AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 9, 2004

RESOLVED, That the American Bar Association,

1. Urges that the Federal Government retain exclusive jurisdiction over civil immigration matters,

2. Opposes delegation of legal authority to state, territorial and local police to enforce federal civil immigration laws, and

3. Opposes criminalization of civil violations of immigration law.

REPORT

This Report addresses aspects of H.R. 2671, the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, introduced on July 9, 2003 by Representative Charles Norwood (R-GA). The Act makes the mere undocumented presence or entry of an alien a felony that can result in asset forfeiture. The Act also, for the first time in our nation's history, delegates jurisdiction over federal *civil* immigration laws to state and local law enforcement officials and requires these officials to enforce the federal civil immigration laws. These unprecedented proposals violate important domestic constitutional and civil justice principles (including separation of powers) as well as existing treaties to which the United States is a signatory and international law.

A copy of the bill is attached to this Report. The bill has been through several committee hearings in the House of Representatives and has, as of November 17, the co-sponsorship of 111 members of the House. A similar bill is expected to be introduced in the Senate soon. For the reasons that follow, we urge the American Bar Association to oppose three aspects of the bill that threaten to undermine the integrity of our judicial system, the rule of law and long-established demarcations of authority between state and federal governments.

1. Civil Immigration Matters Should Remain the Exclusive Province of the Federal Government. Although the bill's title suggests it is anti-crime legislation directed to aliens who have committed crimes, the bill actually creates legal authority for state and local police to enforce federal *civil* immigration laws. The bill provides that state and local law enforcement officials are "fully authorized to investigate, apprehend, detain, or remove aliens in the United States. . . in the enforcement of the immigration laws of the United States." Sec. 101, H.R. 2671. This conflicts with important Constitutional principles and with ABA stated policies against state and local law enforcement officers enforcing federal immigration laws.[1] Delegating such broad authority for the enforcement of federal immigration laws to state and local police is both unprecedented and unwise. The U.S. Constitution has vested exclusive power over immigration

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[1] In August 1983 the House of Delegates adopted the following Resolution:

1. Because immigration law enforcement is a federal responsibility, state and local police should not exercise the powers of an immigration officer under, or directly or indirectly enforce, the federal immigration laws, except in the case of alien smuggling as authorized by the Immigration and Nationality Act (8 U.S.C. 1324(c));

2. When state and local police have a person in custody on state or local charges, and while the custody is proper under state or local law, state and local police should inform the Immigration and Naturalization Service when, consistent with applicable law, they suspect the person is an undocumented or illegal alien. State and local police should not interrogate the person with respect to violations of the federal immigration laws.

matters, including removal of aliens, with the federal government. U.S. Const. art. I, § 8, cl. 4. That immigration is a uniquely federal matter has been recognized time and again by the Supreme Court. The Supreme Court has stated that "[t]he authority to control immigration ... is vested solely in the Federal government," *Truax v. Raich*, 239 U.S. 33, 42 (1915), and that the formulation of "[p]olicies pertaining to the entry of aliens and their right to remain here ... is entrusted exclusively to Congress," *Galvan v. Press*, 347 U.S. 522, 531 (1954). *See also, e.g., Reno v. Flores*, 507 U.S. 292, 305-306 (1993) ("the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

Sound policy underlies the federal government's exclusive control over immigration matters. Immigration decisions "take into account the character of the relationship between the alien and this country," *Mathews v. Diaz*, 426 U.S. 67, 80 (1976), implicate "foreign relations and international commerce," and call for "delicate policy judgments." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). International diplomatic relations are neither the province nor within the expertise of local and state law enforcement officials.

Moreover, the Immigration and Nationality Act governing the admissibility of aliens and their status within our borders is among the most complex of federal statutory schemes. *Id*. Indeed, former Chief Judge Kaufman of the Second Circuit has complained:

> We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges. In this instance, Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle. The fate of the alien faced with imminent deportation often hinges upon narrow issues of statutory interpretation.

Lok v. INS, 548 F.2d 37, 38 (1977). If the INA has this impact upon a sophisticated jurist, imagine the chaos that will ensue upon entrusting the enforcement of the Act to state and local police, whose responsibilities have already increased dramatically following the September 11 terrorist attacks.

2. State and Local Law Enforcement Officials Should Not Be Required to Enforce Federal Civil Immigration Laws. The bill thrusts the obligation to enforce federal civil immigration laws on state and local police without any guarantee that they will be trained in immigration law, Sec. 109, H.R. 2671. State and local police are extremely ill-equipped to determine who has violated a civil immigration law due to the complex administrative nature of the violations. Expecting a local law enforcement officer - whose primary role is to ensure public safety - to be able to determine whether an individual is an asylum seeker, has been the victim of human trafficking and is entitled to the new T-visa, is out of status because the former

INS mis-processed or lost their papers, or has valid immigration appeal rights is unreasonable. Instead, the local law enforcement officer will inevitably stop and question people of certain ethnic backgrounds, who speak certain languages, or who speak with an accent. This will encourage race and ethnicity based profiling, the targeting of business who hire foreign-looking or sounding workers, etc.

Conscripting state and local law enforcement officers to be quasi-immigration agents will also severely damage their vital local law enforcement functions. The bill has been widely criticized by state and local law enforcement, who maintain that it will adversely affect their ability to gain the trust of immigrant residents and will irreversibly dismantle gains made in reducing crime since the advent of "community-based" policing. By turning police into immigration agents, the CLEAR Act ensures that more immigrants will avoid contact with local law enforcement, putting entire communities at risk. Newcomers will quickly learn that if they - as victims, witnesses, or concerned residents - have any contact with police, they or their family members will risk deportation. They will remain silent and our streets will be less safe as a result. With local police enforcing immigration laws, immigrant survivors of domestic violence, sexual assault, trafficking and other crimes will not feel safe in approaching law enforcement officials, even for immediate emergency assistance if trapped in a potentially life-threatening domestic violence situation.

The bill also provides immunity from personal liability for enforcement of immigration law committed on duty, as well as immunity from claims of money damages based on any incident arising out of enforcement of any immigration law. Sec. 110, H.R. 2671. Such broad immunity for state and local law enforcement officers, in a complex area with which they are untrained and unfamiliar, invites abuse and misconduct (including racial profiling) by any police officer so inclined and ensures that victims of even the most egregious civil violations will go uncompensated.

Compensation for victims of civil rights violations by law enforcement officials is an extremely important component of our judicial system. Qualified immunity already provides immunity for violations of civil rights unless the violation is of clearly established law. This standard has been more than sufficient to provide for the competing interest of law enforcement. The courts have repeatedly recognized the importance of accommodating "two important societal objectives: to compensate persons injured by civil rights violations and to do so without discouraging vigorous enforcement of the laws. The first objective [has] impelled the [Supreme] Court to reject absolute in favor of qualified immunity for most officials." *Hanrahan v. Hampton*, 446 U.S. 754, 764 (1980), *citing Butz v. Economou*, 438 U.S. 478 (1978). There is simply no public policy reason to provide immunity from liability for every civil rights violation no matter how egregious or willful.

3. Mere Undocumented Presence or Entry Should Not Be Criminalized. One of the most pernicious aspects of H.R. 2671 is that it criminalizes the very type of entry most asylum seekers are forced to make into this country. In so doing, the bill violates existing treaties and international law. The bill defines as an "immigration violator" any alien "apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers," and any alien who "enters the United States without inspection." Sec. 103, H.R. 2671. This is precisely the method of entry made by a large number of refugees who

flee persecution in their native countries, and that is countenanced by the 1967 Protocol relating to the Status of Refugees, 606 U.N.T.S. 267 (1967), and the substantive provisions of the 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137 (1951), to which the United States is a State party. Article I (1) of the 1951 Convention provides:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The United Nations High Commissioner for Refugees has repeatedly recognized that it is likely that refugees may need to resort to illegal means to flee from persecution, which should not result in them being subject to penalties by the country of asylum. Executive Committee Conclusion No. 58 (XL) (1989) ("[C]ircumstances may compel a refugee or asylum seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered."); UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and th3 1967 Protocol relating to the Status of Refugees (1992), para. 196 ("In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently without personal documents."); UNHCR, "Detention of Asylum Seekers and Refugees: the Framework, the Problem and Recommended Practice," a Conference Room Paper for the Standing Committee, EC/49/SC/CRP.13, June 4, 1999 ("UNHCR Note on Detention"), para. 15 ("[T]he very circumstances which prompt the flight may compel an asylum-seeker to leave without documents or to have recourse to fraudulent documentation when leaving a country where his/her safety or freedom is endangered.").

Not only does this bill provide that asylum seekers may be subject to criminal penalties in violation of international law, it also provides that their data, including *civil* immigration violations will be entered into the FBI's National Crime Information Center (NCIC) database (a database of wanted persons maintained by the FBI for local law enforcement use). The database is a major tool used by state and local law enforcement to identify criminals. The CLEAR Act expands the scope of this database significantly, loading potentially millions of names of people with technical or administrative law violations into NCIC and undermining its integrity. The immigration service's data management problems are well documented.[2] Dumping its often outdated and erroneous files into the NCIC will lead to untold numbers of unlawful arrests, and a nightmare for the state and local agencies charged with implementing this law.

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[2] For example, the INS reported in 1998, "This agency is reliant on paper case files, with 25 million A-Files located in 80 offices across the nation. As of January 1998, there were 76,884 lost alien files service-wide." *Communique*, Volume 21, Number 4, April 1998 at 12. Earlier this year INS contract service personnel in California were indicted by federal authorities for having "managed" a high case backlog by shredding 90,000 files, many of which contained irreplaceable original documents such as passports and foreign birth certificates. *Shredder Ended Work Backlog, U.S. Says*, John M. Broder, New York Times, Section A, p. 22, col. 4, January 31, 2003.

Finally, the bill provides for the civil asset forfeiture of any immigrant who fails to depart for more than one year. In addition to the draconian nature of this penalty and its potential impact on the alien's family who remain in this country, it ignores the very real possibility that an immigrant may have received an order of deportation but have other claims for relief from that order such as a motion to reopen or an appeal to the Circuit Court pending more than one year later.

Patricia Lee Refo, Chair
Section of Litigation
February 2004

GENERAL INFORMATION FORM

Submitting Entity: Section of Litigation

Submitted By: Patricia Lee Refo, Chair

1. Summary of Recommendation(s). This Report and Recommendation requests that the ABA take a position in opposition to three aspects of H.R. 2671, the CLEAR Act. The issues addressed in this recommendation are the CLEAR Act's delegation of jurisdiction over civil immigration matters to state and local law enforcement authorities, its requirement that such state and local authorities enforce civil immigration laws, and its criminalization of the mere undocumented presence of an alien.

2. Approval by Submitting Entity. This Recommendation was approved by the Section of Litigation Council at its regularly scheduled meeting on October 11, 2003.

3. Has this or a similar recommendation been submitted to the House or Board previously? In August 1983 the House approved a Recommendation providing that, "[b]ecause immigration law enforcement is a federal responsibility, state and local police should not exercise the powers of an immigration officer under, or directly or indirectly enforce, the federal immigration laws, except in the case of alien smuggling, as authorized by the Immigration and Nationality Act."

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption? See above. The 2003 ABA Issues Handbook states that the "ABA opposes summary removal laws and favors preserving meaningful hearings with access to legal counsel and administrative and judicial review." The CLEAR Act seeks to accelerate removal of aliens (in certain instances even by state or local law enforcement) and to require that all aliens must leave within one year of a deportation order even if their case is on appeal. This recommendation opposes these provisions in the CLEAR Act and is therefore fully consistent with ABA policy. Adoption of this recommendation would also further the ABA's policies in favor of the preservation of constitutional protections and the international rule of law.

5. What urgency exists which requires action at this meeting of the House? The bill has been through several committee hearings in the House of Representatives and has, as of November 17, the co-sponsorship of 111 members of the House. A similar bill is expected to be introduced in the Senate soon. If the ABA is to be heard on these important issues it must consider this matter at the Midyear Meeting in February.

6. Status of Legislation. (If applicable.) See above.

7. Cost to the Association. (Both direct and indirect costs.) None.

8. Disclosure of Interest. (If applicable.) Not applicable.

9. Referrals. This Report and Recommendation has been or will be referred to the Individual Rights and Responsibilities Section, the Criminal Justice Section, the Young Lawyers Division, the Section of State and Local Government Law, the Section of Administrative Law and Regulatory Practice, General Practice, Solo and Small Firm Section, the Section of International Law and Practice, the Commission on Immigration Policy, Practice and Pro Bono, the American Immigration Lawyers Association, the State Bar Associations of Arizona, California, Florida, Illinois, New Mexico, New York, Texas and Washington, and the Beverly Hills, Chicago, New York City, New York County and San Francisco Bar Associations. Official responses have not yet been received.

10. Contact Person. (Prior to the meeting.) JoNel Newman, Co-Chair, Immigration Litigation Committee, Section of Litigation, Florida Legal Services, 3000 Biscayne Blvd., Suite 450, Miami, FL 33137, tel. (305) 573-0092, fax (305) 576-9664, jonel@floridalegal.org, or Judah Best, Section of Litigation Delegate, Debevoise & Plimpton, 555 13th Street, NW, Washington, DC 20004, tel. (202) 383-8060, fax (202) 383-8118, jbest@debevoise.com.

11. Contact Person. (Who will present the report to the House.) Judah Best, Section of Litigation Delegate, Debevoise & Plimpton, 555 13th Street, NW, Washington, DC 20004, tel. (202) 383-8060, fax (202) 383-8118, jbest@debevoise.com.