

Chris Burbank
Chief of Police
Salt Lake City Police Department

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Hearing on H.R. 3808, the "Scott Gardner Act"

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As I have expressed many times before in public forums, including this prestigious committee, the goal of local law enforcement is to provide for public well-being and security while safeguarding the civil rights of all persons, equally without bias. Proper and effective policing occurs when we profile for criminal behavior, not for race, ethnicity, religion, gender or sexual orientation.

I sincerely sympathize with my fellow panel member, Mr. McCann and his family. The criminal justice system failed this family and allowed a tragedy to occur. The perpetrator in that circumstance, an individual with a significant criminal history, should not have been released from custody. Not for reasons associated with his immigration status however, but for his demonstrated behavior and the threat his actions posed to public safety. H.R. 3808 will not resolve situations such as this. I believe, in fact, it has the potential to increase the likelihood of a similar catastrophe occurring to another family.

As set forth in H.R. 3808, the loose interpretation of the reasonable standard pertaining to immigration status checks will undoubtedly place more individuals into the criminal justice system awaiting determination. In essence, this proposed legislation will create a de-facto mandatory detention program. Compulsory incarceration, especially of status, misdemeanor or traffic offenders, dramatically increases stress on an already overcrowded detention system, necessitating the release of criminal offenders back into our neighborhoods. For example, the Salt Lake County Jail currently releases between 700 and 900 criminals monthly for reasons of overcrowding. Last year, the Salt Lake City Police Department booked an individual for exposing himself to children on an elementary school playground. That individual spent 45 minutes in jail prior to being released due to overcrowding. We are fortunate this particular individual was not predisposed to engage in more serious criminal activity following his release, such as actually abducting or injuring a child.

It is vital that legislation and laws target and address the root problem, not ancillary circumstances of a specific isolated situation. February 2007, in Salt Lake City, an 18 year-old Bosnian refugee went on a violent rampage in a local shopping mall, killing five and injuring several others before responding officers took his life. Immediate sentiment from the community would have undoubtedly supported the rounding up of all Bosnian immigrants in our city and detaining them for questioning.¹ As overreaching and ridiculous as this seems, is this bill not moving us in the same direction? The young man in our mall situation was not motivated by religious belief, ethnicity, or even violent video games. He was simply an individual who found the wrong outlet for his personal circumstance. As the fight against terrorism has demonstrated extensively, profiling on the basis of appearance is ineffective and in fact exposes us to greater risk, allowing individuals exhibiting behavioral indicators to go unnoticed.

I would be proud, as would my colleagues, to be involved in the drafting of effective legislation that addresses all repeat offenders of DUI laws and works to prevent this crime from reoccurring. DUI is a preventable crime. It is not a crime of passion, but an act of irresponsibility. Many of our drivers do not recognize the impact of their actions or understand the level of impairment that accompanies alcohol consumption. Across the

nation, states have refused to publish driver rules and regulations in languages other than English. As a nation proud of its immigrant heritage, this seems shortsighted. Is not an educated motoring public important?

It is estimated there are more than 11 million undocumented individuals residing in the United States. Studies conducted by the Rand Instituteⁱⁱ and the Consortium for Police Leadership in Equityⁱⁱⁱ found that undocumented individuals actually under-commit crimes compared to other segments of the population. There is certainly no indication they drive intoxicated at a higher rate. Why then should we draft legislation that does not focus on the significant problem of driving while intoxicated in our nation, but focuses on a statistically insignificant issue. Please understand that for the McCann family, this most certainly is in no way insignificant or minor. It is incumbent upon lawmakers and those who enforce the laws to maintain an unemotional evaluation of what is correct and proper when drafting and applying laws that govern our great nation.

H.R. 3808 invites racial profiling by requiring state and local law enforcement officers to check federal databases based on “reasonable ground to believe the person is an alien.” The invitation or quite frankly the encouragement to racially profile or to interject bias is exacerbated by the bill’s use of the over-broad term “apprehended” rather than convicted, which at least implies due process. The phrase facilitates pre-textual checking or verification of immigration status. In this way, H.R. 3808 is a national version of Arizona’s controversial S.B. 1070 and Alabama’s H.B. 56. Both of which invite racial profiling by requiring officers to determine immigration status based on reasonable suspicion that a person is unlawfully present. Due to concerns regarding federal preemption, the Department of Justice has filed suit in both these states, as well as the state of Utah, to block this type of detrimental and misguided legislation.

This bill authorizes state and local officers to issue detainers for any and all apprehended immigrants, thereby inappropriately delegating authority to such officers, absent training and accountability. We have seen the failure first hand of immigration programs, such as the 287(g) program which co-ops local law enforcement as immigration agents without oversight. Atrocious law enforcement abuses occurring both within the program and outside have led the Department of Justice to conduct investigations and issue indictments in Maricopa County, Arizona, as well as East Haven, Connecticut. At least under a flawed 287(g) agreement, the involved officers received training. The Administration has drastically reduced funding to the program and has indicated it will not enter into any new agreements. H.R. 3808 sidesteps any official agreement or training, exposing officers, agencies and the public to abuses and complaints, thereby degrading public cooperation and trust.

The expansion of mandatory detention to any undocumented person who is apprehended but not convicted for a misdemeanor offense ties the hands of the law enforcement system and will result in costly, unnecessary and potentially lengthy detentions. Immigration and Customs Enforcement already has ample authority to detain and make detention decisions based upon the factors of risk to the public and risk of flight. In fact, ICE’s guidance for trial attorneys identifies DUI as a high priority.

This bill inappropriately sets local law enforcement priorities. Perspective is imperative when allocating the limited and ever-shrinking resources of law enforcement agencies throughout the country. Our cities face drive-by shootings, homicides, sexual assaults, and ever increasing dangers from prescription drug diversion. Not to diminish the impact of driving while intoxicated, should the federal government set that as a priority in our cities above all others? Currently, mandatory arrest is connected almost exclusively to instances of domestic violence and no other criminal activity. In the state of Utah, DUI is a misdemeanor traffic offense. Typically, officers process suspected individuals in the station, constituting a breath alcohol content analysis and issuing a citation for first time offenses. The process takes between 30 minutes to an hour. If now officers are required to transport individuals to jail due to mandatory DUI protocol or immigration status checks, the typical out of service time becomes two hours. That is two hours that an officer is not on the street stopping other DUI drivers or criminal perpetrators. Immigration status now becomes the priority, not criminal behavior.

Major Cities Chiefs, a professional association of Chiefs and Sheriffs representing the 69 largest cities in the United States and Canada, recently reiterated its position on immigration.^{iv} This document emphasizes the commitment of member agencies to enforce criminal violations of law regardless of citizenship status; however, the group is unanimous in its position that immigration enforcement is a federal responsibility. Placing local law enforcement officers in the position of immigration agents undermines the trust and cooperation essential to successful community-oriented policing. We do not possess adequate resources or training to appropriately undertake such a federal mandate and, in fact, believe it significantly detracts from the core mission of local police to create safe communities.

In order to be successful in our mission, local law enforcement must have the cooperation of all members of our communities. In Salt Lake City, approximately one third of the population is Latino and subject to inappropriate, or disproportionate, police scrutiny under H.R. 3808. Often unrecognized in the immigration debate is the efficacy of enforcement and the adverse impact upon all individuals of color. How is a police officer to determine “that the individual is an alien unlawfully present in the United States” without detaining and questioning anyone who speaks, looks or acts as if they might be from another nation? Is it not racial bias to subject certain individuals – based solely on a surname or skin color – to a different standard or practice than others with whom we interact?

On its face, this bill appears unconstitutional, as it violates the anti-commandeering doctrine in Justice Scalia's majority opinion in *Printz v. U.S.*^v That doctrine generally prevents federal law from establishing blanket requirements for state and local officers. Federal law can incentivize state and local conduct through grants, but it cannot simply require certain actions. The type of background checks identified and required in this bill are directly parallel to those required by Congress in the interim rules of the Brady Act, that the Court declared unconstitutional.

I am extremely proud to be a law enforcement officer and am represented by many fine individuals, not only in my own agency but throughout the nation. The standard by which we judge successful police interaction is reasonableness. We expect our officers to interact in a responsible and prudent manner with every member of the public, including those who have engaged in criminal activity. In order to provide these outstanding men and women with the support they deserve, it is incumbent upon us, as policy and lawmakers, to ensure we provide them reasonable legislation.

ⁱ News articles

ⁱⁱ RAND

ⁱⁱⁱ CPLE

^{iv} MCC

^v Scalia