#### IACP September 2005 Legal Officers Section

### "Emerging Immigration Issues For Local Law Enforcement"

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#### IACP September 2005 Legal Officers Section

Where we are...

How we got here...

Where we're going...

#### WHERE WE ARE...

No uniform approach.

Disagreement on roles and duties—

- → "Breaking the law"
  - "Help secure our homeland"
  - -VS-
- → "Impact on local mission" and "It's federal job to do"



London, July 2005 attacks

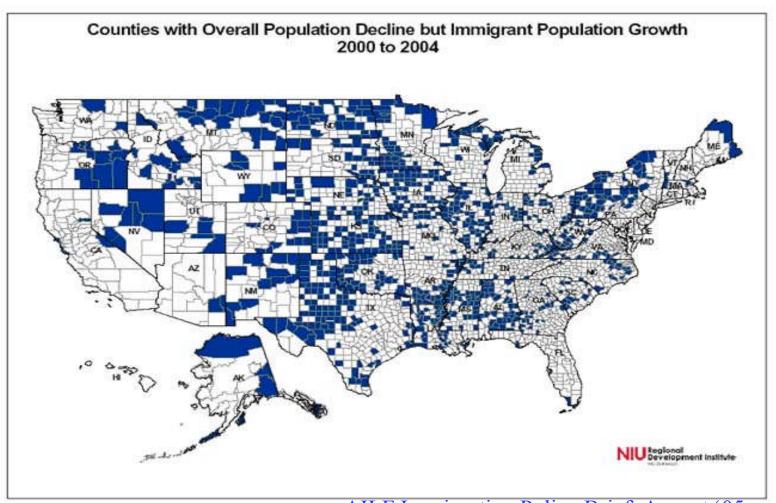
Transnational Terrorism

→ Ties to some illegal aliens and terrorism.

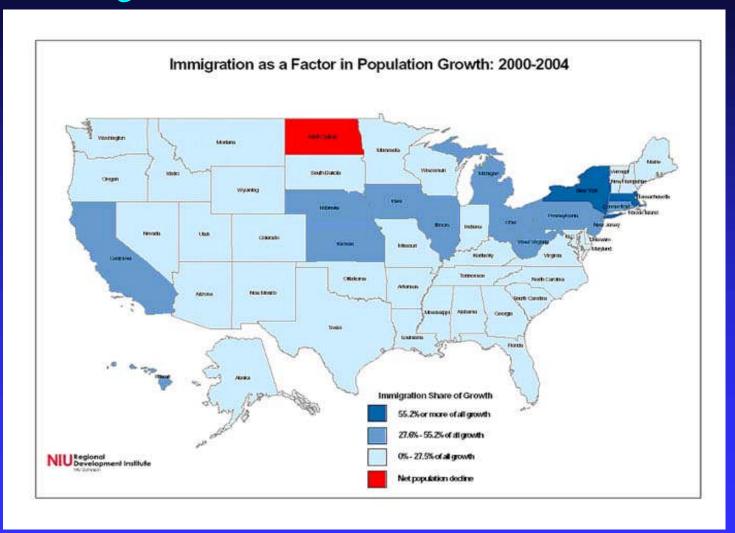
• Immigration enforcement is not "just a big city" or "border states" issue

- States with large numbers of immigrants are strongly associated with immigration enforcement issues.
- BUT states where immigration is a large portion of population growth are impacted by immigation.
- Significant impact due to low growth rates among the native population.

Rob Paral, American Immigration Law Foundation



AILF Immigration Policy Brief, August '05



Immigration enforcement issues affect all communities, <u>everywhere</u>.

## IACP September 2005 Immigration and State/Local Law Enforcement Ongoing issues and concerns:

- Negative impact on ability to handle local mission because immigrants fear and distrust local law enforcement.
- Increased costs and liability implications
- Lack of training on the highly complex immigration laws among non-immigration officers
- Increased "racial profiling" issues
- Reluctance of illegal aliens who are victims of crime to report and cooperate
- But still, we must enforce the laws of the land.

How do we reach a workable balance?

## IACP September 2005 Immigration and State/Local Law Enforcement WHERE WE ARE...

• Numerous "sanctuary" policies in cities prohibit inquiring into immigration status; reporting suspected violators to ICE, etc.

# IACP September 2005 Immigration and State/Local Law Enforcement Some variations try to reach compromise:

- E.g. New York City order states that police and corrections "...shall continue to cooperate with federal authorities in investigating and apprehending aliens suspected of criminal activity.
- "However, such agencies shall not transmit to federal authorities information respecting any alien who is the victim of a crime."

WHERE WE ARE...

Questions continue about the

AUTHORITY OF STATE AND LOCAL OFFICERS TO ENFORCE CRIMINAL AND CIVIL IMMIGRATION LAWS

Do state and local officers have such "inherent" authority?

Unfortunately, there is no clear answer.

This means state and local agencies should utilize caution when solely enforcing immigration laws.

State and local police authority to enforce immigration laws—

• An April, 2002 Department of Justice Office of Legal Counsel Opinion says state and locals have "inherent authority" to arrest and detain individuals for criminal and non-criminal violations of the immigrations laws.

• This opinion reverses at least three of the OLC's own prior formal opinions—including one written in 1996.

 The Opinion has been criticized by some as lacking substance to support the change from previous Opinions.

• It remains, however, the current USDOJ posture on this matter.

• The question of whether state and locals have "inherent authority" to enforce civil and criminal immigration violations remains subject to continued debate.

• Attorney General John Ashcroft recognized that any inherent authority was subject to limitations imposed by state law or agency policy.

5/13/03 letter from Ashcroft to William Casey, Boston Police Department:

"...The only barriers to executing such arrests are statutes or policies that states or municipalities may have imposed upon themselves."

The OLC Memo cites two Tenth Circuit cases in support of proposition that locals can make arrests:

U.S. v. Vasquez-Alvarez, 176 F.3d 1294 (10<sup>th</sup> Cir. 1999) {previously deported felon}

<u>U.S. v. Salinas-Calderon</u>, 728 F.2d 1298 (10<sup>th</sup> Cir. 1984) {knowing transportation of illegal aliens}

Both cases involve CRIMINAL immigration violations. (Unclear how much precedence for civil enforcement.)

Regardless of "inherent" authority, there are three federal statutory options with specific authority...

Three specific federal immigration options for granting authority to locals:

TITLE 8, US CODE

• Section 1103(a)(10)— "Mass immigration emergency"

Three specific federal immigration options for granting authority to locals:

TITLE 8, US CODE

Section 1324(c)— authorizing "all...officers whose duty it is to enforce criminal laws" to make arrests for smuggling, transporting, or harboring criminal aliens.

Three specific federal immigration options for granting authority to locals:

TITLE 8, US CODE

Section 1357(g) a/k/a "287(g)"-

Authorizing written MOU's to grant specified authority

This is an important and workable alternative!

These specific statutes are argued by some to support proposition that there is NO "inherent authority."

Their argument: If state and locals already have "inherent authority" to enforce all civil and criminal immigration violations, why are the three specific sections needed at all? They reflect "preemption."

Counter argument: These are protections by Congress to assure that, whatever happens, these specific options stay open. They don't indicate preemption by Congress.

My recommendations:

- DETERMINE YOUR OWN AGENCY'S AUTHORITY UNDER YOUR STATE LAW
- DON'T ASSUME IMMIGRATION ENFORCEMENT IS AKIN TO ENFORCING OTHER FEDERAL LAWS
- DON'T UNDERESTMATE THE COMPLEXITY OF IMMIGRATION LAW

#### Remember...

- Over 90% of the "absconders" listed in NCIC are there by reason of a <u>civil</u> violation or non-criminal, administrative immigration warrant.
- Do you have <u>clear</u> authority to arrest for solely immigration violations?
- Any authority to detain is generally derived from ultimate authority to arrest.
- Does your authority to arrest by warrant extend to administrative or civil warrants?

• Acting without clear authority could subject agency and officers to suit

• Acting with clear authority still causes concerns regarding injury, excessive force, expense of incarceration, federal pickup response times, diversion from local missions, training, profiling, negligent training, etc.

### EVENTS AND TRENDS FROM THE PAST YEAR

#### Trends and Events...

- Some report a spike in crime in Hispanic communities—
  - Criminals prey upon those who they know are reluctant to come forward and report crime or serve as witnesses out of fear of deportation.
  - Many illegal immigrants are suspicious and fearful of using banks and carry large cash.
- Shortage of Spanish-speaking officers

Trends and Events...

"Day Laborers" are often illegal aliens.

The Fairfax County Virginia approach--

- The County Board of Fairfax County Virginia voted to establish three "day laborer" sites in the county, at the cost of \$400,000.
- County has declined to partner with ICE and others to address as criminal matter.
- County's own official study of "day laborer" sites documented that a substantial majority of persons seeking work at such sites <u>are illegal aliens</u>.

#### Trends and Events...

- Vote criticized as an action to "subsidize and incentivize criminal human smuggling operations that enable foreign persons to illegally cross the US border and make their way to the metropolitan Washington DC area... operations...run by criminal gangs, such as MS-13, who brutally exploit the illegal immigrants as part of their broader racketeering operations."
- Ignores Federal law that requires cooperation in immigration investigations?

- "...Fairfax County Supervisors are using federal funds from a Department of Housing and Urban Development 'community block grant' in order to selectively violate federal law."
- Judicial Watch, which represents a group of concerned residents and taxpayers of Fairfax, provided the Fairfax County Board of Supervisors with written legal notice and warning on September 8, 2005 advising against unlawfully expending public funds in furtherance of illegal activity.

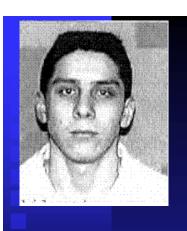
Source and quotes from: Arizona National Ledger

Trends and Events...

#### **CONSULAR NOTIFICATION**

• Article 36 of the 1963 Vienna Convention on Consular Relations requires consulate notification of the arrest or detention of foreign nationals.

- Ongoing issue, particularly with Mexico.
- Ongoing complaints with U.S. Dept. of State



#### Violating the treaty: Could it overturn criminal convictions?

- On 5/23/05 the U.S. Supreme Court dismissed as "premature" a Mexican national's appeal, claiming his conviction for 1993 murder and gang rape of a 14 year old was in violation of notification requirements the Vienna Convention. (Jose Medellin v. Dretke)
- European Union and other countries = Amicus briefs supporting Medellin.
- New state appeal must run course, but Supreme Court reserved right to again grant review. Submitted to Texas Court of Appeals in September 14, 2005.
- There are 118 foreigners from 32 countries on America's death rows according to talkleft.com

#### My recommendation:

Make sure your troops know of the obligation to notify foreign consul whenever ANY foreign national is detained or arrested. Have a policy in place and assure your agency follows it.

- US Department of State has good materials on this issue.
   See:
  - www.travel.statel.gov/law/consular/consular\_636.html)
- See also: www.fdle.state.fl.us/ogc/legal\_bulletins for detailed discussion.

#### Where we are...BORDER EMERGENCIES

- New Mexico and Arizona declared states of emergency in August, 2005.
- New Mexico's declaration included: "..."has been devastated by the ravages and terror of human smuggling, drug smuggling, kidnapping, murder, destruction of property and the death of livestock. ... is in an extreme state of disrepair and is inadequately funded or safeguarded to protect the lives and property of New Mexican citizens."
- \$750,000 in emergency state funds to the four counties sharing 180 mile border with Mexico, with \$1 million additional available, for new officers and to pay overtime.

#### Arizona's declaration followed New Mexico's.

- Earmarks \$1.5 million in state emergency funds to counties which border on Mexico. The money will be used to help law enforcement agencies combat drug traffickers, illegal immigrant smugglers and criminal gangs operating along the border.
- NM's Governor Bill Richardson (D) is nation's only Hispanic Governor.
- AZ's Governor is Janet Napolitano (D).
- There are an estimated 15 million illegal immigrants currently in U.S.
- The declarations MIGHT result in federal assistance.

# IACP September 2005 Immigration and State/Local Law Enforcement 8/19/05 memo to House Homeland Security Committee from Congressional attorney:

"The types of concerns voiced by the Governors of Arizona and New Mexico appear to (be an) emergency as defined in the Stafford Act. Thus, federal assistance...would appear to be available... provided the President declares an emergency...Even if the President does not declare an emergency... it would appear that the Secretary of DHS...has the authority to shift resources within DHS or to request personnel from elsewhere in government to address these areas of concern...."

- Dateline 9/21/05 "Minutemen Planning National Action At U.S. Borders"
- In October, thousands of Minutemen will guard much of the northern and southern borders.
- Some Minuteman Civil Defense Corps volunteers are arriving early along the Tex-Mex border in response to DHS's shift of some Border Patrol agents to Katrina recovery efforts.
- More than 200 anti-Minutemen protestors demonstrated in Austin earlier in September.
- The chiefs of the FBI and CIA have testified before Congress about the possibility that terrorist are crossing the border as easily as undocumented workers.

- No clear consensus in support of "Minuteman" citizen patrols—
- August "Field Poll" of 615 Californians:
  - 81% express some concern about illegal immigration (49% extremely; 32% somewhat)
  - 56% oppose "Minuteman" citizen patrols along the California/Mexico border
  - 44% favor declaring a state of emergency like New Mexico and Arizona; 40% oppose
  - (65% of Latino respondents opposed declaration).
  - Margin of error +/- 4.9%

- High degree of frustration.
- Not enough law enforcement resources on the border.
- Not limited to land borders?
- What about Canadian border?

"Many questions...few answers."

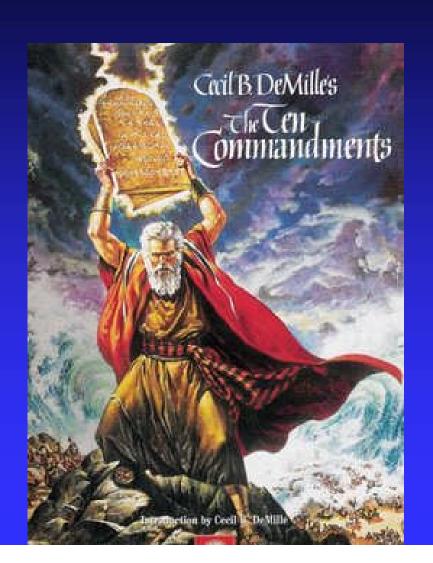


Trends and Events...

• Virginia's

"THOU
SHALT
ENFORCE"

approach



## IACP September 2005 Immigration and State/Local Law Enforcement Trends and Events...

- Virginia Code 19.2-81.6: All law enforcement officers...shall have the authority to enforce immigrations laws of the United States...(and) may, in the course of acting upon reasonable suspicion that an individual has committed or is committing a crime, arrest the individual without a warrant upon receiving confirmation (from ICE) that the individual (i) is an alien illegally present...and (ii) has previously been convicted of a felony in the United States and deported or left the United States after such conviction..."
- 19.2-120 = Presumptive no bail.
- 19.2-294.2 = Peporting suspected illegal status to feds within 60 days of final disposition of offender

## IACP September 2005 Immigration and State/Local Law Enforcement Trends and Events...

- The Virginia Code changes (HB 570) were cited by Virginia State Police as why Virginia State Police backed away from a pending 287(g) MOU with DHS to empower about 24 Virginia State Police with immigration powers.
- "Virginia law provided Virginia state and local officers with immigration enforcement powers to address drug trafficking and gangs, the types of offenders of main concern."
- Law was effective 7/1/2004.

Virginia authority and law not being used?

The Washington Post reported on 6/6/2005 that almost a year after the new law became effective, officials with nine police and sheriff's departments in Northern Virginia, home to the majority of the state's immigrants, said in interviews that they were not aware of a single arrest made using the additional authority.

Trends and Events...

Attempted use of state's "criminal trespass"

• Traffic stop. Mexican found to be illegally in country.

• Federal authorities declined to arrest.

- Police in New Ipswitch, New Hampshire charged the immigrant with "trespassing." Hudson, N.H. police soon made similar charges.
- In August, both sets of charges were dismissed as unconstitutional by a New Hampshire trial judge.

- "The criminal charges against the defendants are unconstitutional attempts to regulate in the area of enforcement of immigration violations, an area where Congress must be deemed to have regulated with such civil sanctions and criminal penalties as it feels are sufficient..."
- The Court noted that 287(g) training and authorization was available-- a process which "…is further indication that Congress intended to preclude any local efforts which are unauthorized or based on other than federal law."
- The judge also professed to know nothing about immigration law and having no inclination to learn it!
- Mexican consulate was so concerned that it hired an attorney to represent the defendants.

Trends and Events...

## INITIATIVES IN 109<sup>th</sup> CONGRESS and STATUS OF FEDERAL EFFORTS OVERALL

Federal budget does not significantly increase federal immigration officer ranks.

- "Katrina" diverted federal resources, including border and other immigration officers to disaster relief efforts. Border states diverted significant resources to disaster relief, too.
- No significant change in overall dedicated resources to national problem

#### Clear Law Enforcement For Criminal Alien Removal Act (CLEAR ACT) of 2005

• HR 3137 (Norwood of Ga. Now with 74 cosponsors; intro'd 6/30/05, referred to committee)

- Congress' "CLEAR" Act seeks to "encourage" by withholding funding for failure to conform the states to authorize their officers to enforce immigration laws.
- CLEAR seems to underestimate the complexity of immigration law and the specialized training required to effectively enforce the unique area of law
  - Similar bill in Senate but less "encouragement" Homeland Security Enhancement ACT of 2005 S 1362 (Sen. Sessions of Al. with 3 co-sponsors; intro'd 6/30/05, referred to committee)

#### IACP opposed first CLEAR ACT:

- IACP announced in 12/04 its opposition to the CLEAR ACT. Urged Congress to proceed with caution in attempts to mandate state/local involvement in immigration enforcement
- Issued "Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement" indicating decision should be local and is a complex matter.

## S. 1033 – Secure America and Orderly Immigration Act

(By Sen. McCain and Sen. Kennedy; intro'd 5/12/05, referred to Judiciary. HR 2330 intro'd 5/31/05 and referred to Committee.)

- Would establish a worker visa program that would allow employers to temporarily hire foreign citizens to fill jobs that cannot be filled with U.S. laborers
- Proposes to allow individuals unlawfully here to stay and sign up for the program by paying a \$1,500 fine. (i.e., "Amnesty"?)

## IACP September 2005 Immigration and State/Local Law Enforcement S. 1033 – Secure America and Orderly Immigration Act

- <u>Criticized</u> because proposal undercuts the rule of law by rewarding those who have acted wrongly and will only encourage further illegal entry.
- Those opposed argue the bill lacks needed details such as:
  - No infrastructure in place to handle flood of paper.
  - Truly effective internal enforcement to deter further illegal entry.
  - Requiring individuals to leave and apply for admission without prejudice or advantage.
  - Why devote significant enforcement efforts if \$1500 buys a ticket to stay illegally in USA?

## IACP September 2005 Immigration and State/Local Law Enforcement S. 1033 – Secure America and Orderly Immigration Act

- Infrastructure criticism is important.
- According to the Heritage Foundation, The Immigration Reform and Control Act of 1986 created a huge visa application backlog, generating 3.5 million applications. The backlog prompted an effort to reduce it at the expense of security vetting.
- Three known terrorists used these programs to stay in the United States.
- Unless security protocol and effective infrastructure is in place, dangerous illegal immigrants could use proposed system to "legitimize" their presence.

- H.R. 3622 "Border Protection Corps Act"
- (Rep. Culberson, TX and 51 co-sponsors, intro'd 729/05; referred to committee)
- Would authorize the Governor of a State to organize and call into service an armed militia of able-bodied and eligible citizens to help prevent individuals from unlawfully crossing an international border and entering the United States anywhere other than a port of entry, to appropriate funds to support this service.

• Keep an eye on Congress.



Trends?

• No clear national "emerging trend" in immigration enforcement issues related to state and local law enforcement

Trends?

• Will remain a local issue to resolve...

#### Reminder of our concerns...

- Acting without clear authority could subject agency and officers to suit (false arrest, 18 USC 1983, etc.)
- Acting with clear authority still causes concerns regarding injury, excessive force, expense of incarceration, federal pickup response times, diversion from local missions, training, profiling, etc.

• HOWEVER...there are some promising developments!

#### Some Promising Developments...

• Effective use of partnership with immigration enforcement to address criminal street gangs and their high % of members who are illegal immigrants.





#### Some Promising Developments...

- Increased use of 287(g) authorization
  - Specific purposes
  - Specific training
  - Clear authority under federal law
  - Planned multi-agency utilization.



#### COMMON KEY FACTORS—

- Focus
- Defined Mission
- Mission-Based Operations
- Mission-Based Training
- Tie immigration efforts to local issues so that use of local resources "makes sense"
- Avoiding trying to do too much with too little.

### Immigration enforcement to enhance street gang eradication efforts

- Studies show that a large % (in some gangs, over half) of major street gang members are illegal aliens
- Immigration enforcement can result in detaining these illegal aliens even if no state crime violation has occurred

Query:

What are all the New Orleans gang members doing while they have been displaced by Katrina?

- Gang Eradication Efforts—Example of power of using immigration enforcement--
- OPERATION COMMUNITY SHIELD
- Begun in February, 2005
- ICE Initiative Targeting Criminal Street Gangs
- Initial Focus: Mara Salvatrucha organization, commonly referred to as "MS-13"

 During Phase I, ICE arrested 359 MS-13 members including 10 clique leaders

• May 2005, ICE expanded Operation Community Shield to include all criminal street gangs that pose a risk to public safety and a concern to national security

- Ultimately, gang members arrested from:
   MS-13, Sureños, 18th Street gang, Latin
   Kings, Vatos Locos, Mexican Mafia, La
   Raza gang, Border Brothers, Brown Pride,
   Norteno, Florencia 13, Tiny Rascal, Asian
   Boyz, and Jamaican Posse
- Over 1260 arrests to-date
- See ICE Website for articles and more details

## IACP September 2005 Immigration and State/Local Law Enforcement Example of mutual cooperation working well:

- 9/16/05 COLUMBUS, Ohio An illegal alien from El Salvador was sentenced to 71 months in prison for his conviction (in Ohio state court) for carrying a concealed weapon, and his guilty plea for Re-entry after Deportation in the U.S. District Court.
- Arrested by Columbus Police Dec. 23 after a minor traffic accident when he was identified as having been previously deported by U.S. Immigration and Customs Enforcement.
- Columbus Police discovered his criminal background by contacting the ICE Law Enforcement Support Center (LESC).

- The LESC confirmed Flores' true identity through fingerprints and photographs.
- The LESC provides local, state, and federal law enforcement agencies with real-time immigration status and identity information on aliens suspected, arrested, or convicted of criminal activity, 24-hours-per day, 365 days a year.
- Defendant was identified as a violent, previously deported felon gang leader who had been convicted of assault with a deadly weapon, and for participating in a drive-by shooting in Nevada.
- ICE placed a detainer placed on him at the time of his traffic accident, which enabled Columbus Police to lawfully detain him. (continued...)

- "This is case is a textbook example of how ICE special agents, local law enforcement, and our prosecutors effectively work together to help rid our cities and communities from the scourge street gang known as MS-13," said Brian M. Moskowitz, special agent-in-charge of the ICE Office of Investigations.
- "... ICE will be waiting for him upon his release to make sure he is ultimately removed from the United States."

#### A GOOD TOOL:

# INCREASED USE OF 287(g) AUTHORITY

- An effective tool:
  - Section 287(g) of the Immigration and Nationality Act (8 USC §1357(g))
  - Authorizes Secretary of DHS to enter into written agreements with State or political subdivision so that qualified officers can perform certain functions of an immigration officer.
  - Done by Memorandum of Understanding

- 287(g) MOU's allow the parties to specify
  - What locals will do and who covers costs
  - How they have authority to do so
  - Who will receive the authority
  - Training required as a predicate
  - Levels of supervision, oversight and review of actions and activities
  - Liability coverage

#### Florida's 287(g) MOU—

- Original MOU in 2002; renewed 2003
- Two sets of selected officers; approx. 70 total
- Special training (6 weeks, full time)
- Accompanied by joint community outreach to explain the program
- Work RDSTF cases, work with ICE and FBI, work with task force efforts (domestic security nexus)
- Immigration authority is supplement to other efforts; a "force enhancer" throughout the state
- Are NOT involved in general immigration enforcement efforts

- Florida joint ICE and 287(g) effort:

  In March 2005, ICE agents arrested six illegal aliens performing contract maintenance work at the Crystal River Nuclear Power Plant in Citrus, Florida.
  - \*All were employees of a specialty services company that is now cooperating in an ongoing ICE investigation.
  - \*One of the illegal aliens was indicted on criminal charges of re-entering the country after deportation, while the others have been placed in immigration removal proceedings.

# IACP September 2005 Immigration and State/Local Law Enforcement Alabama's 287(g) experience:

- Entered into MOU 2003
- Reactive, not proactive
- 20 troopers now; class of 25 in October
- Immigration is "other assigned duty"
- Over 130 arrests to-date
- Troopers at DL stations and on highways
- Traffic stops are based on state-based reasonable suspicion
- Arrest is usually in context of good state probable cause
- Notify ICE w/in 24 hours of arrest. ICE makes timely response

#### IACP September 2005

#### Immigration and State/Local Law Enforcement The Heritage Foundation on use of 287(g)

"Model programs already exist in Florida and Alabama, instituted under section 287(G) of the Immigration and Naturalization Act. The programs train selected state and local law officers to assist in immigration investigations and provide federal oversight and liability protection. (Federal) law should require the Department of Homeland Security (DHS) to seek out other states to participate in the program."

Source: Executive Memorandum #975 (7/26/05)

#### 287(g) Initiatives In Correctional Situations-

ARIZONA Department of Corrections agreement finalized 9/20.

- 10 ADC officers will perform immigration work in 2 Arizona facilities. Evaluate prisoners at intake.
- 5 week training.
- Will question status; can file detainer paperwork;
- Into ICE custody at completion of state prison sentence

- 287(g) Initiatives In Correctional Situations-Los Angeles County Jail
  - To screen those coming into jail
  - Still not finally approved due to lastminute County amendments

#### San Bernardino County, California

pursuing a 287(g) agreement to screen those coming into the county's jail.

- Estimated that at least 15 percent of the county's jail inmates are illegal immigrants.
- Board of Supervisors on 8/16/05 unanimously supported a plan to create a sheriff's unit devoted to identifying and deporting undocumented arrestees.

#### (San Bernardino County, continued)

- Estimated number of illegal immigrants booked into the West Valley Detention Center each month: 750
- Cost to house an inmate for one day: \$46.68
- Average number of days an inmate spends at the center: 28
- Estimated annual cost to county of housing illegal immigrants: \$11,763,360
- Source: San Bernardino County Sheriff's Department as reported in the "Press Enterprise"

CONCLUSION—

Cooperative state/local/federal efforts are effective

Responses remain primarily a local decision

#### ARE WE THERE YET?

Not yet...

- Expect much debate
- Expect Congressional responses that may not be locally workable or acceptable
  - Don't expect major federal resource expansion

#### CONCLUSION—

Maximize effectiveness by keeping focused on defined mission.

Don't try to do too much with too little.

#### CONCLUSION—

If "authority" is a concern,

 Pursue 287(g) or multi-agency task force approaches

 Cooperative state/local/federal efforts are effective.

Cooperative, well reasoned mission = "A formula for success!"

CONCLUSION—

Cooperative state/local/federal efforts are effective.

"A formula for success!"

CONCLUSION—

Whatever the approach...

Train and hold accountable.