

Summer 11-5-2018

287(g) Agreements in the Trump Era

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Recommended Citation

Huyen Pham, *287(g) Agreements in the Trump Era*, 75 Wash. & Lee L. Rev. 1253 (2018), <https://scholarlycommons.law.wlu.edu/wlulr/vol75/iss3/3>

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Huyen Pham*

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I. Introduction

Articulated as a priority in President Trump’s executive orders, his administration has forcefully pushed to sign more 287(g) agreements (and more aggressive forms of those agreements) with local law enforcement agencies (LEAs).¹ In the summer of 2017, the administration signed eighteen new

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1. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (expanding federal-state agreements); Amanda Sakuma, *Donald Trump’s Plan to Outsource Immigration Enforcement to Local Cops*, ATLANTIC (Feb. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-immigration-enforcement/517071/> (last visited Sept. 18, 2018) (discussing Trump’s plan to enlist the assistance of local authorities to carry out his immigration plans) (on file with the Washington and Lee Law Review).

agreements in the state of Texas alone.² At the end of 2017, there were at least thirty-eight other LEAs interested in joining the program.³ Once these agreements come online, the result will be more local law enforcement officers deputized to enforce immigration laws than have ever existed in the history of the 287(g) program.

What are the implications of this deputization? On one level, we have had greater than fifteen years' experience with 287(g) agreements, so we could expect this administration's resurrection of the program to result in more of the same dynamic that we have seen in past years. But given this administration's plans to significantly expand the program, together with other components of its aggressive immigration policies, this Article suggests that implementation of the 287(g) program under the Trump administration will look different, in significantly harsher ways, than under previous administrations.

First, the profile of immigrants who are deported through this program under the Trump administration will likely look different from those deported under the Obama administration. Upon taking office, President Trump revoked policies instituted under the Obama administration that prioritized the removal of recently arrived immigrants and those with serious criminal histories.⁴ These Obama priorities, in turn, placed restrictions on the types of immigrants who could be removed through federal–sub-federal

2. See *ICE Announces 18 New 287(g) Agreements in Texas*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (July 31, 2017), <https://www.ice.gov/news/releases/ice-announces-18-new-287g-agreements-texas> (last visited Sept. 18, 2018) (noting the increase in the number of agreements ICE has entered into since 2016) (on file with the Washington and Lee Law Review).

3. See Mica Rosenberg & Reade Levinson, *Police in Trump-Supporting Towns Aid Immigration Officials in Crackdown*, REUTERS (Nov. 27, 2017, 6:16 AM), <https://www.reuters.com/article/us-trump-effect-immigration-police/police-in-trump-supporting-towns-aid-immigration-officials-in-crackdown-idUSKBN1DR169> (last visited Sept. 18, 2018) (reporting that police departments across the nation have been deputized to assist in the immigration plans under the Trump administration) (on file with the Washington and Lee Law Review). See generally REUTERS, 287(G) GRAPHICS DATA, (2017), <http://fingfx.thomsonreuters.com/gfx/rngs/TRUMP-EFFECT-IMMIGRATION-POLICE/010051YZ4FG/287ggraphics%20data.pdf> (highlighting the increased interest of law enforcement agencies seeking to assist in Trump's immigration programming).

4. See Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (expanding the enforcement and removal priorities).

cooperation programs.⁵ Trump's revocation of the Obama administration's priorities, and his assertion of his own long list of broadly worded new enforcement "priorities" means that, effectively, all immigrants with unauthorized status are now priorities for removal.⁶ Trickleing down to the 287(g) context, deputized local law enforcement seem to have much more latitude to target all immigrants for immigration enforcement, without regard for their actual dangerousness.

Second, the 287(g) program under the Trump administration may employ more powerful forms of agreements than existed under the Obama administration. Through his executive orders, President Trump has expressed a willingness to resurrect the task force model (which would broaden powers and geographic range to LEAs compared to the more traditional jailhouse enforcement model), a model the Obama administration phased out in 2012 amid concerns about its special vulnerability to racial profiling.⁷ And in an agency memo, the U.S. Department of Homeland Security (DHS) gave permission to Customs and Border Protection (CBP) to sign 287(g) agreements, rather than limiting agreements to Immigration and Customs Enforcement (the agency responsible for interior immigration enforcement and the traditional federal partner for 287(g) agreements).⁸ The combination of these

5. See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enft (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (outlining new policies and guidelines with respect to the apprehension, detention, and removal of aliens in the United States) (on file with the Washington and Lee Law Review).

6. See David A. Martin, *Trump's Order on the Deportation of Undocumented Residents, Annotated by an Immigration Law Expert*, VOX, <https://www.sanctuary-trump> (last updated Jan. 31, 2017) (last visited Sept. 18, 2018) (noting the broadly sweeping language used in the Trump administration executive orders) (on file with the Washington and Lee Law Review).

7. See FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 20, 2012), <https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and> (last visited Sept. 18, 2018) [hereinafter FY 2012: ICE Announces Year-End Removal Numbers] (reporting year-end removal numbers and setting forth guidelines highlighting the priorities for removal) (on file with the Washington and Lee Law Review).

8. See *Read the Memos Signed by DHS Secretary Kelly on New Guidelines for Deporting Illegal Immigrants*, WASH. POST (Feb. 17, 2017),

potentially more potent forms of agreements, together with the new policy making every immigrant a removal priority, could be combustible: newly deputized local law enforcement officers could effectively operate like fully empowered immigration agents, questioning and detaining people encountered on the streets based on immigration status.

The third difference is the Trump administration's seeming lack of concern for the racial profiling and other civil rights dangers inherent in 287(g) programs. Critics of sub-federal enforcement of immigration laws—and even some proponents—point to substantial evidence that local law enforcement officers who have concurrent immigration authority often target individuals for criminal law action based on accent or skin color, knowing that those individuals will likely face removal proceedings.⁹ Singular among administrations that have implemented the 287(g) program, the Trump administration has shown little interest in protecting the civil rights of immigrants. The 287(g) agreements signed by the Trump administration continue to require local agencies to abide by federal civil rights laws and continue to provide a complaint process for reporting misconduct.¹⁰ But Mr. Trump's statements on this subject as a candidate and his action as President raise serious doubts that civil rights violations committed under the authority of a 287(g) agreement will be prosecuted.

This Article proceeds in three parts. Part II provides a brief history of the 287(g) program, including its iterations under different presidential administrations. Part III analyzes the role of these agreements in the Trump administration's enforcement

<http://apps.washingtonpost.com/g/documents/national/read-the-memos-signed-by-dhs-secretary-kelly-on-new-guidelines-for-deporting-illegal-immigrants/2338/> (last visited Sept. 18, 2018) (explaining the new guidelines for deportation of illegal aliens and the expansion of enforcement entities to fulfill the new plans) (on file with the Washington and Lee Law Review).

9. See *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL (Mar. 15, 2017), <https://www.americanimmigrationcouncil.org/research/287g-program-immigration> (last visited Sept. 18, 2018) (explaining the 287(g) program) (on file with the Washington and Lee Law Review).

10. See generally, e.g., U.S. IMMIGR. & CUSTOMS ENFT, MEMORANDUM OF AGREEMENT (2017), [https://www.ice.gov/doclib/287gMOA/TarrantCounty Sheriff.pdf](https://www.ice.gov/doclib/287gMOA/TarrantCounty%20Sheriff.pdf) (containing an agreement between ICE and the Tarrant County Sheriff's Office).

policies, focusing on their rapid expansion, especially in the border areas; this section also considers the implications of this rapid deputization. In Part IV I offer some concluding thoughts.

II. 287(g) Program: History and Early Operations

A. Congress's Vision

The 287(g) program was enacted as part of the omnibus Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),¹¹ which substantially increased penalties on immigrants who violated U.S. law (either as unauthorized immigrants who violated immigration laws or authorized immigrants who violated other laws).¹² Though there is abundant legislative history for IIRIRA generally, very little exists to explain why Congress decided to enact the 287(g) program at this point in time, or in this particular form.

Against this sparse legislative history, we turn to the statutory language. Section 287(g) of the Immigration and Nationality Act¹³ authorizes the Department of Homeland Security to enter into agreements with a state or political subdivision “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)”¹⁴ The specifics of the immigration functions are left to DHS and the state or political subdivision to negotiate through a written agreement.¹⁵ The statute further provides that the 287(g) officers (a subset of the larger local law enforcement agency) will continue to be paid by

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

12. See Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Law*, VOX (April 28, 2016, 8:40 AM), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration> (last visited Sept. 18, 2018) (discussing the impact of the 1996 immigration bill in the wake of legislation passed in the Reagan administration) (on file with the Washington and Lee Law Review).

13. 8 U.S.C. § 1357 (2012).

14. *Id.*

15. See 8 U.S.C. § 1357(g)(5) (2012) (outlining the performance of immigration officer functions by state officers and employees).

their local agencies¹⁶ and must receive federal certification that they have been trained on relevant federal immigration laws.¹⁷

The key to understanding 287(g) agreements is to understand that 287(g) delegates officers federal powers. In contrast to other federal–sub-federal cooperation programs, these officers are not merely exercising their own enforcement authority in partnership with federal immigration agencies; rather, they are receiving federal immigration powers to use, albeit under federal supervision. For example, through the Criminal Alien Program (CAP), LEAs provide ICE with lists of detainees held in their jails and allow ICE access (either physical access or video access) to interview detainees of interest.¹⁸ The cooperation sought from LEAs under this program focuses on powers that the LEAs already have as part of their law enforcement authority: information on detainees they have arrested for non-immigration reasons and access to those detainees within their jails.

Similarly, through the newly-resurrected Secure Communities program, LEAs are asked to detain immigrants of interest beyond their usual release date, to allow ICE more time to pick them up and place them in removal proceedings.¹⁹ Again, LEAs are being asked to use their pre-existing criminal law powers to assist ICE with immigration law enforcement. That LEAs use their own criminal enforcement powers in honoring ICE detainer requests has been underscored in federal judicial decisions issued in cases challenging the constitutionality of detainer holds. For

16. See *id.* § 1357(g)(1) (discussing the particular powers of the Attorney General in entering agreements with a State).

17. See *id.* § 1357(g)(2) (noting the restrictions on State power in performing an agreement entered into with the Attorney General).

18. See ANDREA GUTTIN, IMMIGR. POLICY CTR., *THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS*, 1, 5 (2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf (providing a detailed analysis of immigration policies in Texas).

19. See *Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements*, U.S. DEPT OF HOMELAND SECURITY (July 10, 2009), <https://www.dhs.gov/news/2009/07/10/secretary-announces-new-agreement-state-and-local-immigration-enforcement> (last visited Sept. 18, 2018) (“[P]articipating local law enforcement agencies are required to pursue all criminal charges that originally caused the offender to be taken into custody.”) (on file with the Washington and Lee Law Review).

example, in *Miranda-Olivares v. Clackamas County*,²⁰ the district court held that the sheriff's office violated the plaintiff immigrant's Fourth Amendment rights when it continued to hold her beyond her release date based on an ICE detainer request; though ICE might have had legal authority to detain the immigrant for those additional days, the LEA could not piggyback on ICE's civil authority to detain when it was exercising its criminal detention powers.²¹

By contrast, when an LEA signs a 287(g) agreement, it receives new powers related to immigration enforcement that it did not previously possess. For example, when the Hall County Sheriff's Office²² signed a 287(g) agreement in 2016, it gained the power to interrogate detainees about their immigration status, process detainees for immigration violations, serve warrants of arrest for immigration violations, prepare evidence for immigrant processing (including taking fingerprints and photographs, interviewing the immigrant, preparing affidavits and taking sworn statements for ICE review), preparing charging documents (the Notice to Appear that officially starts the removal process), issuing requests for detainers and release information (such as asking another LEA when it plans to release the immigrant), and transporting the immigrant to ICE detention facilities.²³ Hall County's agreement is a jailhouse model of enforcement, meaning that the 287(g) functions are limited to the jailhouse, after immigrants have been arrested for other reasons. As explained in more detail below, LEAs which agree to a task force model

20. No. 3:12-cv-0217-ST, 2014 WL 1414305 (D. Ore. Apr. 11, 2014).

21. *See id.* at *11; *see also* *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39 (D.R.I. 2014) (holding that the detention of an immigrant based on an immigration detainer "for purposes of mere investigation is not permitted.").

22. Hall County, Georgia is about one hour north of Atlanta. Driving Directions from Atlanta, GA to Hall County, GA, GOOGLE MAPS, <http://maps.google.com> (follow "Directions" hyperlink; then search starting point field for "Atlanta, GA" and search destination field for "Hall County, GA").

23. *See generally* U.S. IMMIGR. & CUSTOMS ENF'T, MEMORANDUM OF AGREEMENT, (2016) [hereinafter HALL COUNTY SHERIFF'S DEPARTMENT ICE AGREEMENT], https://www.ice.gov/doclib/287gMOA/r_287ghallcountys.pdf (highlighting an agreement between ICE and the Hall County Sheriff's Department).

agreement have even more expansive immigration-related powers.²⁴

With this delegation of its powers, ICE gains more federal control over 287(g) LEAs (or at least the potential for that control), as compared with the control it has in other federal–sub-federal cooperation programs.²⁵ Much of that control follows from the statutory structure of the 287(g) program: the LEAs can only perform the immigration functions that ICE agrees to give them,²⁶ the individual officers agree to be subject to the “direction and supervision” of ICE,²⁷ and notwithstanding that the agreements have an expiration date, ICE or the LEA can unilaterally decide to terminate at any time.²⁸ Beyond the federal statute, the 287(g) agreements, which ICE drafts and seem to be almost identical in content, also provide opportunities for ICE to assert control. In signing the agreements, LEAs generally agree to abide by federal immigration priorities²⁹ and federal civil rights laws,³⁰ to use federally defined procedures for processing 287(g)-related complaints,³¹ to collect data related to their 287(g) work,³² to provide translators as needed,³³ and to meet annually with ICE to

24. See OFFICE OF INSPECTOR GENERAL, THE PERFORMANCE OF 287(G) AGREEMENTS REPORT UPDATE 3 (2010), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf (discussing the increased authority of law enforcement agencies from agreements entered into with ICE).

25. The federal control that exists in the letter of the law has not always been borne out in practice. See Notes 62–67 and 79–86 and accompanying text.

26. See 8 U.S.C. § 1357(g)(1) (2012) (noting authority of the Attorney General to enter into agreements with State agencies).

27. See *id.* § 1357(g)(3) (discussing that State agencies are under the authority of the Attorney General).

28. See, e.g., HALL COUNTY SHERIFF’S DEPARTMENT ICE AGREEMENT, *supra* note 23, at 10 (detailing the agreement between ICE and the Hall County Sheriff’s Department).

29. See, e.g., *id.* at 2 (describing the authorized function of the State within the agreement with ICE).

30. See, e.g., *id.* at 8 (detailing the liability and responsibility of the State agency).

31. See, e.g., *id.* (noting the federally mandated procedures that must be followed by the State).

32. See, e.g., *id.* at 7 (discussing reporting requirements while carrying out the agreement).

33. See, e.g., *id.* at 8 (noting requirements to secure the assistance of a translator if necessary).

review and ensure compliance with the agreements' requirements.³⁴

The deeper level of federal control in the 287(g) program becomes apparent when contrasted with other federal–sub-federal cooperation programs. Through Secure Communities, the LEAs can decide for themselves whether, and to what extent, they want to honor immigration detainers or inform ICE of immigrants' release dates.³⁵ Even when an LEA decides to participate, it can limit the conditions of its participation, for example, only honoring detainers for immigrants convicted or charged with serious crimes.³⁶ Indeed, most of the sub-federal governments that have been dubbed “sanctuary” cities or states do not entirely eliminate cooperation with federal immigration authorities, but rather, limit the circumstances for that cooperation. For example, San Diego Police Department's policy is to report individuals to USCIS only when police arrest individuals based on probable cause that they had committed a felony *and* reasonable suspicion that they have violated federal immigration laws.³⁷ Accordingly, San Diego PD is prohibited from releasing individuals to ICE or Border Patrol who (1) witnessed a crime, (2) were contacted during a family disturbance, (3) were involved in a minor traffic offense (infractions and nonbookable offenses), and (4) are seeking medical treatment.³⁸

Equipped with this understanding of congressional intent, with its combination of delegated federal powers and increased federal control, we turn now to an analysis of how the 287(g)

34. See, e.g., *id.* at 9 (outlining the requirement that LEAs meet annually with ICE to ensure compliance with the terms of the agreement).

35. See Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 35–39 (2016) (detailing how some states have limited the scope of cooperation with Secure Communities).

36. See *id.* at 37 (describing California legislation that permitted LEA cooperation with ICE detainer requests only if the individual committed a violent felony).

37. See SAN DIEGO POLICE DEPARTMENT PROCEDURE 4 (2014) (citing California Government Code § 53069.75 preventing local law from prohibiting reporting to INS where an individual committed a felon and is suspected of violating immigration law).

38. *Id.* at 3.

program has evolved under the different presidential administrations.

B. Agreements Under the Bush Administration (2002–2007)

Though authorized by Congress in 1996, the first 287(g) agreement wasn't signed until 2002, shortly after the 9/11 attacks. Those attacks were a catalyst for the 287(g) program and sub-federal immigration regulation generally. Before the attacks, the federal government's longstanding legal position was that states only had authority to enforce criminal immigration laws.³⁹ But months after the attacks, Attorney General John Ashcroft invited states, using their "inherent authority" as sovereigns, to enforce both civil and criminal immigration laws.⁴⁰ Florida was the first state to respond, signing a 287(g) agreement in 2002 with the then-Immigration and Naturalization Service.⁴¹

Given its special links to the attacks and apparent vulnerability to terrorist infiltration (thirteen of the nineteen hijackers had spent time there, getting Florida driver's licenses and attending flight training school in the state), Florida's participation made sense, as the federal government emphasized the program's national security focus.⁴² Florida's agreement empowered its newly created Regional Domestic Security Task

39. See U.S. DEP'T OF JUSTICE, ASSISTANCE BY STATE AND LOCAL POLICE IN APPREHENDING ILLEGAL ALIENS 26, 31–32 (Feb. 5, 1996), <https://www.justice.gov/file/20111/download> (describing a memorandum from Legal Counsel of the U.S. Department of Justice to the United States Attorney for the Southern District of California).

40. Attorney General John Ashcroft, *Prepared Remarks on the National Security Entry-Exit Registration System* (June 6, 2002), <https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (last visited on Sept. 18, 2018) (on file with the Washington and Lee Law Review).

41. See Memorandum of Understanding Between the INS and the State of Florida (July 26, 2002), *reprinted in* 79 INTERPRETER RELEASES 1138, app. II at 1140 (2002) (outlining authority provided to Florida state and local officers). These officers were trained by the INS and then placed in Florida's seven Regional Domestic Security Task Forces. *Id.* at 1140–41.

42. See generally *Identity and Immigration Status of 9/11 Terrorists*, FAIR (Jan. 2017) <http://www.fairus.org/issue/national-security/identity-and-immigration-status-911-terrorists> (last visited Oct. 2, 2018) (on file with the Washington and Lee Law Review).

Forces to carry out limited immigration enforcement duties, all focused on domestic security concerns. As a result of its 287(g) activities, the state of Florida reported that it had detained individuals apparently involved in “surveillance activities in sensitive locations”; the state also reported conducting investigations resulting in the arrests of unauthorized immigrants working in restricted or secured areas of seaports, airports, and nuclear plants.⁴³

A few other sub-federal jurisdictions soon followed suit and signed 287(g) agreements; those jurisdictions included the state of Alabama and the Los Angeles County Sheriff’s Department.⁴⁴ These initial agreements were also targeted in scope, focusing on immigrants with criminal records or who otherwise presented a threat to public safety.⁴⁵ In his July 2005 testimony in front of a Homeland Security subcommittee, Paul Kilcoyne, Deputy Assistant Director of ICE’s Office of Investigations, assured Congressional members that the 287(g) program would remain “focused on criminal organizations, those individuals who pose a threat to the border security,” and not on “the landscape architect that had the broken headlight.”⁴⁶

Three types of agreements developed. Under the first, a jail enforcement model, deputized officers can only exercise their delegated immigration functions on alleged noncitizens which LEAs arrested and detained on separate state or local charges. The second, a task force model, authorized deputized officers to perform their immigration functions during the course of their daily activities as patrol officers, detectives, or criminal investigators, or in coordination with ICE in task force settings (for example,

43. See *The 287(g) Program: Ensuring the Integrity of America’s Border Security System through Federal-State Partnerships: Hearing Before the Subcomm. On Mgmt., Integration, and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong., 16 (2005) [hereinafter Kilcoyne testimony], <https://www.gpo.gov/fdsys/pkg/CHRG-109hhr28332/pdf/CHRG-109hhr28332.pdf> (statement of Testimony of Paul M. Kilcoyne, Deputy Assistant Director, Office of Investigations, ICE).

44. See RANDY CAPPS ET AL., *MIGRATION POL’Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 9* (2011) (discussing a brief history of 287(g)).

45. See *id.* (noting that Alabama and Florida signed similar targeted agreements).

46. See *id.* (citing Kilcoyne testimony referenced later in this Article).

working together on a gang-focused task force). Under the task force model then, the officers could interrogate alleged noncitizens they encountered “on the beat” and not just those who had been arrested on separate charges. The third, a hybrid model, combined elements of the jail enforcement and task force models, allowing immigration enforcement both on the streets and at the jails.⁴⁷

Though it continued to be publicly advertised as focusing on dangerous criminals and other public safety concerns,⁴⁸ the 287(g) program experienced a significant expansion in 2006. In that year, some 287(g) jurisdictions adopted a universal model of enforcement, where the goal was to apprehend as many unauthorized immigrants as possible, regardless of their criminal records or dangerousness. The most visible example of this universal enforcement focus was the 287(g) agreement signed by Mecklenburg County, North Carolina. The county’s goal, as articulated by Sheriff Jim Pendergraph, was to apprehend as many unauthorized immigrants as possible, believing that unauthorized immigrants committed crimes and drained public resources.⁴⁹ Thus, the county viewed the 287(g) program as a vehicle to identify for removal immigrants who had committed civil immigration violations.⁵⁰ The county seemed to find at least some degree of support for its universal enforcement model within ICE. For example, Mecklenburg’s agreement, which became a model for all new agreements signed from 2007 to mid-2009,⁵¹ explicitly states: “It is the intent of the parties that this agreement will result in enhanced capacity to deal with immigration violators in the

47. See OFF. OF INSPECTOR GEN., THE PERFORMANCE OF 287(G) AGREEMENTS REPORT UPDATE 3 (2010), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-124_Sep10.pdf (discussing progress of prior 287(g) agreements).

48. See CAPPS, *supra* note 44 (citing ICE’s 2007 fact sheet on delegating Section 287(g) authority) (noting the broadened scope of the 287(g) program from the priorities publicly known). ICE regularly updates the fact sheet, and this older version is no longer available on the web.

49. See *id.* at 10 (noting the emergence of universal models of enforcement in the southeast between 2006–2008).

50. See *id.* at 26 (citing *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. (2009)) (providing the statement of Charles A. Jenkins, Sheriff, Frederick County, MD).

51. See *id.* at 10 (outlining the history of the 287(g) program).

County.”⁵² And ICE’s 2008 version of its program fact sheet omitted previous language that had limited enforcement to criminal immigrants and other security threats.⁵³

In 2007, the last year of the Bush administration, sub-federal interest in the program increased substantially; in that year alone, ICE signed twenty-six new agreements.⁵⁴ Together with the enforcement expansion by some jurisdictions (switching from a targeted model to a universal model), the program was poised for significant growth during the Obama administration.

C. Agreements Under the Obama Administration (2008–2016)

During the Obama administration, the 287(g) program continued the growth of the Bush years but it also experienced contractions and restrictions, reflected in the fluctuating number of agreements and the changing scope of authority delegated to sub-federal jurisdictions. “The 287(g) program is an essential component of DHS’ comprehensive immigration enforcement strategy,” stated ICE Assistant Secretary John Morton.⁵⁵ Accordingly, the administration actively pursued signing new 287(g) agreements. In 2008, it signed twenty-eight new

52. See U.S. IMMIGR. & CUSTOMS ENF’T, MEMORANDUM OF UNDERSTANDING 1 (2002), <https://www.ice.gov/doclib/287gMOA/mecklenburgcountysheriffsoffice.pdf> (discussing the agreement made between ICE and Mecklenburg County, North Carolina).

53. See CAPPS, *supra* note 44, at 10–11 (outlining the history of the 287(g) program between 2006–2010).

54. See Rodriguez et al., *A Program in Flux: New Priorities and Implementation Challenges for 287(g)*, MIGRATION POL’Y INST. 3 (Mar. 2010), <https://www.migrationpolicy.org/research/program-flux-new-priorities-and-implementation-challenges-287g> (last visited Sept. 18, 2018) (discussing the history of the 287(g) program, the specifics of the 2009 template and questions of its implementation) (on file with the Washington and Lee Law Review).

55. See Department of Homeland Security, *Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements*, *supra* note 19 (noting the standardized agreement to enter into 287(g) agreements as well as eleven new agreements to be implemented across the country with local enforcement agencies) (on file with the Washington and Lee Law Review).

agreements;⁵⁶ at the peak of its 287(g) activity, the program had seventy-seven active agreements (2009).⁵⁷

During these years of increased interest and activity, Congressional funding for the program rose accordingly. Appropriations started at \$5 million (2006), grew to \$15 million (2007), then rose significantly to \$42.1 million (2008) and \$54 million (2009), before settling at \$68 million (2010–2013).⁵⁸ These federal funds were used to pay for the training of the deputized officers and for program management and oversight.⁵⁹ Local jurisdictions continued to pay for the salaries and other expenses of their deputized officers (including expenses during the training period), which constitute the largest costs of the 287(g) program.⁶⁰

As more sub-federal jurisdictions joined, the program became more successful by at least one metric: increasing the number of immigrants who are identified and placed into removal proceedings. Between 2005 and 2010, 287(g) officers identified and screened 186,000 noncitizens for potential removal.⁶¹ But as these numbers grew, so did criticism of the program. In a letter on behalf of over 500 national, state, regional and local organizations, Marielena Hincapie, Executive Director of National Immigration Law Center, implored President Obama to terminate the program. Citing egregious abuses by 287(g) jurisdictions, she argued, “Racial profiling and other civil rights abuses by the local law enforcement agencies that have sought out 287(g) powers have compromised public safety, while doing nothing to solve the immigration crisis.”⁶² Law enforcement agencies also expressed concerns about

56. See Rodriguez, *supra* note 54, at 3 (discussing the recent trend of local and state officials participating in immigration policies).

57. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582 n.88 (2010) (noting the increase in agreements entered into).

58. See AM. IMMIGR. COUNCIL, *THE 287(G) PROGRAM: AN OVERVIEW 2* (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_287g_program_an_overview_0.pdf (detailing specifics of the different 287(g) agreement types).

59. See *id.* (noting that federal funding for the 287(g) program hit a high in FY 2010–2013).

60. See *id.* at 3 (discussing the authority of local agencies and the selection process for local entities).

61. See CAPPS, *supra* note 44, at 10 (noting the expansion of the program in the southeast region between 2006–2008).

62. Letter from Marielena Hincapie, Exec. Dir. of Nat'l Immigr. Law Ctr., to

the program. After holding focus groups across the country that included local police and after administering a written survey to police chiefs attending a national police conference, the Police Foundation⁶³ found that a majority of participating police chiefs believed that the costs of participating in the 287(g) program outweighed the potential benefits, “where there is no criminal nexus.”⁶⁴

In that same year, in response to a Congressional request, the General Accountability Office (GAO) issued a detailed review of the 287(g) program, in which the agency interviewed officials from all sub-federal agencies participating in the program and reviewed information provided by these agencies and ICE.⁶⁵ The GAO found that ICE needed to impose more controls, to make sure that the program operated as intended. Specifically, the GAO recommended that ICE (1) document the program’s objectives, (2) describe more fully the nature and extent of its supervision over sub-federal jurisdictions, and (3) define what data sub-federal jurisdictions should collect and how it should be collected and reported.⁶⁶ By articulating standards for the program and communicating those standards to participating sub-federal agencies, ICE would be in a position to follow up to make sure that the standards are being implemented.⁶⁷

President Barack Obama (Aug. 25, 2009) (on file with author).

63. The Police Foundation is “oldest nationally-known, non-profit, non-partisan, and non-membership-driven organization dedicated to improving America’s most noble profession—policing.” POLICE FOUND. <https://www.policefoundation.org/> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

64. See ANITA KHASHU, POLICE FOUND., *THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES* xii (2009), <https://www.policefoundation.org/wp-content/uploads/2015/07/Khashu-2009-The-Role-of-Local-Police.pdf> (highlighting the variance of immigration policies in response to historically high rates of immigration).

65. See U.S. GOV’T ACCOUNTABILITY OFF., *IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS* 33 (2009), <https://www.gao.gov/new.items/d09109.pdf> (highlighting the need for better oversight controls over programs authorizing local and state agencies to participate in immigration enforcement).

66. See *id.* at 24 (recommending action items for the Assistant Secretary for ICE).

67. See *id.* at xii (detailing the impetus for the study and recommendations as a result of the findings).

After this deluge of critical reports, immigrant advocates hoped that the Obama administration would cancel the 287(g) program.⁶⁸ Instead, in July 2009, DHS Secretary Janet Napolitano announced that ICE would sign eleven new agreements. To address critics' concerns, ICE also announced that the program would use a new standardized template for its agreements, that would provide for closer federal supervision and focus the 287(g) program on the removal of "dangerous criminals."⁶⁹ Most of the changes tracked the GAO's recommendations. First, the template articulated a set of enforcement priorities, making it clear that the purpose of the 287(g) program is to identify and process for removal "criminal aliens who pose a threat to public safety or a danger to the community."⁷⁰ The template also stated that ICE retains "sole discretion" on how to manage its own resources and that LEAs should manage their own allocation of resources according to ICE's three-tiered set of priorities.⁷¹

Second, the template was much more specific in describing ICE's role in supervising LEAs. Under the task force model, an LEA must ask on a case-by-case basis for permission to interrogate and process a person solely based on immigration violations;⁷² the LEA must also ask in advance for ICE permission to conduct a 287(g) enforcement action.⁷³ The template also imposed new responsibilities on ICE to provide LEAs with data and guidance in specific situations.⁷⁴ Finally, the template specifies the kind of information that LEAs are required to provide to ICE, with ICE

68. See Dawn Teo, *After Being Ignored by White House, 521 Immigration Groups Join to Protest Obama's Inaction*, HUFFINGTON POST (Sept. 27, 2009, 5:12 AM), https://www.huffingtonpost.com/dawn-teo/after-being-ignored-by-wh_b_270451.html (last updated May 25, 2011) (last visited Sept. 18, 2018) (reporting on responses to immigration policy inaction) (on file with the Washington and Lee Law Review).

69. See CAPPS, *supra* note 44, at 11 (detailing the new standardized agreement under the Obama Administration).

70. See Rodriguez, *supra* note 54, at 12 (discussing enforcement priorities and objectives).

71. *Id.*

72. See *id.* at 18 (discussing federal supervision).

73. See *id.* (noting how ICE monitors LEA action).

74. See *id.* (outlining the responsibilities of ICE to effectuate the new programming).

reserving the right to request specific tracking data or other documents related to a specific arrest.⁷⁵

The general purpose of these templates, according to Secretary Napolitano, was to “promote[] consistency across the board to ensure that all of our state and local law enforcement partners are using the same standards in implementing the 287(g) program.”⁷⁶ The new agreements would “support[] local efforts to protect public safety by giving law enforcement the tools to identify and remove dangerous criminal aliens.”⁷⁷ Accordingly, DHS required all existing 287(g) jurisdictions to renegotiate their agreements to conform with the template; new jurisdictions also had to agree to use the template.⁷⁸

Did the template help the program achieve its desired consistency and control? The Migration Policy Institute (MPI) conducted an extensive review in which its researchers visited seven 287(g) sites operating under the new agreements and interviewed federal ICE officials.⁷⁹ It found that the template changes did not have any “substantial effect on 287(g) priority setting, program operations, . . . or community impacts.”⁸⁰ Rather, decisions about enforcement priorities continued to be made at the sub-federal levels, driven by local political pressures. For example, in many communities in the southeast and southwest, growing immigrant populations put political pressure on elected officials, including sheriffs, to pursue different enforcement strategies.⁸¹ The MPI study found that the universal enforcement model

75. *See id.* (describing required updates such as how aliens are processed, how documentation errors are communicated, and notification requirements for new detainees).

76. *See Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements*, *supra* note 19 (noting the standardization Memorandum of Agreements used to enter into 287(g) partnerships).

77. *See id.*

78. *See* CAPPS, *supra* note 44, at 11 (discussing the standardized immigration agreements under the Obama administration).

79. *See id.* at 52–53 (noting the research questions and methodologies used in analyzing the 287(g) programs).

80. *Id.* at 3.

81. *See id.* (providing examples of direct, targeting legislation adopted in Arizona and Georgia).

continued to be concentrated in the southeast, following the example set by Mecklenburg County, North Carolina in 2006.⁸²

Though the template revisions did result in increased ICE supervision, that ICE supervision did not influence local enforcement priorities. For example, ICE supervisors signed off on virtually all 287(g) detainer requests that LEAs issued, even if the detainees were for immigrants charged with low priority crimes and traffic offenses.⁸³ For jailhouse model agreements, ICE supervision did not extend to officers who made the initial arrests. Often those arresting officers worked for agencies without 287(g) agreements and thus were not trained in immigration law or subject to ICE supervision. “The lack of federal control over arresting officers,” warned MPI, “opens the door to racial profiling and pretextual arrests, especially in jurisdictions that place immigration detainees universally.”⁸⁴ On a national level, MPI found that despite ICE’s attempts to refocus the program on serious criminal offenders, “the program is not targeted primarily or even mostly toward serious offenders.”⁸⁵ Specifically, half of the detainees issued through the program were for people who were arrested for misdemeanors or traffics, even though these offenses were not considered priority offenses, according to the 2009 template.⁸⁶

Beyond the template standardization, the Obama administration also made other policy changes to try to assert more control over the program and respond to critics’ complaints. In 2012, the administration announced that it would not renew any task force model agreements, citing the greater efficiency of other enforcement programs, including Secure Communities.⁸⁷ The administration was likely also responding to criticism that the task force model was more prone to racial profiling and other abuses. By delegating more powers to LEAs and allowing them to

82. See *id.* at 2 (highlighting the study’s findings).

83. See *id.* at 3 (noting that ICE allowed local agents to set enforcement priorities).

84. *Id.* at 2.

85. *Id.*

86. See *id.* (noting that half of the detainees were considered Level 3, the lowest priority ranking).

87. See FY 2012: ICE Announces Year-End Removal Numbers, *supra* note 7 (highlighting the priorities for removal like convicted criminals).

exercise those powers in a broader geographic jurisdiction, critics charged that the task force model allows local officers to engage in racial profiling and other illegal practices without even requiring the pretense of a separate criminal charge.⁸⁸ The elimination of the task force model (and the related hybrid model) likely had more symbolic, rather than practical, impact. In its 2011 in-depth assessment, the MPI found that the 287(g) program was primarily a jail-based program. For example, in FY 2010, “jail models accounted for 90 percent of detainers issued, while hybrid models accounted for 8 percent and task force models just 2 percent.”⁸⁹

As another control measure, the administration also actively investigated complaints received about specific 287(g) participants, and in two high-profile cases, ICE revoked the LEAs’ permission to participate in the program, based on findings of misconduct. The more straightforward revocation was in Alamance County, North Carolina. After receiving complaints that the Alamance County Sheriff’s Office (ACSO) engaged in discriminatory policing and unconstitutional searches and seizures, the Department of Justice in 2010 started a two-year investigation. Among DOJ’s findings: the ACSO was four to ten times more likely to stop Latino drivers than non-Latino drivers; the ACSO located checkpoints in majority Latino neighborhoods and treated stopped drivers differently based on their ethnicity; the ACSO improperly detained Latinos for immigration enforcement purposes after they had already posted bond; and the ACSO’s discrimination was intentional and rooted in Sheriff Terry S. Johnson’s prejudices against Latinos⁹⁰ (Sheriff Johnson

88. See Ted Hesson, *As One Immigration Enforcement Program Fades Away, Another Rises*, ABC NEWS (Dec. 27, 2012), http://abcnews.go.com/ABC_Univision/News/immigration-enforcement-program-287g-scaled-back/story?id=18077757 (last visited Sept. 18, 2018) (noting the shift in immigration programming) (on file with the Washington and Lee Law Review); see also CAPPS, *supra* note 44, at 2 (discussing how lack of federal control allows for racial profiling and pretextual arrests).

89. CAPPS, *supra* note 44, at 2.

90. See generally Letter from Thomas E. Perez, Asst. Attn’y Gen., U.S. Dep’t of Justice, to Clyde B. Albright, Cty. Attn’y, Alamance Cty. & Chuck Kitchen, Turrentine Law Firm 2 (Sept. 18, 2012) [hereinafter Letter from Thomas E. Perez], https://www.justice.gov/sites/default/files/crt/legacy/2012/09/18/acso_findings_9-18-12.pdf.

continues to serve as the county's sheriff).⁹¹ Based on the DOJ's findings, ICE terminated its 287(g) agreement with the county.⁹²

The more complicated revocation involved the Maricopa County Sheriff's Office (MCSO), located in Arizona, because it was done in stages, over several years. From 1993–2016, Sheriff Joe Arpaio, a controversial figure who embraced his reputation as “America's Toughest Sheriff,” headed the MCSO. During his multiple terms as sheriff, he was accused of engaging in racial profiling against Hispanics and in other civil rights violations as he ordered his deputies to enforce federal immigration laws. He lost multiple lawsuits, requiring the county to pay millions of dollars in legal fees.⁹³ Against this background, MCSO's task force agreement was revoked in 2009, but its jailhouse agreement was renewed.⁹⁴ In 2011, DOJ issued a report finding that MCSO had engaged in a “pattern or practice of unconstitutional policing.”⁹⁵ Specifically, DOJ found evidence that MCSO engaged in racial profiling of Latinos, unlawfully stopped, detained, and arrested

91. See Natalie Allison Janicello, *Alamance County May Rejoin 287(g)*, TIMES-NEWS (June 1, 2017, 5:49 PM), <http://www.thetimesnews.com/news/20170601/alamance-county-may-rejoin-287g> (last updated June 1, 2017) (last visited Sept. 18, 2018) (noting the county's renewed decision to participate in the immigration identification program) (on file with the Washington and Lee Law Review).

92. See Gustavo Valdes & Thom Patterson, *Feds Accuse North Carolina Sheriff's Office of Racial Profiling*, CNN (Sept. 20, 2012, 11:18 AM), <https://www.cnn.com/2012/09/20/justice/north-carolina-justice-immigration/index.html> (last visited Sept. 18, 2018) (reporting on instances of racial profiling in North Carolina) (on file with the Washington and Lee Law Review).

93. See Michael Kiefer & Rebekah L. Sander, *Maricopa County Voters Oust Sheriff Joe Arpaio, Elect Paul Penzone*, AZCENTRAL (Nov. 8, 2016, 9:22 PM), <https://www.azcentral.com/story/news/politics/elections/2016/11/08/maricopa-county-sheriff-joe-arpaio-paul-penzone-election-results/93169028/> (last updated Nov. 9, 2016) (last visited Sept. 18, 2018) (discussing the shift in sheriff control to one that values transparency) (on file with the Washington and Lee Law Review).

94. See Stephen Lemons, *Joe Arpaio Scores 287(g) Jails Agreement in ICE Announcement, ICE Head Says Arpaio Has No Federal Authority to Continue Sweeps*, PHX. NEW TIMES (Oct. 16, 2009, 10:00 AM), <http://www.phoenixnewtimes.com/news/joe-arpaio-scores-287-g-jails-agreement-in-ice-announcement-ice-head-says-arpaio-has-no-federal-authority-to-continue-sweeps-6499142> (last visited Sept. 18, 2018) (noting the continuation of 287(g) programming in many counties including Maricopa County despite allegations against the Sheriff's office) (on file with the Washington and Lee Law Review).

95. See Letter from Thomas E. Perez, *supra* note 90, at 2 (noting the findings of the investigation into the Maricopa County Sheriff's Office).

Latinos, and unlawfully retaliated against individuals who complained or criticized its policies and practices.⁹⁶ It was only after DOJ issued its report that ICE terminated MCSO's jailhouse 287(g) agreement and limited its access to the Secure Communities program as well.⁹⁷

These high-profile revocations, together with other problems in implementing the 287(g) program, decreased interest in the 287(g) program from both the federal and sub-federal levels. At the end of 2016, there were only thirty-four active 287(g) agreements.⁹⁸

III. 287(g) Agreements in the Trump Era: On the Ground

President Trump's interest in the 287(g) program was apparent from the beginning of his administration, as reflected in his January 2017 executive orders calling for the expansion of the program.⁹⁹ In the Border Security and Immigration Enforcement Executive Order, he directed the DHS Secretary to enter into more 287(g) agreements and to "structure each agreement . . . in the manner that provides the most effective model for enforcing Federal immigration laws and obtaining operational control over the border for that jurisdiction."¹⁰⁰ That latter language opened the door to resurrecting the task force model that the Obama administration eliminated.¹⁰¹

96. See *id.* (discussing the targeting of Latinos in particular by the Sheriff's Office).

97. See *Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements*, *supra* note 19.

98. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> (last visited Sept. 18, 2018) (outlining the provisions of the delegation of authority under 287(g)) (on file with the Washington and Lee Law Review).

99. See *generally* Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (discussing changes to border security and immigration enforcement); Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (noting immigration policy shifts internally in the United States).

100. See Exec. Order No. 13,767, *supra* note 99, at 8795 (detailing changes in border security).

101. See FY 2012: ICE Announces Year-End Removal Numbers, *supra* note 7 (highlighting how the broadened priorities fit within the earlier language).

Shortly after the executive orders were released, then-DHS Secretary John Kelly issued memos implementing, among other things, the 287(g) expansion. In his memo implementing the Border Security executive order, Secretary Kelly directed ICE to “expand the 287(g) Program to include all qualified law enforcement agencies that request to participate and meet all program requirements.”¹⁰² The Kelly memo also authorized Customs and Border Protection (CBP) to “accept State services and take other actions as appropriate to carry out immigration enforcement pursuant to section 287(g) of the INA.”¹⁰³ That language appears to authorize CBP, as well as ICE, to enter into 287(g) agreements.

The Trump administration moved quickly to implement its plans, signing twenty-five new agreements in 2017 alone.¹⁰⁴ These new agreements nearly doubled the thirty-four agreements that remained active from the Obama administration;¹⁰⁵ seventeen of these new agreements were signed with Texas LEAs.¹⁰⁶ As of November 2017, there were an additional thirty-nine LEAs that were interested in joining the program.¹⁰⁷ If all of these interested

102. See *Read the Memos Signed by DHS Secretary Kelly on New Guidelines for Deporting Illegal Immigrants*, *supra* note 8 (including memos from Kelly regarding more detailed plans on expanded enforcement policies for the removal of immigrants).

103. *Id.*

104. The number of active agreements at any given time can be tracked. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

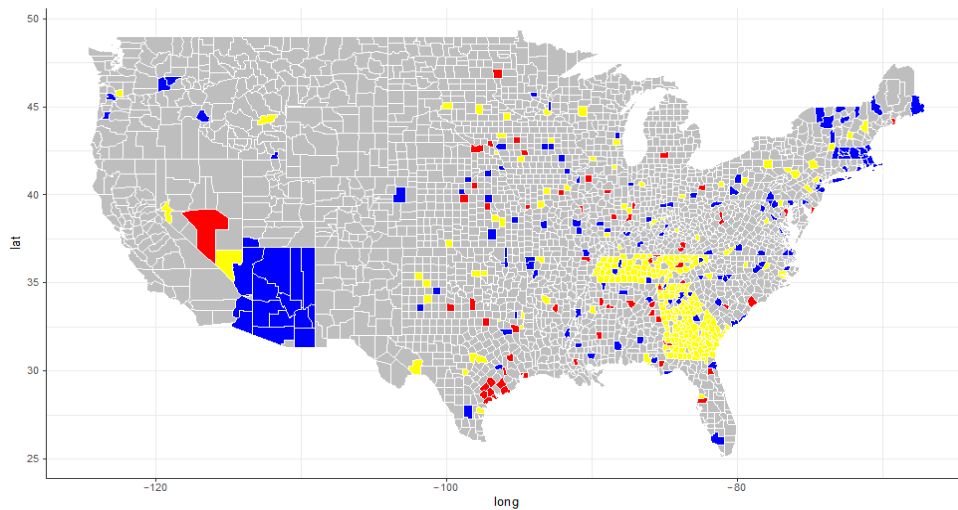
105. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 98 (listing the participating entities).

106. ICE’s press release states that the Trump Administration signed eighteen new Texas agreements in 2017. *ICE Announces 18 New 287(g) Agreements in Texas*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (July 31, 2017), <https://www.ice.gov/news/releases/ice-announces-18-new-287g-agreements-texas> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review). Technically, however, one of those agreements with Lubbock County was signed in 2016 while the Obama administration was still in office, and thus is not counted in the 2017 numbers for purposes of this Article. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

107. See Rosenberg & Levinson, *supra* note 3 (discussing the delegation of authority to police departments across the United States) (on file with the Washington and Lee Law Review); See generally REUTERS, 287(G) GRAPHICS DATA

LEAs sign agreements, there would be over ninety active 287(g) jurisdictions, the largest in the program's history¹⁰⁸ and with expansive geographical reach.¹⁰⁹

Figure 1: Expansion of the 287(g) Program Under the Trump Administration



(Blue=Obama agreements at end of 2016, Red=Trump signed agreements in 2017, and Yellow=Interested LEA applicants as of Nov. 2017)

A. Changing Profile of Deportees

With a potentially record high number of LEAs signing agreements, the number of immigrants who will be identified and

(2017), <http://fingfx.thomsonreuters.com/gfx/rngs/TRUMP-EFFECT-IMMIGRATION-POLICE/010051YZ4FG/287ggraphics%20data.pdf>.

108. The previous high point in 287(g) participation was in 2011, when there were seventy-two active agreements. See Chacón, *supra* note 57, at 1582 n.88.

109. See Figure 1.

placed into removal proceedings as a result of 287(g) operations under President Trump will inevitably increase. But we can also expect to see a change in the profile of those immigrants who are placed in removal through contact with the 287(g) program. With the institution of very broad enforcement priorities at the federal level, we should expect that immigration enforcement at the sub-federal level will similarly result in the arrest and removal of more unauthorized immigrants without criminal records.

When he revoked the Obama administration's immigration enforcement priorities,¹¹⁰ President Trump replaced them with incredibly broad priorities: any removable alien who has been convicted of any crime, charged with a crime, committed acts that constitute a crime, engaged in any fraud or misrepresentation before a government agency, abused public benefits, has a final order of removal, or "[i]n the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security."¹¹¹ Trump's policy did not prioritize between these categories, leading Professor David Martin to observe, "[a]n old canard applies: [w]hen everything is a priority, nothing is a priority. In practice, this feature gives individual agents wide latitude to follow their own preferences—or perhaps biases."¹¹² Moreover, regarding the criminal categories, Martin noted

[t]here is no distinction between felonies and misdemeanors, and even people charged but not yet tried get thrown into this capacious criminal pot. Indeed, there doesn't even need to be a charge—just an immigration agent's determination that the person committed a criminal act, even years ago—presumably including even the misdemeanor of entering the US without inspection.¹¹³

110. See generally Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (replacing the Obama administration's removal priorities with a new list of removal priorities).

111. See *id.* at 8800 (providing enforcement priorities).

112. See David A. Martin, *Trump's Order on the Deportation of Undocumented Residents, Annotated by an Immigration Law Expert*, VOX (Jan 31, 2017, 10:13 AM), <https://www.vox.com/the-big-idea/2017/1/28/14416616/executive-order-immigrants-sanctuary-trump> (last visited Sept. 18, 2018) (annotating the executive order intended to enhance public safety inside the United States) (on file with the Washington and Lee Law Review).

113. *Id.*

In his February 2017 memo implementing these priorities, then-DHS Secretary Kelly stated: “The Department no longer will exempt classes or categories of removable aliens from potential enforcement.”¹¹⁴

Enforcement statistics from 2017 show the impact of these new priorities. In its FY 2017 report, ICE touts its increased interior arrests and removals based on those arrests (as compared with previous years under the Obama administration).¹¹⁵ The agency also noted a substantial increase in its administrative arrests (arrests solely based on a civil immigration violation) to 143,470 in 2017, from 110,104 in FY 2016 under the Obama administration.¹¹⁶ The agency attributes this increase to the administration’s new priorities and specifically to its decision not to exempt any category of immigrants from enforcement.

Anecdotal information also reflects the impact of the new enforcement priorities. The media reports regularly on the heart-wrenching deportation of immigrants who have lived in the country for many years, established successful careers, and leave behind U.S. citizen family members. For example, in April 2017, Roberto Beristain was deported to Mexico, after illegally crossing into the U.S. nearly twenty years prior.¹¹⁷ In those twenty years, he married a U.S. citizen, had three U.S. citizen children, and owned and operated a popular restaurant, Eddie’s Steak Shed in Granger, Indiana.¹¹⁸ Significantly, he had no criminal record, but despite years of trying to obtain legal status, he had a final order

114. *Read the Memos Signed by DHS Secretary Kelly on New Guidelines for Deporting Illegal Immigrants*, *supra* note 8.

115. *See* FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 12 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (summarizing the U.S. Immigration activities in 2017). ICE notes, however, that total removal numbers are down compared to previous years, due to a decrease in border apprehensions.

116. *Id.*

117 *See* Anderson Cooper, *Deported Man’s Wife and Friends Rethink Voting for Trump*, CBS NEWS (May 7, 2017), <https://www.cbsnews.com/news/trump-immigration-crackdown-causes-some-to-rethink-their-vote/> (last visited July 28, 2018) (noting that in those twenty years, he had been issued a temporary work permit and a social security number) (on file with the Washington and Lee Law Review).

118. *See id.* (reporting on the impact of Trump’s immigration policies in the community in Indiana).

of removal, which made him a priority for deportation under the Trump administration.¹¹⁹ The story of Jorge Garcia of Lincoln Park, Michigan, is similar. He was brought illegally to the U.S. from Mexico as a child, nearly thirty years ago.¹²⁰ He, too, married a U.S. citizen and had two U.S. citizen children, whom he supported through his work as a landscaper.¹²¹ Mr. Garcia had no criminal record and tried to obtain a green card, based on his marriage; however, his immigration attorney filed the wrong paperwork, resulting in a removal order.¹²² During the Obama administration, he was allowed to remain in the U.S. pending annual meetings with ICE; in 2017, however, he was deported to Mexico.¹²³

Regarding the 287(g) program specifically, we can expect to find similar shifts in enforcement, with more immigrants without criminal records being identified and placed in removal as a result of their 287(g) encounters. On its website, ICE continues to refer to its mission to “ensure enforcement efforts remain focused on criminal aliens, particularly those who pose the greatest risk to public safety.”¹²⁴ Yet given that federal enforcement priorities have changed under the Trump administration and that LEAs are required to abide by those federal priorities, we will likely see a magnification of the trend that the MPI observed in its 2011 study: that LEAs set enforcement priorities for their individual 287(g)

119. See Mayra Cuevas, *Undocumented Husband of Indiana Trump Supporter Deported to Mexico*, CNN (Apr. 6, 2017, 8:47 PM), <https://www.cnn.com/2017/04/05/us/undocumented-husband-deported/index.html> (last visited Sept. 18, 2018) (noting the effect of Trump’s policies on families in Indiana) (on file with the Washington and Lee Law Review).

120. See Christina Caron, *Michigan Father Deported After Living in U.S. for 30 Years*, N.Y. TIMES (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/us/man-deported-jorge-garcia.html> (discussing the impact of the deportation of a Michigan father on his family) (on file with the Washington and Lee Law Review).

121. See *id.* (noting Mr. Garcia was employed and had no criminal record).

122. See *id.* (discussing Mr. Garcia’s multiple removal orders).

123. See *id.* (noting that Mr. Garcia was one of 226,119 individuals that ICE removed in FY 2017).

124. See *Updated Facts on ICE’s 287(g) Program*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/factsheets/287g-reform> (last updated Jan. 10, 2018) (last visited Sept. 18, 2018) (referring to the program’s history and the reasons why the 2009 template changes were made) (on file with the Washington and Lee Law Review).

programs, influenced by local political pressure.¹²⁵ In fact, with this broadening of federal enforcement priorities, the program may become more attractive to LEAs interested in universal enforcement.

B. More Powerful Forms of Agreements

Through executive orders and agency memos, the Trump administration has encouraged the use of alternative 287(g) agreement models: the task force model of enforcement and a border patrol model agreement.¹²⁶ None of the new agreements signed by this administration in 2017 employ either model, but if future agreements used these alternative models, the result would give LEAs more expansive powers. The implications of that expansion are explored in this section.

As noted earlier, the task force model has deep roots in the program. Before the Obama administration discontinued it, the task force model was used predominantly by state and city LEAs, while counties favored the jail or hybrid models. This alignment made sense as counties usually operate the local jails, whereas city police departments make arrests and detain individuals only for a short time before transferring them to county jails for longer-term detentions.¹²⁷ If the Trump administration resurrects the task force model, it could, of course, deviate from the Obama administration's practices. But absent any indication that it plans to do so and given the interest from at least some 287(g) applicants in the task force model,¹²⁸ it is informative to understand how this model operated under the Obama administration.

The Prince William Police Department signed a typical task force agreement in 2009 and gave 287(g) trained officers the usual powers of a jailhouse agreement: the power to interrogate

125. See *supra* notes 79–82 and accompanying text (discussing the change in priorities from the Obama administration to the Trump administration).

126. See *supra* notes 92–94 and accompanying text (describing the Trump Administration's adoption of new agreements).

127. See Rodriguez, *supra* note 54, at 5 (noting the history and context of 287(g)).

128. See Rosenberg & Levinson, *supra* note 3 (noting the interest of Bensalem, Pennsylvania in signing a task force model agreement).

detainees about their immigration status; serve immigration arrest warrants; prepare evidence related to immigration proceedings; issue immigration detainer requests, prepare charging documents; and transport detainees to immigration detention facilities.¹²⁹ As a result of the task force agreement, these officers had the additional authority to: interview and arrest someone solely based on an immigration violation (with ICE approval); arrest for immigration felonies without a warrant if the individual is likely to escape; and arrest for any federal crime committed in the officer's presence.¹³⁰

The distinguishing characteristic of the task force model then was the authority it gave to LEAs to investigate and prosecute based on immigration offenses alone, without needing the predicate criminal offense required by the jail house model (where an LEA could only exercise its delegated immigration powers on immigrants detained on separate, non-immigration charges). This broad discretion that could be exercised "on the beat" raised concerns that the model was particularly vulnerable to racial profiling and other illegal abuses. These concerns, coupled with the rising utility of the Secure Communities program, motivated the Obama administration in 2012 to retire the task force model from the 287(g) program.¹³¹ President Trump resurrecting this model would raise similar concerns about racial profiling.

The second alternative model that the Trump administration has encouraged would allow Customs and Border Protection to sign agreements with LEAs under the 287(g) program. Administration officials have not spoken further about what a CBP-signed agreement might look like, nor is there precedent for this kind of agreement in the program's history.¹³² But based on

129. See U.S. IMMIGRATION AND CUSTOMS ENF'T, MEMORANDUM OF UNDERSTANDING 3 (2009) (authorizing LEA tasks supporting federal immigration initiatives).

130. See *id.* (discussing the agreement made between ICE and Prince William County, Virginia).

131. See Kanyakrit Vongkiatkajorn, *How the Trump Administration Is Using Local Cops to Widen Its Immigration Dragnet*, MOTHER JONES (Dec. 4, 2017, 6:00 AM), <https://www.motherjones.com/politics/2017/12/how-the-trump-administration-is-using-local-cops-to-widen-its-immigration-dragnet/> (last visited Sept. 18, 2018) (discussing the policies the Trump administration is using to expand its immigration objectives) (on file with the Washington and Lee Law Review).

132. All of the 287(g) agreements to date have been signed by Immigration

the CBP's powers and authority, we can make some educated guesses about how this kind of agreement might operate. The CBP's mission is "[t]o safeguard America's borders thereby protecting the public from dangerous people and materials while enhancing the Nation's global economic competitiveness by enabling legitimate trade and travel."¹³³ Looking at the CBP's specific responsibilities related to immigration and the resources that LEAs control, the most obvious operations where CBP could delegate authority and receive assistance would be in border patrols. While it would be logistically difficult and expensive for LEAs to assist with actual line watches (where CBP agents monitor the physical land border), LEAs could provide support through traffic checks, traffic observation, city patrols and transportation checks. They could also do joint operations with CBP related to anti-smuggling activities.¹³⁴ Related to these new operations, CBP could delegate to LEAs powers associated with the task force model: the powers to interrogate, arrest, and process for removal based on evidence of civil immigration offenses.¹³⁵

An agreement with CBP would obviously give an LEA new powers in a broad context, especially if combined with an additional agreement with ICE. The general concerns that exist with any broad expansion of 287(g) powers apply here: will the newly deputized officers receive adequate training to carry out their new duties effectively? Will there be sufficient federal controls to prevent racial profiling and other illegal acts? Will local immigrant communities and immigrant advocacy groups be consulted in the implementation of the program? But because CBP has been recognized to have extra-constitutional powers within its

and Customs Enforcement as the supervising federal agency. *See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, supra* note 98 (updating the changes to 287(g)) (on file with the Washington and Lee Law Review).

133. *About CBP*, U.S. CUSTOMS AND BORDER PROTECTION (Nov. 21, 2016), <https://www.cbp.gov/about#> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

134. CBP conducts these activities as part of its border patrol activities. *See Along U.S. Borders*, U.S. CUSTOMS AND BORDER PROTECTION (2018), <https://www.cbp.gov/border-security/along-us-borders> (last visited Sept. 18, 2018) (on file with the Washington and Lee Law Review).

135. *See supra* note 129 and accompanying text (listing powers available to LEAs).

special jurisdiction (100 miles of any external boundary of the U.S.¹³⁶), there are special questions that a CBP agreement would raise. For example, CBP has authority to operate immigration checkpoints, pulling over individuals when its agents have “reasonable suspicion” that an immigration violation or crime has occurred.¹³⁷ Moreover, CBP agents can enter private property without a warrant (except for dwellings) within twenty-five miles of any border.¹³⁸ Would these extra-constitutional powers transfer over to LEAs? If so, what measures would CBP and LEAs take to prevent abuse of these powers?

C. Civil Rights Enforced?

As we consider the impact of the Trump Administration on the 287(g) program, perhaps the biggest question is how the administration will respond to allegations and evidence of racial profiling and other illegal practices by program participants. The vulnerability of the program to racial profiling, illegal searches, and other abuses has been widely documented; and as the Trump administration seeks to expand the program, those abuses will occur. The question then becomes, how will the administration respond? The evidence thus far strongly suggests that the administration does not prioritize civil rights in the context of immigration law enforcement.¹³⁹

The vulnerability of the 287(g) program to racial profiling has been well-documented. The DOJ’s findings of racial profiling and other abuses committed by Maricopa County Sheriff’s Office (AZ) and the Alamance County Sheriff’s Office (NC) have already been analyzed.¹⁴⁰ Academic studies have found similar evidence of

136. 8 CFR § 287.1(b).

137. See AM. CIVIL LIBERTIES UNION, CUSTOMS AND BORDER PROTECTION’S (CBP’S) 100-MILE RULE 1 (discussing limits on ICE agents’ authority).

138. See *id.* (outlining the details of CBP’s authority) see also Authority of U.S. Customs and Border Protection Agents: An Overview, AMERICAN IMMIGRATION COUNCIL (2012), https://www.americanimmigrationcouncil.org/sites/default/files/research/CBP_Overview_022112.pdf (noting the authority of CBP).

139. See *supra* Part IV.A (discussing the Trump administration’s prioritizing immigration enforcement over civil rights).

140. See *supra* notes 90–97 and accompanying text (discussing the DOJ’s finding of racial profiling).

racial profiling once 287(g) programs are implemented within a jurisdiction. For example, when the Frederick County Sheriff's Office (MD) implemented its 287(g) program in 2008, it started arresting eleven to thirteen more Hispanics per month than would be expected without the program.¹⁴¹ This finding was based on data compiled from FCSO's individual arrest records for the period between January 1, 2006 and December 31, 2013, using difference-in-difference estimates.¹⁴² Based on these findings, the researcher concluded that there was a "shift in attention by the FCSO away from the white and black community toward the Hispanic community following the implementation of the 287(g) program."¹⁴³

When the Trump Administration does receive complaints of LEA bad acts, compelling evidence suggests that it will not necessarily prioritize civil rights enforcement or view racial profiling as a negative. Candidate Trump, in his speech announcing his bid for the presidency, engaged in an infamous example of racial profiling when he described Mexican immigrants as drug dealers and rapists, though studies show that first generation immigrants commit crimes at a lower rate than native-born Americans.¹⁴⁴ During that speech, he said:

When Mexico sends its people, they're not sending their best. They're not sending you. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people.¹⁴⁵

141. See Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. ON MIGRATION & HUM. SECURITY 645, 657 (2017), <http://journals.sagepub.com/doi/pdf/10.1177/233150241700500305> (noting the impact of immigration policy changes on the white people).

142. See *id.* at 651 (discussing the data collection process).

143. See *id.* at 656 (highlighting the impact immigration policy changes have had on the Hispanic community).

144. See Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.6e044818d46a (last visited Sept. 18, 2018) (pointing out the falsities in Trumps immigration discussions) (on file with the Washington and Lee Law Review).

145. *Id.*

Zooming in closer to the 287(g) program itself, there is more evidence of the administration's disregard for racial profiling concerns. In the spring of 2017, the administration approached Sheriff Terry Johnson of Alamance County (NC) and invited the county to apply to participate again in the 287(g) program.¹⁴⁶ Sheriff Johnson was the sheriff of Alamance County Sheriff's Office when ICE revoked its 287(g) agreement in 2012; that revocation was based on DOJ findings that the ACSO had engaged in intentional and illegal racial profiling, rooted in Sheriff Johnson's prejudice against Latinos.¹⁴⁷ Admittedly, the DOJ lawsuit against ACSO was dismissed in federal court, but the specific circumstances need to be understood: to avoid further appeals, ACSO settled, agreeing to implement bias-free policing, citizen-complaint, and data-collection policies.¹⁴⁸ The ACSO's troubled record on civil rights and the continued leadership of Sheriff Johnson should have given the Trump administration pause, but instead, the administration reached out and *invited* the department to re-apply for 287(g) participation.¹⁴⁹

The most damning evidence, however, is President Trump's pardon of Sheriff Joe Arpaio in August 2017.¹⁵⁰ Sheriff Arpaio led

146. See Natalie Allison Janicello, *Alamance County May Rejoin 287(g)*, TIMES-NEWS (June 1, 2017, 5:49 PM), <http://www.thetimesnews.com/news/20170601/alamance-county-may-rejoin-287g> (last updated June 1, 2017) (last visited Sept. 18, 2018) (noting that Alamance County may rejoin the 287(g) program) (on file with the Washington and Lee Law Review).

147. See *supra* notes 90–92 (detailing the DOJ's findings, including unlawful detainers).

148. See Sarah Willets, *The Alamance County Sheriff's Office Was Booted from a Federal Immigration Program over Accusations of Discrimination. Now It Wants to Rejoin.*, INDY WEEK: NEWS (Nov. 9, 2017, 1:56 PM), <https://www.indyweek.com/news/archives/2017/11/09/the-alamance-county-sheriffs-office-was-booted-from-a-federal-immigration-program-over-accusations-of-discrimination-now-it-wants-to-rejoin> (last visited Sept. 18, 2018) (discussing Alamance's desire to rejoin the 287(g) program after being removed from the program because of discrimination) (on file with the Washington and Lee Law Review).

149. See *id.* (reporting that ICE asked Alamance to rejoin).

150. See Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/joe-arpaio-trump-pardon-sheriff-arizona.html> (last visited Sept. 18, 2018) (discussing Trump's pardon of an Arizona sheriff known for harsh conditions in his county jails) (on file with the Washington and Lee Law Review).

the Maricopa County Sheriff's Office when the Obama administration revoked its 287(g) agreements, based on evidence that the sheriff and his deputies engaged in racial profiling in implementing their 287(g) responsibilities.¹⁵¹ But the Sheriff's legal problems were not limited to the 287(g) program. In 2007, Sheriff Arpaio and the MCSO were sued by a Mexican national with a valid tourist visa who was wrongfully detained for nine hours on suspicion of violating immigration laws.¹⁵² The lawsuit became a class action filed on behalf of Latino drivers in Maricopa County.¹⁵³ After four years of litigation, a federal judge in 2011 ordered the defendants to stop enforcing civil immigration laws, ruling that they lacked the legal authority to do so.¹⁵⁴ Over the next six years, Sheriff Arpaio continued to defy the federal order, ordering his deputies to make immigration-based stops and lying under oath.¹⁵⁵ In 2017, the sheriff was convicted in a federal bench trial of criminal contempt of court and faced a possible six-month jail sentence.¹⁵⁶

In announcing his pardon, President Trump tweeted, "I am pleased to inform you that I have just granted a full Pardon to 85-year-old American patriot Sheriff Joe Arpaio. He kept Arizona safe!"¹⁵⁷ Political analysts opined that the President was sending a

151. See *supra* notes 93–97 and accompanying text (discussing the allegations against the Maricopa Sheriff's Office prior to their 287(g) agreement being revoked).

152. See *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 980–81 (D. Ariz. 2011) (describing Ortega-Melendres's multiple interactions with local authorities during his detainment).

153. See *id.* at 993 (stating that the certified class included "[a]ll Latino persons who, since January, 2007, have been or will be in the future, stopped, detained, questioned or searched by MCSO agents while driving or sitting in a vehicle on a public roadway or parking area in Maricopa County, Arizona.").

154. See *id.* at 972 ("Local law enforcement officers, however, do not have the 'inherent authority' to investigate civil immigration violations, including status violations." (quoting *United States v. Arizona*, 641 F.3d 339, 362 (9th Cir. 2011))).

155. See Hirschfeld & Haberman, *supra* note 150 (discussing Arpaio's civil contempt charge).

156. See Tom Jackman, *How Ex-Sheriff Joe Arpaio Wound Up Facing Jail Time before Trump Pardoned Him*, WASH. POST (Aug. 25, 2017), https://www.washingtonpost.com/news/true-crime/wp/2017/08/25/how-ex-sheriff-joe-arpaio-wound-up-facing-jail-time-before-trump-pardoned-him/?utm_term=.c61618111a24 (last visited Sept. 18, 2018) (discussing the history of the proceedings against Arpaio) (on file with the Washington and Lee Law Review).

157. Hirschfeld & Haberman, *supra* note 150.

message to his political base, who share Arpaio's immigration positions and consider him a hero.¹⁵⁸ But some analysts suggested that the pardon had a more targeted audience: reassuring sheriffs across the country who feared possible legal problems if they cooperate with federal immigration enforcement.¹⁵⁹ For immigrant advocates and others monitoring the 287(g) program, the pardon represented damning evidence of the administration's disdain for civil rights enforcement in the immigration law context.¹⁶⁰

IV. Conclusion

This Article has analyzed the differences, actual and expected, between the Trump administration's implementation of the 287(g) program and that of his predecessors. Those differences—the identification of more removable immigrants without criminal records, the use of more powerful agreement forms, and grave concerns about this administration's commitment to civil rights enforcement—have been analyzed separately and in some detail. But it is the combination of these policy differences that is powerful, providing a troubling picture of what the 287(g) program will look like under the Trump administration. In essence, the program will be a supercharged version of what operated under Presidents Bush or Obama, with few federal controls and little federal interest in those controls. The end result will be the magnification of the program's flaws as it operated in previous iterations, on a larger scale and reaching more jurisdictions.

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158. See David Z. Morris, *Trump, Playing to His Base, Pardons Anti-Immigrant Sheriff Joe Arpaio*, FORTUNE (Aug. 26, 2017), <http://fortune.com/2017/08/26/donald-trump-pardons-joe-arpaio/> (last visited Sept. 18, 2018) (reporting that Trump's pardon of Arpaio was aimed toward his core supporters) (on file with the Washington and Lee Law Review).

159. See Dara Lind, *Trump Just Pardoned the Infamous Anti-Immigrant Ex-Sheriff Joe Arpaio*, VOX (Aug. 25, 2017), <https://www.vox.com/policy-and-politics/2017/8/22/16151256/trump-pardon-arpaio> (last updated Aug. 25, 2017, 8:29 PM) (last visited Sept. 18, 2018) (highlighting the impact of Arpaio's pardon) (on file with the Washington and Lee Law Review).

160. See *id.* (“Arpaio was convicted of violating a judge's order by doing something the Trump administration's trying to pressure sheriffs around the country to do now.”).