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## **Enforcing Immigration Law: The Role of State and Local Law Enforcement**

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# Enforcing Immigration Law: The Role of State and Local Law Enforcement

## Summary

Since the September 11, 2001, terrorist attacks, the enforcement of our nation's immigration laws has received a significant amount of attention. Some observers contend that the federal government does not have adequate resources to enforce immigration law and that state and local law enforcement entities should be utilized. Several proposals introduced in the 109<sup>th</sup> Congress would enhance the role of state and local officials in the enforcement of immigration law, including H.R. 4437, S. 2612, S. 2454, H.R. 2092, H.R. 3137, S. 1362, S. 1438, H.R. 3333, H.R. 3776, and H.R. 3938. This proposed shift has prompted many to question what role state and local law enforcement agencies should have in the enforcement of immigration law, if any.

Congress defined our nation's immigration laws in the Immigration and Nationality Act (INA) (8 U.S.C. §§1101 *et seq.*), which contains both *criminal* and *civil* enforcement measures. Historically, the authority for state and local law enforcement officials to enforce immigration law has been construed to be limited to the *criminal* provisions of the INA; by contrast, the enforcement of the *civil* provisions, which includes apprehension and removal of deportable aliens, has strictly been viewed as a federal responsibility, with states playing an incidental supporting role. The legislative proposals that have been introduced, however, would appear to expand the role of state and local law enforcement agencies in the *civil* enforcement aspects of the INA.

Congress, through various amendments to the INA, has gradually broadened the authority for state and local law enforcement officials to enforce immigration law, and some recent statutes have begun to carve out possible state roles in the enforcement of *civil* matters. Indeed, several jurisdictions have signed agreements (INA §287(g)) with the federal government to allow their respective state and local law enforcement agencies to perform new, limited duties relating to immigration law enforcement. Still, the enforcement of immigration by state and local officials has sparked debate among many who question what the proper role of state and local law enforcement officials should be in enforcing immigration law. For example, many have expressed concern over proper training, finite resources at the local level, possible civil rights violations, and the overall impact on communities. Some localities, for example, even provide "sanctuary" for illegal aliens and will generally promote policies that ensure such aliens will not be turned over to federal authorities.

This report examines some of the policy and legal issues that may accompany the increasing role of state and local law officials in the enforcement of immigration law. This report will be updated as warranted.

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# Enforcing Immigration Law: The Role of State and Local Law Enforcement

## Introduction

Since the September 11, 2001, terrorist attacks, the enforcement of our nation's immigration laws has received a significant amount of attention. Some observers contend that the federal government has scarce resources to enforce immigration law and that state and local law enforcement entities should be utilized. To this end, several proposals have been introduced in the 109<sup>th</sup> Congress that would enhance the role of state and local law officials in the enforcement of immigration law. Still, many continue to question what role state and local law enforcement agencies should have in light of limited state and local resources and immigration expertise.

States and localities bear the primary responsibility for defining and prosecuting crimes. But beyond enforcing the laws or ordinances of their state or locality, state and local officials may also have the authority to enforce some federal laws, especially criminal laws. Immigration law provides for both *criminal* punishments (e.g., alien smuggling, which is prosecuted in the courts) and *civil* violations (e.g., lack of legal status, which may lead to removal through a separate administrative system). The states and localities have traditionally only been permitted to directly enforce the *criminal* provisions, whereas the enforcement of the *civil* provisions has been viewed as a federal responsibility with states playing an incidental supporting role.

The Immigration and Nationality Act (INA) (8 U.S.C. §§1101 *et seq.*) currently provides limited avenues for state enforcement of both its *civil* and *criminal* provisions. The legislative proposals that have been introduced, however, would appear to expand the role of state and local law enforcement agencies in the *civil* regulatory aspects of immigration law (i.e., identifying and detaining deportable aliens for purposes of removal). Adding the enforcement of *civil* immigration law to the role of state and local law enforcement could, in essence, involve the agencies in a seemingly unfamiliar mission. This potential expansion has prompted many to examine the legal authority by which state and local law enforcement agencies may enforce immigration law, particularly the civil enforcement measures.

This report examines the role of state and local law enforcement in enforcing immigration law. The discussion is limited to the role of state and local law enforcement in the investigation, arrest, and detention of all immigration violators. The report does not discuss the prosecution, adjudication, or removal of aliens who violate the law. The report opens with a brief discussion of the types of immigration interior enforcement activities that the former Immigration and Naturalization Service (INS) pursued and the current immigration activities that are now the focus

of the Department of Homeland Security (DHS). A discussion of the legal authority that permits state and local law enforcement to enforce immigration law under certain circumstances follows. Current administrative efforts to involve state and local law enforcement in enforcing immigration law as well as selected issues are discussed. The report concludes with a discussion of the pros and cons of such a policy and an analysis of policy options for Congress.

## Background

The enforcement of immigration laws in the interior of the United States has been controversial. Traditionally, the debate posed concern over large numbers of “lawbreakers” (i.e., illegal aliens) depressing wages against perceptions that foreign labor benefits the economy and promotes relations with “source” countries. Nonetheless, after the attacks of September 11, attention refocused on the adequacy of interior immigration enforcement, especially the perceived lack of federal resources. Prior to the September 11, 2001 terrorist attacks, the INS had fewer than 2,000 immigration agents to enforce immigration laws within the United States. Although that number has not changed since the terrorist attacks, the merger of the interior enforcement function of the former INS with the investigative arm of the U.S. Customs Service (Customs) into the Bureau of Immigration and Customs Enforcement (ICE), which is located in DHS, has doubled the number of interior agents potentially available to enforce immigration laws.<sup>1</sup>

In spite of the increase in interior enforcement agents, many continue to believe that the number is still insufficient. Moreover, although the consolidation increased the number of interior enforcement agents, they now have multiple missions, which include enforcing immigration law in the interior of the United States, stemming the flow of illicit drugs, and deterring money laundering, among other things.

The enforcement of immigration law within the interior of the United States includes investigating aliens who violate the INA and other related laws. Prior to September 11, 2001, immigration interior enforcement focused on investigating: (1) aliens committing crimes; (2) suspected fraudulent activities (i.e., possessing or manufacturing fraudulent immigration documents); (3) suspected smuggling and trafficking of aliens; and (4) suspected work site violations, frequently involving aliens who work without legal permission and employers who knowingly hire illegal aliens. Since the terrorist attacks, however, the majority of ICE’s resources have been directed at stemming terrorist-related activities and activities that have a national security interest.

Currently, there are express provisions in federal law that provide state and local law enforcement the authority to assist federal officers with the enforcement of immigration law under certain circumstances. Such authorities were enacted into law in 1996 in §439 of the Antiterrorism and Effective Death Penalty Act (AEDPA; P.L. 104-132) and §133 and §372 of the Illegal Immigration Reform and Immigrant

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<sup>1</sup> Michael Garcia, Director of the ICE, speech at the Heritage Foundation, July 23, 2003.

Responsibility Act of 1996 (IIRIRA; P.L. 104-206).<sup>2</sup> In addition to the provisions enacted in AEDPA and IIRIRA, the DHS has several initiatives with state and local law enforcement agencies to facilitate the investigation, arrest and apprehension of foreign nationals who have violated the law, as discussed below.

## **Alien Criminal Apprehension Program**

The Alien Criminal Apprehension Program (ACAP) was established in 1991 by the former INS. Through ACAP, criminal aliens are identified by immigration officials after they have been notified by state and local law enforcement officials. Upon an encounter with an immigrant whose immigration status may be in question, state and local law enforcement officials notify immigration officials, who determine the immigrant's status and, if applicable, take the immigrant into federal custody.

## **Quick Response Teams**

Congress first authorized the former INS to establish Quick Response Teams (QRTs) in the Omnibus Consolidated and Emergency Supplemental Appropriations Act, FY1999 (P.L. 105-277). QRTs apprehend illegal aliens and deport them back to their country by working directly with state and local law enforcement officers. QRTs respond to requests from state and local law enforcement authorities who believe they have an illegal immigrant in custody. QRTs are established in areas that have experienced an increase in illegal immigration and are comprised of federal, state and local law enforcement officials. The federal law enforcement officials on a QRT usually include special agents, immigration officers and detention and removal officers. As of September 30, 2002, there were 45 QRTs in 11 different states. Congress appropriated funding for QRTs in FY1999 and FY2001.<sup>3</sup>

## **Absconder Apprehension Initiative**

The Absconder Apprehension Initiative was initially created to clear up the backlog of cases of aliens who had an unexecuted final order of removal. Absconders are unauthorized or criminal aliens or nonimmigrants who violated immigration law and have been ordered deported by an immigration court. Although the identification and removal of criminal aliens had been a focus of the former INS, the terrorist attacks brought renewed interest in their removal. In 2001, the former INS Commissioner, James Ziglar, in cooperation with the Federal Bureau of Investigation (FBI), decided to list the names of absconders in the FBI's National Criminal Information Center (NCIC).<sup>4</sup>

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<sup>2</sup> See discussion under "State Involvement in the Enforcement of Immigration Law."

<sup>3</sup> For FY1999, Congress appropriated \$21.8 million for INS to establish QRTs (see H.Rept. 105-825; P.L. 105-277). For FY2001, Congress appropriated \$11 million for 23 additional QRTs (see H.Rept. 106-1005; P.L. 106-553).

<sup>4</sup> The names of aliens with final orders of deportation was included in the NCIC, which includes both criminal aliens and aliens who violated civil immigration law.

## Current Practices

Although there is quite a bit of debate with respect to state and local law enforcement officers' authority to enforce immigration law (see discussion below), as a matter of practice, it is permissible for state and local law enforcement officers to inquire into the status of an immigrant during the course of their normal duties in enforcing state and local law. This practice allows state and local law enforcement officers to play an indirect role that is incidental to their general criminal enforcement authority.

For example, when state or local officers question the immigration status of someone they have detained for a state or local violation, they may contact an ICE agent at the Law Enforcement Support Center (LESC).<sup>5</sup> The federal agent may then place a detainer on the suspect, requesting the state official to keep the suspect in custody until a determination can be made as to the suspect's immigration status. However, the continued detention of such a suspect beyond the needs of local law enforcement designed to aid in the enforcement of federal immigration laws may be unlawful.<sup>6</sup>

Indirect state participation by means of immigration detainers is not without controversy. Many have alleged such abuses as state detentions premised on immigrant status alone and custodial arrests for traffic violations or similar offenses as pretexts for verifying an individual's status with immigration authorities. Past allegations of abuse at times have led to states and localities entering into consent decrees that strictly limit their role in the enforcement of immigration law. On the other hand, some localities have been concerned that an active role in enforcing immigration law may stretch resources and hinder community cooperation in curbing criminal activity. (See discussion on Sanctuary States and Cities.)

## Authorities to Enforce Immigration Law

The power to prescribe rules as to which aliens may enter the United States and which aliens may be removed solely resides with the federal government,<sup>7</sup> particularly with the Congress. To implement its plenary power, Congress has enacted and amended the INA — a comprehensive set of rules for legal immigration, naturalization, deportation, and enforcement. Concomitant to its exclusive power to determine which aliens may enter and which may stay, the federal government also

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<sup>5</sup> Under current practice in most jurisdictions, state and local law enforcement officials can inquire into an alien's immigration status if the alien is being questioned by an officer as a result of a criminal investigation or other related matters (i.e., traffic violation). The LESL is discussed in "Selected Issues," under "Access to Database."

<sup>6</sup> Charles Gordon, et. al, *Immigration Law and Procedure* §72.02[2][b], at 72-27 (Matthew Bender & Co., Inc. 2000) (citing *Abel v. United States*, 362 U.S. 217 (1960); *United States v. Cruz*, 559 F.2d 30 (5<sup>th</sup> Cir. 1977)).

<sup>7</sup> U.S. Const., Art. I, §8, cl. 3, 4.



has power to proscribe activities that subvert these rules (e.g., alien smuggling) and to set criminal or civil penalties for those who undertake these activities.

In examining the INA, it is crucial to distinguish the civil from criminal violations. Mere illegal presence in the U.S. is a *civil*, not criminal, violation of the INA, and subsequent deportation and associated administrative processes are civil proceedings.<sup>8</sup> For instance, a lawfully admitted non-immigrant alien may become deportable if his visitor's visa expires or if his student status changes. Criminal violations of the INA, on the other hand, include felonies and misdemeanors and are prosecuted in the federal courts. These types of violations include, for example, 8 U.S.C. §1324, which addresses the bringing in and harboring of certain undocumented aliens; §1325(a), which addresses the illegal entry of aliens; and §1326, which penalizes the reentry of aliens previously excluded or deported.<sup>9</sup>

Congress also has exclusive authority to prescribe procedures for determining who may enter or stay and the right of aliens in these proceedings, subject to the individual rights all aliens in the United States enjoy under the Constitution. However, exclusive authority to prescribe the rules on immigration<sup>10</sup> does not necessarily imply exclusive authority to enforce those rules. While enforcement standards and procedures may differ between the criminal and civil aspects of immigration law, Congress may authorize the states to assist in enforcing both, and state officers may exercise this authority to the degree permitted under federal and state law. There is a notion, however — one being more frequently articulated by the federal courts and the Executive branch — that states have “inherent” authority to enforce at least the federal *criminal* law related to immigration. This inherent authority position is now apparently beginning to be expressed with regard to the enforcement of the *civil* aspects of immigration law as well. State enforcement, nonetheless, must always be consistent with federal authority.

Even assuming states have some inherent authority to enforce immigration law, federal law preempts inconsistent state law where concurrent jurisdiction exists. Congress' power to preempt state law arises from the Supremacy Clause of the Constitution, which provides that “the Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>11</sup> Congressional intent is paramount in preemption analysis; accordingly, a court must determine whether Congress expressly or

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<sup>8</sup> 8 U.S.C. §1227(a)(1)(B). Other examples of civil violations include §1253(c) (penalties relating to vessels and aircraft) and §1324d (penalties for failure to depart).

<sup>9</sup> Other criminal provisions include §1253(a) disobeying a removal order, §1306 offenses relating to registration of aliens, and §1324a(f) engaging in a pattern or practice of hiring illegal aliens.

<sup>10</sup> The federal authority to set rules on the entry of aliens and the conditions of their stay still leaves limited room for state law aimed at the alien community. If a state regulation is consistent with federal law and the equal protection requirements of the Fourteenth Amendment, it may stand. See generally *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

<sup>11</sup> U.S. Const. Art. VI, cl.2.

implicitly intended to preempt state or local action.<sup>12</sup> Generally, a court will determine that Congress intended to preempt a state regulation or enforcement when (1) Congress expresses preemptive intent in “explicit statutory language,” (2) when a state entity regulates “in a field that Congress intended the Federal Government to occupy exclusively,” or (3) when a state entity’s activity “actually conflicts with federal law.”<sup>13</sup>

## State Involvement in the Enforcement of Immigration Law

Setting the rules on the entry and removal of aliens is unquestionably an exclusive federal power and some would argue that uniformity in enforcing those rules is critical to the exercise of sovereign authority (i.e., it should *not* be enforced by states).<sup>14</sup> Accordingly, it has been suggested that state involvement in immigration law should be strictly limited to express congressional indication for such participation.<sup>15</sup> On the other hand, Congress can not compel the states to enforce federal immigration law and to do so in a particular way.<sup>16</sup>

From the states’ point of view, the federal government’s exclusive power over immigration does not preempt every state activity affecting aliens.<sup>17</sup> And it generally has been assumed that state and local officers may enforce the *criminal* provisions

<sup>12</sup> See, e.g., *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 96 (1992).

<sup>13</sup> *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Complete occupation of a field can be inferred from a “scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an act of Congress “touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Ibid.*, (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Conflict preemption occurs where it is “impossible for a private party to comply with both state and federal requirements,” *Ibid.*, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)), or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Ibid.*, (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>14</sup> Celica Renn, Selected Comment on 1986 Immigration Reform: *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. Miami L. Rev. 999, 1023 (1987) (hereafter cited as Renn, Selected Comment); see also Linda R. Yanez and Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 Tex. Hisp. J.L. & Pol’y 9, 29 (1994).

<sup>15</sup> Renn, Selected Comment, at 30.

<sup>16</sup> See generally, *Printz v. United States*, 521 U.S. 898, 922 (1997); see, e.g., INA §287(g)(9) (“Nothing in this subsection shall be construed to require an agreement under this subsection in order for any State or political subdivision of a State to enter into an agreement with the Attorney General (AG) under this subsection.”).

<sup>17</sup> *De Canas v. Bica*, 424 U.S. 351, 355 (1976); *Gonzalez v. City of Peoria*, 722 F. 2d 468, 474 (9<sup>th</sup> Cir. 1983).

of the INA if state law permits them to do so but are precluded from directly enforcing the INA's *civil* provisions.<sup>18</sup> This view may be changing, however.

State enforcement of the criminal provisions of the INA is seen as being consistent with the state's police power to make arrests for criminal acts and the expectation that states are expected to cooperate in the enforcement of federal criminal laws.<sup>19</sup> Civil immigration law enforcement, on the other hand, has generally been viewed as strictly a federal responsibility: The civil provisions of the INA have been assumed to constitute a pervasive and preemptive regulatory scheme — leaving no room for a direct state or local role.<sup>20</sup> The distinction between civil and criminal violations in the INA has been seen to suggest a bifurcated role for states and localities. For example, state and local law enforcement officers cannot arrest someone solely for illegal presence for the purpose of deporting them because it is a civil violation, but they can arrest someone for the criminal offense of entering the country illegally.<sup>21</sup> To the degree that it is not preempted, the authority of state and local law enforcement officers to investigate and arrest for violations of federal law is determined by reference to state law.<sup>22</sup> This may be done through express authorization in state law. However, this may not be necessary according to some recent decisions from the Tenth Circuit that appear to suggest that state and local law enforcement officers may possess “inherent authority” within their respective jurisdictions to investigate and make arrests for criminal immigration matters.

The following sections briefly examine Department of Justice, Office of Legal Counsel (OLC) opinions that have examined immigration enforcement authority, analyze the major cases on the issue, and describe current provisions in law that authorize state and local involvement in the enforcement of immigration law.

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<sup>18</sup> See *Gonzalez*, 722 F. 2d at 474 (9<sup>th</sup> Cir. 1983).

<sup>19</sup> *Yanez*, *supra* note 14, at 28-29. *Cf. People v. Barajas*, 81 Cal. App. 3d 999 (1978) (concluding that “the supremacy clause is a two-edged sword, and in the absence of a limitation, the states are bound by it to enforce violations of the federal immigration laws.”). *Ibid.*, at 1006.

<sup>20</sup> *Gonzalez*, 722 F.2d at 474-75; see also *Assistance by State and Local Police in Apprehending Illegal Aliens*, 1996 OLC Lexis 76, at 2 (Feb. 5, 1996); Jeff Lewis, et al., *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 *Bender's Immigration Bulletin* No. 15, p. 944 (Aug. 1, 2002).

<sup>21</sup> Illegal entry is a misdemeanor under INA §275. Because many encounters between local police and undocumented aliens involve warrantless arrests, an officer's authority to apprehend a person in violation of §275 will necessarily depend on whether state arrest statutes permit an arrest for a misdemeanor occurring outside the officer's presence, since the misdemeanor of illegal entry is apparently completed at the time of entry, and is not a “continuing” offense that occurs in the presence of the officer. A continuing offense may be found under INA §276, which applies to aliens previously deported who enter or are found in the United States.

<sup>22</sup> *Vasquez-Alvarez*, 176 F. 3d at 1295; 84 Op. Atty. Gen. Cal. 189 (Nov. 16, 2001) 2001 Cal. AG Lexis 46, at \*15; 2000 Op. Atty. Gen. N.Y. 1001 (Mar. 21, 2000) 2000 N.Y. AG Lexis 2, at \*11-12.

## Office of Legal Counsel Opinions

Several Administrations have spoken on the scope of state and local involvement. For example, a 1978 press release during the Carter Administration stressed the need for cooperation and joint federal/state law enforcement operations, but placed much emphasis on the exclusive federal role to enforce *civil* immigration law and the special training required to do so.<sup>23</sup> A 1983 statement issued by the Reagan Justice Department emphasized similar cooperative measures, but still made clear that *only* INS could make arrests for *civil* immigration violations and that state and local cooperation consisted primarily of notifying INS about, and detaining, suspected illegal aliens taken into police custody for state/local violations.<sup>24</sup> In 1989, the Department of Justice, OLC opined that local police could enforce the criminal violations of the INA, but stated that it was “unclear” under current law whether local police could enforce non-criminal federal statutes.<sup>25</sup> More recently, a 1996 OLC opinion concluded that state and local police *did* possess the authority to arrest aliens for *criminal* violations of the INA, but lacked recognized legal authority to enforce the *civil* provisions of immigration law.<sup>26</sup>

A shift in policy towards increasing the role and authority of local law enforcement officers in the field of immigration enforcement came following the terrorist attacks in September 2001. In December 2001 the INS reportedly began sending the names of thousands of noncitizens to the NCIC databases as part of the Absconder Apprehension Initiative. At a 2002 press conference, Attorney General Ashcroft confirmed the existence of a new OLC opinion that, among other things, expressed the department’s view that state and local officials have “inherent authority” to enforce federal immigration law, including the *civil* enforcement provisions. According to the Attorney General:

When federal, state and local law enforcement officers encounter an alien of national security concern who has been listed on the NCIC for violating immigration law, federal law permits them to arrest that person and transfer him to the custody of the INS. The Justice Department’s Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily — arresting aliens who have violated criminal provisions of the Immigration and Nationality Act or *civil provisions* that render an alien deportable, and who are listed on the NCIC — is within the *inherent authority* of states.<sup>27</sup> (*emphasis added*)

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<sup>23</sup> Interpreter Releases, vol. 55, Aug. 9, 1978, p. 306 (quoting DOJ press release).

<sup>24</sup> Interpreter Releases, vol. 60, Mar. 4, 1983, pp. 172-73 (quoting Feb. 10, 1983, statement).

<sup>25</sup> Dep’t of Justice, Office of Legal Counsel, *Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File*, at 4, 5, & n.11 (Apr. 11, 1989).

<sup>26</sup> Dep’t of Justice, Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens*, 1996 OLC Lexis 76, at 2 (Feb. 5, 1996). (Hereafter cited as 1996 OLC Opinion).

<sup>27</sup> Federal News Service, Press Conference With U.S. AG John Ashcroft and James Ziglar, Commissioner, INS, Re: Tracking of Foreign Visitors (June 5, 2002).

Initially, the Department of Justice did not release or publish the 2002 OLC opinion. Accordingly, several immigrant and public interest groups sought disclosure under the Freedom of Information Act (FOIA). The department, however, claimed that the memorandum was exempt from disclosure under FOIA based on the deliberative process and attorney-client privileges. A lawsuit seeking the release of the 2002 OLC opinion was subsequently filed by the groups against the Department of Justice. In May of 2005, the Second Circuit granted the interest groups' FOIA request and mandated that the department release the 2002 OLC opinion.<sup>28</sup> The department released the opinion in July of 2005 but was allowed to redact certain sections.<sup>29</sup>

The 2002 OLC opinion concludes that (1) states have inherent power, subject to federal preemption, to make arrests for violations of federal law; (2) the advice provided in the 1996 OLC opinion that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken; and (3) 8 U.S.C. §1252c did not preempt state authority to arrest for federal violations. As to the first conclusion, the opinion focuses on the authority of states, as *sovereign entities*, to retain certain police powers under the Constitution, namely, the inherent authority to make arrests for a violation of federal law. With respect to the second conclusion, the 2002 opinion discredits much of the authority cited in the 1996 and 1989 opinions, takes into account case law not previously considered, and frames the preemption issue differently (from the earlier opinions).<sup>30</sup> The analysis under the third conclusion examines the legislative history of §1252c and a Tenth Circuit case to find a strong presumption against preemption.

Critics have described the newly released opinion as “deeply flawed” and unsupported by legislative history or judicial precedent.<sup>31</sup> It has been stated, for example, that (1) immigration has long been recognized as a distinctly federal concern; (2) federal law authorizes state and local enforcement of the immigration laws only in specific circumstances, not broadly; (3) the opinion does not address the significant distinction between criminal and non-criminal enforcement; and (4) the opinion could have implications far beyond the immigration context.<sup>32</sup> It should also

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<sup>28</sup> Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2<sup>nd</sup> Cir. 2005).

<sup>29</sup> Dep't of Justice, Office of Legal Counsel, *Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, (Apr. 3, 2002) (Hereafter cited as 2002 OLC opinion) available at [<http://www.aclu.org/FilesPDFs/ACF27DA.pdf>].

<sup>30</sup> For example, the 2002 opinion states that the issue at hand does not fit under the typical preemption scenario, but instead, presents the question of whether states can *assist* the federal government by arresting aliens who have violated *federal law* (emphasis in original). As such, relying on the dictum discussed in the *Gonzales v. City of Peoria* case (see text under Case Law) was “entirely misplaced,” according to the opinion.

<sup>31</sup> American Civil Liberties Union, Refutation of 2002 DOJ Memo, (Sept. 6, 2005) available at [<http://www.aclu.org/FilesPDFs/ACF3189.pdf>].

<sup>32</sup> For example, it has been suggested that the 2002 OLC opinion could support state and local arrests for violations of federal tax, environmental, finance, food safety, and education (continued...)

be recognized that although the 2002 OLC opinion describes a position in contrast to previous policy, it cannot compel state action nor does it carry the same weight as an act of Congress. Generally, interpretations contained in opinion letters are not controlling and should be followed only insofar as they have the “power to persuade.”<sup>33</sup>

## Case Law

The issue of whether state and local law enforcement agencies are precluded from enforcing provisions of the INA was analyzed in the Ninth Circuit case of *Gonzalez v. City of Peoria*.<sup>34</sup> In *Gonzalez*, the Ninth Circuit examined the City of Peoria’s policies that authorized local officers to arrest illegal immigrants for violating the *criminal* entry provision of the INA (8 U.S.C. §1325).<sup>35</sup> The arrestees claimed that the INA represented a full federal occupation of the field, which would in turn preempt state action. The court turned to the legislative history of §1324(c)<sup>36</sup> and determined that when Congress specifically removed language limiting the enforcement of §1324 to federal officers and inserted specific language authorizing local enforcement, that “it implicitly made the local enforcement authority as to all three criminal statutes (i.e., §§1324, 1325, 1326) identical.”<sup>37</sup> Accordingly, the Ninth Circuit declared that local police officers may, subject to state law, constitutionally stop or detain individuals when there is reasonable suspicion or, in the case of arrests, probable cause that such persons have violated, or are violating, the *criminal* provisions of the INA.<sup>38</sup>

With regards to preemption, the *Gonzalez* court determined that the criminal immigration provisions were “few in number,” “relatively simple in their terms,” constituted a “narrow and distinct element” of the INA, and did not require a “complex administrative structure” consistent with exclusive federal control.<sup>39</sup> The court, therefore, concluded that the criminal provisions did not support the inference that the federal government occupied the field of *criminal* immigration enforcement.

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<sup>32</sup> (...continued)  
laws. See *ibid*.

<sup>33</sup> *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

<sup>34</sup> *Gonzalez v. City of Peoria*, 722 F.2d 468, 474 (9<sup>th</sup> Cir. 1983).

<sup>35</sup> The plaintiffs alleged that the city police engaged in the practice of stopping and arresting persons of Mexican descent without reasonable suspicion or probable cause and based only on their race. Furthermore, they alleged that those persons stopped under this policy were required to provide identification of legal presence in the U.S. and that anyone without acceptable identification was detained at the jail for release to immigration authorities.

<sup>36</sup> 8 U.S.C. §1324 prohibits the bringing in and harboring of certain undocumented aliens (see later discussion under “Express Authorization”).

<sup>37</sup> See *Gonzalez*, 722 F. 2d at 475 (citing H.R. 1505, 82<sup>nd</sup> Cong., 2d sess, reprinted in 1952 U.S.C.C.A.N. 1358, 1360-61).

<sup>38</sup> *Gonzalez*, 722 F.2d at 475.

<sup>39</sup> *Ibid.*, at 474-75.

With respect to *civil* immigration enforcement, *Gonzalez* has been construed to support the argument that states do not possess the authority, “inherent” or otherwise, (unless specifically granted by Congress) to enforce the *civil* enforcement measures of the INA.<sup>40</sup> In conducting a preemption analysis for certain criminal provisions of the INA, the Ninth Circuit in *Gonzalez* made a distinction between the civil and criminal provisions of the INA, and assumed that the former constituted a pervasive and preemptive regulatory scheme, whereas the latter did not. The court stated:

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. However, this case [*Gonzalez*] does not concern that broad scheme, but only a narrow and distinct element of it — the regulation of criminal immigration activity by aliens.<sup>41</sup>

Accordingly, the court concluded that the authority of state officials to enforce the provisions of the INA “is limited to criminal provisions.”<sup>42</sup> The preemption analysis in *Gonzalez* has been criticized by some for parsing the INA when statutory construction and preemption principles generally require consideration of the whole statutory scheme in evaluating a specific provision.<sup>43</sup> While *Gonzalez* appears to stand for the proposition that states do not possess the authority to enforce *civil* immigration laws, it has been argued that the preemption analysis in *Gonzalez* was based merely on an assumption and was outside the holding of the case, and thus does not constitute binding precedent.<sup>44</sup> Whether this conclusion is completely accurate has yet to be tested in the courts in a definitive manner, although some decisions from the Tenth Circuit regarding criminal investigations may be seen by some as strengthening the role of state and local law enforcement agencies in immigration enforcement.

In the Tenth Circuit case of *United States v. Salinas-Calderon*,<sup>45</sup> a state trooper pulled over the defendant for driving erratically but soon found six individuals in the back of the defendant’s truck. Because the defendant, who was eventually charged with the crime of illegally transporting aliens did not speak English, the state trooper questioned the passenger (the defendant’s wife) and learned that the driver and the other six individuals were in the country illegally. From this line of questioning, the court determined that the trooper had probable cause to detain and arrest all the individuals.

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<sup>40</sup> See, e.g., 1996 OLC Opinion; 84 Op. Atty. Gen. Cal. 189 (Nov. 16, 2001) 2001 Cal. AG Lexis 46; 2000 Op. Atty. Gen. N.Y. 1001 (Mar. 21, 2000) 2000 N.Y. AG Lexis 2.

<sup>41</sup> *Gonzalez*, 722 F.2d at 474-75.

<sup>42</sup> *Ibid.*, at 476.

<sup>43</sup> Linda R. Yanez and Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 Tex. Hisp. J.L. & Pol’y 9 (1994), at 28-29.

<sup>44</sup> CLEAR Act Hearing, H.R. 2671 (Oct. 1, 2003) (testimony of Kris W. Kobach, Professor of Law, Univ. of Missouri-Kansas City).

<sup>45</sup> *United States v. Salinas-Calderon*, 728 F.2d. 1298 (10<sup>th</sup> Cir. 1984).

In addition to the probable cause conclusion, the Tenth Circuit determined that a “state trooper has general investigatory authority to inquire into possible immigration violations.”<sup>46</sup> It has been argued that since there was no reason to believe that the alien passengers had committed any criminal violations (i.e, they were only in the country illegally — a civil violation), the court’s statement appears to apply fully to civil as well as criminal violations.<sup>47</sup> The *Salinas-Calderon* court, however, did not differentiate between civil and criminal INA violations nor did it address the charges or judicial proceedings for the six alien individuals found in the back of the truck. Instead, the focus of the *Salinas-Calderon* decision was on the probable cause and potential suppression of the statements made by the six alien passengers.

In *United States v. Vasquez-Alvarez*, an Oklahoma police officer arrested a Hispanic male suspected of drug dealing because he was an “illegal alien.”<sup>48</sup> A specific provision in the INA (8 U.S.C. §1252c) authorizes state officers to pick up and hold for deportation a previously deported alien who had been convicted of a crime in the United States and reentered illegally. Section 1225c requires state officers to obtain confirmation from the INS before making such an arrest. At the time of the arrest in *Vasquez-Alvarez*, however, the state officer did not have actual knowledge of the defendant’s immigration status or past criminal behavior; it was only later discovered that the alien had a history of prior criminal convictions and deportations.

The defendant argued that the state police could only arrest him in accordance with the restrictions detailed in 8 U.S.C. §1252c and since his arrest did not meet the requirements of that provision, it was unauthorized. The Tenth Circuit, however, ultimately concluded 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 law. Instead, §1252c merely creates an additional vehicle for the enforcement of federal immigration law.”<sup>49</sup>

The court also recognized that it had previously determined in *Salinas-Calderon* that state law enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws.<sup>50</sup> The court concluded that the “legislative history (of §1252c) does not contain the slightest indication that Congress intended to displace any preexisting enforcement power already in the hands of state and local officers.”<sup>51</sup> While *Vasquez-Alvarez* may be interpreted to suggest that state and local police officers do in fact possess the “inherent authority” to enforce all aspects of immigration law, it should be noted that the case arose in the context of

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<sup>46</sup> *Salinas-Calderon*, 728 F. 2d. at 1302 n. 3.

<sup>47</sup> See CLEAR Act Hearing, H.R. 2671 (Oct. 1, 2003) (testimony of Kris W. Kobach, Professor of Law, Univ. of Missouri-Kansas City).

<sup>48</sup> *United States v. Vasquez-Alvarez*, 176 F. 3d 1294 (10<sup>th</sup> Cir. 1999).

<sup>49</sup> *Ibid.*, at 1295.

<sup>50</sup> *Ibid.*, at 1296 (citing *Salinas-Calderon*, 728 F.2d at 1301-02 & n.3 (10<sup>th</sup> Cir. 1984)).

<sup>51</sup> *Ibid.*, at 1299.



a criminal investigation and was premised on Oklahoma law, which allows local law enforcement officials to make arrests for violations of federal law, including immigration laws.<sup>52</sup>

Expanding on *Vasquez-Alvarez*, the Tenth Circuit, in *United States v. Santana-Garcia*,<sup>53</sup> again addressed the role of local law enforcement in immigration. In *Santana-Garcia*, a Utah police officer stopped a vehicle for a traffic violation. The driver of the car did not speak English and did not possess a driver's license. The passenger of the car spoke limited English and explained that they were traveling from Mexico to Colorado, which prompted the officer to ask if they were "legal." The passenger and the driver appeared to understand the question and answered "no." From these facts, the court held that the officer had probable cause to arrest both defendants for suspected violation of federal immigration law.

In recognizing that state and local police officers had "implicit authority" within their respective jurisdictions to investigate and make arrests for violations of immigration law, the court seemingly dismissed the suggestion that state law must explicitly grant local authorities the power to arrest for a federal immigration law violation.<sup>54</sup> To come to this conclusion, the court relied upon a number of inferences from earlier decisions that recognized the "implicit authority" or "general investigatory authority" of state officers to inquire into possible immigration violations.<sup>55</sup> The court also seemed to rely upon a broad understanding of a Utah state law that empowers officers to make warrantless arrests for any public offense committed in the officers presence to include violations of federal law.<sup>56</sup>

Although the defendants in *Santana-Garcia* were apparently in violation of a *civil* provision of the INA (i.e., illegal presence), the *Santana-Garcia* court made no distinction between the civil and criminal violations of the INA, and the authorities the court cited generally involved arrests for criminal matters. Moreover, it remains unclear how the court, pursuant to its broad understanding of the Utah state law it relied upon, would have ruled absent the initial reason for the stop — the traffic

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<sup>52</sup> *Ibid.*, at 1297 (citing 11 Okla. Op. Att'y Gen. 345 (1979), 1979 WL 37653). See also *United States v. Daigle*, 2005 U.S. Dist. LEXIS 14533 (D. Me. July 19, 2005) (finding state statutory authority for the stop of a person suspected of the federal immigration offense of entering the country without inspection because (1) the immigration offense was the functional equivalent to a state Class E or Class D offense and (2) state law authorizes an officer to make a warrantless arrest for an analogous offense if, among other things, the stop and arrest are made upon a "fresh pursuit" or "reasonable time" after the commission of the offense (Me. Rev. Stat. Ann. tit. 17-A, §15(2)).

<sup>53</sup> *United States v. Santana-Garcia*, 264 F.3d 1188 (10<sup>th</sup> Cir. 2001).

<sup>54</sup> *Ibid.*, at 1194. The court, nonetheless, cited Utah's peace officer statute (Utah Code Ann. §77-7-2) which empowers Utah state troopers to make warrantless arrests for "any public offense." The court also found Defendant's acknowledgment in *Vasquez-Alvarez* that Oklahoma law specifically authorized local law enforcement officials to make arrests for violations of federal law unnecessary to that decision. *Ibid.*, at 1194 n. 7.

<sup>55</sup> Citing *Salinas-Calderon*, 728 F. 2d 1298 (10<sup>th</sup> Cir. 1984); *United States v. Janik*, 723 F. 2d 537, 548 (7<sup>th</sup> Cir. 1983); *United States v. Bowdach*, 561 F. 2d 1160, 1167 (5<sup>th</sup> Cir. 1977).

<sup>56</sup> *Santana-Garcia*, 264 F. 3d at 1194 n. 8 (citing Utah Code Ann. §77-7-2).

violation. Accordingly, it can be argued that this case still seems to leave unresolved the extent to which state and local police officers may enforce the civil provisions of the INA as such.

The aforementioned cases ultimately arose in the context of enforcing *criminal* matters or violations of state law. This would seem to weaken the argument for an independent role in enforcing *civil* immigration matters. Nonetheless, as the cases from the Tenth Circuit illustrate, there appears to be a general movement towards expanding the role of state and local law enforcement officers in the field of immigration law, including some aspects of civil immigration enforcement.

## **Express Authorization for State and Local Law Enforcement Officers to Enforce Immigration Law**

Clearly preemption does not bar state and local immigration enforcement where Congress has evidenced intent to authorize such enforcement.<sup>57</sup> In exercising its power to regulate immigration, Congress is free to delegate to the states, among other things, the activities of arresting, holding, and transporting aliens. Indeed, Congress already has created avenues for the participation of state and local officers in the enforcement of the federal immigration laws.

**8 U.S.C. §1357(g).** One of the broadest grants of authority for state and local immigration enforcement activity stems from §133 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which amended INA §287 (8 U.S.C. §1357(g)). This provision authorizes the AG (now the Secretary of Homeland Security) to

enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

Section 1357(g) allows for significant flexibility. It permits state and local entities to tailor an agreement with the AG to meet local needs, contemplates the authorization of multiple officers, and does not require the designated officers to stop

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<sup>57</sup> Conversely, state action may be preempted where Congress explicitly manifests its intent in law. Such an intent is evidenced in INA §274A(h)(2) (8 U.S.C. §1324A(h)(2)), which explicitly prohibits states from imposing civil or criminal sanctions upon those who employ, recruit, or refer unauthorized aliens. Other provisions that expressly consider the role of states are INA §287(d) (state and local police are requested to report to INS arrests related to controlled substances when the suspect is believed to be unlawfully in the country) and INA §288 (instructing INS to rely on state and local police for the enforcement of local laws within immigrant stations).

performing their local duties.<sup>58</sup> In performing a function under §1357(g), the written agreement must articulate the specific powers and duties that may be, or are required to be, performed by the state officer, the duration of the authority, and the position of the agent of the AG who is required to supervise and direct the individual.<sup>59</sup>

8 U.S.C. §1357(g)(2) requires that state officers “have knowledge of and adhere to” federal law governing immigration officers in addition to requiring adequate training regarding the enforcement of immigration laws. Section 1357(g)(3) mandates that the AG direct and supervise state officers who are performing immigration functions pursuant to §1357(g). Under §1357(g)(6), the AG, in carrying out §1357(g), can not accept a service if the service will displace any federal employee. Officers designated by the AG are not federal employees except for certain tort claims and compensation matters, but they do enjoy federal immunity.<sup>60</sup> Section 1357(g)(9) establishes that a state is not required to enter into an agreement with the AG under §1357(g); furthermore, under §1357(g)(10) no agreement is required for a state officer to communicate with the AG regarding the immigration status of any individual or to cooperate with the AG in the identification, apprehension, detention, or removal of aliens unlawfully present in the United States.

**8 U.S.C. §1103(a)(8).** Section 372 of IIRIRA amended INA §103(a) to allow the AG to call upon state and local police in an immigration emergency (8 U.S.C. §1103(a)). 8 U.S.C. §1103(a)(8) provides:

In the event that the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States or near a land border presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the power, privileges or duties conferred or imposed by the Act or regulations issued thereunder upon officers or employees of the service.

Thus, under 8 U.S.C. §1103(a)(8), state and local officers may exercise the civil or criminal arrest powers of federal immigration officers (1) when expressly authorized by the AG; (2) when given consent by the head of the state or local law enforcement agency; and (3) upon the AG’s determination of an emergency due to a mass influx of aliens. Any authority given by the AG to state law enforcement officers under this provision can only be exercised during the emergency situation.

On July 24, 2002, the DOJ issued a final rule that implemented §1103(a)(8) and described the cooperative process by which state or local governments could agree to place authorized state and local law enforcement officers under the direction of the

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<sup>58</sup> Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 B.Y.U. L. Rev. 899, 925 (1997).

<sup>59</sup> INA §287(g)(5).

<sup>60</sup> INA §287(g)(7)(8).

INS in exercising federal immigration enforcement authority.<sup>61</sup> In February of 2003, the DOJ found it necessary to amend the previous regulations, however, because it determined that the AG did not have the flexibility to address unanticipated situations that might occur during a mass influx of aliens. The new rules also allow the AG to abbreviate or waive the otherwise normally required training requirements when such an action is necessary to protect public safety, public health, or national security.<sup>62</sup>

**8 U.S.C. §1252c.** Section 1252c originated in the House of Representatives as a floor amendment to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA §439).<sup>63</sup> Section 1252c authorizes the arrest of aliens by state and local officers who have presumably violated §276 of the INA (Reentry of Removed Alien). Section 1252c(a) states in part:

[T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who —

- (1) is an alien illegally present in the United States; and
- (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

The purpose of §1252c was to overcome a perceived federal limitation on the ability of state and local officers to arrest an alien known by them to be dangerous because of past crimes committed in their jurisdiction.<sup>64</sup> The court in *United States v. Vasquez-Alvarez*, however, found that neither the defendant, the government, or the court could identify any pre-§1252c limitations on the powers of state and local officers to enforce federal law.<sup>65</sup> Section 1252c(b) also mandates cooperation between the AG and the states to assure that information in the control of the AG, including information in the NCIC, that would assist state and local law enforcement officials in carrying out the duties of §1252c is made available to the states.

**8 U.S.C. 1324(c).** Congress appears to have delegated arrest authority to local law enforcement officers in 8 U.S.C. §1324 (INA §274), which establishes a number of criminal penalties for the smuggling, transporting, concealing, and harboring of illegal aliens. Subsection (c) of §1324, entitled “Authority to Arrest” states that:

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<sup>61</sup> Codified at 28 C.F.R. §65.84; see also 67 *Federal Register* 48354.

<sup>62</sup> Abbreviation or Waiver of Training for State or Local Law Enforcement Officers Authorized To Enforce Immigration Law During a Mass Influx of Aliens, 68 *Fed. Reg.* 8820-8822 (Feb. 26, 2003) (codified at 28 C.F.R. §65.84(a)(4)).

<sup>63</sup> P.L. 104-132, §439. See 142 *Congressional Record* 4619 (Rep. Doolittle offering amend. no. 7 to H.R. 2703).

<sup>64</sup> *Vasquez-Alvarez*, 176 F. 3d at 1299.

<sup>65</sup> *Vasquez-Alvarez*, 176 F. 3d at 1299, n. 4.

[n]o officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and *all other officers whose duty it is to enforce criminal laws*. (emphasis added)

The plain language in this subsection seems to indicate that local law enforcement officers — that is, officers authorized to enforce criminal laws — are empowered to make arrests for the smuggling, transporting, and harboring offenses described in §1324. The legislative history of §1324 confirms this understanding. The Senate-passed version of this provision stated that arrests for violations only could be made by INS agents and “other officers *of the United States* whose duty it is to enforce criminal laws.”<sup>66</sup> The House, however, struck the words “of the United States,” so that local officials could enforce this specific provision.<sup>67</sup> The elimination of the limiting phrase “of the United States,” appears to make Congress’s intent clear that all criminal law enforcement officers, federal or otherwise, are authorized to enforce §1324.<sup>68</sup>

## Current Efforts

As mentioned above, IIRIRA amended the INA by authorizing the AG to enter into written agreements with states or political subdivisions of a state so that qualified officers could perform specified immigration-related duties. This authority was given new urgency following the terrorist attacks in September 2001. In 2002, the AG proposed an initiative to enter into such agreements in an effort to carry out the country’s anti-terrorism mission. Under the agreement, state and local law enforcement officers could be deputized to assist the federal government with enforcing certain aspects of immigration law.<sup>69</sup> To date Alabama, Arizona, Florida and the Los Angeles County Sheriff’s Department have entered into such an

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<sup>66</sup> 98 Cong. Rec. 810, 813 (1952) (emphasis added).

<sup>67</sup> Conf. Rep. No. 1505, 82 Cong., 2d (1952). Former Representative Walter offered the amendment to strike the words “of the United States.” He stated that the purpose of the amendment was “to make it possible for any law enforcement officer to make an arrest.” 98 Cong. Rec. 1414-15 (1952).

<sup>68</sup> As previously discussed, the 9<sup>th</sup> Circuit in *Gonzalez* used the legislative history of §1324(c) to conclude that local law enforcement officers are authorized to enforce all criminal immigration matters.

<sup>69</sup> U.S. Department of Justice, *Attorney General Prepared Remarks on the National Security Entry-Exit Registration System*, June 6, 2002.

agreement.<sup>70</sup> For FY2006, Congress appropriated 5 million for states and localities who enter into such agreements with DHS.<sup>71</sup>

## Florida's Memorandum of Understanding

**Background.** In September 2002, the state of Florida Department of Law Enforcement (FDLE) and DOJ entered into a one-year memorandum of understanding (MOU).<sup>72</sup> The MOU was designed as a pilot program that authorized 35 state and local law enforcement officers to work on Florida's Regional Domestic Security Task Forces (RDSTF). The task forces performed immigration enforcement functions that pertain to domestic security and counter-terrorism needs of the nation and the state of Florida.

Under Florida's renewed MOU with DHS, selected officers are authorized to enforce immigration laws and policies upon successful completion of mandatory training provided by DHS instructors.<sup>73</sup> Officers assigned to the RDSTF are nominated by the co-directors of each RDSTF and are presented to the FDLE for consideration. Each nominee has to be a U.S. citizen, have been a sworn officer for a minimum of three years, and have, at minimum, an Associate Degree. Candidates also must be able to qualify for federal security clearances. Once selected, each candidate's employer has to indicate that it will allow the officer to work a significant portion of his work responsibilities within the RDSTF for a minimum of one year.

**Training.** Training for the officers is provided by ICE at a mutually designated site in Florida. The program uses ICE curriculum and competency testing, which includes information on the following: (1) the scope of the officer's authority; (2) cross-cultural issues; (3) the proper use of force; (4) civil rights law; and (5) liability issues. Officers also receive specific training on their obligations under federal law and the Vienna Convention on Consular Relations on making proper notification upon the arrest of foreign nationals.<sup>74</sup> All training materials are provided by DHS, while the employing agency is responsible for the salaries and benefits of the officers in training. The FDLE covers the costs of housing and meals during training.

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<sup>70</sup> Local law enforcement was used to enforce immigration law prior to the 2002 DOJ initiative. In 1997, the then-INS and the police department in Chandler, Arizona conducted a joint operation wherein individuals in the community who were suspected of being illegally present in the United States were investigated. The city was sued due to allegations of profiling and settled the law suit with members in the community who were involved in the operation.

<sup>71</sup> P.L. 109-90.

<sup>72</sup> The MOU was renewed on Nov. 26, 2003.

<sup>73</sup> Under the MOU, law enforcement officers have the following authorities: (1) interrogate an alien in order to determine if there is probable cause for an immigration arrest; (2) arrest an alien without warrant for civil and criminal immigration violations; (3) complete required arrest reports and forms; (4) prepare affidavits and take sworn statements; (5) transport aliens; (6) assist in pre-trial and post-arrest case processing of aliens taken into custody by the ICE; (7) detain arrested aliens in ICE approved detention facilities.

<sup>74</sup> Available at [<http://www.un.org/law/ilc/texts/consul.htm>].

Upon successful completion of the training, DHS provides a signed document setting forth the officer's authorization to perform specified immigration enforcement functions for an initial period of one year. The officer's performance is evaluated by the District Director and the FDLE commissioner on a quarterly basis to assure compliance with the MOU requirements. Authorization of the officer's powers could be revoked at any time by DHS, FDLE or the employing agency.

Immigration-related activities performed by the officers are supervised by DHS. Participating officers cannot perform any immigration officer functions except when fulfilling their assigned RDSTF duties and under the direct supervision of a DHS officer. The DHS officer coordinates the involvement of the officers in DHS-related operations in consultation with the RDSTF supervisor to assure appropriate utilization of personnel. Under the MOU, officers cannot be utilized in routine DHS operations unless it relates to the RDSTF's domestic security and counter-terrorism functions. All arrest made under this authority must be reported to ICE within 24 hours.

**Complaint Procedures.** Florida's MOU requires complaint procedures to be disseminated throughout the state in English and any other appropriate languages. Under the MOU, complaints can be accepted from any source and submitted to federal or state authorities. All complaints received by the federal government, FDLE or the officer's employing agency have to be reported to ICE's Office of Internal Audit. Under the MOU, complaints reported directly to ICE must be shared with FDLE, at which time both agencies would determine the appropriate jurisdiction for the complaint to be resolved. Under the MOU, complainants must receive notification of the receipt of the complaint, and officers involved could be removed from participation in activities covered under the MOU pending resolution of the complaint.

**Program Evaluation.** Under the MOU, the Secretary of DHS and the commissioner of FDLE are require to establish a steering committee to periodically review and assess the effectiveness of the operations conducted by the task forces. The reviews are intended to assure that the efforts remain focused on the investigation of domestic security and counter-terrorism related matters. According to the MOU, within nine months of certification an evaluation of the program should be conducted by DHS with cooperation from other involved entities.<sup>75</sup>

## Alabama's Memorandum of Understanding

**Background and Training.** On September 10, 2003, the state of Alabama and DHS entered into an MOU that is similar to Florida's MOU. Officers are nominated by the Director of the state's Department of Public Safety (DPS) and forwarded to ICE. As with Florida's MOU, all nominees must be U.S. citizens, have at least three years of experience as a sworn law enforcement officer, and be able to qualify for federal security clearances. Unlike Florida's MOU, however, there is no minimal education requirement. Training is provided by ICE, and the curriculum is

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<sup>75</sup> The evaluation should include statistical evaluation, reports, records, officer evaluation, case reviews, complaint records, site visits, media coverage and community interaction.

the same as provided in Florida's MOU. DPS is responsible for all expenses incurred during training and updated training will be provided to the officers at the end of their initial year of appointment.<sup>76</sup>

Immigration enforcement activities of the officers will be supervised and directed by ICE special agents, who are located in Huntsville, Birmingham and Montgomery, Alabama. Such activities can only be performed under direct supervision of ICE special agents. Arrests made under the authority must be reported to ICE within 24 hours, and will be reviewed by the ICE special agent on an ongoing basis to ensure compliance with immigration laws and procedures.

## **Los Angeles County Sheriff's Department MOU**

In February 2005, the Los Angeles County Sheriff's Department (LASD) entered into an MOU with the Department of Homeland Security. The terms of the MOU are similar to those of Florida and Alabama with several exceptions. Under the MOU, LASD personnel in county jails are authorized to (1) complete required criminal alien processing; (2) prepare immigration detainers; (3) prepare affidavits and take sworn statements (4) prepare Notice to Appear (NTA) applications; and (5) interrogate in order to determine probable cause for an immigration violation.<sup>77</sup> The MOU explicitly states that both parties understand that the LASD will not continue to detain an alien after the alien becomes eligible for release from LASD custody in accordance to applicable law and policy, except for a period of 48 hours excluding weekends and holidays. The MOU also specifies that the LASD has sole discretion to terminate the MOU should the State Criminal Alien Assistance Program (SCAAP)<sup>78</sup> funding fall below an acceptable level or is terminated in its entirety.

## **Arizona's MOU**

In September 2005, the *Arizona Department of Corrections* (ADOC) entered into an MOU with the Department of Homeland Security in an effort to enhance Arizona's capacity to deal with immigration violators in Arizona.<sup>79</sup> The director of the Arizona Department of Corrections nominated eight correction officer candidates and two supervisory correctional officers for initial training and certification. All candidates were required to have a minimum of two years with ADOC and be bilingual in English and Spanish. Other criteria included not being married to a person illegally present in the U.S., or knowingly having family associations that

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<sup>76</sup> On Oct. 3, 2003, 21 Alabama state troopers completed training under the MOU.

<sup>77</sup> The aforementioned functions are usually performed by ICE agents in preparation for possible deportation proceedings and/or deportation.

<sup>78</sup> SCAAP is a federal grant program that reimburses states and localities for correctional officers' salary costs incurred for incarcerating undocumented criminal aliens.

<sup>79</sup> Under the MOU, *correctional officers* have the following authorities: (1) interrogate an alien in order to determine if there is probable cause for an immigration violation; (2) complete required arrest reports and forms; (3) prepare affidavits and take sworn statements; (4) prepare immigration detainers and I-213 Record of Deportable/Inadmissible Alien reports; and (5) prepare Notice to Appear or other removal charging documents.



could adversely impact their ability to perform ICE functions under the MOU. The selected officers' principal assignments are in Phoenix and Perryville. There is no termination date for Arizona's MOU, however it does contain the stipulation that it can be temporarily suspended should resource constraints or competing priorities necessitate.

**Complaint Procedures.** Complaint procedures under the MOUs are the same as those described in the Florida MOU. Community and media relations in all MOUs are stressed. DHS will engage in community outreach with any organization or individuals expressing interest in the MOUs. All information released to the media must be coordinated between DHS and state law enforcement entities.

## Commonalities in the MOUs

In all MOUs, officers are treated as federal employees for the purpose of the Federal Tort Claims Act<sup>80</sup> and worker's compensation claims when performing duties authorized under the MOUs. They also have the same immunities and defenses of ICE officers from personal liability from tort suits.<sup>81</sup> Under the MOUs, officers named as defendants in litigation arising from activities carried out under the MOU may request representation by the DOJ. The MOUs of the participants stipulate that any party can terminate the MOU at anytime. Currently, none of the MOUs discussed have termination dates.

## Legislation in the 109<sup>th</sup> Congress<sup>82</sup>

Since the attacks of September 11, 2001, many have called on state and local law enforcement agencies to play a larger role in the enforcement of federal immigration laws. Some question, however, whether state and local law enforcement officers possess adequate authority to enforce all immigration laws — that is, both the *civil* violations and *criminal* punishments. Several bills in Congress would address these authority issues and enhance the role of state and local law enforcement agencies in the enforcement of immigration law.

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (H.R. 4437), as passed by the House, would “reaffirm the existing inherent authority of States,” as sovereign entities (including their law enforcement personnel), to investigate, identify, apprehend, arrest, detain, or transfer into federal custody aliens in the United States in the course of carrying out routine duties. Similar to H.R. 4437, the Department of Homeland Security Authorization Act for FY2006 (H.R. 1817), as passed by the House, would authorize state and local law enforcement personnel to apprehend, detain, or remove aliens in the United States in the course of carrying out routine duties. Likewise, it would reaffirm the existing

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<sup>80</sup> 28 U.S.C. §§2671-2680.

<sup>81</sup> 5 U.S.C. §§8101 *et seq.*

<sup>82</sup> Legislation discussed in this part is limited to provisions that pertain to state and local law enforcement's role in enforcing immigration law.

general authority for state and local law enforcement personnel to carry out the above mentioned activities.<sup>83</sup> S. 2612, the Comprehensive Immigration Reform Act of 2006, and S. 2454, the Securing America's Borders Act would also reaffirm a state's inherent authority to investigate, identify, apprehend, arrest, detain, or transfer into federal custody aliens in the United States, but would limit such practices to the enforcement of the *criminal* provisions of the INA.

Several provisions in H.R. 4437 and S. 2612 would provide funding to state and local law enforcement agencies that are addressing immigration enforcement issues. H.R. 4437, for example, would authorize the Secretary of DHS to make grants to state and local police agencies for the procurement of equipment, technology, facilities, and other products that are directly related to the enforcement of immigration law; however, S. 2612 would require DHS to reimburse state and local law enforcement agencies the cost of purchasing such equipment. H.R. 4437 would allow a state to reimburse itself with certain DHS grants for activities that relate to the enforcement of federal laws aimed at preventing the unlawful entry of persons or things into the United States that are carried out under agreement with the federal government. H.R. 4437 would also require designated sheriffs within 25 miles of the southern international border of the United States to be reimbursed or provided an advance for costs associated with the transfer of aliens detained or in the custody of the sheriff. S. 2612 would create a border relief grant program for eligible law enforcement agencies to address criminal activity that occurs near the border. Under the program, the Secretary of DHS would be authorized to provide grants to law enforcement agencies located within 100 miles of the northern or southern border or to agencies outside 100 miles that are located in areas certified as "high impact areas" by the Secretary. S. 2612 would also authorize DHS to reimburse state and local authorities for certain training, transportation, and equipment costs related to immigration enforcement, and certain costs associated with processing criminal illegal aliens through the criminal justice system.

Several other pieces of legislation have been introduced in the 109<sup>th</sup> Congress that would enhance the role of state and local law enforcement officials in the enforcement of immigration law (see for example, the Clear Law Enforcement for Criminal Alien Removal Act of 2005, H.R. 3137; the Homeland Security Enhancement Act of 2005, S. 1362; the Comprehensive Enforcement and Immigration Reform Act of 2005, S. 1438; the Rewarding Employers that Abide by the Law and Guaranteeing Uniform Enforcement to Stop Terrorism Act of 2005, H.R. 3333; and the Enforcement First Immigration Reform Act of 2005, H.R. 3938). However, none of these bills have seen legislative action. These bills, along with H.R. 4437, H.R. 1817, S. 2612 and S. 2454, would in part:

- prohibit federal funding to states and localities if they have in effect a law, policy or practice that prohibits law enforcement officers from assisting or cooperating with federal immigration law enforcement in the course of carrying out official law enforcement duties (H.R. 3137, S. 1438, H.R. 3333 and H.R. 3938); require such funding to

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<sup>83</sup> Additional legislation contain a similar provision including, H.R. 3137, S. 1362, H.R. 3333, S. 1438 and H.R. 3938.

be reallocated to states that comply with federal immigration law enforcement (H.R. 3137 and H.R. 3938);

- make it a violation of 8 U.S.C. 1373(a) and 1644 for a state or locality to have in effect a law, policy or practice that prohibits law enforcement officers from assisting or cooperating with federal immigration law enforcement in the course of carrying out official law enforcement duties *or* from providing information to the federal government with respect to the immigration status of individuals who are believed to be illegally present in the United States (S. 1362);
- require DHS to reimburse state and localities for all reasonable expenses incurred as a result of providing information on possible illegal aliens apprehended in their jurisdictions (S. 1362, S. 1438, H.R. 3333 and H.R. 3938);
- impose a fine and/or increase the criminal penalty for aliens in violation of immigration laws by sentencing them to “not less than one year” (H.R. 3137), while S. 1362 would increase the penalty by up to one year; also, the bills would increase the criminal penalty for aliens in violation of immigration laws from six months to one year and subject their assets to forfeiture (H.R. 3137, S. 1362, H.R. 3333 and H.R. 3938);
- make illegal presence in the United States a felony (H.R. 4437, H.R. 3137 and H.R. 3333), while S. 1362 would make illegal presence in the United States a misdemeanor.
- allow as an *affirmative defense* with respect to illegal presence due to the alien overstaying the terms of his visa due to an “exceptional and extremely unusual hardship or physical illness” that prevented the alien’s departure from the United States (S. 1362, H.R. 3333 and H.R. 3938);
- increase the civil penalties for aliens who fail to depart the country (H.R. 3137 and H.R. 3938), and subject their assets to forfeiture, under certain circumstances (H.R. 3137, S. 1362, H.R. 3333 and H.R. 3938);
- require DHS to provide specified information to the NCIC on aliens who(se): (1) have been issued a final order of removal (H.R. 4472, S. 2454, S. 2612, H.R. 3137, S. 1362, S. 1438, H.R. 3333 and H.R. 3938); (2) signed a voluntary departure agreement (H.R. 4472, S. 2454, S. 2612, H.R. 3137 and H.R. 3333); (3) is subject to a voluntary departure agreement (S. 2454, S. 2612, S. 1362, S. 1438 and H.R. 3333); (4) overstayed their authorized period of stay (H.R. 4472, S. 2454, S. 2612, H.R. 3137, S. 1362, H.R. 3333 and H.R.

3938); and (5) visa has been revoked (H.R. 3137, S. 1362, S. 1438 and H.R. 3938).<sup>84</sup>

- require states and localities to have a policy that provides DHS with identifying information on aliens arrested in their jurisdiction in violation of immigration laws to be included in the NCIC (H.R. 3137, S. 1362, H.R. 3333 and H.R. 3938); require states and localities to provide information to federal authorities of aliens for inclusion into the NCIC (H.R. 3137, H.R. 3333 and H.R. 3938);
- encourage states and localities to provide information on aliens arrested in their jurisdictions to DHS (H.R. 3137 and 3938);
- require DHS to make grants to states and political subdivisions that would provide for compensation for incarcerating illegal aliens (H.R. 3137);
- require DHS to verify the immigration status of aliens apprehended or arrested by state and local law enforcement agencies (S. 2612 and S. 2454);
- require DHS to take possession of illegal aliens within 48 hours (H.R. 3137, H.R. 3333 and H.R. 3938) or 72 hours (S. 1362, S. 1438, S. 2454 and S. 2612) after the state or local law enforcement agency has completed its charging process or within 48 hours (H.R. 3137, H.R. 3333 and H.R. 3938) or 72 hours (S. 1362, S. 1438, S. 2454 and S. 2612) after the illegal alien has been apprehended if no charges are filed; require the Secretary of DHS to establish a mechanism to collect illegal aliens from state and local law enforcement authorities (H.R. 3137, S. 1362, H.R. 3333, H.R. 3938 and S. 2454);
- require DHS to designate at least one federal, state or local prison, jail, private contracted prison or detention facility within each state as the central facility for that state to transfer custody of aliens to DHS (S. 2612 and S. 2454);
- require DHS to reimburse state and local law enforcement agencies for the cost incurred to incarcerate and transport illegal aliens in their custody, and authorize appropriations for the detention and transportation of illegal aliens to federal custody (S. 2612, S. 2454, H.R. 3137, S. 1362, S. 1438, H.R. 3333 and H.R. 3938);

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<sup>84</sup> Provisions in the Gang Deterrence and Community Protection Act of 2005 (H.R. 1279), as passed by the House, would also require information on certain immigration violators to be entered into the National Crime Information Center.

- require DHS to provide transportation and officers to take illegal aliens who are apprehended by state and local law enforcement officers into DHS custody (S. 2454 and S. 2612);
- require DHS to reimburse states and localities for the cost to train state and local law enforcement officers in immigration enforcement if such training was provided by the state or locality (S. 2454, S. 2612 and S. 1817);
- require DHS to establish a training manual and pocket guide for state and local law enforcement personnel with respect to enforcing immigration law; require DHS to make the training available to state and local law enforcement officers through as many means as possible; require DHS to be responsible for the cost incurred in establishing the training manual and pocket guide (H.R. 4437, H.R. 3137, S. 1362, and H.R. 3938);
- require Cameron University (Lawton, OK) to establish and implement a demonstration project to assure the feasibility of establishing a basic immigration law enforcement nationwide e-learning training course; require the demonstration project to be carried out in selected states and sets forth the criteria (H.R. 3333);
- provide immunity to the same extent as a federal law enforcement officer for state and local law enforcement officers with respect to personal liability that may arise as a result of the officer performing his official duties (H.R. 3137, S. 1362, S. 1438 and H.R. 3938); and
- provide immunity for federal, state or local law enforcement agencies with respect to claims of money damages that may arise as a result of an officer from the agency enforcing immigration law, except to the extent a law enforcement officer committed a violation of federal, state, or local criminal law in the course of enforcing such immigration law (H.R. 3137, S. 1362, S. 1438 and H.R. 3938).

Contrary to the aforementioned bills, the Save America Comprehensive Immigration Act of 2005 (H.R. 2092) would eliminate the ban on state and local governments from prohibiting communications with DHS. The bill would also eliminate the authority in current law that permits state personnel to enforce immigration law. The bill has been referred to the relevant committees and no further action has been taken.

## **Selected Issues**

In addition to the legal complexities that may arise with respect to utilizing state and local law enforcement to enforce immigration law, several additional issues have been noted.

## Sanctuary States and Cities

Current day “sanctuary cities” or “non-cooperation policies” have their roots in the 1980s religious sanctuary movement by American churches. These churches provided sanctuary to thousands of unauthorized Central American migrants fleeing civil war in their homelands. Most cities that are considered sanctuary cities have adopted a “don’t ask-don’t tell” policy where they don’t require their employees, including law enforcement officers, to report to federal officials aliens who may be illegally present in the country.

Localities, and in some cases individual police departments, in such areas that are considered “sanctuary cities,” have utilized various mechanisms to ensure that unauthorized aliens who may be present in their jurisdiction illegally are not turned in to federal authorities.<sup>85</sup> Some municipalities address the issue through resolutions, executive orders or city ordinances, while many police departments address the issues through special orders, departmental policy and general orders. To date, there are two statewide policies regarding providing sanctuary for unauthorized aliens. In May 2003, Alaska’s state legislature passed a joint resolution prohibiting state agencies from using resources or institutions for the purpose of enforcing federal immigration laws.<sup>86</sup> In 1987, Oregon passed a law that prohibits state and local law enforcement agencies from using agency moneys, equipment or personnel for the purpose of detecting or apprehending foreign citizens based on violation of federal immigration law.<sup>87</sup> Oregon law, however, does permit their law enforcement officers to exchange information with federal authorities to verify the immigration status of an individual arrested for criminal offenses.

According to proponents, the movement to provide coverage for unauthorized aliens stems from the belief that the enforcement of immigration law is the responsibility of federal authorities, and that state resources should not be used for this purpose. Some view these policies to be at odds with §642 of IIRIRA, which permits the sharing of information between agencies and requires state and local agencies to share information with INS and prohibits such information from being restricted. They argue that requiring the reporting of unauthorized aliens to federal authorities infringes on states’ tenth amendment right to sovereignty.

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<sup>85</sup> Cities and counties currently that have sanctuary policies are; Anchorage, AK, Fairbanks, AK, Chandler, AZ, Fresno, CA, Los Angeles, CA, San Diego, CA, San Francisco, CA, Sonoma County, CA, Evanston, IL, Cicero, IL, Cambridge, MA, Orleans, MA, Portland, ME, Baltimore, MD, Takoma Park, MD, Ann Arbor, MI, Detroit, MI, Minneapolis, MN, Durham, NC, Albuquerque, NM, Aztec, NM, Rio Arriba, County, NM, Sante Fe, NM, New York, NY, Ashland, OR, Gaston, OR, Marion County, OR, Austin, TX, Houston, TX, Katy, TX, Seattle, WA, and Madison, WI.

<sup>86</sup> H.J.Res. 22, 23<sup>rd</sup> Leg., 1<sup>st</sup> sess., (Ak. 2003).

<sup>87</sup> Or. Rev. Stat. §181.850.

On January 5, 2006, the President signed the Violence Against Women and Department of Justice Reauthorization Act of 2005 into law.<sup>88</sup> As part of this reauthorization, the Inspector General of the Department of Justice is required to conduct a study of cities and localities with sanctuary policies and provide the Congress with a list of such areas.

## Access to Database

Under current practice, state and local law enforcement officials do not have direct access to information on the immigration status of an alien. In the course of their duties, if state and local law enforcement officials encounter an alien whose immigration status is in question, they can contact the LESC in Burlington, Vermont.<sup>89</sup> Immigration officials at the LESC query a database that contains information on an alien's immigration status. If the alien is unauthorized to be present in the country and the state or local law enforcement official has decided that the alien will be released from their jurisdiction, immigration officials are notified to come and pick up the alien.<sup>90</sup>

In addition to the LESC, state and local law enforcement officials can access the NCIC for those aliens who are listed as absconders.<sup>91</sup> Aliens listed on the absconder list can be detained by state and local law enforcement officials because they are in violation of the federal criminal code. It has been reported, however, that the FBI has a backlog with respect to entering the names of over 350,000 absconders in the database.<sup>92</sup>

State and local law enforcement officials, however, have reported a variety of problems with accessing LESC and soliciting the help of federal immigration officials once it has been determined that an alien is unauthorized to be present in the country.<sup>93</sup> According to some state and local law enforcement officials, it can take

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<sup>88</sup> P.L. 109-162; 119 Stat 2960.

<sup>89</sup> LESC was established in 1994 and is administered by ICE. It operates 24 hours a day, seven days a week. LESC gathers information from eight databases and several law enforcement databases, including the NCIC. In July 2003, LESC processed 48,007 inquiries.

<sup>90</sup> Section 642(c) of IIRIRA required the former INS to respond to inquiries from local law enforcement agencies that sought to ascertain the immigration status of an individual within the jurisdiction of the agency for any purpose authorized under law.

<sup>91</sup> Absconders are unauthorized or criminal aliens or nonimmigrants who violated immigration law and have been ordered deported by an immigration court.

<sup>92</sup> Testimony of INS Commissioner James Zigler, in U.S. Congress, House Appropriations Committee, Subcommittee on Commerce, Justice, State and the Judiciary, Hearing on the President's FY2003 Budget Request, Mar. 7, 2002.

<sup>93</sup> In some cases, local law enforcement may pick up an alien for questioning and determine that the alien could be released under normal circumstances, but because the alien has an illegal status, the officer should turn the alien over to federal authorities.

several hours to get the results of a single query.<sup>94</sup> DHS, however, has reported that, on average, an immigrant status query takes 15 minutes.<sup>95</sup> State and local law enforcement officials have also reported that federal authorities rarely cooperate once they have been contacted by a state or local law enforcement entity.<sup>96</sup> Whatever the facts may be, there is a perception on the part of state and local law enforcement personnel that cooperation could be improved.

## Civil Rights

One of the overriding concerns with state and local police involvement in the enforcement of immigration law is the potential for civil rights violations. A person is afforded certain civil rights under the Fifth Amendment, which guarantees that “no person shall ... be deprived of life, liberty, or property, without the due process of law ...,” and the Fourteenth Amendment, which prohibits a state from denying to “any person within its jurisdiction the equal protection of the laws.” It should also be noted that courts have reviewed alleged police misconduct under the Fourth Amendment’s prohibition against unreasonable searches and seizures.

Congress has also statutorily prohibited certain discriminatory actions and has made available various remedies to victims of such discrimination. For example, Title VI of the Civil Rights Act of 1964 prohibits “discrimination under federally assisted programs on the grounds of race,” which can include federal and state law enforcement entities. 42 U.S.C. §1983, enacted as part of the Civil Rights Act of 1871, provides a monetary damages remedy for harm caused by deprivation of federal constitutional rights by state or local governmental officials. The Violent Crime and Control and Law Enforcement Act of 1994 included a provision, 42 U.S.C. §14141, which authorizes the DOJ (but not private victims) to bring civil actions for equitable and declaratory relief against any police agency engaged in unconstitutional “patterns or practices.”

Because unauthorized aliens are likely to be members of minority groups, complications may arise in enforcing immigration law due to the difficulty in identifying illegal aliens while at the same time avoiding the appearance of discrimination based on ethnicity or alienage. Thus, a high risk for civil rights violations may occur if state and local police do not obtain the requisite knowledge, training, and experience in dealing with the enforcement of immigration laws. Moreover, suspects of immigration violations may become victims of “racial profiling” — the practice of targeting individuals for police or security detention based on their race or ethnicity in the belief that certain minority groups are more

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<sup>94</sup> U.S. Congress, House Subcommittee on Immigration, Border Security, and Claims, *H.R. 2671, The Clear Law Enforcement for Criminal Alien Removal Act*, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., Oct. 1, 2003.

<sup>95</sup> Congressional Research Service interview with an ICE congressional liaison and official in Dec. 2003.

<sup>96</sup> Reportedly, this is more of a problem in rural areas where the closest immigration official may be in another state. U.S. Congress, House Subcommittee on Immigration, Border Security, and Claims, *H.R. 2671, The Clear Law Enforcement for Criminal Alien Removal Act*.



likely to engage in unlawful behavior or be present in the U.S. illegally. The prevalence of alleged civil rights violations and racial profiling among federal, state, and local law enforcement agencies has already received a significant amount of attention from the public and the courts.<sup>97</sup>

## **Detention Space**

The former INS has long lacked sufficient beds to house immigration violators. As a result of the lack of bed space, many aliens continue to be released from detention. Some contend that a possible unintended consequence of permitting state and local law enforcement entities to enforce immigration law would lead to more aliens being detained. These critics point to the fact that there are over 350,000 aliens with final orders of deportation present in the United States; and, according to the 2000 U.S. Census, there are approximately 8 million undocumented aliens present. By increasing the number of law enforcement officers to enforce immigration law, they argue, inevitably more undocumented aliens would be detained. States and local jurisdictions already face some of the same challenges the federal government has been experiencing with respect to the lack of facilities to house criminals and immigrant violators. Moreover, some argue that state and local law enforcement agencies may bear the cost of detaining unauthorized aliens.<sup>98</sup>

## **Pro/Con Analysis of State and Local Law Enforcement Officials Enforcing Immigration Law**

Determining what the proper role of state and local law enforcement officials is in enforcing immigration law is not without controversy. Lawmakers, scholars, observers and law enforcement officials have all expressed their opposition or support for increasing the role of state and local law enforcement with respect to enforcing immigration law. Following is a discussion of a few of the issues.

### **Impact on Communities**

Opponents argue that utilizing state and local law enforcement to enforce immigration law would undermine the relationship between local law enforcement agencies and the communities they serve. For example, potential witnesses and victims of crime may be reluctant to come forward to report crimes in fear of actions that might be taken against them by immigration officials. They assert that the trust between immigrants and local authorities is tenuous in many jurisdictions and that such a policy could exacerbate the negative relationship.

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<sup>97</sup> See *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the House Comm. on the Judiciary*, 108<sup>th</sup> Cong. 66-69 (2003) (statement of the Mexican American Legal Defense and Education Fund) (citing various examples of racial profiling among federal and state officers).

<sup>98</sup> For additional information on aliens in detention, see CRS Report RL31606, *Detention of Noncitizens in the United States*, by Alison Siskin and Margaret Mikyung Lee.

Proponents contend that state and local law enforcement officers would best be able to enforce such laws simply because they know their communities. They argue that state and local law enforcement officers already have the power to enforce criminal immigration violations and have not seen a reluctance on the part of the communities they serve to cooperate.

## **Resources**

Opponents argue that state and local law enforcement resources should not be used to fund a federal responsibility. They contend that such action could result in the reduction of local law enforcement resources available for other purposes and constitute a cost shift onto state and local law enforcement agencies. According to some, local jurisdictions are already witnessing a depletion of traditional funding to fight crime. Moreover, they contend, many jurisdictions have not received funding for their first responders programs. These critics also contend that there could be a de-emphasis on certain types of criminal investigations in an effort to focus on enforcing immigration law, which would divert law enforcement authorities' from their primary duties.

Proponents in favor of utilizing state and local law enforcement to enforce immigration law argue that such assistance would help the federal government to enforce the immigration law deeper into the interior of the United States. Moreover, they contend that local law enforcement agencies would bring additional resources to assist the federal government with enforcing immigration law. Finally, they argue that the current atmosphere of terrorist threat adds impetus to any efforts that might reduce this threat.

## **National Security**

Opponents argue that such a policy would undermine public safety and could force many undocumented aliens to go underground, thus making it more difficult to solicit their cooperation in terrorist-related and criminal investigations.

Proponents assert that permitting state and local law enforcement to enforce immigration law would make it easier to arrest potential terrorists and criminals who are illegally present in the country, thus providing an elevated level of security for the nation. They argue that these individuals could provide important tips in an investigation.

## **Application of Policy**

Under current law, the Secretary of DHS could enter into separate agreements with states and localities. Opponents contend that separate agreements could lead to inconsistent application of immigration law across jurisdictions and possible legal claims of disparate treatment. Moreover, they contend that different applications could lead to allegations of racial profiling and discrimination.

Proponents argue that jurisdictions have different needs and that separate agreements that are designed to meet the need of each jurisdiction are critical. They

contend that as long as the jurisdiction is abiding by the conditions set forth in its MOU with the federal government, then the propensity for abuse or misapplication is mitigated.

## **Training**

Since federal immigration law is a complex body of law, it requires extensive training and expertise to adequately enforce. Some argue that there are a variety of documents that allow someone to be legally present in the United States and state and local law enforcement officials do not have the necessary training on how to differentiate between those documents. Additionally, opponents maintain that the use of fraudulent documents is a growing problem and immigration authorities must be familiar with the various techniques that are used to misrepresent a document.

Proponents argue that the current training that is outlined in policy is sufficient to adequately train state and local law enforcement officials to properly enforce immigration law. They contend that state and local law enforcement entities, as in the case of Alabama's MOU, can supplement the required training as they see fit.<sup>99</sup>

## **Selected Policy Options**

As Congress debates the use of state and local law enforcement officers to enforce immigration law, it may want to consider several policy options, which may represent a choice among the options listed below or a combination. Congress may also choose to take no action, which could leave it to the courts to define these boundaries.

### **Direct Access to Databases**

Under current practice, state and local law enforcement officials have indirect access to the immigration status of aliens through LESC and direct access to absconders through the FBI's NCIC, (see discussion in "Legislation in the 108<sup>th</sup> Congress"). Some law enforcement officials argue that direct access to databases that contain information on the immigrant's status would assist them in carrying out their responsibilities more efficiently and effectively. Opponents, on the other hand, argue that providing state and local law enforcement officials with direct access to an alien's personal information could lead to abuse of such information by the law enforcement official. Some raise questions about the quality of the various databases and the potential for false positives, which could lead to the incarceration of innocent people. While there are critics on both sides of the issue, there may be a consensus that state and local law enforcement officials need access to certain information on aliens with whom they come into contact.

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<sup>99</sup> According to a 2002 rule, the AG could waive the required training for state or local law enforcement officers who may deputized to enforce immigration law.

According to some, other issues arise when addressing state and local law enforcement's access to immigration databases: (1) how much access should be granted to state and local law enforcement officials; (2) who should have access to the databases; (3) what level of background clearance would be sufficient for the officers accessing the database; (4) what type of privacy protection should be given for individuals whose personal information is being accessed; and (5) how can the quality of the databases be improved to avoid potential problems such as "false positives" and individuals with similar names, which could potentially clog up the system.

## Funding for State Cooperation

Congress could appropriate additional funding to state and local law enforcement agencies for their cooperation with enforcing immigration law. A common argument made by local law enforcement officials against enforcing immigration law is the lack of resources.<sup>100</sup> Many states are facing budget crises and police departments have seen decreases in federal funding for some law enforcement programs. Moreover, there have been complaints from some jurisdictions that they are not receiving first responder funding.

**State Criminal Alien Assistance Program (SCAAP).** In addition to some reduction in traditional funding for law enforcement-related purposes, states and localities have also seen a reduction in federal reimbursement for the SCAAP. SCAAP provides payment assistance to states and localities for the costs incurred for incarcerating undocumented aliens being held as a result of state or local charges.<sup>101</sup> SCAAP funding decreased from \$564 million in FY2002 to \$250 million in FY2003. In FY2004, SCAAP funding increased to \$300 million. Congress appropriated an additional \$5 million in FY2005 (a total of \$305 million). For FY2006, Congress appropriated \$405 million for SCAAP.

## Criminalizing Civil Immigration Violations

At the center of the current debate to permit state and local law enforcement to enforce immigration law is whether state and local law enforcement has the inherent authority to enforce *civil* immigration violations, such as a nonimmigrant who overstays his visa. While this issue still appears somewhat unclear from a legal perspective (see earlier discussion in "Authorities to Enforce Immigration Law" and "State Involvement in the Enforcement of Immigration Law"), by criminalizing all *civil* immigration violations, state and local law enforcement agencies could seemingly arrest and detain all immigration violators.

While some view this option as closing the existing loophole, others express concern that state and local law enforcement officials are not adequately trained to

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<sup>100</sup> Local law enforcement officials have also made other arguments against enforcing immigration law as discussed in "Pro/Con Analysis of State and Local Law Enforcement Officials Enforcing Immigration Law."

<sup>101</sup> Section 241 of the INA created SCAAP.

ascertain the difference between a bonafide asylum seeker and an individual who may be fraudulently trying to circumvent the system. Others express concern that the pool of violators is great (8 million undocumented aliens)<sup>102</sup> and the immigration system is already overburdened. Observers question that if civil immigration violations were to become criminal would it be retroactive, and if so to what date; and would it preempt aliens who have civil immigration violations from adjusting their status

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<sup>102</sup> The 2000 Census Bureau estimated that there are approximately 8 million undocumented aliens in the United States.