

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL COUNCIL OF LA RAZA, NEW YORK
IMMIGRATION COALITION, AMERICAN-ARAB
ANTI-DISCRIMINATION COMMITTEE, LATIN
AMERICAN WORKERS PROJECT, and UNITE,

Plaintiffs,

v.

JOHN ASHCROFT, Attorney General of the United States,
TOM RIDGE, Secretary of Homeland Security, ROBERT
MUELLER, Director, Federal Bureau of Investigation,
MICHAEL GARCIA, Assistant Secretary of Homeland
Security in charge of the Bureau of Immigration and
Customs Enforcement, UNITED STATES
DEPARTMENT OF JUSTICE, UNITED STATES
DEPARTMENT OF HOMELAND SECURITY,
FEDERAL BUREAU OF INVESTIGATION, and
BUREAU OF IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Defendants.

03-6324

03 Civ. _____

GLASSER, J.

CHREIN, J.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ DEC 17 2003 ★
BROOKLYN OFFICE

COMPLAINT

Plaintiffs National Council of La Raza, New York Immigration Coalition, American-Arab Anti-Discrimination Committee, Latin American Workers Project, and UNITE, through their counsel, hereby complain and allege on personal knowledge as to themselves and otherwise on information and belief as follows:

PRELIMINARY STATEMENT

1. Attorney General John Ashcroft, the United States Department of Justice ("DOJ"), the Federal Bureau of Investigation ("FBI") and other defendants, without lawful authority, have begun entering civil immigration information regarding hundreds of thousands of non-citizens into the FBI's principal criminal database, the National Crime Information Center ("NCIC"), and unlawfully disseminating that information to state and local police. Defendants

have misused the NCIC database in an effort to facilitate, cause, and induce state and local police, in the course of their routine duties, to make federal immigration arrests that Congress has barred the police from undertaking.

2. The FBI operates and maintains the NCIC database, but state and local police officers access it millions of times each day during ordinary encounters with motorists, pedestrians, and other persons. In defiance of Congress's careful delineation of the categories of criminal justice information that may lawfully be collected and exchanged through this powerful database, defendants have entered and continue to enter non-criminal, administrative immigration information into the NCIC, and have disseminated and continue to disseminate it to state and local police.

3. Defendants' misuse of the NCIC database is unlawful for the additional reason that it has caused and induced, and continues to cause and induce, state and local police to make federal immigration arrests that Congress has prohibited. Congress has broadly preempted state or local police from making federal immigration arrests, except pursuant to statutory procedures that defendants have not followed. Defendants' misuse of the NCIC database thus creates an imminent risk of unlawful arrest for hundreds of thousands of non-citizens across the nation.

4. Defendants have entered civil immigration records into the NCIC and disseminated them to police despite the repeated findings of DOJ's own Inspector General that "INS has serious and continuing problems with data reliability" (2003), and that specific immigration databases are "seriously flawed in content and accuracy" (1997), "not consistently reliable because of faulty data entry" (1998), and "lack[] written standards to ensure [data] quality" (2001).

5. Defendants' misuse of the NCIC database undermines public safety by deterring cooperation from immigrant victims and witnesses, diverts scarce resources from local policing priorities, and exposes officers untrained in the complexities of immigration law to liability for wrongful arrests. Police enforcement of immigration laws also encourages racial and ethnic profiling and chills vital communications from immigrants, their families, and colleagues to police and other government officials.

6. Plaintiffs bring this civil rights action on behalf of their individual members to enjoin defendants' entry of civil immigration information into the NCIC database and its dissemination to state and local police, done by defendants in an effort to facilitate, cause and induce state and local police to make immigration arrests that Congress has forbidden them to undertake.

JURISDICTION AND VENUE

7. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1361, 2201 & 2202, and U.S. Const. art. III.

8. Venue is proper pursuant to 5 U.S.C. § 703 and 28 U.S.C. § 1391(b), (e), as a substantial part of the events or omissions giving rise to the claims occurred in this district, and the principal place of business of plaintiff Latin American Workers Project is in this district.

PARTIES

9. Plaintiff National Council of La Raza ("NCLR"), a private non-profit organization and the largest constituency-based national Hispanic organization in the United States, seeks to reduce poverty and discrimination and to improve opportunities for Hispanic Americans. In connection with this mission, NCLR advocates for its members on federal immigration policy issues. NCLR has nearly 300 member organizations in forty states, including New York. Some of the organizations that are members of NCLR are themselves membership

organizations, whose individual members pay dues and exercise voting and representation rights within their own organizations. Many of the organizations that are members of NCLR provide legal, medical, or other services to non-citizens. NCLR has its principal place of business in Washington, D.C.

10. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a non-profit civil rights organization committed to defending the rights of all people of Arab descent in the United States and promoting their rich cultural heritage. Founded in 1980 by U.S. Senator Jim Abourezek, ADC is the largest Arab-American organization of its kind and has members and chapters in cities throughout the United States, including New York. Its individual members pay dues and exercise voting and representational rights. In connection with its mission, ADC advocates for its members on federal immigration policy issues. Its principal place of business is in Washington, D.C.

11. Plaintiff New York Immigration Coalition ("NYIC") is a non-profit umbrella policy and advocacy organization for roughly 150 New York member groups that work with immigrants and refugees. Some of the organizations that are members of NYIC are themselves membership organizations, whose individual members pay dues and exercise voting and representation rights within their respective organizations. NYIC's office and principal place of business is located in New York County, New York.

12. Plaintiff Latin American Workers Project ("LAWP") is a non-profit civil rights organization incorporated under the laws of New York. Founded in 1997, the mission of LAWP is to secure better living and working conditions and respect for the labor and civil rights of immigrants. The principal program areas of LAWP include organizing day laborers, street vendors, factory workers, and other employees, providing educational and cultural programs, and

working to improve access to health care. Members of LAWP pay dues and have voting and representational rights. LAWP's principal place of business is in Kings County, New York.

13. Plaintiff UNITE is an unincorporated labor union of approximately 250,000 members in the United States and Canada. Immigrant workers have been members of UNITE or its predecessor garment worker unions since their inception. UNITE's mission includes working to address the immigration issues that affect its members. In connection with this mission, UNITE advocates for its members on immigration policy issues. Members of UNITE pay dues and may run for leadership positions and vote in union elections. UNITE's principal place of business is in New York County, New York.

14. Defendant John Ashcroft is the Attorney General of the United States. He is sued in his official capacity, in which he bears responsibility for overall oversight of federal law enforcement programs, including the NCIC database, and shares responsibility for the implementation of federal immigration policy.

15. Defendant Tom Ridge is the Secretary of Homeland Security. He is sued in his official capacity, in which he shares responsibility for implementation of federal immigration policy and directs the newly-formed Bureau of Immigration and Customs Enforcement ("ICE"). ICE is now responsible for the immigration enforcement functions formerly performed by the Immigration and Naturalization Service ("INS").

16. Defendant Robert Mueller is the Director of the Federal Bureau of Investigation ("FBI"). He is sued in his official capacity. Pursuant to 28 U.S.C. § 534(c) and 28.C.F.R. § 0.85, the Attorney General has designated the Director of the FBI to administer the NCIC database.

17. Defendant Michael Garcia is Acting Assistant Secretary of Homeland Security in charge of ICE. He is sued in his official capacity, in which he oversees ICE law enforcement functions.

18. Defendant United States Department of Justice ("DOJ") is the federal agency authorized by statute to administer the NCIC database.

19. Defendant United States Department of Homeland Security ("DHS") is the federal agency responsible for securing the nation's borders, in part by enforcing federal immigration laws, and managing the immigration process.

20. Defendant FBI is the agency within the U.S. Department of Justice responsible for administering the NCIC.

21. Defendant ICE is the agency within DHS responsible for investigating violations of the criminal and administrative provisions of the Immigration and Nationality Act ("INA") and for ensuring the departure of removable aliens from the United States.

STATEMENT OF FACTS

22. Congress first authorized the FBI to establish a clearinghouse of federal, state, local, and international criminal justice records in 1930, during the Prohibition era. Sensitive to widespread popular complaints of over-zealous federal law enforcement at that time, Congress scrupulously limited the types of records that the FBI was empowered to acquire and exchange through its vast new clearinghouse.

23. In 1967, the FBI's clearinghouse was renamed the National Crime Information Center ("NCIC"). Today, from its location in Clarksburg, West Virginia, the FBI provides an NCIC host-computer and telecommunication network to a control terminal agency in each of the fifty states. The NCIC provides direct on-line access to its computerized index of criminal

justice information for more than 700,000 law enforcement officers nationwide, twenty-four hours per day, 365 days per year.

24. Over 17,000 local, state, federal, and tribal law enforcement agencies query NCIC in the performance of their daily activities, including routine patrols. In September 2003, NCIC processed an average of 3.7 million transactions per day with an average response time of 0.12 seconds.

25. Since its inception, what is now known as the NCIC database has contained principally criminal justice records, such as rap sheets, criminal warrants, and stolen property records.

26. On occasion, however, Congress has specifically authorized by statute the addition of non-criminal records to this powerful database. In 1994, for instance, as part of the Violence Against Women Act, Congress amended the NCIC statute to allow the FBI to include civil orders of protection against domestic violence and stalking in the database. In 1996, Congress authorized the addition to the NCIC of immigration records relating to previously deported felons.

27. There are presently seventeen files in the NCIC, of which seven are "property" files and ten are "person" files.

28. Defendants have designated certain NCIC files as "hot" files. State and local law enforcement officials may release information in "hot" files to private individuals, such as neighbors, and do release "hot" file information to commercial enterprises in certain circumstances.

Defendants' Unlawful Use of the NCIC

29. In disregard of the careful statutory limitations on entry and dissemination of non-criminal records via the NCIC, defendants have begun to enter civil immigration records regarding hundreds of thousands of non-citizens into the NCIC.

30. In 2002, defendants started to enter records for persons with outstanding orders of deportation, exclusion, or removal (collectively, "removal orders") whom defendants believe have remained in the United States. Defendants refer to such persons as "absconders" and estimate that there are more than 400,000 such persons resident in the United States. Defendants intend to enter information regarding each "absconder" into the NCIC.

31. Defendants have not sought or obtained a criminal arrest warrant from a federal judge upon a showing of probable cause to believe each person with a removal order has committed a crime. Instead, defendants have misused the NCIC by entering only administrative warrants of removal for "absconders."

32. In 2003, defendants also began to enter records for persons whom defendant DHS believes have violated a requirement of the National Security Entry-Exit Registration System ("NSEERS"), the "special registration" program announced by the Attorney General in June 2002. Defendants have not publicly announced an estimate of the number of NSEERS violators that will be entered into the NCIC.

33. Defendants have not sought or obtained a criminal arrest warrant from a federal judge upon a showing of probable cause to believe each alleged NSEERS violator has committed a crime. Instead, defendants have misused the NCIC by entering only administrative notices regarding alleged NSEERS violators.

34. Defendants have placed the records regarding "absconders" and alleged NSEERS violators in a new file in the NCIC, named the Immigration Violators File.

35. Presently, the Law Enforcement Support Center ("LESC"), a unit of DHS located in Burlington, Vermont, has the responsibility to enter "absconder" and alleged "NSEERS violator" records directly into the NCIC Immigration Violators File. Defendant DHS is the only agency authorized to enter and maintain these records.

36. When a state or local police officer runs an NCIC check on an individual, the Immigration Violator File hit response advises the local law enforcement officer to contact the LESC for confirmation. Upon confirmation, DHS typically requests the police officer to arrest or detain the alleged immigration violator until DHS officials can arrive to take custody of the person.

37. Defendants have announced their intention to add two additional categories of civil immigration records to the NCIC Immigration Violators File. Defendants will enter and disseminate via the NCIC information regarding foreign students whom university records indicate have not maintained sufficient credits, earned minimum grades, or otherwise violated a term of their student visa. Defendants will also enter and disseminate via the NCIC information regarding previously deported persons with minor criminal convictions that ICE does not even classify as "aggravated felonies."

38. As of December 1, 2003, defendants have entered records regarding approximately 19,000 "absconders" and dozens of alleged NSEERS violators into the NCIC Immigration Violators File.

39. The records defendants are now entering into the NCIC Immigration Violators File contain numerous inaccuracies.

40. Defendant DOJ's own Inspector General concluded in February 2003 that "the INS has serious and continuing problems with data reliability." In particular, after comparing tracking systems maintained by INS and the Executive Office for Immigration Review, the Inspector General found discrepancies in 7% of files of persons with final removal orders — the very records defendants are now entering into NCIC as "absconders" — and 11% of files of persons who come from countries considered "state sponsors of terrorism." The Inspector General further noted that INS did not have a system in place to correct these errors.

41. In addition, many persons with removal orders were not present in the administrative court when the order was entered. Many of these persons did not receive notice of their scheduled court hearing, the entry of their removal order, or the denial of their administrative or judicial appeals.

42. In the widespread confusion that has accompanied defendants' announcement and implementation of NSEERS, many persons are ignorant of their obligations under NSEERS and may be unaware that they have failed to comply with an NSEERS rule.

43. Other immigrants treated as "absconders" or "NSEERS violators" by defendants have valid claims of United States citizenship or are eligible for immigration relief based on their marriage to a U.S. citizen, as a political asylee, or otherwise.

44. The Immigration Violators File is a "hot" file. Private citizens and commercial enterprises can access its records or confirm the status of records under certain circumstances.

45. Defendants have ignored the December 2002 recommendation of the FBI's own advisory body for information services, the Criminal Justice Information Services Advisory Policy Board. This advisory body is composed principally of state and local police officials and resolved that NSEERS information not be entered into the NCIC "unless legislation and/or clear

and unambiguous direction exists to arrest and detain these individuals until appropriate authority arrives.”

Defendants’ Unlawful Causing of Prohibited Immigration Arrests

46. Congress has enacted a complex and comprehensive statutory scheme regulating immigration in the United States.

47. A central feature of this comprehensive federal scheme is a set of numerous and detailed provisions relating to enforcement of federal immigration laws. In adopting this statutory scheme, Congress has broadly preempted immigration enforcement by state and local officials, except as specifically authorized by Congress.

48. Congress has crafted specific exceptions to its broad preemption of immigration enforcement by state and local police. It has enacted direct arrest authority for state and local police officials to enforce certain immigration provisions. Congress has also established emergency and general procedures for the Attorney General to authorize state and local police, under particular sets of circumstances, to enforce other immigration provisions, provided that certain statutory requirements are satisfied.

49. Faithful to this legislative design, various administrations have recognized that state and local police are barred from making arrests for civil violations of the federal immigration laws.

50. In spring 2002, however, DOJ concluded that state and local police possess the “inherent authority” to arrest any immigrant listed in the NCIC database. The Attorney General, the White House Counsel, and other senior DOJ officials have repeatedly stated this conclusion.

51. The Attorney General and other defendants have subsequently encouraged, caused, and induced state and local police to arrest immigrants listed in the NCIC.

52. Some local police jurisdictions have resisted this request.

53. Other police departments have adopted a policy or practice of arresting “absconders” and/or alleged NSEERS violators listed in the NCIC.

54. In reliance on administrative warrants or other non-criminal information listed by defendants in the NCIC, police in New York, Illinois, Minnesota, Connecticut, Florida, and elsewhere have arrested immigrants with outstanding removal orders or who have allegedly violated an NSEERS requirement.

55. Police do not typically inform such NCIC immigration arrestees of their Miranda rights, nor are such persons subject to state or federal criminal prosecution. Police typically detain such persons until they are transferred to the custody of defendant ICE.

56. In reliance on immigration data unlawfully entered into the NCIC by defendants, state and local police have arrested persons who are United States citizens or who have valid claims for immigration relief, as the spouse or parent of a United States citizen, as a political asylee, or otherwise.

57. No authority exists for state or local police officials to arrest persons solely on the ground that they are subject to a removal order or alleged to be an NSEERS violator and listed in the NCIC.

58. No uniform policy or practice governs individual state and local law enforcement officials’ use of information in the NCIC Immigration Violators File.

59. The policy and practice of state and local police of arresting persons listed in the NCIC as “absconders” or “NSEERS violators” are preempted by federal law and invalid.

60. Defendants' practice of entering "absconder" and "NSBERS violator" information into the NCIC and disseminating it to local police upon inquiry illegally causes and induces police to make arrests that Congress has forbidden.

Effect of Defendants' Practices on Plaintiffs' Members and the Public at Large

61. State and local police rely on the cooperation of all residents of the communities they serve and protect. When any member of a community is afraid to communicate with law enforcement officials, police effectiveness is undermined and public safety is diminished for all.

62. Immigrant crime victims significantly under-report crimes, and immigrant witnesses hesitate to cooperate with police when they fear deportation.

63. One DOJ-funded study published in 2001 found that 67% of district attorneys and police chiefs surveyed believe recent immigrants report crimes less frequently than other victims.

64. The same study concluded that more than one-third of the law enforcement personnel interviewed believe under-reporting of crimes by recent immigrants poses a "serious problem" for the criminal justice system as a whole.

65. Defendants' misuse of the NCIC to cause and induce expanded immigration enforcement by local police has created fear in immigrant communities.

66. Defendants' practices deter immigrants from communicating with state and local law enforcement officials when in need and when they would otherwise be willing and able to assist in criminal investigations.

67. Defendants' practices place immigrants at imminent risk of unlawful arrest, inhibit immigrants from accessing vital emergency government services such as police and fire protection, and compromise the privacy interests of immigrants.

68. At least one member of each plaintiff organization, or of the associations that are members of each plaintiff organization (hereafter, collectively "plaintiff members"), has an outstanding removal order or is not in compliance with an NSEERS requirement and lives or works in a jurisdiction whose state or local police have a policy or practice of making immigration arrests in reliance on NCIC information.

69. Defendants have entered or imminently will enter into the NCIC information regarding plaintiff members as "absconders" or "NSEERS violators."

70. Plaintiff members regularly come into contact with state and local police.

71. Some plaintiff members work in settings in which they are frequently questioned by police, such as those who work as day laborers or street vendors.

72. Some plaintiff members appear Arab, Muslim, or South Asian and, especially since the September 11 attacks, have been regularly questioned by police in the course of their daily lives.

73. Plaintiff members listed in the NCIC as an "absconder" or "NSEERS violator" are at imminent risk of arrest by state or local law enforcement officials who stop or question them.

74. Plaintiff members reasonably fear that if they contact state or local law enforcement officials to report a crime, or otherwise speak or communicate with government officials on a matter of public or private concern, they may be arrested based on an NCIC listing as an "absconder" or "NSEERS violator."

75. Personal information regarding plaintiff members has been or imminently will be placed in an NCIC "hot" file. This information is available to neighbors, private citizens, or commercial enterprises.

76. In light of the inaccuracies and discrepancies repeatedly described by DOJ's own Inspector General upon review of defendants' immigration databases, including databases relating to persons with outstanding removal orders, upon information and belief, defendants have entered or imminently will enter erroneous information regarding plaintiff members into the NCIC.

COUNT ONE

VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT
(5 U.S.C. § 702)

77. The foregoing allegations are realleged and incorporated herein by reference.

78. Congress has specifically enumerated the categories of information that may be lawfully entered into and disseminated via the NCIC database.

79. Congress has not authorized the entry or dissemination of administrative warrants for "absconders" or information regarding alleged "NSEERS violators" via the NCIC.

80. By entering civil immigration information into the NCIC database and disseminating that information to state and local officials, defendants have exceeded the statutory authority granted them by Congress to establish and administer the NCIC database, pursuant to 28 U.S.C. § 534 and 8 U.S.C. § 1252c(b).

81. Defendants' entry and dissemination of such information via the NCIC database constitutes final agency action within the meaning of the Administrative Procedures Act, 5 U.S.C. § 551, and is not committed to agency discretion by law.

Defendants' unlawful practices, set forth above, have adversely affected or aggrieved plaintiffs and have caused them to suffer or placed them at imminent risk of suffering a legal wrong.

COUNT TWO

UNLAWFUL CAUSING OF PROHIBITED ARRESTS
(U.S. Const. art. VI and U.S. Const. amend. IV)

82. The foregoing allegations are realleged and incorporated herein by reference.

83. The authority to regulate immigration and naturalization is an exclusively federal power that the Constitution requires be implemented uniformly nationwide.

84. Congress's exercise of this power, and its enactment of a comprehensive scheme for immigration enforcement, has broadly preempted state and local police authority to enforce immigration laws, except where specifically authorized in statute or in conformity with statutory procedures.

85. Congress has preempted state and local police from arresting "absconders" or "NSEERS violators" on the basis of an administrative warrant or mere listing in the NCIC.

86. By entering civil immigration information into the NCIC database, disseminating it to state and local police, confirming NCIC immigration "hits" upon inquiry by local police, advising police to arrest absconders and NSEERS violators based on administrative warrants or information, and taking other actions, defendants have caused and induced and are causing and inducing police to make immigration arrests that Congress has forbidden them from undertaking.

87. Defendants' practices, set forth above, create an imminent risk that plaintiff members will be wrongfully arrested by state or local police, in violation of the Supremacy Clause and the Fourth Amendment.

RELIEF

88. A real and actual controversy exists between the parties.

89. The plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief.

90. The plaintiffs are suffering irreparable harm as a result of the violations complained of herein, and that harm will continue unless declared unlawful and enjoined by this Court.

WHEREFORE, the plaintiffs respectfully request that this Court:

- a. Exercise original jurisdiction over this action;
- b. Enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201-02 that defendants' policy or practice of entering and disseminating civil immigration information to state and local law enforcement officials through the NCIC database is not authorized by statute;
- c. Enter a declaratory judgment pursuant to 28 U.S.C. §§ 2201-02 that defendants' policy or practice of entering and disseminating civil immigration information to state and local law enforcement officials through the NCIC database is unlawful because it wrongfully causes and induces state and local police to make immigration arrests that Congress has forbidden;
- d. Enjoin the defendants from entering and disseminating civil immigration information to state and local law enforcement officials through the NCIC database without lawful authority, and require the defendants to remove all such information already entered;
- e. Award the plaintiffs the cost of this action together with their reasonable attorneys' fees; and

f. Retain jurisdiction over this action and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
December 17, 2003

Respectfully submitted,

By:  _____

WASHINGTON SQUARE LEGAL SERVICES
Michael J. Wishnie (MW1952)
Mayra Peters-Quintero (MP1844)
Ivan Espinoza-Madrigal, Law Student Intern
(IE4839)
Jessica Zagier, Law Student Intern (JZ6740)
161 Avenue of the Americas, 4th Floor
New York, NY 10013
(212) 998-6430

THE BRONX DEFENDERS
Peter Markowitz (PM9052)
860 Courtlandt Avenue
Bronx, NY 10451
(718) 838-7878

CLEARY, GOTTLIEB, STEEN & HAMILTON
Carmine D. Boccuzzi (CB2177)
Asli U. Bali (AB4125)
Anil Kalhan (AK1156)
Sheilah Kane (SK2093)
One Liberty Plaza
New York, NY 10006-1470
(212) 225-2000

Lucas Guttentag (LG0392)
Lee Gelernt (LG8511)
Omar C. Jadwat (OJ5792)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street
New York, NY 10004-2400
(212) 549-2500

Arthur N. Eisenberg (AE2012)
Christopher Dunn (CD3991)
NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, NY 10004
(212) 344-3005

Attorneys for Plaintiffs