

Kris W. Kobach

Professor of Law

University of Missouri (Kansas City) School of Law

April 2, 2009

Testimony on

“Public Safety and Civil Rights Implications of State and Local Enforcement
of Federal Immigration Laws”

Before the

House Committee on Judiciary

Subcommittee on Constitution, Civil Rights, and Civil Liberties

And

Subcommittee on Immigration, Citizenship, Refugee, Border Security, and International Law

Chair and Members of the Subcommittees, it is an honor and privilege to appear before you today to discuss a proven mechanism for securing our homeland and restoring the rule of law in immigration: Section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g). I was involved in overseeing the first two implementations of Section 287(g) by the U.S. Department of Justice during my service as Counsel to the U.S. Attorney General during 2001-2003. Those were Florida's Section 287(g) agreement, of 2002 and Alabama's Section 287(g) agreement in 2003, which was subsequently carried out by the Department of Homeland Security after the new Department took over immigration enforcement. I am also a Professor of Constitutional Law and Immigration Law at the University of Missouri (Kansas City). And finally, I should also note that I am Senior Counsel at the Immigration Reform Law Institute; and in that capacity I have litigated numerous immigration preemption cases in the various Circuits of the U.S. Courts of Appeals. As my university does not take official positions on legislation, I offer my testimony solely in my personal capacity.

Section 287(g) Authority Versus Inherent Arrest Authority

At the outset, it is important to define precisely the scope of the authority we are considering. Many observers have confused Section 287(g) authority, which represents a delegation of enforcement power from Congress to the states, with the narrower inherent arrest authority that the states have always possessed. A few brief comments clarifying this distinction may be useful.

The inherent authority of local police to make immigration arrests was recognized by the Justice Department's Office of Legal Counsel (OLC) and was announced by

Attorney General Ashcroft on June 6, 2002. OLC's unequivocal conclusion was that arresting aliens who have violated either criminal provisions of the Immigration and Nationality Act (INA) or civil provisions of the INA that render an alien deportable "is within the inherent authority of the states."¹ Such inherent arrest authority has never been preempted by Congress. This inherent authority is simply the power to arrest an illegal alien who is removable, detain the alien temporarily, and then transfer the alien to the custody of the Bureau of Immigration and Customs Enforcement (ICE).

In contrast, Section 287(g) delegates authority that is broader than the power to merely arrest an alien and transfer him to ICE custody. Section 287(g) encompasses the spectrum of basic enforcement powers. Such 287(g) authority includes not only the power to arrest and transfer, but also the power to investigate immigration violations, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved the routine enforcement of immigration laws. This broader enforcement authority can only be delegated to state and local law enforcement agencies through a formal Memorandum of Agreement (MOA), which effectively deputizes members of state or local law enforcement agencies to perform the "function[s] of an immigration officer." 8 U.S.C. § 1357(g). The state and local officers that exercise this authority do so only after receiving extensive immigration enforcement training at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia. The officers receive training in many areas, including the procedures of immigration investigations, the identification of fraudulent immigration documents, the use of national immigration databases, the

¹ ATTORNEY GENERAL'S REMARKS ON THE NATIONAL SECURITY ENTRY-EXIT REGISTRATION SYSTEM, June 6, 2002.

details of immigration law, identifying illegal aliens, and the avoidance of racial profiling. Once trained, the officers only exercise their Section 287(g) authority in a part-time capacity and only do so under the coordination of the Bureau of Immigration and Customs Enforcement (ICE).

Appropriately, Congress expressly recognized in 1996 that the creation of Section 287(g) would not displace the inherent arrest authority that local police might choose to exercise from time to time and without express delegation from the federal government:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –
(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10). I have published a law review article that extensively describes the legal distinctions between inherent arrest authority and Section 287(g) authority, and the legal bases for the former.² A copy of that article accompanies my testimony.

The Success of Section 287(g)

Section 287(g) was passed in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act, and is codified at 8 U.S.C. § 1357(g). The first jurisdiction to participate in the program was the state of Florida. The Florida MOA became effective on July 7, 2002. The success of the program was immediately apparent.

² Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALBANY L. REV. 179 (2006).

In the first year under the Florida MOA, after receiving training in federal immigration enforcement the trained Florida officers made 165 immigration arrests, including the bust of a phony document production ring in the Naples area. The second jurisdiction to utilize Section 287(g) was the state of Alabama. The Alabama MOA was signed on September 10, 2003.

At the time of this hearing, there are now 67 state, county, and local law enforcement agencies that have Section 287(g) MOAs in place. Those 67 jurisdictions have provided 951 law enforcement officers who have received Section 287(g) training. Another 42 agencies have requested Section 287(g) authority and are waiting to enter into an MOA. In just 25 of those 42 jurisdictions, there were approximately 43,000 immigration arrests of aliens in fiscal year 2008. Of those, ICE detained approximately 34,000. Most of those who were not detained were either issued notices to appear in immigration removal proceedings or were retained in state custody to be prosecuted for criminal offenses. Of those who were detained by ICE, approximately 14,000 (41 percent) were placed in removal proceedings and approximately 15,000 (44 percent) were given voluntary departure from the United States. The remaining 5,000 (15 percent) were either subsequently released during their removal proceedings for either humanitarian reasons or due to the lack of available ICE detention space, or were sent back to state custody to serve a sentence for a felony offense.³

In the absence of Section 287(g), it is likely that few, if any of those 43,000 immigration arrests would have occurred. Section 287(g) is a valuable force multiplier for an agency that is chronically overburdened. Currently there are an estimated 12

³ Statistics provided by ICE and reported by Richard Stana, U.S. Government Accountability Office, Testimony before the Committee on Homeland Security, House of Representatives, March 4, 2009, GAO-09-381T.

million illegal aliens in the United States, but 5,600 special agents in ICE. Most major cities have more police officers than that. New York City alone has approximately 37,000 police officers. The 951 state, county, and local officers that assist ICE through Section 287(g)—even if only part-time in that capacity—provide a massive amount of assistance to ICE. To curtail or eliminate the Section 287(g) program would radically weaken immigration law enforcement in the United States at time when 12.5 million Americans are unemployed and competing with illegal foreign labor to find a job.

The Many Purposes of Section 287(g): Targeting Different Problems in Different Jurisdictions

A myth has arisen recently concerning Section 287(g). That myth holds that the program has only one purpose, and that purpose is to arrest illegal aliens who have committed serious felonies in addition to their violations of federal immigration law. The myth has been perpetuated by observers who are evidently unaware of the history of the program’s implementation by the executive branch. The myth was also inadvertently perpetuated in March 2009, when a U.S. Government Accountability Office (GAO) witness repeated the statements of others that the program was intended to address “serious criminal activity committed by removable aliens,” but then reported his personal disappointment that “program objectives have not been documented in any program-related materials” and “ICE has not consistently articulated in program-related documents how participating agencies are to use their 287(g) authority.”⁴

⁴ *Id.* at p. 3. The GAO witness stated that unnamed ICE officials had stated the objective of addressing serious criminal activity. That is to be expected from ICE officials supervising a Section 287(g) agreement with a jurisdiction that has that particular objective. But other objectives exist in other jurisdictions. ICE officials in those jurisdictions would likely iterate different objectives.

The reason that ICE has not consistently articulated one and only one program objective is that *there are multiple objectives to the program*, and in each jurisdiction the program serves different needs. It never has been a one-size-fits-all program. Nor should it be. Section 287(g) is a program that respects federalism in that it treats the state jurisdiction as a fellow sovereign entering into an agreement that serves the mutual interests of both sovereign entities entering into the MOA.

It must be made clear that neither the statutory language of Section 287(g), nor the language of any of the committee reports on this legislation in 1996 contains any such limitation on its scope. As the Senate Judiciary Committee Report stated in full, the section “[a]uthorizes the Attorney General to enter into written agreements with a State, or any political subdivision of a State, to permit specially trained State officers to arrest and detain aliens.”⁵ The Conference Committee Report contained similarly broad language, with absolutely no limitation whatsoever on the purposes for which such authority could be exercised. State or local officers would be designated “to perform immigration enforcement functions pertaining to the investigation, apprehension, or detention of aliens unlawfully in the United States, including the transportation of aliens across State lines to detention centers.”⁶ As noted above, the Department of Justice implemented this program for the first time in 2002, and then again in 2003. For the Department of Justice to have imposed limitations on the scope of this program, other than those limitations found in the law itself or in the committee reports, would have been inappropriate and potentially inconsistent with congressional intent.

⁵ Committee Report 104-249, p. 20 (April 10, 1996).

⁶ Conference Report 104-828, p. 203 (Sept. 24, 1996).

Accordingly, the Department of Justice implemented Section 287(g) consistently with the broad terms of the statute, recognizing that law enforcement environments differ from state to state and county to county. We also recognized that different jurisdictions would have different needs. The first two jurisdictions are instructive, because in neither case the arrest of illegal aliens engaged in serious criminal activity the driving motivation behind the MOA. There are at least six distinct purposes that Section 287(g) MOAs have accomplished: (1) addressing terrorism-related concerns, (2) compensating for a lack of federal immigration enforcement personnel within a jurisdiction, (3) removing convicted alien criminals after completion of their prison sentences, (4) dealing with dangerous illegal alien criminals, such as gang members, (5) restoring the rule of law generally in an area with unusually high levels of illegal immigration, and (6) protecting unemployed U.S. citizens from competition with illegal alien labor. I will describe each of these in turn.

(1) Addressing Terrorism-Related Concerns

Take the case of Florida first. Florida's initial interest in seeking a Section 287(g) agreement was driven chiefly by the exigencies of 9/11 and the recognition that state and local law enforcement can increase their effectiveness in the war against terrorism with the addition of Section 287(g) enforcement authority. State and local police officers are often in the best position to come into contact with alien terrorists operating in the United States. Four members of the 9/11 terrorist cohort were stopped by state and local law enforcement in the United States for routine traffic violations. In all four of those instances, the aliens were illegally present in the United States.⁷ Several of the 9/11

⁷ The four hijackers who were stopped by local police were Nawaf al Hazmi, Mohammed Atta, Hani Hanjour, and Ziad Jarrah. See attached article, Kris W. Kobach, *The Quintessential Force Multiplier: The*

hijackers had either entered the United States through Florida or had operated in Florida while preparing for the attack. The suspected twentieth hijacker, Mohamed Al Khatani, also flew to Orlando International Airport; but he was denied entry by a vigilant immigration inspector. Accordingly, the desire to counter alien terrorists was central to the Florida MOA at the time of its inception. Florida would later broaden its focus to illegal document production and alien smuggling enterprises.

(2) Compensating for a Lack of Federal Immigration Enforcement Personnel

In contrast, Alabama faced a different challenge. Alabama's Section 287(g) agreement was intended to address the fact that Alabama had been underserved by federal immigration authorities. At times, as few as three INS interior enforcement agents had been attempting to cover the entire state. At the same time, Alabama had experienced widespread and increasing violations of federal immigration law by aliens in its jurisdiction. This lack of federal manpower left Alabama underserved, in the judgment of Alabama's law enforcement leadership and members of its congressional delegation. Alabama addressed the manpower shortage by committing its own officers to the task and seeking a Section 287(g) agreement.

(3) Removing Alien Criminals After Completion of Prison Sentences

Another need that Section 287(g) agreements have been utilized to address numerous jurisdictions the fact that many removable felons incarcerated in state prison systems across the country are not removed from the country once their sentences are served. ICE's institutional removal program is intended to identify and take custody of such felons before they are released. Unfortunately, the program does not cover every

Inherent Authority of Local Police to Make Immigration Arrests, 69 ALBANY L. REV. 179 (2006), at pp. 183-88 for detailed descriptions of these incidents.

institution, and many felons slip through the cracks. Training state law enforcement officers to screen incarcerated felons and determine which ones are removable serves to fill in the gaps and ensure that criminals who are not entitled to remain in the United States are, in fact, removed.

(4) Dealing with Dangerous Illegal Alien Criminals, such as Gang Members

Perhaps the greatest law enforcement threat of recent years is the rise of violent alien street gangs. A few statistics illustrate the scope of the problem. Mara Salvatrucha-13 (MS-13), the most notorious and fastest-growing alien gang, started as a Salvadoran gang in Los Angeles in the late 1980s. MS-13's more than 10,000 members now operate in at least 33 states. The gang also has various affiliated gangs that operate under different names. In virtually all of the MS-13 and affiliated gangs, the majority of gang members are *illegal* aliens. This due to two factors: many gang members enter the United States without inspection after joining the gang outside of the United States; and MS-13 actively recruits new members within the United States by targeting young men and boys who are unlawfully present in the United States and lack a social support network. These gangs generate cash in different ways in different parts of the country. But by far, the most common forms of activity are drug trafficking, theft, gun trafficking and immigrant smuggling. Wherever MS-13 establishes a presence, the number of murders and the level of gang violence inevitably rises dramatically.

Because so many of these gang members are aliens without lawful presence in the United States, sustained enforcement of immigration laws can have a massive impact in fighting this national scourge. Section 287(g) authority can be particularly useful in dealing with alien street gangs. Every day, police officers in gang-ridden jurisdictions

encounter alien gang members who are known to have been previously deported or who are suspected of being unlawfully present in the United States. Section 287(g) authority enables those jurisdictions to continuously and routinely remove those illegally-present gang members from the streets of our communities. With police officers trained in immigration enforcement, the checking of gang members' names against national databases and the enquiring into immigration violations is done locally, quickly, and regularly.

(5) Restoring the Rule of Law Generally in Areas of High Illegal Immigration

As the members of this Committee are well aware, there are certain states and communities that have endured an extraordinary amount of illegal immigration, along with the fiscal burdens, criminal activity, and social dislocation that accompany such high levels of illegal immigration. Arizona is one of those states. Maricopa County, Arizona, in particular is one of those communities. In 2008, 368 abductions were reported in Phoenix; and the majority of those cases were associated with illegal alien smuggling operations or other criminal enterprises involving illegal aliens. The fiscal burden on the state has been debilitating. In 2007, it was estimated that the total cost of providing public services to the state's estimated 475,000 illegal aliens was approximately \$1.3 billion a year.⁸ In many respects, this burden is akin to an unfunded federal mandate.

In response, state and local jurisdictions in Arizona have employed a variety of measures to reduce illegal immigration into the state. At the state level, the state implemented a law requiring employers to use E-Verify—a law that was recently sustained by the Ninth Circuit U.S. Court of Appeals. And at the county level, Maricopa

⁸ Arizona: Illegal Aliens, Federation of American Immigration Report (2007), available at http://www.fairus.org/site/PageServer?pagename=research_research82b2.

County has had 160 officers receive immigration enforcement training under its Section 287(g) agreement. In the last year, these efforts have begun to make an impact. Thousands of illegal aliens have self-deported out of Arizona.⁹ That progress would not have been as great without Maricopa County's Section 287(g) program. It clearly demonstrated that when federal, state, and county units of government cooperate, illegal immigration can be dramatically reduced.

(6) Protecting Unemployed U.S. Citizens

The final purpose that Section 287(g) achieves in many jurisdictions is the removal of unauthorized aliens who are occupying jobs that would otherwise go to U.S. citizens or to aliens authorized for employment in the United States. This objective is served in Maricopa County as well. With the unemployment rate of U.S. citizens in February 2009 at 8.1 percent and climbing, this is a purpose that is becoming more crucial with each passing day. This Congress has done much in an attempt to create jobs one or two years in the future. Removing unauthorized alien employees from the United States creates jobs for U.S. citizens the very next day.

Conclusion

Section 287(g) is a program that has dramatically improved the rule of law in the immigration arena. It has provided vital support to an agency that has been chronically undermanned for decades. The Department of Justice originally, and the Department of Homeland Security now, have recognized the extraordinary value of this program. The Departments have also recognized that one-size-fits-all is the wrong approach. Each

⁹ Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 *Tulsa J. of Comp. & Int'l Law* 155 (2008).

287(g) MOA is different, so that it meets the particular law enforcement needs of the jurisdiction in question. For Congress to attempt to put this program in a straightjacket would undercut the very flexibility that makes it so useful. For Congress to scale the program back or limit its scope would send a clear message that rigorous enforcement of our nation's immigration laws is not a congressional priority. Even worse, to do so at this time of economic crisis would be grave disservice to the millions of unemployed U.S. citizens who are struggling to put food on the table, but finding that competition with unauthorized alien labor prevents them from doing so.