The Immigration Enforcement Multiplier: Examination of INA Section 287(g) in Light of Florida’s Memorandum of Understanding

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I. **Introduction** ........................................................................................................ 220

II. **Authority of State and Local Law Enforcement Regarding Federal Immigration Laws** ................................................................. 222

   A. **Scope of Police Powers Defined by Case Law** ........................................ 222
   
   B. **1996 Amendment to the Immigration and Nationality Act, Analysis of Section 287(g)** ................................................................. 224

III. **Overview of the Florida Memorandum of Understanding** ........................................... 226

   A. **Purpose Behind the Formulation of the Agreement** .......................... 226
   
   B. **Organization of the Agreement Between the State of Florida and the Department of Justice** ................................................................. 229

IV. **Analysis of the Successes of the Florida Agreement Within the State of Florida** ........................................................................................................... 232

   A. **Specific Successes of the Florida Agreement** ........................................ 232

V. **Controversial Issues Regarding Increased Local Enforcement of Federal Immigration Violations** ................................................................. 236

   A. **Civil Rights Concerns** ........................................................................ 236
   
   B. **Strained Relationships with Minority Communities** ............................ 237

VI. **Examination of the Proper Way to Proceed with an Expansion of 287(g) Programs Throughout the United States** ........................................................................................................... 239

VII. **Expansion of 287(g) Programs and ICE Access** ........................................... 242

   A. **ICE ACCESS** .................................................................................. 242
   
   B. **Adoption of ICE ACCESS Programs** ................................................. 244
   
   C. **Response to ICE ACCESS in Danbury, Connecticut** ....................... 246
   
   D. **The Future Local Immigration Enforcement: Section 287(g) Goes National** ......................................................................................... 250

VIII. **Conclusion** ........................................................................................................ 253

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I. INTRODUCTION

Proponents of greater enforcement of the nation’s immigration laws need only cite one statistic to advocate their point of view. "Three 9/11 hijackers—Mohammed Atta, Hani Hanjour, and Ziad Jarrah—came into contact with state and local police before the attacks for speeding."1

Atta was stopped by police in Tarmac [sic], Florida, in July 2001 and was ticketed for having an invalid license. He ignored the ticket and a bench warrant was issued for his arrest. He was stopped a few weeks later in a town nearby for speeding and the officer, unaware of the bench warrant, let him go with a warning. Hijacker Mohammed Atta is believed to have piloted American Airlines Flight 11 into the World Trade Center’s north tower.2

During contact with law enforcement, Mohammed Atta “was illegally present in the United States.”3 In a post-September 11th world, knowing that several hijackers came into contact with law enforcement while their immigration status was in question is certainly troublesome. This fact has fueled the national debate as to whether local law enforcement should be more engaged in enforcing federal immigration laws.

The debate is fueled not only by grand incidents on a national scale like the 9/11 attacks, but also by gruesome crimes that leave local communities in shock.4 In 2002, for example, “Miguel Angel Heredia Juarez, an illegal alien from Mexico, was convicted for viciously raping and beating a 19-year old..."5

2. Id. at 2 (statement of Hon. Saxby Chambliss, Sen. from the State of Georgia).
4. See id. at 51–53.
woman." He was on probation at the time, having "been previously convicted of four other felonies, including theft and assault, since illegally crossing the Mexican border." Both the 9/11 terrorists and Miguel Angel Héredia Juarez were examples cited by United States Senator Saxby Chambliss during a statement to the Immigration Subcommittee regarding the authority of local police to enforce federal immigration laws.

In 1983, the Ninth Circuit Court of Appeals clarified the role of states in enforcing this nation's federal immigration laws. The court held that "federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Naturalization] Act." The rationale for this decision is the lack of a "pervasive regulatory scheme" for enforcement of criminal provisions of the Immigration and Naturalization Act (INA), which would effectively preempt states and local governments from acting within the field of criminal immigration enforcement. Nevertheless, the "complex administrative structure" established by the federal government over the civil provisions of the INA has effectively prevented state and local governments from enforcing civil immigration violations.

In September of 1996, Congress amended the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and added section 287(g). This section authorizes the Secretary of the U.S. Department of Homeland Security (DHS), and previously the Attorney General of the United States prior to DHS's establishment, to enter into agreements with state and local governments that empower designated officials to enforce civil violations of the immigration code. In 2002, the State of Florida entered into a Memorandum of Understanding (MOU) with the United States Department of Justice. This agreement established "a pilot project pursuant to

5. Authority to Enforce Immigration Law Hearing (statement of Michelle Malkin, Investigative Journalist & Author), supra note 1, at 130.
6. Id.
8. See Gonzales v. City of Peoria, 722 F.2d 468, 472 (9th Cir. 1983).
9. Id. at 475.
10. Id.
11. See id.
13. Id.
14. Id. at 2.
which the Immigration and Naturalization Service (INS) authorize[d] state and local law enforcement officers . . . to perform certain immigration officer enforcement functions.”

This program was renewed by Florida Governor Jeb Bush in 2003, and remains a model for federal and state cooperation in combating illegal immigration. Federal and state officials have hailed the Florida MOU as a success and a model for future expansion of 287(g) programs. However, expansion of local enforcement of immigration laws is not without widespread concern. Minority communities worry about discrimination and harassment in the form of pretextual investigations relating to immigration violations. In addition, these programs require extensive training and funding, both for effective enforcement and to maintain working community relations. The Florida MOU is a model by which to examine the recent efforts of the federal government to expand its enforcement capabilities into local communities. This analysis is particularly important given a current desire to expand the use of 287(g) programs to aid immigration enforcement on a national scale.

II. **Authority of State and Local Law Enforcement Regarding Federal Immigration Laws**

A. **Scope of Police Powers Defined by Case Law**

Case law has established that state and local law enforcement officers have inherent authority to enforce the criminal provisions of the INA, but not the civil provisions. 

In examining the INA, it is crucial to distinguish the civil from criminal violations. Mere illegal presence in the U.S. is a civil, not criminal, violation of the INA, and subsequent deportation and associated administrative processes are civil proceedings.

Criminal violations of the **INA** include, for example, 8 U.S.C. § 1324, which addresses the bringing in and harboring of certain undocumented aliens; § 1325(a), which addresses the illegal entry of aliens; and § 1326, which penalizes the reentry of aliens previously excluded or deported.

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17. See Gonzales v. City of Peoria, 722 F.2d 468, 476 (9th Cir. 1983).

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criminal provisions within the same statute could have different implications on enforcement powers of state and local police. The most important factor for understanding the implications of INA Section 287(g) is an understanding of why civil and criminal provisions of the INA are treated differently.

To begin, Gonzales explained that:

> Where state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized. Therefore, federal regulation of a particular field should not be presumed to preempt state enforcement activity “in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”

Under the preemption rationale discussed in Gonzales, a substantial difference must exist between the civil and the criminal provisions of the INA to warrant such treatment. Referring to 8 U.S.C. § 1325, the criminal provision of the INA regarding illegal entry into the United States, Gonzales makes the point that “[f]ederal and local enforcement have identical purposes—the prevention of the misdemeanor or felony of illegal entry.” The circular rationalization of highlighting the purpose of the criminal provisions versus the civil provisions does not adequately explain why the two warrant
different treatment. It is obvious that both states and the federal government would like to enforce criminal laws, but the same argument can be made for states enforcing civil violations of the INA. In fact, given that states like Florida bear the majority of the cost of illegal immigration, states may not only have the same purpose in enforcing the civil provisions of the INA, but may actually have a greater incentive to do so. Instead, a better way to understand the difference between criminal and civil violations of the INA is the assumption by Gonzales "that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." Essentially, Gonzales is recognizing that civil immigration enforcement is complex, and thus has required pervasive regulation by the federal government. This rationale recognizes that civil immigration violations require extensive training in exercising discretion, as well as access to government databases, neither of which are readily available to state and local police officers.

B. 1996 Amendment to the Immigration and Nationality Act, Analysis of Section 287(g)

"The Illegal Immigration Reform and Immigrant Responsibility Act . . . effective September 30, 1996, added [s]ection 287(g), performance of immigration officer functions by state officers and employees, to the Immigration

24. See id.
26. Id. at 1.
27. Gonzales, 722 F.2d at 474–75.
28. Id. at 475.
29. See id. “Under current practice, state and local law enforcement officials do not have direct access to information on the immigration status of an alien.” Seghetti et al., supra note 17, at 19. “State and local law enforcement officials . . . have reported a variety of problems with accessing LESC [the Law Enforcement Support Center] and soliciting the help of federal immigration officials . . . .” Id. at 20. “LESC was established in 1994 and is administered by ICE. It operates 24 hours a day, seven days a week. LESC gathers information from eight databases and several law enforcement databases, including the NCIC. In July 2003, LESC processed 48,007 inquiries.” Id. at 19 n.82.
and Nationality Act (INA).” Section 287(g) of the INA (8 U.S.C. § 1357(g)) was added by section 133 of the IIRIRA constituting “one of the broadest grants of authority for state and local immigration enforcement activity.” Section 287(g) authorizes that

the 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.

This section is not an authorization of state and local police to obtain immigration enforcement powers at their own discretion. The usefulness of this section is in the ability of state and local governments to arrange programs tailored to their local concerns and benefiting local constituents. This provision makes it clear, however, that any participating officers under the agreement act at the discretion and under the supervision of the Attorney General of the United States. In fact, every aspect of a state or local officer’s involvement in any section 287(g) program must be agreed to and supervised by the Attorney General. While section 287(g) allows states to

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29. U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), supra note 12, at 1.
30. SEGHETTI ET AL., supra note 17, at 12. “Section 1357(g) allows for significant flexibility. It permits state and local entities to tailor an agreement with the AG [Attorney General] to meet local needs, contemplates the authorization of multiple officers, and does not require the designated officers to stop performing their local duties.” Id.
31. 8 U.S.C. § 1357(g)(1) (2006). Note that this provision is the same as INA section 287(g). See SEGHETTI ET AL., supra note 17, at 14.
33. 8 U.S.C. § 1357(g)(3). “In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.” Id.
34. 8 U.S.C. § 1357(g)(5) (“With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.”).
make immigration enforcement a greater priority, it seems there is a potential that state interests may be squeezed out by the interests of the federal government. The federal government's immigration enforcement powers may be extended into local communities under the guise that the state or local entity’s interests are being addressed. Until 2002, it was unknown how an agreement pursuant to INA section 287(g) would operate. However, the Memorandum of Understanding (MOU) between the State of Florida and the Department of Justice, signed in 2002 and renewed in 2003, is often considered an example of how an INA section 287(g) program may be tailored to address both state and federal concerns.

III. OVERVIEW OF THE FLORIDA MEMORANDUM OF UNDERSTANDING

A. Purpose Behind the Formulation of the Agreement

Florida has actively attempted to increase state influence in immigration enforcement before. In 1998, “U.S. Immigration and Naturalization Commissioner Doris Meissner and Florida Governor Lawton Chiles... signed the first agreement between the federal government and a state that provided[d] for a joint response to a mass influx of aliens.” The 1998 MOU was in recognition of a state need “to develop and implement a comprehensive federal response to any mass influx of aliens within the state.” Three years later, the particular needs of the State of Florida changed drastically


36. SEGHETTI ET AL., supra note 17, at 13, 15.

37. See Carafano, Section 287(g), supra note 32, at 2. “A [section] 287(g) pilot program with the State of Florida could serve as a national model. The Florida initiative demonstrates how to craft a program that meets federal as well as state and local needs.” Id.

38. See News Release, INS and Florida Sign Historic Agreement, supra note 35.

39. Id. (“The Memorandum of Understanding (MOU) formalizes the terms under which Florida will support INS operations in response to an actual or imminent mass migration into the state. Under the MOU, Florida may provide logistical and law enforcement support to the federal response upon request by INS. As the lead federal agency, will coordinate responsive law enforcement operations, and the state will be reimbursed for authorized expenses incurred. Implementation of the MOU is contingent upon action by the Attorney General to obligate funds from the Immigration Emergency Fund. The Attorney General also can approve the delegation of authority to state law enforcement officers to enforce immigration law during the mass migration.”).

40. Id.
and so did the nature of its cooperation with the federal government. After September 11, 2001, the State of Florida shared a common understanding with the federal government—that a greater role of the State of Florida in immigration enforcement may have been crucial in preventing the attacks on September 11, 2001. In 2002, the Florida MOU was signed by the Attorney General of the United States, Commissioner of the INS, Governor of Florida, and Commissioner of the Florida Department of Law Enforcement (FDLE). In the year following the September 11th attacks, it is no surprise that the agreement was formulated under the umbrella of domestic security.

The limitation in scope to domestic security was built into the agreement by limiting eligible officers to those already working within seven Regional Domestic Security Task Forces (RDSTF). “These task forces have served as the cornerstone of Florida’s domestic security and anti-terrorism efforts since that time . . . .” The RDSTFs, however, often encountered illegal aliens during operations. While attempts were made to involve federal officials with immigration authority, the scarcity of federal resources often

41. See The 287(g) Program Hearing, supra note 3, at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law).
42. Id. “Terrorism and criminal activity are most effectively combated through a multi-agency/multi-authority approach that encompasses federal, state and local resources, skills and expertise. State and local law enforcement . . . will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety.” U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), supra note 12, at 1. “[S]everal of the 9/11 hijackers had either entered the United States through Florida or had operated in Florida while preparing for the attack.” The 287(g) Program Hearing, supra note 3, at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law).
44. See id. at 1. “The efforts of officers so authorized under this MOU shall remain focused on counter-terrorism and domestic security goals.” Id.
45. See The 287(g) Program Hearing, supra note 3, at 15 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement) (“After the atrocities of September 11, 2001, . . . the state of Florida created seven Regional Domestic Security Task Forces [RDSTFs] . . . . Their mission is to employ the coordinated resources of various local, state and federal agencies to prevent, preempt and disrupt any terrorist attack or other domestic security threats within the state of Florida or in the event of . . . an attack, . . . to effectively respond to the incident to facilitate recovery and investigations.”). “The RSDTF concentrates full-time on domestic security and counter terrorism specific investigative efforts.” Authority to Enforce Immigration Law Hearing, supra note 1, at 226 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).
46. The 287(g) Program Hearing, supra note 3, at 17 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).
47. Authority to Enforce Immigration Law Hearing, supra note 1, at 226 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).
frustrated the efforts of the RDSTFs. The FDLE requested greater access to federal immigration databases to aid the RDSTF in their domestic security efforts. This provided an opportunity for the State of Florida to enter into an agreement with little controversy, as the focus was on domestic security rather than increased immigration enforcement.

While the stated intent of the MOU is "to address the counter-terrorism and domestic security needs of the nation and the State of Florida," the functions listed in the agreement are not specifically limited to instances implicating domestic security concerns. Additionally, limiting the agreement to domestic security and counter-terrorism measures is a unique feature of the Florida agreement and not in any way required by section 287(g). In fact, the agreement authorizes normal immigration functions, including, but not limited to, interrogation of a person believed to be an alien to determine probable cause, completion of arrest reports, preparation of immigration detainers, and even transportation of aliens under arrest. It is also important to note that the agreement supplements already existing duties and authorities of participating officers, rather than limiting them to those set out in the

48. Id. "From the very beginning, [the FDLE's] investigative efforts would encounter alien residents both legal and illegal. Many times it took far too long to get immigration related questions answered, due in some cases to a lack of available federal resources.” Id.

49. See The 287(g) Program Hearing, supra note 3, at 17 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). “The current ICE/RDSTF initiative evolved from a previous FDLE request to allow state law enforcement personnel to have direct access to the Legacy Immigration and Naturalization Service (INS) record systems and databases.” Id.

50. Id. at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law). “Florida’s initial interest in seeking a Section 287(g) agreement was driven in part by the exigencies of 9/11 and the recognition that state and local law enforcement can increase their effectiveness in the war against terrorism with the addition of Section 287(g) enforcement authority.” Id.

51. Memorandum of Understanding 2002, supra note 15, at 1, 3. The Florida MOU “specifies that operations conducted jointly by the INS and the state will be limited to missions involving Florida’s Regional Domestic Security Task Force. The agreement, however, fails to clearly delineate what such operations might entail.” INS and Florida Enter MOU to Allow State Officers to Enforce Immigration Law, IMMIGRANTS’ RTS. UPDATE (Nat’l Immigration L. Ctr. L.A., Cal.) Sept. 10, 2002, at 4, available at http://www.nilc.org/immlawpolicy/arrestdet/ad054.htm,

52. See Memorandum of Understanding 2002, supra note 15, at 3. “Section 287(g) of the INA allows the DHS and state and local governments to enter into assistance compacts. Both sides must agree on the scope and intent of the program before it is implemented, which gives states and local communities the flexibility to shape the programs to meet their needs.” Carafano, Section 287(g), supra note 32, at 2.

53. Memorandum of Understanding 2002, supra note 15, at 3; see Carafano, Section 287(g), supra note 32, at 2.
MOU. 54 Though the participating officers are required to devote substantial time to the Cross-Designation program at the federal agency's discretion, the officers retained their original duties and obligations at the discretion of the employing state agency. 55

B. Organization of the Agreement Between the State of Florida and the Department of Justice

As discussed earlier, agreements under section 287(g) require extensive supervision and discretion by the participating federal agency. 56 Under the Florida MOU, "INS enforcement authority would be delegated to those [participating] officers under Section 287(g) and they would work under the direct supervision of an INS Supervisor and the assigned RDSTF Special Agent Supervisor." 57 According to the structure of the agreement, it is the responsibility of the federal agency to utilize the participating officers only when the purpose of the operation relates to domestic security or counter-terrorism, and the federal agency has the authority to terminate state and local officers' involvement in any operation under the MOU at any time. 58 The limitation in authority granted to participating officers extends beyond the INS' authority under the agreement. 59 In response to expected concerns that participating officers may use their immigration training beyond the stated intent of domestic security and counter-terrorism—and outside the watchful eye of the INS—the agreement provides that "[a]ny such actions . . . shall not

Nothing herein shall otherwise limit the jurisdiction and powers normally possessed by a participating officer as a member of the officer's employing state or local law enforcement entity (employing entity). Nothing herein shall otherwise limit the ability of participating RDSTF members to provide, as provided by or allowed by law, such assistance in any enforcement action unrelated to RDSTF operations as may be lawfully requested by a law enforcement officer having jurisdiction over any such incident, crime, or matter under consideration.

Id.

55. Id. at 6. Nothing in this MOU, "limits RDSTF officers or agents who are within their normal territorial jurisdiction(s) from acting unilaterally as officers or agents of their employing entity to engage in continued investigative or enforcement actions as authorized by their employing entity." Id.

56. See id.

57. The 287(g) Program Hearing, supra note 3, at 17 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

Participating state and local officers are not to be utilized in routine INS operations unless the operation has a nexus to the RDSTF's domestic security and counter-terrorism function. . . . If at any time the INS officer determines that an INS-related operation should be terminated, all actions related to said operation are to be promptly terminated . . . ."

Id.

59. See id.
fall within the privileges and obligations of this MOU.\textsuperscript{60} The legislature has acted to limit the exercise of discretion by state officers while working under the agreement.\textsuperscript{61}

In addition to being an active member of a RDSTF:

Each nominee has to be a U.S. citizen, have been a sworn officer for a minimum of three years, and have, at minimum, an Associate Degree. Candidates also must be able to qualify for federal security clearances. Once selected, each candidate’s employer has to indicate that it will allow the officer to work a significant portion of his work responsibilities within the RDSTF for a minimum of one year.\textsuperscript{62}

These requirements, set out in section V of the MOU, demonstrate an acknowledgement that empowering state and local officials to enforce immigration laws requires special considerations.\textsuperscript{63} In order to deal with the complex immigration regime, the agreement requires educated personnel and reduces personnel turnover.\textsuperscript{64} These requirements help ensure competence and skill, as well as limit the influx of inexperienced officers.\textsuperscript{65}

The design of bringing state and local authorities under the supervision and discretion of the INS is further emphasized in the structure of the training program.\textsuperscript{66} Section VI of the MOU explains that the INS will provide both the training materials and establish the curriculum for the participating officers.\textsuperscript{67} Soon after implementation of the MOU, “the Immigration Officer Academy crafted a six-week training course featuring the delegation of au-

\textsuperscript{60} See id. Under the agreement, “[p]articipating state and local officers will have the same qualified immunity as do INS officers from personal liability from tort suits based on actions conducted under this MOU.” \textit{Id.} at 7. The agreement therefore “shift[s] liability to the federal government and provid[es] the officers with additional immunity when enforcing federal laws.” \textit{Carafano, Section 287(g), supra} note 32, at 2. However, even if an officer is not subject to qualified immunity under section X of the MOU, government agents are generally afforded qualified immunity from their actions as long as the officer could believe he was acting within his discretion under the law clearly established at the time. See \textit{Anderson v. Creighton}, 483 U.S. 635, 638 (1987).


\textsuperscript{62} \textit{Seghetti et al., supra} note 17, at 15.

\textsuperscript{63} See id.

\textsuperscript{64} See id.

\textsuperscript{65} See id.

\textsuperscript{66} See id.

\textsuperscript{67} Memorandum of Understanding 2002, \textit{supra} note 15, at 4. “Training will include presentations on the pilot project, elements of the MOU, scope of officer authority, cross-cultural issues, use of force policy, civil rights law, liability and issues.” \textit{Id.}
"Legacy INS and FDLE, working with law enforcement agencies participating in the RDSTF, finalized the selection of 35 veteran law enforcement investigators as the initial cadre of delegated-authority officers. " All 35 state and local designees attended [the] six-week intensive training course pursuant to this Memorandum of Understanding in Orlando, Florida during July and August 2002."

The course covered immigration and nationality law, immigration criminal laws, removal statutes, civil rights, cultural diversity, alien processing, INS structure and record systems and employed the same testing criteria and techniques as basic Immigration Officer Training. On August 15, 2002, the course graduated all 35 participants, who then returned to their assigned RDSTF locations and became operational."

Pursuant to the 2003 renewal of the MOU, training is provided by ICE and "[t]he program uses ICE curriculum and competency testing." Upon completion of the training program, officers are authorized to perform certain immigration functions with close oversight by the DHS.

The expense of the 287(g) program is borne by both sides of the agreement; the INS is responsible for "training personnel, training materials and supervision." However, the agreement specifies that the expense of offic-

68. The 287(g) Program Hearing, supra note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement); see also Envisage, Case Study: U.S. Immigration Officer Academy, http://www.envisagenow.com/resources/case_studies/usioa.aspx (last visited Nov. 7, 2009) ("The U.S. Immigration Officer Academy (USIOA) operates under the directives of the Department of Justice, Immigration and Naturalization Services. The USIOA provides training to officers in twelve areas of discipline to enforce and maintain the integrity of the immigration laws of the United States. The Academy instructs approximately 3,100 students per year at its Glynco, Georgia training facility.").
69. The 287(g) Program Hearing, supra note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).
70. Authority to Enforce Immigration Law Hearing, supra note 1, at 227 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement).
71. The 287(g) Program Hearing, supra note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).
72. SEGHETTI ET AL., supra note 17, at 15.
73. Id. "The officer’s performance is evaluated by the District Director and the FDLE commissioner on a quarterly basis to assure compliance with the [MOU] requirements. Authorization of the officer’s powers could be revoked at any time by DHS, FDLE or the employing agency.” Id.
ers' participation in training and operations under the MOU is the responsibility of the state and local entities.75

IV. **ANALYSIS OF THE SUCCESSES OF THE FLORIDA AGREEMENT WITHIN THE STATE OF FLORIDA**

A. **Specific Successes of the Florida Agreement**

The history of the Florida agreement began with the signing of the initial document in July of 2002. After structural reorganization issues were sorted out at both the federal and state levels, the MOU “was renewed and signed by Department of Homeland Security Under Secretary Hutchinson and Florida Governor Bush.”76 The renewal of the MOU after a potential setback during the reorganization of the executive branch demonstrates the strong desire of both the federal government and the state of Florida to continue cooperative efforts.77 In April 2005, upon continued support from the

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75. Id. at 4. “The FDLE will cover the costs of all candidates’ housing and per diem while involved in training required for participation in this pilot project. Costs of travel to and from required training will be the employing entity’s responsibility.” Id. In addition, “[p]articipating RDSTF officers will carry out designated functions at state or local expense, including salaries and benefits, local transportation, and official issue material.” Id. at 5.

76. *The 287(g) Program Hearing, supra* note 3, at 17–18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). On March 1, 2003, “the Immigration and Naturalization Service . . . ceased to exist” and, along with other federal agencies, was absorbed by the Department of Homeland Security under the Homeland Security Act. Francesco Isgio, *After 63 Years in the Department of Justice, INS Ceases to Exist—Its Functions Transfer to New Department of Homeland Security, IMMIGRATION LITIGATION BULLETIN, 1 (Feb. 28, 2003)*. ICE (Immigration and Customs Enforcement) “[c]arries out homeland security inspection and investigation[] [functions] formerly handled by [the] INS, Customs Services and Federal Protective Services.” *Department of Homeland Security, DEFENSE NEVER RESTS, July 2003*, at 10; see U.S. Immigration & Customs Enforcement, About, [http://www.ice.gov/about/index.htm](http://www.ice.gov/about/index.htm) (last visited Nov. 7, 2009). At the state level, in October, 2003, “the Florida Department of Law Enforcement . . . received a new Executive Director, Commissioner Guy Tunnell.” *The 287(g) Program Hearing, supra* note 3, at 18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). Due to the creation of the Department of Homeland Security (DHS), section 287(g) now “authorizes the secretary of the U.S. Department of Homeland Security (DHS) to enter into agreements with state and local law enforcement agencies . . . provided that the local law enforcement officers receive appropriate training and function under the supervision of sworn U.S. Immigration and Customs Enforcement (ICE) officers.” U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), *supra* note 12, at 1.

77. *See Authority to Enforce Immigration Law Hearing, supra* note 1, at 227–28 (statement of E.J. Picolo, Regional Director, Florida Department of Law Enforcement). “During the months between September and December 2003, no action could be taken by [the] Cross
state and federal governments, "the ICE Academy graduated twenty-seven (27) additional Task Force Agents." The continuation of the program in Florida is a reflection of the perception by both state and federal agencies that the Florida MOU is effectively addressing immigration concerns within Florida previously beyond the scope of state officers and under the radar of the federal government.

Representing the opinion of the Attorney General was Kris W. Kobach, who claimed that "[t]he success of the [Florida] program was immediately apparent. In the first year under the Florida MOU, the trained state officers made 165 immigration arrests, including the bust of a phony document production ring in the Naples area." In a hearing on the Florida 287(g) program in 2005, Special Agent Supervisor Mark F. Dubina of the FDLE mentioned that "[t]o date over 100 persons have been arrested, and many more have been interviewed by trained officers who can more adequately determine if a person poses a threat based [on] a number of variables, including knowledge gained by participating in the extensive ICE 287(g) training." The FDLE, in particular, claims that implementation and renewal of the MOU directly led to various arrests of illegal aliens at sites invoking national security concerns. One concrete example cited by the FDLE is operation "Open Water," in which "members of the Tampa Bay Regional Domestic Security Task Force . . . arrested several individuals who had obtained port access badges as a result of illegal activity." The arrests were a result of an

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Designated agents, as the Memorandum of Understanding had not been renewed, and was under review." Id. at 228.

The hiatus experienced in renewing the agreement coupled with the reorganization of INS/ICE threatened to cause this valuable and important program to drift into merely 'standby' status—used only when an emergency prompted a need for the use of the specially designated state and local officers. From Florida's perspective, and indeed from Washington's, this was not what anyone wanted to occur.

Id. at 229.

78. *The 287(g) Program Hearing, supra* note 3, at 18–19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

79. Id. at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law).

80. Id. at 19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).

81. See id. ("To date, the arrests cover a broad spectrum of activity. We have arrested single individuals involved in what appears to be surveillance activities of sensitive locations. We have also conducted extensive investigations that have resulted in illegal aliens being apprehended working in restricted or secured areas of airports, seaports and nuclear plants.").

effort “to investigate instances of identity fraud and false statements used by subjects to obtain employment and access to restricted areas of Florida seaports.”

The investigation was a joint effort between several state and local entities, including “the U.S. Attorney’s Office (USAO), Florida Department of Law Enforcement Regional Domestic Security Task Force (RDSTF), Social Security Administration (SSA), Department of Homeland Security (DHS), U.S. Immigration & Customs Enforcement (ICE) and the Tampa Port Authority.” It is unquestionable that cooperation by the state and federal entities was paramount in the success of the operation.

The fundamental inquiry is how effective Section 287(g) and the Florida MOU are in combating illegal immigration and serving the needs of Florida and the federal government. In his law review article, Kobach argues that the entire community of local police throughout the nation are needed to combat illegal immigration. However, the Florida MOU only authorizes a select group of state officers to perform certain immigration functions at the discretion of the federal government, hardly the force multiplier discussed by Kobach. Still, analyzing the structure of the Florida MOU in light of the success of operation “Open Water” suggests Florida and the federal government may have formulated an agreement that effectively accomplishes its stated purpose, while striking a balance between greater local involvement in immigration and protection against wide grants of discretion to local law enforcement. The agreement is tailored to domestic security, and though this is an undefined and ambiguous term, the officers involved are solely within the RDSTFs, which only conduct operations implicating domestic security.

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83. *Id.*

84. *Id.*

85. *See id.* (“A comprehensive list with biographical information of port access badge holders was obtained from the FDLE Applicant Services Section. From that list, biographical information relative to name, date of birth, Social Security number and other identifying features was compared to SSA, ICE and FDLE records in an effort to identify which subjects provided false information to receive port access badges. The screening identified potential suspects that provided inconsistent or false information during the application and security background process. These subjects were then [sic] further examined and the cases were presented to a Federal Grand Jury.”).


87. *See U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), supra note 12, at 2.*

In his article, Kris Kobach cites an example demonstrating how local enforcement of immigration laws is vital to domestic security.\(^8\) In his example, a police officer learns that a university student from a country that is a state sponsor of terrorism has made several purchases of significant quantities of fertilizer. He may also learn from other university students that the individual has not been attending classes. Neither of these actions constitutes a crime. However, from these circumstances, the officer may reasonably suspect that the alien has violated the terms of his student visa.\(^9\)

This is certainly an example of how local officers may assist in addressing domestic security concerns that would ordinarily fly under the radar of the federal government. What this example does not address, however, is the concern of how local officers can operate within the pervasive regulatory scheme identified in *Gonzales* without access to the requisite training and federal databases.\(^9\) This concern is addressed by Section 287(g) and the Florida MOU; and Operation “Open Water” is an example of their effectiveness. In that operation, state officers identified the suspicious characters, and obtained the necessary biographical information to identify potential domestic security threats.\(^9\) The officers then referenced both state and federal databases in an effort to determine which suspects had “provided false information to receive port access badges.”\(^9\) It is unclear whether the state officers would have had access to either the Social Security Administration (SSA) or the U.S. Immigration & Customs Enforcement (ICE) databases without cross-agency cooperation. Essentially, Operation “Open Water” demonstrates how the Florida MOU closed gaps between the investigative spheres of the state and federal law enforcement agencies, providing an opportunity to conduct targeted domestic security operations previously unachievable.\(^9\)

\(^8\) Kobach, *supra* note 86, at 189.
\(^9\) Id. at 189–90 (footnote omitted).
\(^9\) See *Gonzales v. City of Peoria*, 722 F.2d 468, 474–75 (9th Cir. 1983).
\(^9\) Id.
\(^9\) See *The 287(g) Program Hearing, supra* note 3, at 18–19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement). Operation “Open Water” “was successful because it combined the efforts of a number of FDLE programs/initiatives and the training and expertise of the ICE 287(g) trained Agents and the ICE Lead Worker assigned to the RDSTF.” Id. at 19.
Florida had the intention of designing a limited program, by which state law enforcement could assist the federal government in addressing immigration violations related to domestic security concerns that would have ordinarily been outside the investigative authority of the state and under the radar of the federal government. The Florida MOU, the first agreement of its kind formulated under Section 287(g) of the INA, seems to have accomplished that goal. Nevertheless, the program does provide for greater local involvement in immigration enforcement. Anytime there is a wider local involvement in immigration enforcement, concerns of civil rights and community relations must be addressed.

V. CONTROVERSIAL ISSUES REGARDING INCREASED LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION VIOLATIONS

A. Civil Rights Concerns

Civil rights concerns are a big factor when discussing local enforcement of federal immigration law. The American Civil Liberties Union (ACLU) has commented that “[i]nvolving state and local law enforcement in immigration status issues would have a severe impact on the civil rights and civil liberties of all persons, citizens and non-citizens alike, who reside in communities with large immigrant populations.”

It is important to understand how the empowerment of local law enforcement could implicate civil rights concerns, and how the Florida MOU addresses these common concerns.

Empowering local law enforcement to investigate and arrest for civil immigration violations creates an avenue by which minority groups may be subject to harassment. Pretextual stops by police with the intention to investigate immigration status may have drastic consequences for both illegal immigrants as well as legal minorities who are unable to provide proof of citizenship. Local law enforcement simply does not have the resources or training to properly investigate citizenship status without illegally subjecting citizens and legal immigrants to illegal investigations.

96. See Seghetti et al., supra note 17, at 20.
97. See id.
98. See id. (“Because unauthorized aliens are likely to be members of minority groups, complications may arise in enforcing immigration law due to the difficulty in identifying illegal aliens while at the same time avoiding the appearance of discrimination based on ethnicity or alienage. Thus, a high risk for civil rights violations may occur if state and local
The Florida MOU does not seem to implicate these common civil rights concerns due to its narrow scope and implementation. It has even been suggested that the Florida MOU alleviates some of the civil rights problems associated with greater local enforcement of immigration violations and actually benefit immigrants in that respect.\footnote{99. The 287(g) Program Hearing, supra note 3, at 19 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement) (“In those cases where an immigrant is cleared of suspicion, but still has immigration issues, the subject is afforded the same consideration as an illegal alien not encountered under these circumstances.” “Ironically, this training and experience has proven to be a benefit to the immigrant communities because the Agents are more readily able to clear a person that is suspected of suspicious activity by having access to the wealth of information contained in ICE databases.”).} There is some substance to this argument simply based on the training and access to information that is available to the participating state officers. However, it is difficult to see how greater training and information can benefit immigrants who remain in targeted ethnic communities. Simply acknowledging that this program may lead to shorter immigration related detentions of innocent individuals who are members of certain ethnic communities is an acknowledgment that racial profiling does occur in immigration enforcement.\footnote{100. See Seghetti et al., supra note 17, at 20. “[S]uspects of immigration violations may become victims of ‘racial profiling’—the practice of targeting individuals for police or security detention based on their race or ethnicity in the belief that certain minority groups are more likely to engage in unlawful behavior or be present in the United States illegally.” Id.} A better way to understand the civil rights implications is to accept that empowering local law enforcement to enforce civil immigration violations will inherently have an element of racial profiling as a means of investigation and enforcement. The Florida agreement, however, only empowers a relatively small amount of state and local officials to engage in these enforcement practices and is fairly limited to the realm of domestic security and under the supervision of the federal government.\footnote{101. Memorandum of Understanding 2002, supra note 15, at 1.} The amount of oversight required by Section 287(g) and the Florida MOU, along with the narrowly tailored enforcement powers of the participating state and local officers, substantially decreases the likelihood of participating officers engaging in activities that threatens the civil rights of minority communities.

B. Strained Relationships with Minority Communities

While citizens and legal immigrants worry about the potential civil rights abuses stemming from local enforcement of immigration violations,
law enforcement entities worry about a resulting strain on community relations.\textsuperscript{102} The ACLU, an opponent to greater local enforcement of immigration violations, explains that involvement in enforcement of immigration violations “is opposed by many police departments and local governments who fear it would undermine public safety.”\textsuperscript{103} The main priority of local police is crime control and maintenance of law and order within their district.\textsuperscript{104} Empowering local officers to enforce immigration laws encourages minority citizens and illegal aliens to retreat from the police, essentially discouraging the reporting of crimes and cooperation with local police officers.\textsuperscript{105} Florida officials have consistently acknowledged this concern.\textsuperscript{106} During the training period of the initial MOU in 2002, the State of Florida, through the RSDTF’s, expended considerable energy and time communicating the purpose of the program to various ethnic groups. . . . Some cultural groups expressed concerns related to any INS authority being delegated to state and local officers. The Office of the Governor, the RSDTF’s, and Legacy INS diligently worked to communicate exactly what Florida’s intentions were with this program to the ethnic groups with concerns, including community and religious leaders representing Hispanics, Haitians and persons from countries in the Middle East. All participating agencies collaborated on, and later produced, an informative brochure that explained in simple terms, and multiple languages, the mission of the program. Additionally, we did not miss an opportunity to communicate our message via the print, radio and television media.\textsuperscript{107}

The FDLE has ensured that no activity has occurred which should concern local immigrants, regardless of their status.\textsuperscript{108}

\begin{itemize}
  \item \textsuperscript{102} Hearing on H.R. 2671, supra note 95, at 108.
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} See id. at 108–09.
  \item \textsuperscript{105} Seghetti et al., supra note 17, at 21.
  \item \textsuperscript{106} (U)utilizing state and local law enforcement to enforce immigration law would undermine the relationship between local law enforcement agencies and the communities they serve. For example, potential witnesses and victims of crime may be reluctant to come forward to report crimes in fear of actions that might be taken against them by immigration officials. Id.
  \item \textsuperscript{107} See The 287(g) Program Hearing, supra note 3, at 17–18 (statement of Mark F. Dubina, Special Agent Supervisor, Florida Department of Law Enforcement).
  \item \textsuperscript{108} Id. at 18.
\end{itemize}
Again, the structure of the Florida MOU should ease concerns that immigrants may have in interacting with law enforcement. Only a handful of officers are empowered to enforce certain civil immigration violations and only under the discretion of the overseeing federal agency. The main reason that citizens need not fear this program is that the officers within the RDSTFs are not engaged in day-to-day law enforcement activity. Proponents of greater local enforcement of immigration may wish that the Florida agreement provided for broader grants of authority to a wider segment of Florida state law enforcement, but it is this limit on the program’s scope that should ease immigrants’ fears of looming mass deportation.

VI. EXAMINATION OF THE PROPER WAY TO PROCEED WITH AN EXPANSION OF 287(G) PROGRAMS THROUGHOUT THE UNITED STATES

Taking into account the concerns regarding local enforcement of immigration laws as well as the actual effectiveness of programs designed to increase local participation in enforcement of civil violations of the INA, the Florida MOU seems to be a model for the structuring and implementation of future agreements. Shortly after Florida became the first state to utilize INA Section 287(g), the trend of expanding 287(g) programs into other states began. “In November 2003, ICE and the Alabama Department of Public Safety (ALDPS) signed an MOU to provide immigration authority to 21 Alabama state troopers.” The Alabama MOU was structured in a similar fashion as the Florida MOU, mainly due to the limitations required by Sec-
tion 287(g). However, the Alabama MOU is not limited to instances of domestic security like the Florida MOU, a key limitation in the Florida agreements’ scope. Alabama’s desire was to design a program that allowed for state law enforcement officers to assist in general identification and removal of illegal aliens. Under the program, Alabama’s officers “received extensive training in immigration and nationality law and procedures and now have the authority to determine whether or not an individual is an illegal alien and can be removed from the U.S. in addition to their normal duties.” In describing the limitation in scope of the Alabama agreement beyond those enumerated in Section 287(g), Col. Mike Coppage, then Director of the Alabama Department of Public Safety, stated that “the troopers will engage in immigration enforcement actions only as needed during the course of their regular duties.” This was followed by a promise that “[t]hese are state troopers, not immigration agents . . . and they will not take part in ‘sweep’ searches for illegal aliens.” This trend has been seen in other states as well, including Virginia, where an agreement “allow[ed] specially trained state police officers to make arrests for immi-

114. Seghetti et al., supra note 17, at 16 (recognizing that under the Alabama MOU, “[t]raining is provided by ICE, and the curriculum is the same as provided in Florida’s [MOU].”)

Immigration enforcement activities of the officers will be supervised and directed by ICE special agents, who are located in Huntsville, Birmingham and Montgomery, Alabama. Such activities can only be performed under direct supervision of ICE special agents. Arrests made under the authority must be reported to ICE within 24 hours, and will be reviewed by the ICE special agent on an ongoing basis to ensure compliance with immigration laws and procedures.

Id.

115. See id. at 15–16.

116. The 287(g) Program Hearing, supra note 3, at 55 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law) (“Alabama had experienced widespread and increasing violations of federal immigration law by aliens in its jurisdiction. However, the distribution of INS manpower left Alabama underserved, in the judgment of Alabama’s law enforcement leadership and members of its congressional delegation. At times, as few as three INS interior enforcement agents were operating in the state. Recognizing that breakdown of the rule of law in immigration carries with it attendant public safety threats, Alabama addressed the INS manpower shortage by committing its own officers to the task.”).

117. U.S. Immigration & Customs Enforcement, Fact Sheet: Section 287(g), supra note 12, at 2.


119. Id.
"Virginia officials decided to seek extra immigration powers for some state police officers after participating in local and federal task forces on terrorism and gang violence." These programs, similar to the Florida MOU, empower relatively small amounts of state officers to perform certain immigration functions.

Another example of an agreement being narrowly tailored to address a specific state need is the agreement with the Mecklenburg County Sheriff’s Office in Charlotte, North Carolina, entered into in February 2006. In that agreement, the Mecklenburg County Sheriff’s Office desired a limited presence in the county prison system to investigate the immigration status of those already involved in the justice system. This is just another example of the wide variety of issues that can be addressed with INA 287(g) cooperation.

An issue in need of discussion is the scope of these additional agreements. For example, the Alabama program is unquestionably broader than the Florida program in that it is not narrowly tailored to instances involving domestic security or any other specific area of law enforcement. Instead, it supplements the participating officers’ existing duties with the authority to

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120. *Third State to Get Power to Enforce Immigration Laws, 9–10 BENDER’S IMMIGR. BULL. 4 (2004).* Col. Steven Flaherty, superintendent of Virginia’s state police at the time, explained that

[u]nder the agreement . . . about 50 Virginia state police officers would be able to enforce federal immigration law in addition to their other responsibilities . . . . The officers would be stationed throughout the state, with one attached to each of the 24 drug task forces in Virginia . . . . They would be under the supervision of federal authorities when carrying out immigration enforcement.


121. Sheridan, supra note 120.


124. See id.

ICE said it will train 10 deputies to carry out certain duties traditionally handled by federal immigration officers. The Mecklenburg County Sheriff’s Office deputies will operate within the Mecklenburg County Jail facilities to interview foreign national inmates to determine whether there is probable cause for an immigration violation; complete the processing for criminal aliens, including fingerprinting; prepare documentation to place aliens in deportation proceedings concurrent with their prison term; and prepare documentation to deport aliens following their terms.


126. See SEGHETTI ET AL., supra note 17, at 15–16.
perform certain immigration enforcement functions. Nevertheless, given the relatively small amount of officers trained under the programs and the extensive oversight of the federal government required by section 287(g), the probability of civil rights abuses or extensive strains of community relations is minimal. According to the Department of Homeland Security, only “159 officers within seven distinct law enforcement agencies in five States” had been trained by ICE under 287(g) agreements by August 25, 2006. This relatively small number is a balancing factor against any abuses that may arise out of these agreements. The question for the future, however, is the extent that the federal government should expand the use of INA Section 287(g) programs to address illegal immigration issues throughout the nation.

VII. EXPANSION OF 287(G) PROGRAMS AND ICE ACCESS

A. ICE ACCESS

After the initial implementation of 287(g), cross-designation programs were slow to be implemented. But what began as isolated agreements to meet specific state or local needs eventually developed into a broader desire of state and local entities to address the hot political issue of immigration enforcement. ICE set out to make cross-designation programs more accessible to the growing number of communities expressing interest.

On August 21, 2007, ICE announced a new program designated ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). The program was developed in response to “the widespread interest from local law enforcement agencies that have requested ICE partnerships through the 287(g) program.” ICE explains that ICE ACCESS

127. See id. at 16.
128. See Empowering Local Law Enforcement, supra note 123, at 21–22 (statement of Kenneth A. Smith, Special Agent, ICE). Since its inception in which twenty-one Alabama troops were trained under the agreement, only “an additional 27 troopers have been trained and certified.” Id.
129. Id. at 16.
130. See id.
132. See id.
133. See id.
135. Id.
stems from the success of cross-designation programs, as well as the overwhelming increase in interest of state and local officials in entering into cooperative agreements with ICE. But the new ICE ACCESS program is more than a means to contract with local agencies under INA 287(g). Instead, 287(g) is but "one component under the ICE ACCESS umbrella of services," which includes various other programs related to immigration enforcement. For example, under the Document and Benefit Fraud Task Forces, local agencies may partner with ICE in ferreting out document fraud within their jurisdictions. This one program has already been implemented in seventeen cities around the country. It is clear that ICE is building on the framework established by 287(g) to partner with various law enforcement agencies to address a variety of immigration-related tasks. Unlike the Florida Memorandum of Understanding, these immigration-related tasks are not limited to domestic security concerns, but span the realm of immigration related functions. But much like agreements under 287(g) only a few years ago, it is still too early to gauge the impact of these programs both on the crimes they address, and on the communities in which they operate.

136. Id. "In the past two years, the 287(g) program has identified more than 22,000 illegal aliens for possible deportation. More than 60 municipal, county, and state agencies nationwide have requested 287(g) MOAs with ICE and more than 400 local and state officers have been trained under the program." Id.
137. See U.S. Immigration & Enforcement, ICE ACCESS, supra note 131.
138. Id. These programs include Asset Forfeiture, Border Enforcement Security Task Forces (BEST), Criminal Alien Program (CAP), Customs Cross-designation (Title 19), Document and Benefit Fraud Task Forces, Equitable Sharing/Joint Operations, Fugitive Operation Teams (FOTs), Immigration Cross-designation (Title 8)—287(g) Program, IPR Center (Intellectual Rights Property Center), Law Enforcement Support Center (LESC), Operation Community Shield, Operation Firewall, and Operation Predator. Id.
139. Id. ("ICE created Document and Benefit Fraud Task Forces (DBFTFs) to target, dismantle and seize illicit proceeds of the criminal organizations that threaten national security and public safety by exploiting the immigration process through fraud. The DBFTFs provide an effective platform from which to launch anti-fraud initiatives using existing manpower and authorities. Through DBFTFs ICE partners with other federal agencies, state and local law enforcement. These task forces focus their efforts on detecting, deterring and disrupting both benefit fraud and document fraud."). Id.
141. See id.
B. Adoption of ICE ACCESS Programs

ICE ACCESS has proven to be a useful tool for the national spread of 287(g) training programs, as the program has drawn interest from a wide spectrum of local governments and law enforcement agencies. In just one five-week session in January 2008, thirty-seven officers from five different states and eight different law enforcement agencies received training under the 287(g) component of ICE ACCESS. At the same time, another four-week program offered 287(g) training to thirty-six officers from five different law enforcement agencies in Maryland and Virginia.

In fact, as of August 18, 2008, ICE had entered into Memorandums of Agreement with sixty-three separate law enforcement agencies, spanning across the entire country. Throughout these agencies, more than 840 officers have received training, and ICE claims that more than 70,000 individuals have been identified for possible immigration violations pursuant to section 287(g) authority.

These programs are vastly different from the original section 287(g) Memorandum of Understanding between ICE and the Florida Department of Law Enforcement, which was limited specifically to domestic security. While ICE notes that the purpose of section 287(g) programs is to combat “[t]errorism and criminal activity . . . through a multi-agency/multi-authority approach,” it is clear that these programs are actually


144. Id. The agencies included:
Hall County Sheriff’s Office (GA)—9 officers; Whitfield County Sheriff’s Office (GA)—6 officers; Butler County Sheriff’s Office (OH)—8 officers; Durham Police Department (NC)—1 officer; Cabarrus County Sheriff’s Office (NC)—5 officers; Colorado State Patrol—2 officers; El Paso County Sheriff’s Office (CO)—5 officers; [and] Florida Department of Law Enforcement—1 officer.

145. News Release, U.S. Immigration & Customs Enforcement, ICE Begins Immigration Training for Maryland and Virginia Officers (Feb. 4, 2008), available at http://www.ice.gov/pi/news/newsreleases/articles/080204federickcounty.htm [hereinafter News Release, ICE Begins Immigration Training for Maryland and Virginia Officers]. The agencies included “Frederick County Sheriff’s Office (MD)—26 deputys; Manassas Police Department (VA)—1 officer; Manassas Park Police Department (VA)—1 officer; Prince William County Police Department (VA)—6 officers; [and] Prince William County Sheriff’s Office (VA)—2 deputys.” Id.

146. Programs, U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act (Aug. 18, 2008), available at http://www.ice.gov/partners/287g/section287_g.htm?searchstring=287g.

147. Id.

148. See id.; see also Memorandum of Understanding 2002, supra note 15, at 1.
This shift to a generalized immigration enforcement function at the local level can be seen in Frederick County, Maryland, where twenty-six Sheriff's deputies "receive[d] training that will enable them to start deportation for [illegal] immigrants who . . . have been apprehended for committing a crime." Of the twenty-six officers trained, sixteen consist of correctional officers who work in the Frederick County Adult Detention Center, similar to the officers from the Mecklenburg County Sheriff's Office in Charlotte, North Carolina. But the other ten officers are sworn deputies intermingled within various units of the department, including narcotics, criminal investigation, the Community Response Team, and even the patrol unit. Sheriff Chuck Jenkins, in attempting to assure that the program would be limited in scope, gave the following example of when an immigration investigation might be triggered: "If a driver is stopped for speeding and unable to present identification or possesses a fake ID, an immigration check could be triggered." Sheriff Jenkins seems to misunderstand the concerns that immigrants have for such a program. In assuring that the program would not lead to round-ups of immigrants, Sheriff Jenkins explained that the trained officers "won't all be in a white van driving up and down the streets looking for people to pick up." This simplistic understating of the fear held by immigrant populations threatens to increase the divide between the immigrant community and local law enforcement. The threat of immigration investigations pursuant to ordinary traffic stops is exactly the type of conduct that immigrants, both legal and illegal, are concerned about.

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149. Programs, U.S. Immigration & Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, supra note 146.


152. Neal, supra note 151.

153. Id.

154. Id.

155. See id.

156. See id.
C. Response to ICE ACCESS in Danbury, Connecticut

Danbury is a city in Fairfield County, Connecticut, of about 90,000 residents.\textsuperscript{157} The city, however, is known to have an actual population of about 80,000 legal residents.\textsuperscript{158} "At least 10,000 illegal immigrants . . . are estimated to reside in Danbury . . . ."\textsuperscript{159} What makes Danbury even more interesting in the national immigration debate is the fact that "Danbury has a greater proportion of foreign-born residents than any other city in Connecticut, [constituting] 34 percent of the population."\textsuperscript{160} This sets the backdrop for one of the more interesting immigration cases on the national scene today, where a government is determined to begin cooperation with federal immigration authorities, and a wary public awaits the implementation of the program with skepticism and fear.\textsuperscript{161}

In 2004, Mark Boughton, Mayor of Danbury, began actively pursuing immigration reform on both the national and local level.\textsuperscript{162} Mayor Boughton expressed concern that the federal government was not enforcing immigration regulations, and, by letter to the Director of the U.S. Citizenship and Immigration Services, specifically requested greater focus on enforcement in Danbury.\textsuperscript{163} The following year, Mayor Boughton requested that Attorney General Richard Blumenthal negotiate an agreement with the federal government "to increase enforcement of immigration laws."\textsuperscript{164} The implementation of ICE ACCESS provided an opportunity for Mayor Boughton’s vision of immigration enforcement to be realized.\textsuperscript{165} On September 13, 2007, the Danbury Common Council informed the Mayor of the ICE ACCESS program and requested that he contact the Chief of Police to study the feasibility

\begin{footnotes}
\footnote{158. Id.}
\footnote{159. Id.}
\footnote{161. See id.}
\footnote{162. See Press Release, Michael McLachlan, Mayor Boughton Calls on Immigration Service to Increase Enforcement in Danbury (Dec. 17, 2004), http://www.ci.danbury.ct.us/content/39/75/2732/2481.aspx.}
\footnote{163. Id.}
\footnote{164. Press Release, Michael McLachlan, Mayor Requests State Police be Deputized as Immigration Agents (Apr. 15, 2005), http://www.ci.danbury.ct.us/content/39/75/2732/3186.aspx.}
\end{footnotes}
of such an agreement.166 Within two months, both the Deputy Corporation Counsel of Danbury and Chief of Police Alan Baker were advocating for a cooperative agreement under the ICE ACCESS program.167 A few days later, Mayor Boughton endorsed the ICE ACCESS program, and the process began to implement such an agreement.168 On February 7, 2008, the Common Council voted 19 to 2 to approve a plan for cooperation with ICE, allowing Police Chief Baker to enter into a training agreement.169

Not all Danbury residents were happy to see these events unfold. On the same night as the Council’s vote, thousands of protesters picketed near City Hall.170 “Opponents of the plan said it would inspire racial profiling and damage the trust between the large immigrant community [in Danbury] and the authorities.”171 While the Mayor, Police Chief, and council members have all reassured Danbury residents that the agreement would not lead to “sweeps” in local communities,172 residents may nevertheless have reason to be skeptical. In an effort to ease fears about a formal agreement, Police Chief Baker has insisted that the agreement would be a mere formalization of a long-standing relationship with ICE.173 In a similar respect, Deputy Corporation Counsel Laszlo L. Pinter has stated that the ICE ACCESS programs do not “provide for the unbridled arrest or detention of individuals involved in day labor, housing violations or related non criminal activity.”174 But

166. Id.
170. Id.
171. Id.
172. See id. Danbury residents were reassured by Councilman Benjamin Chianese, “‘[t]here aren’t going to be sweeps,’” but rather “‘there is going to be mutual trust in this community.’” Id. Police Chief Alan Baker has met with representatives of the immigrant community, explaining that working with ICE does not mean “the mass roundup of people who look like ‘immigrants,’ as predicted by the activists on both sides.” News-Times Staff, ICE, NEWS-TIMES (Ct.), Feb. 27, 2008. Mayor Boughton has also reassured the community, expressing that “‘[b]oth sides think there will be sweeps. It’s not going to happen.’” Eugene Driscoll, ICE DOMINATES DANBURY FORUM, NEWS-TIMES (Ct.), Feb. 28, 2008.
173. See Memorandum from Alan D. Baker, supra note 167.
174. Memorandum from Laszlo L. Pinter, supra note 167.
many residents doubt the true motives behind the plan to formalize a relationship with ICE. They point to an incident from September 2006, where eleven illegal immigrants were approached by law enforcement in a city park, offered jobs, and “when the workers followed, they were arrested.”

One year later, nine of the day laborers filed a federal lawsuit challenging the legality of the sting operation, claiming that the arrests were a result of racial profiling and that they were illegally detained for immigration violations by Danbury police officers. The lawsuit further clarified that none of the officers involved in the operation were searching for a fugitive, and there was no evidence of illegal entry into the country by any of the individuals. Mayor Boughton defended the operation, claiming that “local police had only provided ‘logistical support’ to federal immigration agents during the operation.” Nevertheless, residents remain skeptical, and continue to protest the formalization of the relationship with ICE.

Danbury officials have maintained that the program will be of limited scope. Officers will participate in the enforcement of several specific “crimes committed by illegal immigrants.” But a simple notation of crimes which will be targeted by local officials does not effectively limit the scope of discretion and authority exercised by the officers. This was recognized by Danbury Council Member Paul Rotello who called for further discussion regarding the grant of authority before voting on approving a plan. Rotello argued that the information provided to the Council did not

175. See Kaplan, supra note 157.
176. Id.

According to the complaint, on Sept. 19, 2006, a Danbury police officer posing as a contractor drove an unmarked van belonging to the federal Immigration and Customs Enforcement agency to a park in downtown Danbury where day laborers, many from Ecuador, gather. Pretending to offer $11 an hour to demolish a fence, the officer transported 11 would-be workers to a fenced-in lot where they were arrested, handed over to federal immigration agents and eventually placed in deportation proceedings.

178. Id.
179. Id.
181. See Memorandum from Alan D. Baker, supra note 167.
182. Id. (stating that these crimes included, but were not limited to, “gangs [and] organized crime, drug smuggling, human trafficking, document fraud, identity and benefit theft, [and] work site investigation”).
184. Id.
adequately explain what the Danbury police would be doing.185 Rotello explained, as an example, that the ICE ACCESS literature included programs regarding “asset forfeiture,” a function in which Rotello does not want Danbury police to be engaged.186 But Rotello also takes issue with the ambiguous crime descriptions provided by the Police Department and endorsed by Mayor Boughton, including the inclusion of “work site investigation” within the enumerated powers of the local officers.187 Mr. Rotello recognizes the danger of granting broad immigration authority to local police officers.188 Whereas the Florida Memorandum of Understanding employed a structural limitation on authority by only empowering officers within the RDSTFs, which focused solely on domestic security concerns, the Danbury officers will be limited only by their own discretion and their inclination to follow the policy principles described by Mayor Boughton and Police Chief Baker.189

More importantly than the concerns of Mr. Rotello, however, are the concerns of the actual citizens and residents of Danbury.190 Recent protests in Danbury highlight the importance of communication between a local government and the people over which it exercises power.191 While a final Memorandum of Understanding has yet to be completed, residents have been left uninformed about the specifics of the agreement during the early stages of its creation.192 The lack of effective communication, coupled with skepticism rooted in previous incidents, has led to wide scale demonstrations and protests.193 Effective communication between a skeptical immigrant population and the local government is important not only to explain the specific intentions and limitations of the program, but also to combat the local media and newspaper editorials that fuel impassioned responses of local immi-

185. Id.
186. Id.
187. See Nick Keppler, Fire and ICE, FAIRFIELD COUNTY WEEKLY, Jan. 10, 2008, available at http://www.fairfieldweekly.com/article.cfm?aid=5148. “I see this [letter] and it says “work site investigation” and I think, “What does that mean? Does that mean, if you suspect a company is hiring undocumented people you can go in and take their computers? When do they get them back? How long will it take?”” Id.
188. See id.
189. See id.
190. See Driscoll, ICE Dominates, supra note 172.
191. See Keppler, supra note 187.
192. Id.
193. Id. On January 10, 2008, “[p]icketers circled City Hall [in Danbury] waving signs with slogans like Stop the Abuse of Power and Full Rights For All Immigrants!” Id. Other opponents of ICE and of the Danbury partnership have undertaken organizing “a boycott of businesses owned by Common Council members who voted for the ICE partnership.” News-Times Staff, ICE, supra note 172.
grants.\footnote{See generally Gulamhusein A. Abba, Opinion Letter, Boughton Panders to the Shrill Voices, NEWS-TIMES (CT.), Feb. 28, 2008.} For example, just three weeks after the council approved cooperation with ICE, an article in The News-Times, a local Danbury newspaper, described Danbury's partnership with ICE as "a clever ruse by the mayor to divert people’s attention from his dismal failure to come up with pragmatic and practical solutions to" illegal immigration.\footnote{Id.} The article continued by calling those who approved the partnership "racists," and explaining that the "move has frightened documented and undocumented immigrants, many of whom are already leaving."\footnote{Id. at 17. "In the FY06 Emergency Funding Bill, $50 million is being provided for the expansion of training for these authorities, including the training of additional local law enforcement officers to bolster border security efforts." Id. at 26.} Mayor Boughton has addressed the criticism by explaining that the discussion must happen in the middle, rather than dignifying the extreme opinions on the left and right of the political spectrum.\footnote{Driscoll, ICE Dominates, supra note 172.} But given the reaction of the immigrant community in Danbury, and the incendiary commentaries appearing in the local media, it seems that the discussion needs to happen wherever there is concern, and not just where that concern may be considered legitimate.

D. The Future Local Immigration Enforcement: Section 287(g) Goes National

There are certain areas of immigration that seem ripe for section 287(g) expansion. Just recently, a spokesman for DHS explained that greater cooperation with state and local governments is desired for bolstering border security.\footnote{Empowering Local Law Enforcement, supra note 123, at 16 (statement of Kenneth A. Smith, Special Agent, ICE) (ICE is committed to “continue to establish and augment effective partnerships and information sharing with State and local law enforcement agencies. Such partnerships are essential to our mission of deterring criminal alien activity and threats to national security and public safety. We are grateful for [the work of] the many State and local law enforcement officers who assist ICE daily in [its] mission and we are pleased to assist them.”). Id. at 17. “In the FY06 Emergency Funding Bill, $50 million is being provided for the expansion of training for these authorities, including the training of additional local law enforcement officers to bolster border security efforts.” Id. at 26.} The Heritage Foundation has also advocated for increased use of section 287(g) in dealing with border security.\footnote{James Jay Carafano, Build on Section 287(g) of the Immigration and Nationality Act to Boost State and Local Immigration Enforcement, HERITAGE FOUNDATION, Web Memo 1212, Sept. 14, 2006, at 1, available at http://www.heritage.org/Research/HomelandSecurity/upload/wm_1212.pdf.}
certainly be beneficial in this area. Border states could contribute state and local officers to assist in the protection and immigration enforcement on the Mexican border. Under a 287(g) agreement, officers would receive the proper training, as well as have access to the appropriate federal resources. Task forces, similar to the RDSTFs in Florida, could be designed where state and federal officers can conduct investigations into human and drug smuggling organizations operating on and beyond the physical border. This would allow for greater investigatory abilities into areas previously outside the scope of both the federal and state governments.

With section 287(g) programs increasing throughout the country, and many programs receiving positive reports, the question looms: should cooperative agreements with the federal government under section 287(g) be mandated? The Heritage Foundation argues for a strengthening of section 287(g) by asking Congress to “[d]raft a strategy for implementing [section] 287(g) nationwide.” This sentiment has been reflected in congressional bills, such as section 232 of the TRUE Enforcement and Border Security Act of 2005, which “[r]equires DHS to execute cooperative enforcement training programs in each state under INA [section] 287(g).” Such sentiment, however, has not always been well received.

The greatest limitation on potential abuse for these programs continues to be the discretion of the states or local governments in deciding whether to enter a partnership, and if so, what “type of partnership is most beneficial” to the particular locality. Major cities throughout the country have resisted coercion from the federal government to enforce federal immigration laws.

The right answer is to strengthen and expand programs authorized under Section 287(g) of the Immigration and Nationality Act (INA).

Id.

200. See id.

201. Carafano, Section 287(g), supra note 32, at 1.

202. Id. at 2.

203. See id.

204. See id.

205. Id.


208. See News Release, New ICE ACCESS, supra note 134. In an assurance that these programs will not be forced on local communities, ICE explains that “ICE and local agencies will determine which type of partnership is most beneficial and sustainable before entering into an official agreement.” Id.

On June 6, 2006, the House of Representatives approved an amendment by United States Representatives Steven King and John Campbell that would "refuse federal funding for states and localities that have sanctuary policies to harbor illegal aliens."210 In response, the National League of Cities, U.S. Conference of Mayors, as well as six major cities around the country, addressed an urgent letter to the House of Representatives urging them to reconsider.211 The letter explained that local enforcement hinders community oriented policing strategies, which use confidentiality as a means to encourage immigrants to cooperate with law enforcement.212 The letter urged members of Congress not to "deny necessary homeland security funds to states" and localities who wish to utilize these community policing strategies effectively.213

Similarly, on October 15, 2007, just two months after the implementation of ICE ACCESS, Senator David Vitter proposed an amendment to the U.S. Senate Commerce, Justice and Science Appropriations Bill which would "withhold federal Community Oriented Policing Services funding from sanctuary cities."214 This time, the Major Cities Chiefs Association (MCCA)215 addressed a letter to Barbara Mikulski, Chairwoman of the Subcommittee on Commerce, Justice, and State, urging her to oppose the Vitter Amendment.216 The MCCA argued that denial of COPS funding would "make the streets of our major cities less safe and more riddled with crime."217 It is clear that the MCCA also believed that enforcement of immigration law was contrary to their community policing strategies.218

The U.S. Conference of Mayors makes it clear that its position is not anti-immigration enforcement, but rather protective of effective policing

210. Id.
212. Id.
213. Id.
217. Id.
218. See id.
strategies. Undermining community policing efforts and alienating immigrants hinders crime reporting and other police functions, such as crime investigations and dealing with homegrown terrorism. Resisting forced or coerced enforcement of federal immigration law by local law enforcement is not an anti-immigration enforcement stance, but merely recognizes that “state and local police should not be made to compensate for the federal government’s failure to update outdated immigration admissions policies.”

VIII. CONCLUSION

By establishing the first ever cross-designation program under INA section 287(g), Florida created a model by which state and local governments can and should follow when pursuing greater immigration enforcement at the state and local level. Section 287(g) programs may be effective for combating various immigration issues afflicting individual states, such as removal of aliens in the criminal justice system, and infiltrating and removing gangs through immigration enforcement. However, state and local governments must strike the right balance between assisting in immigration enforcement, and serving their citizens’ best interests.

The most effective means of protecting against civil rights abuses under section 287(g) programs is the discretion of state and local governments to enter into a partnership with the federal government. State and local governments are more accountable to their citizens than the federal government, and will take greater care to preserve community relations. Therefore, expansion of section 287(g) programs must remain discretionary. Mandating section 287(g) programs would not only be potentially harmful, but is also unnecessary. States have a strong desire to address immigration concerns within their districts, and expansion of INA 287(g) programs is inevitable as being a functional way to address these various concerns.


220. Id.


222. See The 287(g) Program Hearing, supra note 3, at 53 (statement of Kris W. Kobach, Professor, University of Missouri-Kansas City School of Law) (The infrastructure for additional MOUs is already in place. The training model has been developed. And “[t]he success of Florida and Alabama is prompting law enforcement agencies across the country to knock on ICE’s door. Interest has been expressed publicly by leaders in Arizona, Connecticut, Orange County and San Bernardino County, California, and other jurisdictions.”).
Participating entities must find a balance between immigration enforcement and maintaining an effective relationship with the local community. State and local governments must continue to resist any forced or coerced cooperation with immigration enforcement that does not address any specific local need. The Florida Memorandum of Understanding effectively balanced state needs with citizen concerns, and remains a model for states that wish to address current and future immigration concerns.