

SCOTT GARDNER ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON
IMMIGRATION POLICY AND ENFORCEMENT
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
SECOND SESSION

ON

H.R. 3808

MARCH 7, 2012

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SCOTT GARDNER ACT

WEDNESDAY, MARCH 7, 2012

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON IMMIGRATION
POLICY AND ENFORCEMENT,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:34 p.m., in room 2141, Rayburn Office Building, the Honorable Elton Gallegly (Chairman of the Subcommittee) presiding.

Present: Representatives Gallegly, Smith, King, Lofgren, Conyers, and Pierluisi.

Staff present: (Majority) Dimple Shah, Counsel; Marian White, Clerk; and (Minority) Tom Jawetz, Counsel.

Mr. GALLEGLY. Good afternoon. We are going to call the Subcommittee to order. Today, we are going to be addressing H.R. 3808, the "Scott Gardner Act."

Drunken driving is a serious crime that resulted in 10,839 deaths in 2009.

Yet, there are numerous documented cases of illegal immigrants who receive convictions for drunk driving, and then are not deported. Although these illegal immigrants have no right to be in our country; they remain in the United States. They are simply released and often go on to drink and drive again. This problem cannot continue to be ignored.

In a recent and egregious example, Carlos Martinelly Montano drove while drunk, crashed into an oncoming car killing one passenger and critically injuring two others. According to an ICE report, Montano had been arrested for drunken driving twice and reckless driving once. In two of the three cases, his immigration status was never checked, even though he was convicted and sent to jail for the first offense.

Even when he was placed in ICE "custody" after his second DUI arrest, he was released onto the streets with a GPS device. However, GPS monitoring does not prevent a released criminal from driving drunk. And we know that drunken drivers involved in fatal crashes are 8 times more likely to have a prior drunken driving conviction than all other drivers.

On August 1, 2010, Montano got behind the wheel of his vehicle yet again after he had been drinking heavily. This time, tragically, he plowed into a car of three Catholic nuns, killing one and severely injuring the two others. Montano was subsequently convicted of felony murder and involuntary manslaughter.

The report claims that Montano would have been detained under subsequent ICE guidelines because he was a repeat offender, and he demonstrated himself to be a danger to public safety. However, an anonymous ICE official stated that two drunken driving incidents by an illegal immigrant “aren’t enough to warrant detention.” There is absolutely no reason for the Administration’s outrageous policy.

Montano is not an isolated case. In 2011, an illegal immigrant and habitual drunken driver named Saul Chavez ran over and killed Dennis McCann of Chicago. Chavez had recently finished a sentence for 2 years of probation for an earlier aggravated drunken driving offense. Mr. Chavez was apprehended at the scene of the crime and booked in Cook County jail. ICE issued a detainer for Mr. Chavez, who already had a prior criminal record. The Cook County jail ignored the detainer and allowed Chavez to post bond. Chavez has since failed to appear in court.

How many people must die before illegal immigrant drunken drivers are detained and removed? Why is it that they are not a priority for our Administration? Congress has no choice but to act since the Administration will not.

Representative Myrick’s bill solves the problem and ensures that illegal immigrants who drink and drive are detained and processed by ICE.

The bill contains common sense measures that require the detention of illegal immigrants who are apprehended for drunk driving after they are released from custody by local law enforcement; instructs the Department of Homeland Security to prioritize the deportation of an illegal immigrant who is convicted of drunk driving; requires a State or local law enforcement officer to verify with Federal databases, the immigration status of a person who the officer has apprehended for drunk driving and has reasonable grounds to believe is an illegal immigrant; gives law enforcement the authority to issue a Federal detainer to keep an illegal immigrant arrested for drunken driving in custody until he or she is convicted or transferred to a Federal facility.

I strongly support this bill. It ensures that public safety is maintained, that law is enforced, and dangerous criminals are removed from our communities.

And at this point, I would yield to my good friend, the Ranking Member, Ms. Lofgren, for her opening statement.

[The bill, H.R. 3808, follows:]

112TH CONGRESS
2D SESSION

H. R. 3808

To amend the Immigration and Nationality Act with respect to detention of unlawfully present aliens who are apprehended for driving while intoxicated, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 23, 2012

Mrs. MYRICK (for herself, Mr. COBLE, and Mr. MCINTYRE) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Immigration and Nationality Act with respect to detention of unlawfully present aliens who are apprehended for driving while intoxicated, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Scott Gardner Act”.

1 **SEC. 2. DETENTION AND REMOVAL OF ALIENS APPRE-**
 2 **HENDED FOR DRIVING WHILE INTOXICATED**
 3 **(DWT).**

4 Section 236 of the Immigration and Nationality Act
 5 (8 U.S.C. 1226) is amended—

6 (1) in subsection (e)(1)—

7 (A) in subparagraph (C), by striking “or”
 8 at the end;

9 (B) in subparagraph (D), by adding “or”
 10 at the end; and

11 (C) by adding after subparagraph (D) the
 12 following:

13 “(E) is unlawfully present in the United
 14 States and is apprehended for driving while in-
 15 toxicated, driving under the influence, or simi-
 16 lar violation of State law (as determined by the
 17 Secretary of Homeland Security) by a State or
 18 local law enforcement officer,”;

19 (2) by redesignating subsection (e) as sub-
 20 section (f); and

21 (3) by inserting after subsection (d) the fol-
 22 lowing new subsection:

23 “(e) DRIVING WHILE INTOXICATED.—If a State or
 24 local law enforcement officer apprehends an individual for
 25 an offense described in subsection (c)(1)(E) and the offi-

1 cer has reasonable ground to believe that the individual
2 is an alien—

3 “(1) the officer shall verify with the databases
4 of the Federal Government, including the National
5 Criminal Information Center and the Law Enforce-
6 ment Support Center, whether the individual is an
7 alien and whether such alien is unlawfully present in
8 the United States; and

9 “(2) if any such database indicates that the in-
10 dividual is an alien unlawfully present in the United
11 States—

12 “(A) a State or local law enforcement offi-
13 cer is authorized to issue a Federal detainer to
14 maintain the alien in custody in accordance
15 with such agreement until the alien is convicted
16 for such offense or the alien is transferred to
17 Federal custody;

18 “(B) the officer is authorized to transport
19 the alien to a location where the alien can be
20 transferred to Federal custody and shall be re-
21 moved from the United States in accordance
22 with applicable law; and

23 “(C) the Secretary of Homeland Security
24 shall—

1 “(i) reimburse the State and local law
2 enforcement agencies involved for the costs
3 of transporting aliens when such transpor-
4 tation is not done in the course of their
5 normal duties; and

6 “(ii) prioritize removal of such
7 aliens.”.

○

Ms. LOFGREN. Thank you, Mr. Chairman.

I would like to let the Ranking Member of the full Committee, Mr. Conyers, precede me, if I may.

Mr. GALLEGLY. Without objection.

Mr. CONYERS. I thank, Zoe Lofgren. And welcome our colleagues, Sue Myrick, Mike McIntyre, and a former Member of Judiciary Committee, Charles Gonzalez.

And briefly, and the reason I asked if I might proceed Zoe Lofgren is to remind you of the 10th Amendment of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." This was recently used by no one less than Justice Scalia, whose opinion used this premise that nothing in the Constitution delegates to the Federal Government the power to commandeer State law enforcement personnel to perform Federal background checks. That is the reason he struck down the relevant provision in the Brady Act, and it is the reason he might ultimately be forced to strike down H.R. 3808. So, my point is that we have a constitutional infirmity here that might be controlling.

The opinion is important, and I just remind you there are a lot of other problems with using racial identity or ethnicity as a basis to suspect someone should be stopped.

I thank you and return the balance of time, and ask unanimous consent to put my full statement in the record.

Mr. GALLEGLY. Without objection.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

I want to begin by extending my sympathy to the families of Scott Gardner and William McCann. Losing a loved one is a horrible experience and I appreciate how much courage it takes to speak out publicly to try to ensure that similar tragedies do not happen in the future.

I also want to welcome my three distinguished colleagues, Rep. Sue Myrick (R-NC), Rep. Mike McIntyre (D-NC), and Rep. Charles Gonzalez (D-TX), who will be testifying before us on our first panel. Rep. Gonzalez was, until recently, a Member of this Committee and it is a special pleasure to have him back.

Let me turn to the bill we are considering today. I do not doubt the intentions of the authors of this bill. Following the unnecessary and tragic death of Scott Gardner, my colleagues drafted a bill that they hoped would respond to the problem and they have continued to introduce versions of the bill in subsequent Congresses. Unfortunately, the bill has very serious problems.

The bill's central feature is its requirement that every time a State and local law enforcement officer apprehends a person for driving under the influence, that officer must determine whether there is a "reasonable ground to believe" that the person apprehended is an immigrant.

The bill provides no guidance as to what officers can and cannot take into account when making that judgment. Should the officer consider the person's race or ethnicity? What about the clothes or shoes the person is wearing? Should it make a difference if the person speaks with an accent?

Based upon that officer's judgment, the bill then requires the officer to verify the person's immigration status by performing federal background checks.

We know what is going to happen with a bill that directly invites racial profiling like this one does. We know that people who look, sound, and act different are going to receive additional scrutiny. Latino U.S. citizens—especially those who were born abroad and became naturalized citizens—will be detained by State and local police while background checks are performed. The same is true for lawful permanent residents and other law-abiding immigrants.

Back in November, the Subcommittee on Crime held a hearing about how smart policing can target criminal behavior. The hearing gave us an opportunity to talk about the many problems that result when race, ethnicity, or national origin play a role in ordinary police practices.

Law enforcement officers have a difficult and dangerous job. We know that the majority of them perform that job professionally and without bias—and we value the work they do to keep our communities safe. But we cannot deny that the specter of racial profiling has infected the relationship between the police and minority communities. That is why more than half of the states have enacted legislation to address the issue of racial profiling and why I introduced H.R. 3618, the “End Racial Profiling Act.”

There is another problem with this bill. This bill is unconstitutional because it commands State and local law enforcement officers to act in furtherance of a Federal law. The Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997), struck down a similar provision in the Brady Act in an opinion written by conservative Justice Scalia. That opinion was based on the same Tenth Amendment, States’ right, and Federalism principles that many of my Republican colleagues believe in so strongly. As we know, the Tenth Amendment says: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Justice Scalia’s opinion is based on the premise that nothing in the Constitution delegates to the Federal Government the power to commandeer State law enforcement personnel to perform Federal background checks. That is the reason he struck down the relevant provision in the Brady Act and it is the reason he would be forced to strike down H.R. 3808 if given the chance.

I think this bill needs to go back to the drawing board. I look forward to hearing from the witnesses and I yield the balance of my time.

Mr. GALLEGLY. The gentleman from Texas, the Chairman of the full Committee, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Drunk driving is a national tragedy. According to the National Highway Safety Administration, someone dies in the U.S. in a car crash that involves alcohol an average of every 48 minutes. In 2009, alcohol-impaired car crashes accounted for nearly one-third of all traffic-related deaths in the United States.

According to the Centers for Disease Control and Prevention, drunk drivers drive intoxicated 80 times before their first arrest.

The CDC also found that the annual cost to the Nation due to alcohol-related crashes totals more than \$51 billion. These costs include lost productivity, medical costs, legal and court costs, emergency service costs, insurance administration costs, travel delay, property damage, and workplace losses.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 requires the Federal Government to detain aliens who are deportable on the basis of having committed aggravated felonies.

The Immigration and Nationality Act provides that a crime of violence for which the term of imprisonment is at least 1 year is considered an aggravated felony.

The Board of Immigration Appeals ruled that drunk driving is “an inherently reckless act which exacts a high societal toll in the forms of death, injury, and property damage.”

However, the Supreme Court ruled in 2004 that a criminal conviction for driving under the influence of alcohol, absent a malicious mental state, is not a crime of violence for immigration purposes. Therefore, current law does not require Immigration and Customs Enforcement to detain illegal immigrants who have committed drunk driving offenses.

Illegal immigrants who drive drunk should be detained until they have been removed so they cannot endanger more American lives. Unfortunately, ICE often fails to detain illegal immigrants who drive drunk.

The Washington Post reported that ICE believes that two drunk driving incidents are not enough to warrant detention. This policy drives our country on a dangerous road, and puts American lives at risk.

Representative Sue Myrick has introduced the Scott Gardner Act, named after a North Carolina man who was killed in a July 2005 drunk driving accident that involved an illegal immigrant who had numerous previous drunk driving convictions. Representative Myrick's bill mandates that ICE detain illegal immigrant drunk drivers.

This legislation also requires State and local law enforcement officials to check with Federal databases to determine whether a drunk driver is an illegal immigrant.

If North Carolina authorities had done this in the case of illegal immigrant Ramiro Gallegos, they could have detained him after one of his five previous DUI incidents. Scott Gardner would still be alive, and the tragic accident, which also left Gardner's wife, Emily, in a vegetative state, could have been prevented.

Sadly, similar tragedies have occurred across the country. In August 2010, Carlos Martinelly-Montano, an illegal immigrant with several prior DWI charges, struck and killed a nun in Virginia while driving under the influence.

North Carolina resident Leanna Newman and her unborn child were killed in a wreck caused by an illegal immigrant who admitted to drinking before getting behind the wheel.

In California, Sara Cole was paralyzed when she was hit by an illegal immigrant who was driving drunk and had previous convictions for DWI.

These are just a few of the many instances where drunk illegal immigrants have injured or killed Americans behind the wheel.

Representative Myrick's legislation also provides State and local law enforcement authorities with the resources necessary to transport aliens to ICE custody.

I support this bill as it protects public safety and ensures that Americans are not injured and killed by illegal immigrant drunk drivers.

Thank you, Mr. Chairman. I will yield back.

Mr. GALLEGLY. I thank the gentleman. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I have tremendous sympathy for the families of Scott Gardner and William McCann. It is always terrible to lose a loved one, but particularly difficult when the death results from an irresponsible and criminal act. Drunk driving is a public safety threat.

According to the Bureau of Justice Statistics, 10.5 percent of all arrests nationwide in 2009 were for driving under the influence, more than any other category of offense, other than drug abuse. This is clearly an area in which we need to do more to encourage law abiding behavior.

But I think we can all agree that when we respond to serious problems, we have to do so in a serious and constitutionally sound manner. We also need to make sure that our response does not create other problems, and unfortunately, although I have tremendous respect for the authors, I think H.R. 3808 fails on these fronts.

First, the bill creates a new Federal mandate on State and local police officers that clearly violate the U.S. Constitution. In *Printz v. U.S.K.*, the Supreme Court considered a Federal requirement under the Brady Act mandating that State officers make a reasonable effort to perform Federal background checks on prospective gun purchasers. The Court, in a Justice Scalia opinion, struck this provision down as a violation of the 10th Amendment. Noting that the States are their own sovereigns in our Federalist system of government, the Court held that the Federal Government cannot simply commandeer State officers to enforce Federal law.

Like the Federal mandate in the Brady Bill, this bill establishes a Federal mandate requiring State officers to make judgments about whether persons who they apprehend or stop are immigrants, and, if so, conduct background checks to verify their immigration status. This fails the Supreme Court holding in *Printz*. Congress can no more require State officers to perform Federal background checks to enforce Federal immigration laws than they can require State officers to perform such checks to enforce Federal handgun laws.

The bill's unconstitutionality is not its only problem. The bill would also invite racial profiling and discrimination by requiring State officers to perform background checks only if they have "reasonable ground to believe" that the persons they apprehend are illegal immigrants.

We have seen similar language in the recent Arizona and Alabama laws, which both require officers to verify immigration status if they have reasonable suspicion that a person is unauthorized. And like those laws, nothing in this bill provides any guidance on what might inform the basis for such a belief or suspicion.

We have had our colleague, Mr. King, suggest that clothing, shoes, accent, or grooming would form the basis. "Sometimes," Mr. King said, "it is just a sixth sense." But that is really not an appropriate basis for reasonable belief. We need to look no further than the recent investigation in Maricopa County, where the Department of Justice found that Latino drivers were between 4 and 9 times more likely to be stopped than similarly situated non-Latino drivers. And the Department's experts said it was "the most egregious racial profiling in the United States that he has ever personally seen in the course of his work, observed in litigation, or reviewed in professional literature." And just this January, the Department indicted four officers in East Haven, Connecticut for crimes stemming from egregious racial profiling against Latinos.

By directing State officers to treat people differently based on their perceived alienage, the bill would essentially become a national version of the Arizona and Alabama laws, inviting widespread racial profiling and discrimination in violation of the Constitution.

And finally, I must point out the irony in our consideration of this bill today. Some of those who support this bill for its effort to

prioritize removal of immigrants apprehended for DUI are the same Members who have been repeatedly objecting to the Administration on its efforts to set smarter enforcement policy. They are the same Members who argued against prioritizing criminals, including those convicted for DUI, over the spouses of U.S. citizen soldiers. They are the same Members who said ICE should go after innocent children the same way it goes after murderers and rapists. To do anything else would be backdoor amnesty, they said.

Now, while those Members were arguing, the Administration went ahead and set new enforcement priorities to do exactly something about this issue. For example, while some have strenuously objected to efforts to clear immigration court backlogs by moving low priority cases to the back of the docket, the Administration undertook this initiative to improve its ability to quickly and efficiently remove high priority targets. Under the written guidance for this initiative, such targets expressly include persons with misdemeanor DUI convictions.

The Administration's efforts to prioritize DUI and other criminal offenses are also clear from current removal and detention figures. ICE figures show that the percentage of removals involving persons with criminal records is the highest it has ever been. And a recent snapshot of detention population shows that those with criminal convictions, the most frequent serious conviction, is for DUI. The truth is that while this Administration was working to prioritize the detention and removal of people convicted of DUI offenses, Members of this Committee objected every step of the way.

We know that the drunk drivers who struck and killed Scott Gardner and William McCann both had prior convictions for DUI. I just wish that the Obama Administration's smart enforcement policies had already been in place at those times so that their lives could have been saved.

The problem with drunk driving is real. It is one that we as a society have yet to solve. But this bill will not get us closer to a solution.

I look forward to hearing the testimony of my colleagues and our other four witnesses. And I yield back, Mr. Chairman.

Mr. GALLEGLY. The time of the lady has expired.

As you may or may not be aware, there is a vote. Actually there are a series of votes on the floor, and we have about 3 minutes to get to the floor. So, we will recess until such time that we have completed the 1, 2, 3, 4, 5 votes. I am assuming that it could be 45 minutes to an hour. But whenever we are finished, we will reconvene.

Thank you.

[Whereupon, at 1:53 p.m., the Subcommittee recessed, to reconvene at 3:04 p.m., the same day.]

Mr. GALLEGLY. We will call the hearing back to order.

I would like to introduce our three witnesses, and we will move ahead. I know Mr. McIntyre is on his way, but there is a concern that we are going to have another series of votes, and I do not want to have the situation holding folks up any more than we have to.

We have a very distinguished panel of witnesses on our first panel today. Each witness' written statements will be made part of the record of the hearing in its entirety. I ask that each witness

summarize his or her testimony in 5 minutes. And at this time I would like to introduce our first panel.

Congresswoman Sue Myrick represents North Carolina's 9th District in the United States House of Representatives. She serves as Vice Chairman of the Energy and Commerce Committee, and was selected by House leadership to serve on the House Permanent Select Committee on Intelligence. From 2002 to 2004, the congresswoman served as Chairman of the Republican Study Committee. In addition, she has served as deputy whip since the 108th Congress.

Mr. McIntyre, who will be joining us shortly, has represented North Carolina's 7th Congressional District in the U.S. House of Representatives since 1996. He is a Member of the House Agriculture Committee and the House Armed Services Committee. Congressman McIntyre is a graduate of the University of North Carolina at Chapel Hill, where he also received his J.D.

And our third witness today is Congressman Charles Gonzalez, is currently serving his seventh term in the House of Representatives, representing the 20th District of the great State of Texas. He is a Member of the House Committee on Energy and Commerce and House Administration. He is the Chairman of the Congressional Hispanic Caucus. Before serving in the U.S. House of Representatives, Mr. Gonzalez served most of his career in the legal field.

We welcome you all.

With that, I would yield to the gentlelady from North Carolina, Ms. Myrick.

TESTIMONY OF THE HONORABLE SUE WILKINS MYRICK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Ms. MYRICK. Thank you, Mr. Chairman, and Ranking Member Lofgren, and all the Members. We appreciate very much your holding this hearing today and giving us an opportunity to present to you the Scott Gardner Act. I feel it is a vital piece of legislation.

On July 16 in 2005, Scott Gardner, who was in my district, and his family were on the way to the beach for a typical summer beach trip. And they got to New Brunswick County, which is Mike's area, and literally an illegal immigrant hit them driving drunk. Scott was killed. His wife is still in a vegetative state, and their two kids do not have parents.

And after the accident, it was discovered that Mr. Gallegos, who was the driver of the car that hit them, this was not his first time. He had previously been arrested 5 times—5 times—for drunk driving. And so, this was not his first alcohol-related event. In 2002, he was also involved in a head on collision.

So, after Scott's death, that is when I first introduced the Scott Gardner Act, and it is been introduced every Congress, and I am very grateful that Representative McIntyre has been my co-sponsor every year.

It does three things. It is called H.R. 3830, and it does three things. First, local and State officers will be required to verify immigration status by Federal databases of a person apprehended for drunk driving and believed to be in the country illegally.

In many jurisdictions, this is already being done by the Secure Communities Program, which is operational in 1,508 jurisdictions in 44 States. And it is expected to be implemented nationwide by Fiscal Year 2013.

It would allow, not mandate, local and State law enforcement officers to issue a Federal detainer for any individual who is in the country illegally and has been arrested for DWI. Lastly, the bill instructs the Department of Homeland Security to prioritize the deportation of any illegal immigrant arrested for DWI.

Since 2006, 11,494 illegal immigrants have been arrested in Mecklenburg County, which is my district and where I live; 2,789 of these arrests have been for DWI. That is 24 percent. It is a problem, and it is only getting bigger.

So, I have had many local law enforcement officers, some of them who have testified before your Committee, sit in my office and tell me this very same story from around the country. And because DWI is not considered to be a serious enough crime to warrant deportation, many of those illegal immigrants are released, jailed for a short period of time, and released and told to show up in court, and, of course, they never show up in court. That never happens. So, that leaves the illegal immigrant in the community and able to drive again drunk.

In many cases, these illegal immigrants end up back in jail perpetrating the enforcement method of catch and release. It is ineffective, and in cases of DWI, I believe it is dangerous and wrong.

You know, immigration reform is a divisive and highly controversial subject, but this Scott Gardner Act is not a controversial piece of legislation. This legislation simply gives local and State officers the ability to protect their citizens. It is their job, just as it is the job of the Federal Government to ensure the safety and security of our country.

And, again, I thank the Subcommittee very much for holding this hearing today, and I would look forward to further consideration of the bill.

With that, I yield back.

[The prepared statement of Ms. Myrick follows:]

**Prepared Statement of the Honorable Sue Wilkins Myrick,
a Representative in Congress from the State of North Carolina**

Chairman Gallegly, Ranking Member Lofgren, and Members of the Subcommittee, thank you for inviting me and my colleague Representative Mike McIntyre here today. And thank you for holding a hearing on what we feel is a vital piece of legislation – the Scott Gardner Act.

On July 16, 2005, Scott Gardner, his wife Tina, and their two children were on their way to Sunset Beach. Scott was a high school Social Studies teacher from Gaston County, and as is customary during the summer break from school, many Carolinians make a trip to the coast.

However, while the Gardner Family was in Brunswick County, their car was struck by Ramiro Gallegos, an illegal immigrant who was driving drunk. Scott Gardner was killed. Seven years later, Tina Gardner remains in a vegetative state.

After the accident, it was discovered that Gallegos had been previously arrested five times – FIVE TIMES – for drunk driving. The accident on July 16th, 2005, was not his first alcohol-related accident. In 2002, he was involved in a head-on collision. Two of the previous arrests were outside the state of North Carolina.

Once, he was deported back to Mexico. However, six months later, he was back in the United States with a Michigan driver's license. After his other arrests, he was either released on probation, or served minimal time in jail – up to thirty days – before being released and asked to show up in court. He never did.

Sadly, this is not an isolated incident. In August 2010, Carlos Martinelly-Montano, an illegal immigrant with several prior DWI charges, struck and killed a nun in Virginia while driving under the influence. North Carolina resident Leanna Newman and her unborn child were killed in a wreck caused by an illegal immigrant who admitted to drinking before getting behind the wheel. In California, Sara Cole was paralyzed when she was hit by an illegal immigrant who was driving drunk and had previous convictions for DWI.

In June 2011, Denny McCann was hit and killed by Saul Chavez, an illegal immigrant who was first arrested for DWI in 2008. He was allowed to remain in the United States. In August 2011, Matthew J. Denice died after being hit by Nicolas Guaman, an illegal immigrant with several prior arrests.

After Scott's death, I first introduced the Scott Gardner Act in Congress. In December 2005, it was added as an amendment to the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. The bill originally stated that an illegal immigrant was eligible to be deported after three DWI arrests. My amendment made DWI a deportable offense after ONE arrest.

In addition to working on the Scott Gardner Act, I became involved in helping officers enforce immigration laws within their communities – at a local level. I was one of the first advocates of the successful 287(g) program, whereby local officers have authority to gain information about a detainee's immigration status and are trained to process and detain individuals who are in the country illegally.

I advocated for better communication between local jurisdictions and the federal government when it came to driving records and immigration status. Ramiro Gallegos was allowed to drink and drive because one jurisdiction didn't know what the other one did.

Since 2005, I have reintroduced the Scott Gardner Act every Congress.

Very simply, HR 3808 does three things:

First, it amends the Immigration and Nationality Act to allow local or state law enforcement officers to issue a federal detainer for any individual who is in the country illegally and has been arrested for driving while intoxicated. Officers would be allowed to confirm immigration status via national databases if reasonable evidence exists that the arrested individual is in the country illegally.

Second, the bill requires that The Department of Homeland Security reimburse local law enforcement for the cost of transferring any such individual(s) into federal custody.

Lastly, the bill requires that DHS prioritize the deportation of any illegal immigrant arrested for DWI.

Since 2006, 11,494 illegal immigrants have been arrested in Mecklenburg County, NC, which is in my district and the county that I call home. 2,789 of these arrests have been for DWI. That's 24 percent. It's a problem, and it's only getting bigger.

I've had local law enforcement officers sit in my office – the same ones that have sat before this Committee – and talk of their frustrations. Because DWI isn't considered to be a serious enough crime to warrant deportation, many of those illegal immigrants arrested are released, jailed for a short period of time, or released and told to show up at court.

This often does not happen, leaving the illegal immigrant in the community and able to again drive drunk. In many cases, these illegal immigrants end up back in jail, perpetuating the enforcement method of 'catch and release'. It's ineffective. In cases of DWI, it's dangerous and wrong.

As with all law enforcement agencies, resources are limited. The State Criminal Alien Assistance Program (SCAAP) already reimburses state and local jurisdictions for costs incurred for incarcerating criminal aliens with one felony charge or two or more misdemeanor charges, AND who are incarcerated for at least four consecutive days.

However, we should not simply reimburse local law enforcement when alleged crimes are deemed severe enough. When local and state officers help enforce immigration laws in the place of federal officers, we should absolutely reimburse them for the associated costs. That's what the Scott Gardner Act would allow – state and local jurisdictions would be reimbursed for the cost of transporting illegal immigrants into the hands of federal officials for deportation proceedings.

According to The Century Council, one-third of all DWI arrests are repeat offenders. The Scott Gardner Act allows some of these would-be repeat offenders to be taken off of the streets.

Immigration reform is a divisive and highly controversial topic. However, The Scott Gardner Act is not a controversial piece of legislation.

Let's be clear: Being in the United States illegally is a deportable offense, and the Administration – through its newly instated policy of “prosecutorial discretion” is saying that enforcement of our immigration laws is no longer a priority. Because DWI is not a felony crime, it's not serious enough to deem that someone – who is here illegally – should be deported.

In conjunction with programs like 287(g) and Secure Communities, The Scott Gardner Act gives law enforcement officers at the local and state level the resources and ability to protect their citizens. It's their job, just as it's the primary job of the federal government to ensure the safety and security of our country.

Mr. GALLEGLY. I thank the gentlelady.
Congressman McIntyre.

TESTIMONY OF THE HONORABLE MIKE McINTYRE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

Mr. McINTYRE. Thank you very much, Mr. Chairman, Ranking Member, and Members of the Subcommittee. I am honored and privileged to have the opportunity to testify before you today about the Scott Gardner Act. And I would like to thank my good friend and colleague, Sue Myrick, for her great work on this. And our work together has been such that we hope that we will finally see this come to fruition.

This was in response to a tragic accident that occurred in the congressional district that I represent, and what began as a family vacation obviously turned into the worst thing imaginable with Scott Gardner's life being taken, and with his wife remaining in critical condition in a vegetative state. And what this has done to those two young children is truly something that I think Congress can be in a position to do something about.

The drunk driver was a repeat offender, an illegal immigrant, an individual who should never have been in this country in the first place. And to have had five prior arrests, all DWIs, and one of those times his blood alcohol content being 3 times the legal limit, a transgression that only earned him 30 days in jail. There is no greater evidence that the immigration system is broken than when an illegal alien, who is a repeat offender and has earned himself, for all intents and purposes, felonious action, is able not only to remain in our country, but to continue committing the crime for which he has earned the felony.

The Scott Gardner Act would ensure the DWI is grounds for mandatory detention and deportation of illegal immigrants. Now, if it is determined that the individual is within the country illegally, the officer is authorized to detain or transport the alien to Federal custody, whereby he or she shall be removed.

This bill would also improve communications between Federal, State, and local law enforcement agencies, and it would allow those agencies and law enforcement to collect immigration information in the course of their normal duties.

Let me just clarify something. As an attorney, I can appreciate the concern about the constitutionality, but I will also tell you, this is about a driving record being made available to stop the senseless and reckless taking of life on our highways. There is no mandate that violates the Constitution. To somehow sit here and act like, oh, we are going to violate the Constitution when this law has not even been tested yet, I think is preempting ourselves and our legislative duty.

But to make a background check when there is a reasonable suspicion is not unconstitutional. Common sense dictates that any driver's record for use of our public highways is subject to check. This is not the same as in the court case that has been cited today.

The Second Amendment protects the right for the use of firearms. The Brady Act was entirely a different situation that the Court was protecting. Use of the public highways is a privilege. It

is not a guaranteed constitutional act. It is not under the Bill of Rights like the Second Amendment that protects the use of firearms. So, the use of public highways is a privilege, not a right. Licenses are issued by the government to allow someone to drive on our highways. And they ought to be checked, especially for someone who has a record of DWIs.

In her concurring opinion, Justice O'Connor noted that the distinction here, when she was talking about, and she concurred in the majority opinion on the act that has been cited today, *Printz v. U.S.*, said that that was a situation where State and local law enforcement officers must do background checks before issuing permits to buy firearms. That is distinctive language. What we are talking about is checking someone's record after they have been issued a license to go on the highway, not before they are ever issued a license. And I think that has been overlooked today.

Also, when we look at the fact that in the language Justice O'Connor also noted the Court appropriately refrains from deciding whether purely ministerial reporting requirements on State and local authorities are invalid. And, in fact, she says, "The provisions invalidated here are those that directly compel State officials to administer a federally regulatory program." We are not asking anybody to administer a Federal regulatory program. We are saying check the record and see if this person, whoever it is that has been the privilege of driving on our highways, has traffic violations. That is not profiling. That is not administering a Federal program. That is common sense that a police officer goes and checks a person's record.

And in this case, it cost someone their life, and it cost two children the opportunity to know their parents.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McIntyre follows:]

U.S. Representative Mike McIntyre
 Testimony before the U.S. House Committee on the Judiciary Subcommittee on
 Immigration Policy and Enforcement
 Hearing on H.R. 3808, the "Scott Gardner Act"
 Wednesday, March 7, 2012

Chairman Gallegly, Ranking Member Lofgren, members of the Subcommittee, I am honored and privileged to have the opportunity to testify before you today about the "Scott Gardner Act," H.R. 3808. I would also like to thank my good friend and colleague, Congresswoman Sue Myrick, for inviting me to speak on this very important bill, which strengthens our national immigration laws and preserves our public safety.

I have been an original co-sponsor of the "Scott Gardner Act" since Congresswoman Myrick first introduced this legislation in 2005 in response to a tragic accident which took place in my congressional district. On July 16, 2005, 33-year-old husband and father, Scott Gardner, was driving to the beach in Brunswick County, NC, with his wife Tina, and their two young children in tow. Their summer vacation was over almost before it began when their car was struck head on by a drunk driver. Only a few hours after being airlifted to New Hanover Regional Medical Center, Scott lost his life and his wife remained in critical condition. She would linger in a vegetative state for years. His children, though suffering only minor physical injuries, were robbed of their father for the rest of their lives.

The drunk driver was a repeat offender and an illegal immigrant, an individual who should never have been in this country in the first place. He had five prior arrests, all DWI's, and one of those times, his blood alcohol content was three times the legal limit, a transgression which earned him only 30 days in jail.

Mr. Chairman, there is no greater evidence that our immigration system is broken than when an illegal alien, who is a repeat offender and who has earned himself a felony for all intents and purposes, is able to not only remain in our country, but to continue committing the crime for which he has earned a felony.

The Scott Gardner Act would ensure that DWI is grounds for mandatory detention and deportation of illegal aliens. Specifically, if a state or local law enforcement officer apprehends an individual for driving under the influence, the officer shall use a federal database to verify the legality of the individual's status within the country. If it is determined that the individual is within the country illegally, the officer is authorized to detain or transport the alien to federal custody whereby he or she shall be removed from the United States. The bill would also improve communications between Federal, State and local law enforcement agencies, and it would allow those agencies and law enforcement to collect immigration information in the course of their normal duties.

The tragedy that the Gardner family experienced was completely preventable, but our broken borders allowed an illegal immigrant with five prior drunk driving charges to not only remain in the United States, but to continue driving and going about his normal business. I thank Congresswoman Myrick for her leadership in reintroducing this bill, and I look forward to working toward its passage. We must make serious changes within our immigration system now so that we never lose another life to a criminal who doesn't deserve rightfully to be in our country.

Mr. GALLEGLY. Thank you, Congressman.
Congressman Gonzalez.

**TESTIMONY OF THE HONORABLE CHARLES A. GONZALEZ, A
REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS**

Mr. GONZALEZ. Thank you very much, Mr. Chairman, and, of course, Ranking Member Lofgren, for the opportunity of appearing before you today.

This hearing is about a serious problem, but it is not the one the Chairman or my colleagues on this panel described. And the bill in question will not address it. The bill would only create more problems for State and local law enforcement.

I will start with the problem that has already been cited. The National Highway Traffic Safety Administration reports that approximately 11,000 people died from DUI accidents in 2009. We know how to address the problem, though, and we are fortunate. And that is State and local law enforcement need more resources to put cops on the beat and prosecute offenders.

If you really want to help to stop drunk driving in this Congress in laws that would reflect an effort, then join me and my colleagues in supporting the \$5 billion investment in law enforcement which is provided in the American Jobs Act.

Adopting H.R. 3808 would not help to stop drunk driving. It would force State and local police to spend their time on immigration duties instead of going after criminals. But drunk driving is not in the Subcommittee's jurisdiction; immigration is, so let us discuss that.

This bill will not stop anyone from immigrating. First, if they entered the country illegally, there will be no record for the police to find. I can also say with complete confidence that no one has ever, in contemplating entering the United States illegally, considered what might happen if he should be arrested for driving under the influence.

Here is a worse problem. In California, a night in the county jail will cost \$150. Local authorities have told me that they often lessen criminal charges to get inmates off of their rolls and sent to the Department of Homeland Security. This bill would just exacerbate this problem by giving State and local officers the unchecked authority to give up responsibility for people they picked up for committing crimes.

Now, I handled drunk driving cases as a judge. It is a horrible crime, and I do not want anyone to get a free pass on drunk driving just because he did not get his passport stamped when he entered the country. But this bill will encourage State and local authorities to drop drunk driving charges to get the Federal Government to pay for the incarceration. And that is just plain wrong. If you read this bill in its exact wording, that is what is going to transpire in this country.

More importantly, we are already doing what this bill tries to do. If an undocumented immigrant gets booked for DUI in any of the 1,700 jurisdictions in the Secure Communities Program—and as has already been cited, I believe by the end of this year we will have 96 percent of the thousands of jurisdictions will come under Secured Community Program.

This program, the names will be run by the FBI and the ICE databank. If he is deportable, ICE can issue a detainer and pick him up. DUI is one of ICE's priorities, and they have been very effective of late. We have seen a 30 percent increase in deportations since 2007.

H.R. 3808 cannot help with deportations for drunk driving because ICE already considers DUI a high priority offense. This bill would only burden local law enforcement officers with additional responsibilities that they are neither trained nor equipped to handle.

These are concerns about the Secured Community Program, and they have been expressed by Members of Congress. But its record of deporting criminals is not one of those complaints.

In conclusion, Mr. Chairman, and the Ranking Member, and Members of the Committee, DUI is a serious crime with horrific consequences to our communities. And the seriousness and the horrific consequences are not determined by whether an accused is an illegal immigration or the town's most outstanding citizen. Let us work together to, one, make sure that DUI or complaints, prosecution, and incarceration is enforced, and that the efforts are fully supported by us. Secondly, that bonding procedures are made with full knowledge of an accused's criminal history. And lastly, that we do not avoid the trial, the conviction, and the punishment of those guilty of DUI.

And I yield back, and I appreciate this opportunity.

[The prepared statement of Mr. Gonzalez follows:]

Testimony for Hearing of the
House Committee on the Judiciary
Subcommittee on Immigration Policy and Enforcement

on

H.R. 3808, the “Scott Gardner Act”

March 07, 2012

by

The Honorable Charles A. Gonzalez
Member of Congress for
Texas’s 20th Congressional District

Mr. Chairman, Ranking Member Lofgren, I thank you for allowing me to testify today. This hearing is about a serious problem, but it's not the one the Chairman or my colleagues on this panel described, and the bill in question won't address it. Rather, what the bill would do is create additional problems for our country and for state and local law enforcement.

I'll start by laying out the problem: According to the National Highway Traffic Safety Administration, one-third of traffic fatalities result from people driving under the influence, approximately 11,000 people in 2009.¹ That is far too high and we need to address it. Fortunately, we know how. The number one answer, according to the Bush Administration, is "Sustained high-visibility enforcement".² State and local police need more resources to put cops on the beat and prosecute offenders. This is the problem we saw in Mr. Gardner's and Mr. McCann's cases, where problems with information sharing between police departments left officers and the bond court unaware of their past records. If you want to stop more people from dying at the hands of drunk drivers, you should join me in supporting the \$5 billion investment in state and local public safety personnel contained in the President's American Jobs Act.

What you shouldn't do is adopt H.R. 3808.

This bill won't stop drunk driving. It could actually make the problem worse by forcing state and local police to spend their time and money on immigration duties for which they haven't been trained and that aren't their job. That means less time patrolling for drunk drivers and going after criminals. But drunk driving isn't within the Subcommittee's jurisdiction, Immigration is, so let's talk about that.

¹ Department of Transportation, "Fatality Analysis Reporting System, General Estimates System, 2009 Data Summary", page 12. (<http://www-nrd.nhtsa.dot.gov/Pubs/811401.pdf>)

² National Highway Traffic Safety Administration, "The Nation's Top Strategies to Stop Impaired Driving", Summary. (<http://www.nhtsa.gov/people/injury/alcohol/StrategiesStopID/pages/Summary.html>)

This bill, like the border fence, won't stop undocumented immigration, though it could discourage people from coming to the country legally, both tourists and immigrants. Because it should be noted that the bill goes even further than SB 1070, the flawed and unconstitutional law passed in Arizona in 2010.

That bill limited the demand, "Show me your papers!" to those for whom "reasonable suspicion exists that the person is an alien who is unlawfully present in the United States."³ Now, I would like to know how anyone could have reasonable suspicion of such a fact short of seeing the person cross the border. I was born in San Antonio, like my father before me, but I don't see anything that says, "lawfully present in the United States" when I look in the mirror. Chairman Gallegly, with all due respect, I don't see that in your face either. But H.R. 3808 doesn't even make that distinction. It requires the officer to suspect anyone if "the officer has reasonable ground to believe that the individual is an alien".⁴ Does that mean that we now suspect everyone who wasn't born in this country is a criminal?

Alabama arrested and jailed an executive from Mercedes-Benz last year. They nabbed a Honda executive a few weeks later. Do we expect these companies to invest in the United States when we treat their workers this way? Do we expect them to visit on vacation? One study said SB 1070 cost Arizona's economy \$140 million and the state \$30 million.⁵ That's \$30 million less for the police officers who can actually stop drunk driving. H.R. 3808 would bring the same economic and jobs losses to the rest of the country. I suppose that's one way of creating equality.

³ State of Arizona, Forty-ninth Legislature, Second Regular Session, Senate Bill 1070, p. 1 (http://azgovernor.gov/dms/upload/SB_1070_Signed.pdf)

⁴ United States House of Representatives, 112th Congress, Second Session, H.R. 3808, line 25 of Page 2 through line 2 of Page 3. (<http://www.gpo.gov/fdsys/pkg/BILLS-112hr3808ih/pdf/BILLS-112hr3808ih.pdf>)

⁵ Ginger Rough, "The issue: SB 1070's effect on tourism revenue", *The Arizona Republic*, August 10, 2011 (<http://www.azcentral.com/news/election/azelections/azfactcheck/fact-story.php?id=289>)

Here's a worse problem. Incarcerating people costs money. In California, a night in county jail costs the county about \$150.⁶ State and local governments already use government programs to shift the costs of incarcerating people from their budgets to the Department of Homeland Security. Local authorities have told me that they often lessen criminal charges to get them off of their roll and sent to DHS. The federal government itself has problems affording to reimburse them. This bill will just exacerbate this problem by giving state and local officers the unchecked authority to give up responsibility for people they've picked up for committing crimes.

H.R. 3808 is also probably unconstitutional, as I see nothing in the Constitution granting Congress the power to command state and local officers to check the immigration status of people they stop. I trust that the Congressional Tenth Amendment Caucus will publically announce its opposition to the bill shortly.

Mr. Chairman, when I served as a judge, I dealt with cases of drunk driving. It's a horrible crime, and I expect people who commit it to be exposed to the full force of the law. I don't want someone to get a free pass on drunk driving just because he didn't get his passport stamped when he entered this country. But this bill would encourage state and local authorities to drop the drunk driving charge so they can get the federal government to pay for the incarceration. That's just not right.

But will it stop immigration, the Subcommittee's jurisdiction? The answer, again, is No.

First of all, someone who entered the country illegally won't be listed in any federal database unless they have already been processed by law enforcement. There will be no criminal

⁶ Jennifer Medina, "In California, a Plan to Charge Inmates for Their Stay", *The New York Times*, December 11, 2011 (<http://www.nytimes.com/2011/12/12/us/in-riverside-california-a-plan-to-charge-inmates.html>)

record for the police to find. I can also say with complete confidence that no one has ever, in contemplating entering the United States illegally, considered what might happen if he should be arrested for driving under the influence.

But let me tell you something else: If an undocumented immigrant gets booked for DUI in San Antonio today, or in any of the 1,700 jurisdictions in the Secure Communities program – up from 140 in 2008⁷ – they'll run his name past the FBI and ICE. "If these checks reveal that an individual is unlawfully present in the United States or otherwise removable due to a criminal conviction, ICE takes enforcement action".⁷ If he's got a DUI, that's one of ICE's priorities and they have been very effective, with deportations in 2011 30% above the number in 2007.⁸

H.R. 3808 can't help with deportations for drunk driving because ICE already considers DUI a high priority offense. This bill would only burden local law enforcement officers with additional responsibilities they are neither trained nor equipped to handle. There are concerns about the Secure Communities program, but its record of prosecuting and deporting drunk drivers isn't one of them. The Obama Administration is rapidly implementing the program. The last counties in North Carolina were added a year ago⁹ and the Department of Homeland Security expect to have the entire country, including Cook County, active in the Secure Communities program by the end of 2013. Let's empower ICE and our state and local officers to work on combating the scourge of drunk driving and not get distracted by this well-intentioned but misguided legislation.

⁷ United States Department of Homeland Security, Immigration and Customs Enforcement, "Secure Communities" (http://www.ice.gov/secure_communities/)

⁸ United States Department of Homeland Security, Immigration and Customs Enforcement, "Removal Statistics" (<http://www.ice.gov/removal-statistics/>)

⁹ United States Department of Homeland Security, Immigration and Customs Enforcement, "Secure Communities Activated Jurisdictions" p. 16 (<http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>)

Mr. GALLEGLY. I thank the gentleman.

You know, it is typically our custom in the Judiciary Committee not to pose questions to Members who testify during the hearing. Today that is my preference. However, anyone that feels they have an important question they would like to direct to one of the three Members who just testified, I will not stand in their way.

But hearing no requests, we will thank the Members for their testimony, and look forward to working with you on this and other issues. Thank you.

Ms. LOFGREN. I would like to join in your thanks, and especially our Member, my colleague, Sue Myrick, who was my classmate when I was elected, and who is retiring at the end of this session. It is wonderful to have you here.

Mr. GALLEGLY. Thank you.

Our second panel that we have today, if they would come forward. I will go through the resumes, and then we will start with Sheriff Jenkins.

Our first witness is Sheriff Charles "Chuck" Jenkins. Sheriff Jenkins began his law enforcement career in the Frederick County's Sheriff's Office in 1990 and was elected to the office of sheriff in 2006. After attending the Hartford County Sheriff's Office Law Enforcement Academy, he was assigned to the patrol divisions and then to criminal investigations, where he conducted many high profile cases.

Ms. Jessica Vaughan is the policy director at the Center for Immigration Studies. She has been with the Center since 1991, where her area of expertise is administrative and implementation of immigration policy. Prior to joining the Center, Ms. Vaughan was a foreign service officer with the U.S. State Department. She holds a master's degree from Georgetown University and a bachelor's degree from Washington College in Maryland.

Our third witness, Mr. Brian McCann, retired in 2005 after 35 years of teaching. From 1973 to 2005, he served as a special ed and history high school teacher in the Chicago Public Schools. Prior, he worked as an instructor for the U.S. Army, and taught at St. John the Baptist Middle School in Chicago. Mr. McCann earned his bachelor's degree from Southern Illinois University, as well as a double master's degree from Chicago State University.

And our fourth witness today is Chief Chris Burbank. Chief Burbank has been with the Salt Lake City Police Department since 1991. He was appointed to the position of chief of police in March 2006. He has been an outspoken opponent to the cross-deputization of police officers as immigration enforcement agents. Chief Burbank graduated from the University of Utah, and is a graduate of the FBI's National Executive Institute.

Welcome.

Sheriff, we will start with you. Mr. Jenkins.

**TESTIMONY OF CHARLES A. JENKINS, SHERIFF,
FREDERICK COUNTY SHERIFF'S OFFICE, FREDERICK, MD**

Mr. GALLEGLY. Sheriff, would you mind pushing your button there? You may need to pull the microphone just a little closer.

Sheriff JENKINS. I'm sorry. Good afternoon, Mr. Chairman, honorable Members of the Committee. It is a privilege to be here this afternoon and speak as a voice of local law enforcement in support of this bill. I have expressed previous testimony in prior Committees here in the House and on panels that I believe there is certainly a role for local law enforcement in the world of immigration enforcement and enforcing those laws.

I believe that this legislation will enhance the ability of law enforcement in general to assist in the enforcement of those laws. It will add additional teeth to the law, and more importantly, help preserve the safety and security of Americans. This law will ensure that illegal criminal aliens will no longer remain in our country after being arrested and convicted for driving while intoxicated.

Drunk driving is recognized as a violent crime and typically is a reoccurring and irresponsible act against Americans on our roadways. It is a primary mission of local law enforcement to control drunk driving, to enforce the laws, and make our roads and highways safe in combatting drunk driving. It is truly a public safety issue.

I am going to talk briefly about Frederick County, Maryland, which is about 1 hour northwest of D.C., where I serve as sheriff and chief law enforcement authority in that jurisdiction.

My office currently participates in both the 287 Program and also Secure Communities. This 287(g) Program, having been very effective, working in partnership with DHS since 2008.

I would like to point out that as of today, out of the 100—I am sorry, 1,032 detainees that have been lodged under the 287(g) Program in Frederick County, 97 of those detainees lodged were for driving while intoxicated. That equates to about 9.39 percent of the arrests of all detainees lodged in the Frederick County program.

Currently, the way it is in law enforcement, in jurisdictions without 287(g), those offenders arrested for DUI and in this country illegally would and are typically released and back into our communities. Many are released back onto the streets after their initial appearance before a district court commissioner or magistrate. Oftentimes, they never appear for court and are not held accountable for their crimes. And many times they end up becoming repeat offenders in a revolving door system.

I would like to cite three specific cases that I think are relevant. April 15, 2008, an offender was arrested in Frederick County and charged with driving while intoxicated with a blood alcohol content 3 times the legal limit. This offense occurred in a school zone during school hours with the offender driving 20 miles over the speed limit. Without the authority to file a detainer under 287(g), he would have been released. However, during the intake, certified officers determined the offender was in the country illegally. He was held and eventually ordered removed. That may not sound like a big thing or very important unless it is your grandson, my son, or our daughter on that playground.

March 1, 2011, law enforcement arrested an offender for DUI. During the intake screening, the offender was determined to be a lawful permanent resident, but because of his extensive criminal history, he was subject to removal. The criminal history consisted of 10 prior arrests and 4 prior convictions. A detainer was lodged. He was eventually removed back to Germany.

There was a fatal crash August 22, 2010. The offender's blood alcohol was .18, more than twice the legal limit of alcohol in the blood. This was a Guatemalan citizen, second conviction for drunk driving. He will serve a 4-year sentence, after which time he will face removal from the United States.

Opponents of this legislation will say that the law would invite racial profiling of ethnic groups, and result in discriminatory enforcement of the law, which is absolutely not the case. And I would reiterate, the wording is clear that the Federal database check to determine lawful presence will occur only after an arrest or apprehension for the DWI arrest. Status checks are not and will not be conducted prior to taking the offender into custody.

If the status check indicates the unlawful presence of the offender in the United States, the local law enforcement officer is authorized to issue a Federal detainer to maintain that alien in custody in accordance with the agreement until the alien is convicted for the offense or the alien is transferred to Federal custody. This law will certainly prioritize the removal of an illegal immigrant who is convicted of DWI.

This is not profiling. This is not racial or ethnic bias. This is simply strong, effective law enforcement.

Currently, the implementation and roll out of Secure Communities that we talked about, it may be the perfect time to look at this bill and go forward, and really put this into effect in conjunction with Secure Communities. DHS would certainly be able to train the officers to the extent necessary to prepare and issue the detainers on local offenders.

I will end up here in a minute.

I can speak to experience with my agency that DHS—ICE, if you will—has always provided outstanding oversight, supervision, and participation with their programs. DHS needs the help of local law enforcement to be successful in carrying out its mission.

[The prepared statement of Sheriff Jenkins follows:]

FREDERICK COUNTY SHERIFF'S OFFICE

HEADQUARTERS
FREDERICK COUNTY LAW
ENFORCEMENT CENTER
110 Airport Drive East
Frederick, Md. 21701
301-600-1046
301-600-1527 (Fax)
301-600-7655 (TTY)

JUDICIAL OPERATIONS
100 W. Patrick Street
Frederick, Md. 21701
301-600-2162
301-600-3690 (Fax)



CHARLES A. JENKINS
SHERIFF

**DETENTION CENTER/
CENTRAL BOOKING**
7300 Marcie's Choice Lane
Frederick, Md. 21704
301-600-2550 (D.C.)
301-600-2566 (D.C. Fax)
301-600-1790 (C.B.)
301-600-1791 (C.B. Fax)

WORK RELEASE CENTER
7281 Marcie's Choice Lane
Frederick, Md. 21704
301-600-1727
301-600-3404 (Fax)

Charles A. Jenkins
Sheriff
Frederick County Sheriff's Office

Subcommittee on Immigration Policy and Enforcement
Hearing on H.R. 3808
The Scott Gardner Act

March 7, 2012

Mr. Chairman, Honorable Members of the Judiciary Subcommittee on Immigration Policy Enforcement

It's a privilege this afternoon to testify on behalf of local law enforcement and many local Sheriff's across our nation in support of HR 3808, known as the "The Scott Gardner Act". I have expressed in previous testimony to a house committee and on panels that I believe that there is certainly a role and a need for local law enforcement in the enforcement of our nation's immigration laws.

I strongly believe that this legislation will enhance the ability of law enforcement in general to assist in the enforcement of our immigration laws; it will add additional teeth to our federal immigration laws, and more importantly help preserve the safety and security of Americans. This law will insure that illegal criminal aliens will no longer remain in our country after being arrested and convicted for Driving While Intoxicated.

Drunk Driving is recognized as a Violent Crime and a typically reoccurring and irresponsible act committed against Americans on our roadways. It is recognized nationally as a public safety issue. One of the primary responsibilities of local law enforcement is to make our roads and highways safe in part by combating drunk driving and enforcing the DWI laws. This national legislation will add a strong tool to law enforcement's toolbox and another means to combat DWI across the United States.

There are many stories of horrific and very sad tragedies that occur in communities across America every single day that impact Americans and their families. Are these offenders any less of a public safety threat than the perpetrators of other violent crimes?

I will talk briefly about Frederick County, Maryland, about one hour northwest of Washington, where I serve as Sheriff and Chief Law Enforcement authority in that jurisdiction. My office participates with DHS in both the 287g Program and Secure Communities, the 287g Program having been very effective working in partnership with ICE/ DHS since early 2008.

As of today, out of the 1032 detainees lodged under the 287g Program in Frederick County, 97 of those detainees lodged were for Driving While Intoxicated charges. That equates to 9.39 % of the arrests of all detainees lodged in the Frederick County program.

Currently, in jurisdictions without the 287g Program those offenders arrested for DWI and in this country illegally would and are, typically being released back in to our communities. Many are released back onto the streets after their initial appearance before a local District Court

Commissioner or Magistrate. Often times they never appear for court and are not held accountable or punished for these crimes. Many end up becoming repeat offenders in a revolving door system.

The Scott Gardner Act will fill this gap in closing this hole of allowing those back into our communities and prioritize the removal of these criminal aliens!

- I would like to cite three specific relevant cases in Frederick County
- On April 15, 2008 an offender was arrested by the Frederick County Sheriff's Office and charged with driving while intoxicated with a BAC of three times the legal limit, and other violations. This offense occurred in a school zone, during school hours, with the offender driving 20 mph over the posted speed. He was released under his own recognizance. Without the authority to file a detainer under 287g he would have been released, however during the offender's intake 287g certified officers determined the offender was in the country illegally. He was held and eventually ordered removed.
- On March 1, 2011 local law enforcement arrested an offender for DUI and other offenses. During intake screening the offender was determined to be a Lawful Permanent Resident, but because of his extensive criminal history he was subject to removal. The criminal history consisted of 10 prior arrests with four prior convictions. A detainer was lodged and he was eventually deported back to Germany.
- On August 22, 2010, an individual was arrested and charged with DWI in a fatal crash in Frederick County. The offender's blood alcohol level was 0.18, more than twice the .08 level, the amount necessary to support a conviction for drunk driving. This was the Guatemalan citizen's second conviction for drunk driving. The offender will serve a four-year sentence after which time he will face removal from the United States.

In addition, members of violent street gangs including MS-13 have been arrested for DWI, identified as not lawfully present, and have been removed from the streets of Frederick County.

Opponents of this legislation will say that the law will invite racial profiling of ethnic groups and result in discriminatory enforcement of the law, which is absolutely not the case. The wording is clear that the federal database check to determine immigration status and lawful presence will occur only after an arrest or apprehension for the DWI arrest. Status checks will not be conducted prior to taking offender into custody.

If the status check indicates the unlawful presence of the offender in the United States, the local enforcement officer is authorized to issue a Federal detainer to maintain that alien in custody in accordance with the agreement until the alien is convicted for the offense or the

alien is transferred to federal custody. This law will prioritize the removal of an illegal immigrant who is convicted of DWI. This not profiling, not racial or ethnic bias; this is simply strong effective enforcement of the law.

Currently, with the implementation and rollout of the Secure Communities program in every jurisdiction across the United States by DHS, the timing would be ideal to pass H.R. 3808 and implement that law in conjunction with Secure Communities. DHS would be able to train the officers to the extent necessary, to prepare and issue the detainers on local offenders.

I can speak to experience with my agency that DHS has always provided outstanding oversight and supervision within their programs. DHS needs the help of local law enforcement to be successful in carrying out its mission. This could in fact be a fairly seamless implementation of what potentially could be a very effective law.

For decades we have failed to protect American citizens by securing our borders, enforcing our immigration laws, and identifying criminal illegal aliens that are living in our country. This bill in itself is certainly not the entire solution but a reasonable step in the right direction to strengthen the Immigration and Nationality Act. It is certainly incumbent on lawmakers to pass laws that protect the safety and security of American citizens by closing loopholes in our laws and give local law enforcement agencies all of the tools and support possible to enforce those laws as effectively as possible.

Mr. GALLEGLY. Sheriff, because of the fact we may have a vote here, as I said to the previous panel, we will have your entire statement made a part of the record of the hearing. And with your concurrence, I will move on to Ms. Vaughan.

Sheriff JENKINS. Okay.

Mr. GALLEGLY. Thank you very much, Sheriff.
Ms. Vaughan.

**TESTIMONY OF JESSICA M. VAUGHAN, POLICY DIRECTOR,
CENTER FOR IMMIGRATION STUDIES**

Ms. VAUGHAN. Thank you for the opportunity to be here today.

The Scott Gardner Act addresses a very serious gap in immigration law enforcement that enables a particularly dangerous set of individuals to remain in our communities in defiance of our laws.

Of course ICE already has the authority to detain and remove illegal immigrants in general, and has programs in place that prioritize the removal of those who are a threat to public safety. But in practice, many illegal alien drunk drivers are falling between the cracks, sometimes with tragic consequences.

This problem seems to have become worse in recent years, not because ICE personnel are incapable, but because the current Administration has scaled back immigration law enforcement to affect only the most egregious offenders. In addition, they have made it harder for local law enforcement agencies to help ICE identify offenders, and they have failed to act against local governments that deliberately obstruct enforcement of the laws that Congress has passed.

As we have heard, drunk driving is the most frequently committed violent crime in America. And illegal aliens who drive drunk usually come into our criminal justice system with three strikes: unlawful presence, drunk driving, and driving without a license. There simply is no rational argument for allowing drunk drivers who are also illegal aliens, to remain here.

Experts agree that drunk drivers are particularly prone to re-offend, especially if they have not faced swift and stern penalties for their first offense. I have reviewed statistics from some of the local law enforcement agencies that keep track of the crimes committed by the illegal aliens that they refer to ICE, and the number of illegal alien drunken driving arrests was significant in all the jurisdictions I looked at. In some areas, drunk drivers represent one-fifth to one-half of the criminal alien caseload. But it is the significance and mainly the stories that you hear, as well as the statistics, that suggest that some are definitely escaping justice.

This bill focuses on what is key to addressing the problem, and that is the need to detain these individuals. And I want to emphasize that I do not think ICE can detain every illegal alien that is ever encountered. That is not realistic. But ICE needs a clear mandate from Congress to get this particular group of offenders off the streets so that they can be sent back to their home country.

Experience and studies have shown that illegal aliens who are not detained, especially those who are facing criminal charges, often will flee from proceedings in order to avoid prosecution and removal. Statistics show that nearly 60 percent of illegal aliens who are not detained while in proceedings will fail to appear for their hearings or ignore orders to depart. And there are more than 700,000 absconders now at large, which is a 28 percent increase over 2008.

Again, ICE already has the authority to detain illegal alien drunk drivers. The problem is the current policies constrict officers in the field from doing so in many cases. And, yes, there is a need for more detention space, but most problematic, as this Committee is aware, is that the White House had directed ICE to implement

policies that exclude all but the most egregious offenders from immigration law enforcement under a scheme, it euphemistically describes as prosecutorial discretion, but in practice is an amnesty.

Now, too many illegal aliens who have been charged with crimes who once would have been detained are released, and government attorneys are directed to file motions with the courts to have their charges dismissed. It is certain that some number of illegal alien drunk driving offenders are benefitting from these lax policies.

The other reason many illegal alien drunk drivers end up back on the streets and behind the wheel is because of local sanctuary policies where local governments actually block ICE access to non-citizen offenders.

The Administration has not seen fit to challenge these actions despite a variety of tools at its disposal, including lawsuits, funding, and tools like Secure Communities.

It is important to note that sanctuary policies are often adopted for the purpose of cultivating good relations with immigrant communities, but they do not seem to have that effect in practice. I have spent years following the research on this topic, and while I understand the concerns about trust, there really is no evidence to suggest that police-ICE cooperation has any significant effect on how immigrants view police, nor any chilling effect on crime reporting, or that it results in racial or ethnic profiling.

Because when people, including immigrants, see that some laws are not enforced, this does not increase respect for local authorities. It only makes the community more vulnerable to criminals.

This bill's provision to allow local officers to issue detainers and transport drunk drivers to Federal custody definitely will help many law enforcement agencies, but there is definitely a need for more training in places.

And, in addition, ICE should expand the cost-effective 287(g) Program, which is a force multiplier and adds local resources to the mix. And finally, it is about time for ICE to establish a victim's advocacy unit to help give a voice to the people who are affected by crimes committed by illegal aliens, because currently they do not have a voice.

Thank you.

[The prepared statement of Ms. Vaughan follows:]

Hearing on The Scott Gardner Act:
Detention of Illegal Aliens Arrested for Drunk Driving

U.S. House of Representatives Judiciary Committee
Subcommittee on Immigration Policy and Enforcement
Washington, DC

March 7, 2012

Statement of Jessica M. Vaughan
Director of Policy Studies
Center for Immigration Studies

Chairman Galleghy, Ranking Member Lofgren, and other subcommittee members, thank you for the opportunity to be here today to discuss the Scott Gardner Act, a bill that will facilitate the removal of illegal aliens who are arrested for drunk driving offenses.

This bill addresses a very serious gap in immigration law enforcement that enables a particularly dangerous set of individuals to remain in our communities in defiance of our laws. Although ICE has the authority to detain and remove illegal aliens in general, and has programs in place that prioritize the removal of illegal aliens who are a threat to public safety, in practice many illegal alien drunk drivers are falling between the cracks, sometimes with tragic consequences. This problem has worsened in the last several years, as the Obama administration has moved to scale back immigration law enforcement to only the most egregious offenders, made it harder for local law enforcement agencies to help them identify offenders, and failed to act against local governments that deliberately obstruct their ability to enforce the laws that Congress has passed.

Statistics on Illegal Alien Drunk Driving Arrests and Removals. According to the National Highway and Traffic Safety Administration, drunk driving is the most frequently committed violent crime in America, killing 10,839 people last year, and costing the public billions of dollars annually.¹ Illegal aliens who drive drunk usually come into our criminal justice system with three strikes: unlawful presence, drunk driving, and driving without a license. There simply is no rational argument for allowing drunk drivers who are also illegal aliens to remain here in defiance of our laws.

According to ICE director John Morton, in FY2011 the agency removed 35,927 individuals who had been convicted of driving under the influence (DUI). This is nine percent of the total number of removals (396,906) for that year. That works out to almost 100 alien drunk drivers removed every day of the year. So why do we need this bill?

Because based on the statistics I have reviewed, conversations I have had with law enforcement officers, and the all-too-frequent and heartbreaking stories in the news media and from victim's families who contact me, there are still too many illegal alien drunk drivers who are escaping justice and evading immigration law enforcement. This puts the public needlessly at risk. Experts agree that drunk drivers are particularly prone to re-offend, especially if they have not faced swift and stern penalties for their first offense.

Consider the case of 10-year old Anthony Moore. In May of last year, Anthony was walking to his bus stop in Minneola, Florida when he was mowed down and killed by unlicensed illegal alien Mario Alberto Saucedo. Saucedo had at least two prior charges for DUI and a probation violation, but

¹ Mothers Against Drunk Driving, Fact Sheet on Drunk Driving in America, www.madd.org.

prosecutors had declined to pursue convictions, or charge Saucedo with the criminal offense of unlicensed driving in the prior offenses, enabling him to escape the ICE attention that could have saved Anthony's life if he had been removed promptly when first brought to the attention of police and prosecuting authorities.

While there is limited information available, figures from ICE's local law enforcement partners suggest that many illegal alien drunk drivers are being identified, but not necessarily removed by ICE. The table below presents statistics from some of the few local law enforcement agencies that are able to track the crimes committed by the illegal aliens that they refer to ICE. It summarizes information on illegal alien drunk drivers arrested or incarcerated in these jurisdictions, or the number of drunk driving charges levied on illegal aliens. Most of the numbers were extracted from databases used to track aliens arrested under the auspices of 287(g) and/or Secure Communities (except for the Virginia Dept. of Corrections numbers, which are from a study done for the Virginia State Crime Commission). Some of the 287(g) agencies have made the removal of illegal alien drunk drivers an explicit priority, often because of public outcry after an illegal alien drunk driving fatality in their jurisdiction.

Table 1	Column1	Column2	Column3	Column4	Column5
Drunk Driver Removals in Selected Law Enforcement Agencies					
Agency	Time Period	# Illegal Alien DUI Arrests/Inmates	Total Illegal Alien Arrests/Inmates	% Drunk Drivers	Comments
ICE	2011	35,927	396,908	9	
Cobb County Adult Detention Center (Ga.)	2011	125	1,256		37% of DUI arrests had prior arrests, of whom 65% had 3 or 10 more prior arrests.
Collier County Sheriff's Office (Fla.)	2009-Present	1,161	3,626	32	Each alien had an average of 2 DUI or alcohol-related charges per person.
Frederick County Sheriff's Office (Md.)	April 2010-Present	97	1,032	9	
Gwinnett County Sheriff's Office (Ga.)	July 2009 - Present	1,040	14,940		Figures are for charges, not 7 individuals.
Harris County Sheriff's Office (Texas)	2009	240	1,120	21	Figures are for May 16-July 9, 2009.
Maricopa County Sheriff's Office (Ariz.)	2007	384	2,178	8	Figures are for those sentenced in Maricopa County Superior Court, felony DUI only. 20% of those sentenced for felony DUI were illegal.
Mecklenburg County Sheriff's Office (NC)	Feb. 2006-Present	2,789	11,494	24	
Prince William County Police Dept. (Va.)	2010	321	1,006	32	16% of all DUI arrests are illegal aliens.
Rockingham County Sheriff's Office (NC)	Oct. 2010-Present	33	63	52	
Virginia Department of Corrections (Jails)	2007	3,209	27,148	12	Figure is based on offenses, not inmates. DUI was the 2nd most common offense for illegal alien inmates in jails.

In all jurisdictions for which data was obtained, the number of arrests of illegal alien drunk drivers was significant, representing at least seven percent of all illegal alien arrests. In some areas, drunk drivers represent one-fifth to one-third of the criminal illegal alien caseload – far more than the corresponding share of ICE's caseload. In one county examined, Rockingham County, NC, more than

half of all the illegal aliens in jail had been arrested for drunk driving. Clearly, in these communities, immigration law enforcement is contributing to public safety, as it results in the removal of individuals whose behavior is dangerous to others.

While I recognize that these figures are by no means exhaustive or necessarily representative of the country as a whole, they are a mix of large urban, suburban and small rural communities, and I find it interesting that some of the local agencies with immigration enforcement authority have a much higher share of their criminal alien cases that are drunk drivers than ICE does. There surely are many possible explanations for this, including the fact that different communities have different crime problems. However, it caused me to wonder if ICE is removing only a portion of all of the illegal alien drunk drivers that the local agencies refer to their agents in the field offices, and how large a portion.

Detention is Key to Ensure Removal and Protect the Public. By focusing on the identification and detention of illegal alien drunk drivers, this bill will make sure that ICE and local law enforcement agencies can fulfill their responsibility to remove them from our communities. In my view, the most important provision is the amendment to the Immigration and Nationality Act to require the detention of illegal aliens who are apprehended for drunk driving. Detention has been proven to be the most effective way to ensure that aliens who are here unlawfully and who are a priority for deportation are actually removed. Experience and studies have shown that illegal aliens who are not detained, especially those who are facing criminal charges, often will flee from proceedings in order to avoid prosecution and removal. One recent study published by my organization found that nearly 60 percent of aliens who are not detained while in proceedings will fail to appear for their hearings or will ignore orders to depart.² Some of these individuals, such as Saul Chavez, who killed Dennis McCann in Chicago last year³, also flee from local criminal proceedings.

Absconders are a huge problem in our immigration system. In 2010, there were 715,000 aliens present here who had failed to appear in immigration court or who had disobeyed orders to depart. This is a 28 percent increase over 2008. Today there are more than one million unexecuted orders of removal, and the number has increased more than 84 percent since 2002.⁴ Given the unique risk that illegal alien drunk drivers in particular pose to society, it makes sense that these individuals should be detained pending their removal, to dramatically increase the chances that ICE will be able to carry out the order of removal if it should be issued.

Current ICE Policies Inadequate. Of course, ICE already has the authority to detain illegal alien drunk drivers; the problem is that current policies constrict officers in the field from doing so in many cases. Even as ICE has ramped up programs to identify removable aliens who are arrested, the amount of funded detention space has remained flat. Meanwhile, ICE officers currently are discouraged from using some of the more efficient methods of removal, such as stipulated removal and expedited removal. Most problematic, as this committee is aware, within the last year, the White House has directed ICE to implement policies that exclude all but the most egregious offenders from immigration law enforcement, under a scheme it euphemistically describes as “prosecutorial discretion,” but in practice is more like an amnesty, even for some illegal aliens charged with crimes. ICE agents in the field are instructed to refrain from arresting, charging and detaining illegal aliens who have not yet been convicted of a crime as well as those aliens who have U.S. citizen relatives, are students, or meet other

² Mark H. Metcalf, *Built to Fail: Deception and Disorder in America's Immigration Courts*, Center for Immigration Studies, May 2011, <http://www.cis.org/Immigration-Courts>.

³ Jessica Vaughan, “Cook County Pressured to Reverse Sanctuary Policy,” Center for Immigration Studies Blog, January 6, 2012, <http://cis.org/vaughan/cook-county-pressured-to-reverse-sanctuary-policy>; and “The Alternative to Immigration Detention: Fugitives,” October 18, 2011, <http://cis.org/vaughan/alternative-to-detention-fugitives>.

⁴ Metcalf, *op.cit.*

broadly drawn criteria that the administration apparently believes should be grounds for immunity from immigration law enforcement. As a result, from what I hear from local law enforcement officers in different parts of the country who are familiar with these cases, a significant number of removable aliens who have been charged with crimes who formerly would have been detained while in proceedings, are now being released.

It is certain that some unknowable number of illegal alien drunk driving offenders are benefiting from these lax policies. Typically, drunk driving is not a felony charge unless the offender has prior offenses, sometimes multiple prior offenses. Often there is no trial and no conviction per se; most first-time offenders are fined or receive a continuance. It is entirely possible that many immigration agents in the field believe they are to refrain from charging and detaining illegal alien drunk drivers unless they have felony convictions. In his recent appearance before this subcommittee, ICE's director of Enforcement and Removal Operations acknowledged that some drunk driving offenders have been released by ICE, including the President's uncle, Onyango Obama, an immigration fugitive ordered deported in 1992, who was arrested in Framingham, Massachusetts last August, and is accused of nearly ramming a police car while driving drunk.

In addition to putting the public at risk, these policies and practices have the cumulative effect of eroding the relationships between state and local law enforcement agencies and ICE, which had slowly improved since the agency's creation, and had started to overcome the reputation for unresponsiveness that was one unfortunate legacy of the INS. Now, when ICE fails to follow through on referrals from local agencies and is overly selective about which criminal aliens it will accept for processing, this breeds frustration among the local partners, reduces their willingness to work with ICE, and damages the reputation of the agency and its personnel.

Local Sanctuary Policies Shield Criminal Aliens from ICE. But ICE policies are not the only obstacle to removing illegal alien drunk drivers. A number of state and local governments have adopted policies designed to thwart immigration law enforcement and shield many illegal aliens, even those charged with local crimes, from coming to the attention of ICE. The most egregious of these policies is in Cook County, Illinois. There, local officials have long barred ICE agents from screening aliens in the county jails, and recently enacted an ordinance to forbid the county sheriff from honoring ICE detainers. Other jurisdictions with similar criminal alien sanctuary policies are New York City, San Francisco, Santa Clara County, and New Haven, Connecticut. In addition, several states and localities, including Massachusetts, New York and Illinois, have asked to be kept out of the Secure Communities program.

We all expect that some states and localities will adopt eccentric policies, and their leaders are presumably accountable to the voters who put them in office. But some of these policies may be in violation of federal laws that were enacted to prevent states and localities from going too far and actually obstructing the ability of federal agencies to enforce immigration laws. Yet the Obama administration has chosen to allow the interference to continue, even as it has filed lawsuits and initiated other hostile actions against states and localities that choose to assist in immigration law enforcement.

State sanctuary policies have cost people their lives, sometimes at the hands of illegal alien drunk drivers. Consider the case of 23-year old Matt Denice, who was killed in August of last year, just a few miles from my house in Massachusetts, by an illegal alien drunk driver. This individual, Nicholas Guaman, had been arrested at least four times in three Massachusetts towns, for unlicensed driving, assault and battery on a police officer, and other offenses. His two brothers, at least one of whom is also here illegally, are also in police custody for different serious offenses. A key witness in the Denice case, also an illegal alien facing state charges, is believed to have fled the country after ICE released the man on an electronic monitoring bracelet. The governor refused for many weeks to meet with Matt Denice's

family to discuss the policy failures that contributed to his death, but Matt's mother, Maureen Maloney, has told her son's story to the news media and to state legislators.⁵

The White House, Department of Homeland Security and Department of Justice have stood by, apparently unconcerned, as several large jurisdictions, including New York City and Cook County, Illinois, and Santa Clara County, California, all of which have significant numbers of criminal aliens, have implemented policies that prevent ICE agents from interviewing inmates in these jails to determine their immigration status.⁶ In addition, some of these jurisdictions do not honor ICE detainers. These local actions severely hamper ICE's ability to remove criminal aliens – especially drunk drivers, who often are not in a felony category that might exempt them from the local sanctuary law. In New York City, since the implementation of the anti-ICE policy, the number of aliens charged with immigration violations at Rikers Island, the city's main detention facility, has been cut in half. In Cook County, the sheriff has released at least 300 offenders in the last few months, including Saul Chavez, who killed Dennis McCann. Some of these offenders have already committed new crimes of violence. In Santa Clara County, the individuals who were released by the county sheriff included a heroin dealer, a child molester and a man convicted of kidnapping.⁷

Further, the administration has taken no action against those jurisdictions, such as San Francisco and the state of Connecticut, that have established policies directing law enforcement agencies to ignore ICE detainers.

While the executive branch cannot prevent state and local governments from enacting laws or policies that interfere with immigration authorities, it does have a number of tools at its disposal to dissuade them. The Department of Justice could file a lawsuit and seek an injunction in federal court against the sanctuary jurisdictions, as it has done against Arizona, Alabama, and Utah, that do the opposite and have passed legislation seeking to *assist* in enforcement of immigration laws. It could allow the FBI and DHS to exercise their authority to implement the Secure Communities program in those places that restrict ICE access to jails, so that ICE agents would have information on aliens who get arrested, and could try to take action. In addition, the Department of Justice and DHS could work together to deny federal law enforcement and homeland security funding to any agency or jurisdiction that refuses to participate in Secure Communities, bars ICE agents from jails, or fails to honor detainers. None of this requires action by Congress.

Rather than use its authority and leverage to discourage sanctuary policies, the Obama administration has adopted a strategy of appeasement. It has held off implementing Secure Communities in New York, Illinois and Massachusetts in deference to the governors who object, even though many law enforcement agencies in those states have begged to be activated. In the most surprising move, just a few weeks ago, ICE Director John Morton offered to pay Cook County an additional sum of money tied to the average cost of incarceration if the county would agree to permit ICE to have access to removable alien inmates. This offer is an unprecedented concession that verges on allowing the agency to be extorted in exchange for the ability to enforce federal immigration laws. If this arrangement is implemented, it is virtually certain that other counties will attempt to follow suit.

⁵ Maureen Maloney, "Immigration 'magnet' claims a young life," *Milford Daily News*, March 4, 2012, <http://www.milforddailynews.com/opinion/x1014037076/l.azcena-life-death-and-immigration>.

⁶ See W.D. Reasoner, "Which Way, New York? Will Feds Tolerate Local Interference or Assert Their Authority?," Center for Immigration Studies Memorandum, October, 2011, <http://cis.org/nyc-local-interference> and Vaughan, "Cook County" blog, January 12, 2012, cited above.

⁷ Michael Volpe, "63 Illegals Arrested After County Sets Them Free," *World Net Daily*, February 25, 2012, <http://www.wnd.com/2012/02/63-illegals-arrested-after-county-sets-them-free/>.

Provisions for Local Officers to Issue Detainers and Transport Aliens to ICE. This bill will authorize local officers to issue federal detainers to keep suspected illegal alien drunk drivers in local custody and to transport them to federal custody, after they have verified the offender's status with appropriate federal agencies. This especially will assist those local agencies in areas that are distant from ICE field offices and in populated areas where ICE enforcement officers are overwhelmed with criminal alien caseloads.

Transporting illegal aliens to federal custody for removal processing has always been a logistical sticking point in the system, and authorizing payment to local agencies for this expense will enable many more agencies to assist ICE. In addition, local agencies should be encouraged or incentivized to devise low-cost solutions to this problem. For example, several years ago, the sheriff's office in Allen County, Ohio set up a system that relied on specially trained auxiliary peace officers to pick up and transport aliens to ICE in a coordinated fashion along organized circuits that covered all parts of the county and eventually 17 other counties in northwest Ohio. This system, which also included training dispatchers and jail booking officers to perform the Law Enforcement Support Center (LESC) checks, was a highly efficient and cost-effective solution in a region that lacked adequate ICE coverage.⁸ ICE's Office of State, Local and Tribal Coordination should be directed to conduct pilot programs based on this model and other promising ideas that may be devised by local agencies.

Lawmakers should be aware that, unfortunately, surprisingly few local law enforcement officers are aware of and making use of the LESC to verify the status of aliens they encounter. For example, only about 10 to 20 percent of the officers taking the training programs I teach through Northwestern University's Center for Public Safety have even heard of the LESC, much less use it as a resource. In some states, the police training programs include no mention of the LESC or how to perform IAQ queries through the NLETS system, so officers have no idea how to verify the status of an alien. The lack of such basic immigration training programs for local officers is a glaring deficiency at ICE that needs to be corrected in order for the agency to succeed in its key mission to identify and remove criminal aliens. ICE should be directed to increase outreach and training programs on alien status verification as part of this legislation.

Cost and Effect on ICE Priorities. Critics may try to suggest that this bill is too costly to be practical, or that the mandatory detention provisions will bog down the system and prevent ICE from dealing with "more serious" offenders. This is not necessarily the case.

Contrary to statements made by administration officials, ICE is not limited to a certain number of removals each year, even with finite funding for detention and removal operations. Although I would argue that ICE certainly could use additional funding, still, there are numerous ways in which ICE can do more with the same level of resources. Our research shows that in recent years ICE has made less use of the most efficient methods of removal, which are those that do not require the alien to appear before an immigration judge. These include expedited removal, stipulated orders of removal, administrative removals, and even reinstatements of prior removal orders. The result has been a significant increase in the number of cases before the immigration courts and a significant increase in the length of time it takes to resolve cases and remove illegal aliens. This situation is unfair to the aliens, costly to taxpayers, and decreases the functionality of the immigration courts. If ICE were to make more use of these options, it could increase the number of removals without compromising due process or skewing its priorities.

⁸ For more information, see "Immigration Law Enforcement: Beyond 287(g) and Secure Communities," training webinar produced by Jessica Vaughan and presented at the June, 2011 National Sheriffs' Association annual conference, and available through the Law Enforcement And Public Safety Network, http://leaps.tv/pgm.php?program_code=201106190900.

In addition, ICE should increase the number of agencies participating in the 287(g) program. This is a highly cost-effective force multiplier for ICE, since the local agencies provide the personnel to screen aliens and issue detainers. It is especially helpful in addressing the illegal alien drunk driving problem, as it is the local agencies who encounter these offenders and, in my experience, most are more than willing to assist ICE in processing them for removal.

Victims Advocacy Unit Needed. Congress should direct ICE to establish a Victim's Advocacy Unit to address the concerns of those who are victims of crimes and other damaging actions committed by removable aliens. Unlike illegal aliens, who have a newly-designated advocate⁹, currently these victims and their families have no voice within the DHS bureaucracy, no avenue to get their questions answered, and no way to help ensure that immigration law enforcement failures that have tragic consequences are not repeated. The Victims Advocacy Unit would provide a point of contact for those directly affected by alien crime and be empowered to investigate incidents and trends with the goal of identifying system breakdowns and correcting policy or procedural gaps. In addition, the unit staff would work with established local and national victims organizations, such as Mothers Against Drunk Driving, on issues of common concern.

Respectfully submitted by,

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⁹ Andrew Lorenzen-Strait, "ICE Announces First Ever Public Advocate," <http://blog.dhs.gov/2012/02/ice-announces-first-ever-public.html>.

Mr. GALLEGLY. I thank the gentlelady.
Mr. McCann.

TESTIMONY OF BRIAN McCANN, CHICAGO, IL

Mr. McCANN. I want to thank the——

Mr. GALLEGLY. I do not know if your microphone——

Mr. McCANN. Oh, okay. I want to thank the Chairman and the Committee for inviting me to speak on behalf of the McCann family back in Chicago.

My remarks will focus on three areas. The first is a chronology of the criminal history of the young man that killed my brother dating back to September of '08, to his release from custody this past November.

He was an illegal immigrant, and he killed my brother last June. My family sincerely believes that my brother would be alive today if ICE and the criminal justice system cooperated within this time frame.

I will also continue the chronology of events following my brother's death that led to the flight of Mr. Chavez this past November.

We are focusing more on this history of late because in 2008, Mr. Chavez was arrested for aggravated DUI, not too far from where my brother was killed this past June. He pleaded guilty that night, and in the police report, it stated clearly that he was illegal. Words he gave to the policeman was "I have no papers." He did not say he was illegal. "I don't have a license because I have no papers." And this was tantamount to admission that he was illegal.

We concluded that in the subsequent 4 months since his arrest in '08 until he was put on probation in February '09, that no less than 10, perhaps as many as 20, police officers and other members of the criminal justice system saw this police report that said he was illegal. But no one contacted ICE.

We are convinced that had this cooperation taken place, my brother would be alive today. Think about that.

Now, I do not know that this panel or the U.S. House of Representatives can do anything about leveraging the County of Cook back in Illinois, but I would like to think a message can be sent, at the very least. It is my family's view that cooperation with ICE and Cook County is at issue.

Now, following the second part of this chronology, following the death of my brother, he was issued a detainer because ICE used some sort of database. I cannot remember the name of it. And a detainer was issued a couple of days later. The assistant States' attorney in Cook County assured us 3 weeks later, sometime in July, not to worry; if he posts bond, we have this back stop called a detainer. Well, I did not know what a detainer was. I know a lot about detainers now. But we were comforted that he would never be released, and that justice would be returned to the McCann family in some small measure, that retribution would follow. One judge in my community, who is retired, figured it would be anywhere from 4 to 12 years of imprisonment because of the prior aggravated DUI that he was convicted of.

He was charged, by the way, with aggravated DUI with death and reckless homicide in Cook County.

Insult was added to injury because in November, I get this phone call from personnel in the Cook County sheriff's department the Sunday before Thanksgiving. It was a recording that said Saul Chavez had been released, and then they hung up. And who am I going to call on a Sunday, you know? So, we had to wait until the next day to talk to the assistant States' attorney. She ran down there, up to bond, I do not know how high, but up to bond and issued a warrant for his arrest. Well, four cops went out, and needless to say, he was not there. And the brother said, well, he went out for coffee, or he went shopping, or something. So, it was obviously all pre-arranged.

The reason that he was able to post bond and be released is because in August, just a few months prior, the 17 members of the Cook County board passed this ordinance that effectively prohibited the sheriff from detaining or honoring these detainees. Think about that.

And here we are as a family trying to make sense of all of this stuff. It is just bizarre. But yet that is what happened. And to this day, in fact, I was at a county board hearing—I did something similar to this a few weeks ago, and I learned that a couple of the county board members—

Mr. GALLEGLY. Pardon me, Mr. McCann, I would ask unanimous consent the gentleman would have one additional minute because the time has expired. But I would, without objection, would have an additional minute.

Mr. MCCANN. Oh, thank you.

Mr. GALLEGLY. Yeah, I mean, I want to give you a little additional time.

Mr. MCCANN. Well, it will be less than that.

What we were learned was that a couple of the county board of supervisors did not know that this amendment would apply to felons. They did not even know. Again, we think guidance needs to come from Capitol Hill.

We are trying to have that ordinance amended, by the way. I have been spending a lot of time with five of the county commissioners that voted against the amendment. As of late, it is stalemated for a number of reasons, one of which is one of our recent county board members was indicted just last Friday, and so that has got them pretty occupied with other matters.

But in any case, we are hopeful that it will come up for a vote in a couple of months, and that this will not happen to future families, and that a very, very small measure of justice will be returned to the McCann family if we can straighten out this ordinance in Cook County.

With that, I want to thank you so very much for inviting me. And if there is anything else I can do, I will be more than happy. Thank you.

[The prepared statement of Mr. McCann follows:]

TO: United States House of Representatives Judiciary Committee subcommittee
On Immigration Policy and Enforcement

FROM: Brian McCann
SUBJECT: Synopsis of Testimony on March 7, 2012

Five-minute remarks will focus on three areas. First, a brief chronology of the criminal history of Saul Chavez dating from 9/08 to 11/11. This chronology will be within the context that Saul Chavez was an illegal immigrant and he killed my brother last June in Chicago. My family sincerely believes that my brother would be alive today if ICE and the criminal justice system cooperated within this time frame. Second, a continuing chronology of events following my brother's death that led to the flight of Mr. Chavez, presumably to Mexico. Third, I will comment on the Scott Gardner Act.

Back in September of 2008 Mr. Chavez was arrested for aggravated DUI. After pleading guilty to the charge of Aggravated DUI, Chavez was placed on probation by a Cook County judge on 2/11/09 for two years. During that five-month period, ICE was never contacted by anyone from the Chicago or Cook County criminal justice system. Records show on the night he was arrested Mr. Chavez admitted he was not a citizen and in my judgment no less than 10 people would have read that admission.

Judge William Timothy O'Brien terminated Mr. Chavez' probation on 2/10/2011 and five months later Chavez killed my brother on 6/8/2011. Immediate family in Illinois, California and Maryland were contacted and the grieving process began and as we learned of the previous felony conviction questions were raised and questions continue. It is the families view that cooperation with ICE and Cook County agencies would have prevented Dennis McCann's death.

Following the 2/10/11 death of my brother and subsequent arrest of Mr. Chavez the Cook County State's Attorney assured us that the detainer would keep Mr. Chavez in custody even if he remitted the required \$25,000 bail or 10% of the \$250,000. The family was minimally comforted that retribution would follow sometime in the future and Mr. Chavez would be appropriately sentenced for the charge of Aggravated DUI with death and reckless homicide.

Insult was added to injury to the McCann family because on the Sunday before Thanksgiving 2011 I received a tape recording indicating Mr. Chavez was released from custody. Justice had been denied because we believed he had fled.

The reason he was able to post bond is the result of an official policy of non-cooperation with ICE that had existed for some time prior and an official policy established by the Cook County Board in August that effectively guarantees non cooperation by the Sheriff.

At present the Cook County Board, because of my family's efforts and others, is attempting to amend the ordinance thereby enabling the sheriff to honor these detainees.

I have met with members of the Cook County Board and testified publicly, but sadly the political dynamics of their deliberative process in the context of the Cook County political culture has stalemated the process.

I support the Scott Gardner Act, because it is a significant step toward requiring local jurisdictions to comply with federal law and policy. Moreover, passage of the Scott Gardner would prevent deaths similar to the circumstance of my brother, Dennis McCann.

Mr. GALLEGLY. Thank you, Mr. McCann, and I can assure you that this entire Committee passes on our sorrow and condolence to your family——

Mr. McCANN. Thank you.

Mr. GALLEGLY [continuing]. And other families that have suffered the same plight.

Mr. Burbank, or Chief Burbank.

**TESTIMONY OF CHRIS BURBANK, CHIEF OF POLICE,
SALT LAKE CITY POLICE DEPARTMENT**

Chief BURBANK. Thank you very much. The goal of local law enforcement is to provide for the public well-being and security, while safeguarding the civil rights of all persons equally without bias. Proper and effective policing occurs when we profile for criminal behavior. As the fight against terrorism has demonstrated, profiling on the basis of appearance is ineffective and exposes us to greater risk, allowing individuals exhibiting behavioral indicators to go unnoticed.

I sincerely sympathize with Mr. McCann. The criminal justice system failed this family and allowed a tragedy to occur. The perpetrator should not have been released from custody, not for reasons associated with his immigration status, however, but for his demonstrated behavior and the threat his actions posed to public safety.

As set forth in this bill, the loose interpretation of the reasonable standard pertaining to immigration status checks will place more individuals into the criminal justice system, creating a *de facto* mandatory detention program. Compulsory incarceration dramatically increases stress on an over-burdened detention system, necessitating the release of criminal offenders back into our neighborhoods.

Last year, my department booked an individual for exposing himself to children on an elementary school playground. That individual spent 45 minutes in jail prior to being released due to overcrowding. We are fortunate this individual was no pre-disposed to engage in more serious criminal activity, such as abducting or injuring a child.

It is vital that legislation and laws address the root problem, not ancillary circumstances. DUI is an act of irresponsibility and is preventable. Many drivers do not recognize the impact of their actions or understand the level of impairment that accompanies alcohol consumption.

Many States have refused to publish driver rules and regulations in languages other than English. As a Nation proud of its immigrant heritage, it seems short sighted not to educate the motoring public.

Studies have found that undocumented individuals under commit crimes compared to other segments of the population. There is no indication they drive intoxicated at a higher rate. Why then should we draft legislation not focused on the significant problem of DUI, but on a statistically insignificant issue.

It is incumbent upon lawmakers and those who enforce the laws to conduct an unemotional evaluation of what is correct and proper when drafting and applying laws. H.R. 3808 invited racial profiling

by requiring State and local law enforcement officers to check Federal databases based on reasonable ground to believe the person is an alien.

The encouragement to racially profile or to interject bias is exacerbated by the bill's use of the overbroad term "apprehended" rather than "convicted," which at least implies due process. The phrase facilitates pre-textual verification of immigration status. In this way, H.R. 3808 is a national version of controversial laws in Arizona and Alabama.

This bill authorizes State and local officers to issue immigration detainers, inappropriately delegating authority to such officers absent training and accountability. We have seen the failure of immigration programs, such as 287(g), which coopts local law enforcement as immigration agents without oversight. Atrocious law enforcement abuses have led the Department of Justice to conduct investigations and issue indictments in Maricopa County, Arizona, as well as East Haven, Connecticut.

At least under a flawed 287(g) agreement, the involved officers receive training. The Administration has drastically reduced funding to the program, and has indicated it will not enter into any new agreements. H.R. 3808 sidesteps any official agreement or training, exposing officers, agencies, and the public to abuses and complaints, thereby degrading public cooperation and trust.

This bill inappropriately sets local law enforcement priorities. Perspective is imperative when allocating the limited and ever-shrinking resources of law enforcement should the Federal Government set DUI as a priority above all others in our cities.

In Utah, officers typically process individuals suspected of DUI in the station and release them on a citation. This process takes between 30 minutes to an hour. If now officers are required to transport individuals to jail due to mandatory DUI protocol or immigration status checks, the out of service time because 2 hours. That is 2 hours that an officer is not stopping other DUI drivers or criminal perpetrators. Immigration status now becomes a priority, not criminal behavior.

How is a police officer to determine that the individual is an alien unlawfully present in the United States without detaining and questioning anyone who speaks, looks, or acts as if they might be from another Nation? Is it not racial bias to subject certain individuals, based solely on surname or skin color, to a different standard or practice than others with whom we interact?

The standard by which we judge successful police interaction is reasonableness. We expect our officers to interact in a responsible and prudent manner. In order to provide these outstanding men and women with the support they deserve, it is incumbent upon us as policy and lawmakers to ensure we provide them reasonable legislation.

Thank you very much.

[The prepared statement of Chief Burbank follows:]

Chris Burbank
Chief of Police
Salt Lake City Police Department

Subcommittee on Immigration Policy and Enforcement

Hearing on H.R. 3808, the “Scott Gardner Act”

Wednesday, March 7, 2012
1:30 PM

Rayburn House Office Building
Room 2141

As I have expressed many times before in public forums, including this prestigious committee, the goal of local law enforcement is to provide for public well-being and security while safeguarding the civil rights of all persons, equally without bias. Proper and effective policing occurs when we profile for criminal behavior, not for race, ethnicity, religion, gender or sexual orientation.

I sincerely sympathize with my fellow panel member, Mr. McCann and his family. The criminal justice system failed this family and allowed a tragedy to occur. The perpetrator in that circumstance, an individual with a significant criminal history, should not have been released from custody. Not for reasons associated with his immigration status however, but for his demonstrated behavior and the threat his actions posed to public safety. H.R. 3808 will not resolve situations such as this. I believe, in fact, it has the potential to increase the likelihood of a similar catastrophe occurring to another family.

As set forth in H.R. 3808, the loose interpretation of the reasonable standard pertaining to immigration status checks will undoubtedly place more individuals into the criminal justice system awaiting determination. In essence, this proposed legislation will create a de-facto mandatory detention program. Compulsory incarceration, especially of status, misdemeanor or traffic offenders, dramatically increases stress on an already overcrowded detention system, necessitating the release of criminal offenders back into our neighborhoods. For example, the Salt Lake County Jail currently releases between 700 and 900 criminals monthly for reasons of overcrowding. Last year, the Salt Lake City Police Department booked an individual for exposing himself to children on an elementary school playground. That individual spent 45 minutes in jail prior to being released due to overcrowding. We are fortunate this particular individual was not predisposed to engage in more serious criminal activity following his release, such as actually abducting or injuring a child.

It is vital that legislation and laws target and address the root problem, not ancillary circumstances of a specific isolated situation. February 2007, in Salt Lake City, an 18 year-old Bosnian refugee went on a violent rampage in a local shopping mall, killing five and injuring several others before responding officers took his life. Immediate sentiment from the community would have undoubtedly supported the rounding up of all Bosnian immigrants in our city and detaining them for questioning.¹ As overreaching and ridiculous as this seems, is this bill not moving us in the same direction? The young man in our mall situation was not motivated by religious belief, ethnicity, or even violent video games. He was simply an individual who found the wrong outlet for his personal circumstance. As the fight against terrorism has demonstrated extensively, profiling on the basis of appearance is ineffective and in fact exposes us to greater risk, allowing individuals exhibiting behavioral indicators to go unnoticed.

I would be proud, as would my colleagues, to be involved in the drafting of effective legislation that addresses all repeat offenders of DUI laws and works to prevent this crime from reoccurring. DUI is a preventable crime. It is not a crime of passion, but an act of irresponsibility. Many of our drivers do not recognize the impact of their actions or understand the level of impairment that accompanies alcohol consumption. Across the

nation, states have refused to publish driver rules and regulations in languages other than English. As a nation proud of its immigrant heritage, this seems shortsighted. Is not an educated motoring public important?

It is estimated there are more than 11 million undocumented individuals residing in the United States. Studies conducted by the Rand Instituteⁱⁱ and the Consortium for Police Leadership in Equityⁱⁱⁱ found that undocumented individuals actually under-commit crimes compared to other segments of the population. There is certainly no indication they drive intoxicated at a higher rate. Why then should we draft legislation that does not focus on the significant problem of driving while intoxicated in our nation, but focuses on a statistically insignificant issue. Please understand that for the McCann family, this most certainly is in no way insignificant or minor. It is incumbent upon lawmakers and those who enforce the laws to maintain an unemotional evaluation of what is correct and proper when drafting and applying laws that govern our great nation.

H.R. 3808 invites racial profiling by requiring state and local law enforcement officers to check federal databases based on “reasonable ground to believe the person is an alien.” The invitation or quite frankly the encouragement to racially profile or to interject bias is exacerbated by the bill’s use of the over-broad term “apprehended” rather than convicted, which at least implies due process. The phrase facilitates pre-textual checking or verification of immigration status. In this way, H.R. 3808 is a national version of Arizona’s controversial S.B. 1070 and Alabama’s H.B. 56. Both of which invite racial profiling by requiring officers to determine immigration status based on reasonable suspicion that a person is unlawfully present. Due to concerns regarding federal preemption, the Department of Justice has filed suit in both these states, as well as the state of Utah, to block this type of detrimental and misguided legislation.

This bill authorizes state and local officers to issue detainers for any and all apprehended immigrants, thereby inappropriately delegating authority to such officers, absent training and accountability. We have seen the failure first hand of immigration programs, such as the 287(g) program which co-ops local law enforcement as immigration agents without oversight. Atrocious law enforcement abuses occurring both within the program and outside have led the Department of Justice to conduct investigations and issue indictments in Maricopa County, Arizona, as well as East Haven, Connecticut. At least under a flawed 287(g) agreement, the involved officers received training. The Administration has drastically reduced funding to the program and has indicated it will not enter into any new agreements. H.R. 3808 sidesteps any official agreement or training, exposing officers, agencies and the public to abuses and complaints, thereby degrading public cooperation and trust.

The expansion of mandatory detention to any undocumented person who is apprehended but not convicted for a misdemeanor offense ties the hands of the law enforcement system and will result in costly, unnecessary and potentially lengthy detentions. Immigration and Customs Enforcement already has ample authority to detain and make detention decisions based upon the factors of risk to the public and risk of flight. In fact, ICE’s guidance for trial attorneys identifies DUI as a high priority.

This bill inappropriately sets local law enforcement priorities. Perspective is imperative when allocating the limited and ever-shrinking resources of law enforcement agencies throughout the country. Our cities face drive-by shootings, homicides, sexual assaults, and ever increasing dangers from prescription drug diversion. Not to diminish the impact of driving while intoxicated, should the federal government set that as a priority in our cities above all others? Currently, mandatory arrest is connected almost exclusively to instances of domestic violence and no other criminal activity. In the state of Utah, DUI is a misdemeanor traffic offense. Typically, officers process suspected individuals in the station, constituting a breath alcohol content analysis and issuing a citation for first time offenses. The process takes between 30 minutes to an hour. If now officers are required to transport individuals to jail due to mandatory DUI protocol or immigration status checks, the typical out of service time becomes two hours. That is two hours that an officer is not on the street stopping other DUI drivers or criminal perpetrators. Immigration status now becomes the priority, not criminal behavior.

Major Cities Chiefs, a professional association of Chiefs and Sheriffs representing the 69 largest cities in the United States and Canada, recently reiterated its position on immigration.^{iv} This document emphasizes the commitment of member agencies to enforce criminal violations of law regardless of citizenship status; however, the group is unanimous in its position that immigration enforcement is a federal responsibility. Placing local law enforcement officers in the position of immigration agents undermines the trust and cooperation essential to successful community-oriented policing. We do not possess adequate resources or training to appropriately undertake such a federal mandate and, in fact, believe it significantly detracts from the core mission of local police to create safe communities.

In order to be successful in our mission, local law enforcement must have the cooperation of all members of our communities. In Salt Lake City, approximately one third of the population is Latino and subject to inappropriate, or disproportionate, police scrutiny under H.R. 3808. Often unrecognized in the immigration debate is the efficacy of enforcement and the adverse impact upon all individuals of color. How is a police officer to determine “that the individual is an alien unlawfully present in the United States” without detaining and questioning anyone who speaks, looks or acts as if they might be from another nation? Is it not racial bias to subject certain individuals – based solely on a surname or skin color – to a different standard or practice than others with whom we interact?

On its face, this bill appears unconstitutional, as it violates the anti-commandeering doctrine in Justice Scalia's majority opinion in *Printz v. U.S.*^v That doctrine generally prevents federal law from establishing blanket requirements for state and local officers. Federal law can incentivize state and local conduct through grants, but it cannot simply require certain actions. The type of background checks identified and required in this bill are directly parallel to those required by Congress in the interim rules of the Brady Act, that the Court declared unconstitutional.

I am extremely proud to be a law enforcement officer and am represented by many fine individuals, not only in my own agency but throughout the nation. The standard by which we judge successful police interaction is reasonableness. We expect our officers to interact in a responsible and prudent manner with every member of the public, including those who have engaged in criminal activity. In order to provide these outstanding men and women with the support they deserve, it is incumbent upon us, as policy and lawmakers, to ensure we provide them reasonable legislation.

ⁱ News articles

ⁱⁱ RAND

ⁱⁱⁱ CPLE

^{iv} MCC

^v Scalia

Mr. GALLEGLY. Thank you very much, Chief.

Let me ask you very quickly. I have had a lot of exposure as a former mayor 30 years ago working with local law enforcement, and since then working with district attorneys and other people in the criminal justice system. And I understand their issue of how much down time there is when an officer has to transport someone, book them, and so on and so forth.

But you mentioned that when you make a DUI arrest, it is not uncommon—and if I misunderstood you, please correct me—that you would take him into your, I guess, either your headquarters or one of your precincts. Salt Lake City is a pretty good sized city, and you probably have several stations. And all the information is taken down, and that person is released. Do they make a bond? I assume you run a warrants check on them and things of that nature. Is that correct?

Chief BURBANK. Absolutely, and they are issued a misdemeanor citation and then released with the promise to appear in court.

Mr. GALLEGLY. Okay. Now, is it just a promise, or is there a bond of \$10,000 or \$50, or you just release them OR?

Chief BURBANK. OR.

Mr. GALLEGLY. Okay. Have you ever had anybody not appear that you released OR?

Chief BURBANK. Certainly.

Mr. GALLEGLY. What would you say the percentage is?

Chief BURBANK. I could not tell you off the top of my head, absolutely not. I apologize.

Mr. GALLEGLY. Okay. But it is reasonable to think that when you do not even give a guy a \$20 fine for drunk driving or a bond, that there is a chance he may not return.

Chief BURBANK. That is true for any offense, yes.

Mr. GALLEGLY. That is true. That is another issue maybe for another day.

Ms. Vaughan, in Fiscal Year 2011, ICE claimed to remove 35,927 illegal immigrants who had been convicted of drunk driving. If this is the case, why would we need the bill, and do you believe this number is accurate?

Ms. VAUGHAN. Well, I assume that it is accurate. ICE, you know, has put that statistic out there, and that sounds like a lot. It is about 9 percent of the removals for last year. But what I noticed when I went through the statistics that I was able to obtain from the law enforcement agencies that are able to track the crimes of the illegal aliens that they refer to ICE, that they were reporting higher percentages of their illegal alien caseload that were drunk drivers. So, I started to wonder why would there be that discrepancy, and there could be a lot of reasons for it.

But based on those statistics and based on what I was hearing from some of these agencies and their experiences, there seemed to be a lot of people falling between the cracks. And this often has to do with the message that ICE agents in the field seem to have gotten, that they are to wait for a conviction before they are able to act on immigration violations. And the problem is that so many of these drunk driving offenders never get to the conviction stage because they abscond before that, just as the case with Mr. Chavez in Chicago.

So, there is a noticeable discrepancy between what local agencies are seeing and what ICE is actually doing.

Mr. GALLEGLY. Thank you, Ms. Vaughan. Can I go back to the chief again very quickly? When you do this background check, if a person had a prior drunk driving arrest in your jurisdiction, would he still have been caught and released?

Chief BURBANK. No, absolutely not. Prior convictions for DUI enhances the penalty associated with that, and then that would move—

Mr. GALLEGLY. So, they would go to be booked, and it would not be just a citation.

Chief BURBANK. That is correct.

Mr. GALLEGLY. Mr. McCann, and I read your testimony. But I just want to bring this up to date. It is my understanding that when Mr. Chavez left custody, he just walked away and did not appear for any further court or sentencing. Is that not correct?

Mr. MCCANN. No, he did not appear. No.

Mr. GALLEGLY. So, is there still a warrant out for his arrest?

Mr. MCCANN. The FBI issued a warrant, and included in the warrant is extradition, which I guess is harder—

Mr. GALLEGLY. It is pretty hard to extradite if you cannot catch him.

Mr. MCCANN. That is right.

Mr. GALLEGLY. Thank you very much, and I thank all the witnesses. I would yield to the gentlelady from California.

Ms. LOFGREN. Mr. Chairman, I understand that Mr. Pierluisi has another obligation. I would like to let him ask his questions first, if I may.

Mr. PIERLUISI. Thank you, Mr. Chairman. Thank you so much, Ranking Member.

I want to begin by addressing Mr. McCann directly. Mr. McCann, I thank you for your testimony today. I am profoundly sorry for your loss. I lost my brother my own brother in a terrible, and that pain never goes away. And I respect and admire you for your efforts to honor your brother's legacy and to ensure that other families do not suffer what you and your family have no doubt endured.

I must tell you that I do have serious constitutional and public policy concerns about the bill we are discussing today. But I do not want you to think for a single moment that my opposition is in any sense an effort on my part to diminish what you have gone through.

What happened to your brother and what happened to Scott Gardner were profound tragedies, and, more than that, they were crimes. But just as there is an old saying among judges that hard cases make bad law, it is also sometimes the case that terrible events lead to legislative overreach.

Tragedies lead to bills that go too far and that are too broad. They lead to bills in a well-intentioned effort to address particular injustice, but then give rise to a different set of injustices.

I think that is clearly the case we have here today. So, let me pose a few questions.

Under this bill, when a State or local law enforcement officer apprehends an individual for a DWI, if that officer has a reasonable ground to believe that the individual is an alien, then the officer

would be required to run an immigration check to determine if that individual is unlawfully present in the United States.

There are so many legal and policy problems here. Among them, the unambiguous and potentially broad definition of "apprehend," the highly subjective reasonable grounds standard, and the categorical nature of the mandate that local officials are required to obey, regardless of the circumstances.

Sheriff Jenkins, if this bill becomes law and you are training your officers in Frederick County to implement it, what specific factors would you advise them to consider when making the determination as to whether there is reasonable ground to believe that an individual who has been pulled over for a possible DWI is an undocumented immigrant? Their accent? Their clothing? Their skin color? If they have a foreign-sounding name? If they work in a particular job or not? Their behavior? What behavior?

I think it is a colossal understatement to say this bill would invite racial profiling on the part of local law enforcement. I think it guarantees racial profiling and makes a mockery of the constitutional principle of equal protection under the law.

Sheriff Jenkins, tell me why I am wrong.

Sheriff JENKINS. First of all, with all due respect, everything we talk about under our current programs are after the arrest is made. They are into our facility for central booking. That individual is brought, regardless of ethnicity, race, gender. That individual is brought into central booking. They are charged and booked on the local charges. As a part of that process, the intake process, they are asked a series of questions. Every single individual are asked two specific questions: where were you born and what country are you a citizen of? Now, depending on that answer triggers a status check under our current 287 program. It is that simple, sir.

Mr. PIERLUISI. Mr. Chairman, I would like to allow Sheriff Burbank to comment on the answer, if you may. I am running out of time here. I will just note that the bill does not provide for waiting for an arrest to do everything else that local law enforcement personnel would have to do, by the way. It is not drafted that way. I see that that is your policy in Frederick County, but that is not what this bill provides for.

But I would like to hear from Sheriff Burbank, if the Chairman allows it.

Mr. GALLEGLY. Yes, Chief.

Chief BURBANK. Thank you very much. You are absolutely correct. The law provides for prior to arrest. It already exists when you talk about Secure Communities and some of those other things, the checking that takes place in a detention facility. This actually directs officers out in the field to take this action, and, thus, altering the way that they proceed with the stop.

And when it gets right down to it, I mean, honestly, sir, if you and I are subject to the same scrutiny, nobody is going to ask me if I am in the country legally, but you are going to get that question. And that is where the bias is interjected. When do we ask that question? And if it is different than how I would be treated on the street, that is where the bias is interjected, because it is not based on behavior, it is based solely on what you look like.

Mr. PIERLUISI. Thank you so much.

Mr. GALLEGLY. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I feel like I should go back to my 10th Amendment routine here. Matter of fact, I think I will just read it one more time so that you constitutional authorities will be able to reason with me. "Powers not delegated to the United States by the Constitution, nor prohibited by it to the State, are reserved to the States, respectively, or to the people." And this means that the Federal system cannot assign Federal responsibilities to local law enforcement. And here is where we get into some problems, Sheriff.

In 3808, we say that if a State or local law enforcement officer apprehends an individual for an offense described in the subsection, and the officer has reasonable ground to believe that the individual is an alien, uh-oh. That is a Federal responsibility. That is why when you were telling our colleague about what happens after they have been booked, we are talking about what happens that caused them to get booked. And in this instance, it is that somebody had reasonable ground to believe the individual is an alien, and that raises a whole host of problems.

And so, all I am pointing out to you is that we have a constitutional infirmity that I do not think is correctable. Does anybody else want to share their view on this? Then I presume you all agree with me? Yes, ma'am.

Ms. VAUGHAN. In my experience from doing training of law enforcement officials and interacting with them, and I would leave it to the two law enforcement officers here at this table to correct me if I am wrong. But I have never gotten the sense that local law enforcement agencies see this bright line between State and Federal responsibilities, that most local law enforcement agencies that I have encountered feel it is their duty and responsibility to work closely with Federal law enforcement agencies in getting the job done on behalf of public safety. And they are more than willing to do that, and do not see it as a burden because they see the benefits of that for their community.

Mr. CONYERS. Yeah, but this requires the observation of some kind of profiling going on. You have to think that somebody is an alien, and as was pointed out, some people look like they might be an alien, and some people look less like they might be an alien. So, there is the problem.

And, you know, we have been through this with—it would be different if we were talking about a case that had never happened. But the Supreme Court struck down this provision, and of all people, we had Supreme Court Justice Scalia that wrote the opinion, a rather conservative member of the Court saying that how people look and sound and act will require under this bill that they get additional scrutiny. They can be detained by State and local police to determine if they are, in fact, aliens or in sync with immigration law.

So, that is a constitutional infirmity that would, I think, require the Court to do exactly what they have done in previous cases.

I thank the Chairman for his time.

Mr. GALLEGLY. All right. I thank our Chairman emeritus here. And with that, I would yield to the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I would like to ask unanimous consent to put several statements in the record. The first is a statement from immigration and constitutional law professors regarding *Printz v. United States*, and the unconstitutionality of H.R. 3808, a statement from the Leadership Conference on Civil and Human Rights and the Rights Working Group on racial profiling, a statement from the ACLU, a statement from the American Immigration Lawyers Association, a statement from the national State and Local advocates for survivors of domestic violence and sexual assault, and a statement from the National Immigration Project of the National Lawyers Guild, the Immigrant Defense Project, the Immigrant Legal Resource Center, the Washington State Defenders Association, and the Immigration Project, all in opposition to the bill.

Mr. GALLEGLY. Without objection.

[The information referred to follows:]

March 6, 2012

The Honorable Lamar Smith
Chairman, House Judiciary Committee
2409 Rayburn House Office Bldg.
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2426 Rayburn Office Bldg.
Washington, DC 20515

RE: Tenth Amendment concerns relating to the Scott Gardner Act

Dear Chairman Smith and Ranking Member Conyers:

We, the undersigned immigration and constitutional law professors and scholars, write to inform the Congress of our concern regarding the Scott Gardner Act. The Act would compel state and local law enforcement officials to conduct immigration background checks of those stopped or arrested for driving under the influence or similar state offenses. We believe this provision is in clear violation of the Tenth Amendment's anti-commandeering principle.

The legal question that the "shall verify" provision of the Scott Gardner Act¹ raises is whether compulsion of state officials by the federal government violates the Tenth Amendment's reservation of powers to the states. The Supreme Court answered this question with abundant clarity in *Printz v. United States*,² striking down in no uncertain terms a federal statute requiring local law enforcement officers to initiate background checks for prospective handgun purchasers:

We held in *New York*³ that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular

¹ Section Two of the Act would amend Section 236 of the Immigration and Nationality Act to provide: "If a State or local law enforcement officer apprehends an individual for [driving while intoxicated, driving under the influence, or similar violation of State law] and the officer has reasonable ground to believe that the individual is an alien--the officer *shall* verify with the databases of the Federal Government, including the National Criminal Information Center and the Law Enforcement Support Center, whether the individual is an alien and whether such alien is unlawfully present in the United States" (emphasis added).

² 521 U.S. 898 (1997).

³ *New York v. United States*, 505 U.S. 144 (1992).

problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.⁴

There can be no distinguishing *Printz*. The proposed legislation here, just as in *Printz*, requires local officials to initiate federal background checks. The command that local officials “shall verify” a suspect’s immigration status is “fundamentally incompatible with our constitutional system of dual sovereignty.”

Section 287(d) of the Immigration and Nationality Act provides a useful point of contrast.⁵ That statutory provision *permits* local law enforcement officials, after a controlled substances arrest, to report suspected immigration violators, and to request federal immigration officials for a prompt detainer decision. Congress carefully crafted the detainer statute to avoid Tenth Amendment problems that would have been present if the statute *required* local officials to report suspects.⁶

INA § 287(d) was passed more than ten years before the *Printz* decision – but Congress was careful to avoid the Tenth Amendment commandeering problem, because the problem has been a recurring one with respect to rendition. Rendition history provides deep support for Congress’s understanding, when it passed INA § 287(d), that the federal government has no authority to compel state officials to act in service of any federal rendition plan.

As early as 1818 legislators raised the commandeering problem in a rendition context. The 1793 Fugitive Slave and Extradition Acts clearly imposed duties on state officials⁷ – but could any federal authority provide a remedy if state officials failed to discharge these duties? In 1818, a bill was proposed which would have, among other provisions

⁴ *Printz*, 521 U.S. at 935.

⁵ Immigration and Nationality Act § 287(d), 8 U.S.C. § 1357(d).

⁶ Congress left control in the hands of local law enforcement officials to decide for themselves when to bring a controlled substance arrestee to the attention of federal immigration officials, ensuring INA § 287(d) avoided any Tenth Amendment commandeering problem.

⁷ The Extradition Act of 1793 prescribed the duties of a state governor. Section 1 of the 1793 acts declared “it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given ... and to cause the fugitive to be delivered” 1 Stat. 302. Similarly, the Fugitive Slave Act of 1793 prescribed the duties of state magistrates. The Act authorized the owner of a fugitive slave (or his agent), to seek a certificate from a magistrate judge. The Act further declared: “It shall be the duty of such ... magistrate [receiving satisfactory proof] to give a certificate ... which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled.” 1 Stat. 304-05.

strengthening the Fugitive Slave Act, made it a federal crime for state officials to refuse assistance in enforcing the Fugitive Slave Act.⁸ Representative Whitman from Massachusetts objected to the bill because “he did not believe Congress had the right to compel the State officers to perform this duty – they could only authorize it.”⁹ Senator Morrill of New Hampshire offered impassioned argument against the bill on the same grounds: “It is not expedient,” argued Morrill, “for the United States to call on State and county officers, under State governments, to perform any duty under the criminal laws of Congress. ...

It may justly be considered a perversion of the Constitution of the United States, and extremely dangerous, to commit power into the hands of those who are no way officially responsible; and also, very unjust to exact service without compensation; [State and county officers] derive their official existence and power from the government of the State in which they reside. The constitution and laws of their State define and regulate their power and duties; the extent of their jurisdiction in civil and criminal causes, and the tenure of their offices. They are commissioned to perform services for the State; they are compensated by the State; they are amenable to the State; they are removable and punishable by the State, and by that only.¹⁰

Senator Morrill also remarked: “[Y]ou call upon a State officer, under the State government, to perform a judicial act authorized by a law of the United States. Upon the services of this officer you have no claim; to demand them you have no power.”¹¹

The Supreme Court took up the issue of commandeering in *Prigg v. Pennsylvania*,¹² and again in *Kentucky v. Dennison*.¹³ In *Prigg*, the Justices agreed that Congress could not impose fugitive slave rendition duties on local officials. And in *Dennison*, the Court reached the same conclusion with respect to imposing criminal rendition duties. The near unanimous rejection of a federal commandeering power illustrates the anti-commandeering principle was settled law.

Justice McLean, dissenting in *Prigg*, was the lone voice in favor of a federal compulsion power over rendition. But even Justice McLean rested his argument narrowly upon the explicit duties laid upon state officials in the text of the Fugitive Slave Clause of the Constitution. This argument ultimately prevailed, with respect to criminal rendition, in the 1987 decision in *Puerto Rico v. Branstad*.¹⁴ The Court held in *Branstad* that the

⁸ 31 Annals of Cong. 839 (1817-18).

⁹ *Id.* Whitman’s argument was unavailing – the bill passed the House, 31 Annals of Cong. 840, but ultimately failed for non-concurrence between the House and Senate versions.

¹⁰ 31 Annals of Cong. 254 (1817-18).

¹¹ *Id.* at 245.

¹² 41 U.S. 539 (1842).

¹³ 65 U.S. 66 (1860).

¹⁴ 483 U.S. 219 (1987).

federal government *can* compel the states to perform their duties under the Extradition Clause. *Branstad* did not indicate, however, that the ability of the federal government to exercise compulsion over state officials would be widespread. Indeed the holding of *Branstad* was narrowly confined to the Extradition Clause:

Because the duty is directly imposed upon the States by the Constitution itself, there is no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment.¹⁵

Of course there is no such explicit text of the Constitution that would support federal compulsion of state officers as is called for by the Scott Gardner Act. To derive any constitutional authority for the compulsion envisioned in the Scott Gardner Act, one would have to rely on the Necessary and Proper Clause – but the Court in *Printz* rejected such constitutional sleight of hand:

When a “La [w] ... violates the principle of state sovereignty ... it is not ... proper” under the Necessary and Proper Clause, but instead is “in the words of The Federalist, ‘merely [an] ac[t] of usurpation’ which ‘deserve[s] to be treated as such.’”¹⁶ Thus, the Tenth Amendment and anti-commandeering concerns persist.

Indeed, the anti-commandeering doctrine seen throughout the nineteenth century and taken as a given in *Prigg* and *Dennison* was reaffirmed in the post-*Branstad* decisions of *New York v. United States* and *Printz v. United States*. In *New York*, the Court limited *Branstad* to the proposition “only that federal law is enforceable in state courts and that federal courts may in proper circumstances order state officials to comply with federal law, propositions that by no means imply any authority on the part of Congress to mandate state regulation.”¹⁷ And when the federal government argued in *Printz* that the Extradition Act of 1793 was an instance of Congress imposing duties on state executive officials, the *Printz* majority pointed out that this was in direct implementation of the Extradition Clause of the Constitution.¹⁸ Thus, *Branstad* has not been held to support a broad power of compulsion in the federal government.

¹⁵ *Branstad*, 483 U.S. at 220.

¹⁶ *Printz*, 521 U.S. at 923-24.

¹⁷ *New York*, 505 U.S. at 179.

¹⁸ *Printz*, 521 U.S. at 909. The majority then proceeded to a discussion showing the First Congress was sensitive to the commandeering problem:

On September 23, 1789 – the day before its proposal of the Bill of Rights – the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress “recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States,” and offered to pay 50 cents per month for each

In the light of all of this history, and the clear holding in *Printz*, we believe the Scott Gardner Act would violate the Tenth Amendment by attempting to impose duties on state officers, and urge Congress to reject the “shall verify” provision of the Act.

Sincerely,

Gabriel J. Chin, Professor of Law, University of California, Davis, School of Law

Holly S. Cooper, Associate Director, University of California, Davis, School of Law
Immigration Law Clinic

Susan Hazeldean, Assistant Clinical Professor of Law, Cornell Law School

Raha Jorjani, Staff Attorney & Lecturer, University of California, Davis, School of Law
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Thalassa Kingsnorth, Pro Bono Coordinator/Senior Staff Attorney, Florence Immigrant
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Christopher N. Lasch, Assistant Professor, University of Denver Sturm College of Law

Elizabeth McCormick, Associate Clinical Professor of Law and Director, Immigrant
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Professor Vanessa Merton, Pace University School of Law

Nancy Morawetz, Professor of Clinical Law and Supervising Attorney, Immigrant Rights
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Katherine L. Vaughns, Professor at the University of Maryland Francis King Carey
School of Law

prisoner. Moreover, when Georgia refused to comply with the request, Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.
Id. at 909-10 (citations omitted).

Shoba Sivaprasad Wadhia, Esq., Clinical Professor and Director, Center for Immigrants' Rights, The Pennsylvania State University, The Dickinson School of Law

Michael J. Wishnie, William O. Douglas Clinical Professor of Law, Yale Law School

Note: Institutional affiliations are listed for identification purposes only.



STATEMENT OF

**WADE HENDERSON, PRESIDENT & CEO
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS**

AND

**MARGARET HUANG, EXECUTIVE DIRECTOR
RIGHTS WORKING GROUP**

HEARING ON: H.R. 3808, THE "SCOTT GARDNER ACT"

**COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON IMMIGRATION POLICY AND ENFORCEMENT
MARCH 7, 2012**

Chairman Gallegly, Ranking Member Lofgren and members of the Subcommittee: we are Wade Henderson, President & CEO of The Leadership Conference on Civil and Human Rights, and Margaret Huang, Executive Director of Rights Working Group. Thank you for the opportunity to submit testimony for the record regarding today's hearing on H.R. 3808, the Scott Gardner Act.

As the nation's oldest, largest, and most diverse coalition of civil and human rights organizations, The Leadership Conference has long been concerned with the civil rights implications surrounding immigration enforcement by state and local law enforcement agencies. The Leadership Conference was founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, and seeks to further the goal of equality under law through legislative advocacy and public education. The Leadership Conference consists of more than 210 national organizations representing persons of color, women, children, organized labor, people with disabilities, older adults, LGBT Americans, and major religious groups.

Rights Working Group (RWG) was formed in the aftermath of September 11th to promote and protect the human rights of all people in the United States. A coalition of more than 330 local, state and national organizations, RWG works collaboratively to advocate for the civil liberties and human rights of everyone regardless of race, ethnicity, religion, national origin, citizenship or immigration status. Currently, RWG leads the *Racial Profiling: Face the Truth Campaign*, which seeks to end racial and religious profiling.

The issue of our public safety, in particular the safety of our streets and roads, is a collective concern and we appreciate the Subcommittee's interest in considering and addressing the important issue of drunk driving. Our thoughts remain with the family of Scott Gardner, who was tragically killed as a result of drunk driving.

Unfortunately, H.R. 3808 fails to address the problem of drunk driving highlighted by Scott Gardner's needless death and rather raises serious civil rights issues of grave concern to The Leadership Conference and RWG. The provisions we are most specifically concerned about include mandating a state and local law enforcement officer to verify the immigration status of an individual the officer has "reasonable ground to believe that the individual is an alien"; mandating this verification for all individuals "apprehended"; expanding the definition of mandatory detention in the Immigration and Nationality Act; and authorizing the issuance of federal detainers by state and local law enforcement officers. These provisions go beyond existing immigration enforcement programs and state immigration laws, like Arizona's S.B. 1070, which have been proven to result in increased racial profiling of Latinos and those perceived to be immigrants.

**Racial Profiling: A Violation of Federal Law, Civil and Human Rights and
An Ineffective Law Enforcement Practice**

Racial profiling is an insidious violation of civil and human rights that can affect people in both public and private places – in their homes or at work, or while driving, flying or walking. Racial profiling by law enforcement instills fear and distrust among members of targeted communities, making them less likely to cooperate with criminal investigations or to seek police protection when victimized. Multiple studies have shown that when police focus on race, even as one of several predictive factors, they tend to pay less attention to criminal behavior.

Racial profiling is defined as any use of race, religion, ethnicity, or national origin by law enforcement agents as a means of deciding who should be investigated, except where these characteristics are part of a specific suspect description. Under this definition, racial profiling doesn't only occur when race is the sole criterion used by a law enforcement agent in determining whom to investigate. Such a definition would be far too narrow. As history has shown, when race, religion, ethnicity, or national origin can be used as a factor, it is easy to identify a law enforcement motive for a traffic stop as a pretext to target a person of a particular race, religion, national origin, or ethnic group.

In addition to violating an individual's civil and human rights, racial profiling has long been understood to be an ineffective method of law enforcement. Targeting people based on race, religion, ethnicity, or national origin rather than specific indicators of criminal activity may increase the number of people who are brought through the system, but decreases the hit rate on finding contraband or other evidence of criminal activity. By focusing on spurious factors unrelated to criminal activity, profiling distracts law enforcement from their primary purpose of preventing and solving crimes, while terrorizing communities and destroying relationships between local law enforcement and the communities they serve.

**State and Local Law Enforcement Agencies Enforcement of Immigration Laws Lead to
Rampant Racial Profiling**

Several immigration enforcement programs currently in effect, such as the 287(g) program, Secure Communities, and the Criminal Alien Program, along with informal agreements with

state and local law enforcement, have led to increased racial profiling of Latino and immigrant communities. State immigration laws, like Arizona's S.B. 1070 and Alabama's H.B. 56, have compounded the impact of these enforcement programs. The regime envisioned by H.R. 3808 surpasses these policies by creating a national version of these ill-advised state bills, granting state and local law enforcement agencies even more federal immigration enforcement authority than currently under 287(g) and similar programs, without any additional training or supervision. If enacted, H.R. 3808 would result in increased civil rights violations and negatively impact law enforcement's ability to protect all communities within their jurisdictions.

Latino and immigrant communities have felt the impact of racial profiling, particularly through immigration enforcement efforts such as the 287(g) program, Secure Communities, the Criminal Alien Program, and state immigration laws such as Arizona's S.B. 1070. The 287(g) program allows Immigration and Customs Enforcement (ICE) to deputize state and local law enforcement agents to enforce civil immigration laws. Research by many independent sources indicates that 287(g) programs lead to racial profiling and that DHS is unable to provide oversight and guidance to local officers deputized under this program.¹ The 287(g) program has been rejected by most state and local law enforcement agencies across the country because it harms community policing, cuts off sources of information police rely on and has extensive economic costs to states and localities.

The Warren Institute on Law and Social Policy, in a detailed study of one jurisdiction—Irving, Texas, has also published strong evidence that the Criminal Alien Program (CAP) incentivizes racial profiling and the use of pre-textual arrests.² CAP is an immigration screening process within federal, state, and local correctional facilities designed to allow ICE to identify and place immigration holds or “detainers” on incarcerated individuals perceived to be deportable immigrants and to process them for possible removal before they are released from custody.

The Secure Communities program checks fingerprints that state or local law enforcement send to the FBI against DHS civil immigration databases. Secure Communities creates an incentive for state and local law enforcement agents to arrest people for pre-textual reasons so that their immigration status can be checked during the booking process. A recent report by the Warren Institute which analyzed connections between DHS' own data and demographic information supports this assertion, finding that Latinos are disproportionately impacted by Secure Communities.³

¹ See Mai Thi Nguyen and Hannah Gill, “The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities,” The University of North Carolina at Chapel Hill, Feb. 2010 available at http://isa.unc.edu/migration/287g_report_final.pdf. See also Migration Policy Institute “Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement,” Jan. 2011 available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>.

² Trevor Gardner II and Aarti Kohli, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program (The Warren Institute on Race, Ethnicity and Diversity, Sept. 2009), available at www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

³ Aarti Kohli, Peter L. Markowitz and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, The Chief Justice Earl Warren Institute on Law and Social Policy, Oct. 2011, available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

These immigration enforcement programs that implicate state and local police not only result in discriminatory policing practices, they have had the added consequence of reinforcing a message to states and localities that it is permissible for them to determine immigration policies and priorities. The 2002 Department of Justice Office of Legal Counsel “inherent authority” memo has also reinforced this belief. It reversed years of previous legal opinions by finding that state and local law enforcement had “inherent authority” to enforce civil immigration law. It has been interpreted by some state and local law enforcement as granting them the inherent power to arrest individuals they suspect of lacking legal immigration status and turn them over to ICE. This federal devolution of immigration enforcement authority to states and localities has emboldened state legislation such as Arizona’s S.B. 1070 and Alabama’s H.B. 56.

Both Arizona and Alabama’s state immigration laws, in addition to similar legislation passed in four other states, have been enjoined by federal courts and have resulted in costly litigation for states, confusion over what law enforcement practices are currently lawful, and terrorized immigrant communities. Several leading law enforcement officers have spoken out against these “papers please” laws citing among concerns, a belief that pretextual arrests will increase when law enforcement officers are asked or required to determine a person’s immigration status.⁴ These laws require law enforcement officers to question the immigration status of anyone who is stopped, detained, or arrested if there is “reasonable suspicion” to believe they are in this country unlawfully. This essentially codifies racial profiling and the disparate treatment of Latino and immigrant communities by law enforcement. State “papers please” laws have resulted in widespread fear of law enforcement as well as confusion by law enforcement officers who are untrained and under-resourced in immigration law. These laws also have had costly economic and political implications.⁵ Due to the grave concerns about constitutional and civil rights abuses inherent in “papers please” laws, after the passage of Alabama’s H.B. 56 the Civil Rights Division of the Department of Justice contacted over 150 law enforcement officials in Alabama informing them of their legal obligations to engage in non-discriminatory policing and warning of the Department’s close monitoring of Alabama law enforcement agencies.⁶

The most troubling provisions of H.R. 3808 go further than the immigration enforcement programs and state immigration laws cited above by granting local and state officers direct authority to enforce immigration law and issue detainers as well as creating a national “papers please” scheme.

H.R. 3808, if Enacted, Will Lead to Increased Racial Profiling of Latino and Immigrant Communities

Several provisions of H.R. 3808 go well beyond existing federal law and violate the U.S. Constitution’s guarantee of equal protection under the law and federal civil rights protections by encouraging discriminatory policing practices, such as racial profiling. Specific provisions of

⁴ See “Plaintiff’s Motion For Preliminary Injunction and Memorandum in Support,” in *Hispanic Interest Coalition of Alabama, et al. v. Bentley*, July 21, 2010 available at http://www.aclu.org/files/assets/motion_for_pi_final.pdf

⁵ See Paul Reyes, “It’s Just Not Right”: The Failures of Alabama’s Self-Deportation Experiment,” Mother Jones, Mar./Apr. 2012 Issue, available at <http://motherjones.com/politics/2012/03/alabama-anti-immigration-law-self-deportation-movement?page=1>.

⁶ The Civil Rights Division of the Department of Justice, “Civil Rights Division Sends Letter to Alabama Law Enforcement Agencies About Alabama Immigration Law,” available at <http://www.justice.gov/crt/about/sp/HB56.php>.

concern are: 1) mandating state and local law enforcement officers to verify the immigration status of individuals officers have reasonable grounds to believe are “aliens”; 2) mandating immigration status verification of individuals “apprehended”; 3) expanding the definition of mandatory detention in the Immigration and Nationality Act; and 4) authorizing the issuance of federal detainers by state and local law enforcement officers.

1) Mandating State and Local Law Enforcement Officers to Verify Immigration Status of Individuals Officers Have Reasonable Grounds to Believe Are Aliens

Section 2 of H.R. 3808 contains a provision which amends the Immigration and Nationality Act by requiring a state or local law enforcement officer who apprehends an individual for driving while intoxicated, driving under the influence, or similar violation of state law to verify the immigration status of the individual if the officer has reasonable grounds to believe the individual is an alien. The “reasonable ground to believe that the individual is an alien” mirrors the reasonable suspicion language of state “papers please” laws such as Arizona’s S.B. 1070 and Alabama’s H.B. 56 and codifies the targeting of Latino and immigrant communities. Though H.R. 3808 focuses on crimes related to drunk driving, rather than all crimes, its “reasonable ground to believe” language creates an unspecified and vague standard that opens law enforcement up to demanding papers from anyone they perceive to be immigrants. This is the same scheme as S.B. 1070 and its copycat laws. These laws are currently being challenged by the federal government as unconstitutional and have been enjoined in several federal courts. H.B. 3808 uses the same flawed logic and if enacted, would result in the disparate treatment of individuals based on race or ethnicity.

2) Mandating Immigration Status of Individual “Apprehended”

The same provision of H.R. 3808 directs officers to conduct immigration verifications of any individuals “apprehended.” The term apprehended, which is not defined in the bill, encourages law enforcement to engage in pretextual arrests by allowing them to conduct immigration checks of anyone they stop for drunk driving offenses. By using the term “apprehended” and creating no protection against pretextual arrest, law enforcement is incentivized to engage in racial profiling. Similarly, under Secure Communities, where fingerprint checks against immigration databases are run for anyone arrested, regardless of whether the arrests are valid or pretextual in nature, data shows that Latinos are disproportionately targeted.⁷

3) Expanding the Definition of Mandatory Detention in the Immigration and Nationality Act

H.R. 3808 expands the definition of mandatory detention in the Immigration and Nationality Act by increasing its scope to include undocumented individuals apprehended for drunk driving offenses. Mandatory detention without any opportunity for judicial review is a fundamental violation of an individual’s human rights. This expansive amendment to the definition of mandatory detention exacerbates the problem because, as noted above, the use of the term

⁷ See Aarti Kohli, Peter L. Markowitz and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, The Chief Justice Earl Warren Institute on Law and Social Policy, Oct. 2011, available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

“apprehended” allows law enforcement to engage in pretextual arrests and racial profiling. Under this scheme, individuals will be subject to mandatory detention for a mere apprehension without judicial review or an opportunity to challenge constitutional or civil rights violations. Around the country when immigration enforcement programs such as 287(g), Secure Communities and the Criminal Alien Program have gone into effect, Latinos and immigrant communities have been increasingly targeted by law enforcement and subject to racial profiling because the officers know individuals will be subject to immigration consequences. Knowing that individuals will be subject to mandatory detention will likely add to this trend as law enforcement officers will have another incentive to stop Latinos and those perceived to be immigrants – knowing that they will be detained at federal expense. The unimagined consequences to families and children have already played out in places like Alabama and Arizona; H.R. 3808, if enacted, would be an added cause of separating families and children as well as raise numerous legal issues related to detaining individuals without even a cursory adjudication of their cases.

4) Authorizing the Issuance of Federal Detainers by State and Local Law Enforcement Officers

Section 2 of H.R. 3808 also authorizes state and local law enforcement offices to issue federal immigration detainers once they have verified the immigration status of individuals apprehended for drunk driving violations they reasonably believe are aliens. Under the 287(g) program, specified state or local officers are deputized to perform certain immigration functions, including the issuance of detainers. Even allowing 287(g) officers, who have received nominal training in federal immigration policies and even more nominal supervision by the Department of Homeland Security, has proven to be highly problematic. The H.R. 3808 provisions go beyond the discredited 287(g) program by allowing officers without even nominal training and supervision by the Department of Homeland Security to issue detainers. The deprivation of liberty, accomplished by a detainer, cannot be taken lightly and cannot be undertaken by state and local officers who have no training or resources to engage in enforcing immigration law. Under this provision of H.R. 3808 the civil rights violations in 287(g) jurisdictions that have resulted in Department of Justice investigations in places like Maricopa County and Alamance County will grow exponentially.

Because many of the provisions of H.R. 3808 resemble and amplify notorious immigration enforcement practices such as the 287(g) program and state immigration laws, such as Arizona’s S.B. 1070, it envisions a scheme where state and local law enforcement will be heavily engaged in enforcing immigration law and encourages racial profiling and other civil rights violations. Police Chief Chris Burbank of the Salt Lake City Police Department, a witness before you today, stated,

The Secure Communities program combined with misguided state legislation has promoted a shift in local law enforcement’s mission across the country and driven a wedge between the police and the public. The resulting priority adjustment places emphasis upon civil immigration action over community policing and all criminal enforcement. Additionally, the program sets an unhealthy priority for much needed jail space. Individuals are being held for civil immigration purposes, causing criminal

violators to be released. In Salt Lake County, between 700 and 900 criminal offenders are released monthly due to overcrowding. Civil detainees often supersede criminal charges. We in law enforcement must safeguard community trust. Without the support and participation of the neighborhoods in which we serve, we cannot provide adequate public safety and maintain the well being of our nation. I do not believe Secure Communities has positively contributed to the mission of local law enforcement.”⁸

This statement is no less true when applied to efforts such as H.R. 3808 which would expand and entrench the responsibility of state and local law enforcement over civil immigration enforcement. Though the bill intends to address the important social problem of drunk driving, it fails to actually do so and instead, if enacted, would encourage unconstitutional and discriminatory police practices throughout the country.

Recommendations

In sum, H.R. 3808 will lead to widespread profiling by local law enforcement, terrorized communities and increased threats to public safety. The Leadership Conference and RWG strongly urge the Subcommittee to:

- Reject H.R. 3808 because it would encourage unconstitutional and discriminatory police practices;
- Reassert federal authority over national immigration laws and policies and reject the authority of states and localities to enforce these federal responsibilities;
- Underscore the proper role of state and local officials in the enforcement of criminal laws rather than civil immigration enforcement;
- Encourage Congress to pass the End Racial Profiling Act of 2011 (H.R. 3618) instituting a ban on profiling based on race, religion, ethnicity, national origin and gender at the federal, state and local levels; and
- Encourage the Department of Justice to rescind and reissue its legal opinion regarding the inherent authority of state and local law enforcement agencies to enforce immigration law.

Thank you again for this opportunity to express the views of The Leadership Conference and the Rights Working Group. We welcome the opportunity for further dialogue and discussion about these important issues.

⁸ Restoring Community: A National Community Advisory Report on ICE’s Failed ‘Secure Communities’ Program, Aug. 2011, available at <http://uncoverthetruth.org/media/restoring-community-a-national-community-advisory-report-on-ice%E2%80%99s-failed-%E2%80%99Csecure-communities%E2%80%99D-program/>.



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

"H.R. 3808: The Scott Gardner Act"

**Submitted to the House Judiciary Subcommittee
on Immigration Policy and Enforcement**

March 7, 2012

ACLU Washington Legislative Office

Laura W. Murphy, Director
Joanne Lin, Legislative Counsel
Christopher Rickerd

ACLU Immigrants' Rights Project

Judy Rabinovitz
Deputy Director, and
Director of Detention and Federal Enforcement Programs

I. Introduction

The ACLU is a nationwide, non-partisan organization of more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goals. The ACLU submits this statement in opposition to H.R. 3808, which would mandate an unprecedented and harmful expansion of state and local law enforcement agencies' (LEAs) activity in the federal realm of immigration enforcement.

H.R. 3808 would force every state and local police officer in the United States to assume additional responsibilities as an immigration agent, by requiring them to conduct immigration status investigations of aliens, lawful and unlawful, who are "apprehended" for "driving while intoxicated, driving under the influence, or similar violation of State law" (collectively DWI). Without any specialized training, these officers would then be authorized by H.R. 3808 to issue detainers for anyone they determine to be in the United States unlawfully – detainers which would impose not only mandatory immigration custody, but also mandatory pretrial detention for those against whom criminal charges are pursued.

Reducing the incidence of DWI and its often tragic consequences is in everyone's interest. H.R. 3808 would, however, create far more problems than it aims to solve and raises serious constitutional concerns as well. *First* and foremost, H.R. 3808, like other efforts to enlist state and local police to enforce immigration law, would promote **racial profiling** of Hispanics, Latinos and other people of color, eroding community trust in law enforcement and inviting civil rights lawsuits. Indeed, by dispensing with the training that is currently required when local police are authorized to enforce immigration law, and allowing officers to rely on Department of Homeland Security (DHS) databases that have been repeatedly unreliable, the bill would result in racial profiling as well as the arrest and detention of people who are lawfully in the United States, including U.S. citizens.

Second, H.R. 3808 would raise **serious constitutional problems** by mandating immigration custody and pretrial detention of individuals, without the opportunity for a bail hearing, based solely on their "apprehension" for DWI and an untrained officer's determination that they are in the United States without authorization. A person's right to be free from

confinement unless convicted of a crime or subject to a special justification has been recognized by the Supreme Court as fundamental.¹ Although this right is not absolute, its deprivation almost always requires an individualized bail determination.² Under the Constitution, a person charged with DWI is therefore entitled to review of his or her custody. In addition, although the Supreme Court has upheld mandatory immigration custody for crimes deemed particularly serious – based on congressional findings that such individuals posed a particular risk of flight or recidivism³ – no such findings support the expansion of mandatory custody proposed by H.R. 3808.

Finally, H.R. 3808 would **impose unnecessary costs** on state and local governments, which would be required to devote scarce resources to investigating immigration status, with negative consequences for public safety. State and local officers have the challenging, resource-intensive task of combating DWI. They cannot afford the impositions of H.R. 3808 which would trap police on highway shoulders or in front of an office computer investigating immigration status. H.R. 3808 is also unnecessarily costly for the federal government, which must foot the bill for transporting and taking into custody individuals apprehended by local officers, many of whom may be in the United States lawfully or have a legal claim to remain.

For all of these reasons, the ACLU urges the Judiciary Committee to reject H.R. 3808.

II. Overview of H.R. 3808 and its Effects on State and Local DWI Policing

H.R. 3808, if implemented, would cost state and local police innumerable hours of additional work at the expense of their current duties and public safety. It would also charge U.S. taxpayers tens of millions of unnecessary immigration enforcement dollars by expanding federal Department of Homeland Security (DHS) operations irrationally. The bill would be burdensome in five ways:

- For every individual “apprehended” for DWI, the bill mandates that state and local police *query federal government databases for immigration status* if “the officer has reasonable ground to believe that the individual is an alien,” without distinction between aliens lawfully present (such as lawful permanent residents (“green card” holders), authorized workers, students, or tourists) and those without documentation.
- If a database “indicates that the individual is an alien unlawfully present in the United States,” the bill gives LEAs unprecedented and unfettered authority to *issue immigration detainees to*

¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

² *United States v. Salerno*, 481 U.S. 739 (1987).

³ See *Demore v. Kim*, 538 U.S. 510 (2003).

hold the person in custody – a power that currently belongs only to federal immigration officers and other designees of the United States Attorney General.

- The bill grants LEAs new authority to *transport apprehended individuals to DHS, at the federal government's expense*, even if the individual has not been arrested, charged, or convicted of DWI.

- The bill requires federal immigration custody of *all individuals "apprehended" for DWI pending removal proceedings* without individualized consideration.

- The bill provides that detainers apply to pretrial detention of those charged with DWI, thus *depriving individuals of their right to a bail hearing*.

H.R. 3808 shows a striking lack of consultation with the state and local law enforcement officials who have daily responsibility and expertise in deterring and intercepting drunk drivers. A leading law enforcement research group, the Police Executive Research Forum (PERF), has advised that "active involvement in immigration enforcement can complicate local law enforcement agencies' efforts to fulfill their primary missions of investigating and preventing crime."⁴ As Salt Lake City Police Chief Chris Burbank has testified, laws like H.R. 3808 "undermine[] my ability to set law enforcement priorities for my agency because I cannot prohibit the allocation of already scarce resources toward civil immigration enforcement instead of violent crimes and criminal enforcement."⁵ Although H.R. 3808 purports to catch drunk drivers who lack immigration status, the bill proposes a radical overhaul of criminal law enforcement which would have enormously detrimental repercussions for state and local policing as well as federal immigration enforcement.

Enforcement of drunk driving laws is preeminently the domain of state and local law enforcement. As one of the most common and damaging crimes, drunk driving is a top priority for LEAs around the country.⁶ State and local police receive extensive training on enforcement of drunk driving laws, including visual detection techniques and how to administer breathalyzer tests.⁷ H.R. 3808 would enact a sea change in current best practices in state and local DWI prevention. Consider its effects on two standard methods by which police officers detect potential drunk drivers: First, the National Highway Traffic Safety Administration (NHTSA)

⁴ Debra A. Hoffmaster et al. "Police and Immigration: How Chiefs Are Leading their Communities through the Challenges." Police Executive Research Forum (Mar. 2011), xv, available at <http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf>

⁵ Declaration of Chris Burbank, *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-00401-CW (D.Ut.) (May 6, 2011), 6.

⁶ In 2009, more than 1.4 million DWI offenses constituted 10.5% of offenses nationwide. See FBI, Uniform Crime Reporting (UCR) Program (2009), available at <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>

⁷ See, e.g., Ohio Dep't of Public Safety, "OVI Interdiction Handbook," (May 2011), available at <http://ohiopublicsafety.com/links/DPS0011.pdf>; see also NHTSA, Student and Instructor Standardized Field Sobriety Tests.

has published a guide to “24 driving cues” which are “a set of behaviors that can be used by officers to detect motorists who are likely to be driving while impaired.”⁸ Second, state and local police employ checkpoints for DWI detection. Under each of these DWI-prevention regimes, state and local police have a singular focus: keeping roads safe for American families.

DWI patrols and checkpoints depend on a high volume of often brief law enforcement encounters. Mothers Against Drunk Driving emphasizes that at a sobriety checkpoint “[l]aw-abiding people are sent on their way within minutes.”⁹ If a citation is issued by a roving patrol, Chief Burbank notes that for his officers “[t]he process . . . takes less than 10 minutes per stop.”¹⁰ H.R. 3808 would interfere with these procedures. In cases of law-abiding people and persons issued citations, the bill would create an opportunity for state or local police officers to initiate immigration inquiries based on what H.R. 3808 calls “reasonable ground to believe that the individual is an alien,” adding to the duration of stops.

Complementing PERF’s observation that “[a]ttempts to enforce immigration laws may make local police vulnerable to civil rights lawsuits and claims that they are using racial profiling when questioning or arresting people,”¹¹ Chief Burbank explains that inquiries based on “factors that cannot be readily observed, such as [a Utah law’s proposed] ‘reasonable cause to believe that the person is an alien’ . . . would allow for arrest based solely on violations of civil immigration law rather than criminal law. These provisions invite racial profiling and expand the power to arrest in dangerous ways.” He adds that involving state and local police in direct immigration enforcement would “dramatically prolong detention duration because immigration status is not something that can be easily and expeditiously verified in the field. *Law enforcement officers in the field do not have access to a database containing information about an individual’s immigration status.* Therefore, an officer’s only option to verify immigration status will be to contact [ICE] directly and wait for verification or book individuals unnecessarily into jail.”¹²

ICE stated in 2010 with respect to its database center, the Law Enforcement Support Center (LESC), that “the average [immigration status] query waits for approximately 70 minutes before a Law Enforcement Specialist is available to work on the request. On average, it takes an additional 11 minutes per query to research DHS data systems and to provide the written alien

⁸ See U.S. National Highway Traffic Safety Administration (NHTSA), “The Visual Detection of DWI Motorists.” (Mar. 2010), available at <http://www.nhtsa.gov/staticfiles/nti/pdf/808677.pdf>

⁹ MADD, “Sobriety Checkpoints.” (Apr. 2011), available at http://www.madd.org/laws/law-overview/Sobriety_Checkpoints_Overview.pdf

¹⁰ Declaration of Chris Burbank, *supra*, 4.

¹¹ Hoffmaster et al., *supra*, at xix.

¹² Burbank, *supra*, at 3-4 (emphasis added).

status determination.”¹³ This hour-and-a-half per query will also apply under H.R. 3808 to lawful permanent residents and U.S. citizens “apprehended” for DWI who are “reasonably believed” to be aliens, an elastic definition that could easily be extended to cover the vast majority of American who do not carry proof of citizenship. ICE itself has criticized these submissions because “an increase in the number of U.S. citizens and lawful permanent residents being queried through the LESC . . . reduc[es] our ability to provide timely responses to law enforcement on serious criminal aliens.” In the context of only one state’s potential to increase the number of queries sent to ICE, the agency warned that if Arizona required its officers to check immigration status in the manner proposed by H.R. 3808, that:

will delay response times for all [queries] and risks exceeding the capacity of the LESC to respond to higher priority requests for criminal alien status determinations from law enforcement partners nationwide. Furthermore, the potential increase in queries by Arizona along with the possibility of other states adopting similar legislation could overwhelm the system. If the LESC’s capacity to respond to requests for assistance is exceeded, the initial impact would be delays in responding to time-sensitive inquiries from state, local, and federal law enforcement, meaning that very serious violators may well escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the illegal alien they have encountered. If delays continue to increase at the LESC, ICE might have to divert personnel from other critical missions to serve the needs of our law enforcement partners. The LESC directly supports both the public safety and national security missions of DHS. These are critical missions which cannot be allowed to fail.¹⁴

To approximate the scale of the added burdens H.R. 3808 would place on the LESC, compare the number of queries sent in FY 2011, 1,278,219,¹⁵ to the number of drunk driving *convictions* – a subset of arrests and the even more numerous category of “apprehensions” – which totaled 1.4 million in 2009. For at least tens of thousands of those 1.4 million people officers could have had a “reasonable ground to believe that the individual is an alien,” triggering a LESC inquiry.

H.R. 3808 undermines efficient procedures even for those who are arrested rather than merely “apprehended.” As is well-known, the ACLU opposes ICE’s Secure Communities (S-

¹³ Declaration of David C. Palmatier, Unit Chief, Law Enforcement Support Center, in *United States v. Arizona* (2010), available at <http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf>

¹⁴ *Id.*

¹⁵ Declaration of William M. Griffen, Acting Unit Chief, Law Enforcement Support Center, in *United States v. South Carolina* (2011) (also containing the 81-minute waiting period figure).

Comm) enforcement program.¹⁶ In the present context, however, H.R. 3808 would wrongly create duplication and redundancy in jurisdictions where S-Comm is active, now close to 75% of the country with the remainder to be added by next year.¹⁷ A person who is arrested will already be brought to Immigration and Customs Enforcement's (ICE) attention through S-Comm. Under S-Comm, any time an individual is arrested and booked into a local jail for any reason, his or her fingerprints are electronically run through ICE's database. The fingerprints allow ICE to identify people in state or local custody, issue a federal immigration detainer that allows for continued custody of them, and initiate deportation proceedings if ICE believes they may be removable.

ICE describes S-Comm as "impos[ing] no new or additional requirements on state and local law enforcement . . . [T]he federal government, not the state or local law enforcement agency, determines what immigration enforcement action, if any, is appropriate. Only federal DHS officers make immigration enforcement decisions, and they only do so after an individual is arrested for a criminal violation of state law, separate and apart from any violations of immigration law."¹⁸ Under H.R. 3808, however, anyone arrested for DWI and suspected of being an alien would be run *twice* through ICE's databases, once by the state and local police, then again via S-Comm. This duplication would unnecessarily detract from LEAs' limited police resources.

In sum, H.R. 3808 would burden and interfere with state and local DWI policing practices. Police officers burdened by the bill's requirement to conduct immigration status checks would inspect and stop fewer motorists. Those encountered, however, would be rendered susceptible to racial profiling by officers eager to exercise their new, unsupervised immigration enforcement authority without even needing to make an arrest.

III. H.R. 3808 would require untrained state and local police officers to assume the role of federal immigration agents and detain persons on that basis. State and local participation in immigration enforcement guarantees an increase in racial profiling and damage to community trust in police, particularly in Hispanic and Latino communities.

a. H.R. 3808 improperly dispenses with federal immigration enforcement oversight and training for state and local police.

¹⁶ See, e.g., ACLU Statement to the House Judiciary Subcommittee on Immigration Policy and Enforcement for a Hearing on "Is Secure Communities Keeping Our Communities Secure?" (Nov. 30, 2011).

¹⁷ ICE, Secure Communities Activated Jurisdictions (Jan. 31, 2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>

¹⁸ DHS FY 2013 Budget Justification, 1092, available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf>

H.R. 3808 would require state and local LEAs to exercise unprecedentedly autonomous immigration enforcement functions outside the scope of Immigration and Nationality Act section 287(g), which permits ICE to partner with state and local jurisdictions under strict conditions. 287(g) agreements contain baseline requirements that, before state and local police exercise immigration enforcement authority, they must undergo specialized training. According to ICE, deputized state and local police under 287(g) participate in “a four-week training program The training includes coursework in immigration law, how to use ICE databases, multi-cultural communication and the avoidance of racial profiling.”¹⁹ 287(g) requires that “[i]n performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.”²⁰

There are good reasons for requiring federal training and oversight of local police who take on immigration enforcement functions, including the documented record of civil rights abuses by state and local police engaged in these efforts across the country.²¹ Yet H.R. 3808 eliminates any requirement that state and local police receive specialized training, and contains no oversight mechanisms. Indeed, were H.R. 3808 to become law, on that very day, every officer of the Maricopa County Sheriff’s Office (MCSO) would be required to exercise immigration enforcement functions, despite: (i) a complete lack of training and (ii) the federal government’s decision, based on a Department of Justice (DOJ) investigation, that MCSO is unfit to play any role in immigration enforcement. H.R. 3808’s return of immigration enforcement powers to Sheriff Joe Arpaio would overrule DOJ’s conclusion that MCSO’s actions toward Latinos demonstrate “a pattern or practice of misconduct that violates the Constitution and federal law,”²² as well as DHS’s belated determination that MCSO can be trusted with neither S-Comm nor 287(g) partnership agreements.²³

Every state and local police department would be conscripted and deputized in the cause of roving immigration enforcement under H.R. 3808. That includes all LEAs that have been or are being investigated by DOJ’s Civil Rights Division (CRT) for discriminatory policing targeting Latinos and other people of color. For example, the DOJ CRT earlier this year

¹⁹ ICE, “Fact Sheet: Updated Facts on ICE’s 287(g) Program.” (undated), available at <http://www.ice.gov/news/library/factsheets/287g-reform.htm>; see also ICE, “Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act.” (Sept. 2, 2011) (287(g) officers must undergo a background investigation, possess at least one year of experience, and have no disciplinary actions pending), available at <http://www.ice.gov/news/library/factsheets/287g.htm>

²⁰ 8 U.S.C. § 1357(g).

²¹ See, e.g., ACLU Statement to the House Homeland Security Committee for a Hearing on “Examining 287(g): The Role of State and Local Enforcement in Immigration Law.” (Mar. 4, 2009).

²² See U.S. DOJ, Civil Rights Division, Findings Letter re: United States’ Investigation of the Maricopa County Sheriff’s Office (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf

²³ Mark Rockwell, “DHS pulls Maricopa County agreement, access to Secure Communities.” Government Security News (Dec. 15, 2011).

announced, following a comprehensive investigation, that the New Orleans Police Department (NOPD) has engaged in patterns of misconduct that violate the Constitution and federal statutes. The DOJ report documented multiple instances of Latinos being stopped by NOPD officers for unknown reasons and then questioned about immigration status. Members of the New Orleans Latino community told DOJ that Latino drivers are pulled over at a higher rate than other drivers because officers assume from physical appearance that they are undocumented.²⁴ H.R. 3808 would legitimize NOPD's practices by according its officers unsupervised immigration arrest and detention authority. Similarly, the effects of DOJ's investigation of the Suffolk County Police Department (SCPD), which culminated in a September 2011 letter finding in part that SCPD was improperly using roadblocks in Latino communities,²⁵ would be nullified by H.R. 3808's encouragement of officers to use their own untrained judgment to determine who "is an alien."

In East Haven, Connecticut, where four officers were recently indicted because they, *inter alia*, "stopped and detained people, particularly immigrants, without reason, federal prosecutors said, sometimes slapping, hitting or kicking them when they were handcuffed, and once smashing a man's head into a wall,"²⁶ a Yale University study found that 56 percent of all traffic tickets issued by the police department in 2008-09 were to Hispanic drivers, although Hispanics comprise only 5.8 percent of East Haven residents.²⁷ H.R. 3808 would empower rogue officers and departments like East Haven's to target immigrant communities pretextually and engage in biased policing with impunity, regardless of DOJ oversight.

Alamance County, North Carolina, Sheriff Terry Johnson's belief that immigrants are more prone to commit crimes than legal residents because "[t]heir values are a lot different – their morals – than what we have here They do a lot of drinking down in Mexico"²⁸ is not only empirically false²⁹ but also exemplifies why LEAs must not be involved in immigration enforcement. Drunk driving is by no means a problem limited to Hispanic and Latino communities, but those residents, including U.S. citizens and lawful permanent residents who are never deportable for DWI – as well as others perceived to look or sound "foreign" – would be singled out for investigation and, in many cases, unlawful detention under H.R. 3808.

²⁴ DOJ CRT, "Investigation of the New Orleans Police Department," Mar. 16, 2011, 63, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf

²⁵ DOJ CRT, Suffolk County Police Department Technical Assistance Letter (Sept. 13, 2011), available at http://www.justice.gov/crt/about/spl/documents/suffolkPD_TA_9-13-11.pdf

²⁶ Peter Applebome, "Police Gang Tyrannized Latinos, Indictment Says," New York Times (Jan. 24, 2012).

²⁷ Rights Working Group, *FACES OF RACIAL PROFILING: A Report from Communities Across America* (2010), 10, available at <http://rightsworkinggroup.org/sites/default/files/ReportText.pdf>

²⁸ Kristin Collins, "Sheriffs help feds deport illegal aliens," News & Observer (Apr. 22, 2007).

²⁹ See, e.g., Kathleen Kingbury, "Immigration: No Correlation with Crime," Time (Feb. 27, 2008).

These concerns are compounded by the fact that ICE's databases at its LESC—on which state and local law enforcement officers must in part rely under H.R. 3808's troublingly vague reference to “the databases of the Federal Government, including the National Criminal Information Center and the Law Enforcement Support Center” — are notoriously unreliable. The LESC itself acknowledges that “the LESC's responses to [queries] do not always provide a definitive answer as to an alien's immigration status, particularly in cases where the alien has not been previously encountered by DHS. Moreover, a U.S. citizen, when queried through the LESC, would likely be returned with a ‘no match’ response. Many—if not most—U.S. citizens have no records contained in the databases available to the LESC. *Experience has demonstrated that some police officers are confused when they receive a ‘no match’ response and sometimes want to detain the suspected illegal alien (actually a U.S. citizen)* until they can resubmit the request with additional information to the LESC or contact their local ICE field office to confirm the subject's immigration status.”³⁰

We know that U.S. citizens and others lawfully in the country are illegally detained and deported. Jakadrien Turner, an African American U.S. citizen from Dallas who was reported missing in 2010 at age fourteen, made national and international news when her family discovered that ICE deported her to Colombia. Turner spoke no Spanish and possessed no Colombian ID prior to her deportation.³¹ ICE has detained more than 2 million people since 2003. Extrapolating from her research, Professor Jacqueline Stevens estimates that across the United States ICE in the last decade may have incarcerated “over 20,000 U.S. citizens and deported thousands more.”³² H.R. 3808 will increase the frequency of these mistakes by making untrained state and local law enforcement officers the front line for immigration status inquiries initiated based on biases inherent in hunches, stereotypes, and prejudice.

b. In setting as a standard for immigration status investigations any state or local law enforcement officer's “reasonable ground to believe that the individual is an alien,” H.R. 3808 would enact the same poisonous invitation to racial profiling contained in state laws such as Arizona's SB 1070 and Alabama's HB 56.

The experience of states which have enacted laws containing standards like H.R. 3808's “reasonable ground to believe that the individual is an alien” shows that racial profiling is inseparable from such open-ended immigration status inquiries. In Arizona, for example, SB 1070 did not go into effect but nevertheless fortified already-existing biased police practices. Jim Shee, a plaintiff in the case brought by the ACLU and allied organizations to enjoin SB

³⁰ Griffen Declaration, *supra*.

³¹ “Runaway US girl Jakadrien Turner deported to Columbia,” BBC News (Jan. 5, 2012), available at <http://www.bbc.co.uk/news/world-us-canada-16436780>

³² Jacqueline Stevens, “U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens,” 2011 VA. J. Soc. POL'Y & L. 606, 619-30, available at <http://www.jacquelinestevens.org/StevensVSP18.32011.pdf>

1070, is an elderly resident of Litchfield Park, Arizona, a U.S. citizen of Spanish and Chinese descent who has lived in Arizona his entire life. In April 2010, Shee was stopped twice by Arizona police and asked to produce identification documents, with no resulting citations. In the lawsuit, Shee expressed his fear that SB 1070 would lead to his detention because he would be unable to prove that he is a U.S. citizen without carrying his passport around.

In Albertville, Alabama, a centre of the state's Latino community, racial profiling was also taking place before HB 56 gave it a patina of legitimacy. Local grocery store owner Jose Contreras described a police checkpoint as "a nuisance to our community for the last two years, but since HB 56, I've heard of many more incidents of police detaining and sometimes deporting immigrants, about three to four accounts a week."³³ Under H.R. 3808, these police practices would be validated and encouraged.

San Francisco District Attorney George Gascón has 32 years of law enforcement experience, including leadership positions in the Los Angeles, Mesa, Arizona, and San Francisco police departments. He emphasizes in sworn testimony on Alabama's HB 56 that "[a]n officer motivated by race or ethnicity can easily find a valid pretext for encountering an individual . . . by following a car until a minor traffic violation occurs." As discussed above, DWI prevention depends in large part on observing traffic violations as visual detection indicators, a procedure which can easily be abused to cloak racial profiling. Pretextual exploitation by police can also result from undocumented immigrants' inability in 48 states to obtain a driver's license. Gascón concludes that:

[T]he immigration status check provisions of HB 56 cannot be enforced in a race-neutral manner. When police officers attempt to determine whether an individual they encounter on patrol is in the United States without federal immigration status . . . they will inevitably rely upon race and ethnicity as factors in establishing reasonable suspicion As a practical matter, short of directly observing an individual actually crossing the border in a surreptitious way . . . , there are not reliable indicia that would give rise to a reasonable suspicion to believe that a person is unlawfully present in the United States.³⁴

Involving state and local police in immigration enforcement as H.R. 3808 does is diametrically opposed to the expert opinions of law enforcement leaders for other reasons as well, notably the erosion of community trust. The law enforcement think tank PERF cautions against state and local police participation in immigration enforcement because "[m]ost police

³³ Ed Pilkington, "The grim reality of life under Alabama's brutal immigration law," *The Guardian* (Oct. 14, 2011).

³⁴ Declaration of George Gascón, *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-cv-02484-SLB (N.D. Ala.) (July 21, 2011), 4-5.

chiefs see this as a fundamental question of the trust they have built up over the years with their communities. They recognize that much is at stake, including the willingness of a crime victim to report the crime, the willingness of a witness to step forward and provide information, and the continued support of the community.”³⁵

Knowing that even “apprehension” for a DWI offense can result in mandatory immigration custody and likely deportation, some bar employees and patrons – documented and undocumented – will, for example, hesitate to cooperate with law enforcement, thereby damaging public safety. This avoidable trust deficit is why the Police Foundation research center reported that many law enforcement leaders believe that “immigration enforcement by local police undermines their core public safety mission, diverts scarce resources, increases their exposure to liability and litigation and exacerbates fear in communities already distrustful of police.”³⁶ H.R. 3808’s unfunded mandate that state and local LEAs use their resources – time and money – in furtherance of federal immigration enforcement shows a disturbing inattention to what local communities have determined to be best practices for maximizing their public safety.

IV. H.R. 3808 raises serious constitutional problems by mandating immigration custody and pretrial detention without any individualized consideration.

As the Supreme Court has repeatedly recognized, “freedom from physical restraint” is a fundamental right, with imprisonment the carefully limited exception.³⁷ In the criminal context, imprisonment without conviction is limited to those circumstances where there has been an individualized showing of danger or flight risk. Thus, with only rare exceptions, individuals who are subject to pretrial detention are entitled to bail hearings, and to release on bail if they pose no danger or flight risk.³⁸

The only exceptions to this rule are extreme cases where it is determined that a particular defendant clearly presents such a high degree of flight risk that, it can reasonably be concluded, no set of conditions imposed on pretrial release would provide reasonable assurance of his or her appearance. In those limited circumstances, it may be permissible to deny pretrial release on bail altogether. Similarly, as held by the Supreme Court in *United States v. Salerno*,³⁹ if it is determined by clear and convincing evidence that a particular defendant presents a demonstrable danger to an individual or the community, the individual may be detained before trial without bail. The Supreme Court has never, however, upheld a statute imposing criminal pretrial

³⁵ Hoffmaster et al., *supra* at 65.

³⁶ Mary Malina (ed.), “The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties.” (Police Foundation, Apr. 2009); see also “Law Enforcement Leaders to Discuss How Local Immigration Enforcement Challenges Public Safety Mission.” (May 20, 2009), available at <http://www.policefoundation.org/pdf/strikingRelease.pdf>

³⁷ See, e.g., *Salerno*, 481 U.S. at 755.

³⁸ *Id.*; see also *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”).

³⁹ 481 U.S. 739.

detention without an individualized determination regarding flight risk or dangerousness. Numerous federal (and state) courts have held or opined that such laws violate due process and/or the Eighth Amendment, with limited exceptions (e.g., capital defendants) that would not apply in the case of charged DWI offenses.

H.R. 3808 violates this rule, unconstitutionally eliminating bond hearings entirely for individuals who are “apprehended” and charged with DWI, merely because a local police officer, without specialized training, has determined that a database check “indicates” they are unlawfully in the United States. Moreover, H.R. 3808 mandates pretrial detention without affording the defendant any opportunity to rebut the charge of being “unlawfully present.”

Mandatory immigration custody of individuals “apprehended” for DWI – as proposed by H.R. 3808 – also raises serious constitutional problems. While the Supreme Court in *Demore v. Kim*⁴⁰ upheld mandatory immigration custody for noncitizens convicted of certain crimes that were deemed to be particularly serious, this was based in large part on the record before Congress showing that such individuals posed a special risk of flight or recidivism. No such record is currently before the Judiciary Committee showing that individuals apprehended for DWI pose such a serious risk of flight or danger as to justify categorical custodial measures without any individualized determination. Nor does this make sense from a policy perspective.

V. H.R. 3808 would waste taxpayer money by requiring transportation and federal immigration custody of a vast number of people “apprehended” for DWI. It also ignores the fact that many arrested immigrants can effectively be supervised without the high financial and other costs of incarceration.

In requiring the investigation for immigration status, and potential detention, of individuals “apprehended” for DWI, H.R. 3808 does not define “apprehension.” Nor does it explain what legal authority exists for a state or local police officer to detain an individual who has not been arrested, based on mere suspicion of unauthorized immigration status. Federal immigration detainers, which authorize temporary custody of a person upon ICE’s request, may not be issued by state or local police who are not deputized “immigration officers.”⁴¹ Moreover, ICE’s currently effective policy precludes detention based on “apprehension” by a state or local LEA alone: “Immigration officers shall not issue a detainer unless an LEA has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e., roadside or *Terry* stops) but not arrested.”⁴² By exposing individuals “apprehended” by state or local police but never charged for a criminal offense to newly mandatory federal immigration custody, H.R. 3808 would not

⁴⁰ 538 U.S. 510.

⁴¹ See 8 C.F.R. § 287.7(b).

⁴² U.S. ICE, Interim Policy 10074.1: Detainers (Aug. 2, 2010), at 4.1 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

only strip them of their day in court to prove their innocence, but also vastly expand the number of people required to be in federal immigration custody.

This expansion comes at a steep price, as detention costs range from \$122 to \$166 per person per day.⁴³ By making immigration custody mandatory for all specified “apprehended” individuals, H.R. 3808 would add a great number of new detainees, and may hinder ICE from using effective alternative supervision methods. These cost from 30 cents to \$14 per person per day and avoid the unnecessary detention of persons who are neither a flight risk nor a danger to the community,⁴⁴ a category including DREAM-eligible students who came to the United States as children and long-time residents with U.S. citizen children and other family members.

DHS affirms that detention alternatives (ATDs) are “a cost-effective alternative to secure detention of aliens in removal proceedings. ATD is integral to ICE’s detention and removal strategies, as a cost-effective alternative for aliens who do not pose a risk to public safety, a flight risk, or are otherwise not suitable for detention at a secure facility.”⁴⁵ In the current fiscal year, ICE will spend more than \$2 billion on its detention operations.⁴⁶ H.R. 3808 would add to these costs unnecessarily – in addition to reimbursing states and localities for their transport of detainees – and impose harsh conditions on immigrants without attention to individual circumstances, such as when a case presents a valid claim to remain in the United States.

In its across-the-board custody mandate, H.R. 3808 makes no distinction between a first-time offender who was not even driving his or her vehicle (DWI convictions can result from being passed out in a parked car) and the repeat offenders whose crimes are used to illustrate why H.R. 3808 is needed. For example, the man convicted of Scott Gardner’s tragic death – from which H.R. 3808 draws its name – had a criminal record of “five driving while impaired charges in five years, including one previous head-on collision.” Those aggravated circumstances explain why the *Charlotte Observer* editorialized that “[a] series of oversights in the state’s justice system put a man with a record of drinking behind the wheel too many times,” adding the newspaper’s opposition to a prior version of H.R. 3808 because “holes in North Carolina’s justice system put many people with a record of drinking and driving back behind the wheel. Demanding that local police officers enforce immigration laws will not fix those problems.”⁴⁷

⁴³ National Immigration Forum, *The Math of Immigration Detention*, (Aug. 2011), 1, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>

⁴⁴ *Id.*

⁴⁵ DHS FY 2012 Budget Justification, 940, available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>

⁴⁶ DHS FY 2013 Budget Justification, *supra*, at 66.

⁴⁷ “Time to sober up: N.C. laws are meaningless if courts can’t make them stick.” *Charlotte Observer* (Aug. 3, 2005) (emphasis added); “Passing the Buck: Local, State Officers Can’t Effectively Police Immigration.” *Charlotte Observer* (Sept. 9, 2005).

VI. Conclusion

H.R. 3808 is unconstitutional and bad policy. Congress should never legislate in a manner that singles out a group, here Latinos and others perceived to look or sound “foreign,” for racial profiling. The massive burdens on state and local police and vast added federal immigration detention expenditure inherent in the bill present a profligate and scattershot approach to actual reduction of DWI offenses. The ACLU urges the Judiciary Committee to take this unconstitutional, wasteful, and unnecessary bill no further.



Testimony of the American Immigration Lawyers Association

Submitted to the Subcommittee on Immigration Policy and Enforcement of the
Committee on the Judiciary of the U.S. House of Representatives

Hearing on March 7, 2012
"H.R. 3808, the Scott Gardner Act"

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The American Immigration Lawyers Association (AILA) offers the following testimony to the Subcommittee on Immigration Policy and Enforcement regarding the Scott Gardner Act, H.R. 3808. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 11,000 attorney and law professor members.

Driving while under the influence (DUI) is an important public safety issue that deserves thoughtful and comprehensive response by Congress and law enforcement agencies nationwide. The Scott Gardner Act, however, is the wrong tool to address this problem. This bill would force state or local law enforcement agencies (LLEA) to engage in significant additional activities without federal reimbursement—this constitutes an unfunded mandate and a violation of the 10th Amendment. By compelling states and localities to engage in immigration enforcement, the bill would also foster abuse and racial profiling by police officers and undermine the community trust in local law enforcement. As a result, H.R. 3808 would compromise public safety rather than strengthen it.

Furthermore, H.R. 3808 would result in the detention of large numbers of people who have never been convicted of a crime and do not need to be held in custody to ensure public safety. This bill would take away the authority from federal immigration officers and judges who should be making the individualized determinations about whether to keep someone in custody or release them. In effect, H.R. 3808 would impose huge costs unnecessarily on federal taxpayers because it mandates custody across the board. In so doing, it would mandate into ICE custody individuals who have families that depend on them or other compelling equities in their favor and who may be eligible for relief under immigration law.

What is H.R. 3808? This bill would mandate U.S. Immigration Customs and Enforcement (ICE) to take into custody anyone who is merely "apprehended" for a DUI charge while unlawfully present in the U.S. ICE interprets the federal law mandating custody (8 U.S.C. § 1226(c)) as requiring jail-like detention. Under H.R. 3808, when a state or local law enforcement officer apprehends someone for DUI and has "reasonable ground to believe that the individual is an alien," that officer would have to verify whether that person is unlawfully present through federal law

enforcement databases. The bill would authorize the LLEA to issue a federal detainer to keep the person in custody and to transport the person to federal custody. It reimburses LLEAs for transport costs only. Finally, H.R. 3808 would require the Department of Homeland Security (DHS) to prioritize the removal of these individuals. This last provision duplicates what is already a clear enforcement priority of ICE to remove DUI offenders.¹

H.R. 3808 misuses local public safety resources and imposes an unfunded mandate on states. DUI arrests constitute more than one in ten of all law enforcement arrests nationwide and total over 1.4 million arrests annually. Under H.R. 3808, police officers and sheriffs would be drawn away from their primary duty to ensure public safety in order to verify the immigration status of the many people being arrested for DUI. A police officer who has stopped someone for drunk driving should be concerned primarily with evaluating whether the person is a danger on the road and needs to be taken off streets, not with making a legal determination of alienage.

While making a traffic stop, police and sheriffs do not have access to databases containing information about an individual's immigration status. Under H.R. 3808, the officer would have to contact ICE and have ICE run the person through the federal database. During the time ICE checks the database the officer will either have to detain that person or book them into jail. H.R. 3808 would result in thousands of people being held by the roadside or taken to jail while the checks are being run. All the time officers spend on these checks would be time diverted from other public safety priorities. For example, local law enforcement who are running sobriety checkpoints on large numbers of individuals would experience enormous delays if they had to confirm immigration status while stopping large numbers of vehicles.

Moreover, the cost of training state and local personnel and verifying the immigration status of arrestees would place a substantial burden on state and local resources. None of these costs would be reimbursed by the federal government, despite the fact that H.R. 3808 mandates them. In this regard, H.R. 3808 is almost certainly in violation of the 10th Amendment to the Constitution and its prohibition against the federal government commandeering state or local participation to enforce federal law. In 1997, the Supreme Court struck down a federal handgun law as a 10th Amendment violation because it compelled state and local law enforcement officials to conduct background checks on persons attempting to purchase handguns. *Printz v. United States*, 521 U.S. 898 (1997). H.R. 3808 would similarly require LLEAs to conduct checks on the immigration status of DUI arrestees without reimbursing states for the costs.

H.R. 3808 would cause the unnecessary detention of people who pose no public safety threat. Mandatory custody laws take the authority away from federal law enforcement officials to make the important determination as to whether an individual should be released or kept in custody. Typically, ICE agents or a judge decide whether to detain someone based on a variety of factors that indicate the risk that the individual poses to public safety and the likelihood that he or she will appear for court.

¹ See November 17, 2011 ICE memorandum, "Guidance to ICE Attorneys Reviewing Cases before EOIR," available at www.afla.org/pd.

H.R. 3808 is a blunt instrument that would mandate custody even if someone posed little or no threat to public safety. H.R. 3808 does not require that a person has been convicted for DUI to be subject to mandatory custody. The bill would cover all those who are “apprehended” for DUI. Furthermore, the bill treats someone with just a single apprehension the same as a DUI offender with multiple convictions. The man convicted of killing Scott Gardner, for whom H.R. 3808 is named, had a criminal record of five DUIs including one incident that was a head-on collision. By making no distinction between those who have been apprehended or convicted or who are repeat recidivists, the bill casts too wide a net.

H.R. 3808 would waste federal resources. In many cases ICE will not detain someone in immigration removal proceedings because he or she poses neither a threat to public safety nor a flight risk. In such cases, ICE may release the individual or require a bond, intensive supervision, or ankle monitors that use GPS-technology. These alternative methods cost less than a dime for each dollar spent on jails.

Under H.R. 3808, federal taxpayers would bear substantial costs for the jailing of individuals until their cases are decided. Currently about \$2 billion is spent annually on immigration detention. This covers the cost of maintaining about 33,000 detention beds and detaining about 400,000 people annually. If H.R. 3808 became law, it would result in the detention of thousands of people and increase costs by tens of millions of dollars.

H.R. 3808 would force ICE to take custody of victims of crime, trafficking, or persecution and others who have compelling cases or personal circumstances. Under H.R. 3808, ICE would be compelled to take custody of someone no matter the specific circumstances involved or factors showing the person poses no risk to public safety. ICE would not be able to take into account favorable factors such as whether someone is a caregiver of young children or other dependents. ICE could not consider if the person has a clean record and no previous arrests for DUI or any other crime. As a result, H.R. 3808 would cause hardship for many people who are eligible for relief under immigration law, including asylum seekers and applicants for visas to protect victims of human trafficking or serious crimes. Moreover, those who are detained are much less likely to obtain relief.

When Emilia G was a child living in Mexico, she was sexually abused by her mother’s boyfriend. She married at the age of 17, and during their marriage her husband beat and raped her repeatedly. In 1997, Emilia came to the U.S. illegally to join her husband who had come earlier. The beatings and sexual abuse continued until they separated in 2004. Emilia began a relationship with another man. That relationship ended when he returned to Mexico a year later. After his departure, Emilia discovered she was pregnant with his child. She gave birth to their daughter in 2007 and now bears the sole responsibility of raising their daughter.

In 2008, Emilia G was violently raped while returning home late at night from her job at a restaurant. The man forced her out of her car and raped her while her one-year-old girl was in the car. As a victim of a serious crime, Emilia is eligible to apply for a U visa. She testified at his trial. The prosecutor supported her

application and wrote a letter on her behalf. Emilia's case for U visa is exceptionally strong. Emilia also has a conviction for driving while intoxicated. She has no other criminal background.

If Emilia G were apprehended for DUI after H.R. 3808 became law, ICE would have no choice but to take her into custody until her U visa is granted. While Emilia is in detention, it would be a severe hardship—and perhaps an impossible task—for her to provide and care for her daughter who is now four years-old. Mandatory custody would likely result in her child being placed in the child welfare system. Emilia's case for a U visa would also be in jeopardy while she is in detention for the sole reason that people who have strong cases for relief frequently give up because they simply cannot endure being jailed.

The mandatory custody required under H.R. 3808 would result in severe punishment that is grossly out of proportion for many people, especially those with a single DUI arrest like Emilia who have compelling factors that speak in favor of their release. The ability to make judgments about custody and release should remain with ICE officers and immigration judges.

H.R. 3808 will foster abuses by local law enforcement officers and undermine public safety. Under H.R. 3808's terms, if an officer has "reasonable ground to believe that the individual is an alien," the officer must verify that person's immigration status. In this regard the bill suffers from the same fundamental problem as Arizona's immigration enforcement law, S.B. 1070, which is now being challenged before the Supreme Court. Both operate on the premise that state and local law enforcement officials will identify and confirm an individual's immigration status. Arizona's S.B. 1070 requires officers to determine the immigration status of any individual who is stopped or detained if there is "reasonable suspicion that the person is an alien" and "unlawfully present in the United States."

H.R. 3808 will encourage abuse and racial profiling by law enforcement officers. Alienage is a legal status. Whether a person is an alien is not a determination that can be readily made based on observable factors or traits, such as physical appearance or behaviors. As a result, H.R. 3808 will create incentives for officers to use proxies such as race, ethnicity, language, or accent to identify people who are unlawfully present. Such practices are precisely what local officials complain are undermining the community's trust of law enforcement and, as a result, the ability of LLEAs to ensure public safety and to investigate crimes.

In August 2011, AILA released a report entitled, "Immigration Enforcement Off Target: Minor Offenses with Major Consequences,"² that showcased dozens of examples of racial profiling and disturbing police practices. In these cases, local law enforcement had detained individuals at the roadside or booked them even though the individual had committed only minor offenses or no offense at all, presented no public safety or security risk, and had no criminal background. The targeting of people who look foreign by the police is a recognized problem that needs to be stopped not encouraged. H.R. 3808 would only compound a problem that already exists and give additional motivation for police to detain people using biased assumptions of who is unlawfully present.

² Available at www.aila.org.

In conclusion, AILA recommends that the subcommittee reject H.R.3808 as a poor solution to an important problem. H.R. 3808 would misuse finite law enforcement resources and place tremendous burdens on states, localities, and federal taxpayers. Moreover, it would sweep so many people unnecessarily into detention causing tremendous harm and hardship.

For follow-up, contact Gregory Chen, Director of Advocacy, 202/507-7615, gchen@aila.org.

The Honorable Elton Gallegly
Chair, Subcommittee on Immigration Policy and Enforcement
U.S. House of Representatives

The Honorable Zoe Lofgren
Ranking Member, Subcommittee on Immigration Policy and Enforcement
U.S. House of Representatives

March 6, 2012

We write to express our alarm and concern about H.R. 3808, “The Scott Gardner Act.” H.R. 3808 forces police officers to consult immigration and police databases to verify if a person is an “alien” during an “apprehension” for driving while intoxicated or under the influence, authorizes the same police officers to issue immigration detainer requests and escort individuals to federal detention centers. Moreover, it subjects those individuals to mandatory pretrial detention without the possibility of an individualized bond hearing.

As organizations that advocate for survivors of domestic violence and sexual assault, we urge the Judiciary Committee to reject H.R. 3808. We oppose laws that would force police to be effectively transformed into immigration agents, further undermine relationships between the police and our communities, and drastically expand mandatory federal immigration custody that hurts families.

Already, immigrant communities are fearful of and have had complicated relationships with state and local law enforcement. We are now in a time of unprecedented entanglement of the criminal justice system with federal immigration enforcement. Recent ICE deportation programs have compromised public safety, leading our communities to be even more resistant to reporting crimes or cooperating in criminal investigations. Immigrant domestic violence and sexual assault survivors are particularly afraid to report the crimes they have suffered – especially since perpetrators often use immigration status as a tool of power and control over their victims – which also has led them to be fearful of seeking any services altogether. H.R. 3808 would exacerbate these problems by changing the role of a police officer to that of an immigration agent.

H.R. 3808 and similar efforts would further undermine survivors’ trust in us as advocates for their best interests. Over the last decade, we have shared with our constituents the possibility that working with law enforcement can help undocumented survivors get to a place of greater recovery and independence by potentially securing a temporary status (the U visa for crime victims). But recent developments have demonstrated that this approach is no longer safe. Under H.R. 3808, the same survivors who approach law enforcement to report crimes would be even more vulnerable to detention by local police who may believe they are simply doing “the right thing” by using their new-found authority to engage in immigration enforcement functions. Under this bill, we fear women would remain in situations of violence, threatening the well-being of their children, themselves and the larger community.

State and local police should also not be forced to take on additional federal responsibilities that fall outside their purview, without any specialized training, that in fact undermine their work to protect communities. Immigration status determinations are enormously complex

and resource-intensive, which is why many police departments have chosen not to engage in immigration enforcement. Moreover, authorizing police officers to conduct status inquiries and escort suspected noncitizens to federal detention centers diverts critical and scarce resources from police departments that, instead, could be used to focus on more appropriate ways to address crime. We believe the Judiciary Committee should be very concerned about expanding the power to issue immigration detainers to local police officers, especially since their misuse is becoming more known and criticized.

For both immigrant and of color populations in general and survivors of domestic violence and sexual assault in particular, H.R. 3808 would violate civil rights by encouraging racial profiling. With provisions eerily similar to enjoined provisions in Arizona's S.B. 1070 law, H.R. 3808 would perpetuate problems we have seen in Arizona and through ICE programs like 287(g) – by encouraging the police to make pretextual arrests in order to funnel immigrants into the deportation system.

Lastly, mandatory federal immigration custody has profound impacts on families and children. According to one report, more than 5,100 children are in foster care as a result of the detention and deportation of one parent. Moreover, it interferes with the individual's ability to find counsel and assemble evidence necessary to show their eligibility for relief from removal. We are opposed to any expansion of mandatory federal immigration custody.

We urgently ask that you take steps to stop H.R. 3808 in order to instill trust in the police, keep immigrant survivors of domestic violence and sexual assault out of unfair deportation proceedings, and allow immigrant survivors and their children to access the services and protections they so desperately need.

Thank you for considering our comments.

Sincerely,

Core National Signatories

National Network to End Domestic Violence
 National Organization of Women
 National Coalition of Anti-Violence Programs
 ASISTA Immigration Assistance
 Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
 National Latina Institute for Reproductive Health
 Women's Refugee Commission

Supporting National Organizations

National Domestic Workers Alliance
 National Employment Law Project
 National Network for Immigrant and Refugee Rights
 African Services Committee

State Organizations

North Carolina Coalition Against Domestic Violence
 DC Coalition Against Domestic Violence

Sakhi for South Asian Women
 Apna Ghar, Inc. (Our Home)
 Americans for Immigrant Justice
 Casa de Maryland
 Kentucky Coalition for Immigrant and Refugee Rights
 STITCH: Organizers for Labor Justice
 The Legal Aid Society
 Pennsylvania Immigration Resource Center (PIRC)

Local Organizations

CLUE-VC (Clergy & Laity United for Economic justice - Ventura County)
 Community Immigration Law Cntr
 Florida Coastal School of Law Immigrants Rights Clinic
 Greater Hartford Legal Aid
 Immigrant Legal Advocacy Project
 Immigrant Rights Project, University of Tulsa College of Law
 Community Legal Services in East Palo Alto

**National Immigration Project of the National Lawyers Guild
Immigrant Defense Project
Immigrant Legal Resource Center
Washington State Defenders Association, Immigration Project**

**Written Statement
For a Hearing on**

“H.R. 3808: The Scott Gardner Act”

**Submitted to the House Judiciary Subcommittee
on Immigration Policy and Enforcement**

March 7, 2012

**Contact:
Paromita Shah, Associate Director National Immigration Project of the
National Lawyers Guild
paromita@nationalimmigrationproject.org**

Information about the submitters

The National Immigration Project of the National Lawyers Guild (NIP/NLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. For 40 years, the, NIP/NLG has provided technical assistance to immigration lawyers on defenses to removal, use of immigration waivers and the immigration consequences of criminal conduct. The NIP/NLG has a direct interest in ensuring that the Immigration and Nationality Act is interpreted consistently and that noncitizens receive a full and fair opportunity to present their cases before the immigration courts and the Board of Immigration Appeals.

The Immigrant Defense Project promotes fundamental fairness for immigrants accused or convicted of crimes. We seek to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system by 1) working to transform unjust deportation laws and policies and 2) educating and advising immigrants, their criminal defenders, and other advocates.

ILRC, founded in 1979, is a non-profit national back-up center that provides technical assistance in advocacy to low-income immigrants and their advocates. ILRC is known nationally as a leading authority on issues at the intersection of immigration and criminal law. Its publications include *Defending Immigrants in the Ninth Circuit* (formerly *California Criminal Law and Immigration*), which was first published in 1999. ILRC has provided daily assistance to criminal defense and immigration counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions since 1979.

The Washington Defender Association's Immigration Project (WDAIP) works to defend and advance the rights of noncitizens within the criminal justice system and noncitizens facing the immigration consequences of crimes. WDAIP provides case-by-case technical assistance to defenders representing noncitizens in criminal proceedings, convenes and participates in regular educational programs on these issues, and works with courts, prosecutors and defenders on policy issues impacting noncitizens in the criminal justice system.

Introduction

The NIP/NLG, Immigrant Defense Project, Washington State Defenders Association's Immigration Project, and Immigrant Legal Resource Center submit this statement in opposition to H.R. 3808, which would saddle state or local law enforcement with additional federal responsibilities, unnecessarily expand mandatory detention, and interfere with the execution of state bail laws.

H.R. 3808 imposes unnecessary and complicated federal responsibilities on state and local police officers. First, police officers are required to run immigration status checks to verify whether a person is "an alien" by querying federal agencies and databases. The bill also authorizes local police officers to issue detainers, which has not been done outside the confines of 8 U.S.C. §1357(g) agreements and escort individuals to federal immigration detention facilities. While these tasks constitute unprecedented expansion of state and local agencies' activities, localities will be forced to bear all costs related to verification of immigration status and federal immigration detainers. The risk of racial profiling increases because the bill encourages pretextual stops for investigations of immigration status.

The constitutionality of H.R. 3808 is questionable. First, it interferes with the operation of state bail laws by creating a scheme where the individual is denied the opportunity of a pre-trial bail hearing, even if they are eligible. Second, by forcing police to incorporate federal responsibilities and duties, the bill raises a question of commandeering resources from localities and states.

H.R. 3808 constitutes a radical departure from our current immigration laws because it unnecessarily *expands* a controversial scheme of mandatory, no-bond detention provisions in the Immigration and Nationality code that duplicates existing policy, hurts families, and is a significant taxpayer expense.

Instead of improving public safety, H.R. 3808 may jeopardize gains by states in combating drunk driving -- measures that have dropped the percent of alcohol-impaired driving fatalities from 48 percent in 1982 to 32

percent.¹

H.R. 3808 burdens state and local law enforcement officers in the field with federal immigration obligations and requirements for which they are ill equipped to handle.

H.R. 3808 essentially deputizes police officers to federal immigration enforcement agents by requiring them “to determine if the person is an alien.” It makes no distinction between lawfully present aliens such as lawful permanent residents who would not necessarily be deportable, asylees, or U-visa grantees, and persons who are here without authorization.

Immigration status determinations are notoriously complex that often cannot be resolved quickly or accurately through federal database queries. Whether a person is a U.S. citizen or not is also equally complex because the United States does not maintain records on U.S. citizens. A query by a police officer to federal immigration authorities on a U.S. citizen or a person who has crossed the border without inspection by immigration authorities may yield the same results: no results in a federal database. Additionally, asylum seekers without proper documents or the 16.2 million tourists who enter on a visa-waiver program² who have no federal registration information that is readily verifiable in federal databases. H.R. 3808 allows for the commission of another error: lawful permanent residents or other noncitizens who are not deportable can be held on immigration detainees and detained for long periods while their status is verified. These errors invite lawsuits for unlawful detention and other constitutional violations.

In the past, Congress authorized the the Attorney General and the Department of Homeland Security to train any state or local official whenever it authorized those officials to engage in federal immigration enforcement. H.R. 3808, in an unprecedented fashion, expands the role of state and local personnel in immigration enforcement and without any training and oversight role for the federal government. In so doing, Congress increases the likelihood that local personnel will make serious

¹ “Alcohol-Impaired driving,” Factsheet, 2009, National Highway and Safety Transportation Board. Available at <http://www-nrd.nhtsa.dot.gov/Pubs/811385.pdf> (last viewed March 1, 2012)

² “Visa Waiver Program,” Congressional Research Service, October 28, 2010. (available at <http://trac.syr.edu/immigration/library/P5139.pdf>)

mistakes. Nationality Act This means state and local officers, without any training, will use their own judgment to determine who is an “alien” Even without this authority, the United States Department of Justice is investigating the Maricopa County Sheriff’s Office and East Haven Police Department for violating the civil rights of noncitizen residents. That Congress would confer expanded rights to the Maricopa County Sheriff’s Office and East Haven Police Department emboldens these departments instead of limiting them.

H.R. 3808 is susceptible to abuse and racial profiling

It is impossible to execute the provisions in H.R. 3808 in a race neutral manner. State and local officials would likely detain individuals based on race, associations, language, and other improper factors; and prolong detention because immigration status determinations are not simple. H.R. 3808 provides no limit on the time that state officials may detain suspected noncitizens while ascertaining their immigration status. What is particularly pernicious is that Congress is requiring police to hold these individuals until the police can verify their immigration status.

The provisions of H.R. 3808 are eerily similar to those of Arizona, S.B. 1070 especially those that mandate that local law enforcement inquire about the person’s immigration status. George Gascón, Chief of San Francisco’s Police Department, stated, “If SB 1070 goes into effect, there will be a greater incidence of pretextual stops of individuals of color in Arizona as officers will use pretextual reasons to stop or question individuals they believe to be here illegally. If an officer is motivated by race or ethnicity he/she can easily find a valid pretext for encountering an individual, whether by following a car until a minor traffic violation occurs or by approaching a pedestrian for ‘consensual’ questioning.”

H.R. 3808 will create chaos for immigration detention management.

Even with constraints as to which criminal charges could lead to a detainer, H. R. 3808 would grant discretion over immigration decisions to thousands of law enforcement officers not subject to, nor under any supervision from, the authority of the Attorney General.

Under proposed section (e)(2)(b), any law enforcement officer can decide to bring a noncitizen subject to a detainer by this law to be put into federal custody. The United States has more than 3000 counties and innumerable municipal police departments, amounting to tens of thousands of law enforcement officers who would be authorized to drive immigrants to ICE detention. ICE would have little control over when individuals were thrust into its custody, and no ability to prepare or coordinate detention space to accommodate those individuals.

Under H.R. 3808, with all law enforcement in the country empowered to issue detainers and deliver individuals directly to ICE detention facilities, and with no training in immigration law at all, ICE could hardly expect to maintain control over immigration enforcement. ICE already faces serious challenges managing a detainee population over which the agency theoretically holds exclusive control.³ In the 287(g) program, even with direct ICE supervision, delegation of immigration enforcement power has threatened the coherence of immigration policy. In an exhaustive study of Immigration and Customs Enforcement's 287(g) program, in which state and local law enforcement officers receive training in immigration law and are deputized to carry out immigration enforcement actions, such as issuing detainers, the Migration Policy Institute found that even this ICE-managed 287(g) program operated according to local priorities and political pressures.⁴ Detention agreements with state and local jails (IGSAs) have likewise produced substantial confusion over whether ICE or the state has taken custody and who is responsible for detainees. In 2009, the DHS Inspector General reported that ICE's tracking of detainees had improved, but still had numerous flaws, including entirely missing records of detainees who had been admitted to IGSA facilities and deported without ever being entered into ICE databases.⁵

With tens or hundreds of thousands of additional law enforcement, who have no training or knowledge of immigration law and regulation, suddenly choosing whether to issue detainers or transport immigrants to

³ According to an Office of Inspector General Report in 2009, "Since its publication in March 2007, ICE's plan for cost-effectively acquiring detention bedspace has not been implemented." Immigration and Customs Enforcement Immigration Detention Bedspace Management," April 2009, Office of the Inspector General.

⁴ *Randy Capps, Marc Rosenblum, Cristina Rodriguez, and Muzaffar Chishti*, Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement 28 (Migration Policy Institute 2011).

⁵ Department of Homeland Security, Office of Inspector General, Immigration and Customs Enforcement's Tracking and Transfers of Detainees, 4-6, Mar. 17, 2009.

ICE, the systemic impact on the detention and immigration court system would be drastic. It is unimaginable for Congress to expect ICE to handle the potential for chaotic workflow threatened by H. 3808.

The Judiciary Committee should reject any expansion of 8 USC §1226(c) because it is unnecessary, duplicative, expensive, and harms communities

8 U.S.C. §1226(c) authorizes the use of mandatory detention – detention without the opportunity to seek bond – for specific classes of individuals. Noncitizens subject to mandatory detention are held in immigration custody without any individualized assessment of their risk of flight or danger to the community.

Except in limited circumstances related to trafficking of persons and drugs, Congress generally has restricted mandatory detention pursuant to 8 U.S.C. §1226(c) to individuals who are *convicted* of crimes. H.R. 3808 changes this scheme by extending mandatory detention to individuals who are “apprehended for driving while intoxicated, driving under the influence, or similar violation of State law.” The committee should be concerned about requiring mandatory detention before an adjudication of guilt on the underlying offense. People arrested could be innocent or have medical reasons for their level of intoxication. For example, diabetics, who compromise 15-20 percent of our population, erroneously show up as positive because of the collection of alcohol on their breaths.⁶ Moreover, the bill interferes with the rights of the person to stand trial on the accused crime because it encourages the transfer of individuals to immigration authorities.

Mandatory detention has profound impacts on families, friends and communities. In the United States, 5.5 million children have one undocumented family member.⁷ 73 percent of those 5.5 million children are U.S. citizens.⁸ Mandatory detention impedes access to counsel. Because individuals subject to mandatory detention are transferred far away from families and their home; they face significant obstacles in finding counsel and in fashioning a defense to their removal.

⁶ <http://www.8newsnow.com/story/7107333/dui-like-warning-signs-of-diabetes>

⁷ Chaudry, A., et al. (2010). Facing Our Future: Children in the aftermath of immigration enforcement. Washington, DC: The Urban Institute.

http://carnegie.org/fileadmin/Media/Publications/facing_our_future.pdf

⁸ Id.

Moreover, mandatory comes at significant taxpayer expense. According to the Government, noncitizens who are subject to mandatory detention must remain detained for the entirety of their administrative removal proceedings—whether such proceedings take days, months, or years. Because of the detention and removal of a parent, over 5,100 children currently live in foster care as a result of the deportation or detention of a parent.⁹

Expanding the mandatory detention category is unnecessary because ICE already targets offenses involving Driving Under the Influence/Alcohol as a significant public safety threat. According to data from Immigration and Customs Enforcement, ICE already includes Driving Under the Influence among their most serious offenses, Level 1 offenses.¹⁰ Moreover, ICE identified individuals convicted of “driving under the influence of alcohol or drugs” as an enforcement priority.¹¹ Because ICE has activated Secure Communities in the majority of counties and states, Level 1 offenses will receive the most attention from ICE. Because H.R. 3808 is duplicative of existing policy, it makes no sense to create a law when policies are already in place.

Additionally, police and safety officers invest considerable resources into the arrest of individuals suspected of driving under the influence or driving while intoxicated. The Bureau of Justice statistics suggest that approximately ten percent of arrests involve driving under the influence. Diverting resources away from these important police functions to immigration enforcement is unjustified and will lead to inefficiencies in public safety agencies.

The Judiciary Committee should reject H.R. 3808 because it unconstitutionally expands the detention authority and commandeers

⁹ “Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System,” Wessler, Seth. Applied Research Center (November 2011).

¹⁰ “ICE Classification of Detained Individuals By Most Serious Criminal Conviction Sorted by Frequency of Level 1 Charge,” January 2012, Transactional Records Act Clearinghouse. <http://trac.syr.edu/immigration/reports/274/include/table3.html>

¹¹ Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review, November 17, 2011, Immigration and Customs Enforcement.

the resources of local governments.

House bill 3808 provides that law enforcement who exercise their new authority to issue detainers "maintain the alien in custody in accordance with such agreement until the alien is convicted for such offense or the alien is transferred to Federal custody." This is a grab for federal power in an area that historically is the province of states to determine. It is plainly beyond the power of Congress to legislate.

A state determines the standards for releasing a person on bail for state charges. There is absolutely zero authority in our constitutional system for the federal government to determine the circumstances under which a state can release a defendant facing federal charges. This attempt to dictate to the states would likely cause the Founders of this country to role over in their graves. Maintaining an individual in custody indefinitely is unconstitutional and in violation of America's most fundamental liberty rights. Requiring the detention of someone subject to a detainer until they are transferred to ICE at some undetermined and indefinite time will frequently result in indefinite detention, in violation of the Constitution. Congress cannot require states to hold someone until the federal government agrees to take custody of them merely on an immigration detainer.

Furthermore, H.R. 3808's directive to maintain custody pursuant to a detainer until conviction results in an unconstitutional denial of bail without an individualized hearing.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law..."¹² But the language in H. 3808 amounts to denying bail for any individual charged with a drunk driving offense, who is reported by ICE databases to be an unauthorized immigrant, regardless of individualized circumstances.

The Supreme Court has held that "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."¹³ H. 3808 clearly fails to meet the requirements for such an exception. It proscribes any individualized determination and creates a

¹² U.S. Const. Fifth Amendment.

¹³ See *U.S. V. Salerno*, 481 U.S. 739 (1987).

blanket requirement of detention without conviction, contravening any due process of law. The Court stated in *Salerno*: “Although pre-trial detention is not per se unconstitutional, it cannot be applied without “clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community...”¹⁴ That an individual allegedly without lawful immigration status has been charged with a driving while intoxicated offense does not amount to clear and convincing evidence of a threat to the community. While the act of drunk driving presents a threat to the community, it hardly amounts to clear and convincing evidence of any future threat if the person is released. Moreover, singling out the person’s immigration status does not contribute to specific evidence of any threat. Rather, it suggests that Congress seeks to usurp state authority over local criminal law enforcement.

In addition, demanding that state and local law enforcement maintain custody until the federal government arrives to take custody or until the person is convicted amounts to unconstitutional commandeering of state and local resources to implement a federal regulatory program. By federally denying bail to a specific class of persons charged with state criminal offenses, Congress would mandate that states detain individuals pursuant to federal law. But the Supreme Court has held that under the Tenth Amendment, Congress cannot commandeer state resources to enact a federal regulatory program.¹⁵ Whether detention is prolonged prior to trial or because the federal government has not taken custody, Congressionally mandating states and localities to detain individuals at their own cost is a clear transgression of separation of powers. And the resources that Congress purports to commandeer in this case are substantial; detention is very expensive. The National Highway Transit Safety Authority wrote in 1998 that “The time required to adjudicate driving while intoxicated (DWI) cases is excessive in many jurisdictions, often stretching out for months and, sometimes, for years.”¹⁶ Congress lacks the power to demand that localities detain undocumented immigrants until trial at the state’s own expense.

Summary

H.R. 3808 is a flawed bill that violates the Constitution, interferes with state

¹⁴ See *id.*

¹⁵ See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264 (1981).

¹⁶ Ralph K. Jones, John H. Lacey, Connie H. Wiliszowski, Problems and Solutions in DWI Enforcement Systems, National Highway Traffic Safety Administration, January 1998.

laws, and creates massive burdens on local and state police. It will not meet its goal in reducing DWI offenses. We urge members of the Judiciary Committee to reject this bill.

Ms. LOFGREN. Chief Burbank, Ms. Vaughan in her testimony indicated that she had, I do not want to misstate it, but I think it is actually correct. In her research, she had not come across evidence that cooperation with ICE had an impact on community policing.

Do you share that view? Do you have research that shows that there is an impact on community policing or studies that show that this might have an impact?

Chief BURBANK. If I can answer that in two ways.

Ms. LOFGREN. Of course. Whatever is true.

Chief BURBANK. This year the major city chiefs, of which I am the vice president of the organization, reiterated their 9-point position on this that stated that immigration is a Federal issue, that local law enforcement should not be coopted as immigrant agents. And it was very clear and a very unanimous position for that organization. And that represents the 70 largest cities in the United States and Canada that came out with that statement. And so, it is not a matter of cooperation. It is a matter that we should not be in that position or that role.

As the immigration debate heated up locally in the State of Utah, I actually joined with the Consortium for Police Leadership and Equity and conducted a study in the State of Utah that asked specifically would people be less inclined to cooperate with police if, in fact, they were viewed as immigration agents. And, yes, in fact, not only did undocumented individual say they were less likely, Latino individuals said they were less likely, but, in fact, our overall population of Caucasians said they were less likely because they viewed us as less legitimate if we were engaged in immigration enforcement.

Ms. LOFGREN. Well, that that is very interesting. I wonder if, you know, after this hearing if we could get a copy of that study. I think that would useful, too.

Chief BURBANK. In my written statement, I actually included that study.

Ms. LOFGREN. Okay. All right. I did not see that. Well, I missed it then.

I would like to note also, Ms. Vaughan, I assume that you favor the immigration enforcement priorities, that we should set priorities, and that one of those priorities ought to be drunk driving. Is that correct?

Ms. VAUGHAN. Well, that should be up to ICE.

Ms. LOFGREN. Okay. I would like to ask unanimous consent, Mr. Chairman, to include in the record the guidance from ICE.

[The information referred to follows:]

Guidance to ICE Attorneys Reviewing the CBP, USCIS, and ICE Cases Before the Executive Office for Immigration Review

I. Introduction

On August 18, 2011, the Department of Homeland Security announced a review of all administrative removal cases pending before and incoming to the Executive Office for Immigration Review (EOIR) of the Department of Justice. The purpose of the review is to identify those cases that reflect a high enforcement priority for the Department of Homeland Security. This review covers all CBP, USCIS, and ICE removal cases, whether the cases are before immigration judges or the Board of Immigration Appeals. The review to which this guidance applies shall focus on the criteria laid out in Section II, but nothing in this guidance should be construed to prohibit or discourage the consideration of all of the factors laid out in the June 17, 2011 Prosecutorial Discretion Memorandum.

II. Criteria for Review

The following removal cases are enforcement priorities for the Department of Homeland Security and should generally be pursued in an accelerated manner before EOIR. These cases involve an alien—

- who is a suspected terrorist or national security risk;
- who has a conviction for—
 - a felony or multiple misdemeanors,
 - illegal entry, re-entry, or immigration fraud, or
 - a misdemeanor violation involving—
 - violence, threats, or assault,
 - sexual abuse or exploitation,
 - driving under the influence of alcohol or drugs,
 - flight from the scene of an accident,
 - drug distribution or trafficking, or
 - other significant threat to public safety;
- who is a gang member, human rights violator, or other clear threat to public safety;
- who entered the country illegally or violated the terms of their admission within the last three years;
- who has previously been removed from the country;
- who has been found by an immigration officer or immigration judge to have committed immigration fraud; or
- who otherwise has an egregious record of immigration violations.

The following cases are generally not enforcement priorities for the Department of Homeland Security and should be carefully considered for prosecutorial discretion on a case-by-case basis to avoid unnecessary diversion of resources from the enforcement priorities identified above. These cases involve an alien—

- who is a member in good standing of the Coast Guard or Armed Forces of the United States, an honorably discharged veteran of the Coast Guard or Armed Forces of the United States, or the spouse or child of such a member or veteran;
- who is a child, has been in the United States for more than five years, and is either in school or has successfully completed high school (or its equivalent);
- who came to the United States under the age of sixteen, has been in the United States for more than five years, has completed high school (or its equivalent), and is now pursuing or has successfully completed higher education in the United States;
- who is over the age of sixty-five and has been present in the United States for more than ten years;
- who is a victim of domestic violence in the United States, human trafficking to the United States; or of any other serious crime in the United States;
- who has been a lawful permanent resident for ten years or more and has a single, minor conviction for a non-violent offense;
- who suffers from a serious mental or physical condition that would require significant medical or detention resources; or
- who has very long-term presence in the United States, has an immediate family member who is a United States citizen, and has established compelling ties and made compelling contributions to the United States.

III. National Security and Public Safety Checks

If an ICE attorney decides to exercise prosecutorial discretion to dismiss or administratively close a particular case or matter, the attorney must first ensure that the alien in question is vetted for national security and public safety concerns. No exercise of discretion under this case review may proceed without this vetting.

IV. Special Rule for Asylum Cases

ICE attorneys may agree to the administrative closure of removal proceedings of an individual who filed an asylum application if the individual jointly requests administrative closure with the immigration judge. Upon the filing of such a joint request, however, the individual will be subject to 8 CFR 208.7(a)(2) which tolls the 180-day clock for employment authorization eligibility.

V. Individual Case Review

ICE attorneys are reminded that the decision to exercise prosecutorial discretion should be made on a case-by-case basis and on the totality of the circumstances presented by the individual case in question. The factors discussed in section II do not replace or supersede the June 17, 2011 Prosecutorial Discretion Memorandum, which remains the cornerstone for assessing whether prosecutorial discretion is appropriate in any circumstance. No one positive factor is determinative, and no one factor should be considered solely in isolation. General guidance such as this guidance cannot provide a “bright line” test, and many cases will require a balancing of the various factors laid out in the June 17, 2011 Prosecutorial Discretion Memorandum and earlier memoranda on the same subject. Reasonable minds can differ on close cases, and ICE attorneys should consult closely with their ICE supervisors whenever questions, concerns, or issues arise. ICE attorneys should base their decisions on the information in the record and are not expected to conduct additional investigation, although they may seek additional information if easily and timely available. Similarly, individuals may submit to ICE attorneys additional information relevant to their case for consideration under this process.

VI. Notice to Charging Component

If an ICE attorney decides to exercise prosecutorial discretion to dismiss or administratively close a particular case or matter, the attorney must notify a relevant supervisory charging official at CBP, USCIS, or ICE about the decision. In the event there is a dispute between the supervisory official and the ICE attorney regarding the attorney’s decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute locally. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

VII. Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this guidance should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE, CBP, or USCIS or any of their respective personnel to enforce Federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Ms. LOFGREN. And it says the following are enforcement priorities for the Department of Homeland Security, and it includes obviously terrorism and national security, but also driving under the influence of alcohol or drugs as a priority for enforcement for the Department of Homeland Security.

And I would note also, as I think has been discussed, that the single greatest most serious charge for those in ICE custody is driv-

ing under the influence of liquor. That is the most common reason for somebody being held in ICE custody. And that certainly is not to say that, you know, there are not people, both U.S. citizens, undocumented aliens, legal aliens, who are out driving drunk, and that is a terrible thing, and it is a dangerous thing. And people get hurt, and people get killed. And there is just no excuse for it. But the question is whether this bill is a remedy that is going to improve the situation.

And here is the concern that I have. We have a lot of ways that people can be harmed by criminal intent. Driving under the influence is a crime in every State. But if we, with the best of intentions, take actions that actually have the impact of lessening collaboration on a community policing basis with our law enforcement officers for other crimes, we are going to end up actually increasing the danger that we face.

Now, Chief, the concern that has been expressed about racial profiling is a serious one, and as, I think, Mr. Pierluisi, who is the former attorney general of Puerto Rico, mentioned, what the bill actually does require its pre-textual. The State law enforcement officer who apprehends an individual is then required to verify. And apprehend, I think, would be anything. It could be, you know, we had these State-wide checkpoints in the holiday season. It could be something like that.

The impact of having to make kind of a racially-based distinction in the circumstances outlined in the bill, do you think that would have an adverse impact on law enforcement generally, in your experience as a chief?

Chief BURBANK. Absolutely in my experience because we have no way to determine who is undocumented and who is a citizen. And so, the question then becomes is who do you ask? Who do you question about their citizenship status? And as I pointed out, they are not going to question from my appearance, but anyone who has a Hispanic surname or anything else is going to receive those questions.

And so, bias is interjected into that stop, right? We have officers who are making decisions from that point forward based on what someone looks like, not their behavior. We should always profile for criminal behavior, articulable things that this is what I see that leads me to believe that they are engaged in criminal activity. Appearance, race, ethnicity, gender, what does your family history look like, is not indicative of criminal behavior.

Ms. LOFGREN. Thank you. Mr. Chairman, my time has expired.

Mr. GALLEGLY. The gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman. I have to start with thanking the witnesses for your testimony here. And I was just absorbing some of the concepts that are so foreign to the upbringing that I had in a law enforcement family. It would not have occurred to the law enforcement officers whom I grew up with, let us just say, or dare I say 50 years ago, that they would encounter someone who is obviously breaking the law and somehow shrug their shoulders and walk away because of some kind of discretion. The law was the law, and you either enforce the law. And you also had the opportunity to go and advocate to your legislature to change the law.

And so, I look at this discussion that we have and the pain that Mr. McCann has gone through, and thousands and thousands of other Americans, individuals and families, who have lost loved one in preventable deaths. And I know that you cannot quantify the value of a life, but I recall a study that I read that was done by the Justice Department in about 1992 that put a monetary value on violent crime, that being murder, rape. I remember rape was set at \$84,000. I do know anyone that would even think of submitting for such a price, but it was a loss in income, and it was loss of income, medical, and a quantifiable amount for some pain and suffering. The deaths to murder were over a million dollars even then.

And so, I am thinking there must be somehow a rationale that has taken place, that is that we cannot afford all of the officers, and all of the prison beds, and all of the judges to enforce our immigration laws 100 percent because it is too costly. I recall a study done by the Rand Corporation, 1995 or so, that calculated that a criminal turned loose on the street cost \$18,000 a year to incarcerate, and the cost to society if you turned him loose was \$444,000 a year.

So, we do have some ways to quantify this, regardless of the infinite value of a single human life. And I would wonder if anybody would be a volunteer to having looked at any of that kind of data and try to come to some kind of a conclusion as to what we might have to reallocate for resources so that we could enforce the law 100 percent all the time, so that our law enforcement officers, when they encounter somebody that is unlawfully present in the United States can turn them over to ICE, and ICE can be there reliably to pick them up and put them back in the condition that they were in before they committed the crime, or punish them appropriately and then do so.

Has anyone looked at it from that perspective? Ms. Vaughan?

Ms. VAUGHAN. Not specifically using that methodology, but I think there is also an assumption that some people make that, you know, and I have heard it said a lot, well, if we are forced to enforce immigration laws against these so-called minor criminals, well then, we cannot deal with the ones that everyone considers to be the more serious criminals. And that is really a false choice that is set up, because ICE, in its ability to set priorities, also has a range of different options available to it for how it deals with people.

And what we have been noticing in our research is that the choices they are making and how they process people are actually stifling their ability to increase the number of removals and deal with all of the people that they encounter. So, you know, there is no, like, finite number. There is no limit on the number of people that they can necessarily remove in a year, like it is set at 400,000 and we cannot do anymore unless we have more money. There are ways to do more with the same amount of money that they are not choosing to do.

Mr. KING. Ms. Vaughan, you understand what troubles me here, I think, and that I am watching us walk backwards with the rule of law Administration by Administration, year by year, administrative amnesty by administrative amnesty, 300,000 people that are adjudicated for deportation and the Administration then announces

that they are going to have the manpower or the staff power to scour through all of those applications and try to find some people that they can unadjudicate for deportation.

And so, we have got administrative amnesty that is established. And now, the discretionary enforcement that seems to be more of our public vernacular than we have ever had before. And I am watching as in, well, there is a case coming before the Supreme Court this month, Arizona's SB 1070. It looks to me that the attorney general has taken a position that he is going to contribute not just the sanctuary city, as I think we are well aware of, but a sanctuary State that we know that Utah has at least stepped into that in some degree, but now a *de facto* sanctuary nation.

And I just listened to the hearing here, and I am troubled by the broken hearts, and I am troubled by the narrowness of this bill, which I think is justifiable and has merit. But I am even more troubled by the idea that we can just wave our hand away and disregard hundreds of thousands of violations of criminal law in the United States, and discuss it as if it happens to be somehow a discretionary decision that is made by things that are out of our hands.

Congress makes the laws, and the executive branch's job is to execute those laws, do so faithfully. It is the President's oath; it is the oath of many of his subordinates in the executive branch.

And so, I encourage the bill, Mr. Chairman, and yet I think that we have to go a lot further and a lot faster if we are going to restore the rule of law in America.

Thank you, and I yield back.

Mr. GALLEGLY. I thank the gentleman. I thank all our panelists for being here. I would just take the Chair's prerogative, and like to ask the chief one more question because I did cut myself a little short at the beginning.

I understand what your protocol is for making an arrest, and whether you book or whether you give a cite, or whatever.

Now, if your patrol person makes a stop based on erratic driving and has concern that the driver may be somewhat incapacitated for drinking or other things, and you make a determination of field sobriety test, I assume the first thing you do is ask for a license and registration. Is that correct?

Chief BURBANK. That is correct.

Mr. GALLEGLY. Now, in the event that the driver has no registration and has no driver's license, do you tow the vehicle and impound it?

Chief BURBANK. Most often, yes.

Mr. GALLEGLY. Okay. And when the person has no license or no registration and you do determine that he is intoxicated; however, he has no priors, would there be anything more than just a citation at that time when there is no registration, no driver's license, no proof of insurance, and DUI, in most cases?

Chief BURBANK. No, there would not be more than a citation.

Mr. GALLEGLY. It would be a citation. Now, in the course, would you ever ask a person why do you not have a driver's license?

Chief BURBANK. Certainly that can be asked, yes.

Mr. GALLEGLY. And if he says or she says, well, I do not have papers, volunteers I am here undocumented, illegally in the coun-

try, then you realize clearly that the person has admitted committing a crime. Would you then notify ICE, or would you just, again, give the citation and expect that he would not appear in court?

Chief BURBANK. Well, the long answer to that is in the State of Utah, if you are undocumented, then that is all it is. It is not a criminal violation; it is a civil violation, and we do not enforce civil law. There is no criminal penalty associated with being in the State of Utah undocumented. You can simply be detained and deported. So, it is not a matter of a violation of a law; it is violation of civil law, which local law enforcement—

Mr. GALLEGLY. If you are aware that it is a violation of Federal, you are not a Federal law enforcement officer, you do not feel any responsibility—

Ms. LOFGREN. Would the gentleman yield, because that is actually incorrect. Mere presence without documentation is not a criminal offense under the Federal law. It is a civil offense.

Mr. GALLEGLY. But when someone says I have entered this country illegally, with all due respect, Ms. Lofgren, that is a Federal crime.

Ms. LOFGREN. Well, we could have a long argument, but the discussion was that I do not have my papers. Not having your papers is not a criminal offense under the Federal law.

Mr. GALLEGLY. If he volunteered that he was illegally in the country, that was the question I asked of Chief Burbank.

Ms. LOFGREN. That is correct, and being illegally in the country is not a criminal law offense. It is a civil law offense.

Chief BURBANK. If there was no criminal warrant on the NCI check that was conducted—

Mr. GALLEGLY. Well, perhaps that explains some of the problems we have in this country.

With that, I would yield back. I thank all the witnesses today for your testimony. And, Sheriff and Chief, we appreciate what you do to try to make our respective jurisdictions a safer place to live.

The Subcommittee stands adjourned.

[Whereupon, at 4:20 p.m., the Subcommittee was adjourned.]

A P P E N D I X

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Office of the Director


U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536



**U.S. Immigration
and Customs
Enforcement**

June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director 

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil
Immigration Enforcement Priorities of the Agency for the
Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bensen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement¹. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

¹ The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director² and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

² Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

communication with represented individuals³ and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

³ For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.

**Material referenced by Chris Burbank, Chief of Police,
Salt Lake City Police Department**

Bosnian Community Meets With City Officials

KSL.com

February 15th, 2007 @ 9:50pm
Bosnian Community Feeling the Backlash of Talovic's Actions
Trolley Square Shooting Coverage
Shelley Osterloh Reporting

Salt Lake City officials say they've received hateful e-mails directed at the Bosnian community.

Today Mayor Rocky Anderson invited Bosnians to meet him at a local restaurant to assure them they are safe and welcome in Salt Lake City.

Some Bosnians said they are worried about a backlash. Some said they are embarrassed by the actions of this one young man and they hope people will not judge them all by his actions.

The restaurant Bosna was packed with Bosnian immigrants who listened as Mayor Anderson and City Police Chief Chris Burbank tried to counter the hateful words of a few.

Chris Burbank, SLC Police Chief: "There have been a lot of very hateful e-mails, correspondence coming to my office and mayor's office and different people in the community. But we haven't seen any of that acted out, thankfully."

Salt Lake City Mayor Rocky Anderson: "The Salt Lake community has been proud always to welcome refugee families here to lend a hand in any way we can."

But some Bosnians I spoke with say the shooting at Trolley Square has shamed them.

Mirza Tatarevic: "Some people might look at us a little differently. But this is the act of one person. They shouldn't judge the whole community."

I asked each of them if they were able to leave behind their differences after a bloody civil war and get along with each other here in Utah -- Muslims, Serbs and Croats.

Aladin Duzan: "Very well. Because everybody came here for one reason, that's to start a new life, start all over and forget what happened there."

Aida Duzan: "To forget the past and move on. To get educated, to get a better life here. And now that we came here and something like this happened, it's just horrible, just horrible."

Ilijas Horozovic: "I moved here because I want to keep my family together and be happy."

The Bosnian ambassador to the United States told the group Bosnians came to America to escape the pain of violence, and he expressed sympathy for the victims.

Bisera Tukovic, Bosnian Ambassador to the U.S.: "We lost 200,000 people in Bosnia. If anybody can understand then Bosnians should understand pain and suffering of people who lost dear ones."

Bosnians I spoke with say they have been welcomed and feel safe here. There are about 7,000 Bosnians in Utah --- about 2,500 of them came through the Refugee Settlement program -- most about 10 or 11 years ago.

The Trolley Square shooting hasn't tainted the feelings of most Utahns about Bosnians. In an exclusive Survey USA poll, 70-percent feel the shootings make no difference.

Five percent even have a more positive opinion of Bosnians. 22-percent, however do have a more negative attitude.

Nearly eight of ten Utahns say Bosnian immigrants do not pose a threat to the community. 13- percent, feel ... they DO.

Deseret News

Police identify gunman as 18-year-old Bosnian

By Linda Thomson, Deseret News

Published Friday, Feb. 16 2007 12:51 p.m. MST

Police Tuesday identified the gunman accused in Monday night's Trolley Square shooting as Sulejman Talovic, an 18-year-old Bosnian refugee who lived in Salt Lake City.

Salt Lake City Police Chief Chris Burbank said Talovic drove his car to the mall, parked in the west parking terrace and encountered two people who he shot before entering the mall.

There, he encountered a female who also was shot right away, then went into a gift shop where there were five people, all of whom the young man shot. Moving through the mall, the gunman tried to shoot others, Burbank said. The chief said he could not say now how many shots were involved in the entire episode.

Burbank praised an unnamed Ogden police officer who took action at the mall to intervene in the incident, and praised the many law enforcement and other agencies that responded quickly and professionally to the crisis.

Until Salt Lake police arrived, it was "basically a shoot-out between the Ogden individual and this individual," Burbank said.

"As you can see, this individual was well-prepared," Burbank said, apparently referring to the young man's backpack filled with ammunition. "He had one purpose."

Six individuals died and four others were hospitalized. Currently, four Salt Lake City police officers are on administrative leave, as is the Ogden police officer.

"This is something in our community that is really unheard of," Burbank said.

At a news conference Salt Lake City Mayor Rocky Anderson extended his sympathies to families of victims of Monday's shooting at Trolley Square and reassured the community that, "This is a safe place."

"We want to do everything we can to help," Anderson said. "At times like this, there is an enormous sense of helplessness. There is help available."

Anderson said counseling is available at Valley Mental Health and people can call its crisis line at 961-1442.

The mayor said managers at Trolley Square were meeting with employees to provide any needed counseling, the city was offering help to police and firefighters, and Anderson especially singled out the "particular effect felt by children" after going through or viewing such a frightening episode.

"We urge everyone with children — let them know they can talk about this openly, they don't have to hide their feelings."

Anderson said it is important for adults to do what they can to provide assurances to children that this was an isolated and very rare incident. "Notwithstanding what happened last night, this is a safe place," the mayor said.

Anderson said the city is experiencing the lowest serious crime rate in 14 years.

A memorial fund for victims has been established at Wells Fargo Bank.

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CONSORTIUM FOR POLICE LEADERSHIP IN EQUITY
www.policingequity.org

Deputizing Discrimination?

Causes & Effects of Cross-Deputization Policy in Salt Lake City, Utah

A Report Issued by:

The Consortium for Police Leadership in Equity, Board of Directors

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Executive Summary

Passage of Utah State Senate Bill 81 (SB 81) in 2008 calling for the deputization of police officers as immigration officers thrust Utah onto the national stage as the first state to pass such legislation. Due to law enforcement's resistance to the policy, cross-deputization has not yet gone into effect. Though there are strong feelings on both sides of the issue, there has been limited empirical data to support the claims of either the bill's opponents or advocates. Thus, in 2009, at the request of the Salt Lake City Police Department (SLCPD), the Consortium for Police Leadership in Equity, (CPLE) began a program of research in Salt Lake City, Utah. Surveys were conducted with SLCPD police officers as well as White and Latino residents, and crime data from the last five years were analyzed. Results are presented below by the CPLE's board of directors.¹

The goal of the research was to assess the validity of public arguments on both sides of the debate. This involved testing competing hypotheses in three major areas: 1) Why people support SB 81; 2) The relationship of the growing Latino population to crime rates; and 3) The likely impact of cross-deputization.

First, proponents of the bill publicly stated that they supported cross-deputization because it would 1) reduce the movement of undocumented immigrants into Utah and increase the movement of undocumented immigrants out of Utah, 2) reduce criminal activity, and 3) promote democratic values. Conversely, opponents of the bill publicly argued that it was motivated by racial prejudice. Our survey data suggests that cross-deputization may reduce the number of undocumented immigrants, but that this belief is unrelated to endorsement of SB 81. Rather, support for cross-deputization is predicted by racial prejudice and a threat to individuals' values.

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In other words, support for SB81 is likely motivated not by an expectation of impact on the behavior of the undocumented immigrant population, but by a sense of threat and prejudice.

Second, proponents of the bill advanced an argument that cross-deputization was necessary due to the criminal activities of new Latino residents. Opponents of the bill did not believe that the Latino crime rate was increasing significantly. An analysis of both survey and crime data indicates that Latino criminal activity is currently proportional to their representation in the population, that Latino criminal activity is not increasing disproportionately to their growing population, and that the Latino crime rate is actually likely to *increase* as a result of cross-deputization—in response to a decrease in Latino crime-reporting.

Third, and most importantly, proponents of SB 81 argued that cross-deputization will improve lawful behavior and discourage criminality. Opponents of the bill argued that cross deputization would decrease trust and obedience to the law—driving down crime reporting and compliance. Responses to surveys revealed that Latinos—regardless of documentation status—indicated that they would be less likely to report a crime if SLCPD officers were cross-deputized. Importantly, White civilians indicated that they would also be less likely to report drug crimes if SLCPD officers were cross-deputized. Subsequent data also reveal that White civilians indicated that their sense of trust in and obedience to the SLCPD would decrease significantly should officers become cross-deputized.

Taken together, these data strongly support the contentions of SB 81's opponents, and support the contentions of SB 81 advocates only with regard to the likely reduction in total immigrant population. More importantly, these data suggest that support for cross-deputization stems more from concern over values and racial animus than a principled or pragmatic stand regarding

immigration, and that police agencies are justified in their concern that cross-deputization will reduce both crime-reporting and the public's general esteem of law enforcement. This casts doubts on both the rationale and the effectiveness of cross-deputization policies in the current socio-political climate.

Background

As of 2006, the undocumented immigrant population in the United States was estimated at 11.6 million people (Department of Homeland Security, 2007). Lawmakers continue to grapple with how to address this burgeoning population. One strategy proposed is the policy of federal training for police officers so that they are able to act as immigration officers while policing. This policy, known as "cross-deputization," was codified in 1996 by section 287(g) of the Immigration and Nationality Act, and has recently grown in popularity (U.S. Department of Homeland Security, 2008). As this approach is poised to be both a crucial and controversial means of addressing illegal immigration in the coming years, we believe it is important to investigate its potential psychological and behavioral implications. The goal of the following research was to provide law enforcement and legislators with information about the effects of cross-deputization in order to inform future policy decisions.

To address the burgeoning popularity of cross-deputization, the Consortium for Police Leadership in Equity (CPLE) began a program of research in Salt Lake City, Utah in 2009 at the request of Chief Christopher Burbank of the Salt Lake City Police Department (SLCPD). The CPLE is an independently funded research consortium that creates partnerships between empirical social scientists and law enforcement agencies interested in issues of police effectiveness, transparency, equity, and accountability. Salt Lake City initiated this collaboration

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in response to the passage of Utah State Senate Bill 81 (SB 81), which asked law enforcement agencies statewide to “make a reasonable effort to determine the citizenship status of a person confined to a county jail for a period of time and to verify the immigration status of a confined foreign national” (lines 13-15). As Salt Lake City’s immigrant population is predominately Latino, we have concentrated our survey efforts on Latinos, Whites, and SLCPD officers (of all races and ethnicities). The goal of the present research was to investigate three aspects of the public debates surrounding SB 81 specifically, and the issue of cross-deputization more generally. These goals were, first, what motivates support for SB 81 and cross-deputization? Second, what is the relationship of immigration to crime? And, third, how will residents respond to a policy of cross-deputization?

Methodology & Sampling

The goal of our research was to test the hypotheses of SB 81’s supporters and critics in the population that would be affected by its enactment. During an initial site visit, we met with police officers, politicians, activists, and academics to gather qualitative data regarding perceptions of SB 81 and the debates that surround it. The goal of this site visit was to document arguments, perceptions, and attitudes on both sides of the issue. This would allow us to investigate the hypotheses generated by both sides of the issue, rather than approaching it in one-sided manner. Specifically, we asked prominent supporters and critics of the bill to outline 1) the reasons the bill were necessary, 2) the relationship of the growing Latino population to crime trends, and 3) what they believed the outcome of the bill would be. We then used the most popular answers from our interviews to create testable hypotheses in each domain.

Based upon these conversations, we then created a survey that was given to 118 SLCPD officers,

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96 White Salt Lake City residents, and 103 Latino residents (54 documented, 49 undocumented). Basic demographics are reported in Table 1. The survey took approximately 30 minutes to complete. To control for differing levels of literacy, surveys were conducted orally. Bilingual surveyors conducted the interview in either English or Spanish, according to the respondent's preference. The use of Spanish-speaking personnel also served to increase the level of trust between surveyors and participants—particularly important with the undocumented immigrant community. For SLCPD officers and White Salt Lake City residents, only White surveyors were used so as to lessen the respondents' fear of "saying the wrong thing." Lowering the degree to which respondents feel self-conscious helps to generate more reliable data. Surveyors approached civilians in public spaces likely to be populated by individuals from a diversity of backgrounds (i.e. local Department of Motor Vehicles). Religious organizations that aid undocumented families helped surveyors identify and contact undocumented individuals.

For the three groups sampled (Police, White, and Latino), the surveys were similar, to allow for comparisons between groups. Surveys contained questions about SB 81 itself and the impact expected from its implementation, as well as more general questions about the respondent's values and attitudes. We also included several questions about crime reporting which asked whether the respondent would be willing to report specific types of crime with and without SB 81 in place.

In the next stage of data collection, we collected and analyzed crime data in Salt Lake City spanning from 2004 to 2008 with the permission and cooperation of the SLCPD. Next, we conducted an additional survey with 91 White residents of Salt Lake City to improve our understanding of how their attitudes toward the police might change as a result of cross-deputization. Basic demographic information is reported below in Table 1. The discussion

below combines the results of the first and second survey, along with the crime data analysis. Though the sample size of this initial research is small, demographic information suggests that respondents came from a diversity of political backgrounds, but were fairly moderate in the aggregate. Importantly, both our law enforcement and White civilian samples were evenly split on the issue of cross-deputization, though Latinos strongly disagree with the policy. While sample size and sampling method make us cautious of over-generalizing the below results, respondents seem to comprise a representative sample of Salt Lake City residents from each population. Our sample was comprised of Salt Lake City residents over the age of 18. The sample was politically moderate, with an oversampling of men and individuals representing a wide range of views on SB 81 and cross-deputization.

Table 1

	Survey 1				Survey 2
	Police	White	Latino		White
			Doc.	Undoc.	
Gender	99 Male 18 Female	63 Male 30 Female	20 Male 30 Female	25 Male 24 Female	56 Male 35 Female
Age	39	38	33	31	32
Political Ideology ² (scale from 1-7)	4.62 "Leans Conservative"	3.36 "Leans Liberal"	3.87 "Moderate"	3.36 "Leans Liberal"	3.41 "Leans Liberal"
SB 81 Support ³ (NR = No Response)	33% Pro 20% Con 33% Neutral 14% NR	20% Pro 29% Con 26% Neutral 25% NR	9% Pro 61% Con 11% Neutral 19% NR	20% Pro 51% Con 0% Neutral 29% NR	—

A note on language: Throughout this report, we refer to immigrants who reside in the United States without the proper legal permissions as "undocumented" as opposed to "illegal" immigrants. Though we understand that there is controversy surrounding which word is most appropriate to describe these individuals, we have chosen to use the word "undocumented"

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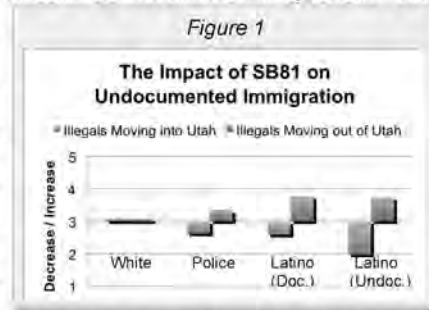
throughout this report, except when a survey question was worded differently for data collection purposes, because it was the preferred term of respondents. We have chosen to refer to “illegal” as opposed to “undocumented” immigration for the same reason. This language has the added benefit of describing actions—but not people—in terms of legality.

Myth versus Fact: Rationales for cross-deputization

Our site visit revealed three arguments given by proponents of SB 81 with regard to what motivated the drafting of cross-deputization policy: 1) to dampen the movement of undocumented immigrants into Utah and boost the movement of undocumented immigrants out of Utah, 2) to diminish the level of criminal activity in Utah, and 3) to bolster democratic values in Utah. Opponents of the bill argued that cross-deputization policy was motivated by racial bigotry and threats to personal values. We addressed each of these in our survey and analyze the results below. Results are reported for police officers (collapsed across race and ethnicity), White residents, and Latino residents (both documented and undocumented). The Latino resident category is broken apart into documented and undocumented when there is a meaningful difference between the two groups, and collapsed when there is not. Except where indicated, responses to items reported in these sections were given on a scale from one to five.

Undocumented Immigration Movement. The first rationale we investigated for cross-deputization was that it would decrease the undocumented immigrant population of Utah. Specifically, proponents of SB 81 argue that passage of the bill will simultaneously discourage prospective undocumented immigrants from moving into Utah and encourage current undocumented immigrants to leave Utah. To test this hypothesis, we asked respondents to answer questions

about whether immigration would increase or decrease, and whether out-migration would increase or decrease (with 1 being “decrease dramatically” and 5 being “increase dramatically”). Results (see Figure 1) revealed that White residents did not endorse this hypothesis—even among those who supported SB 81 and a policy of cross-deputization. White civilians believed that the number of undocumented immigrants moving into and out of Utah would remain the same regardless of whether or not a policy of cross-deputization



was adopted by the SLCPD. There was also no difference between those who supported SB 81 and those who opposed it in terms of their opinion regarding SB 81’s impact on undocumented immigrant movement.⁴ SLCPD officers believed that the number of undocumented immigrants moving into Utah would decrease slightly and the number of undocumented immigrants moving out of Utah would increase.⁵ Interestingly, police officers showed a strong relationship between support of SB 81 and belief in the impact in immigration movement argument.⁶ Latinos, on the other hand, endorsed the undocumented immigration movement rationale. Documented Latino residents believed that the number of undocumented immigrants moving into Utah would decrease slightly and the number of undocumented immigrants moving out of Utah would increase somewhat. Undocumented Latinos exhibited this trend even more strongly, and believed that the number of undocumented immigrants moving into Utah would decrease somewhat and the number of undocumented immigrants moving out of Utah would increase somewhat.

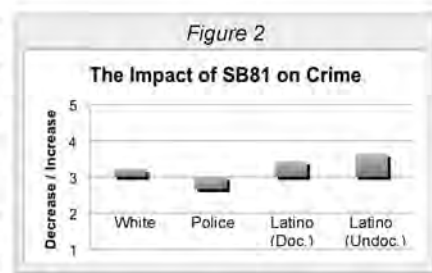
Thus, our data support the argument that cross-deputization could discourage undocumented immigrants from living in Utah, given that undocumented immigrants indicated that cross-

deputization would affect immigration rates. However, it is noteworthy that White civilians did not endorse this rationale. This suggests that while there is likely validity to the argument that cross-deputization will decrease the number of undocumented residents (given Latino responses), White residents may not believe it—even if they support the program. This, in turn, casts doubt on the genuineness of arguments regarding immigration reduction as a primary rationale of cross-deputization.

Criminal Activity Reduction. The next rationale put forward in favor of cross-deputization was that undocumented immigration is a source of crime. Consequently, if police contact becomes more of a threat to undocumented immigrants then they will be less likely to break the law—or to be in Utah in the first place. This again treats cross-deputization as a tool to inspire fear in undocumented immigrants. We asked about the impact of SB 81 on overall crime rates as well as the three types of crime most often attributed to Latinos in Utah by proponents of cross-deputization: identity theft, violent crime, and drug crime. Responses were given on a scale from 1 to 5 (with 1 being “decrease dramatically,” 5 being “increase dramatically,” and 3 being neither increase nor decrease).⁷ As there was little difference among the categories only the overall crime impact is reported here.

As evidenced in Figure 2, the impact on crime rates rationale enjoyed little support in the White population sampled, with Whites indicating that they believed crime rates would actually remain constant.⁸ Consistent

with data regarding immigration (discussed above), Whites who supported SB 81 did not differ from those who opposed it in their beliefs



regarding the expected impact of SB 81 on crime.⁹ Police officers believed that crime would decrease slightly, again endorsing a practical rationale for cross-deputization.¹⁰ Additionally, the same relationship was seen between support of SB 81 and belief in the crime reduction argument.¹¹ Latinos, on the other hand, shared the view of White residents, with both documented and undocumented Latinos indicating that they thought crime would increase somewhat as a result of SB 81. Thus, no civilians endorsed the proposition that SB 81 would reduce crime. It is also noteworthy that, Whites, did not subscribe to the idea that SB 81 would reduce crime—even if they supported the bill. This, again, casts doubt on how genuine these arguments are when advanced as rationales in the public sphere.

Democratic Values. The final rationale for cross-deputization legislation advanced by supporters of the initiative was that illegal immigration devalues U.S. citizenship and degrades respect for the law. Curbing illegal immigration, the argument continues, would increase the value of both U.S. citizenship and respect for the law. To test this hypothesis, again, we asked respondents to estimate how the value of citizenship and the rule of law would change if SB 81 were to be enacted. Whites, police, documented Latinos, and undocumented Latinos all indicated that the value of U.S. citizenship would remain unaltered by SB 81.¹² Additionally, Whites, police, and documented Latinos also indicated that respect for the rule of law would remain unaltered by SB 81.¹³ Undocumented Latinos, on the other hand, believed that respect for the rule of law would be damaged by the implementation of SB 81.¹⁴ Returning to our White and police sample, though neither sample agreed with the idea that SB 81 would increase the value of either U.S. citizenship or the rule of law in the aggregate, those who supported the bill differed significantly from those who did not. Police and White supporters of SB 81 were more likely to endorse the idea that the value of American citizenship and respect for the rule of law would be bolstered by

cross-deputization.¹⁵ It is interesting to note, however, that there was no difference between how much the proponents and opponents of SB 81 *valued* the rule of law.¹⁶ The difference was only in how they thought SB 81 would impact respect for the law. This is the first of the three rationales provided by supporters of SB 81 that is supported by White respondents. That is, Whites who endorse SB 81 also believe that the passage of SB 81 will increase the value of citizenship and respect for the law, suggesting that this rationale may be among the most important to the bills advocates.¹⁷

An alternative explanation. Recall that opponents of SB 81 suggested that the bill was motivated by racial prejudice and xenophobia. Survey data supported this explanation. First, SLCPD officers' and White residents' support for SB 81 was moderately related to a dislike of immigrants (both documented and undocumented) as well as a dehumanization of undocumented immigrants in particular.¹⁸ That is, the more respondents endorsed cross-deputization the more they tended to endorse items such as "illegal immigrants are no better than animals" (see Appendix for full set of items). However, dehumanization of undocumented immigrants and dislike of Latinos accounted for less than 1% of the variance in SB 81 support.

Explicit prejudice is often a poor predictor due to the fact that respondents are reluctant to express it. Thus, the presence of a more subtle bias was also investigated. To this end, a measure of what psychologists have called "symbolic racism" was included in our survey. Symbolic racism emphasizes "abstract, moralistic resentment" of a given sub-population, and is consistently a strong correlate of policy attitudes that tend to have a racially biased impact.¹⁹ Symbolic racism has traditionally been used to understand Black-White race relations in the United States and associated policy attitudes (e.g. school integration). A scale for the issue of illegal immigration was developed²⁰, and contained items such as: "immigrants are a drain on the

state's resources" and "immigration is causing resentment between the races to grow" (see Appendix for full set of items). Though individual scale items refer to concrete symbols of intergroup conflict such as conflict over resources or values, the large and reliable relationship between our measure of symbolic racism and explicit anti-Latino prejudice suggests that this scale is a valid measure of racial animosity.²¹ Endorsement of this symbolic racism scale was strongly related to support for SB 81.²² Not only was this relationship strong and reliable, but it also accounted for nearly 40% of the variance in support for SB 81, making it by far the strongest predictor of SB 81 support of all variables measured.

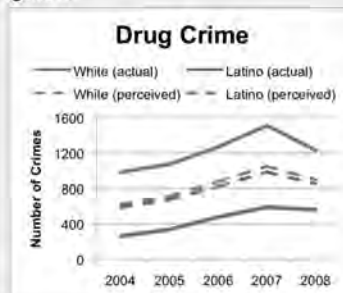
Taken together, these data suggest that support of SB 81 is closely related to a dislike of Latino immigrants—both documented and undocumented. There was relatively little evidence that proponents of the bill believed that it would reduce Utah's undocumented population or crime rates, casting doubt on the notion that proponents of SB 81 support cross-deputization to reduce immigration and crime. However, there was significant evidence that proponents of the bill supported it in proportion to their belief that cross-deputization would increase the value placed on citizenship and rule of law. Additionally, proponents of SB 81 supported it in proportion to their racial animosity towards Latinos and their sense that Latinos threatened their values. This further suggests that the bill is conceptualized by civilians in terms of being pro- or anti-Latino—and not simply pro- or anti-immigration.

Myth versus fact: Race and crime

The blurring of lines between Latino and "undocumented immigrant" has implications for the way Latinos are seen in the context of criminal activity. In our survey, Whites and SLCPD

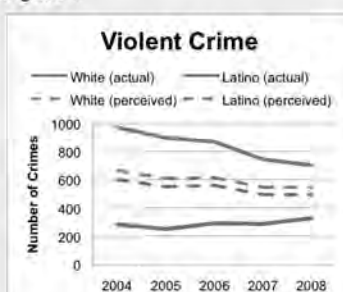
officers who agreed with the statement, "In Utah, Latinos take advantage of Whites in illegal ways," also tended to support SB 81.²³ In fact, agreement with this single statement accounts for 30% of the variance in opinions regarding SB 81. This Latino criminalization narrative is at the heart of many anti-immigration policies, not just cross-deputization policy. Thus, to understand whether Latino residents contribute disproportionately to crime rates in Salt Lake City we compared SLCPD crime statistics and to the perceptions of our second sample of White Salt Lake City residents.

Figure 3



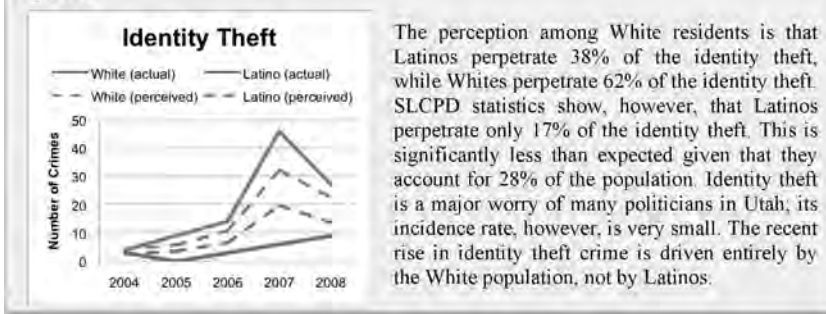
The perception among White residents is that Latinos perpetrate 47% of the drug crime, while Whites perpetrate 50% of the drug crime. SLCPD statistics show, however, that Latinos perpetrate only 27% of the drug crime. This is slightly less than expected given that they account for 28% of the population. The increase in drug crime over the years is mostly driven by an increase in offenders in the White population. Drug crime is increasing but more among Whites than Latinos.

Figure 4



The perception among White residents is that Latinos perpetrate 48% of the violent crime, while Whites perpetrate 53% of the violent crime. SLCPD statistics show, however, that Latinos perpetrate only 26% of the violent crime. This is slightly less than expected given that they account for 28% of the population. Over the years of increasing Latino immigration, the violent crime rate has remained constant.

Figure 5



In conclusion, when asked about crime rates, White Salt Lake City residents consistently overestimated the rate at which Latinos committed drug-related, violent, and identity theft crimes and consistently underestimated the rate at which Whites committed drug-related, violent, and identity theft crimes. Nevertheless, White residents did generally acknowledge that Whites committed more crimes than Latinos. Overall, crime rates have remained relatively constant despite burgeoning immigration rates. The only category for Latinos that showed any crime increase was drug crime.²⁴ Thus, on average, Latinos are slightly under-offending, and Whites are slightly over-offending. If Latinos were disproportionately contributing to crime rates, then we should have seen an exponential growth in crimes perpetrated by Latinos over the five years in our analysis. All available evidence, therefore, suggests that Latinos do not contribute disproportionately to crime rates in Salt Lake City.

Though there was no evidence of disproportionate Latino criminal representation, it was still possible that when Latinos do commit crimes, they disproportionately victimize Whites. This pattern would validate the perspective endorsed by many in our qualitative data that Latinos "take illegal advantage of Whites." To this end, SLCPD crime data from 2004-2008 were

analyzed for patterns of victimization. According to their proportions in the Salt Lake City population, White residents should be victimized in 72% of the crimes, while Latino residents should be victimized in 28% of the crimes.²⁵

In examining the crime data we separated perpetrators of crimes by race (Latino versus White). White perpetrators victimized other Whites 83% of the time (16,995 incidences from 2004-2008) and Latinos only 17% of the time (3,517 incidences from 2004-2008). Latino perpetrators victimized Whites only 54% of the time (2,187 incidences from 2004-2008) and other Latinos 46% of the time (1,844 incidences from 2004-2008). Thus, White perpetrators are “over-victimizing” Whites, while Latino perpetrators are “under-victimizing” Whites. Put another way, White perpetrators are “under-victimizing” Latinos and Latino perpetrators are “over-victimizing” Latinos. Latino perpetrators have victimized “out-group” members more than have White perpetrators. Still, statistically speaking, crime is disproportionately an in-group phenomenon, with Latino and White criminals targeting same-race residents well out of proportion to their representation in the population. This supports the opponents of SB 81, and does not support its advocates.

Unintended Consequences: Collateral damage of cross-deputization

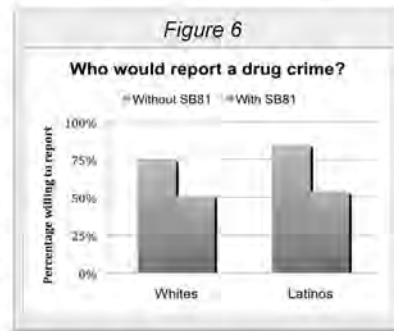
Police cooperation. The strongest concern voiced by opponents of SB 81—particularly law enforcement—is that enacting such policies will create a non-compliant, criminal subculture. The rationale is that, if undocumented immigrants are afraid of the police, then they will not call the police when a crime occurs—nor will they cooperate with police investigations out of fear of what police may uncover about their immigration status—or the status of their loved ones.

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Additionally, documented immigrants with undocumented friends or relatives are likely to behave similarly. This will then strain relations between the police and immigrant/Latino communities making it more difficult for the police to do their job of keeping residents safe. Supporters of SB 81 argued that lawful behavior would increase. Neither of these lay-theories, however, has ever been examined empirically.

First, we asked our White and Latino sample about how likely they were to report a variety of crimes in the future both with or without SB 81 in place. As evidenced in Figure 6, Whites and Latinos were equally willing to report drug crimes to the police in the future *without* SB 81 in place. However, when respondents considered the future *with* SB 81 in place, this drastically reduced willingness to report drug crimes.²⁶ As drug crimes are often mentioned as one of the negative byproducts of illegal immigration, cross-deputization might be counterproductive in this instance. It is much harder to police drug crime effectively if community members, *regardless of race*, are unwilling to report its occurrence. The Latino portion of the sample (both documented and undocumented) showed a drop in willingness to report violent crimes similar to the drop in drug crime reporting.²⁷ The White sample showed a drop, albeit a smaller one (11%) for violent crimes as well.²⁸ Thus, not only are documented and undocumented Latino residents showing an identical detrimental impact, but White residents' willingness to report crimes is also being affected.

Crime reporting, however, is just one aspect of community cooperation with the police. Prior research on law enforcement demonstrates that general cooperation with police is connected to



the perceived legitimacy of the police department.²⁹ Legitimacy has two components: obedience and trust, both of which hinge on the way that police exercise their authority. To see if cross-deputization would impact community compliance on a broad-based level, a follow-up study was conducted with White respondents in Salt Lake City. Respondents indicated their agreement or disagreement with a variety of items such as, "You should accept the decisions made by the SLCPD, even if you think they are wrong" (*obedience*) and "People's basic rights are well protected by the SLCPD" (*trust*). The full set of items is listed in the appendix. As each respondent completed measures of obedience to, and trust of the SLCPD twice (with and without cross-deputization in place), any change in the level of each can be directly and causally linked to the enactment of cross-deputization.

Results indicated that White residents were mixed in their perceptions of SLCPD legitimacy, with a mean response equivalent to slight agreement that the SLCPD was legitimate. On average, the enactment of cross-deputization damaged the perceived legitimacy of the SLCPD in the eyes of White residents.³⁰ That is, White residents reported being less like to obey and trust the SLCPD simply because a policy of cross-deputization was in place. A depressed sense of police legitimacy has the potential to harm the SLCPD's reputation and to impair the SLCPD's ability to police effectively amongst both White and Latino residents. A new policy can undermine the legitimacy of a police force in the eyes of its constituents regardless of whether the given individual will be affected directly by the law.³¹

Police & Community Disconnect. Cross-deputization also has the potential to create a preoccupation among SLCPD officers with the way that undocumented immigrants perceive them. All survey respondents were asked to use a 'feeling thermometer' to indicate how they felt toward other groups on a scale from 0-100, with 100 being very warm and 0 being very cold.

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Actual and perceived warmth towards the SLCPD among Whites and Latinos both hovered around 50. This indicates that both Whites and Latinos feel mixed about the police and the police accurately perceive these mixed feelings. The group about which the SLCPD is inaccurate, however, is undocumented residents of Salt Lake City. SLCPD officers perceive a great deal of antipathy towards the police in the undocumented community. In reality, however, undocumented immigrants' liking of the police is identical to both Latinos in general, as well as Whites. The extent to which SLCPD officers underestimated how much undocumented residents like them has implications. For example, it was related to dislike of both Latinos and undocumented immigrants.

Latino residents (both documented and undocumented) were highly concerned with the possibility that SB 81 would create more anti-Latino and anti-immigrant prejudice and discrimination. Police officers, however, indicated that both anti-Latino and anti-immigrant prejudice and discrimination would remain constant, and would be unaffected by SB 81.³² Additionally, the more an SLCPD officer denied the potential discriminatory impact of SB 81, the more he or she underestimated the degree to which the police were liked by undocumented immigrants.³³ Thus, this perceptual disconnect has the potential to cause a great deal of strain on police/community relations.

Taken together, these data support the opponents of cross-deputization in terms of their concern that residents will be less willing to report a crime in the wake of a cross-deputization law. Importantly, this was the case even among Whites civilians. Similarly, White civilians saw the SLCPD as a less legitimate agency when the agency purportedly engaged in cross-deputization than when they did not. This, again, supports the critics of SB 81 and does not support the arguments of its advocates.

Concluding Remarks

In conclusion, opponents of cross-deputization expressed a series of concerns, and nearly all were confirmed by the above data. First, opponents of cross-deputization questioned the motives of submitting such legislation, offering that SB 81 was about personal values rather than lawfulness, and that the legislation was anti-immigrant and anti-Latino rather than advanced on principle. The data bore out those suspicions. Similarly, opponents of SB 81 and cross-deputization—particularly law enforcement—were not convinced that the recent spike in undocumented immigrants had led to a corresponding spike in crime. Again, the data supported their suspicions. Finally, opponents of cross-deputization advance the argument that it will make cities less safe and produce a sub-culture of criminal lawlessness, the first step of which is not reporting a crime. Across White and Latino civilians, respondents generally felt that enacting immigration cross-deputization was both an illegitimate use of law enforcement powers, and they responded by indicating less of a willingness to report a crime—particularly drug crimes.

While the bulk of our data support the opponents of cross-deputization, SB 81 advocates found support for their argument that passage of the bill would decrease the total immigrant population—though it is possible that this decreased population would include a significant number of legal citizens. Additionally, supporters of cross-deputization demonstrated a genuine belief that the policy would bolster the value placed on democratic ideals, though there was not support that this would occur. This suggests that individuals' support for the legislation was based on threats to their values, and not solely based on intergroup prejudice as opponents had suggested—though both prejudice and principle were important contributing factors.

Taken together, these data are disturbing. This is particularly true in the wake of the recent Arizona law (Arizona Senate Bill 1070), given that Utah's SB 81 simply encourages law enforcement to "make a reasonable effort" to identify prisoners who might be in the United State illegally—and Arizona's law mandates that street-level law enforcement get involved. In Salt Lake City constituents do not believe that cross-deputization will be effective in reducing illegal immigration or criminal activity. Rather, support for cross-deputization policy is based on a fear that the rule of law and citizenship are under attack as well as symbolic racism against both legal and undocumented immigrants. Additionally, the focus on criminal activity in relation to immigrants, may serve to criminalize Latinos in general.

These data, however, suggest that this portrayal of Latinos as criminal is unwarranted, with Latinos committing crimes at a rate *less than* their proportion to the population and under-victimizing Whites within that. These data also illustrate how cross-deputization has the potential to damage community-police relations. First, it may endanger public safety by decreasing resident cooperation with the police, regardless of ethnicity. Second, it has the potential to strain relations between the SLCPD and the Latino community. Thus, our analyses indicate that SB 81 and similar cross-deputization laws may be counter-productive. That is, cross-deputization is likely harmful to both public trust in law enforcement and public safety.

Armed with the knowledge that support for SB 81 was strongly associated with anti-Latino bias, that there was no compelling crime need for new legislation targeting Latinos, and that the legislation would drive down crime-reporting, it is certainly worth re-examining this policy as the national immigration debate gains attention. Those who support cross-deputization are unlikely to get much of the benefit that they suggest (i.e. crime reduction or improved democratic values). However, the data suggest that law enforcement is likely to see everything

they fear: a reduction in crime-reporting and public trust. Given the rapidly changing demographics of our nation, the stakes for understanding the best way to implement immigration policy reform could not be higher. Therefore, the CPLE submits this report as an initial investigation into the merits of both sides of the debate. Our conclusion is that initial data militate against the wisdom of such legislation.

Appendix

Symbolic Racism:

1. Utah is a welcoming place for illegal immigrants.
2. Illegal immigrants are a drain on the state's resources.
3. Illegal immigration is a victimless crime.
4. Illegal immigration is causing resentment between the races to grow.
5. Compassion, empathy, tolerance, and goodwill fuel illegal immigration.
6. Immigrating illegally is a sign of disrespect for the laws of Utah.
7. Illegal immigration is unfair to the legal immigrants.
8. Utah is a welcoming place for legal immigrants.
9. Legal immigrants are a drain on the state's resources.
10. Legal immigration is causing resentment between the races to grow.
11. Currently, Utah is more lenient and soft than the rest of the states in the U.S. when it comes to immigration law.

Dehumanization:

1. In some nations illegal immigrants are no better than animals.
2. Illegal immigrants are not entitled to anything.
3. Illegal immigrants deserve to be treated with dignity.

Obedience:

1. You should accept the decisions made by the SLCPD, even if you think they are wrong.
2. You should do what the SLCPD tells you to do even when you do not understand the reasons for their decisions.
3. You should do what the SLCPD tells you to do, even when you disagree with their decisions.
4. You should do what the SLCPD tells you to do, even when you don't like the way they treat you.
5. There are times when it is okay for you to ignore what the SLCPD tells you.
6. Sometimes you have to bend the law for things to come out right.
7. The law represents the values of the people in power, rather than the values of people like you.
8. People in power use the law to try to control people like you.
9. The law does not protect your interests.
10. Overall, the SLCPD is a legitimate authority and people should obey the decisions that SLCPD officers make.

Trust:

1. I have confidence that the SLCPD can do its job well.
2. I trust the leaders of the SLCPD to make decisions that are good for everyone in the city.
3. People's basic rights are well protected by the SLCPD.
4. The SLCPD cares about the wellbeing of everyone they deal with.
5. The SLCPD are often dishonest.
6. Some of the things the SLCPD does embarrass our city.
7. There are many things about the SLCPD and its policies that need to be changed.

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Endnotes

¹ The Board or Directors is composed of: Kay Deaux, Ph.D.; John F. Dovidio, Ph.D.; Jennifer L. Eberhardt, Ph.D.; Phillip Atiba Goff, Ph.D.; Delores D. Jones-Brown, JD, Ph.D.; Tracie L. Keese, Ph.D.; James Sidanius, Ph.D.; Samuel R. Sommers, Ph.D.; Tom R. Tyler, Ph.D.

The Consortium for Police Leadership in Equity (CPLE) is a research consortium that promotes police transparency and accountability by facilitating innovative research collaborations between law enforcement agencies and empirical social scientists. Through these facilitated collaborations, the Consortium seeks to improve issues of equity—particularly racial and gender equity—in policing both within law enforcement agencies and between agencies and the communities they serve. The Consortium aims to effect cultural transformations within both law enforcement and the academy by creating opportunities that simultaneously preserve the dignity of law enforcement and advance the application of social science to the real world. Taken from <http://www.policingequity.org>.

² The full scale for political ideology ranged from 1, “Very Liberal” to 7, “Very Conservative”.

³ Support for SB 81 was measured by level of agreement on a scale of 1-5 with a single item, “It is a good idea to put SB81 into practice.” In Table 1, “Pro” refers to the percentage of a given population that expressed support for SB 81 (i.e. a score > 3 on our scale); “Con” refers to the percentage of a given population that expressed opposition to SB 81 (i.e. a score < 3 on our scale); while “Neutral” refers to those who had a score of exactly 3 on our scale.

⁴ The relationship between SB 81 support and belief in undocumented immigrant movement was calculated using linear regressions. For the White sample undocumented immigrant movement into, $\beta = .07$, $p = .58$, nor out of, $\beta = .19$, $p = .12$, Utah showed a relationship to policy support.

⁵ Difference of each mean from the midpoint of the scale was evaluated with a one-sample t-test. Both the mean for undocumented immigrant influx ($M = 2.62$, $SD = 1.12$), $t(101) = -3.46$, $p = .001$, and the mean for undocumented immigrant egress ($M = 3.35$, $SD = .93$), $t(100) = 3.74$, $p < .001$, were significantly different from the midpoint.

⁶ The relationship between SB 81 support and belief in undocumented immigrant movement was calculated using linear regressions. For the police sample both undocumented immigrant movement into, $\beta = -.24$, $p = .02$, and out of, $\beta = .25$, $p = .01$, Utah showed a relationship to policy support.

⁷ The question asked participants to use a 5-point scale to indicated how they thought each potential outcome listed (i.e. violent crime) would *change*, regardless of how widespread the outcome was currently.

⁸ A one-sample t-test was used to demonstrate that this mean of 3.22 ($SD = 1.02$) was not significantly different from the midpoint of the scale, $t(73) = 1.82$, $p = .073$.

⁹ A one-way ANOVA contrast was used to demonstrate that the mean of 3.32 ($SD = 1.13$) for supporters and 3.00 ($SD = .82$) for detractors did not significantly differ, $t(67) = -1.35$, $p = .18$ —equal variances were not assumed.

¹⁰ A one-sample t-test was used to demonstrate that this mean of 2.66 ($SD = 1.05$) was significantly different from the midpoint of the scale, $t(102) = -3.28$, $p = .001$.

¹¹ The relationship between SB 81 support and belief in criminal activity reduction was calculated using linear regression. For Whites there was no relationship ($\beta = .10$, $p = .43$), while for the SLCPD there was a strong relationship where greater support for SB 81 meant increased belief that it would reduce crime, $\beta = -.31$, $p = .002$.

¹² For impact on citizenship, the difference of each mean of from the midpoint of the scale was evaluated with a one-sample t-test. Neither the mean Whites ($M = 3.13$, $SD = .94$), $t(101) = 1.37$, $p = .17$, nor SLCPD officers ($M = 2.97$, $SD = 1.20$), $t(74) = -.19$, $p = .85$, nor documented Latinos ($M = 2.89$, $SD = .97$), $t(52) = -.85$, $p = .40$, nor undocumented Latinos ($M = 2.91$, $SD = 1.36$), $t(44) = -.44$, $p = .66$, were significantly different from the midpoint.

¹³ For rule of law, the difference of each mean of from the midpoint of the scale was evaluated with a one-sample t-test. Neither the mean Whites ($M = 3.10$, $SD = .98$), $t(101) = 1.01$, $p = .32$, nor SLCPD officers ($M = 2.95$, $SD = 1.19$), $t(73) = -.39$, $p = .67$, nor documented Latinos ($M = 2.81$, $SD = .93$), $t(51) = -1.49$, $p = .14$, were significantly different from the midpoint. Findings for undocumented Latinos are reported in Endnote 12.

¹⁴ This amounted to a mean of 2.51 ($SD = 1.27$). This difference between undocumented immigrants views and the other three groups combined on respect for the rule of law was significant, as tested by a one-way ANOVA contrast without assuming equal variances, $t(60) = -2.22$, $p = .030$.

¹⁵ This relationship between SB 81 support and values was tested with linear regression, the White and police samples were combined, as there was no difference between the groups. The relationship between SB 81 support and both the value of citizenship, $\beta = .33$, $p = .001$, and respect for the rule of law, $\beta = .32$, $p = .001$, were reliable.

¹⁶ The means of rule of law endorsement were nearly identical, with proponents reporting a mean of 4.46 ($SD = .50$) and opponents reporting a mean of 4.50 ($SD = .56$). Rule of law was measured using a highly reliable scale ($\alpha = .77$) adapted from the theoretical work of legal scholar Lon Fuller. See, Fuller, L. (1977). *The Morality of Law: Revised Edition*. New Haven, CT: Yale University.

¹⁷ Though these relationships are reliable, the amount of variance they account for is small. Consequently, the values rationale as the sole basis for attitudes about SB 81 is not a compelling explanation on its own.

¹⁸ Support for SB 81 was related to a dislike of immigrants in general, $\beta = .21, p = .006$, and dehumanization of illegal immigrants in particular, $\beta = .30, p < .001$. Dehumanization was measured with a reliable 3-item scale ($\alpha = .62$) the full set of items is listed in the Appendix.

¹⁹ Kinder, D. R. & Sears, D. O. (1981). Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life. *Journal of Personality and Social Psychology*, 40, 414-431.

²⁰ This scale was developed using the work of Kinder & Sears as a model, and was highly reliable ($\alpha = .84$).

²¹ The relationship was shown to be significant using bivariate correlations, $r = -.45, p < .001$. This relationship remained significant regardless of whether one supported SB 81 or not.

²² Linear regressions were used to calculate the relationship between SB 81 support and belief in symbolic racism, $\beta = .44, p < .001$.

²³ Linear regressions were used to calculate the relationship between SB 81 support and belief in Latino victimization of Whites, $\beta = .55, p < .001$.

²⁴ This increase was predominately due to the larger number of Latinos arrested for drug sales.

²⁵ Using proportions of Latinos and Whites in the population of Salt Lake City, expected base rates were constructed and then compared to actual incidence rates. As crime did not vary appreciably over the 2004-2008 period, results were collapsed across years.

²⁶ Two paired-samples t-tests were used to test for a difference in the willingness of Latinos and Whites to report drug crimes with and without SB 81 in place. The means with and without SB 81 were significantly different, $t(176) = 3.87, p < .001$.

²⁷ A paired-samples t-test was used to test for a difference in willingness of Latinos to report violent crimes with and without SB 81 in place. The means with ($M = .54, SD = .50$) and without ($M = .94, SD = .24$) SB 81 were significantly different, $t(95) = 7.57, p < .001$.

²⁸ A paired-samples t-test was used to test for a difference in willingness of Whites to report violent crimes with and without SB 81 in place. The means with ($M = .77, SD = .42$) and without ($M = .88, SD = .33$) SB 81 were significantly different, $t(83) = 3.16, p = .002$.

²⁹ Tyler, T. R. & Wakslak, C. J. (2004). Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority. *Criminology*, 42, 253-281.

Tyler, T. R. & Fagan, J. (2008). Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities? *Ohio State Journal of Criminal Law*, 6, 231-275.

³⁰ A paired-samples t-test was used to test for a difference between legitimacy levels with and without SB 81 in place. The mean SLCPD legitimacy with SB 81 in place ($M = 3.21, SD = .72$) was significantly lower than the mean SLCPD legitimacy initially reported ($M = 3.33, SD = .66$), $t(90) = 3.27, p = .002$.

³¹ The purpose of the Wave 2 data collection was to deepen our understanding of White's unwillingness to report crimes in the wake of cross-deputization. Consequently, only White civilians were recruited for the Wave 2 data collection.

³² The means for Latino endorsement were $M = 4.23 (SD = .99)$ for prejudice and $M = 4.24 (SD = 1.06)$ for discrimination. The means for the police sample were $M = 3.11 (SD = 1.00)$ for prejudice and $M = 3.15 (SD = .94)$ for discrimination. The difference between the Latino and White/police samples was tested with a one-way ANOVA contrast without assuming equal variances. The Latino sample showed a significantly higher endorsement of both anti-Latino, $t(200) = 8.60, p < .001$, and anti-immigrant, $t(187) = 8.20, p < .001$, prejudice and discrimination.

³³ Relationships were calculated with bivariate correlations. Misjudgment of undocumented immigrants level of liking was related to dislike of Latinos, $r = .30, p < .001$, dislike of undocumented immigrants, $r = .54, p < .001$, denial of discriminatory impact, $r = -.22, p = .028$, and concern with being seen as racist, $r = -.27, p = .004$.



**Major Cities Chiefs Association
Revised Immigration Position
October 2011**

The foundation of the Major Cities Chiefs Association's nine point position statement is based upon five key concerns with local police enforcing federal immigration law. These concerns are:

1. It undermines the trust and cooperation with immigrant communities which are essential elements of community oriented policing.
2. Local agencies do not possess adequate resources to enforce these laws in addition to the added responsibility of homeland security.
3. Immigration laws are very complex and the training required to understand them significantly detracts from the core mission of local police to create safe communities.
4. Local police do not possess clear authority to enforce the civil aspects of these laws. If given the authority, the federal government does not have the capacity to handle the volume of immigration violations that currently exist.
5. The lack of clear authority increases the risk of civil liability for local police and government.

Given these concerns, the Major Cities Chiefs are recommending that Congress and the President adopt the following nine points:

1) COMMITMENT OF CONTINUED ENFORCEMENT AGAINST CRIMINAL VIOLATORS REGARDLESS OF IMMIGRATION STATUS

M.C.C. member agencies are united in their commitment to continue arresting anyone who violates the criminal laws of their jurisdictions regardless of the immigration status of the perpetrator. Those individuals, regardless of their citizenship status, who commit criminal acts will find no safe harbor or sanctuary from their criminal violations of the law within any major city but will instead face the full force of criminal prosecution.

2) A FEDERAL RESPONSIBILITY

Immigration is a federal policy issue between the United States government and other countries, not local or state entities and other countries. Any immigration enforcement laws or practices should be nationally based, consistent, and federally funded.

3) SECURE THE BORDERS

Immigration is a national issue and the federal government should first act to secure the national borders preventing illegal entry into the United States. We support further and adequate funding of federal agencies responsible for border security and immigration enforcement so they can accomplish this goal. We also support consideration of all possible solutions including construction of border fences where appropriate, use of surveillance technologies and increases in the number of border patrol agents.

4) ENFORCE LAWS PROHIBITING THE HIRING OF UNDOCUMENTED IMMIGRANTS

The federal government and its agencies should continue its enforcement of existing immigration laws prohibiting employers from hiring illegal immigrants. Enforcement and prosecution of employers who illegally seek out and hire undocumented immigrants or turn a blind eye to the undocumented status of their employees will help to eliminate one of the major incentives for illegal immigration. Additionally, this will serve to reduce the exploitation of individual workers.

5) CONSULT AND INVOLVE LOCAL POLICE AGENCIES IN DECISION MAKING

Major Cities Chiefs and other representatives of the local law enforcement community should be consulted and involved in any process to develop a national initiative or practice impacting local police agencies. The inclusion of local law enforcement at every level of development will take advantage of their perspective and experience in local policing.

6) LAW ENFORCEMENT PRIORITIES

The decisions related to how local law enforcement agencies allocate their resources, direct their workforce and define the duties of their employees to best serve and protect their communities must be left in the control of local governments. The decision to have local police officers perform the function and duties of immigration agents should be left to the local government. This shall not be mandated or forced upon them by the federal government through the threat of sanctions or the withholding of existing police assistance funding.

7) NO REDUCTION OR SHIFTING OF CURRENT ASSISTANCE FUNDING

The funding of any initiative concerning the enforcement of immigration laws should not be at the detriment or reduction directly or indirectly of any current federal funding or programs focused on assisting local police agencies with local policing or homeland security activities.

8) CLARIFICATION OF AUTHORITY AND LIMITATION OF LIABILITY

The authority of local police agencies and their officers to become involved in the enforcement of immigration laws should be clearly stated and defined. The statement of authority should also establish liability protection and an immunity shield for police officers and police agencies that take part in immigration enforcement as authorized by clear federal legislation.

9) CLARIFICATION OF IMMIGRATION AND CUSTOM ENFORCEMENTS PROGRAMS AND THE PURPOSE OF THE N.C.I.C. SYSTEM

Clarification of the Immigration and Customs Enforcement's program goals and oversight of its mission and implementation is strongly encouraged. Further, the integrity of the N.C.I.C. system as a notice system for criminal warrants and/or criminal matters must be maintained. The inclusion of civil detainees in the system continues to create confusion for local police agencies subjecting them to possible liability for exceeding their authority by arresting a person upon the basis of a mere civil detainee. Federal agencies should seek federal criminal warrants for any person they have charged criminally with violations of immigration laws and submit those criminal warrants on the N.C.I.C. system so the warrants can be acted upon by local police officers within their established criminal enforcement authority and training.

RAND Congressional Newsletter
February 2008

**Recidivism No Higher Among Deportable Immigrants
Than Similar Nondeportable Immigrants**

Deportable immigrants released from the Los Angeles County jail system were no more likely to be rearrested than similar nondeportable immigrants released during the same period, according to a RAND Corporation study issued today.

Researchers say the findings suggest that illegal and other immigrants subject to deportation who are released into the community from a local jail do not pose a greater threat to public safety than non-deportable immigrants released at the same time.

Researchers studied nearly 1,300 male immigrants released from jail over a 30-day period and followed them for a year to see whether there were differences in recidivism between the deportable and nondeportable immigrants.

Immigrants who were deportable — deemed so because they entered the United States illegally, overstayed their visas or committed other violations — were no more likely to be rearrested during the study period when compared to similar legal or naturalized immigrants.

"Our findings run counter to the notion that illegal immigrants are more likely than other immigrants to cycle in and out of the local criminal justice system," said Laura Hickman, assistant professor with the Criminal Justice Policy Research Institute at Portland State University and a researcher at RAND, a nonprofit research organization.

The RAND study, published in the February edition of the journal *Criminology and Public Policy*, followed foreign-born men (517 deportable and 780 nondeportable) who were released back to the community between Aug. 4, 2002, and Sept. 2, 2002, from jails operated by the Los Angeles County Sheriff's Department.

Hickman and co-author Marika Suttrop of RAND found that a higher percentage of deportable immigrants were rearrested at least once during the following year — 43 percent compared to 35 percent. But when researchers compared deportable immigrants to similar nondeportable immigrants — considering factors such as age, ethnicity, country of birth, and type of criminal arrest — the differences disappeared.

Criminal justice research has shown that some groups are more likely than others to be rearrested. For example, younger people and those jailed on drug charges have higher rates of recidivism than other groups.

The results of this study are significant because the researchers were able to show that the difference in the simple percentages of rearrest between the groups (43 versus 35) was due to the influence of the other factors like age, ethnicity, and criminal history related to recidivism. When these factors were accounted for in the analysis, immigration status had no influence on rearrest.

The study excluded immigrants who were sent from Los Angeles jails to state prisons or were transferred to the custody of immigration officials.

Researchers say a limitation of the study is that it relies upon the self-reporting of birthplace by arrestees. Although the study period was relatively short, the sample size was large enough to produce statistically meaningful results and there is no reason to believe the mix of arrestees was unusual during the study period, according to researchers.

The project did not examine whether immigrants as a group were more likely than native-born U.S. citizens to be rearrested. However, the study did find a smaller percentage of all immigrants were rearrested after one year (38 percent) than the percent of rearrests identified in unrelated study of the Los Angeles County jail population a few years earlier. The earlier study looked at the rearrest patterns of 1,000 men (including both immigrants and native born) and found 50 percent were rearrested after one year of arrest.

Among the concerns motivating a recent crackdown on illegal immigration in some jurisdictions is a fear that immigrants — particularly illegal immigrants — increase crime in the community. The RAND project is one of a small number of studies that has tried to examine claims that deportable immigrants are a unique threat to public safety and the first to use statistical procedures to examine patterns of recidivism among immigrants released from a large jail population.

The project was conducted by the RAND Safety and Justice Program, which conducts public policy research on corrections, policing, public safety and occupational safety.

To Learn More, please visit:

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JAY PRINTZ, SHERIFF/CORONER, RAVALLI COUNTY, MONTANA, PETITIONER
95-1478 v. UNITED STATES RICHARD MACK, PETITIONER 95-1503

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 27, 1997]

Justice Scalia delivered the opinion of the Court.

The question presented in these cases is whether certain interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks, violate the Constitution.

The Gun Control Act of 1968 (GCA), 18 U.S.C. § 921 *et seq.*, establishes a detailed federal scheme governing the distribution of firearms. It prohibits firearms dealers from transferring handguns to any person under 21, not resident in the dealer's State, or prohibited by state or local law from purchasing or possessing firearms, §922(b). It also forbids possession of a firearm by, and transfer of a firearm to, convicted felons, fugitives from justice, unlawful users of controlled substances, persons adjudicated as mentally defective or committed to mental institutions, aliens unlawfully present in the United States, persons dishonorably discharged from the Armed Forces, persons who have renounced their citizenship, and persons who have been subjected to certain restraining orders or been convicted of a misdemeanor offense involving domestic violence. §§922(d) and (g).

In 1993, Congress amended the GCA by enacting the Brady Act. The Act requires the Attorney General to establish a national instant background check system by November 30, 1998, Pub. L. 103-159, as amended, Pub. L. 103-322, 103 Stat. 2074, note following 18 U.S.C. § 922 and immediately puts in place certain interim provisions until that system becomes operative. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must first: (1) receive from the transferee a statement (the Brady Form), §922(s)(1)(A) (i)(I), containing the name, address and date of birth of the proposed transferee along with a sworn statement that the transferee is not among any of the classes of prohibited purchasers, §922(s)(3); (2) verify the identity of the transferee by examining an identification document, §922(s)(1)(A)(i)(II); and (3) provide the "chief law enforcement officer" (CLEO) of the transferee's residence with notice of the contents (and a copy) of the Brady Form, §§922(s)(1)(A)(i)(III) and (IV). With some exceptions, the dealer must then wait five business days before consummating the sale, unless the CLEO earlier notifies the dealer that he has no reason to believe the transfer would be illegal. §922(s)(1)(A)(ii).

The Brady Act creates two significant alternatives to the foregoing scheme. A dealer may sell a handgun immediately if the purchaser possesses a state handgun permit issued after a background check, §922(s)(1)(C), or if state law provides for an instant background check, §922(s)(1)(D). In States that have not rendered one of these alternatives applicable to all gun purchasers, CLEOs are required to perform certain duties. When a CLEO receives the required notice of a proposed transfer from the firearms dealer, the CLEO must "make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General." §922(s)(2). The Act does not require the CLEO to take any particular action if he determines that a pending transaction would be unlawful; he may notify the firearms dealer to that effect, but is not required to do so. If, however, the CLEO notifies a gun dealer that a prospective purchaser is ineligible to receive a handgun, he must, upon request, provide the would be purchaser with a written statement of the reasons for that determination. §922(s)(6)(C).

Moreover, if the CLEO does not discover any basis for objecting to the sale, he must destroy any records in his possession relating to the transfer, including his copy of the Brady Form.

§922(s)(6)(B)(i). Under a separate provision of the GCA, any person who "knowingly violates [the section of the GCA amended by the Brady Act] shall be fined under this title, imprisoned for no more than 1 year, or both." §924(a)(5).

Petitioners Jay Printz and Richard Mack, the CLEOs for Ravalli County, Montana, and Graham County, Arizona, respectively, filed separate actions challenging the constitutionality of the Brady Act's interim provisions. In each case, the District Court held that the provision requiring CLEOs to perform background checks was unconstitutional, but concluded that that provision was severable from the remainder of the Act, effectively leaving a voluntary background check system in place. 856 F. Supp. 1372 (Ariz. 1994); 854 F. Supp. 1503 (Mont. 1994). A divided panel of the Court of Appeals for the Ninth Circuit reversed, finding none of the Brady Act's interim provisions to be unconstitutional. 66 F. 3d 1025 (1995). We granted certiorari. 518 U. S. ____ (1996).

From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme. Regulated firearms dealers are required to forward Brady Forms not to a federal officer or employee, but to the CLEOs, whose obligation to accept those forms is implicit in the duty imposed upon them to make "reasonable efforts" within five days to determine whether the sales reflected in the forms are lawful. While the CLEOs are subjected to no federal requirement that they prevent the sales determined to be unlawful (it is perhaps assumed that their state law duties will require prevention or apprehension), they are empowered to grant, in effect, waivers of the federally prescribed 5 day waiting period for handgun purchases by notifying the gun dealers that they have no reason to believe the transactions would be illegal.

The petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional. Because there is no constitutional text speaking to this precise question, the answer to the CLEOs' challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court. We treat those three sources, in that order, in this and the next two sections of this opinion.

Petitioners contend that compelled enlistment of state executive officers for the administration of federal programs is, until very recent years at least, unprecedented. The Government contends, to the contrary, that the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws." Brief for United States 28. The Government's contention demands our careful consideration, since early congressional enactments "provid[e] 'contemporaneous and weighty evidence' of the Constitution's meaning," *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986) (quoting *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)). Indeed, such "contemporaneous legislative exposition of the Constitution . . . , acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States*, 272 U.S. 52, 175 (1926) (citing numerous cases). Conversely if, as petitioners contend, earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist.

The Government observes that statutes enacted by the first Congresses required state courts to record applications for citizenship, Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103, to transmit abstracts of citizenship applications and other naturalization records to the Secretary of State, Act of June 18, 1798, ch. 54, §2, 1 Stat. 567, and to register aliens seeking naturalization and issue certificates of registry, Act of Apr. 14, 1802, ch. 28, §2, 2 Stat. 154-155. It may well be, however,

that these requirements applied only in States that authorized their courts to conduct naturalization proceedings. See Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103; *Holmgren v. United States*, 217 U.S. 509, 516-517 (1910) (explaining that the Act of March 26, 1790 "conferred authority upon state courts to admit aliens to citizenship" and refraining from addressing the question "whether the States can be required to enforce such naturalization laws against their consent");

United States v. Jones, 109 U.S. 513, 519-520 (1883) (stating that these obligations were imposed "with the consent of the States" and could not be enforced against the consent of the States"). ^[n.11] Other statutes of that era apparently or at least arguably required state courts to perform functions unrelated to naturalization, such as resolving controversies between a captain and the crew of his ship concerning the seaworthiness of the vessel, Act of July 20, 1790, ch. 29, §3, 1 Stat. 132, hearing the claims of slave owners who had apprehended fugitive slaves and issuing certificates authorizing the slave's forced removal to the State from which he had fled, Act of Feb. 12, 1793, ch. 7, §3, 1 Stat. 302-305, taking proof of the claims of Canadian refugees who had assisted the United States during the Revolutionary War, Act of Apr. 7, 1798, ch. 26, §3, 1 Stat. 548, and ordering the deportation of alien enemies in times of war, Act of July 6, 1798, ch. 66, §2, 1 Stat. 577-578.

These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so called Madisonian Compromise, Article III, §1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress--even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. See C. Warren, *The Making of the Constitution* 325-327 (1928). And the Supremacy Clause, Art. VI, cl. 2, announced that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time. The principle underlying so called "transitory" causes of action was that laws which operated elsewhere created obligations in justice that courts of the forum state would enforce. See, e.g., *McKenna v. Fisk*, 1 How. 241, 247-249 (1843). The Constitution itself, in the Full Faith and Credit Clause, Art. IV, §1, generally required such enforcement with respect to obligations arising in other States. See *Hughes v. Fetter*, 341 U.S. 609 (1951).

For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service. Indeed, it can be argued that the numerousness of these statutes, contrasted with the utter lack of statutes imposing obligations on the States' executive (notwithstanding the attractiveness of that course to Congress), suggests an assumed *absence* of such power. ^[n.2] The only early federal law the Government has brought to our attention that imposed duties on state executive officers is the Extradition Act of 1793, which required the "executive authority" of a State to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the State from which the fugitive had fled. See Act of Feb. 12, 1793, ch. 7, §1, 1 Stat. 302. That was in direct implementation, however, of the Extradition Clause of the Constitution itself, see Art. IV, §2. ^[n.3]

Not only do the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization, they contain some indication of precisely the opposite assumption. On September 23, 1789--the day before its proposal of the Bill of Rights,

see 1 Annals of Congress 912-913--the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Act of Sept. 23, 1789, 1 Stat. 96. Moreover, when Georgia refused to comply with the request, see L. White, *The Federalists* 402 (1948), Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made, see Resolution of Mar. 3, 1791, 1 Stat. 225.

In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of *The Federalist* which reply to criticisms that Congress's power to tax will produce two sets of revenue officers--for example, "Brutus's" assertion in his letter to the *New York Journal* of December 13, 1787, that the Constitution "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country," reprinted in 1 *Debate on the Constitution* 502 (B. Bailyn ed. 1993). "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes, *The Federalist* No. 36, p. 221 (C. Rossiter ed. 1961) (A. Hamilton) (hereinafter *The Federalist*), and predicted that "the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States," *id.*, No. 45, at 292 (J. Madison). The Government also invokes the *Federalist's* more general observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *id.*, No. 27, at 176 (A. Hamilton), and that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed in the correspondent authority of the Union," *id.*, No. 45, at 292 (J. Madison). But none of these statements necessarily implies--what is the critical point here--that Congress could impose these responsibilities *without the consent of the States*. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government, see *FERC v. Mississippi*, 456 U.S. 742, 796, n. 35 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part), an assumption proved correct by the extensive mutual assistance the States and Federal Government voluntarily provided one another in the early days of the Republic, see generally White, *supra*, at 401-404, including voluntary *federal implementation of state law*, see, e.g., Act of Apr. 2, 1790, ch. 5, §1, 1 Stat. 106 (directing federal tax collectors and customs officers to assist in enforcing state inspection laws).

Another passage of *The Federalist* reads as follows:

"It merits particular attention . . . , that the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction will become the supreme law of the land; to the observance of which all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath. Thus, the legislatures, courts, and magistrates, of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws." *The Federalist* No. 27, at 177 (A. Hamilton) (emphasis in original).

The Government does not rely upon this passage, but Justice Souter (with whose conclusions on this point the dissent is in agreement, see *post*, at 11) makes it the very foundation of his

position; so we pause to examine it in some detail. Justice Souter finds "[t]he natural reading" of the phrases "will be incorporated into the operations of the national government" and "will be rendered auxiliary to the enforcement of its laws" to be that the National Government will have "authority . . . , when exercising an otherwise legitimate power (the commerce power, say), to require state 'auxiliaries' to take appropriate action." *Post*, at 2. There are several obstacles to such an interpretation. First, the consequences in question ("incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws") are said in the quoted passage to flow *automatically* from the officers' oath to observe the "the laws of the Confederacy as to the *enumerated* and *legitimate* objects of its jurisdiction." ^{1b.41} Thus, if the passage means that state officers must take an active role in the implementation of federal law, it means that they must do so without the necessity for a congressional directive that they implement it. But no one has ever thought, and no one asserts in the present litigation, that that is the law. The second problem with Justice Souter's reading is that it makes state *legislatures* subject to federal direction. (The passage in question, after all, does not include legislatures merely incidentally, as by referring to "all state officers"; it refers to legislatures *specifically* and *first of all*.) We have held, however, that state legislatures are *not* subject to federal direction. *New York v. United States*, 505 U.S. 144 (1992). ^{1b.51}

These problems are avoided, of course, if the calculatedly vague consequences the passage recites--"incorporated into the operations of the national government" and "rendered auxiliary to the enforcement of its laws"--are taken to refer to nothing more (or less) than the duty owed to the National Government, on the part of *all* state officials, to enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law, and the attendant reality that all state actions constituting such obstruction, even legislative acts, are *ipso facto* invalid. ^{1b.61} See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (federal pre-emption of conflicting state law). This meaning accords well with the context of the passage, which seeks to explain why the new system of federal law directed to individual citizens, unlike the old one of federal law directed to the States, will "bid much fairer to avoid the necessity of using force" against the States, *The Federalist* No. 27, at 176 . It also reconciles the passage with Hamilton's statement in *Federalist* No. 36, at 222, that the Federal Government would in some circumstances do well "to employ the state officers as much as possible, and to attach them to the Union by an accumulation of their emoluments"--which surely suggests inducing state officers to come aboard by paying them, rather than merely commandeering their official services. ^{1b.71}

Justice Souter contends that his interpretation of *Federalist* No. 27 is "supported by No. 44," written by Madison, wherefore he claims that "Madison and Hamilton" together stand opposed to our view. *Post*, at 4. In fact, *Federalist* No. 44 quite clearly contradicts Justice Souter's reading. In that Number, Madison justifies the requirement that state officials take an oath to support the Federal Constitution on the ground that they "will have an essential agency in giving effect to the federal Constitution." If the dissent's reading of *Federalist* No. 27 were correct (and if Madison agreed with it), one would surely have expected that "essential agency" of state executive officers (if described further) to be described as their responsibility to execute the laws enacted under the Constitution. Instead, however, *Federalist* No. 44 continues with the following description:

"The election of the President and Senate will depend, in all cases, on the legislatures of the several States. And the election of the House of Representatives will equally depend on the same authority in the first instance; and will, probably, forever *be conducted by the officers* and according to the laws *of the States*." *Id.*, at 287 (emphasis added).

It is most implausible that the person who labored for that example of state executive officers' assisting the Federal Government believed, but neglected to mention, that they had a responsibility to execute federal laws. ^{1b.81} If it was indeed Hamilton's view that the Federal

Government could direct the officers of the States, that view has no clear support in Madison's writings, or as far as we are aware, in text, history, or early commentary elsewhere. ^[n.2]

To complete the historical record, we must note that there is not only an absence of executive commandeering statutes in the early Congresses, but there is an absence of them in our later history as well, at least until very recent years. The Government points to the Act of August 3, 1882, ch. 376, §52, 4, 22 Stat. 214, which enlisted state officials "to take charge of the local affairs of immigration in the ports within such State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need of public aid"; to inspect arriving immigrants and exclude any person found to be a "convict, lunatic, idiot," or indigent; and to send convicts back to their country of origin "without compensation." The statute did not, however, *mandate* those duties, but merely empowered the Secretary of the Treasury "to *enter into contracts* with such State . . . officers as *may be designated* for that purpose *by the governor* of any State." (Emphasis added.)

The Government cites the World War I selective draft law that authorized the President "to utilize the service of any or all departments and any or all officers or agents of the United States *and of the several States*, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act," and made any person who refused to comply with the President's directions guilty of a misdemeanor. Act of May 18, 1917, ch. 15, §6, 40 Stat. 80-81 (emphasis added). However, it is far from clear that the authorization "to utilize the service" of state officers was an authorization to *compel* the service of state officers; and the misdemeanor provision surely applied only to refusal to comply with the President's *authorized* directions, which might not have included directions to officers of States whose governors had not volunteered their services. It is interesting that in implementing the Act President Wilson did not commandeer the services of state officers, but instead requested the assistance of the States' governors, see Proclamation of May 18, 1917, 40 Stat. 1665 ("call[ing] upon the Governor of each of the several States . . . and all officers and agents of the several States . . . to perform certain duties"); Registration Regulations Prescribed by the President Under the Act of Congress Approved May 18, 1917, Part I, §7 ("the governor [of each State] is *requested* to act under the regulations and rules prescribed by the President or under his direction") (emphasis added), obtained the consent of each of the governors, see Note, The President, the Senate, the Constitution, and the Executive Order of May 8, 1926, 21 Ill. L. Rev. 142, 144 (1926), and left it to the governors to issue orders to their subordinate state officers, see Selective Service Regulations Prescribed by the President Under the Act of May 18, 1917, §27 (1918); J. Clark, *The Rise of a New Federalism* 91 (1965). See generally Note, 21 Ill. L. Rev., at 144. It is impressive that even with respect to a wartime measure the President should have been so solicitous of state independence.

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case. For deciding the issue before us here, they are of little relevance. Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice. Compare *INS v. Chadha*, 462 U.S. 919 (1983), in which the legislative veto, though enshrined in perhaps

hundreds of federal statutes, most of which were enacted in the 1970's and the earliest of which was enacted in 1932, see *id.*, at 967-975 (White, J., dissenting), was nonetheless held unconstitutional.

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934), a principle that controls the present cases.

It is incontestable that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon*, 7 Wall. 71, 76 (1869); *Texas v. White*, 7 Wall. 700, 725 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, §3; the Judicial Power Clause, Art. III, §2, and the Privileges and Immunities Clause, Art. IV, §2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, §4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal state conflict. See The Federalist No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people--who were, in Hamilton's words, "the only proper objects of government," The Federalist No. 15, at 109. We have set forth the historical record in more detail elsewhere, see *New York v. United States*, 505 U.S., at 161-166, and need not repeat it here. It suffices to repeat the conclusion: "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.*, at 166. ¹⁰⁻¹⁰¹ The great innovation of this design was that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other--"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. See *New York*, *supra*, at 168-169; *United States v. Lopez*, 514 U.S. 549, 576-577 (1995) (Kennedy, J., concurring). Cf. *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) ("the State has no legitimate interest in protecting nonresident[s]"). As Madison expressed it: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject,

within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245. ^[n.11]

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory, supra*, at 458. To quote Madison once again:

"In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323.

See also The Federalist No. 28, at 180-181 (A. Hamilton). The power of the Federal Government would be augmented immeasurably if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States.

We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself. The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, §3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves presidential appointees), Art. II, §2. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive--to insure both vigor and accountability--is well known. See The Federalist No. 70 (A. Hamilton); 2 Documentary History of the Ratification of the Constitution 495 (M. Jensen ed. 1976) (statement of James Wilson); see also Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws. ^[n.12]

The dissent of course resorts to the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause. It reasons, *post*, at 3-5, that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art. I, §8, conclusively establishes the Brady Act's constitutional validity, because the Tenth Amendment imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers "*not* delegated to the United States." What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. ^[n.13] When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra*, at 19-20, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson &

Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 297-326, 330-333 (1993). We in fact answered the dissent's Necessary and Proper Clause argument in *New York*: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U. S., at 166.

The dissent perceives a simple answer in that portion of Article VI which requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," arguing that by virtue of the Supremacy Clause this makes "not only the Constitution, but every law enacted by Congress as well," binding on state officers, including laws requiring state officer enforcement. *Post*, at 6. The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, see *Maryland v. EPA*, 530 F. 2d 215, 226 (CA4 1975); *Brown v. EPA*, 521 F. 2d 827, 838-842 (CA9 1975); and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds, see *District of Columbia v. Train*, 521 F. 2d 971, 994 (CA DC 1975). After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness. *EPA v. Brown*, 431 U.S. 99 (1977).

Although we had no occasion to pass upon the subject in *Brown*, later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law. In *Hodel* we cited the lower court cases in *EPA v. Brown*, *supra*, but concluded that the Surface Mining Control and Reclamation Act did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field, *Hodel*, *supra*, at 288. In *FERC*, we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978, to contain only the "command" that state agencies "consider" federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field. 456 U. S., at 764-765. We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," *id.*, at 761-762.

When we were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program, our decision should have come as no surprise. At issue in *New York v. United States*, 505 U.S. 144 (1992), were the so called "take title" provisions of the Low Level Radioactive Waste Policy Amendments Act of 1985, which required States either to enact legislation providing for the disposal of radioactive waste generated within

their borders, or to take title to, and possession of the waste--effectively requiring the States either to legislate pursuant to Congress's directions, or to implement an administrative solution. *Id.*, at 175-176. We concluded that Congress could constitutionally require the States to do neither. *Id.*, at 176. "The Federal Government," we held, "may not compel the States to enact or administer a federal regulatory program." *Id.*, at 188.

The Government contends that *New York* is distinguishable on the following ground: unlike the "take title" provisions invalidated there, the background check provision of the Brady Act does not require state legislative or executive officials to make policy, but instead issues a final directive to state CLEOs. It is permissible, the Government asserts, for Congress to command state or local officials to assist in the implementation of federal law so long as "Congress itself devises a clear legislative solution that regulates private conduct" and requires state or local officers to provide only "limited, non policymaking help in enforcing that law." "[T]he constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities." Brief for United States 16.

The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. It is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation of powers purposes. See *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 428-429 (1935). This Court has not been notably successful in describing the latter line; indeed, some think we have abandoned the effort to do so. See *FPC v. New England Power Co.*, 415 U.S. 345, 352-353 (1974) (Marshall, J., concurring in result); Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?* 83 Mich. L. Rev. 1223, 1233 (1985). We are doubtful that the new line the Government proposes would be any more distinct. Executive action that has utterly no policymaking component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer. Is it really true that there is no policymaking involved in deciding, for example, what "reasonable efforts" shall be expended to conduct a background check? It may well satisfy the Act for a CLEO to direct that (a) no background checks will be conducted that divert personnel time from pending felony investigations, and (b) no background check will be permitted to consume more than one half hour of an officer's time. But nothing in the Act *requires* a CLEO to be so parsimonious; diverting at least *some* felony investigation time, and permitting at least *some* background checks beyond one half hour would certainly not be *unreasonable*. Is this decision whether to devote maximum "reasonable efforts" or minimum "reasonable efforts" not preeminently a matter of policy? It is quite impossible, in short, to draw the Government's proposed line at "no policymaking," and we would have to fall back upon a line of "not too much policymaking." How much is too much is not likely to be answered precisely; and an imprecise barrier against federal intrusion upon state authority is not likely to be an effective one.

Even assuming, moreover, that the Brady Act leaves no "policymaking" discretion with the States, we fail to see how that improves rather than worsens the intrusion upon state sovereignty. Preservation of the States as independent and autonomous political entities is arguably less undermined by requiring them to make policy in certain fields than (as Judge Sneed aptly described it over two decades ago) by "reduc[ing] [them] to puppets of a ventriloquist Congress," *Brown v. EPA*, 521 F. 2d, at 839. It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. See *Texas v. White*, 7 Wall, at 725. It is no more compatible with this independence and autonomy that their officers be "dragooned" (as Judge Fernandez put it in his dissent below, 66 F. 3d, at 1035) into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.

The Government purports to find support for its proffered distinction of *New York* in our decisions in *Testa v. Katt*, 330 U.S. 386 (1947), and *FERC v. Mississippi*, 456 U.S. 742 (1982). We find neither case relevant. *Testa* stands for the proposition that state courts cannot refuse to apply federal law--a conclusion mandated by the terms of the Supremacy Clause ("the Judges in every State shall be bound [by federal law]"). As we have suggested earlier, *supra*, at 6-7, that says nothing about whether state executive officers must administer federal law. Accord *New York*, 505 U.S., at 178-179. As for *FERC*, it stated (as we have described earlier) that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," 456 U.S., at 761-762, and upheld the statutory provisions at issue precisely because they did *not* commandeer state government, but merely imposed preconditions to continued state regulation of an otherwise pre-empted field, in accord with *Hodel*, 452 U.S., at 288, and required state administrative agencies to apply federal law while acting in a judicial capacity, in accord with *Testa*, See *FERC*, *supra*, at 759-771, and n. 24. ^[n.14]

The Government also maintains that requiring state officers to perform discrete, ministerial tasks specified by Congress does not violate the principle of *New York* because it does not diminish the accountability of state or federal officials. This argument fails even on its own terms. By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects. See Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 Vand. L. Rev. 1563, 1580, n. 65 (1994). Under the present law, for example, it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error (even one in the designated federal database) that causes a purchaser to be mistakenly rejected.

The dissent makes no attempt to defend the Government's basis for distinguishing *New York*, but instead advances what seems to us an even more implausible theory. The Brady Act, the dissent asserts, is different from the "take title" provisions invalidated in *New York* because the former is addressed to individuals--namely CLEOs--while the latter were directed to the State itself. That is certainly a difference, but it cannot be a constitutionally significant one. While the Brady Act is directed to "individuals," it is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State. The distinction between judicial writs and other government action directed against individuals in their personal capacity, on the one hand, and in their official capacity, on the other hand, is an ancient one, principally because it is dictated by common sense. We have observed that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). And the same must be said of a directive to an official in his or her official capacity. To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance. ^[n.15] Indeed, it merits the description "empty formalistic reasoning of the highest order," *post*, at 15. By resorting to this, the dissent not so much distinguishes *New York* as disembowels it. ^[n.16]

Finally, the Government puts forward a cluster of arguments that can be grouped under the heading: "The Brady Act serves very important purposes, is most efficiently administered by CLEOs during the interim period, and places a minimal and only temporary burden upon state officers." There is considerable disagreement over the extent of the burden, but we need not pause over that detail. Assuming *all* the mentioned factors were true, they might be relevant if we were evaluating whether the incidental application to the States of a federal law of general

applicability excessively interfered with the functioning of state governments. See, e.g., *Fry v. United States*, 421 U.S. 542, 548 (1975); *National League of Cities v. Usery*, 426 U.S. 833, 853 (1976) (overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)); *South Carolina v. Baker*, 485 U.S. 505, 529 (1988) (Rehnquist, C. J., concurring in judgment). But where, as here, it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty, such a "balancing" analysis is inappropriate. ^[a-17] It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect. Cf. *Bowsher*, 478 U. S., at 736 (declining to subject principle of separation of powers to a balancing test); *Chadha*, 462 U. S., at 944-946 (same); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239-240 (1995) (holding legislated invalidation of final judgments to be categorically unconstitutional). We expressly rejected such an approach in *New York*, and what we said bears repeating:

"Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Id.*, at 187.

We adhere to that principle today, and conclude categorically, as we concluded categorically in *New York*: "The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.*, at 188. The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

What we have said makes it clear enough that the central obligation imposed upon CLEOs by the interim provisions of the Brady Act--the obligation to "make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local record keeping systems are available and in a national system designated by the Attorney General," 18 U.S.C. § 922(s)(2)--is unconstitutional. Extinguished with it, of course, is the duty implicit in the background check requirement that the CLEO accept notice of the contents of, and a copy of, the completed Brady Form, which the firearms dealer is required to provide to him, §§922(s)(1)(A)(i)(III) and (IV).

Petitioners also challenge, however, two other provisions of the Act: (1) the requirement that any CLEO "to whom a [Brady Form] is transmitted" destroy the form and any record containing information derived from it, §922(s)(6)(B)(i), and (2) the requirement that any CLEO who "determines that an individual is ineligible to receive a handgun" provide the would be purchaser, upon request, a written statement of the reasons for that determination, §922(s)(6)(C). With the background check and implicit receipt of forms requirements invalidated, however, these provisions require no action whatsoever on the part of the CLEO. Quite obviously, the obligation to destroy all Brady Forms that he has received when he has received none, and the obligation to give reasons for a determination of ineligibility when he never makes a determination of ineligibility, are no obligations at all. These two provisions have conceivable application to a CLEO, in other words, only if he has chosen, voluntarily, to participate in administration of the federal scheme. The present petitioners are not in that position. ^[a-18] As to them, these last two challenged provisions are not unconstitutional, but simply inoperative.

There is involved in this Brady Act conundrum a severability question, which the parties have briefed and argued: whether firearms dealers in the jurisdictions at issue here, and in other jurisdictions, remain obliged to forward to the CLEO (even if he will not accept it) the requisite notice of the contents (and a copy) of the Brady Form, §§922(s)(1)(A)(i)(III) and (IV); and to wait five business days before consummating the sale, §922(s)(1)(A)(ii). These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the Court. Cf., e.g., *New York, supra*, at 186-187 (addressing severability where remaining provisions at issue affected the plaintiffs).

* * *

We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

NOTES

¹ The dissent is wrong in suggesting, *post*, at 13, n. 9, that the *Second Employers' Liability Cases*, 223 U.S. 1 (1912), eliminate the possibility that the duties imposed on state courts and their clerks in connection with naturalization proceedings were contingent on the State's voluntary assumption of the task of adjudicating citizenship applications. The *Second Employers' Liability Cases* stand for the proposition that a state court must entertain a claim arising under federal law "when its ordinary jurisdiction as prescribed by local law is appropriate to the occasion and is invoked in conformity with those laws." *Id.*, at 56-57. This does not necessarily conflict with *Holmgren* and *Jones*, as the States obviously regulate the "ordinary jurisdiction" of their courts. (Our references throughout this opinion to "the dissent" are to the dissenting opinion of Justice Stevens, joined by Justice Ginsburg and Justice Breyer. The separate dissenting opinions of Justice Breyer and Justice Souter will be referred to as such.)

² Bereft of even a single early, or indeed even pre-20th century, statute compelling state executive officers to administer federal laws, the dissent is driven to claim that early federal statutes compelled state judges to perform executive functions, which implies a power to compel state executive officers to do so as well. Assuming that this implication would follow (which is doubtful), the premise of the argument is in any case wrong. None of the early statutes directed to state judges or court clerks required the performance of functions more appropriately characterized as executive than judicial (bearing in mind that the line between the two for present purposes is not necessarily identical with the line established by the Constitution for

federal separation of powers purposes, see *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957)). Given that state courts were entrusted with the quintessentially adjudicative task of determining whether applicants for citizenship met the requisite qualifications, see Act of Mar. 26, 1790, ch. 3, §1, 1 Stat. 103, it is unreasonable to maintain that the ancillary functions of recording, registering, and certifying the citizenship applications were unalterably executive rather than judicial in nature.

The dissent's assertion that the Act of July 20, 1790, ch. 29, §3, 1 Stat. 132-133, which required state courts to resolve controversies between captain and crew regarding seaworthiness of a vessel, caused state courts to act "like contemporary regulatory agencies," *post*, at 14, is cleverly true--because contemporary regulatory agencies have been allowed to perform adjudicative ("quasi judicial") functions. See 5 U.S.C. § 554; *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). It is foolish, however, to mistake the copy for the original, and to believe that 18th century courts were imitating agencies, rather than 20th century agencies imitating courts. The Act's requirement that the court appoint "three persons in the neighbourhood . . . most skilful in maritime affairs" to examine the ship and report on its condition certainly does not change the proceeding into one "supervised by a judge but otherwise more characteristic of executive activity," *post*, at 14; that requirement is not significantly different from the contemporary judicial practice of appointing expert witnesses, see *e.g.*, Fed. Rule Evid. 706. The ultimate function of the judge under the Act was purely adjudicative; he was, after receiving the report, to "adjudge and determine . . . whether said ship or vessel is fit to proceed on the intended voyage . . ." 1 Stat. 132.

³ Article IV, §2, cl. 2 provides:

"A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

To the extent the legislation went beyond the substantive requirement of this provision and specified procedures to be followed in complying with the constitutional obligation, we have found that that was an exercise of the congressional power to "prescribe the Manner in which such Acts, Records and Proceedings, shall be proved, and the Effect thereof," Art. IV, §1. See *California v. Superior Court of Cal., San Bernardino Cty.*, 482 U.S. 400, 407 (1987).

⁴ Both the dissent and Justice Souter dispute that the consequences are said to flow automatically. They are wrong. The passage says that (1) federal laws will be supreme, and (2) all state officers will be oath bound to observe those laws, and *thus* (3) state officers will be "incorporated" and "rendered auxiliary." The reason the progression is automatic is that there is *not* included between (2) and (3): "(2a) those laws will include laws compelling action by state officers." It is the mere existence of *all* federal laws that is said to make state officers "incorporated" and "auxiliary."

⁵ Justice Souter seeks to avoid incompatibility with *New York* (a decision which he joined and purports to adhere to), by saying, *post*, at 3-4, that the passage does not mean "any conceivable requirement maybe imposed on any state official," and that "the essence of legislative power . . . is a discretion not subject to command," so that legislatures, at least, cannot be commanded. But then why were legislatures mentioned in the passage? It seems to us assuredly *not* a "natural reading" that being "rendered auxiliary to the enforcement of [the national government's] laws" means impressibility into federal service for "courts and magistrates" but something quite different for "legislatures." Moreover, the novel principle of political science that Justice Souter

invokes in order to bring forth disparity of outcome from parity of language--namely, that "[t]he essence of legislative power . . . is a discretion not subject to command"--seems to us untrue. Perhaps legislatures are inherently uncommandable as to the outcome of their legislation, but they are commanded all the time as to what subjects they shall legislate upon--commanded, that is, by the people, in constitutional provisions that require, for example, the enactment of annual budgets or forbid the enactment of laws permitting gambling. We do not think that state legislatures would be betraying their very "essence" as legislatures (as opposed to their nature as sovereigns, a nature they share with the other two branches of government) if they obeyed a federal command to enact laws, for example, criminalizing the sale of marijuana.

[§] If Justice Souter finds these obligations too insignificant, see *post*, at 3, n. 1, then perhaps he should subscribe to the interpretations of "essential agency" given by Madison, see *infra*, at 15 and n. 8, or by Story, see *infra*, n. 9. The point is that there is *no* necessity to give the phrase the problematic meaning which alone enables him to use it as a basis for deciding this case.

[‡] Justice Souter deduces from this passage in No. 36 that although the Federal Government *may* commandeer state officers, it *must* compensate them for their services. This is a mighty leap, which would create a constitutional jurisprudence (for determining when the compensation was adequate) that would make takings cases appear clear and simple.

[§] Justice Souter's discussion of this passage omits to mention that it *contains an example* of state executives' "essential agency"--and indeed implies the opposite by observing that "*other* numbers of the *Federalist* give examples" of the "essential agency" of state executive officers. *Post*, at 4 (emphasis added). In seeking to explain the curiousness of Madison's *not mentioning* the state executives' obligation to administer federal law, Justice Souter says that in speaking of "an essential agency in giving effect to the Federal Constitution," Federalist No. 44, Madison "was not talking about executing congressional statutes; he was talking about putting the National Constitution into effect," *post*, at 4, n. 2. Quite so, which is our very point.

It is interesting to observe that Story's Commentaries on the Constitution, commenting upon the same issue of why state officials are required by oath to support the Constitution, uses the same "essential agency" language as Madison did in Federalist No. 44, and goes on to give more numerous examples of state executive agency than Madison did; all of them, however, involve not state administration of federal law, but merely the implementation of duties imposed on state officers by the Constitution itself: "The executive authority of the several states may be often called upon to exert Powers or allow Rights given by the Constitution, as in filling vacancies in the senate during the recess of the legislature; in issuing writs of election to fill vacancies in the house of representatives; in officering the militia, and giving effect to laws for calling them; and in the surrender of fugitives from justice." 2 Story, Commentaries on the Constitution of the United States 577 (1851).

[§] Even if we agreed with Justice Souter's reading of the Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution." C. Rossiter, *Alexander Hamilton and the Constitution* 199 (1964). More specifically, it is widely recognized that "The Federalist reads with a split personality" on matters of federalism. See D. Braveman, W. Banks, & R. Smolla, *Constitutional Law: Structure and Rights in Our Federal System* 198-199 (3d ed. 1996). While overall The Federalist reflects a "large area of agreement between Hamilton and Madison,"

Rossiter, *supra*, at 58, that is not the case with respect to the subject at hand, see Braveman, *supra*, at 198-199. To choose Hamilton's view, as Justice Souter would, is to turn a blind eye to the fact that it was Madison's--not Hamilton's--that prevailed, not only at the Constitutional Convention and in popular sentiment, see Rossiter, *supra*, at 44-47, 194, 196; 1 Records of the Federal Convention (M. Farrand ed. 1911) 366, but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice, see *supra*, at 5-10.

¹⁰ The dissent, reiterating Justice Stevens' dissent in *New York*, 505 U. S., at 210-213, maintains that the Constitution merely *augmented* the pre-existing power under the Articles to issue commands to the States with the additional power to make demands directly on individuals. See *post*, at 7-8. That argument, however, was squarely rejected by the Court in *New York*, *supra*, at 161-166, and with good reason. Many of Congress's powers under Art. I, § 8, were copied almost verbatim from the Articles of Confederation, indicating quite clearly that "[w]here the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it." Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1972 (1993).

¹¹ Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. The Framers were familiar with many federal systems, from classical antiquity down to their own time; they are discussed in Nos. 18-20 of *The Federalist*. Some were (for the purpose here under discussion) quite similar to the modern "federal" systems that Justice Breyer favors. Madison's and Hamilton's opinion of such systems could not be clearer. Federalist No. 20, after an extended critique of the system of government established by the Union of Utrecht for the United Netherlands, concludes:

"I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contra distinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity" *Id.*, at 138.

Antifederalists, on the other hand, pointed specifically to Switzerland--and its then 400 years of success as a "confederate republic"--as proof that the proposed Constitution and its federal structure was unnecessary. See Patrick Henry, Speeches given before the Virginia Ratifying Convention, 4 and 5 June, 1788, reprinted in *The Essential Antifederalist* 123, 135-136 (W. Allen & G. Lloyd ed. 1985). The fact is that our federalism is not Europe's. It is "the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Friendly, *Federalism: A Forward*, 86 Yale L. J. 1019 (1977)).

¹² There is not, as the dissent believes, *post*, at 23, "tension" between the proposition that impressing state police officers into federal service will massively augment *federal* power, and the proposition that it will also sap the power of the Federal *Presidency*. It is quite possible to have a more powerful Federal Government that is, by reason of the destruction of its Executive unity, a less efficient one. The dissent is correct, *post*, at 24, that control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal programs, but the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency.

¹³ This argument also falsely presumes that the the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions, see *supra*, at 19-20, and not only those, like the Tenth Amendment, that speak to the point explicitly. It is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926) (finding by implication from Art. II, §1, 2, that the President has the exclusive power to remove executive officers); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (finding that Article III implies a lack of congressional power to set aside final judgments).

¹⁴ The dissent points out that *FERC* cannot be construed as merely following the principle recognized in *Testa* that state courts must apply relevant federal law because "[a]lthough the commission was serving an adjudicative function, the commissioners were unquestionably not 'judges' within the meaning of [the Supremacy Clause]." *Post*, at 33. That is true enough. But the answer to the question of which state officers *must* apply federal law (only " 'judges' within the meaning of [the Supremacy Clause]") is different from the answer to the question of which state officers *may be required by statute* to apply federal law (officers who conduct adjudications similar to those traditionally performed by judges). It is within the power of the States, as it is within the power of the Federal Government, see *Crowell v. Benson*, 285 U.S. 22 (1932), to transfer some adjudicatory functions to administrative agencies, with opportunity for subsequent judicial review. But it is also within the power of Congress to prescribe, explicitly or by implication (as in the legislation at issue in *FERC*), that those adjudications must take account of federal law. The existence of this latter power should not be unacceptable to a dissent that believes distinguishing among officers on the basis of their title rather than the function they perform is "empty formalistic reasoning of the highest order," *post*, at 15. We have no doubt that *FERC* would not have been decided the way it was if *nonadjudicative* responsibilities of the state agency were at issue.

¹⁵ Contrary to the dissent's suggestion, *post*, at 18-19, n. 16, and 29, the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here. We long ago made clear that the distinction is peculiar to the question of whether a governmental entity is entitled to Eleventh Amendment sovereign immunity, see *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 690, n. 55 (1978); we have refused to apply it to the question of whether a governmental entity is protected by the Constitution's guarantees of federalism, including the Tenth Amendment, see *National League of Cities v. Usery*, 426 U.S. 833, 855-856, n. 20 (1976) (overruled on other grounds by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)); see also *Garcia, supra* (resolving Tenth Amendment issues in suit brought by local transit authority).

¹⁶ The dissent's suggestion, *post*, at 28-29, n. 27, that *New York v. United States*, 505 U.S. 144 (1992), itself embraced the distinction between congressional control of States (impermissible) and congressional control of state officers (permissible) is based upon the most egregious wrenching of statements out of context. It would take too much to reconstruct the context here, but by examining the entire passage cited, *id.*, at 178-179, the reader will readily perceive the distortion. The passage includes, for example, the following:

"Additional cases cited by the United States discuss the power of federal *courts* to order state officials to comply with federal law. . . . Again, however, the text of the Constitution plainly confers this authority on the federal courts The Constitution contains no analogous grant of authority to Congress." *Id.*, at 179.

¹⁷ The dissent observes that "Congress could require private persons, such as hospital executives or school administrators, to provide arms merchants with relevant information about a prospective purchaser's fitness to own a weapon," and that "the burden on police officers [imposed by the Brady Act] would be permissible if a similar burden were also imposed on private parties with access to relevant data." *Post*, at 25. That is undoubtedly true, but it does not advance the dissent's case. The Brady Act does not merely require CLEOs to report information in their private possession. It requires them to provide information that belongs to the State and is available to them only in their official capacity; and to conduct investigation in their official capacity, by examining databases and records that only state officials have access to. In other words, the suggestion that extension of this statute to private citizens would eliminate the constitutional problem posits the impossible.

¹⁸ We note, in this regard, that both CLEOs before us here assert that they are prohibited from taking on these federal responsibilities under state law. That assertion is clearly correct with regard to Montana law, which expressly enjoins any "county . . . or other local government unit" from "prohibit[ing] . . . or regulat[ing] the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, [or] possession . . . of any . . . handgun," Mont. Code §45-8-351(1) (1995). It is arguably correct with regard to Arizona law as well, which states that "[a] political subdivision of this state shall not . . . prohibit the ownership, purchase, sale or transfer of firearms," Ariz. Rev. Stat. §13-3108(B) (1989). We need not resolve that question today; it is at least clear that Montana and Arizona do not require their CLEOs to implement the Brady Act, and CLEOs Printz and Mack have chosen not to do so.