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ICE Reforms Fail to Solve Fundamental 287(g) Problems

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On April 2, 2010, the Office of Inspector General (OIG) of the U.S. Department of Homeland Security (DHS) released *The Performance of 287(g) Agreements*,^[1] a report prepared pursuant to the inspector general's oversight responsibility.^[2] The OIG report addresses the performance of 287(g) agreements between state and local law enforcement agencies (LEAs) and Immigration and Customs Enforcement (ICE), an agency within DHS. Named after the section of the Immigration and Nationality Act (INA) that enacted it, the 287(g) program cross-designates local law enforcement officers to enforce federal immigration laws. State and local agencies enter into a memorandum of agreement (MOA) with ICE pursuant to which law enforcement officers become deputized immigration enforcement officers.^[3] Based on interviews, direct observations, and a review of documents related to the 287(g) program, the OIG report juxtaposes evidence of various problems with recommendations for change and ICE's response to those recommendations. Of the 33 recommendations the OIG makes, ICE itself concurs with 32.^[4] The OIG report confirms issues raised by advocates since implementation of INA section 287(g) began in 2002 and provides damning evidence that the program is fundamentally flawed. It points out the following deficiencies:

- Failure to comply with terms of memoranda of agreement (MOAs) between LEAs and ICE;
- Failure to focus on noncitizens who pose a threat to public safety or are a

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- danger to the community;
- Failure to provide adequate guidance and supervision to the LEAs;
- Failure to provide oversight;
- Failure to consistently weigh civil rights and civil liberties in the 287(g) application and selection process;
- Failure of ICE and LEAs to collect data that would allow civil rights violations to be addressed;
- Failure to adequately train officers;
- Failure to provide accurate program information; and
- Failure to provide a transparent complaint process.

Fundamental Flaws of the 287(g) Program Were Known Prior to the OIG Report

None of the criticisms raised by the OIG report is novel.[5] A series of governmental and nongovernmental reports in the past few years provides evidence that 287(g) authority is used to process individuals for minor offenses and pretextual arrests. In May 2008, 83 percent of charges resulting from 287(g) arrests in Gaston, North Carolina, were for traffic violations.[6] According to reports by the American Civil Liberties Union (ACLU) of Georgia about the 287(g) program's implementation in Cobb and Gwinnett Counties, officers have misused the authority granted to them under the agreement and have engaged in racial profiling.[7] A report from the University of North Carolina School of Law and the ACLU of North Carolina found evidence that the 287(g) program enabled law enforcement officers to engage in racial profiling.[8] For example, the 287(g)-authorized officers pulled over Hispanic-appearing drivers under the pretense of a traffic infraction, but with the intention of determining immigration status.[9] The main investigative arm of Congress, the Government Accountability Office (GAO), sharply criticized the 287(g) program's management in a January 2009 report documenting, among other issues, that ICE has not consistently articulated how participating agencies are to use their 287(g) authority.[10] According to the GAO, many of the MOAs did not mention that an arrest must precede use of 287(g) authority.[11] In addition, although MOAs signed after 2007 contain a requirement to track and record data related to program implementation, none of them specified what data should be tracked or how it should be collected and reported.[12]

ICE's New MOA Did Not Solve the Reported Problems

The criticisms have not resulted in improvements. In July 2009, ICE announced

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that LEAs would be required to sign a new standardized MOA intended to cure deficiencies identified by the GAO.[13] The new MOA created the opportunity for ICE to build greater protections into the 287(g) program and to mitigate the numerous civil rights violations experienced by immigrants and criticized by advocates. While DHS claimed that the new MOA addressed many of the criticisms levied at the 287(g) program regarding purpose, priorities, and oversight, the changes made were not meaningful and in some cases represented a regression.[14]

The field work for the OIG report was conducted between February and July 2009, prior to actual implementation of the new MOA, but the OIG nonetheless took the new MOA into account in its report. The OIG made 33 recommendations aimed at addressing major problems in the program. In response to those recommendations, ICE asked the OIG to consider 16 of the 33 OIG recommendations closed because of actions ICE had already taken.[15] However, in only 2 cases did the OIG agree the recommendations were closed. [16] The OIG clearly recognizes that ICE's claims of improvement have not been proven.

For example, the new MOA outlined three criminal-level priorities,[17] but it did not provide any mechanism for ensuring that participating agencies comply with the priorities.[18] The OIG report states 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." [19] The need for prioritizing is clear: in a sample of 280 immigrants identified by the program at four sites visited by the OIG, only 9 percent were within Level 1, those arrestees presenting the greatest risk to the public.[20]

The new MOA also fails to provide even the most minimal mechanisms to track or prevent racial profiling, such as collecting and reporting arrest data, including the ethnicity of arrestees. ICE has argued, without any evidence to support the claim, that the standardized MOA's recommendation that criminal charges be taken to completion would ensure adherence to the stated priorities and prevent pretextual arrests. The MOA's recommendation, however, has little effect in preventing arrests for traffic or low-level offenses that may be pretextual and based on profiling.

ICE Refuses to Collect and Distribute Information Necessary to the 287(g) Program's Functioning

In the report, the OIG recommends that ICE establish “collection and reporting standards that provide objective data to increase monitoring of methods participating jurisdictions use in carrying out 287(g) functions, and their effect on civil liberties.”[21] The OIG recommends monitoring and reporting to address concerns that minor offenses are being used “as a guise” to initiate removal proceedings.[22] However, this is the one recommendation that ICE rejected, stating that OIG’s recommendation for data collection was similar to “a consent decree applicable to agencies that have engaged in racial profiling” and that the recommendation raised logistical issues for officers in their reporting.[23] Yet ICE offered no substitute means of protecting civil liberties.

The OIG report criticizes the absence of meaningful complaint procedures, confirming the need to publish complaint reporting procedures in LEA buildings, at community meetings, and on the Internet.[24] The report states, “[B]ecause the only description of the complaint process in most jurisdictions is contained in the MOAs and because ICE and LEAs had not clearly disseminated them at the time of our fieldwork, members of the public are unaware of how to file a complaint.”[25] ICE has claimed to solve the lack of a meaningful complaint procedure through a new complaint procedure, arguing in its response to the recommendation that the complaint procedure was posted on the ICE website in October 2009 and described in the new MOA.[26] Disappointingly, the OIG found this claim to be sufficient, without any evidence of community or LEA posting.[27] Moreover, lack of access to the Internet and inability to call 1-800 numbers from a jail render any reliance on these means an inadequate complaint process for a detained person.

ICE’s Response to the OIG Report is Inadequate

In response to the publication of the OIG report, ICE published *Updated Facts on ICE’s 287(g) Program*, an online statement that ICE had “fundamentally reformed” the program through the new MOA and other changes.[28] ICE’s statement that its reforms have cured the problems pointed out in the OIG report is disingenuous, given that the OIG provided ICE with the opportunity to respond to the draft report in December 2009 — after implementation of the new MOA — and ICE itself still considered 16 of the 33 recommendations open.[29] ICE offered the same solutions that do not work despite the OIG’s report and despite the OIG’s response to ICE.

Given the opportunity to critically examine the 287(g) program, ICE has failed to make changes that would make the program legitimate. Rather than correct the problems pointed out by the GAO, the OIG, and advocates, ICE has blindly

forged ahead without even suspending the program while addressing these fundamental flaws. ICE's inaction in the face of such abundant criticism shows ICE's willful disregard for the consequences of the 287(g) program.

Notes:

[1] *The Performance of 287(g) Agreements*, OIG-10-63 (Dept. of Homeland Security Office of Inspector General, Mar. 2010),

www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf (last visited Apr. 26, 2010; hereinafter "OIG report").

[2] See *Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009*, House Report 110-862, requiring that the OIG report on the performance of 287(g) agreements.

[3] For more information, see Melissa Keaney and Joan Friedland, *Overview of the Key ICE ACCESS Programs: 287(g), the Criminal Alien Program, and Secure Communities*(NILC, Nov. 2009), www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf.

[4] OIG report at 1.

[5] *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety* (ACLU of Georgia, Oct. 2009),

www.acluga.org/287gReport.pdf (last visited April 26, 2010); *Immigration*

Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws (Government Accountability Office,

GAO-09-109, Jan. 2009), www.gao.gov/new.items/d09109.pdf (last visited April

26, 2010); Aarti Shahani and Judith Greene, *Local Democracy on Ice: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*

(Justice Strategies, Feb. 2009); *The Policies and Politics of Local Immigration*

Enforcement Laws (ACLU of North Carolina Foundation and Immigration & Human Rights Policy Clinic, Univ. of North Carolina, Feb. 2009),

www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf (last visited

April 26, 2010); *The Persistence of Racial Profiling in Gwinnett: Time for*

Transparency, Accountability, and an End to 287(g) (ACLU of Georgia, March 2010),

www.acluga.org/GwinnettRacialReportFinal.pdf (last visited April 26, 2010); Mai

Thi Nguyen and Hannah Gill, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities* (The Univ. of North Carolina at Chapel Hill, Feb. 2010)

http://isa.unc.edu/migration/287g_report_final.pdf (last visited April 26, 2010).

[6] See *The Policies and Politics of Local Immigration Enforcement Laws*, *supra* note 5 at 29.

[7] See *The Persistence of Racial Profiling in Gwinnett*, *supra* note 5; see also *Terror*

and Isolation in Cob, *supra* note 5.

[8] See *The Policies and Politics of Local Immigration Enforcement Laws*, *supra* note 5.

[9] See *id* at 29, 44.

[10] See *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, *supra* note 5 at 12.

[11] *Id.* at 5.

[12] *Id.*

[13] "Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships and Adds 11 New Agreements" (DHS Office of the Press Secretary, July 10, 2009),

www.dhs.gov/ynews/releases/pr_1247246453625.shtm (last visited April 26, 2010); Standardized Memorandum of Agreement (U.S. Immigration and Customs Enforcement), available at www.nilc.org/immlawpolicy/LocalLaw/287g-MOA-2009-07-14.doc (last visited April 26, 2010).

[14] *Overview of the Key ICE ACCESS Programs*, *supra* note 3 at 3.

[15] Letter from ICE Audit Liaison Office Director Robert F. DeAntonio to the OIG: ICE Input to DHS Response to Office of Inspector General Draft Report titled, "The Performance of 287(g) Agreements" (Dec. 9, 2009), OIG report at 64.

[16] See OIG report at 50, 58, referencing recommendations 11 and 28.

[17] See Standardized Memorandum of Agreement (MOA), *supra* note 13. Prioritization levels, according to the standardized MOA:

- Level 1 – Individuals who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
- Level 2 – Individuals convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering; and
- Level 3 – Individuals who have been convicted of or arrested for other offenses.

[18] See Standardized MOA, *supra* note 13.

[19] OIG report at 8–9.

[20] *Id.* at 9.

[21] *Id.* at 53.

[22] *Id.* at 25–27.

[23] *Id.* at 53.

[24] *Id.* at 38–39.

[25] *Id.* at 38.

[26] *Id.* at 58.

[27] *Id.*

[28] *Updated Facts on ICE's 287(g) Program* (Immigration and Customs Enforcement, April 12, 2010), available at www.ice.gov/pi/news/factsheets/section287_g-reform.htm (last visited April 26, 2010).

[29] See ICE Input to DHS Response to Office of Inspector General Draft Report, *supranote* 15 at 64, 65.