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ACLU Statement on H.R. 2671, the "Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003" before the House Subcommittee on Immigration, Border Security and Claims

October 1, 2003

Mr. Chairman, Representative Jackson-Lee and members of the subcommittee:

On behalf of the American Civil Liberties Union (ACLU) we are pleased to submit the following statement for the record at this hearing on H.R. 2671, the "Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2003." Despite its title, the CLEAR Act seeks to entangle local police officers with the enforcement of civil, not criminal, violations of federal immigration law.

The ACLU is a non-partisan, non-profit organization with 330,000 members, dedicating to preserving our freedoms as set forth in the Constitution. The promises of the Constitution, including those against discrimination and those against unreasonable searches and seizures, apply to all persons within the United States, and thus protect both citizens and non-citizens.

Policies that separate federal immigration enforcement and state and local law enforcement, such as those adopted by hundreds of communities across the country, are vital to preserving the civil liberties and safety of residents of immigrant communities. The CLEAR Act would penalize governments and police forces that adopt such policies, substituting the federal government's judgment for that of local police. Passing the CLEAR Act would be a serious mistake.

Involving state and local law enforcement in immigration status issues would have a severe impact on the civil rights and civil liberties of all persons, citizens and non-citizens alike, who reside in communities with large immigrant populations. Such involvement is opposed by many police departments and local governments who fear it would undermine public safety. It is opposed by conservatives who are wary of establishing a precedent for state and local enforcement of federal civil regulatory schemes. Finally, such a policy is not supported by the Bush White House, except with respect to what it describes as a narrow class of "anti-terrorism" matters.

Reversing Policies That Separate Local Law Enforcement from Immigration Enforcement Would Undermine Civil Liberties and Provide a Green Light for Racial Profiling

Reversing policies that separate immigration enforcement from local law enforcement will increase racial profiling and other unjustified stops, not only of undocumented workers, but also of legal residents and United States citizens who "look foreign." Many of these problems have plagued earlier efforts of state and local law enforcement officers to become involved in civil immigration enforcement. For example, an effort in 1997 in Chandler, Arizona on the part of local police to enforce immigration laws resulted in widespread civil rights abuses, including unjustified arrests of legal residents and citizens of Mexican descent, severely strained police and community relations, and led to substantial liability on the part of the municipality.

A policy that permits or encourages state and local law enforcement officers to stop and question persons for the purpose of enforcing federal immigration law is fraught with constitutional peril. Any stops made on the basis of racial appearance clearly violate the Fourth Amendment. As the Supreme Court has made clear, officers may not arrest individuals for immigration enforcement purposes except on the basis of probable cause.^[1] The Court also made clear that the bare fact that a person "looks foreign" cannot supply probable cause.^[2] Indeed, relying on racial factors for the enforcement of any law, including immigration laws, is strictly forbidden under the Constitution and will lead to damages if officers engage in such conduct.^[3] Because of these problems, many state and local police departments and local governments, including New York City, Los Angeles, Seattle, Washington and Montgomery County, Maryland, have longstanding policies precluding their officers from becoming entangled in immigration enforcement.

Reversing Policies That Separate Local Law Enforcement from Immigration Enforcement Would, According to Many Police Departments and Law Enforcement Officials, Seriously Undermine Public Safety

Reversing such policies would also seriously erode public safety. While those who favor such a change could point to incidents of particular undocumented immigrants who were not detained as a result of such a policy, these incidents must be weighed against the police's need to establish the trust and cooperation of their residents in order to solve crimes. Many state and local police departments who have considered these issues have decided that any benefits of involvement in immigration enforcement matters would be seriously outweighed by the effect such a policy would have on undermining the trust and confidence of immigrant communities. Absent such trust, many local and state police are concerned that members of immigrant communities will fear contacting the police if they are a victim of crime or a witness to crime.^[4]

Having a specialized federal agency whose sole responsibility is immigration enforcement simply makes good sense, as it frees other agencies, such as state and local police, to investigate crime and to obtain the cooperation of the communities they serve and protect. Good law enforcement requires trust. Reversing policies that separate immigration enforcement from local law enforcement could drag state and local police into the business of questioning and detaining individuals solely on the basis of immigration status, driving a wedge between immigrant communities and the very police they need to keep their communities safe.

Involving State and Local Police in Civil Immigration Enforcement Is Opposed by Conservatives, Who Fear It Could Set a Precedent For State and Local Involvement in Enforcing Other Federal Regulatory Schemes

Leading conservatives, including Grover Norquist, President of Americans for Tax Reform, and David Keene, Chairman of the American Conservative Union, have expressed opposition to having state police enforce civil immigration laws, denouncing it as a scheme that could lead to "nationalization of local law enforcement." As they observe, "If local police are to enforce our immigration laws, will they soon be required to seek out and apprehend those who violate our environmental laws, or the Americans with Disabilities Act as well?"^[5]

These concerns arise because enlisting states in enforcing immigration laws would upset the basic federal scheme. Under our Constitution, immigration policy is a federal matter. The question of which non-citizens are permitted to stay in the United States, and which may be removed, is governed by a complex set of laws and regulations which is implemented by a federal regulatory agency. These laws and regulations have been described by the Supreme Court as "intimately blended and intertwined with responsibilities of the national government," so that where the federal government has enacted "a complete scheme of regulation" on the subject of immigration, "any concurrent state power that may exist is restricted to the narrowest of limits."^[6] State law enforcement officials are not trained in the complexities of immigration law and procedure, and are not well suited to make judgments about the enforcement of such laws.

For these and other reasons, according to a 1996 memorandum from the Office of Legal Counsel (OLC) of the Department of Justice, while state and local police may lawfully assist federal immigration officials in certain respects, "[s]tate and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws." In 2002, the Bush Administration announced it was reconsidering this policy, and eventually endorsed an exception to this position in certain allegedly terrorism-related cases (discussed below). We agree with OLC's 1996 conclusion that any use of state or local police to enforce civil immigration laws, regardless of whether the cases are said to be terrorism related, is vulnerable to legal challenge.

Using State and Local Law Enforcement Officials to Enforce Immigration Law, Except With Respect to a Narrow Class of "Anti-Terrorism" Cases, Is Not Supported by the Bush White House

A wholesale reversal of these policies also appears to be at odds with the views of the Bush White House, which has endorsed expanding the role of state or local law enforcement to arrest individuals for immigration offenses only in cases said to be related to terrorism. In 2002, controversy arose when the Justice Department announced that it would place the names of some non-citizens who were wanted only for committing immigration violations in the National Crime Information Center (NCIC) database, which is routinely consulted by state and local police.

In response to these concerns, White House Counsel Alberto Gonzalez said that "[o]nly high-risk aliens who fit a terrorist profile" would be placed in the NCIC.^[7] President Bush's stated preference for a "narrow" use of the NCIC would be completely undermined by a wholesale reversal of state and local government policies that generally prohibit their officers from enforcing immigration laws.

As we explain above, we do not agree that creating an exception providing for state and local immigration enforcement in some cases would be legal or wise; nor do we agree that the cases this Administration calls terrorism-related – almost all of which involve very common, garden-variety immigration status violations – necessarily have anything to do with terrorism. Nevertheless, a complete reversal of policies separate immigration and local law enforcement would plainly go beyond authorizing some state and local law enforcement officials to assist in enforcing immigration laws in some "narrow" subset of cases said to be terrorism-related.

Conclusion

Any benefits that might result from enlisting state and local police to enforce complex federal immigration laws would be far outweighed by the serious consequences of such a change. A wholesale reversal of policies that separate immigration enforcement from local law enforcement

would (1) harm the civil rights and civil liberties of immigrant communities and lead to widespread racial profiling, (2) harm public safety by driving a wedge between immigrant communities and the police who serve and protect them, (3) harm our federal system by authorizing state and local police to enforce a civil federal regulatory scheme, and (4) complicate President Bush's stated position of supporting state and local enforcement only in certain "narrow" circumstances said to be related to terrorism.

[1] *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)

[2] See *id.*, at 885-86 (holding that arrest violated Fourth Amendment because officers could not justify stop of car based only on "the apparent Mexican ancestry of the occupants.")

[3] See, e.g. *Carrasca v. Pomeroy*, 313 F.3d 828, 835-36 (3rd Cir. 2002) (refusing to "summarily dismiss" claim that arrest "was based solely on Plaintiffs' appearance as Mexicans . . . further bolstering their racial profiling claim.")

[4] The National Immigration Forum has posted on its website a list of statements by local and state police from across the country, all opposing any attempt to enlist them in the enforcement of immigration laws. See *Opposition to Local Enforcement of Immigration Laws*, updated October 1, 2002, available at: http://www.immigrationforum.org/currentissues/articles/100102_quotes.htm[5] See Eric Schmitt, *Two Conservatives Tell Bush They Oppose Plan for Police*, N.Y. Times, June 2, 2002; Letter from Raymond Flynn, David Keene and Grover Norquist to President Bush, May 30, 2003, available at: http://www.immigrationforum.org/currentissues/articles/060302_doj.htm[6] *Hines v. Davidowitz*, 315 U.S. 52, 66-67 (1941) (striking down separate Pennsylvania scheme for registration of non-citizens, where federal government had already put in place such a scheme).

[7] See Letter from White House Counsel Alberto R. Gonzalez to Migration Policy Institute, June 24, 2002, available at: <http://www.migrationpolicy.org/files/whitehouse.pdf>