



**Migration and Refugee Services/Office of Migration Policy and Public Affairs  
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**Issue Briefing Series, Issue #3:**

***287(g) and Secure Communities: The Facts about Local Immigration Law Enforcement***

This, the third in a series of immigration issue briefs authored by the Office of Migration Policy and Public Affairs at Migration and Refugee Services/United States Conference of Catholic Bishops (USCCB), provides a thumbnail sketch of applicable law governing two state/local law enforcement programs, 287(g) and Secure Communities; analyzes the facts surrounding the implementation of these more controversial pillars of the Department of Homeland Security's (DHS) interior immigration law enforcement strategy; and provides the Conference's policy perspective on the issue of state and local enforcement of federal immigration law.

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**Background**

In the past decade, Congress has spent \$117 billion of taxpayer dollars on immigration enforcement initiatives, yet the number of unauthorized in the country has grown to approximately 11.2 million and the demand for foreign-born, low-skilled labor has continued on pace with the ebbs and flows of the U.S. economy.<sup>1</sup> Despite the obvious inability of enforcement-only immigration policy to fix what has become a very broken immigration system, the Obama Administration has channeled millions of dollars in resources and oriented its immigration policy largely around enforcement. Specifically, the Administration has prioritized the use and expansion of state and local police enforcement of federal immigration laws by targeting immigrants who come into contact with the criminal justice system.

Two such programs are 287(g) and Secure Communities. In the past few years, these two programs have yielded an increasing number of deportations of immigrants swept up by the criminal justice system. However, among those deported as a result of both 287(g) and Secure Communities are a large number of *non*-priority immigrants. Indeed, all too frequently, those deported are not the serious offenders who present a danger to their communities, as the programs are intended to target. At the same time, these programs have also undermined local law enforcement's ability to keep communities safe by maintaining working relationships with immigrant communities and enabled the use of racial profiling, pre-textual stops, and excessive deprivations of liberty through abuse of detainers, thus infringing on the civil rights and liberties of not only immigrants, but also communities at large.

## 287(g)

The first of these programs, 287(g), was established in 1996 when Congress enacted section 287(g) of the Immigration and Nationality Act (INA) as part of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)<sup>ii</sup>, creating a mechanism for state and local officers to become *de facto* immigration agents.<sup>iii</sup> INA §287(g) authorizes the Department of Homeland Security (DHS)<sup>iv</sup> to enter into written agreements with state officers or state political subdivisions to perform immigration functions such as the investigation, apprehension, or detention of aliens, under the direction and supervision of DHS.<sup>v</sup> The section further provides that any state or local officer acting pursuant to such an agreement must have knowledge of federal law, receive federal law enforcement training, and be supervised by federal authorities.<sup>vi</sup>

Federal and local authorities signed the first written agreement – or Memorandum of Agreement (MOA) – in 2002.<sup>vii</sup> By 2007, the program boasted a mere seven MOAs between DHS and local authorities.<sup>viii</sup> By 2009, though, this number had grown to 29.<sup>ix</sup> At the time, the nascent Obama Administration decided to continue the program, but would revise the MOAs between existing and new state and local law enforcement partners to address what it and its critics saw as flaws in the program.<sup>x</sup> These revised MOAs, among other things, articulated the program’s intention to identify and remove criminal aliens who are a threat to public safety or a danger to the community.<sup>xi</sup> To this end, DHS announced a new prioritization scheme which placed those convicted or arrested of major drug offenses or violent crimes, including rape and murder in category 1 (or top priority); those convicted or arrested for minor drug offenses, larceny, fraud and other similar crimes in category 2; and those convicted or arrested for civil offenses and misdemeanor crimes in category 3 (or lowest priority).<sup>xii</sup>

While both these revised MOAs and a June 2010 enforcement guidance issued by DHS Assistant Secretary John Morton<sup>xiii</sup> underscore the fact that Immigration and Customs Enforcement (ICE) and its local partners may continue to dedicate resources on identifying and deporting non-criminal immigration law violators, they also make clear that a new prioritization system is to serve as the guidepost for interior enforcement actions under 287(g) and more generally.<sup>xiv</sup> Indeed, according to the Obama Administration’s DHS, the very purpose of these federal/state/local partnerships is to enhance the safety and security of communities by addressing serious criminal activity committed by removable aliens.<sup>xv</sup>

According to ICE, as of January 2010 there were 69 MOAs signed in 24 states, with over 1,200 state and local officers trained and certified under 287(g). ICE credits 287(g) with the identification of more than 200,300 potentially removable aliens.<sup>xvi</sup> All told, 287(g) accounts for approximately 10 percent of individuals identified by DHS for removal.<sup>xvii</sup>

Pursuant to 287(g), certified state and local officers, in turn, perform a number of immigration enforcement functions, including: (1) screening an individual for immigration status using DHS databases and through interviews of the individual with the purpose of ascertaining their status; (2) issuing detainers<sup>xviii</sup> on an individual for up to 48 hours until custody is transferred to

ICE to commence removal; and (3) issue a Notice to Appear (NTA), waging immigration charges against an individual for immigration offenses and thus initiating the removal process.<sup>xix</sup>

Given the broad degree of immigration enforcement authority delegated to state and local law enforcement officers, coupled with the significant implementation and oversight weaknesses that plague the program, 287g has been widely-criticized by those both within and outside the Government. Indeed, reports and analysis conducted by the Governmental Accountability Office (GAO) and the DHS Office of Inspector General (OIG), among others, have similarly highlighted deep concerns with the program,<sup>xx</sup> including: the creation of a trust chasm between immigrant communities and local police, which police associations across the country have echoed; increased racial profiling in jurisdictions where 287(g) is active; and inefficacy in targeting major offenders in keeping with the program's stated intentions.<sup>xxi</sup>

In 2009, the GAO found over fifty percent of those entities reviewed reported concerns about racial profiling and the targeting of low-level offenders instead of top priority offenders. Part and parcel to these concerns were the lack of necessary internal controls, supervision, and guidance regarding 287(g) authority, which helped create a vacuum in which racial profiling and other abuses were able to occur.<sup>xxii</sup>

Similarly, in a March 2010 report, the DHS OIG issued a scathing review of the program, finding that: (1) ICE and its state and local partners were not in compliance with the terms of their MOAs; (2) ICE needed to enhance and extend supervision and oversight of the program, which were lacking; (3) ICE did not adequately collect data or analyze program impact; (4) ICE failed to adequately train local officers in immigration enforcement duties; (5) ICE needed to incorporate civil rights and civil liberties considerations in its application and selection process; and (6) ICE did not use local steering committees comprised of key community stakeholders to engage in the assessment of immigration enforcement activities in their communities.<sup>xxiii</sup>

In a subsequent report in September of that same year, the OIG largely repeated its earlier findings and made recommendations that ICE establish mechanisms to adequately determine whether 287(g) was meeting its stated objectives.<sup>xxiv</sup>

To its credit, ICE implemented select reforms to 287(g) in response to the OIG reports and recommendations. According to the agency, since the OIG audit was conducted "ICE has fundamentally reformed the 287(g) program, strengthening public safety and ensuring consistency in immigration enforcement across the country by prioritizing the arrest and detention of criminal aliens — fulfilling many of the report's recommendations."<sup>xxv</sup> These reforms included: implementing guidelines for ICE field offices, prioritizing the arrest and detention of criminal aliens; requiring that 287(g) partners maintain "comprehensive alien arrest, detention, and removal data;" strengthening the training of officers on program requirements; "deploy[ing] additional supervisors to the field to ensure greater oversight;" and establish[ing] an internal advisory committee, including DHS Office of Civil Rights and Civil Liberties.<sup>xxvi</sup> The question becomes, then, whether such reforms have meaningfully addressed the concerns raised by the OIG, among others.

More recent analysis suggests not. Research published in January 2011 found that the program has continued to fail to target, on a national level, serious criminal offenders. All told, in the first 10 months of 2010, of those detainees placed by 287(g) officers, only half were for Level 1 or 2 offenses; the other half were for Level 3 offenders who had committed low-level misdemeanors, traffic offenses, or non-criminal immigration law violations.<sup>xxvii</sup>

Moreover, there is a striking disparity among jurisdictions in which detainees were issued on Level 1 offenders. Indeed, in jurisdictions like Colorado, 68 percent of detainees were placed on individuals with no criminal violations. Equally troubling, in jurisdictions like Cobb County, Georgia and Frederick County, Maryland, more than 60 percent of the detainees issued were for traffic offenders. And, despite the “reforms” made by ICE to the program following the 2009 OIG reports, researchers found no significant changes in the screening or placement of detainees in the jurisdictions where the program is active.

Finally, and significantly, there is concerning evidence of outmigration of Hispanics from, and “fear, distrust of police, and immigrants avoiding public spaces” in, select jurisdictions where the program is active.<sup>xxviii</sup>

## Secure Communities

Unlike 287(g), the second of these programs, Secure Communities, was not created through legislation. Instead, DHS created Secure Communities in 2008 as part of its overall enforcement strategy. Although not established through legislation, Congress has appropriated funds for the program, stating that the purpose of the funding is to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.”<sup>xxix</sup>

According to ICE, through Secure Communities, it is “improving public safety by working to identify, detain, and ultimately remove dangerous criminal aliens. . . .”<sup>xxx</sup> ICE does so by “focusing first on those who have been charged with or convicted of the most dangerous crimes.” To this end, ICE established a three-tier system when it initiated Secure Communities. The system was intended to determine the threat levels of criminal aliens based on the types of crimes for which they were either charged or convicted, ranging from the most dangerous at Level 1 to nonviolent misdemeanors at Level 3.<sup>xxxi</sup> As mentioned in the section on 287(g) above, in June 2010, ICE Assistant Secretary John Morton revised this three-level threat system. According to the June 2010 Morton memo, Level 1 offenses now consist of “aggravated felonies” as defined by INA § 101(a)(43) or two or more felonies; Level 2 offenses consist of any felony or three or more misdemeanor crimes; and Level 3 offenses consist of those which are punishable by a sentence of less than one year.<sup>xxxii</sup>

ICE implements Secure Communities in partnership with the Department of Justice.<sup>xxxiii</sup> It does so by “enhanc[ing] fingerprint-based biometric technology used by local law enforcement agencies during their booking process.”<sup>xxxiv</sup> According to ICE, “this enhanced technology enables fingerprints submitted during the booking process to be checked against [Federal

Bureau of Investigation (FBI)] criminal history records and DHS records, including immigration status, providing valuable information to accurately identify those in custody.”<sup>xxxv</sup>

ICE maintains that Secure Communities is an information-sharing program, not a local immigration enforcement program like 287(g); the agency emphasizes that “Secure Communities does not authorize local law enforcement to enforce immigration laws.”<sup>xxxvi</sup>

Yet, not unlike 287(g), prior to implementation in a given local jurisdiction, ICE first executes a Memorandum of Agreement. However, in the case of Secure Communities, that MOA<sup>xxxvii</sup> is between ICE and the state agency responsible for Criminal Information Systems that links to the Federal Bureau of Investigation’s (FBI) National Crime Information Center (NCIC) Integrated Automated Fingerprint Identification System (IAFIS).<sup>xxxviii</sup> In some states, ICE enters into an MOA with the state bureau of investigation, while in others it does so with the statewide police department or the state department of justice.<sup>xxxix</sup>

Once the MOA is ratified between ICE and the state identification bureau, ICE then has authority to use Secure Communities in any state or local law enforcement agency within the state.<sup>xl</sup> As a result, fingerprints which are taken at an individual’s arrest at a local booking facility and sent to the state agency with which ICE has entered an MOA, that agency then forwards the prints to both the FBI, as per usual protocol, and to DHS as per the terms of Secure Communities.<sup>xli</sup> DHS, in turn, runs the fingerprints against the Automated Biometric Identification System (IDENT) – a repository of over 91 million prints for travelers, immigration benefit applicants, immigration violators, suspected fugitives, criminals, sex offenders, military detainees, and other persons of interest.<sup>xlii</sup> In the event of a match with DHS immigration records through IDENT, ICE then determines whether to issue a detainer, requesting that the locality notify ICE when the individual’s case is resolved or dismissed, and to then hold that individual until ICE assumes custody, but no longer than 48 hours.<sup>xliii</sup>

It is at this point in the process that ICE ostensibly employs the hierarchical priority system to determine whether the individual who is deportable should, in fact, be deported – placing top priority, and thus the bulk of ICE resources, on Level 1 criminals – or the “worst of the worst” in keeping with the long-articulated purpose of Secure Communities.<sup>xliv</sup>

Despite its stated objectives, however, ICE’s own data makes clear that it has resoundingly failed to do so. In fact, according to ICE data, between October 2008 and April 24, 2011, Secure Communities achieved 104,802 removals and returns.<sup>xlv</sup> Of these, only 26 percent were for Level 1 crimes and a mere 14 percent for Level 2 crimes.<sup>xlvi</sup> A large bulk, or 31 percent, of those removed were for the low-Level 1 crimes.<sup>xlvii</sup> And, a stunning 29 percent of removals were of individuals *without any* criminal convictions.<sup>xlviii</sup> This means that 60 percent of those removed were non-criminals or low level criminal offenders. Thus, instead of successfully meeting its stated objectives, Secure Communities has largely failed - identifying and removing from the United States numerous non-criminals, individuals convicted of low-level crimes, and lawfully present individuals with prior convictions that now render them deportable. Without question, these are not the worst of the worst.

[Excerpt of ICE ERO Secure Communities Data as of April 24, 2011 and released for public dissemination]



# ICE ERO Secure Communities

		FY2009	FY2010	FY2011 YTD (10/01/10 - 04/24/11)	Cumulative (10/27/08 - 04/24/11)
<b>Interoperability Submissions</b>	<b>Total</b>	<b>828,119</b>	<b>3,376,753</b>	<b>3,439,083</b>	<b>7,643,955</b>
<b>Removals and Returns**</b>	<b>Criminal</b>	<b>10,728</b>	<b>36,098</b>	<b>27,732</b>	<b>74,558</b>
	L1	3,360	14,007	9,846	27,213
	L2	1,520	6,040	7,280	14,840
	L3	5,848	16,051	10,606	32,505
	<b>Non-Criminal Immigration Violators</b>	<b>3,752</b>	<b>13,746</b>	<b>12,746</b>	<b>30,244</b>
	<b>Total</b>	<b>14,480</b>	<b>49,844</b>	<b>40,478</b>	<b>104,802</b>

Yet, DHS has repeatedly stated its intention to expand Secure Communities nationwide by 2013.<sup>xlix</sup> It is on track to do so. As of April 26, 2011, Secure Communities boasted MOAs with 39 states,<sup>l</sup> and active presence in 1253 local jurisdictions.<sup>li</sup>

DHS stands to do so in the face of some significant opposition in numerous communities across the country. This is because DHS now maintains, after some serious vacillation on the issue, that the participation of local jurisdictions is mandatory.<sup>lii</sup>

In the past year, various local jurisdictions, from Santa Clara, California to Arlington, Virginia have requested to opt-out of the program, though their states had ratified MOAs with DHS.<sup>liii</sup> In August of 2010, DHS issued a memo with its policy on the process for opting-out.<sup>liv</sup> Only a little over a month later, however, DHS explained that because Secure Communities is grounded in information sharing between ICE and the FBI, and not on state/local immigration enforcement, local jurisdictions are automatically incorporated into the program – and thus, cannot opt-out.<sup>lv</sup> Yet, to-date ICE has not publicly explained the legal basis upon which it rests its stance that the program is mandatory.<sup>lvi</sup>

In light of this, and other issues related to the implementation of Secure Communities, several organizations, including the Center for Constitutional Rights, filed suit to compel ICE to release documents on Secure Communities.<sup>lvii</sup> These released documents reveal the vacillation within the agency regarding the voluntariness of the program.<sup>lviii</sup> Of even greater concern, the documents allegedly reveal that ICE intentionally distributed misleading information about the program to facilitate its rapid implementation.<sup>lix</sup> As a result, on April 28, 2011, California Democratic Congresswoman Zoe Lofgren, Ranking Member of the House Judiciary Subcommittee on Immigration, Policy, and Enforcement, formally requested that the DHS OIG and ICE Office of Professional Responsibility (OPR) to launch an investigation into what she characterizes as alleged “false and misleading statements to local governments, the public, and

Members of Congress in connection with the deployment of the Secure Communities Program.”<sup>ix</sup>

Mandatory or not, Secure Communities, like its 287(g) counterpart, has unquestionably changed the relationship between federal immigration enforcement and state and local law enforcement. In its current form, the program casts a wide net that captures in its fold virtually any immigrant who has come into contact with the criminal justice system, including victims of crime, low-level offenders, non-criminals, and the unlawfully present. Moreover, based on hard data and anecdotal evidence alike, community and legal advocates, and civil rights groups continue to denounce what they deem to be a clear pattern and practice in select jurisdictions of channeling immigrants into the criminal justice system through racial profiling and pretextual arrests for the purposes of vetting them for their immigration status. Further, law enforcement officers have joined the chorus of Secure Communities critics, denouncing the program because it undermines trust between immigrant communities and the police – negatively impacting their ability to investigate crime, assist victims of crime, and ensure public safety.

### **Position of the U.S. Conference of Catholic Bishops**

To address legitimate concerns surrounding immigration law enforcement in the United States, the USCCB believes that our country must pass comprehensive immigration reform laws to ensure the rule of law, while simultaneously ensuring that the law is rooted in the reunification of family and respectful of the human dignity of the immigrants in our midst.

In the absence of such reform, however, immigration law enforcement can neither cease completely nor continue unabated in its current status. The two pillar programs of DHS’ interior enforcement strategy, 287(g) and Secure Communities, are rife with management and oversight failures; opportunities for civil rights and civil liberties abuses ranging from racial profiling to extended deprivation of liberty through misuse and abuse of detainers; an erosion of local law enforcement’s critical relationship with immigrant communities; and the disproportionate deportation of non or low-level criminal offenders to those who are the purported targets of the programs – violent felons. Because of this, and because in many cases the individuals being apprehended, detained, and deported as a result of these programs are the very individuals who could and should benefit from comprehensive immigration reform, the USCCB believes that the following changes need to be made to these programs.

First, the USCCB calls on DHS to immediately develop and implement improved standards, training, and accountability and oversight mechanisms for 287(g). Local law enforcement officers remain largely unchecked in their use and, unfortunate abuse, of 287(g). DHS should require all participating entities to document their stop and arrest data by ethnicity, race, and offense and share such data with the Federal Government for analysis of potential civil rights and civil liberties abuses. DHS should use a post-conviction detainer policy for all priority level offenses, including level 3 offenses. DHS should work with DOJ to investigate accusations of racial and ethnic profiling. Finally, NGOs should be allowed to participate in the local steering

committees to ensure that these key stakeholders are engaged in the critical oversight and review of the program at the local level. In its current form, 287(g) represents the greatest devolution of immigration law enforcement authority DHS has ever undertaken. By deputizing local law enforcement as immigration officers, with the concomitant immigration enforcement authority from which that flows, DHS has enabled civil rights and liberties abuses by jurisdictions that have historically and continue to exhibit little respect for the same, particularly among the immigrant population. The USCCB urges DHS to rethink this program and its harmful imprint on communities across the country.

Absent making these changes immediately, the USCCB believes that 287(g) should be phased out. Because 287(g) continues to be plagued by abuses and program failures, even after DHS has implemented measures to reform the program in response to two OIG reports, the program should and cannot continue in its current form. In the absence of true reform, the USCCB believes, as do numerous legal and policy advocates, that any new MOAs with state and local law enforcement agencies should be frozen and DHS should undertake the termination of existing MOAs.

Second, the USCCB believes that Secure Communities should be frozen until such time that meaningful changes to the program are made. These changes include: (1) undertaking a comprehensive collection and analysis of data on the implementation of Secure Communities; (2) revamping the program so that a detainer determination is not made until the individual has been convicted of a crime that poses a threat to public safety, instead of upon arrest and booking; (3) implementing clear procedural safeguards and oversight mechanisms to curtail the propensity for abuse; (4) instituting and widely publicizing a confidential complaint process that is accessible; (5) issuing clear policy guidance on the legal basis for the mandatory nature of the program; (6) consulting with local jurisdictions who have expressed concerns about the program and adapt the program to address local needs, if DHS precludes opting-out; and (7) ensuring collaboration with the Department of Justice (DOJ) to screen for racial profiling and civil rights abuses. Even in the absence of a temporary freeze on the program, the USCCB does not believe that Secure Communities in its current iteration can or should be expanded to every jurisdiction nationwide by 2013, as DHS intends – particularly without articulating a clear and sound legal basis for making the program mandatory. Doing so would represent a knowing disregard for the very real and human damage the program has caused in jurisdictions throughout the country and which have been decried by legal advocates, government officials, and local law enforcement alike.

Finally, given their direct relation to both the 287(g) and Secure Communities programs, the USCCB calls upon DHS to issue clear detainer guidance which clarifies, at a minimum, that (1) detainers should be issued to persons convicted of crimes and not merely charged; (2) requires the severity of the criminal history to be taken into account when making the decision to issue the detainer and requires a standard of proof of removability be met prior to issuance; and (3) makes clear that an individual may not be held on detainer any longer than 48 hours and tracks local jurisdictions' compliance with this directive.

**Authored by Cynthia Smith, Esq., Immigration Policy Advisor, United States Conference of Catholic Bishops**

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<sup>i</sup> Jeffrey S. Passel and D’Vera Cohn, *Unauthorized Immigrant Population, National and State Trends, 2010* (Washington, DC: Pew Hispanic Center, 2011), 1, <http://pewhispanic.org/reports/report.php?ReportID=133>.

<sup>ii</sup> Public Law 104-208.

<sup>iii</sup> Immigration and Nationality Act (INA), §287(g), 8 U.S.C. § 1357(g)(2000).

<sup>iv</sup> Section 287(g) authorized the Attorney General (AG) to undertake such agreements, but with the move of immigration enforcement responsibility to DHS from the Department of Justice (DOJ), that function now falls upon the Secretary of DHS.

<sup>v</sup> INA §287(g).

<sup>vi</sup> INA §287(g).

<sup>vii</sup> Randy Capps et al, *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement* (Washington, D.C.: Migration Policy Institute, 2011), 9-10.

<sup>viii</sup> *Id.* at 10.

<sup>ix</sup> *Id.* at 11.

<sup>x</sup> *Id.* (citing DHS, “Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement & Adds 11 New Agreements.”).

<sup>xi</sup> Cristina Rodriguez et al, *A Program in Flux: New Priorities and Implementation Challenges for 287(g)* (Washington, D.C.: Migration Policy Institute, 2010).

<sup>xii</sup> *Id.*

<sup>xiii</sup> See U.S. Immigration and Customs Enforcement (ICE), Memorandum from Assistant Secretary John Morton to All Ice Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, Policy Number 10072.1 (June 30, 2010) (articulating three priority target populations for apprehension, detention and removal: (1) Priority 1: Aliens who pose a danger to national security or a risk to public safety, including those convicted of crimes, “with a particular emphasis on violent criminals, felons, and repeat offenders.” According to the Memo, for the purposes of prioritizing the removal of aliens convicted of crimes, ICE should refer to offense levels defined by the Secure Communities Program – Level 1 Offenders (highest priority): aliens convicted of aggravated felonies under the INA or two or more felony crimes; Level 2 Offenders: aliens convicted of any felony or three or more misdemeanor crimes; and Level 3 Offenders (lowest priority): aliens convicted of crimes punishable by less than one year; (2) Priority 2: Recent Illegal Entrants; and (3) Priority 3: Aliens who are fugitives or otherwise obstruct immigration controls.

<sup>xiv</sup> Capps et al, *Delegation and Divergence*, at 11-12.

<sup>xv</sup> See U.S. Immigration and Customs Enforcement (ICE), *Fact Sheet: Updated Facts on ICE’s 287(g) Program*, available at <http://www.ice.gov/news/library/factsheets/287g-reform.htm> (reaffirming that 287(g) program now requires “officers to maintain comprehensive alien arrest, detention, and removal data in order to ensure operations focused on criminal aliens, who pose the greatest risk to public safety and community”).

<sup>xvi</sup> See Immigration and Customs Enforcement, *Fact Sheet: Delegation of Immigration Authority, 287(g)*, available at <http://www.ice.gov/news/library/factsheets/287g.htm>.

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- <sup>xvii</sup> Capps et al, *Delegation and Divergence*, at 18.
- <sup>xviii</sup> ICE relies upon detainers for both its 287(g) and Secure Communities programs. In simple terms, a detainer is a request from ICE to a local law enforcement agency to notify ICE prior to releasing an individual in custody, and then detain that person for up to 48 additional hours so that ICE may assume custody within that period if ICE determines the individual is deportable. There have been a number of concerns raised by legal advocates regarding the use of detainers by both 287(g) and Secure Communities. These include the lack of clear guidance on the detainer issuance and lifting process; abuse of the 48 hour limitation on detention; the lack of proof needed of removability prior to issuing a detainer; and the use of detainers for anyone charged with a crime without consideration of the severity of the crime.
- <sup>xix</sup> Capps et al, *Delegation and Divergence*, at 13-14.
- <sup>xx</sup> See generally, Aarti Kohl and Deepa Varma, *Borders, Jails, and Jobsites: An Overview of Federal Immigration Enforcement Programs in the U.S.* (Berkley Law Center, University of California, February 2011), 12-13.
- <sup>xxi</sup> See *id.* at 15-17.
- <sup>xxii</sup> See *id.*
- <sup>xxiii</sup> See Department of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements*, OIG-10-63 (March 2010), available at [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf).
- <sup>xxiv</sup> See Department of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements Report Update*, OIG-10-24 (September 2010), available at [http://www.dhs.gov/xoig/assets/mgmtrpts/OIG\\_10-24\\_Sep10.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-24_Sep10.pdf).
- <sup>xxv</sup> See ICE, *Fact Sheet: Updated Facts on ICE's 287(g) Program*.
- <sup>xxvi</sup> See *id.*
- <sup>xxvii</sup> Capps et al, *Delegation and Divergence*, at 18-19.
- <sup>xxviii</sup> See *id.* at 18-50.
- <sup>xxix</sup> See, e.g., FY 2008 DHS Appropriations Act (Pub. L. No. 110-161, 121 Stat. 1844, 2365), available at [http://www.ice.gov/doclib/foia/secure\\_communities/appropriationutilizationplanfy09.pdf](http://www.ice.gov/doclib/foia/secure_communities/appropriationutilizationplanfy09.pdf).
- <sup>xxx</sup> Immigration and Customs Enforcement, Secure Communities, *Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens* Brochure, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf>.
- <sup>xxxi</sup> See Kohl and Varma, *Borders, Jails, and Jobsites*, at 18.
- <sup>xxxii</sup> See Immigration and Customs Enforcement, Memorandum from Assistant Secretary John Morton to All Ice Employees, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, Policy Number 10072.1 (June 30, 2010).
- <sup>xxxiii</sup> See ICE, Secure Communities, *Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens* Brochure.
- <sup>xxxiv</sup> *Id.*
- <sup>xxxv</sup> *Id.* (emphasis in original).
- <sup>xxxvi</sup> *Id.*
- <sup>xxxvii</sup> See Kohl and Varma, *Borders, Jails, and Jobsites*, at 23 (stating that the Secure Communities MOA's list their legal authority to include: (1) Immigration and Nationality Act

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(INA) provisions regarding identification, detention, arrest and removal of aliens, namely 8 U.S.C. § 1226(c) (regarding the Attorney General’s power to detain aliens); (2) 8 U.S.C. § 1226(d) (allowing information sharing with localities regarding individuals guilty of “aggravated felonies” with the limited exception of sharing immigration information based on the request of a state governor); (3) 8 U.S.C. § 1226(e) (limiting judicial review of Attorney General actions); 8 U.S.C. § 1227(a)(2) (defining which crimes, e.g., crimes of moral turpitude, lead aliens to become deportable); (4) 8 U.S.C. § 1228 (creating special removal proceedings in local detention facilities for aliens convicted of crimes leading them to become deportable); and (5) 8 U.S.C. § 1105 (permitting ICE to access federal criminal databases such as NCIC solely in order to make determinations on visa applications or to admit the alien to the United States).

<sup>xxxviii</sup> *See id.*

<sup>xxxix</sup> *See id.*

<sup>xi</sup> *See* Muzaffar Chrishti, et al, *Unanswered Questions Surround ICE’s Secure Communities Program* (Washington, DC: Migration Policy Institute, March 2011).

<sup>xli</sup> *See* Kohl and Varma, *Borders, Jails, and Jobsites*, at 23.

<sup>xlii</sup> *See id.*

<sup>xliii</sup> *See* ICE, *Secure Communities, Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens* Brochure. *See also* Kohl and Varma, *Borders, Jails, and Jobsites*, at 23.

<sup>xliv</sup> Immigration and Customs Enforcement, *ICE Fiscal Year 2008 Annual Report*, available at [www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf](http://www.ice.gov/doclib/news/library/reports/annual-report/2008annual-report.pdf), p. 5.

<sup>xlv</sup> ICE ERO Secure Communities Statistics, Released on April 29, 2011 and made available for public dissemination.

<sup>xlvi</sup> *Id.*

<sup>xlvii</sup> *Id.*

<sup>xlviii</sup> *Id.*

<sup>xlix</sup> Chrishti, et al, *Unanswered Questions*.

<sup>i</sup> *Id.*

<sup>ii</sup> ICE ERO Secure Communities Statistics, Released on April 29, 2011 and made available for public dissemination.

<sup>iii</sup> Chrishti, et al, *Unanswered Questions*.

<sup>liii</sup> *Id.*

<sup>liv</sup> *See* Kohl and Varma, *Borders, Jails, and Jobsites*, at 23-24.

<sup>lv</sup> Chrishti, et al, *Unanswered Questions*.

<sup>lvi</sup> Kohl and Varma, *Borders, Jails, and Jobsites*, at 23-24.

<sup>lvii</sup> Chrishti, et al, *Unanswered Questions*.

<sup>lviii</sup> *Id.*

<sup>lix</sup> *Id.* *See also*, Letter from Congresswoman Zoe Lofgren (D-CA) to the Department of Homeland Security Office of Inspector General and the Immigration and Customs Enforcement Office of Professional Responsibility (OPR), April 28, 2011 (Requesting an Investigation into alleged “false and misleading statements to local governments, the public, and Members of Congress in connection with the deployment of the Secure Communities Program”), available

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at <http://www.docstoc.com/docs/78191508/Lofgren-letter-to-DHS-IG> (last visited, May 6, 2011).

<sup>ix</sup> Zoe Lofgren Letter to DHS OIG and ICE OPR.