

The 287 (g) Program



Enforcement of Civil Immigration
Law by State & Local
Law Enforcement Agencies



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The 287(g) Program: Enforcement of Civil Immigration Law by State and Local Law Enforcement Agencies

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Written in November 2009: This information is for educational and advocacy purposes only. The contents do not constitute legal advice. Consult an immigration lawyer for legal advice.

Introduction

Over the last several years, CLINIC's partners have seen a dramatic increase in city, county and state law enforcement agencies asking individuals about their immigration status and detaining individuals they suspect to be in the country without authorization. This issue is of great concern to CLINIC and its partners, as well as civil rights, community and immigrant organizations around the country.

CLINIC staff attorneys have been following closely three programs that bring the enforcement of civil immigration law into local communities.¹ These include: the 287(g) program, the Criminal Alien Program (CAP),² and Secure Communities.³

This paper will focus on the 287(g) program. It will provide an overview of the program, describe the work of 287(g) designated officers, discuss the impact of the program on families and communities, set forth recommendations to address the flaws in the program, and give advice on how communities can challenge the program in their communities. It also will show why the Catholic Bishops of Mexico and the United States have stated, "the enforcement function in both nations should be left to federal authorities ... not transferred to local police who necessarily have other priorities and who are untrained in the proper methods for enforcing immigration law."⁴

¹ See generally Helen Harnett, "Should Local Police Enforce Federal Immigration Laws?," (Washington, DC: The Catholic Legal Immigration Network, Inc., November 2007).

² The Criminal Alien Program (CAP) occurs in state and local prisons and jails around the country. Under CAP, ICE officers identify undocumented immigrants incarcerated in federal, state and local facilities and initiate formal removal/deportation proceedings against them. In 2008, approximately 221,000 immigrants were charged by ICE and placed in removal/deportation proceedings pursuant to CAP. CLINIC will address CAP and Secure Communities in later papers.

³ Secure Communities uses technology to provide local and state law enforcement agencies with the criminal history and immigration status of individuals in their custody. Through Secure Communities, fingerprints that are taken during the normal booking process are checked with information in FBI and DHS databases. Both ICE and local law enforcement agencies are notified when there is a positive identification. ICE then evaluates each case to determine the individual's immigration status and communicates its findings to the local law enforcement agency within a few hours. As of August 30, 2009, biometric identification is available in 81 jurisdictions in 9 states.

⁴ "Strangers No Longer: Together on the Journey of Hope," (Washington, DC: United States Catholic Conference of Bishops, Inc. and Conferencia del Episcopado Mexicano, January 22, 2003) [hereinafter "Strangers No Longer"].

INA Section 287(g) Agreements

A hotly debated issue at both the federal and state level is whether local law enforcement entities can and should be utilized to enforce federal civil immigration law.⁵ Historically, the federal government has been responsible for civil immigration enforcement, such as apprehensions, detention and removal of deportable immigrants.⁶ However, both legislative context and constitutional underpinnings suggest that states may exercise enforcement authority if they are granted a specific delegation of authority by the federal government.⁷

Section 287(g) of the Immigration and Nationality Act (INA) provides for such a specific delegation of authority. This section was added to the INA as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).⁸ Under INA Section 287(g), local law enforcement entities may sign a Memorandum of Agreement (MOA) with the U.S. Department of Homeland Security (DHS) to perform certain immigration-related functions.

Section 287(g) states in part:

The Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.⁹

The 287(g) program began modestly but has expanded rapidly in recent years. As noted above, 287(g) became part of the law in 1996 with the passage of IIRIRA. This provision of the law gained prominence following the September 11th terrorist attacks.¹⁰ The first agreement between the federal government and a state/local government was signed in 2002 by the state of Florida.¹¹ The DHS entered into a second MOA with the state of Alabama on September 10, 2003.¹²

Since 2007 the program has grown quickly and, according to John Morton, Assistant Secretary of ICE, it has become “an essential component of DHS’ comprehensive immigration

⁵ See Lisa Seghetti, Karma Ester and Michael John Garcia, “Enforcing Immigration Law: The Role of State and Local Law Enforcement,” (Washington, DC: Congressional Research Service, 2009), pg. 5-14, available at <http://fpc.state.gov/documents/organization/122461.pdf>, [hereinafter “Congressional Research Service”].

⁶ See *Id.*; *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001) and *Gonzalez v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983).

⁷ See *Id.*

⁸ Pub. L. No. 104-208, div. C, Section 133, 110 Stat. 3009-546, 3009-563 to 64.

⁹ INA Section 287(g) (1), 8 U.S.C. Section 1357(g) (1).

¹⁰ See Congressional Research Service, pg. 14.

¹¹ Testimony of Muzaffar A. Chishti, Director, Migration Policy Institute’s Office at New York University School of Law, to the Committee on Homeland Security U.S. House of Representatives, *Hearing on Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law*, 111Cong., 1st sess., March 4, 2009, pg. 1 [hereinafter “MPI Testimony”]; Congressional Research Service, pg. 15.

¹² Congressional Research Service, pg. 16.

enforcement strategy.”¹³ As of July 2009, “ICE has trained more than 1,000 officers operating under 66 local 287(g) agreements between DHS and law enforcement agencies nationwide.”¹⁴ These local law enforcement agencies include sheriffs’ offices, police departments, highway patrol offices as well as state and local departments of corrections.

On July 11, 2009, DHS Secretary Janet Napolitano announced that ICE had standardized the MOA used to enter into 287(g) partnerships.¹⁵ Additionally, she announced the expansion of the 287(g) program to eleven (11) more law enforcement agencies.

¹³ Press Release, U.S. Department of Homeland Security, Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

¹⁴ Id.

¹⁵ Id.

Civil Immigration Enforcement Functions that Local Law Enforcement Agencies Can Perform Under 287(g) Agreements

The new standardized MOA gives local law enforcement agencies the opportunity to enter into an agreement to enforce civil immigration law out on the streets (“Task Force Officer (TFO) Model”) or in state prisons and jails (“Jail Enforcement Officer (JEO) Model”).¹⁶ In some jurisdictions, ICE also has approved MOAs that included both the JEO and TFO Models.¹⁷

Pursuant to the TFO Model, 287(g)-authorized officers perform immigration-related enforcement on the streets in their communities in terms of investigation, detention and removal of immigrants in the U.S. Essentially, they check the immigration status of an individual as part of their regular policing duties. According to the MOA, these TFO Model officers can perform the following tasks:

- (1) Interrogate any person reasonably believed to be an alien about his/her right to be or remain in the US and to process him/her solely based on an immigration violation on a case by case basis;¹⁸
- (2) Arrest without a warrant for felonies which have been committed and which are cognizable under any law of the U.S. regulating the admission, exclusion, expulsion, or removal of aliens, if there is reason to believe that the person arrested has committed such felony and if there is likelihood of the person escaping before a warrant can be obtained;
- (3) Arrest for any criminal offense against the U.S. if the offense is committed in the officer’s presence;
- (4) Execute search warrants;
- (5) Issue arrest warrants for immigration violations;
- (6) Administer oaths and take and consider evidence to complete required criminal alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as preparing affidavits and taking sworn statements for ICE supervisory review;
- (7) Prepare charging documents, including preparing a “Notice to Appear” application or other charging documents;
- (8) Issue immigration detainers and Form I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors; and
- (9) Detain and transport arrested aliens subject to removal to ICE-approved detention facilities.

In the JEO Model, 287(g)-authorized officers exercise their immigration-related authority during the course of their normal duties while assigned to their respective jail/correctional facilities. Officers working in state prisons or local jails screen those arrested or convicted of crimes by accessing federal databases to determine a person’s immigration status. Specifically, these JEO Model officers perform the following:

¹⁶ A template of the standardized MOA is available on the Immigration Advocates Network website at: <http://www.immigrationadvocates.org>, under the library entitled “State and Local Enforcement.” The duties outlined for the TFO and JEO were taken from the template of the standardized MOA.

¹⁷ Press Release, U.S. Immigration and Customs Enforcement, ICE Announces Standardized 287(g) Agreements With 67 State And Local Law Enforcement Partners, (October 16, 2009), available at <http://www.ice.gov/pi/nr/0910/091016washingtondc.htm>.

¹⁸ To exercise such an authority, a TFO first must obtain approval from an ICE supervisor, who will approve the exercise only to further the priorities of the removing serious criminals, gang members, smugglers and traffickers and when reasonable suspicion exists to believe the aliens is or was involved in criminal activity.

- (1) Interrogate any person believed to be an alien as to his right to be or remain in the U.S. and to process for immigration violations any removable alien or those aliens who have been arrested for violating a Federal, State, or local offense.
- (2) Serve arrest warrants for immigration violations.
- (3) Administer oaths and take and consider evidence to complete required criminal alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as preparing affidavits and taking sworn statements for ICE supervisory review.
- (4) Prepare charging documents, including preparing a “Notice to Appear” application or other charging documents.
- (5) Issue immigration detainers and Form I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors.
- (6) Detain and transport arrested aliens subject to removal to ICE-approved detention facilities.

Pursuant to the standardized MOAs, local law enforcement entities enter into an agreement with ICE for a three year period. At the expiration of the three years, ICE and the local law enforcement entity can decide to modify, expand or permit the MOA to lapse. Officers deputized under the 287(g) program must attend a four week training course called the Immigration Authority Delegation Program (IADP) and are supervised by ICE officers.

The Impact of 287(g) Agreements on Communities

The role of state and local law enforcement agencies in enforcing civil immigration law has been and remains controversial. In his eloquent testimony before Congress on comprehensive immigration reform in July of 2006, Bishop Nicholas DiMarzio stated CLINIC's and the United States Conference of Catholic's Bishops' (USCCB) concerns about providing local law enforcement agencies with the authority to enforce civil immigration law in their communities:

State and local law enforcement authorities have many serious concerns on their hands, such as protecting our communities from violent criminals. If these provisions are enacted into law, we fear that immigrant communities would no longer trust local police to protect them or to share with them important information about crime in their neighborhoods. We also are fearful that massive-scale enforcement of civil immigration laws by ill-trained state and local police officials will result in inadvertent deprivations of even citizens' and lawful permanent residents' civil and constitutional rights.¹⁹

The harmful consequences that can occur when local law enforcement agencies enforce civil immigration laws, as presaged by Bishop DiMarzio in 2006, have been realized in a number of communities where 287(g) agreements exist. As detailed in reports and congressional testimony and explained further below, the 287(g) program can and often does undermine the building of safe, inclusive communities and contribute to the deprivation of constitutional and civil rights of some members of our communities.²⁰ Additionally, because the overall program has lacked sufficient internal controls, mistakes have been made by local law enforcement agencies that have harmed some families and communities.

287(g) Programs Can Undermine the Building of Safe Communities and the Common Good:

The use of state and local law enforcement agencies to enforce immigration law can significantly undermine the relationship between local law enforcement agencies and the communities they

¹⁹ Statement of Bishop Nicholas DiMarzio, Bishop of Brooklyn, Chairman of the Catholic Legal Immigration Network, Inc. (CLINIC), and a consultant to the U.S. Conference of Catholic Bishops' (USCCB) Committee on Migration, to the House Judiciary Subcommittee on Immigration, Border Security, and Claims, *On Implementation of Comprehensive Immigration Reform*, 109th Cong., 2nd sess., July 26, 2006, pg. 6, available at <http://www.usccb.org/mrs/dimarziotestimony.shtml>.

²⁰ See Written Statement of Caroline Fredrickson, Director, ACLU Washington Legislative Office, Joanne Lin, Legislative Counsel, ACLU Washington Legislative Office, Monica M. Ramirez, Staff Attorney, ACLU Immigrants' Rights Project, Reginald T. Shuford, Senior Staff Attorney, ACLU Racial Justice Program, U.S. House of Representatives Committee on Homeland Security, *Examining 287(g): The Role of State and Local Enforcement in Immigration Law*, 111th Cong., 1st sess, March 4, 2009, <http://acluofnc.org/?q=new-study-finds-dramatic-problems-287g-immigration-program> [hereinafter "ACLU Written Statement"]; MPI Testimony; Aarti Shahani and Judith Greene, "Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration," A Justice Strategies Report (February 2009) available at <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf> [hereinafter "Justice Strategies Report"]; University of North Carolina, Immigration and Human Rights Policy Clinic & ACLU of North Carolina Legal Foundation, "The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina" (February 2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> [hereinafter "North Carolina 287(g) Report"]; "Local Enforcement of Immigration Laws Through the 287(g) Program: Time, Money, and Resources Don't Add Up to Community Safety," (Immigration Policy Center, Washington, DC) March 3, 2009.

serve.²¹ Immigrant victims of crime, who fear questioning about their own or a family member's immigration status, are less likely to seek police assistance.²² Additionally, immigrant women facing domestic violence may not report or seek protection from abuse out of fear that they, their partners, or their relatives will be deported.²³ As one example, the El Paso Police Department no longer conducts joint operations with Customs and Border Protection because the agency found a troubling decrease in domestic violence reports.²⁴ As our law enforcement executives know well, "[w]ithout the cooperation of immigrant witnesses and victims of crime, local law enforcement's ability to identify, arrest and prosecute criminals is jeopardized."²⁵

This point was recently underscored by Police Chief Steven Carl in Framingham, Massachusetts. His agency withdrew from the 287(g) program on October 1, 2009, after Federal officials asked him to expand the program by detaining and transporting immigrants and testifying in court.²⁶ Chief Carl said that the expansion "could hurt the police's relationship in the community, where 26 percent are immigrants."²⁷

Additionally, 287(g) agreements marginalize an already vulnerable population by making immigrants feel more isolated and excluded. Therefore, they are more susceptible to exploitation and to becoming victims of crime.²⁸ Indeed, research conducted in Memphis, Tennessee, on victimization of undocumented immigrants and their interaction with police found that undocumented workers experienced high rates of victimization, yet they were unlikely to report the crimes to law enforcement officials.²⁹ Certainly the safety our families and communities is severely compromised when criminals believe they can prey on individuals who may not seek assistance from law enforcement agencies.

The police chiefs of major cities cogently stated these major concerns:

Without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard-won trust, communication, and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims, and eliminate the potential for assistance from immigrants in solving crimes or preventing future terrorist attacks.³⁰

²¹ Anita Khashu, "The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties," (Washington, DC: The Police Foundation, 2009), pg. 23-25, [hereinafter "The Role of Local Police"].

²² *Id.*, pg. 23.

²³ MPI Testimony, pg. 8.

²⁴ The Role of Local Police, pg. 23.

²⁵ *Id.*, pg. xiii, 23.

²⁶ Maria Sacchetti, "Framingham, Barnstable no longer enforcing US immigration laws," BOSTON GLOBE, October 1, 2009, available at http://www.boston.com/news/local/breaking_news/2009/10/framingham_barn.html.

²⁷ *Id.*

²⁸ The Role of Local Police, pg. 25; Written Statement of ACLU, pg. 17.

²⁹ The Role of Local Police, pg. 25, *citing* Butcher, Jacob, Beth Tarasawa, and Michelle Manasse. 2007. "Hidden Victims: An Examination of Crimes Against Illegal Immigrants." Paper presented at the annual meeting of the American Society of Criminology, Atlanta, Georgia, November 14.

³⁰ Major Cities Chiefs Association, "M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws by Local Police Agencies" (position paper, June 2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

Finally, communities and their local law enforcement agencies are experiencing challenging economic times. “[P]olice departments throughout the country have experienced budget cuts because of the diversion of federal funds from traditional law enforcement funding streams ... while simultaneously their workloads have increased as a result of current homeland security and counterterrorism responsibilities.”³¹ It makes little sense to divert scarce resources from the main mission of local law enforcement agencies – fighting crime and protecting public safety – to a task that can and should be handled by the federal government.

Building and maintaining safe communities require that all residents feel safe turning to and cooperating with law enforcement. Programs that erode the trust necessary for effective community policing can undermine the creation of safe communities, make us less secure, and compromise the good of everyone in our society.

287(g) Programs Can and Have Deprived Individuals of Their Rights and Dignity: Immigration law is complex and constantly changing. ICE officers, employed by DHS, receive five months of training in the intricacies of immigration law.³² In contrast, 287(g)-designated officers receive just four weeks of training. Additionally, by law, ICE is responsible for supervising 287(g) programs. However, the agency’s supervision has been inconsistent and in some cases non-existent.³³ The Government Accounting Office (GAO) reported to Congress that ICE has failed to define the nature or the extent of its supervision of 287(g) program partners.³⁴

The dearth of training in a complex area of law, coupled with the lack of consistent and quality supervision, has resulted in legal mistakes, costly litigation, and the deprivation of rights. In one egregious situation, a developmentally disabled U.S. citizen was mistakenly identified as a Mexican national and transferred to an ICE detention center and was later deported.³⁵ In other situations, individuals have complained that their constitutional and civil rights have been violated and their dignity diminished.³⁶

Civil rights and community organizations have reported and testified on the link between the use of the 287(g) program by state and local law enforcement agencies and racial and ethnic profiling.³⁷ In a letter to President Obama, five hundred and twenty-one (521) civil rights,

³¹ The Role of Local Police, Pg. 26.

³² MPI Testimony, pg. 7.

³³ GAO, “Immigration Enforcement, Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws, GAO-09-109 (January 2009); available at <http://www.gao.gov/new.items/d09109.pdf> [hereinafter “GAO 287(g) Report”], pg. 12-16.

³⁴ Id.

³⁵ Paloma Esquivel, “Suit Filed Over Disabled U.S. Citizen’s Deportation Ordeal, *Los Angeles Times*, February 28, 2008. See ACLU Written Statement, pg. 9.

³⁶ See *Ortega et al. v. Arapio et al.*, No. CV 07-02513-PHX-MHM (D. Ariz., filed July 16, 2009) (four citizens and one individual with lawful status at the time of his arrest describe being unlawfully stopped, detained and questioned by Maricopa County Sheriff’s Office based on 287(g) agreement); The Role of Local Police, pg. 78-80.

³⁷ “Available data, pending litigation, and news reports strongly indicate ... that racial profiling under the 287(g) program is a serious nationwide problem that ICE has completely failed to monitor or acknowledge, much less address.” ACLU Written Statement, pg. 2. Among other things, the ACLU points out in its testimony that data collected in Davidson County, Tennessee and in Alabama suggest that Latinos are being stopped and searched by deputized police at higher rates than whites. ACLU Written Statement, pg. 5. Additionally, the ACLU notes that a

community and faith-based groups have called for the immediate termination of the 287(g) program because of the prevalence of racial profiling and civil rights abuses.³⁸ The letter points to the “widespread use of pretextual traffic stops, racially motivated questioning, and unconstitutional searches and seizures primarily in communities of color.”³⁹

Similarly, the Congressional Hispanic Caucus, in a letter to President Obama on September 28, 2009, has requested that DHS terminate all MOAs under the 287(g) program and cease entering into new agreements.⁴⁰ Among other things, the Congressional Hispanic Caucus points out that the agreements have been misused to target communities of color, including a disproportionate number of Latinos.⁴¹

Because of the reports and concerns of racial profiling and other civil rights abuses, the Police Foundation recommended in its report that “agencies engaging in immigration enforcement activities ... put into place their own racial profiling and civil rights violation self-monitoring policies and practices to prevent potential abuses of immigrant rights.”⁴² The police executives that contributed to the report have acknowledged that this type of monitoring is necessary to protect the rights of all immigrants. As noted by one chief and reiterated by other police executives, “police have a duty to uphold state and local laws but must do so while respecting and protecting the constitution. This includes the equal protection clause which prohibits racially discriminatory enforcement practices.”⁴³

Additionally, the Homeland Security Advisory Council Southwest Border Task Force, a government chartered task force, recently stated in its recommendation to Secretary Janet Napolitano that “[I]local law enforcement should not take the place of federal law enforcement with regards to immigration. The 287(g) program should be limited to detention.”⁴⁴ This program “should be limited to identifying illegal immigrants in state prisons and county jails and exclude any effort to track them down outside of criminal investigations.”⁴⁵

Targeting members of our communities simply because of their race, national origin and/or ethnicity is discriminatory, unjust, and wrong. It also is against the law. The Constitution, specifically the Equal Protection Clause of the Fourteenth Amendment and the Fourth

pending class action case depicts racial profiling in a 287(g) jurisdiction with U.S. citizens. ACLU Written Statement, pg. 7-9.

³⁸ Letter from Maielena Hincapie, Executive Director, National Immigration Law Center on behalf of over 500 National Organizations and Regional, State and Local Organizations, to President Obama Regarding 287(g) Program, (August 25, 2009), <http://www.nilc.org/immlawpolicy/LocalLaw/287g-Letter-2009-08-25.pdf>, [hereinafter “Letter to President Obama”].

³⁹ Id. at 1.

⁴⁰ Letter from the Congressional Hispanic Caucus, to President Obama, (September 28, 2009), *available at* <http://ndlon.org/images/documents/hcletterdhs.pdf>.

⁴¹ Id.

⁴² The Role of Local Police, pg. 32.

⁴³ Id., pg. 35.

⁴⁴ “Homeland Security Advisory Council Southwest Border Task Force Recommendations” (Department of Homeland Security, DC), September 30, 2009, *available at* http://www.dhs.gov/files/committees/editorial_0331.shtm#2.

⁴⁵ Jeremy Roebuck, “Task force advises limiting federal immigration arrest program,” THE MONITOR, September 30, 2009 (on file with CLINIC).

Amendment as it applies to unreasonable searches and seizures, prohibits selective enforcement of the law based on race.⁴⁶

Additionally, race-based immigration enforcement creates a myriad of problems. First, it injures U.S. citizens and lawful permanent residents who are perceived to be undocumented by subjecting them to unwarranted stops, questioning, and arrests.⁴⁷

Second, race-based immigration enforcement reinforces harmful perceptions that immigrants, in general, are “illegal” and must prove that they are “legal” to fully participate in society.⁴⁸ This type of practice makes members of our communities feel unaccepted, marginalized, and undeserving of full civil and community participation. It also reinforces harmful stereotypes in communities and unjustly associates immigrants with criminal activity.⁴⁹

Third, race-based immigration enforcement engenders fear and mistrust of law enforcement agencies. As noted previously, individuals who are being discriminated against by law enforcement personnel will have difficulty coming forward to report crimes or abuses they witness or experience. Additionally, such enforcement deepens racial divides, perpetuating the belief by people of color that law enforcement policies and the justice system are unfair.⁵⁰

This type of injustice should not happen in a society that respects each individual’s rights and dignity. “Every person – regardless of race, sex, age, national origin, religion, sexual orientation, employment or economic status, health, intelligence, achievement or any other differentiating characteristic – is worthy of respect.”⁵¹ It is not what a person does or what a person has that gives him/her a claim on respect; it is simply being human that establishes his/her dignity.⁵²

287(g) Programs Can Undermine the Building of Strong, Inclusive Communities: The U.S. has traditionally been a nation of immigrants grounded in the firm belief that newcomers offer new energy, hope, and cultural diversity.⁵³ Our communities are informed, enriched and strengthened when immigrants and native-born residents respect one another and work together toward a common good. As Pope John Paul II stated, our “mutual openness will bring enrichment to all.”⁵⁴

For individuals, families and communities to remain strong, it is essential that they be hospitable and open-minded, not hostile and close-minded. The “us” versus “them” mentality and practices divide rather than build and sustain communities. Thus, we need all members of and institutions

⁴⁶ See ACLU Written Statement, pg. 12, citing *Whren v. United States*, 517 U.S. 806, 813 (1996).

⁴⁷ ACLU Written Statement, pg. 2.

⁴⁸ *Id.*

⁴⁹ Ruben Rumbaut, professor of sociology at the University of California at Irving, argues that “empirical evidence has consistently refuted the popular myth that influxes of immigrants lead to increase crime.” *The Role of Local Police*, pg. 11.

⁵⁰ ACLU Written Statement, pg. 17.

⁵¹ William J. Byron, “Ten Building Blocks of Catholic Social Teaching,” (America, New York, New York) October 31, 1998.

⁵² *Id.*

⁵³ *Strangers No Longer*, Pg. 3 of 15.

⁵⁴ Pope John Paul II, *Ecclesia In America*, (EA, No 65).

in our communities, including law enforcement agencies, to be part of programs that celebrate, integrate and support families and communities for the good and well-being of all. We need local initiatives that benefit the most vulnerable members of our communities rather than marginalize them. “They, the new people among us, are an integral part of the “us” that constitutes the great diversity that is our nation.”⁵⁵

Programs that contribute to an inhospitable environment by isolating and marginalizing immigrants from the greater community reinforce the negative and unproductive “us” versus “them” dichotomy and tear down communities rather than build and strengthen them.

The Ineffective Implementation of 287(g) Programs Can and Does Harm Families and Communities: As noted above, the GAO conducted a performance audit of the 287(g) program from September 2007 through January 2009.⁵⁶ In a report published in January 2009, the GAO found that ICE lacks important internal controls in the implementation of the 287(g) program. Specifically, it reported that ICE has not: (1) articulated and documented the objective of the 287(g) program for its partner agencies; (2) consistently articulated or documented how partner agencies are to use their 287(g) authority; (3) described the nature and extent of ICE’s supervision over the implementation of the program; or, (4) defined for partners what data should be tracked and how it should be collected.⁵⁷ Additionally, it noted that ICE has not developed performance measures for the 287(g) program to track the progress toward attaining its objective.⁵⁸

To date, DHS has not promulgated any regulations about the 287(g) program that would help guide and provide clarifying information for local law enforcement agencies. Instead, ICE seems to rely exclusively on the MOA. This document sets forth in broad terms the scope and nature of the relationship between ICE and the local law enforcement agency. It is far from comprehensive and instructive to 287(g) agencies and does not adequately address the problems identified by the GAO.

First, while ICE does state the purpose of the collaboration in the new MOA, the agreement still provides too little guidance as to when the local law enforcement agencies should exercise their immigration enforcement powers and leaves too much discretion in the hands of 287(g)-designated officers. In response to the GAO’s report, ICE indicated that “clarifying how such authority may be utilized in specific situations is best effected through ICE’s mandatory 287(g) training program.”⁵⁹ Reliance on this four week training to instruct local law enforcement agencies on when they should exercise their enforcement powers is naïve and misplaced.⁶⁰

⁵⁵ Most Revered William F. Murphy, Bishop of Rockville Centre, Chairman of the Committee on Domestic Justice and Human Development, United States Conference of Catholic Bishops, “The Value of Work; The Dignity of the Human Person,” (September 7, 2009) (on file at CLINIC).

⁵⁶ GAO 287(g) Report

⁵⁷ Id., pg. 4-6, 10-17.

⁵⁸ Id., pg. 6, 18

⁵⁹ Id., pg. 41.

⁶⁰ As noted previously, the 287(g) designated officers receive just 4 weeks of training in contrast to the 5 months of training that ICE officers receive. During these 4 weeks, 287(g)-designated officers must learn a wide range of topics, including federal immigration law. Federal immigration law is complex, complicated, technical and constantly changing.

Additionally, there is no requirement that the 287(g) designated officers receive additional training at regular intervals. The MOA states that ICE *may* provide additional training after one year and that local training on relevant issues will be provided by ICE supervisors or team leaders *as needed*. Given that federal immigration law is complicated, technical and constantly changing, it appears short-sighted that ICE does not offer 287(g) partners regular refresher courses to keep local law enforcement officers current in the law.

Second, the new MOA generally discusses the roles and responsibilities of the 287(g)-designated officer and the ICE supervisor. However, conspicuously absent is any discussion as to the nature and extent of the supervision. For example, it is unclear whether the supervision is to be provided remotely or directly, whether reviews are conducted as written assessments or through oral feedback, and how often ICE and the 287(g)-designated officer will interact.⁶¹

In its report, the GAO noted the importance of ICE providing guidance to partner agencies as to what data is to be collected and how it should be gathered and reported.⁶² The new MOA cursorily addresses this issue by stating that local law enforcement agencies are **not** required to provide statistical or arrest data above what is entered into ENFORCE. (ENFORCE is the primary administrative case management system for ICE.) Additionally, the MOA places significant controls over the release of information to the media and third parties. For instance, the MOA states that local law enforcement agencies agree to coordinate with ICE prior to releasing any information relating to, or exchanged, under this MOA. It also states that information obtained or developed as a result of this MOA is under the control of ICE and is subject to public disclosure only pursuant to the provision of application of federal laws, regulations and executive orders. Additionally, the MOA makes clear that the local law enforcement agency must coordinate with ICE regarding information released to the media.⁶³

ICE's insistence on controlling the flow of information to the public and the media suggests that ICE is not interested in transparency and/or public scrutiny. This is a mistake. Educating and informing the public about the 287(g) program and how it is operating in the community is essential to ensuring that it is operating effectively and as intended by the local community and the federal government. Indeed, the Police Foundation, in its report, "The Role of Local Police," noted that there is very little information and research and empirical evidence of the cost and benefits of collaborative efforts like 287(g).⁶⁴ The Police Foundation report recommended that research be done to obtain more objective data by which to understand how the 287(g) program is being carried out and the impact on public safety and civil liberties.⁶⁵ This recommendation is contrary to ICE's desire to control information and data about how the 287(g) program is being implemented.

⁶¹ See MPI Testimony, pg. 9; GAO 287(g) Report, pg. 14.

⁶² GAO 287(g) Report, pg. 16-18.

⁶³ Other restrictions include: Any documents created by the local law enforcement agency that contains information developed or obtained as a result of the MOA are not considered public records; the release of statistical information regarding the 287(g) program must be coordinated with ICE Office of Public Affairs.

⁶⁴ The Role of Local Police, pg. 33.

⁶⁵ Id., pg. xii, 33.

Without effective internal controls, it is difficult for ICE to ensure that the 287(g) program is operating in accordance with its policies and program objectives. Additionally, this lack of guidance, supervision, and accountability can lead to unfair interpretation and implementation of civil immigration law as well as the misuse of authority. Further, ICE's resolve to control the information about the program means that the public cannot easily access data to determine how the program is working and impacting the community. The lack of controls, supervision, and public information, in turn, can harm families and communities.

Recommendations for Addressing the Serious Flaws with the 287(g) Program

Families and communities need to be strengthened and the common good promoted. Programs that threaten, marginalize, and exclude individuals based upon race and/or national origin should not be tolerated. Similarly programs that diminish individuals' dignity and rights also should not be tolerated. Below are recommendations, supported by CLINIC, from the Police Foundation, civil rights groups, community organizations, and the GAO on how to address the serious flaws with the 287(g) program.⁶⁶

- Immigration is a federal responsibility. “The administration should reassert the primacy of the federal government’s role in enforcing immigration law.”⁶⁷
- The civil enforcement of immigration laws should be left to the federal government and not transferred to local law enforcement authorities whose critical role is maintaining public safety and fighting crime.
- Police officers should be prohibited from arresting and detaining to investigate immigration status in the absence of probable cause of an independent crime.⁶⁸
- Congress should hold field hearings on the 287(g) program in communities that have MOAs as well as those that have chosen not to pursue an agreement.
- DHS should provide more transparency in the 287(g) program by requiring all law enforcement agencies with 287(g) MOAs to collect data on all contacts with the public and to release this data to the public and the media when requested.⁶⁹
- DHS should require all law enforcement agencies with 287(g) MOAs to communicate to the public the complaint procedure instituted for the 287(g) program. Communication should be in writing through brochures in English and other languages and handed out by law enforcement officers upon every contact with the public.
- Local law enforcement agencies should put into place their own racial profiling and civil rights violation self-monitoring policies and practices to prevent potential abuses of immigrant rights.
- DHS should prohibit any law enforcement agency with a recent history of racial profiling from entering into a MOA.
- DHS should require and fund meaningful training on the complexity of immigration laws, limitations of state/local authority, ICE enforcement priorities, and the harmful effects of profiling.
- DHS should require regular and meaningful refresher training to 287(g)-designated officers to keep them current with the law.

⁶⁶ The recommendations were taken from the following sources: ACLU Written Statement, pg. 18-19; GAO 287(g) Report, pg. 4-6, 23-24; MPI Testimony, pg. 11-12; The Role of Local Police, pg. 30-35.

⁶⁷ Doris Meissner and Donald Kerwin, “DHS and Immigration: Taking Stock and Correcting Course, (Washington, DC: Migration Policy Institute, 2009), pg. 49.

⁶⁸ The Role of Local Police, pg. 31.

⁶⁹ This data should be available to the public and include: date, time, and location of the stop or contact; length of the stop, make and model of any vehicle involved and whether the individual stopped was a local resident or from out-of-state; race and ethnicity of the individual; reason for the stop; results of the stop; whether a search was conducted; type of search, what if anything, was found in the course of the search; officer badge number or individual identifier, if a passenger was present, what, if anything happened to the passenger.

- DHS should enumerate specific and meaningful programmatic objectives that fit logically into the agency's overall enforcement priorities.
- DHS should make clear that any law enforcement agency that consistently exceeds its authority will have its MOA terminated.
- DHS should provide detailed information about the nature and extent of supervision that will be given to 287(g) designated officers.
- DHS should provide clear information as to how and under what circumstances 287(g) authority should be used by local law enforcement.
- DHS should refrain from entering *civil* immigration infractions into the criminal (National Crime Information Center) database because of the inaccuracy of the database and because these infractions are *civil*.
- Local law enforcement agencies should involve community members in developing the agency's immigration policies. It is important to regularly meet with representatives of immigrant communities to educate about safety issues in their community, obtain their perspectives on immigration enforcement, and maintain and establish collaborative partnerships.
- DHS should appoint an individual or organization to research and evaluate the 287(g) programs in terms of the program's outcomes and impact on safety and civil liberties. Suggested topics of research include: (1) who conducts the immigration status inquiry, (2) who is being arrested and detained, (3) who is being questioned but released, (4) is there any racially disparate impact, (5) how often is error occurring, (6) how often do civil rights violations occur, (7) what happens to those agencies that violate 287(g) agreements, and (8) how many people are being jailed and deported because of these efforts.

Steps Communities Can Take to Challenge 287(g) Agreements

Law enforcement agencies are not required to provide public notice of intent to sign a 287(g) MOA. Therefore, sometimes a community first learns that its local police officers will be enforcing immigration law after the agreement is already in place. In many cases, however, local law enforcement officials and local political figures will publicly discuss entering into an agreement with DHS. In both of these situations, there are steps that communities can take to challenge the implementation of the 287(g) program in their area. These steps include: (1) building a broad based *credible* coalition; (2) meeting with the local law enforcement agency interested in entering into the 287(g) agreement; (3) developing educational and advocacy materials; (4) meeting with decision makers and leaders; and, (5) engaging the media.

Build a Broad Based Coalition: One of the most powerful efforts that community members can take to challenge the proposed agreement is to build a coalition of people and groups that do not want their local police involved in enforcing immigration law. Community members should focus on building a broad coalition that reaches out to a number of different groups. Potential allies and collation partners may include: religious groups and churches; unions; police and sheriffs departments; community organizations that assist immigrants (especially domestic violence shelters); civil rights and social justice groups; ethnic organizations; elected officials, and Chambers of Commerce and other business organizations, especially those that employ immigrant workers (hospitality industry, construction, farms).⁷⁰

The coalition should become very familiar with the 287(g) program in general and the specific aspects of the one being proposed. Coalition members should read the reports that have studied the effects of the 287(g) program as well as a recent report by the Police Foundation entitled, “The Role of Local Police: Striking a Balance Between Immigrant Enforcement and Civil Liberties.” This report by the Police Foundation provides a thoughtful analysis of the issues involved when local law enforcement authorities take on the federal responsibility of civil immigration enforcement.

Additionally, for the coalition to be effective it must be *credible*. When the coalition collects information and meets with the public, decision makers, and the media, it should avoid making generalized statements. Instead, it should present facts and information that is specific, detailed and can be verified. Dialogue and discourse should always be respectful and include empirical evidence that can move the debate forward.

Meet with the Local Law Enforcement Agency Interested in Entering into the 287(g) Agreement:

The coalition should help to keep the lines of communication open between the immigrant community and the local law enforcement agency. It is important that the immigrant community understand the agency’s immigration policies. Likewise, it is important for the coalition to explain the impact that they believe a 287(g) agreement would have on the immigrant community, including the erosion of trust and cooperation between the local law enforcement agency and the immigrant community. By keeping the dialogue open, the coalition can work

⁷⁰ National Council of La Raza, “State and Local Enforcement of Federal Immigration laws: A Tool Kit for Advocates,” (March 2006), pg. 11-13, available at <http://www.nclr.org/content/resources/detail/41508>, [hereinafter “NCLR Tool Kit”].

toward collaborative partnerships for public safety and crime control purposes and hopefully dissuade the local law enforcement agency from signing a 287(g) agreement.

Develop Educational and Advocacy Materials: The coalition may need to educate leaders, decision makers, and members of the community about immigration issues and the 287(g) program. Thus, the coalition should consider developing educational and advocacy materials including talking points, letters to decision makers, testimony for members of the coalition to give at public meetings or before the legislature, and letters to the editor and op-eds.

Additionally, coalition members may want to attend or hold a town hall meeting to educate the public about immigration issues and the 287(g) program, illicit information about the community's fears and concerns, and address any fears and concerns with facts and logic.

Some quick sample talking points are:

- Immigration is a federal responsibility;
- Immigration law is a highly complex and technical legal area;
- 287(g) programs can undermine the building of safe communities and the common good by eroding the trust between the community and the local law enforcement agency;
- 287(g) programs can deprive individuals of their dignity and constitutional rights;
- 287(g) programs can undermine the building of strong, inclusive communities;
- The ineffective implementation of 287(g) programs can harm families and communities;
- 287(g) programs tend to divert scarce law enforcement resources from more effective safety and crime prevention methods that promote the common good.

Meet with Decision Makers: The 287(g) agreement must be signed by the ICE Assistant Secretary, and the governor, a senior political entity, or the head of the local agency before trained local officers are authorized to enforce immigration law.⁷¹ Thus, coalition members should identify the person responsible for signing the MOA. Next, the coalition should meet with this individual to explain the coalition's specific and detailed concerns with the MOA. The coalition also should seek opportunities to meet with all public officials interested in this issue—no matter their feelings about immigrants—in order to show goodwill and to provide some clarity about the immigration system.

When the advocacy coalition meets with political leaders, it should stress that cities and communities are safer when they adopt pro-community safety policies. Under such policies, local police are prohibited from racial profiling, from inquiring into immigration status, and from using city or county resources to enforce federal immigration law. Approximately 49 cities and towns and 3 states have policies that limit the authority of local police to enforce federal immigration law.⁷² These policies reinforce the point that when immigrants are encouraged to come forward and report crimes or assist in investigations, we are all safer and the common good is attained.

⁷¹ Information from Office of Public Affairs, DHS, "Delegation of Authority Section 287(g) Immigration and Nationality Act, (May 19, 2009) (on file with CLINIC).

⁷² See The Role of Local Police, pg. 97; see also National Immigration Law Center, "Laws, Resolutions and Policies Instituted Across the U.S. Limiting Enforcement of Immigration Laws by State and Local Authorities," (December 2008), available at <http://www.nilc.org/immlawpolicy/LocalLaw/locallaw-limiting-tbl-2008-12-03.pdf>.

An important note on pro-community safety policies: Some anti-immigrant advocates allege that community safety policies provide “sanctuary” to undocumented immigrants. They claim that these policies prevent local police from arresting immigrants who have committed crimes. *This is simply untrue.* State and local police can and should arrest anyone who has committed a crime. Additionally, the Immigration and Nationality Act (INA) expressly asserts that state and local officers have the authority to enforce the following sections, in addition to INA Section 287(g): (1) INA Section 274 – granting them arrest authority to enforce prohibitions against transporting and harboring certain aliens; (2) INA Section 276 – giving authority to arrest and detain re-entry offenders; and (3) INA Section 103(a)(8)—conferring emergency powers on the Secretary of DHS to authorize any state or local law enforcement officer to enforce federal immigration laws in the event the Secretary certifies that there is an actual or imminent mass influx of aliens arriving off the coast of the U.S. or near a land border.

Engage the Media: Through the media, the coalition can increase the widespread communication and dissemination of information about the 287(g) program. This method also gains the attention of decision makers who often pay attention to the media and public opinion in planning their priorities and contemplating their votes.

Some practices that coalition members can follow to engage the media include: developing personal relationships with reporters; responding to a reporter’s inquiry in a timely manner; providing good quotations when asked; responding to any negative press by a letter to the editor or by asking for a meeting with the reporter and his/her editor; writing op-eds and letters to the editor.⁷³ Additionally, the coalition can put out its own press release to communicate directly with the press.⁷⁴

⁷³ NCLR Tool Kit, pg. 30-31.

⁷⁴ Id., pg. 40.

Steps to Take After a 287(g) Agreement Has Been Signed

When a coalition discovers that an agreement is already in place, the first step to take is to find out the exact terms of the MOA. The coalition can ask for it from the law enforcement agency that has entered into the MOA. According to the new MOA, the agency, at its discretion, may communicate the substance of the agreement to interested organizations and groups.

If for some reason the coalition is not able to attain the MOA from the local law enforcement agency, the coalition may want to pursue both an administrative and a legal avenue. Pursuant to the administrative advocacy, the coalition should try to meet with the entity that supervises the local law enforcement agency. For example, in D.C. the coalition would want to meet with the mayor and, if necessary, the city council. Pursuant to the legal advocacy, the coalition can submit a federal Freedom of Information Act (FOIA) request⁷⁵ to DHS and/or submit a similar request through the state. (Every state has its own version of a FOIA or “sunshine act” law that community members can use to obtain a copy of the 287(g) agreement.)

After obtaining the MOA, coalition members will know the type of agreement—Task Force Officer Model, Jail Enforcement Officer Model, or a combination of the two models. It also will know the points of contact for the law enforcement agency as well as ICE. With this information, coalition members can meet with the local law enforcement agency and the ICE contacts to discuss the MOA, cover common ground, and voice concerns.

Additionally, because the 287(g) agreement may have compromised the relationship between the local law enforcement agency and the immigrant community, the coalition should encourage the local law enforcement agency to engage in outreach to the immigrant community. The goal would be to involve the community in establishing collaborative partnerships for public safety and crime control and to obtain input from the immigrant community on the impact of police department policies. Some outreach strategies used in communities in parts of the country include: organizing and attending community meetings, events and forums; establishing community outreach programs or using community liaisons; educating the community through the media and bilingual pamphlets, or creating specialized department positions or programs to focus on the immigrant community.⁷⁶

Additionally, the coalition members will want to discern how the MOA is working in practice and how it is affecting the community. The coalition should request that the governor, mayor, city, or county board hire an outside monitor to evaluate the 287(g) program, its outcomes and its impact on the community. (Note: The Police Foundation pointed out in its report that there is a need for evaluation of and research on 287(g) programs because there is very little research and empirical evidence of the costs and benefits of local law enforcement collaboration in federal immigration enforcement efforts.)⁷⁷ The results of the outside monitor should be widely disseminated to the public and media for review and comment.

⁷⁵ Information about filing a Federal FOIA is available at http://www.dhs.gov/xfoia/editorial_0579.shtm.

⁷⁶ The Role of Local Police, pg. 34.

⁷⁷ Id., pg. 33. .

If the coalition is not successful in having an outside monitor appointed to evaluate the 287(g) program, the coalition should try to perform the task on its own by obtaining information through town hall meetings, outreach to the immigrant community, inquiries to public officials and the media, and FOIA requests. Suggested topics of inquiry include:

- Who is making the stop?
- How many people are being stopped?
- Where did the stop occur?
- What was the reason for the stop?
- After being stopped, are the individuals being asked about their immigration status?
- Are people being charged with a crime?
- If so, what types of crimes are people being charged with?
- What is the length of the stop?
- Were any vehicles involved? If so, what is the make and model of the vehicles?
- Are individuals being stopped from the local area or from out of town?
- What is the race and/or ethnicity of people stopped?
- Was there a search of the person and/or vehicle?
- What type of training are local police officers receiving in civil immigration law?
- Who supervises the local officers?
- What is the extent and nature of the supervision?
- Regarding complaint procedures: What procedures are in place? How many complaints have been made? What was the outcome of the complaint investigations?
- How many people are being questioned but released because of the 287(g) agreement?
- How many people are being arrested and detained because of the 287(g) agreement?
- How many people are being jailed and deported because of the 287(g) agreement?

Coalition members should also gather stories from the local community about their interactions with local law enforcement agencies after the 287(g) agreement is signed. It is very important that these stories be thoroughly documented. Personal stories about racial profiling or police mistreatment are not useful in advocacy efforts unless they are accurate and well documented with concrete information.

CLINIC can help coalition members collect information and provide a format for filing complaints. With the information contained in the complaint, CLINIC, working in coordination with other advocacy organizations, can submit individual or collective complaints to DHS about local law enforcement officers committing misconduct, illegal profiling, civil rights abuses or otherwise violating the terms of the 287(g) agreements under which they enforce immigration law.

The Process for Filing Complaints about the 287(g) Program

Victims of 287(g) misconduct/abuse also can file a formal complaint with the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties (OCRCL). This office investigates and resolves complaints filed by members of the public concerning abuses of civil rights, civil liberties, and racial profiling. Detailed instructions about what a complaint letter should include can be found at http://www.dhs.gov/xabout/structure/editorial_0373.shtm. For more information about the Office for Civil Rights and Civil Liberties, visit their website or contact them at civil.liberties@dhs.gov or (866) 644-8360.

Additionally, complaints can be reported to other federal authorities as follows:

1. Telephonically to the DHS office of the Inspector General at the toll free number 1-800-323-8603.

2. Telephonically to the ICE Office of Professional Responsibility at the Joint Intake Center in Washington, D.C. at the toll free number 1-877-246-82553 and by email Joint.Intake@dhs.gov.

3. Mail to: Department of Homeland Security, Immigration and Customs Enforcement, Office of Professional Responsibility, P.O. Box 14475, Pennsylvania Avenue, NW, Washington, DC 20044.

Please also let CLINIC know of any complaints filed with any of the agencies listed above by contacting Allison Posner at aposner@cliniclegal.org or Karen Herrling at kherrling@cliniclegal.org.

Conclusion

The civil enforcement of immigration laws should be left to the federal government and not transferred to local law enforcement authorities whose critical role is maintaining public safety and fighting crime. As explained above, the costs of the 287(g) program outweigh the benefits. The 287(g) program can erode years of trust and cooperation between the local law enforcement agency and the immigrant community. Given the complexity of immigration law and the limited supervision by ICE, the 287(g) program can lead to the deprivation of constitutional and civil rights and the diminishment of individual dignity in communities. Additionally, 287(g) programs can divert scarce resources from more effective safety and crime prevention methods that promote the common good.

November 2009: If you have questions or comments about this paper, please contact Karen Herrling, State and Local Advocacy Attorney at CLINIC at kherrling@cliniclegal.org. This information is for educational and advocacy purposes only. The contents do not constitute legal advice. Consult an immigration lawyer for legal advice.