

The Obama Administration's 287(g) An Analysis of the New MOA

By Jon D. Feere

The Obama administration may have begun to undermine one of the most successful immigration enforcement programs in the country.¹ Known as 287(g), the program allows trained state and local law enforcement officials to assist federal immigration agencies in carrying out immigration enforcement. Since the beginning of 2006, state and local law enforcement officials have identified over 120,000 illegal aliens for removal. As of this writing, 77 jurisdictions in 25 states have signed on to the program.

But it seems the program is working too well. According to Sen. Charles Grassley (R-Iowa)² and Rep. Lamar Smith (R-Texas),³ two authors of the 287(g) program, the Department of Homeland Security has made changes to the program that may slow the program's growth and endanger community safety by providing a free pass to many illegal aliens in the country. A revised Memorandum of Agreement (MOA) and Standard Operating Procedures (SOP) template has been issued by DHS and all current and future participants in the 287(g) program will have to sign it despite the fact that it advances legal inaccuracies, affirmatively makes some illegal aliens a low priority, suggests a distrust of local law enforcement, and arguably embraces a pre-9/11 mentality. A number of local 287(g) agencies are trying to negotiate modifications to the new DHS template agreement, but it remains unclear to what extent they will be successful.

The following is an analysis of some of the potentially problematic changes. A number of earlier MOAs are available online,⁴ and the new MOA is available on our website.⁵

New 287(g) MOA Language Misinterprets Statutory Law. Department of Homeland Security Secretary Janet Napolitano is contradicting statutory law and congressional intent by redefining and narrowing the scope of 287(g), and by claiming it is designed to only support local law enforcement's identification of "dangerous criminal aliens." Under the "Purpose" section of the new MOA, 287(g) is described as a program designed to carry out the "removal of *criminal* aliens" (emphasis added). The original MOAs did not make that distinction and all illegal aliens were subject to removal under the program.

For at least the past year, the ACLU has been spreading false legal analysis, claiming that the 287(g) program was created solely for the purpose of detaining dangerous, criminal aliens. As I noted in a recent blog⁶ the ACLU has sought to change 287(g) into a "stay here illegally until someone is seriously injured" policy.

The ACLU claims that the 287(g) program "was originally intended to target and remove undocumented immigrants convicted of violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling, and money laundering." However, 287(g) was *not* created with a limited focus on criminal aliens. Here's the statutory text:

"[T]he Attorney General may 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, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law." [8 U.S.C. §1357(g). The entire statute is available online.]⁷

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Clearly, no such distinction about the type of alien removable under 287(g) is in the statute. Furthermore, at a recent congressional hearing the co-author of the statute, Rep. Lamar Smith, explained this fact:

“I was the House author of the 1996 immigration bill that included the 287(g) program and... there’s nothing in the legislation that limits the program to detaining those who committed serious crimes. The goal was not that at all; the goal was to enable those local law enforcement authorities who wanted to, to enforce the immigration laws in whatever way they thought best. And that might or might not include those who committed serious crimes.”⁸

Despite all this, the White House has taken the same position as the ACLU and is arguably encouraging law enforcement agencies involved with 287(g) to narrow the scope of their enforcement efforts. This could conceivably result in thousands of illegal aliens being permitted to continue to violate federal immigration law until they seriously injure someone. According to the language in the SOP that accompanies the new MOA, only after an alien has been convicted of or arrested for violent offenses such as murder, manslaughter, rape, robbery, kidnap, or major drug offenses will the Obama administration consider deporting the illegal alien perpetrator a top priority.

New Policy May Threaten Public Safety. The Obama administration’s new 287(g) directives could potentially harm public safety. In accordance with statutory law, any illegal alien can be charged with immigration violations via 287(g). But under the new directive, an illegal alien will be required to be arrested for or convicted of killing, raping, robbing, and/or kidnapping someone, or be arrested/convicted for a major drug offense, before his removal becomes a high, “Level 1” priority on the administration’s new three-level priority scheme. The MOA provides for ICE to take custody of some low-priority aliens, but the decision to move forward with processing for such a removal will be made by ICE on a case-by-case basis, presumably depending on detention space, but also potentially subject to the administration’s politically driven enforcement policies.

Although the new SOP definitively makes some illegal aliens low priorities, it remains somewhat unclear what the Obama administration considers a “minor offense” unworthy of deportation. Is identity theft enough to warrant deportation? What about driving

without a license or drunk driving? Must an innocent motorist be killed before law enforcement can act on such crimes? An ounce of prevention is worth a pound of cure.

Take, for example, Alfredo Ramos,⁹ an illegal alien from Mexico who killed 16-year-old Tessa Tranchant and 17-year-old Alison Kundhardt in Virginia Beach, Va. On March 30, 2007, the girls were stopped at an intersection, waiting for the light to turn green when a drunk Ramos slammed his vehicle into theirs at 70 mph, killing both of them. Two months previously, Ramos had been arrested for identity theft, public drunkenness, and DUI. In an ideal world, the earlier crimes would have set off red flags and resulted in deportation, preventing the tragedy. This would have required a commitment by both the local jurisdiction and the federal authorities to remove low-level offenders like Ramos, of course. But the Obama administration has decided against such a commitment: Under the new MOA, ICE would likely direct local law enforcement to release similarly-situated aliens, and lives would not be spared. Instead of crafting a more pro-active MOA, the Obama administration seems to have taken a step backward.

Take as another example Lidia Monica Lopez,¹⁰ an illegal alien from Mexico living in North Carolina. On July 11, 2008, she was pulled over and cited for operating a vehicle without a license. That was her only additional offense, and she was not processed for removal under 287(g). Less than a year later, on April 5, 2009, Lopez slammed into on-coming traffic (it is alleged she ran a red light) injuring Pamela Coble, aged 60, and then struck and killed motorcyclist William Bryan Barber, Sr. His nine-year-old son, William Jr., was also knocked from the motorcycle and injured. Instead of trying to prevent this from happening to someone else, the new DHS directive arguably encourages the same result: prior to the killing, Lopez would not be considered a Level 1 or Level 2 priority.

DHS will now find reason to deport Ramos and Lopez, but why should people have to die before our government enforces the law? Both individuals should have at least been charged with immigration violations if not actually detained and removed during their first interaction with law enforcement. But even with an active local law enforcement agency that is robustly participating in a 287(g) program and reporting illegal aliens to ICE, the new MOA and the Obama administration’s apparent lack of interest in detaining a larger share of illegal aliens seems to make the possibility of deporting aliens like Ramos and Lopez before they kill unlikely.

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The new SOP that accompanies the MOA uses a three-level priority list for criminal aliens, but exactly how it will operate remains unclear. It appears that DHS will focus its detention efforts largely on “Level 1” aliens and will make other illegal aliens a low priority until they commit a serious crime. While ICE has used a similar prioritization scheme for its internal operations, this is the first time an administration has required local agencies participating in 287(g) to adopt such a scheme. Here are the three priorities:

- Level 1: Criminal aliens 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: Criminal aliens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering.
- Level 3: Criminal aliens who have been convicted of or arrested for other offenses.

The new MOA states that the purpose of 287(g) is to “enhance the safety and security of communities by focusing resources on identifying and processing for removal, criminal aliens who pose a threat to public safety or danger to the community.” But which illegal aliens will fall into this category? Likely, many dangerous illegal aliens would not be a priority under the new, three-level scheme. An alien selling fake IDs, for example, may not appear to be a significant threat, but he may simply be successfully shielding his connections to international syndicates. An alien driving with a broken taillight may not appear to pose a significant danger to public safety, but what if the alien is a gang member with a violent overseas record that has not yet made it to U.S. databases? Categorizing illegal aliens under a three-tiered priority scheme will prove to be difficult and while the new MOA gives the appearance of security, many dangerous aliens may fall through the cracks.

New MOA Suggests a Distrust of Local Law Enforcement. Some changes to the MOA imply a distrust of local law enforcement engaged in 287(g). Perhaps the most problematic is the removal of language that gave significant arrest authority to local law enforcement, under the task force model. In citing statutory law, some original MOAs contained the following authorized function:

“The power and authority to arrest without warrant any alien entering or attempting to unlawfully enter the United States, or any alien in the United States, if the officer has reason to believe the alien to be arrested is in the United States in violation of law and is likely to escape before a warrant can be obtained.”

This section gave very broad authority to state and local law enforcement to arrest illegal aliens based solely on their immigration status. But the new MOA abandons this language and apparently requires law enforcement agencies to rely on the following language:

“The power and authority to arrest without warrant for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if there is reason to believe that the person so arrested has committed such felony and if there is likelihood of the person escaping before a warrant can be obtained. Arrested individuals must be presented to a federal magistrate judge or other authorized official without unnecessary delay. Notification of such arrest must be made to ICE within twenty-four (24) hours.”

While the original language included in some MOAs allowed task force officers to arrest any illegal alien, this second clause apparently requires the alien to have committed a felony before an officer can make an arrest. While this second clause also appeared in some of the old MOAs, it does not appear sufficient to address illegal aliens who have not committed a felony. In order to do so, a task force officer now must get prior approval from ICE before arresting an alien solely based on an immigration violation. A task force officer must also get permission from ICE before interrogating any person “reasonably believed to be an alien about his right to remain in the United States.” However, local officers operating under the detention model do not need permission from ICE to initiate such an interrogation.

While these are not the only authorities granted under the MOA, the mandated approvals may result in a less effective program.

The new MOA also has a much more extensive “Nomination of Personnel” section that also arguably indicates a federal-level distrust of state and local law enforcement officials. The original MOA allowed ICE to conduct a background check and required jurisdictions

to keep the 287(g)-trained officers in their positions for at least two years in order to make the training worthwhile. If the jurisdiction wanted to change the officer's position within that timeframe, officials simply had to give ICE a 60-day notice "to the extent possible and practicable."

The new MOA doubles the background check process. Local jurisdictions are now required to conduct their own criminal background checks on candidates and may be required make "all related information and materials it collected, referenced, or considered" available to ICE. The secondary ICE-administered background check has apparently been extended. Now, a candidate must complete a "background questionnaire," which "requires, but is not limited to, the submission of fingerprints, a personal history questionnaire, and the candidate's disciplinary history (including allegations of excessive force or discriminatory action)."

Note that mere allegations are now on Napolitano's radar. As explained in the previous section, ICE does not appear to want to make the deportation of illegal aliens who are actually *guilty* of certain low-level crimes a high priority, but ICE *does* appear willing to deny a police officer 287(g) authority based on mere allegations.

The new MOA also explains that ICE will "query any and every national and international law enforcement database" in order to evaluate a candidate's "suitability to participate" in 287(g) and that ICE can require the agency to provide "continuous access to disciplinary records of all candidates." It remains unclear what metric DHS will use to evaluate "suitability." Regardless, this language provides one more tool the federal government can use to end a jurisdiction's participation.

The complaint/allegation procedure also has been changed. The new SOP requires the local law enforcement agency to "immediately notify ICE of the existence and nature of the complaint or allegation." ICE is required to accept complaints from anyone and "immediately forward a copy of the complaint to the DHS Office for Civil Rights and Civil Liberties Review and Compliance." Here's the rub: If any officer is "under investigation" as a result of an allegation or is "alleged to have violated the terms" of the MOA, "ICE may revoke that individual's authority and have that individual removed from participation in the activities covered under the MOA." The original MOAs also had a process for filing complaints, but officers facing allegations would only be removed from participation in 287(g) "if appropriate" — meaning, one would think, that the allegations actually are based in reality — and only "pending resolution of an inquiry." The difference is subtle, but the new language arguably indicates a

heightened distrust of state and local law enforcement officers.

One concern is that 287(g) detractors will use this process to their advantage, with seemingly no repercussions for filing false or misleading complaints. Here's how it may play out: Someone will make an allegation (based on little or no evidence) against all 287(g)-trained officers in a certain jurisdiction which will, in turn, automatically require the local law enforcement agency to report it to ICE. Then, regardless of the truth or accuracy of the allegation, ICE can effectively suspend the jurisdiction's 287(g) program by revoking all authority. This is what the new MOA allows. DHS expects to have the investigation resolved in 90 days, but makes no guarantee. Bottom line, a local jurisdiction's efforts at stopping illegal activity will be dependent on the federal government's bureaucratic complaint and allegation resolution procedures. Countless numbers of illegal aliens may run free during the three-month investigation period.

While the original MOAs are proactive and explain how law enforcement can act, the new MOA is focused largely on the limiting language, telling local law enforcement what it cannot do. It reads like an attempt to administratively limit the scope of 287(g) via the MOA.

The Obama Administration Embracing a 9/10 Mentality? The 9/11 Commission found that local law enforcement officials are oftentimes on the front lines of national security and that hindering their involvement in immigration enforcement was partially to blame for the terrorist attacks of 2001. Specifically, the 9/11 Commission noted:

"In 1996, a new law [287(g)] enabled the INS to enter into agreements with state and local law enforcement agencies through which the INS provided training and the local agencies exercised immigration enforcement authority. Terrorist watchlists were not available to them. Mayors in cities with large immigrant populations sometimes imposed limits on city employee cooperation with federal immigration agents. A large population lives outside the legal framework. Fraudulent documents could be easily obtained. Congress kept the number of INS agents static in the face of the overwhelming problem."¹¹

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In a section of the 9/11 Commission Report titled, “The System Was Blinking Red,” the Commission touched on the danger of not encouraging state and local cooperation:

“In sum, the domestic agencies never mobilized in response to the threat. They did not have direction, and did not have a plan to institute. The borders were not hardened...State and local law enforcement were not marshaled to augment the FBI’s efforts.”¹²

It is important to remember that the FBI and ICE often work together on immigration-related cases. As noted by the 9/11 Commission, not making the most of state and local law enforcement can only benefit those seeking to cause us harm.

The 9/11 Commission Report also explained the need for giving more, not less authority to state and local law enforcement agencies:

“There is a growing role for state and local law enforcement agencies. They need more training and work with federal agencies so that they can cooperate more effectively with...federal authorities in identifying terrorist suspects.”

It is much more likely that a local police officer, rather than a federal officer, will come into contact with a removable gang member or terrorist. Take for example, 9/11 terrorist Nawal al Hazmi, who hijacked Flight 77 and crashed it into the Pentagon. Hazmi had overstayed his visa and consequently rendered himself a deportable illegal alien. According to the FBI,¹³ on April 1, 2001, Hazmi was pulled over by an Oklahoma police officer for speeding. Had the officer been part of the 287(g) program, the then-existing original MOA would have allowed the officer to arrest Hazmi based on his illegal immigrant status. His status could have been used as a means to detain and deport Hazmi. Perhaps the entire 9/11 plot may have unraveled and been prevented. Of course, the officer was not trained under the 287(g) program, Hazmi was not detained, and massive casualties resulted.

But under the new MOA, even if that officer had been trained under 287(g), he likely would have been instructed by ICE to not arrest Hazmi because he had no traceable, violent criminal record. In other words, under the new MOA, Hazmi would likely be classified as a low-level priority.

While it remains unclear exactly how the tiered priority levels will operate, the Obama administration

should recognize that even illegal aliens who appear to be low-level offenders may nonetheless be significant security risks. It follows that illegal aliens should be detained and deported at the first possible opportunity, even for minor offenses like speeding. It is impossible to predict exactly who that illegal alien may turn out to be.

Will the new MOA shift law enforcement from a focus on prevention to a post-incident investigation mentality? Time will tell.

Recommendations

DHS Should Acknowledge that All Illegal Aliens Pose a Threat to Society. On a basic level, illegal aliens represent a threat to sovereignty, the value of citizenship, and the rule of law. A government that embraces this illegal activity does a disservice to civil society and encourages social tension and continued lawbreaking. On an individual level, any illegal alien may be an immediate threat to personal safety; aliens do not necessarily have a paper trail and it is therefore impossible for DHS to conclude that it is in the public’s best interest to shelter any illegal alien from deportation. For example, an illegal alien may have a violent criminal history in his country of origin, the records of which remain unavailable to U.S. officials. Or the illegal alien may have no record at all but may be planning to fly a passenger jet into a government building. Regardless, any illegal alien is deportable simply by nature of his illegal status and even low-level offenders may pose great security risks.

DHS Should Not Narrow Its Focus to “Criminal” Aliens. The misrepresentation of 287(g) as a program focused solely on criminal aliens should be corrected. The new MOA should be amended to reflect congressional intent. In the spirit in which the program was written, local law enforcement should be granted as much authority as 287(g) allows. Congress should also reassert its authority to ensure that 287(g)’s purpose remains intact. As part of this effort, DHS should distance itself from activist groups that have intentionally spread legal misrepresentations about 287(g).

DHS Should Encourage Participation in 287(g). State and local law enforcement should be made confident that DHS intends to expand rather than restrict the program. DHS must assure law enforcement that the White House will not hastily end a jurisdiction’s 287(g) program based on politics or mere allegations and that revocation of an MOA will only occur as a last resort. Part of this effort

must include a commitment to create the necessary infrastructure to detain and process a greater number of aliens for removal. The three-tiered prioritization scheme is partially the result of limited resources. As infrastructure is expanded, fewer and fewer deportable

aliens may be considered low priorities. With increased participation, the 287(g) program, an important component of the “attrition through enforcement”¹⁴ strategy, will become increasingly effective at reducing the illegal alien population.

End Notes

¹ Department of Homeland Security press release, “Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements,” July 10, 2009, at http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

² Office of Senator Chuck Grassley press release, “Grassley: Homeland Security Department Hampers State and Local Law Enforcement Ability to Apprehend Illegal Aliens,” July 14, 2009, at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=21811.

³ Numbers USA blog, “Author of 287(g) Local Enforcement Program Strikes Back at Wall Street Journal and Obama,” July 20, 2009, at <http://www.numbersusa.com/content/news/july-20-2009/author-287g-local-enforcement-program-strikes-back-wall-street-journal-and-obama.h>.

⁴ Worker & Immigrant Rights Clinic of Yale Law School website, “U.S. Immigration and Customs Enforcement FOIA Disclosures: 287(g) Memoranda of Understanding.” Accessed July 30, 2009, at http://islandia.law.yale.edu/wirc/287g_foia.html.

⁵ <http://www.cis.org/articles/2009/moa-final.pdf>.

⁶ Jon Feere, “ACLU-UNC Wrong on 287(g),” Center for Immigration Studies blog, April 16, 2009, at <http://cis.org/Feere/UNCandACLU>.

⁷ H. Rep. No. 104-863, “Making Omnibus Consolidated Appropriations For Fiscal Year 1997; Sec. 133. Acceptance of State Services to Carry Out Immigration Enforcement.” Available from Library of Congress (THOMAS), at http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp104&sid=cp104cHmSP&refer=&r_n=hr863.104&item=&sel=TOC_1842733&.

⁸ Feere, *supra* note 6.

⁹ Duane Bourne, “Alfredo Ramos gets 24 years in Virginia Beach teens’ deaths,” *Virginian-Pilot*, November 20, 2007, at <http://hamptonroads.com/node/431131>.

¹⁰ “Woman in fatal wreck previously cited for having no license,” *Times-News of Burlington* (N.C.), April 8, 2009, at http://www.news-record.com/content/2009/04/08/article/woman_in_fatal_wreck_previously_cited_for_having_no_license.

¹¹ National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, Pg. 81. July 26, 2004. <http://www.9-11commission.gov/report/911Report.pdf>.

¹² *Ibid.* at 265.

¹³ Federal Bureau of Investigation, “Working Draft Chronology of Events for Hijackers and Associates,” November 14, 2003, at: <http://www.historycommons.org/sourcedocuments/2001/pdfs/fbi911timeline106-210.pdf>.

¹⁴ Mark Krikorian, “Downsizing Illegal Immigration: A Strategy of Attrition Through Enforcement,” Center for Immigration Studies Background, April 2005, at <http://www.cis.org/ReducingIllegalImmigration-Attrition-Enforcement>.