



**MALDEF**

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**TESTIMONY**

**Submitted to the House Judiciary Committee  
Immigration, Border Security and Claims Subcommittee  
Hearing  
On the**

**Clear Law Enforcement for Criminal Alien Removal (“CLEAR”) Act**

**By**

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## **MALDEF Opposes Using First Responders To Enforce Federal Civil Immigration Laws**

Proponents of the Clear Law Enforcement for Criminal Alien Removal (“CLEAR”) Act (H.R. 2671) tell horror stories alleging that local police are not empowered to catch criminals who happen to be undocumented immigrants. None of the cases being put forward to justify the CLEAR Act would be solved by state and local police enforcing civil immigration laws. State and local police already have all the legal power needed to make the arrests necessary. We do not need a change in the laws for the criminals described in these horror stories to have been arrested and prosecuted for their crimes and any of their immigration law violations.<sup>1</sup>

The CLEAR Act and similar proposals would have state and local police target all immigrants, criminals and non-criminals alike. There are approximately eight million undocumented immigrants in the U.S. It is a civil violation to be living in the U.S. without legal authorization. The overwhelming majority of these immigrants are hard-working families trying to make a better life for themselves. They are not criminals.

If the CLEAR Act were enacted, first responders would have to use precious national and local security resources to reign in immigrants instead of doing the police work needed to keep America safe. Police across the country are opposed to such policies, because such policies would lead to a decrease in trust between police departments and immigrant communities and an increase in vulnerability to crime and harassment in immigrant communities, for immigrants and those who “look like” immigrants, decreasing security for everyone.<sup>2</sup> MALDEF, a national, nonpartisan, nonprofit organization that has been defending the civil rights of Latinos for 35 years, is also opposed to the CLEAR Act and similar proposals, for many of the same reasons, as set forth in the legal and factual analysis below.

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<sup>1</sup> See Discussion of 1996 Department of Justice Office of Legal Counsel Opinion, at notes 24-25, infra.

<sup>2</sup> National Immigration Forum, Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws (July 31, 2003). Here are some representative quotes: Sgt. John Pasquariello, Los Angeles Police Dept.: “Because of our immigrant population here and our diverse communities, we don’t want to alienate anybody, or give anyone fear... That’s just not our policy. Hasn’t been for twenty years.” Cpt. Maria Alvarenga-Watkins (ret.), Metropolitan Washington (DC) Police Dept.: “Our government has an important responsibility to act on the very real threats of terrorism that are of concern to all of us. But I, and many others in the law enforcement community, strongly believe that deputizing police officers to be INS agents will not help this fight against terrorism but will make our communities less safe and our country no more secure.” Lt. Bill Schwartz, Miami (FL) Police Dept.: “We will not function in an INS capacity. It’s not our job. Our job is to solve crimes. We have way too much to do to be acting as INS agents.”

## **Immigrant/Minority Communities Would Be Less Safe**

Latinos know from tough experience that when local police enforce federal civil immigration laws, neighborhoods become less safe. Crime victims are further victimized by being unable to safely report the crimes against them. Witnesses of crimes committed against immigrants and citizens are afraid to come forward for fear they will be deported. Some examples of these situations are:

- Mexican national Petra Martinez was murdered along with her two-year-old son, Urel Martin, on July 19, 2003, in their home in a heavily-immigrant neighborhood in Clearwater, Florida. Local police believe that some members of the community have information, but are afraid to come forward for fear of immigration repercussions.<sup>3</sup>
- “Jorge” is a sixteen-year-old boy who went to the police after escaping a kidnapping situation, in which he was held captive and tortured by a gang of boys for days. Instead of helping Jorge, the police turned him over to immigration and although he was a crime victim with no criminal record himself, he was sent to a maximum-security juvenile facility in Spokane, Washington.<sup>4</sup>
- In Maine, a Honduran-American victim of robbery called the police. The police then tried to determine if he was legal and turned him over to the former Immigration and Naturalization Service (“INS”). He was eventually released, but he was also living with several other immigrants who were out of status, and were taken into INS custody. Such practices have an extreme chilling effect.<sup>5</sup>
- On February 27, 2003, Lesley Orloff, Director of the National Organization for Women’s (“NOW”) Legal Defense Fund’s Immigrant Women Program testified that battered immigrant women’s fear of reporting abuse for fear of retaliation by their abusers is compounded by fear of deportation, and that: “These issues preclude many battered immigrant women from requesting the help they need to counter the domestic violence they are experiencing in their lives.”<sup>6</sup>
- The NOW Legal Defense Fund survey demonstrated that fear of deportation was the most significant reason that battered immigrant women are much less likely to report abuse. This reality is exacerbated by state and local police threatening to enforce civil immigration laws, and is in direct contradiction to the legal protections for immigrant women set forth in the Violence Against Women Act.<sup>7</sup>

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<sup>3</sup> Clearwater Police Department’s Hispanic Outreach officer William Farias said he “wasn’t surprised people were hesitant to talk. . . . [C]ultural differences and fear of deportation often keep undocumented immigrants from coming forward.” N. Gregoire, “Police Appeal For Clues In Slaying Of Mom, Son,” Tampa Tribune (July 22, 2003).

<sup>4</sup> National Immigration Forum, State and Local Police Enforcing [Civil] Immigration Laws, Stories from Around the Nation (Aug. 5, 2003) at p. 7.

<sup>5</sup> Id. at p. 4.

<sup>6</sup> L. Orloff, Safety Implications of Police Response to Calls for Help from Battered Immigrants, Testimony Before the House Judiciary Committee, Subcommittee on Immigration, Border Security and Claims, New York City’s “Sanctuary” Policy and the Effect of Such Policies on Public Safety, Law Enforcement, and Immigration (Feb. 27, 2003) at p. 26 ([www.house.gov/judiciary/85287.PDF](http://www.house.gov/judiciary/85287.PDF)).

<sup>7</sup> Id. at pp. 30-38.

Because community policing, i.e., building trust between police officers and the communities they patrol, is such a valuable tool for public safety, numerous police departments across the country have made public statements against becoming involved in civil immigration enforcement.<sup>8</sup>

### **Increased Racial Profiling is Foreseeable**

Not only is safety compromised for Latinos and other minority/immigrant families and communities; to make matters worse, law enforcement's use of racial profiling increases when state and local police think they are charged with enforcing federal civil immigration laws. For example:

- This past May in Riverside, California, local police officers demanded to see documents of all Latinos working in an avocado grove, harassing citizens, legal residents and undocumented immigrants alike and threatening to turn them over to the Border Patrol. One undocumented immigrant ran and was then assaulted by the local police.<sup>9</sup> The Riverside Sheriff told the press that his department policy was that his officers should not be enforcing civil immigration laws, but the officers were confused by the statements of Attorney General Ashcroft.
- Prior to 9/11, Latino civil rights groups reported a national trend of case after case of racial profiling of Latinos (including citizens and legal residents from all walks of life) when state and local police became involved in enforcement of federal civil immigration laws. For example, in Chandler, Arizona, police tried to assist the INS in raids and the Arizona Attorney General later found that residents were stopped repeatedly "for no other reason than their skin color or Mexican appearance or use of Spanish language."<sup>10</sup> In a Katy, Texas joint police-INS operation, local police stopped individuals in vehicles and in street sweeps based on Hispanic appearance only. This type of discrimination is prohibited by the U.S. Constitution.<sup>11</sup>
- Since 9/11, across the South, state and local police have been stopping Latinos and demanding their immigration papers, through the practice of racial profiling.<sup>12</sup>

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<sup>8</sup> See, e.g. Statements cited at note 2, *supra*.

<sup>9</sup> "Sheriff Brutality Case Renews Call for Police Conduct Guidelines; MALDEF Opposes CLEAR Act," MALDEF Newsletter for Fall 2003 (Sept. 2003).

<sup>10</sup> National Council of La Raza ("NCLR"), Immigration Enforcement by Local Police: The Impact on the Civil Rights of Latinos, Issue Brief No. 9 (Feb. 2003), at pp. 11-13. Selective enforcement of immigration laws by federal entities is also unconstitutional, and the problem is worse when state and local police, with no training in immigration and no federal oversight or accountability, try to enforce civil immigration laws. Leadership Conference on Civil Rights ("LCCR"), Justice on Trial: Racial Disparities in the American Criminal Justice System (2000) at Ch. I, Race and Police, 4.

<sup>11</sup> *Id.*

<sup>12</sup> MALDEF, §2, Civil Rights Concerns Within the Department of Homeland Security (Feb. 25, 2003)(see e.g. *Lopez v. City of Rogers*, Civil Action No. 01-5061 (W.D.Ark. 2002)). See also LCCR, Wrong Then, Wrong Now: Racial Profiling Before & After September 11, 2001 (Feb. 2003)(available at [www.civilrights.org](http://www.civilrights.org)).

- When state and local police think they can enforce federal civil immigration laws, racial profiling of those who “look like” immigrants is highly foreseeable.<sup>13</sup>

Racial profiling is foreseeable because the CLEAR Act would allow local police to perform a role for which they are ill-equipped and have little or no training. When state and local police interact with immigrants, their actions are subject to strict scrutiny.<sup>14</sup> Despite this high standard, many local police rely on race and national origin in determining who to detain, question, or arrest.

Local police cannot properly discern between who is an asylum seeker,<sup>15</sup> who has been the victim of human trafficking and is entitled to the new T-visa,<sup>16</sup> who is out of status because their papers were mis-processed or lost by the former INS, which was notorious for the inaccuracy of its records,<sup>17</sup> who has valid immigration appeal rights,<sup>18</sup> and who is without documentation with no remedies yet still deserves the due process protections

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<sup>13</sup> LCCR, Comments to Interim Rule Titled “Abbreviation or Waiver of Training for State or Local Law Enforcement Officers Authorized To Enforce Immigration Law During a Mass Influx of Aliens” INS No. 2241-02; AG Order No. 2659-2003; RIN 1115-AG84 (February 26, 2003), filed April 28, 2003.

<sup>14</sup> LCCR, Justice on Trial: Racial Disparities in the American Criminal Justice System (2000) at Ch. I, Race and Police, p. 4.

<sup>15</sup> T. Wenski & S. Schiff, Refugees: Forced Papers May Be the Only Way to Safety, Miami Herald (Op-Ed., Sept. 15, 2003)(asylum seekers are not required to carry legal documentation because they are fleeing persecution; many World War II asylees arrived with false or no documentation); See also Physicians for Human Rights, From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers (June 2003)(abusive detention conditions; detention of asylum seekers violates U.S. and international law)(available at [www.prusa.org](http://www.prusa.org)); Lawyers’ Committee for Human Rights (“LCHR”), Is this America? The Denial of Due Process Rights to Asylum Seekers in the United States (Oct. 2000)(available at [www.lchr.org](http://www.lchr.org)).

<sup>16</sup> See Attorney General Ashcroft, News Conference Regarding Human Trafficking (Jan. 24, 2002)([www.usdoj.gov/ag/speeches/2002/012402newsconferenceregardinghumantrafficking.htm](http://www.usdoj.gov/ag/speeches/2002/012402newsconferenceregardinghumantrafficking.htm)) (unveiling the new T-visa program). See also Int’l. Human Rights Institute, De Paul Univ. College of Law, In Modern Bondage: Sex Trafficking in the Americas (2002).

Trafficking in persons — also known as “human trafficking” — is a form of modern-day slavery. Traffickers often prey on individuals who are poor, frequently unemployed or underemployed, and who may lack access to social safety nets, predominantly women and children in certain countries. Victims are often lured with false promises of good jobs and better lives, and then forced to work under brutal and inhuman conditions. ([www.usdoj.gov/trafficking.htm](http://www.usdoj.gov/trafficking.htm).)

<sup>17</sup> See, e.g., Testimony of Richard Stana, Director, Justice Issues, General Accounting Office, Before the House Judiciary Committee, Subcommittee on Immigration, Border Security and Claims, Immigration and Naturalization Service: Overview of Recurring Management Challenges (Hearing on INS Performance Issues, Oct. 17, 2002) ([www.house.gov/judiciary/75762.pdf](http://www.house.gov/judiciary/75762.pdf).)

<sup>18</sup> See e.g. Padilla v. Ridge, Complaint No. \_\_\_ (S.D. Tex. 2003)(class action of persons with valid immigration rights approved by the judiciary unable to receive documentation from the DHS due to backlogs and other breaches of due process rights under the 4<sup>th</sup> Amendment of the U.S. Constitution).

that the U.S. Constitution ensures for every person under the Bill of Rights.<sup>19</sup> Local police are overwhelmed with public safety and community policing needs, and they are simply not properly trained in immigration laws. Without proper training, federal oversight and accountability,<sup>20</sup> many officers simply choose to demand immigration documents from those who “look foreign,” which is a determination based on race, ethnicity and national origin.

Section 109 of the CLEAR Act expressly states that training would not be required before local police are tasked to enforce federal civil immigration laws, breaking the model currently set forth under the Immigration and Nationality Act (“INA”). Section 1357(g) of the INA permits the use of state and local police to enforce federal civil immigration law only under the limited statutory circumstances of a properly signed Memorandum of Understanding (“MOU”), which requires their training in the complexities of federal civil immigration laws.<sup>21</sup>

In contrast, the CLEAR Act would break the MOU rules requiring training under the INA, and it would completely gut civil rights protections in the process. Its sponsors acknowledge that racial profiling is foreseeable under these circumstances. In sum, while the CLEAR Act would not increase public safety or national security, it would provide an excuse to harass Latinos.

### **Enforcing Civil Immigration Laws Falls Under the Exclusive Jurisdiction of the Federal Government**

For the reasons discussed above, MALDEF urges Congress to vote against any policy that would encourage state and local police to become federal civil immigration law enforcers. This would be very dangerous public policy. Congress should instead clarify that immigration enforcement is the job of the federal government, through the newly-created Department of Homeland Security (“DHS”). Federal law enforcement should concentrate on identifying the individuals who are most dangerous. Instead of targeting or profiling all immigrants, a more effective strategy would be to investigate suspicious behavior in order to find the real terrorists.<sup>22</sup>

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<sup>19</sup> LCHR, A Year of Loss: Reexamining Civil Liberties Since September 11 (Sept. 5, 2002), Ch. 3 (available at [www.lchr.org](http://www.lchr.org)).

<sup>20</sup> See Discussion of the Memorandum of Understanding provisions under the Immigration and Nationality Act, *infra*.

<sup>21</sup> 8 U.S.C.A. §1357(g) and See Testimony of Under Secretary of Border and Security Asa Hutchinson, Before the House Judiciary Committee Subcommittee on Immigration, Claims and Border Security (April 10, 2003)(reported in 80 Interpreter Release 540 (April 14, 2003)); See also 8 U.S.C.A §1357(g)(1)(may carry out functions only to the extent consistent with State and local law); §1357(g)(2)(requiring certification of adequate training regarding enforcement of Federal civil immigration laws); §1357(g)(3)(subject to direction and supervision of Attorney General); and §1357(g)(4)(MOU must set forth duties and limits and agency powers in writing).

<sup>22</sup> Migration Policy Institute, America’s Challenge: Domestic Security, Civil Liberties and National Unity After September 11<sup>th</sup> (June 2003)(available at [www.migrationpolicy.org](http://www.migrationpolicy.org))

The CLEAR Act and similar proposals would not only decrease public safety and increase racial profiling, they would also contradict well-settled Supreme Court doctrine that civil immigration enforcement falls under the exclusive jurisdiction of the federal government. As the Department of Justice and the former INS acknowledged in their own rule-making procedure as recently as January of this year, the federal government and Congress have plenary power over immigration, and the States may not interfere.<sup>23</sup>

In 1996, the Department of Justice (“DOJ”) Office of Legal Counsel issued a legal opinion clarifying that state and local police may not enforce federal civil immigration laws, which falls under the exclusive jurisdiction of the federal government.<sup>24</sup> The DOJ clarified that state and local police may assist only in cases of criminal violations of federal immigration laws, under the circumstances of a Terry stop; or in cases of emergency, if a special deputization has been undertaken by Justice and supervised by federal officials; or if an exceptional memorandum of understanding has been agreed to, in accordance with Section 1357(g) of the INA, which was enacted in 1996.<sup>25</sup>

However, during a June 2002 press conference, Attorney General Ashcroft expressed a different sentiment, and stated that he thought that state and local police have “inherent authority” to enforce federal civil immigration laws.<sup>26</sup> Since then, the Department of Justice answered a Freedom of Information Act (“FOIA”) request as to the basis of this idea by denying access to the documents underlying this novel interpretation. This FOIA request is now the subject of federal litigation,<sup>27</sup> and a second FOIA request, filed by the

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(citing national security experts such as Vincent Cannistraro, former head of counter-terrorism for the Central Intelligence Agency).

<sup>23</sup> Immigration and Naturalization Service, Final Rule, Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities, Dept. of Justice, Vol. 68, No. 19 Federal Register 4364 (Jan. 29, 2003), in which the Department of Justice and the Immigration and Naturalization Service (“INS”) published the following analysis:

“Federal control over matters regarding aliens and immigration is plenary and exclusive. ‘Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere.’ *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977); *see also, e.g., Matthews v. Diaz*, 426 U.S. 67, 81 (1976)(‘[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the federal government.’).”

<sup>24</sup> DOJ, Memorandum Opinion for the United States Attorney Southern District of California, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1006)[hereinafter “1996 DOJ Memorandum Opinion”]

<sup>25</sup> *Id.* (note that criminals, including those described by the CLEAR Act sponsors, could be apprehended by state and local police, and their immigration status subsequently checked, under these exceptions).

<sup>26</sup> Federal News Service, Press Conference With U.S. Attorney General John Ashcroft and James Ziglar, Commissioner, Immigration and Naturalization Service Re: Tracking of Foreign Visitors, June 5, 2002.

<sup>27</sup> Freedom of Information Act (“FOIA”) Request to the Department of Justice, requesting records of the basis of Attorney General Ashcroft’s statement, as representatives of the news media

ACLU and numerous other groups, is still pending.<sup>28</sup> During House Judiciary hearings this [July], Attorney General Ashcroft did not answer Representative Linda Sanchez' question about the basis of his idea that state and local police have "inherent authority" to enforce federal civil immigration laws. Representative Sanchez asked the question because the Attorney General's statement has led to increased racial profiling and harassment of Latino citizens and immigrants alike.<sup>29</sup> But Attorney General Ashcroft avoided answering her question as to the basis of his idea.

Since the Attorney General's interpretation contradicts well-established Supreme Court doctrine about the exclusive federal plenary power to regulate immigration under the U.S. Constitution, it may be that the only legal basis for local law enforcement's expanded involvement in civil immigration matters is that which the Congress would put into place through the CLEAR Act.<sup>30</sup> However, in any case, Congress may not legislate in contravention of the U.S. Constitution.<sup>31</sup>

### **Conclusions and Recommendations:**

Congress must not pass the CLEAR Act. As discussed above, demanding that state and local police enforce federal civil immigration laws would be very bad policy and alienate immigrant and minority communities, who are not the enemy. Latinos, for example, are very concerned about the war against terrorism. However, for all practical purposes, the CLEAR Act would mandate the excuse of racial profiling of Latinos and many other U.S. citizens and immigrants, especially people of color.

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(American Civil Liberties Union ("ACLU"), with MALDEF and NCLR, et. al, March 5, 2003); FOIA Appeal of refusal to release relevant Office of Legal Counsel ("OLC") documents (ACLU et. al., Oct. 15, 2002); FOIA Request for copy of OLC opinion and clarification of the law (ACLU et. al., August 21, 2002).

<sup>28</sup> Id.

<sup>29</sup> Testimony of Attorney General John Ashcroft, Oversight Hearing on the United States Department of Justice, House Judiciary Committee (June 5, 2003) ([www.house.gov/judiciary/fulltrans/050603.htm](http://www.house.gov/judiciary/fulltrans/050603.htm).)

(questions of Rep. Sanchez and answers of Attorney General Ashcroft at pp. 88-93).

<sup>30</sup> Note that state and local police do have authority to contact federal authorities and ask about immigration status during a criminal arrest, or if special deputization has been undertaken, or under the circumstances of a Memorandum of Understanding. 1996 DOJ Memorandum Opinion, note 24 supra. (*citing* cases). These limited exceptions have clearly been authorized through Congress.

<sup>31</sup> Saenz v. Roe, 526 U.S. 489, 508 (1999) ("Article I of the Constitution grants Congress broad power to legislate in certain areas. Those legislative powers are, however, limited not only by the scope of the Framers' affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution [*citing* cases]... Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment. See, e.g., Califano v. Goldfarb, 430 U.S. 199, 210 [97 S.Ct. 1021, 51 L.Ed.2d 270] (1977); Williams v. Rhodes, 393 U.S. 23, 29 [89 S.Ct. 5, 21 L.Ed.2d 24] (1968). Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-733 [102 S.Ct. 3331, 73 L.Ed.2d 1090] (1982).")

For all these reasons, MALDEF urges the Congress and the DHS to clarify that enforcement of federal civil immigration laws falls under the exclusive mandate of the DHS. The 1996 Department of Justice (“DOJ”) Memorandum Opinion clarifying this conclusion and detailing the limited exceptions in which state and local police may enforce civil immigration laws should be reaffirmed. The only legal circumstances under which state and local police may get involved in civil immigration enforcement is through an MOU negotiated under Section 1357(g) of the INA, with proper training and federal accountability and oversight, to prevent abuse, including due process and civil rights violations. Furthermore, federal law enforcement should concentrate first on identifying dangerous criminals and terrorists, prioritizing precious national security resources in order to keep American communities safe. First responders such as state and local police should concentrate on protecting against crime and terrorism, while maintaining community policing practices recognizing America as a nation of immigrants.

MALDEF supports the Rule of Law and is not against enforcement of federal immigration laws. However, Congress and the Administration have acknowledged that the system is broken; therefore, it must be acknowledged that many are out of status through no fault of their own. The former INS lost and even shredded documents, and INS information is notoriously inaccurate. Comprehensive immigration reform is needed before any massive enforcement effort would not lead to serious due process violations and permanent damage to American democracy.

Finally, careful review of the facts and the law shows that the crimes mentioned by supporters of the CLEAR Act could have been solved through existing laws. If this was not done in the cases at issue, Congress and the DHS should concentrate on identifying how existing law should be properly implemented to ensure protection against these egregious crimes. At the same, immigrant communities must also have safe access to police protection, including the ability to report crimes. If public safety and national security are truly a priority, the CLEAR Act must not be enacted, community policing practices must be supported and even encouraged, and the U.S. government should clarify that it values the assistance of immigrant communities in fighting the war against terrorism.

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