VIRGINIA STATE CRIME COMMISSION

FINAL REPORT
of the
ILLEGAL IMMIGRATION TASK FORCE

Studying the Impact of Illegal Immigration on Virginia's Criminal Justice System

VIRGINIA STATE
CRIME COMMISSION

ILLEGAL IMMIGRATION TASK FORCE FINAL REPORT

JANUARY 2008

COMMONWEALTH of VIRGINIA

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January 9, 2008

TO: The Honorable Timothy M. Kaine, Governor of Virginia

And

Members of the Virginia General Assembly

The *Code of Virginia* § 30-156 authorizes the Virginia State Crime Commission to study, report and make recommendations on all areas of public safety and protection. Section 30-158(3) provides the Commission with the power to conduct studies and gather information and data in order to accomplish its purposes as set forth in § 30-156...and formulate its recommendations to the Governor and the General Assembly.

Enclosed for your review and consideration is the final report of the Illegal Immigration Task Force's study on the impact of illegal immigration on Virginia's criminal justice system. The Commission received assistance from all affected agencies and gratefully acknowledges their input.

Respectfully submitted,

David B. Albo
Chairman

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ILLEGAL IMMIGRATION TASK FORCE MISSION STATEMENT

Throughout our history, immigrants have come to our country to realize their potential in a land of freedom, stability, and security. Through hard work and dedication to our founding principles, immigrants have forged a new nation unlike any before it. The result is a national character and prosperity that are the envy of the world.

Today we are engaged in a national discussion about the nature and volume of future immigration to this country. Much of the focus of this discussion has centered on that immigration which is in violation of federal law. Immigration, legal and illegal alike, has historically been viewed as a responsibility of the federal government. In recent years, however, debate over illegal immigration has spilled over into the individual states. Indeed, a considerable amount of legislative measures aimed at addressing various aspects of illegal immigration has been proposed to the General Assembly of Virginia. While such legislation has often raised a host of legal and practical issues, its prevalence has served to demonstrate the interest in the issue that many Virginians hold.

While a state's role in the enforcement of federal immigration law may be the subject of debate, a state's duty to provide for the safety of its citizens is not. The Virginia State Crime Commission was created to study, report, and make recommendations on all areas of public safety and protection. The Commission's Illegal Immigration Task Force, therefore, will endeavor to study the impact of illegal immigration on Virginia's criminal justice system. The scope of this endeavor, by its very words, is limited in two respects. First and foremost, a distinction is made at the outset between immigration which is legal and that which is illegal, with only the latter being relevant to the Task Force's endeavor. Second, the Task Force will focus its study on the impact of illegal immigration on the criminal justice system.

The Task Force launches this endeavor with no premature determinations. The nexus between illegal immigration and crime is not assumed but, rather, will be the subject of review. The Task Force will focus its review on crime by and against illegal immigrants, the cost of illegal immigration on Virginia's criminal justice system, and what measures may effectively be taken at the state and local levels of government. The Task Force will consider and present recommendations to the Crime Commission that range from legislation to community-based programs. It is intended that efforts will be made to ensure that any recommendations be accurately communicated to Virginia's immigrant communities so that misunderstanding and misinformation do not give way to fear and disassociation.

The Illegal Immigration Task Force is composed of highly-qualified individuals from across Virginia. The group is diverse in its experience and will be expected to study the issue from a variety of perspectives. The Task Force members will engage in an open and honest discussion of the issue for it is only through a frank discussion that the public safety of all Virginia communities will be served.

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ACKNOWLEDGEMENTS

I. AUTHORITY FOR STUDY

The *Code of Virginia,* § 30-156, authorizes the Virginia State Crime Commission ("Crime Commission") to study, report and make recommendations "on all areas of public safety and protection." In so doing, the Crime Commission "shall endeavor to ascertain the causes of crime and recommend ways to reduce and prevent it, explore and recommend methods of rehabilitation of convicted criminals, study compensation of persons in law enforcement and related fields and study other related matters including apprehension, trial and punishment of criminal offenders."[1] Section 30-158(3) empowers the Crime Commission to "conduct studies and gather information and data in order to accomplish its purpose as set forth in § 30-156 … and formulate its recommendations to the Governor and the General Assembly."

II. EXECUTIVE SUMMARY

An apparent lack of action by the federal government to successfully address the issue of illegal immigration has resulted in calls for action at the state and local levels of government. The Commonwealth of Virginia and its localities have not been immune from this trend. Indeed, a considerable amount of legislative measures aimed at addressing various aspects of illegal immigration has been proposed to the General Assembly of Virginia, in increasing amounts, in recent years. These recent efforts aimed at prompting state action related to illegal immigration, combined with uncertainty over what measures are effective or even legally permissible, have compelled a thorough look at the issue in the Commonwealth. The Crime Commission formed its Illegal Immigration Task Force ("Task Force") to address this necessity.

The mission of the Task Force was framed with the statutory authority of the Crime Commission in mind. Consequently, the mission of the Task Force was appropriately limited in scope to the impact of illegal immigration on Virginia's criminal justice system.

The members of the Task Force were selected from across Virginia. These highly-qualified individuals are diverse in their experiences and enabled the Task Force to study the issue from a variety of perspectives. The twenty-one voting members consisted of an array of legislative leaders, law enforcement and corrections experts, prosecutors, members of civic and cultural organizations, and faith-based leaders. The Task Force was also aided by two citizen advocates, two independent legal advisers, and a congressional liaison.

The Task Force conducted five meetings between May and October of 2007. General topics covered at these meetings included legal issues affecting state action, illegal immigrants as criminals, illegal immigrants as victims of and witnesses to crime, and enhancement of communication and relations between law enforcement and immigrant communities. Twenty presentations were made before the Task Force. These presentations included those by representatives of the United States Immigration and Customs

[1] VA CODE ANN., § 30-156 (Michie 2007).

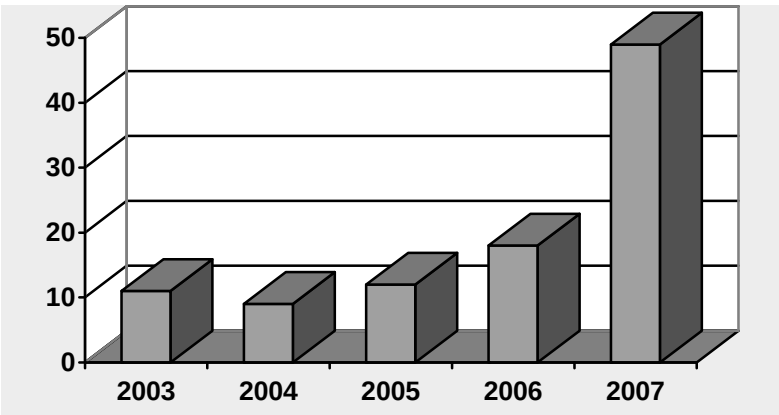
Enforcement ("ICE"), legal experts, local law enforcement officers, a representative of the International Association of Chiefs of Police, a representative of the National Latino Peace Officers Association, representatives of non-profit organizations, and Crime Commission staff.

A total of thirty-two proposals for recommendations were submitted by individual Task Force members for consideration at its final meeting. Sixteen of the proposals were approved as official Task Force recommendations. Three were found to be outside the scope of the Task Force's mission and were recommended for referral to the Governor's Commission on Immigration. All of the Task Force's sixteen recommendations were approved by the Crime Commission. The recommendations reflect the diverse experiences of the Task Force's members and the vast array of topics covered at the meetings. They range from legislation to community-based measures. Included are recommendations regarding the role of the federal government, data collection, education for immigrant communities, training for law enforcement, cooperation and communication with ICE, and the role of jails and prisons. The recommendations represent the Task Force's desire to bring forth measures that are not only legally permissible, but also constructive and effective.

III. FEDERAL IMMIGRATION LAWS AND THE EFFECT OF PREEMPTION ON STATE MEASURES

A. Immigration-Related Legislation in Virginia

Illegal immigration has become a high profile issue in the last few years on both the federal and state levels of government. In 2007, there were over 1,500 immigration-related bills introduced in state legislatures across the country. In fact, there have been immigration bills introduced in every state legislature during 2007.[2] Illegal Immigration legislation has also been debated during the past few sessions of the Virginia General Assembly. Specifically, the number of immigration related bills have steadily increased since the 2003 General Assembly session.



[2] National Conference of State Legislatures, 2007 report on Immigration legislation.

Of the nearly fifty bills introduced during the 2007 session of the General Assembly, only 4 were signed into law by the Governor.[3]

While there were a significant number of bills introduced over the last five legislative sessions, there are quite a few existing Virginia Code sections that already address illegal immigration. Currently, there are twenty-three Virginia Code sections that directly address illegal immigration. Of these twenty-three, fifteen deal with criminal justice or public safety.[4] Four provisions address public benefits/assistance,[5] one creates an identification requirement pertaining to drivers licenses,[6] and two impose reporting requirements for colleges/universities and state mental health facilities.[7] Additionally, the Virginia State Bar and Legal Services Corporation are forbidden from filing suits on behalf of illegal immigrants.[8]

B. Criminal Violations under Federal Immigration Law

With the high number of bills introduced over the last few legislative sessions, there have been many questions regarding the ability of a state to enact legislation concerning illegal immigration in light of federal preemption. There are several sections of the United States Code, as well as case law, which address criminal violations of immigration law.

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[3] HB1921/SB815 (both strengthen the existing extortion statute, § 18.2-59 by adding the use of a person's immigration status as a means of extortion); HB 1673 (created a "Commission on Immigration" to report to the Governor); and HB 2923 (establishes the "Commission on the Prevention of Human Trafficking").

[4] § 16.1-309.1 (intake officers, in juvenile proceedings, are required to report suspected illegal alien to ICE); § 18.2-59 (Class 5 felony to use a person's illegal status in the U.S. to extort money or another form of consideration); § 18.2-308 (an illegal alien is disqualified from obtaining a concealed weapon permit); § 18.2-308.2:01 (class 6 felony for an illegal alien to possess or transport an assault firearm); § 18.2-308.2:2 (class 6 felony for dealer to transfer a firearm to an illegal alien); § 19.2-81.6 (provides the authority for all law enforcement to arrest illegal aliens under limited circumstances); § 19.2-294.2 (post-conviction inquiry into immigration status for persons on probation or parole); § 40.1-11.1 (class 1 misdemeanor to knowingly employ, or refer for employment, an illegal alien); § 53.1-218 (officers at correctional facilities must inquire as to citizenship of new committees and, if it appears that the inmate is an illegal immigrant, report that information to the Central Criminal Records Exchange); § 53.1-219 (if requested by a federal immigration officer, a clerk has the duty to provide conviction information concerning an alien); § 53.1-220 (permits the transfer of alien prisoners, under treaty); § 53.1-220.1 (allows ICE to take custody of certain convicted alien felons, with agreement from the state or local officials); and § 66-3.2 (the director of DJJ shall coordinate submissions to the U.S. Department of Justice for the State Criminal Alien Assistance Program ("SCAAP")); Further, the 1st enactment clause from Acts of Assembly 2004, for sections § 19.2-310.2 and § 19.2-310.3:1, requires the State Compensation Board to maintain citizenship of inmates in the Local Inmate Data System ("LIDS"), ensure that jails are entering this information, and encourage local jails to participate in the SCAAP.

[5] § 23-2.2 (colleges and universities are required to report to the Attorney General students on visas who fail to enroll or who violate terms of their visa); § 23-7.4 (illegal aliens are not eligible for in-state tuition at Virginia colleges and universities); § 32.1-325.03 (legal presence required to receive Medicaid benefits); § 60.2-617 (workman's compensation is denied to illegal aliens); § 63.2-503.1 (legal presence required to receive public assistance).

[6] § 46.2-328.1 (legal presence required to obtain a Virginia driver's license);

[7] § 37.2-827 (requires the Commissioner of mental health to inquire about the immigrations status of patients and report illegal immigrants to ICE);

[8] Located in a second enactment clause to § 54.1-3916 from the 2004 session.

The U.S. Code contains twenty-four sections that deal specifically with crimes related to immigration. The unlawful activities that are forbidden by these sections can be divided into four categories: (1) aiding of illegal immigrants by third parties; (2) illegal entrance and departure; (3) unlawful acts involving immigration documents; and (4) employment.

1. Aiding of Illegal Immigrants by Third Parties

Many of the federal provisions criminalize the act of aiding illegal immigration. The U.S. Code contains statutes making it both illegal to aid illegal immigrants in entering the country and to aid illegal immigrants in avoiding detection once inside the country.

With respect to aiding entrance into the country, the U.S. Code makes it illegal to:

- Transport or attempt to transport another person into or out of the U.S. with the reasonable knowledge that the person's entry or departure into or out of the U.S. is unlawful;[9]
- Bring in an illegal immigrant into the U.S. without a valid passport or unexpired visa (if needed);[10]
- Bring an illegal immigrant into the U.S. in a manner other than the one designated by law;[11]
- Knowingly provide another person with a permit or evidence of permission to enter or depart the country that is either false, forged, counterfeited, mutilated, altered,[12] or not issued or designed for their use;[13]
- Encourage or induce an alien into the country knowing that the entrance will be in violation of the law;[14]
- Aid an illegal immigrant who is inadmissible due to a felony conviction (see 8 U.S.C.A. § 1182(a)(2) (2007)) in entering the country;[15]
- Aid an illegal immigrant who is inadmissible due to a health reason in entering the country; or,[16]
- Import an illegal immigrant for the purpose of prostitution.[17]

With respect to avoiding detection, the U.S. Code makes it illegal to:

- Transport an illegal immigrant within the country with the knowledge of his illegal status;[18]
- Conceal, harbor, or shield from detection an illegal immigrant knowingly or in reckless disregard of his illegal status;[19]

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[9] 8 U.S.C.A. §1185(2) (2007).
[10] Id. at § 1323(a)(1).
[11] Id. at § 1324(a)(1)(A)(i).
[12] Id. at § 1185(7).
[13] Id. at § 1185(4).
[14] Id. at § 1324(a)(1)(A)(iv).
[15] Id. at § 1327.
[16] Id. at § 1322.
[17] Id. at § 1328.
[18] Id. at § 1324(a)(1)(A)(ii).

- Keep or harbor an illegal immigrant for the purpose of prostitution;[20]
- Harbor a known illegal immigrant with the knowledge they will commit a crime; or,[21]
- Harbor a known illegal immigrant for the purpose of commercial gain.[22]

There are a few sections of the U.S. Code that apply to owners or commanding officers of vessels and aircrafts which travel into the U.S. from a foreign country as well as owners of transportation lines, international bridges, or toll roads. These statutes make it illegal for commanding officers to pay off or discharge any alien crewman who is not legally admitted for permanent residence without the consent of the Attorney General.[23] Owners and officers must also make a diligent effort to prevent aliens from entering the U.S. in any way other than that prescribed by the Attorney General.[24] Finally, it is illegal for the commanding officer of any vessel or aircraft bringing an alien to the U.S. to take any consideration that is contingent upon whether the alien is admitted to the country or not.[25]

2. Illegal Entrance and Departure

Some provisions of the U.S. Code pertain to crimes committed with regard to the entrance and departure of illegal immigrants. While most of these statutes relate to actual entrance and/or departure, a few relate to required administrative procedures once the illegal immigrant arrives in the U.S.

<u>With respect to illegal entrance and departure, the U.S. Code makes it illegal to:</u>

- Depart or enter except under such reasonable rules, regulations, and orders as the President prescribes;[26]
- Evade departure by[27]
    - willfully failing to depart within 90 days when a final order of removal has been ordered,
    - willfully failing to timely apply for documents necessary to depart when a final order of removal has been ordered,
    - taking action to prevent or hamper departure,
    - willfully failing to be present at the time and place ordered for departure;
- Improperly enter the country by
    - failing to enter at a time and place other than that designated by immigration officers,[28]
    - eluding examination by immigration officers,[29]

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[19] Id. at § 1324(a)(1)(A)(iii).
[20] Id. at § 1328.
[21] Id. at § 1324(a)(2)(B)(i).
[22] Id. at § 1324(a)(2)(B)(ii).
[23] Id. at § 1286.
[24] Id. at § 1321.
[25] Id. at § 1323.
[26] Id. at § 1185.
[27] Id. at § 1253.
[28] Id. at § 1325(a).

- gaining entrance due to a false or misleading representation or concealment of fact,[30]
- using a permit for entrance that was not issued to them,[31]
- entering into a sham marriage for the purpose of evading immigration laws,[32]
- establishing a commercial enterprise for the purpose of evading immigration laws,[33]
- reentering the U.S. after being denied admission, deported, or removed,[34]
- fleeing or evading a checkpoint operated by the U.S. Customs and Border Protection or any other Federal law enforcement agency, or,[35]
- overstaying the time allotted as an alien crewman.[36]

With respect to administrative procedures once in the U.S., the U.S. Code makes it illegal for any alien to:

- Willfully fail to apply for registration and fingerprinting if required;[37]
- Fail to give written notice of a change of address; or,[38]
- Fail to carry their alien registration card.[39]

3. Unlawful Acts Concerning Immigration Documents

The U.S. Code contains numerous sections concerning crimes involving entrance and departure permits, applications for registration, and other immigration documents. Most of the statutes involve a type of fraud. The U.S. Code makes it illegal to:

- Make a false statement on an application for departure or entrance with the intent to secure permission of departure or entrance for himself or another;[40]
- Make a false statement on an application for adjustment of status;[41]
- Forge, counterfeit, mutilate, or alter any permit to depart or enter the country;[42]
- Make a false statement on an application for registration;[43]
- Photograph, print, or make any engraving, photograph, or impression similar to any certificate of alien registration with unlawful intent;[44]
- Forge, counterfeit, alter, or falsely make any immigration document;[45]

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[29] Id.
[30] Id.
[31] Id. at § 1185(a)(5).
[32] Id. at § 1325(c).
[33] Id. at § 1325(d).
[34] Id. at § 1326.
[35] 18 U.S.C.A. § 758 (2007).
[36] 8 U.S.C.A. § 1282(c) (2007).
[37] Id. at § 1306(a).
[38] Id. at § 1306(b).
[39] Id. at § 1304(e).
[40] Id. at § 1185(a)(3).
[41] Id. at § 1255a(c)(6).
[42] Id. at § 1185(a)(6).
[43] Id. at § 1306(c).
[44] Id. at § 1306(d).

- Use, attempt to use, possess, receive, or provide any forged immigration documents;[46]
- Use or provide for use any document lawfully issued to another person;[47]
- Prepare or file any application for immigration benefits that should be known to be falsely made or related to the wrong person; or,[48]
- Present immigration documents when boarding a common carrier coming to the U.S., but fail to do so to an immigration officer at the port of entry.[49]

4. Employment

One section of the U.S. Code concerns the unlawful employment of illegal immigrants.[50] Significantly, this section contains an express preemption clause which states, "[t]he provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment unauthorized aliens."[51]

This section makes it illegal to:

- Hire, or recruit or refer for a fee, an alien for employment knowing the alien is unauthorized;
- Hire an individual without complying with the requirements of the Employment Verification System; or,[52]
- Continue to employ an alien after discovering the alien is unauthorized.

C. Preemption

In general, Article 7 of the U.S. Constitution makes the "Constitution, and the laws of the United States" the "supreme law of the land." Also known as the Supremacy Clause, it prevents the creation of, or "preempts," existing state or local law that conflicts with existing federal law.[53] The power to regulate immigration is considered an exclusive federal power.[54]

Although the federal power to regulate immigration is considered "exclusive," the U.S. States Supreme Court has never held "that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this

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[45] Id. at § 1324c(a)(1).
[46] Id. at § 1324c(a)(2).
[47] Id. at § 1324c(a)(3).
[48] Id. at § 1324c(a)(5).
[49] Id. at § 1324c(a)(6).
[50] Id. at § 1324a (2007).
[51] Id. at § 132a4 (h)(2).
[52] Id. at § 1324a (b). This section defines the forms of documentation and identification acceptable to establish eligibility for employment. Examples include passport, visa, driver's license, SSN cards, just to name a few.
[53] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).
[54] DeCanas v. Bica, 424 U.S. 351, 354 (1976).

constitutional power, whether latent or exercised."[55] Specifically, the Court has held that the regulation of immigration is "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[56] The Court, in DeCanas v. Bica, outlined a three-part test for determining whether a state measure is preempted: whether (1) the state law regulates immigration, (2) it was Congress's "clear and manifest purpose" to ouster state power, or (3) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[57]

Under the DeCanas test, there are some factors that courts use to address the prongs of the test. Within the first prong of the DeCanas test, one factor courts have used when applying the test is whether the state law utilizes federal standards.[58] In Equal Access Educ. v. Merten, the United States District Court for the Eastern District of Virginia considered a preemption challenge to the Virginia policy of denying illegal immigrants admission to post-secondary schools.[59] The District Court held that a policy utilizing federal standards, and not state standards, is not a regulation of immigration under the first prong of DeCanas, since it does not determine "who should or should not be admitted into the country."[60] On the other hand, portions of California's Proposition 187 were held to be impermissible regulations of immigration because the law in question allowed California agents to make independent determinations of immigration status, instead of using federal standards.[61]

One of the principal factors for the second prong of the test is the presence of "congressional action" in the subject area.[62] For example, in DeCanas, the U.S. Supreme Court noted that the Immigration and Naturalization Service, at that time, did not penalize the employment of illegal immigrants. This fact was important to the Court's determination that California's law barring employment of illegal immigrants was not preempted.[63] Additionally, even if there is "congressional action," the Court will examine whether the specific action is a "peripheral concern" of the overall federal regulation.[64] Courts will also consider whether the federal regulation represents Congress' intent to "occupy the field."[65] For example, in Merten, the District Court stated that Congress had enacted regulations defining the requirements for student visas, which specifically excluded any mention of illegal immigrants.[66] Based on the exclusion of illegal immigrants, the District Court determined that it was "clear that Congress has left the states to decide for themselves

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[55] Id. at 355.
[56] Id.
[57] Id. at 355-63.
[58] Id. at 355.
[59] Equal Access Educ. v. Merten, 305 F.Supp.2d 585 (E.D.Va. 2004).
[60] Id. at 603.
[61] League of United Latin Am. Citizens v. Wilson, 908 F.Supp. 755, 769 (C.D. Cal. 1995).
[62] Id. at 356.
[63] Id.
[64] Id. at 360-61. Specifically, in DeCanas, the U.S. Supreme Court noted while there was existing language in 8 U.S.C. § 1324 which discussed employment of aliens, this language was a "peripheral concern" to the primary focus of the statute to punish harboring illegal aliens.
[65] DeCanas, 424 U.S. at 357-58.
[66] Merten, 305 F.Supp.2d at 606-07.

whether or not to admit illegal aliens into their public post-secondary institutions."[67] However, there is a suggestion by at least one court that the presence of federal regulation that covers a topic that is similar to an aspect in a local law is evidence that the federal law "occupies" the same field.[68]

The last prong of the DeCanas test, which addresses apparent conflicts between state and federal laws, looks to reconcile both statutory schemes in order to protect the purpose of the federal law.[69] While not addressing a conflict between state and federal law, the U.S. Supreme Court held that awarding back pay to an illegal alien would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy," such as illegal aliens obtaining a job with false documents.[70] In League of United Latin Am. Citizens v. Wilson, the District Court invalidated sections of Proposition 187 that defined the requirements to receive benefits that were narrower than federal guidelines.[71] Specifically, in Wilson, the Court stated that some of the aliens excluded from Proposition 187 are entitled to certain benefits under federal immigration law, creating a direct conflict.[72]

D. Law Enforcement Authority

There is some confusion concerning state law enforcement authority to arrest for criminal violations of federal immigration law. Currently, three statutes in the U.S. Code grant specific authority for state law enforcement officers to effect arrests for violations of immigration law.[73] Section 1252c allows state and local law enforcement officers to arrest and detain an illegal immigrant who was previously convicted of a felony and removed from the U.S. Section 1324 allows state and local officers to effect arrests under the federal anti-harboring statute.[74] Section 1357(g) provides the ability for state and local law enforcement agencies to enter into a memorandum of understanding with ICE for the purpose of authorizing its officers to enforce immigration law.[75] Despite the explicit authorization found in these three statutes, there is a belief that state and local law enforcement have "inherent authority" to enforce criminal violations of immigration law.[76]

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[67] Id.
[68] In Garrett v. City of Escondido, the Court suggested that the city's regulation of the landlord tenant relationship, which included proscriptions against harboring illegal aliens, was similar and possibly covered by 8 U.S.C.A. § 1324 (anti-harboring). Garrett v. City of Escondido, 465 F.Supp.2d 1043 (S.D. Cal. 2006). It should be noted that this case arose from the filing of a temporary restraining order, and is by no means a final decision on the merits.
[69] DeCanas, 424 U.S. at 358.
[70] Hoffman Plastic Compounds, Inc. v. N.L.R.B. 535 U.S. 137, 152 (2002). In Hoffman, the conflict was between rulings by NLRB and employment restrictions located in the INA.
[71] Wilson, 908 F.Supp. at 777-78.
[72] Id.
[73] 8 U.S.C.A. § 1324(c) (West 2007) and 8 U.S.C.A § 1252c (West 2007).
[74] Id. at § 1324(c).
[75] 8 U.S.C.A. § 1357(g) (West 2007). This statute is also known by its popular name the "287(g)" program.
[76] See Kris W. Kobach, The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests, 69 ALB. I. REV. 179 (2005) and Michael M. Hethmon, The Chimera and the Cop: Local Enforcement of Federal Immigration Law, 8 UDC/DCSL L. Rev. 83 (2004).

The concept of "inherent authority" to enforce criminal immigration law began with a 1983 decision by the Ninth Circuit Court of Appeals, in the case of Gonzales v. City of Peoria, involving city police officers who made a series of warrantless arrests of illegal immigrants.[77] The police made these arrests by relying on a memo which stated that "state law enforcement officers have the authority to make arrests for federal violations."[78] The memo based the legal authority for state law enforcement arrests of federal violations on the U.S. Supreme Court's decision in U.S. v. DiRe.[79] The Tenth Circuit Court of Appeals has followed the general rationale articulated by the Gonzales Court in a series of cases, stating "this court has held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws."[80]

The U.S. Department of Justice ("DOJ") has adopted the "inherent authority" doctrine. In a 1996 memo, the DOJ Office of Legal Counsel opined, "[i]t is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests."[81] With regard to application to immigration law, the memo stated that the general principle "extends to state enforcement of the Immigration and Naturalization Act as well."[82] In 2002, the Office of Legal Counsel again reiterated its concurrence with the "inherent authority" doctrine.[83] In fact, the 2002 opinion went even further, suggesting that states have general police power as "sovereign entities" to enforce criminal and *civil* violations within their borders.[84] The 2002 memo cites a 1928 opinion, by Judge Learned Hand, as further proof for the notion of "inherent authority."[85]

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[77] Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983).

[78] Id. at 472.

[79] In that case, a local police officer made a warrantless arrest of an individual for reproducing gasoline ration coupons. U.S. v. DiRe, 332 U.S. 581 (1948). The police officer made the arrest in the presence of an investigator from the Office of Price Administration, who originally obtained the tip about the counterfeit gas coupons. Id. at 583. The Court does not specifically say that state law enforcement officers have authority to make arrests for federal crimes, but the implication is believed to be found in the following from the case; "We believe, however, that in absence of an applicable federal statute, the law of the state where an arrest without warrant takes place determines its validity." Id. at 589. The Court in DiRe was primarily concerned with the fact that there was no federal rule for "arrests without warrant" under the particular facts of the case. Id. In fact, the Court decided to affirm the court of appeals reversal of the conviction, stating that "taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them." Id. at 595.

[80] U.S. v. Vasquez-Alvarez, 176 F.3d 1294 (10th. Cir. 1999). See also U.S. v. Santana-Garcia, 264 F.3d 1188 (10th Cir. 2001); U.S. v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984).

[81] 20 U.S. Op. Off. Legal Counsel 26 (1996).

[82] Id. The memo cited the Gonzalez case as authority for this position, as well as a California Court of Appeals case, People v. Barajas, 81 Cal. App.3d 999, 147 Cal. Rptr. 195 (1978).

[83] U.S. Op. Off. Legal Counsel 28 (1996).

[84] Id. The "sovereign entity" theory is also a part of Kobach's argument for inherent authority. Kobach, supra note 3, at 199-200.

[85] Marsh v. U.S., 29 F.2d 172 (2nd Cir. 1928). In that case a city police officer made a warrantless arrest of an individual for transporting liquor in violation of federal law. Id. at 173. While acknowledging that the Eighteenth Amendment gave states concurrent jurisdiction under prohibition law, Judge Hand, nevertheless opined that it has been the "universal practice of police officers in New York to arrest for federal crimes" and that the "uniform practice is persuasive." Id. at 174. Furthermore, Judge Hand noted that even though there was no federal law allowing the arrest it "would be unreasonable to suppose that its (the Federal Government) purpose was to deny to itself any help that the states may allow." Id.

While the Ninth and Tenth Circuits have adopted it, there is a valid argument against the "inherent authority" doctrine. Currently, there are three sections in the U.S. Code that give state and local law enforcement express, specific authority to effect arrests for violations of immigration law.[86] By simple application of the maxim of statutory construction *expressio unius exclusio alterius*, only U.S. Code §§ 1324 and 1252c authorize state and local enforcement of immigration law in specific instances[87] and § 1357(g), allows designated state and local law enforcement officers to be authorized and trained to enforce immigration law under the supervision of ICE. Even under § 1357(g), the officers that participate in the program, called the "287(g)" program, "shall have knowledge of, and adhere to, federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant federal immigration laws."[88] It is also important to note that § 1357 grants powers of warrantless arrest, search and investigation to "any officer or employee of the Service authorized under regulations prescribed by the Attorney General."[89] While not conclusive, it can be argued that these statutory provisions provide congressional intent to exclude state and local enforcement of immigration law, except through U.S. Code §§ 1252c, 1324, and 1357(g), or when "cooperating" with the Attorney General.[90]

E. Preemption Analysis of Recent Virginia Legislation

1. Employment

Bills have been introduced over the last few General Assembly sessions that seek to penalize employers for hiring illegal immigrants. For example, in 2007, HB 1067 and HB 2605 proposed to amend Va. Code § 40.1-11.1 to make the penalty for employing an illegal alien $100, per day employed. HB 2328, also introduced in 2007, proposed to amend Va. Code § 40.1-11.1 to make it a Class 1 misdemeanor to fail to confirm the legality of an employee through the electronic verification-of-work authorization program operated by the Department of Homeland Security. Both proposed measures are expressly preempted by U.S. Code § 1324a because they penalize employers for hiring illegal immigrants.[91] Congress

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[86] Supra, at note 64. Which begs the question, why would Congress feel the need to extend arrest powers to the states that they already posses?

[87] This very argument was made in Vasquez-Alvarez, but the Tenth Circuit noted, "the maxim, like other canons of statutory construction, is not conclusive." Vasquez-Alvarez, 176 at 1299.

[88] Id. at (g)(2).

[89] 8 U.S.C.A. § 1357(a)&(c) (West 2007).

[90] Id. at (g)(10)(B). This section states "Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State to … otherwise to *cooperate* with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."

[91] In 8 U.S.C. § 1324a4(h)(2), Congress states, "The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment unauthorized aliens." Furthermore, existing code section Va. Code § 40.1-11.1 is expressly preempted as well, since it criminalizes conduct already made illegal by § 1324a.

has clearly indicated with the passage of 8 U.S.C.A. § 1324a that its "manifest purpose" is to ouster state power in the area of employment of illegal immigrants. Consequently, any state measure which attempts to criminalize or sanction the employment, recruitment or referral for a fee of illegal immigrants is expressly preempted and, thus, unconstitutional.

Attempts have been made to hold employers accountable by forcing them to include illegal immigrant employees in the Virginia workers' compensation system. HB 2688 was introduced during the 2007 session to create criminal and civil penalties for employers who fail to pay workers' compensation benefits to illegal immigrants. This type of bill is likely preempted by the U.S. Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. N.L.R.B., in which the U.S. Supreme Court held that the National Labor Relations Board could not award an illegal immigrant back pay because such payment would run contrary to the federal immigration policy of prohibiting the employment of illegal aliens.[92] Consistent with Hoffman, forcing employers to comply with workers compensation payments to illegal immigrants would also seem to encourage, rather than prevent, illegal immigrants from obtaining work. While some lower courts have declined to extend Hoffman in some circumstances, such cases have relied on very questionable distinctions.[93] It would be prudent to consider the Supreme Court's decision in Hoffman as the controlling precedent.

While states are preempted from penalizing employers who hire illegal aliens, Congress has allowed the states some room to place restrictions on employers. Specifically, U.S. Code § 1324a permits state and local governments to pass measures that address the hiring of illegal immigrants through "licensing and similar laws."[94] The extent to which "licensing" is defined is not clear, although one U.S. District Court recently held that the meaning was limited.[95] The plain meaning of licensing would seem to permit a few bills that were introduced during the 2007 session. HB 3130 sought to prohibit the issuance of a business license to any individual who cannot provide legal documents proving such individual is legally eligible to be employed in the U.S. House Bill 2826 sought to require every "public body" to participate in federal work authorization programs to verify new employees and to require all contractors of public bodies to participate in the federal program. Both of these bills seem to avoid preemption, based on the plain meaning of the exception in § 1324a, since HB 3130 is based on denying licenses to illegal immigrants and

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[92] Supra, at note 69.

[93] For example, the New York Court of Appeals decided not to follow Hoffman because the illegal immigrant in Hoffman broke the law by using false identification, but in the New York case the illegal immigrant apparently broke no federal immigration laws. Balbuena v. IDR Realty LLC, 845 N.E.2d 1246, 1258 (N.Y. 2006). Likewise, the Second Circuit also noted that Hoffman dealt with conflict between federal laws, but in its case it was dealing with federal and state law, and went through a preemption analysis without applying the DeCanas test. Madeira v. Affordable Housing Foundation, Inc., 469 F.3d 219 (2nd Cir. 2006).

[94] Supra, at note 91.

[95] In Lozano v. City of Hazleton the district court held the city of Hazelton's ordinance that revoked licenses for businesses that employed illegal immigrants was preempted. Lozano v. City of Hazleton, 496 F.Supp.2d 477 (M.D.Pa.,2007). Specifically, the court referred to the Committee Notes for the legislative intent to hold that the only type of "licenses" a state or local government could revoke were similar to "'fitness to do business laws' such as state farm labor contractor laws or forestry laws." Id. at 520.

HB 2836 regulates the employment of illegal immigrants without a civil or criminal punishment.

2. Criminal Penalties and Criminal Procedure

Some bills introduced over the last few sessions attempted to create new crimes or modify criminal procedure with regard to illegal immigrants. During the 2007 session, HB 1918 and HB 1970[96] both sought to make it a Class 1 misdemeanor for an illegal immigrant to be present in Virginia. Both of these bills are likely preempted for two reasons. First, it is already a federal crime under 8 U.S.C. § 1325(a) for a person to enter the U.S. illegally. Consequently, Congress has already (1) acted and, (2) the subject matter of § 1325(a) relevant to both bills is not a "peripheral concern." So, consistent with DeCanas, these bills are likely preempted. Additionally, it also is a civil violation, under U.S. Code § 1227(a)(1)(B), for an illegal immigrant to be present in the country illegally. The misdemeanor punishment in the two bills would create a conflict between federal and state law because these bills sought to punish the act more severely than federal law. This conflict between the bills and existing federal law is a very clear example of federal "conflict" preemption.

During the 2007 session, three bills sought to establish a presumption against bail for illegal aliens; HB 2322, HB 3206, and SB 1421. Specifically, these bills sought to create a presumption against bail for "any felony committed by the person after entering the United States unlawfully." There are no relevant statutes in the U.S. Code addressing a presumption against bail for illegal aliens. Criminal aliens, however, are required to be detained during removal proceedings.[97] Denial of bail for illegal immigrants awaiting deportation is constitutional, but they cannot be held "indefinitely."[98] Since the bail proceedings fall under criminal and not deportation proceedings, the constitutional limits on presumption against bail would include whether the aim of the statue is regulatory or punitive and if there is a compelling state interest.[99] Without a federal statute addressing bail for illegal immigrants, states are not preempted from creating a presumption against bail for illegal immigrants.

3. Law Enforcement Authority

Several bills were introduced over the last few sessions that sought to increase Virginia law enforcement authority to make arrests for violations of federal immigration law. Five bills were introduced to establish agreements between Virginia law enforcement and ICE: HB 2926 (2007), HB 2933 (2007), HB 1618 (2007), SB 1045 (2007), and HB 487 (2006).

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[96] HB 1970 also attempted to remove the requirement from § 19.2-81.6 that the illegal immigrant must have been previously convicted of a felony before he could be arrested. This is problematic because § 19.2-81.6 is based on a specific grant of power to the states under U.S. Code § 1252c. The proposed removal of the felony requirement in HB 1970 from Va. Code. § 19.2-81.6 exceeds the authority granted under U.S. Code § 1252c.
[97] 8 U.S.C.A. § 1226 and 8 U.S.C.A. § 1231.
[98] Zadvydas v. Davis, 533 U.S. 678 (2001).
[99] U.S. v. Salerno, 481 U.S. 739 (1987). Also, the Court notes that the procedures in the bail proceedings provide the defendant access to counsel, as well as other procedural safeguards. Id. at 751-52.

These bills sought to grant sheriffs, police, and the State Police powers to enforce immigration law under an agreement with ICE.[100] This agreement would be pursuant to the "287(g)" program with ICE. These bills are not preempted. In fact, 8 U.S.C.A. § 1357(g) expressly permits state and local law enforcement to enter into agreements with ICE to enforce immigration law.

Some bills have attempted to grant Virginia law enforcement broad powers to enforce immigration law without an agreement with ICE. House Bill 2936 (2007) and HB 1837 (2005) both sought to grant all Virginia law enforcement the authority to make warrantless arrests for immigration law violations, upon confirmation of the individual's legal status with ICE. As discussed previously, there is some confusion concerning state law enforcement's ability to make immigration arrests.[101] Clearly, the Ninth and Tenth Circuit Courts of Appeals would consider the regulations forwarded in the bills acceptable. It is unclear whether the Fourth Circuit Court of Appeals would agree with the Ninth and Tenth Circuits and validate this authority or, rather, consider the existence of § 1252c, § 1324, and § 1357(g) as clear congressional intent to "occupy the field" under the second prong of the DeCanas test. The Tenth Circuit rejected the argument that the existence of § 1252c was proof of congressional intent to preempt state arrest power.[102] Due to the confusion that exists over the authority of state and local law enforcement to enforce violations of immigration law, the Task Force requested a formal opinion from the Attorney General of Virginia.[103] In response, the Attorney General issued a formal opinion stating that Virginia law enforcement has the authority to make arrests for *criminal* violations of federal immigration law.[104] Since there is considerable ambiguity with "inherent authority", however, the Attorney General opined that it would be prudent to limit state arrest authority to what is already expressly permitted by § 1252c[105], § 1324, and § 1357(g).

Finally, a bill introduced during the 2007 session, HB 2931, sought to bar any local entity from prohibiting the exchange of information with ICE. This bill is essentially the same as what is already required in both 8 U.S.C.A. § 1373 and 8 U.S.C.A. § 1644. HB 2931 is most likely preempted since the presence of two federal statues on point is a fairly clear

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[100] WL 1456159 Va. AG. (2007). The Opinion states that "under § 15.2-1726 (Virginia Code), a local law enforcement agency may exercise its discretion to enter into an agreement with the Department of Homeland Security to enforce selected immigration laws."

[101] Specifically, the previous section starting on page 8, entitled "Law Enforcement Authority," discussed the legal issues surrounding states enforcing federal immigration law.

[102] U.S. v. Vasquez-Alvarez, 176 F.3d 1294, 1299 (10th. Cir. 1999). The Court reasoned that with the inclusion of "[n]otwithstanding any other provision of law, to the extent permitted by relevant State and local law", ensured that "other **federal** laws not be construed to restrict the authority granted in § 1252c." Id. It is important to note that the preemption test used by the Vasquez-Alvarez court was not the DeCanas test and it did not consider either § 1324 or § 1357 in its preemption analysis. Id. at 1298.

[103] *See*, **Attachment A**.

[104] Va. AG. Opinion No. 07-086 (2007). The Opinion also acknowledged that Virginia law enforcement may not have the authority to arrest for *civil* violations of immigration law **(Attachment B)**.

[105] This arrest power is already permitted by VA. CODE. ANN. § 19.2-81.6 (Michie 2007).

example of congressional intent to "occupy the field" under the second prong of the DeCanas test.[106]

IV. THE ROLE OF THE UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT[107]

The United States Immigration and Customs Enforcement ("ICE") was established in March 2003 as the largest investigative arm of the Department of Homeland Security. It investigates a wide range of national security, financial and smuggling violations including drug smuggling, human trafficking, illegal arms exports, financial crimes, commercial fraud, human smuggling, document fraud, money laundering, child pornography and exploitation, and immigration fraud. It is comprised of five branches, including the Office of Investigations, the Office of Detention and Removal Operations, the Federal Protective Service, the Office of Intelligence, and the Office of International Affairs.

The Office of Investigations is responsible for investigating a range of issues that may threaten national security. It utilizes its legal authority to investigate issues such as immigration crime, human rights violations, human smuggling, narcotics, weapons and other types of smuggling, and financial crimes, cyber crime and export enforcement issues. The Office of Detention and Removal Operations is responsible for making certain, through the enforcement of immigration law, that all illegal immigrants and removable aliens depart the U.S. The Office transports aliens, manages them while waiting for their cases to be processed, and removes illegal immigrants and other aliens from the U.S. when ordered.

The Washington D.C. Special Agent in Charge Office ("SAC DC") of ICE is responsible for enforcement in the District of Columbia and the Commonwealth of Virginia. The SAC DC office is located in Northern Virginia and is responsible for performing duties within Northern Virginia and the District of Columbia. A Resident Agent in Charge Office (RAC) located in Harrisonburg services the western part of Virginia and a RAC office in Norfolk services Southeast Virginia.

Given ICE's role as the federal agency responsible for the enforcement of immigration law, representatives of ICE were asked to present the Task Force with information on ICE initiatives and available resources. ICE representatives also made themselves available to answer specific questions that arose at Task Force meetings concerning the practical implications and efficacy of proposals.

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[106] The Second Circuit upheld § 1373 from Tenth Amendment and Guarantee Clause challenges. City of New York v. U.S., 179 F.3d 29 (2nd Cir. 1999).

[107] The information contained in this section, with the exception of subsection E, was obtained through presentations made to the Task Force by officials from ICE and an official from the Mecklenburg County, North Carolina, Sheriff's Office at meetings held on May 15, July 24, and August 28, 2007.

A. Section "287(g)" of the Immigration and Nationality Act[108]

The Task Force was presented with information on ICE's "287(g)" program at its May 15, 2007 meeting. The Illegal Immigration Reform and Immigration Responsibility Act of 1996 amended the Immigration and Nationality Act through the addition of "287(g)." Through this provision, the Secretary of the Department of Homeland Security is authorized to enter into agreements with state and local law enforcement to allow designated officers to become trained and authorized to perform immigration law enforcement functions pursuant to a memorandum of understanding. The program is voluntary. It is designed to multiply the forces of ICE through enhanced cooperation and communication with state and local law enforcement. Participating state and local law enforcement officers are provided with training by ICE on how to identify, process and detain illegal immigrants encountered during their regular duties. The memorandum of understanding details the scope of authority and enforcement activities, supervision requirements, and training requirements. The Task Force was informed that the memorandum of understanding is flexible and may be tailored and subject to modification as needed. For example, it may be tailored to limit the number of officers designated and to only those officers engaged in specific duties. The focus of the memorandum of understanding is on the criminal element and not civil enforcement.

To be designated for such authorization, an officer must be a U.S. citizen, undergo a background investigation, have no pending disciplinary actions, and have a minimum of two years experience in his/her current position. Officers designated under the program are supervised by ICE officers with regard to their immigration enforcement activities, which must immediately be reported to the ICE supervisor.

A variety of operational models exist for the implementation of a "287(g)" relationship. In the task force participation model, law enforcement officers assist in cases with a nexus to counter-terrorism and domestic security. In the highway patrol/identity fraud model, highway patrol officers and drivers license issuing offices identify illegal immigrants during the course of their normal duties. In the correctional institutions model, correctional officers process convicted or non-convicted criminal illegal immigrants within the jail population.

Law enforcement officers, such as state troopers, detectives, and patrol officers that are designated for authorization must undergo a five week training program. Correctional officers must undergo a four week training program. The training consists of instruction on nationality law, immigration law, criminal law, ICE operations, statutory authority, document examination, cross-cultural communications, special status aliens such as refugees and asylees, Department of Justice guidelines regarding the use of race, and removable charges.

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[108] The information contained in this subsection was obtained by presentations made to the Task Force on May 15, 2007 by officials from ICE and an official from the Mecklenburg County, North Carolina, Sheriff's Office.

When the ICE representatives presented the Task Force with information on the "287(g)" program on May 15, 2007, the following agencies were cited as current program participants:

Florida Department of Law Enforcement (law enforcement officers)
Alabama State Police (Highway and DMV)
Arizona Department of Corrections (correctional officers)
Los Angeles County Sheriff's Department (correctional officers)
San Bernardino County Sheriff's Department (correctional officers)
Mecklenburg County, North Carolina Sheriff's Department (correctional officers)
Riverside County California Sheriff's Department (correctional officers)
Alamance County Sheriff's Department, North Carolina (correctional officers)
Gatson County Sheriff's Department, North Carolina (corrections officers)
Orange County Sheriff's Department, North Carolina (correctional officers)
Maricopa County Sheriff's Department, Arizona (correctional officers)
Cobb County Sheriff's Department, Georgia (correctional officers)
Massachusetts Department of Corrections (correctional officers)
Colorado Department of Public Safety (task force officers)
Davidson County Sheriff's Department, Tennessee (correctional officers)
Herndon Police Department, Virginia (task force officers)

The ICE representatives further informed the Task Force on May 15, 2007, that on that very morning, "287(g)" training was beginning at the Herndon Police Department for the Herndon Police Department, the Prince William Manassas Adult Detention Center, the Rockingham County Sheriff's Office, and the Shenandoah County Sheriff's Office. The Task Force was informed that the agreement between Herndon and ICE is based upon the task force participation model and that the Department would be working with ICE on gang task force matters.

Representatives from ICE presented the Task Force with information on specific instances of success under the "287(g)" program. Pursuant to the agreement with the Alabama State Police, twenty-seven individuals were convicted of federal charges after attempting to obtain an Alabama driver's license through the use of fraudulent documents. Thirteen individuals have been convicted of state charges that include narcotics violations and possession of forged instruments. In Florida, deputy sheriffs arrested twenty individuals attempting to purchase fraudulently obtained state drivers licenses. All of these individuals were convicted on state driver's license fraud charges and eighteen were removed from the U.S. after serving their sentences. In November of 2005, the Arizona Department of Corrections began processing illegal immigrant inmates at their intake center as part of their "287(g)" program. Arizona law allows for early release for the purpose of removal for incarcerated illegal immigrants identified through the "287(g)" program. By processing illegal immigrants who met criteria for early release and turning them over to ICE for removal, the Arizona Department of Corrections realized a cost savings of $2,985,655 and a savings of 53,135 bed days.

The Task Force was presented with information by a representative of the Mecklenburg County, North Carolina Sheriff's Office on that agency's "287(g)" program with ICE. The Sheriff's Office entered in its "287(g)" program with ICE in 2006. The program is limited to illegal immigrants who are arrested. Twelve deputies who work within the county's jail facilities were trained under the program and interview inmates to determine whether there is probable cause for an immigration violation, complete the processing for criminal immigrants, prepare the documentation to place the illegal immigrants in deportation proceedings concurrent with their prison term, and prepare documentation to deport illegal immigrants following their terms. After approximately one year of the program, 3,490 foreign-born inmates were held in the county jails, of which 1,898 were processed for removal. Of the 1,898 processed for removal, 125 had re-entered after having been previously deported and 110 had an outstanding warrant for removal. The Task Force was also informed that of the 1,898 inmates processed, 393 had been arrested for driving under the influence. The representative informed the Task Force that the program initially exacerbated the jail overcrowding problem but has since become a success without cost to the county.

B. ICE's Law Enforcement Support Center[109]

The Task Force was presented with information about ICE's Law Enforcement Support Center at both its May 15, 2007 and July 24, 2007 meetings. The Law Enforcement Support Center ("LESC"), located in Vermont, operates an Immigration Alien Query, which provides access to the approximately ninety-three million records held by ICE. The LESC mission is to provide investigative assistance to local, state, and federal law enforcement, twenty-four hours a day, seven days a week, three-hundred and sixty five days a year, in the identification of illegal immigrants who are suspected of criminal activity. The LESC allows law enforcement officers to easily and quickly obtain information and assistance from ICE on law enforcement matters. The LESC database includes information on such individuals as lawfully admitted aliens or those who are here to apply to become lawful aliens, anyone who has previously been deported, students who enter on a visa, and those who constitute a national security interest who are trying to enter the U.S. The Task Force was informed that when the LESC was initially constructed in 1996, it was thought that the primary "customer" of their services would be the police officer on the street, but what they have found over the years is that requests for information and the demand for their services have spread throughout the entire law enforcement / judicial community. They now receive inquiries from law enforcement agencies, courts, corrections, and other federal agencies.

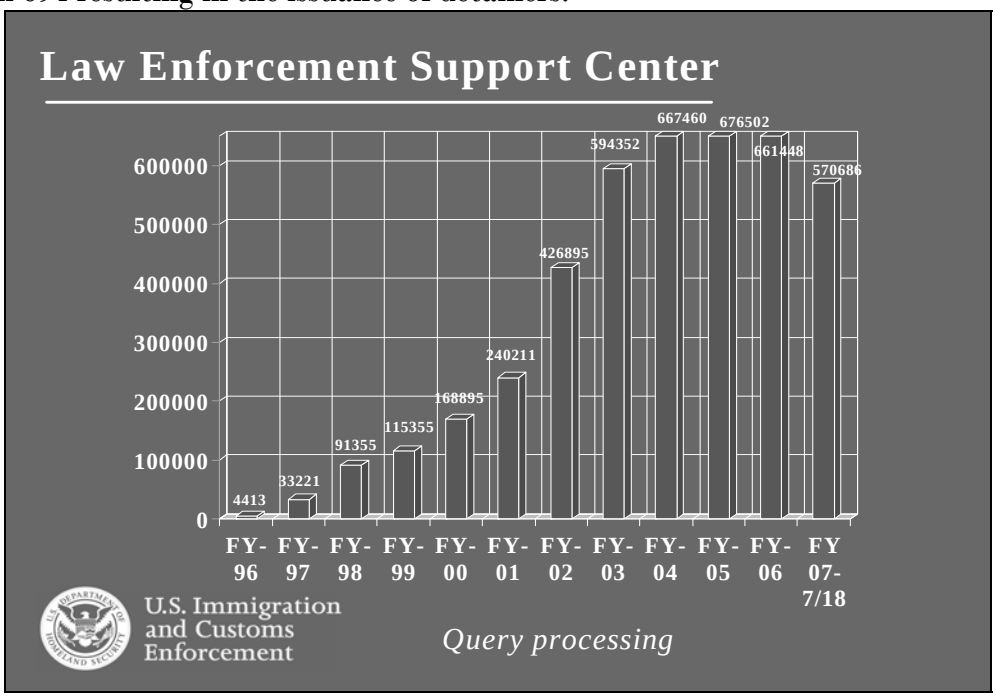
The Task Force was informed that the LESC database is comprised of different lists. These lists include lawfully admitted aliens, individuals deported from the U.S., individuals who apply for benefits in the U.S., students who enter the country on an F1 visa, and individuals of national security interest who are trying to enter the U.S. In short, the LESC database contains information on those who have come here legally and those who have been

[109] The information contained in this subsection was obtained by presentations made to the Task Force on May 15 and July 24, 2007 by officials from ICE.

removed. For example, if an individual claims to be in the U.S. on a valid visa, the LESC could be used to verify their claim or ascertain that the claim is false. The database does not include information on U.S. citizens or on individuals who have entered illegally and eluded detection. U.S. citizens can be verified by the database, by way of their social security number, through access to a database administered by the Social Security Administration. The Task Force was informed that the LESC database has a 99% accuracy rate for information on those who have entered the country legally.

As of 2003, all fifty states have online access to the LESC. The Task Force was informed that from October 1, 2006 to May 7, 2007, there have been approximately 500,000 queries nationwide to the LESC. The Task Force was informed that LESC technicians receive about 2,000 requests for information per day and they expect to answer about 700,000 requests this year.

Virginia has been online with the LESC since 2001. A representative from ICE informed the Task Force that the LESC is a very important tool for Virginia law enforcement and that its use by Virginia law enforcement is increasing with each year. Virginia law enforcement ranks tenth among the most frequent users of the LESC nationwide. In the past three fiscal years, LESC responded to a combined total of 22,283 electronic queries from Virginia law enforcement. In Fiscal Year 2004, the LESC received 4,878 queries from Virginia law enforcement. In Fiscal Year 2005, it received 8,880. In Fiscal Year 2006, the number decreased to 8,525. In Fiscal Year 2007, as of the July 24 meeting, the LESC had received 9,668 queries from Virginia and was expecting to receive about 12,000 by the end of the year. Ultimately, it was reported that the LESC received 12,073 inquiries from Virginia law enforcement agencies between August 1, 2006 and July 31, 2007, with 694 resulting in the issuance of detainers.



Source: Presented to the Task Force on July 24, 2007 by ICE.

Upon questioning from the Task Force as to how many of the inquiries received from Virginia law enforcement led to the identification of illegal immigrants, the Task Force was informed that such information was not available. Specifically, it was stated that the person inquired about could be identified through the LESC as a legal permanent resident, a lawful permanent resident, a previously deported felon, or a visa overstay. U.S. citizens are not in the database. Nor are illegal immigrants who have not been encountered. In instances where a query does not result in the production of any information on an individual, it may indicate that the person is either a U.S. citizen or an illegal immigrant who has not been previously encountered.

A representative of the Task Force emphasized the need to know how many of the inquiries made by Virginia law enforcement to ICE resulted in the identification of illegal immigrants and, further, how many of those against whom detainers were issued were eventually picked up by ICE and deported. Task Force members also urged the importance of knowing criteria that will be used to determine whether or not an illegal immigrant charged with a crime will be detained and picked up by ICE. In response to these inquiries, ICE representatives indicated that they do not have information on the number of inquiries made to the LESC that have resulted in the identification of an illegal immigrant and, further, do not have statistics on the number of illegal immigrants against whom detainers were issued who were eventually picked up and deported. Additionally, ICE was unable to provide the Task Force with criteria that could be used to provide local law enforcement agencies with more concrete expectations as to when ICE will and will not detain and pick up an illegal immigrant in custody.[110]

An ICE representative informed that the most important factor in determining whether or not to hold an individual is the amount of bedspace available in any one location at that time. Available space is an issue throughout the country, not just in Virginia. A Task Force member stressed that, when known illegal immigrants commit crimes, the public has a perception that the government should do something about it and that all localities in Virginia should have the same policies with regard to illegal immigrants. Consequently, it is important to know when ICE will respond to a situation as well as what ICE's capacity is to dealing with a statewide approach to illegal immigrants. The ICE representatives informed that ICE's ability to utilize its limited resources to detain and remove an illegal immigrant is determined by two factors: 1) the severity of the offense, and 2) the amount of available bed space. The amount of available bed space, in turn, is dependent upon the amount of funding available to ICE to pay for that space. Currently, ICE has funding for approximately 650 beds in Virginia. The availability of ICE officers to come and pick up the illegal immigrant in question is also a factor.

C. Document and Benefit Fraud Task Forces[111]

[110] A formal request was sent to ICE requesting a list of offenses, or other criteria, that can be used to provide local law enforcement agencies with more concrete expectations as to when ICE will and will not detain and pick up an illegal immigrant in custody **(Attachment C)**.

[111] The information contained in this subsection was obtained by a presentation made to the Task Force on July 24, 2007 by officials from ICE.

ICE representatives were asked to present the Task Force with information on document and benefit fraud task forces at its July 24 meeting. The Task Force was informed that the ICE identity and benefit fraud investigations support the Homeland Security mission by investigating immigration fraud in all its forms. It targets individuals and organizations that subvert the legitimate immigration process and pose a potential threat to national security. ICE involvement in this area is based upon the fact that identity and benefit fraud present a vulnerability by which criminal and terrorist organizations can obtain unrestricted entry or status in the U.S.

Immigration fraud underlies human trafficking and alien smuggling, enables the improper access of individuals to critical infrastructure worksites and shields violators from detection. ICE immigration fraud investigations are primarily focused on two categories. Document fraud is generally the manufacturing, counterfeiting, alteration, sale, and/or use of identity documents and other fraudulent documents to circumvent immigration laws or for other criminal activity. Unlike benefit fraud, document fraud does not in and of itself confer lawful status upon the perpetrator. Identity theft often links the perpetrator's identity to the legitimate identity of an innocent individual to obtain immigration and financial benefits. Vulnerabilities resulting from fraudulent documents are that they are often used as "breeder" documents to obtain additional identification documents, such as driver's licenses, social securities, etc., that shield illegal aliens from detection, obtain financial benefits and entitlements intended for U.S. citizens or lawful permanent residents, used by traffickers and alien smugglers to facilitate movement into and within the U.S., and to obtain unauthorized employment.

Benefit fraud is the knowing and willing misrepresentation of a material fact on a petition or application to gain an immigration benefit. It is an extremely lucrative form of crime, complex and challenging to investigate, and often involves sophisticated schemes and multiple co-conspirators requiring substantial resources to investigate and prosecute. Because immigration benefits confer lawful status upon an individual, their value to illegal immigrants, as well as to terrorists and criminals, is significant.

ICE has established 17 document and benefit fraud task forces. Participating agencies include ICE, the U.S. Department of Labor – Office of Inspector General, U.S. Department of State – Office of Inspector General, U.S. Department of State – Bureau of Diplomatic Security, U.S. Social Security Administration – Office of Inspector General, U.S. Secret Service, U.S. Attorneys, and state and local agencies. These task forces seize illicit proceeds of, and dismantle criminal organizations that threaten national security and public safety and address the vulnerabilities that currently exist in the immigration process. Statistics from the document and benefit fraud task forces from April 4, 2006 through June 30, 2007 reveal that 807 cases were initiated, resulting in 759 arrests, 534 indictments, and 461 convictions.

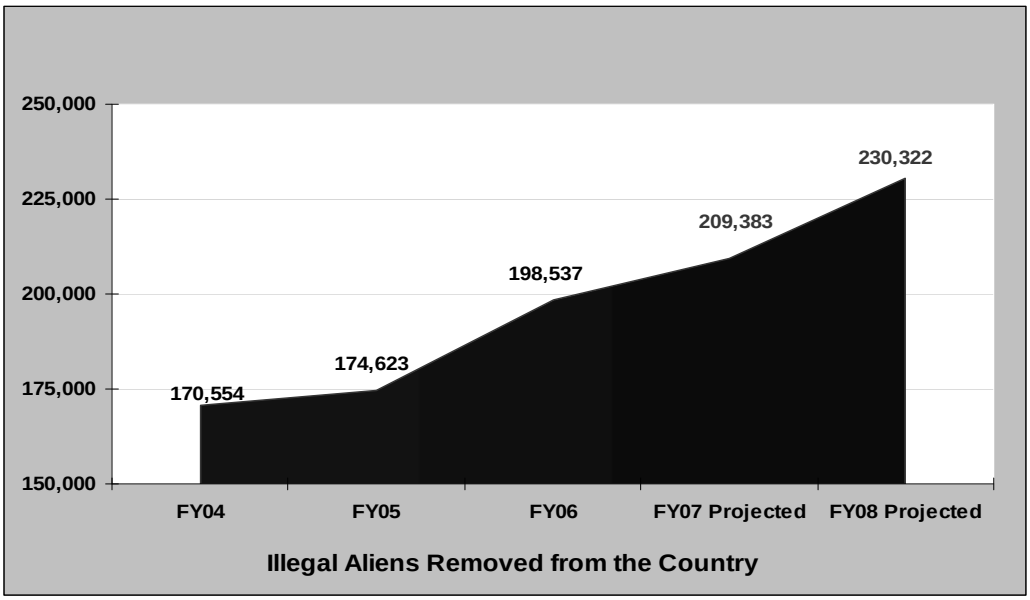
The Task Force was informed that by partnering with ICE through a document and benefit fraud task force, agencies will contribute in targeting criminal organizations, seizing illicit proceeds and dismantling the infrastructures that threaten our national security and

public safety. These task forces also address the vulnerabilities that currently exist in the immigration, labor, visa and other areas threatened by these organizations. ICE representatives informed that some of the benefits of partnering with ICE on a document and benefit fraud task force include a unified case management system affording shared information and greater communication between agencies, reimbursement to local agencies for authorized expenses such as overtime pay, access to a forensic document lab which provides the needed documents to investigate a case, access to the Law Enforcement Support Center, sharing of seized assets upon completion of a case, and the ability to use resources that a local or state office might not possess.

D. ICE's Criminal Alien Program[112]

ICE's Office of Detention and Removal Operations ("DRO") promotes the public safety and national security by ensuring the departure from the U.S. of all illegal immigrants and other removable aliens through the enforcement of immigration law. For FY 2007, DRO had a total of 6,762 positions, including 2,036 deportation officers, 3,273 immigration enforcement agents, and 1,453 administrative and support staff. The Senate Appropriations Committee approved funding for a 30% increase in staffing for Fiscal Year 2008. There are, however, 4,296 facilities in the country, including 126 in Virginia.

DRO conducted more than 198,000 removals in FY 2006, including over 89,000 criminals. On average, over 29,000 aliens are held in custody on any given day. Over 1.2 million active cases are being managed by DRO staff. Since the creation of ICE, Fugitive Operations Teams have removed over 109,000 illegal immigrants and other aliens from the fugitive population.



Source: Presented to the Task Force on August 28, 2007 by ICE.

[112] The information contained in this subsection was obtained by a presentation made to the Task Force on August 28, 2007 by officials from ICE.

DRO has 24 field office locations, the closest to Virginia being in Washington, D.C., and is comprised of four operational divisions: 1) Detention Management Division, 2) Removal Management Division, 3) Criminal Alien Division, and 4) Compliance Enforcement Division.

Field Office Locations

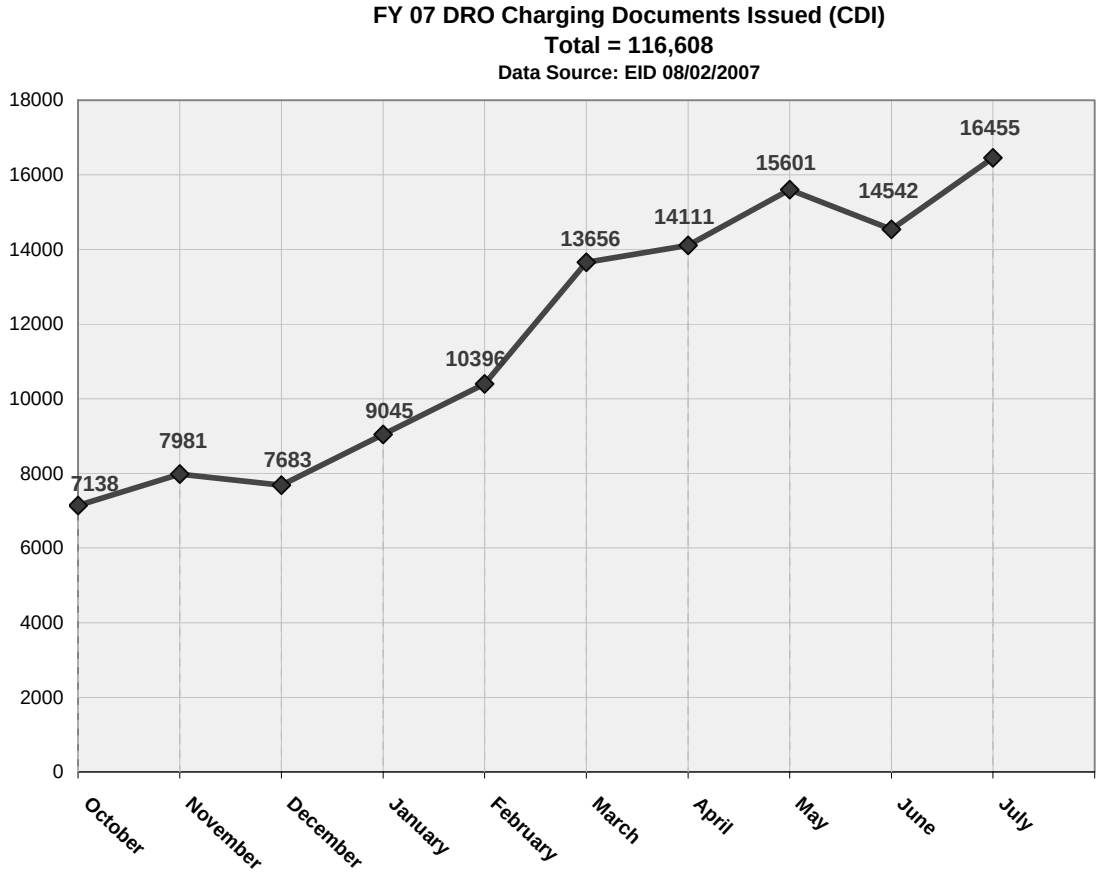
Atlanta	Baltimore	Boston
Buffalo	Chicago	Dallas
Denver	Detroit	El Paso
Houston	Los Angeles	Miami
New Orleans	New York	Newark
Phoenix	Philadelphia	Salt Lake City
San Antonio	San Diego	San Francisco
Seattle	St. Paul	Washington

Source: Presented to the Task Force on August 28, 2007 by ICE.

The primary objective of the Criminal Alien Program is to ensure that all criminal illegal immigrants and other removal aliens serving criminal sentences are processed for removal prior to their release from Federal, state, and local custody. This is intended to provide for the reduction of the average detention time in ICE custody, thereby decreasing the number of beds and the number of personnel required to manage the detained population.

ICE has developed a risk assessment which is a comprehensive list of federal, state, and county jails across the United States. A list of 4,296 facilities was compiled and weighed scores were assigned based on six factors: the foreign-born population in a facility; the jail population (when foreign born population is unknown); number of releases to ICE; the population density surrounding the facility; whether a facility is a state release site; and security level of the facility. The risk assessment is used to identify and assist ICE and their partners in better identifying the incarcerated criminal population.

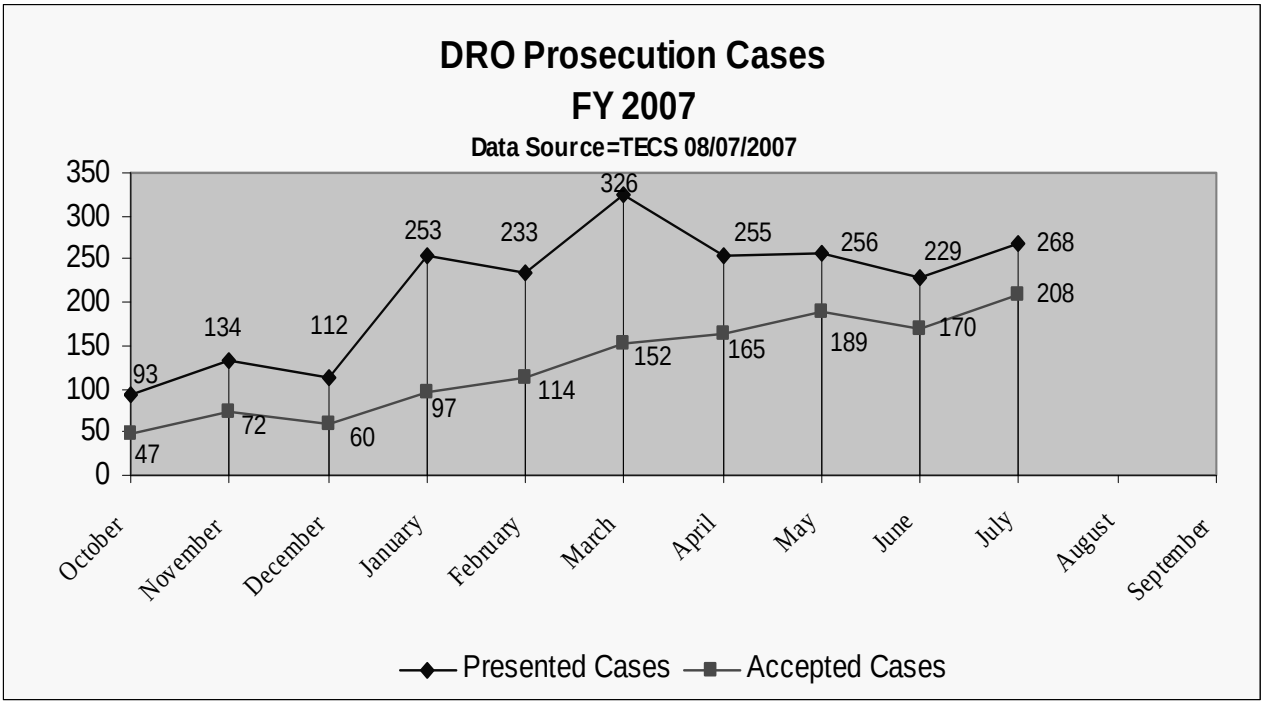
Initiating removal proceedings against criminal aliens in jails and prisons is a primary goal of the Criminal Alien Program. It is using the number of charging documents issued on illegal immigrants encountered in jails and prisons as a measure of productivity towards achieving this goal. Since the beginning of FY 2007, DRO has seen over a 100% increase in monthly charging documents issued.



Source: Presented to the Task Force on August 28, 2007 by ICE.

The Detention Enforcement and Processing Offenders by Remote Technology ("DEPORT") is the designated interview and processing site for criminal illegal immigrants and other removable aliens within the Bureau of Prisons ("BOP"). This site commenced operations on June 1, 2006 and is located in Chicago, Illinois. Prior to the inception of DEPORT, ICE had onsite coverage of 14 BOP locations. Now ICE has coverage of all 114 BOP facilities by utilizing remote technology. Since commencement, DEPORT has screened 20,945 BOP prisoners and issued 12,303 charging documents. DEPORT has also identified and placed immigration holds on 6,845 criminal illegal immigrants and other removable aliens within the BOP.

The Criminal Alien Program is aggressively pursuing criminal prosecutions of immigration violators located in jails and prisons. In FY 2007, DRO presented 2,159 cases to the Office of the U.S. Attorney. Of these, 1,274 were accepted.



Source: Presented to the Task Force on August 28, 2007 by ICE.

The Washington Field Office of DRO covers Virginia. This field office has increased staffing within Virginia by adding an office in Roanoke and by increasing officers in Harrisonburg, Richmond, Norfolk, and Fairfax. The number of charging documents issued in Virginia has increased from 80 in FY 2006 to 1,228 in FY 2007. The field office has also coordinated with the Virginia Department of Corrections to establish ICE onsite representation at intake centers. The field office seeks to continue the improvement of all processes for communication and identification of illegal immigrants and promote ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ACCESS"), a program that provides local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities.

The Task Force was informed that DRO is starting to build a relationship with local jails in populous areas similar to that which exists with the Virginia Department of Corrections. They frequently visit local and regional jails in an effort to improve relations. The Task Force was informed that even if a jail does not have a "287(g)" agreement in place with ICE, the jail can contact the Law Enforcement Support Center if it suspects that an individual in custody may be an illegal immigrant. The Law Enforcement Support Center will run an Illegal Alien Query (IAQ). If the individual is an illegal immigrant, ICE can issue a detainer that will authorize the jail to detain the individual.[113]

E. Communications between ICE and Virginia Sheriffs

Crime Commission staff, in conjunction with the Virginia Sheriffs' Association, sent out a survey to all 123 sheriff's offices in Virginia to ascertain the extent and effectiveness of communications between sheriff's offices and ICE. The survey inquired as to whether offices had a policy on determining the immigration status of individuals in custody and contacts with ICE. Responses were received from 63 offices representing the various regions of the Commonwealth.[114]

Of the offices that responded, none had a policy that prohibited deputies from inquiring into an individual's immigration status when stopped or in custody. Sixty-eight percent of the responding offices responded that their deputies do inquire into the immigration status of persons in custody. The same number of offices responded that they had contacted ICE to inform them of an illegal immigrant in custody.

Offices were asked how many times they had contacted ICE in calendar years 2004, 2005, and 2006. The responses received indicate that offices in Northern Virginia tend to contact ICE more frequently than offices in other parts of the state. The general trend, based upon the numbers provided, is that some offices are contacting ICE more frequently than they did in the past.

Offices were asked to describe the responses they generally receive when they contact ICE. Of the 63 offices responding, ten gave general reviews that were favorable, fourteen gave reviews that were very negative, six complained that ICE would only come to pick up felons, and four complained that ICE would only arrange pick ups if there were a large number of illegal immigrants at one time. The responses did seem to indicate that increased clarity from ICE would help localities to know when and how to contact them. Guidance would also to help clear up expressed confusion as to when ICE can, and cannot, come to take illegal immigrants into custody.

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[113] As noted previously in Section IV(B), ICE's ability to utilize its limited resources to detain and remove an illegal immigrant is determined by two factors: 1) the severity of the offense, and 2) the amount of available bed space. The amount of available bed space, in turn, is dependent upon the amount of funding available to ICE to pay for that space. The availability of ICE officers to come and pick up the illegal immigrant in question is also a factor.

[114] *See*, **Attachment D**.

At the October 16, 2007 meeting of the Task Force, John W. Jones, Executive Director of the Virginia Sheriffs' Association expressed that illegal immigration is a priority for sheriffs because it is a public safety issue. He also expressed that overcrowding, staffing shortages, and costs are concerns and that a consistent, statewide training component should be a part of any new program. He related that the Virginia Sheriffs' Association recommends 1) amending Virginia law to provide for the reimbursement to any city or county of up to one-half of the capital cost of a jail construction, enlargement or renovation project, 2) removing Appropriations Act restrictions which prevent sheriffs and regional jails from using federal funds pursuant to ICE contracts for operation of the jails, 3) the adoption and funding of staffing standards for any new responsibilities given to sheriffs with regard to illegal immigrants, and 4) funding a statewide training component through the Virginia Center for Policing Innovation for consistent statewide delivery of immigration-related training services to all jails.

V. ILLEGAL IMMIGRANTS IN VIRGINIA JAILS AND PRISONS

In order to assist the Task Force in gaining a better understanding of the number of illegal immigrants in Virginia jails and prisons, Crime Commission staff requested and analyzed records from the Virginia State Compensation Board and Department of Corrections.

A. Illegal Immigrants in Virginia Jails

In order to obtain information regarding individuals in Virginia jails, Crime Commission staff contacted the Virginia State Compensation Board. The Compensation Board oversees the Local Inmate Data System ("LIDS") database. Staff specifically requested records for all individuals who spent time in a Virginia jail between FY2003-2007. Staff received over 1.8 million records.[115] Due to the large amount of records, staff analyzed the most recent fiscal year, FY2007.

Each record represents an offense committed by an individual; thus, there were far more offenses listed than number of individuals. Specifically in FY2007, there were over 925,000 listed offenses committed by over 215,000 individuals. After receiving all of the records, staff had to determine a way to identify whether an individual was legal or illegal. As a result, three criteria were developed for analyzing the LIDS data.

First, the individual had to be born in a country other than the U.S. If the individual was born in the U.S., he or she was not included because they would have become an automatic U.S. citizen. Second, the individual had to have citizenship in a country other than the U.S. However, an individual born in another county and with citizenship from a

[115] Staff would like to acknowledge Anne Wilmoth (Chief Information Officer, State Compensation Board) for her patience and generous assistance in fulfilling this very large request in a timely fashion and for her willingness to promptly clarify any issues with the data.

country other than the U.S. could still be in the country legally. For instance, it would include those who are here legally on a temporary work visa, student visa or as a legal permanent resident. It should be noted that these two criteria (birth country and citizenship outside of the U.S.) are what ICE uses as a proxy for investigations into whether an individual is illegally present in the U.S. or has violated residency or visa restrictions. Finally, an additional prong was added for determining whether someone was illegal. Specifically, the individual had to have an invalid social security number. Invalid social security numbers are denoted by a unique 900-series number assigned to individuals by Virginia jail administrators when an individual does not have a social security number, cannot articulate a social security number or gives a false social security number. It should be underscored that the Social Security Administration does not issue any social security numbers beginning with a nine.

1. Estimated Figures of Illegal Immigrants in Virginia Jails

The total number of individuals in a Virginia jail at some point during FY2007 was 215,769. Of this number, six percent (13,735 of 215,769) were determined to be proxy illegal according to staff's three-prong criteria; whereas, 94 percent (202,034 of 215,769) were determined to be proxy legal.

It must be underscored that the figures set forth represent the most conservative estimate of proxy illegal immigrants in Virginia jails. If those with 900-series social security numbers who were born in a foreign country but citizenship status was unknown were included, an additional 887 offenses would be added; if including those with 900-series social security numbers and unknown birth country and citizenship status, an additional 12,793 offenses by 7,629 additional individuals would be added. Thus, the estimated percentage of illegal immigrants in Virginia jails would be raised to ten percent.

Staff purposefully set forth the most conservative estimate for a number of reasons. First, staff did not want to appear to inflate the estimated number of illegal immigrants in Virginia jails. Second, staff did not know for certain how much of the additional percentage included individuals who were intoxicated, mentally ill, or otherwise unable to articulate a social security number or who were currently on a student or tourist visa. It was concluded that it was too great an assumption to accept a less conservative approach at that point in time. However, the potential range of illegal immigrants in jails being anywhere between 6 to10 percent needed to be recognized. It also needs to be recognized that the overall findings are based upon the best available resources for analysis at this point in time.

Staff also undertook an alternative approach to estimating the number of illegal aliens in Virginia jails, which helped to serve as a cross-validation of estimated LIDS figures. According to the U.S. Census Bureau, there are roughly 7.6 million people in Virginia. A total of 215,769 individuals spent time in a Virginia jail at some point during FY 2007, or 2.8% of Virginia's total population. There are an estimated 250,000 to 300,000 illegal aliens in Virginia (Pew Hispanic Center, based on 2005 data). Assuming an identical crime rate for this population subset, one would expect that 8,400 (2.8% of 300,000) illegal immigrants

would spend time in a Virginia jail during that time period. This tracks very closely with the figures derived from analyzing the LIDS database. For instance, if calculating:

- 13,735 proxy illegal immigrants (conservative approach) / 300,000 = 4.6% of total estimated illegal alien population);
- 13,735 proxy illegal immigrants minus the 4,875 being held on behalf of ICE (non-criminal arrest)= 8,860, or 3% of total estimated illegal immigrant population; and,
- 13,735 plus 7,629 (those with blank fields that were initially excluded) minus the 4,875 (held on behalf of ICE) = 5.5% of total estimated illegal alien population.

Again, this was an alternative approach to estimating the number of illegal immigrants in Virginia's jails, and is useful as a "double check." What this reveals is that our examination of the LIDS database leads to numbers that one would otherwise expect. If this approach resulted in figures that indicated 75% of the illegal immigrant population was being arrested for a crime, then that might indicate that the methodology was flawed. Instead, these numbers show that the basic method used (examining the LIDS database and separating out those inmates who are citizens of another country and who do not have valid social security numbers) does have validity as a method of approximation.

2. Offenses committed by proxy legal individuals versus proxy illegal immigrants

The total number of offenses for which individuals were held during FY2007 was 925,834, of which 3% (27,148 of 925,834) were committed by proxy illegal immigrants and 97% (898,686 of 925,834) were committed by proxy legal individuals.

3. Gender

When looking at gender and the proxy illegal immigrant population in jails during FY2007, it was determined that of the 27,148 offenses committed by 13,735 illegal immigrants, 95% (25,757 of 27,148) of offenses were committed by 12,852 males; whereas, 5% (1,391 of 27,148) of offenses were committed by 883 females.

4. Country of Birth

The findings indicate that over 40% of proxy illegal immigrants in Virginia jails are from Mexico, followed by 20% from El Salvador, and 12% from Honduras and Guatemala.

Top 5 Countries of Birth for Proxy Illegal Immigrants in Jail During FY2007				
Rank	**Country of Birth**	**Number of Proxies (N=13,735)**	**% of Total Proxies**	**Number of Offenses (N=27,148)**
1	Mexico	5,589	40.7%	11,617
2	El Salvador	2,814	20.5%	5,472
3	Honduras	1,694	12.3%	3,113
4	Guatemala	1,649	12.0%	3,625
5	Bolivia	239	1.7%	445

5. General Types of Offenses

When looking at general types of offenses for which proxy illegal immigrants were being held in jails at some point during FY2007, 46% involved misdemeanor offenses, 39% were felonies and 15% involved local ordinance violations.[116]

6. Specific Types of Offenses

The table below represents the top twelve offenses for which proxy illegal immigrants were being held in jails at some point during FY2007. After examining the ranking of offenses proxy illegal immigrants are held for, it appears that the majority involve alcohol-related offenses and possession of fake identification documents.

Top 12 Offenses by Proxy Illegal Immigrants in Jail During FY2007			
Rank	**Type of Offense**	**Number of Offenses (N=27,148)**	**% of Total Offenses**
1	Held on both state and federal felony charges	4,078	15.0%
2	DUI- Misdemeanor	3,209	11.8%
3	Driver's license violation- Misdemeanor	3,086	11.3%
4	Drunk in Public	1,749	6.4%
5	Held on federal felony	1,532	5.6%
6	Local ordinance-related offenses	1,526	5.6%
7	Larceny- Felony	798	2.9%
8	Held on federal misdemeanor	777	2.9%
9	Fraud- Misdemeanor	623	2.3%
10	Fraud- Felony	600	2.2%
11	Reckless Driving	565	2.0%
12	Traffic- Misdemeanor	507	1.9%

[116] Felony offense category includes felony conspiracy (n=42) and felony attempt (n=59).

Unfortunately, the figures for the state and federal felonies and misdemeanors were not able to be separated into specific categories of crimes. However, staff was able to separate some of the other offenses included in the other ranked offenses. The third ranking includes driving without a license. The sixth ranking involved local ordinance-related offenses, of which 70% (1,068 of 1,526) were related to drinking and an additional 17% (264 of 1,526) were DUI related. In other words, 87% of the ordinance violations were alcohol-related. The ninth ranking involved misdemeanor frauds, of which 56% (351 of 623) involved possessing fake driver's licenses and an additional 24% (148 of 623) involved possessing a fake birth certificate, license or other document. Hence, 80% involved possessing fake identification documents. The tenth ranking involves felony frauds, of which 46% (276 of 600) were related to forged public records. These instances most likely involved an individual signing a false name on his or her summons.

7. Court Jurisdiction

The table below represents under which jurisdictional authority proxy illegal immigrants were held for in FY2007. It should be understood that this is not necessarily *where* the inmate is being held; rather, it reflects what jurisdiction the inmate is being held for. As the table indicates, over 35% of proxy illegal immigrants are being held in Virginia jails on behalf of ICE, followed by 13% in Prince William County, 6.5% in Chesterfield County, 5.6% in Arlington and 4.9% in Loudoun County court jurisdictions. A question was raised as to what court jurisdiction the INS (ICE) field referred to. The State Compensation Board, who oversees the LIDS database, indicated that the INS field does not necessarily represent detainers, but also all individuals being held on behalf of ICE.

Top 10 Court Jurisdictions for Proxy Illegal Immigrants in Jail During FY2007

Rank	Court Jurisdiction	Number of Individuals (N= 13,735)*	% of Total Individuals	Number of Offenses (N= 27,148)
1	INS (ICE)	4,875	35.5%	5,690
2	Prince William	1,872	13.6%	3,895
3	Chesterfield	893	6.5%	2,993
4	Arlington	765	5.6%	1,635
5	Loudoun	672	4.9%	1,686
6	U.S. Marshall	563	4.1%	714
7	Alexandria	488	3.6%	1,297
8	Manassas	457	3.3%	861
9	Out of State/Federal	312	2.3%	355
10	Henrico	229	1.7%	463

* 971 individuals appeared in more than one court for an offense resulting in jail in FY2007.

8. Jails Where Proxy Illegal Immigrants Were Held

The table below represents the top ten jails where proxy illegal immigrants were held during FY2007. According to the figures, 17.5% of proxy illegal immigrants were held in the Prince William/Manassas Regional jail during FY2007, followed by 14.3% in Piedmont Regional and 10.7% in Arlington jail. When these preliminary figures were presented to the Task Force, the question was raised as to why the Fairfax County jail was not represented on the chart. Given our conservative criteria for determining whether or not an individual was illegal, there were 39 individuals charged with 177 offenses that were held in the Fairfax County jail at some point during FY2007. After examining the dataset, staff found that 64% (4,869 of 7,629) of individuals who had a 900-series social security number, as well as blank country of birth and citizenship fields were in the Fairfax County jail at some point during FY2007. Given this finding, staff contacted Fairfax County jail administrators who indicated that they held approximately 4,276 illegal aliens at some point during FY2007. Due to an antiquated database, the country of birth and citizenship fields were not able to be uploaded into the LIDS database and were instead stored in a different system, thus, not being captured in the analysis. However, when including these individuals, the largest percentage of proxy illegal immigrants appears to be held in the Fairfax County jail rather than Prince William/Manassas Regional jail.

Top 10 Jails Where Proxy Illegal Immigrants Were held During FY2007

Rank	Jail	Number of Individuals (N= 13,735)*	% of Total Individuals	Number of Offenses (N= 27,148)
1	Prince William/Manassas Regional	2,409	17.5%	5,134
2	Piedmont Regional	1,970	14.3%	2,406
3	Arlington	1,465	10.7%	2,561
4	Hampton Roads Regional	1,088	7.9%	1,233
5	Chesterfield	835	6.1%	2,746
6	Alexandria	687	5.0%	1,632
7	Pamunkey Regional	655	4.8%	923
8	Loudoun	636	4.6%	1,378
9	Riverside Regional	464	3.4%	717
10	Rockingham	446	3.2%	836

* 448 individuals spent time in more than one jail in FY2007.

9. Summary of Jail Findings

In summary, the findings from the analysis indicate that the proxy illegal immigrant population comprised anywhere from 6% to 10% of Virginia's jail population in FY2007. When looking at country of birth, individuals born in Mexico comprised the largest group of individuals held in jails across the Commonwealth. The majority of offenses for which proxy

illegal immigrants are being held involve alcohol-related offenses and possession of fake identification documents.

B. Proxy Illegal Immigrants in Virginia Prisons

Crime Commission staff contacted the Virginia Department of Corrections ("DOC") to obtain information regarding illegal immigrants in Virginia prisons. Again, staff asked for all records on individuals under DOC supervision for FY2003-2007. Staff received over 100,000 records.[117] Each record received represents the most serious offense committed by an individual from his or her most recent event. So, if one was held on multiple convictions, only the most serious offenses were counted for purposes of this analysis.

Over the past five fiscal years, there were nearly 130,000 individuals that were under DOC supervision at some point. In FY2007, there were nearly 24,000 individuals under DOC supervision. It should be noted that these figures represent the number of individuals under DOC *supervision*. As such, the figures do include those solely under community supervision. While this does not cost as much as housing an inmate in a prison, it still represents a cost and impacts Virginia's criminal justice system. Of the 23,958 individuals under DOC supervision, 43% (10,302 of 23,958) were under community supervision only; whereas, 57% (13,656 of 23,958) were in prison at some point.

1. Determining Status

Unlike the Compensation Board's LIDS database, staff did not use Social Security numbers as a determination of illegal status. This was due to the fact that examination of that particular data entry field shows that DOC does not make extensive use of it for identification purposes and, thus, do not pay as much attention to cleaning out erroneous data in that field. While staff was unable to establish a three-prong criterion for DOC data, it should be emphasized that ICE uses the two-prong criteria of examining country of birth and citizenship status. Again, staff was only able to establish a third prong with the LIDS data due to their extensive effort at confirming the validity of social security numbers.

The number of individuals under DOC supervision between FY2003-2007 was 129,876. Of this number, 6,936 were foreign nationals (meaning born in a country other than the U.S.). Of the 6,936 foreign nationals, 44% or 3,064 individuals met the second prong of not having U.S. citizenship. Hence, proxy illegal immigrants comprised 2% (3,064 of 129,876) of individuals under DOC supervision over FY2003-FY2007. In FY, 2007, proxy illegal immigrants comprised 1.5% (368 of 23,958) of the total number of individuals under DOC supervision.[118]

[117] Staff would like to thank Andrea Ross (System Analyst) at DOC for all of her patience and help with filling our large data request.
[118] 250 of 368 were in prison only (68%); whereas, 118 began community supervision in FY2007.

2. Country of Origin

The data indicate that individuals from El Salvador comprised the largest group of proxy illegal immigrants under DOC supervision over the past 5 fiscal years. The data also indicate an increase in the number of proxy illegal immigrants from Mexicans under DOC supervision from FY2003 to FY2007. The remaining rankings are delineated in the table below:

Top 5 Countries of Birth for Proxy Illegal Immigrants Under DOC Supervision: Comparison FY2003 and FY2007				
Rank	**Country of Birth**	**Number of Individuals- FY2003 (N= 384)**	**Country of Birth**	**Number of Individuals- FY2007 (N= 368)**
1	El Salvador	34%	El Salvador	25%
2	Mexico	12%	Mexico	19%
3	Honduras	8%	Honduras	6%
4	Guatemala	6%	Guatemala	5%
5	Vietnam	5%	Germany	5%

3. Court Jurisdiction

A majority of cases involving proxy illegal immigrants in the Commonwealth are handled by Northern Virginia courts. However, FY2007 data may point to a changing trend in the courts handling cases involving proxy illegal immigrants. For instance, there is large decrease in the number of cases handled by Fairfax County courts and an increase in cases handled by Chesterfield County courts. On the other hand, it may not be a definite trend given the analysis is only a comparison of two fiscal years. In FY2007, the least amount of cases were handled by Bedford, Botetourt, Brunswick, Campbell, Fluvanna, Hampton, Lynchburg, New Kent, Page, Petersburg, Rappahannock, Staunton, and Suffolk court jurisdictions.

Top 5 Court Jurisdictions for Proxy Illegal Immigrants Under DOC Supervision: Comparison FY2003 and FY2007				
Rank	**Court Jurisdiction**	**Number of Individuals- FY2003 (N= 383)**	**Court Jurisdiction**	**Number of Individuals- FY2007 (N= 356)**
1	Fairfax County	45%	Fairfax County	23%
2	Arlington	12%	Prince William County	22%
3	Prince William County	7%	Arlington	5%
4	Alexandria	5%	Chesterfield	4%
5	Loudoun	3%	Virginia Beach	3%

4. Types of Offenses

In general, the data indicate that the most serious offenses committed by proxy illegal immigrants under DOC supervision have remained fairly consistent over the past five fiscal years.

Top 5 Offenses Committed by Proxy Illegal Immigrants Under DOC Supervision: Comparison FY2003 and FY2007				
Rank	**Type of Offense**	**Number of Individuals- FY2003 (N= 383)**	**Type of Offense**	**Number of Individuals- FY2007 (N= 303)**
1	Grand Larceny	10%	Drug Possession	9%
2	Drug Possession	10%	DUI	7%
3	Robbery	7%	Robbery	6%
4	DUI	5%	Residential Burglary	5%
5	Kidnapping/Abduction	4%	Grand Larceny	4%

5. Summary of Prison Findings

Proxy illegal immigrants comprised approximately 2% of Virginia's prison population between FY2003-2007. Individuals born in El Salvador comprised the largest group of proxy illegal immigrants, followed by an increasing number of individuals from Mexico. The majority of cases are handled in Northern Virginia; however, cases heard involving proxy illegal immigrants do appear to be "spreading out" across the Commonwealth. The offenses committed by proxy illegal immigrants have remained fairly consistent over the past five fiscal years, including grand larceny, drug possession, robbery, DUI, and kidnapping/abduction.

VI. ILLEGAL IMMIGRANTS AS VICTIMS AND WITNESSES

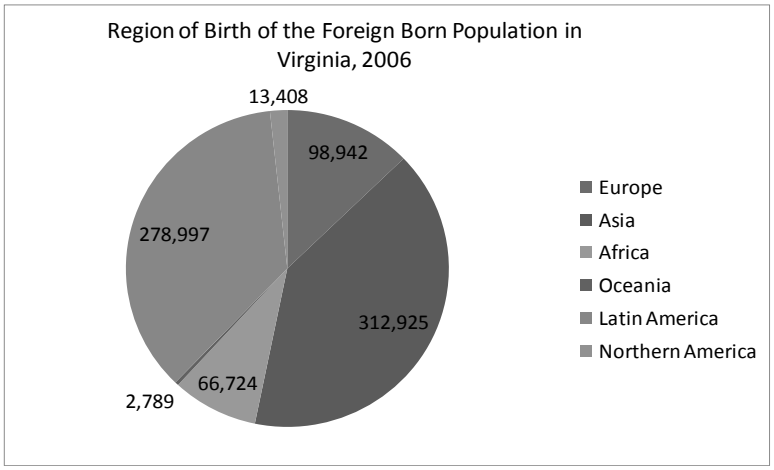
A. Employment Abuses[119]

At its September 25, 2007 meeting, the Task Force was presented with information on illegal immigrants as victims of employment-related crimes. The Legal Director of the Virginia Justice Center for Farm and Immigrant Workers[120] informed the Task Force that

[119] The information contained in this subsection was obtained by presentations made to the Task Force on September 25, 2007, by Tim Freilich, Legal Director, VA Center for Farm and Immigrant Workers, and Clement D. Carter, Williams Mullen, a volunteer with the VA Hispanic Chamber of Commerce Foundation – Legal Clinic.

[120] The VA Center for Farm and Immigrant Workers was formed in 1998 as a statewide project of the Legal Aid Justice Center, which provides free civil legal assistance to low-income Virginians and helps low-wage immigrant workers find justice and fair treatment in the workplace.

more than 10% of Virginians were born outside of the U.S.[121] and that, in 2005, the foreign-born represented 12.6% of Virginia's civilian workforce with the majority of foreign-born residents being from Asia, followed by Latin America.[122]



Source cited by presenter: U.S. Census Bureau. (2007). 2006 American Community Survey. Selected social characteristics in the United States: Virginia. Washington, D.C. Available online at http://factfinder.census.gov.

The Legal Director further reported that there were an estimated 250,000 to 300,000 "unauthorized migrants" in Virginia in 2006.[123] He indicated that 30% of the foreign born in the U.S. are illegal immigrants and that, as of 2005, there were 6.6 million families, containing 14.6 million people, in the U.S. in which either the head of the family or the spouse was illegal.[124]

It was emphasized that criminals do not check the immigration status of their victims and that perpetrators commit crimes based on their stereotypes and perceptions of potential victims. An Assistant Commonwealth's Attorney from Prince William County, Virginia, was quoted as saying, "[t]he problem is that they [illegal immigrants] make good victims, and they have been targeted because they are disinclined to report the robberies."[125] The Legal Director indicated that criminals target illegal immigrants because illegal immigrants are less

[121] Source cited by presenter: U.S. Census Bureau, 2006 American Community Survey, Virginia data and profile highlights. Available online at http://factfinder.census.gov.

[122] Sources cited by presenter: Migration Policy Institute (2006), Virginia fact sheet on the foreign-born: demographic and social characteristics. Washington, D.C. Available at http://www.migrationinformation.org/DataHub/asscensus.cfm#.; U.S. Census Bureau (2007). 2006 American Community Survey. Selected social characteristics in the United States, Virginia. Washington, D.C. Available online at http//factfinder.census.gov.

[123] Source cited by presenter: Pew Hispanic Center (2006). Fact Sheet. Estimates of the unauthorized migrant population for states based on the March 2005 CPS. Washington, D.C. Available online at http://pewhispanic.org/factsheet.php?FactsheetID=17.

[124] Source cited by presenter: Passel, J.S. (2006). The size and characteristics of the unauthorized migrant population in the U.S. Estimates based on the March 2005 Current Population Survey, Washington D.C. Pew Hispanic Center. Available online at http://pewhispanic.org/files/reports/61.pdf.

[125] Source cited by presenter: Theresa Vargas, *Teen Pleads Guilty in Slaying of Immigrant: Authorities say the Woodbridge 18-year-old and Accomplice Decided to "Get a Mexican,"* The Washington Post, May 31, 2007, at PW01.

likely to report crime due to a fear of police or deportation, language barriers, a lack of familiarity with the U.S. judicial system, as well as a lack of identification documents that makes it difficult to open bank accounts to deposit money, thus, they are believed to carry a large amount of cash.

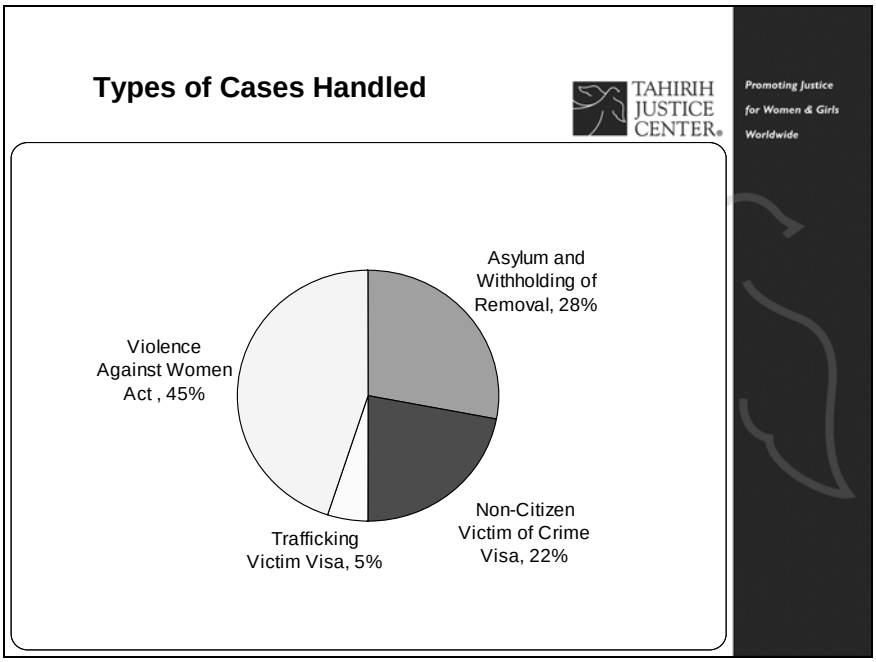
Since 1998, the Virginia Justice Center has represented more than 1,500 immigrant workers with claims against hundreds of employers. The Center's immigrant worker clients have won judgments and settlements totaling more than two million dollars, primarily for unpaid wages for work performed. Ways in which employers exploit illegal immigrant workers include non-payment of wages, failure to pay the required minimum wage and overtime, payment with bad checks or checks with insufficient funds, misclassification of employees as independent contractors, and extortion related to immigration status such as the withholding of passports and threatening deportation.

The Task Force was advised by the Legal Director that Virginia laws that could be used to provide protection to immigrant workers against such conduct include the non-payment of wages provision of the minimum wage act, set forth in Virginia Code § 40.1-28.8 et seq., Virginia bad check laws, set forth in Virginia Code § 18.2-181-184, mechanics and materialman's liens, set forth in Virginia Code § 43-13, and Virginia's new amendment to the extortion statute, set forth in Virginia Code § 18.2-59, which criminalizes the withholding of a passport or threats to report to immigration authorities for the purpose of extorting money or for pecuniary benefit. It was reported by the Legal Director, however, that these laws are rarely enforced. Financial Crime units, he informed, are generally not interested in bad check violations, there are few prosecutions for non-payment of wages, and the Virginia Department of Labor and Industry, which is charged with enforcing the minimum wage law, needs more investigators, improved language access, and more power to punish employers who violate the law. He also reported that barriers to justice for victims include a fear of police and reluctance to report crimes, lack of familiarity with U.S. laws and the judicial system, language barriers, the fact that filing claims requires money and the ability to miss work to appear in court, wage claims are rarely attractive to private attorneys, and limited pro bono efforts require bilingual attorneys familiar with employment law. The Legal Director further informed the Task Force that immigrants are also often dissuaded from coming forward as witnesses to crime due to a fear of incarceration and deportation for themselves or others, limited language access, and concern for other family members who are illegal immigrants.

The Task Force also heard from Clement D. Carter, an attorney with the law firm of Williams Mullen and a volunteer with the Virginia Hispanic Chamber of Commerce Foundation Legal Clinic. He noted that members of the illegal immigrant community seek assistance from the Clinic with regard to abuses by employers. The largest percentage of individuals the clinic represents is from the construction industry. He reported that there is a pattern in this industry of many employers simply not paying the last two weeks of wages to the worker.

B. Domestic Violence, Sexual Assault, and Human Trafficking[126]

At its September 25, 2007 meeting, the Task Force was presented with information on illegal immigrants as victims of domestic violence, sexual assault, and human trafficking by the Director of Public Policy and the Director of Legal Services of the Tahirih Justice Center.[127]



Source: Presented to the Task Force on September 25, 2007 by representatives of the Tahirih Justice Center.

The representatives from the Tahirih Justice Center reported that practical, cultural, economic, and legal factors combine to render immigrant women especially vulnerable to abuse. Practical factors include language barriers, lack of a support network, and lack of knowledge about rights and resources. Cultural factors include the denial of, or excuse for, domestic violence, fear of police, and fear of disgrace. Economic factors include dependence on the abuser and lack of work authorization. Legal factors include the fear of deportation, loss of custody, and the withholding of documents by the abuser.

The most pervasive factor reported was the manipulation of, and control over, the victim's legal status by the abuser. Nearly 75% of abused women in one survey reported that their spouse had never filed immigration papers. Abusers who eventually filed petitions

[126] The information contained in this subsection was obtained by a presentation made to the Task Force on September 25, 2007 by Jeanne L. Smoot, Director of Public Policy for the Tahirih Justice Center, and Rená E. Cutlip-Mason, Director of Legal Services for the Center.

[127] The Tahirih Justice Center works to protect immigrant women and girls seeking justice in the U.S. from gender-based violence such as domestic violence, sexual assault, rape, human trafficking, torture, forced marriage, female genital cutting, and "honor" crimes.

for their immigrant spouses waited almost four years to file.[128] Additionally, 65% of 157 battered immigrants interviewed reported that their abuser threatened deportation.[129]

It was also reported that abuse rates in marriages between U.S. citizens and immigrant women may be as much as three times higher than in the general U.S. population.[130] In one survey of 280 immigrant Latinas, 62% of abused women who responded were married to U.S. citizens.[131] The physical/sexual abuse rate among all married, or previously married, women who responded was 60%.[132] One study concluded that foreign-born women were "over-represented" among victims of intimate partner homicide (51% compared to 45% born in the U.S.).[133] A survey of immigrant Korean women also found that 60% had been battered by their husbands.[134] Immigrant women with a more stable immigration status were more likely than immigrant victims with temporary legal immigration status or those lacking legal immigration status to seek help from the social service and justice systems for domestic violence.[135] In one study, less than 20% of battered women without legal status contacted the police, versus 43% with stable immigration status.[136]

The Tahirih representative noted that special federal protections for immigrant crime victims do exist that are intended to encourage certain immigrant crime victims without legal status, or who depend on the perpetrator of the crimes against them for their legal status, to escape violence, report crimes, and cooperate with the police without fearing automatic deportation. The Violence Against Women Act ("VAWA") provides various forms of relief from removal available to abused immigrants who are married to U.S. citizens or lawful permanent residents, assists victims who, but for the abuse, would have legal status through their spouse, and enables victims, provided she produces the requisite evidence, to establish independent legal status from her abuser. The Victims of Trafficking and Violence Protection Act ("VTVPA") provides for the non-citizen crime victims "U" visa. The Act is a more limited form of relief from removal than the VAWA. It is subject to annual limits, the

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[128] Sources cited by presenter: Dutton, Orloff & Hass, "Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications," 7 Geo. J. Poverty Law & Pol'y 245, 259 (2000).

[129] Source cited by presenter: National Institutes of Justice Report (May 2003) *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* by Erez & Ammar p. 92 (see http://www.ncjrs.gov/pdffiles1/nij/grants/202561.pdf).

[130] Hass, Ammar, & Orloff (April 2006) "Battered Immigrants and U.S. Citizen Spouses," at pp. 2,5 (see http://legalmomentum.org/legalmomentum/files/dvusc.pdf).

[131] Hass, Ammar, & Orloff, *supra* n.3, at p. 5.

[132] Dutton, Orloff & Hass, *supra* n.1.

[133] New York City Department of Health and Mental Hygiene Report (October 2004), "Femicide in New York City: 1995-2002," at p.5 (see http://www.nyc.gov/html/doh/downloads/pdf/ip/femicide1995-2002_report.pdf).

[134] Song, Y.I., "Battered Korean Women in Urban America: The Relationship of Cultural Conflict to Wife Abuse," doctoral dissertation, Ohio State University, Columbus, 1986.

[135] National Institutes of Justice Report (Nov. 2006), *Use and Outcomes of Protection Orders by Battered Immigrant Women* by Dutton, Ammar, Orloff & Terrell at p.8 (see http://www.ncjrs.gov/pdffiles1/nij/grants/218255.pdf).

[136] Orloff, Dutton, Hass & Ammar, "Battered Immigrant Women's Willingness to Call for Help and Police Response," 13 UCLA Women's L. J. 43, 60 (2003).

victim must have suffered substantial trauma, and must cooperate with law enforcement. It is available to an immigrant victim of certain particularly serious crimes without regard to her marital status or the immigration status of the perpetrator. The VTPVA also provides for the human trafficking victim "T" visa. Like the "U" visa, it is a more limited form of relief than from removal than the VAWA in that it is subject to annual limits and the victim must prove she would suffer extreme hardship if removed from the U.S. and must cooperate with law enforcement. It is available to an immigrant victim who is in the U.S. as a result of a severe form of human trafficking.

The Tahirih representatives also expressed concern over the enforcement of immigration law by police, stating that it creates a chilling effect on crime victims and witnesses, and on immigrant communities generally, who avoid all contact with the authorities for fear their legal status could be called into question. It was expressed that without full cooperation from immigrant communities, law enforcement's ability to translate crime statistics into conviction statistics is impaired.

VII. BRIDGING THE GAP BETWEEN LAW ENFORCEMENT AND IMMIGRANT COMMUNITIES

In an effort to better understand particular issues and needs concerning communications between law enforcement and immigrant communities, as well as related concerns with the ramifications of the enforcement of federal immigration law by local law enforcement, the Task Force took testimony from representatives from Virginia's law enforcement community. Specifically, the Task Force heard from Chief Mark A. Marshall, the Chief of the Smithfield Police Department and Fourth Vice-President of the International Association of Chiefs of Police ("IACP"), Sergeant Leonardo Reyes of the Virginia Beach Police Department, in his capacity as President of the Virginia Chapter of the National Latino Peace Officers Association, Officer Juvenal Valdez of the Norfolk Police Department, and Captain Steve Drew and Lieutenant Harvey Powers of the Richmond Police Department.

The Task Force requested the above individuals to provide background information and a description of the practices currently used in their localities. All of the agencies noted that there are both cultural and language issues that serve as barriers between the immigrant community and police, that communication is the key component to overcoming these barriers.

Smithfield Chief Mark A. Marshall, representing the IACP, presented the "Police Chief's Guide to Immigration Issues," a publication produced by the IACP, which provides a framework for local police to develop a working relationship with immigrants in their community. In the report it is noted that communication and the addition of bilingual and local ethnic minority officers are some of the chief components to interacting and building trust with the local immigration community. The IACP also suggests the following:

- Cultural competence training to teach officers about possible behavior characteristics of an immigrant suspect from another country and culture during interviews;
- Recruitment of bilingual sworn and civilian staff persons with language proficiency;
- Recruitment in immigrant neighborhoods by immigrants and advertising in local immigrant newspapers;
- Creation of volunteer or paid interpreter list for police and the courts; and,
- Meetings held with immigrant community members supported by training materials to provide a mutual understanding of cultural differences and to acquaint newcomers with local laws and ordinances.[137]

The Norfolk Police Department has implemented a pilot program, funded in large part by a federal grant, to reach out to Norfolk's immigrant population. In this program, Officer Juvenal Valdez strives to build a stronger relationship with the immigrants in his community by distributing bilingual, informative flyers to businesses and residents. He also holds monthly information sessions, where the public is invited to attend and is encouraged to ask questions regarding crime in their community. A large part of Officer Valdez's plan involves using local immigrant media outlets to help target his key demographic. He makes weekly appearances on a local Hispanic radio to ensure his message is directed to the Norfolk area Latino community. Officer Valdez also refers to print media as well, relying on ECHO, a local Hispanic newspaper, to help alleviate some fears and misconceptions of the police by immigrants.

Captain Steve Drew and Lieutenant Harvey Powers of the Richmond Police Department's Second Precinct reported to the Task Force on their program in the Southwood neighborhood, a community with a substantial Latino population. The Second Precinct presented the following problems to the Task Force:

- Latinos deal only in cash because of trust issues with banks, and a lack of identification prevents them from getting bank accounts;
- When a Latino is robbed of his cash, or is a victim of any crime, he does not know if the police officer he calls will question his status in this country;
- If the Latino victim does report a crime, they are much less likely to testify against the suspect;
- Most Latinos come from countries where the standards of conduct for local law enforcement are very different;
- The language barrier between the victim and police delays responsiveness to the crime; and,
- Different policies among the various law enforcement agency's across the Commonwealth with regard to illegal immigrants leads to confusion.[138]

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[137] The Police Chief's Guide to Immigration Issues, The International Association of Chiefs of Police, July, 2007.
[138] Richmond Police Department, 2nd Precinct. Presentation to the Task Force on September 25, 2007.

In order to help alleviate some problems in the community, the Richmond Police Department has implemented numerous programs to not only improve police community relations, but also to address misconceptions commonly held by the public. Captain Drew and Lieutenant Powers said that the Second Precinct is actively engaging the immigrant population with a bilingual flyer campaign and by holding open forums where the population is instructed that the police exist for their protection. The Imagine Festival, held by the Richmond Police Department, is a community-based event aimed at establishing a trusting relationship between the public and uniformed officers. The police department notes that they use the holiday season to help improve relations by distributing Christmas presents to needy children in the neighborhood. As a result of their proactive approach, crime in the immigrant community of Southwood has drastically been reduced. Since 2006, homicides are down 100%, robberies are down 43%, burglary is down 14%, and motor vehicle theft is down 27%.[139]

VIII. RECOMMENDATIONS

A total of thirty-two proposals for recommendations were submitted by individual Task Force members for consideration at its October 16, 2007 meeting. Sixteen of the proposals were approved as official Task Force recommendations. Three were found to be outside the scope of the Task Force's mission and were recommended for referral to the Governor's Commission on Immigration. All of the Task Force's sixteen recommendations were approved by the Crime Commission at its November 13, 2007 meeting. The recommendations reflect the diverse experiences of the Task Force's members and the vast array of topics covered at the meetings and range from legislation to community-based measures. Included are recommendations regarding the role of the federal government, data collection, education for immigrant communities, training for law enforcement, cooperation and communication with ICE, and the role of jails and prisons. The recommendations represent the Task Force's desire to bring forth measures that are not only legally permissible, but also constructive and effective.

A. Role of the Federal Government

Task Force Recommendation # 1 - Resolution:

The Task Force recommends a resolution, addressed to Virginia's representatives serving in the U.S. Senate and House of Representatives, reflecting that 1) the regulation and enforcement of immigration law is the responsibility of the federal government, 2) federal law preempts most state and local measures aimed at addressing the effects of illegal immigration, 3) despite the federal government's preemption over the field of illegal immigration, it has failed to properly address the issue, thereby forcing the state and local governments to attempt to address an issue which is largely preempted, and 4) the limited state and local measures that can be implemented will be of limited effect unless and until the

[139] Richmond Police Department, 2nd Precinct. Presentation to the Task Force on September 25, 2007.

federal government provides the dedicated members of the U.S. Immigration & Customs Enforcement with the resources needed to do its job.

B. Data Collection

Task Force Recommendation # 2 - Local Inmate Data System: (Related to Recommendations # 6 and # 14)

The Local Inmate Data System should include a field requiring the input of confirmation, upon consultation with the U.S. Immigration and Customs Enforcement, of the immigration status of any inmate who 1) was born in another country, and 2) is a citizen of another country, or for whom this information is unknown.

Task Force Recommendation # 3 - Department of Corrections Data:

The data system used by the Virginia Department of Corrections should include a field requiring the input of confirmation, upon consultation with the U.S. Immigration and Customs Enforcement, of the immigration status of any inmate who 1) was born in another country, and 2) is a citizen of another country, or for whom this information is unknown.

Task Force Recommendation # 4 - Department of Corrections; Social Security Number Verification:

The Virginia Department of Corrections should be required to verify the validity of inmates' social security numbers in its records and to omit from its records those that are discovered to be false.

Task Force Recommendation # 5 - Data of the U.S. Immigration & Customs Enforcement:

It is recommended that the U.S. Immigration & Customs Enforcement maintain data on 1) the number of inquiries made by state and local law enforcement agencies to its Law Enforcement Support Center, 2) the number of these inquiries that are found to be illegal immigrants, legal nonimmigrants, legal permanent residents, and U.S. citizens, 3) the number of detainers issued for those found to be illegal immigrants, nonimmigrants, and legal permanent residents, and 4) the number of deportations that result from the detainers issued. The U.S. Immigration & Customs Enforcement should provide the data to the Commonwealth upon request.

Task Force Recommendation # 6 – Cross Check LIDS Against NCIC/LESC: (Related to Recommendations # 2 and # 14)

It is recommended that the information within the Local Inmate Data System for all inmates currently in jails be cross checked against the illegal alien databases of the National Crime Information Center and the Law Enforcement Support Center illegal immigrant databases.

C. Education

Task Force Recommendation # 7 - Bridging the Language Barrier between Law Enforcement and Immigrant Communities:

Law Enforcement agencies should enhance their ability to overcome language barriers with immigrant communities by arranging for law enforcement officers to be trained in different languages and cultures within their jurisdiction and by hiring more multi-lingual personnel. The Department of Criminal Justice Services should partner with community organizations, such as the Hispanic Chamber of Commerce, to provide language training at no cost to the officer and to explore the possibility of tuition assistance or grant opportunities for officers who seek to earn language degrees at community colleges.

Task Force Recommendation # 8 - Greater Education for Immigrant Communities on Laws, Regulations, and Safety:

Law enforcement agencies, state and local governmental agencies, and community organizations should work together to educate immigrant communities on laws, regulations and safety issues relevant to immigrant communities.

D. Law Enforcement & Public Safety

Task Force Recommendation # 9 - Building Relationships between Law Enforcement and Immigrant Communities:

Law enforcement agencies should continue to build stronger working relationships and tighter bonds with immigrant communities by working to establish trust through crime prevention programs, neighborhood watch programs, citizen police academies, community outreach events, and community information meetings.

Task Force Recommendation # 10 - Regional Anti-Gang Task Forces:

It is recommended that 1) all regions of the Commonwealth that have not already done so form an anti-gang task force, and 2) all anti-gang task forces include, as a member, a representative from the U.S. Immigration & Customs Enforcement.

E. Agreements with ICE Pursuant to 8 U.S.C. 1357(g) – "287(g)"

Task Force Recommendation # 11 – Authorization for the Department of State Police:

Request that the Governor execute a "287(g)" agreement with the U.S. Immigration and Customs Enforcement to authorize the Virginia State Police to assist federal authorities in the detection, apprehension, detention and removal of illegal aliens confronted in the course of investigating violent felonies, drug offenses, and gang-related crime.

F. The Role of Jails & Prisons

Task Force Recommendation # 12 - Offenses Triggering Response by ICE:[140]

The Crime Commission should work with the U.S. Immigration & Customs Enforcement to develop a list of felonies and misdemeanors not already covered by ICE, which, if committed by a person illegally present in the country, will guarantee that ICE will detain and take custody of the suspect at the time of his/her trial or at the conclusion of his/her sentence, whichever is longer. If the U.S. Immigration & Customs Enforcement cannot guarantee detention and deportation of criminal illegal aliens for all offenses that qualify under federal law, then it must advise the Commonwealth of the reason(s) for that decision so that the Commonwealth may evaluate any options at its disposal to facilitate deportation.

Task Force Recommendation # 13 - Presumption Against Bail:

Virginia Code § 19.2-120 should be amended to include illegal immigrants charged with a state crime, or for whom a federal warrant is outstanding, among those for whom there exists a presumption against bail unless and until notification is received from the U.S. Immigration & Customs that it does not plan to detain the individual. Upon such notification being received, the presumption shall no longer exist.

Task Force Recommendation # 14 - Inquiry into Immigration Status and Reports to ICE: (Related to Recommendations # 2 and # 6)

Virginia Code § 53.1-218 should be amended to require direct reporting to the Law Enforcement Support Center of the U.S. Immigration & Customs Enforcement, of any inmate who 1) was born in another country, and 2) is a citizen of another country, or for whom this information is unknown and, further, to require that confirmation of such an inmate's immigration status be requested. The jailer must inquire as to the country of birth and citizenship of every person.

Task Force Recommendation # 15 – Training for Certain Jail and Prison Officers:

Clarify the requirements of Virginia Code § 53.1-218 to ensure that officers responsible for intake and detention of inmates at local and regional jails and state prisons obtain training on the detection of illegal aliens coming into our criminal justice system.

[140] The recommendations pertaining to jail space, allowing jailers to keep per diems received from the federal government, and admission to bail are all predicated upon an agreement being reached with I.C.E. as to the offenses that will trigger detention and removal under federal immigration law. *See*, **Attachment C**.

Task Force Recommendation # 16 – Reimbursement Rates Received from ICE for Use of Bed Space and Funding for Construction of Extra Bed Space:

Jailers shall receive a higher rate (100%) of the reimbursement received from ICE for use of bed space, rather than it going to the General Fund, and the state should fund new construction of extra bed space at a rate of 50%, rather than the current 25%.

G. Proposals Referred to the Commission on Immigration

Verification Cards for Purpose of Showing Identity:

A "verification card" should be accepted/created and issued to those who are in the United States without legal presence to help state and local authorities properly identify such persons in the Commonwealth. Such a document shall not provide legal status or rights but, rather, will merely serve as verification that the individual is who he/she claims to be.

Verification of New Employees Through "Basic Pilot Program;" Loss/Suspension of License for Knowing Employment of Illegal Immigrants:

Provides the loss of licenses for a business that knowingly employs illegal immigrants after investigation by the Attorney General or local commonwealth's attorney. The determination of an employee's immigration status can only be made by the federal government. A first time violation will result in the minimum suspension of license, not to exceed 10 business day and a 3 year probationary period. It permits the business to avoid the loss of licenses if it discharges the illegal immigrants. Any loss of license requires a hearing and court order. All employers are also required to verify the immigration status of all new employees through the federal government's "E-Verify" program.

Documentation Required for Certain Benefits:

Any person who applies for a state administered public benefit program that requires participants to be U.S. citizens, must provide documentation that they are legally present in the U.S. Self-declarations of U.S. citizenship, even under the penalty of perjury, are not sufficient to document citizenship.

ACKNOWLEDGEMENTS

The Virginia State Crime Commission extends its appreciation to the following agencies and individuals for their assistance and cooperation on this study:

LAW ENFORCEMENT AGENCIES

Commander Steve Drew, Richmond Police Department, 2nd Precinct
John W. Jones, Executive Director, Virginia Sheriffs' Association
Chief Mark A. Marshall, Smithfield Police Department, Fourth Vice-President, International Association of Chiefs of Police
Lieutenant Harvey Powers, Richmond Police Department, 2nd Precinct, Sector 212
Sergeant Leonardo Reyes, President, Virginia Chapter, National Latino Peace Officers Association
Sergeant Quinn Stansell, Mecklenburg County Sheriff's Office, North Carolina
Officer Juvenal Valdez, Norfolk Police Department

ORGANIZATION REPRESENTATIVES

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Tim Freilich, Legal Director, Virginia Justice Center for Farm and Immigrant Workers
Jeanne L. Smoot, Director of Public Policy, Tahirih Justice Center
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ATTACHMENT A

COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

Delegate David B. Albo, *Chairman*
Senator Kenneth W. Stolle, *Vice Chairman*

Executive Director
James O. Towey

Director of Legal Affairs
G. Stewart Petoe

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August 30, 2007

The Honorable Robert F. McDonnell
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

Re: <u>Request for Official Advisory Opinion Pursuant to Virginia Code § 2.2-505</u>

Dear General McDonnell:

As you are aware, the Virginia State Crime Commission has formed an Illegal Immigration Task Force to study the impact of illegal immigration on Virginia's criminal justice system. At its second meeting, held on July 24, 2007, the Task Force was presented with information on federal immigration law and the legality, under preemption analysis, of potential state measures. A specific area of interest to the Task Force pertained to the authority of state and local law enforcement to enforce federal immigration law.

The information presented revealed a considerable lack of certainty surrounding state and local law enforcement's authority to enforce immigration law. Three federal statues explicitly grant state and local law enforcement the authority to enforce immigration law. These statutes appear to authorize state and local officers to act in very narrow and specific circumstances. Specifically, Title 8 U.S.C. § 1252c provides that state and local officers may, after confirming with Immigration and Customs Enforcement ("I.C.E."), detain an individual who, (1) is illegally present in the United States, and (2) was previously convicted of a felony in the United States. Title 8 U.S.C. § 1324(c) allows state and local law enforcement officers to make arrests for violations of the federal anti-harboring statute. Finally, 8 U.S.C. § 1357(g) permits state and local law enforcement agencies to enter into agreements with I.C.E. to train and authorize designated officers to enforce federal immigration law.

After our Crime Commission hearing, we were lead to understand that our state and local police can likely enforce federal immigration *criminal* laws, but there is a question as to whether they can enforce federal immigration *civil* laws. Federal court decisions in some circuits have dismissed the limited authority granted by §§ 1252c, 1324(c) and 1357(g) of Title 8 and suggest that state and local law enforcement have full authority to enforce criminal violations of federal

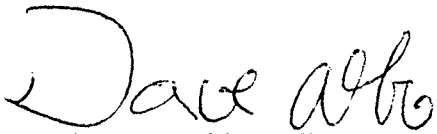
immigration law. Some even suggest that such authority exists to enforce civil violations. In Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983), the Ninth Circuit held that "state law enforcement officers have authority to make arrests for federal violations" and that general principle "extends to state enforcement of the Immigration and Naturalization Act as well." The Ninth Circuit, however, limited its interpretation of state authority to criminal violations. In U.S. v. Salinas-Calderon, 728 F.2d 1298 (10th Cir. 1984), the Tenth Circuit similarly concluded that "state law enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws." More recently, the Tenth Circuit ruled in U.S. v. Vasquez-Alvarez, 176 F.3d 1294 (10th. Cir. 1999), that 8 U.S.C. § 1252c does not preempt state authority to enforce immigration law. Additionally, in U.S. v. Santana-Garcia, 264 F.3d 1188 (10th Cir. 2001), the Tenth Circuit extended state and local authority to enforce immigration law to civil violations. The Fourth Circuit has not ruled on the authority of state and local law enforcement to enforce criminal and/or civil immigration laws.

Legal memoranda issued by the U.S. Department of Justice have served to further complicate the matter. In a 1996 memo, the Department's Office of Legal Counsel opined "it is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests." This memo, like the Ninth Circuit decision in Gonzalez, limited the authority to criminal violations. In a 2002 memo, however, the Office extended state and local law enforcement authority to enforce federal immigration law to civil violations.

The aforementioned case law and legal memoranda may be in conflict with what appears to be limited authority bestowed upon state and local law enforcement by the federal statutes. Consequently, we respectfully request that you render an official advisory opinion on the legal basis and extent of the authority held by state and local law enforcement officers in Virginia to enforce civil and criminal immigration law. Specifically, we ask that the opinion consider, 1) whether such authority is limited to that which is explicitly granted by federal statute, 2) whether such authority also includes inherent authority to enforce all criminal violations of federal immigration law, and 3) whether inherent authority, if it exists, extends to the enforcement of civil violations or, rather, is confined to violations that are criminal.

Sincerely,

Senator Kenneth W. Stolle



Delegate David B. Albo

cc: James Towey, Director

ATTACHMENT B

COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

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Richmond, Virginia 23219
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October 15, 2007

The Honorable Kenneth W. Stolle
Member, Senate of Virginia
2101 Parks Avenue, Suite 700
Virginia Beach, Virginia 23451

The Honorable David B. Albo
Member, House of Delegates
6367 Rolling Mills Place, Suite 102
Springfield, Virginia 22152

Dear Senator Stolle and Delegate Albo:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia.*

Issue Presented

You inquire concerning the authority of Virginia law-enforcement agencies to detain and arrest individuals based on violations of federal immigration law. Specifically, you ask whether there is inherent authority to arrest; and, if so, whether that authority extends both to criminal and civil violations of federal immigration law.

Response

It is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding a state's authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.

Applicable Law and Discussion

The law relating to the authority of state and local law-enforcement agencies to enforce violations of federal immigration law is complex and, in part, unclear. Although it appears that Virginia possesses authority to make arrests for federal criminal violations, including criminal violations of certain federal immigration laws, the authority to enforce civil violations requires clarification by Congress or the federal appellate courts.

I. Inherent Authority

The power to enforce federal law belongs exclusively to the President and his subordinates.[1] However, states may cooperate in the enforcement of federal law.[2] Indeed, such cooperation has taken place since the framing of the Constitution of the United States.[3] Thus, to the extent that state and local law-enforcement officers work in cooperation with federal officials, they have inherent authority to enforce federal law.[4] It is not necessary under federal law to have explicit statutory authority for such enforcement.[5]

Although Congress has enacted legislation in the field of immigration enforcement and preempted state and local enforcement in certain areas, it has not preempted the field. For example, 8 U.S.C. § 1357 expressly authorizes state and local law-enforcement agencies to enter into cooperative agreements with federal agencies for enforcement of federal immigration law. These agreements commonly are known as "287(g)" agreements, referring to § 287 of the Illegal Immigration Reform and Immigrant Responsibility Act.[6] Section 1357 further provides that:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.[7]

Moreover the federal circuits "have never ruled that the states are preempted from arresting aliens for criminal immigration violations"[8] and have recognized the states' authority to make federal arrests, generally.[9] The United States Court of Appeals for the Fourth Circuit has not addressed the specific issue

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[1] Printz v. United States, 521 U.S. 898 (1997).

[2] *See, e.g.*, 8 U.S.C.S. § 1357 (LexisNexis 1997 & Supp. 2007).

[3] *Printz*, 521 U.S. at 907-12.

[4] United States v. Janik, 723 F.2d 537, 548 (7th Cir. 1983).

[5] United States v. Santana-Garcia, 264 F.3d 1188, 1194 (10th Cir. 2001).

[6] *See* U.S. Immigration & Customs Enforcement, "Fact Sheets," *at* http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm (last visited Oct. 5, 2007).

[7] 8 U.S.C.S. § 1357(g)(10) (LexisNexis (1997).

[8] Jeff Session & Cynthia Hayden, *Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-first Century: The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 332 (2005).

[9] *Janik*, 723 F.2d at 548 (noting that court has never invalidated such arrest; thus, inferring that "[state] officers have implicit authority to make federal arrests").

of whether states possess authority to make arrests for violations of federal immigration law. However, the United States Courts of Appeals for the Ninth and Tenth Circuits have held that when there is cooperation with federal authorities, the "general rule is that local police are not precluded from enforcing federal statutes"[10] and "state and local police officers [have] implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'"[11]

The federal circuits are not as clear on the issue of whether the states possess authority to arrest for *civil* violations of federal immigration law. Although no federal appellate court has held that state and local officials are prevented from doing so, several competing authorities suggest that the authorization is not clear. For example, the Ninth Circuit, has assumed, in *dicta*, "that the civil provisions of the [Immigration and Nationalization] Act ... constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration,"[12] thereby limiting state authority to arrests for only criminal immigration violations. The *Gonzales* court[13] does not adequately explain how the Immigration and Nationalization Act is so pervasive that it preempts civil arrests while leaving unscathed the states' authority to arrest for criminal violations.

Further complicating matters is the effect of an opinion letter issued by the Office of Legal Counsel[14] ("OLC") of the United States Department of Justice ("Justice Department") and the subsequent reversal of a portion of the Department's position. In a 1996 opinion, OLC concluded that "state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability."[15] The fact that the Attorney General of the United States subsequently reversed the Department's position[16] does little to clarify this area of the law.

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[10] Gonzales v. Peoria, 722 F.2d 468, 474 (9th Cir. 1983).

[11] *Santana-Garcia*, 264 F.3d at 1194 (quoting United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999)).

[12] *Gonzales*, 722 F.2d at 474-75.

[13] *Id.* at 475 (noting that statutes relating to criminal activities "are few in number and relatively simple in their terms").

[14] Mem. Op. Off. Legal Counsel, U.S. Dep't of Justice, for U.S. Att'y, S. Dist. Cal., "Assistance by State and Local Police in Apprehending Illegal Aliens," *available at* http://www.usdoj.gov/olc/immstopo1a.htm (Feb. 5, 1996).

[15] *Id.* at *10.

[16] *See* "Attorney General Prepared Remarks on the National Security Entry-Exit Registration System," p. 5 (June 6, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (stating that "we are asking state and local police to undertake voluntarily – arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC — is within the inherent authority of the states"); *see also Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the H. Comm. On the Judiciary* (Oct. 1, 2003) (statement of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City), p. 2, *available at* http://judiciary.house.gov/HearingTestimony.aspx?ID=238 (last visited Sept. 28, 2007) (noting that Counsel issued "an erroneous 1996 opinion," which was corrected by unpublished opinion in 2002).

While it is important to note that authority exists for Virginia law-enforcement officers to arrest for criminal violations of federal law,[17] there are significant unanswered questions regarding arrest procedures. When acting under the authority of 8 U.S.C. § 1357, federal procedure would apply. Similarly, Virginia law provides a procedure to detain and initially process a limited group of criminal illegal aliens in the Commonwealth until federal authorities can take custody of such aliens or until a specified period of time has elapsed.[18] That process, however, does not apply to the vast majority of aliens who are unlawfully present in the United States and are in violation of federal criminal law pursuant to 8 U.S.C. § 1325.[19] Ostensibly, under their inherent authority to arrest and with the knowledge of sufficient facts, Virginia law-enforcement officers could detain an alien who has unlawfully entered the United States and is present within the Commonwealth. However, without proper training in applicable federal criminal procedure, it would be difficult for such officers to arrest solely on the basis of a federal criminal violation without assistance from federal authorities. Additionally, as explained hereafter in greater detail, there are state law limitations on the exercise of such authority.

II. Express Congressional Authority

In addition to the authority previously discussed, Congress has enacted statutes that expressly permit states and localities to enforce certain immigration laws.[20]

A. 8 U.S.C. § 1252c

Section 1252c(a) expressly authorizes states and localities to arrest and detain individuals provided the individual: (1) is illegally present in the United States; and (2) has previously been convicted of a felony and deported or left the United States after such conviction. Additionally, a state or locality must confirm the status of the individual with Immigration and Customs Enforcement prior to arrest or detainment. To facilitate cooperation, § 1252c(b) compels the United States Attorney General to share information that would assist state and local law-enforcement officials in the performance of these duties.

B. 8 U.S.C. § 1324

Section 1324(c) expressly allows "all ... officers whose duty it is to enforce criminal laws" to arrest for violations of 8 U.S.C. § 1324, the "anti-harboring" statute. Specifically, § 1324(a)(1)(A) mandates punishment for persons who knowingly (or in some instances who demonstrate a reckless

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[17] *See supra* notes 8-9 and accompanying text.

[18] *See* VA. CODE ANN. § 19.2-81.6 (2004) (authorizing enforcement of immigration laws of the United States); § 19.2-82(B) (2004) (establishing procedure for arrest without warrant and providing limitation of seventy-two hours).

[19] Pursuant to 8 U.S.C. § 1325(a)(3), a first offense for improper entry by an alien into the United States is punishable by up to six months imprisonment while a subsequent offense is punishable up to two years.

[20] Sessions & Hayden, *supra* note 8, at 341-42 (noting that "[w]hile most sections of the INA do not expressly delineate which law enforcement officers have the authority to enforce them, several sections expressly recognize general state and local authority to enforce federal immigration law"); *see also* 8 U.S.C.S. § 1252c(a) (LexisNexis 1997) (granting authority "to the extent permitted by relevant State and local law").

disregard): (1) transport an alien into the United States through an undesignated point of entry; (2) transport an alien within the United States; (3) harbor, conceal, or otherwise shield an alien from detection; or (4) encourage an alien to enter the United States in violation of federal law. Because state and local law-enforcement officers have the duty to enforce criminal laws, they would encompass the group expressly designated by Congress in § 1324(c) to enforce § 1324.

C. 8 U.S.C. § 1357(g)

Section 1357(g)(1) expressly authorizes the Unites States Attorney General to enter into agreements with states and localities to permit qualified officers or employees to serve as immigration officers in relation to the investigation, apprehension, or detention of aliens. Importantly, § 1357(g)(1) provides authorization beyond any inherent arrest authority or other express authority granted in other federal statutes because it includes both criminal and civil authority for the investigation and apprehension of aliens. Two important caveats to consider are that the state or local agency will bear the cost of federal enforcement activities, and such activities must be consistent with both state and local law. The rationale behind § 1357(g)(1) is that due to the vast number of aliens in the United States compared to the relatively few federal immigration officers, state and local law-enforcement officers may be utilized for the detection and the apprehension of aliens. Further, § 1357(g)(10) provides that the express authority granted to states in no way diminishes their inherent authority to assist in immigration enforcement.[21]

D. 8 U.S.C. § 1103(a)(10)

Although § 1103(a)(10) contains a mechanism for triggering its application, it also involves an express grant of power to states or localities. If the United States Attorney General determines that an actual or imminent influx of aliens requires an immediate federal response, he may authorize any state or local law-enforcement officer to perform certain federal immigration functions. The head of the state or local law-enforcement agency must consent to the "emergency" provision before it may be utilized.

III. Pertinent Virginia Authority

The federal statutes analyzed above outline the basic parameters of the federal immigration enforcement power delegated to states and localities. Specifically, these statutes and authority delineate the "outer boundaries" of acceptable state enforcement action in the area.[22] However, the delegation of authority from the federal government to states and localities is contingent upon the specific limitations of

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[21] *See supra* note 7 and accompanying text.

[22] *See generally* Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 920-21 (1997). "[T]he only question that remains to be resolved where Congress explicitly grants state and local authority to enforce the [Immigration and Nationality Act]'s provisions is whether state and local immigration enforcement is authorized by state law." *Id.* at 920.

a state's or locality's own laws and regulations.[23] Thus, to enforce federal immigration laws or to legislate in areas where no federal regulations exist, federal approval coupled with state authorization is required.[24]

The General Assembly of Virginia has enacted several statutes pursuant to federal authority that provide guidelines and parameters for state and local action. Although not an exhaustive list, the following statutes detail the major substantive procedures and constraints that Virginia has enacted.

A. VA. CODE ANN. § 15.2-1726

Section 15.2-1726 authorizes localities to enter into agreements for cooperation in the furnishing of police services, generally. It sets forth a procedure and gives broad discretion for local law-enforcement agencies, including the state police, to enter into agreements with federal law-enforcement agencies to cooperate in the furnishing of police services.[25] However, local law-enforcement agencies cannot enforce federal law unless authority is provided by federal statute.[26] In the context of immigration enforcement policy, § 15.2-1726 would provide authority to Virginia law-enforcement officers to execute the express federal authorization under 8 U.S.C. § 1357(g).[27]

B. VA. CODE ANN. §§ 19.2-81.6 and 19.2-82(B)

Collectively, §§ 19.2-81.6 and 19.2-82(B) formalize authority for Virginia law-enforcement officers to exercise the express grant of arrest authority given to state and local law-enforcement officers by 8 U.S.C. § 1252c. Specifically, §§ 19.2-81.6 and 19.2-82(B) authorize state and local law-enforcement officers, in the course of their regular duties, to detain an individual illegally present in the United States who previously has been convicted of a felony and has been deported or left the county upon such conviction. In § 19.2-82(B), Virginia specifically restricted the use of this federal authority by mandating that such a person may only be held for a maximum of seventy-two hours.

C. VA. CODE ANN. § 15.2-1704

Section 15.2-1704 delineates the powers and duties of local law-enforcement officers and provides certain constraints. First, under § 15.2-1704(A), local law-enforcement officers are vested with the power to prevent and detect crime, apprehend criminals, safeguard life and property, preserve peace, and enforce "state and local laws, regulations and ordinances." In limiting the authority of local law-enforcement officers to the enforcement of state and local laws, regulations, and ordinances, § 15.2-1704(A) ostensibly prohibits such officers from enforcing federal laws and regulations. However, the responsibilities granted to local law-enforcement officers "for the prevention and detection of crime,

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[23] *See Gonzales*, 722 F.2d at 475-77 (requiring that state law grant state police authority that is delegated from federal government).

[24] *Id.*

[25] *See* 2007 Op. Va. Att'y Gen. No. 07-016, *available at* http://www.vaag.com/OPINIONS/2007opns/07-016-Rust.pdf.

[26] *Id.*

[27] Such authority exists in the context of "287g" agreements pursuant to 8 U.S.C. § 1357(g)(1) and general agreements to cooperate pursuant to § 1357(g)(10).

the apprehension of criminals, the safeguard of life and property, [and] the preservation of peace"[28] appears to provide the necessary authority to cooperate in the enforcement of federal laws and regulations despite the limiting language.[29] Furthermore, this limiting language does not affect the ability of the state or localities to enter into agreements with federal authorities, as specifically detailed in § 15.2-1726 and 8 U.S.C. § 1357(g).

Additionally, § 15.2-1704(B) provides that

> [a] police officer has no authority in civil matters, except (i) to execute and serve temporary detention and emergency custody orders ..., (ii) to serve an order of protection ..., (iii) to execute all warrants or summons as may be placed in his hands by any magistrate for the locality ..., and (iv) to deliver, serve, execute, and enforce orders of isolation and quarantine[.]

The bar for local police officers to participate in civil matters appears to limit the enforcement of federal civil immigration violations outside the scope of any agreement under § 15.2-1726 and 8 U.S.C. § 1357(g). The statutory language employed in granting specific exceptions to this general rule may allow such federal civil enforcement by local law-enforcement officers to occur.[30] However, in light of the current judicial uncertainty[31] regarding the scope of federal authority granted to localities to make arrests based solely on suspicion of a civil violation, coupled with the specific limitations in § 15.2-1704, would make local enforcement of federal civil immigration laws imprudent at this juncture.

D. VA. CODE ANN. § 15.2-530

Section 15.2-530 delineates the powers and duties of sheriffs. Specifically, "[t]he sheriff shall exercise the powers conferred and perform the duties imposed upon sheriffs by general law." Similar to the analysis regarding § 15.2-1704, the ability of sheriffs to enforce federal civil immigration law, without a specific statutory grant, is unclear. However, in the absence of specific powers and duties, as in § 15.2-1704 for local law-enforcement officers, a stronger argument exists that sheriffs are permitted to conduct such civil enforcement activities. Again, the prudent course of conduct is that sheriffs refrain from enforcement of federal civil immigration law outside the scope of § 15.2-1726 and 8 U.S.C. § 1357(g) until such authority is clarified by federal courts or statute. For example, a specific mandate from Congress or direction from the appellate courts would provide such clarification coupled with any necessary amendments to the *Virginia Code*.

E. VA. CODE ANN. § 52-8

Section 52-8 outlines the powers and duties of the Virginia state police. In pertinent part, § 52-8 provides that state police officers "are vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this Commonwealth." Because the powers of state police officers are tied to those of sheriffs, the previous analysis for § 15.2-530 would apply equally to state police officers.

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[28] VA. CODE ANN. § 15.2-1704(a) (Supp. 2007).

[29] While authority arguably exists within the existing language of § 15.2-1704, clarification by the General Assembly ultimately may be necessary.

[30] *See* VA. CODE ANN. § 15.2-1704(B)(iii) (authorizing execution of all warrants or summons from magistrates).

[31] *See supra* notes 8-13 and accompanying text.

IV. Summary

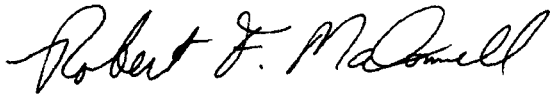
Virginia, as a sovereign within the constitutional framework of dual sovereignty, has the inherent authority to cooperate with the federal executive branch in the enforcement of criminal violations of federal immigration, unless otherwise expressly preempted. Although the Fourth Circuit has not issued a ruling on states' inherent authority, the Ninth and Tenth Circuits have ruled that the states' authority to arrest for criminal violations has not been preempted by federal action.[32] However, it is unclear whether arrest authority extends to civil violations of federal immigration law. Absent an express agreement with federal authorities to make arrests for civil violations of federal immigration laws, it is my opinion that Virginia law-enforcement officers should refrain from making such arrests for such civil violations until the law is clarified. Additionally, Congress has granted express authority to the states to assist in the enforcement of federal immigration law; however, Virginia law limits the ability of Virginia law-enforcement officers to arrest and detain individuals for violations of federal immigration.

Conclusion

Accordingly, it is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding a state's authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

3:831; 1:941/07-086

[32] *See supra* notes 10-11 and accompanying text.

ATTACHMENT C

COMMONWEALTH of VIRGINIA

Virginia State Crime Commission

Delegate David B. Albo, *Chairman*
Senator Kenneth W. Stolle, *Vice Chairman*

Executive Director
James O. Towey

Director of Legal Affairs
G. Stewart Petoe

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December 14, 2007

Assistant Secretary Julie L. Myers
U.S. Immigration & Customs Enforcement
425 I Street, NW, Suite 7100
Washington, D.C. 20536

Re: <u>Request for Information – Virginia State Crime Commission's Illegal Immigration Task Force</u>

Dear Assistant Secretary Myers:

The Virginia State Crime Commission would like to thank you for the assistance that you and your agency have provided to the Commission's Illegal Immigration Task Force. Several members of Immigration and Customs Enforcement (I.C.E.) have helped the Commission and its Task Force better understand how Virginia and I.C.E. can work together to address the public safety concerns related to illegal immigration.

The Task Force has concluded its work and submitted sixteen recommendations to the Commission, all of which were approved. One recommendation seeks to address your agency's lack of available bed space by creating financial incentives for local and regional jails to house criminal illegal immigrants on behalf of I.C.E. A related recommendation will create a presumption against bail for those illegal immigrants who commit certain "trigger" crimes that will result in the eventual issuance of a detainer and transfer into I.C.E. custody.

Virginia cannot afford to create a presumption against bail for all illegal immigrants who commit crimes. As I.C.E. statistics reveal, there were 12,073 inquiries made by Virginia law enforcement to I.C.E.'s Law Enforcement Support Center in FY 07. Only 694 of these inquiries, however, resulted in detainers. Considering the fact that approximately 95% of them will not be detained by I.C.E. anyway, the cost of keeping all criminal illegal immigrants in jail prior to trial is a cost that Virginia cannot bear. It is for this reason that the aforementioned recommendations are predicated on an agreement being reached as to specific crimes which, if committed by an

illegal immigrant, will trigger the issuance of a detainer by I.C.E., along with the payment of per diem costs once that detainer becomes effective.

While it is understood that I.C.E. cannot guarantee the issuance of detainers for all illegal immigrants who commit crimes, a list of specific crimes beyond felonies, such as DUI, weapons violations, and drug offenses, will help us to prioritize Virginia's limited resources. Providing our law enforcement agencies with clear expectations will also diminish the growing sense of frustration and foster improved relations between local law enforcement and I.C.E. We hereby request that I.C.E. enter into a contact with Virginia to specify what offenses, when committed by an illegal immigrant, will prompt the issuance of a detainer by I.C.E.

It has also been recommended that I.C.E. be requested to maintain data on the number of persons confirmed to be illegal immigrants as a result the inquiries made to the Law Enforcement Support Center and, further, how many of the detainers result in deportations. Having this additional information would help us to better understand the impact of illegal immigration on our criminal justice system and to ensure that Virginia's jails and prisons are reporting potential illegal immigrants as required by Virginia law.

Thank you again for the assistance provided by your agency. You should be proud of the professionalism and devotion exhibited your agency's representatives. Should you have any questions or concerns with this request for information, please do not hesitate to contact the Crime Commission's Director, James Towey, at 804-225-4534.

Sincerely,

Senator Kenneth W. Stolle
Co-Chair, Illegal Immigration Task Force
Vice-Chairman, Virginia State Crime Commission

Delegate David B. Albo
Co-Chair, Illegal Immigration Task Force
Chairman, Virginia State Crime Commission

cc: James Towey, Director, Virginia State Crime Commission
William F. Reid, Special Agent in Charge
Mark X. McGraw, Deputy Special Agent in Charge
Vincent E. Archibeque, Washington Field Office Director, ODR
Mary Loiselle, Acting Deputy Assistant Director, Detention Management Division, ODR

ATTACHMENT D

Survey of Sheriff's Offices and the
Relationship with the
U. S. Immigration and Custom Enforcement (ICE)

Locality	Do your officers inquire as to an individual's immigration status when lawfully in custody?	Does your office have a policy that prohibits officers from inquiring as to the individual's immigration status when the individual is lawfully stopped or in your custody?	Does your office determine the immigration status of individuals held in your custody? If yes, state process	Has your office contacted ICE to inform them of an illegal immigrant in your custody?	If you have contacted ICE relating to illegal immigrants in your custody, please indicate the number of times your office has contacted ICE for this purpose in calendar years 2004, 2005, and 2006.	Please describe the response you generally receive from ICE when you contact ICE on illegal immigration issues on behalf of your office.	Please provide any further comments you have regarding your relationship with your office and ICE.
Accomack	No	No		Yes		Biggest problem is waiting for ICE to get their prisoners once notification is made. No funds available to come to	

Survey of Sheriff's Offices and the
Relationship with the
U. S. Immigration and Custom Enforcement (ICE)

						Accomack and transport the prisoner.	
Albemarle							
Alexandria	Yes	No	No	Yes	2004: 100 2005: 100 2006: 150	ICE wants name, date of birth, and arranges pick-up times	Would be helpful to have an operated ICE contact phone list
Alleghany	No	No	No	No	N/A	N/A	N/A
Amelia							
Amherst							
Appomattox	Yes	No	No	No	N/A	N/A	N/A
Arlington	Yes	No	Yes. We need the data to use on our booking information sheet to enter data into our computer for booking a new arrest.	Yes	We do not capture this data.	We have always maintained an excellent working relationship with ICE	We currently have ICE holds. Our average daily population of ICE holds is approximately 35.
Augusta							
Bath	Yes	No	No	No	N/A	N/A	N/A
Bedford	Yes	No	Yes. Try and get information from ICE.	Yes	2004: 4 2005: 1 2006: 1	Good luck and there's nothing we can do about it unless we have a truck load of them.	Troops on the ground are a ok.

Survey of Sheriff's Offices and the
Relationship with the
U. S. Immigration and Custom Enforcement (ICE)

Bland	No	No	No	Yes	Unknown	Usually if 1 or 2 people you're told a small number is not worthwhile for Immigration to fool with.	I believe they are not interested in small numbers.
Botetourt							
Bristol	Yes	No	No	Yes	2004: 0 2005: 0 2006: 0	I have only called one and the response was very positive.	
Brunswick							
Buchanan							
Buckingham	Yes	No	No	No			
Buena Vista	Yes	No	No	No	N/A	N/A	N/A
Campbell	Yes	No	Yes. Passport or other travel documents	Yes	2004: 0 2005: 0 2006: 0	One time in 2007 we were told to release the two subjects and that they would conduct a follow-up investigation.	None
Caroline	Yes	No	No	Yes	2004: 2	Willing to	Willing to help

Survey of Sheriff's Offices and the
Relationship with the
U. S. Immigration and Custom Enforcement (ICE)

					2005: 3 2006: 1	help but nothing happened.	but they are limited on manpower and other cases take a large amount of time.
Carroll	Yes	No	Yes. U.S. State Dept. Diplomatic and consular immunity. Guidance for law enforcement and judicial authorities.	No	N/A	N/A	N/A
Charles City							
Charlotte							
Charlottesville							
Chesapeake							
Chesterfield	Yes	No	No. We forward list of all confined to ICE for immigration determination.	Yes	2004: 15 2005: 12 2006: 44	Local office is great to work with. Sometimes get the run around from Norfolk or DC offices when calling to arrange pickup.	We send ICE a daily list of inmates in our facility to check to see if they are wanted or subject to deportation. We keep in contact with the local office agents on a weekly basis.

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Clarke	Yes	No	No	Yes	Unavailable	New contacts recently obtained have improved response.	
Colonial Heights							
Craig							
Culpeper							
Cumberland							
Danville	No	No	No	Yes	2004: 2 2005: 3 2006: 4	The response has improved a great deal over past 5 years.	
Dickenson							
Dinwiddie	Yes	No	Yes. Contact is made with ICE.	Yes	2004 and 2005: unknown 2006: 5	The telephone response is always no more than 24 hours.	None.
Emporia							
Essex	Yes	No	No	No	2004: 0 2005: 1 2006: 0	Not much help.	Each sheriff's office should have a contact person in ICE in their area.
Fairfax	Yes	No	No	Yes	2004: 150 2005: 225	Difficult time getting ICE	ICE officials need to contact

					2006: 300	to pick up their prisoner. We phone, fax, and typically get no response.	us once we gotten word to them to come pick up their prisoner. We only have one agent we deal with who is reliable.
Falls Church	No	No	No	Yes	Unknown	Very poor	After hours personnel gave us no help or suggestion at all.
Fauquier							
Floyd	No	No	No	No			
Fluvanna							
Franklin	Yes	No	No	Yes	2004: 0 2005: 0 2006: 3	Limited response due to severity of crime.	
Frederick	Yes	No	Regional Jail does.	Yes	Unknown	Most often they show little or no interest.	The only change has been their name. Very unresponsive, little or no assistance.
Fredericksburg	No	No	No	No	N/A	N/A	N/A
Giles							

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Gloucester							
Goochland							
Grayson	No	No	No	No	N/A	N/A	N/A
Greene							
Greensville							
Halifax							
Hampton							
Hanover	Yes	No	Yes. Sheriff's personnel request verification status of illegal aliens from ICE via Hanover Communications. Conact with illegal aliens, foreign nationals, diplomats and consular offficals are governed by Sheriff's office policy and procedure.	Yes	2004: 0 2005: 0 2006: 2 2007: 1	At times the Sheriff's office received through and timely responses from ICE regarding immigration issues. However, there have been times the Sheriff's office requested assistance from ICE and the responses were less than desirable.	In the past, the Sheriff's office requested to meet with officials from ICE and we continue to encourage this. We wish to discuss our current and future working relationship with them. We remain committed to working with and fostering productive relationships with local, state and federal agencies.

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Henrico							
Henry	No	No	No	Yes	2004: 2 2005: 2 2006: 1	Rarely get to speak to ICE on initial call. Must leave a message usually get response within 24 hours.	
Highland	Yes	No	Yes. Card supplied by suspect.	No	2004: 0 2005: 0 2006: 0	N/A	N/A
Hopewell							
Isle of Wight							
King George	No	No	No	No	N/A	N/A	N/A
King William							
King & Queen	Yes	No	Yes. By phone call.	Yes	2004: 2 2005: 2 2006: 2	Not good.	None.
Lancaster	Yes	No	Yes. We submit the information through VCIN to ICE.	Yes	Unknown	The initial response is always in a timely manner but the follow-up is slow.	We recently detained an alien from 2/16/07-2/21/07 placed him under federal detention on 2/21/07. He was not picked up by ICE until

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							3/20/07 at a cost to us of $49.19 a day due to this office not having a contract to hold Feds. So Fed recovery deducted $1328.15 from our reimbursements. Numerous calls made to ICE with no response.
Lee							
Loudoun							
Louisa	Yes	No	Yes. Inquiry is made only in those cases where an officer may suspect illegal status. Request identification or immigration card from individual.	No	N/A	N/A	None.
Lunenburg							
Lynchburg							
Madison							

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Martinsville	Yes	No	No	Yes	2004: 6 2005: 8 2006: 4	Very good response, quick but not getting back with us.	None.
Mathews	Yes	No	Yes. Wanted checks through VCIN.	Yes	2004: 0 2005: 1 2006: 1	Some response. No action taken by ICE as of yet.	None.
Mecklenburg	Yes	No	Yes. Contacted INS.	Yes	2004: 3 2005: 3 2006: 4	Usually does not meet the requirements to be removed.	In 2007 ICE assisted us in a very successful operation in the County.
Middlesex							
Montgomery	No	No	No	Yes	2004: 1 2005: 2 2006: 2	Very polite and responsive.	
Nelson							
New Kent	Yes	No	Yes. Through Social Security Administration.	Yes	2004: 2 2005: 2 2006: 5	The response has been very poor. It seems as they don't want to assist you. That the problem is not big enough and nothing is	I would like to see a more proactive approach on their parts to assist with the illegal immigration problem.

						done. We have stopped calling them.	
Newport News	Yes	No	Yes. To the best of our abilities, we questions the inmate and examine documents.	Yes	Unknown	ICE refuses to respond or to detain unless it is a serious felony.	I have a great relationship with ICE. ICE is grossly understaffed to deal with the immigration problem in this area.
Norfolk	Yes	No		Yes	2004: 2005: 2006: 50-75	The response is whether or not the person is illegal and if he/she has ever been deported.	No problems.
Northampton	Yes	No	Yes. We contact ICE with name given, they inform us of legal or illegal status of the immigrant.	Yes	2004: 5 2005: 6 2006: 3	ICE will pick up immigrant only if felony charges have been placed on the subject. We usually have to transport to the other side of	

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						Chesapeake Bay Bridge Tunnel because ICE does not have money to pay tolls.	
Northumberland							
Norton							
Nottoway							
Orange							
Page							
Patrick	Yes	No	Yes. Check for green card and American identification.	No	2004: 0 2005: 0 2006: 0	N/A	
Petersburg	No	No	No	No	N/A	N/A	
Pittsylvania							
Portsmouth	Yes	No	Yes, NCIC, immigration.	3 to 4 times per year.	None at best.	We were told that they didn't have the time to deal with them so just let them go.	
Powhatan	No	No	No	No	N/A	N/A	
Prince Edward							
Prince George							
Prince William	No	No	Yes. If for long-term	No	N/A	N/A	Situation currently under

			incarceration/felony we may or may not inquire as to country of origin and diplomatic status.				review as to should/should not Prince William County Regional Jail receive ICE training.
Pulaski							
Radford	Yes	No	No	Yes	2004: 0 2005: 0 2006: 0	If we have a truckload they will pick them up, otherwise no.	
Rappahannock	No	No	No	Yes	2004: 0 2005: 0 2006: 0		Would like to have more information on how ICE could provide services to our jurisdiction.
Richmond City							
Richmond County							
Roanoke City							
Roanoke County							
Rockbridge							
Rockingham	No	No	No	Yes	2004: 160 2005: 169 2006: 193	They will come to the facility or call	

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						in and speak to someone.	
Russell							
Salem	No	No	No	No	N/A	N/A	None.
Scott							
Shenandoah	Yes	No	Yes, ICE contacted.	Yes	2004: 0 2005: 0 2006: 15-20	Only interested if felony charge.	My office has approved a MOU with ICE to train my staff on processing criminal illegal immigrants. Program to being this Spring.
Smyth							
Southampton	Yes	No	Yes. Ask individual, call immigration.	Yes	Unknown	If individual is not under arrest for a major offense, ICE does nothing. They will cooperate if it is a major crime.	
Spotsylvania	Yes	No	Yes. We just ask from time to time.	Yes	2004: 5-15 2005: 5-15 2006: 5-15	A very slow response.	We have worked with them in the past and have a good

							relationship with them. They are just very slow to response, they are understaffed.
Stafford	Yes	No	No	Yes	2004: 6-8 2005: 6-8 2006: 6-8	Usually not able to assist us with illegal immigration issues (too busy).	ICE officers seem to be overwhelmed and unable to help us with local or small scale immigration problems.
Staunton	No	No	No	No	2004: 0 2005: 0 2006: 0	N/A	N/A
Suffolk							
Surry							
Sussex	Yes	No	No	Yes	2004: 5 2005: 5 2006: 5	Release them when finished with our charges.	We plan to go through the ICE training as recommended by U. S. attorneys.
Tazewell							
Virginia Beach	Yes	No	Yes. During the classification	Yes	Unknown	Interested in convicted	Professional.

			process.			felons and individuals already deported from prior incident.	
Warren							
Washington	Yes	No	No	Yes	2004: 3 2005: 4 2006: 4	That they do not respond to small numbers of illegals.	N/A
Waynesboro							
Westmoreland	Yes	No	Yes. By contacting ICE and giving them the information.	Yes	2004: 0 2005: 0 2006: 15-20	Excellent response.	They are always there for us.
Wmsbg/James City County	No	No	No	No	N/A	N/A	N/A
Winchester	Yes	No	Yes. They are asked and if they can produce valid ID then that's all is asked.	Yes	2004: 1 2005: 2 2006: 2	We haven't had any issues.	No problems.
Wise	Yes	No	No	Yes	2004: 2 2005: 1 2006: 1	They would not respond or have subject deported.	They should send an agent to give advice or take action when contacted.
Wythe							

York Co.-Poquoson	Sometimes	No	No	Yes	2004: 2 2005: 2 2006: 2	Let them go.	WE do not call as often because the answer is always the same, "let them go!"