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## Subcommittee on Immigration, Border Security, and Claims

**October 1, 2003** - Legislative hearing on [H.R. 2671](#), the "Clear Law Enforcement for Criminal Alien Removal Act of 2003" (CLEAR Act).

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**WITNESS LIST**  
**COMMITTEE ON THE JUDICIARY**  
**SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND**  
**CLAIMS**

Wednesday, October 1, 2003 at 4:00 P.M.

Room 2237 of the Rayburn House Office Building

Legislative hearing on H.R. 2671, "Clear Law Enforcement for Criminal Alien  
Removal Act of 2003" (CLEAR Act).

The Hon. John M. Morganelli  
District Attorney  
Northampton County, Pennsylvania

Professor Kris W. Kobach  
Associate Professor of Law  
University of Missouri Kansas City

James R. Edwards, Jr., Ph.D.  
Adjunct Fellow  
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# COUNTY OF NORTHAMPTON

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**JOHN M. MORGANELLI**  
DISTRICT ATTORNEY

**TESTIMONY OF NORTHAMPTON COUNTY, PENNSYLVANIA  
DISTRICT ATTORNEY JOHN M. MORGANELLI BEFORE  
THE SUBCOMMITTEE ON IMMIGRATION, BORDER,  
SECURITY AND CLAIMS – WEDNESDAY, OCTOBER 1, 2003  
ROOM 2237 OF THE RAYBURN HOUSE OFFICE BUILDING ON  
THE “CLEAR LAW ENFORCEMENT FOR CRIMINAL ALIEN  
REMOVAL ACT OF 2003 (CLEAR ACT)**

Good afternoon. My name is John M. Morganelli and I am the elected District Attorney in Northampton County, Pennsylvania. I have served as District Attorney for twelve (12) years and I am a past President of the Pennsylvania District Attorneys Association, a statewide Association of prosecutors in Pennsylvania.

On June 25, 2003 there occurred in Northampton County a ceremony that is often repeated in courthouses

throughout the United States. A number of individuals from all parts of the world participated in a naturalization ceremony that resulted in new citizens of the United States of America. I had the pleasure of meeting some of these individuals who were beaming with pride, carrying American flags as they swore the oath of naturalization and U.S. citizenship. These people immigrated to the United States legally, followed the rules, did what was required to become U.S. citizens and now enjoy what America has to offer them. I have no doubt that they, like many before them and many who will come after them, will be productive citizens contributing to the greatness of America.

Unfortunately, there are also those who come to America illegally. They come not with an intent to commit to the American way, but rather to evade the law, commit crime and impact negatively on our country. In the last ten (10) years, there has been a staggering increase in the number of illegal aliens residing in Pennsylvania. INS, now ICE, estimated that the illegal alien population of Pennsylvania in 1992 to be about 27,000. In 1996 that number jumped 37% to approximately 37,000. The 2000 census suggests that the number of illegal aliens in Pennsylvania is somewhere between 100,000 and 200,000. Nationwide, the estimates of illegal aliens living in the United States is somewhere between 9 and 13 million.

Despite the voices of those who naively believe that the influx of this estimated 9 to 13 million illegal aliens into the United States is a positive thing, the fact of the matter is that illegal immigration is having an extremely negative impact upon America at many levels. Unfortunately, the majority of illegal aliens who are here are engaged in criminal activity. Identity theft, use of fraudulent social security numbers and green cards, tax evasion, driving without licenses represent some of the crimes that are engaged in by the majority of illegal aliens on a daily basis merely to maintain and hide their illegal status. In addition, violent crime and drug distribution and possession is also prevalent among illegal aliens. Over 25% of today's federal prison population are illegal aliens. In some areas of the country, 12% of felonies, 25% of

burglaries and 34% of thefts are committed by illegal aliens. The numerous crimes being committed by illegal aliens such as identity theft, fraud and use of false identification is causing havoc with record-keeping systems including but not limited to Social Security, income tax and other compilation of data that we have routinely relied upon for accuracy and identity verification. Just about every day, municipal and state police come in contact with illegal aliens who are utilizing fraudulent documents, false names and other people's identities. Identification of these individuals is impossible and, quite frankly, many of the illegal aliens committing crimes here in the United States have criminal records from their country of origin which cannot be ascertained because of their continuous use of false identities. Clearly, in addition to being a crime issue, the growing population of illegal aliens in the United States is without a doubt the single most important national security issue facing us. As an example of that, in May 2002 federal agents arrested 2 Egyptian nationals for trying to smuggle illegal Middle Eastern immigrants into New Jersey by way of Mexico. For a fee of \$8,000.00, court documents showed the suspected smuggling ring flew customers on tourist visas to Brazil, then sent them to Guadamala through Mexico and finally across the southwest border into the U.S. With regard to our northern border in Blaine, Washington, a retired Deputy Chief of Border Patrol Agent Eugene Davis stated recently that there has been no effort to locate 95% of aliens apprehended in his region over the past 10 years and released pending deportation hearings. According to Davis, these illegal aliens have simply been allowed to disappear into the United States. No one knows whether a number of these missing persons are trained terrorists who will emerge to perpetrate more acts of terrorism inside the United States.

Then, there is the direct cost to taxpayers as a result of the criminal acts committed by illegal aliens. In Pennsylvania the financial cost to taxpayers is staggering. Pennsylvania requested compensation from the federal government in fiscal year 1999 for the incarceration expenses for about 196,676 days of detention for illegal aliens in state

and local jails and prisons. The cost to Pennsylvania taxpayers amounted to \$15,500,000.00. Under the "State Criminal Alien Assistance Program" (SCAAP), Pennsylvania received \$5 million leaving \$8 million of uncompensated cost to be footed by Pennsylvania taxpayers. In fiscal year 2000, Pennsylvania received \$4.3 million. Payments to the states were lower overall so local taxpayers were faced to absorb a much larger share of the cost of criminal illegal alien incarceration. Clearly, illegal immigration into the United States is a negative and not a plus and must be addressed for a variety of the aforesaid reasons. But the solution lies in empowering local and state police with the authority to arrest, detain and deport illegal aliens. Clearly, the CLEAR Act, which you are considering today, would expressly authorize local and state law enforcement to investigate, apprehend, detain and remove aliens in the United States. The CLEAR Act provides economic incentives and penalties for those municipalities and states who for whatever reasons do not recognize the seriousness of this problem and fail or lack the desire to help with this growing problem. In Pennsylvania, not only in the Lehigh Valley where I serve as the District Attorney, law enforcement has taken an interest in identifying and removing illegal aliens. There have been efforts in the Scranton Wilkes-Barre area by local police and in western Pennsylvania to deal with this issue but, unfortunately, local and state law enforcement at the present time have to rely on federal officials. In the past, the federal government has not shown much interest in this issue. For example, on a number of occasions, my office as well as local and state police have come into contact with illegal aliens who have admitted their illegal status and entry into the United States. When federal agencies such as the INS now ICE were contacted, we were often told that as long as these criminal aliens were not committing additional crimes, they should just be let go. I have also been told that in the past INS discourages "this type of investigation." In other words, it is not enough for them to be aware of the fact that there are thousands of illegal aliens living in our communities, we are told that they must essentially be committing some other type of crime before the federal government would get involved. When arrests are made by local police on state charges such as

identity theft, etc. INS will often inform us that they are “not interested” in detaining and deporting these kinds of illegal immigrants. For some reason, the federal government continues to believe that immigration violations by themselves do not warrant much enforcement. In my view, this thinking must change and the CLEAR Act certainly is an indication from the Congress that the thinking has in fact changed. The fact of the matter is that the cost to society from the impact of illegal aliens is so severe, we can no longer afford not to act or leave this problem exclusively to the federal government. Local prosecutors, local and state police must be empowered, aggressive and diligent with respect to the presence of illegal aliens. Although some may argue that most local police departments do not want to enforce immigration violations and have resisted the idea of using their officers to track down illegal immigrants, reasoning that crime fighting is better served by building relationships of trust in immigrant communities, I believe that now in the wake of September 11, 2001 a growing percent of law enforcement agencies around the country are beginning to equate illegal immigration and immigration enforcement with protecting national security and they want to be involved. You have seen pilot programs in the state of Florida empowering local law enforcement to enforce immigration laws. Implementation of the provisions of the CLEAR Act would, perhaps, make unnecessary the memorandums of understandings that some jurisdictions are seeking with the Justice Department in order to obtain power for state and local police to enforce immigration laws.

In summary, let me therefore state unequivocally that as a state prosecutor, I believe that this legislation is necessary. However, I caution you that the ultimate success of this goal will be based upon the political will of both political parties here in Washington. Quite frankly, I am not very optimistic. I believe that both the Republicans and the Democrats are to blame for the present lack of enthusiasm on the part of the government to enforce immigration laws. Business interests that often influence Republican Party politics clearly want cheap labor and often employ illegal aliens in

minimal jobs paid less than the minimum wage. On the other hand, the Democratic Party continuously at the national level panders to ethnic politics. Obviously, the CLEAR Act is not a panacea and we cannot overnight deal with the issue of the huge invasion of illegal aliens into America. And, it is also clear that even with an aggressive approach to enforcement and passage of the CLEAR Act, we continue to have the problem of hundreds of thousands of illegal aliens invading our country on a regular basis through our northern and southern borders. And lastly, there must also be attention to immigration judges who routinely, after local law enforcement has apprehended, arrested and prosecuted an illegal alien, often release these illegal aliens back out into the community on ROR or minimal bail with an order for them to deport. Of course, these illegal aliens again disappear into American society, adopt a new false identity, a new false name and relocate to some other community. Occasionally, we have seen the people that we have prosecuted come right back to my area resuming again their jobs, life under another name and another social security number. The effort to clean up this mess cannot only be done legislatively via the CLEAR Act, but must recognize the other areas related to immigration enforcement that also must be addressed. Nevertheless, the CLEAR Act is necessary because without an empowered municipal and local departments throughout the United States, the problem will continue to grow and get worse.

I would like to thank the Chairman of the Committee and members of the Committee for inviting me to offer these comments today.

**TESTIMONY OF KRIS W. KOBACH**  
**PROFESSOR OF LAW, UNIVERSITY OF MISSOURI-KANSAS CITY**  
**OCTOBER 1, 2003**

**State and Local Authority to Enforce Immigration Law AND A REVIEW**  
**OF THE PROPOSED CLEAR ACT.**

The terrorist attacks of September 11, 2001, underscored for all Americans the need to restore the rule of law in the immigration arena. Terrorists were able to enter the country undetected, overstay their visas with impunity, and move freely within the country without interference from local law enforcement officers. Each of these realities created a vulnerability that the hijackers of September 11 exploited.

Enforcing our nation's immigration laws is one of the most daunting challenges faced by the Federal Government. With more 8-10 million illegal aliens already present in the United States and fewer than 2000 interior enforcement agents at its disposal, the Bureau of Immigration and Customs Enforcement (BICE) has a Herculean task on its hands-one that it simply cannot accomplish alone.

The assistance of state and local law enforcement agencies can mean the difference between success and failure in enforcing the immigration laws. The more than 650,000 police officers nationwide represent a massive force multiplier.

I will briefly summarize the legal authority upon which state and local police may currently act in rendering such assistance and then review relevant provisions of the proposed CLEAR Act. I will not cover the provisions of Section 287(g) of the Immigration and Nationality Act (INA), since the scope of such delegated authority is evident on the face of the act. Rather, I will discuss the inherent authority that has been possessed and exercised by state and local police since the earliest days of federal immigration law.

It has long been widely recognized that state and local police possess the inherent authority to arrest aliens who have violated *criminal* provisions of the INA. Once the arrest is made, the police officer must contact federal immigration authorities and transfer the alien into their custody within a reasonable period of time. Bear in mind that the power to arrest, and take temporary custody of, an immigration law violator is a subset of the broader power to “enforce.” This is most salient distinction between inherent *arrest* authority and 287g authority to *enforce*-which includes arresting, investigating, preparing a case, and all of the other powers of the exercised by BICE agents.

Where some confusion has existed in recent years is on the question of whether the same authority extends to arresting aliens who have violated civil provisions of the INA that render an alien deportable. This confusion was, to some extent, fostered by an erroneous 1996 opinion of the Office of Legal Counsel (OLC) of the Department of Justice. That opinion, the relevant part of which has since been withdrawn by OLC, indicated that while states did possess the authority to arrest aliens for criminal violations of the INA, congressional

preemption barred the states from arresting aliens for civil violations of the act. In 2002, OLC corrected this error, withdrew the relevant portion of the 1996 opinion on its website, and produced a new opinion which thoroughly analyzed the issue. Although the Attorney General did not publish the 2002 opinion, the Attorney General did announce OLC's unequivocal conclusion that arresting aliens who have violated either criminal provisions or civil provisions that render an alien deportable "is within the inherent authority of the states."

This conclusion has been confirmed by every court to squarely address the issue. Indeed, it is difficult to make a persuasive case to the contrary. That said, I will proceed to offer my opinion as to why this conclusion is correct.

## THE INHERENT ARREST AUTHORITY POSSESSED BY STATES

The preliminary question is whether states have inherent power (subject to federal preemption) to make arrests for violation of federal law. That is, may state police, exercising state law authority only, make arrests for violation of federal law, or do they have power to make such arrests only insofar as they are exercising delegated federal executive power? The answer to this question is plainly the former.

The source of this authority flows from the States' status as sovereign entities. As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so

far as they may be abridged by that instrument.” *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

It is well established that the authority of state police to make arrests for violation of federal law is not limited to those instances in which they are exercising delegated federal power. Rather, such arrest authority inheres in the States' status as sovereign entities. It inheres in the ability of one sovereign to accommodate the interests of another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being committed and makes an arrest. That officer is not acting pursuant to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.

There is abundant case law on this point. No act of Congress has authorized state police to arrest for federal offenses when they act without an arrest warrant. Nonetheless, in *United States v. Di Re*, 332 U.S. 581 (1948), the Supreme Court, held that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity," *id.* at 589, implicitly adopting the position that States have inherent authority to authorize their police to make warrantless arrests for federal criminal violations. See *id.* at 589-90. In *Miller v. United States*, the Court stated flatly that “in the . . . circumstance of an arrest for violation of federal law by state peace officers, . . . the lawfulness of the arrest without warrant is to be determined by reference to state law.” 357 U.S. 301, 305 (1958) (citing *Di Re*, 332 U.S. 581, 589). Similarly, in *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928), Judge Learned Hand's opinion for the Second Circuit construed a New York statute to authorize

state police to make warrantless arrests for violation of federal law. *Id.* at 174. In so doing, Judge Hand specifically rejected the argument that the existence of a federal statute governing state arrests pursuant to warrant for federal offenses should be understood to preempt state officers from making warrantless arrests for federal offenses: "it would be unreasonable to suppose that [the United States'] purpose was to deny to itself any help that the states may allow." *Id.* Judge Hand's analysis plainly started from the premise that states have inherent authority to make arrests for federal offenses. This authority exists unless the federal government has preempted it or state law otherwise constrains it.

The Ninth and Tenth Circuits have expressed this understanding specifically in the immigration context. In *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), the Ninth Circuit declared that the "general rule is that local police are not precluded from enforcing federal statutes," *id.* at 474, and engaged in a preemption analysis to assess whether Congress had precluded state police enforcement of the criminal provisions of federal immigration law. *See id.* The Tenth Circuit has similarly opined that a "state trooper has general investigatory authority to inquire into possible immigration violations," *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984), and has applied preemption analysis to determine whether a federal statute "limit[s] or displace[s] the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws," *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999).

## THE ABSENCE OF CONGRESSIONAL PREEMPTION

In conducting preemption analysis, courts must look for (1) express preemption by congressional statement, (2) field preemption where the federal regulatory scheme is so pervasive as to create the inference that Congress intended to leave no room for the states to supplement it, or (3) conflict preemption, where compliance with both state and federal law is impossible or state law prevents the accomplishment of congressional objectives. *See Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion). In all three categories, there must exist manifest congressional intent for preemption to exist. With respect to immigration arrests, because there is no case of direct conflict, the only types of preemption that are even possible are field preemption and express preemption.

Moreover, in the context of state arrests for violations of federal law, there is a particularly strong presumption against preemption. Unlike the typical preemption scenario, a state arrest for a violation of federal law does not involve an attempt by states to enact state laws, or to promulgate regulations pursuant to state laws, that arguably conflict with federal law or intrude into a field that is reserved to Congress or that federal law has occupied. Rather, the question is whether states can assist the federal government by arresting aliens who have violated federal law and by turning them over to federal authorities. And the critical starting presumption must be that the federal government did not intend to deny itself any assistance that states might offer. *See* 29 F.2d at 174.

In 1996, Congress expressly put to rest any suspicion that it did not welcome state and local assistance in making immigration arrests. Congress added section 287(g) to the INA, providing for the establishment of written

agreements with state law enforcement agencies to convey federal immigration enforcement functions to such agencies. In doing so, Congress reiterated its understanding that states and localities may make immigration arrests regardless of whether a 287(g) agreement exists. Congress stated that a formal agreement is *not necessary* for “any officer or employee of a State or political subdivision of a state . . . to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States,” or “otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.” 8 U.S.C. § 1357(g)(10).

Consequently, it is hardly surprising that no appellate court has expressly ruled that states are preempted from arresting aliens for civil violations of the INA. The only case that even comes close is the 1983 opinion of the Ninth Circuit in *Gonzales v. City of Peoria*, 722 F.2d 468 (9<sup>th</sup> Cir. 1983). In *Gonzales*, the Ninth Circuit held that local police officers have the authority to arrest an alien for a violation of the criminal provisions of the INA if such an arrest is authorized under state law. In that instance, a group of persons of Mexican descent challenged a policy of the City of Peoria, Arizona, that instructed local police to arrest and detain aliens suspected of illegally entering the United States in violation of the criminal prohibitions of section 1325 of title 8. *See* 722 F.2d at 472-73. Observing that local police generally are not precluded from enforcing federal statutes and that concurrent enforcement authority is authorized where local enforcement would not impair federal regulatory interests, the court engaged in a preemption analysis to determine whether Congress had precluded local enforcement of this criminal provision of the INA. The court concluded that

no such preemption had occurred. *See id.* at 475. In passing, the Ninth Circuit "assume[d] that the civil provisions of the [INA] ... constitute . . . a pervasive regulatory scheme" that suggested a congressional intent to preempt local enforcement, *id.* at 474-75. However, this was possibility of field preemption merely an *assumption*, asserted without any analysis, and made in *dictum*-entirely outside of the holding of the case (which concerned a criminal offense). It does not constitute binding precedent. And even if the Ninth Circuit had squarely reached this conclusion in 1983, such a holding would have been fatally undermined by the court's failure to apply the strong presumption against preemption discussed above. Moreover, the actions of Congress in 1996 made such a holding unsustainable.

In contrast, the case law supporting the conclusion that Congress has *not* preempted state arrests of aliens for violations of civil provisions of the INA is solid and on point. The Tenth Circuit has issued several opinions on the subject, all pointing to the conclusion that Congress has never sought to preempt the states' inherent authority to make immigration arrests for both criminal and civil violations of the INA. Its 1984 ruling in the case of *United States v. Salinas-Calderon*, 728 F.2d 1298 (10<sup>th</sup> Cir. 1984), confirmed the inherent arrest authority possessed by the states. The defendant in that case was the driver of a pickup who had been arrested for the criminal violation of transporting illegal aliens. He had been stopped by a state trooper for driving erratically. The driver and his wife were in the cab; and six passengers, none of whom spoke English, were in the back of the pickup. The defendant claimed that a state trooper did not have the authority to detain the transported passengers while he questioned them about their immigration status. In rejecting this claim, the Tenth Circuit held that a

"state trooper has general investigatory authority to inquire into possible immigration violations." 728 F.2d at 1301 n.3. The court did not differentiate between criminal and civil violations. Indeed, because there is no indication in the opinion that there was any reason to believe that the alien passengers had committed any criminal violations, the court's statement appears to apply fully to civil as well as criminal violations.

The Tenth Circuit's most salient case on the preemption question is *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). In that case, an Oklahoma police officer arrested the defendant because he was an "illegal alien." The officer did not know at the time whether the defendant had committed a civil or criminal violation of the INA. *Id.* at 1295. It was later discovered that the alien had illegally reentered the country after deportation, in violation of 8 U.S.C. § 1326, a criminal violation. When the government indicted the defendant, he moved to suppress his post-arrest statements, fingerprints, and identity, arguing that he was arrested in violation of 8 U.S.C. § 1252c. The defendant claimed that a local police officers could arrest an illegal alien only in accordance with the restrictions set forth in section 1252c and that because his arrest was not carried out according that provision it was unauthorized. Section 1252c authorizes state and local police to make a warrantless arrest and to detain an illegal alien if (1) the arrest is permitted by state and local law, (2) the alien is illegally present in the United States, (3) the alien was previously convicted of a felony in the United States and subsequently was deported or left the country, and (4) prior to the arrest the police officer obtains appropriate confirmation of the alien's status from federal immigration authorities. 8 U.S.C. § 1252c.

The Tenth Circuit's conclusion was unequivocal: section 1252c "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws. Instead, section 1252c merely creates an additional vehicle for the enforcement of federal immigration law." *Vasquez-Alvarez*, 176 F.3d at 1295. Citing its earlier decision in *Salinas-Calderon*, the court observed that it had "held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1296. The court rejected the alien's contention that all arrests not authorized by section 1252c are prohibited by it. The court found no congressional intent in the text of section 1252c to preempt existing state authority to enforce federal immigration laws. *See id.* at 1297-98. The court also opined that the legislative history of section 1252c supported its conclusion. Citing the comments of Representative Doolittle, the sponsor of the floor amendment that later became section 1252c, the court stated that "the purpose of § 1252c was to displace a perceived federal limitation on the ability of state and local officers to arrest aliens in the United States in violation of Federal immigration laws." *Id.* at 1298-99. However, the court noted that Representative Doolittle did not identify the source of this perceived limitation; neither the defendant nor the government had identified such a law; and the court itself had "not been able to identify any pre-§ 1252c limitations on the powers of state and local officers to enforce federal law." *Id.* at 1299 n.4. The court concluded that the "legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." *Id.* at 1299. Finally, the court drew additional support for its conclusion from the fact that "in the months following the enactment of

section 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *Id.* at 1300 (citing 8 U.S.C. §§ 1103(a)(9), (c), 1357(g)).

Indeed, if section 1252c were somehow to be read to preempt state arrest authority, it would lead to an untenable reading of the law; the preemptive effect would have to extend to all state arrests for violations involving illegal presence in the United States. That is, state police would be able to arrest only those aliens who were convicted felons and who had thereafter left or been deported from the United States. Because such aliens are not readily identifiable visually, this would mean "that there is no means of securing offenders caught in flagrante"-as Judge Hand observed-"a result which would so impair the execution of the laws that it seems to us incredible it should have been intended." *Marsh*, 29 F.2d at 174. There is simply no evidence in the legislative history of section 1252c to support such a reading.

The Fifth Circuit has also rejected the notion that Congress has preempted the inherent arrest authority possessed by the states. In *Lynch v. Cannatella*, 810 F.2d 1363 (5<sup>th</sup> Cir. 1987), the court considered whether 8 U.S.C. §1223(a) defined the sole process for detaining alien stowaways, thereby preempting harbor police from detaining illegal aliens as occurred in that case. The Eighth Circuit's conclusion was broad and unequivocal: "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Id.* at 1371.

Finally, on the subject of preemption, it must be noted that the distinction between arrests by state police for criminal violations of the INA and arrests for civil violations of the INA is utterly unsustainable. None of the statutes that have been considered by the courts under claims of express preemption contain such a distinction. And any claim of field preemption would have to establish that the civil provisions of the INA create a pervasive regulatory scheme indicating congressional intention to preempt, while the criminal provisions do not. The structure of the INA, with its numerous overlapping civil and criminal provisions, does not support such a distinction.

## THE CLEAR ACT

Passage of H.R. 2671 is an important and step that must be taken if the voluntary cooperation of state and local police in the enforcement of immigration laws is to be maximized. And such cooperation is necessary if the rule of law is ever to be fully restored to immigration in this country. I do have several suggestions that may assist the committee in strengthening H.R. 2671. They are as follows.

Section 101-Affirmation of Inherent Arrest Authority. It is important that nothing in the CLEAR Act be misinterpreted by the Executive Branch or by the Judiciary as narrowing the inherent arrest authority that the states already possess. The current wording says that “law enforcement personnel of a State . . . are *authorized*” to investigate and detain illegal aliens. I strongly recommend that the committee not use the word “authorized,” because it implies that Congress is authorizing or conferring these arrest powers upon the states. That

is, of course, unnecessary since the authority is already possessed by the states and it flows from their inherent powers as sovereign entities within our federalist system. What should be stated unequivocally is that Congress has never preempted this authority. Such a statement would prevent courts from making any mistake on this account. I would also note that the inherent authority does not extend to “removal,” in the broad sense of adjudicating an alien’s status and returning the alien to his country of origin. Therefore, I suggest the following alternative phrasing of Section 101:

“Notwithstanding any other provision of law, it is recognized that law enforcement personnel of a State or political subdivision of a State possess the inherent authority of sovereign governments to investigate, apprehend, detain, and transport aliens who are unlawfully present in the United States (including the transportation of such aliens across State lines to detention centers or to federal custody), in the enforcement of the immigration laws of the United States. It is further recognized that no Act of Congress has ever preempted this authority with respect to either criminal violations or civil violations of federal immigration law.”

Section 103-Criminal Penalties and Forfeiture of Assets. With respect to this section, I wish to note at the outset that the Committee has correctly recognized that illegal immigration imposes a massive financial burden on all levels of government. The costs of providing education, health care, and other social services, combined with the law enforcement costs that are incurred regardless of whether a state chooses to cooperate in enforcing immigration laws, are staggering. The meager taxes collected from illegal aliens do not come close to reimbursing governments at the local, state, and federal level. It is estimated that the net cost of illegal immigration totals approximately \$40 billion per year.

The forfeiture of assets is an appropriate mechanism to allow governments to begin to recover these costs. It is also a substantial deterrent to those who would flaunt our immigration laws.

I would like to offer two minor suggestions to improve Section 103.

First, it would be useful to create a blanket criminal misdemeanor offense that applies to any alien who violates any provision of U.S. immigration law or is unlawfully present in the United States. This would eliminate any ambiguity that persists regarding arrests for criminal versus civil violations of immigration law. It would also defeat the misinformation campaign that has been launched by organizations hostile to the enforcement of immigration laws. Second, I suggest that in Section 103(a), in the provision amending Section 275(b) of the Immigration and Nationality Act, after the phrase “after the expiration of a nonimmigrant visa” the following words should be inserted: “or after the end of the alien’s period of authorized stay in the United States.” This would cover those situations in which the alien’s visa is valid for a period beyond the period for which the alien is actually authorized to stay in the United States. This is common with B(1) and B(2) visas that may be valid for as long as ten years, even though the alien has only been authorized to stay in the United States for a period of six months.

Section 104-Sharing of Information Through NCIC. This section is an extremely important component of the CLEAR Act. As the Committee is aware, the sharing of information with state and local law enforcement agencies through the National Criminal Information Center (NCIC) of the Department of Justice has improved substantially since the attacks of September 11, 2001. However,

there are bureaucratic and institutional forces that have slowed the entry of information regarding aliens into the NCIC database. I suggest that the Committee reword Section 104 slightly, in order to (1) make the obligation to provide such information unmistakable and (2) to accelerate the entry of information regarding alien absconders. I suggest the following wording:

“Provision of Information to the NCIC.- Within 180 days after the date of the enactment of this section, the Under Secretary for Border and Transportation Security of the Department of Homeland Security shall provide the National Criminal Information Center of the Department of Justice with all information relevant for the apprehension of all persons who are known to have violated any immigration law of the United States. Thereafter, the Under Secretary shall be required to provide such information to the National Criminal Information Center with respect to each new violation that is discovered within 180 days after such violation becomes known to the Department of Homeland Security. The names and particulars of aliens who have disregarded or disobeyed a final order of removal shall be provided to the National Criminal Information Center regardless of whether the alien’s failure to depart was willful and regardless of whether the alien received actual notice of the final order of removal.”

The alien absconder problem is of such immense magnitude that it has made an utter mockery of the rule of law. There are now more than 400,000 absconders at large in the United States. These aliens have had their day in immigration court and have disobeyed a final order of removal. A substantial number of absconders have engaged in serious criminal activity in addition to their immigration violations. Most absconders have committed criminal violations of the INA. Others have committed civil violations only, if the underlying immigration violation was of a civil provision and the refusal to obey

the order of removal was not willful. At the end of 2001, the Department of Justice and the INS launched the absconder initiative, which has continued under the Department of Homeland Security. Under this initiative, the process of listing absconders in the NCIC database was begun. Although the initiative has yielded many valuable arrests with the cooperation of state and local law enforcement, the effort has been hamstrung by the fact that the entry of names into the NCIC database has occurred at an alarmingly slow rate. Indeed, the number of absconders is growing faster than the entry of absconders into NCIC. A primary reason is for this slow rate of entry is the current practice of attempting to ascertain whether federal immigration officials effected actual notice of the final order of removal. This is, of course, difficult when the alien has changed address without informing the immigration court or when the alien has become a fugitive. The inherent legal authority of a state or local law enforcement officer to make the arrest exists regardless of whether notice was effected. Therefore, this unnecessary impediment to the rapid entry of absconder data into the NCIC system should be unequivocally removed.

### Section 108-Claims by States and Localities Against the Federal

Government. This section provides a useful incentive to ensure that the federal government remains a faithful partner in the cooperative effort to enforce immigration laws. I suggest only a minor clarification here. Section 108(a)(2), as currently drafted, indicates that the decisions of the administrative law judge “may be appealed only to the Attorney General or the Secretary of Homeland Security....” I would delete “or the Secretary of Homeland Security.” Because Section 108 locates the administrative law judge within the Department of Justice, and because it is consistent with the adjudication of immigration law

questions by the immigration courts of the Department of Justice, it is appropriate that the Attorney General review any appeals. Ambiguity as to the final arbiter of such cases would only exacerbate the sensitivity that will inevitably surround such cases.

New Section 114-The Issuance of Driver's Licenses to Illegal Aliens. As the Committee is no doubt aware, the issuance of driver's licenses to illegal aliens by some states jeopardizes immigration law enforcement, general law enforcement, and national security. The driver's license effectively serves as the basic identity document in America today. It is a de facto national identity card issued by more than 50 different jurisdictions. Driver's licenses allow illegal aliens to operate with ease in American society and escape the scrutiny that might otherwise occur in routine law enforcement encounters. On our northern border the driver's license operates as an effective substitute for a U.S. passport, allowing an alien who is persuasive in falsely asserting U.S. citizenship to cross the border freely.

Permitting illegal aliens to acquire driver's licenses also opens up opportunities for criminals, whether they be foreign nationals or U.S. citizens. States that allow illegal aliens to possess driver's licenses inevitably reduce the level of identity documentation that is required to obtain a license. The result is that criminals are able to use the lax standards to create false identities backed up by the imprimatur of a driver's license. Such false identities facilitate money laundering, credit card fraud, and check fraud. They also defeat the operation of the NCIC system, because criminals are able to evade arrest warrants by presenting fraudulently-obtained "clean" licenses during traffic encounters with

local law enforcement officers. Worse, the driver's license becomes a useful tool in the hands of terrorists. Virginia issued licenses to eight of the 9/11 terrorists-licenses that likely were used to board the airplanes on that fateful day.

The most effective solution to this problem would be to make eligibility for federal highway funds contingent upon the states' denying driver's licenses to illegal aliens. Such funds should also be contingent upon states' setting expiration dates so that driver's licenses for legal aliens expire on the date that an alien's period of authorized stay terminates. The only documentation sufficient to qualify an alien for a driver's license should be a valid passport with a valid U.S. visa. This would allow state and local police officers to draw reasonable conclusions from an alien's possession of an unexpired driver's license.

In summary, it is clear that state and local police possess substantial inherent authority to make immigration arrests. It is also clear that the potential for closer cooperation with state and local law enforcement has not been fully exploited. Consequently, there has been a cost in the national security of the United States, as well as in the enforcement of immigration laws. The CLEAR Act would improve the situation substantially. I appreciate the efforts of this Committee to address these issues and the opportunity to share my perspective.

# Statement

of

James R. Edwards, Jr.

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Author, Center for Immigration Studies Backgrounder, *Officers Need Backup: The Role of State and Local Police in Immigration Law Enforcement*, April 2003

at the hearing of the

House Judiciary Subcommittee on Immigration, Border Security, and Claims

on

H.R. 2671, the Clear Law Enforcement for Criminal Alien Removal Act

October 1, 2003

Mr. Chairman and members of the subcommittee, thank you for the honor of testifying before this subcommittee. I commend you for holding this important hearing on this outstanding legislation. I approach today's topic from the perspective of someone who, as legislative director for a former United States Attorney, Rep. Ed Bryant of Tennessee, became closely attuned to the issues before his two subcommittee assignments, the Immigration and the Crime Subcommittees.

## **The Problem**

Mr. Chairman, a very common complaint of state and local law enforcement is that they get very little cooperation from federal immigration authorities.

The problem has occurred time and time again from shore to shore. And the scenario is generally the same: In the normal course of his duties, a police officer encounters an immigration violator (or several of them). He contacts federal immigration authorities; in most parts of the country, they are located many miles away. The policeman is told that no federal agent is coming to get the illegal or criminal alien, so let him go.

This “let them go” pattern was well established before September 11, 2001. Troublingly, it remains common since September 11. Billings, Montana, Police Chief Ron Tussing responded with well-founded skepticism, as reported in the Billings Gazette last year, after U.S. Attorney General John Ashcroft asked a convention of police chiefs to help secure the homeland by calling federal agents whenever local police take immigration violators into custody. Chief Tussing said, “We’d call them (INS) up and they’d say let them go, we’re too busy.”

In a post-September 11 world, “let them go” is unacceptable.

A 29-year veteran assistant chief with the Border Patrol characterized the problem of illegal immigration to me as “worse than epidemic.” He said the practice of the Immigration Service has changed – but for the worse, now actually aiding and abetting more and more illegal immigration. This agent said the Immigration and Naturalization Service practice when he started out was to detain all illegal aliens; the only aliens INS released before deportation had extraordinary extenuating circumstances. But now, aliens are routinely released; the only ones held in custody are those with unusual circumstances.

These “let them go” policies and practices have real-world

consequences. “Let them go” policies apparently contributed to the year-long rape rampage of Reynaldo Elias Rapalo, the recently apprehended illegal criminal alien from Honduras who is suspected in seven rapes in Miami. Local law enforcement arrested him for “lewd and lascivious” molestation in October 2002, after his visa had expired. But he wasn’t removed from the country.

“Let them go” contributed to the rape of two nuns and the murder of one nun last year in Oregon. El Salvadoran illegal alien Maximiliano Silerio Esparza, who has been indicted in these crimes, had been caught and let go by the Border Patrol, despite his prior criminal record and an outstanding warrant for his arrest.

“Let them go” put Jamaican illegal alien Lee Malvo back on America’s streets after police captured him in Washington State. This occurred just months before the Washington, D.C., sniper shootings of 2002, in which Malvo is a suspect.

“Let them go” incidents happened this past summer in the subcommittee chairman’s district. In one incident, Indiana State Troopers stopped a van with 15 people in it — one of whom was a drug trafficker. ICE reportedly let them go. In another subcommittee member’s district, local police in Greensburg, Pennsylvania, caught seven illegal aliens this past spring, but ICE told the police to release them.

These are only a handful of examples of the sorts of violators our state and local police officers encounter every day while on the beat, yet federal officials, for whatever reason, don’t think they pose a threat to the domestic tranquility, the general welfare, or the blessings of liberty of American citizens.

The veteran immigration enforcer I mentioned earlier, and others with whom I have spoken, say there are many good, dedicated people in

the immigration service. I believe that to be true. And there are valid reasons to explain why local INS offices – now Bureau of Immigration and Customs Enforcement – do not presently dispatch officers to respond to every call from a sheriff’s deputy or state trooper who has illegal or criminal aliens in custody. But, again, it should be clear to everyone that “let them go” isn’t good enough. More than terrorism threatens the homeland in these cases.

Immigration enforcers are outmanned. We have only 2,000 immigration investigators to cover the whole nation. Interior states may have just one or two ICE enforcement officers stationed there. For all the tough talk about securing our borders (which remain as leaky as a sieve), we have virtually abandoned interior enforcement. A witness from the General Accounting Office told this subcommittee on April 10 that we spend one-fifth the money on interior enforcement that goes to border enforcement.

These immigration enforcement officers who are charged with interior enforcement are trained investigators. They work diligently to crack alien smuggling rings, ID and benefits fraud schemes, and other immigration-related criminal enterprises. Understandably, it would be hard to do the good work that these dedicated officers do if they constantly were having to drop everything, drive a couple of hours to a county jail, take custody of routine immigration lawbreakers, drive back, and process them for removal. From a resource-allocation standpoint, this wouldn’t be the best use of their time and talents. But, once again, while this situation is understandable, that does not justify “let them go” policies or mean that the situation should continue uncorrected in post-September 11 America.

The “let them go” culture of federal immigration authorities has real-world consequences. First, this response has won the federal immigration agency a low reputation in the minds of state and local

police. It has developed and ensconced the perception of the INS (now ICE) as unwilling to cooperate, lax in its attitude toward enforcing immigration violations, and unresponsive. "Let them go" has left a bad taste in the mouth of state and local law enforcement. From the perspective of state and local police agencies, they are trying to do their duty and help enforce the very laws that are the federal agency's prime responsibility to enforce, so why would ICE not act responsibly and responsively in these cases where cooperation is key?

In addition to dismaying our nation's law officers, "let them go" sends a clear signal to the at least 8 million illegal aliens already in this country – as well as to the untold millions of would-be illegal aliens – that breaking our law is of no consequence. Our lack of enforcing many of our immigration laws leads illegal and criminal aliens to believe there is no down side for them; even if they get caught, chances are authorities will set them free and put them back on the streets of America. At worst, they will get a free trip home, from where they can quickly return, perhaps through one of the alien smuggling rings that have proliferated and operate unthreatened across our country. This is a dangerous message to send in a post-September 11 world.

We know that smuggling rings have become big business on the black market. We also know that among them are those who smuggle into the United States Middle Easterners. There have been reports of finding Islamic prayer rugs in the desert Southwest. Smuggler George Tajirian from Iraq is said to have snuck in more than 1,000 illegal aliens from the Middle East. And alien smugglers mix trafficking in persons with trafficking in narcotics. We know 18-wheeler trucks are becoming the vehicle of choice for these criminal enterprises. Foreign and ethnic gangs, such as the Salvadoran MS-13, are on the rise across America. All of this is abetted by a lack of taking basic illegal immigration violations seriously and giving federal cooperation and support to the state and local police who run across alien lawbreakers.

As a practical matter, there are several more aspects to the problem. State and local law officers may be unclear about their legal authority to enforce immigration laws. Regrettably, activist judges, INS officials, and the Clinton Justice Department have clouded the issue. But even the Clinton Justice Department acknowledged, “It is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests.” James Madison, who knew a little bit about our Constitution and state sovereignty under it, said in Federalist 45 that states retain “a very extensive portion of active sovereignty.”

As you know from a hearing earlier this year, some big cities have “sanctuary” policies that prohibit police cooperation with federal immigration authorities and coddle immigration lawbreakers. Such policies directly and flagrantly violate federal law. This subcommittee’s hearing highlighted New York City’s sanctuary policy and the unintended but not unforeseeable consequence of a gang rape by illegal immigrants, about half of whom had prior criminal records and should have been removed.

Another practical problem relates to information-sharing. The cop on the beat routinely uses the National Crime Information Center to check for outstanding warrants and fugitives. NCIC gives quick responses. It is ingrained in the modern police culture. But NCIC contains virtually no immigration violation records. The Justice Department has begun listing absconders — aliens under final order of removal — in NCIC, but is far from having all of the nearly 400,000 absconders in the system. And the immigration-violation database, housed in the DHS Law Enforcement Support Center, requires a secondary, slower, more onerous check — one from which an officer on the side of the highway on a traffic stop doesn’t have time to wait for an answer.

At a hearing last week of the Senate Judiciary Immigration Subcommittee regarding information-sharing, several Senators expressed how vital it is that information about alien threats be available to state and local police officers. One Senator observed that having 8 to 10 million illegal aliens in our country is itself a homeland security issue. Yet, that hearing confirmed that records about such offenses as visa overstay and absconding under final order of removal still remain largely inaccessible to “the average state trooper.”

A third practical problem has to do with resources. It takes resources to hold illegal and criminal aliens in detention, to process, and to transport them. The State Criminal Alien Assistance Program is woefully underfunded, dropping from \$585 million in FY 2002 to \$250 million in FY 2003. A strong argument can be made that a good portion of the resources that police and ICE need for enforcement should come from the lawbreakers themselves, as restitution to society. At present, things are backwards. State and local law enforcers and taxpayers incur the costs of enforcing immigration violations, while the lawbreakers suffer practically nothing. Immigration crime presently pays for the lawbreakers while the public bears the costs. The incentives should be the other way around. Immigrant criminals should incur the costs, and police who catch them (and taxpayers) should reap rewards.

One more thing bears mention. We know that holding immigrant lawbreakers in custody greatly improves the chances of their removal from our country — that is, if we “let them go,” they almost uniformly don’t comply with the law and disappear into the woodwork within our nation. The Department of Justice Inspector General in 1996 and 2003, as well as a 1998 GAO study, confirms that aliens who are detained get removed, while those not held in custody get away and stay here. The IG’s report last February found that INS removed 92 percent of detained aliens, but only 13 percent of nondetained aliens in 2000 and 2001. Of INS’s top priority, criminal aliens, just 35 percent of nondetained aliens were

removed. A mere 3 percent of nondetained aliens from terrorist-sponsoring countries and 6 percent of nondetained asylum seekers who received final orders of removal — including “potential terrorists” — were removed. These reports confirm the obvious.

## **The Solution**

There is a solution to this dangerous predicament, and the CLEAR Act (H.R. 2671) goes to it exactly. Every day, nearly 700,000 state and local police officers patrol our nation’s communities, our highways and streets. And every day, state and local police officers going about their normal duties encounter immigration violators.

Rather than putting immigration violators back on the streets of America, law enforcement authorities should apply the “broken windows” theory of policing to immigration enforcement. This is a critical component to securing the homeland.

“Broken windows” policing refers to a model developed by James Q. Wilson and George Kelling more than 20 years ago. It maintains that by enforcing laws against relatively minor offenses, more serious crimes will be reduced, as well. In other words, society sends a signal that it means business about law and order, and thus that it will not tolerate signs of disorder – property crimes such as breaking windows, graffiti, and shoplifting, “quality of life” offenses such as panhandling, prostitution, and public urination.

In the immigration context, alien smuggling rings, traffickers, immigration benefits frauds, counterfeit document producers and sellers, ID theft and fraud enterprises, and so forth are serious, more complex crimes and deserve the attention of ICE investigators. This is not even to mention the identification of terrorist cells and arrest of terrorist sleepers

who use our immigration system to prosecute a war against the United States from within our borders. But it must be recognized and acknowledged that allowing the presence of at least 8 million illegal aliens in our midst – in fact, with some politicians even seeking to reward their illegality with green cards or in-state college tuition or valid driver's licenses – is the equivalent of tolerating graffiti, broken windows, and other so-called “minor” crimes in our cities.

One thing we know: “Broken windows” policing works. For example, research from the Manhattan Institute found that Mayor Rudy Giuliani’s application of “broken windows” policing in New York City led to falling crime rates. “Broken-windows policing significantly and strongly associates with sharp reductions in violent crime; in fact, we estimate that it prevented at least 60,000 violent crimes in New York between 1989 and 1998,” the Manhattan Institute reported in Winter 2002. Studies such as those by the National Bureau of Economic Research and the California Institute for County Government also confirm the validity of the “broken windows” model.

We have indications that the same approach, enhanced by using the vast number of state and local law enforcement personnel as force multipliers in immigration enforcement, would reduce the incidence of both “low-level” illegal immigration and the kinds of offenses ICE agents are investigating.

The National Security Entry-Exit Registration System, or NSEERS, went into effect this past year. It required nonimmigrant males from 25 terrorist-sponsoring nations to register with the INS. Lack of immigration enforcement had become so bad, many illegal aliens walked into INS offices to register expecting no adverse consequences. When INS actually detained these lawbreakers and word got around in immigrant communities, the next round of news reports told how many illegal aliens began to self-deport. Rather than register with NSEERS and risk being

caught and removed, lawbreakers on their own fled to Canada or elsewhere outside this country. About 82,000 aliens registered with NSEERS; 13,000 were illegal aliens. An estimated 26,000 Pakistanis illegally resided in the United States in 2000; the Pakistani embassy has said 15,000 of its illegal aliens have left since September 11, 2001.

The link between run-of-the-mill illegal immigration and more serious immigration violations must be acknowledged. In many instances, sneaking across the border is a precursor crime. It is inexorably linked to illicitly holding a job in America, acquiring and using false documents or valid ID documents fraudulently obtained, aiding and abetting fellow illegal and criminal aliens, harboring fugitive illegal aliens, involvement with smuggling rings, and so forth. And most instances of illegal immigration — simply staying in this country — are continuing offenses.

Not enforcing the laws against the seemingly low-level immigration violators is the same as not going after the graffiti artist, the trespasser, the loiterer, the panhandler, the window breaker. It sends a message that they can get away with this lawbreaking, so they can get away with breaking other laws. Acting on this belief is how the initial crime of illegally crossing our border becomes a precursor crime to larger offenses.

Columnist Rich Lowry wrote, “In the post-Sept. 11 environment, it is no longer possible to shrug your shoulders and ask, ‘What harm can one illegal immigrant do?’” We have 8 million illegal immigrants within our borders, and that number grows by upwards of a half-million each year. It is extremely difficult to pick out the few terrorists from such a huge crowd. But by implication, it should be easier to identify the millions of people who have committed precursor crimes of the immigration sort.

Taking advantage of the vast ranks of local and state police officers and the law enforcement duties they are already doing every day makes common sense. Border and Transportation Security Undersecretary Asa

Hutchinson acknowledged at an April 10, 2003, hearing of this subcommittee that routine traffic stops and other routine law enforcement encounters present good opportunities to capture illegal aliens. These officers would not be taking on extra duties; rather, the federal government would simply take advantage of current, daily encounters as these officers go about their duty when they happen to come into contact with an illegal alien. This would be maximizing the available human resources to help enforce the laws already on the books and to hold the lawbreakers accountable.

To do so will require clarifying legal authority. It will require two-way information sharing. It will require additional resources. It will require creative ways to maximize existing resources, such as use of new technology to conduct removal proceedings across long distances. It will require deriving resources from the lawbreakers; that is, immigration lawbreakers must be held accountable. And it will require flexibility so localities can come up with the most practicable means of detaining, transporting, and handing federal authorities custody of illegal criminal aliens.

## **The CLEAR Act**

H.R. 2671 contains the solution that would close the gap. The bill would do so in exactly the ways just outlined and suggested in my Center for Immigration Studies report. Whenever state or local police come into contact with illegal or criminal aliens as the officers carry out their regular duties, the response from the federal side would no longer be “let them go.” This is the glaring problem. The CLEAR Act would fix it by providing practical means for federal and state or local law enforcement to work together in the apprehension, detention, transportation, processing, and removal of immigration lawbreakers.

First, the CLEAR Act clarifies the legal authority question in federal law. It encourages states to do so, too. The bill's approach does this in a way that respects the Founding Fathers' principle of federalism. States and localities retain the freedom to decide the extent of their law enforcement officers' involvement in enforcing immigration violations. H.R. 2671 contains no unfunded federal mandates. It merely empowers those states and localities that wish to have their police officers on the front lines of homeland security.

Second, H.R. 2671 enhances two-way information sharing. The saying is that "information is power," and two-way communication of intelligence is vital to any effort's success, from the battlefield to counterterrorism to crime fighting. This legislation puts information about immigration violators into the hands of the cop on the beat in the most practical way possible, through the most established tool of information sharing in law enforcement, NCIC. It provides a system for state and local jurisdictions to collect and send information to the Justice Department about their encounters with immigration lawbreakers. And the bill provides additional resources to help offset the cost.

This is ground-level intelligence that will yield a wealth of valuable data. From it can be gleaned patterns and trends in illegal immigration and specific information about individual immigration lawbreakers. With such two-way information sharing, law enforcement at all levels can make more informed improvements in strategy and tactics, coordination and implementation. With this kind of data, those aliens who threaten our homeland's security may be able to run, but they cannot hide.

Third, the CLEAR Act provides additional resources to bring "broken windows" policing to immigration violations. It does this in a very responsible, practical way. It doesn't look primarily to additional federal spending, in terms of very heavily tapping the federal treasury. It does increase the SCAAP authorization and creates a new grant program, but

at realistic levels. It looks as well to the ill-gotten gains of immigration lawbreakers as a source of revenue. This follows the model we use with respect to other crimes, where the assets of lawbreakers help fund law enforcement efforts, federal and state and local.

The bill provides financial incentives to the states and localities that choose to become more involved in this aspect of securing the homeland. It contemplates applying resources to all the major elements of the process, from apprehension to removal from the country. These include police training, detention, transportation, administrative or criminal proceedings, exchange of custody, and removal. And H.R. 2671 builds on existing resources, maximizing their use. For instance, the bill makes the existing Institutional Removal Program and Internet training programs more widely accessible to state and local law enforcement.

Importantly, H.R. 2671 allows for the flexibility of the states to be “the laboratories of democracy” in this area. States and localities would be the drivers in creatively solving the challenges of detention, transportation, and so forth. That is, the CLEAR Act refrains from dictating a “one-size-fits-all,” Washington “solution.” Rather, states and localities would determine the best way to address each specific thing. For example, one city may be close to an ICE office, so the best way to hand over custody of illegal criminal aliens to federal authorities would be for ICE to establish a circuit-riding system. The local police and county sheriff in that area would know that every Tuesday morning at 11, the ICE van would come to the courthouse square for alien pickup. In another locality, it may make more sense for the county sheriff’s department to contract with the federal government to transport the aliens itself. In another place, perhaps contracting with a private security firm to transport apprehended aliens to a federal detention facility would work best. CLEAR provides such practicality and flexibility.

Also of importance, H.R. 2671 includes measures to end federal

noncooperation and the nonresponse of “let them go.” Nothing works as well to rectify a problem as sunlight and accountability. These are the principles the CLEAR Act applies. State or local law enforcement agencies could hold uncooperative or unresponsive federal agencies accountable through a limited administrative appeals process.

Finally, H.R. 2671 would ensure that the civil rights of aliens are safeguarded and that jail facilities used for detention meet federal standards. The bill strikes the right balance to ensure that police agencies do not take license, but remain accountable. It preserves police officers’ discretion with respect to crime victims, witnesses, and tipsters. It only involves police officers in immigration law enforcement to the extent they encounter illegal and criminal aliens in the course of the officers’ normal duties.

## **The Benefits**

All told, the CLEAR Act would have a deterrent effect on illegal immigration. By its force-multiplication through state and local police, it increases the chances that an immigration lawbreaker will get caught, that he will be held in custody, that he will face being identified through fingerprinting and the creation of a record, that he will forcibly leave the country, that he will leave behind his ill-gotten gains acquired from having broken our nation’s laws, and that if he re-enters the United States then he will be recaptured and suffer even greater consequences.

By holding lawbreakers accountable, individual immigration violators will get the message that America is no longer turning a blind eye to their offenses. That message also goes out to would-be lawbreakers. Such “broken windows” policing can be expected to reduce the number of new illegal immigrants, lead at least some current illegal immigrants to self-deport, and have the spillover effect of curbing some of the bigger

immigration crimes. It starts to “drain the swamp,” as in the Weed and Seed program. These beneficial effects would occur at a manageable rate. Thus, there would not be the severe impact of mass deportations or huge raids. Suddenly burdening the law enforcement and criminal justice and immigration enforcement systems with great numbers of people — much like the deleterious effect on the immigration backlogs of amnesties such as the LIFE Act’s 245(i) extension or the gross expansion of legal immigration as through the 1990 Immigration Act’s multiplication of legal immigration categories and quotas — would be counterproductive, overwhelm the system, and possibly cause the economy some harm.

This bill’s approach would change the dynamics of the war on crime and terrorism. It would change the mindset of no fear of capture or punishment among immigration lawbreakers. It would restore confidence in federal immigration agencies. It would empower state and local police to finish the job, rather than saddle them with the demoralizing knowledge that they are putting lawbreakers right back on the street.

This common-sense solution of law enforcement cooperation has been recommended by the National Taxpayers Union Foundation. In its recent report *Borderline Infraction: Unsafe Borders, Complacent Government?*, NTU identified the need for the Department of Homeland Security immigration agencies to “collaborate with law enforcement on the local, state, and federal levels that are monitoring or assisting in the apprehension of illegal immigrants” and “work more aggressively to root out fraudulent benefit payments to illegal immigrants.” NTU notes how such reforms would save taxpayers billions of dollars.

The American public overwhelmingly supports such an approach. A RoperASW poll this past spring found 85 percent in support of “requiring state and local government agencies, and law enforcement agencies, to apprehend and turn over to the INS illegal immigrants with whom they come in contact.” Sixty-two percent of respondents “strongly”

agreed. Eighty-three percent support “mandatory detention and forfeiture of property” for illegal aliens. Seventy percent favor mandatory prison sentences, in addition to asset forfeiture and removal, for immigration law violations.

Encouraging and enabling federal cooperation to those state and local police who are already trying to do their part in immigration enforcement would vastly help to secure our homeland. What would our nation have been spared had we applied “broken windows” enforcement to immigration violations prior to September 11? Of course, we will never know. However, the fact that three of the terrorists – Hani Hanjour, Ziad Jarrah, and Mohammed Atta – were stopped by state or local police prior to that fateful date chillingly illustrates that opportunity exists for state and local law enforcement to play a vital role on this front. The stakes are too high for America’s well-being not to pursue this avenue.

In conclusion, I believe H.R. 2671, the CLEAR Act, would be the most appropriate next step toward securing our borders, tackling illegal immigration, and restoring the rule of law in an area in which we have far too long been derelict. It addresses the problem areas relating to authority, information, and resources. And it does so in a very practicable, effective manner. Our nation would benefit tremendously from the provisions of the CLEAR Act.

Mr. Chairman, I am submitting along with this testimony my CIS backgrounder for inclusion in the record. It elaborates on many topics I have merely highlighted here. I am now pleased to take questions from the subcommittee. Thank you.

# # #

Thank you, Chairman John Hostettler (R-IN), Ranking Member Sheila Jackson Lee (D-TX), and members of the House Subcommittee on Immigration, Border Security, and Claims for the opportunity to speak with you today. I am Gordon Quan, Mayor Pro Tem and At Large Council Member from Houston, Texas. I am pleased to testify on behalf of the National League of Cities on H.R. 2671, the "Clear Law Enforcement for Criminal Alien Removal Act of 2003".

The National League of Cities (NLC) is the nation's oldest and largest association representing municipal interests in Washington, D.C. NLC represents more than 16,000 cities of all sizes – from our largest member New York City with a population of 8 million to our smallest member De Graff, Minnesota with a population of 133. As the representative of the nation's local leaders, NLC has a vital interest in clarifying the roles and responsibilities for local law enforcement in the enforcement of federal immigration law and stopping terrorisms.

I am prepared to testify before you as the president of the Asian Pacific American Municipal Officials of the National League of Cities as well as an advisor to the Houston Mayor, Lee P. Brown's Office for Immigration and Refugee Affairs. I am certified by the Texas Board of Legal Certification in Immigration and Nationality Law and have practiced in this area of law for the past 26 years.

Like many major cities across America, Houston has seen a dramatic demographic transformation in the past twenty years. No one ethnic group comprises the majority of the population in Houston. We have benefited greatly from immigrants moving to our city. Houston is roughly one-third Anglo, one-third Hispanic and the remaining third Black and Asian. With 77 consulates in Houston, we have the third largest consular corps in the U.S. The Port of Houston ranks number one in foreign tonnage in the U.S. We are truly an international city.

Since September 11, local law enforcement across the nation have improved the security of their cities. In my city of Houston, Texas we have significantly assumed responsibilities for counterterrorism in partnership with federal law enforcement agencies revamped emergency preparedness plans, provided airport security, responded to anthrax threats and incidents, purchased new equipment

and shouldered significant costs in overtime pay.

Since September 11, the Mayor's office and Houston Police Department estimate that we are spending an extra \$584,000 per month for security at the city's water plants, airports, extra helicopter flights, among others. That figure does not include the added cost for security at City Hall and "soft targets" such as local temples and synagogues. In sum, the City of Houston has spent \$14 million more on securing the city since September 11, 2001.

As this committee considers new ways to improve the nation's security, I ask that it does so without diverting essential federal responsibilities onto local governments. I am specifically referring to H.R. 2671, the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (The CLEAR Act). The bill, authored by Rep. Norwood (R-GA), would mandate that state and local law enforcement enforce federal immigration laws or risk the reimbursement from the State Criminal Alien Assistant Program (SCAAP).

NLC's policy on immigration and the role of local government is clear. Specifically, it reads:

With regard to the enforcement of federal immigration laws, local police have a responsibility to cooperate with the federal government to apprehend specific persons identified as having committed a crime and violated US immigration laws and who have been located by the federal government. However, local police should not be responsible for reporting or retaining the custody of those persons they have detained or charged.

Local personnel cannot be conscripted into federal service because the federal government has decided not to fund and staff its immigration enforcement agencies to meet demand. This type of action can divert local personnel from their primary duties and constitute a cost shift onto local governments. National Municipal Policy and Resolution, Section §4.06(D)(5)(A)(ii)

Simply put, the CLEAR Act, if enacted, would be bad policy on many grounds. I am here to speak on four issues: preemption, unfunded mandate, community policing, and racial profiling.

The Preemption Issue:

If the Senate were to adopt the CLEAR Act it would blatantly preempt state and local laws. Specifically, Section 102 of H.R. 2671 would require state and local governments to pass laws authorizing their law enforcement officers to enforce federal immigration laws or risk losing reimbursement from the federal government for costs related to the incarceration of illegal immigrants. Put simply, Section 102 would preempt state and local laws that bar their law enforcement officers from assuming the federal responsibility of enforcing federal immigration laws. This section would have the effect of preempting two state laws (Alaska and Oregon), and the resolutions and measures of numerous municipalities including the city of Houston.

In June 1992, the City of Houston adopted Police Department General Order No. 500-5 which holds that undocumented immigration status is not in itself a matter for local police action and entry without inspection is not to be treated as an on-going offense. The order also prohibits police officers from stopping or apprehending individuals solely on the belief that they are in the country illegally. This Order has served the people and the law enforcement community of Houston, TX well since its adoption.

Houston, as with many cities across the nation, has routinely assisted the federal government by apprehending, housing, and feeding non-documented criminal suspects in our city jails until the Bureau of Immigration dispatches its officers to retrieve the suspects. Local governments have done so despite the costs associated with these services. Indeed, members of this Subcommittee are all too aware of the annual battle local governments undergo to get SCAAP reimbursement for the costs incurred by local law enforcement for assisting the Bureau of Immigration. More often than not, the SCAAP reimbursement is less than the financial burden assumed by the local police departments.

Why then would Congress consider a bill that would punish the very sector of law enforcement that has stepped in to fulfill the responsibility of the federal immigration bureau? Section 102's threat to withhold SCAAP reimbursement to local governments is a blunt force of extortion. In essence, Section 102 is Congress' way of telling local governments that they must assume the

responsibilities of the federal immigration agency or risk not getting reimbursed for the services they have rendered.

On behalf of the National League of Cities, “No thank you.” Congress should not preempt local governments simply because the federal government has failed or is unwilling to adequately staff and fund its federal enforcement agencies. Local governments will continue to cooperate with the federal government in its endeavor to stop crime. However, before Congress usurps local authority, it should first consider the precedent, the policy implications, and the cost of such a drastic measure.

Members of the Subcommittee, the events of September 11<sup>th</sup> and the events thereafter have clearly demonstrated that the men and women in blue are partners in fighting terrorism. Therefore, on behalf of these men and women, I ask that you gravely reconsider any attempt to preempt local law. Preemption would unduly burden already overworked police forces around the nation.

### Unfunded Mandate

Protecting the homeland cost billions of dollars.. Local governments have already assumed much of the fiscal burden while they wait for first-responder funds to trickle down to the local level. As a Mayor Pro Tem and an At-Large Councilmember from Houston, I can tell you it is extremely difficult to protect essential policing services in these fiscal trying times. NLC and the City of Houston would therefore welcome your support for full funding for first-responder grant programs, the Community Oriented Policing Services (COPS) program, and the Local Law Enforcement Block Grant. NLC, however, unequivocally opposes yet another Congressional effort to saddle local governments with an unfunded mandate.

Chiefly, I am perturbed by Section 109 of the CLEAR Act, which would require the federal government to pay only up to 50% of the cost to train state and locally elected officials to enforce federal immigration laws. In addition, there is no guarantee that Congress will ever fully appropriate the \$1 billion Section 106 authorizes for state and local police agencies to obtain equipment, technology, and other administrative support. It is a leap, indeed, to assume that \$1 billion is a

sufficient authorization figure.

On behalf of the NLC, I respectfully ask, pursuant to Title I of the Unfunded Mandate Reform Act (UMRA), that members of this Subcommittee ask the Congressional Budget Office to prepare a mandate statement as it relates to the intergovernmental mandate issued in the bill. UMRA was passed to ensure that “Congress had information about the costs of mandates before it decided whether to impose them and encourage the federal government to provide funding to cover the costs of intergovernmental mandates.”

Additionally, NLC policy specifically calls for the Congress to “explicitly express its intent to preempt, and accompany any such proposals with a timely intergovernmental analysis, including estimated costs.” (National Municipal Policy §1.06(J))

The CLEAR Act, as proposed, presses local governments and their law enforcement officials to perform additional federal immigration duties under the threat of preemption and with no guarantee of full funding. Members of the Subcommittee, if Congress is ready to improve the security of this nation by strengthening its immigration enforcement, then it must be willing to properly fund the appropriate personnel and programs. As stated earlier, local police have a responsibility to cooperate with the federal government. However, local police cannot be conscripted into federal service because the federal government has decided not to fund and staff its immigration enforcement agencies to meet demand.

To shift the responsibility of immigration law enforcement to local governments without the necessary funds undermines the integrity of those championing the bill. The cost for police overtime, improved planning and coordination, and security enhancements have already been assumed by local governments. It is unfair to demand, under the threat of preemption, that local governments to undertake the federal government’s responsibilities. It is also unreasonable to mandate such responsibilities upon local governments without full fiscal support.

### Effect on Community Policing and Racial Profiling

Police departments across the nation have raised concerns that efforts to force

local officers to enforce federal immigration laws would damage successful community policing initiatives and inadvertently encourage racial profiling. I, too, am concerned with the effect of the CLEAR Act, if enacted. As a local elected official and immigration lawyer with over 26 years of experience, I know too well that communication, visibility, and trust are the foundation of effective community policing. Victims of crime must know that they can call us without the threat that they will be detained or deported simply because of their immigration status.

NLC's policy specifically states, "Community policing must be seen as part of the basics in law enforcement. There must be a constant commitment to assure that justice is dispensed equally and not based on race, gender, religion, national origin, sexual orientation, disabilities, education, or economic status of the victims or perpetrators." (National Municipal Policy §6.01(B)) In short, NLC supports community policing and opposes profiling.

Forcing local law enforcement to be the "eyes and ears" of every civil immigration violation, would demoralize the very members in the community we are sworn to protect. The job of police officers is tough. I ask you, members of the Subcommittee, not to further complicate an already delicate situation. The State of Texas and my city of Houston are truly reflective of the diversity we praise in this nation. However, it would be a grave error to mandate that local police officers must now round up and detain those suspected of civil immigration violation.

Our government has the important task of stopping credible threats of terrorism. However, rounding up individuals standing based on their suspected citizenship status would undermine the credibility of the police departments and do little to prevent another tragedy like September 11<sup>th</sup>. In fact, H.R. 2671 may hinder the fight against terrorism if members of the immigrant community cannot trust the police officers who serve them. The CLEAR Act would render our communities to be less safe and our country no more secure.

In closing, I respectfully ask that this subcommittee fully weigh my comments as an elected local and immigration legal expert. I further ask that you take into account the unmanageable burden the CLEAR Act would place on local law

enforcement. Specifically, consider the burden in cost, personnel, and the potentially devastating effect on community policing programs.

The American public wants us to find effective tools to combat terrorism. I submit that the most effective tools are not preemption, unfunded mandates, deteriorated community policing, and racial profiling; rather, our most effective tools to fight terrorism are improved coordination, planning, technology, training, and funding.

Thank you.