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The Misguided Expansion of § 287(g) Agreements

Allowing Local Police to Perform Immigration Duties.

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Recently, the Department of Homeland Security (“DHS”) decided to expand Section 287(g) of the Immigration and Nationality Act, which allows local law enforcement representatives to act as immigration officers and enforce federal civil immigration laws.¹ Human Rights Initiative of North Texas (“HRI”) is opposed to this expansion and believes that the 287(g) program should be terminated altogether, as it prevents immigrants from reporting crimes and working with the police, encourages racial profiling, and wastes taxpayer money. Instead, local law enforcement agencies should be encouraged to work with immigrants to prosecute serious criminals and improve the safety of their communities.

Background Information: 287(g) Agreements

Section 287(g) is part of the Immigration and Nationality Act (“INA”).² This statute allows a state or local law enforcement agency to enter into a Memorandum of Agreement (“MOA”) with DHS to carry out federal immigration functions such as the apprehension and

¹ AZADEH SHAHSHAHANI, AM. CIV. LIBERTIES UNION FOUND. OF GA., TERROR AND ISOLATION IN COBB: HOW UNCHECKED POLICE POWER UNDER 287(G) HAS TORN FAMILIES APART AND THREATENED PUBLIC SAFETY 3 (2008).

² 8 U.S.C. § 1357 (2009).



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detention of undocumented individuals.³ The program is completely voluntary.⁴ There are two different models by which 287(g) programs can be carried out. First, the *jail enforcement model* allows for 287(g) officers working in state and local detention facilities to identify and process removable aliens who have been charged with or convicted of an offense.⁵ Second, the *task force model* allows for 287(g) officers to identify and process removable aliens in community settings, through either their regular duties as enforcement officials or in close coordination with Immigration and Customs Enforcement (“ICE”) in task force settings.⁶

ICE, the federal agency within DHS charged with enforcing U.S. immigration laws, has entered into 67 local 287(g) agreements nationwide.⁷ Three of these agreements are with municipalities in Texas: the Carrollton Police Department, the Farmers Branch Police Department, and the Harris County Sheriff’s Office.⁸ Any city or state that engages in a 287(g) agreement must sign an MOA with ICE. The MOA details the agreement’s scope, confers authority, details the allotment of costs, and sets out the complaint procedures for the public, among other stipulations.⁹ In order for a state or local law enforcement agency to begin

³ I.N.A. § 287(g)(1) (2009).

⁴ *Id.*

⁵ DEP’T OF HOMELAND SEC., THE PERFORMANCE OF 287(G) AGREEMENTS 3 (2010), *available at* www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf.

⁶ *Id.*

⁷ *Id.* at 84-85.

⁸ *Id.*

⁹ *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, (Aug. 18, 2008), http://www.ice.gov/partners/287g/Section287_g.htm.



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immigration enforcement activities, an agency's participating officers must be United States citizens, undergo complete background checks, have worked in their current positions for two years, and have no disciplinary actions pending. Next, the agency's participating officers must undergo a four-week training and certification program conducted by ICE. Once these officers have completed their training, ICE supervises any immigration operations that the officers perform.¹⁰

Last year, DHS implemented some changes to the standard MOA used in each 287(g) agreement.¹¹ The new MOA enumerates specific objectives and guidelines for ICE's oversight authority, including "the supervision of local agency operations, information reporting and tracking, complaint procedures, and implementation measures."¹² Further, it requires local law enforcement to "pursue all criminal charges that originally caused the offender to be taken into custody."¹³ This provision is meant to prevent law enforcement officials from taking minorities into custody under the pretense of a minor violation with the real intent to place the person in deportation proceedings.¹⁴

¹⁰ *Id.*

¹¹ DEP'T OF HOMELAND SEC., SECRETARY NAPOLITANO ANNOUNCES NEW AGREEMENT FOR STATE AND LOCAL IMMIGRATION ENFORCEMENT PARTNERSHIPS & ADDS 11 NEW AGREEMENTS (2009).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*



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ICE has also established a priority system for deporting undocumented persons who commit crimes. The priority system is intended to demonstrate that the key targets of the 287(g) program are those who commit major crimes and not those guilty of petty crimes (such as minor traffic violations).¹⁵ Persons convicted or arrested for major drug or violent crimes are assigned to Level 1 priority. Level 2 priority is assigned to individuals committing minor drug offenses and crimes like burglary and larceny.¹⁶ Anyone arrested or convicted of any other offense is assigned to Level 3 priority. Although ICE does not specifically mandate that undocumented immigrants of higher priority levels should be removed from the United States faster than those assigned to Level 3, it requires that ICE personnel give Level 1 and Level 2 offenders “principal attention” in removal decisions.¹⁷

The Government Should End the 287(g) Program.

HRI opposes the 287(g) program even with these changes. Through HRI’s extensive work with immigrant victims of crime, we deeply understand the importance of facilitating cooperation between violent crime victims and law enforcement (rather than instilling a fear of deportation among such victims). If crime victims believe they cannot trust the police, local communities are less safe. In addition, as will be explained below, 287(g) agreements have led

¹⁵ Sherry Greenfield, *Federal Authorities Announce Changes to Controversial 287g Program*, GAZETTE (Jul. 21, 2009), http://www.gazette.net/stories/07232009/frednew160019_32531.shtml.

¹⁶ *Id.*

¹⁷ U.S. IMMIGR. & CUSTOMS ENFORCEMENT, MEMORANDUM: CIVIL IMMIGRATION ENFORCEMENT: PRIORITIES FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2010).



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to discrimination and racial profiling. Finally, as we will discuss below, 287(g) programs are costly, because taxpayers in municipalities with 287(g) agreements provide the primary source of funding for local authorities to perform a traditionally federal function.

More Dangerous Communities

Section 287(g) programs undermine local law enforcement's ability to work with immigrants to prevent and solve crimes and keep communities safe. There are two primary ways in which 287(g) agreements make communities less safe. First, 287(g) agreements are unsuccessful at ridding communities of serious criminals rather than those who commit minor infractions, such as traffic violations. Second, 287(g) agreements and similar programs often cause undocumented immigrants to fail to report serious crimes due to a fear of deportation, thus leading to the failure to apprehend criminals.

With respect to the first issue, DHS admits that “although ICE has developed priorities for alien arrest and detention efforts, it has not established a process to ensure that the emphasis of 287(g) efforts is placed on aliens that fall within the highest priority level.”¹⁸ For example, in a sample collected by the DHS, only 9 percent of individuals arrested through the 287(g) program fell into the Level 1 category, while 44 percent of the individuals were categorized as Level 2. This means that almost half of those arrested via 287(g) agreements are being arrested

¹⁸ DEP'T OF HOMELAND SEC., THE PERFORMANCE OF 287(G) AGREEMENTS 9 (2010).



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for minor “crimes” such as traffic violations. DHS admits that these results “do not show that 287(g) resources have been focused on aliens who pose the greatest risk to the public.”¹⁹

A study of the Criminal Alien Program (“CAP”) in Travis County, Texas, has produced analogous findings. CAP is similar in effect to the 287(g) jail enforcement model. In both programs, law enforcement officials are granted access to county jails to identify deportable non-citizens.²⁰ The primary difference between CAP and the jail enforcement model of 287(g) is that ICE officials investigate an individual’s residency status under CAP, whereas local law enforcement officials trained by ICE carry out this duty under 287(g).²¹ Indeed, CAP’s implementation in Travis County has primarily impacted individuals without criminal records. For instance, an October 2009 DHS report shows that 57 percent of immigrants identified through CAP had no criminal convictions.²² Similarly, a recent study in Irving, Texas, by the Warren Institute found that 98 percent of all arrestees placed under detainer (an instrument that flags an inmate as a deportable non-citizen) in 2007 through CAP had been arrested for misdemeanor offenses, rather than felonies or serious crimes.²³ These figures provide convincing evidence that programs targeting removable aliens do not significantly increase the safety of communities, and instead primarily affect individuals with minor (if any) criminal histories.

¹⁹ *Id.*

²⁰ ANDREA GUTTIN, IMMIGRATION POLICY CENTER, THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 3 (2010).

²¹ *Id.*

²² *Id.* at 9.

²³ *Id.*



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Additionally, the evidence suggests that 287(g) agreements prevent undocumented immigrants from working with law enforcement to catch serious criminals. For instance, in Travis County, “social service providers and community organizations in Austin have noted a climate change in the immigrant community” coinciding with local law enforcement’s cooperation with ICE.²⁴ These observations are corroborated by the *Proyecto Defensa Laboral* (“PDL,” Worker’s Defense Project), a non-profit center that helps low-wage workers improve their working conditions, which has recorded numerous calls from members afraid to contact police. One example of such a case occurred when a female member’s 13-year-old daughter was sexually assaulted, but waited several days before reporting the incident due to the presence of ICE in Travis County. Only after speaking with PDL did the member seek help.²⁵

Similarly, Danny Sigui, an undocumented Guatemalan, testified in a murder trial in 2003 that led to a conviction.²⁶ During the case, the Attorney General of Rhode Island found out that Sigui was undocumented and reported him to DHS. Sigui was then deported. After learning of his deportation order, Sigui issued a statement illustrating the detrimental effects of 287(g) agreements on community safety, claiming, “If I had known they would take my liberty, that

²⁴ *Id.* at 14.

²⁵ *Id.*

²⁶ LYNN TRAMONTE, IMMIGR. POLICY CENTER, DEBUNKING THE MYTH OF SANCTUARY CITIES 3 (2009).



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they would take my children away from me, that they would put me [in immigration detention], I would not [have testified].”²⁷

These examples show that the 287(g) program is contradictory in both spirit and effect to DHS’s U Visa program, which encourages immigrant victims of violent crime to assist police in finding and punishing criminals by rewarding qualified immigrants with legal status in the United States.²⁸ HRI represents many of these crime victims in their U Visa applications. The purpose of the U Visa is to encourage noncitizens to come forward, report violent crimes, and work with law enforcement without fear of being detained and deported. Section 287(g) agreements nullify the purpose of the U Visa—at least in communities where these agreements are in place—because there are no guarantees that law enforcement in a 287(g) jurisdiction would certify that an undocumented person was helpful in an investigation. Indeed, police in these areas could place the crime victim or a witness into deportation proceedings. Moreover, the overall effect of 287(g) and similar programs is to create an atmosphere of fear and unease between law enforcement and the community. Violent crimes may go unreported and when they are reported, undocumented persons may not be willing to assist or cooperate in investigations with law enforcement.²⁹

²⁷ *Id.*

²⁸ INA § 101(a)(15)(U)(I)-(IV) (2009); see also *The U Visa: Obtaining Status for Immigrant Victims of Crime*; 8.

²⁹ See Lynn Tramonte, *Debunking the Myth of Sanctuary cities*, Immigration Policy Center, 3, March 2009, available at <http://www.immigrationpolicy.org/images/File/specialreport/CommunityPolicingPaper3-09.pdf>.



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Hence, 287(g) agreements are not only ineffective at focusing resources on serious criminals (and instead primarily target minor offenders), but they also shield criminals from effective prosecution, leave undocumented immigrant victims without recourse, and nullify the effect of other DHS policies intended to increase community safety. The harmful nature of these programs has been emphasized not only by pro-immigrant agencies and organizations, but also by individuals in law enforcement. For instance, in June of 2009, several big-city police chiefs urged Congress to separate the local police from immigration enforcement; as Chief Art Acevedo of the Austin, Texas Police Department stated, those who support enforcement agreements between local and federal officials concerning immigration “[misread] the law and [hurt] their own communities by scaring neighbors who could identify criminals.”³⁰ These recommendations reaffirm the principles underlying a 2006 press release by the Major Cities Chiefs Association (a group of the largest police agencies in the United States), which cautioned that local enforcement of federal immigration laws undermine “the trust and cooperation with immigrant communities which are essential elements of community oriented policing.”³¹ Thus, the views of experts in local law enforcement coincide with the findings from empirical studies, reaffirming that 287(g) agreements are detrimental to community safety.

Race and Profiling

³⁰ Damien Cave, *Big-City Police Chiefs Urge Overhaul of Immigration Policy*, N.Y. TIMES. Jul. 1, 2009.

³¹ MAJOR CITIES CHIEFS ASS., PRESS RELEASE 1 (June 2006), available at www.majorcitieschiefs.org/pdfpubil/mcc_press_release_june_2006.pdf.



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Although section 287(g) is not intended to discriminate against immigrants or those who look undocumented, that has unfortunately been the case in some communities. Similar programs have increased the number of Hispanic arrests for minor infractions (relative to the number of arrests of members in other ethnic groups). Additionally, there are many examples of the way in which 287(g) programs have implemented, and continue to implement, practices that cast doubt on the program's legitimacy.

A case study of Irving's CAP program indicates that policies targeting undocumented immigrants will lead to racial profiling rather than to the deportation of serious criminals.³² Indeed, with the implementation and increased enforcement of the CAP program in Irving, the number of Hispanics arrested for Class-C misdemeanors (including petty crimes such as public intoxication and minor traffic violations) increased by nearly 150 percent between April 2007 and September 2007.³³ Although the number of white and African-American arrests increased for Class-C misdemeanors during this time period as well, it cannot be questioned that Hispanics have been disproportionately affected by these policies.³⁴ Indeed, 96 percent of the 883 ICE detainees recorded in the "on-view" arrest data were issued to Hispanics,³⁵ despite the fact that

³² TREVOR GARNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INST., THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (2007).

³³ *Id.* at 6.

³⁴ *Id.*

³⁵ *Id.* at 7.



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only 71 percent of undocumented immigrants in Texas are Hispanic.³⁶ This information, when coupled with the fact that 171 ICE detainers were issued in September of 2007 while 0 detainers were issued between January 2006 and August 2006, suggests that the Irving CAP program could facilitate racial profiling.

Additionally, there are previous instances in which 287(g) programs have resulted in egregious racial profiling. In fact, some law enforcement agencies have even acknowledged that they use 287(g) as a basis for stopping people from certain communities of color. For example, in Johnson County, North Carolina, an officer was quoted as saying that the county's goal is to reduce or even eliminate the Mexican community there.³⁷ Meanwhile, in Maricopa County, Arizona, Sheriff Joe Arpaio provoked accusations of racial profiling by conducting sweeps of cities with large Hispanic populations after the county entered into a 287(g) agreement.³⁸ In these sweeps, sheriff's deputies and volunteers pulled over cars and arrested people in the streets who they suspected of being undocumented immigrants or criminals. One example of profiling in Arpaio's sweeps is the detention of Manuel Nieto Jr., a U.S. citizen who was arrested in front of friends and neighbors near his family's auto repair shop "after police heard him listening to

³⁶ Carole Keeton Strayhorn, Texas Comptroller, *Undocumented Immigrants in Texas: A Financial Analysis of the Impact to the State Budget and Economy*, Section II, December 2006, found at <http://www.window.state.tx.us/specialrpt/undocumented/2backgrnd.html>.

³⁷ LYNN TRAMONTE, IMMIGR. POLICY CENTER, *DEBUNKING THE MYTH OF SANCTUARY CITIES 3* (2009).

³⁸ Spencer Hsu, *Arizona Sheriff Accused of Racial Profiling*, WASH. POST, Jul. 17, 2008.



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music in Spanish.”³⁹ This arrest provides evidence that 287(g) agreements have discriminatory and illegal ramifications, as Nieto notes that while “it’s not a crime to be Latino or listen to a Spanish-language radio station . . . you wouldn’t know that by the way Sheriff Joe and his posse treat people.”⁴⁰

The Financial Burden

Finally, municipal governments shoulder an enormous financial burden when local officials perform federal functions of immigration enforcement. Although ICE provides financing for officer supervision activities, training for local enforcement officials, and information technology equipment and services, municipal governments are responsible for the salaries and benefits of local enforcement officials, the traveling costs and per diem expenses associated with officer training, and any enforcement efforts that the municipalities undertake.⁴¹ For example, the average salary for a 287(g) officer in his first year of service is \$20,252.⁴² Thus, the cost of salaries for the 833 active officers in July 2009 was greater than \$16.7 million – just some of the costs that were borne by local governments who implemented 287(g) programs.⁴³

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 6.

⁴³ *Id.*



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The costs for some counties with 287(g) agreements are particularly high. For instance, shortly after the 287(g) agreement was signed in Maricopa County, Arizona, deputies amassed 4,500 extra hours in a two-week pay period, compared to the previous average of 2,900 overtime hours.⁴⁴ Due largely to such overtime increases, the sheriff's office incurred a \$1.3 million deficit in the first three months after the agreement was signed.⁴⁵ Similarly, between 2001 and 2009, the budget of the sheriff's office (excluding jails) grew at a rate four times greater than that of Maricopa County's population during this time period (from \$37.6 million to \$72.5 million).⁴⁶ Racial profiling stemming from 287(g) agreements also produces fiscal ramifications. Indeed, Maricopa County taxpayers funded over \$30 million of legal battles from prisoners between 2004 and 2008, with much of the damage awards going to families of prisoners who died in custody without being convicted of a crime at the time of their deaths.⁴⁷ Thus, it is clear that the implementation of 287(g) agreements has a negative direct and indirect financial impact on municipalities; when taken in conjunction with the fact that communities are made more dangerous and that minorities are vulnerable to racial profiling under these agreements, HRI believes that 287(g) programs are misguided social policies and should not be implemented.

Conclusion

⁴⁴ *Id.* at 9.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ David Carr, *A Star Turn for a Sheriff on Fox TV*, N.Y. TIMES, Jan. 4, 2009.



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Section 287(g) agreements are destructive and counterproductive. Communities become more dangerous due to the implementation of section 287(g) agreements because undocumented persons will be less willing to participate in criminal investigations and prosecutions. Further, these agreements increase the likelihood of racial profiling by police forces against persons of Hispanic origin. Finally, because the enforcement costs of 287(g) agreements are funded by local law enforcement agencies, taxpayers will end up paying for these superfluous, dangerous, and counterproductive programs. As a result, HRI believes that several important changes need to be made to current policies regarding local involvement with federal immigration laws.

HRI Recommendations:

- Congress should remove Section 287(g) from the Immigration and Nationality Act.
- Local law enforcement should engage in neither Section 287(g) agreements, nor any other agreements (such as CAP) that involve local enforcement of federal immigration laws.
- Local law enforcement should work instead on cooperating with undocumented immigrant victims of violent crime to incarcerate truly dangerous individuals.
- Local law enforcement should streamline and standardize the process for providing the law enforcement certification necessary for a U Visa to ensure the local community's cooperation in investigating and prosecuting violent and drug-related crimes.



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- Instead of recruiting local law enforcement to carry out federal responsibilities, ICE should develop a more comprehensive plan to regulate immigration that does not involve tactics that lead to racial profiling and the disintegration of trust between police and the local community.