

## **ICE'S Enforcement Priorities and the Factors that Undermine Them**

As part of its strategy to gain support for comprehensive immigration reform, the administration has continually touted its enforcement accomplishments. In fact, over the last two years, the Obama administration has committed itself to a full-court press to demonstrate how committed the administration is to removing criminals and others who remain in the country without proper documentation. They have continued to use the enforcement programs of the previous administration, including partnering with state and local law enforcement agencies to identify, detain, and deport immigrants. However, in doing so, they have lost the ability to fully control their own enforcement priorities and enforcement outcomes, and the results have demonstrated that the state and local partners are not necessarily committed to the same priorities. Download the [Special Report](#) [1]

At an October 6, 2010, press conference, Secretary of Homeland Security Janet Napolitano announced that the Department of Homeland Security (DHS) had removed more than 392,000 individuals in Fiscal Year (FY) 2010, and presented other “record-breaking immigration enforcement statistics achieved under the Obama administration.” In addition to record-breaking overall numbers, Napolitano also announced the “unprecedented numbers of convicted criminal alien removals” in FY 2010. Of the 392,000 removals in FY 2010, more than 195,000 were classified as “convicted criminal aliens,” which was 81,000 more criminal removals than in FY 2008.

U.S. Immigration and Customs Enforcement (ICE) has stated that budget realities make it impossible to remove everyone who is in the country illegally or who is otherwise deportable, and has released a series of memos designed to prioritize the “worst of the worst.” Overall, this prioritization represents an effort to bring order to the increasingly complex world of immigration enforcement. ICE has prioritized the identification, arrest, detention, and removal of immigrants who pose a threat to public safety and national security. At the same time, however, other enforcement-related decisions—particularly the growing emphasis on state and local law enforcement—stand to undermine ICE's priorities.

In recent years, ICE has grown more and more dependant on the 287(g) program and the expanding Secure Communities program, which are partnerships with state and local police agencies to identify immigrants for deportation. ICE has, in effect, outsourced the identification of immigrants for enforcement actions to local police agencies and jails. However, programs such as Secure Communities and 287(g) undermine ICE's priorities because they are designed in such a way that leads to the deportation of immigrants with minor criminal offenses or no criminal history at all.

Not only do these new partnerships take the initial identification and arrest outside of ICE's control, they exacerbate the potential for profiling and pretextual arrests, which in turn take the focus off of serious criminals and lead to the arrest of large numbers of people for minor offenses. Other factors at the state and local level also remove ICE from the decision-making process at the critical early stages. Laws such as Arizona's SB1070 attempt to impose enforcement priorities on ICE and determine where and how ICE should use its limited resources, regardless of ICE's own stated objectives.

Ultimately, quality and quantity are intertwined. If ICE truly wishes to focus on the “quality” of the immigrants deported as opposed to the sheer quantity of persons deported, it must look more closely at its partnerships with states and localities. This paper reviews the steps that ICE has taken in recent months to clarify its enforcement priorities and how those priorities are playing out nationally and in local communities.

### REPRIORITIZING WORKSITE ENFORCEMENT AND FUGITIVE OPERATIONS GOALS

One of the first steps the Obama administration took toward changing enforcement priorities came with the elimination of large worksite raids, which were widely used during the Bush administration. In contrast to large raids, the Obama administration has emphasized investigating and penalizing employers. On April 30, 2009, the administration announced a new Worksite Enforcement Strategy. Under the new strategy, the administration would focus worksite enforcement resources on the criminal prosecution of employers, not on the prosecution and deportation of large numbers of unauthorized workers. However, it was made clear that workers were not immune to enforcement:

ICE will continue to arrest and process for removal any illegal workers who are found in the course of these worksite enforcement actions in a manner consistent with immigration law and DHS priorities. Furthermore, ICE will use all available civil and administrative tools, including civil fines and debarment, to penalize and deter illegal employment.

Similarly, criticism of Fugitive Operations Teams (FOTs), which were created to locate and detain fugitive immigrants who pose a threat to the nation or the community or who have a violent criminal history, led the administration to revisit the authority of these teams. According to a 2009 report by the Migration Policy Institute (MPI), while the number of immigrants apprehended by FOTs has increased, they have netted fewer violent criminals and arrested greater numbers of unauthorized immigrants with no criminal history. Specifically, MPI found that in 2007, fugitives with criminal convictions represented just 9 percent of total FOT arrests. Many of those arrested were “ordinary status violators”—individuals which the FOTs believe are unauthorized or in violation of immigration laws, but who have not been charged with anything.

Much of the criticism of FOTs was based in the use of arrest quotas. MPI found that the increase in arrests of ordinary status violators can be attributed to a new arrest quota system that was implemented by ICE in FY 2006. In that year, ordinary status violators increased to 35 percent of total FOT arrests, and in FY 2007 rose to 40 percent of total arrests. MPI concluded that the Fugitive Operations Program “has failed to focus its resources on the priorities Congress intended when it authorized the program. In effect, NFOP has succeeded in apprehending the easiest targets, not the most dangerous fugitives.”

#### ICE Response to Fugitive Operations Program Priorities

In August 2009, ICE Director John Morton announced that FOTs would no longer use arrest quotas. He stated, “I just don’t think that a law enforcement program should be based on a hard number that must be met at the end of the day.” Then, on December 8, 2009, ICE issued a memorandum, “National Fugitive Operations Program: Priorities, Goals, and Expectations.” This memo set forth a three-tiered enforcement priorities system; Tier 1: fugitive aliens; Tier 2: previously removed aliens; Tier 3: removable aliens convicted of crimes. Each tier was further broken down into sub-priorities ranging from individuals who pose threats to national security to individuals with no criminal convictions. The memo then directed FOTs to focus the vast majority of their resources (70 percent) on apprehending persons within Tier 1.

According to statistics from ICE’s Quarterly Reports to Congress, higher percentages of “criminal aliens” are being arrested and removed through the FOTs. However, there is no public data regarding which priority Tier each person arrested and deported falls into. Furthermore, it is likely that many of the persons counted as “criminal aliens” have been convicted of minor crimes and misdemeanors and do not pose a threat to public safety or national security.

Despite the memo, it was questionable whether quotas remained in effect. This fear became particularly acute on March 27, 2010, when the *Washington Post* reported that James M. Chaparro, head of ICE detention and removal operations, had issued a memo in February that stood in direct conflict with the administration’s stated goal of prioritizing dangerous criminal aliens. The memo stated that ICE had set a quota of 400,000 deportations for the year, without regard to whether

those individuals were criminals or not, and laid out strategies for doing so. According to the *Post*, Chaparro issued a new memo in March stating that his earlier e-mail “signals no shift in the important steps we have taken to date to focus our priorities on the smart and effective enforcement of immigration laws, prioritizing dangerous criminal aliens... while also adhering to Congressional mandates to maintain an average daily [detention] population and meet annual performance measures.” Later that day, ICE issued a statement clarifying that the internal memo did not reflect their policies and was sent without proper authorization. Furthermore, ICE remained “strongly committed to carrying out [its] priorities to remove serious criminal offenders first and [they] definitely do not set quotas.”

The fact that the memo was authored by a high-level official who sets official policy signaled a serious disconnect – if not disagreement – within the agency and undermined ICE’s credibility, as well as its ability to set enforcement priorities. Nonetheless, in the case of worksite enforcement and FOTs, ICE leadership was able to reassert its commitment to new enforcement priority goals.

### ENFORCEMENT PRIORITIES AND STATE AND LOCAL PARTNERSHIPS

It becomes far more difficult to maintain control of enforcement priorities, however, when ICE is dependent on state and local policies and personnel. Partnerships between ICE and state and local law-enforcement agencies (LEAs) are generating the most concern over enforcement priorities. Over the past several years, these partnerships have been greatly expanded, and ever greater numbers of LEAs are serving as “force multipliers” for DHS. The two programs most closely associated with immigration enforcement are the 287(g) program and the Secure Communities program. The stated objective of both of these programs is to target dangerous criminals and persons who pose a threat to the community. ICE credits these programs with the increase in deportations of “criminal aliens” over the past year.

Programs such as 287(g) and Secure Communities merge the federal immigration enforcement system with state criminal justice systems. Through these programs, noncitizens are made known to ICE because of charges or convictions for non-immigration-related offenses. In some cases, noncitizens commit serious crimes that lead to their deportation. But in many cases, local police arrest noncitizens who pose no threat to public safety for relatively minor crimes, such as driving without a license or shoplifting. In other cases, immigrants are merely charged with crimes for which they are never convicted.

Through the partnerships between ICE and local police, immigrants are channeled into the immigration enforcement system, regardless of their guilt or innocence or the severity of the crime with which they are charged. These immigrants then face lengthy detention, few due-process protections, and deportation. This includes long-term lawful immigrants who have committed minor crimes which nonetheless make them deportable under current law, and lawful immigrants who may be deported for having committed a deportable offense years ago, regardless of whether the immigrant is convicted of the current charge. Thus, despite the stated priorities of the programs, they have, in fact, been casting a wide net, resulting in the identification and deportation of persons charged with or convicted of low-level crimes, or who have no criminal history at all.

#### 287(g)

The 287(g) program, named for Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), allows the Secretary of Homeland Security to enter into agreements that delegate immigration powers to local police, but only through negotiated agreements that are documented in a Memorandum of Agreement (MOA). The first 287(g) MOA was signed in 2003, and there are currently 72 signed MOAs in 26 states.

There has been much concern over the motivations behind jurisdictions requesting 287(g) MOAs and how they are being implemented. Many reports from government and nongovernmental sources point to the fact that the 287(g) program is not achieving its objectives. A January 2009 Government Accountability Office (GAO) report found that ICE had failed to articulate the 287(g) program’s

objectives and had not consistently articulated how local partners use their 287(g) authority. An April 2010 report by the DHS Office of Inspector General (OIG) found that ICE and its local law-enforcement partners had not complied with the terms of their 287(g) MOAs. The report states:

ICE's primary performance measure for the 287(g) program is the number of aliens encountered by 287(g) officers. ICE also collects information on the number of aliens identified through the 287(g) program who are subsequently removed by ICE. However, with performance measures that do not focus on aliens who pose a threat to public safety or are a danger to the community, there is reduced assurance that the goal of the 287(g) program is being met... although ICE has developed priorities for alien arrest and detention efforts, it has not established a process to ensure that the emphasis of 287(g) efforts is placed on aliens that fall within the highest priority level.

In September 2010, the DHS Inspector General released an updated report on the *Performance of 287(g) Agreements*, which largely echoes the findings of the first report. The new report contains additional recommendations to ensure that ICE establishes a comprehensive approach for determining whether 287(g) program goals for removing criminal aliens who pose a threat to public safety are being achieved.

### ICE Response to 287(g) Concerns

Prior to the publication of the OIG report, in July 2009, ICE made changes to the 287(g) MOA and announced that it had "fundamentally reformed the 287(g) program, strengthening public safety and ensuring consistency in immigration enforcement across the country by prioritizing the arrest and detention of criminal aliens." In response to the concerns about large numbers of low-level offenders and noncriminal immigrants being deported through the program, ICE made several changes to the program. It clarified that the purpose of the program is to identify and remove immigrants who pose a threat to public safety or a danger to the community. ICE also put in place other measures to ensure compliance with ICE priorities.

In addition, ICE issued a memo titled "Monitoring the Exercise of 287(g) Authority" to all Special Agents in Charge and Field Office Directors, advising them of their responsibility for ensuring that LEAs adhere to the terms of the revised 287(g) MOA and exercise the delegated authority consistent with ICE priorities. This includes requiring ICE field offices supervising 287(g) agreements to submit quarterly reports that include arrest data to be analyzed for compliance with the goals and priorities of the program. However, the OIG notes that ICE does not have data about arrests, detentions, and removals within each priority level; that there are no performance measures linked to compliance with priority levels; and that there is no follow-up process to ensure that actions taken by the police actually result in better adherence to the priorities.

Despite the existence of new guidance memos, the actual execution of the 287(g) program involves numerous factors outside ICE's control. At this point, at least, the memo sends mixed messages, arguing for careful monitoring without requiring collection of the data that could lead to a more complete assessment of whether priorities are being met.

### Secure Communities

Secure Communities, in contrast to 287(g)'s deputization model, employs technology to identify immigrants who may be deportable. Under Secure Communities, fingerprints routinely taken by LEAs at the point of booking are submitted to federal immigration databases in addition to the federal criminal databases to which they are normally submitted. If there is a database "hit," meaning that the arrested person is matched to a record indicating an immigration violation, ICE and the local law-enforcement authorities are automatically notified. ICE then evaluates each case to determine the individual's immigration status and take appropriate enforcement action.

Secure Communities prioritizes the immigrants it identifies using a three-level prioritization system; Level 1 being the most serious criminal offenses, and Levels 2 and 3 being less-serious offenses.

According to the latest ICE data, between October 2009 and September 10, 2010, Secure Communities resulted in 49,638 removals, of which 23 percent were for Level 1 crimes, 49 percent were for Level 2 and Level 3 crimes, and 28% were non-criminals. During the same time period, 24 percent of Secure Communities arrests were Level 1, while 30 percent were noncriminals.

Examinations of ICE's Secure Communities statistics reveals that those identified by Secure Communities include large numbers of individuals with no criminal history, individuals charged with (but not convicted of) crimes, and legal immigrants with prior convictions that make them deportable.

### ICE Memo on Enforcement Priorities

On June 30, 2010, ICE issued a memo entitled "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens," which set forth new enforcement prioritization objectives. The memo outlines civil immigration enforcement priorities as they relate to the apprehension, detention, and removal of immigrants. The memo sets forth a three-tiered priority system:

**Priority 1:** Non-citizens who pose a danger to national security or a risk to public safety, including those suspected of terrorism, convicted of violent crimes, and gang members. Within Priority 1, these crimes are further ranked as Level 1, 2, or 3, with Level 1 being the most serious crimes. Level 1 and 2 offenders are of the greatest priority. The levels presented within Priority One are to replace existing Secure Communities levels of offenses:

- **Level 1 offenders:** aliens convicted of "aggravated felonies," as defined in section 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as "felonies." (ICE notes that the definition of aggravated felony includes serious, violent offenses as well as less serious, non-violent offenses, and that ICE personnel should prioritize the former within Level 1 offenses.)
- **Level 2 offenders:** aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors;" and
- **Level 3 offenders:** aliens convicted of crimes punishable by less than one year.

A footnote states that "some misdemeanors are relatively minor and do not warrant the same degree of focus as others. ICE agents and officers should exercise particular discretion when dealing with minor traffic offenses such as driving without a license."

**Priority 2:** Non-citizens who recently crossed the border or a port of entry illegally, or through the knowing abuse of a visa or the visa waiver program.

**Priority 3:** Noncitizens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls.

Similar to the policy on worksite enforcement, the June 30 memo, while prioritizing serious criminals, allows for the identification, detention, and removal of immigrants with no criminal histories. It specifically states that "ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States."

### Limitations of the June 30, 2010 Memo

The data from ICE does in fact show an increase in the percentage of deportations of "criminal aliens" or "convicted criminal aliens." However, a closer look at the numbers reveals that many of those "criminals" have committed low-level offenses or misdemeanors, and many noncriminals continue to be deported.

There are several reasons why ICE's objective to focus enforcement resources on the "worst of the worst" cannot be realized. First and foremost, ICE policy remains such that they may identify, detain, and deport immigrants with no criminal histories. As long as they are not prohibited from

taking action against any unauthorized immigrant or any lawful immigrant who is deportable, we will continue to see the deportation of noncriminals and persons with low-level criminal offenses. When the press reported on a woman who may be deported after calling the police for domestic violence, an ICE spokesperson said, "ICE cannot and will not turn a blind eye to those who violate federal immigration law. While ICE's enforcement efforts prioritize convicted criminal aliens, ICE maintains the discretion to take action on any alien it encounters."

The second problem is immigration law itself. Under current law, lawful immigrants face mandatory detention and deportation for having committed a growing number of low-level crimes. This ensures that the label "criminal aliens" encompasses a wide collection of individuals, some of whom are violent or serious criminals, while many others have committed low-level, non-violent crimes and do not present a threat to the community.

The third set of problems are inherent to the design and implementation of the 287(g) and Secure Communities programs, as well as other ICE partnerships with LEAs, that guarantee that large numbers of low-level offenders will be caught up in the program:

- **Immigrants are identified pre-conviction.** Under Secure Communities and 287(g), immigrants are identified pre-conviction, guaranteeing that persons never convicted of a crime will be made available to ICE for deportation.
- **Police officers with 287(g) MOAs, or working in areas that have Secure Communities in their local jails, may have an incentive, or at least the ability, to make arrests based on race or ethnicity, or to make pretextual arrests of persons they suspect to be in violation of immigration laws, in order to have them run through immigration databases.** This results in large numbers of individuals with low-level offenses, such as traffic offenses, being identified for ICE enforcement action.
- **There is no mechanism to ensure that LEAs comply with ICE priorities.** Increased data collection could help to identify LEAs with large numbers of noncriminal or pretextual arrests, but data is useless if there is no way for ICE to stop LEAs from making these arrests. Increased ICE supervision was written into the 287(g) MOA, but supervision means little if ICE continues to deport low-level offenders and noncriminals that have been identified by LEAs.
- **The prioritization process comes down to resources.** ICE has stated that its ability to take custody of low-priority persons identified in local jails is conditioned by the resources available on the ground at the time. In other words, if ICE has someone to pick up the immigrant and a detention bed for that immigrant, the priority level makes little difference.

For these reasons, the universe of individuals identified through 287(g) and being run through the Secure Communities program is much larger than those convicted of serious criminal offenses. As long as local police have the ability to arrest – on minor charges – large numbers of persons they suspect may be deportable immigrants, and as long as ICE continues to respond to low-level "hits," the number of deportations of low-level and noncriminal immigrants will continue to be larger the number of serious criminals removed.

## IMMIGRATION DETAINERS

Another factor that undermines ICE's prioritization efforts is the immigration detainer. An immigration detainer is an official request from ICE to another LEA—such as a state or local jail—that the LEA notify ICE prior to releasing an individual from local custody so that ICE can arrange to take over custody within a designated 48-hour time period during which the LEA can continue to detain him. In other words, detainers are the lynchpin between local law-enforcement agencies and ICE through programs such as 287(g) and Secure Communities. Once an LEA has a person in custody and ICE determines that the person may be deportable, the detainer is the method for holding the person until ICE takes custody.

As the use of detainers has increased with the expansion of the 287(g) and Secure Communities programs, it has become clear that detainers are often issued to persons charged with crimes, but not convicted of crimes, and that detainers are issued regardless of the severity of the person's

criminal history.

### **ICE Response to Detainer Concerns**

On August 1, 2010, after months of anticipation, ICE released a draft detainer policy and granted the public 60 days to comment on the draft. While the draft does show an effort to clarify ICE's detainer policies, it does not adequately respond to the many concerns about detainers that have been voiced:

It does not mention nor reflect the June 30, 2010, memo on ICE's civil enforcement priorities.

It allows for placing detainers on individuals following arrest, rather than conviction, in direct contradiction of the June 30 memo.

It fails to include instruction regarding exercising discretion consistent with enforcement priorities.

It does not mandate data collection regarding any aspect of the detainer issuance process, making it difficult to make determinations regarding the number, location, race/ethnicity, and reason for arrest of persons issued detainers.

The document fails to acknowledge the significant role of detainers in the prioritization process. The detainer issuance process is a concrete way in which ICE can enforce its own enforcement priorities. By limiting the universe of individuals to whom ICE issues detainers, the agency could take a serious step toward its stated goal of targeting serious criminals. However, ICE's failure to advance its own enforcement priorities through its detainer policy signals a lack of conviction on the issue and once again undermines the agency's credibility concerning enforcement priorities.

### **ICE PRIORITIES AND STATE LEGISLATIONS**

The issue of ICE enforcement priorities is likely to grow as the 287(g) and Secure Communities programs expand across the country, and as states and localities pass laws and ordinances aimed at controlling illegal immigration. These measures interfere with the federal government's ability to set its own enforcement priorities.

Arizona's SB1070 provides a useful example. While the proponents of SB1070 believe that the law would enable Arizona to assist ICE in enforcing immigration laws, it would actually impinge upon ICE's ability to fulfill its mandate, set enforcement priorities, and allocate resources effectively. SB1070 would inundate DHS with requests to determine the immigration status of individuals police have arrested for suspicion of being unlawfully present. If ICE determines that the individual is indeed unlawfully present, ICE would be expected to take custody of him/her and place him/her in deportation proceedings. The crimes created by the Arizona law likely fall into the lowest priority level. In essence, Arizona would be asking ICE to respond to all of Arizona's requests and take custody of countless individuals who are not serious threats to the country and who have not committed serious crimes. According to experts such as former INS Commissioner Doris Meissner, this means that ICE would have fewer resources to deal with serious criminals, terrorists, and other priority individuals.

As additional states consider SB1070 copycat legislation, the Obama administration must consider the impact of such legislation on ICE enforcement priorities and capacity. A patchwork of state-level enforcement policies and priorities will severely undermine the administration's ability to set its own enforcement priorities and take action against the "worst of the worst."

### **CONCLUSION**

ICE has taken important steps toward acknowledging that its enforcement programs do not necessarily prioritize serious criminals, and ICE has also taken important steps toward defining its

priorities and ensuring that ICE agents and officers act in line with the agency's stated priorities. However, ICE's memos, guidance, and training can only go so far in terms of ensuring that ICE's enforcement resources are directed toward identifying, detaining, and deporting the "worst of the worst." The nature of current immigration law and the expansive list of aggravated felonies and deportable offenses mean that immigrants convicted of relatively minor and nonviolent crimes will be detained and deported, regardless of how many years they have lived in the United States or whether they have U.S.-citizen dependents.

Furthermore, by partnering with state and local police agencies, ICE has put non-ICE personnel at the front lines of immigration enforcement. While ICE can take steps toward greater supervision of these LEAs, ICE will always be limited in terms of the authority it can express over its state and local partners. Because, under this model, LEAs are responsible for channeling immigrants from the criminal justice system into the federal immigration enforcement system, and because LEAs have their own local interests and priorities, it is very likely that non-priority immigrants will continue to be subject to immigration enforcement actions. As long as ICE continues to outsource the identification and arrest of immigrants to LEAs and communities intent on ridding their jurisdiction of undocumented immigrants, ICE cannot truly focus on serious criminals. Finally, ICE's own statements on its priorities leave plenty of space for them to deport immigrants charged with crimes but not convicted, immigrants convicted of minor crimes, and immigrants with no criminal history. These factors, together with new enforcement-oriented legislation at the state level, means that ICE resources are far from focused solely on deporting serious criminals.

### RECOMMENDATIONS:

- Legalization would be an enormous step toward true prioritization. A pool of more than 11 million persons subject to deportation is not a good starting place. Legalizing undocumented immigrants who do not pose a threat to public safety or national security, would allow DHS to focus its limited enforcement resources on unauthorized and legal immigrants with serious criminal convictions.
- Restoring discretion to immigration judges and ensuring that each person has a fair day in court before an immigration judge would also eliminate some of the greatest damage done by the failure to follow through on prioritization.
- ICE must re-consider its partnerships with LEAs. Additional data collection and analysis is necessary to determine if LEAs are misusing their authority and intentionally casting a wide net to increase the numbers of deportations. ICE must also strictly enforce their own enforcement priorities within these partnerships and ensure that persons convicted of serious crimes are truly prioritized.
- ICE must rewrite its detainer guidelines to ensure that detainers are issued in line with ICE's own enforcement priorities, and that ICE agents, LEAs, and persons on whom detainers have been issued are aware of their rights and responsibilities with regard to the detainer.
- States and localities must be dissuaded from passing legislation and/or policies that interfere with ICE's ability to enforce immigration laws and abide by the agency's priorities.

Published On: **Tue, Nov 09, 2010** | [Download File](#) [1]

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