

Local Enforcement of Immigration - Secure Communities & 287(g)

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287(g) – What is it?

- A recent and growing phenomenon in the state of North Carolina and around the country involving the local enforcement of immigration laws under Section 287(g) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g) (2006).
- Until recently, immigration laws have been traditionally enforced by federal immigration officers.

287(g) – What is it?

- Passed in 1996, Section 287(g) of the INA, as amended by the Department of Homeland Security (DHS), empowers United States Immigration and Customs Enforcement (ICE) to enter into individual agreements with state and local police enforcement agencies to execute immigration monitoring and enforcement functions.

287(g) – What is it?

- These individual agreements are known as Memoranda of Understanding (MOUs), now more commonly referred to as Memoranda of Agreement (MOAs).
- The MOAs, for the first time, formally deputize state and local law enforcement officers to implement certain immigration laws.

287(g) – What is it?

- Section 287(g) authorizes the Attorney General to enter into a written agreement with a:
- State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision . . . to perform the function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States . . ., may carry out such function at the expense of the State or political subdivision.

287(g) – What is it?

- The statute also provides that immigration enforcement activities must be carried out at the expense of the State or political subdivision and to the extent consistent with State and local law.

287(g) – What is it?

- Historically, there was a clear division between the enforcement of civil immigration laws and the enforcement of criminal immigration laws.
- Civil violations of the INA include unlawful presence and working without proper employment authorization.
- On the other hand, criminal immigration law covers offenses such as human trafficking, the harboring of undocumented immigrants, and the reentry of immigrants who were previously deported or excluded.

287(g) – What is it?

- Federal authorities have long held exclusive jurisdiction over the ability to regulate civil immigration laws, while federal, state, and local authorities have had concurrent jurisdiction for the purpose of enforcing criminal immigration laws.
- The written agreements under §287(g) effectively erase that line, enabling local law enforcement officers to enforce civil immigration law for the first time in history.

MOAs – Correction Model vs. Field Model

- Two basic types of MOAs – those covering “field-level law enforcement officers” and those covering “correctional/detention personnel.”
- ICE also refers to these two sets of officers as “Task Force Officers” (TFOs) and “Jail Enforcement Officers” (JEOs).
- Under the correction model, §287(g)-trained corrections officers are authorized to check the immigration status of any individual who enters a corrections facility after arrest and is suspected of being in the country illegally.
- In the field model, 287(g)-trained local law enforcement officers are empowered to check the immigration status of individuals they encounter in the course of their routine law enforcement duties.

MOAs – Correction Model vs. Field Model

- 7 County MOAs in NC appear to be correction models, although the language of the Alamance and Mecklenburg MOAs is ambiguous.
- City of Durham has a field model MOA. However, only one officer has been trained and her duties are limited to particular felonies.

Secure Communities – What is it?

- In March 2008, U.S. Immigration and Customs Enforcement (ICE) announced the initiation of the Secure Communities program.
- Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens): During booking in a jail, arrestees' fingerprints will be checked against U.S. Department of Homeland Security (DHS) databases, rather than just against FBI criminal databases.

Secure Communities – What is it?

- ICE will automatically be notified if the fingerprints match fingerprints in the DHS system. It will then do follow-up interviews and “take appropriate action.”
- Secure Communities is just one of the programs included under Immigration and Custom Enforcement Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS).

Intersection Between 287(g) & Secure Communities

- Both part of the ICE ACCESS program.
- ICE describes ICE ACCESS as an “umbrella of services and programs” that “provide local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities.”
- ICE has included the section 287(g) program as one of the components of Secure Communities, to “increase local law enforcement partnerships through 287(g) cross-designation that allows trained officers to interview and initiate removal proceedings of aliens processed through their detention facilities.”

Intersection Between 287(g) & Secure Communities

- It is conceivable that a community would have both a 287(g) program based either in or outside a jail, as well as access to DHS databases in a jail through Secure Communities.
- If the 287(g) program is in a jail, then jail officers might be the ICE officers who “conduct follow-up interviews and take appropriate action.”

And Still More Immigration-Related Laws in NC

- In addition to the influx of 287(g) agreements in North Carolina, many other North Carolina counties are participating in the “Criminal Alien Program” (CAP), which is part of the federal ICE ACCESS program.
- Counties that are CAP counties will have computer systems that are linked with ICE databases so that police officers can simultaneously perform criminal background searches and ICE searches on each individual. Under CAP, the federal ICE agent makes the decision to place an immigration hold on a detainee. Under 287(g), local law enforcement who have been deputized as 287(g) agents make that decision.

And Still More Immigration-Related Laws in NC

- Finally, during the 2007 session the General Assembly also passed Senate Bill 229, Legal Status of Prisoners (Session Law 2007-494). N.C. Gen. Stat. § 162-62.
- That legislation *requires* that jail administrators attempt to determine the nationality of any person charged with a felony or impaired driving offense who is held for any period in any jail or other confinement facility.
- While jail administrators are only required to determine the nationality of those detainees charged with a felony or impair driving offense, legislative aides have indicated that jail administrators are permitted under Senate Bill 229 also to make this determination for those who are charged with a lesser offense, including traffic offenses.

How 287(g) and Secure Communities Work in Practice

- If ICE determines that there is a match with DHS records, it will then “evaluate each case to determine the individual’s immigration status and take appropriate enforcement action.”
- If the county has 287(g), then jail officers might be the ICE officers who evaluate the case to determine the individual’s immigration status and take appropriate enforcement action.
- Either way, in practice, this means that ICE will likely impose a detainer against the arrested person.

How 287(g) and Secure Communities Work in Practice

- A detainer is simply a request from ICE that the arresting agency notify ICE before its release of the noncitizen so that ICE can assume custody, and authority for a temporary, 48-hour hold if the noncitizen is not already subject to detention.
- However, many jails and police departments treat detainers as a requirement that the jailed person not be released, and deny bond in the criminal case, including in minor cases such as traffic offenses or misdemeanors.

How 287(g) and Secure Communities Work in Practice

- ICE procedures provide no mechanism for an arrested person with a detainer to challenge the wrongfulness of a detainer.
- ICE frequently does not comply with the 48-hour time limit within which to assume custody of jailed persons against whom detainers have been issued, leaving them in detention limbo but often without the means to challenge their unlawful detention.

ICE's Priorities for the Secure Communities Program

- ICE reports that under the program's "risk-based" approach, it will use the following three levels to ensure that resources are appropriately allocated to identify and determine the immigration status of non-U.S. citizens arrested for crime who pose the greatest risk to the public:
 - Level 1 – Individuals who have been *convicted* of major drug offenses and violent offenses, such as murder, manslaughter, rape, robbery, and kidnapping;
 - Level 2 – Individuals who have been *convicted* of minor drug offenses and mainly property offenses, such as burglary, larceny, fraud, and money laundering; and
 - Level 3 – Individuals who have been *convicted* of other offenses.
- According to ICE, Level 1 offenses will be the "top priority."

NC Counties Mirroring ICE's Priorities for the Secure Communities Program?

- Too soon to tell.
- Concerns that counties will focus on misdemeanors, rather than felonies, as is the case with 287(g)
- Concern about checkpoints coinciding with Secure Communities implementation

287(g) and/or Secure Communities – Coming to Every NC County?

- There are currently a total of 67 active §287(g) MOAs in 23 states, with more than 950 officers trained and certified.
- Other than possibly Virginia, North Carolina sheriffs have expressed more interest in §287(g) MOAs than in any other state.

287(g) and/or Secure Communities – Coming to Every NC County?

- There are currently eight active MOAs in the North Carolina; agreements have been signed by Alamance, Cabarrus, Cumberland, Gaston, Henderson, Mecklenburg, and Wake counties, and the Durham Police Department.
- At least fourteen additional North Carolina law enforcement agencies have requested § 287(g) partnerships.

287(g) and/or Secure Communities – Coming to Every NC County?

- ICE implementation of Secure Communities program began in October 2008 in North Carolina and Texas.
- The agency expects SC to be fully implemented in all jails and prisons throughout the country within the next four years.

Concerns about 287(g) & Secure Communities

- Unanswered questions regarding intersection between criminal and immigration law
- Supposed to be targeted to the worst of the worst – but aren't
- Racial profiling reports
- Erosion of community trust

Unanswered questions regarding intersection between criminal and immigration law

- When can a detainee plead the 5th?
- When does the right to counsel attach?
- Denial of bond issues.
- Challenges to detainer.
- Any others?

Are programs targeting the “hardened criminals”?

- No for 287(g); too soon to tell for Secure Communities.
- Federal, state and local lawmakers, as well as sheriffs, tout the benefits of the 287(g) program in taking “hardened criminals” off the street in North Carolina.
- Similarly, ICE states that § 287(g) MOAs provide “local and state officers” with the “necessary resources and latitude to pursue investigations relating to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling and money laundering; and increased resources and support in more remote geographical locations.”

Are programs targeting the “hardened criminals”?

- But documentation from counties to ICE shows that the majority of people processed are arrested for misdemeanors.
- Majority of misdemeanor arrests are for traffic offenses.
- Including:
 - Driving without a license
 - Driving while license revoked

Are programs targeting the “hardened criminals”?

- Increase in arrests for speeding in excess of 15 mph
- Increase in arrests for NOL
- Increase in checkpoints in 287(g) and SC counties
- Checkpoints by State Highway Patrol - ?

Racial profiling reports

- Increase in reports of stops for “driving while brown”
- Drivers AND passengers asked for ID
- Checkpoints outside of Latino markets, Latino churches

Erosion of Community Trust

- Examples of victims arrested and processed
- Reports re fear of contacting police, especially in DV situations
- Potential increase in gang membership for protection
- Less willingness to act as witnesses

Changes Under Obama Administration?

- Hard to tell.
- Definitely appear to be steering clear of Field Model MOAs
- Secure Communities program seems to be increasing, while new 287(g) programs appear to be slowing down.
- GAO report may generate more oversight.

References for further study

- ACLU-NCLF and UNC Law Policy Brief, February 2009 – The Policies and Politics of Local Immigration Enforcement Laws – 287(g) Program in North Carolina, *available at* http://www.acluofnorthcarolina.org/files/287gpolicyreview_0.pdf
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- National Immigration Law Center Report, March 2009 – More Questions Than Answers About the Secure Communities Program, *available at* <http://www.nilc.org/immlawpolicy/LocalLaw/secure-communities-2009-03-23.pdf>
- US Government Accountability Office Report, dated January 2009 – Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws, *available at* <http://www.gao.gov/new.items/d09109.pdf>
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