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**SUBCOMMITTEE ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER
SECURITY, AND INTERNATIONAL LAW**

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES**

**PUBLIC SAFETY AND CIVIL RIGHTS IMPLICATIONS OF
STATE AND LOCAL ENFORCEMENT OF FEDERAL
IMMIGRATION LAWS**

TESTIMONY OF

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I thank Subcommittee Chairs Lofgren and Nadler and Ranking Members King and Sensenbrenner for convening this important hearing today. The American people need to know that using state and local police forces for immigration enforcement raises significant public safety and civil rights issues that pose a danger to everyone.

We now have a severely dysfunctional immigration system, in which problems have built up and compounded for years. But putting state and local police into the position of enforcing immigration law will create new problems that will endanger the safety of all Americans, and subject state and local law enforcement agencies and their officers to possible liability for racial and ethnic profiling. In short, moving our state and local police into the business of immigration enforcement risks the gains we have made against crime over the last fifteen years, and creates significant new perils for the men and women who dedicate themselves to public safety. This explains why the overwhelming number of state and local police departments and law enforcement professional organizations want no part of immigration enforcement.

Section 287(g) and Efforts to Push State and Local Police to Enforce Immigration Law

In the 1990s, Congress created Section 287(g) of the immigration law. Section 287(g) authorized the federal government to enter into voluntary agreements called Memoranda of Agreement (MOAs) with state and local law enforcement agencies, under which the state and local police departments (usually small numbers of designated officers from within the departments) would become partners with federal immigration enforcement agencies. They would work together on immigration enforcement; would receive some training; and would participate in joint operations under federal supervision.

But no police departments decided to participate in the 287(g) program until early in this decade; even then, only two agencies – state police in Florida and Alabama – chose to involve small numbers of their officers in the program. (The number has since grown, but remains miniscule compared to the 17,000 police departments nationwide, and includes no police departments from major cities.)

This has frustrated some who advocated for stronger immigration enforcement. In particular, many Americans have questioned the federal government's inability to assure the integrity of our borders against unauthorized crossings. By 2006, an estimated twelve million people had entered the country illegally, and the federal agencies empowered to deal with the problem seemed unable or unwilling to do so in any satisfactory way, and resulted in the introduction of federal legislation such as the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, H.R. 2671 (108th Cong.), and the Homeland Security Enhancement Act, S. 1906 (108th Cong.). Both bills aimed to force non-federal police into the enforcement of immigration law by depriving those agencies that refused to do so of federal funds designed to reimburse them for the costs of detaining and housing illegal immigrants for the federal government. These costs to states, counties, and municipal governments ran into the millions of dollars, often because the federal government could not or would not do its duty and take custody of the individuals apprehended. The threat to these local governments was real: either step up and begin enforcing immigration law, or lose the money you need to pay for carrying this federal burden. Virtually all major police organizations, including the International Association of Chiefs of Police, the Major Cities Chiefs Association, opposed this legislation.

These were not the only efforts made to push state and local police into immigration enforcement. During the Bush Administration, the Department of Justice began to use the

National Crime Information Center (NCIC) database for this purpose. NCIC constitutes the single most important information source for police departments and cops on the street in the U.S. Police in every corner of the country query NCIC thousands of times a day to determine whether drivers stopped for traffic enforcement, suspicious persons encountered by officers, or persons arrested for crimes are wanted in any jurisdiction. The FBI maintains the NCIC under a strict federal law governing how police agencies can use it and what kind of information may be put into it. Only certain data can be entered, in order to keep NCIC free of inaccurate, untimely, and unnecessary information; all other types of data are strictly prohibited. In direct violation of these rules, the Department of Justice put tens of thousands of immigration warrants – most of which are civil in nature and do not even pertain to crimes – into NCIC, with the goal of forcing local police to make arrests based on these warrants.

All of these efforts took place against the backdrop of increased pressure from advocates of stronger immigration enforcement, who clothed their efforts in the rhetoric of the war on terror. If millions of poor people from Mexico and Central America could make it into the U.S. by simply walking across the border, surely potential terrorists could do this, too. Never mind the lack of evidence that this had occurred or might occur at some time in the future; it could happen, they argued, so policing the border had to become a national security matter. And state and local police needed to take on the job of immigration enforcement to keep our country safe from terrorists.

The Response of Police Departments: “No, Thank You”

American police departments and their officers have a long history of rising to challenges for the country, of responding in times of emergencies large and small, short and long term, with

a willingness to tackle whatever problems have emerged. Thus it surprises long-time observers of the criminal justice system to see that (with only a few exceptions) state and local law enforcement has answered the call to enforce immigration law with a straightforward refusal: “no, thank you.”

For some, it is a matter of the correct use of governmental powers. Immigration is a federal matter, both under the Constitution and in every practical sense. Therefore, the federal government has always had the job of enforcing our numbingly complex immigration laws, and that must continue. For others, the question comes down to resources. Police departments have never found themselves more strapped; some governments have had to lay off officers. They also face a daunting new array of homeland security-related tasks, at the same time that they find their ranks depleted by military deployments of officers who are members of the National Guard. They simply do not have the wherewithal to take on the huge and complex problem of immigration enforcement.

But by far the most common response to the push to get state and local police involved in immigration enforcement centers on the core public safety responsibilities of our police departments. Simply put, police officers know that getting involved in immigration enforcement would constitute a huge mistake from the perspective of crime fighting. It will degrade their ability to prevent crime and catch criminals; they will find their ability to keep people safe crippled. And for that reason above all others, they want no part of the effort.

Destroys the Ability of Local Police to Assure Public Safety

For the past two decades, American police departments have virtually all moved toward community policing. While this philosophy of police work has many facets, among the most

important is that police and the communities they serve must work together to make the streets safe in our cities and towns. Partnerships, based on trust, put police and citizens on the same side of the struggle against crime, instead of solidifying old “us versus them” differences. This results in police receiving valuable information from citizens about who is up to what in their neighborhoods. And it is this information that is the lifeblood of successful policing; without it, police do nothing but respond to crime after it happens, and can do nothing to prevent damage before it occurs. Thus the relationships between police and the people who live in our communities are at the heart and of any anti-crime effort. Without it, police move about only blindly, without guidance from the people who know what is happening on the ground.

Creating and nurturing these relationships is not easy, and always takes sustained effort over time, especially in communities in which there exists a history of mistrust and abuse. But police departments that have successfully devoted themselves to community policing have undertaken the task and devoted resources to it because it pays real dividends in terms of crime reduction.

The task is only more difficult in immigrant communities. In these areas, police confront cultural differences invisible to the uninitiated outsider. Along with culture, language barriers can make even basic communication difficult. What is more, people in immigrant communities may carry a distrust of police from experiences in their home countries. Despite all of this, American law enforcement has built a record of attempting to work through these differences to build relationships. The police realize that, as in any other community, they need public support to succeed – whether the public consists of native born Americans, naturalized immigrants, even illegal immigrants, or a mix of all three. And, generally speaking, they have worked hard to create these relationships.

Involvement of state and local police in immigration enforcement potentially jeopardizes all of this progress, and threatens to cut off the all-important avenues of communication and information that community policing uses to create public safety. Put simply, if state and local police become participants in immigration enforcement, people in immigrant communities will not trust them. Instead, they will begin to fear them, and to fear contact with them. They will fear that any encounter with the police – reporting a crime, telling a police officer about dangerous persons or events in the community, or even telling an officer that they themselves have become crime victims – will result in investigation *of them*, and will focus on their immigration status. Thus every police contact becomes a possible occasion for deportation. Naturally, immigrants whose legal status is questionable will fear this, and avoid the police.

This fear will spread beyond illegal immigrants. According to the Pew Hispanic Center, 3.2 million American citizens live in mixed status households, in which some people have legal status, but others do not. Even those with legal status will hesitate to become involved with police if they think it might bring immigration consequences on someone living in the home – usually, of course, a family member.

The consequences of this are both obvious and disastrous. First, police will not have all of the information that they need to make the neighborhood safe, because some number of residents will not communicate with them out of fear. Second, and perhaps more appalling, immigrants victimized by predators – robbers, rapists, even potential killers – will not report crimes against them. This leaves the predators free to victimize others.

This is why police departments have not, as a rule, embraced the call to involve themselves in immigration enforcement: it will corrode their hard-won gains with immigrant

communities, and as a consequence it will damage crime control efforts. According to Gene Voegtlin of the International Association of Chiefs of Police, “a key concern is that state and local enforcement involvement in immigration can have a chilling effect on the relationship” police have “with the immigrant community in their jurisdiction.” *Cities and States Take On Difficult Duty of Handling Undocumented Workers*, Wall Street Journal, Feb. 2, 2006. This translates directly into less information for the police, and a lessening of their ability to catch criminals. “It’s a matter of practical policing,” says George Gascon, former Assistant Chief of the Los Angeles Police Department and now Chief of Police in Mesa, Arizona. “If an undocumented woman is raped and doesn’t report it, the suspect who raped that woman, remember, could be the suspect who rapes someone else’s sister, mother or wife later.” (Jack Dunphy, *Arresting A Crime Wave*, National Review Online, Jan. 30, 2006 <http://article.nationalreview.com/?q=MDUzZGUyNTgwNTEzYzliNDVkOGVjMjk3NjA0Nm4NzU=>).

Racial and Ethnic Profiling Almost Certainly Follows

Inserting local police into immigration enforcement represents a serious mistake for another reason: it will force our police officers into an untenable position by giving them an assignment which most cannot carry out without relying on racial or ethnic appearance. This will lead them into profiling, and will subject them and their departments to legal liability.

Immigration law ranks among the most complex bodies of rules, statutes, regulations and court cases that this country has. One court memorably noted the “striking resemblance between (immigration law) and King Minos’s labyrinth in ancient Crete, and said that immigration law is among “examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate

the aging process of judges.” *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). One might liken the extreme complexity of U.S. immigration law to the tax code – except that the tax code is easy to understand and changes less often by comparison. For this reason if no other, the task of immigration enforcement demands high specialized knowledge, training, and experience. Thus the importance of having expert immigration officers in agencies like Immigration and Customs Enforcement makes sense.

In contrast, state and local police get no training in the intricacies of immigration law during their training. (Even those officers who are among the few in the U.S. who get training in immigration law under Section 287(g) MOAs receive only five weeks of training – not long enough to thoroughly grasp the rules.) And no officer can pick up crucial subtleties – of what makes specialized immigration documents genuine or fraudulent, of understanding when an individual allowed into this country legally may or may not have fallen out of status, or of knowing whether a work permit has or has not expired – simply from spending time on the street.

Thus when state and local officers become involved in immigration enforcement, they operate without vital knowledge that usually enables police to make intelligent distinctions on the street between law abiding persons and possible criminals. This inevitably results in the use of substitute clues: racial or ethnic appearance, inability to speak English, or the presence of an accent. All of these, of course, constitute racial and ethnic markers. Relying on race or ethnicity this way may not be the intent of the officer in any way, but because they do not have access to other clues or intelligence, since they do not have the requisite training and direct immigration experience, they inevitably fall back on what is easily perceivable: ethnic appearance or accent.

Note that the impact of this activity falls not just on persons present illegally in this country, but on anyone who looks or sounds as if they might belong to the same ethnic group. And the more people in any particular area who share that ethnic heritage, the more American citizens or legally present nationals will receive this treatment: they will be treated like people who have to prove they have a right to be present, perhaps in the country of their birth. Unfortunately, this will happen most frequently in the American southwest, where the population of American citizens with Mexican or Central American appearance will be highest.

Enforcing the law based on race, ethnic appearance, or national origin violates the Equal Protection Clause of the Constitution, and can create legal liability for the departments and the officers involved. Legal action might come from the individuals affected by these practices, either singly or as part of a class of persons, or even from the Department of Justice, which has authority to bring suit against law enforcement agencies that engage in “patterns or practices” of violations of the constitutional rights of persons, under 42 U.S.C. Section 14141. Thus our police are put in an untenable position. If we push them into enforcing a complex body of law with little or no training, we put them into a position in which grave mistakes are nearly inevitable – mistakes which may cost them and their departments dearly.

A Case Study: Maricopa County, Arizona

Many Americans have become familiar with “Sheriff Joe” Arpaio of Maricopa County, Arizona. He has long embraced his reputation as “America’s toughest sheriff,” and during the past year Arpaio has used his authority to undertake crackdowns on suspected illegal immigrants. This has included raids of various kinds, as well as the use of traffic enforcement as a pretext to investigate immigration status. Arpaio has frequently clashed with other local officials,

including the heads of other law enforcement agencies in Maricopa County; he has staged his immigration enforcement actions in their jurisdictions unilaterally, with neither their permission nor participation, because his own jurisdiction is county wide. This has caused considerable frustration and consternation, but Arpaio has continued these actions anyway.

Late in 2008, the conservative Goldwater Institute, located in Arizona, released an independent study of Sheriff Arpaio's immigration enforcement actions and the impact these actions have had on not just immigration but public safety in general. The report, entitled "Mission Unaccomplished," (which can be found at in its entirety at <http://www.goldwaterinstitute.org/Common/Img/Mission%20Unaccomplished.pdf>) contained several key findings.

- Rates of violent crime in Maricopa County and the City of Phoenix increased during Arpaio's immigration enforcement initiative.
- Response times to 911 calls to the Sheriff's Department increased.
- The immigration crackdown had resulted in the diversion of significant resources away from the mission of fighting crime and acting as primary first responders in various emergency situations.
- There had been little or no coordination with other police agencies during the Sheriff's enforcement actions, resulting confusion among departments as well as anger and resentment.
- The Sheriff's efforts had been utterly ineffective as immigration enforcement mechanisms.

- These efforts had led directly to law suits against the Sheriff’s department, specifically for allegedly illegal and unconstitutional conduct during the actions, including profiling.

And less than a month ago, Sheriff Arpaio’s actions earned his department a dubious distinction. In the first action of its kind for the new Administration, the Department of Justice announced a formal investigation of the Maricopa County Sheriff’s Department under 42 U.S.C. Section 14141, for a “pattern or practice” of constitutional violations.

Conclusion

For public safety and civil rights, the implications of immigration enforcement by state and local police departments could not be clearer, or more negative. Immigration enforcement by these non-federal law enforcement agencies will lead to a decrease in public safety and an increase in crime, because vital relationships between police and the communities they serve will break down, corroding under the fear generated by immigration enforcement. And going in this direction almost guarantees that police, no matter how well intentioned, will fall back into identifying suspects by racial or ethnic appearance – racial profiling by any other name. By and large, our state and local police do not want to do this; they want no part of this doomed effort, and rightfully so. We must do everything in our power to support them and their desire to do what it takes to make us safe and to avoid the barriers immigration duties would put in their way.