



**National  
Immigration  
Law  
Center**

## IMMIGRATION LAW & POLICY

### Arrest and Detention

#### **SWEEPING LEGISLATION INTRODUCED TO REQUIRE LOCAL POLICE TO ENFORCE IMMIGRATION LAW**

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With the bipartisan support of two Republicans and one Democrat, Rep. Charlie Norwood (R-GA) has introduced legislation mandating that state and local police enforce immigration law. Entitled the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act, HR 2671), the bill has already garnered 61 additional cosponsors since it was introduced on July 9, 2003. The legislation is extremist and has far-reaching implications. If passed, it would criminalize immigration status violations and drastically expand the role of state and local police in the enforcement of immigration law.

**Background.** Immigration law contains both criminal and civil restrictions. Courts have found that state and local police generally may enforce the criminal provisions, but the civil provisions constitute a complex and comprehensive regulatory scheme that generally is within the exclusive purview of the federal government. *See, e.g., Gonzalez v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983). There are some exceptions to this, where Congress has provided in the Immigration and Nationality Act for state and local enforcement. These exceptions include where the attorney general finds there is an immigration "mass influx" (INA § 103(a)(10)), and where a local government contracts with the Justice Dept. to conduct immigration enforcement at the local government's expense and under the department's supervision and training (INA § 287(g)).

Entering the United States without inspection is a misdemeanor criminal offense, but the offense is completed once an individual has entered the country. Because many states, such as California, do not authorize police to make arrests for misdemeanors that were not committed in their presence, many police who work in the interior of the United States cannot make arrests for the misdemeanor violation of entry without inspection, which is committed only at the border. *Gonzalez v. City of Peoria*. Being present in the U.S. following an illegal entry, or after overstaying a nonimmigrant visa, generally is not a criminal violation, but rather a civil immigration violation.

The attorney general and other Bush administration officials have complicated this legal area by rescinding a portion of a 1996 Justice Dept. Office of Legal Counsel opinion holding that state and local police lack recognized legal authority to enforce the civil provisions of immigration law. The attorney general and other officials have asserted that local police have "inherent authority" to enforce civil immigration law beyond the limited exceptions authorized in the INA, apparently relying on a Tenth Circuit case that does not address the distinction between criminal and civil offenses discussed above. *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). These officials have used this claim to justify inputting information about certain civil immigration violations in the National Crime Information Center (NCIC), the nation's principal automated information-sharing tool for law enforcement for local, state, and federal officers. This effort to enlist state and local law enforcement to enforce civil immigration law has provoked broad opposition, not only from immigrants' rights organizations, but also from law enforcement personnel concerned over its impact on their efforts to build trust in immigrant communities. (For a more comprehensive discussion of this background, see "Policies to Permit Police to Enforce Immigration Law Could Undermine Public Safety, Violate Civil Rights," IMMIGRANTS' RIGHTS UPDATE, Nov. 22, 2002, p. 4).

The CLEAR Act would dramatically expand the role of state and local police in immigration enforcement. Some principal features of the bill are outlined below.

***Mandating Local Enforcement of Immigration Law.*** The CLEAR Act would not just authorize, but in fact require, the country's over 600,000 state and local police to enforce civil and criminal immigration law. First, as a condition of receiving reimbursement for incarcerating non-U.S. citizens and obtaining funds for immigration enforcement, state and local jurisdictions would be required to institute policies authorizing police to enforce immigration law while in the course of their official duties within two years of CLEAR's enactment.

Second, the legislation would broadly criminalize immigration status violations. Any noncitizen present in the United States in violation of the provisions of the INA would be made subject to imprisonment for up to one year and to a fine. The legislation broadly defines "immigration violators" as noncitizens who

- Are apprehended while entering, or attempting to enter the United States at a time or place other than as designated by immigration officers;
- Enter without inspection;
- Fail to depart the United States within 30 days after the expiration of a nonimmigrant visa or voluntary departure, and are not otherwise in lawful status, or
- Fail to depart within 30 days of a final order of removal and are not otherwise in lawful status.

Thus, for purposes of immigration enforcement, the distinctions between civil and criminal immigration violations would be eliminated and police would be required to arrest all immigration violators.

Third, the legislation would authorize the insertion of immigration data into the National Criminal

Information Center (NCIC), the federal database that stores criminal information. It also would require the Dept. of Homeland Security (DHS) to transmit data on immigration violators to the NCIC. Thus, police officers who encounter immigrants would have at their disposal a database that would provide them information on the immigration violators they encounter.

These three mechanisms would dovetail to create heightened police enforcement of immigration law. If this bill were to become law, any police encounter with immigrants, resulting from either nefarious or innocent acts, would lead to enforcement of immigration law. Thus, an immigrant who had overstayed her visa or entered illegally and was also a crime victim, a battered spouse, or a witness to a crime would be subject to immigration enforcement by police in the same way that at an immigrant who was stopped for a traffic violation or arrested for robbery might be.

***Enhanced Civil Penalties and Fees.*** The legislation would dramatically stiffen fines for illegal entries and add new provisions allowing the forfeiture of assets of noncitizens who fail to depart the U.S. pursuant to an order of removal and then remain in the U.S. for longer than one year. The current penalties for illegal entry violations under INA sec. 275(b) range from \$50 to \$250. The top end of that range would be increased to \$500 and would reach \$10,000 if the individual had three prior violations.

The legislation would authorize a billion dollars each fiscal year for immigration enforcement. State and local police departments would be able to apply for funds for technology, equipment, and administrative support for housing and processing noncitizens held for immigration violations. Only those agencies that instituted a policy and practice of enforcing immigration laws would be eligible for funds. A third of the money raised from the fees that immigrants pay in applying for benefits would be diverted to enforcement efforts. In addition, the legislation would authorize the attorney general or the secretary of the DHS to increase fees for immigration benefits in order to carry out immigration enforcement.

These provisions are significant for two reasons. First, siphoning off funds from immigration benefits would lower the amount that is spent on processing those benefits. Diverting these funds would probably result in backlogs for adjudicating benefits, and these backlogs are already out of control. Second, with such large amounts to be raised for enforcement, fees for processing immigration-related applications and paperwork would most likely need to be raised.

***Burdensome Reporting Requirements for Local Law Enforcement.*** The legislation would impose onerous reporting requirements on all state and local jurisdictions. Within ten days of encountering an immigration violator, police departments would be required to report the following information about the person to the Justice Dept. and Homeland Security Dept.:

- Name
- Address or place of residence
- Physical description
- Date, time, and location of agent's encounter with immigration violator and the reason for the stop, detention, apprehension, or arrest

- Driver's license number and its state of issuance, if applicable
- Identification number, any designation number on the document, and the issuing entity, if applicable
- The license plate number, make and model of any automobile registered or driven by the violator, if applicable
- A photo, if readily obtainable
- Fingerprints, if readily obtainable

In addition, the legislation would establish a procedure for identifying and notifying state and local entities that fail to comply with reporting requirements. If the attorney general found that a state or local jurisdiction had failed to report or that it engages in a pattern or practice of incomplete reporting, the attorney general would be required to notify the jurisdiction and detail its deficiencies. A jurisdiction would then be required to respond to the attorney general, address each deficiency and provide a plan for correcting it.

***Claims by States and Localities Against the Federal Government.*** In congressional hearings, immigration enforcement advocates have complained that immigration officials do not respond when local police have arrested noncitizens who might be subject to removal. To address this, the legislation would create a claim by states and local entities against federal agencies for failing to cooperate with them to enforce immigration laws. The legislation would also establish new administrative law judges within the Justice Dept. to adjudicate these claims. Judges could fine federal agencies \$1000 for each instance of nonenforcement, upon the determination of a valid claim. If the judge found that the agency had engaged in a pattern or practice of nonenforcement or noncompliance with a state or local law enforcement agency, the judge would be required to fine the agency \$10,000. Appeals could only be brought to the attorney general or secretary of Homeland Security and would not be subject to judicial review.

***Broadened Immunity to Law Enforcement Personnel & Agencies.*** As written, the legislation purports to completely immunize federal, state, and local law enforcement agents from personal liability arising from enforcement of immigration law committed while on official duty. It would also immunize state and local law enforcement agencies from claims for money damages based on civil rights laws for incidents arising out of immigration law enforcement, except in situations where officers violated criminal laws. What this means is that individuals who wish to sue police for harms resulting from governmental action would be unable to bring their claims in court. These claims are generally brought under the Federal Tort Claims Act (FTCA) for claims against the federal government, 42 USC sec. 1983 for claims against state and local police agencies and officers, and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for claims against individual federal officers. Because Congress created the FTCA claims provision, Congress can also modify and even eliminate it. However, because *Bivens* claims are grounded in constitutional law, it is questionable whether Congress can eliminate it.