

287(g) and other ICE ACCESS Programs in 2008

**Marty Rosenbluth
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Southern Coalition for Social Justice**

This year also saw a dramatic expansion of what Immigration and Customs Enforcement (ICE) refers to as the ICE ACCESS Program (Agreements of Cooperation in Communities to Enhance Safety and Security).¹ Under ICE ACCESS, the Department of Homeland Security (DHS) has entered into a range of agreements with state and local law enforcement agencies, which while promoted as targeting “criminal aliens,”² also allow these agencies to carry out immigration law enforcement functions that they had not been previously allowed to perform. The authority of state and local law enforcement agencies (LEAs) was previously interpreted as being limited to the enforcement of the statutes criminal provisions, whereas the enforcement of the statutes civil provisions was seen as the exclusive responsibility of federal authorities.³

A key component of ICE ACCESS is the “287(g) Program,” which takes its name from Section 287(g) of the Immigration and Nationality Act (INA).⁴ Under 287(g), ICE is authorized to enter into Memorandum of Understanding (MOUs), also referred to as Memorandum of Agreement (MOAs) with local governments, whereby ICE deputizes local law enforcement agencies to enforce federal immigration laws.⁵

In 2008, the number of these MOUs nearly doubled. There are currently a total of 63 active 287(g) MOUs in 20 states, with 29 of these agreements having been signed in

¹ http://www.ice.gov/partners/287g/Section287_g.htm (hereinafter ICE Partners Website)

² *Id.*

³ *Id.*

⁴ 8 U.S.C. §§1101 *et.seq.*

⁵ ICE Partners Website, *supra* note 1

2008 alone.⁶ According to ICE, a total of 840 officers have been trained and certified since the first MOU was signed in 2002.⁷ Since January of 2006, over 70,000 people have been deported under the 287(g) program nationwide.⁸

As stated above, in promoting the 287(g) program, ICE has emphasized its usefulness in removing dangerous felons from the community and countering the threats of terrorism. But many of those individuals arrested and deported under 287(g) have been charged with minor offenses, including routine traffic violations.⁹ In North Carolina, for example, during the first 10 months of 2008 of the approximately 3,000 people placed in removal proceedings, 23% were charged with Driving While Impaired (DWI) and 33% were charged with violations of motor vehicle laws other than DWI,¹⁰ such as driving without an operator's license.¹¹

Unfortunately detailed statistics on what offenses undocumented immigrants are arrested for under the 287(g) program are not available, in part due to the fact that ICE has not developed a standardized statistical reporting format to keep track of this data.¹² Each agency keeps statistics in their own way, leading to variations in what is reported and how this data is presented.¹³ In the above cited North Carolina statistics, for example, the remaining 44% of those removed were charged with "criminal violations

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Sarah Ovaska, *Immigrants Face Deportation If Arrested On Traffic Charges*, News & Observer, Nov. 15, 2007

¹⁰ *Presentation to the Joint Legislative Corrections, Crime Control and Juvenile Justice Oversight Committee, North Carolina General Assembly* (Statement of the Illegal Immigration Project of the North Carolina Sheriff's Association) November 18, 2008 (Hereinafter "NCSA Presentation")

¹¹ North Carolina, like many other states, requires a valid Social Security number, or other US government issued ID, to show that the individual has legal presence in the country.

http://www.ncdot.org/DMV/driver_services/drivingpublic/applying.html

¹² NCSA Presentation, *supra* note 10

¹³ *Id.*

including murder, assault, illegal drugs, theft, domestic violence, trespass and others”,¹⁴ but no breakdown was provided to enable an evaluation of how many of those removed were charged with serious felonies and how many for minor misdemeanors.

In some jurisdictions, however, local law enforcement authorities have refused to release statistics requested by public interest or civil rights organizations, which were seeking to determine if racial profiling was taking place.¹⁵ Casa de Maryland, an immigrants rights group, filed suit against the Montgomery County Sheriff’s office seeking the immediate release of the information.¹⁶ What information was available from Montgomery showed, however, that a majority of those detained under the county’s 287(g) agreement were arrested for driving without a license and that of the hundreds of people arrested, only 15 felony charges were brought.¹⁷

While the lack of detailed statistics makes it difficult to determine whether racial profiling exists, or if it exists, how widespread the problem is, the statistics that are available show clear cause for concern. In Alabama, for example, a lawsuit revealed that one state trooper involved in the 287(g) program was targeting out-of- state Hispanic drivers for vehicle stops and searches.¹⁸ A preliminary review of the data showed that 58% of the motorists the officer stopped were Hispanic, even though Hispanics make up less than 2 percent of Alabama’s population.¹⁹ Although a judge ordered the state police

¹⁴ *Id.*

¹⁵ Press Release, CASA de Maryland , CASA Sues Fredrick County Sheriff’s Office for Withholding Immigration Enforcement Information (November 25, 2008) (on file with author).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Daniel C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.Org., <http://www.stateline.org/live/details/story?contentId=259949>

¹⁹ *Id.*

to turn over the data, the case was settled out of court before the all the information could be compiled.²⁰

It should be noted that there are two basic types of MOU/MOAs. These are most commonly referred to as the “Task Force Officer” (TFO) and the “Jail Enforcement Officer” (JEO) models.²¹ JEOs are authorized to check the immigration status of any individual who is arrested and brought into the county jail or other detention facility and are suspected of being in the country illegally. TFOs are local law enforcement officers who are empowered to check the immigration status of individuals they encounter in the course of their routine law enforcement duties.

The difference between the two models, however, may not be that significant. A study of arrest data in Davidson County in Tennessee, which uses JEO model of MOU, shows that the arrest rates for Hispanic defendants for driving without a license more than doubled after the implementation of their 287(g) program.²² During the same period, arrest rates for driving with a license for non-Hispanics decreased by around 25%.²³ This raises the question of whether or not Hispanics are being arrested in circumstances where non-Hispanics would not be detained so that 287(g) trained correction officers can check their immigration status.

Also in 2008, ICE began pilot testing a new program that would link ICE’s Automated Biometric Identifications System (IDENT) to the FBI’s criminal database as

²⁰ *Id.*

²¹ ICE partners website, *supra* note 6.

²² Tenn. Immigrant and Refugee Rights Coalition, Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007 1 (July 31, 2007) (in possession of author).

²³ *Id.*

part of the “Secure Communities” program.²⁴ Under this program, all persons detained will have their fingerprints simultaneously checked through both databases.²⁵ The IDENT database contains millions of immigration records, and if anyone’s fingerprints raise suspicions about their immigration status, they will be referred to ICE’s Law Enforcement Support Center for further investigation.²⁶

While billed as intended to help “focus resources on assisting all local communities remove high-risk criminal aliens,”²⁷ statements by ICE officials raise questions as to whether that is the way it will work in actual practice. Julie L. Myers, assistant secretary of the Dept. of Homeland Security, stated that while the program is focusing on those who have committed serious crimes, in cases involving less serious offenses, ICE would consider its staffing levels and resources in deciding how to proceed.²⁸ Myers also stated that those who have not had contact with DHS may not be included in the database, making additional investigation necessary to determine where the person is from and if they have permission to be in the U.S.²⁹ Whether this means that ICE will seek to hold these individuals in detention until their status can be determined was not clear at press time.

Immigration rights groups have voiced their concerns about inaccurate or outdated information in the IDENT database.³⁰ Further, rights groups have also voiced their concern that since the immigration check is run when a person is arrested, rather

²⁴ Susan Carroll, *Harris Jailers Can Access Huge Immigration Database*, Houston Chronicle, Oct. 27, 2008

²⁵ *Id.*

²⁶ *Id.*

²⁷ Press Release, Dept. of Homeland Security, *Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens*, (March 28, 2008), *available at* http://www.ice.gov/pi/news.factsheets.secure_communities.htm

²⁸ Anabelle Garay, *Dallas County to Check Immigration Database*, Associated Press, Nov. 12, 2008

²⁹ *Id.*

³⁰ *Id.*

than after they are convicted, someone could be transferred into ICE custody even though they are eventually found innocent.³¹

While much of the criticism of cooperation agreements between ICE and local law enforcement has come from immigrant and civil rights groups, some of the strongest criticisms and concerns about enforcement of immigration laws by local police agencies have come from law enforcement leaders and personnel themselves. A report by the Immigration Committee of the Major Cities Chiefs Association (MCC), expressed the organization's concerns that being called on to enforce federal immigration laws could undermine trust and cooperation with immigrant communities and divert resources away from other law enforcement priorities.³² The report also expressed concern over the complexity of federal immigration law, the lack of state and local authority, and the risk of civil liability.³³

The MCC further expressed concern that involving local law enforcement agencies in enforcing immigration laws would not only affect the relationship between their departments and undocumented immigrants, but would also adversely affect their ability to interact with legal immigrant communities as well.³⁴

³¹ Leslie Berestein, *County to Check Immigration Status of Arrestees in Jail*, San Diego Union-Tribune, Nov.13, 2008

³² Major Cities Chiefs Association, *Immigration Committee Recommendations For Enforcement of Immigration Laws By Local Police Agencies* (2006) , pages 5

³³ *Id.*

³⁴ *Id.* at 6.