WebMemo

Published by The Heritage Foundation

No. 2543
July 14, 2009

Section 287(g) Revisions: Tearing Down State and Local Immigration Enforcement One Change at a Time

Jena Baker McNeill and Matt A. Mayer

On Friday, July 9, the Obama Administration announced plans to revise the Memorandums of Agreement (MOAs) that are negotiated under section 287(g) of the Immigration and Naturalization Act (INA). The section 287(g) program is designed to allow state and local law enforcement agencies to enforce federal immigration laws. For participating cities and states, this program is a critical tool for enforcing America's immigration laws, because it has become a force multiplier for the under-resourced Immigration and Customs Enforcement (ICE).

The MOA changes, however, undercut the motivation of jurisdictions to participate in the program by forcing prosecutors and law enforcement to prosecute illegal immigrants for the underlying crime instead of simply processing them for removal. Furthermore, they limit the ability of law enforcement officers to check immigration status to that of only minor offenses. Essentially, without saying so, they gut the force-multiplier purpose of 287(g). These changes are driven entirely by political special interests and are not representative of the positive contribution section 287(g) makes toward enforcing immigration laws. The Obama Administration should not move forward with these changes, and it should instead promote the expansion of section 287(g) and similar programs.

Section 287(g). In 1996, Congress created section 287(g) programs as an amendment to the INA. For six years, ICE failed to use the powers authorized in section 287(g). Starting in 2002, ICE started allowing state and local law enforcement agencies to enter into MOAs.

Under section 287(g), law enforcement entities entered into agreements with ICE in order to "act in the stead of ICE agents by processing illegal aliens for removal." Before officers could participate, state and local law enforcement would sign MOAs with ICE and undergo a five-week training course, background check, and mandatory certifications.

Section 287(g) was a solid improvement in terms of enforcing immigration laws. Before it was created, a state and local law enforcement officer who apprehended an individual who could not demonstrate legal presence in the U.S. would simply notify ICE and wait for them to come and get the individual. In practice, this meant most illegal immigrants went free and immigration laws were not enforced.

In the seven years since ICE started using section 287(g), roughly 66 state and local agencies have entered into MOAs resulting in roughly 1,000 law enforcement officers being "deputized" to enforce federal immigration law. Even more importantly, over 120,000 individuals have been identified as illegal immigrants under the program.

Changes to the MOAs. Section 287(g) has experienced great success. This program and other

This paper, in its entirety, can be found at:
www.heritage.org/Research/HomelandSecurity/wm2543.cfm

Produced by the Douglas and Sarah Allison
Center for Foreign Policy Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

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ICE ACCESS programs help fight crime, getting gang leaders and other serious criminals off of the streets and, if they are illegal, removed from the United States.

But in the last year, groups such as the ACLU and other pro-illegal immigration groups, as well as a U.S. Government Accountability Office report, have claimed that section 287(g) programs encourage racial profiling and have other undesirable consequences. Their accusations, however, are not supported by real data or proof that such actions were occurring. In reality, opponents of section 287(g) have often been groups that are in favor of less immigration enforcement.

On July 9, the Obama Administration caved to these demands. It announced plans to make the MOAs "more uniform." The changes announced go to the heart of the program and will disrupt any real attempt to enforce the law, including:

- *Forcing local law enforcement agencies to pursue all criminal charges.* The new MOAs would require law enforcement to prosecute an offender found to be illegal for all initial offenses for which he/she was taken into custody. In practice, and for good reason, law enforcement would often start removal proceedings if they found someone to be illegal instead of going through a costly and lengthy criminal process that would end in the same result. Requiring criminal prosecution will be a severe drain on the resources of the local jurisdictions—and for no legitimate reason. In accordance with America's long-standing commitment to federalism, the Obama Administration should respect the decisions of state and local governments and cease any attempt to micromanage them.
- *Limiting actions to minor offenses.* The new MOAs would attempt to limit the use of immigration checks to those arrested for "major" offenses. But most illegal immigrants who commit crimes commit misdemeanors, not felonies. Given that one of the 9/11 hijackers, Mohammad Atta, was pulled over in a traffic stop (a minor offense) two days before the 9/11 attacks, there is a significant benefit to checking the immigration status of all individuals who are arrested. Had the officer inquired about Atta, he may have found that Atta was in the country illegally and may well have prevented his participation in the attacks.
- *Questioning the credibility of state and local law enforcement.* The announced changes insinuate that ICE should do more to prescribe how section 287(g) participants should use their authority. But Americans trust law enforcement officers to enforce U.S. criminal laws—trust that should be granted to those enforcing U.S. immigration laws as well. Making law enforcement feel like their decisions are questioned will only dissuade them from participating. In light of the new MOAs, a pattern seems to be emerging that indicates the Obama Administration does not trust the professionalism and legality of state and local law enforcement agencies.

The Wrong Approach. American simply cannot afford to lose section 287(g). Although not a panacea in itself to America's illegal immigration problem, it is one of the most useful and efficient tools that can be used to curtail illegal immigration. Any workable section 287(g) program must be flexible and implemented in a way that respects the Constitution and existing laws; recognizes the professionalism, experience, and know-how of state and local law enforcements; and preserves this highly valuable program. A better way forward would include the following:

- *Allocate more money.* Officials have cited a shortage of resources as a reason behind the perceived lack of oversight. And ICE has taken strides to align its resources in a way that saves money. For example, it has reduced a backlog of applications and addressed equipment delays and problems. But given the tremendous benefits, Congress should allocate more funding to these programs in order to address these resource shortages and expand the program.
- *Institute flexible performance measures.* While it is important to have metrics to gauge program success, doing so should not involve a one-size-fits-all approach—and uniformity is not necessary as long as the jurisdictions are acting within the Constitution. One of the easiest ways to track progress is to better define the data reporting process. This data will help ICE to see progress of

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section 287(g)—progress that should be reported to Congress annually.

It seems illogical to begin dismantling ICE on the same day 11 new jurisdictions are being added to the program. The only viable outcome that will result from the changes to the MOAs is that few, if any, state and local law enforcement agencies will participate in the program. This is death by stealth and too-clever-by-half inside the Beltway tradecraft. If the Obama Administration wants to end the section 287(g) program, it should make its case—in an open and transparent fashion—to Congress and the American taxpayers. Otherwise, the Obama Administration should rethink its choice to revise the MOAs and ensure that state and local law enforcement retain the flexibility needed to make decisions without federal mandates and second-guessing.

—Jena Baker McNeill is Policy Analyst for Homeland Security in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation. Matt A. Mayer is a Visiting Fellow at The Heritage Foundation, President and Chief Executive Officer of Provisum Strategies LLC, and an Adjunct Professor at Ohio State University. He has served as Counselor to the Deputy Secretary and Acting Executive Director for the Office of Grants and Training in the U.S. Department of Homeland Security.