NATIONAL IMMIGRATION FORUM

BACKGROUNDER

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

Immigration Law Enforcement by State and Local Police

With the failure of the 110th Congress to reform our immigration laws, America continues to be burdened with a broken immigration system. Across the country, states and localities are grappling with the problem of illegal immigration. Scores of communities are considering the role their police department might play in helping the federal government enforce immigration laws.

Jurisdiction Over Immigration

The Constitution gives the federal government the duty of setting and administering immigration policy. Federal legislators set U.S. immigration policy, and federal agencies administer immigrant admissions and removals. As to the enforcement of immigration laws, it has historically been the case that state and local police do not have the authority to enforce federal civil immigration laws. While state and local police have often worked with federal agents on criminal matters, they have generally steered clear of the enforcement of administrative/civil immigration laws.

The Law, and Authority to Enforce it, is a Complex Matter

Immigration law is extremely complex, and is constantly changing. There are criminal and civil violations of immigration law. Civil violations include, for example, illegal presence and failure to depart after the expiration of a temporary visa. Criminal violations include illegal entry, re-entry after deportation, and failure to depart after an order of removal. To make matters more complicated, those in this last category are committing a criminal offense only if the government can show that they "willfully" failed to depart; but most removal orders are entered *in absentia.* If failure to depart is not "willful" (if, for example, the person was not aware that there was a removal order entered against them), the offense is a civil violation.

At the federal level, there are conflicting signals as to whether state and local police have the authority to arrest persons for violations of immigration law. A published 1996 Justice Department Office of Legal Counsel memo states that local police have the authority to arrest persons only for *criminal* immigration violations. A 2002 *unreleased* memo from the same office states that police have the authority to make arrests for criminal *and* civil violations.

Still more complication is added with the overlay of state and local ordinances. Some states and localities authorize the enforcement of immigration laws, others do not authorize it, and some *prohibit* their police agencies from enforcing immigration laws.

Enforcement of such complex and ever-changing laws requires not only weeks of training and continuing education, but knowledge of case histories and files that only the Department of Homeland Security (DHS) has. Attempts to enforce immigration laws have made local police vulnerable to civil rights lawsuits, particularly when they arrest someone who is not undocumented or use racial profiling to determine who to scrutinize.

In fact, scores of cities, counties, and even states have policies in place that explicitly limit their police departments' ability to coordinate with federal immigration authorities outside of criminal investigations. They have these policies in order to *enhance public safety.* Why is that? Because when immigrant community residents begin to see state and local police as deportation agents, they stop reporting crimes and assisting in investigations. The fear of deportation for them or their family members often silences them from reporting abuses, making it more difficult for police to effectively do their jobs. It is the need to protect the whole community effectively that has lead scores of police departments to reject policies that would expand their role in federal immigration law enforcement, policies which have been promoted increasingly since the September 11th terrorist attacks.

Undocumented Immigrants

Currently, there are an estimated 12 million undocumented immigrants residing in the United States. They make up one in twenty U.S. workers. The vast majority are law-abiding, except that they have come here illegally or have remained in the U.S. after a temporary visa, such as a tourist visa, expired. Most undocumented immigrants would immigrate legally if that were possible or practical. However, because our laws are out of date, legal immigration is simply not an option. For example, although Americans hire hundreds of thousand of immigrants to fill low-skilled jobs each year, there are only 5,000 visas available for this type of immigrant per year. Immigrants who want to join close family members—a spouse and children, for example—may have to wait five or more years for a visa because of our outdated quotas. Instead of waiting many years, some choose to make the dangerous trek across our Southern border, or to overstay a temporary visa, so that they can reunite with their loved ones in the United States.

There are many communities throughout the United States where undocumented immigrant populations are substantial. Many undocumented immigrants live in "mixed status" families. For example, the husband may be a legal permanent resident, the wife may be undocumented, and the children may be U.S. citizens, having been born here. There are more than 3.1 million U.S. citizen children who have one or more undocumented parents.

Policing for the Community

Beginning in the 1980s, police agencies across the country began to embrace a policing strategy known as community oriented policing. The success of community policing hinges upon the development of trust between community residents and law enforcement officials. For communities with significant immigrant populations, building trust means getting immigrants to know that if they are victimized by crime or if they witness a crime, they can approach the police and not fear immigration-related consequences.

As police departments around the country embraced community policing, crime rates dropped substantially. Between 1993 and 2005, violent crime rates fell 57 percent for the general population, and 55 percent for the Latino population. The downward trend was attributed by many state and local police agencies, in part, to community policing strategies.

Falling crime rates in increasingly diverse communities encouraged local governments to keep some distance between federal immigration law enforcement and the day-to-day duties of their local peace officers. Residents' concerns over racial profiling in local law enforcement, particularly in response

to a series of high-profile incidents in the 1990s where U.S. citizens and legal residents of Latin American origin were caught up in joint INS-local police raids, further encouraged local governments to adopt resolutions prohibiting their local police from enforcing immigration laws, or directing civil servants not to deny services to individuals on the basis of immigration status. Police departments also adopted policies against enforcement of immigration laws.

Today, scores of states, counties, city councils, and police departments have adopted confidentiality polices prohibiting immigration status inquiries of people not suspected of having committed crimes. These confidentiality policies have been retained (and new localities have adopted them in recent years) despite pressure applied by the Justice Department on states and localities to enforce immigration laws in the wake of the September 11, 2001 terrorist attacks. Again, communities with significant immigrant populations wanted to preserve the trust that had been built between the police and immigrant communities, in order to be more effective in gathering information about crime.

Federal Law Regarding State and Local Police Enforcement of Immigration Laws

Legislative provisions relating to civil immigration law enforcement by state and local police were included in two 1996 laws, the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

AEDPA authorized state and local police to arrest and detain persons who are unlawfully present in the United States after being deported *and* who have "previously been convicted of a felony in the United States." These persons would be deportable based on their criminal behavior, and their re-entry into the U.S. is itself an immigration crime.

IIRIRA authorized state and local police to enforce civil immigration laws in two very specific situations. IIRIRA amended an earlier version of the Immigration and Nationality Act (INA) that outlined state and local police roles in addressing a "mass influx of aliens." The law now authorizes state and local police to enforce civil immigration laws when all of the following conditions are met: there is a "mass influx" of foreign nationals; the situation requires an immediate response from the federal government; and federal officials obtain the consent of the state or local supervising department.

IIRIRA also established a mechanism whereby the attorney general could delegate immigration law enforcement authorities to state and local police, provided the officers have undergone adequate training and have entered into a formal agreement with the Department of Justice. A Memorandum of Agreement is required between the state or locality and the Justice Department before the former can exercise any new immigration law enforcement powers. The MOA process (specified in section 287(g) of the INA) includes safeguards designed to ensure the integrity of local enforcement of federal civil laws and specifies that such arrangements are possible only when they do not supersede state or local laws that prohibit such arrangements. Each agreement is also very specific about what laws police can and cannot enforce.

Finally, IIRIRA also stated that public employees cannot be barred from reporting immigration-related information about a particular resident to the INS—preempting state and local laws or executive orders that had been enacted around the country to prohibit such disclosures. However,

this provision did not address local policies that prohibit police and other employees from *inquiring about* the immigration status of persons with whom they come in contact.

In the past several years, immigration restrictionists in Congress have introduced legislation to outlaw immigration-related confidentiality policies. These efforts have been opposed by police agencies and their associations. Thus far, immigration restrictionists have failed in their efforts to pass such legislation.

State and Local Laws

With the failure of Congress to enact immigration reforms, states and localities are enacting their own laws to deal with illegal immigration. In 2007 alone, more than 1,400 pieces of legislation had been introduced by July in the 50 state legislatures Many more have been introduced at the local level as well. Much of the legislation targeting undocumented workers is punitive, but in 2006, about a third of the local ordinances were pro-immigrant. Of the 170 laws that had been enacted in the states, 11 concerned local law enforcement. Demands to have local police enforce immigration laws have pitted politicians against the police, who are stuck with the public safety fallout of having a segment of the community afraid to approach them to report crimes or serve as witnesses.

In many of the jurisdictions that have adopted confidentiality policies, such policies have come under attack by immigration restrictionists. While immigration restrictionists have attempted to blur the distinction, undocumented immigrants are not protected by confidentiality policies from being arrested for criminal activity. An undocumented immigrant who has committed a crime is arrested and treated as any other criminal. Furthermore, in recent years, Immigration and Customs Enforcement (ICE) has greatly expanded its programs aimed at identifying incarcerated criminals who are deportable and securing final orders of deportation *prior* to the completion of their prison sentences. For example, in 2005, ICE spent $53 million on its Institutional Removal Program. In 2007, ICE spent more than $137 million on the program. The additional resources have enabled ICE to greatly expand its presence within federal, state, and local detention facilities. Once an immigrant commits a crime and is detained, he or she is now much more likely to be dealt with simultaneously by the criminal justice system and by the federal immigration authorities than in the past.

Immigration restrictionists also make the claim that confidentiality policies "attract illegal immigrants." Immigrants are attracted by jobs. The fact that police do not inquire about immigration status does not put food on anyone's table.

Confidentiality policies do not violate existing laws. In general the many confidentiality policies established by local ordinances, executive orders, or police department policies treat immigration status as a confidential matter, and prohibit employees from inquiring about it. These policies do not prohibit communication with ICE—the focus of the IIRIRA provision mentioned above. A 2007 audit by the Department of Justice Office of Inspector General found that such policies in the jurisdictions it surveyed did not violate federal law and did not impede police cooperation with ICE regarding criminals in police custody.

Blurring the Lines: Immigration Detainers in the National Crime Information Center Database

The National Crime Information Center (NCIC) is a computerized database of criminal justice information available to virtually every law enforcement agency nationwide, 24 hours a day, 365 days a year. It is used primarily to exchange criminal history information and to identify individuals with outstanding warrants, and contains millions of records. It is maintained by the FBI, but information is contributed to the NCIC by various federal, state, and local agencies.

In 1996, Congress authorized for the first time the inclusion of certain immigration records in the NCIC when it approved the inclusion of records of persons who had been convicted of felonies and deported after serving a sentence. In 2002—without Congressional authorization—the Justice Department began to enter certain other *civil* immigration violations in the NCIC. Now, the Immigration Violators File contains the records of three types of immigration violators: persons previously convicted of a felony and subsequently deported; persons who had been (allegedly) subject to a final order of removal but who remained in the country (the so-called "absconders"); and persons who have violated the requirements of the National Security Entry-Exit Registration System (applicable to certain persons from mostly middle-Eastern countries). Several hundred thousand records have been added to the Immigration Violators File. An immigration "hit" occurs when a name or other identifying information entered in a search of the database produces a positive response. In that case, the officer is supposed to contact the Law Enforcement Support Center, an office within ICE, to verify the information turned up in the query to the NCIC.

In conducting an analysis of the use of the NCIC immigration data by state and local police forces, the Migration Policy Institute (MPI) found that, from 2002 to 2004, of the 20,876 immigration hits from state and local agencies, the error rate—that is, the percent of hits where ICE could not confirm the information—was 42 percent. To put this another way, 42 percent of persons held after an initial immigration hit were erroneously detained pending confirmation by the Law Enforcement Support Center. This is not surprising, since immigration records have a reputation for a high level of inaccuracy. The rate of inaccuracy is compounded by the fact that immigration status is subject to change, so that even initially accurate information may be out of date. Another factor compounding the inaccuracy problem was the decision of the Attorney General in 2003 to exempt the NCIC database from the accuracy requirements of the Privacy Act, in effect relieving the government of responsibility for ensuring that records are accurate, timely, and reliable.

The Justice Department used anti-terrorism justifications when it began to put immigration violators into the NCIC. MPI's analysis revealed that no NSEERS violators were identified in the 2002 to 2004 period. However, the number of "absconders" who were identified greatly increased from 2002 to 2004. As mentioned above, absconders are persons who have been ordered removed, but who failed to depart the U.S. Typically, these are persons who are working in the U. S. without authorization. Two-thirds of removal orders are entered *in absentia.* The absconders may or may not have received a notice to appear for their removal hearing, and they may or may not even be aware that there is an order for their removal. Unless it was "willful," failure to depart after a removal order is a civil immigration violation.

In sum, the placement of immigration violators in the NCIC is increasingly diverting police away from their primary missions: protecting public safety and fighting crime. Instead, agencies are wasting time and resources holding persons for civil violations of immigration laws—many of whom

are being held simply because there is an inaccurate or out-of-date record in the NCIC. Furthermore, with immigrants being held as a result of NCIC immigration detainers, trust in the local police is being eroded, making the job of local police more difficult.

The Major Cities Chiefs—an association of the 64 largest police departments in the U.S. and Canada—has taken a position against the inclusion of civil detainers in the NCIC:

> The integrity of the system as a notice system for criminal warrants and/or criminal matters must be maintained. The inclusion of civil detainers 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 detainer.
>
> M.C.C. would encourage the federal agencies to seek federal criminal warrants for any person they have charged criminally with violations of immigration laws and submit those criminal warrants on the N.C.I.C. system so the warrants can be acted upon by local police officers within their established criminal enforcement authority and training.

The 20,000-member International Association of Chiefs of Police has made a similar recommendation: that federal agencies seek federal criminal warrants for any person they have charged criminally with violations of immigration laws.

Federal Legislation in the 110th Congress

In the wake of the failure of the Senate to pass comprehensive immigration reform, immigration has become an even more contentious issue in the federal legislature, and more divided along partisan lines. Republicans in Congress are making efforts to overturn local confidentiality policies and to force local police to enforce immigration laws. These efforts have pit Republican members of Congress against police, domestic violence prevention advocates, immigrant advocates, and others who work to build trust between police and the community.

Conclusion: We Should Not Have Our Local Police Compensate for Congress' Failure to Act on Immigration Reform

Instead of repressing immigration ineffectively we need to regulate immigration under realistic and modern admissions limits. Not only do immigrants fill jobs in important industries now, but U.S. demographic projections portend an even greater gap between the number of jobs in low-skilled sectors and the number of Americans able and willing to fill them in the decades to come. It is in the national interest to create laws that are actually amenable to being enforced. In the current political climate, Congress has demonstrated it does not have the political will to reform our immigration laws in a comprehensive manner. It will take time to build support for reforms that make sense. In the meantime, state and local police should not be made to compensate for the federal government's failure to update outdated immigration admissions policies.

Revised August 2007