear Law Enforcement for Criminal Alien Removal Act of 2005*, H.R. 3137, 109th Cong. (2005); *Clear Law Enforcement for Criminal Alien Removal Act of 2003*, H.R. 2671, 108th Cong. (2003). *The CLEAR Act's sponsor, Representative Norwood, died on February 13, 2007.*

⁵⁴ *Library of Congress Web Site, Major Congressional Actions on H.R. 4437*, at <http://www.thomas.gov/cgi-bin/bdquery/z?d109:HR04437:@@R>.

⁵⁵ *Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005*, H.R. 4437, 109th Cong. § 220(a) (2005).

⁵⁶ *Id.* § 225(a).

⁵⁷ *Id.* §§ 221, 222.

⁵⁸ *Comprehensive Immigration Reform Act of 2006*, S. 2611, 109th Cong. (2006).

⁵⁹ *Library of Congress Web Site, Major Congressional Actions on S. 2611*, at <http://www.thomas.gov/cgi-bin/bdquery/z?d109:SN02611:@@R>.

⁶⁰ *Comprehensive Immigration Reform Act of 2006 of 2006*, S. 2611, 109th Cong. § 229(a) (2006).

⁶¹ *Id.* at § 231.



Where the Law Is and Where It Is Going: Cont'd

Traditionally, it has contained immigrant information relating to criminal activity but was expanded by then-Attorney General John Ashcroft in 2003 to include civil immigration violations. Codifying current Justice Department policy would not only expand the immigration enforcement duties of state and local police but also undermine a separate provision of the Comprehensive Immigration Reform Act of 2006, described in the preceding paragraph, which confirms that nonfederal authorities may enforce only criminal immigration laws. In April 2006, a group of law professors sought unsuccessfully to have that harmful provision removed from the bill.⁶²

In March 2007, Representative Gutierrez (D-Illinois) and Representative Flake (R-Arizona) introduced a bill, commonly referred to as the STRIVE Act, that tracks language in the Comprehensive Immigration Reform Act of 2006 that would clarify that state and local law enforcement personnel may enforce criminal provisions of immigration laws.⁶³ Importantly, the STRIVE Act omitted the harmful provisions found in the Border Protection Act and Comprehensive Immigration Reform Act of 2006 – the STRIVE Act neither ties federal funding to states and localities on the basis of their participation in immigration enforcement, nor mandates the inclusion of civil immigration records into the NCIC database.

The favorable responses the Border Protection Act and Comprehensive Immigration Reform Act of 2006 received underscore the uncertainty over the course the current immigration debate in Congress will take. Most recently, the Comprehensive Immigration Reform Act of 2007, introduced by Senators Reid (D-Nevada) and Kennedy (D-Massachusetts) in May 2007, would limit the authority of nonfederal officials to enforce immigration law. The bill specifically provides that it does not “authorize State or local law enforcement agencies or their officers to exercise Federal immigration law enforcement authority.”⁶⁴ Demonstrating the close division that exists on this issue, the Senate narrowly defeated an amendment offered by Senator Coleman (R-Minnesota), 49-48, which would have allowed a state or local government employee to ask an individual about his or her immigration status if the employee had “probable cause” to believe that the individual was not legally present in the United States.⁶⁵

Opposition by law enforcement has proven to be the strongest bulwark against the passage of bills, such as the Border Protection Act, that would allow the federal government to coerce state and local assistance in the enforcement of immigration law. A broad range of organizations representing law enforcement – from individual police departments to associations of police chiefs and sheriffs – have been vocal opponents of such legislative efforts in recent years.⁶⁶

As discussed more fully in Section III.C.5 below, the opposition of the Major Cities Police Chiefs Association and the International Association of Chiefs of Police (IACP) to the Border Protection Act and the CLEAR Act undermined those proposals’ claim that clarifying the authority of states and localities to assist in immigration enforcement would enhance their ability to police their communities effectively.⁶⁷ The IACP criticized the coercive effects of the CLEAR Act, especially its threat to withhold federal funds from those jurisdictions that do not assist with immigration enforcement.⁶⁸

⁶² Letter from Michael J. Wisniewski, Professor of Clinical Law, New York University School of Law, et al., to Senator Arlen Specter, Chairman, Committee on the Judiciary, United States Senate (Apr. 1, 2006). (Appendix at Tab 29)

⁶³ Security Through Regularized Immigration and a Vibrant Economy Act of 2007, H.R. 1645, 110th Cong. § 215 (2007).

⁶⁴ Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. § 144 (2007).

⁶⁵ Robert Pear, Senate Narrowly Rejects Changes in Immigration Bill, N.Y. Times, May 24, 2007.

⁶⁶ For a list of police departments and other organizations that oppose efforts to involve state and local officials in immigration enforcement, see Proposals to Expand the Immigration Authority of State and Local Police: Dangerous Public Policy According to Law Enforcement, Governments, Opinion Leaders, and Communities, National Immigration Forum, Sept. 18, 2006, available at <http://www.immigrationforum.org/documents/thedebate/enforcementlocalpolice/clearhsequotes.pdf>.

⁶⁷ See *infra* note 143 and accompanying text.

⁶⁸ Gene Voeglin, Legislative Alert: IACP Announces Immigration Enforcement Policy, The Police Chief, Jan. 2005, available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=481&issue_id=12005.

While the Border Protection Act failed to pass in the Congress, the favorable response it received was a clarion call to immigrants' rights groups and those who believe such policies would seriously hinder police efforts to fight crime and prevent terrorism. Advocates should be prepared to fight against similar measures in upcoming terms as Congress continues to debate multiple aspects of immigration reform.

2. **Recent Federal Court Decisions Present an Unclear Picture of the Courts' Views on Local Police Authority in Immigration Enforcement.**

The civil/criminal distinction enunciated in past DOJ policy statements and in the *Gonzales* decision defined the permissible functions of state and local law enforcement in immigration regulation for more than 20 years.⁶⁹ However, as discussed above, *Gonzales* has been assailed on a number of fronts and, in light of recent developments, the decision's future may be in doubt. Not only has another circuit's subsequent judicial opinions indirectly called into question the *Gonzales* court's analysis and conclusions, but the recent proposed and actual changes in federal immigration law would override the civil/criminal distinction and involve local police in civil enforcement.

It is difficult to predict the direction the courts will take. In light of the 1996 amendments to the INA (discussed above) and the announced policy change at DOJ in 2002 (discussed below), judicial decisions could take two distinctly different, even diametrically opposite, tracks.

On the one hand, the recent amendments to the INA have complicated the federal regulatory scheme such that the courts could conclude that Congress has preempted the entire field of immigration authority and thus precluded the states from any role in immigration enforcement beyond those specifically provided for by existing federal law. On the other hand, those amendments may still leave room for courts to conclude that state and local officials have "inherent authority" in all aspects of immigration enforcement.⁷⁰ The few decisions from the federal courts in recent years evidence this tension and demonstrate the uncertainty of the direction the courts will ultimately take.

a. **Tenth Circuit Cases Support an Expanded Role for State and Local Authorities in Immigration Enforcement.**

In a series of rulings, the Tenth Circuit Court of Appeals (which covers Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming, plus the portions of Yellowstone National Park that extend into Idaho and Montana) has appeared to interpret federal law to permit a broad role for state and local authorities in immigration enforcement. Again, advocates should keep in mind that trends in various circuit courts, while instructive, are not binding on other circuits, and that the U.S. Supreme Court has not ruled on this issue, so it is far from settled.

In *United States v. Salinas-Calderon*,⁷¹ the Tenth Circuit concluded that a highway patrolman had probable cause to arrest the driver of a vehicle, after learning from a passenger (the driver's wife) that the individuals in the vehicle were undocumented. The appeal did not address preemption and the decision did not differentiate between civil and criminal INA violations. Nevertheless, some have argued that, because there was no reason to believe that the alien passengers had committed any criminal violations, the court's decision could be read to permit local authorities to enforce the civil provisions of the INA.⁷²

⁶⁹ As discussed below, there have been a handful of federal court rulings that have departed from *Gonzales*, though none has squarely taken issue with that decision's reasoning or expressly rejected the Ninth Circuit's conclusion that civil and criminal immigration provisions should be treated differently.

⁷⁰ That is the approach taken by the DOJ in its 2002 OLC memo.

⁷¹ 728 F.2d 1298 (10th Cir. 1984). (Appendix at Tab 14)

⁷² CLEAR Act Hearing, H.R. 2671 (Oct. 1, 2003) (testimony of Kris W. Kobach, Professor of Law, Univ. of Missouri-Kansas City), available at http://www.friendsjiv.org/Legislation/Immigration/CLEAR/Hearing_HR2671.pdf.



Where the Law Is and Where It Is Going: Cont'd

Fifteen years later, in *United States v. Vasquez-Alvarez*,⁷³ the Tenth Circuit addressed the authority of state officers to arrest for immigration violations where the arrest had been authorized by state law, but not by federal law. Oklahoma law authorized local officers to make arrests for federal offenses, including immigration violations. Section 1252c of the INA (discussed above), however, provided that where state law permitted, local officers could arrest an alien who was illegally present in the United States only if the officers first confirmed with the INS that the alien was previously convicted of a felony and previously had been deported. The officers arrested Vasquez-Alvarez for unauthorized presence (a civil INA provision), with no knowledge or confirmation of his previous felony conviction and deportation. The court of appeals nevertheless held that the arrest was valid. The court rejected Vasquez-Alvarez's preemption argument, concluding that nothing in § 1252c suggested that it was intended to limit state law.⁷⁴ Accordingly, the court held that the officers did not need specific authorization from a federal statute and the arrest was valid.

The court's language in *Vasquez-Alvarez* is troubling:

This court agrees that § 1252c did not authorize Vasquez's arrest. Nevertheless, we further conclude that § 1252c does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws. Instead, § 1252c merely creates an additional vehicle for the enforcement of federal immigration law.⁷⁵

This analysis and the Tenth Circuit's holding render § 1252c meaningless.⁷⁶ If state law always determines local authority to make immigration arrests, then the purpose of federal statutes that specify the circumstances for local enforcement becomes questionable. Indeed, if applied more widely, the *Vasquez-Alvarez* holding casts doubt on the effect of other INA provisions that grant specific authority to states.

Two years later, in *U.S. v. Santana-Garcia*,⁷⁷ the Tenth Circuit held that an officer had probable cause to arrest the defendants for a suspected violation of federal immigration law where, when stopped for a traffic violation, the passenger of the car admitted that he and the driver were not legally present in the United States. Following *Salinas-Calderon* and *Vasquez-Alvarez*, the Tenth Circuit reiterated that officers "'have the general authority to investigate and make arrests for violations of federal immigration laws,' and that federal law as currently written does nothing 'to displace . . . state or local authority to arrest individuals for violating federal immigration laws.'"⁷⁸ *Santana-Garcia*, like *Vasquez-Alvarez*, therefore suggests that state law can define the scope of state and local law enforcement's immigration authority except where Congress has expressly limited that authority.⁷⁹

These Tenth Circuit decisions can be read as a departure from *Gonzales* (Ninth Circuit) in two key respects: (i) the Tenth Circuit rulings do not recognize a civil/criminal distinction and appear to embrace broad state and local immigration authority, although it is notable that none of these rulings expressly consider this distinction; and (ii) the Tenth Circuit rulings reject the contention made in *Gonzales* that state law must affirmatively grant to local authorities the power to arrest for federal immigration violations. These decisions — particularly, the two most recent — would radically change the immigration law landscape by making state

⁷³ 176 F.3d 1294 (10th Cir. 1999). (Appendix at Tab 16)

⁷⁴ *The Vasquez-Alvarez court found further support for its holding in the recent amendments to the INA. The court stated, "we note that in the months following the enactment of § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws. . . . This collection of statutory provisions evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws."* *Id.* at 1300.

⁷⁵ *Id.* at 1295 (emphasis added).

⁷⁶ *The court even acknowledged this in its decision. See id.* at 1300 ("[I]t might be argued that this court's interpretation of § 1252c leaves the provision with no practical effect. That reason standing alone is not, however, sufficient for this court to manufacture a purpose for § 1252c by interpreting it to preempt state law.")

⁷⁷ 264 F.3d 1188 (10th Cir. 2001). (Appendix at Tab 15).

⁷⁸ *Id.* at 1193 (quoting *Vasquez-Alvarez*, 176 F.3d at 1296).

⁷⁹ See Lisa M. Seghetti, Stephen R. Vina, & Karma Ester, *Enforcing Immigration Law: The Role of State and Local Law Enforcement*, Congressional Research Service, March 11, 2004, at 12. (Appendix at Tab 32)

law on immigration enforcement controlling, absent a contrary statement from the federal government. In these respects, the Tenth Circuit decisions are worrisome and advocates should fight to establish better legal limits on state and local immigration enforcement authority.⁸⁰

The Tenth Circuit rulings suggest one direction federal courts could take in subsequent cases dealing with the role of state and local law enforcement in immigration enforcement. It is worth noting that in 2002 the DOJ announced a policy change (discussed below) that relied heavily on the direction of these Tenth Circuit cases. Given this DOJ policy change, states' "inherent authority" to enforce immigration laws is a plausible, and very troubling, judicial interpretation that we could observe in the future.

b. A Renewed Preemption Challenge Could Be Made in the Wake of the 1996 Amendments to the INA.

Even as the executive and legislative branches are taking steps to expand the role of state and local law enforcement in immigration, those very efforts may compel a finding by the federal courts that states are in fact preempted from the field of immigration enforcement. The 1996 amendments to the INA (discussed above) have undeniably complicated the federal regulatory scheme. It could now be argued, therefore, that the civil/criminal distinction from *Gonzales* should not survive because Congress has further complicated the criminal immigration laws and thereby preempted states from any activity in immigration enforcement.

In 2003, the Ninth Circuit acknowledged in *Mena v. City of Simi Valley* that the 1996 amendments to the INA granted authority to state and local law enforcement to enforce civil immigration law in limited specified circumstances.⁸¹ And, in 2002, the Third Circuit found that there is "uncertainty" about the authority of state and local law enforcement to enforce the immigration laws.⁸² However, it is important to bear in mind that neither of these rulings in any way



⁸⁰ In a recent, unpublished decision, the Tenth Circuit declined to reach the question of whether state troopers have inherent authority to enforce federal immigration laws; it upheld the conviction of an undocumented immigrant on other grounds. *U.S. v. Roblero-Mejia*, No. 06-8066, 2007 WL 576039 (10th Cir. Feb. 26, 2007). (Appendix at Tab 13) Because the decision is unpublished, and because it does not reach the inherent authority question, it has little value in predicting trends in the Tenth Circuit.

⁸¹ *Mena v. City of Simi Valley*, 332 F.3d 1255, 1265-66 & n.15 (9th Cir. 2003). (Appendix at Tab 6). The Ninth Circuit's decision in *Mena* was reversed by the Supreme Court in 2005. *Muebler v. Mena*, 544 U.S. 93 (2005). (Appendix at Tab 7). While the Supreme Court said nothing about the doctrine of preemption, it did reverse the Ninth Circuit's finding that *Mena's* rights were violated when authorities questioned her about her immigration status, finding that the questioning occurred during an otherwise lawful detention.

⁸² *Carrasca v. Pomeroy*, 313 F.3d 828, 837 (3d Cir. 2002) (vacating summary judgment in a § 1983 action challenging immigration arrest by New Jersey park ranger and stating that "[t]here is too much uncertainty on this record of the state of the law with respect to state rangers' authority to detain immigrants. . . to affirm the District Court's holding of qualified immunity on that ground"). (Appendix at Tab 2)



Where the Law Is and Where It Is Going: Cont'd

squarely addressed the question of Congressional intent to preempt the field of immigration enforcement or even the authority of state and local officials to enforce immigration laws.

c. **In the Spring of 2005, the Supreme Court Issued an Opinion Regarding Police Authority to Question Criminal Suspects about Their Immigration Status.**

While recent amendments to the federal immigration laws may have opened up new avenues for preemption challenges, the Supreme Court's decision in *Muebler v. Mena*⁸³ may signal the direction the Court will take when presented with challenges to local law enforcement's authority to enforce the immigration laws. Like those discussed above, this decision, while potentially troubling, may be a narrow ruling on the facts presented.

In *Muebler*, the Supreme Court reversed the Ninth Circuit's decision in *Mena v. City of Simi Valley* (discussed above), and held that Mena's Fourth Amendment rights were not violated by officers who held her in handcuffs for several hours during a search of the premises where she resided. The Court further held that the officers' questioning of Mena regarding her immigration status during that detention did not violate her Fourth Amendment rights.

Although the Court wrote that "[t]he officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status,"⁸⁴ this language cannot be read alone and must be considered in the context of the facts presented to the Court. The Court upheld Mena's detention during the search and concluded that the questioning regarding her immigration status was permissible during that detention. Because police questioning was not an independent "seizure" for Fourth Amendment purposes, and because the questioning was incident to a lawful detention and did not prolong that detention, the Court concluded the questioning was permissible.

The decision therefore does not stand for the proposition that officers may simply question civilians regarding their immigration status at any time without reasonable suspicion.⁸⁵ It is unknown how the Court would rule if presented with a case in which an individual's immigration status was questioned, absent a lawful detention for suspicion of violating other laws.

3. **Despite Legal Uncertainty in the Courts, the Department of Justice in 2002 Announced a New View that States Have "Inherent Authority" to Enforce Both Criminal and Civil Immigration Laws.**

In 2002, then-Attorney General John Ashcroft, in a series of press conferences and speeches, discussed the existence of an OLC memorandum – kept secret from the public until 2005 – that concluded that state and local officials have "inherent authority" to enforce both criminal and civil provisions of federal immigration law.⁸⁶

⁸³ 544 U.S. 93 (2005).

⁸⁴ *Id.* at 101.

⁸⁵ Recent cases from the Tenth Circuit buttress this interpretation. See *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1258 (10th Cir. 2006) (holding that as long as officer's questioning does not extend length of traffic detention, there is no Fourth Amendment issue regarding the content of the officer's questions) (Appendix at Tab 11); *United States v. Guerrero-Espinoza*, 462 F.3d 1302, 1308 n.6 (10th Cir. 2006) (finding that Mena did not permit a state trooper's questions unrelated to the stop, where the questioning "prolonged" the stop) (Appendix at Tab 12).

⁸⁶ Press Release, Attorney General's Prepared Remarks, U.S. Proposes Registration System for Selected Foreign Visitors: New Entry-Exit Procedures Aimed at Bolstering Security (June 5, 2002) (mentioning the memorandum, which was kept secret for three more years) (Appendix at Tab 52); see also Letter from Alberto Gonzalez, White House Counsel, to Migration Policy Institute, 7 *Bender's Immigration Bulletin* 965 (Aug. 1, 2002).

The concept of “inherent authority” to enforce civil immigration law was immediately controversial because it appears to encourage rather than limit state and local roles in enforcing federal immigration law. Furthermore, because civil immigration investigations do not necessarily afford the same level of Fourth Amendment protection as criminal investigations, the “inherent authority” approach would seem to dramatically expand the circumstances in which state and local police could apprehend persons for suspected immigration violations.⁸⁷

In the wake of a firestorm of negative response to the announced policy shift, the DOJ did not publicly reiterate the “inherent authority” view. For several years, immigrant advocacy groups and the ACLU sought access to the memo, but the DOJ refused to make the memo public. Finally, after a successful lawsuit under the Freedom of Information Act (FOIA), the district and appeals courts ordered the DOJ to release the memo and it was finally made public in September 2005.⁸⁸

The OLC memorandum contains three conclusions that, together, reflected a significant shift in DOJ immigration policy.⁸⁹

- First, the OLC concluded that states — by virtue of their status as sovereign entities — have authority to enforce all federal laws, including immigration laws, unless specifically preempted by Congress.
- Second, the OLC revisited and rejected the preemption analysis of its own 1996 memorandum (discussed above), in which the OLC had adopted the civil/criminal distinction embraced by the Ninth Circuit in *Gonzales*. The OLC found instead that “federal statutory law pose[s] no obstacle to the authority of state police to arrest aliens on the basis of civil deportability.” The OLC cited favorably to the Tenth Circuit decision, *United States v. Salinas-Calderon*,⁹⁰ which appeared to permit a state highway patrolman to make an arrest based solely on suspicion of a civil immigration violation.⁹¹
- Third, the OLC specifically addressed § 1252c of the INA, which, as discussed above, authorizes state and local law enforcement officials to arrest and detain an illegal alien who previously was convicted of a crime and who previously was deported or left the country after that conviction, provided that state law provides for such authority. The OLC memo concluded that despite the apparently narrow scope of § 1252c, it should not be read as a limit on states’ general authority to enforce all federal immigration laws. Rather, the OLC concluded, it merely provided one set of procedures by which states may enforce federal immigration laws. In its conclusion, the OLC relied on the Tenth Circuit’s explanation in *Vasquez-Alvarez* that § 1252c “merely creates an additional vehicle for the enforcement” of federal immigration law by the states.⁹²

⁸⁷ Arrests for criminal violations require that the officer has “probable cause” to make the arrest. If state and local police can arrest individuals based on a civil deportation order or a listing in the NCIC database, such arrests seem likely to be based on evidence that falls far short of the “probable cause” standard.

⁸⁸ *Nat’l Council of La Raza v. Dep’t of Justice*, No. 04-5474-CV (2d Cir. May 31, 2005) (affirming district court’s order releasing the OLC memorandum). (Appendix at Tab 9)

⁸⁹ Memorandum from Jay S. Bylee, Assistant Attorney General, U.S. Department of Justice Office of Legal Counsel to John Ashcroft, Attorney General, U.S. Department of Justice, “Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations,” at 5 (Apr. 3, 2002). (Appendix at Tab 23)

⁹⁰ 728 F.2d 1298 (10th Cir. 1984). (Appendix at Tab 14)

⁹¹ *Id.* *Gonzales* and *Salinas-Calderon* are both discussed in detail above.

⁹² The OLC proffered two reasons why this interpretation does not render § 1252c meaningless. First, according to the OLC, § 1252c serves a largely prophylactic, prospective function in that it would act to ensure states some minimal authority in the enforcement of immigration laws, even were a court to wrongly conclude that the federal government had fully preempted the field of immigration. Second, the memorandum opined that state police “could” have “reasons” to operate pursuant to § 1252c rather than their purportedly inherent authority, such as to promote cooperation with the federal immigration authorities. These reasons are similar to those advanced by the court in *Vasquez-Alvarez*, which was discussed earlier in this briefing book.



Where the Law Is and Where It Is Going: Cont'd

The OLC's analysis has many flaws. Most notably, in reaching all three conclusions, the OLC relied heavily on a 1928 non-immigration law decision from the Second Circuit, *Marsh v. United States*,⁹³ in which the court held that a state trooper, by virtue of state law, had authority to make an arrest for a federal misdemeanor (a violation of the National Prohibition Laws). However, in relying on *Marsh*, the OLC glossed over significant considerations underpinning the Second Circuit's decision. The outcome in *Marsh* was driven largely by the idea that it is in a state's interest to arrest criminals within its borders and, therefore, there was no basis for treating federal misdemeanors differently from federal felonies. Moreover, the court expressly relied on the fact that New York law permitted local police to make arrests for misdemeanors committed in an officer's presence. Indeed, the court cited with approval a Texas ruling overturning an arrest for a federal misdemeanor that had not been committed in the presence of the arresting officer.⁹⁴

Nonetheless, the OLC extrapolated from the narrow holding in *Marsh*, made in the context of federal criminal law, to conclude that states have general authority to enforce all manner of other federal laws, including civil law such as immigration, and without regard to the preemption issue. In doing so, the OLC failed to take into account that states and localities may have quite different interests when it comes to enforcing civil immigration laws versus criminal laws. As discussed above, many cities and counties have determined that effective law enforcement is more likely to result where community relations are strong and positive than where immigration enforcement is emphasized.

The OLC also ignored that *Marsh* largely turned on the particular circumstances of the Prohibition laws. The Second Circuit specifically noted that the Eighteenth Amendment gave concurrent jurisdiction to the states, and that "[t]he purpose of such a system was to secure obedience as far as possible, [thus] it cannot be supposed that, within a state which has no independent system of her own, such co-operation as she does extend must be rejected."⁹⁵ There is no similar constitutional grant of jurisdiction to the states over immigration matters. Thus, the OLC's heavy reliance on *Marsh* is misplaced and unpersuasive.



⁹³ 29 F.2d 172 (2d Cir. 1928).

⁹⁴ *Id.* at 174 (citing *Ex parte Jones*, 208 S.W. 525 (Tex. Crim. 1919)) (noting that "[i]n the absence of any state law authorizing such an arrest, it is hard to see how it could be upheld, and it was not").

⁹⁵ *Id.*

A number of additional arguments can be made in opposition to the OLC's 2002 memo. These have been well summarized by the ACLU in a memorandum released shortly after its successful FOIA lawsuit.⁹⁶ Some of the arguments highlighted by the ACLU include:

- In claiming that states' status as sovereign entities enables them to enforce civil provisions of federal immigration laws, the OLC memorandum relied on cases that address states' ability to enforce federal criminal laws — such as Marsh and the line of Tenth Circuit cases discussed above. However, none of these cases clearly addresses civil violations. As a result, they are arguably inapposite as sources of authority to support the OLC's position regarding state authority to enforce civil immigration laws.
- The OLC fails even to mention numerous sections of the INA that provide states with authority in immigration matters only in limited circumstances. For example, the OLC does not mention the MOU provision, § 1357(g), which sets forth specific procedures before state and local officers can be certified to assist with immigration enforcement. These sections of the INA suggest Congress intended to preclude state involvement except where specifically authorized — directly contrary to the OLC's "inherent authority" position.
- In asserting that § 1252c does not preempt state authority, the OLC's analysis essentially deprived the statute of any meaning. The purpose of the statute, as indicated by its title, is to authorize law enforcement to arrest and detain a particular category of illegal aliens, and yet the OLC's memo concludes that state and local police have that authority without the statute. The text of § 1252c offers little support for the OLC's interpretation. Furthermore, the memorandum ignored legislative history that demonstrates that Congress passed § 1252c in response to the concern that federal law does preempt immigration enforcement by state and local police.
- The OLC's "inherent authority" approach is so sweeping it could lead to absurd results. The OLC's stance that state and local police can arrest individuals for any civil federal law violation would apparently permit state and local police to arrest individuals for violations in other areas subject to federal regulation, such as taxation.

As discussed above, the current state of the law on local enforcement authority falls far short of supporting the OLC memorandum's bold claims. Nevertheless, it appears that DHS has relied — and will continue to rely — on the advice proffered in that memo to formulate policies that enable local authorities to arrest immigrants for civil violations of the federal immigration laws.

C. Current Homeland Security Policies and State and Local Activity Indicate a Trend Toward Expanded State and Local Involvement in Immigration Enforcement and Increasing Opposition to Such Policies.

In the following sections, we describe a number of new policies and procedures in the Departments of Justice and Homeland Security that appear to signal a new level of coordination between federal and state governments in immigration enforcement. We also describe a concurrent trend toward increasing opposition to such policies, voiced by state and local governments, police departments, and others.

⁹⁶ *Memorandum from ACLU Immigrants' Rights Project, Refutation of Department of Justice Immigration Memo (Sept. 6, 2005)*, available at <http://www.aclu.org/FilesPDFs/ACF3189.pdf>. (Appendix at Tab 28)

Where the Law Is and Where It Is Going: Cont'd

1. The Expansion of the NCIC Database Has Prompted Increased Arrests for Civil Immigration Violations.

One cooperative effort between the federal and state governments in the area of immigration enforcement is information sharing; a variety of informal federal-state information sharing programs have been established in recent years. The most important example of such an information sharing program is the Law Enforcement Support Center (LESC) that is operated by ICE and provides local and state law enforcement agencies with information on identity and immigration status for aliens suspected, arrested, or convicted of criminal activity. The LESL contains information gathered from various databases, the National Crime Information Center (NCIC), the Interstate Identification Index, and other state criminal history indices.

The NCIC database, which is a computerized database of documented criminal justice information, is the most important component of the LESL from an immigrant's standpoint because it is the resource most often used by police during an encounter. The NCIC database is available to almost all law enforcement agencies twenty-four hours a day and can be easily accessed by police, even during routine traffic stops. The NCIC database includes twelve to sixteen "subfiles" of information on a range of criminal activity, such as criminal warrants for state and federal crimes or missing persons.⁹⁷

With respect to immigration information, until August 2003, the NCIC database included only persons who had been deported from the United States. Before August 2003, if the police stopped or arrested a person and wanted to run a search on that person's immigration status, the only information that the police could discover through the NCIC was whether the stopped person had committed the specific felony of re-entry after deportation.⁹⁸

In August 2003, then-Attorney General John Ashcroft announced that additional categories of people who had committed certain civil immigration violations would be added to the NCIC database. That change enabled law enforcement agencies with access to the database, including agencies at the state and local levels, to identify people with civil immigration violations. The federal government has since added thousands of names to the NCIC database in cases where the persons are believed to be either "absconders," meaning they have outstanding removal orders, or where they are considered to be in violation of certain fingerprinting and registration requirements of the National Security Entry-Exit Registration System (NSEERS).

This expansion of the NCIC database poses a threat to immigrants and public safety for several reasons. First, the addition of civil immigration information expands state and local police's ability to access information on and make arrests for civil immigration violations. (Neither removal orders nor violations of the NSEERS program are crimes.) Furthermore, if the police run a name through the NCIC database and find that an individual is listed in either the absconders or the NSEERS "subfile," the government is not automatically entitled to a criminal warrant for that person's arrest. The government often can obtain a warrant in those circumstances, but it must request one. Nevertheless, it often appears that the police are making arrests in cases where there is a match in the NCIC database, without the actual criminal warrant. Accordingly, many police officers around the country may be acting outside the scope of their authority. A recent statement by the Immigration Committee of the Major Cities Chiefs Association states that "[t]he inclusion of civil detainees on the system has created confusion for local police agencies and subjected them to possible liability for exceeding their authority by arresting a person upon the basis of a mere civil detainee."⁹⁹ The statement recommends that civil detailers be removed from the NCIC database.¹⁰⁰

⁹⁷ The statute governing the NCIC appears at 28 U.S.C. § 534. (Appendix at Tab 21)

⁹⁸ For a more detailed description of the NCIC database, and arguments critical of the use and expansion of the NCIC database, see Michael J. Wisniew, *22nd Annual Edward V. Sparer Symposium: Terrorism and the Constitution: Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws*, 6 U. Pa. J. Const. L. 1084 (2004). (Appendix at Tab 34)

⁹⁹ M.C.C. *Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies*, June 2006, at 10, available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf. (Appendix at Tab 48)

¹⁰⁰ *Id.*

Second, use of the NCIC database thus far indicates that it is prone to abuse and misunderstanding. The lack of training and clarity on the appropriate use of the NCIC database by local law enforcement has aggravated the problem. For instance, advocates around the country have heard reports of immigrants being stopped and checked on the NCIC database without any probable cause or other stated reason. At least one immigrant in the California Bay Area was checked on the NCIC database after approaching the police to assist her with the enforcement of a protective order.¹⁰¹

Third, the data available on the NCIC database is not reliable. In December 2005, the Migration Policy Institute published a report that examined the use of NCIC immigration records by local law enforcement from 2002 to 2004.¹⁰² The group found that 42% of all NCIC immigration hits in response to policy inquiry were “false positives” because DHS was unable to confirm that there was an actual immigration violation. As a result of the reliance on the data in the NCIC database, local police are diverting time, attention, and resources from public safety priorities.

Fourth, the NSEERS category is defined in such a way that the majority of names in the database are Arab and Muslim men. As Prof. Michael Wishnie has stated, “a request that local police arrest ‘NSEERS violators’ is tantamount to a request to arrest Arab and Muslim men.”¹⁰³

Use of the NCIC database is likely to affect police practices across the country and represents a significant departure from past practices in federal-state information sharing.

2. Faced with Growing Political Pressure, Additional States and Localities Are Likely to Consider Entering into MOUs.

As discussed above, in 1996 the INA was amended to include, among other things, Section 287(g), which authorizes DHS to enter into MOUs with state and local law enforcement agencies to deputize and train local law enforcement officers to enforce federal immigration laws, civil and criminal alike.¹⁰⁴ To exercise the authority granted in the MOU, designated officers in the localities must be certified by participating in a 287(g) training program offered by ICE. Before 9/11, the federal government sought to establish such agreements with a number of states and cities, but no MOUs resulted from those negotiations. In the post-9/11 world, with immigration and national security issues dominating the headlines and influencing voters at the ballot box, the federal government has successfully negotiated several MOUs.¹⁰⁵

Thus far there is limited data available about how MOUs are being received and are affecting the communities in which they operate. There have been both reported successes and serious problems related to 287(g) programs under the existing MOUs. Those reporting successes suggest that communities view MOUs as a possible solution and will encourage their local law enforcement agencies to seek to enter into MOUs with the federal government. In July 2005, Paul M. Kilcoyne, the Deputy Assistant Director of DHS, testified before the House Homeland Security Committee on Management, Integration, and Oversight. During his testimony, Mr. Kilcoyne described MOUs as a force multiplier for ICE.¹⁰⁶

¹⁰¹ Telephone interview with Anita Sinha, National Immigration Law Center, in Oakland, Cal. (Mar. 31, 2005).

¹⁰² Hannah Gladstein, Annie Lai, Jennifer Wagner & Michael Wishnie, *Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002-2004* (Dec. 2005). (Appendix at Tab 46)

¹⁰³ Wishnie, *supra* note 98, at 1102.

¹⁰⁴ ICE, *Fact Sheets: Delegation of Immigration Authority: Section 287(g) Immigration and Nationality Act*, available at <http://www.ice.gov/pi/news/factsheets/070323dc287gfactsheet.htm>.

¹⁰⁵ As of March 23, 2007, ICE reported that there were twelve existing MOUs and 214 officers trained. *Id.*

¹⁰⁶ *287(g) Program: Ensuring the Integrity of America's Border Security System through Federal-State Partnerships Before House Homeland Security Committee on Management, Integration, and Oversight, 109th Cong. (2005) (statement of Paul M. Kilcoyne, Deputy Assistant Dir., U.S. Dep't of Homeland Security)* available at <http://www.ice.gov/doclib/pi/news/testimonies/050727kilcoyne.pdf>.



Where the Law Is and Where It Is Going: Cont'd

As an example, he explained that 62 officers had been trained under the Florida MOU and the state's task forces had conducted over 170 investigative cases. More recently, the Arizona Department of Corrections cited the relief to taxpayers as a benefit of their program.¹⁰⁷ The news release reported that since the program began in December 2005, the state had saved almost \$3 million and 53,135 bed days. In addition, the media has reported information about the perceived successes in other localities with MOUs, including since 2003, more than 218 immigration-related arrests have occurred in Alabama; in a five month period, almost 700 inmates in Riverside County, California were marked for deportation hearings; and in 8 months, the Charlotte, North Carolina jail referred almost 1200 people arrested for other crimes for deportation.¹⁰⁸

Despite these claimed successes, there are local law enforcement groups that have decided not to enter into MOUs with DHS. For example, in the fall of 2006, Irving, Texas law enforcement officials announced they would not be seeking to join the federal initiative to train local law enforcement to enforce federal immigration laws. Police Chief Larry Boyd explained that municipalities do not normally enforce federal law and he stated they “have significant tools in hand today that allow us to deal with that issue without us having to go down the road of enforcing federal laws and taking on that burden.”¹⁰⁹ Although recognizing that the program has assisted Mecklenburg County to issue hundreds of orders for deportation and/or give notices to appear in immigration court, the county has also reported drawbacks, such as “holding more people in its jail and [having] to hire more employees to replace those who underwent . . . training and are dedicated to immigration activities.”¹¹⁰

Advocates for immigrants should understand that, while an MOU may place immigrants at greater risk because of possible improper enforcement of the immigration laws, increased racial profiling, and selective enforcement of the laws, an MOU is an agreement. Therefore, the scope and terms of an MOU may be negotiated. As such, there is an opportunity for advocates to ensure that MOUs protect civil rights as much as possible, by insisting on provisions for training of participating officers, for filing complaints, and for obtaining redress where the laws are improperly applied.

In the past four years, local law enforcement agencies in Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Massachusetts, New Hampshire, North Carolina, Oklahoma, Tennessee, and Virginia have entered into MOUs with DHS. The specifics of the MOUs differ, but the overarching purpose and effect of each is the same — to increase state or local law enforcement's role in immigration enforcement.

Florida's MOU. The Florida MOU was the first MOU entered into between a state and DOJ.¹¹¹ It was signed in mid-2002 and was effective for one year. It was renewed in November 2003, though with significant changes to its purpose and its scope.

The first Florida MOU's stated intent was to “address the counter-terrorism and domestic security needs of the nation and the State of Florida by enhancing those efforts through the authorization of selected state and local law enforcement officers . . . to perform certain functions of an immigration officer.” Notwithstanding this stated limitation on scope, the MOU granted to the participating officers broad authority, including the authority to: (1) interrogate an alien to determine if there is probable cause for an immigration arrest; (2) complete required arrest reports and forms; (3) prepare affidavits and take sworn statements; (4) transport aliens; (5) assist in pre-trial and post-arrest case processing of aliens taken into custody by ICE; and (6) detain arrested aliens in ICE-approved detention facilities.

¹⁰⁷ News Release, Arizona Dep't of Corrections, *Ice Program Nets More than 2.9M Savings (July 12, 2006)* available at http://www.azcorrections.gov/News/2006/ice_program_nets_071206.html.

¹⁰⁸ John Keilman, *To Serve, Protect, Perhaps Deport: Suburb Cops Could Act as Immigration Agents*, *Chi. Tribune*, Jan. 15, 2007, at 1.

¹⁰⁹ Eric Aasen, *Irving Won't Join U.S. Program to Process, Hold Illegal Migrants: Officials Say It's Not Up To Police to Enforce Federal Law*, *Dallas Morning News*, Oct. 12, 2006, at 1B.

¹¹⁰ Eric Aasen, *Illegal Immigrant Program Taking Off: U.S. Training Gives Local Officers Authority to Process Detainees Faster*, *Dallas Morning News*, Oct. 7, 2006.

¹¹¹ See Florida MOU at 1. (Appendix at Tab 24)

This first MOU was significantly scaled back from what was initially proposed, however. The initial proposal was to deputize all 40,000 Florida police. What was agreed upon instead was to certify/deputize a total of 35 officers.

When the Florida MOU was renewed in late 2003, two significant changes were made to the agreement. First, the language regarding the program's scope was changed: the reference to counter-terrorism was eliminated and the focus expanded to encompass domestic security generally. Second, a significant addition was made to the list of functions that officers are permitted to perform pursuant to the MOU: "arrest without warrant for civil and criminal immigration violations."¹¹² The second Florida MOU is of indefinite term; it will remain in force until it is terminated by one of the parties.

Alabama's MOU. Unlike either of the two Florida MOUs, the stated purpose of the Alabama MOU in 2003 was more simple and more directly a delegation of broad immigration authority. The Alabama MOU authorizes "selected troopers to perform certain functions of an ICE officer." The Alabama MOU grants participating officers the same authorities as the second Florida MOU, thus the Alabama officers have the authority to "arrest without warrant for civil and criminal immigration violations." Senator Jeff Sessions (R-Alabama) made clear that the officers participating in the Alabama program would have broad immigration enforcement authority: "There are many immigrants in Alabama who are here legally, and they deserve protection . . . This law is simply designed to say 'if your time is up, then it's time to go home, and if you are here illegally in the first place, you must pay the penalty.'"¹¹³

Los Angeles County's MOU. The stated purpose of the Los Angeles MOU, by contrast, is quite limited.¹¹⁴ And, the participating officers' authority is similarly circumscribed. The Los Angeles MOU was entered into to "allow Los Angeles County Sheriff's Department to perform certain immigration enforcement functions, namely, conduct interviews of foreign-born inmates in the Los Angeles County Jail." The jurisdiction of participating officers is limited to the Los Angeles County jail facilities.¹¹⁵ There is no reference in the MOU to authority to arrest for any immigration violations under any circumstances (neither by the participating Sheriff's Department officers nor by any other entity, including the Los Angeles Police Department). Many of the more recent MOUs entered into by local agencies have followed the Los Angeles County model, limiting officers to checking the status of individuals arrested in those jurisdictions. A common theme used to justify these MOUs is that law enforcement is focused only on those individuals who commit crimes, not individuals walking down the street. (Of course, since the status of these individuals is checked immediately after arrest, they have not yet been convicted of a crime.)

Accordingly, the Los Angeles MOU has another provision not found in the Florida or Alabama MOUs. The Los Angeles MOU provides: "As part of its commitment to the communities it serves, [Los Angeles Sheriff's Department] may, at its discretion, communicate the intent, focus, and purpose of this project to organizations and groups expressing an interest in the law enforcement activities to be engaged in under this MOU."¹¹⁶

The differences among these three MOUs demonstrate the broad latitude available to the negotiating parties in tailoring an agreement for a specific locality. Advocacy groups should recognize the importance of their input into the negotiating process and organize to effectively lobby for protective policies. The negotiation phase presents advocacy groups an opportunity to convince lawmakers to put into place, at the outset, safeguards, such as stringent training requirements, limited grants of enforcement authority, meaningful community relations programs, and protective complaint procedures. The Los Angeles MOU is particularly instructive in its limited scope and its recognition of the need to communicate with the public about the program.

¹¹² *This grant of authority, pursuant to a lawfully negotiated and executed MOU, wipes out the civil/criminal distinction that previously limited the scope of state and local law enforcement's immigration enforcement authority.*

¹¹³ *Bill Barrow & Brendan Kirby, Troopers and INS Announce Joint Effort on Illegal Aliens, Mobile Register, Feb. 21, 2003, at 1B. (Appendix at Tab 118)*

¹¹⁴ *See Los Angeles County MOU. (Appendix at Tab 26)*

¹¹⁵ *Id. at 1 ("The exercise of immigration enforcement authority . . . shall occur only as provided in this MOU and shall be limited to activities at Los Angeles County jail facilities.")*

¹¹⁶ *Id. at 2.*



Where the Law Is and Where It Is Going: Cont'd

3. Some States Are Addressing Local Immigration Issues by Passing State Legislation.

With increasing pressure from their constituents, some state legislators are introducing bills and resolutions to address immigration issues, including the use of local law enforcement to enforce federal immigration laws. Between January and April 2007, at least 129 bills had been introduced in 30 states that specifically addressed local law enforcement.¹¹⁷ Many of these proposals authorized the state law enforcement agencies to cooperate with federal immigration officials by entering into an MOU.¹¹⁸ Others legislatures, however, have proposed laws restricting local law enforcement from assisting in the enforcement of federal immigration laws.¹¹⁹ In signing a bill into law in May 2007 that included a provision permitting local police officers to enforce federal immigration laws, Oklahoma Governor Brad Henry stated that “[w]hile some will undoubtedly claim this state legislation is a landmark step forward, the truth of the matter is we will not effectively address immigration reform until the federal government acts.”¹²⁰ Despite Governor Henry’s belief in the primacy of federal legislation, these state laws may be opening the doors to abusive practices by local law enforcement.

For example, on April 17, 2006, Governor Sonny Perdue signed Georgia’s Security and Immigration Compliance Act (commonly known as “Senate Bill 529”) into law. That bill, which went into effect on July 1, 2007, authorizes the state to negotiate and enter into an MOU with the federal government and requires officers to determine the nationality of anyone confined for a felony or DUI charge. Opponents of the law argue that its law enforcement provisions are an avenue for abuse.¹²¹ Lending credence to this view, in April 2007, local news articles reported that Glynn County Sheriff Wayne Bennett fired a communications officer and suspended two supervisors after a female tourist from Ottawa, Canada was detained for about 10 hours. Although the woman was stopped for minor traffic violations, she was taken into custody pending an immigration check and payment of a bond. The Sheriff explained it was standard procedure to take a foreign national into custody for traffic violations until a bond is paid.¹²² Further, he had directed his staff to run the names of all non-U.S. citizens through LESC, regardless of the offense, to determine if there are any outstanding warrants for immigration violations.¹²³ The Sheriff explained that the woman’s detention lasted longer than it should have because the officer failed to see the response from LESC that there were no outstanding warrants for her arrest.¹²⁴ The Sheriff stated the procedure of checking immigration status was not related to Senate Bill 529 and explained, “[o]ur policy is sound; it just wasn’t followed properly.”¹²⁵ This account, and others around the nation, exemplify the potential abuses that are likely to result if local law enforcement is asked to enforce federal immigration laws.

4. Even Without Entering into MOUs, Many State and Local Authorities Appear to Be Taking a More Aggressive Stance Regarding Their Role in Immigration Enforcement.

Short of entering into MOUs, some states have passed laws, adopted informal policies, or simply taken action to involve local police in immigration matters. Meanwhile, some cities and towns have adopted, or tried to adopt, ordinances that penalize businesses and landlords that contract with undocumented immigrants.

¹¹⁷ See *supra* note 9, at 1.

¹¹⁸ See, e.g., H.B. 2370, 2007/2008 Leg., 2007 Session (Kan., 2007); H.B. 1804, 51st Leg., 1st Sess. (Okla., 2007); S.B. 392, 117th Leg., 1st Sess. (S.C., 2007); S.B. 1604, 105th Gen. Assemb. (Tenn., 2007); C.S.H.B. 13, 80th Leg., Regular Sess. (Tex. 2007); H.B. 1618, 2007 Regular Sess. (Va., 2007).

¹¹⁹ See, e.g., H.B. 404-Local, 2007 Sess. (N.H., 2007); A. 5404, 2007-2008 Reg. Sess. (N.Y., 2007).

¹²⁰ Janice Fancis-Smith, “Immigration Reforms Signed Into Law by Oklahoma Governor,” *J. Rec.*, May 9, 2007.

¹²¹ Brian Fegans, “Glynn Officers Punished Over Jailed Canadian,” *Atlanta J.-Const.*, Apr. 18, 2007.

¹²² Jerry Gonzalez, “Canadian’s Arrest Shows Law’s Fallout: Governor Perdue Must Investigate and Issue Guidelines,” *Atlanta J.-Const.*, Apr. 16, 2007.

¹²³ Andrew Seymour, “Georgia Jailer Fired Over Ottawa Woman’s Ordeal: Two Others Suspended; Sheriff Says Situation Should Have Been Quickly Resolved,” *Ottawa Citizen*, Apr. 17, 2007.

¹²⁴ *Id.*

¹²⁵ See Fegans, *supra* note 121.

For example, there are indications that the state and local police in Virginia have been arresting suspected illegal aliens based on no more than a suspicion that they are in the country illegally. Unauthorized presence is a civil provision, not traditionally a permissible area for state and local involvement, and the state has no MOU in place. The only state authority cited for the action is the state's recently-passed law under 8 U.S.C. § 1252c, which, as discussed above, is intended merely to authorize state and local police to arrest aliens who were previously convicted of a crime, were deported, and illegally re-entered the country. In late 2004, immigrant community representatives became concerned that the new law was being used to harass legal immigrants who congregated in public places.¹²⁶ More recently, advocates on the other side of the issue have lamented that the law gives the local police "no authority to detain someone solely for being in the country illegally," even while acknowledging that the police were doing so anyway and attempting to hand such persons over to ICE.¹²⁷ Some localities have stated that they will engage in local police enforcement of immigration based on a person having committed any type of violation, even a misdemeanor. The police will use the standard of "probable cause" when deciding whether to inquire into a person's legal status in the U.S.¹²⁸

Similarly, in New Hampshire, local officers used local trespassing laws – equating illegal presence with trespassing – as the basis for charging and taking into custody undocumented immigrants. In one instance the individuals had pulled to the side of the road to change a tire; in another the motorist was pulled over for a broken taillight. A New Hampshire district court ruled the charges unconstitutional for being in violation of the Supremacy Clause.

In 2006 and early 2007, a wave of cities and towns passed anti-immigrant ordinances that explicitly prohibited businesspersons from hiring, and landlords from renting to, undocumented immigrants. Immigrants' rights advocates argue that, like police enforcement of immigration law, the ordinances violate the Constitution by usurping federal authority.¹²⁹ These anti-immigrant ordinances started in San Bernardino, California, where a proposed "Illegal Immigration Relief Act" would have denied city permits and contracts to businesses that employed undocumented workers and imposed monetary fines on such businesses. The Act was narrowly defeated in the San Bernardino City Council, and proponents of a ballot initiative seeking to pass a similar law failed to gather enough signatures. However, San Bernardino's ill-fated proposal appears to have inspired towns across the nation to adopt similar proposals.



¹²⁶ See Jon Ward, "Arrests Not Linked to Illegals Crackdown," *The Wash. Times*, Oct. 29, 2004 at B-01. (Appendix at Tab 99)

¹²⁷ Editorials, *The Feds' Turn-Em-Loose Policy*, *Wash. Times*, Apr. 15, 2005. Indeed, the criminal alien "problem" is very often cited by advocates of increased state and local involvement. See, e.g., Transcript, Lou Dobbs Tonight, Mar. 16, 2005, available at <http://transcripts.cnn.com/TRANSCRIPTS/050316/ldt.01.html> (Bill Tucker report).

¹²⁸ See Theresa Vargas, "Police Have Plan For Scrutinizing More Immigrants: Minor Crimes to Trigger Status Checks," *Washington Post*, Sept. 15, 2007 at B-05.

¹²⁹ See, e.g., Mexican American Legal Defense and Education Fund (MALDEF) "Legal and Policy Analysis: Local Illegal Immigration Relief Act Ordinances," available at <http://www.maldef.org/publications/pdf/LEGAL%20AND%20POLICY%20ANALYSIS.pdf> (Appendix at Tab 38); ACLU, "Local Anti-Immigration Ordinance Cases," available at <http://www.aclu.org/immigrants/discrim/27848res20070105.html> (Appendix at Tab 39).



Where the Law Is and Where It Is Going: Cont'd

The American Civil Liberties Union estimated in January 2007 that, since July 2006, 86 localities have proposed similar ordinances, 26 of which have passed.¹³⁰ In March 2007, a coalition of attorneys and groups mounted a federal court challenge to anti-immigration ordinances passed by the city of Hazleton, Pennsylvania. The ordinances, which were originally set to go into effect in November 2007, would have imposed fines on landlords who rented to undocumented immigrants and denied business permits to companies that hired them. On July 26, 2007, U.S. District Judge James M. Munley ruled that the Hazleton ordinance would violate due process rights guaranteed in the Fourteenth Amendment and conflicted with federal law. The ordinance, considered a test case by all sides, galvanized immigrant and Latino community members to organize against what they considered an “anti-immigrant” ordinance. But the fight also came at a cost. Many immigrants fled the area amidst the controversy and dozens of immigrant- and Latino-owned businesses were hobbled by the exodus of customers.

In August, the City of Hazleton filed an appeal with the 3rd Circuit Court of Appeals in Philadelphia. In the interim, Hazleton’s insurance carrier sued the city, stating it was liable for more than \$2 million in legal bills stemming from the lawsuit. In federal civil rights cases, the prevailing plaintiffs can ask the judge to force the defendant to pay for their legal fees.

In another recent Missouri state case, a judge struck down a similar ordinance on the grounds that it conflicted with state law.¹³¹

5. Local Authorities Are Also Facing the Ramifications of Increased Federal Enforcement.

Since DHS unveiled its new interior enforcement strategy in April 2006, ICE has increased its enforcement efforts and, as a result, local authorities are facing challenges in their communities. In the last year, ICE has increased the number of Fugitive Operation Teams from 18 to 52, and seeks to expand the program to 75 teams by the end of 2007.¹³² Between June 2006 and March 2007, Fugitive Operation Teams arrested 18,000 people as part of their “Operation Return to Sender” initiative. After the sweeps, numerous local media reported that agents “illegally entered and searched residences, mis-identified themselves as members of local police forces, racially profiled individuals to conduct their searches and committed acts of abusive treatment.”¹³³ Such reports have confirmed the fears of immigrants’ rights groups that such raids would be conducted in an illegal manner. In particular, reports that federal authorities masqueraded as local police have caused confusion and increased tension between communities and their local police forces.

Immigration sweeps have varied in the size of the targeted group of individuals. In December 2006, ICE authorities simultaneously raided six meatpacking plants across the country. Although ICE had warrants for only 170 individuals, it ultimately detained 1,297 suspected undocumented workers.¹³⁴ Smaller-scale raids have occurred not only in businesses, but also in residences and even vehicles. For instance, in September 2006, ICE conducted a raid at a poultry plant in Stillmore, Georgia. In this raid, the ICE

¹³⁰ ACLU, “Local Anti-Immigrant Ordinance Cases,” available at <http://www.aclu.org/immigrants/discrim/27848res20070105.html>.

¹³¹ *Reynolds v. City of Valley Park, Mo.*, No. 06-CC-3802 (Mo. Cir. Ct., St. Louis County, Mar. 12, 2007). (Appendix at Tab 10) In *Reynolds*, the judge held that (1) provisions penalizing landlords who did not evict tenants within five days of finding they were undocumented conflicted with a state statute requiring tenants-at-will to be given 30 days notice of termination of the lease; (2) provisions imposing fines of at least \$500 on businesses employing undocumented workers conflicted with a state statute allowing ordinances to levy fines of no more than \$500; and (3) provisions under which business owners employing undocumented immigrants would lose business permits were unauthorized by governing state statutes.

¹³² U.S. Immigration and Customs Enforcement, National Fugitive Operations Program, <http://www.ice.gov/partners/dro/nfop.htm> (last visited Apr. 12, 2007).

¹³³ Michael Manekin, *Immigrant Sweeps Rouse ACLU: Fears are that Racial Profiling May Have Been Used in Mass Arrests on Peninsula*, San Mateo County Times, InsideBayArea.com, Mar. 7, 2007. (Appendix at Tab 61)

¹³⁴ See, e.g., Julia Preston, *U.S. Raids Six Meatpacking Plants in ID Case*, N.Y. Times, Dec. 13, 2006; N.C. Aizenman, *Pleading to Stay a Family: Raids on Illegal Immigrants Have Their U.S.-Born Children Fearing Separation – and Some Are Lobbying Capitol Hill*, Wash. Post, Apr. 2, 2007, at A01. The raids occurred at Swift & Co. meatpacking plants in Hyrum, Utah; Greeley, Colo.; Cactus, Tex; Grand Island, Neb.; Marshalltown, Iowa; and Worthington, Minn. The vast majority of detained immigrants are charged with immigration violations, rather than with identity theft.

loaded 120 undocumented immigrants onto buses bound for immigration courts in Atlanta, leaving the Stillmore community as a “ghost town.”¹³⁵ As an additional example, in February 2007, ICE officials stopped a Pentecostal preacher’s church-bound van in Schuyler, Nebraska, and demanded proof of residency from each passenger.¹³⁶

Although the meatpacking-plant raids and those such as the ones in Stillmore and Schuyler were carried out by ICE officers, a number of local police departments have had to cooperate with federal authorities by providing, at a minimum, traffic and crowd control.¹³⁷ Local authorities have expressed concerns that the ICE raids are creating tension between their departments and the citizens they protect. Indeed, local law enforcement departments have felt compelled to assure their communities that they are not involved in the raids. For instance, in the aftermath of the meatpacking-plant raids, police officials told a newspaper reporter that police involvement in the raids would jeopardize the trust, communication, and cooperation required for crime prevention and community policing.¹³⁸

In addition, local authorities are left to deal with the humanitarian ramifications of these raids, such as caring for children whose parents are detained during the raids. For example, a March 2007 ICE raid on a leather goods factory in New Bedford, Massachusetts, has drawn strong criticism from state and local officials in Massachusetts.¹³⁹ That raid detained 361 workers, most of them young and middle-aged Latina women. Many of the captured workers were immediately flown from Massachusetts to a Texas detention facility, before social workers had an opportunity to inquire about the workers’ childcare needs. Consequently, many children of those workers were left with inadequate care. For instance, two infants were hospitalized for dehydration after their nursing mothers were taken away.¹⁴⁰

6. At the Same Time, Many State and Local Authorities, Governments, and Others Are Beginning to Take a Public Stand Against Such Policies.

While some policies and activity appear to be moving toward increased police involvement in immigration enforcement, there has also been increasing opposition to such policies and concern that they will harm public safety.

Across the country, a growing range of police departments, local governments, city councils, governors, and other groups are speaking out against these policies. During the debates over the Border Protection and CLEAR Acts, many voiced their opposition to the proposal to compel state and local police to enforce federal immigration law. For example, on June 7, 2006, the Major Cities Police Chiefs Association, which represents the 47 largest police departments in the United States,¹⁴¹ announced its opposition to requiring local police to enforce immigration law.¹⁴² Similarly, in December 2004, the International Association of Chiefs of Police (IACP) – the world’s oldest and largest association of law enforcement executives with more than 18,500 members – announced its opposition to the CLEAR Act and similar plans and released a policy document highlighting its concerns.¹⁴³

¹³⁵ Russ Bynum, “Immigration Raid Devastates Ga. Town: Half of Workforce Lost; Businesses at Virtual Standstill,” *Boston Globe*, Sept. 16, 2006.

¹³⁶ Religious Leaders Say Their Obligation to Help People [Trumps] Immigration Laws, *Omaha World-Herald*, Mar. 6, 2007. (Appendix at Tab 62)

¹³⁷ Andrew Villegas, Federal Government to Pay Greeley Cops for Work During Swift Raid, *The Greeley Tribune*, Mar. 6, 2007.

¹³⁸ Josh Funk, Some Local Police Reluctant to Help in Immigration Raids, *Associated Press*, Dec. 13, 2006. See also Barbara Ferry, *Immigration Raids: Feds Say Local Sweep is ‘Ongoing,’* *The New Mexican*, Mar. 7, 2007.

¹³⁹ See Raja Mishra & Brian R. Ballou, *DSS to Check on Detainees Sent to Texas*, *Boston Globe*, Mar. 9, 2007, at A1 (describing “sharp disagreement” between Massachusetts Governor Deval Patrick and ICE officials over raid); Ray Henry, *Children Stranded After Immigration Raid*, *Associated Press*, Mar. 7, 2007.

¹⁴⁰ See *id.*

¹⁴¹ Massachusetts Immigrant and Refugee Advocacy Coalition, “The Truth About Immigrants in Massachusetts: Ensure Public Safety By Keeping Immigration Enforcement Federal” (undated), <http://www.miracoalition.org/uploads/Qu/NS/Qu/N8JDxWMMHQthxYGF1M3w/Truth-about-Local-Enforcement.pdf>.

¹⁴² Press Statement, Major Cities Chiefs Association (June 7, 2006), available at http://www.boustontx.gov/police/pdfs/mcc_release.pdf. (Appendix at Tab 55)

¹⁴³ See Press Release, International Association of Chiefs of Police, *Police Chiefs Announce Immigration Enforcement Policy* (Dec. 1, 2004), available at http://www.theiacp.org/documents/index.cfm?fuseaction=document&document_type_id=7&document_id=634&subtype_id= (Appendix at Tab 53)



Where the Law Is and Where It Is Going: Cont'd

In a press release, IACP President Joseph Estey, Chief of the Hartford, Vermont Police Department, said, “Many leaders in the law enforcement community have serious concerns about the chilling effect any measure of this nature would have on legal and illegal aliens reporting criminal activity or assisting police in criminal investigations. This lack of cooperation could diminish the ability of law enforcement agencies to police effectively their communities and protect the public they serve.”¹⁴⁴

As another example, in June 2006, the Immigration Committee of the Major Cities Chiefs Association adopted a set of recommendations that cast doubt on the wisdom of using local law enforcement to enforce immigration laws. The recommendations explained that “[i]mmigration enforcement by local police would likely negatively effect and undermine the level of trust and cooperation between local police and immigrant communities. . . . Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.”¹⁴⁵

The law enforcement community has been joined by community leaders and organizations in opposing the enforcement of immigration laws by local authorities. Dozens of cities, including Los Angeles, San Francisco, Detroit, and New York, have some sort of “effective policing” policy on their books.¹⁴⁶ Such a policy prohibits the police from questioning immigrants about their immigration status. In defending his city’s police, Los Angeles Mayor Antonio Villaraigosa echoed the position of the city’s police chief when he asserted that requiring police officers to enforce federal immigration laws would “result in fewer arrests, prosecutions and convictions.”¹⁴⁷ In Detroit, Michigan, city council members recognized the importance of gaining the trust of the community in the police force when seeking to keep the city safe. It passed an anti – racial profiling ordinance in July 2007 that cites criteria the police must abide by when investigating crimes and interacting with the community.¹⁴⁸

Counties and smaller towns, such as Orange County, North Carolina, and Trenton, New Jersey, have adopted similar policies to those of the cities listed above.¹⁴⁹ The City of New Haven, Connecticut has gone even further. It recently started sponsoring workshops to help undocumented workers file federal income taxes and plans to allow undocumented residents to apply for municipal identification cards.¹⁵⁰ In jurisdictions where police are instructed not to question residents about their immigration status, authorities report a marked improvement in communication between undocumented residents and local law enforcement officials.¹⁵¹

In cities and states across the country, coalitions of religious leaders have formed to inform immigrants of their rights and to call on Congress to pass immigration reform. Many clergy members oppose ICE’s more aggressive enforcement tactics because such tactics are inconsistent with those members’ understanding of Judeo-Christian principles, Catholic social teaching, and other religious values.¹⁵² For example, because of the often devastating effect the raids have on families of those detained, church leaders from Seattle to Nebraska and Chicago to California have promised to offer refuge to undocumented workers if the ICE raids continue

¹⁴⁴ *Id.*

¹⁴⁵ *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies, June 2006, at 6. (Appendix at Tab 48).*

¹⁴⁶ *Although the mainstream media often refers to effective policing policies as “sanctuary policies,” that term should be avoided, as it may signal immunity for criminals. A fuller discussion of “sanctuary,” “non-cooperation,” “effective policing,” and other terms appears in Section IV. C.*

¹⁴⁷ *Patrick McGreevy & Richard Winton, L.A. Police Immigration Policy Faces Another Test, L.A. Times, Apr. 11, 2007 (quoting Los Angeles Mayor Antonio Villaraigosa). (Appendix at Tab 56)*

¹⁴⁸ *See Detroit ordinance, available at National Council of La Raza website, <http://www.nclr.org/content/resources/detail/48116/>*

¹⁴⁹ *P.J. Huffstutter, Sanctuary Movement Still Has a Heartbeat, L.A. Times, Nov. 24, 2006, at 25; Brian Feagans, Local Agencies Enlist to Deport: Immigrant Advocates Worry About Abuse, Atlanta Journal-Constitution, Feb. 17, 2007, at A1.*

¹⁵⁰ *See Jennifer Medina, New Haven Welcomes Immigrants, Legal or Not, N.Y. Times, Mar. 5, 2007, at B1.*

¹⁵¹ *See Anthony Faiola, Looking the Other Way on Immigrants: Some Cities Back Federal Policies, Wash. Post, Apr. 10, 2007, at A01. (Appendix at Tab 57)*

¹⁵² *Religious Leaders Say Their Obligation to Help People [Trumps] Immigration Laws, Omaha World-Herald, Mar. 6, 2007 (quoting church pastor who stated, in explaining his opposition to raids, that “Jesus teaches us to welcome the stranger”). (Appendix at Tab 62)*

in their localities. One community leader described the effort to keep parents and children together in the aftermath of these raids as promoting the “family values that our country holds most dear.”¹⁵³ Efforts in Washington, D.C. to reform the federal government’s immigration policies have also taken on religious overtones, as evangelical leaders joined with a bipartisan group of senators in March 2007 to press for reform, calling the issue a “moral one.”¹⁵⁴

The National Immigration Forum tracks a growing list of police departments and associations, government entities, editorial boards, and more than 300 organizations opposed to local police enforcement of federal immigration laws. The Forum has also compiled an excellent list of resources pertaining to the issue, including opposition letters and quotes from around the country, stories from law enforcement and other entities, and comments from police both in large cities and in “New Immigrant” states who oppose the policy.¹⁵⁵

* * *

Given the murky legal landscape, local efforts to clarify police practices, educate communities and police forces, and implement beneficial policies are crucial to ensuring the proper balance between immigration enforcement, public safety, and community relations with the police. The following section sets forth considerations for local advocates working on the issue.



¹⁵³ N.C. Aizenman, *Pleading to Stay a Family: Raids on Illegal Immigrants Have Their U.S.-Born Children Fearing Separation – and Some Are Lobbying Capitol Hill*, *Wash. Post*, Apr. 2, 2007, at A01 (quoting Emma Lozano, co-founder of Family Latina Unida in Chicago). (Appendix at Tab 58)

¹⁵⁴ Sam Youngman, *Senators, Evangelicals Embrace Immigration Reform*, *The Hill*, Mar. 29, 2007. (Appendix at Tab 59)

¹⁵⁵ See the National Immigration Forum list of resources pertaining to state and local enforcement of immigration laws at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=567>.





What Advocates Can Do

THE CRITICAL NEED FOR LOCAL ADVOCACY

Although the federal legal and political landscape remains somewhat volatile, it is clear that more police officers around the country are being instructed and encouraged to act as immigration agents, even as many community policing programs themselves oppose such policies. Regardless of the outcome of the legal issues, the need for advocacy, education, and outreach to promote reasonable policing and to maintain positive relationships between the police and immigrant communities is great. Given the current state of the law, and the obvious fact that police departments and state troopers report directly to local and state (not federal) authorities, the actual practices by local law enforcement can vary greatly from state to state, county to county, and city to city. Local advocates can and should work towards creating good policies within their communities.

Because every community is unique, it is difficult to identify a single set of best practices that can serve as models for duplication across the country. Because many factors may affect the local approach to advocacy, the following discussion provides guidelines for advocacy that follow from the discussion of legal developments in Section III. These guidelines are not intended to be exhaustive.¹⁵⁶ Furthermore, changes in the law, a new administration in the White House, and/or current events could significantly alter the strength of the following recommendations. It is crucial that local advocates follow future legal and policy developments and carefully assess the local needs of their communities.

The following section sets forth some guidelines and suggestions that will enable local advocates to develop strategies that are tailored to their communities.

A. Know the Community and Assess the Possibilities.

The debate over the proper role for the police in enforcing immigration laws has the potential to create controversy and division within communities confronting the issue. In certain situations, aggressive advocacy risks creating a backlash or stirring up existing resentment against immigrants. Advocates' knowledge of their communities and the leaders within those communities will enable them to identify constructive, creative, and affirmative possibilities for positive change and minimize the risk of backlash. This section discusses some of the key characteristics of the community with which advocates should be familiar.¹⁵⁷

Political Landscape. The overall political landscape and the extent to which policymakers have addressed immigration-related issues in the past are likely to provide clues for advocacy efforts on the policing issue. If local lawmakers have already proposed an MOU or other policy that calls for the police to enforce immigration laws — or there is an active anti-immigrant lobby — then advocates will most likely need to assume a defensive posture. If, on the other hand, the local jurisdiction already has policies that welcome immigrants, then advocates may have the latitude to explore proactive strategies that prevent police enforcement of immigration laws in the future.

Demographics. The demographics of the local community will affect the nature of the police enforcement debate. “Border” states, as well as communities that have experienced a recent surge in immigration, may be more likely to support the allocation of police resources towards immigration enforcement. Also, communities that have felt friction as a result of the arrival of immigrant workers, especially those in which vocal minorities oppose the presence of immigrant workers, may be at greater risk of enacting counterproductive policing policies.

¹⁵⁶ *The National Immigration Forum and National Immigration Law Center have also developed a set of materials geared towards providing advocates with advice on crafting local strategies with respect to police enforcement of immigration laws. (Appendix at Tabs 40, 42-45) In addition, a coalition of organizations, including the National Immigration Forum, National Immigration Law Center, and National Council of La Raza, among others, developed a tool kit for advocates that may also be helpful in crafting local strategies. (Appendix at Tab 47)*

¹⁵⁷ *For a more detailed list of the types of questions that advocates should ask in their local area in order to better assess the needs of the relevant jurisdiction, please see Memorandum from Wilmer Cutler Pickering Hale and Dorr LLP to Linda Singer and Laura Feldman, Applesseed Found. (Nov. 15, 2004). (Appendix at Tab 1)*



What Advocates Can Do: Cont'd

Law Enforcement Relationships. Local advocates must also examine their relationships with local police departments and elected officials. A good relationship with influential members of the local law enforcement agency can be a valuable resource and create an opening for the development of effective policies and procedures. If local advocates do not already have a working relationship with local law enforcement, they should attempt to develop one. They may wish to explore whether other potential allies who support limits on police enforcement of immigration laws have established relationships with the police. (Domestic violence advocates, the Anti-Defamation League, and other victims' rights advocates, for instance, often have experience working with the police.)

Local Networks. Advocates should work to build a diverse coalition of local allies from broad sectors of the community, including domestic violence and anti-crime advocates, religious leaders, immigrants, ethnic community leaders, and others. In many areas, local advocates may be able to work together with an existing immigrant advocacy network; in others they may need to assume leadership to create such a network. In any case, they should aim to connect with a variety of local advocates and networks on this issue.

B. “Information Sharing” of a Different Kind: Document the Effects of Policing Policies and Educate the Community.

The more information that advocates have about what local and state police are actually doing in their communities, the better. Regardless of the types of policies that have already been enacted, advocates can help promote good policy by collecting and documenting stories of how the police are treating immigrants and how immigrants are responding to reports (if they exist) of police officials stopping, arresting, or detaining individuals for immigration violations. In the event that the state or locality has already entered into an MOU or otherwise enacted official policies to encourage enforcement of immigration law by local police, it is critical to document the effects of such an agreement or policy.

To collect the relevant information, advocates should ask the following questions:

- Are there reports of police stopping immigrants for no reason other than to question them about their immigration status?
- What is the experience of immigrant crime victims with police? When they report a crime, do the police ask them about their immigration status? When immigrants are witnesses at crime scenes, are they asked about their immigration status?
- Are there reports of police stopping individuals for minor issues, such as traffic violations, and then questioning them about their immigration status?
- Are there reports of police obtaining criminal warrants for immigrants with civil immigration violations? Are there incidents of police referring immigrants directly to ICE?
- If an ICE raid has occurred in the community, were the local police involved in that raid? Did local authorities assist ICE in conducting the raid? What was the role of local police?

Local advocates should also work on educating the local population and relevant policymakers. Community members may wish to engage in a wide range of activities aimed at communicating to voters and local officials that public safety will ultimately be undermined by efforts to include immigration enforcement in local and state police responsibilities. Advocates can do this work through a variety of means, such as writing newspaper editorials or holding public forums.

Finally, local advocates should seek to shield immigrant communities from the ripple effects of increased immigration enforcement by educating newcomers, to the extent possible, about the role of the police.

Educating immigrant communities presents a challenge: in the absence of a clear policy governing police practices in the jurisdiction, it is difficult to assure immigrants and their family members that they can call the police for help or otherwise cooperate with the police. As a result, in some instances, it may be necessary to work with the police to enact policies that can be applied and communicated to newcomers.

C. Good Policing for Cities, Counties, and States: Encourage the Adoption of Policies that Set Safe Boundaries on Law Enforcement Activity.

A number of jurisdictions have adopted ordinances, resolutions, or policies that generally call for local police (and, in some cases, government agencies) to perform the duties with which they have been charged and not to expand into the area of immigration enforcement. At least sixty-eight state or local governmental entities in twenty-five different states have adopted such policies, some of which have been in place for many years. Others were passed in response to the 1996 immigration reform or, more recently, in opposition to the CLEAR Act or similar proposals. If, as discussed in Section III, some federal laws are trending toward permitting local police to be involved in immigration matters, then it becomes all the more important to establish local policies that preserve effective community policing and protect immigrants' rights from potential overreaching by local officials.

Such policies may contain a range of provisions and have varying degrees of effect. Some have been passed by city council resolution, others by executive order or decree, and others as policy memoranda issued directly by local police departments. The National Immigration Law Center has produced a helpful document, entitled "Sample Language for Policies Limiting the Enforcement of Immigration Laws by Local Authorities," which describes model policies, provides a more detailed description of the content of such policies, and suggests sample language for drafting purposes.

In exploring or pursuing a local policing policy, advocates should take note of several issues pertaining to local policies.

1. The Key Value of a Local Policing Policy Is the Ability to Educate the Community and the Police More Effectively.

When a locality has a policy that clearly sets forth limits on when the police can arrest and detain individuals for violations of the immigration law, then advocates can communicate to community members when they can and should expect the police to carry out their duties as the police and not as immigration agents. Additionally, a local policy enables and encourages police departments and advocates to educate police officers on related issues, such as when they should (or should not) inquire into a person's immigration status, whether police officers have an incentive to contact federal immigration officials, and how they should respond to matched names from the immigration "subfiles" of the NCIC database.

As described in Section III, federal law on immigration enforcement by local authorities remains unclear. Therefore, local advocates can proactively pursue policies that clarify the roles and responsibilities of the police.

The educational potential of a local policy should not be overlooked, particularly since enforcement of such policies is difficult. No existing local policy has a meaningful enforcement mechanism that, if violated, would give rise to a complaint process, disciplinary action, or civil cause of action. While advocates need not give up entirely on the chances of obtaining such an enforcement mechanism in future policies, the reality is that they are unpopular and unlikely to be enacted.



What Advocates Can Do: Cont'd

2. A Good Policy Should Specifically Address the Role of the Police and the Use of the NCIC Database.

While a number of existing policies purport to set forth clear guidelines on the proper role of the police, most contain some exceptions permitting the police to investigate a person's immigration status under a few limited circumstances. Such exceptions may not be unreasonable policy: for example, local advocates and police may conclude that local police should be permitted to investigate the immigration status of individuals whom authorities have a proven basis (carefully defined) for believing are involved in terrorism-related activities.

However, most existing policies do not address the fact that many law enforcement officers are arresting individuals as a result of matches in the NCIC database, which may be hits based on either civil or criminal warrants or detainers. Advocates may wish to consider seeking adoption of the approach taken by the Houston, Texas Police Department. In 2006, the Houston Police Department announced that it had reached an agreement with the U.S. Attorney's Office for the Southern District of Texas and ICE.¹⁵⁸ Under the agreement, once an officer confirms the identity of a person subject to a warrant or detainer using data on the NCIC database, the officer asks ICE to accept a criminal hold on the suspect. As a result, ICE marks the detainer criminal, under §§ 1253 and 1326. Based on the criminal detainer, the suspect is transported to the city jail, where he or she is held for up to 24 hours. If ICE agents do not take custody within 24 hours, the suspect is either released or processed on local charges that may have been filed simultaneously with the arrest.

As noted above, problems of enforcement are likely to persist, and other cities have experienced problems with the police violating written policies that purport to prevent police from asking about immigration status unless criminal activity – including terrorism – is being investigated.¹⁵⁹

3. While Local Policies Can Generally Prevent Police from Asking About Immigration Status, They Cannot Bar Local Police from Reporting Immigration Violations to Federal Authorities.

Most existing policies announce that local police should not generally inquire about immigration status (also known as “don't ask” provisions). However, for the reasons described below, very few localities have stated that local police may not share information about immigration status with the federal authorities (also known as “don't tell” provisions).

Congress has restricted the ability of local governments to prohibit certain types of immigration reporting. Pursuant to 8 U.S.C. § 1373, Section 642 of the 1996 amendments to the INA stated as follows:

[A] Federal, state or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.¹⁶⁰

In *New York v. United States*,¹⁶¹ the Second Circuit held that a New York City policy enacted after the 1996 amendments, which prohibited city officials from reporting immigration violations to the immigration authorities, was unconstitutional. As a result, some question the authority of local jurisdictions to enact “don't tell”-type provisions which, in contrast to policies prohibiting local law enforcement and service agencies from inquiring about immigration status, go so far as to prohibit them from providing information to immigration officials.

¹⁵⁸ Craig E. Ferrell, Jr., *Houston – We Have a Solution*, *The Police Chief*, Dec. 2006. (Appendix at Tab 35).

¹⁵⁹ For instance, in *New York City*, advocates believe that the police department continues to make arrests as a result of non-criminal stops. Charlie LeDuff, “Police Say Immigrant Policy is a Hindrance,” *N.Y. Times*, Apr. 7, 2005, at A-1 (Appendix at Tab 69); Telephone interview with Michael Wisniewski, Professor of Clinical Law, NYU School of Law, in *New York, NY* (Mar. 31, 2005).

¹⁶⁰ 8 U.S.C. § 1373. (Appendix at Tab 20)

¹⁶¹ 179 F.3d 29 (2d Cir. 1999). (Appendix at Tab 3)

Nonetheless, in *New York v. United States*, the Second Circuit suggested, but did not rule, that a local policy that limited the reporting of various types of private information, of which immigration status comprised one category, might possibly withstand challenge. Since the decision in *New York v. United States*, New York City's Executive Order 41 has been framed as a general confidentiality policy that prohibits the asking and reporting of immigration status, in addition to other categories of confidential information. However, the ability of "don't tell" provisions to hold up under challenge remains unclear, particularly in light of the Supreme Court's recent decision, *Muehler v. Mena*, discussed in Section II above.

4. Careful Use of Terminology Is Important in This Discussion.

Advocates should continue to evaluate carefully whether adoption of a local policy could generate backlash against immigrants. One strategy for curbing that risk is to choose with great care the language used to describe these policies. As advocates are well aware, the use of the term "illegal immigrant" might suggest that all undocumented immigrants are criminals, which in turn connotes some level of moral condemnation. In fact, people who lawfully entered the United States and overstayed their visas – a group that comprises an estimated 40 to 50 percent of all undocumented immigrants – have not committed any crime. As explained in Section III, above, overstaying one's visa is a civil infraction (as is, for instance, not paying parking tickets). A better term is "undocumented immigrant," which carries less of the moral freight attached to "illegal."

While the phrase "sanctuary policy" frequently has been used to describe city or state policies aimed at curbing local enforcement of immigration laws, advocates should refrain from using this term. "Sanctuary" can communicate, incorrectly, that the policies are intended to prohibit any enforcement of immigration laws, or to provide amnesty to immigrants with criminal records. In the same way that the term "amnesty" has elicited criticism from opponents of immigration reform, the term "sanctuary" may provide opponents with unintended leverage in public debate.

To the extent that local policies are adopted as general confidentiality orders, then the phrase "confidentiality" or "privacy" may be a more neutral and accurate choice of language. In the alternative, advocates may consider using a phrase such as "good policing," "effective policing," or even "policy on enforcement of immigration laws by police." Similarly, MOUs or related policies can be described as an "expanded role" for police or one that blurs the lines of traditional police responsibilities.

Finally, advocates can be aggressive in how they frame legislation such as the Border Protection Act, which would tie federal funds to states and localities based on their enforcement of immigration laws. Such proposals may be described as "coercive" in nature, because they would not allow states and localities to decline involvement with immigration enforcement and continue to receive certain federal funding. Describing the Border Protection Act as coercive helps combat the perception that state and local authorities are merely "doing their job" when they assist with federal immigration enforcement efforts.

D. MOUs: Fight Early, But If Defeating the MOU Is Unlikely, Then Seek to Limit Its Negative Impact.

In recent years, MOUs have gained more attention among communities addressing immigration issues. Recently, a number of local agencies have contemplated entering MOUs to train officers under the ICE 287(g) program, including the Ottumwa City Council in Iowa, Irving City Council in Texas, the City of Elgin in Illinois, and police departments in Arizona.¹⁶²

Most significantly, Massachusetts Governor Deval Patrick, who took office in January 2007, rescinded an MOU reached the previous month by his predecessor. Governor Patrick stated he would void the agreement "on the ground that state troopers already have enough to do enforcing Massachusetts statutes and should not have the added responsibility of dealing with federal

¹⁶² *Mark Newman, Clark says ICE Program Designed to Target Serious Offenders, Ottumwa Courier, Feb. 5, 2007 (Appendix at Tab 65); Eric Aasen, Police Immigration Training Sought in Irving, Dallas Morning News, Feb. 2, 2007 (Appendix at Tab 66); Nathaniel Zimmer, Immigration Issue Won't Be on Elgin Ballot, The Courier News, Feb. 15, 2007 (Appendix at Tab 64); Arizona Police Agencies Consider Immigration Training, AP Alert – Arizona, Mar. 1, 2007 (Appendix at Tab 63).*



What Advocates Can Do: Cont'd

law.”¹⁶³ Governor Patrick explained that he would negotiate a new agreement limiting the scope to using 12 officers to search for illegal immigrants within the state prison system.

1. Oppose the Execution of an MOU, Especially in the Beginning.

In many instances, the negotiation of an MOU may have negative effects on public safety and immigrant communities. It is likely that, when initially proposed, the public official pursuing the MOU's enactment will push for a strong MOU that provides a fairly expansive set of powers to a fairly large number of law enforcement officials.

Advocates should respond to proposals for MOUs by presenting the reasons why commingling the tasks of generalized immigration law enforcement with local police priorities is bad policy, as discussed in detail in Section I above. A few specific strategies to consider in working to prevent the execution of an MOU include:

- **Determine whether local officials have applied for an MOU.** File a Freedom of Information Act (FOIA) request or use open records laws at the local level.
- **Educate city officials about what the immigrant community thinks of the proposal.** Don't assume they know how an MOU will affect immigrant and nonimmigrant members of the community.¹⁶⁴ Consider holding an immigrant community meeting to document immigrants' reactions to the proposal.
- **Hold multi-perspective and multi-ethnic meetings with city officials to communicate the negative effects of an MOU.** Invite church representatives, pastors, teachers, immigrant community members, local business owners, and others. Hold advance meetings with spokespeople to prepare clear messages. Advocates in Marshalltown, Iowa, also conducted a survey of Latino businesses and Wal-Mart to show that local businesses believed that an MOU would negatively impact their business and might even require them to close.
- **Offer a positive alternative.** MOUs are often billed as a necessary tool to fight crime. City leaders have reacted very positively to alternatives that will improve the relationship between immigrant community members and the local police in order to more effectively assist in crime prevention. For example, the Des Moines Police community policing effort and its HONRA (Hispanic Outreach Neighborhood Resource Advocate) unit are effective because the police do not serve as immigration agents. The HONRA unit has a regular presence at the local HOLA Center (Hispanic Outreach and Legal Assistance community center) and other immigrant community events and programs in order to communicate this policy and build positive relationships. The immigrant community responds with the trust and communication that make the program work. Other city police departments have established similar means of regular, proactive outreach to local immigrant communities.
- **Meet with proponents of the MOU.** Meeting with an MOU's proponents can improve advocates' credibility in addressing arguments for an MOU, even if advocates ultimately have to agree to disagree with the proponents themselves.

¹⁶³ Katie Zezima, *Massachusetts Rescinds Deal on Policing Immigration*, *N.Y. Times*, Jan. 12, 2007, at A17.

¹⁶⁴ Erica Palmer of Iowa Citizens for Community Improvement/Latinos en Acción de CCI commented that if advocates hadn't sat down with the mayor, police chief, and city council when an MOU was proposed for Marshalltown, Iowa, these officials would not have realized the potential negative impact of an MOU on police relations with the immigrant community and simply would have accepted proponents' arguments about the need for an MOU. Telephone presentation by Erica Palmer on national conference call coordinated by Center for Community Change (Sept. 6, 2007).

2. MOUs Can Come in a Range of Shapes and Sizes, So Get the Most Palatable MOU Possible.

If defeating an MOU in its entirety appears unlikely, the local advocates should remain involved in the process of negotiating the MOU. Because MOUs are products of negotiation, they can be tailored and narrowed to have the least harmful effect on public safety. The following are some features of an MOU that advocates should support:

- MOUs should focus on specific mandates, such as terrorism-related investigations, and not on the broad enforcement of civil immigration laws.
- The MOU should have a sunset provision, that is, an expiration date at which time there must be a review and renewal process. The expiration and required review are an important opportunity for community members to ensure that the MOU is publicly evaluated and not automatically continued.
- MOUs should provide for greater amounts of training for smaller, specialized contingents of the police force who have specific knowledge and expertise, and who will not be confused with police officers who respond to 911 calls or conduct traffic patrols.
- MOUs should place limits on the types of authority that police officers have to effectuate removal proceedings or detain immigrants.
- MOUs should clarify the circumstances under which officers can make arrests for immigration violations.
- MOUs should provide a means of information and referral for victims of domestic violence.
- MOUs should include systemic procedures to track and evaluate their results and impact on the community.¹⁶⁵ For example, they should not only report how many arrests are made under the agreement but how many lead to criminal convictions. They should also document the impact on the immigrant community: do they generate an increase in fear and reluctance to interact with the police?
- MOUs should include complaint procedures. A complaint hotline is one option, but it should be well advertised.
- MOUs should include provisions for monitoring compliance with the agreement. They should also include accountability measures that commit upfront to ongoing meetings with local community groups.¹⁶⁶

As the Florida example indicates, MOUs are likely to be re-negotiated in subsequent years. Once passed, local advocates should actively plan to assess an MOU's effect in the community and seek to participate in the re-negotiation process if possible.

3. MOUs Are Probably Legal But Are Not Obligatory.

It would be difficult to bring a legal challenge to the MOU process itself, which is specifically authorized by Section 287(g) of the INA (see Section III.B.1 above), and most MOUs — as products of voluntary negotiation between states or localities and the Department of Homeland Security — are unlikely to be a viable target of a legal challenge once enacted. Nonetheless, it may be worth noting that MOUs are not required of any state or locality, a point that local advocates may wish to make in the course of discussing whether an MOU is in fact good policy.

¹⁶⁵ Presentation by Charu Newhouse al-Sabli, Florida Immigrant Advocacy Center, on national conference call coordinated by Center for Community Change (Sept. 6, 2007).

¹⁶⁶ *Id.*



What Advocates Can Do: Cont'd

E. Lobby Congress.

In 2007, Congress considered a host of immigration-related measures. In the future, advocates can continue to make a difference by persuading legislators not to pass bills that expand immigration enforcement responsibilities to state and local police.

In assessing competing bills, advocates should be cognizant of provisions concerning three important policies: (1) whether the bill confirms that state and local police may enforce only the criminal provisions of the immigration laws, and not the civil provisions; (2) whether the bill allows the federal government to coerce state and local authorities to assist with immigration enforcement by tying certain federal funds to those jurisdictions' participation; and (3) whether the bill requires the entry of civil immigration records into the NCIC database.

As discussed above, the leading proposal in the Senate this past Session, the Comprehensive Immigration Reform Act of 2007, would have limited the authority of state and local police to enforce immigration laws. Advocates should support similar bills but nonetheless be wary of bills and amendments, such as the one introduced by Senator Coleman, that expand nonfederal enforcement powers.¹⁶⁷

Indeed, it is likely that bills will be offered that emulate the Border Protection Act's and Comprehensive Immigration Reform Act of 2006's harmful policy proposals. Specifically, such bills may fully authorize state and local police to enforce both the criminal and civil provisions of the immigration laws, tie federal funding to the jurisdiction's participation in immigration enforcement, or require the inclusion of civil immigration records into the NCIC database. In arguing against these misguided proposals to Members of Congress or their staffs, advocates should emphasize how these proposals would jeopardize public safety by impeding local jurisdictions' anti-terrorism and community policing efforts. To support this argument, it is important to mention that many police departments and law enforcement organizations, such as the Major Cities Police Chiefs Association and the International Association of Chiefs of Police, have historically opposed such proposals. If a police organization in the Member's district has come out against these proposals, that information may be especially persuasive to the Member or his or her staff.

Advocates should be ready to respond quickly to a harmful provision or proposed amendment to a bill. For example, Senator Coleman's amendment was offered and voted on in only a matter of hours. Additionally, the House Judiciary Committee reviewed and voted on the Border Protection Act in just two days, without holding any hearings, and the full House of Representatives affirmed the bill only one week later.¹⁶⁸ Because immigration enforcement is merely one of many immigration-reform issues that Congress is expected to consider in the future, advocates should be mindful that measures affecting immigration enforcement may surface in bills that largely address other immigration-related issues. The legislative process can move in unexpected ways, and advocates should be ready to mobilize on short notice.

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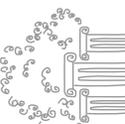
Despite the complexity and shifting nature of the legal and political issues surrounding the question of the proper role of local law enforcement in America's communities, local advocates can help bring clarity and ensure positive policies and practices in their communities.

¹⁶⁷ Many of the more palatable bills codify the authority of state and local authorities to enforce the criminal provisions of immigration laws. See, e.g., *Comprehensive Immigration Reform Act of 2007*, S. 1348, 110th Cong. (2007); *Security Through Regularized Immigration and a Vibrant Economy Act of 2007*, H.R. 1645, 110th Cong. (2007) (the STRIVE Act). Such bills have at least once drawback, however, in that they foreclose the opportunity to argue that local enforcement of criminal immigration laws is preempted because of the increasingly complex criminal immigration code. See *infra*, Part III.B.2.b

¹⁶⁸ Noorani, *supra* note 8, at 192. The Border Protection Act was introduced on December 6, 2005 and passed the House on December 16, 2005. Library of Congress Web Site, *Major Congressional Actions on H.R. 4437*, available at <http://www.thomas.gov/cgi-bin/bdquery/z?d109:HR04437:@@X>; Library of Congress Web Site, *Major Congressional Actions on S. 2611*, available at <http://www.thomas.gov/cgi-bin/bdquery/z?d109:SN02611:@@X>.

Glossary

AEDPA:	Antiterrorism and Effective Death Penalty Act of 1996.
AG:	United States Attorney General, head of DOJ.
Border Protection Act:	Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. The Border Protection Act would have authorized state and local law enforcement personnel to enforce criminal and civil provisions of federal immigration law and would have denied certain federal funds to states that did not change their laws to permit state and local officer to enforce immigration law.
Civil/criminal distinction:	Refers to the view that state and local police are permitted to enforce only “criminal” provisions of federal immigration law, but not “civil” ones; see Gonzalez.
CLEAR Act:	Clear Law Enforcement for Criminal Alien Removal Act. The CLEAR Act would have denied certain federal funds to states that did not change their laws to permit state and local officer to enforce federal immigration law. The bill was introduced in 2003 and reintroduced in 2005 and 2007.
Comprehensive Act of 2006:	Comprehensive Immigration Reform Act of 2006. The Act Immigration Reform would have authorized state and local law enforcement personnel to enforce the criminal provisions of federal immigration law and would have required the entry of civil immigration records into the database maintained by the National Crime Information Center.
Community policing:	An approach to law enforcement designed to reduce and prevent crime by increasing interaction and cooperation between local law enforcement agencies and the people and neighborhoods they serve. The federal government has authorized funds to promote community policing.
DHS:	Department of Homeland Security. On November 25, 2002, the President signed the Homeland Security Act of 2002 into law, which transferred INS functions to the new Department of Homeland Security (DHS). Immigration enforcement functions were placed, in part, within the ICE.
DOJ:	Department of Justice; headed by the AG.
Gonzalez:	Refers to a 1983 decision from the Ninth Circuit Court of Appeals, <i>Gonzalez v. City of Peoria</i> , 722 F.2d 468 (9th Cir. 1983), in which the court concluded, on preemption grounds, that state and local police may enforce criminal provisions of the INA, but not civil provisions.
IIRIRA:	Illegal Immigration Reform and Immigrant Responsibility Act of 1996.



Glossary: Cont'd

“Inherent authority” view:	View that state and local police have inherent authority to enforce all federal immigration laws. In 2002, the DOJ announced its support for this view, and some commentators have read decisions from the Tenth Circuit Court of Appeals to embrace this view.
IACP:	International Association of Chiefs of Police.
ICE:	Division of DHS that took over the enforcement functions formerly held by the INS.
INA:	Immigration and Nationality Act, passed in 1952 and subsequently amended.
INS:	Immigration and Naturalization Service; abolished effective March 1, 2003. INS is the former division of the DOJ responsible for administration and enforcement of the nation’s immigration laws. Its functions are now under DHS.
LESC:	Law Enforcement Support Center. Operated by ICE, LESL provides local and state law enforcement agencies with information on identity and immigration status.
MOU:	Memorandum of Understanding. Pursuant to an amendment to the INA in 1996, the federal government may negotiate MOUs with state or local authorities to share immigration enforcement responsibilities.
NCIC:	National Crime Information Center. The NCIC is one of the resources within LESL that provides criminal history information to state and local authorities.
NSEERS:	National Security Entry-Exit Registration System.
Section 1252(c):	Refers to 8 U.S.C. § 1252c, which amended the INA to allow states to apprehend, under limited circumstances, illegal immigrants who were previously convicted of a crime and deported or left the country after that conviction.
Section 287(g):	Refers to 8 U.S.C. § 287(g), which amended the INA to permit MOUs between the federal government and state or local governments to share responsibility for immigration enforcement.
STRIVE Act:	Security Through Regularized Immigration and a Vibrant Economy Act of 2007. The STRIVE Act would have authorized state and local law enforcement personnel to enforce the criminal provisions of federal immigration law.

List of Appendices¹

APPLESEED MATERIALS

Memorandum from Wilmer Cutler Pickering Hale and Dorr LLP to Linda Singer and Laura Feldman, Appleseed Foundation, dated Nov. 15, 2004	1
--	---

CASES

Carrasca v. Pomeroy, 313 F.3d 828 (3d Cir. 2002)	2
City of New York v. United States, 179 F.3d 29 (2d Cir. 1999)	3
De Canas v. Bica, 424 U.S. 351 (1976)	4
Gonzalez v. City of Peoria, 722 F.2d 468 (9th Cir. 1983)	5
Mena v. City of Simi Valley, 332 F.3d 1255 (9th Cir. 2003)	6
Muehler v. Mena, 544 U.S. 93 (2005)	7
Nat'l Council of La Raza v. Dep't of Justice, 339 F. Supp. 2d 572 (S.D.N.Y. 2004)	8
Nat'l Council of La Raza v. Dep't of Justice, No. 04-5474-CV (2d Cir. May 31, 2005)	9
Reynolds v. City of Valley Park, No. 06-CC-3802 (Mo. Cir. Ct., St. Louis County Mar. 12, 2007)	10
United States v. Alcaraz-Arellano, 441 F.3d 1252 (10th Cir. 2006)	11
United States v. Guerrero-Espinoza, 462 F.3d 1302 (10th Cir. 2006)	12
United States v. Roblero-Mejia, No. 06-8066, 2007 WL 576039 (10th Cir. Feb. 26, 2007)	13
United States v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984)	14
United States v. Santana-Garcia, 264 F.3d 1188 (10th Cir. 2001)	15
United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999)	16

¹ All materials can be found on-line at www.appleseednetwork.org or by calling Appleseed at (202) 347-7960.

List of Appendices: Cont'd

STATUTES

8 U.S.C. § 1103	17
8 U.S.C. § 1252c	18
8 U.S.C. § 1357(g)	19
8 U.S.C. § 1373	20
28 U.S.C. § 534	21

MEMORANDA

Memorandum Opinion for the United States Attorney, Southern District of California, from the Office of the Associate Deputy Attorney, dated Feb. 5, 1996.....	22
Memorandum for the Attorney General, from the U.S. Department of Justice Office of Legal Counsel “Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations,” dated April 3, 2002.....	23
Memorandum of Understanding Between the United States Department of Justice and the State of Florida, dated July 2, 2002.....	24
Memorandum of Understanding Between the United States Department of Homeland Security and the State of Alabama, undated	25
Memorandum of Understanding Between the United States Department of Homeland Security and the Los Angeles County Board of Supervisors, dated July 6, 2004.....	26
Review of the Memorandum of Understanding Between the Sheriff, Los Angeles County, and the Bureau of Immigration and Customs Enforcement, dated Jan. 21, 2005.....	27
Memorandum from ACLU Immigrants’ Rights Project, Refutation of Department of Justice Immigration Memo, dated Sept. 6, 2005.....	28

LETTERS

Letter from Michael J. Wishnie, Professor of Clinical Law, New York University School of Law, et al., to Senator Arlen Specter, Chairman, Committee on the Judiciary, United States Senate, dated April 1, 2006	29
--	----

LAW REVIEW and JOURNAL ARTICLES

Craig Ferrell, The War on Terror’s ‘Absconder Initiative’, The Police Chief (Oct. 2002)	30
Craig Ferrell, Immigration Enforcement: Is It a Local Issue?, The Police Chief (Feb. 2004)	31
Lisa M. Seghetti, Stephen R. Vina, and Karma Ester, Enforcing Immigration Law: The Role of State and Local Law Enforcement, Congressional Research Service (Mar. 11, 2004)	32
Huyen Pham, The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution, 31 Fla. St. U. L. Rev. 965 (2004)	33
Michael J. Wishnie, 22nd Annual Edward V. Sparer Symposium: Terrorism and the Constitution: Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws, 6 U. Pa. J. Const. L. 1084 (2004)	34
Craig E. Ferrell, Jr., Houston – We Have a Solution, The Police Chief (Dec. 2006)	35
Huyen Pham, The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. Cin. L. Rev. 1373 (2006)	36
Ali Noorani, Race, Class, and the Emergence of an Immigrant Rights Movement, 31-WTR Fletcher F. World Aff. 185 (2007)	37

RESOURCES FROM ORGANIZATIONS

“Legal and Policy Analysis: Local Illegal Immigration Relief Act Ordinances, ” Mexican American Legal Defense and Education Fund, undated	38
“Local Anti-Immigration Ordinance Cases,” ACLU, undated.....	39
QUESTIONS AND ANSWERS: Advocacy Ideas to Ensure Immigrants’ Access to Police Protection and Social Services, National Immigration Forum, Jan. 2004.....	40
Organizations Opposed to the CLEAR Act and Its Senate Companion, National Immigration Forum, Apr. 2004.....	41
Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by Local Authorities, National Immigration Law Center (Last Updated July 2004)	42
Introduction and Background: Sample Language for Policies Limiting the Enforcement of Immigration Law by Local Authorities, National Immigration Law Center, Nov. 2004	43



List of Appendices: Cont'd

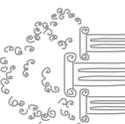
Sample Language for Policies Limiting the Enforcement of Immigration Laws by Local Authorities, National Immigration Law Center, Nov. 2004	44
Appendix A: Sample Language for Policies Limiting the Enforcement of Immigration Law by Local Authorities, National Immigration Law Center, Nov. 2004	45
Hannah Gladstein, Annie, Lai, Jennifer Wagner & Michael Wishnie, Blurring the Lines: A Profile of State and Local Police Enforcement of Immigration Law Using the National Crime Information Center Database, 2002 – 2004, Dec. 2005	46
State and Local Police Enforcement of Federal Immigration Laws: A Tool Kit for Advocates, American Immigration Lawyers Association, Mexican American Legal Defense and Educational Fund National Immigration Forum, National Immigration Law Center, and National Council of La Raza (March 2006)	47
Modes of Entry for the Unauthorized Migrant Population, Pew Hispanic Center, May 22, 2006	48
Recommendations for Enforcement of Immigration Laws by Local Police Agencies, M.C.C. Immigration Committee (June 2006)	49

PRESS RELEASES

Department of Justice, Press Release, dated June 23, 1978, in Vol. 55, No. 31, Interpreter Releases 306 (Aug. 9, 1978)	50
Department of Justice, Press Release, dated Feb. 10, 1983, in Vol. 60, No. 9, Interpreter Releases 172-73 (Mar. 4, 1983)	51
Department of Justice, Press Release, U.S. Proposes Registration System for Selected Foreign Visitors; New Entry-Exit Procedures Aimed at Bolstering Security (Jun. 5, 2002)	52
International Association of Chiefs of Police, Press Release, Police Chiefs Announce Immigration Enforcement Policy (Dec. 1, 2004)	53
Department of Homeland Security, Press Release, Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior (April 20, 2006)	54
Major Cities Chiefs Association, Press Statement (June 7, 2006)	55

NEWSPAPER ARTICLES

04/11/07 - Patrick McGreevy & Richard Winton, L.A. Police Immigrant Policy Faces Another Test, L.A. Times	56
04/10/07 - Anthony Faiola, Looking the Other Way on Immigrants: Some Cities Buck Federal Policies, Wash. Post.....	57
04/10/07 – N.C. Aizenman, Pleading to Stay a Family: Raids on Illegal Immigrants Have Their U.S.-Born Children Fearing Separation – and Some Are Lobbying Capital Hill, Wash. Post.....	58
03/29/07 - Sam Youngman, Senators, Evangelicals Embrace Immigration Reform, The Hill	59
03/22/07 - Alexander Bolton, Immigration on Deck, The Hill.....	60
03/07/07 - Michael Manekin, Immigrant Sweeps Rouse ACLU: Fears are that Racial Profiling May Have Been Used in Mass Arrests on Peninsula, San Mateo County Times	61
03/06/07 - Religious Leaders Say Their Obligation to Help People [Trumps] Immigration Laws, Omaha World-Herald.....	62
03/01/07 - AP Alert – Arizona, Arizona Police Agencies Consider Immigration Training, Associated Press.....	63
02/15/07 - Nathaniel Zimmer, Immigration Issue Won't be on Elgin Ballot, The Courier News	64
02/05/07 - Mark Newman, Clark says ICE Program Designed to Target Serious Offenders, Ottumwa Courier	65
02/02/07 - Eric Aasen, Police Immigration Training Sought in Irving, Dallas Morning News	66
10/15/06 - Joseph Lelyveld, The Border Dividing Arizona, N.Y. Times.....	67
04/16/05 - Danbury Mayor Calls for Deputizing State Police as Immigration Agents, AP State & Local Wire.....	68
04/07/05 - Charlie LeDuff, Police Say Immigrant Policy is a Hindrance, N.Y. Times	69
04/07/05 - Joyce Purnick, The Invisible Deliveryman, N.Y. Times	70
04/01/05 - Richard Winton & Andrew Blankstein, Agency Shifts on Immigration Law; Orange County Sheriff's Deputies Will Be Trained to Enforce Federal Law in Some Cases, L.A. Times.....	71
04/01/05 - Orange County Deputies Seeking to Arrest Illegal Immigrants, AP Press State & Local.....	72
03/31/05 - Richard Winton, Department Clarifying Rule on Immigrants, L.A. Times.....	73



List of Appendices: Cont'd

03/28/05 - Michael Crowley, Border War, The New Republic.....	74
03/27/05 - Patrick O'Gilfoil Healy, A Gang Sweep With a Difference, N.Y. Times	75
03/23/05 - MS-13 Gang Member Carrying Three Rifles Nabbed by Ice, Miami Police, US Fed News.....	76
03/10/05 - Dena Bunis, Doing Federal Agents' Jobs Not the Point, Sheriff Says, The Orange County Register.....	77
02/28/05 - Melissa Nelson, Hispanic Issues Abound in Arkansas Legislature, AP Press State & Local Wire	78
02/18/05 - Melissa Nelson, House Rejects Bill on Ark. State Police and Immigration Laws, AP Press State & Local Wire	79
02/12/05 - Editorial, Hit Montgomery Where it Hurts, Wash. Times.....	80
02/12/05 - Jessie Mangaliman, Immigrant Advocates Criticize Jail Policy; LA County to Work with Federal Agency in Moving Criminals Toward Deportation, San Jose Mercury News.....	81
02/10/05 - Suzanne Gamboa, House OKs Citizenship Check for Licenses, AP.....	82
02/06/05 - Mike Masterson, Camel's Nose Sensed, Arkansas Democrat-Gazette.....	83
02/05/05 - Jake Bleed, Bill Would Let State Police Enforce Immigration, Arkansas Democrat-Gazette	84
01/27/05 - Special Report: Immigration Law; Detention Rates Increase in Name of Homeland Security, but Advocates on Both Sides Worry About Tactics, Miami Daily Business Review.....	85
01/26/05 - Immigration Protest, City News Service, Inc.	86
01/26/05 - Troy Anderson, Jail Immigration Enforcement OK'd, Daily News of Los Angeles.....	87
12/21/04 - Rachel L. Swarns, Program's Value in Dispute As a Tool to Fight Terrorism, N.Y. Times.....	88
11/29/04 - Patrick Healy, L.I. Clash on Immigrants is Gaining Political Force, N.Y. Times	89
11/24/04 - Emi Endo & Bart Jones, Immigration Plan; Levy Drops Deputizing; Backing Off from his Controversial Proposal to Give Police Power of Immigration Agents, He Asks Instead for Access to National Databases, Newsday	90
11/17-18/04 - Melissa Block (Anchor), Daniel Zwerdling (Reporter), All Things Considered, Investigation of a Case Where Guards at the Hudson County Jail in New Jersey Allegedly Assaulted Two Immigrant Detainees, NPR Radio Transcript.....	91

11/14/04 - Mary Reinholz with Campbell Robertson, For Illegal Immigrants, the Deportation Threat Declined After 9/11. Now Comes Steve Levy With a Different Idea, N.Y. Times.....92

11/14/04 - Razing Apartments: Farmingdale Calls it a Revitalization Project. The Critics Describe it as Ethnic Cleansing, N.Y. Times93

11/14/04 - Eugene O'Donnell, Long Island Topic, Don't Sic the Police on Day Laborers, Newsday94

11/11/04 - Bart Jones, 'Deputization' Plan Criticized, Latino Board to Levy: Drop It, Newsday.....95

11/09/04 - Editorial, To Serve and Deport, N.Y. Times96

11/07/04 - Yvonne Wingett, Prop. 200 Win Inspires Other Groups Across U.S., Arizona Republic.....97

11/03/04 - Bart Jones, Policing Immigrants? County Executive's Plan to Give Suffolk Officers Same Powers as Immigration Agents Draws Controversy, Newsday.....98

10/29/04 - Jon Ward, Arrests Not Linked to Illegals Crackdown, Wash. Times.....99

06/27/04 - Patty Pensa, Immigrants on Edge; Fears Rise as Law Enforcement Scrutiny Increases, Sun Sentinel (Ft. Lauderdale)100

06/01/04 - Niraj Warikoo, Police Could Get More Power; Enforcing Immigration Law a Duty Under Bill, Detroit Free Press.....101

05/17/04 - Rebecca McCarthy, Immigration Status Not Local Matter; Police, Others Resist U.S. Legislation to Have Them Enforce Law, Atlanta Journal-Constitution.....102

05/14/04 - Emily Bazar, Police, Feds May Work in Tandem, Partnership Would Allow Cops to Enforce Immigration Law, Sacramento Bee.....103

05/11/04 - Gregg Krupa, Metro Police Balk at Plan to Hunt Illegal Immigrants, Detroit News104

03/31/04 - Oscar Avila, Bill Imperils Immigrants' Fragile Trust in Police, Chi. Tribune105

12/12/03 - Lesley Tllez, Immigrants in Area Urged to Report Crimes; Some Police Agencies Have Outreach Plans, Won't Report Status, Dallas Morning News.....106

11/28/03 - Jason Song, O'Malley, Duncan Join to Fight Bill; Lawmakers Asked to Defeat Act that Would Let Police Enforce Immigration Laws, Balt. Sun107



List of Appendices: Cont'd

11/16/03 - Opinion, Weekly Review, The Wrong Target, Fort Worth Star Telegram	108
11/15/03 - Editorial, Thomas Roeser, Oberweis Takes CLEAR Stand, Chi. Sun Times	109
11/11/03 - Ricardo Alonso Zaldivar, The Nation: Police May Join Hunt for Illegal Migrants; Advocates See a Way to Boost Enforcement, But Officers and Civil Rights Groups Fear Abuses, Los Angeles Times	110
10/07/03 - Cecilia Munoz & Michele Waslin, Immigration Duties for Police Officers?, San Diego Union-Tribune	111
10/02/03 - Philip Kretsedemas, Ironic Title for Murky Legislation; The CLEAR ACT, Miami Herald.....	112
10/01/03 - Dena Bunis, Expanded Powers Delicate for Sheriff // Deputies' Taking on Immigration Duties Could Be Thorny in Many Communities They Serve, Orange County Register.....	113
09/30/03 - Enforcement; Immigration Bill Not What It's Cracked Up to Be, Houston Chronicle.....	114
09/13/03 - CLEAR Danger to Public Safety, Miami Herald	115
08/02/03 - Tanya Weinberg, 1 Year, 35 Agents, 165 Arrests; State's Example has Inspired National Expansion, Sun-Sentinel (Ft. Lauderdale).....	116
07/09/03 - Jason Song, Local Police May Get Role in Immigrant Law; Federal Bill to Address Disparities Among Agencies, Balt. Sun.....	117
02/21/03 - Bill Barrow & Brendan Kirby, Troopers and INS Announce Joint Effort on Illegal Aliens, Mobile Register.....	118

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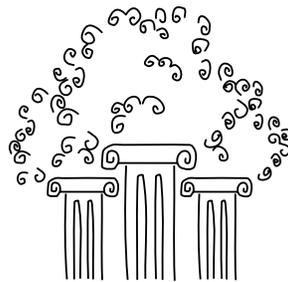
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