

Report of the Governor's Working Group on Law Enforcement and Illegal Immigration

A Report to the Governor and Colorado General Assembly



Colorado Department of Public Safety
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700 Kipling Street
Lakewood, Colorado 80215

December 31, 2008

This report summarizes deliberations and recommendations of an ad hoc Working Group convened in late 2008 at the request of Governor Bill Ritter, Jr., by Department of Public Safety Executive Director Peter A. Weir.

The report was written by members of the Department of Public Safety. As closely as possible, the report attempts to capture the thoughts of members of the Working Group during many hours of public discussion. The Department of Public Safety takes responsibility for the content of this report.

Members of the Working Group devoted many hours of their valuable time to the Group's mission. Their significant contributions to the citizens of the State of Colorado are hereby recognized and sincerely thanked by the Department of Public Safety.

Note: Due to their extensive length, minutes of the Working Group's six meetings have been omitted from this report. Meeting minutes, including discussion notes and votes, can be found on the CDPS website corresponding to the Immigration Enforcement Working Group (cdpsweb.state.co.us/immigration). The material is also available in hard copy form on request to the Executive Director's Office.

December 31, 2008

Honorable Bill Ritter, Jr.
Governor
State of Colorado
State Capitol
Denver, CO 80203

Honorable Peter Groff
President
Colorado State Senate
State Capitol
Denver, CO 80203

Honorable Andrew Romanoff
Speaker
Colorado House of Representatives
State Capitol
Denver, CO 80203

Dear Governor Ritter, President Groff and Speaker Romanoff:

I am pleased to present this report concerning current issues in Colorado traffic law enforcement and immigration to you following many hours of interesting study and debate involving law enforcement, human rights, prosecution and criminal justice system leaders in meetings held in October and November of this year in response to your request by letter to me of September 12, 2008.

I believe members of this panel identified some concrete issues with specific, achievable solutions to conditions about which so many citizens in Colorado have expressed their strong opinions following separate and tragic traffic crashes that occurred this year in Aurora.

The suggestions contained in this report, of course, have relevance across jurisdictions to the entire state.

The Department of Public Safety remains dedicated to assisting you and members of the General Assembly in finding ways to improve public safety in Colorado.

Sincerely,

Peter A. Weir
Executive Director

Table of Contents

Executive Summary.....	5
Governor’s Letter.....	6
Working Group Members.....	8
History and Structure of Meetings.....	10
Introduction.....	11
Definition of Terms.....	11
Racial Profiling.....	13
Complexity of Federal Immigration enforcement.....	13
Role of ICE.....	13
The Federal 287(g) Program.....	14
Colorado Human Smuggling / Trafficking Statutes.....	16
Colorado State Patrol’s Immigration Enforcement Unit.....	17
Educational Phase of the Working Group.....	18
Immigration in the U.S. and Colorado.....	19
Encountering Drivers in Traffic Stops.....	19
Criminal History Databases.....	21
Federal Immigration Databases.....	22
Driver License Sanctions.....	22
Prosecution of HTOs.....	23
The Hernandez Case.....	23
Colorado State Patrol’s Immigration Enforcement Unit.....	25
El Paso County Sheriff’s 287(g) Jail Authority.....	26
Other Law Enforcement Issues Concerning 287(g) Authority.....	26
Additional Prosecution Issues.....	27
DOC’s Incarceration Experience.....	29
Discussion and Recommendation Phase of the Working Group.....	30
Conclusion and Final Comments.....	37
Appendix A.....	38
Appendix B.....	43
Appendix C.....	49
Appendix D.....	55
Appendix E.....	62

Executive Summary

A panel of 31 specially recruited leaders from law enforcement, legal aid, human services, prosecution, criminal justice, and government agencies throughout Colorado met in six four-hour long sessions to examine current conditions in immigration and traffic law enforcement at the request of Governor Bill Ritter, Jr., following two tragic traffic crashes this year involving drivers who were living in the United States in violation of federal immigration laws. In the most recent incident the driver in a crash that resulted in the deaths of three people had been living in the country since childhood, providing a number of different aliases and residency claims to local law enforcement officers in a number of jurisdictions during his numerous contacts with law enforcement. In the course of the resulting investigation, officials learned he never had been licensed to drive. By all accounts, his true immigration status remained undiscovered until the fatal crash, due to his misrepresentations, to his ability to cast himself as a U.S. citizen and to federal immigration data systems that are not linked to criminal histories maintained by states and the FBI.

At present, it is impossible for local police officers, sheriffs' deputies and most State Patrol troopers to be able to verify immigration status of persons they normally encounter. Such a verification presently requires a separate request for a manual search of a federal database. In two states, a pilot project of the U.S. Immigration and Customs Enforcement agency called Secure Communities may help local law enforcement agencies overcome the existing limitations of data systems. Members of the panel want Colorado to explore the possibility of becoming a Secure Communities participating test site.

The only other option available to local law enforcement agencies to obtain federal immigration status information is their participation in a program known as 287(g) authority. Participating in the 287(g) program, however, costs local agencies significant resources to train officers. It also severely reduces the ability of local police officers to work effectively in communities to solve crime and serve victims. When 287(g) authority is applied to county jail operations, some savings can be realized to counties, even though there are other resource issues associated with limited 287(g) authority. The decision whether to participate in the 287(g) program must remain with individual law enforcement agencies in Colorado.

Immigration enforcement remains within the realm of federal law enforcement agencies. Local law enforcement agencies do not have the authority and cannot be expected to develop the complex technical expertise needed to enforce federal immigration law.

Peace officers need better ways of verifying the identity of persons they encounter who do not have identification or who criminally misrepresent their identities.

This report presents a number of recommendations and potential improvements that might help avoid the ability of a driver to take advantage of data system limitations. Some of these recommendations will require state and federal legislative changes, and others can be enacted administratively. Most of the legislative changes suggested by the panel involve improving definitions and refining existing statutes rather than creating new sections of state law.

Governor Ritter's Letter to Executive Director Weir

September 12, 2008

Peter A. Weir
Executive Director
Colorado Department of Public Safety
700 Kipling Street
Denver, CO 80215

Dear Director Weir:

As you are aware, two recent incidents in Aurora involving local law enforcement contacts with illegal immigrants have once again highlighted the challenges surrounding these issues. In one of these cases, three innocent people are dead.

During the past week, I have spoken with many people who are concerned, frustrated and angry about these issues, including community members, law enforcement officers and elected officials. You and I have previously discussed the complexity of immigration issues and the ability of the state to effectively support law enforcement.

These two most recent cases demonstrate two main difficulties that local and state law enforcement officers encounter every day when they contact offenders: 1) determining the immigration status of the individual, and 2) ensuring that those who are not lawfully present in the United States can be turned over to federal authorities for appropriate action, including detention and deportation.

State and local law enforcement officers continue to experience frustrations due to a lack of federal resources and a clear federal response. However, these federal challenges should not prevent state and local agencies from seeking solutions. In fact, because we are on the front lines, we must constantly seek to identify shortcomings in the system, particularly where federal, state and local enforcement agencies intersect, and recommend solutions.

This approach has led to successful implementation of SB 06-225, which created the State Patrol's unique relationship with Immigration and Custom Enforcement (ICE) and the agreement that provides federal 287(g) authority to the Patrol's Immigration and Enforcement Unit. This state-federal partnership has provided the Patrol with the ability to utilize federal immigration databases and to work closely with local ICE officers. We have taken important steps to collect and share data relative to that Unit's efforts to interdict and apprehend smugglers and traffickers.

While our relationship with ICE is an important tool to stop smuggling, many resource gaps remain.

We have also listened to concerns expressed by members of the General Assembly, and partnered with state legislators in devising strategies to bolster Colorado's efforts. As part of this collaboration, at my direction, you convened an Immigration Summit on April 25, 2008 at the Capitol, which drew more than 85 attendees. Presentations were made by representatives from the United States Attorney's Office, the Colorado State Patrol's Immigration Enforcement Unit, the Colorado District Attorneys' Council, the County Sheriffs of Colorado, the Colorado Association of Chiefs of Police, and the Colorado Network to End Human Trafficking. This Summit provided information about efforts underway to identify and prosecute human smugglers. Unfortunately, local ICE officers were restricted from participating in any meetings that included policy discussions. We need to reengage the federal authorities in this process.

As noted above, the recent cases in Aurora underscore the need to continue our efforts to identify problems, measure system gaps, and offer proposals for solutions. Therefore, I am asking that you convene a working group of community stakeholders, including law enforcement, policymakers and legislators, to:

- Identify the problems faced by local and state law enforcement relative to the enforcement of the state and municipal criminal laws involving illegal immigrants.
- Identify information gaps and barriers to sharing criminal justice and immigration status information among local, state and federal law enforcement agencies.
- Discuss whether there are specific statutory or other changes that might address some of the problems.
- Facilitate a discussion of policy recommendations to the federal government to address the problems identified by local and state law enforcement.

This effort should begin as soon as possible. We can consult further over the next week to determine the group's membership. A report of the working group's findings and recommendations should be prepared for review by me and the Speaker of the House and the President of the Senate, no later than December 31, 2008. I understand that we cannot expect that this working group will solve the complex immigration problems that must be addressed in Washington, D.C. However, I believe it is important that Colorado law enforcement work together to identify people who commit crimes, determine immigration status of offenders, and demand that the federal authorities are provided the resources to do their jobs to deal with those who are not legally present in our country.

Thank you, in advance, for your work on these issues. I look forward to receiving your report and findings.

Bill Ritter, Jr.

Governor

Working Group Members

How Members Were Selected

Executive Director Peter Weir, working in consultation with the Governor's Office, recruited 31 members for the Working Group. They were selected for their official association roles representing Colorado's police chiefs and sheriffs as well as other chiefs and sheriffs who have played key roles in immigration and human trafficking cases throughout the state; leadership from the Colorado State Patrol and its Immigration Enforcement Unit; the General Assembly leadership and other members; immigration and legal services providers; the Colorado Attorney General; the United States Attorney for the District of Colorado; the Governor's Deputy Chief of Staff; key state agency executive directors; the District Attorney for the First Judicial District; and legal, administrative and legislative liaison staff from the Department of Public Safety.

Because the panel was charged with a responsibility for examining enforcement issues, law enforcement representatives necessarily played a dominant role in membership and the group's discussions. Immigration encompasses a variety of additional issues such as human rights, and representatives from legal service organizations also agreed to join the Working Group.

Members

Stephanie Villafuerte	Deputy Chief of Staff, Office of the Governor
Peter Weir	Executive Director, Department of Public Safety
Chief Dan Oates	Aurora Police Department
Hon. John Suthers	Colorado Attorney General
Sheriff Grayson Robinson	Arapahoe County
Sheriff Stan Hilkey	Mesa County
Sheriff Lou Vallario	Garfield County
Chief Dan Brennan	Wheat Ridge Police Department
Sheriff Terry Maketa	El Paso County
Chief Dennis Harrison	Fort Collins Police Department
Lt. Col. Doyle Eicher	Colorado State Patrol
Maj. Brenda Leffler	Colorado State Patrol
Capt. Kevin Eldridge	Colorado State Patrol
Kathy Sasak	Deputy Executive Director, Department of Public Safety
Ann Terry	Department of Public Safety
Sheriff Doug Darr	Adams County
Patricia Medige	Colorado Legal Services
Hon. Nancy Todd	Colorado House of Representatives
Hon. Jim Kerr	Colorado House of Representatives
Hon. Dave Schultheis	Colorado Senate
Hon. John Morse	Colorado Senate
Amber Tafoya, Esq.	Colorado Immigrant Rights
L. Antoinette Salazar	Salazar and Associates
Hon. Scott Storey	District Attorney, First Judicial District
Hon. Andrew Romanoff	Speaker, Colorado House of Representatives
Hon. Steve King	Colorado House of Representatives
Hon. Troy Eid	U.S. Attorney for the District of Colorado
Roxanne Huber	Executive Director, Department of Revenue

Aristedes Zavaras	Executive Director, Department of Corrections
Ron Sloan	Director, Colorado Bureau of Investigation
Chief Gerald Whitman	Denver Police Department

Staff:

Sgt. Todd James	Colorado State Patrol
Trooper Mike Milne	Colorado State Patrol
Adrienne Loye	Department of Public Safety
Lance Clem	Department of Public Safety

Immigration and Customs Enforcement (ICE) Participation

Federal agencies are prohibited from actively influencing policy or statutory changes in state government. Recognizing the limitation on federal officials, Governor Ritter and Executive Director Weir requested the participation of representatives from Immigration and Customs Enforcement (ICE) of the U.S. Department of Homeland Security in the Working Group deliberations for background and educational purposes. ICE representatives have not been named in this report as members of the Working Group, but ICE representatives nonetheless attended all meetings and provided helpful information about federal immigration enforcement practices. ICE's involvement in the education of Working Group members was vital and played a significant role in members' understanding of federal policies, terminology, resources and practices.

Throughout the meetings, members of the Working Group expressed their appreciation for the information provided by representatives of Immigration and Customs Enforcement.

History and Structure of Meetings

Members devoted more than 24 hours over the course of four weeks studying immigration enforcement issues, discussing local challenges and making recommendations in fulfillment of the Governor's mandate. Each meeting was scheduled between 1-5 p.m. on announced meeting days.

Initially, five meetings were planned, beginning October 21, 2008, on October 31 and then again on November 6, 13 and 17, 2008. Members added a final and sixth session on November 25, 2008, to continue discussions.

All meetings were open to the public and to news media representatives. Meeting schedules, agendas and minutes were posted in a timely manner on the Department of Public Safety web page.

The Executive Director of the Department of Public Safety served as chairman of the Working Group.

Chairman Weir determined that a thorough understanding of all agencies involved not only in immigration enforcement and human rights services was a requirement for informed discussions to follow but also that terminologies and policies needed to be defined. The greatest amount of meeting time, therefore, was devoted to comprehensive briefings on the roles, responsibilities, practices, policies, resources and operating procedures of key law enforcement, prosecution and human rights agencies. The Working Group conducted its assignment in two phases: an educational phase and a discussion phase followed by the crafting of recommendations. This report summarizes important elements of each of the two phases.

During the discussion phase, members were asked to specify whether they agreed, disagreed or "could live with" a recommendation but were not completely in support of it.

This report is an accounting of the long periods of discussion of Working Group members. This report attempts to portray, as accurately as possible, the concerns, findings and recommendations of the Working Group.

Members of the Working Group did not always agree on all propositions and recommendations. Actual vote tallies are shown in meeting minutes which are available on the web site. In addition, two members submitted material after the final meeting was held, expressing their views on the deliberations of the group. Their views are reflected in letters attached to this report as appendices.

Introduction

Members of the Working Group used a number of phrases, words and terms that require clarification. In addition some terms and phrases were used by representatives of the U. S. Department of Homeland Security in response to questions from panel members. The terms that require a common understanding are described here.

Definition of Terms

Absonder: a fugitive who runs away and hides to avoid arrest or prosecution.

Administrative removal: an official removal or deportation. It can result from the actions of an alien committing an aggravated felony as defined in the Immigration and Nationality Act (INA). In this case, the alien is not afforded the opportunity to see an immigration judge to contest the actual removal charges. Upon release from custody, he or she is removed from the country as quickly as possible. The removed alien may be banned from entering the United States for life.

Alien: the Federal Immigration and Nationality Act defines the term alien as any person who is not a citizen or national of the United States. This term includes temporary visitors and lawful permanent residents.

Criminal alien: any alien who has committed a crime as defined in the Colorado Revised Statutes, United States Criminal Code or statutes of other states or municipalities.

Detainer: a written order requesting a jail to hold a foreign national for ICE up to 48 hours, excluding holidays and weekends. The detainer only becomes effective after the alien has posted bond, served a court sentence, satisfied judgments or is otherwise released from state custody. A detainer serves to notify a law enforcement agency that the U.S. Customs and Enforcement Agency (ICE) seeks custody of an alien presently in the custody of that agency.

Human smuggling (as described in state law, which differs from federal law): providing or agreeing to provide transportation to a person in exchange for money or any other thing of value for the purpose of entering, remaining in, or traveling through the United States or the State of Colorado.

Human trafficking (also as described in state law): selling, exchanging, bartering or leasing a person and receiving any money or other consideration or thing of value for the person as a result of such transaction.

Illegal alien: anyone who has entered the United States illegally and is deportable, or anyone who has "overstayed a visa" or otherwise violated the terms of their legal admission into the United States, sometimes known as an "illegal immigrant." The term illegal immigrant includes several categories of individuals who are subject to removal from the United States for a variety of reasons that are defined by the federal Immigration and Nationality Act. In general, an individual may be considered removable because he or she does not qualify for admission to the United States, has entered the country illegally by crossing the border without

formal inspection, or has violated the terms of a legal admission, such as by entering the country on a student visa and then dropping out of school.

Lawful permanent resident: any person not a citizen of the United States who is residing in the U.S. under a legally recognized and lawfully recorded permanent residence. Also known as "Permanent Resident Alien," "Resident Alien Permit Holder," and "Green Card Holder."

Probable cause: a stronger standard of evidence than reasonable suspicion, and is needed to charge for a criminal offense. Probable Cause exists when a peace officer has a reasonable belief that a person has committed a crime. The officer must be able to articulate facts that would lead a neutral, independent magistrate to conclude that under the totality of circumstances, there is a "fair probability" that the person committed a crime.

Reasonable suspicion: is needed for a stop or investigatory detention, and is a lesser standard than probable cause. It is defined as a particularized and objective basis of specific and identified facts and inferences that a person has been, is, or is about to be involved in criminal activity.

Removal / Deportation: is a formal order handed down by an immigration judge or appropriate DHS official for administrative removal orders and expedited removal orders. It is based on factual allegations that the alien is unlawfully present in the United States and has no immigration documents or benefits that would allow the alien to reside in, pass through, or visit the United States. Lawfully admitted aliens may be removed or deported if they are convicted of violating certain laws. The alien may be banned from entering the United States for a period of 5, 10, or 20 years. Violation of the ban carries significant consequences upon illegal re-entry.

Stipulated Removal: occurs when an alien has the opportunity to see an immigration judge but waives that right in order to expedite removal by stipulating in writing to the truth of the charges in the Notice to Appear. This removal is essentially like a no contest plea and is counted as an actual deportation.

Temporary detention at department request: a detainer to hold an alien not otherwise detained on criminal charges by a law enforcement agency. Such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by ICE.

Voluntary Departure: return of no consequence granted to aliens from any country. This is granted by the arresting DHS agency at the beginning of removal proceedings or in a decision by an immigration judge. The cost of this departure is the sole burden of the alien and is contingent on the alien having the funds to depart. A voluntary departure grant by an administrative judge can have an effect on future immigration matters, as the alien can generally receive only one such grant and cannot obtain other benefits if he or she overstays the period of voluntary departure.

Voluntary Return: a method used to expedite the repatriation of an alien to a home country with no immigration consequences. Voluntary return is an agency decision and had no consequences with regard to future immigration or criminal processes. The agency frequently bears the expense of removal. This option is available to persons from any country and carries no consequence upon illegal re-entry.

Racial Profiling

Today's immigration issues magnify sensitivities regarding race and ethnicity. All participants of the Immigration Working Group were careful to ensure that discussions recognized concerns about racial profiling and biased based policing. Chiefs and sheriffs throughout Colorado strive to ensure that race, ethnic factors and residency have been avoided in state and local law enforcement. Throughout their discussion in the Working Group, law enforcement leaders reiterated their dedication to ensuring that no existing or proposed practices in any way be allowed to contribute toward racial profiling.

Complexity of Federal Immigration Enforcement

Federal agents – unlike local and state peace officers -- are specifically authorized to stop persons and conduct investigations regarding immigration status without a warrant.

Federal immigration law enforcement is complicated by the fact that cases can be civil by being administrative actions or criminal. The federal government and agencies including the Department of Homeland Security's ICE and the Department of Justice are given authority and responsibility to regulate and enforce immigration laws. These federal agencies determine whether a person will be criminally prosecuted for violations of immigration laws or be dealt with through an administrative process, or both.

Being illegally present in the United States is *generally* an administrative, not criminal, violation of the Immigration and Nationality Act. Subsequent deportation processes are administrative proceedings. Lawfully admitted persons may become deportable when they violate terms of their visas. Criminal violations of the INA can include the illegal entry of aliens, bringing and harboring certain undocumented aliens, and the re-entry of persons who have already been deported.

Federal law does not require states or local police agencies to enforce immigration laws, nor does it give the states or local agencies the authority to act in the area of immigration without specific arrangements. The Colorado General Assembly in 2006 created the Immigration Enforcement Unit in the State Patrol in an effort to provide a state response to the traffic-related consequences of illegal immigration and human trafficking and smuggling.

Individuals who fail to appear in immigration court, or who fail to comply with a resulting court order, are considered absconders. Their identifying information is entered into the National Crime Information Center (NCIC) database, a tool which is available to federal, state and local law enforcement agencies to check for outstanding warrants. A federal immigration warrant may be an administrative document which can be included in NCIC. Administrative detainers being placed in NCIC notify local officers that the detainers are administrative in nature and include a warning that local officers should not act upon the detainers unless permitted by the laws of their state. State and local officers can act on a suspected state law violation that initiated the contact, however. Greater detail about how state and local law enforcement agencies work together can be found in this report.

Role of ICE

Immigration and Customs Enforcement (ICE) is the largest investigative branch of the Department of Homeland Security. ICE's Detention Removal Operations (DRO) maintains 12 office locations in Colorado and Wyoming.

ICE investigates violations of immigration laws and identifies illegal immigrants who are removable from the United States. In the 2007, federal fiscal year ICE removed 276,912 illegal aliens from the United States -- a record high number -- according to the agency's annual report. More than 6,000 persons have been removed from Colorado and Wyoming in 2008. ICE has been able to reduce the backlog of fugitive alien cases for the first time in its history. On a typical day, ICE holds nearly 30,000 illegal aliens in detention facilities nationwide. More than 700 of those are held in Colorado and Wyoming. ICE has acknowledged plans to expand its capacity in Colorado for holding detainees.

Aliens who illegally enter the U.S. commit a federal crime called "improper entry by an alien." They are subject to arrest on that charge alone if encountered by authorized officers. Troopers in the Colorado State Patrol's Immigration Enforcement Unit, in addition to ICE agents, have been granted this authority under a formal 287(g) Memorandum of Agreement (MOA) which is described below in greater detail.

DRO seeks out and arrests fugitives and detains criminals, detains aliens in facilities throughout the United States, and ultimately pursues their return to countries of origin. This process can take hours if detainees agree to a voluntary return; otherwise, it can take days or years. In 2007, the Denver field office was responsible for 438 fugitive arrests, and so far in 2008, more than 571 fugitives have been arrested.

The Secure Communities program is a new initiative involving ICE and selected local and state law enforcement agencies in a pilot effort in two states. Working Group members learned about this pilot program and expressed interest in it. (Please see Appendix D for more information about Secure Communities.)

The local ICE Office of Investigations covers one of the largest territories in the nation, including Colorado, Wyoming, Montana and Utah. There are 17 investigation offices within these states.

The Office of Investigations oversees the Law Enforcement Support Center (LESC), which provides information through NCIC to state and local law enforcement officers about foreign nationals. If an alien has never been contacted or referred to ICE, no information will be available in ICE databases.

ICE also maintains a fingerprint identification database of naturalized citizens and a database of illegal aliens. No information on natural born citizens of the United States is included in any ICE database. LESG operates 24 hours a day, 365 days a year, and receives over 2,400 inquiries daily from officers throughout the nation. In the 2007 fiscal year, LESG received 728,243 requests for information.

The Federal 287(g) Program

Section 287(g) of the federal Illegal Immigration Reform and Immigrant Responsibility Act, which became effective September 30, 1996, gives the secretary of the U.S. Department of Homeland Security (DHS) authority to deputize state and local law enforcement agencies for the performance of immigration law enforcement. The optional arrangement is made through a formal Memorandum of Agreement (MOA). As participants in the 287(g) program, local law enforcement officers must receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) officers.

The cross-designation between ICE and state and local officers, detectives, investigators and correctional officers working in conjunction with ICE provides local and state officers *in agencies choosing the full breadth of 287(g) authority* with necessary resources and latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering and increased resources and support in more remote geographical locations. Local agencies choose what elements of 287(g) authority best suits local needs, and in Colorado, the State Patrol's 287(g) authority is limited to traffic law enforcement situations on state highways only. For other local Colorado law enforcement agencies, 287(g) authority is limited to jail operations.

Nationally, only a very small fraction – 67 state and local law enforcement agencies out of thousands --participate in the 287(g) program. The ICE website lists the agencies currently participating in some form in the 287(g) program.

Before choosing to participate in the federal program, many local jurisdictions reported “revolving door” frustrations with undocumented aliens. Prior to 287(g) authority, it was not uncommon for criminal offenders who were suspected of being criminal aliens to be arrested on numerous charges, post bond and be released without the arresting agency really knowing who they were. In some cases unconfirmed identity issues resulted from local law enforcement agencies not having close working relationships with ICE or ICE agents. Having 287(g) authority since its enactment and availability in 1996 has helped agencies identify and remove those types of offenders.

The value of 287(g) authority for an officer on the street remains contentious among local law enforcement agencies because having it may impose a complex set of federal-level responsibilities on officers who are primarily trained for enforcing state criminal law. Except for the Colorado State Patrol, all local agencies in Colorado with 287(g) authority are trained for detention setting only, not for proactive street-level enforcement.

From an administrative viewpoint, having 287(g) authority has helped agencies identify and initiate the removal process. Local law enforcement officials do not have the authority to remove suspects. The responsibility and authority for removal is provided only to ICE and U.S. Department of Justice.

An arrestee may indicate he is a citizen of another country voluntarily or may have a criminal history in NCIC that indicates he was born in a foreign country. NCIC records will indicate he has been arrested previously and claimed multiple places of birth. Arrestees with no positive identification are checked via the Automated Fingerprint Identification System (AFIS).

When any local officer suspects that a suspect may be a foreign national, he can make an Illegal Alien Query (IAQ), which is sent via CCIC through NLETS to ICE's Law Enforcement Support Center (LESC) in Vermont. The IAQ is resent if there is no response, although resending the original IAQ can lengthen the queue and create a duplication of effort at ICE. If there is no further response, an Alien Status Inquiry (ASI) is completed and faxed to ICE. ASI information is provided by ICE, and ICE agents usually contact the detention facility by telephone and speak with the arrestee. ICE agents may issue a verbal detainer to sheriff's deputies. Currently, in the Arapahoe County detention facility, 30 percent of all IAQs result in ICE detainers.

Colorado's Human Smuggling and Trafficking Statutes

The Working Group evaluated whether a number of related, recently-enacted state laws have been effective. The state laws examined include:

SB 06-90: C.R.S. 29-29-101, 102, and 103: This bill which became effective July 1, 2006, requires any law enforcement officer to contact ICE if the officer has arrested an individual for a criminal offense in Colorado and has probable cause to believe that the individual is illegally in the country. Although the ICE notification is a statutory requirement, the timeframe when the notification must be made is not defined by the state statutes. Because of this lack of specificity, the notification can occur at any time after the arrest.

SB 06-206: C.R.S. 18-13-128: The Smuggling of Humans bill makes it a crime to assist a person to enter, remain in, or travel through the United States or Colorado in violation of immigration laws, if he or she agrees to provide transportation to that person in exchange for money or anything of value. Smuggling of humans is a class 3 felony.

To date, there have been 50 smuggling cases filed in 17 Colorado counties. Twenty seven of these cases have been plea bargained, and one is pending sentencing. Of the 26 cases where the defendant was sentenced, only one went to prison.

The State Patrol reports difficulty retaining witnesses in smuggling cases. The Patrol also reports difficulty proving that a "thing of value" was exchanged when supporting charges. Operators of smuggling organizations are taking advantage of law enforcement's frequent inability to prove the receipt of a "thing of value" as required in the statute. Without a verifiable exchange of the thing of value, law enforcement and prosecutors do not have a case. Working group members identified recommended statutory changes regarding the "thing of value" issue later in this report. Potential material witnesses are being briefed in advance on what not to say to law enforcement officers who question them. In federal law enforcement, by contrast, agents do not have to prove the exchange of a "thing of value."

SB06-207 C.R.S. 18-13-127: Trafficking in Adults. This statute makes it a crime for anyone to sell, exchange, barter, or lease an adult and receive any money, or consideration of a thing of value, or receive an adult, as a result of a transaction described above. Trafficking is a Class 2 felony if the adults are illegally present in the United States.

An issue with this statute was noted by the Working Group because trafficking an illegal adult is a more serious crime than trafficking a child. Trafficking a child is a Class 3 felony.

C.R.S. 18-6-402: Trafficking in Children. If a person sells, exchanges, barter, or leases a child and receives any money or other consideration or thing of value for the child as a result of such transaction, or receives a child as a result of a transaction described above, he or she commits a Trafficking in Children offense. As used in this section, “child” means someone under the age of 16. Trafficking in children is a class 3 felony.

SB06S-004: C.R.S. 18-3-207: The Extortion of Immigrants makes it illegal to extort a thing of value from immigrants in exchange for not reporting them to law enforcement. Forcing another to pay or give anything of value in exchange for agreement not to report that person’s immigration status to law enforcement is extortion and a class 4 felony.

SB06S-005: C.R.S. 18-13-129: Makes it illegal to coerce immigrants into involuntary servitude. A person commits coercion of involuntary servitude if he or she coerces labor or services by threatening to withhold or destroy immigration related documents, or threatening to notify law enforcement about immigration status, and is a class 6 felony.

Colorado State Patrol Immigration Enforcement Unit

The Colorado State Patrol’s Immigration Enforcement Unit (IEU) has been operational since July 2007. The unit consists of 23 sworn members, including one captain, three sergeants and 19 troopers. Six troopers are assigned to the metro area, three troopers in the eastern region, and four troopers in the west. The south eastern region has two troopers and the southwest region as four troopers.

A criminal alien for CSP IEU purposes is a foreign national who has committed any felony or aggravated felony, is a multiple traffic offender or a previously deported alien. A multiple traffic offender is someone with repeat offenses for DWAI, DUI, Reckless Driving, Careless Driving, Driving Under Revocation, or any combination thereof.

CSP Immigration Enforcement Unit troopers have undergone an extensive four week training course facilitated by ICE instructors. The course covers, among other topics, officer authority, civil rights law, liability issues, ICE use of force policy, cross cultural issues, consular notifications, and identifying fraudulent documents. This training is followed by a period of hands-on training with ICE agents.

In addition to their state sanctioned enforcement authority, IEU troopers can take sworn statements for use in federal removal proceedings and for federal criminal prosecutions. They can fingerprint, photograph and complete the processing of all foreign nationals. They can issue charging documents that initiate removal proceedings. They have the authority to issue immigration detainers and can detain and transport foreign nationals to ICE approved detention facilities.

The Educational Phase of the Working Group

Working Group members examined the entire range of common encounters with drivers by asking officers from the State Patrol, from Arapahoe County Sheriff's Office, El Paso County Sheriff and the Wheat Ridge Police Department to describe their work, including practices, policies and time required for standard procedures. They also learned about practices at the Colorado Department of Revenue.

The general themes discussed in the educational sessions include:

1. **The problem of unlicensed drivers or drivers who drive after having licenses revoked or suspended is significant.**
2. **The most noteworthy public safety tragedy this year involved a driver who never had a license and had been driving for a number of years without one. His immigration status was a separate federal law enforcement issue.**
3. **Local law enforcement officers have no authority to enforce federal immigration law without the limited power granted under the 287(g) program.**
4. **Obtaining federal 287(g) authorization for many local and state law enforcement agencies may not be an acceptable answer to the national immigration problem.**
5. **287(g) authority can benefit county jails in Colorado by helping sheriffs more quickly determine residency status and, when appropriate, moving detainees out from county responsibility to ICE responsibility, thereby saving some housing costs to counties.**
6. **The ability of prosecutors to adjudicate persons who commit state smuggling and trafficking offenses is weakened by the need to prove the exchange of a "thing of value" and material witness issues.**
7. **The work of the State Patrol's Immigration Enforcement Unit is consistent with the General Assembly's mandate in 2006, but the Patrol sees opportunities for legislative refinements that will assist its IEU enforcement.**
8. **Immigration enforcement originally is a federal enforcement problem but because of significant consequences for local public safety, states are forced to respond.**
9. **Peace officers on the street need better ways of confirming the identity of persons who do not possess valid documentation and misrepresent themselves verbally.**
10. **It is impossible for an officer on the street to verify information about the immigration status of a suspect. The best he or she can do is to obtain some form of identification from a suspect and then turn to ICE for assistance when justified.**
11. **State and local law enforcement agencies need to be able to share more information among themselves and with federal agencies regarding both identity and alien status.**

Recommendations that address many of these themes are included in the next section of this report.

Immigration in the U.S. and Colorado

Between 1910 and 1920, the U.S. experienced its biggest wave of immigration. One in four, or 25 percent, were immigrants. Currently 37.5% of our population are immigrants. The current US population is approximately 305,419,048, and of that number, three and one half percent are estimated to be residing illegally in the country.

The statistics for Colorado are not easily verified. Some estimates indicate that approximately 500,000 residents in Colorado are foreign born. Estimates further suggest that as many as 200,000 to 225,000 may be in violation of immigration laws.

Encountering Drivers in Traffic Stops

Working Group members heard from State Patrol troopers and other officers about how several common types of traffic stops occur, how long they take and what kinds of information are revealed about a driver in the course of business. Typical traffic stops were reviewed for the purpose of understanding what information might be available to an officer on the street in each scenario.

What happens in a typical traffic stop with an identified traffic violation?

- Driver has a current driver's license, registration and valid insurance. The driver speaks English. A typical contact of this kind requires 5-7 minutes.
- Driver does not have a license physically on him or her but does have other valid identification. The driver speaks English. The contact requires 6-8 minutes.
- Driver has no license and no identification. The driver speaks English. The officer must obtain information verbally and match description of driver with the information found in computer records. This contact requires 10 – 15 minutes.
- The fourth scenario involves a driver with a foreign driver's license. The officer is challenged with extracting information from an unfamiliar license. The officer relays the driver's last name, first, name and middle initial along with date of birth to dispatch to verify a license. The driver speaks English. This type of contact requires about 10 – 20 minutes.
- Another common type of contact is a driver with no paperwork. The driver speaks broken English and communication becomes a problem. The officer must convey information to the driver as well as decipher what the driver is saying. If this occurs in a metro area, there is a possibility that another officer can be called in who can speak the driver's language. It can be more challenging in rural areas where finding another officer to help can be a bigger issue. This contact requires 10 – 40 minutes. The officer can ask if the driver is in the country legally, but without 287(g) authority and cause, the question can not only be pointless but also could open up civil rights issues for the officer and agency.

The process of contacting a driver involves an inquiry into the electronic database known as the Colorado Crime Information Center, or CCIC. CCIC contains all Colorado-associated criminal history information and is tied to its national equivalent, the FBI's NCIC which provides criminal history information from other states. *Neither CCIC nor NCIC provides information to*

the officer regarding the immigration status of the person whose name is being checked.

Currently, a local or state officer who does not have authority under the federal 287(g) program is unable to confirm the residency status of a driver by direct access to ICE databases. The ICE databases are separate from the CCIC, and NCIC databases and cannot be queried directly by non- 287(g) state and local officers except through dispatch or contact with the LESC. ICE databases are not criminal history databases.

What happens next?

An officer determines whether there is an indication of criminal activity on the part of the driver aside from any traffic violations that resulted in the traffic stop.

The officer analyzes:

Probable cause, which is defined as facts that would lead a neutral, independent magistrate to conclude under the circumstances that there is a “fair probability” that a person committed a crime and

Reasonable suspicion, which is an objective basis for suspecting that a driver is involved in criminal activity. Reasonable suspicion must be established on an objective foundation, not a subjective one. The practice of profiling is subjective and does not create the legal foundation for reasonable suspicion.

The officer must decide at this point whether to arrest a driver.

“Arrestable” offenses versus “non-arrestable” offenses. Some offenses can result in an arrest. The decision to arrest is dictated by law and by standardized policies of law enforcement agencies. Offenses such as driving under the influence of alcohol or drugs, for example, may lead to arrest, depending on policy. Suspected criminal activity results in an arrest.

When an officer contacts someone who may be in the country in violation of immigration laws but determines no probable cause of a criminal act exists, the officer will release the driver after identity is determined, provided there are no outstanding warrants. The officer has no authority to take action on administrative federal immigration matters unless he or she has 287(g) authority. In Colorado, only the State Patrol has this kind of federal authorization.

A peace officer may arrest a person when:

- He has a warrant commanding that such person be arrested; or,
- Any crime has been or is being committed by such person in his presence; or,
- He has probable cause that a crime has been committed.

Possessing and presenting a fake driver’s license is a crime.

- Forgery involves uttering content of a forged document to a peace officer and creates presumption that a person intended to defraud the officer.
- Criminal Possession of a Forged Instrument occurs when a person has knowledge that the instrument is forged and intends to use it to defraud an officer.

- Criminal Impersonation occurs when a person assumes a false or fictitious identity or capacity and commits an act which would subject the person impersonated to an action that is civil or criminal; or with the intent to unlawfully gain a benefit for self or another.

What happens when a driver is arrested?

In addition to taking any other appropriate action involving a suspect on a state charge, when an officer has determined **probable cause** that an arrestee for a criminal offense does not legally reside in the United States, the officer reports the arrestee to the United States Immigration and Customs Enforcement office.

When an officer believes a driver provides fraudulent documents, the officer must arrest the driver and book the person into a local jail. This requires 4 - 5 hours.

According to policy of the Arapahoe County Sheriff, whose policies are typical among Colorado law enforcement agencies, there are some exceptions to an immediate arrest. They include instances when a person displays serious medical issues, pregnancy or has dependent children involved in the situation. Special circumstances do not exempt a person from arrest but do alter how deputies handle the situation.

Only state and local officers with federal 287(g) authority are allowed to detain a suspected illegal alien on administrative charges – charges relating only to being present in the country illegally. Other kinds of immigration related criminal charges may exist and become known through a criminal history query, resulting in arrest. On administrative charges alone, local officers must have 287(g) authority to take action.

Criminal History Databases

CCIC is maintained by the Colorado Bureau of Investigation. All information in the CCIC database comes from the local law enforcement agencies, the state judicial system and the Department of Revenue.

Officers conducting a traffic stop will make several queries on the driver of a vehicle via communication with dispatch or using a linked computer in a patrol car. The queries include vehicle information, warrants, and driver license status. Criminal history information is available but is not typically obtained for a traffic stop.

When an arrest has been made, the arrestee is booked at a local law enforcement station. The creation of an individual's criminal history at CBI begins when fingerprints are taken during the booking process. If fingerprints are not received at CBI, a criminal history is not created.

An individual's criminal history must include name, date of birth, sex, height, weight, and eye and hair color. Other personal identifiers are not mandatory. When identification is not documented at the time of booking, the information on the fingerprint card is "self reported" by the arrestee. When a person provides a false name at the time of booking, the resulting criminal history will contain the false name. Sometimes, arrestees provide several names on arrest reports. All names will appear on a criminal history in the order received at the time of each succeeding

arrest. There can be several names and Social Security numbers associated with a single criminal history.

Every agency in the state is required to provide CBI information on all persons arrested in Colorado. After a fingerprint card is processed by the CBI, the card is forwarded to the FBI.

Federal Immigration Databases

A Colorado officer only indirectly can obtain information from federal databases, including the immigration databases, by requesting an IAQ or by contacting a local ICE agent. An Illegal Alien Query (IAQ) is transmitted by a local law enforcement agency to ICE through the International Law Enforcement Telecommunication System (NLETS). ICE then conducts a manual search of its databases and returns the information to the requesting law enforcement agency. The purpose of an IAQ query is to obtain information from the U.S. Immigration Law Enforcement Support Center regarding a subject's alien status. The IAQ response indicates if the subject is of interest to ICE. The input data required for an IAQ is a person's name, date of birth, gender and other standard identification information. IAQs responses take more time than a CCIC query not associated with immigration status.

CCIC is a repository for Colorado's law enforcement and criminal justice agencies only, and the information it contains belongs to agencies that put it there, not to CBI or to any other state agency. This arrangement exists largely because only the agency entering the information can document it. Consequently, CCIC is not a repository for non-criminal information from federal agencies such as ICE. Even if liability concerns did not exist, the volume of federal data as well as the absolute need for it to be updated continuously throughout the country would prevent the two systems from ever becoming a singular system.

A pilot project called Secure Communities (Appendix D) is underway in North Carolina and Texas that will attempt to establish interoperability between the FBI's IAFIS (national automated fingerprint identification system) and the DHS fingerprint identification system. The Secure Communities project will allow interoperability among state, FBI and DHS databases. Issues like multiple identifications and aliases can be uncovered because the identification system will be fingerprint based. If the pilot projects are successful, the system might become available to other law enforcement agencies beginning in 2009 and future years.

Driver License Sanctions in Colorado

SB 06S-1009 and CRS 24-34-107 requires the verification of lawful presence in the United States as a condition for a person to obtain license. Since August 2006 the Division of Motor Vehicles runs all received identification documents through the Systematic Alien Verification for Entitlements (SAVE) program. Fifteen percent of all DMV clients are immigrants and must be checked through SAVE. When first implemented, the SAVE system began identifying counterfeit documents almost immediately. Many of the counterfeit documents matched records that were previously recorded in the DMV system. The SAVE system uncovered matches between illegal immigrants who had obtained driver licenses or identification by using false documents previously. SAVE prevents the reissuance of identification or driver licenses upon expiration of old ones.

SAVE has forced counterfeiters underground. Because of its features, many offenders are being caught using facial recognition software. Currently, about 18 percent of all identification requests cannot be verified initially. The applicant is instructed to return in person to the office with additional documentation for further verification. Of the people turned away, only one in four has returned with the required documents. There are checks and balances built into the system to ensure all persons legally entitled to a license will get one. Many of the fail safe processes involve personal, hand inspection of documents to ensure their authenticity.

In Colorado, the DMV suspends or revokes licenses of 275,000 drivers a year for a variety of causes.

A person is designated as a Habitual Traffic Offender (HTO) if he or she has ten or more convictions of separate offenses carrying four or more points each, or 18 or more convictions of separate offenses of three or fewer points. These convictions must arise from separate acts committed within a period of five years involving moving violations.

The specific number of unlicensed offenders who continue to drive on our roadways is staggering. In Colorado there are 387,833 drivers with active restraints against their licenses. Since 1992, 142,913 drivers have been convicted for driving under restraint in at least two to five instances. 2,399 drivers have been charged six-to-ten times, and 221 have been charged with eleven or more separate instances. The numbers are similar for offenders charged with driving without a license. 324,541 drivers have been charged two-to-five times, 912 have been charged six-to-ten times, and 42 people have been charged with eleven or more separate offenses.

Prosecution of HTOs

First Judicial District Attorney Scott Storey noted there are currently 178 state inmates who have been convicted of being an HTO. Felony HTOs most likely will get probation and possibly time in jail. Any HTO case that involves physical injury to a third party will get a higher priority over non injury incidents. Detention facilities are at capacity. The deterrent factors associated with prosecuting these offenders are diminished because of capacity problems. Less serious HTO violators typically will be sentenced to in-home detention.

Home detention is not an option for judges if the accused is living illegally in the U.S. If the offender is an HTO and an illegal alien, he cannot legally obtain a drivers' license in Colorado based on his residency status. Points, obviously, cannot be assessed against a non-existent driver's license.

California passed a law that impounds vehicles of HTO drivers. This legislation had a significant impact on roadway safety. There was a 34 percent reduction in repeat offenders, and the impoundment reduced crashes by 25 percent. Because California allowed the jurisdictions to charge for impound costs, more than 50 percent of the vehicles were abandoned at the impound lot and sold at auction. Some states block vehicle registration for people without a license and others reduce the plea bargains, plate impoundment, license checkpoints, or issue special plates that indicate probable cause for a stop.

Colorado accepts licenses from states that require proof of lawful presence as evidence of driving privileges when exchanging other states' licenses for a new Colorado license.

The Hernandez Case

An important factor existing at the time of the meetings of the Working Group is that the multiple-fatal traffic case involving Francis Hernandez in the city of Aurora on September 4, 2008, has not been adjudicated, and Hernandez remains presumed innocent of the charges that have been filed or will be filed against him involving the incident. The Working Group has played no role in determining his guilt or innocence in the traffic case. The Working Group examined the Hernandez case in order to review how databases relate to each other and how falsified citizenship and identity information affects the work of law enforcement in Colorado.

Hernandez's record reflects a criminal history as a juvenile in California. When he was arrested in Aurora, he stated he was born in California. His command of English and knowledge of California and Colorado provided no indication to a reasonable person that he might be the legal citizen of another country. No probable cause existed to suspect he was present in the United States in violation of immigration laws.

As an adult, he was arrested by multiple Colorado agencies on various misdemeanor charges including assault, theft, false reporting, criminal impersonation, forgery related offenses, disorderly conduct, obstruction of police and resisting arrest. His criminal history reflected 29 failure-to-appear warrants issued by multiple courts in Colorado. His history of contacts with law enforcement spanned many agencies and criminal justice authorities. SB 90 notification to ICE was not required in most of Hernandez's earlier contacts with officers because they occurred before SB 90 took effect.

In checking his driving history in Colorado following this year's incident, Aurora police learned that Hernandez never had a driver's license. He pled guilty to eight different traffic charges including driving without a license. He was sentenced to jail six times, with the longest sentence being 32 days.

Hernandez had three contacts with the Aurora Police Department. The first time occurred when he was contacted by the Aurora Police Department in April 2007 on a noise complaint. Aurora authorities found he had an outstanding Fugitive of Justice (FOJ) warrant, and he was arrested. He served 3 days. His second contact came in April of 2008 when he was arrested for speeding, failure to signal for a turn and no proof of insurance. Hernandez was held in the Aurora City Jail. No IAQ was sent to ICE by Aurora, in part because no probable cause existed to question his residency status and also because he was to be transferred to other jurisdictions on outstanding warrants. He was taken to the Arapahoe County jail. He was ultimately fined \$395 for the traffic offenses.

ICE records reflect no IAQs regarding Hernandez following the many prior contacts he had with other Colorado peace officers or criminal justice agencies. Aurora was not alone in having no reasonable basis for believing he was not living legally in the U.S.

Hernandez's third contact with Aurora Police occurred the day of the tragic crash on September 4, 2008, that resulted in three fatalities and generated significant news media interest and public outrage. A day after the fatal crash in Aurora, when Hernandez's residency status was questioned

in part due to intense news media interest, Aurora Police sent an IAQ to ICE using Hernandez's self-reported identification information, including his stated California birthplace.

Because the IAQ input data included a California birthplace given by Hernandez, the inquiries initially produced the following responses: "Searches will not be completed on subjects ... that are United States citizens." "The following mandatory fields were incomplete / incorrect. Please resubmit your query." "Subject's place of birth is U.S. State or Territory." Aurora Police interpreted these responses as further indications that Hernandez was, in fact, a U.S. citizen. Later, authorities from ICE were able to determine that Hernandez was not born in California or in the United States. He had been born in Guatemala. ICE officials discerned this information following a lengthy interview by a skilled and seasoned immigration officer.

Senate Bill 90, passed in the 2006 session of the General Assembly and made effective July 1, 2006, requires a notification to ICE when a law enforcement officer has *probable cause* that an arrestee for a *criminal offense* is not legally present in the United States. During 2007 the Aurora Police Department processed 2,512 individuals and submitted 1,171 IAQs to ICE. ICE placed detainers on 24 percent of those individuals. So far during 2008, Aurora sent approximately 1,500 IAQs to ICE, resulting in detainers on 29.5 percent of those individuals.

Colorado State Patrol's Immigration Enforcement Unit

History behind the creation of the unit and what the unit does. Following recruitment and specialized ICE training, the State Patrol's Immigration Enforcement Unit began patrolling state highways in July 2007. The unit was created by the Colorado General Assembly following a number of traffic incidents involving suspected human smuggling.

Some of the incidents resulted in serious and fatal injuries to passengers who were being transported in seriously overloaded vehicles not designed for as many people as were being carried in them. Most did not have seats or safety belts. Vehicles were modified and showed serious mechanical defects and alterations that compromised the safety of passengers and other drivers. Drivers and passengers were determined to be in violation of federal immigration laws.

When the General Assembly created the IEU, it also passed statutes concerning human smuggling and trafficking, and IEU members enforce the state's relatively new smuggling and trafficking statutes.

The primary duty of Unit members is the enforcement of traffic laws. In the course of enforcing traffic laws, IEU troopers also enforce the state's human smuggling and trafficking laws.

Contrary to some impressions, the IEU is not the equivalent of a Colorado ICE. Its members only process aliens in the course of state highway traffic enforcement duties that are initiated by Colorado State Patrol members. The IEU does not process foreign nationals for other state or local law enforcement agencies and does not respond to other agencies when officers contact someone suspected of immigration violations.

During its first full year of operation, the IEU contacted 920 undocumented foreign nationals (children are not counted when accompanied by a parent). Of this number, 21 were aggravated felons; 188 were classified as criminal aliens. The IEU pursued 35 human smuggling operations.

IEU implementation issues. During a discussion about the work of the State Patrol's IEU, several implementation matters were reviewed. In addition to the reference already made in this report concerning proving the exchange of a "thing of value," two other situations were described. They are:

Capacity problems sometimes still occur in ICE-authorized facilities used to hold persons suspected of being in the country in violation of federal immigration law. This occurs when subjects are not suspects in state statute offenses. The IEU continues to work with sheriffs and ICE on the problem of occasional lack of capacity for the holding of aliens for ICE action.

Troopers report that some subjects being smuggled into the United States may also be victims of human trafficking but are unaware that they are being trafficked until a demand or additional demands are made upon arrival at their final destination, which is often not in Colorado. In this way, the crime of trafficking is regarded as a *destination crime*. Some individuals are unwilling to make claims that they are being trafficked.

El Paso County Sheriff's 287(g) Jail Authority

In 2006 Sheriff Terry Maketa sent a letter to the U. S. Department of Homeland Security requesting that 14 detention deputies be trained under the 287(g) program. His MOA was signed in 2008, and training of deputies followed in March of 2008. This authority is provided only for the Sheriff's jail operations.

The Sheriff sought the training for his people because inmate overcrowding is an issue in his jail, as it is for most agencies in Colorado. The Sheriff found that there was a continuous inmate population of approximately 130 illegal aliens with an average stay of approximately 54 days. Using their 287(g) authority, deputies conduct immigration processing. The jail now averages only 80 illegal aliens, with an average stay of approximately 41 days. This program overall has been a cost saving measure to El Paso County.

This program does have a negative effect on resources, however. To date, the El Paso County Sheriff's Office has used over 2,200 hours of staff time in processing criminal aliens. The county received no reimbursement from the federal government for these services. The cost per day to house an inmate without health issues or special management issues is \$40-42 a day. For those who have health issues or special needs, the cost can reach \$140 per day.

As of October, 2008 the El Paso County Sheriff's Office detention center 287(g) personnel had conducted 628 investigations of foreign born nationals. Of the 628 investigated, 223 or 36 percent were processed for removal. Sixty-four percent of the investigated foreign born nationals were not removed and were processed through the Colorado criminal justice system.

Other Law Enforcement Issues Concerning 287(g) Authority

A local law enforcement agency's having 287(g) authority produces other issues, in addition to the experience of El Paso County that saved housing costs at the significant expense of deputy time. Aurora Police Chief Dan Oates emphasized to Working Group members that federal

immigration enforcement authority at the local level may result in a serious barrier to the ability of local police and deputies to assist crime victims and to solve and prosecute serious crimes. When local police in communities with significant populations of immigrants -- whether or not they are residing legally in the United States -- are perceived as having immigration law enforcement authority, non-English speaking witnesses to criminal events sometimes will not cooperate in investigations. Immigrant witnesses simply will not come forth or will not participate in investigations, leading not only to unsolved crime but also to frustrated victims of crime. Chief Oates and other local law enforcement leaders in Colorado maintain that 287(g) authority creates more problems than it solves when dealing generally with crime, and many do not seek such authority.

Even when 287(g) authority at the local level is limited to deputies in county jails, the requisite federal training takes them away from their other duties, sometimes leaving sheriffs with additional resource problems to solve while training takes place.

To make it fiscally viable ICE generally has limited 287(g) training to its facility in South Carolina and in other east coast locations. The relevant computer systems used in instruction are located there and are difficult to move around in a mobile training environment. Because agencies with 287(g) detention authority are finding this authority helpful, there is great national interest in receiving training. To date, all the available future training spots for the 287(g) program are reserved. The federal government assesses a fixed budget to conduct the training throughout the federal fiscal year. ICE may agree, and has agreed in the case of CSP's IEU training, to travel and conduct the training elsewhere, however. ICE headquarters makes the final decisions about when and where training will be conducted.

Additional Prosecution Issues

The material witness dilemma. In a Jefferson County smuggling case, two defendants were difficult to prosecute because all the witnesses disappeared, having fled the area or returned to their country of origin. Lack of witnesses makes the state prosecutions of the laws created by SB 206 and 207 very difficult and costly to pursue.

Smuggled passengers are seen as witnesses under Colorado law. Colorado has no witness retention provision in its statutes, and prosecutors often lose access to smuggled passenger witnesses without it. Currently, most occupants of suspected smuggling operations wind up in ICE immigration proceedings. They can be given a bond amount by ICE officials or an immigration judge and can bond out from immigration detention facilities, be removed, or housed in another area of the country. ICE cannot hold individuals for the furtherance of a state criminal prosecution. ICE's federal mandate is to house and remove aliens under final orders of removal or deportation as expeditiously as possible.

In federal cases and under federal law, a material witness statute is available to prosecutors. In these cases material witnesses can be held for three days before having to appear before a judge for a determination of immigration status. Legal representation is provided during these proceedings. There are limitations to witness holds, and alternatives to detention are sought to alleviate as many issues as possible regarding the detention. Creation of a similar state material witness statute might be beneficial for prosecuting these types of state cases. A material witness statute would allow investigators to hold witnesses for a brief period of time to allow for a

formal deposition. Arizona has enacted a state material witness statute that allows witnesses to be held for a certain period of time in the local jail. Regardless of the proposed benefits, state and federal constitutional issues must be addressed and evaluated before considering material witness provisions in Colorado.

There are non-immigrant visas available to victims of trafficking and of violent crimes. These visas have varying eligibility requirements but generally require that the victim cooperate with law enforcement in the investigation and prosecution of crime. These visas are adjudicated by the United States Citizenship and Immigration Services (USCIS).

False identities and accurate immigration status information. A crime that is committed disproportionately but not surprisingly by illegal aliens is the crime of giving false identifying information. More than half of the cases filed in Jefferson County for providing false information are committed by people who are in the country illegally.

A defendant may have a prior criminal history under a different name and active arrest warrants under yet another name. Proper proof of identity can be obtained through a CBI fingerprint comparison. More than one alias is common, and the multiple aliases often can be common names. In some instances, the offender's actual name may never be known. The most common charges are forgery, impersonation and identity theft. Any previous municipal court convictions that did not include an arrest are not entered into the NCIC/CCIC system, leaving prosecutors unaware of earlier convictions.

For a local prosecutor, the immigration status of any arrestee is confirmed only when an ICE detainer is placed on the subject. Prosecutors are not privy to this information prior to the detainer. Timing of detainer placements is inconsistent. When ICE puts a hold on a defendant, the prosecutor has no other immigration information on the individual, other than the existence of a hold. The prosecutor does not know whether the defendant will be deported. This lack of knowledge for a prosecutor is not due to the withholding of information by ICE, but instead to the separate administrative process that must be followed by ICE and the federal immigration system in order to preserve a person's right to due process.

Bonding issues. A defendant's immigration status is never a factor in the filing of charges, but immigration status is often a factor in the setting of bond. The standard bond argument is that a person without ties to the community is more likely to flee if released from custody because he lacks verifiable ties to the community. In the absence of an ICE hold, prosecutors do not argue the arrestee's residency status in an effort to obtain a higher bond.

In Colorado, bonding out is also an issue. Illegal aliens who are eligible to bond out may ask for deportation. ICE has no choice but to take illegal aliens who are free on criminal charges into custody and process them for repatriation. If a defendant has been identified as being illegally present in the United States and is involved in removal proceedings, he can be removed to his country of citizenship, state criminal charges notwithstanding. Because the defendant was deported, the bond is usually returned to the family or to whoever posted it. The criminal case that was being pursued is not satisfied. The offender is no longer present for court, so a warrant is issued in Colorado.

Language issues and cultural misunderstandings. Cultural differences can play a role in offender behavior, and our criminal justice system can be confusing to foreign offenders. For example, a defendant is informed that his bond is \$2,000. This is interpreted to mean that his fine is \$2,000, which he then pays. He thinks the case is concluded. Due to his lack of understanding of the system, the accused fails to appear for trial, and warrants are issued for failing to appear.

Justice system information sharing. Communication among criminal justice agencies, jurisdictions and the municipal courts can be problematic. When someone receives a summons into municipal court in Colorado, there is no system currently in place to make this information known state wide. If an offender is given a summons, without fingerprints, no record of the arrest exists in CCIC. If an offender provided a false name in the municipal charges, nothing links him to his real name because fingerprints are the link in the criminal history. The motor vehicle division's system is the only state system that contains the municipal traffic violation conviction information.

The cost to integrate all municipal data systems with the state system would likely be prohibitive, but a system called Coplink is being operated on a small scale in Colorado. Currently, Jefferson and Broomfield counties are the only ones with an operational Coplink system. Coplink is not a database but a software program that allows agencies to search for common threads in criminal investigations. The expansion of Coplink to encompass approximately 80 percent of Colorado's population is imminent. Coplink is viewed as a potential statewide solution for information sharing of arrest and incident data among law enforcement agencies. It remains in a limited, demonstration phase. Whether it can become a viable resource or not remains to be seen.

DOC's Incarceration Experience

The Colorado Department of Corrections (DOC) reports no current operational problems relating to the nationality of inmates. By the time inmates are released by DOC, they have been thoroughly identified through cooperative efforts with ICE. All of the hard work of identifying, and prosecuting the offenders has been accomplished.

Colorado has approximately 23,000 people incarcerated in state facilities. Foreign born nationals represent approximately 8 percent, or 1,840 prisoners. The foreign born offenders come from over 70 different countries.

DOC receives approximately 40 inmates a day, and ICE is contacted if any inmate lists a foreign place of birth. DOC case managers continually review inmate populations for foreign born individuals whose identities have not been confirmed. If DOC staff identify a potential client for ICE, DOC contacts ICE. When an immigration violator is ready to be released from the DOC system, ICE is there to pick them up.

The Discussion and Recommendation Phase of the Working Group

In the final meetings of the Working Group, a large number of recommendations, statements and issues were crafted. Not all members of the Working Group agreed unanimously on all recommendations and statements. Only those that were passed by majority votes are shown here. For actual vote tallies, please consult meeting minutes for the final two meetings. The official records including minutes and vote tallies can be found on the Working Group's web site, cdpsweb.state.co.us/immigration. In addition, members who wish their views be explained in detail submitted statements that are also attached to this report as appendices.

LAW ENFORCEMENT ISSUES

Law Enforcement Recommendation 1

For those local and state law enforcement agencies that have determined that they want to pursue 287(g) powers, the state requests that ICE make the training available to those agencies within a reasonable time to accommodate the needs and interests of Colorado law enforcement.

- A. The federal government should provide supplemental funding for local authorities to assist with the cost of the training, including overtime to backfill the positions of those officers that are away taking the training.
- B. ICE should expand its ability to conduct 287(g) training in Colorado, rather than requiring Colorado agencies to send officers out of state.
- C. 287(g) training should be expanded for detentions and enforcement, depending on the request of the Colorado law enforcement agency

Law Enforcement Recommendation 2

The federal government should significantly expand the detention capacity and all necessary support services and staff available for Colorado detainees.

Law Enforcement Recommendation 3

ICE should revisit its policies regarding appropriate standards for local jails to qualify as an ICE detention facility

- A. ICE should not impose any more stringent requirements for the housing of illegal aliens than are mandated for the constitutional detention of United States citizens (statement applies to criminal and civil detainees).

Law Enforcement Recommendation 4

The federal government should fully compensate local authorities after all local charges have been resolved for any costs associated with arrestees being detained for ICE at all stages of a proceeding including medical, food and housing expenses.

Law Enforcement Statement and Issue 5

Simply increasing the number of law enforcement officials with enforcement authority under section 287(g) without a significant increase in detentions capacity will **not** result in a meaningful strategy to ameliorate the problem. The impact on the entire infrastructure, including detention facilities, attorneys, courts and staff must be considered, in a totality approach to solving the issues.

Law Enforcement Statement and Issue 6

Law enforcement authorities have a duty to support and defend the constitutional rights of **all** persons.

- A. Officers must build trust with all elements of the community, including immigrants. This engenders respect for the law and promotes the cooperation of victims and witnesses at every stage of an investigation and prosecution.
- B. Bias based policing and racial profiling can never be tolerated within the law enforcement community.

Law Enforcement Recommendation 7

The development of a national identification card based on biometric technology such as fingerprints or DNA would be helpful to law enforcement.

Law Enforcement Recommendation 8

The Peace Officers' Standards and Training (P.O.S.T.) Board should develop a curriculum and training to assist local police and sheriff's deputies in determining probable cause regarding a person's place or country of origin and immigration status (as contemplated by SB 06-90, §§29-29-101 *et seq.*, CRS).

Law Enforcement Statement and Issue 9

State and local law enforcement resources are stretched beyond capacity and cannot absorb additional unfunded mandates to deal with the federal immigration problem.

- A. Public funding policies should prioritize public safety needs

Law Enforcement Statement and Issue 10

Because illegal immigrants are as likely as any other group to commit crimes, tragic and egregious activity by a small segment of the illegal immigrant community will continue to occur in Colorado. The problem of illegal immigrants causing such tragedies will not be fully

addressed until such time as the national problems of illegal immigration are resolved by the federal government.

Law Enforcement Recommendation 11

ICE has a national policy of prohibiting its local officials in any jurisdiction, including Colorado, from engaging directly and openly with the local community and local media about its many challenges in enforcing federal immigration law. This policy should be ended immediately. Public discourse directly with ICE about its capacities and limitations is crucial for Colorado to fully partner with the federal government to solve our immigration problems.

COMMUNICATION ISSUES

Communications Recommendation 1

Communication between ICE and local law enforcement, prosecutors and the court is inconsistent regarding detention and deportation (voluntary or otherwise). ICE should not deport any individual with pending state felony, misdemeanor or traffic charges without notifying both the arresting agency and the prosecuting attorney.

- A. If necessary, federal law should be revised to prohibit deportation while state charges are pending.

Communications Recommendation 2

ICE should report to local law enforcement, prosecutors and the court on the ultimate disposition of any individual against whom ICE has lodged a detainer during a state criminal prosecution or detention. Currently ICE's victim notification system is only available for victims of felony crimes to learn the status of an immigration case involving the perpetrator.

Communications Recommendation 3

ICE should provide training for state and municipal prosecutors, judges, law enforcement and the defense bar that would contribute significantly to a more complete understanding of ICE's policies and procedures

Communications Recommendation 4

CBI should continue to explore and, when feasible, implement auto-generated flags to reflect the non-U.S. birthplace or country of origin of individuals within its database.

Communications Statement and Issue 5

This working group supports ICE's efforts to dedicate additional resources to the IAQ system to expedite inquiries from local law enforcement

Communications Recommendation 6

When submitting an inquiry to the IAQ system, local law enforcement should use the “narrative” field to distinguish case priorities.

Communication Recommendation 7

Colorado should vigorously advocate to be designated as a new site for the Immigration and Customs Enforcement’s (ICE’s) “Secure Communities” program, which allows state and local law enforcement authorities to automatically check fingerprints of arrestees against national fingerprint databases. Our congressional delegation should urge the Department of Homeland Security to make implementing this program in Colorado a top priority.

LEGISLATIVE ISSUES**Legislative Recommendation 1**

Additional state legislative guidance is needed in determining appropriate sentences and the extent of the court’s authority when dealing with illegal immigrants accused or convicted of state crimes.

- A. What are appropriate factors to consider when setting a bond?
- B. Is someone who is in the country illegally and is convicted of a crime eligible for probation?
- C. What is an appropriate sentence for both misdemeanants and felons who are in the country illegally and are convicted of a crime?

Legislative Recommendation 2

Colorado should enact a “material witness” statute, similar to the federal statute and must address the following issues:

- A. How long may an individual be detained?
- B. Where would the individual be detained?
- C. Who pays the cost of detention?
- D. What due process rights inure to the detainee?
- E. Is there a right to counsel and, if so, at whose expense?

Legislative Recommendation 3

Colorado should revise its “human smuggling” law to mirror federal statutes by deleting the requirement of proving a “thing of value” for payment.

Legislative Recommendation 4

Colorado should revise its “human trafficking” statute to mirror federal statutes by

- A. Amending the state statute to align subsections of trafficking minors and trafficking aliens to be the same class of crime.
- B. Addressing the definition of the age of a minor. Currently there is disparity between the state and federal statutes.
- C. Compare state statutory language of Coercion of Involuntary Servitude to trafficking statutory language. Align federal and state language.

Legislative Recommendation 5

The Immigration Working Group recommends a comprehensive revision of asset forfeiture laws in Colorado to deter criminal activity, including those committed by illegal aliens. Forfeiture proceeds disbursement should be prioritized to include investigation, apprehension, detention, and deterrence of criminal activities, including those committed by illegal aliens, as well as cost recoveries for bringing these civil actions.

FEDERAL RECOMMENDATIONS

Federal Recommendation 1

The U.S. Congress needs to examine the complexities of current immigration laws and the impact of these laws on policies and practices.

Federal Recommendation 2

The U.S. Congress needs to set policy for the nation regarding the commission of crimes by illegal aliens.

Federal Recommendation 3

Congress should adopt the recommendations contained in the Western States Governors' Association 2006 "Policy Resolution on United States—Mexico Border Security and Illegal Immigration" and Colorado House Joint Resolution 06-1023. The full resolutions can be found as appendices at the end of this report.

Federal Recommendation 4

Congress should appropriate significant additional resources to ICE to implement effective detention, removal and training functions in support of local law enforcement.

Federal Recommendation 5

The federal government should provide supplemental funding to Colorado to provide for a useful state "material witness" statute (applicable to human smuggling and human trafficking prosecutions) for sheltering, housing or detention of victims and witnesses so that admissible depositions may be conducted.

Federal Recommendation 6

The federal government should provide supplemental funding to Colorado to offset the costs of 287(g) training for local law enforcement as well as for overtime and compensation time associated with the training.

Additional Recommendations

As has been noted, Working Group meetings were open to the public. A member of the public who has extensive law enforcement agency experience submitted an additional recommendation that was voted on by members. In discussing the recommendation, members noted that the recommendation is worthy of additional study, including an examination of potential fiscal impact. Here is the recommendation:

“Stop giving multiple driver licenses to the same person who uses different names. Compare driver license applicant fingerprints with each other. If legal status were correctly verified at the time of license or ID card issue, employers would only need the license or ID card to document a job applicant’s legal status. This is consistent with secure and verifiable identification requirements of state law.”

Here is an explanation from the Department of Revenue about the foregoing recommendation from the public:

The Division of Motor Vehicles points out that it has taken a number of steps over the past eight years to prevent individuals having driver's licenses or IDs with multiple identities.

They include:

1. Prior to issuance of a renewal document, the MV clerk reviews photos from previous issuance to assure that the person applying is the same as the previous applicant.
2. Any renewal applicant must match his/her print to the one on file prior to issuance.
3. All applicants who are or claim to be first time applicants are run through the facial recognition system. If there is a match to another identity, the DL/ID is not issued.
4. All applicants for first time licensure are run through the Social Security On-line verification system, to assure that name, gender, date of birth match the federal database.
5. Legislation in 2001 provided that a Colorado resident can have a Driver's License or a State-issued Identification Card, but not both, which prevents sharing of identities. While the department did not have funding to cleanse its database in 2002 prior to beginning the use of the facial recognition system, we have stopped fraudulent issues on a very regular basis. We believe that it is most appropriate to run the fingerprints on file against each other as a means by which to provide a double-check on duplicate identities. However, the amount of time that it will take to compare the prints with any accuracy will be significant. This is the reason that the department determined that facial recognition was a better solution when it was originally adopted.

Additional Prosecution Recommendation from First Judicial District Attorney Scott

Storey: “I think that an additional State prosecution issue ... is the need to study the dispositions and sentences of illegal aliens who are prosecuted for committing felony offenses, and a determination regarding the legality of probation and community correction sentences.”

Conclusion and Final Comments

The tragic incidents leading to the formation of this panel and to the discussions of its members angered the community and devastated families. The incidents involved drivers who were living in Colorado and in the United States in violation of federal immigration laws, and one of them involved a driver whose criminal history demonstrates a flaunting of numerous state and local laws and federal immigration requirements, resulting in many contacts with law enforcement. His repeated contacts with officers led some citizens to portray him as an offender who continued to “fall through the cracks” of the justice system. While it is tempting to summarize his case that way, the gaps in the floors are located in several levels of a building, resulting in a complex challenge for finding solutions.

Despite the challenge of finding ways to close gaps in a multi-level system, the Working Group identified several potential improvements that might help avoid future incidents involving some of the same systemic issues. They can be partially summarized in the following statements:

- The Colorado General Assembly can make some adjustments to statutes concerning material witnesses, human smuggling and human trafficking to help law enforcement officers and prosecutors.
- Federal, local and state agencies can re-engineer some features of their existing data systems to enhance communication and more expeditiously share information for officers on the street. It is important to note that existing data systems were developed for different purposes and are not inherently defective.
- Sheriffs may consider 287(g) authority for their detention operations in order to more easily confirm the immigration status of detainees as well as to save housing costs for aliens who don't need to be held in a jail but should be turned over to federal authorities.
- The United States Congress should more clearly delineate expectations regarding enforcement of federal immigration laws and provide appropriate funding to meet those expectations.

As the situation now exists, Colorado's criminal justice system cannot compensate for inadequate federal policies and practices. To expect state and local agencies to change this condition is unrealistic. Fostering and funding a stronger partnership among federal, state and local law enforcement is a necessary prelude to effectively addressing this pressing issue.

Appendix A

Colorado Legal Services

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December 15, 2008

Mr. Peter Weir
Executive Director
Colorado Department of Public Safety
700 Kipling St.
Lakewood, CO 80215

Re: Comments re Immigration / Public Safety Working Group
a.k.a. Minority View

Dear Director Weir,

As we discussed at the last meeting of the Immigration / Public Safety Working Group, held Nov. 25, 2008, I am writing to articulate some of the opinions I would like to be included in the Minority View portion of the final report.

First, I commend your office and the State of Colorado for dedicating considerable effort and resources to tackling the difficult issues that were before the Working Group. It is impressive indeed that some three dozen individuals committed long hours to participating in the meetings held in October and November.

I came to the working group as an attorney who represents trafficking and other crime victims, immigration detainees and low-wage workers. So I certainly bring that perspective to the views I expressed at meetings and will express in these comments.

That is not to say that I always disagreed with the Majority of the Working Group; on many occasions I agreed wholeheartedly with their conclusions. I commend the Working Group for taking a strong stand against racial profiling. I agree with the majority that law enforcement must strive to earn the public's trust. Along with the majority, I certainly recognize that the federal immigration system is enormously problematic, both in terms of the complicated laws and the disjointed system that has evolved.

In terms of recommendations, I support several approaches that the Majority appeared to disfavor. Since I also made a considerable commitment to the Working Group, and participated in good faith, I believe these should be presented to the public, the Governor and others reading the report, whether as a Majority or Minority view. These comments are meant to supplement, not replace, any comments that I made on the list of discussion topics that were collected after the meetings of Nov. 17 and 24, 2008.

1. Sec. 287(g) Authority: I agree with the Working Group members who expressed concerns about seeking INA § 287(g) authority for local law enforcement agencies. I believe these individuals wisely recognized that private individuals may feel reluctant to report crimes if they viewed their local police department as an arm of Immigration and Customs Enforcement (ICE). However I also believe that establishing § 287(g) authority in jails will create the same perception in local communities, i.e. that many community members will not know the distinction between local jails and local law enforcement and will see them all as an extension of ICE. I further object for other reasons:

a. Unfunded Mandate: Having state and local authorities enforcing federal immigration laws is basically an unfunded mandate. For example, according to the Memorandum of Agreement between the Colorado State Patrol and ICE signed by Gov. Ritter on March 29, 2007, “[p]articipating LEA personnel will carry out designated functions at the LEA’s expense, including salaries and benefits, local transportation, and official issue material.” While ICE will provide the instructors and training materials under this agreement, the vast majority of the expenses will be borne by the LEA assuming 287(g) responsibilities. These resources would be better utilized toward responding to incidents of violent crime in the communities, many or most of which are unrelated to immigration. As taxpayer, I would rue the day when a state trooper or other official acting under 287(g) authority is occupied with detaining a non-violent immigrant arrestee while the proverbial axe murderer is fleeing in the next county.

b. Efficiency: The Working Group frequently discussed the issue of a “bottleneck” in the federal immigration enforcement system. The point was made that more and more arrests will not keep communities safe if ICE can only process a limited number of the arrestees. What the Working Group did not appear to consider is that beyond the detention space bottleneck is the fact that a large portion of immigration removal cases must be reviewed by a federal Immigration Judge. Immigration Courts, operated by the Department of Justice’s Executive Office for Immigration Review, have jurisdiction over most removal (deportation) cases. As law enforcement agencies with 287(g) authority cast a wider net toward individuals present without authorization, the Immigration Courts will get more and more backlogged. In particular, the Immigration Court operating at the GEO/ICE Detention Facility in Aurora will experience inordinate delays in processing cases. Cases involving the most violent or otherwise dangerous individuals will be stuck in the bottle-neck along with those of long-term residents who have lived here for decades, have families and have never committed any act of violence.

I would propose that, instead, the detention system, including the GEO/ICE Immigration Court, be reserved for those individuals deemed to be a danger to the community. Those cases would then be processed more rapidly. Alternatives to detention, such as ankle bracelets (the “ISAP” system) should be made available to nonviolent individuals.

c. Due Process: The Working Group did not seem to acknowledge that many individuals who are detained by ICE have defenses to removal or could even be U.S. Citizens. Just as the Working

Group recommends increasing detention capacity in the state, it should accept the concomitant responsibility to protect the due process rights of those detained. These individuals cannot simply be rounded up and herded out of the country. They have established due process rights under federal and state laws. The only difference is that in the federal immigration system, which classifies removal as a civil process, there is no public defender system in place to ensure that these defendants, called “respondents,” receive due process. I propose that the state dedicate resources to a defender system that would ensure that due process is provided to noncitizen immigration respondents. It is morally and legally the flip side of the pro-detention coin.

d. Humanitarian concerns: As unpopular as this view may be, detained immigrants are human beings, most with families, homes, careers, places of worship and long-term ties to the communities. Many are present in the U.S. simply to provide for their families, which is not possible in their countries of origin. It is brutal to tear these individuals away from their jobs, families and communities and attempt to summarily expel them when they are not a threat to public safety. As stated, the detention system should be reserved for those deemed to be truly a threat to public safety.

2. State Laws: At the session of November 13, various state laws were reviewed, particularly those from the 2006 General and Special Sessions. The Working Group discussed at length the state law criminalizing human smuggling, Colo. Rev. Stat. § 18-13-128. It was quite startling to me that some 50 cases involving state smuggling charges have been filed, and only a single state human trafficking case has been prosecuted. Furthermore, other laws aimed at punishing exploitation have not been utilized even once. Specifically, representatives from the Colorado District Attorneys’ Counsel stated on November 13 that there have been no prosecutions under Colo. Rev. Stat. § 18-3-207, which criminalizes the extortion of immigrants, or under Colo. Rev. Stat. § 18-13-129, prohibiting the coercion of involuntary servitude.

a. Protect individuals from exploitation, including extortion and coercion of involuntary servitude: I certainly understand that smuggling situations can result in exploitation of immigrants and dangers on the highways, as unsafe vans packed beyond capacity travel across our state. However I would ask why essentially the only prosecutions have involved smuggling, rather than directly targeting exploitation.

If state and local authorities wish to establish trust with local communities, they will work to educate the public and enforce laws that prevent exploitation, not just smuggling, including the above extortion, human trafficking and coercion of involuntary servitude laws. A single-minded focus on smuggling will suggest to immigrant communities that law enforcement is not interested in protecting them, only deporting them.

b. Support crime victims by assisting with U-visa and T-visa certifications: Under federal immigration laws, immigrant victims of Human Trafficking and certain violent crimes, who have assisted law enforcement in investigating these crimes, may be eligible to apply for a visa. The U-visa is available to victims of various violent crimes, including Human Trafficking. The T-visa is available exclusively to victims of Human Trafficking. These visas are not a “reward” for testifying against a perpetrator, or a *quid pro quo* providing a visa in exchange for testimony. Rather, these visas are a means of protecting victim witnesses so that their situation is stabilized and they may participate in an investigation or prosecution without fear of removal. In some occasions, these victim witnesses need law enforcement to certify that they have cooperated with an investigation. These law enforcement agencies would not

be granting a visa, they simply would be verifying that the individual was a victim of a crime and cooperated with law enforcement.

On at least two occasions I proposed that the Working Group, as a recommendation, encourage law enforcement agencies to support victim witnesses who report crimes by assisting in the U-visa or T-visa process. Yet this proposal was never included in the discussion points distributed on November 17 and 24th.

I would still submit that law enforcement agencies would better earn the trust of their communities, and would better be able to fight crime and ensure public safety, if they supported immigrants who reported crimes in the visa process. These individuals would be far more likely to report crimes if they did not live in fear that the police intended to deport them.

3. The Hernandez situation / individuals driving without licenses: The Working Group's discussion regularly ranged far from the incidents that led to its creation: two traffic crashes, including a horrific crash that took three lives, in Aurora. (Oct. 20, 2008 Press Release, Gov. Ritter). Some members of the Working Group wisely pointed out that the situation reflects an issue of unlicensed drivers, rather than "illegal immigrants."

I agree with this assessment, and would argue that U.S. Citizen unlicensed drivers also cause horrific crashes, that just do not gain as much press attention. But I also would maintain that some unauthorized immigrants wish to be licensed drivers, and cannot be under Colorado laws. If they had permission to drive, they would be more likely to be insured, their photos, fingerprints and other identifying information would exist in state databases, they would have to pass written and road tests and, consequently, would be safer drivers who could be held accountable for their actions.

For that reason, I researched the Utah Driving Privilege Card, established in 2005 in Utah. Under Utah laws, the card cannot be considered an ID by state government. It simply allows the bearer to drive in Utah. In order to obtain that card, the driver must demonstrate Utah residence, demonstrate completion of a driver safety course, furnish a photograph, proof of name, date and place of birth, and proof of a social security number or individual taxpayer identification number.
<http://publicsafety.utah.gov/dld/drivingprivilegecard.html>

Even in Utah, which could not be considered a "pro-immigrant" state, legislators recognized the public safety value of the Driving Privilege card. Newspaper editorials supported its continuation.¹ A report by the Legislative Auditor General determined that 76 percent of drivers holding the Driving Privilege Card had auto insurance, almost as high as the licensed population.²

¹ See, e.g., "Driving privilege: Utah should not repeal cards for undocumented drivers," Salt Lake Tribune, Feb. 2, 2008.

² "Follow-Up of Sample Matching Driving Privilege (DP) Cards to Vehicle Insurance," Office of Legislative Auditor General, January, 2008, found at http://le.utah.gov/audit/08_bilr.pdf <last accessed Dec. 15, 2008>.

Although the Working Group almost unanimously opposed the idea of considering the establishment of a Driving Privilege Card, I would submit this as a Minority Recommendation. Of all the far-ranging recommendations -- increased detention, increased § 287(g) authority, increasing access to ICE databases -- the concept of a Driving Privilege Card is most relevant to the Francis Hernandez situation. If he had had the option of obtaining a Driving Privilege Card he may well have been stopped long before the tragic crash.

Thank you in advance for including these "Minority Views" in the Working Group report. Please feel free to contact me if you have any questions or concerns.

Sincerely,

Patricia Medige
Senior Attorney
pmedige@collegalserv.org

Appendix B

NOTE: The comments below and appearing in blue were made by Working Group member Amber Tafoya using draft minutes that were made available to members. Her comments are included here because they represent an alternative viewpoint to some, but not all, recommendations and issues cited by the full membership.

Immigration Working Group Recommendations

Law Enforcement Issues:

1. The capacity for additional 287(g) training for interested local law enforcement authorities should be made available by ICE within a reasonable time to accommodate the needs / interests of Colorado law enforcement. *Alternative language suggested by Mr. Suthers: For those local and state law enforcement agencies that have determined that they want to pursue 287(g) powers, the state requests that ICE make the training available to those agencies.*

Agree to alternate language

- a. The federal government should provide supplemental funding for local authorities to assist with the cost of the training, including overtime.

Disagree: These powers should remain separate. ICE functions should not be carried out by local law enforcement. It will damage community policing and community trust.

- b. ICE should expand its ability to conduct 287(g) training in Colorado, rather than requiring Colorado agencies to send officers out of state.

Disagree: The level of intense training required for competency in this area requires special equipment and computers best available at the ICE facility.

- c. 287(g) training should be expanded for detentions and enforcement, depending on the request of the Colorado law enforcement agency.

Disagree: Expansion of 287(g) authority will hurt community policing and actually make communities less safe as immigrants will be fearful to report crimes or serve as witnesses.

2. The federal government should significantly expand the detention capacity and all necessary support services and staff available for Colorado detainees.

Disagree: The federal government should focus its resources on fixing the broken immigration system.

3. ICE should revisit its policies regarding appropriate standards for local jails to qualify as an ICE detention facility.

Agree

- a. ICE should not impose any more stringent requirements for the housing of illegal aliens (both the civil or non-criminal aliens and the criminal aliens) than are mandated for the constitutional detention of United States citizens.

Disagree: People being detained for civil reasons, especially the elderly, pregnant and nursing mothers, and children should have different housing standards than those given for US citizens being held for criminal law violations. The Constitutional requirements for the two groups are different. Additionally, violations to the civil population are not addressed as easily as are violations for criminal detainees and therefore additional protections are warranted.

4. The federal government should fully compensate local authorities after all local charges have been resolved for any costs associated with arrestees being detained for ICE at all stages of a proceeding including medical, food and housing expenses.

Agree

5. Increasing the number of law enforcement officials with enforcement authority under section 287(g) without a significant increase in detention capacity will not result in a meaningful strategy to ameliorate the problem. *(Impact on entire infrastructure, including detention facilities, attorneys, courts and staff must be considered)*

Agree

6. Law enforcement authorities have a duty to support and defend the constitutional rights of all persons.

Agree

- a. Officers must build trust with all elements of the community, including immigrants. This engenders respect for the law and promotes the cooperation of victims and witnesses at every stage of an investigation and prosecution.

Agree

- b. Bias based policing and racial profiling can never be tolerated within the law enforcement community.

Agree

7. The development of a national identification card based on biometric technology such as fingerprints or DNA would be helpful to law enforcement.

Agree: However, there would be Constitutional and civil rights concerns.

8. The Peace Officers' Standards and Training (P.O.S.T.) Board should develop a curriculum and training to assist local police and sheriff's deputies in determining probable cause

regarding a person's place or country of origin and immigration status as contemplated by SB 06-90 (C.R.S. 29-29-101 et. Seq.)

Agree

9. State and local law enforcement resources are stretched beyond capacity and cannot absorb additional unfunded mandates to deal with the federal immigration problem.

Agree

- a. Public funding policies should prioritize public safety needs.

Agree

10. Because illegal immigrants are as likely as any other group to commit crimes, tragic and egregious activity by a small segment of the illegal immigrant community will continue to occur in Colorado. The problem of illegal immigrants causing such tragedies will not be fully addressed until such time as the national problems of illegal immigration are resolved by the federal government.

Agree

11. ICE has a national policy of prohibiting its local officials in any jurisdiction, including Colorado, from engaging directly and openly with the local community and local media about its many challenges in enforcing federal immigration law. This policy should be ended immediately. Public discourse directly with ICE about its capacities and limitations is crucial for Colorado to fully partner with the federal government to solve our immigration problems.

Agree

12. Given the limited resources and need to prioritize functions the CSP Immigration Enforcement Unit should focus primarily on the apprehension of criminal aliens, and not the detection of human smuggling and human trafficking.

Disagree: The unit was designed by the legislature to combat human trafficking and human smuggling. The priority should remain with these official mandates. Enforcement of immigration law and apprehension of criminal aliens would take away from the department's mission of public safety on the state's highways.

- a. The statute should be expanded (or a new statute presented) specifically addressing criminal aliens (undocumented foreign nationals) who have committed criminal violations in Colorado.

Disagree: See reasoning above. This responsibility belongs to the federal government and the Immigration and Customs Enforcement agency.

- b. Should the statute be expanded or a new state presented specifically addressing criminal aliens (undocumented foreign nationals who have committed criminal violations in Colorado.

Disagree: See reasoning above. This responsibility belongs to the federal government and the Immigration and Customs Enforcement agency. Criminal aliens should be treated the same as all

other criminal defendants. It takes away from valuable and limited criminal justice resources to focus on this population with particularity.

Communication:

1. Communication between ICE and local law enforcement, prosecutors and the court is inconsistent regarding detention and deportation (voluntary or otherwise). ICE should not deport any individual with pending state felony charges without notifying both the arresting agency and the prosecuting attorney.

Agree with notification to defense counsel and/or public defender added in.

- a. If necessary, federal law should be revised to prohibit deportation during the pendency of state felony charges, absent the consent of the prosecutor.

Agree: Deportation should not be used in lieu of the criminal judicial process.

2. ICE should report to local law enforcement, prosecutor and the court on the ultimate disposition of any individual against whom ICE has lodged a detainer during a state criminal prosecution or detention. ICE's victim notification system is available for victims of felony crimes to learn the status of an immigration case involving the perpetrator.

Agree

3. ICE should provide training for state and municipal prosecutors, judges, law enforcement and the defense bar would that contribute significantly to a more complete understanding of ICE's policies and procedures.

Agree: Additional knowledge and training would be helpful.

4. CBI should continue to explore and, when feasible, to generate auto generated flags to reflect non U.S. birthplace or county of origin or individuals within its database.

Disagree: This could lead to bias. All criminal defendants should be treated equally regardless of country of origin. This could lead to due process and equal protection challenges that would be costly for the state to defend as citizens would be treated differently based on national origin.

5. This Working Group endorses ICE's efforts to dedicate additional resources to the IAQ system to expedite inquiries from local law enforcement.

Agree

6. When submitting an inquiry to the IAQ system, local law enforcement should use the "narrative" field to distinguish case priorities.

Agree

Legislative Changes:

1. Additional state legislative guidance is needed in determining appropriate sentences and the extent of the court's authority when dealing with illegal immigrants accused or convicted of state crimes.
 - a. What are appropriate factors to consider when setting a bond?
 - b. Is someone who is in the country illegally and is convicted of a crime eligible for probation?

- c. What is an appropriate sentence for both misdemeanants and felons who are in the country illegally and are convicted of a crime?

Agree

2. Should Colorado enact a material witness statute that would mirror the federal law?

Disagree: Colorado cannot treat victims and witnesses like criminals and remain true to the Victims Rights Act. Victims and witnesses need to be supported, not detained. Colorado should not enact a material witness statute. The state is struggling with a lack of resources to house those who have been convicted of crimes. We should not expand that to those who have committed no crime.

3. Colorado should revise its “human smuggling” law to mirror federal statutes.

Disagree: This would lead to widespread criminalization of employers, family and friends of immigrants who may not have their legal status at the time the ride was given or housing provided. This could lead to immigrant families being unable to locate housing if one of the family members lacks legal status. 8 USC 1324 is very broad and designed to be used at a US border or point of entry. It’s use in the interior of the country would be destabilizing to communities and to Colorado’s economy. 10% of Colorado’s workforce is undocumented.

- a. Delete the requirement of proving “thing of value.”

Disagree: Without the exchange of money or thing of value requirement in C.R.S. § 18-13-128(1) anyone who transports someone who is not lawfully present through the state of Colorado would be subject to criminal charges. This would criminalize a very broad segment of Colorado’s population, including construction contractors, family members and friends of immigrants and human service workers that are assisting families in need.

4. Colorado should revise its “human trafficking” statute to mirror federal statutes.

Agree: This would facilitate better collaboration between state and federal law enforcement officers.

- a. If a person is driving with a foreign driver’s license that cannot be verified, or without any valid identification, then that constitutes probable cause for an arrest and referral to ICE. (Congressman Tancredo)

Disagree: Adopting the recommendations of Congressman Tancredo within this report can only damage the credibility of the report. This recommendation would lead to biased based policing. It would lead to fear and distrust of law enforcement within communities of color. There is no requirement in the United States that a person show identification to law enforcement. This has been upheld by the Supreme Court in multiple decisions.

- b. Any repeat DUI violator who does not have a valid driver’s license or a foreign license that cannot be verified shall be taken into custody and held for up to 72 hours for referral to ICE. (Congressman Tancredo)

Disagree: DUIs should be handled under Colorado criminal law. All defendants should be treated the same regardless of immigration status. We cannot simply ship off people as was done with the Australian colony by England.

5. Colorado should vigorously advocate to be designated as a new site for the Immigration and Customs Enforcement’s (ICE’s) “Secure Communities” program, which allows state and local law enforcement authorities to automatically check

fingerprints of arrestees against national fingerprint databases. Our Congressional Delegation should urge the Department of Homeland Security to make implementing this program in Colorado a top priority.

Agree for Secure Communities Level One Priorities.

Disagree for Level 3 Priorities as this would include all convictions including very minor offenses which are in and of themselves not deportable offenses, but where the subject lacks immigration status. Efforts such as these should be limited and balance the need to remove dangerous criminals with the need to reform the immigration system as a whole before proceeding with draconian removal efforts.

6. The Immigration Working Group recommends a comprehensive revision of asset forfeiture laws in Colorado to deter criminal activity, including those committed by illegal aliens. Forfeiture proceeds disbursement should be prioritized to include investigation, apprehension, detention and deterrence of criminal activities committed by illegal aliens, as well as cost recoveries for bringing these civil actions.

Disagree: Asset forfeiture laws are prone to abuse, especially when used with a population that will not be present in the United States to defend the allegations and the seizure. There are also objections to using assets seized from one group for the apprehension and detention of another group such as the forfeiture of all arrestees property in order to apprehend others who are illegal aliens. This recommendation blurs the line between criminal and civil processes. This recommendation creates Constitutional and due process concerns and would lead to increased costly litigation for the State of Colorado.

Appendix C

NOTE: The following was copied from the ICE web site

November 19, 2008

Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens

U.S. Immigration and Customs Enforcement (ICE), the largest investigative agency in the Department of Homeland Security (DHS), is improving community safety by transforming the way the federal government cooperates with state and local law enforcement agencies to identify, detain and remove all criminal aliens held in custody. Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens will change immigration enforcement by using technology to share information between law enforcement agencies and by applying risk-based methodologies to focus resources on assisting communities remove high-risk criminal aliens.

Although ICE has made considerable progress over the past several years in identifying and removing criminal aliens through its Criminal Alien Program (CAP), a fundamental change in ICE's current approach is required to reach the goal of identifying and removing all aliens convicted of a crime. ICE currently screens all inmates referred to ICE who claim to be foreign-born at all federal and state prisons. In addition, any law enforcement agency can query the immigration status of an individual they encounter through ICE's Law Enforcement Support Center (LESC). CAP officers routinely visit or are dispatched to local jails requesting assistance and have contributed to the increased success of identifying and removing criminal aliens in custody.

In FY 2008, ICE identified and charged more than 221,000 aliens in jails for immigration violations – more than triple the number charged just two years ago. Leveraging integration technology that shares law enforcement data between federal, state and local law enforcement agencies, ICE is now able to expand coverage nationwide in a cost effective manner. Interoperability between the Federal Bureau of Investigation's (FBI's) Integrated Automated Fingerprint Identification System (IAFIS) and DHS' Automated Biometric Identification System (IDENT) will help ICE and local law enforcement officers positively identify criminal aliens in prisons and jails.

Given that a nationwide jail/prison reporting system does not exist to determine the total number of criminal aliens in the United States, ICE extrapolated from various sources and estimates that about 300,000 to 450,000 criminal aliens who are potentially removable are detained each year at federal, state, and local prisons and jails. Criminal aliens who are potentially removable include illegal aliens in the United States who are convicted of any crime and lawful permanent residents

(such as holders of a U.S. Permanent Resident Card) who are convicted of a removable offense as defined by the Immigration and Nationality Act (INA).

Strategic Goals for Secure Communities

ICE has delineated four key strategic goals for the Secure Communities plan:

- **Strategic Goal 1** – Identify and process all criminal aliens amenable for removal while in federal, state, and local custody;
- **Strategic Goal 2** – Enhance current detention strategies to ensure no removable alien is released into the community due to a lack of detention space or an appropriate alternative to detention;
- **Strategic Goal 3** – Implement removal initiatives that shorten the time aliens remain in ICE custody prior to removal, thereby maximizing the use of detention resources and reducing cost; and
- **Strategic Goal 4** – Maximize cost effectiveness and long-term success through deterrence and reduced recidivism.

The following three levels are illustrative of the plan’s risk-based approach. These levels will be used to allocate appropriate resources to identifying and determining the immigration status of aliens arrested for a crime that pose the greatest risk to the public.

- **Level 1** – Individuals who have been convicted of major drug offenses and violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
- **Level 2** – Individuals who have been convicted of minor drug offenses and mainly property offenses such as burglary, larceny, fraud, and money laundering; and
- **Level 3** – Individuals who have been convicted of other offenses.

Ensuring the identification and expedited removal of so many criminal aliens on an ongoing basis will require a sustained effort. The cornerstone of the plan is to increase state and local partnerships to ensure time sensitive screening of all foreign-born detainees and identification of criminal aliens. ICE is assessing technology solutions to seamlessly integrate local booking data so that ICE can determine eligibility for removal and quickly prioritize each case to initiate the appropriate level of response.

The plan brings together the expertise and commitment from all parts of ICE, the interagency community, and state and local law enforcement agencies. ICE’s partners within DHS include U.S. Citizenship and Immigration Services (USCIS), Customs and Border Protection (CBP), and the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program. ICE’s federal interagency partners include the Bureau of Prisons (BOP), Executive Office of Immigration Review (EOIR), U.S. Attorneys, Department of State (DOS), Department of Justice (DOJ), U.S. Marshals Service (USMS), and FBI’s Criminal Justice Information Services Division (CJIS). Ongoing success will require enhancements to the nation’s immigration strategy and providing even greater disincentives for recidivists.

Overview of ICE's Criminal Alien Program

The Immigration and Naturalization Service (INS) established the Institutional Removal Program (IRP) in 1988 as a result of the Immigration Reform and Control Act (IRCA) of 1986. IRCA required the INS to initiate deportation proceedings for all criminal aliens, at federal, state, and local prisons as expeditiously as possible after the date of conviction. At the INS, the Office of Investigations (OI) and Detention and Removal Operations (DRO) jointly managed the IRP, which covered about 30 federal institutions and a limited number of state institutions. INS/OI also had responsibility for the Alien Criminal Apprehension Program (ACAP). The ACAP was responsible for the identification, processing, prosecution, and removal of all criminal aliens in institutions not participating in the IRP.

When ICE was established in 2003, the agency recognized that additional effort and resources were needed to address the criminal alien problem at federal, state, and local jails and prisons. In June 2007, DRO assumed complete responsibility and oversight of both IRP and ACAP and combined both programs into the Criminal Alien Program (CAP). ICE adopted a risk-based approach to address the criminal alien population in U.S. jails and prisons and deployed CAP teams to institutions whose inmates posed the greatest threat to the community if released. CAP began utilizing video teleconference (VTC) equipment to expand its reach into more jails and prisons. In June 2006, DRO formed the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago, IL. Today the DEPORT Center screens and processes criminal aliens at 87 BOP facilities. CAP also works closely with the United States Attorney's Office to prosecute aggressively criminal aliens who have reentered the United States after having been previously removed thereby creating a deterrent to illegal reentry by previously removed criminal aliens.

CAP teams focus on identifying, detaining, and removing criminal aliens and in FY 2008 the teams issued charging documents on more than 221,000 removable aliens in federal, state, and local custody. Many of these aliens are still serving sentences. In FY 2008, ICE removed 350,000 aliens, nearly 110,000 with criminal histories. In FY 2007, ICE removed approximately 278,000 aliens, about 95,000 with criminal histories.

In order to ensure that current CAP resources are deployed effectively, ICE conducted a risk assessment of federal, state, and local prisons and jails. The risk assessment provides valuable information for determining which facilities house the most removable aliens and which represent institutions of highest risk. The assessment classified all facilities into four tiers, with Tier 1 representing the highest risk to national security and public safety and Tier 4 representing the lowest risk. In rank order, ICE is moving toward 100 percent screening of foreign-born individuals in each facility. Currently, all Tier 1 and Tier 2 facilities have 100 percent screening, including all BOP institutions and state prisons. In order to achieve screening at all remaining facilities, an infusion of new partnerships, technology, process improvements, and resources will be necessary.

To address the high-risk BOP correctional institutions, ICE established the DEPORT Center in Chicago. DEPORT supports the screening, interviewing and removal processing of all criminal aliens incarcerated in BOP facilities nationwide, often using video conferencing. Since its

inception, DEPORT has screened over 33,000 cases, issued more than 17,000 charging documents to begin removal proceedings, and lodged more than 11,000 detainers. The success of DEPORT is a combination of shared databases including BOP Sentry - a real-time computer system updated 24 hours a day by BOP staff in field offices. Staffers enter and update inmate information from the time the inmate is sentenced until he/she is released from federal custody.

Resource Overview for Secure Communities

The total costs estimated to remove all Level 1, 2, and 3 convicted criminal aliens each year in all federal, state, and local prisons ranges from roughly \$2 billion to \$3 billion. This cost range assumes that aliens incarcerated in local jails have an average length of time in custody of three to six months. The costs are high level estimates that will be revised regularly as the plan is implemented based on detailed business requirements, inputs from ICE partners, and updates to criminal alien population figures. ICE estimates that it may take up to two years to develop an automated process to search and prioritize leads from Interoperability based on the levels of criminality. Until such time, ICE will develop strategies for implementing the gradual rollout of Interoperability using a more manual searching process. Cost estimates therefore will need to be modified as implementation begins, and resources may need to shift to fill the gap between start-up and full implementation.

Level One Implementation

ICE plans to phase-in the implementation of this initiative, starting with Level 1 criminal aliens. The total Level 1 costs, including systems and infrastructure, are estimated to be between approximately \$930 million and \$1.1 billion. ICE anticipates an implementation timeline of 3.5 years to remove all removable Level 1 criminal aliens to ensure program efficiency and effectiveness. Congress provided \$200 million in the FY 2008 Appropriations bill to begin implementing this plan and an addition \$150 million for FY's 2009 and 2010.

Identifying criminal aliens in the past

The Immigration and Naturalization Service (INS) established the Institutional Removal Program (IRP) in 1988, which only covered approximately 30 federal institutions and a limited number of state facilities. INS also had responsibility for the Alien Criminal Apprehension Program (ACAP). Under ACAP, INS officers were responsible for identifying, processing, prosecuting, and removing criminal aliens in institutions not participating in the IRP.

In FY2003, there were only two signed 287(g) agreements to train and authorize local officers to enforce immigration law.

The way it works now

In June 2006, ICE formed the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago. Today ICE screens and processes criminal aliens at

all Bureau of Prisons (BOP) facilities. In addition, ICE began using video teleconference (VTC) equipment to expand its reach into more jails and prisons.

Criminal Alien Program (CAP) teams respond to local law enforcement agencies' requests to determine the alienage of individuals arrested for crimes and other immigration violators as resources permit. Under CAP, ICE identified and issued charging documents on more than 221,000 incarcerated criminal aliens in FY 2008. CAP teams identified more than 164,000 incarcerated criminal aliens in FY 2007 and 67,000 in FY 2006.

ICE conducts screenings of all inmates who claim to be foreign-born at all federal and state prisons. In addition, any law enforcement agency can query the immigration status of an individual they encounter through ICE's Law Enforcement Support Center (LESC). CAP officers routinely visit or are dispatched to local jails requesting assistance and have contributed to the increased success of identifying and removing criminal aliens in custody.

ICE 287(g) program has provided more than 40 local law enforcement agencies with access to DHS databases at their detention centers where trained officers can review the immigration information, determine alienage, and initiate removal proceedings. There are a total of 67 jail, task force, or combined 287(g) agreements nationwide credited for identifying more than 75,000 individuals for possible immigration violations. Most local law enforcement agencies notify ICE of a foreign-born detainee; then an ICE officer must conduct an interview to determine the alienage of the suspect and initiate removal proceedings, if appropriate.

Key Enhancements in Secure Communities

- ICE will continue working with its partners to distribute integration technology that links local law enforcement agencies to both FBI and DHS biometric databases.
- Currently, as part of the routine booking process, local officers submit an arrested person's fingerprints through FBI databases to access that individual's criminal history. With interoperability, those fingerprints are also automatically checked against DHS databases to access immigration history information.
- The automated process notifies ICE when fingerprints match those of an immigration violator. ICE officers conduct follow-up interviews and take appropriate action.
- ICE will identify removable criminal aliens and prioritize their removal based on the threat they pose to the community.
- ICE will continue working with local, state and federal detention centers and the Department of Justice Executive Office of Immigration Review (EOIR) to increase the number of facilities that use video conferencing technology.
- Working with ICE, U.S. Attorney's Offices will seek to prosecute more criminal aliens who illegally re-enter the country. This initiative is aimed at deterring recidivism.
- ICE will streamline processes for Detention and Removal Operations including the expanded use of the Alternatives to Detention Program (ATD) and by more efficiently obtaining removal orders and travel documents before criminal aliens are released from local custody.
- ICE will continue and expand the use of its Rapid REPAT (Removal of Eligible Parolees Accepted for Transfer) program whereby criminal aliens serving state sentences receive early parole in exchange for assisting in their removal from the United States. The programs are restricted to criminal aliens who have not been convicted of serious felonies and who have no history of

violence. The program has proven successful in New York and Arizona thus far and ICE seeks to establish Rapid REPAT programs in four additional states by the end of FY 2008.

- ICE will provide 24/7 nationwide operational coverage for the Criminal Alien Program by assigning additional personnel in field offices, standing up command centers in priority areas, and expanding use of video teleconferencing to remotely interview and process suspected aliens.
- ICE will seek to increase local law enforcement partnerships through 287(g) cross-designation that allows trained officers to interview and initiate removal proceedings of aliens processed through their detention facilities.

U.S. Immigration and Customs Enforcement (ICE) was established in March 2003 as the largest investigative arm of the Department of Homeland Security. ICE is comprised of five integrated divisions that form a 21st century law enforcement agency with broad responsibilities for a number of key homeland security priorities.

Last Modified: Friday, November 28, 2008

Appendix D



**WESTERN
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April 9, 2008

The Honorable Nancy Pelosi
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Speaker, U.S. House of
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The Honorable John Boehner
Representative of Ohio
House Republican Leader
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The Honorable Harry Reid
Senator of Nevada
Senate Majority Leader
528 Hart Senate Office Bldg
Washington, DC 20510

The Honorable Mitch McConnell
Senator of Kentucky
Senate Minority Leader
361-A Russell Senate Office Bldg
Washington, DC 20510

Dear Speaker Pelosi, Minority Leader Boehner, Majority Leader Reid
and Minority Leader McConnell:

The lack of availability of H-2B visas and the bureaucratic hurdles with the H-2A program have created critical problems for key western business and industry. Western Governors support the development of a comprehensive national immigration policy (see attached policy resolution) and believe that businesses and industry relying on H-2B and H-2A visas – an important, effective and legal visa program – should not be constrained by Congress's inaction on comprehensive reform.

As you know, in 2005 Congress approved a series of modest changes to the existing H-2B visa program, one of which created a "returning worker" exemption. This exemption removes workers who have participated in this program during the previous 3 years and abided by all its rules, from counting towards the 66,000 person H-2B visa cap. This exemption has been utilized successfully as it offered employers a legal and reliable way to hire temporary, dependable workers.

Although there were attempts to extend the "returning worker" exemption in October of 2007, it expired. As a result, the number of H-2B visas has dropped by nearly fifty percent this year, the H-2B visa cap for Fiscal Year 2008 is already exhausted, and many businesses have been left out.

Due to the U.S. Citizenship and Immigration Services announcement that no more H-2B visas will be available for Fiscal Year 2008, we are increasingly hopeful that Congress will redouble its efforts to advance legislation that would quickly address this issue.

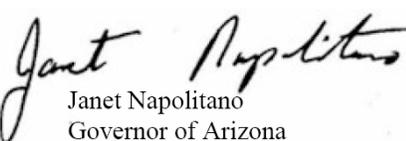
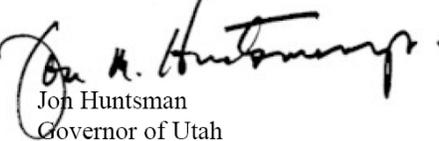
The Honorable Nancy Pelosi
The Honorable John Boehner
The Honorable Harry Reid
The Honorable Mitch McConnell
April 9, 2008
Page 2

The Save Our Small and Seasonal Businesses Act of 2007 (H.R. 1843) and its Senate companion bill (S. 988) would extend the returning worker exemption through FY 2012. These bills are currently pending in Congress. We further understand that H.R. 1843 is subject to a discharge petition (H. Res. 1025) to bring the bill before the full House of Representatives. We ask you to support moving this important piece of legislation to help businesses who deserve a renewal of the "returning worker" exemption.

We also support increasing the numerical limitation on H-1B visas to meet U.S. industry demands, particularly in the high-tech and biotech industries and streamlining the processing of H-2A visas to create a more workable system of addressing the need for foreign, seasonal agricultural workers. The provisions in the Agricultural Job Opportunities, Benefits and Security Act of 2007 were developed through a collaborative dialogue between employers and workers and it proposes meaningful change to H-2A.

Your assistance on these matters would be greatly appreciated. Thank you for your consideration of this request.

Sincerely,

		
Bill Ritter Governor of Colorado	Janet Napolitano Governor of Arizona Lead Governor, Immigration	Jon Huntsman Governor of Utah Lead Governor, Immigration

cc: Western Governors

attachment

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Western Governors' Association
Policy Resolution 2006-01
U.S.-Mexico Border Security and Illegal Immigration

A. BACKGROUND

1. The bilateral economic relationship with Mexico is vital to the United States. The North American Free Trade Agreement (NAFTA), which has been in effect since 1994, is emblematic of the relationship. In bilateral trade, Mexico is the United States' second most important trading partner, while the United States is Mexico's most important trading partner. The U.S. is the largest source of foreign direct investment in Mexico. These links are critical to many U.S. industries and all the border communities in Western states.
2. The deepening economic, historic and long-term social ties between Mexico and the U.S. have resulted in hundreds of millions of legal crossings every year along the U.S.-Mexico border.
3. The U.S.-Mexico border also experiences more legal and illegal crossings than any other border in the world. Over a million people cross the border illegally each year, most of whom are of Mexican origin, with a growing percentage coming from countries other than Mexico.
4. Large segments of the border are either left unguarded or have for many years been staffed with an insufficient number of U.S. Border Patrol agents.
5. As a result of the shared border and proximity to Mexico, Western states of the continental United States suffer a disproportionate financial burden on health care, education, the environment and criminal justice systems because of unauthorized migration from Mexico. Illegal immigration, however, is not solely a Western issue. It impacts the economy of the entire nation.
6. In addition to the economic impacts, illegal border crossings affect our national security. Drug dealers and terrorists cross our borders along with individuals searching for economic opportunity. Securing our southern border is essential to protecting public safety, and must go hand-in-hand with any effort to address the economic and humanitarian consequences associated with illegal immigration.
7. Because border control measures have increased in recent years, so has the use of human trafficking networks, resulting in more violent crimes along the border, a dramatic uptick in assaults on law enforcement, and overwhelmed state and local criminal justice and correctional systems.
8. As a result of federal requirements to treat indigent illegal immigrants needing emergency care, many hospitals in Western states have lost millions of dollars to unpaid

bills.

9. Because U.S. Border Patrol activity is concentrated around larger border cities, the flow of illegal immigrants is diverted into rural mountainous and desert areas. A tragic and growing number of deaths of migrants are occurring in remote, often uninhabited, desert areas. More than 300 migrant deaths occurred each year along the U.S.-Mexico border in the years 2001-2003.

10. Many of those seeking economic betterment in the U.S. attempt to cross the U.S.-Mexico border with their families and/or small children in tow. The risk of death, injury or criminal exploitation during this undertaking is high for adults and even more so when families and children are involved. Detention facilities in the U.S. for immigrants apprehended for attempting to enter illegally may also subject families and children to criminal exploitation by others detained.

11. Should these individuals reach the U.S., they may require assistance to fully participate as residents. When an immigrant arrives in the U.S., they face many anticipated and unanticipated challenges. These can include language barriers, difficulty navigating the current visa system, establishing a residence, getting children enrolled in school and finding employment.

12. The increased volume of illegal immigrant traffic into rural mountainous and desert areas along the border has also led to the severe degradation of forests, grasslands and waterways through increased trash and carving of new roads and paths. Environmental destruction has occurred across the landscape adversely impacting national monuments and wildlife refuges, which have long-been recognized as needing special protection. Not only federal, but state, private and tribal lands have been damaged as well.

13. Unauthorized immigration also impacts the ability of large landowners, particularly ranchers, to carry out their livelihood. They now need to allocate resources to collect waste left by migrants, repair fences cut to assist crossings, and restore habitats degraded by immigrants and border patrol.

14. Agriculture historically and currently plays a pivotal role in Western state economies. It is a seasonal industry that has become heavily dependent upon a stable and reliable foreign labor pool. To the detriment of our nation's food production, our current immigration law addresses neither documented U.S. labor shortages nor marketplace dynamics. Without a lawful avenue to provide seasonal employees, current law encourages continued unlawful migration to the U.S.

B. GOVERNORS' POLICY STATEMENT

1. Comprehensive Reform: Western Governors support the development of a comprehensive national immigration policy. This policy should have the overarching purpose of protecting and preserving the safety and interests of the United States and its citizens while recognizing the needs of Western industries to have a stable and legal supply of workers quickly available where there are no willing U.S. workers otherwise

available.

2. **Oppose Blanket Amnesty:** Western Governors recognize that how best to handle the status of millions of undocumented persons currently present in the U.S. is a complex issue. Western Governors do not support granting blanket amnesty to all such undocumented persons and believe that appropriate sanctions should be part of any solution.

3. **Reduce Delay for Legal Immigration:** In reforming the current systems for work visas and pathways to permanent citizenship, Congress is urged not to inadvertently create incentives for additional illegal immigration by creating unnecessary hurdles and lengthy delays for those who wish to immigrate legally for work or citizenship. For example, the current delay for issuance of a permanent resident visa to the Mexican-born spouse of a current permanent resident is in excess of 6 years, during which the spouse is required to remain outside the U.S. (Department of State Visa Bulletin, Feb. 2006). Such enforced separation of the nuclear family is contrary to our national policy and values, and virtually guarantees illegal migration.

4. **Border Security and Enforcement Provisions:** Comprehensive national immigration reform should provide the following:

a) Full funding at the authorized level of the federal investment in law enforcement personnel and infrastructure along the border as set forth in the "Intelligence Reform and Terrorism Prevention Act of 2004" (Public Law No. 108-458; 118 Stat. 3638, et seq.) that implemented many of the 9-11 Commission's recommendations;

b) Cutting-edge enforcement technology, including a comprehensive database that interfaces with state, national and international criminal and terrorist databases and that also includes state of the art privacy safeguards;

c) Enhanced border security and surveillance through technology such as unmanned aerial vehicles and ground-based sensors and radar that provide wide area intrusion detection;

d) Better coordination of law enforcement efforts by federal agencies in the U.S. with their Mexican counterparts by sharing information relevant to the flow of illegal migrants and human and drug trafficking organizations.

e) In consultation with the states, the construction of Western regional federal correctional facilities required to house criminal aliens who have been apprehended and convicted in state criminal justice systems.

Border security and enforcement should not hinder the flow of legitimate travel and commerce between the western states and Mexico. To ensure the free flow of legal goods and lawful visitors, the Western Governors call on the federal government to: ensure adequate resources for the US-VISIT program (see GAO report of January 6, 2006, <http://www.gao.gov/new.items/d06318t.pdf>); promote and facilitate Cyberports and Fast Lanes; reduce federal delays and bureaucracy for permits to expand and modernize ports of entry; and better coordinate and expedite visa issuance between the Department of State and the Department of Homeland Security. (See WGA Policy

Resolution 05-28 Border Ports of Entry Infrastructure,
<http://www.westgov.org/wga/policy/05/border.pdf>

5. Labor Pool and Visa Issues: Western Governors support Foreign Worker Visa reform as a critical component of national immigration reform and an effective border enforcement strategy. We call on the Administration and the Congress to:

a) Provide full funding at the authorized level for both the Department of Homeland Security (DHS) and the Department of Labor to process all employment-based visas in a timely manner;

b) Eliminate current visa backlogs (as long as five years) and prevent future backlogs by making up to 90,000 additional employment-based immigrant visas available annually;

c) Increase the numerical limitation on H-1B and H-2B visas to meet U.S. industry demands, particularly in the high tech and bio tech industries and seasonal hospitality operations;

d) Streamline the processing of H-2A visas to create a more workable system to enable agricultural employers to hire needed foreign workers for seasonal jobs.

e) Maintain the L-1 visa program; and

f) Grant expedited work authorization for foreign nationals who complete University-level degrees in U.S. institutions to ensure that the benefits of the educational investment the nation has made in these individuals remains in the U.S.

6. Guest Worker Program: A national temporary guest worker program should be established to supplement areas where there are documented shortages of U.S. workers. The new temporary guest worker program should require proper background checks and screening by the federal government including the use of recently proposed biometric, tamper-resistant identification instruments. Realistic steps, including measured and appropriate sanctions, should be taken to address the status of millions of undocumented individuals who already reside in this country. A new temporary guest worker visa program should reduce the need for illegal crossings, providing a safe way for workers to enter the country and return home to their families.

7. Realistic Enforcement: Western Governors encourage enforcement of current federal employer sanctions for knowingly hiring undocumented labor. To that end, the federal government must adopt a secure, reliable and fast employment verification system accessible to employers electronically on a 24/7 basis. The Systematic Alien Verification for Entitlements Program (SAVE) pilots in numerous states provides an opportunity to determine if SAVE is the appropriate system for this type of verification. The pilot programs should be finalized and analyzed rapidly to determine if SAVE could serve this need. Any system should interface with the Social Security Administration (SSA) databases to ensure prompt and accurate production of social security cards that employers can rely upon for work authorization. The SSA and the DHS verification programs must be fully funded at the authorized levels to resolve this urgent security problem.

8. Detention of Children: Detention facilities along the border must be designed and enforcement personnel must be instructed to alleviate the burden of separation on families detained at the border. To the maximum extent possible, families should be kept together and kept separate from the general populace of detained individuals.

9. Financing and Reimbursements to States and Localities: The federal government must work closely with the states to provide immediate resources required to offset the enormous costs imposed upon the states as a result of the failure to control illegal entries along our international borders. Of particular concern are the costs of incarcerating unauthorized immigrants who are being housed in state and local correctional facilities. Full funding of the true costs must also be made readily available to reimburse states for verified expenditures made in furtherance of the apprehension, detention and emergency care of undocumented persons and for local costs such as medical transport.

10. U.S. Foreign Policy Needs: The Federal Government should more aggressively and more effectively address the root cause of illegal immigration, not just its consequences. Western Governors call on the federal government to reduce illegal immigration by working with the Mexican and Latin American governments to generate economic growth, improve the standard of living, and promote ownership in those countries. Western Governors also request that the Bush Administration call on the Government of Mexico to help reduce illegal immigration by enforcing Mexico's immigration laws thereby reducing the flow of non-Mexicans traveling to the U.S.-Mexico border with plans to enter the U.S. illegally. Measurable progress on these goals should be considered in Foreign Aid provided to these governments.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Western Governors' Association (WGA) shall encourage and support federal legislation and programs consistent with the principles articulated in this resolution.
2. WGA shall post this resolution on the WGA web site to be referred to and used as

Appendix E

2006



HOUSE JOINT RESOLUTION 06-1023

BY REPRESENTATIVE(S) Madden, Borodkin, Carroll T., Coleman, Jahn, Marshall, Larson, Massey, Romanoff, and Witwer;
also SENATOR(S) Grossman, Groff, Entz, Fitz-Gerald, Isgar, Taylor, Teck, Tochtrop, and Tupa.

CONCERNING THE COLORADO GENERAL ASSEMBLY'S
ENDORSEMENT OF THE WESTERN GOVERNORS'
ASSOCIATION POLICY RESOLUTION ON UNITED STATES -
MEXICO BORDER SECURITY AND ILLEGAL IMMIGRATION.

WHEREAS, The Western Governors' Association in 2006 adopted a resolution on United States - Mexico border security and illegal immigration; and

WHEREAS, The Western Governors' Association resolution supports the development of a comprehensive national immigration policy that has an overarching purpose of protecting and preserving the safety and interests of the United States and its citizens while recognizing the needs of Western industries to have a stable and legal supply of workers quickly available where there are no willing United States workers otherwise available; and

WHEREAS, The Western Governors' Association resolution opposes blanket amnesty while also recognizing the complexity of handling the status of millions of undocumented persons currently present in the United States. The Colorado General Assembly believes that appropriate sanctions should be part of any solution; and

WHEREAS, The Western Governors' Association resolution supports a reduction in the delay of legal immigration. In reforming the current systems for work visas and pathways to permanent citizenship, the Colorado General Assembly urges Congress not to inadvertently create incentives for additional illegal immigration by creating unnecessary hurdles and lengthy delays for those who wish to immigrate legally for work or citizenship; and

WHEREAS, The Western Governors' Association resolution supports comprehensive national immigration reform that provides the following:

(1) Full funding at the authorized level for the federal investment in law enforcement personnel and infrastructure along the border as set forth in the federal "Intelligence Reform and Terrorism Prevention Act of 2004", which implemented many of the 9/11 Commission's recommendations;

(2) Cutting-edge enforcement technology, including a comprehensive database that interfaces with state, national, and international criminal and terrorist databases and that also includes state-of-the-art privacy safeguards;

(3) Enhanced border security and surveillance through technology such as unmanned aerial vehicles and ground-based sensors and radar that provide wide-area intrusion detection;

(4) Better coordination of law enforcement efforts by federal agencies in the United States with their Mexican counterparts by sharing information relevant to the flow of illegal immigrants and human-trafficking and drug-trafficking organizations; and

(5) In consultation with the states, the construction of western regional federal correctional facilities required to house criminal aliens who have been apprehended and convicted in state criminal justice systems. Border security and enforcement should not hinder the flow of legitimate travel and commerce between the western states and Mexico; and

WHEREAS, The Western Governors' Association resolution supports foreign worker visa reform as a critical component of national immigration reform and an effective border enforcement strategy. We call on the Federal Administration and the Congress to:

(1) Provide full funding at the authorized level for both the Department of Homeland Security and the Department of Labor to process all employment-based visas in a timely manner;

(2) Eliminate current visa backlogs and prevent future backlogs by making up to 90,000 additional employment-based immigrant visas available annually; and

(3) Grant expedited work authorization for foreign nationals who complete university-level degrees in United States institutions to ensure that the benefits of the educational investment the nation has made in these individuals remains in the United States; and

WHEREAS, The Western Governors' Association resolution supports the establishment of a national temporary guest worker program to supplement areas where there are documented shortages of United States workers. The new temporary guest worker program should require proper background checks and screening by the federal government, including the use of recently proposed biometric, tamper-resistant identification instruments. Realistic steps, including measured and appropriate sanctions, should be taken to address the status of millions of undocumented individuals who already reside in this country. A new temporary guest worker visa program should reduce the need for illegal crossings, providing a safe way for workers to enter the country and return home to their families; and

WHEREAS, The Western Governors' Association resolution encourages the enforcement of current federal employer sanctions for knowingly hiring undocumented labor. To that end, the federal government must adopt a secure, reliable, and fast employment verification system accessible to employers electronically on a 24-hour basis. Any system should interface with the Social Security Administration databases to ensure prompt and accurate production of social security cards that employers can rely upon for work authorization. These verification programs must be fully funded at the authorized levels to resolve this urgent security problem; and

WHEREAS, The Western Governors' Association resolution encourages the federal government to work closely with the states to provide immediate resources required to offset the enormous costs imposed upon the states as a result of the federal government's failure to control illegal entries along the United States' international borders. Of particular concern are the costs of incarcerating unauthorized immigrants who are being housed in state and local correctional facilities. Full funding of the true costs also must be made readily available to reimburse states for verified expenditures made in furtherance of the apprehension, detention, and emergency care of undocumented persons and for local costs such as medical transport; and

WHEREAS, The Western Governors' Association resolution encourages the federal government to more aggressively and more effectively address the root cause of illegal immigration, not solely its consequences. The Western Governors' Association resolution calls upon the federal government to reduce illegal immigration by working with the Mexican and Latin American governments to generate economic growth, improve the standard of living, and promote ownership in those countries. The Western Governors' Association resolution also requests that the Bush Administration call upon the government of Mexico to help reduce illegal immigration by enforcing Mexico's immigration laws thereby reducing the flow of non-Mexicans traveling to the United States - Mexico border with plans to enter the United States illegally. Measurable progress on these goals should be considered when providing foreign aid to these governments; now, therefore,

Be It Resolved by the House of Representatives of the Sixty-fifth General Assembly of the State of Colorado, the Senate concurring herein:

That we, the members of the Sixty-fifth General Assembly, endorse the Western Governors' Association resolution and encourage and support federal legislation and programs consistent with the principles articulated in this resolution. However, there is no consensus by the General Assembly concerning the implementation of a temporary guest worker program.

Be It Further Resolved, That copies of this Joint Resolution be sent to Governor Bill Owens, the members of the Colorado Congressional Delegation, and the governors of the other 49 states.

Andrew Romanoff
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Joan Fitz-Gerald
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Karen Goldman
SECRETARY OF
THE SENATE