

ISSUE BRIEF

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White House Takes Wrong Step with Immigration Enforcement

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The Obama Administration has decided to kill one of America's most successful interior enforcement programs to combat illegal immigration. This decision will undermine state and local law enforcement, encourage additional illegal immigration, and make America less secure.

In the first seven years after Immigration and Customs Enforcement (ICE) started using the authorities under Section 287(g) of the Immigration and Naturalization Act (INA), more than 60 state and local agencies entered into Memoranda of Agreement (MOAs) resulting in roughly 1,000 law enforcement officers being “deputized” to enforce federal immigration law. Even more important, over 120,000 individuals were identified as illegal immigrants under the program.

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 to “act in the stead of ICE agents by processing illegal aliens for removal.” Before they could participate, state and local law enforcement officers 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 or 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 take the individual. In practice, this meant most illegal immigrants went free and immigration laws were not enforced.

For participating cities and states, Section 287(g) has been a critical tool for enforcing America's immigration laws, because it has become

a force multiplier for the under-resourced ICE.

The First Attack on 287(g). In its first attack on this successful program, on July 9, 2009, the Obama Administration announced plans to make the MOAs “more uniform.” However, the announced changes went to the heart of the program and disrupted any real attempt to enforce the law.

The first change required local law enforcement to pursue all criminal charges against those individuals who are apprehended. In practice, and for good reason, law enforcement would often start removal proceedings if they found someone to be illegally present instead of going through a costly and lengthy criminal process that would end in the same result. Requiring criminal prosecution put a severe drain on the resources of the local jurisdictions—and for no legitimate reason.

The second change limited the use of immigration checks to those who are 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

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attacks, there is significant benefit to checking the immigration status of all individuals who are arrested. Had the officer inquired about Atta, he might have found that Atta was in the country illegally and therefore might well have prevented his participation in the attacks.

The implicit insinuation of the July 2009 changes was that local law enforcement agencies routinely abused their powers under Section 287(g). Signaling that they would be second-guessed by ICE dissuaded many agencies from participating in the program.

The Second Attack: Heritage Prediction Comes True. The Heritage Foundation predicted¹ in July 2009 that these changes would result in a reduction in the number of local law enforcement agencies interested in using Section 287(g). Sure enough, as recently reported, not one local law enforcement agency has signed an MOA since August 2010, and only two agencies signed MOAs after the July 2009 changes in the

program. Media reports indicate that ICE will not sign any more MOAs and will move to “terminate” the “least productive” MOAs. Notably, the last three-year MOA will end in November 2012, thereby ending the program in its entirety.

To replace the work done under Section 287(g), the Obama Administration will focus on the Secure Communities program. Secure Communities is essentially a database tool for sending information to ICE about illegal immigrants who are arrested by state and local law enforcement and for helping ICE to prioritize resources. The Obama Administration has stated that it will focus on illegal immigrants in jails and prisons who have committed serious felonies.

Secure Communities, while a useful tool, is only a complementary aspect of a broader immigration enforcement system. With the elimination of the Section 287(g) program, that broader immigration enforcement system will get weaker.

Moving Forward on 287(g). It is clear that the Obama Administration, along with its legal assault on state and local immigration enforcement laws, does not respect the rights of states or the important role they play in curbing illegal immigration. Congress can reassert its legislative and oversight authority to preserve the ability of state and local law enforcement agencies to use the Section 287(g) program. For instance, Congress can reverse the burdensome regulatory changes made in July 2009 and continue to fund the program. Many local law enforcement agencies may decide not to use the program, but Congress can help ensure that those that do can continue to do so.

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1. Jena Baker McNeill and Matt A. Mayer, “Section 287(g) Revisions: Tearing Down State and Local Immigration Enforcement One Change at a Time,” Heritage Foundation *WebMemo* No. 2543, July 14, 2009, at <http://www.heritage.org/research/reports/2009/07/section-287g-revisions-tearing-down-state-and-local-immigration-enforcement-one-change-at-a-time>.