

States' Choice on Immigration Enforcement: A look at the 287(g) Program

Immigration policy in the United States is a federal responsibility, however states are free to support the federal government if they so choose. A section of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created one specific method for state and local law enforcement agencies (LEAs) to partner with the federal government in immigration enforcement. Section 287(g) of the IIRIRA “authorizes ICE [Immigration and Customs Enforcement] to enter into written agreements under which state or local law enforcement agencies may perform, at their own expense and under the supervision of ICE officers, certain functions of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States” (Immigration Enforcement: Better Controls Needed, 2009). For my research this term I asked the question why do state or local law enforcement agencies (LEAs) seek to cooperate with federal immigration law, and more specifically what are the reasons state or local agencies use to join or not to join the 287(g) program?

Research Model: See Appendix for Research Matrix

In order to answer my question I conducted a literature review in which I examined the history of the 287(g) program. Initially, I began with a look at peer reviewed articles on topics related to the program or specifically about the program. I soon realized I needed to understand the full history of the policy before I could understand why states chose to volunteer or chose to distance themselves from such policies. At this point I looked back at Government Accountability Office reports, which led me to Congressional hearings, which then led me to think tank analyses. After understanding the timeline and the shifts of the program I then returned to look at the initial journal articles.

Throughout my research I focused on what arguments were made in favor of the program and which against the program. It was important for my research to closely examine the shifts in the program to see whether these changes affected the arguments state or local agencies made for or against the program.

Sources: strengths, weaknesses and barriers

The body of sources I used cover testimonial, analysis, and documentation. It was not possible for me to collect physical evidence for this research. In total the body of evidence available does pass the three tests of sufficient, competent, and relevant. I found that each piece of evidence may be competent and relevant, but on their own they were not sufficient.

The testimonial evidence comes from the expert level, for example congressional hearings with witnesses from ICE and local law enforcement. The panelists are certainly competent to speak on the topic of immigration enforcement and they present relevant arguments. However, the makeup of each panel itself was often more heavily weighted on the pro 287(g) side, consisting primarily of representatives from the law enforcement community. Additionally, in one hearing a mother who lost her son in a devastating hit and run accident where the drivers were undocumented provided a highly emotional testimony. At times there were more neutral panelists, such as representatives from the GAO or from the International Association of Chiefs of Police. And in one hearing a representative from the Migration Policy Institute provided testimony notably on

the opposing side of the argument. The committee members do have a gap in the makeup of their testimonies on this subject when it comes to testimony from the immigrant community itself.

The analysis evidence I collected was varied. The strongest piece of analysis I examined was a study conducted by the GAO, released in 2009. This study provided a rich overview at the program's implementation (Immigration Enforcement: Better Controls Needed, 2009). A journal article from the American Society of Criminology provided a more focused examination at the policy impact of the 287(g) program on crime rates and disorder (The Effects of Local Immigration Enforcement on Crime and Disorder, 2013). More recently, the Immigration Legal Resource Center (ILRC) released a report in December of 2016. While ILRC is clearly a pro-immigrant organization and is staunchly opposed to the 287(g) program, the report was well done and extremely informative.

I was able to find documentary evidence from the ICE website. However, there was one significant barrier I came across. The website regularly updates the list of active MOAs across the country, it does not have a record over time of this information. Often in reports or analysis I would find citations for the ICE Fact Sheet which lists the active MOAs, however rarely did these reports have a copy of the fact sheet as it was on that specific date. Therefore, it was unable to get a full picture of the number and the models of MOAs over time.

I found it challenging to sift through the abundance of material on the topic. Even though most of the country does not choose to participate in 287(g), there is an abundance of discussion regarding its validity and its worth given the controversial nature of the issue. I would argue that both sides of the argument use strong data to back up their claims, however their data can be used to argue for or against the policy, it all depends on ones definition of the problem.

Findings

The 287(g) program has a long and varied history. Despite the ebb and flow of its popularity, even at its peak 95 percent of jurisdictions in the country did not seek to join the program (Examining 287(g): The Role of State and Local, 2009). The arguments for and against joining the program remained fairly consistent throughout the past 21 years.

Pro-298(g)

Those jurisdictions which seek to join the 287(g) program are often doing so due to public pressure to respond to increased illegal immigration. Often the illegal immigration is blamed for an increase in crime rate leading to public outcry for more law enforcement. Thus, the force multiplier effect of the program is attractive to these jurisdictions. Early in the history of the program some from the law enforcement community and from congress stated confusion as to why the program was not more popular. Members of congress were by and large in favor the program, primarily citing concerns of terrorism and hopes that more cooperation amongst law enforcement would protect the homeland (The 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State, 2005).

Those on this side of the debate look at the issue of illegal immigration as a problem of basic law and order. The spectrum ranges from those who argue that only immigrants who commit serious crimes should be deported to those who argue merely being in this country without permission

constitutes a break in the social contract and thus warrants deportation. Finally, those arguing on this side of the debate see the illegal immigration situation as out of control, warranting an all hands on deck response.

Opposed to 287(g)

For those who choose not to join it is often in the name of community policing. These jurisdictions essentially conduct a cost benefit analysis in which the cost of losing trust in the immigrant community greatly outweighs the benefit of identifying and deporting undocumented immigrants. Further reasons include risk of racial profiling and fiscal cost to the local law enforcement agency.

This side of the debate argues strongly for a separation of state and federal responsibilities. The claim is often made that local and state agencies cannot do the federal government's work. Furthermore, a consistent concern throughout the history of the program is the lack of support from ICE to local agencies who do participate in the program. Some agencies report a lack of direction from ICE. This lack of direction is often the precursor for abuses of the program and of the immigrant community, adding to the cost of participation.

There are some who argue against this program not for the reasons listed above but instead on the premise of efficiency alone. For those jurisdictions which do wish to cooperate with federal law enforcement, 287(g) is not the only option. These jurisdictions often prefer to cooperate with the number of other programs that implant ICE into the local law enforcement level of operations. Or they adopt policies which institute a more passive form of cooperation, where their offices may allow a more open door of communication with ICE.

Changes Made

Those opposed to the program have seen several attempts at rectifying the concerns stated above. The program saw two significant revisions, first in 2009 and then again in 2013. In 2009, in response to a GAO report which called attention to the poor implementation of the program, the program underwent a revision which attempted to make the implementation more uniform and thus less prone to abuse.

The program has three models of implementation which are: jail enforcement model, task force officer model, and joint jail enforcement-task force officer model. In 2013, all jurisdictions with MOAs which operated task forces under the 287(g) program were discontinued. It is unclear whether this policy change had a direct impact on the drastic reduction of active MOAs. However, in fiscal year 2012 there were 64 MOAs in 24 States, and by July 2013 there were 39 MOAs in 19 States (The Performance of 287(g) Agreements FY 2013 Update, 2013).

What does this let us say?

While the choice to join the 287(g) program is voluntary, it is only one of many ways in which state and local law enforcement agencies can cooperate with federal immigration enforcement. Currently only 1 percent of jurisdictions have active MOAs (Searching for Sanctuary, 2016), however the new Trump Administration has pushed for a revitalization of the program.

In section D of President Trump's Executive Order issued on February 20th, the President pushes for the "expansion of the 287(g) program in the border region" (Implementing the President's Border Security and Immigration Enforcement Improvements, 2017). The order further encourages Customs and Border Patrol and ICE to evaluate the most effective enforcement model for each jurisdiction individually, including consideration all three models of the 287(g) program.

Why a state or local law enforcement agency decides to join the 287(g) program is an interesting and salient question given how few decide to join. Furthermore, on the national level this debate over local law enforcement cooperation with federal immigration enforcement is very active. The election of Donald Trump has created a policy window for those pushing for more cooperation.

I have listed the various reasons local and state jurisdictions had for joining this program over the 21 years of the program. An important finding in this research however is while the LEAs are mostly not joining this program this does not mean these LEAs do not wish to cooperate with federal immigration enforcement. This finding is supported by a recent study conducted by the Immigration Legal Resource Center. The findings of this study show that while a majority of jurisdictions do not have 287(g) agreements, 99 percent, a majority of the jurisdiction do have other policies in place allowing for active cooperation between local law enforcement and ICE. For example, the research shows that only 25 percent of counties do not hold individuals for ICE after the individual's release date (also known as a detainer).

How can policy-makers use your work?

State and local law enforcement cooperation with federal immigration enforcement is currently on the policy agenda for much of the country. As policy makers approach this question they should be cognizant of the policy history. Programs such as 287(g) have been plagued by controversy, and there are very real concerns in regards to implementation issues. Furthermore, this program is not the only way in which a LEAs can cooperate with federal immigration enforcement. Policymakers should evaluate the concerns of cooperation and the benefits of cooperation provided in this research in order to conduct their own cost benefit analysis for cooperation. The recent threats made by the White House to without funds from jurisdictions that refuse to cooperate with federal immigration enforcement only makes this analysis more complicated. I would argue however it also makes the conversation extremely important. Many in the immigrant community have been having this conversation for decades. Their voice is noticeably absent in the national conversation on programs such as 287(g). Policymakers should work to rectify this by ensuring they hear from all stakeholders.

Appendix: Research Matrix

Objective	Data	Analysis	What will this let us say?
<p>Determining why local and state law enforcement agencies seek to cooperate with federal immigration law.</p> <p>More narrowly, exam the reasons used by state and local agencies to join or not to join the 287(g) program.</p>	<p><i>Testimonial</i> – Congressional hearings</p> <p><i>Analysis</i> – GAO Report; Think Tank Reports; academic journals</p> <p><i>Documentary</i> – ICE website; Office of Inspector General Report</p>	Literature Review	<p>The reasons for and against this program have not changed much over time, it all depends on how a LEA defines the problem.</p> <p>Furthermore, the 287(g) program is not the only method available to LEAs for cooperation with federal immigration enforcement, and most LEAs <u>do</u> cooperate in some way.</p>

Annotated Bibliography

Note: this bibliography is organized according to date because this is the way in which I conducted my research.

The 287(G) Program: Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships: Hearing before the Subcommittee on Management, Integration, and Oversight of the Committee on Homeland Security, House of Representatives, 109th Con. (2005).

This hearing was held out of concern for whether the funds for the 287(g) program were being used appropriately. The committee members by and large approved of the program, primarily citing concerns of terrorism and expressed hopes that more cooperation amongst local law enforcement and federal immigration enforcement would protect the homeland. Committee members brought up the commonly stated benefits and concerns regarding local law enforcement involvement in immigration enforcement – i.e. cooperation creates a force multiplier vs. cooperation may result in a chilling effect on crime reporting in immigrant community.

Empowering Local Law Enforcement to Combat Illegal Immigration: Hearing before the Subcommittee on Criminal Justice, Drug Policy, and Human Resources of the Committee on Government Reform, House of Representatives, 109th Con. (2006).

This was a field hearing held in Gastonia, North Carolina. The purpose of the hearing was to examine the strengths and weaknesses of the 287(g) program specifically in North Carolina. The hearing comes at a time when the 287(g) program is in its nascent period of popularity, which is putting pressure on ICE and their ability to respond to the increased demand for the program but lack of funds and infrastructure. It is stated during the hearing that while North Carolina is not a border state it is struggling to manage the increase in illegal immigration. There is a link made between this surge in illegal immigration and the increase in crime. The committee members push the ICE officials for answers on how the agency can be better supported so that the agency in turn can provide more support to their communities. The local sheriff himself states that the 287(g) program is superior to the resources offered to local law enforcement to manage illegal immigration, stating that they are “virtually worthless and a waste of time.” (p. 48) The witnesses for this hearing are primarily local law enforcement representatives, an ICE agent, representative from the District Attorney, a local mother of a son killed in a hit and run accident where the drivers were undocumented immigrants.

Arpaio, Joseph M. (August, 2007). Memorandum of Agreement. Phoenix, Arizona: Maricopa County Sheriff's Office.

This is a MOA acknowledges the success of completion of the 287(g) program training. Sheriff Arpaio states how proud he is that his office has “the largest staff of cross-trained agents (160) in the nation,” and that the program is already reporting significant number of detainees.

Motomura, Hiroshi. (2008). Immigration Outside the Law. *Columbia Law Review*, 108, 2037-2097.

This essay takes a more holistic approach examining the issue of undocumented or illegal immigration. The author argues that in order for compromise to be made, those engaged in this debate must take into consideration all aspects immigration. She highlights three themes of the current debate that she believes need to be examined concurrently: the meaning of unlawful presence, the role of states and cities, and the integration of immigrants.

Government Accountability Office. (2009). *Immigration Enforcement: Better Controls Needed Over Program Authorizing State and Local Enforcement of Federal Immigration Laws*. (GAO-09-109). Retrieved from <http://www.gao.gov/new.items/d09109.pdf>

The GAO conducts this study on the implementation of the 287(g) program given the surge of interest in the program and the need to examine the on the ground implementation. The two stated reasons for the study are to review “(1) the extent to which ICE has designed controls to govern 287(g) program implementation; and (2) how program resources are being used and activities, benefits, and concerns reported by participating agencies.” (page 2) What the study discovers is there are significant inconsistency among the varied programs, there is a lack of a stated mission and objectives of the program, a lack of metrics to measure success, and overall a need to more uniform implementation and clear communication and direction of the program as a whole. These findings are all the more important to take seriously given the surge in interest in the program.

Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing before the Committee on Homeland Security, House of Representatives, 111th Con, (2009)

This hearing comes after the release of the GAO report is released, detailing concerns with 287(g) implementation. The committee members are concerned about the findings, stating for instance that while the program has surged in popularity and the removal numbers associated with the program have increased dramatically, there is no specific data to determine whether those immigrants deported were in fact dangerous criminal aliens. This sentiment is countered by one of the committee members who was co-author of the legislation that enacted the 287(g) program, when he declares that by no means was the intent of the program to only targeted “serious criminal activity” but instead it was meant to simply enforce immigration law and remove illegal immigrants.

Newton, L., & Adams, B. E. (2009). State Immigration Policies: Innovation, Cooperation or Conflict? *Publius: The Journal of Federalism*, 39(3), 408-431.

One DHS, One Mission: Efforts to Improve Management Integration at the Department of Homeland Security: Hearing before the Oversight of Government Management, the Federal Workforce, and the District of Columbia Subcommittee of the Committee on

Homeland Security and Government Affairs, Senate, 111th Con. (2009).

National Immigration Law Center. (August 2009). Letter to President Obama Regarding 287(g) Program. Retrieved from http://acluaz.org/sites/default/files/documents/LETTER_TO_PRESIDENT_20090825133229.pdf

Letter addressed to the President, urging him to terminate the 287(g) program. The letter is signed by 521 national and local organizations.

Department of Homeland Security Office of Inspector General. (March, 2010). The Performance of 287(g) Agreements. (OIG-10-63). Retrieved from https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf

This report finds that the 287(g) program continued to be plagued with implementation issues, and that it was not operating in compliance with the terms of the agreements. Many of the concerns raised in this report echo the issues raised in the 2009 GAO report. IOG makes 33 recommendations for Immigration and Customs Enforcement, 32 of which ICE concurs.

Rodríguez, C., Chisti, M., Capps, R., St. John, L. (2010) A Program in Flux: New Priorities and Implementation Challenges for 287(g). Washington, DC: *Migration Policy Institute*.

With the release of a more standardized version of the 287(g) MOA in 2009, the Migration Policy Institute seeks to monitor the potential changes in the programs implementation. This paper lays out the framework for a more in-depth research study which will “evaluate the effectiveness of the new MOAs in advancing federal immigration enforcement goals and the impact of the MOAs on local communities.

Capps, R., Rosenblum, M. R., Rodríguez, C., Chishti, M. (2011). Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement. Washington DC: *Migration Policy Institute*.

This is the follow up study conducted by MPI to further examine the implementation of the 287(g) program after the standardization of its formal MOA and the perceived shift in the program’s emphasis toward identifying illegal immigrants who have committed serious crimes. The study seeks to answer the question of whether the 287(g) program should focus primarily on identifying and removing the top priority tier of illegal immigrants, those who pose a security threat or who have committed serious crimes, or should the program seek to identify and remove as many illegal immigrants as possible.

The researchers utilize two sources, “data obtained from ICE for fiscal year (FY) 2010 that describe the offenses committed by those identified and detained through the 287(g) program, and site visits to seven 287(g) jurisdictions in the spring and summer of 2010” (p.1). The researchers find inconsistency in how the program is implemented across the country, they report that “ICE’s implementation practices allow jurisdictions to operate

the 287(g) program in fundamentally different ways across the country” (p.4). Moreover, the research finds that the program continues to have a negative impact on the immigrant community.

Coleman, M., & Kocher, A. (2011). Detention, deportation, devolution and immigrant incapacitation in the US, post 9/11. *The Geographical Journal*, 177(3), 228-237.

The authors of this paper examine the shift of immigration policy from outward focused primarily protection of the border, towards an inner focus on immigration enforcement targeting those immigrants already living in the country.

American Immigration Council. (November, 2102). The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement. [Fact Sheet]. Retrieved from <https://www.americanimmigrationcouncil.org/research/287g-program-flawed-and-obsolete-method-immigration-enforcement>

Koper, C. S., Guterbock, T. M., Woods, D. J., Taylor, B., & Carter, T. J. (2013). The Effects of Local Immigration Enforcement on Crime and Disorder. *Criminology & Public Policy*, 12(2), 239-276. doi:10.1111/1745-9133.12022

The authors of this journal article conducted a study on the policy impacts of the 287(g) program using the case of Prince William County. They specifically focus on the impact the policy had on crime and disorder in the county. Their findings are that the policies did not have an affect on most forms of crime in county, but they conclude that the policy was associated with a decline in the rate of aggravated assaults.

Immigration and Customs Enforcement. (December, 2012). “FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources.” [News Release]. Retrieved from <https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and>

ICE reports here that the agency has decided not to renew any of the task force programs with 287(g) agreements after the new year. They note that other programs such as the Secure Communities program operates more efficiently.

Department of Homeland Security Office of Inspector General. (September, 2013). The Performance of 287(g) Agreements FY 2013 Update. (OIG-13-116). Retrieved from https://www.oig.dhs.gov/assets/Mgmt/2013/OIG_13-116_Sep13.pdf

This report addresses recommendations from four prior reports from the Office of Inspector General regarding the 287(g) program specifically. The IOG reports that all of the 64 recommendations from these prior reports have been closed “based on corrective action plans and supporting documents provided by ICE” (p.2). The report also notes the recent reduction in active MOAs from 64 MOAs in 24 states in 2012, to 39 MOAs in 19

states as of July 2013. As well as the discontinuation of all Task Force Officer Models in January 2013.

- Rosenblum, Marc R., (July, 2015). Federal-Local Cooperation on Immigration Enforcement Frayed; Chance for Improvement Exists. [Commentary] *Migration Policy Institute*. Retrieved from <http://www.migrationpolicy.org/news/federal-local-cooperation-immigration-enforcement-frayed-chance-improvement-exists>
- Pérez, Z. J. (2016, March 17) Here's Why ICE Should Not Renew Contracts That Allow Sheriffs To Become Immigrant Agents. [Web log post]. Retrieved from <http://unitedwedream.org/blog/heres-why-ice-should-not-renew-contracts-that-allows-sheriffs-to-become-immigration-agents/>
- Chishti, M., & Mittelstadt, M. (November, 2016). Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal? [Commentary] *Migration Policy Institute*. Retrieved from <http://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal>
- Graber, L., & Marquez, N. (December, 2016). Searching for Sanctuary: An Analysis of America's Counties & Their Voluntary Assistance With Deportations. *Immigration Legal Resource Center*. Retrieved from https://www.ilrc.org/sites/default/files/resources/sanctuary_report_final_1-min.pdf
- The primary data in this study comes from a Freedom of Information Act (FOIA) request by the Immigration Legal Resource Center. Their objective in the study is to examine the “jail-to-deportation pipeline” (p.1) found at the county jail policy level. Furthermore, they urge counties to adopt sanctuary policies to halt the jail-to-deportation pipeline. They see this pipeline as a mechanism which leads to communities’ distrust in law enforcement and the separation of families.
- The findings of this study show that while a majority of jurisdictions do not have 287(g) agreements, 99 percent, a majority of the jurisdiction do have other policies in place allowing for active cooperation between local law enforcement and Immigration and Customs Enforcement. For example, the research shows that only 25 percent of counties do not hold individuals for ICE after the individual’s release date (also known as a detainer).
- The study ranks counties according to a 7 point rubric, 0 indicating the county has policies that state an active cooperation with ICE, and 7 indicating the county has policies that state a clear separation between local law enforcement and ICE. According to the data, 71.6 percent of counties were ranked as a 2, meaning “generally do whatever Ice asks of them without analyzing whether it is legal or good policy” (p.12).
- Kelly, John. (February, 2017). Implementing the President's Border Security and Immigration Enforcement Improvements Policies. [Memorandum] *Department of Homeland Security*. Retrieved from https://www.dhs.gov/sites/default/files/publications/17_0220_S1

Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf

In section D of President Trump’s Executive Order, he pushes for the “expansion of the 287(g) program in the border region” (p.4). The order further encourages Customs and Border Patrol and Immigration and Customs Enforcement to evaluate the most effective enforcement model for each jurisdiction individually, including consideration all three models of the 287(g) program: jail enforcement model, task force officer model, and joint jail enforcement-task force officer model.