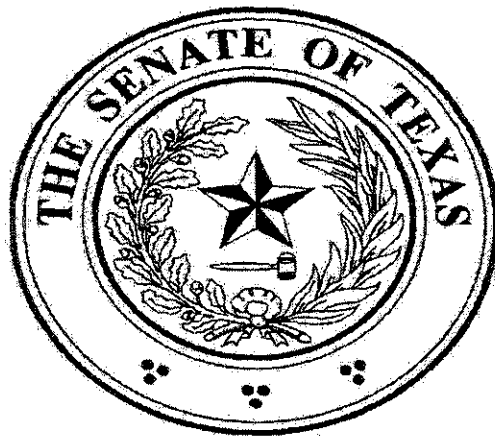
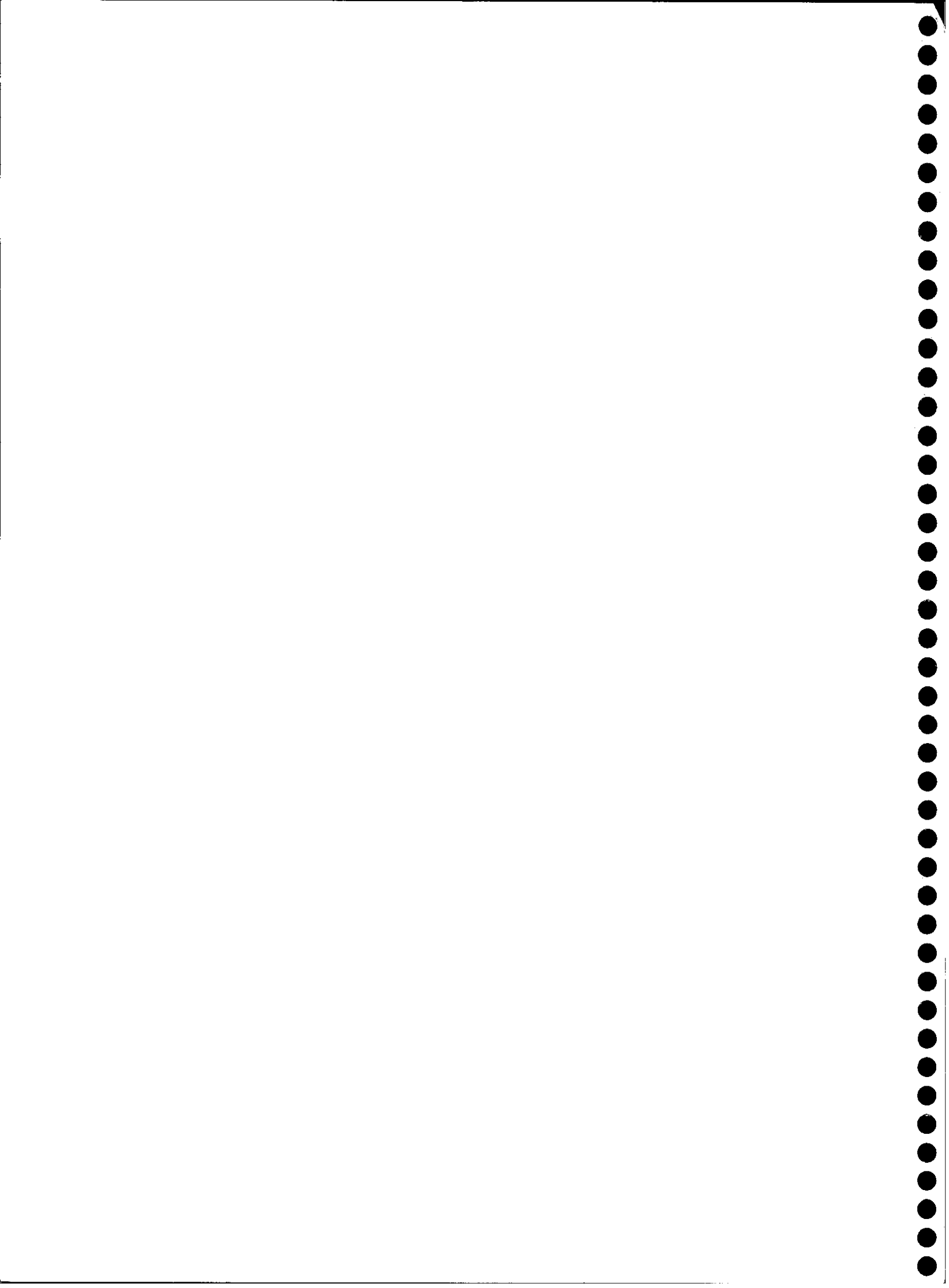


**Senate Veterans Affairs and Military  
Installations Subcommittee on Border Security**

**Interim Report to the 85th Legislature**



**November 2016**



Senator Brian Birdwell  
Senator Sylvia Garcia  
Senator Robert Hall  
Senator Eddie Lucio, Jr.  
Senator José Rodríguez



Border Security Subcommittee  
Senator Brian Birdwell Chair  
Senator Robert Hall Vice-Chair  
Senator Eddie Lucio, Jr.

## Senate Committee on Veteran Affairs and Military Installations

Senator Donna Campbell, M.D., Chair  
Senator Ronni Burton, Vice-Chair

The Honorable Dan Patrick  
Lieutenant Governor of Texas  
Texas State Capitol  
Austin, TX 78701

Dear Lieutenant Governor Patrick:

The Veterans Affairs and Military Installations Subcommittee on Border Security of the Eighty-Fourth Legislature hereby submits its interim report findings and recommendations for consideration by the Eighty-Fifth Legislature.

Respectfully submitted,

Handwritten signature of Brian Birdwell in cursive script.

Senator Brian Birdwell, Subcommittee Chair

Handwritten signature of Bob Hall in cursive script.

Senator Bob Hall, Subcommittee Vice-Chair

Handwritten signature of Eddie Lucio, Jr. in cursive script.

Senator Eddie Lucio, Jr.

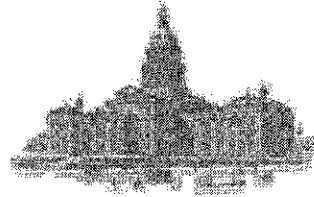
# THE SENATE OF TEXAS

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SENATOR  
EDDIE LUCIO, JR.

November 4, 2016

The Honorable Brian Birdwell  
Chairman, Senate Subcommittee on Border Security  
Capitol Room E1.706

Dear Chairman Birdwell:

I would like to thank you for your leadership as Chair of the Senate Subcommittee on Border Security. I commend the work you and your office have accomplished throughout this interim, and I look forward to working with you in this committee during the upcoming 85th Legislative Session.

I have thoroughly reviewed the proposed Interim Report, and I support and agree with several recommendations. For example, in Interim Charge 2, Recommendations 1 and 2 would greatly benefit the state. A uniform policy regarding the issuance of detainers would provide consistency and improvement throughout local law enforcement agencies. Increasing the SCAAP reimbursement funding would remove the financial burden of the state shouldering the responsibility of the federal government in housing criminal aliens. Furthermore, I also agree with the statement in Recommendation 1 of Interim Charge 3 that the legislature should use caution when considering if a border security compact is a viable option for the state.

On the other hand, I have fundamental reservations regarding some recommendations included in this Report. Having lived in a border town and representing various border counties, I can see the unintended consequences that can be engendered by broad language in Recommendation 3 of Interim Charge 1. Allowing local jurisdictions to enforce federal immigration laws has been struck down in other states (e.g. California's Proposition 187) because it is tantamount to an unconstitutional attempt to regulate immigration, which is the exclusive right and role (i.e., subject matter jurisdiction) of the federal government.

As described above, the Report includes various initiatives that should be implemented as they address the issues that are pressing and important to the people of our great State of Texas. However, other recommendations require further study.

Thank you again for your hard work during the interim, and it is an honor serving with you in your Senate Subcommittee on Border Security.

Sincerely,

Eddie Lucio, Jr.  
State Senator

ELJ/ejg



DISTRICT 27: CAMERON ★ HIDALGO ★ KENNEDY ★ KLEBERG ★ WILCOX  
COMMITTEES CHAIR, INTERGOVERNMENTAL RELATIONS ★ VICE-CHAIR, EDUCATION ★ NATURAL RESOURCES & ECONOMIC DEVELOPMENT ★  
VETERAN AFFAIRS & MILITARY INSTALLATIONS ★ SUBCOMMITTEE ON BORDER SECURITY

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## Interim Charges

The Senate Veterans Affairs and Military Installations Subcommittee on Border Security is charged with conducting a thorough and detailed study of the following issues, and preparing recommendations to address problems or issues that are identified.

1. **Sanctuary Cities:** Study the various sanctuary city policies statewide, the number and types of crimes committed by previously arrested illegal immigrants within the jurisdiction of a "sanctuary policy," and possible solutions to discourage governmental entities from putting in place policies that conflict with immigration laws. Make recommendations to improve community safety.

2. **Local Law Enforcement, PEP:** Study local government efforts to secure their border communities and identify areas where the state could invest to bolster local law enforcement infrastructure and activities. Review the challenges faced by state and local law enforcement when providing border security, including the federal Priority Enforcement Program (PEP).

3. **Interstate Compact:** Conduct a cost-benefit analysis of a potential interstate compact on border security, and consider the constitutional and legal questions that underpin the proposal. Consider which other states might be party to an interstate compact on border security. Make recommendations for policies that Texas should adopt pursuant to an interstate compact, if it were authorized by the Legislature and approved by Congress.

## **Veteran Affairs & Military Installations-S/C Border** **Security Interim Hearings**

December 03, 2015, EI.012

The Committee took invited testimony on Charge No. 1.

January 22, 2016, EI.012

The Committee took public testimony on Charge No. 1.

March 23, 2016, EI.012

The Committee took invited and public testimony on Charge No. 2.

May 04, 2016, EI.028

The Committee took invited and public testimony on Charge No. 3.

# Interim Charge Discussion and Recommendations

## INTERIM CHARGE 1

*Study the various sanctuary city policies statewide, the number and types of crimes committed by previously arrested illegal immigrants within the jurisdiction of a "sanctuary policy," and possible solutions to discourage governmental entities from putting in place policies that conflict with immigration laws. Make recommendations to improve community safety.*

## BACKGROUND

According to the Pew Research Center, six states alone account for 60 percent of our country's estimated, at a minimum, 11 to 12 million illegal aliens.<sup>1</sup> Texas is among those six states with an estimated 1.7 million illegal aliens as of 2012.<sup>2</sup> According to the Department of Homeland Security (DHS) status indicators, over 176,000 criminal aliens (those that are unlawfully present in the United States and have committed an additional crime for which they were arrested) have been booked into local Texas jails between June 1, 2011 and November 30, 2015.<sup>3</sup>

While there is no firm definition of the term "sanctuary city," it generally refers to a local jurisdiction that has established a policy, written or unwritten, that prohibits the use of resources, including law enforcement officers, from asking lawfully stopped or detained individuals about their immigration status, and reporting or otherwise cooperating with federal immigration officers.

In the first hearing on December 3, 2015, the committee sought to define the current operational environment in which we operate; delineations between federal and state authority; our bounds of authority as a state; and other relevant information that results in a clear understanding of the elements of the charge. The issues below reflect what was discussed during that hearing.

## CRIME STATISTICS

According DHS status indicators, over 176,000 criminal aliens have been booked into local Texas jails between June 1, 2011 and November 30, 2015. During their criminal careers, these criminal aliens were charged with more than 472,000 criminal offenses. Those arrests include 952 homicide charges; 55,894 assault charges; 14,191 burglary charges; 55,213 drug charges; 583 kidnapping charges; 34,532 theft charges; 37,441 obstructing police charges; 3,170 robbery charges; 4,948 sexual assault charges; and 7,049 weapons charges. Of the total criminal aliens arrested in that timeframe, over 116,000 or 66% were identified by DHS status as being in the

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<sup>1</sup> Pew Research Center, "5 facts about illegal immigration in the U.S." Nov. 19, 2015. <http://pewresearch.org/fact-tank/2015/11/19/5-facts-illegal-immigration-in-the-u-s/>.

<sup>2</sup> Testimony by Sheriff A.J. Louderback, Legislative Director at the Texas Sheriff's Association to the Senate Border Security Subcommittee on December 3, 2015.

<sup>3</sup> Texas Department of Public Safety, "Texas Criminal Alien Arrest Data." Nov. 30, 2015. [http://dps.texas.gov/administration/crime\\_records/pages/txCriminalAlienStatistics.htm](http://dps.texas.gov/administration/crime_records/pages/txCriminalAlienStatistics.htm).



US illegally at the time of their last arrest. According to DPS criminal history records, those criminal charges have thus far resulted in over 211,000 convictions including 383 homicide convictions; 20,746 assault convictions; 6,844 burglary convictions; 27,586 drug convictions; 197 kidnapping convictions; 15,544 theft convictions; 18,478 obstructing police convictions; 1,579 robbery convictions; 2,227 sexual assault convictions; and 2,989 weapons convictions. Of the convictions associated with criminal alien arrests, over 141,000 or 66% are associated with aliens who were identified by DHS status as being in the US illegally at the time of their last arrest.<sup>4</sup>

## **LEGAL BACKGROUND**

Under the Constitution, foreign policy and related matters such as immigration fall within one of the handful of enumerated powers retained by the federal government. The Supreme Court has held all along that the federal government alone can enforce immigration laws. Practically, this means that if the federal government chooses not to enforce immigration laws to deport a certain illegal immigrant, state and local law enforcement are powerless to do so.<sup>5</sup>

The federal government can ask for cooperation from state and local authorities but it cannot commandeer them. Practically, this means that state and local law enforcement do not have to cooperate with the federal government on immigration unless there is some state law that mandates it.

There are currently thirteen different federal programs offering some cooperative arrangement on immigration between the federal and state and local levels. The precursor to the current federal program was Secure Communities. That program has been transformed into what is now called the Priority Enforcement Program (PEP), and their differences will be described later in this report.

## **SANCTUARY CITY POLICIES STATEWIDE**

While there is no firm definition of the term "sanctuary city," it generally refers to a municipality that has established a policy that prohibits the use of municipal resources, including law enforcement officers, to enforce federal immigration policies. Some cities are referred to as a "sanctuary city" because they refuse to cooperate with the federal government on immigration matters. Most prominently, there have been news stories regarding the refusal of some local law enforcement agencies to hold an arrestee that ICE seeks to remove from the country by declining to uphold a detainer. However, ICE tracks local law enforcement agencies that have policies limiting cooperation — the majority of which are in California. To date, no Texas County has adopted a policy of declining ICE civil detainer requests at its jail according to recent lists compiled by the federal agency.

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<sup>4</sup> Texas Department of Public Safety, "Texas Criminal Alien Arrest Data." Nov. 30, 2015. [http://dps.texas.gov/administration/crime\\_records/pages/txCriminalAlienStatistics.htm](http://dps.texas.gov/administration/crime_records/pages/txCriminalAlienStatistics.htm).

<sup>5</sup> Testimony by Brantley Starr, Deputy Attorney General for Legal Counsel at the Office of the Attorney General to the Senate Border Security Subcommittee on December 3, 2015.

## RECOMMENDATIONS

1. Under the current legal framework, the federal government cannot commandeer the state or a local law enforcement agency to cooperate with federal immigration programs. The State of Texas should enact legislation that mandates all local government entities in the state uphold any federal immigration hold placed on a criminal in the custody of the entity.
2. Currently, there is no requirement that local government entity notify the judge or magistrate when a person in the entity's custody has his or her immigration status verified by the federal government. The state should enact legislation that requires governmental entities, when a person in the entity's custody has been verified as unlawfully present in the United States, to notify the judge or magistrate authorized to grant bail and to record the immigration status in the person's case file.
3. Legislation should be enacted to prohibit local government entities from having a formal, informal, written or unwritten rule, order or ordinance that would prohibit or discourage the enforcement of immigration laws. Proper anti-discrimination language is necessary to help prohibit any discrimination while enforcing immigration laws. The legislation should also include that local entities who do not comply and choose to have a policy prohibiting the enforcement of immigration law will not be able to receive state grant dollars.

## **INTERIM CHARGE 2**

*Study local government efforts to secure their border communities and identify areas where the state could invest to bolster local law enforcement infrastructure and activities. Review the challenges faced by state and local law enforcement when providing border security, including the federal Priority Enforcement Program (PEP).*

### **LOCAL GOVERNMENT EFFORTS**

Local law enforcement entities in the State of Texas all have unique circumstances when it comes to keeping their communities safe. Specifically relating to the interim charge given to this committee, we are discussing their individual efforts and the challenges they face when providing border security. A county that is directly on the border is affected differently than a county along the Interstate 35 or Interstate 10 corridors or a county that is located in the panhandle.

Although each county is unique, according to testimony provided by Texas sheriffs, it is very important for all law enforcement to have a close partnership with the federal government in order to combat illegal immigration. Each agency—whether it's DPS, ICE, or the County Sheriff's Office—plays an important role in providing border security. The presence of law enforcement, whether it is community policing or driving the streets and having a visible presence, in and of itself, deters crime.

Currently in the state, local law enforcement entities are prioritizing where to place their limited resources. For example, putting more emphasis on fugitive apprehension for felony warrants as opposed to misdemeanor warrants. Additional resources, including more manpower, would provide the help needed to keep a community safer.

A big cost driver for many county sheriffs is the cost of incarcerating criminal aliens on an immigration hold. The practical perspective is that local communities are bearing the cost not only for protecting their local community but also performing some degree of support for the federal government's immigration enforcement function. They provide this support with little to no compensation from the federal government. This is an issue that needs to be fixed at the federal level in order for Texas counties to provide the most assistance to combat illegal immigration.

While the partnership between local, state and federal authorities is critical in securing the border, it is important to note that state and local law enforcement officers do not have the authority to enforce immigration law. Because of this fact, it is imperative that we ensure local governments are not being held responsible for the discretion of the federal authorities to not detain a criminal alien that is being held in a Texas jail.

This discretion was expanded in 2014 when the Department of Homeland Security Secretary discontinued the federal Secure Communities Program and created the Priority Enforcement Program (PEP). Under Secure Communities, criminal aliens who entered the country illegally were detained if they were arrested, regardless of the severity of the crime. PEP focuses on

convicted criminals and others who pose the most serious danger to public safety. Bexar County saw a 50% drop in the number of detainees from 2013, under the Secure Communities Program, to 2015, under PEP.<sup>6</sup> Since the implementation of PEP, there has been a significant decline in interior enforcement activity by ICE, with noticeably few criminal aliens being arrested by ICE and processed for deportation.<sup>7</sup>

### **PRIORITY ENFORCEMENT PROGRAM (PEP)**

The Department of Homeland Security's (DHS) Priority Enforcement Program (PEP) enables DHS to work with state and local law enforcement to take custody of individuals who pose a danger to public safety before those individuals are released into the community. PEP was established at the direction of DHS Secretary Jeh Johnson in a November 20, 2014 memorandum entitled Secure Communities, that discontinued the Secure Communities program. PEP focuses on convicted criminals and others who pose a danger to public safety.<sup>8</sup>

PEP begins at the state and local level when an individual is arrested and booked by a law enforcement officer for a criminal violation and his or her fingerprints are submitted to the FBI for criminal history and warrant checks. This same biometric data is also sent to U.S. Immigration and Customs Enforcement (ICE) so that ICE can determine whether the individual is a priority for removal, consistent with the DHS enforcement priorities described in Secretary Johnson's November 20, 2014 Secure Communities memorandum.<sup>9</sup> A local law enforcement official does not have the authority to compel ICE to take action on a criminal alien in their jail. For practical purposes, this means a criminal alien can commit a crime, and if that crime does not fall under the priority list under PEP, the local entity holding that alien would then be required by law to release them back into a Texas community where they could potentially commit a second or subsequent more serious crime putting them back into the criminal justice system. This not only costs Texas taxpayers money, but more importantly, it allows a Texas citizen to be harmed financially or physically in the commission of that more serious crime.

Under prior policy, detainees could be issued when an immigration officer had reason to believe the individual was removable and fell within one or more enumerated priorities, which included immigration-related categories and having been convicted of or charged with certain crimes. Under PEP, ICE will only seek transfer of individuals in state and local custody in specific, limited circumstances. PEP makes it harder for ICE to take custody of criminal alien offenders that are identified through fingerprint matching or after referral from a local law enforcement agency because it restricts use of detainees. This is one of the main differences from Secure Communities. Under Secure Communities, ICE could take action to prevent an alien's release from the time of initial booking into local custody, and the alien could not be released before ICE could take custody. Now, ICE has to wait until the outcome of charges, which cannot be

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<sup>6</sup> Testimony by Susan Pamerleau, Sheriff of Bexar County to the Senate Border Security Subcommittee on March 23, 2016.

<sup>7</sup> Testimony by Jessica M. Vaughan, Director of Policy Studies, Center for Immigration Studies to the Senate Border Security Subcommittee on March 23, 2016.

<sup>8</sup> Office of Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, "Priority Enforcement Program (PEP) Brochure,"

[https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep\\_brochure.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf).

<sup>9</sup> Ibid.

predicted, and the practical result is that some aliens will be able to walk out of custody before ICE can act.<sup>10</sup> ICE will only issue a detainer where an individual fits within DHS's more narrow enforcement priorities and ICE has probable cause that the individual is removable. In many cases, rather than issue a detainer, ICE will instead request notification (at least 48 hours, if possible) of when an individual is to be released. ICE will use this time to determine whether there is probable cause to conclude that the individual is removable.<sup>11</sup>

ICE may seek the transfer of any priority criminal alien. However, under PEP, ICE may only seek the transfer of an alien in the custody of state or local law enforcement when the alien has been convicted of an offense listed in the following priorities:<sup>12</sup>

- Priority 1(c), for which an element was active participation in a criminal street gang; or
- Priority 1(d), classified as a felony in the convicting jurisdiction, other than when an essential element was the alien's immigration status; or
- Priority 1(e), classified as an "aggravated felony" as defined in section 101(a)(43) of the Immigration and Nationality Act.
- Priority 2(a), classified as three or more misdemeanor offenses, other than minor traffic offenses or where the essential element was alien's immigration status; or
- Priority 2(b), classified as a "significant misdemeanor", such as domestic violence; sexual abuse; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or another conviction resulting in a sentence of 90 days or more time to be served in custody, not included suspended sentences; or
- Otherwise as determined by the judgment of an ICE Field Office Director.

## COST TO LOCAL GOVERNMENTS

The largest issue facing local governments holding criminal aliens is financial. The State Criminal Alien Assistance Program (SCAAP) is a **federal** reimbursement administered by the U.S. Department of Justice that provides partial reimbursement to state, local, and tribal governments for prior year costs associated with incarcerating criminal aliens with at least one felony or two misdemeanor convictions for violations of state or local law, and who are incarcerated at least four consecutive days.<sup>13</sup> Reimbursement rates have been falling from 100%

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<sup>10</sup> Testimony by Jessica M. Vaughan, Director of Policy Studies, Center for Immigration Studies to the Senate Border Security Subcommittee on March 23, 2016.

<sup>11</sup> Office of Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, "Priority Enforcement Program (PEP) Brochure," [https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep\\_brochure.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf).

<sup>12</sup> Ibid.

<sup>13</sup> Office of Justice Programs, State Criminal Alien Assistance Program, [http://ojp.gov/about/pdfs/BJA\\_SCAAP%20Prog%20Summary\\_For%20FY%2017%20PresBud.pdf](http://ojp.gov/about/pdfs/BJA_SCAAP%20Prog%20Summary_For%20FY%2017%20PresBud.pdf).

to just over 15% in 2015. The President's 2017 federal budget request to Congress proposed to scrap the program and the reimbursements to the states altogether.

Without reimbursement from the federal government, the financial burden of holding criminal aliens for an extended period of time falls on the Texas taxpayer. The reimbursement rate reduction in SCAAP has negatively impacted local agencies.

## **RECOMMENDATIONS**

1. Encourage the governor, and the members and presiding officers of the Texas Legislature, to urge the members of the United States Congressional delegation from Texas to reauthorize and increase the SCAAP reimbursement funding.
2. Local law enforcement agencies report that the issuance of detainers is somewhat inconsistent and confusing. Having a more uniform policy will help to eliminate this confusion and better enforce immigration law. The legislative branch of the United States should encourage the Executive Branch of the United States, specifically DHS and ICE, to formulate a more consistent policy on issuing detainers.

### INTERIM CHARGE 3

*Conduct a cost-benefit analysis of a potential interstate compact on border security, and consider the constitutional and legal questions that underpin the proposal. Consider which other states might be party to an interstate compact on border security. Make recommendations for policies that Texas should adopt pursuant to an interstate compact, if it were authorized by the Legislature and approved by Congress.*

#### OVERVIEW

Interstate compacts are contracts between two or more states that are designed to manage joint functions or resolve shared problems. States have used interstate compacts to resolve boundary disputes, create interstate commissions to address specific policy problems, and establish uniform standards for member states to follow. Interstate compacts are generally viewed as a way for states to work cooperatively outside the confines of federal regulation. Texas belongs to more than thirty interstate compacts. These compacts span a wide range of issues, including the use of natural resources, law enforcement, health care, and the education and adoption of children.

Interstate compacts are powerful tools to ensure cooperative action between states. An interstate compact establishes the terms for a state's membership in the compact and prescribes the legal requirements that must be met for the compact to take effect, e.g., ratification by a majority of eligible states and congressional consent. Language of an interstate compact is generally adopted into state statute as one section of a chapter of law that provides a Texas-specific framework for operationalizing the compact. Numerous compacts create a regulatory agency, or governing commission, comprised of one or more commissioners from each compacting state. State statute addresses the appointment of these commissioners and may also provide for the commissioners to receive technical and administrative support from a state agency. Each interstate compact enumerates its governing commission's powers and duties and may include the power to adopt rules and regulations consistent with the compact.

Interstate compacts bind member states and can supersede existing state law. If an interstate compact requires congressional consent to be effective, it has no legal effect as a binding agreement on the member states until Congress grants consent. If Congress consents to an interstate compact, the compact is transformed into federal law under the Compact Clause absent compelling evidence that consent was not required. Therefore, a congressionally consented interstate compact becomes federal law subject to federal construction and federal judicial review.<sup>14</sup>

More recently adopted compacts may also establish procedures for rulemaking and contain provisions for resolving disputes among compacting states. Every interstate compact addresses the requirements for amending the compact and withdrawing from the compact. The

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<sup>14</sup> Written testimony provided by Karen Hattaway, Assistant Attorney General, General Counsel Division, Office of the Attorney General of Texas to the Senate Border Security Subcommittee on May 4, 2016.

requirements for amending, or withdrawing from, an interstate compact vary greatly across compacts. For example, in order to withdraw from an interstate compact, a member state may merely be required to enact a state statute that repeals its membership in the compact, or the compact may require mutual agreement of all compacting states confirmed by legislative action in each state.<sup>15</sup>

## THE CONSTITUTIONAL FRAMEWORK

The U.S. Constitution authorizes states, with the consent of the Congress, to enter into compacts or agreements with one another, or with foreign nations. States have used this mechanism to address a wide range of subjects, from natural resource management to border agreements to mutual assistance in criminal enforcement. Several hundred such compacts are in existence.

Compacts have been widely viewed as a potentially effective way of addressing problems that cannot be solved by a single state, acting alone. The U.S. Supreme Court has waxed approvingly about “imagination and resourcefulness in devising fruitful interstate relationships” and about the “voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution.”<sup>16</sup>

Congressional consent is required by the Compact Clause of the U.S. Constitution (Article I, Section, 10, Clause 3) stating “No state shall, without the Consent of Congress, . . . enter into any Agreement Compact with another State. ” Three features of the constitutional arrangement illustrate the Founders’ grave concerns over state compacts.

*First*, the prohibitions of Section 10 are directed against classes of state laws with a manifest detrimental effect on sister states: paper money, debtor relief laws, protectionist duties. Likewise, state agreements and compacts are subsumed under an injunction covering practices that constitute manifest threats to the Union and the Constitution: standing (state) armies, warfare, and actions conducive thereto; and duties of tonnage (like duties on imports and exports, a species of state protectionism).

*Second*, the constitutional language of Section 10 is broad and unqualified. A deal among states, or between a state and a foreign nation, is either a “treaty” (etc.), in which case it is absolutely prohibited; or else, it is a “compact” or “agreement” of some other kind, in which case it requires congressional approval.

*Third*, the Compact Clause inverts the general constitutional default rule for state enactments. Under the Supremacy Clause of Article VI Section 2, any state law must yield to valid Treaties, the Constitution, or laws enacted pursuant to the Constitution. However, until and unless a competent court finds a conflict between federal and state law or Congress (as we now say) preempts state law, state law may be enacted and remain in effect. Conversely, under the plain

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<sup>15</sup> Ibid.

<sup>16</sup> Written testimony provided by Dr. Michael Greve, Professor of Law, George Mason University School of Law, to the Senate Border Security Subcommittee on May 4, 2016.



text of the Constitution, *no* state compact may take effect without congressional approval, or remain in effect if Congress withdraws its approval.<sup>17</sup>

Questions surround issue of congressional consent, as “consent” is undefined. The Supreme Court has afforded states far greater latitude in concluding and administering agreements and compacts, even in the absence of congressional consent, than the Constitution seems to indicate. The reasons have to do both with the text of the Compact Clause and with more functionalist considerations.

While the text of the Compact Clause—requiring congressional consent for *any* agreement or compact among states—is categorical, it cannot literally mean what it seems to be saying. It would require congressional approval for the National Governors Association, sister-city agreements, or perhaps even a breakfast meeting of attorneys general to discuss business. In light of the obvious absurdity of bothering the Congress with such matters, the Court has adopted a narrower understanding of what constitutes a “compact” for purposes of the clause.<sup>18</sup> The Supreme Court has determined that the requirement for consent is activated only when the compact would alter the balance of political power between states and the federal government, or intrude on a power reserved for Congress. For compacts requiring consent, consent is usually conveyed via formal legislation or resolution, and subject to presidential approval/disapproval.<sup>19</sup>

A state compact concerning border security and enforcement would surely require congressional approval. The U.S. Supreme Court’s current operative decision, *Arizona v. United States*, 132 S.Ct. 2492 (2012), held that over a wide range, federal authority over immigration is an *exclusive* federal power and that federal statutes and regulations “preempt the field.” That holding has been followed and extended in several appellate cases. It implies that any compact on the subject-matter under consideration would require congressional approval.<sup>20</sup>

### CURRENT TEXAS INTERSTATE COMPACTS<sup>21</sup>

Below is a listing of the interstate compacts of which Texas is a member:

Interstate Compact	Responsible Agency	Authorizing Statute
<b>Compact for Education</b>	Governor	Educ. Code ch. 161
<b>Emergency Management Assistance</b>	DPS	Health & Safety Code ch. 778

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Testimony by John McGeady, Legislative Budget Board, to the Senate Border Security Subcommittee on May 4, 2016.

<sup>20</sup> Written testimony provided by Dr. Michael Greve, Professor of Law, George Mason University School of Law, to the Senate Border Security Subcommittee on May 4, 2016.

<sup>21</sup> Written testimony provided by Karen Hattaway, Assistant Attorney General, General Counsel Division, Office of the Attorney General of Texas to the Senate Border Security Subcommittee on May 4, 2016.

<b>Compact</b>		
<b>Gulf States Marine Fisheries Compact</b>	TPWD	Parks & Wild. Code ch. 91
<b>Interstate Compact for Adult Offender Supervision</b>	TDCJ	Gov't Code ch. 510
<b>Interstate Compact on Adoption and Medical Assistance</b>	DFPS	Fam. Code ch. 162 subch. C
<b>Interstate Compact on Mental Health</b>	HHSC	Health & Safety Code ch. 612
<b>Interstate Compact to Conserve Oil and Gas</b>	RRC	Nat. Res. Code ch. 90
<b>Interstate Health Care Compact</b>	TDI	Ins. Code ch. 5002
<b>Interstate Mining Compact</b>	RRC	Nat. Res. Code ch. 132
<b>Interstate Wildlife Violator Compact</b>	TPWD	Parks & Wild. Code § 92.001
<b>Nonresident Violator Compact</b>	DPS	Transp. Code ch. 703
<b>Pecos River Compact</b>	TCEQ	Water Code ch. 42
<b>Rio Grande Compact</b>	TCEQ	Water Code ch. 41
<b>South Central Interstate Forest Fire Protection Compact</b>	Texas A&M Forest Service	Educ. Code §§ 88.112-116
<b>Southern States Energy Compact</b>	Governor	Gov't Code ch. 761
<b>Southern States Energy Compact</b>	TPWD	Health & Safety Code ch. 612
<b>Southern States Energy Compact</b>	Commission	Compact Commission is independent, not part of TCEQ

Note: There are several interstate compacts authorized by statute that do not appear to be in effect.

1. The Comptroller's website indicates Texas is not currently a member of the Streamlined Sales and Use Tax Agreement, an interstate compact authorized by Tax Code chapter 142.

2. The website of the Texas Board of Nursing indicates Texas has not implemented the NCSBN Advanced Practice Registered Nurse Compact. This compact was authorized by Occupations Code chapter 305, but section 305.003 of the Occupations Code provided for chapter 305 to expire on December 31, 2011, if the Board of Nursing did not adopt rules to implement the compact.
3. Natural Resources Code chapter 142 authorizes the Natural Energy and Water Resources Compact, which does not appear to have been ratified by the required number of states to take effect.
4. Texas is not a member of the Southern High Speed Rail Compact, authorized by Transportation Code chapter 462.

## RECOMMENDATIONS

1. Given the historical amount of money the state legislature is currently spending on border security, and given the need for congressional consent for a state compact regarding border security, the cost of Texas entering into a state compact with another state regarding border security is unknown at this time. As an example, if Congress were to approve such a compact, would Congress view this compact as *supplanting* federal presence at the border or *supplementing* federal presence on the border. Because of these unknown factors, the legislature should use caution when considering if a border compact is a viable option for the state.
2. In considering which other states might be party to an interstate compact on border security, this element of the charge indeterminable.

## CONCLUSION

While enforcing immigration law is a federal duty, keeping our communities safe is the job of our city, county, and state law enforcement officials. As a state, we must be able to work closely with the federal government to ensure criminal aliens are not being put back onto the streets of our communities. When the federal government fails to do that job, the state of Texas must do what we lawfully can to protect our citizens.

Based on the current adaptation of PEP and the manner in which the federal government is enforcing immigration law on only the most dangerous criminal aliens, it has inherently decided not to enforce immigration law on lesser criminal aliens. This has created a class of lesser criminal aliens that have been given de facto "sanctuary" in this country as long as their crimes are of lesser value to the federal government. The state of Texas must be exceedingly guarded when developing metrics and when coming to an administrative decision on whether a geopolitical subdivision is defined as a "sanctuary city," particularly given the class of criminal aliens that is not an enforcement priority for the federal government.

Geopolitical subdivisions of the state will be well served to have a mechanism in place to ensure accurate tracking of any and all interactions with the federal government when partnering with them to keep their communities safe. It is not the goal of this subcommittee to find fault in the geopolitical subdivisions of this state if they have acted in good faith inside the constraints and priorities that the federal government have place on them and the state.

## **Appendix**

Written testimony from the committee's interim hearings is available upon request.

