



**Testimony of**

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**Hearing on**  
**Examining 287(g): The Role of State and Local Law Enforcement in**  
**Immigration Law**

**Before the**  
**Committee on Homeland Security**  
**U.S. House of Representatives**  
**Washington, D.C.**

**March 4, 2009**

Mister Chairman and Distinguished Members of the Committee:

My name is Muzaffar Chishti, and I am the Director of the Migration Policy Institute's Office at New York University School of Law. Thank you for inviting me to testify before your Committee on "Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law."

## **INTRODUCTION**

The Migration Policy Institute (MPI) is a non-partisan, non-profit think tank that studies migration and the management of migration systems worldwide, and one of its key areas of focus is U.S. immigration policy. Last month, MPI issued a report which called on the federal government to reassert its authority and willingness to enforce immigration law, while recognizing the discrete co-operative role that states and localities could play in important federal enforcement efforts.<sup>1</sup> MPI also recently issued a report on the National Fugitive Operations Program,<sup>2</sup> another component of the interior enforcement strategy of U.S. Immigration and Customs Enforcement (ICE). In that report, we concluded that the fugitive operations program had strayed far from its initial mandate and ICE's core priorities, and issued a series of recommendations to restore integrity and bring efficacy to the program. We are currently engaged in an in-depth study of the 287(g) program; we have been studying the 67 Memoranda of Agreement (MOA) that the federal government has signed with various state and local government agencies for immigration-related enforcement. As part of that work, we are collecting data and will be doing site visits over the next several months in preparation for a comprehensive report expected to be released later this year. Among other things, we are seeking to understand the character, implementation and impacts of the 287(g) agreements. The latter include their costs and benefits to national, state and local law enforcement and to local communities. What follows are some preliminary conclusions based primarily on our examination of the MOAs themselves and publicly available data.

### **I. TWO YEARS OF DRAMATIC, REGIONALIZED GROWTH**

The 287(g) program was created as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. The first agreement under the provision was not signed until 2002 by the State of Florida. Growth in the program remained measured for the next five years, but the last two years have seen dramatic growth in the number of 287(g) agreements.

At the beginning of 2007, there were eight agreements in effect, including six "jailhouse" agreements whereby cross-deputized local incarceration officers perform immigration functions exclusively with respect to individuals already detained on state criminal charges. In 2007, however, 26 agreements were signed, and another 28 were added the following year. The agreements signed in 2007 and 2008 were not confined to the jails, but also included the Task

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<sup>1</sup> Doris Meissner and Donald Kerwin, "DHS and Immigration: Taking Stock and Correcting Course," (Washington, DC: Migration Policy Institute, 2009), pg. 48-50, [http://www.migrationpolicy.org/pubs/DHS\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf).

<sup>2</sup> Margot Mendelson, Shayna Strom and Michael Wishnie, "Collateral Damage: An Examination of ICE's Fugitive Operations Program," (Washington, DC: Migration Policy Institute, 2009), [http://www.migrationpolicy.org/pubs/NFOP\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf).

Force model in which 287(g)-authorized officers perform immigration-related enforcement on the streets, and the “hybrid” model, which entails both the Task Force and jailhouse components. Jailhouse agreements comprise the majority of the 67 agreements currently in force. (Figure 1 in the Appendix section summarizes the growth of 287(g) agreements by year and type.)

While the 287(g) program encompasses law enforcement agencies at the state, county and local levels, counties comprise approximately two-thirds of all program participants. The Task Force model is predominant in state and city law enforcement agencies, while nearly all of the counties have either the jail or hybrid model. (See Figure 2 for MOAs by jurisdiction and type.)

The 287(g) program’s growth has been regionally concentrated. Of the 67 agreements, 42 are in the South, 17 are in the West, five in the Northeast and three in the Midwest. ICE has confirmed that there are approximately 80 applications pending to join the 287(g) program. About two-thirds of the pending applications are from jurisdictions in the South, according to ICE.

## **II. MISSION DRIFT: THE EVOLVING PURPOSE OF SECTION 287(G)**

One critical threshold issue immediately apparent in our study of the 287(g) program is that its ostensible purpose has undergone a dramatic evolution from the time it was added to the Immigration and Nationality Act (INA) in 1996 to the present day. Initially conceived with a narrow mandate, the program has undergone at least two major transformations. The first, following the Sept. 11, 2001 attacks, sought to utilize the program as a tool to fight terrorism and promote public safety. The second transformation, which occurred around 2006, made the program a broader, more generalized immigration enforcement program. The program’s rapid expansion has been accompanied by an apparent shift in mission. These changes suggest the need for closer supervision of ongoing 287(g)-related operations, more extensive training of state and local law enforcement officers in the often complex arena of immigration law, and clear, publicly released guidelines for participating agencies.

### ***1996: Legislative History***

The primary legislative sponsor of the amendment that added the 287(g) program to the INA, Representative Tom Latham (R-IA), explained during the House floor debate that it was intended to “allow state and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend and detain those illegal aliens who are subject to an order of deportation.”<sup>3</sup> Thus, as initially conceived, the program was to focus on non-citizens to whom ICE now refers as “fugitive aliens” and who were previously referred to by the Immigration and Naturalization Service (INS) as “absconders.”

### ***1998: Salt Lake Debate***

Although the first MOA was not signed until 2002, the Salt Lake City Council came close to enacting a 287(g) agreement just two years after IIRIRA’s passage because of a shortage of INS officers in the area. As a result of the shortage, unauthorized immigrants subject to INS detainers were nonetheless released by local law enforcement because there were not sufficient federal personnel to transport the individuals to a facility in Las Vegas or Denver, and the local police

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<sup>3</sup> Floor statement of Rep. Tom Latham, (R-IA), 142 *Congressional Record*, H2475-01, \*H2477, 1996.

had neither the space to continue to hold them nor the authority to convey them across state lines.<sup>4</sup>

This scenario frustrated local law enforcement and led Salt Lake City and County to explore the possibility of signing a Memorandum of Understanding, or MOU as the agreements were then called, so that its officers could gain “the authority to ... assist the INS in transporting that person across state lines to an INS holding facility in Denver or Las Vegas.”<sup>5</sup> Both the County Commission and Sheriff emphasized that this was the sole purpose of seeking the MOU; as the latter put it, “I have no intention of cross-deputizing my deputies so they can enforce the INS laws. I have enough to do in Salt Lake County with the local laws. I have no intention of my people arresting people for illegal status.”<sup>6</sup> Ultimately, however, Salt Lake did not pursue the MOA because of strong public concerns about the potential for racial profiling.<sup>7</sup>

### ***2002-2005: Florida, Alabama and the Los Angeles County Sheriff's Department***

The first 287(g) agreement was ultimately signed by the State of Florida in 2002. The officers trained under the new agreement were members of the Regional Domestic Security Task Forces created to address perceived shortcomings in the state's ability to combat terrorism after the Sept. 11 terrorist attacks.<sup>8</sup> In 2003, the State of Alabama entered an MOA to address particular problems it was experiencing with fraudulent documents being presented to secure drivers' licenses.<sup>9</sup>

In July 2005, when only three agreements were in force, a House Homeland Security Committee Subcommittee held a hearing on the 287(g) program. Paul M. Kilcoyne, Deputy Assistant Director of ICE's Office of Investigations, assured the Subcommittee that the program would remain “focused on criminal organizations, those individuals who pose a threat to the border security,” and not “the landscape architect that had the broken headlight.”<sup>10</sup> At the time, a 287(g) agreement had recently been instituted in Los Angeles County, where custody assistants in the county jails were trained to check the immigration status of inmates after they had been convicted of a crime. Mr. Kilcoyne emphasized the importance of maintaining “a very focused approach” to the 287(g) program in order to make the best use of limited fiscal and managerial resources. For precisely this reason, the Subcommittee was told that the 287(g) program would expand only into state and local jails.

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<sup>4</sup> Statement of Aaron Kennard, Salt Lake County Sheriff, to the House Judiciary Committee, Subcommittee on Immigration and Claims, *Problems Related to Criminal Aliens in the State of Utah*, 105th Cong., 2d sess., July 27, 1998, pg. 14-15.

<sup>5</sup> *Ibid.*, Statement of Mary Callaghan, Commissioner, Salt Lake County Commission, pg. 6.

<sup>6</sup> *Ibid.*, Statement of Aaron Kennard, Salt Lake County Sheriff, pg. 15.

<sup>7</sup> Shawn Foster, “SLC Council Says No to Cross-Deputization,” *Salt Lake Tribune*, September 2, 1998.

<sup>8</sup> Statement of Mark F. Dubina, Special Agent Supervisor, Tampa Bay Regional Operations Center, Florida Department of Law Enforcement, Regional Domestic Security Task Force Supervisor, before the House Committee on Homeland Security, Subcommittee on Management, Integration and Oversight, *The 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships*, 109th Cong., 1<sup>st</sup> sess., July 27, 2005), pg. 17.

<sup>9</sup> *Ibid.*, Statement of Major Charles E. Andrews, Chief, Administrative Division, Alabama Department of Public Safety, pg. 20.

<sup>10</sup> *Ibid.*, Statement of Paul M. Kilcoyne, Deputy Assistant Director, Office of Investigations, ICE.

### ***2006: A Shift in Focus***

By September 2006, the program had expanded into four additional jails, bringing to seven the total number of agreements. The focus of the program — or at least the manner in which it was being employed by some law enforcement agencies — had shifted further. No longer did 287(g) officers focus solely on targeting criminal aliens; rather, at least some law enforcement agencies were, by this point, seeking to apprehend as many unauthorized immigrants as possible on the belief that all unauthorized immigrants are more likely to commit crimes and in response to perceived fiscal burdens placed on public services by immigrants to new immigrant-receiving communities.<sup>11</sup>

The Special Agent in Charge of the Atlanta ICE Office of Investigations, Kenneth Smith, stated that while it could help identify criminal aliens, “the real beauty of the program” is that it guaranteed that every person who enters a jail that has an MOA is screened for civil immigration law violations.<sup>12</sup> Mr. Smith acknowledged that this “would not have necessarily a huge impact on the criminal system,” but that “it certainly would on our detention and removal capabilities.”<sup>13</sup> Mr. Smith speculated that the Mecklenburg County approach was a “model that . . . will be mirrored in jurisdictions around the country.”<sup>14</sup>

At the time, Mecklenburg County was the only jurisdiction in North Carolina with an MOA, and its sheriff, Jim Pendergraph, reported that the agreement had permitted his officers to identify a large number of civil immigration law violators. ICE Detention and Removal Operations, the sheriff said, was “overwhelmed by the numbers we are generating for removal in Mecklenburg County alone,”<sup>15</sup> and “they’ve had to reassign ICE agents to deal with the numbers that we’re seeing.”<sup>16</sup> In so doing, he also foreshadowed significant problems relating to ICE supervision and the 287(g) program’s interference with federal immigration priority-setting and initiative. According to Sheriff Pendergraph, his office had generated so many removal cases for ICE that:

*They can’t support many more because they are flooded with work. I don’t know where the resources are going once they’re appropriated in Washington but they’re not getting to the local field offices because they can’t handle what they have now. If more sheriffs in this state got on board then there would be no ICE agents to deal with what they normally do.*<sup>17</sup>

Since 2006, seven other North Carolina counties have signed MOAs — all of which use largely the same language as the Mecklenburg County MOA (there are reportedly an additional 16 jurisdictions in the state with applications pending). In fact, from the beginning of 2007 to the present day, all or virtually all of the 54 MOAs signed in this period seem to be based on the

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<sup>11</sup> Testimony of Jim Pendergraph, Sheriff of Mecklenburg County, North Carolina, before the House Committee on Government Reform, Subcommittee on Criminal Justice, Drug Policy and Human Resources, *Empowering Local Law Enforcement to Combat Illegal Immigration*, 109th Cong., 2<sup>nd</sup> sess., August 25, 2006.

<sup>12</sup> *Ibid.*, Statement of Kenneth A. Smith, Special Agent in Charge, Atlanta, Georgia, Office of Investigations, ICE, pg. 35

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, pg. 29.

<sup>15</sup> *Ibid.*, pg. 49.

<sup>16</sup> *Ibid.*, pg. 70.

<sup>17</sup> *Ibid.*

same template, and thus not designed to reflect the targeted needs or priorities of each participating agency.

### ***ICE's Statements about the Program's Purpose***

ICE's own 287(g) documents also suggest that the program has gone beyond its initial purpose, which ICE has consistently described as combating serious crime committed by immigrants. According to a 2007 ICE Fact Sheet, the program is aimed at "violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering."<sup>18</sup> The fact sheet went on to clarify that "[t]he 287 (g) programs is not designed to allow state and local agencies to perform random street operations. It is not designed to impact issues such as excessive occupancy and day laborer activities." This 2007 Fact Sheet was even used as evidence that a particular law enforcement agency had exceeded the authority conveyed by the MOA.<sup>19</sup> Later versions of the 287(g) Fact Sheet have not contained similar language concerning the objectives or limitations of the program.<sup>20</sup>

### ***Arrest Statistics***

According to ICE, law enforcement agencies participating in the 287(g) program were responsible for approximately 79,000 arrests of suspected immigration law violators from January 2006 through November 2008.<sup>21</sup> However, it is not known how many of those arrested posed national security or public safety threats because ICE has not set forth priority categories with respect to the 287(g) program and has not released any information to date beyond the raw number of arrests. The statistics, however, indicate that the program has departed from the earlier risk-based approach to immigration enforcement articulated by the Department of Homeland Security (DHS).

By way of illustration, under the first MOA signed, the State of Florida devoted 35 officers to high-value targets — in particular those who posed threats to national security. In the first 36 months that the MOA was in operation, those officers made approximately 165 arrests (i.e., fewer than five arrests a month, or slightly less than one arrest per seven deputized officers per month). The second MOA, through which 21 members of the Alabama State Police were trained, resulted in approximately 200 arrests in the first 21 months — fewer than 10 arrests a month, or about one arrest per two officers per month.<sup>22</sup> In contrast, in the last three years, each law enforcement agency has arrested, on average, roughly 100 immigrants a month, suggesting a shift in emphasis from high-priority targets to volume of arrests. Though the removal of unauthorized immigrants is clearly within ICE's mandate, there are less costly, less disruptive and more efficient ways of accomplishing that.

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<sup>18</sup> Delegation of Immigration Authority, Section 287(g), Immigration and Nationality Act, September 6, 2007.

<sup>19</sup> E.g., Am. Compl. ¶¶ 22-23, Melendres, et al. v. Arpaio, et al., No. 07-02513 (D. Ariz. filed July 16, 2008).

<sup>20</sup> E.g., Delegation of Immigration Authority, Section 287(g), Immigration and Nationality Act, August 18, 2008; "The ICE 287(g) Program: A Law Enforcement Partnership," (November 19, 2008); Section 287(g), Immigration and Nationality Act, "Frequently Asked Questions," (last modified February 20, 2009), [http://www.ice.gov/partners/287g/Section287g\\_faq.htm](http://www.ice.gov/partners/287g/Section287g_faq.htm).

<sup>21</sup> "The ICE 287(g) Program: A Law Enforcement Partnership," (November 19, 2008).

<sup>22</sup> Hearing, *supra* note 6, at 16.

### III. COSTS TO THE SYSTEM

It appears that the rapid expansion of the 287(g) program imposes considerable costs — both tangible and intangible — on the entire immigration enforcement system. I will focus here on four.

#### *Subordination of Federal Immigration Enforcement Priorities*

The 287(g) program threatens the ability of DHS and ICE to set a coherent immigration enforcement agenda at the national level. Because of the need to respond to the demands of the 287(g) program and its state and local partners, the federal government has lost initiative with respect to where, how and when to deploy enforcement resources. Instead, operations have been initiated by 287(g) law enforcement agencies, most of which are led by elected sheriffs who may be using their MOAs for local purposes not necessarily consistent with the overall needs of the region or country. Even law enforcement agencies with the best intentions are primarily concerned with their own communities.

Under some circumstances, law enforcement agencies entering into 287(g) agreements can have an incentive to detain large numbers of immigrants. After the initial arrest and processing by the 287(g) partner, the federal government bears the full cost for virtually every other step in the enforcement process, including detention, prosecution, adjudication and removal. In fact, with regard to law enforcement agencies reimbursed by the federal government for holding immigration detainees through an Inter-Governmental Service Agreement (IGSA), there are strong financial incentives to make as many arrests as possible. For example, under the IGSA between ICE and the Frederick County, Maryland Sheriff's Office — which also has a 287(g) MOA — the county is reimbursed \$83 a day for holding an immigration detainee. However, according to Frederick County Sheriff Charles Jenkins, it costs the county \$7 a day to feed and house a detainee.<sup>23</sup> The difference between the reimbursement rate and the actual cost represents pure profit, and can be an incentive for over-enforcement — particularly in the current economic climate. At least 22 287(g) partners also have IGSA's providing reimbursement for housing immigration detainees.

Immigration enforcement priorities must be set at the federal level. Only from a national perspective can all of the relevant factors and resource levels be taken into account. This permits a much more efficient allocation of resources on a system-wide basis and avoids expending a great deal of federal resources on individuals who pose neither a threat to public safety nor national security. Although ICE has not released comprehensive arrest statistics on the 287(g) program, independent data obtained by journalists suggest that significant resources are expended to remove unauthorized immigrants who are guilty only of traffic violations. In Frederick County, Maryland, for example, more than half of the first 300 suspected immigration law violators charged under its MOA were arrested for driving without a license. Likewise, data from Gaston, North Carolina reveals that 95 percent of state charges filed against 287(g) arrestees were for misdemeanors; 60 percent were for traffic violations that were not DWIs.<sup>24</sup> In

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<sup>23</sup> Nicholas C. Stern, "Sheriff Updates County on ICE Action," *Frederick News-Post*, October 17, 2008.

<sup>24</sup> Michael Barret, "Officers Decide When to Arrest, But for Immigrant Community Decision Can Lead to Deportation," *Gaston Gazette*, July 7, 2008; Aarti Shahani and Judith Green, *Local Democracy on ICE*, (New York:

Mecklenburg County, 2,321 unauthorized immigrants were placed in removal proceedings in 2007. Data shows that fewer than 5 percent of the charges against these individuals were felonies.<sup>25</sup> By yielding such a high rate of relatively low-priority civil immigration arrests, MOAs compromise DHS' ability to set the immigration enforcement agenda.

### ***Fiscal Costs***

Although ICE has not publicly released information about the total fiscal cost of the 287(g) program, statements by agency administrators indicate it is substantial. Former ICE Assistant Secretary Julie Myers testified in July 2007 that it costs slightly more than \$17.5 million in the first year of an MOA to implement the program.<sup>26</sup> This figure included “start-up and first-year maintenance costs consisting of such items as detention, removal and bed space management, IT infrastructure and maintenance, [Office of Investigations]/[Detention and Removal Operations] personnel and support positions, training, transportation and other elements,” and was based on a law enforcement agency with 20 trained officers that made 240 arrests in the first year. Assuming that this figure has remained fairly constant, the first year of the 67 MOAs currently in force would constitute an expenditure of more than \$1.1 billion.

It is important to note that this \$1.1 billion estimate includes only the front end of the removal process. This estimate does not include immigration court prosecution expenses such as the salaries for ICE attorneys, immigration judges and support personnel; maintenance and overhead expenses for their offices; etc. — as well as similar expenses for appeals to the Board of Immigration Appeals and U.S. Courts of Appeals.

The program's substantial apparent costs reinforce the need for it to advance DHS' overall enforcement priorities.

### ***Community Impact***

Given the complexity of immigration law and the apparent paucity of supervision and training offered to agents under the current 287(g) program, harmful errors and even racially motivated law enforcement tactics may be inevitable. Whereas regular ICE agents receive five months of training in the intricacies of immigration law, 287(g) officers receive four weeks of ICE training. Furthermore, because immigration enforcement is not the primary job of local law enforcement agents, they do not accumulate the experience and expertise of ICE agents. Noting that immigration law is intricate, voluminous and distinct, the International Association of Chiefs of Police (IACP) has expressed concern that local law enforcement agents acting under 287(g) agreements will violate the unique standards and constitutional requirements surrounding immigration enforcement: “What constitutes ‘probable cause’ in immigration matters may not be easy to discern.”<sup>27</sup> Indeed, evidence shows that 287(g)-authorized officers purporting to enforce immigration law have illegally detained and even deported U.S. citizens.<sup>28</sup>

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Justice Strategies, 2009), <http://www.justicestrategies.org/sites/default/files/JS-Democracy-On-Ice.pdf>.

<sup>25</sup> Lindsay Haddix, *Immigration and Crime in North Carolina: Beyond the Rhetoric*, (Chapel Hill, NC: Department of City and Regional Planning, UNC Chapel Hill, 2008).

<sup>26</sup> Pre-hearing questionnaire by Julie Myers, DHS Assistant Secretary nominee, submitted to the Senate Committee on Homeland Security and Governmental Affairs, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., July 26, 2007.

<sup>27</sup> International Association of Chiefs of Police, *Police Chiefs Guide to Immigration Issues*, July 2007, 13.

<sup>28</sup> Paloma Esquivel, “Suit Filed Over Disabled U.S. Citizen's Deportation Ordeal,” *Los Angeles Times*, February 28, 2008.



### ***Community Policing***

The core functions of law enforcement officers are to protect the public and keep communities safe. By deputizing state and local law enforcement officials to enforce civil immigration law, the 287(g) program may detract from officers' ability to fulfill their core mission in addition to diverting scarce local law enforcement resources to general immigration enforcement.

In 2005, an IACP representative testified before this Committee that local enforcement of civil immigration laws "would likely have a chilling effect on both legal and illegal aliens reporting criminal activity or assisting police in criminal investigations" and could thereby "diminish the ability of law enforcement agencies to effectively police their communities and protect the public they serve."<sup>29</sup> IACP and the Major Cities Chiefs (MCC) both have publicly expressed concern that 287(g) agreements weaken their capacity to police their communities.

Fear and distrust of law enforcement agencies have broad reverberations. Immigrant victims of crime are less likely to seek police assistance and therefore more vulnerable. 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. Likewise, witnesses to street crime and violence may not come forth with valuable evidence and testimony. With respect to national security and counterterrorism, DHS has long emphasized the necessity for all individuals to report information and intelligence to law enforcement agencies. The underlying message is clear: building safe communities requires that all residents feel safe turning to and cooperating with law enforcement.

Furthermore, as a recent MPI study of the National Fugitive Operations Program demonstrates,<sup>30</sup> failure to abide by strict priorities in immigration enforcement inevitably blurs the distinction between immigrants who are unlawfully present and those convicted of violent crimes. The 287(g) agreements, as they have been applied, potentially collapse the important distinction between civil immigration violations and criminal offenses by affecting all individuals, citizen or non-citizen, suspected of being unauthorized immigrants. In so doing, these agreements send a message to the public that immigrants are criminals — thus, reinforcing harmful stereotypes.

## **IV. THE LACK OF GUIDANCE, SUPERVISION AND ACCOUNTABILITY**

The statutory authorization for the 287(g) program requires that:

With respect to each officer or employee of a state or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the state or political subdivision.<sup>31</sup>

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<sup>29</sup> Hearing, *supra* note 6, at 11.

<sup>30</sup> Mendelson, Strom and Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program*.

<sup>31</sup> INA § 287(g)(5), 8 U.S.C. § 1357(g)(5).

Although the MOAs generally set forth the powers and authorities that may be wielded by the deputized officers, they are far from comprehensive; indeed, those written in the last two years seem to be mostly boilerplate. Of particular concern, the MOAs do not articulate any overall objectives for the program or provide guidance as to when the law enforcement agencies *should* exercise their immigration enforcement powers. These newer agreements simply state that the intent of the agreeing parties (ICE and the law enforcement agency) is either that the MOA will “enable [the law enforcement agency] to identify and process immigration violators” or “result in enhanced capacity to deal with immigration violators.” Such vague statements of intent are less likely to constrain abuses and direct resources to high national enforcement priorities.

This absence of objectives and guidance has essentially authorized participating law enforcement agencies to employ their 287(g) authority as they wish. Inevitably, this has led to widely divergent applications of the newly acquired powers, as well as many of the highest-profile abuses of the program. The wide discretion afforded law enforcement agencies is accompanied by questionable and uneven supervision and insufficient accountability measures.

### ***Lack of Guidance Regarding Immigration Enforcement Functions***

While some of the MOAs state that the participating officers “will exercise their immigration-related authorities during the course of criminal investigations,” the language offers little concrete direction. Nowhere do the MOAs prohibit the officers from using their authorities outside of criminal investigations or set forth consequences if they do. Thus, law enforcement agencies are basically free to use their 287(g) powers at their discretion, including during non-criminal investigations, such as routine traffic stops.

The jailhouse MOAs do little more to curb unbridled officer discretion. One reason is that the jail agreements are no longer confined to the post-conviction stage of criminal proceedings, as the first one was. Instead, the immigration functions are frequently, if not always, performed as to every inmate booked in the facility, including those detained on arrestable traffic offenses and even civil contempt, at the time of initial intake.

### ***Inadequate Supervision***

The requirement that ICE “supervise” participating law enforcement agencies is so vague as to render the statutory language virtually meaningless. To our knowledge, ICE has issued no guidelines, regulations or protocols with respect to the nature of its supervision, how frequently it must take place or which ICE office must provide it. Because of the differentiated regional concentration for the 287(g) agreements, some regional ICE offices have a greater supervision responsibility than others. (See Figure 3 in the Appendix section.)

ICE and its partners have emphasized the importance of close supervision over participating 287(g) partners. Florida Task Force Supervisor Mark Dubina testified to a Subcommittee of this Committee that “[i]n all cases, the ICE team leader to the [task force], the [state law enforcement] special agent supervisor and the local ICE immigration supervisor must agree on a decision to arrest or detain a person, pursuant to 287(g) authority.”<sup>32</sup>

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<sup>32</sup> Hearing, *supra* note 6, at 16.

In practice, however, the boilerplate MOA states only that “activities conducted by the participating law enforcement agency personnel will be supervised and directed by ICE supervisory officers.” In sharp contrast to Mr. Dubina’s description of joint deliberation in advance of arrests, most MOAs require only that participating personnel “shall give notice to the ICE supervisory officer as soon as practicable *after*, and in all cases within 24 hours of, any detainer issued.” Only five of the 67 MOAs set forth specific circumstances in which 287(g) partners must notify ICE of their actions. And, even then, the language is retrospective: law enforcement agencies, for example, are to contact ICE immediately in the event of “death or injury of an alien(s).”

### ***Inadequate Accountability Measures***

At a minimum, a program that does not constrain its state and local partners from deviating from their traditional role and shifts immigration enforcement authority away from federal officials requires careful record-keeping and close review. However, the 287(g) program entails few mechanisms for accountability, transparency or public scrutiny. Most MOAs do not contain requirements or guidelines about the nature of the data that law enforcement agencies should collect. Likewise, ICE has released no information about processes or protocols by which it audits or reviews its 287(g) partners and the data they collect.

Given the magnitude of the program’s authority, one would expect strict and transparent procedures by which individuals can report inappropriate or problematic experiences with law enforcement agencies functioning in their immigration enforcement capacity. To the contrary, however, the complaint procedures set forth in MOAs are vague and boilerplate.

## **V. CONCLUSION AND RECOMMENDATIONS**

We live in a world of choices, with limited law enforcement resources. In general, when law enforcement agencies go beyond their core mission, we must be sure of the purpose and objectives for the departure. Law enforcement agencies already face myriad competing pressures and priorities. They are over-stretched and under-funded: trends that will no doubt worsen under the current economic conditions. The 287(g) program necessarily requires officers to spend time on activities beyond their core functions. With this new responsibility come risks and costs for the participating law enforcement agencies, the federal government and communities across the country.

When conceived by Congress in 1996, the 287(g) program was to be narrowly aimed at training local and state law enforcement officers to arrest unauthorized immigrants already subject to outstanding warrants of deportation (i.e. “fugitive aliens”). Eight years later, the first 287(g) agreement, signed by the State of Florida, was not focused on fugitive aliens, but rather tailored to the counter-terrorism objectives of Florida’s Regional Domestic Security Task Forces. Had the 287(g) program remained confined to either of these initial purposes — fugitive aliens, as envisioned by Congress, or counter-terrorism, as embodied in the first agreement with the state of Florida — perhaps it would be a success today and prove to be a good model for a force multiplier in federal immigration enforcement.

But much has changed in the interim years. The program has grown to include nearly 1,000 officers at 67 law enforcement agencies in 23 states, with most of that expansion happening in just the last two years.

Because of the growth of the 287(g) program over a short period of time, its potential to distract from the federal government's important efforts to enact a coherent national immigration policy, and its potential costs to communities, we therefore make the following recommendations:

- 1. Expansion of the program should be put on hold to permit a thorough review and potential redesign.** Congress or DHS should impose a moratorium on new 287(g) agreements while a broad, in-depth, empirically based study is undertaken to evaluate cost effectiveness and community impact.
- 2. The Committee should hold field hearings on the 287(g) program.** I would encourage the Committee to consider today's hearing a starting point to further examination of the program by holding field hearings in communities that have MOAs as well as those that have chosen not to pursue an agreement.
- 3. If Congress chooses to continue the 287(g) program, it should enumerate specific and meaningful programmatic objectives with clear reporting requirements.** The program would benefit from coherent, transparent objectives that fit logically into the overall DHS enforcement priorities. With respect to its fugitive operations, ICE has set forth priority categories in which individuals posing a threat to national security are specifically identified as most important. ICE should adopt a similar set of publicly articulated priorities for 287(g) operations. Local law enforcement agencies should be required to regularly report arrest data, with specific indication of the individuals' priority levels. As part of that process, 287(g)-authorized agencies should also record and report the violation for which each individual was arrested as well as the individual's race and country of origin.
- 4. If the 287(g) program is continued, the Committee should examine whether it should be confined to the jailhouse model and whether only those convicted of serious crimes should be screened for civil immigration violations.**
- 5. All existing agreements should be reviewed to determine how well they advance federal objectives, how efficaciously they allocate resources, and whether they are sufficiently cost-effective.** Agreements that do not advance DHS' objectives or suffer from other problems of management or oversight should be modified or terminated.
- 6. Congress should make clear any law enforcement agency that consistently exceeds its authority shall have its MOA terminated.** All MOAs should also undergo a mandatory, periodic review to monitor compliance.
- 7. The basic MOA itself should ensure sufficient training and supervision by ICE and include clear reporting and accountability measures. Moreover, processes should be**

included that require law enforcement agencies to seek the input of affected communities.

**VI. APPENDICES**

**FIGURE 1. TYPES OF 287(G) MOAs SIGNED BY YEAR**

| <b>YEAR</b>   | <b>JAILHOUSE AGREEMENTS</b> | <b>TASK FORCE AGREEMENTS</b> | <b>HYBRID JAILHOUSE/ TASK FORCE AGREEMENTS</b> | <b>TOTAL</b> |
|---------------|-----------------------------|------------------------------|--|--------------|
| 2002          | --                          | 1                            | --   | <b>1</b>     |
| 2003          | --                          | 1                            | --   | <b>1</b>     |
| 2004          | --                          | --                           | --   | <b>0</b>     |
| 2005          | 3                           | --                           | --   | <b>3</b>     |
| 2006          | 3                           | --                           | --   | <b>3</b>     |
| 2007          | 11                          | 9                            | 6  | <b>26</b>    |
| 2008          | 14                          | 13                           | 6  | <b>28</b>    |
| <b>TOTAL:</b> | <b>31</b>                   | <b>24</b>                    | <b>12</b>                                      | <b>67</b>    |

**FIGURE 2. TYPES OF 287(G) MOAs BY JURISDICTION TYPE**

| <b>YEAR</b>   | <b>JAILHOUSE AGREEMENTS</b> | <b>TASK FORCE AGREEMENTS</b> | <b>HYBRID JAILHOUSE/ TASK FORCE AGREEMENTS</b> | <b>TOTAL</b> |
|---------------|-----------------------------|------------------------------|--|--------------|
| STATE         | 4                           | 8                            | 0  | <b>12</b>    |
| COUNTY        | 25                          | 6                            | 12   | <b>43</b>    |
| CITY          | 2                           | 10                           | 0  | <b>12</b>    |
| <b>TOTAL:</b> | <b>31</b>                   | <b>24</b>                    | <b>12</b>                                      | <b>67</b>    |

**Figure 3. Supervising ICE Offices and Supervised Law Enforcement Agencies**

| <b>Location of Supervising Office</b> | <b>Number of agencies Supervised</b> | <b>Avg. Distance to agency (Miles)</b> |
|---------------------------------------|--------------------------------------|--|
| Atlanta, GA                           | 13                                   | 219                                    |
| New Orleans, LA                       | 8                                    | 544                                    |
| Phoenix, AZ                           | 7                                    | 42                                     |
| Fairfax, VA                           | 7                                    | 25                                     |
| Charlotte, NC                         | 5                                    | 64                                     |
| Los Angeles, CA                       | 4                                    | 45                                     |
| Miami, FL                             | 4                                    | 313                                    |
| Tampa, FL                             | 4                                    | 194                                    |
| Fort Smith, AR                        | 4                                    | 70                                     |
| Boston, MA                            | 4                                    | 44                                     |
| Dallas, TX                            | 4                                    | 75                                     |