

OVERVIEW OF THE KEY ICE ACCESS PROGRAMS

287(g), the Criminal Alien Program, and Secure Communities

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One of the most troubling aspects of recent immigration enforcement is the degree to which state and local police have become enmeshed in the enforcement of federal immigration law. Their role is largely unregulated and unchallenged. It has occurred through interrelated programs that lack transparency, accountability, oversight, and mechanisms to ensure that the federal government's claimed enforcement priorities — to target "serious criminal aliens"¹ — are carried out in reality.

To a large extent, U.S. Immigration and Customs Enforcement's (ICE's) state and local partnership programs depend on channeling non-U.S. citizens into the criminal justice system, though without the protections that this system usually provides, and from there to the immigration enforcement system. Because these programs operate with very few guidelines or a focus on convictions for serious crimes before subjecting the individual to immigration screening, the programs, in effect, create incentives for the use of racial profiling and pretextual arrests. The involvement of state and local law enforcement agencies is taking place at a pace that exceeds their ability to craft appropriate policies for implementation.

At the same time, the criminalization of noncitizens allows the programs to seem more benign and creates the appearance that ICE is focusing enforcement on "criminal aliens." The growing entanglement of immigration enforcement with the criminal justice system makes it increasingly difficult to track and challenge the treatment of immigrants, all the while diverting resources from law enforcement's traditional role of protecting community safety.²

ICE has grouped the major programs that merge immigration enforcement with the criminal justice system under an umbrella scheme called "Agreements of Cooperation in Communities to Enhance Safety and Security" (ICE ACCESS). ICE ACCESS encompasses 13 separate programs that permit local law enforcement agencies to partner with ICE in immigration enforcement. This overview summarizes three of the most significant and widespread of the programs involving states and localities in immigration enforcement: (1) the 287(g) Program, (2) the Criminal Alien Program (CAP), and (3) the Secure Communities Program.³

Through the 287(g) program, local jurisdictions enter into agreements with the U.S. Department of Homeland Security (DHS) allowing certain local law enforcement officers to enforce federal immigration laws. Under CAP, ICE agents, physically present in local jails and prisons or by telephone, screen inmates flagged by jail or prison officials as being foreign-born to determine if they are removable. Under Secure Communities — the

its impact on community safety, noting, "Americans want a solution to our immigration dilemma, as do law enforcement officials across this nation. But the solution isn't turning every local police department into an arm of Immigration and Customs Enforcement." William J. Bratton, "The LAPD Fights Crime, Not Illegal Immigration," *L.A. Times*, Oct. 27, 2009, www.latimes.com/news/opinion/commentary/la-oe-bratton27-2009oct27.0.1037266.story (last visited Nov. 3, 2009). For other reports by police associations regarding the impact of these programs on community policing strategies and community safety, see also *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* (Police Foundation, Apr. 2009), www.policefoundation.org/strikingabalance/strikingabalance.html (last visited Nov. 3, 2009); *Recommendations for Enforcement of Immigration Laws by Local Police Agencies* (Major City Chiefs Immigration Committee, June 2006), www.majorcitychiefs.org/pdfpublic/mcc_position_statement_revised_cef.pdf (last visited Nov. 3, 2009).

³ It should also be noted that ICE ACCESS is fluid and changing — sometimes Secure Communities appears as an ICE ACCESS program, and sometimes it does not.

¹ "Fact Sheet: Secure Communities" (U.S. Immigration and Customs Enforcement, Mar. 28, 2008), www.aila.org/content/default.aspx?docid=25045 (last visited Nov. 3, 2009, hereinafter "Secure Communities Fact Sheet").

² In a *Los Angeles Times* op-ed article, outgoing Los Angeles Police Chief William Bratton criticized the 287(g) program and

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newest of these initiatives — during the booking process, fingerprints of arrested individuals at participating jails are checked against DHS’s Automated Biometric Identification System, not simply against Federal Bureau of Investigation (FBI) databases. Thus, ICE has created a three-part framework within the criminal justice system for immigration enforcement: physical presence in jails (CAP), technological presence (Secure Communities), and actual transfer of authority (287(g)). While each program is separate, the programs often overlap and can operate simultaneously in the same jurisdiction.

The following sections examine these three key programs and highlight some of the problems in their implementation.

■ Immigration Cross-Designation: 287(g) Program

Named after the section of the Immigration and Nationality Act (INA) that enacted it, the 287(g) Program cross-designates local law enforcement officers to enforce federal immigration laws. State and local agencies enter into a Memorandum of Agreement (MOA) with ICE pursuant to which law enforcement officers become deputized immigration enforcement officers. According to ICE, “More than 1075 officers have been trained and certified through the program under 67 MOAs (61 Mutually Signed; 6 Agreements in Principle).”⁴

The program operates under one of three models. Under the jail model, correctional officers in state prisons or local jails screen those arrested or convicted of crimes by accessing federal databases in order to ascertain the arrestee’s immigration status. Under the broader task force model, law enforcement officers participating in criminal task forces screen arrested individuals during the course of performing their regular policing duties. Finally, ICE has allowed some local law enforcement agencies to concurrently implement both models, in an arrangement referred to as the joint model. As of October 19, 2009, approximately 39 percent of 287(g) MOAs operated under the jail model, 40 percent under the task force model, and 21 percent under the joint model.⁵

ICE claims that the program is aimed at “criminal illegal alien” activity (emphasis added), but it is clear that race and ethnicity, not crime, have propelled its growth. According to a recent report by Justice Strategies, FBI and census data indicate that the majority (61 percent) of

localities running 287(g) programs had crime rates lower than the national average, while nearly 90 percent had a rate of Latino population growth higher than the national average.⁶

Another report issued by the ACLU of North Carolina and the Immigration and Human Rights Policy Clinic at the University of North Carolina found that 287(g) partnerships have, in reality, been used to purge towns and cities of “unwelcome” immigrants.⁷ For example, during the month of May 2008, 83 percent of the immigrants arrested in Gaston County, North Carolina by 287(g)-deputized officers were charged with traffic violations.⁸ The report reveals that local attitudes towards immigrants often inform application of the 287(g) program, or, in other words, the 287(g) program often serves to enforce local practices of racism and racial bigotry. In the report, Johnson County Sheriff Steve Bizzell acknowledged that his goal was to reduce, if not eliminate, the immigrant population of Johnson County through the 287(g) program. Bizzell maintained that everywhere he goes, “people say, ‘Sheriff, what are we going to do about all these Mexicans?’”⁹

The main investigative arm of Congress, the Government Accountability Office (GAO), sharply criticized the 287(g) program’s management in a March 2009 report.¹⁰ The GAO documented, among other issues, that ICE has not consistently articulated how participating agencies are to use their 287(g) authority. Many of the MOAs did not mention that an arrest must precede use of this authority.¹¹ In addition, although MOAs signed after 2007 contain a requirement to track and record data related to program implementation, none of them specified what data should be tracked or how it should be collected and reported.¹² As a result, past abuses of the program include the deportation of a cognitively impaired U.S. citizen to Mexico, the shackling of an un-

⁶ Aarti Shahani and Judith Greene, *Local Democracy on Ice: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement* (Justice Strategies, Feb. 2009), at 2.

⁷ *The Policies and Politics of Local Immigration Enforcement Laws* (American Civil Liberties Union of North Carolina Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina, Feb. 2009), at 8.

⁸ *Id.* at 29.

⁹ *Id.* at 30.

¹⁰ See *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Government Accountability Office, GAO-09-109, Jan. 2009), www.gao.gov/new.items/d09109.pdf (last visited Nov. 3, 2009).

¹¹ *Id.* at 5.

¹² *Id.*

⁴ Representing the latest figures, published on the ICE webpage, www.ice.gov/pi/news/factsheets/section287_g.htm (last visited Nov. 4, 2009).

⁵ See *id.*

documented pregnant woman during labor, and the arrest of an immigrant who had called on police to protect her sister from domestic violence.¹³

Despite mounting criticism of the program, regulations governing its implementation have never been issued. Instead, in July 2009 the Obama administration responded with surprising plans to expand it into eleven new jurisdictions.¹⁴ The government simultaneously announced that the 66 jurisdictions with MOAs would have to sign a new standardized MOA within a 90-day window.¹⁵ On October 16, 2009, DHS reported that 55 jurisdictions had signed new agreements, 12 were awaiting approval by governing authorities, 6 were still in negotiations, and 6 had dropped out of the program. Despite an ongoing investigation by U.S. Dept. of Justice's Civil Rights Division over allegations of racial profiling, Sheriff Joe Arpaio of Maricopa County, Arizona, was allowed to keep his jail MOA, though his task force MOA was not renewed.¹⁶

DHS claims that the new MOA addresses many of the criticisms levied at the 287(g) program regarding purpose, priorities and oversight, but the changes made are not meaningful and in some cases represent a regression. The new MOA outlines three criminal-level priorities,¹⁷ but it does not provide any mechanism for ensuring that participating agencies comply with the priorities. ICE reports that the new MOA's recommendation that criminal charges be taken to completion will ensure that priorities are complied with and that arrests are not pretextual; however this was already a feature of

existing MOAs (including the MOA with Maricopa County, one of the most egregious offenders). Indeed, the "recommendation" has little significance in preventing arrests for traffic or low level offenses that can easily be taken to completion.

Nor does the new MOA provide any mechanism to track or prevent racial profiling, such as collecting and reporting arrest data, including the ethnicity of arrestees. In fact, the new MOA explicitly does not require data collection beyond what is required in the ENFORCE system,¹⁸ a legacy system used to collect biographical and immigration history information, thereby eliminating the primary mechanism to prove and prevent racial and ethnic profiling. In meetings with advocates, ICE officials have claimed that ENFORCE is being revised to collect additional data. But no such expanded information gathering appears to be in place as 287(g) partnerships continue to operate, nor has any change in the system been announced through a System of Records Notice in the Federal Register, as required by the Privacy Act.¹⁹ ICE officials have said privately that the agency decided not to build rigorous data collection requirements into the MOAs that might discourage localities from participating in the program.

It also reduces transparency of the program by claiming that a vast array of records relating to 287(g) are no longer public records.²⁰ This provision not only may limit access to records under the federal Freedom of Information Act, but also appears intended to limit access under state public records acts.

The changes in the program have not stilled public opposition. In August 2009, 521 organizations around the country sent President Obama a statement asking him to end the program. The Congressional Hispanic Caucus (CHC) did likewise, telling President Obama that "[t]he misuse of the 287(g) program by its current participants has rendered it ineffective and dangerous to community safety. . . . It is our opinion that no amount

¹³ Daphne Eviatar, "Scrutiny of Immigration Policy Finds Widespread Abuse," *The Minnesota Independent*, Mar. 9, 2009, <http://minnesotaindependent.com/28496/scrutiny-of-immigration-policy-finds-widespread-abuse> (last visited Nov. 3, 2009).

¹⁴ "Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships and Adds 11 New Agreements" (DHS Office of the Press Secretary, July 10, 2009), www.dhs.gov/ynews/releases/pr_1247246453625.shtm (last visited Nov. 4, 2009).

¹⁵ There are two distinct versions of the "standardized" MOA. One version would apply to jail model programs and another to task force models.

¹⁶ Anna Gorman, "ICE-Local Immigration Partnership to Remain," *L.A. Times*, Oct. 17, 2009, www.latimes.com/news/nationworld/nation/la-na-immig-law17-2009oct17.0.3127477.story (last visited Nov. 4, 2009).

¹⁷ Prioritization levels, according to standardized MOA:

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

¹⁸ ICE, Standardized Memorandum of Agreement, Appendix D: Standard Operating Procedure (SOP) Template, at 18. A copy of the MOA is available at www.nilc.org/immlawpolicy/LocalLaw/287g-MOA-2009-07-14.doc (last visited Nov. 4, 2009).

¹⁹ 5 U.S.C. § 552a(e)(4).

²⁰ For a more in-depth comparison of the old and new 287(g) MOAs, see "DHS Continues State and Local Immigration Enforcement Program Without Meaningful Changes" (ACLU Press Release, July 17, 2009) www.aclu.org/immigrants/gen/40358prs20090717.html (last visited Nov. 4, 2009).

of reforms, no matter how well-intentioned, will change this disturbing reality.”²¹

■ Criminal Alien Program (CAP)

The Criminal Alien Program (CAP) is one of ICE’s longest running and most extensive local-federal partnership programs, yet very little is known about a program that resulted in a total of 221,085 charging documents being issued in fiscal year 2008 alone.²² According to a report prepared by Dr. Dora Schriro, the former director of ICE’s Office of Detention Policy and Planning, nearly half (48 percent) of the admissions and the average daily population in ICE custody during fiscal year 2009 were identified through the CAP program.²³ Clearly, CAP does the heavy lifting when it comes to ICE’s immigration enforcement through local collaboration.

Although CAP has been in operation for more than 25 years, the current version of the program was created through the merger of the Institutional Removal Program and the Alien Criminal Apprehension Program in 2007.²⁴ CAP focuses on identifying criminal aliens who are incarcerated within federal, state, or local prisons and jails. The program is administered by the ICE Office of Detention and Removal Operations (DRO), which assigns officers to these facilities.

Generally, law enforcement agencies notify ICE of foreign-born detainees in their custody based on information obtained from the booking process.²⁵ DRO officers then interview selected inmates flagged by the local

officers to determine whether to lodge a detainer (or immigration hold) against the individual. These detainers notify the jail or prison that ICE (1) intends to take custody of the noncitizen upon release and (2) requests that ICE be notified before such release. ICE has not been forthcoming about the procedures surrounding precisely how it determines which of the flagged inmates to interview or whether detainers are placed only upon individuals subsequent to an interview.²⁶ After a detainer is placed, the local jail or prison may then hold the individual for an additional time period, not to exceed 48 hours (per federal regulation),²⁷ until such time as ICE can assume custody.

In June 2006, ICE began efforts to transition from actual, physical presence in jails and prisons to remote, telephonic presence through its Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center, based in Chicago, IL. With the use of DEPORT, DRO officers assigned to the Center conduct interviews of inmates remotely and process them through CAP. DEPORT employs various shared databases, including BOP Sentry — “a real-time computer system kept updated 24 hours a day by BOP staff in field offices” — to constantly update inmates’ information while they are in federal, state, and local custody.²⁸

In addition, ICE created a risk assessment of all federal, state and local prisons, which classified the facilities into one of four tiers, with Tier 1 including facilities considered to represent the highest risk to national and community safety and Tier 4 representing the lowest risk. According to ICE, all Tier 1 and 2 facilities currently have 100 percent CAP screening, with the goal that eventually the program will operate in 100 percent of all facilities, nationwide.²⁹ It is clear that systematic expansion of the CAP program is central to ICE’s immigration enforcement strategy. In March 2008, ICE reported that all federal and state facilities and about 10 percent of the approximately 3,100 local jails around the country were screening arrestees through the CAP program.³⁰ For fiscal year 2010, ICE requested nearly \$200 million aimed at expanding the program across the country.³¹

²¹ “Letter to President Obama” (Congressional Hispanic Caucus, Sept. 28, 2009), available at <http://ndlon.org/images/documents/hcletterdhs.pdf> (last visited Nov. 4, 2009).

²² ICE Fiscal Year 2008 Annual Report, www.ice.gov/doclib/pi/reports/ice_annual_report/pdf/ice08ar_final.pdf (last visited Nov. 4, 2009), at 3.

²³ Dora Schriro, *Immigration Detention Overview and Recommendations* (U.S. Dept. of Homeland Security, Oct. 6, 2009), www.ice.gov/doclib/091005_ice_detention_report-final.pdf (last visited Nov. 4, 2009), at 12.

²⁴ Secure Communities Fact Sheet, *supra* note 1.

²⁵ Generally, the process begins when the state or local facility collects place-of-birth information from an arrestee, usually for the purpose of securing funding for the federal SCAAP program. The State Criminal Alien Assistance Program (SCAAP) is administered by the Bureau of Justice Assistance, a component of the Department of Justice. The program provides reimbursements to states and localities that incurred costs for incarcerating undocumented criminal aliens with at least one felony or two misdemeanor convictions for a period of at least four days. See “State Criminal Alien Assistance Program (SCAAP)” (Bureau of Justice Assistance), www.ojp.usdoj.gov/BJA/grant/scaap.html (last visited Nov. 4, 2009).

²⁶ In conversations with local advocates, NILC has learned that, at least in some jurisdictions, ICE places a detainer on all individuals flagged by the local agency without first conducting an immigration interview.

²⁷ 8 C.F.R. § 287.7.

²⁸ Secure Communities Fact Sheet, *supra* note 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ For fiscal year 2010, ICE has requested \$192,539,000 for the CAP program. “Fact Sheet: Fiscal Year 2010 President’s Budget Request” (ICE, May 7, 2009),

Generally, a hit results in ICE lodging a detainer or immigration hold against the arrestee.⁴²

ICE first implemented the program in October 2008 in North Carolina and Texas. The agency expects it to be fully implemented in every jail and prison throughout the country by 2013.⁴³ ICE recognizes that Secure Communities “has the potential to significantly expand criminal alien enforcement,” with concomitant ability to “identify large volumes of aliens with low level convictions or no convictions.”⁴⁴ Despite this, ICE has not put in place mechanisms to ensure a focus on noncitizens convicted of serious offenses.

ICE will have vast resources at its disposal to accomplish its expansion. Congress has appropriated about \$200 million to the program for fiscal year 2010 alone.⁴⁵ The appropriations contained no restrictions on use of the funding, requirements for data collection, or mechanisms to ensure that pretextual arrests or arrests based on racial profiling do not occur. ICE argues that racial profiling is not an issue because all arrested persons’ fingerprints are checked against FBI and DHS databases.⁴⁶ But that contention ignores the arrest process that precedes the fingerprint check. The well-documented experience with 287(g) and CAP warrants imposition of mechanisms to ensure that racial profiling and pretextual arrests do not occur, but ICE has not implemented any. Indeed, while some jurisdictions have shied away from the more controversy-laden 287(g) program, many are opting in to Secure Communities, viewing it as a cheaper, fewer-strings-attached solution to partnership with ICE.⁴⁷

As of August 30, 2009, the Secure Communities program has been implemented in 81 jurisdictions, spanning 9 different states.⁴⁸ ICE has provided conflicting information about whether localities can opt out of the program, and, to date, there is no record of a jurisdiction attempting to do so.

ICE asserts that the purpose of the Secure Communities program is to target violent criminals for removal. As with 287(g), ICE has not issued regulations governing the program’s operation. But unlike 287(g), ICE has not made public any MOAs or standard operating procedures regarding the program. The information that is available about the program comes from ICE press releases and the agency website. The website information has changed dramatically over the short time the program has been in operation. For example ICE initially identified the three risk-based classifications ICE would use to ensure that resources were appropriately allocated to target non-U.S. citizens convicted of crimes who pose the great risk to the public.⁴⁹ Later ICE abandoned any mention of levels 2 and 3, and revised the definition of level 1 to include those merely charged with a level 1 offense, those convicted at any time of a level 1 offense regardless of how long ago and the lack of severity of the current charge, and to include crimes such as drug offenses carrying a sentence of one year (an all-encompassing charge). Currently, ICE materials do not even mention classification levels.

Advocates had criticized the program’s operation because it took place at the beginning of the criminal process and therefore indiscriminately targeted persons arrested for crimes of all magnitudes, rather than persons convicted of serious crimes.⁵⁰ ICE’s response has been to soften the risk-based approach and to add new graphics on the website.

The information that is currently available demonstrates that ICE is not complying with its stated priority

⁴² Secure Communities Fact Sheet, *supra* note 1, at 5.

⁴³ The ICE webpage includes a list of current participating counties as well as a map which depicts areas of past and future deployment of the program across the country. See “Secure Communities: Phased Implementation” (ICE webpage), www.ice.gov/secure_communities/deployment/#close (last visited Nov. 4, 2009).

⁴⁴ Schriro, *supra* note 23, at 13.

⁴⁵ *FY2010 Conference Summary: Homeland Security Appropriations* (U.S. Congress Committees on Appropriations, Oct. 7, 2009), http://appropriations.house.gov/pdf/Homeland_Security_FY10_Conference.pdf (last visited Nov. 4, 2009).

⁴⁶ Testimony of David Venturella, Executive Director, Secure Communities, ICE, before the House Appropriations Committee Subcommittee on Homeland Security, “Priorities Enforcing Immigration Law” (Apr. 2, 2009), www.dhs.gov/ynews/testimony/testimony_1239800126329.shtm (last visited Nov. 4, 2009).

⁴⁷ Susan Carroll, “White Steering Clear of 287(g) Concept,” *Houston Chronicle*, Oct. 7, 2009, www.chron.com/disp/story.mpl/special/immigration/6655736.html (last visited Nov. 4, 2009).

⁴⁸ “Secure Communities: Phased Implementation,” *supra* note 43.

⁴⁹ According to ICE’s initial announcements on the Secure Communities program, arrestees were to be classified into one of three levels:

- 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.

See Secure Communities Fact Sheet, *supra* note 1, at 2.

⁵⁰ Joan Friedland, *More Questions Than Answers about the Secure Communities Program* (NILC, Mar. 2009), www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf (last visited Nov. 4, 2009).

to target serious criminal aliens.⁵¹ According to a report by the National Institute of Corrections, as of March 22, 2009, 170,000 sets of fingerprints had been reviewed pursuant to the Secure Communities program. Of these, matches were found for 19,495 individuals, only 1,436 of whom were identified as level 1 criminals. Of the remaining number, more than 17,000 of those identified had been arrested for “lesser” crimes.⁵²

■ Conclusion

While the stated goal of each of these programs is to target and remove from communities the most “dangerous criminals,” data from the 287(g), CAP, and Secure Communities programs document that, in reality, the majority of individuals targeted are identified because of their race or ethnicity and for crimes which do not pose a serious risk to public safety. Indeed, Human Rights Watch recently reported that between 1997 and 2007, 72 percent of people deported whom ICE labels “criminal aliens” were in fact removed for nonviolent offenses.⁵³

Describing noncitizens as “criminal aliens” serves a political purpose. It creates the appearance of tough immigration enforcement and makes it more difficult to challenge abuses of the immigration enforcement regime. The underlying purpose may be to lay the groundwork for real immigration reform. But the mechanisms put in place will be difficult to dismantle, and the civil rights violations they produce cannot be undone.

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⁵¹ See Susan Carroll, “ICE Program is Casting a Wide Net,” *Houston Chronicle*, July 13, 2009, www.chron.com/disp/story.mpl/hotstories/6526211.html (last visited Nov. 4, 2009) (noting that, nationally, of the 6,130 suspects placed under a detainer pursuant to Secure Communities, only 15 percent were aggravated felons, the program’s purported primary target group).

⁵² *Proceedings of the Large Jail Network Meeting, Aurora, Colorado, March 29-31, 2009* (U.S. Dept. of Justice National Institute of Corrections, Apr. 17, 2009), <http://nicic.org/Downloads/PDF/Library/023878.pdf> (last visited Nov. 4, 2009), at 7.

⁵³ See *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses* (Human Rights Watch, Apr. 15, 2009), www.hrw.org/en/reports/2009/04/15/forced-apart-numbers-0 (last visited Nov. 4, 2009).