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No Need for the CLEAR Act: Building Capacity for Immigration Counterterrorism Investigations

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The recent hearings of the 9-11 Commission are a powerful reminder of the need to build up national capacity for domestic counterterrorism. This means both more law enforcement and increasing capacity in a manner that respects civil liberties and the roles and responsibilities of federal and state authorities.

The proposed Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act takes exactly the wrong approach, inappropriately burdening state and local enforcement and providing insufficient protections for civil liberties. Furthermore, it is unnecessary: Adequate authorities already exist. Instead, Congress should promote the use of Section 287(g) of the Immigration and Naturalization Act (INA) as a better mechanism for enabling state and local law enforcement to join in the global war against terrorism.

A War Without Fronts. About 40 million people come to the United States each year by legal and illegal means. The overwhelming majority pose no threat to America or its citizens. On the other hand, not every foreign visitor—as all 19 of the September 11 hijackers amply demonstrated—is harmless. Future terrorists will follow their path, entering the U.S. by any means they can and hiding in American communities. Thus, enforcement of immigration laws and related investigations must be important

tools in the domestic counterterrorism fight.

The federal government lacks the capacity to pursue aggressively all immigration violations that represent serious criminal and national security threats. The Department of Homeland Security (DHS) does not even have sufficient resources to deport criminal aliens released from federal and state prisons. Not only does the department need help, but effective domestic counterterrorism operations also require federal, state, and local investigators to work closely together.

The Wrong Approach. State and local assistance in enforcing federal immigration laws has long been a controversial issue. As proposed, the CLEAR Act would authorize state law enforcement “to investigate, apprehend, detain, or remove aliens in the United States.” The CLEAR Act contains at least four serious flaws:

- The act has the potential to shift police priorities so that officers spend their time tracking down immi-

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- Increasing national capacity to conduct counterterrorism investigations should be a priority.
 - The CLEAR Act is seriously flawed and the wrong approach to improving federal, state, and local cooperation.
 - Congress should appropriate funds to expand §287(g) initiatives.
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gration violations instead of solving and preventing crimes within their communities. It could also undermine the immigrant communities' trust and confidence in law enforcement. Fear of deportation may make immigrants and aliens less likely to report crimes and suspicious activity. Furthermore, foreign nationals may refuse to assist in security investigations because of concerns about the immigration consequences.

- The bill may hinder law enforcement by undermining the usefulness of the FBI's National Criminal Information Center (NCIC) database. Including entries for immigrants with minor violations, whose statuses change frequently, will make it hard to keep the database current. Filling the database with records of minor immigration violators could also distract or impede police officers from using the database to obtain information about violent criminals and terrorists. The NCIC should be reserved for serious, significant immigration violations.
- It provides broad immunity protection for those who may violate an alien's or citizen's rights, thus giving the victim no recourse.
- The proposed legislation is unnecessary. Police already have the authority to arrest aliens who commit crimes, and state and local authorities can help fight terrorism using already established statutory tools.

The Right Approach. That said, homeland security is not just a federal mission. State and local governments must play an important role, particularly in the area of immigration investigations. At the very least, in the normal course of criminal investigations, state and local law enforcement should neither ignore immigration law nor hesitate to cooperate with federal immigration officials. In the case of counterterrorism, more concerted effort is needed.

Section 287(g) of the INA provides adequate authority for state and local enforcement to investigate, detain, and arrest aliens on civil and criminal grounds, and it is structured far more thoughtfully than the proposed legislation. Officers governed by a §287(g) agreement must receive adequate training and operate under the direction of federal authorities. In addition, in a civil lawsuit, the state law enforcement officers would be considered to have

been acting under federal authority, thereby shifting liability to the federal government and providing additional immunity for the state law enforcement officers enforcing federal laws.

The existing §287(g) pilot program with the State of Florida could serve as a national model. Under §287(g), Florida signed a memorandum of understanding (MOU) in 2002 to allow a small group of Florida law enforcement officers to conduct federal immigration investigations. Florida specifically limits its officers' civil immigration enforcement to situations in which they are part of a security or counterterrorism operation that is supervised by Immigration and Customs Enforcement officers (ICE).

The Florida MOU outlines the criteria for selecting the officers, including requiring U.S. citizenship, three years of law enforcement experience, and at least an associate degree. Once selected, officers go through intensive training and must pass a final competency exam. Those who meet these criteria are certified to participate in the program. The MOU also establishes ways for people to file grievances against the program and its officers.

As the Florida MOU demonstrates, §287(g) provides more protection to states and their law officers while requiring that well-trained officers conduct immigration investigations. It also allows states to tailor the use of their officers to essential domestic counterterrorism missions. This is a superior alternative to the CLEAR Act and its unfunded requirements.

What Should Be Done. Three things would enhance state and federal counterterrorism efforts:

- **The DHS** should encourage other states to adopt programs based on the Florida model.
- **Congress** should appropriate funds for the DHS to expand §287(g) initiatives.
- **States** should use the Florida initiative as a model for expanding their own domestic counterterrorism programs and improving cooperation with federal authorities.

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