



# Interior Immigration Enforcement: Programs Targeting Criminal Aliens

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## Summary

Congress has a long-standing interest in seeing that immigration enforcement agencies identify and deport criminal aliens. The expeditious removal of such aliens has been a statutory priority since 1986, and the Department of Homeland Security (DHS) and its predecessor agency have operated programs targeting criminal aliens for removal since 1988. These programs have grown substantially since FY2005.

Despite the interest in criminal aliens, inconsistencies in data quality, data collection, and definitions make it impossible to precisely enumerate the criminal alien population, defined in this report as all noncitizens ever convicted of a crime. CRS estimates the number of noncitizens incarcerated in federal and state prisons and local jails—a subset of all criminal aliens—at 173,000 in 2009 (the most recent year for which complete data are available), with state prisons and local jails each accounting for somewhat more incarcerations than federal prisons. The overall proportion of noncitizens in federal and state prisons and local jails corresponds closely to the proportion of noncitizens in the total U.S. population.

DHS operates four programs designed in whole or in part to target criminal aliens: the Criminal Alien Program (CAP), Secure Communities, the §287(g) program, and the National Fugitive Operations Program (NFOP). The CAP, Secure Communities, and certain §287(g) programs are jail enforcement programs that screen individuals for immigration-related violations as they are being booked into jail and while they are incarcerated; the NFOP and some §287(g) programs are task force programs that target at-large criminal aliens. This report describes how these programs work and identifies their common features and key differences among them.

While consensus exists on the overarching goal to identify and remove serious criminal aliens, these programs have generated controversy, particularly Secure Communities and the §287(g) program. On one hand, the Obama Administration and other supporters of jail enforcement programs see them as efficient and even-handed ways to identify criminal aliens. The Administration has taken steps to strengthen and expand Secure Communities and plans to implement the program in every law enforcement jurisdiction in the country by the end of 2013. On the other hand, some lawmakers and advocacy groups have raised concerns that Secure Communities and the §287(g) program have not been narrowly targeted at serious criminal offenders and that the programs may have adverse impacts on police-community relations, may result in racial profiling, and may result in the detention of people who have not been convicted of criminal offenses and/or may not be subject to removal.

Disagreements about the merits of jail enforcement programs overlap with a separate set of questions about the role of states and localities in immigration enforcement. These jurisdictional questions have focused in particular on Secure Communities, in part because the Obama Administration initially appeared to present it as a discretionary program but now takes the position that states and localities may not “opt out” of Secure Communities.

Legislative issues related to Secure Communities and other ICE programs that Congress may consider include clarifying the role of state and local law enforcement agencies in immigration enforcement, the Obama Administration’s exercise of prosecutorial discretion, mandating new data collection in response to concerns over racial profiling at the state and local levels, and clarifying the statutory authority for states and localities to detain unauthorized aliens.

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## **Introduction**

Congress has a long-standing interest in the criminal alien population and has supported efforts since the late 1980s to identify, detain, and remove these individuals. The Department of Homeland Security's (DHS) Immigration and Customs Enforcement (ICE) agency operates four key programs to address this population. The Criminal Alien Program (CAP) is a screening program that identifies, detains, and initiates removal proceedings against criminal aliens, including within federal, state, and local prisons and jails. Secure Communities is an information sharing program between the Departments of Justice and Homeland Security that screens for removable aliens as people are being booked into jails. Agreements entered into pursuant to Immigration and Nationality Act (INA) §287(g) ("§287(g) agreements") allow DHS to delegate certain immigration enforcement functions to specially trained state and local law enforcement officers, under federal supervision. The National Fugitive Operations Program (NFOP) pursues known at-large criminal aliens and fugitive aliens.

Funding for programs targeting criminal aliens has expanded considerably since FY2005, as has the number of aliens arrested through them. Congress appropriated a total of about \$608 million to ICE for these four programs in FY2012, up from \$23 million in FY2004. At the same time, the number of aliens arrested through programs targeting criminal aliens increased from about 11,000 to over 293,000 in FY2011 (the latest year for which data are available).

While Congress has targeted funding for the removal of criminal aliens, the majority of unauthorized aliens in the United States have not been convicted of a crime. Some have criticized programs designed to remove criminal aliens because these programs have also identified removable aliens who have no criminal record or have committed only nonviolent crimes. Others note, however, that all removable aliens have violated U.S. law.

Partly for these reasons, the continued growth of programs targeting criminal aliens raises a number of potential issues for Congress, including questions about whether and how DHS should exercise prosecutorial discretion in executing such programs, the role of state and local law enforcement agencies in immigration enforcement and whether they can "opt out" of certain federal enforcement programs, whether Congress should take steps to guard against racial profiling and other adverse consequences that may be associated with programs targeting criminal aliens, and possible legislation governing DHS's use of immigration detainers to request that state and local law enforcement agencies hold immigrants until they can be placed in removal proceedings.

This report begins by defining and quantifying the criminal alien population, to the extent possible. The following sections describe current and historical programs designed in whole or in part to target this population, including CAP, Secure Communities, the §287(g) program, and NFOP. After describing how these programs function and key differences among them, the report reviews their recent appropriations history and enforcement statistics.

The final sections of the report describe the controversies surrounding certain programs targeting criminal aliens—particularly the Secure Communities program and the §287(g) program—and legislative issues that may arise as a result. On one hand, these programs are seen as highly efficient and even-handed ways to identify criminal aliens who may be removable, and DHS has

taken steps to strengthen and expand Secure Communities and other enforcement programs based within jails and prisons. On the other hand, critics of Secure Communities and related programs have argued that the programs are not sufficiently focused on serious criminal aliens, and that they may damage police-community relations, may result in racial profiling, and may result in the wrongful incarceration of people who have not been convicted of criminal offenses. These concerns have contributed to a separate set of questions about whether or not states and localities may refuse to participate or limit their participation in DHS's jail enforcement efforts.

## Defining “Criminal Aliens”

For over a century, U.S. immigration law has identified certain crimes that make an alien ineligible for admission to the United States and/or subject to deportation.<sup>1</sup> Such crimes include crimes of “moral turpitude,” crimes involving controlled substances, certain firearm offenses, and crimes related to espionage, sabotage, and related offenses.<sup>2</sup> Yet the term “criminal alien” is not specifically defined in immigration law or regulation, and people use it to refer to several different types of noncitizen offenders.<sup>3</sup> At the broadest level, a “*criminal alien*” is any noncitizen who has ever been convicted of a crime in the United States. This report adopts this broad definition unless otherwise noted. See **Appendix A** for a glossary of additional terms related to the criminal alien population.

Not all criminal aliens are unauthorized or removable, and some removable aliens are not criminals (see **Figure 1**).<sup>4</sup> Three groups of criminal aliens can be distinguished. First, the set of *all criminal aliens* includes both unauthorized aliens,<sup>5</sup> all of whom are potentially removable, and legal aliens,<sup>6</sup> who may or may not be removable depending on specific crimes committed. Second, a subset of *criminal aliens convicted of removable criminal offenses* are subject to

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<sup>1</sup> The Immigration Act of 1917 (P.L. 64-301) and subsequent legislation made certain inadmissible aliens subject to “exclusion” and certain aliens within the United States subject to “deportation.” Pursuant to §§301-309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, P.L. 104-208, Div. C), deportation and exclusion proceedings were combined into a unified “removal” proceeding. This report uses “deportation” to refer to such enforcement prior to the 1997 implementation of IIRIRA and “removal” to refer to such enforcement since 1997.

<sup>2</sup> Whether a crime involves moral turpitude has been determined by judicial and administrative case law rather than a statutory definition. In general, if a crime manifests an element of baseness or depravity under current mores it involves moral turpitude. See CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>3</sup> Noncitizens include permanent immigrants (i.e., aliens admitted as legal permanent residents (LPRs), or “green card” holders), legal nonimmigrants (i.e., aliens admitted on temporary visas), and unauthorized aliens (i.e., aliens who enter without an inspection or overstay a temporary visa).

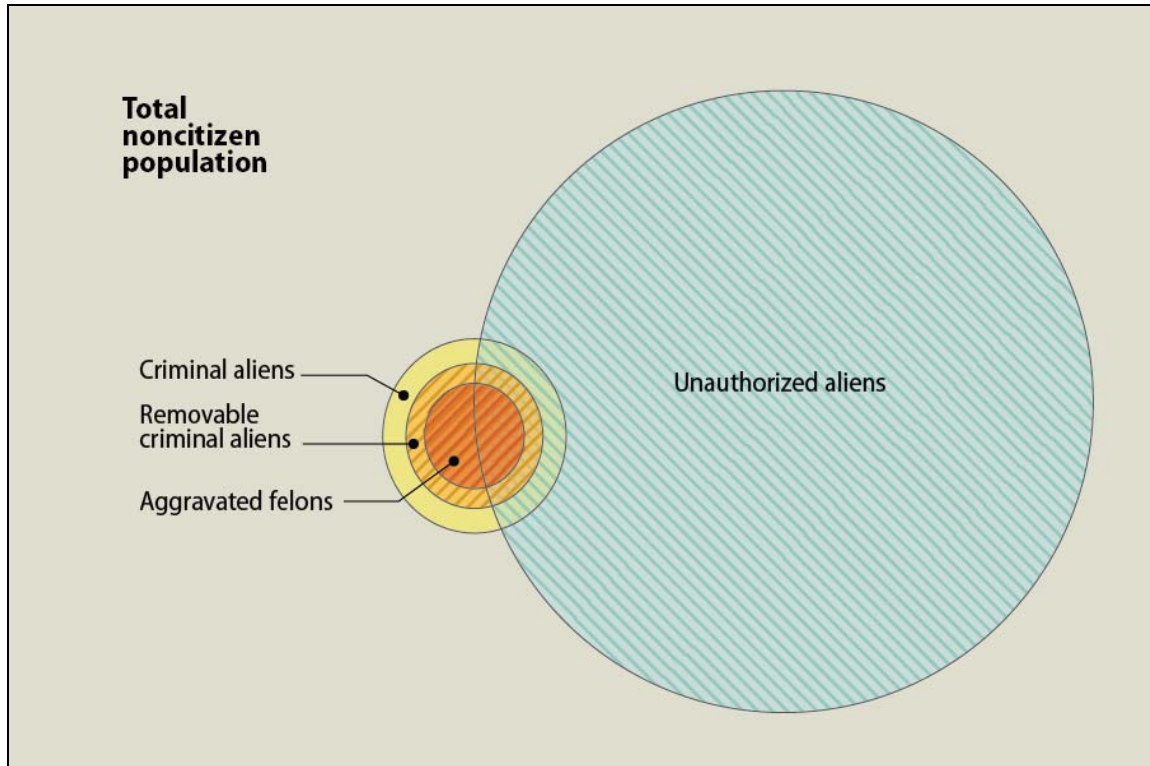
<sup>4</sup> Estimates of the unauthorized resident alien population in the United States range from 10.8 to 11.5 million in 2011; see CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem. By comparison, the CRS estimate of the criminal alien population in jails and prisons computed in this report was 173,000 in 2009 (the latest year for which complete data are available); see “Quantifying the Criminal Alien Population” in this report. Nationally, incarcerated persons represent roughly one-third of the total correctional population, with persons on probation and parole comprising the other two-thirds; see footnote 39. Assuming the same ratio applies to foreign-born criminals, the estimated total foreign-born correctional population would be 519,000. This estimate includes legal and unauthorized immigrants, and does not include aliens previously convicted of crimes who have already completed their criminal sentences. Also see “Other Estimates of the Criminal Alien Population” in his report.

<sup>5</sup> Unauthorized aliens are foreign nationals who have entered the United States without inspection or with fraudulent documents, or who overstayed a nonimmigrant visa.

<sup>6</sup> Legal aliens include immigrants who are aliens admitted as legal permanent residents (LPRs) and nonimmigrants who are aliens admitted on temporary visas, including tourists, temporary workers, and foreign students.

removal under the INA even if they are otherwise legally present.<sup>7</sup> For example, a legal permanent resident (LPR) convicted of public intoxication is not subject to removal, but an LPR convicted of cocaine possession is subject to removal.<sup>8</sup> Third, a subset of these removable criminal aliens, *aggravated felons*,<sup>9</sup> are also ineligible for most forms of relief from removal and ineligible to be readmitted to the United States.<sup>10</sup>

**Figure 1. Criminal and Unauthorized Aliens**



**Source:** CRS analysis of the Immigration and Nationality Act.

**Notes:** Figure 1 is roughly to scale and illustrates that there are more unauthorized aliens than criminal aliens. Given current data constraints, CRS is unable to approximate what share of criminal aliens is unauthorized. All aliens in areas with hash lines are subject to removal.

As **Figure 1** illustrates, all unauthorized aliens are potentially removable, indicated by cross-hatches in the figure, but the majority of them have not been convicted of a crime and are therefore not classified as criminal aliens.<sup>11</sup> (Unlawful presence in the United States absent

<sup>7</sup> Section 237(a)(2) of the Immigration and Nationality Act (8 U.S.C. §1227 (a)(2)) enumerates a list of criminal offenses that make aliens subject to removal. Criminal offenses in the context of immigration law cover violations of federal, state, or, in some cases, foreign criminal law. See CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>8</sup> 8 U.S.C. §1227(a)(2)(B)(i).

<sup>9</sup> Aggravated felonies refer to a class of serious criminal alien offenses created per §101(a)(43) of the INA and include murder, drug trafficking, or illegal trafficking in firearms or destructive devices. Subsequent measures passed by Congress expanded the definition of aggravated felonies and created additional criminal grounds for removal.

<sup>10</sup> For a more exhaustive discussion, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>11</sup> See footnote 4.

additional factors is a civil violation, not a criminal offense.<sup>12</sup>) The smaller circles in **Figure 1** illustrate that some criminal aliens are removable on the basis of the specific crimes committed, and some are also unauthorized.

## Quantifying the Criminal Alien Population

This section presents publicly available arrest and incarceration data for criminal aliens at the federal, state, and local levels from 2001 through 2010.<sup>13</sup> Following CRS’s quantification of the criminal alien population, the section reviews other studies that produced comparable estimates. **Appendix B** describes related data issues in greater detail.

### Federal-Level Arrest Data

**Table 1** presents data from the Department of Justice (DOJ), Bureau of Justice Statistics (BJS) on the number and percentage of persons arrested for federal offenses, by citizenship status, for 2001, 2005, and 2010. Of the 179,489 persons arrested for federal offenses in 2010, 46% were not U.S. citizens and 16% had unknown citizenship status. The data in **Table 1** also indicate that the proportion of noncitizens arrested for federal offenses increased across the period analyzed.

**Table 1. Persons Arrested for Federal Offenses, by Legal Status, 2001, 2005, and 2010**

	Number of Persons			Percent of Total		
	2001	2005	2010	2001	2005	2010
U.S. Citizen	68,200	74,985	68,432	57%	53%	38%
Noncitizen	41,499	56,492	83,024	35%	40%	46%
Status unknown	9,197	8,723	28,033	8%	6%	16%
Total records	118,896	140,200	179,489	100%	100%	100%

**Source:** Bureau of Justice Statistics, Federal Justice Statistics Program website, <http://bjs.ojp.usdoj.gov/fjsrcl/>.

**Notes:** Data do not distinguish between legal noncitizens such as LPRs and unauthorized aliens.

Most noncitizen federal arrests between 2001 and 2010 were for illegal entry. As **Figure 2** illustrates, while federal arrests with *known* citizenship information increased 42%, from 109,699 to 151,456, during this period, noncitizen arrests for illegal entry—which increased noticeably after 2003—accounted for virtually all of this increase.<sup>14</sup> Noncitizen arrests for all other federal offenses accounted for a declining share of all federal arrests, from 19% in 2001 to 5% in 2010.<sup>15</sup>

<sup>12</sup> Unlawful presence is only a criminal offense when an alien is found in the United States after having been formally removed or after departing the U.S. while a removal order was outstanding; see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>13</sup> Individuals housed by Immigration and Customs Enforcement (ICE) are beyond the scope of this report because they are not officially part of the U.S. criminal justice system. This report also does not present data on convictions.

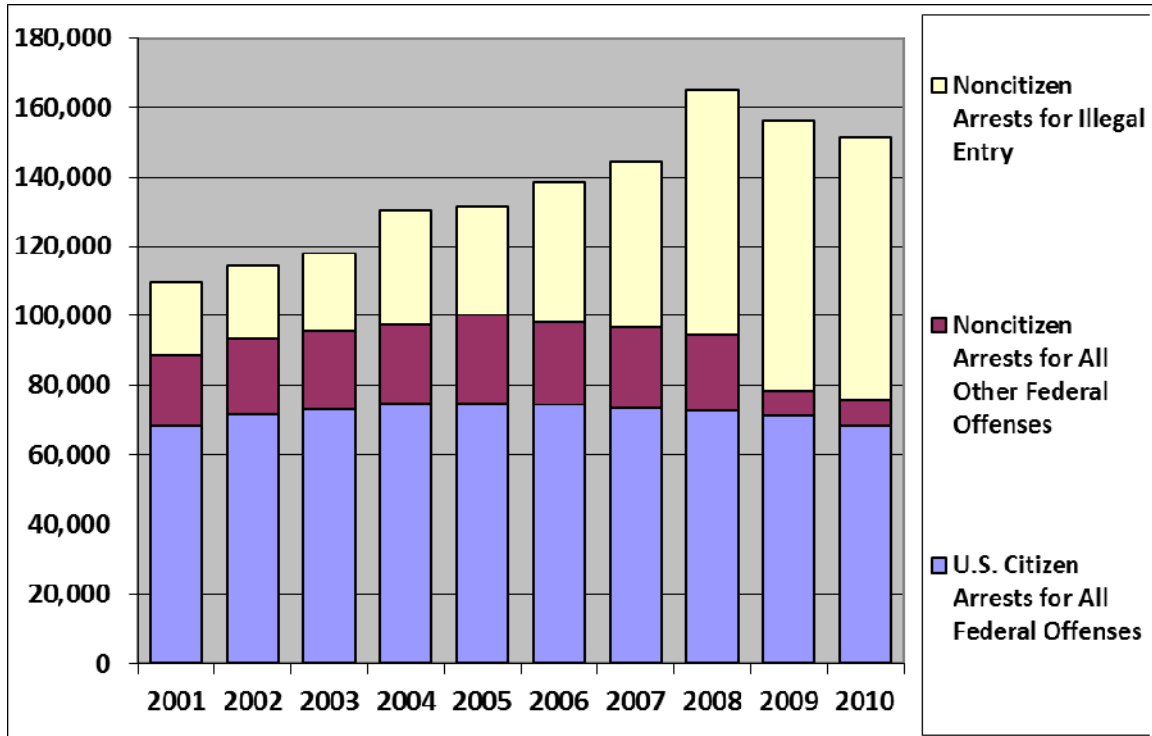
<sup>14</sup> Because **Figure 2** does not include “status unknown” cases, figures cited in this section of the text differ from figures presented in **Table 1**.

<sup>15</sup> According to BJS analysts, the transition by the U.S. Marshals Service to a new prisoner tracking system beginning in 2008 temporarily increased the number of cases with unreported offense types.



The growth of illegal entry cases caused arrests of U.S. citizens to account for a declining share of all federal arrests (from 62% in 2001 to 45% in 2010).

**Figure 2. Federal Arrests by Citizenship Status and Type of Offense, 2001-2010**



**Source:** Prisoner Tracking System, U.S. Marshals Service, as reported to the Bureau of Justice Statistics, Federal Justice Statistics Program website, <http://bjs.ojp.usdoj.gov/fjsrcl/>.

**Notes:** Data presented are only for cases with known citizenship status. Changes in recording procedures in 2008 resulted in a disproportionately high number of cases with missing information in 2009 and 2010. Data do not distinguish between legally present noncitizens, such as legal permanent residents, and the unauthorized alien population. Although persons arrested may have committed more than one federal offense, only the most severe offense is presented by the Bureau of Justice Statistics.

These trends may reflect changes in enforcement and prosecution policies rather than increased noncitizen criminality. The number of Border Patrol apprehensions has always far exceeded the number of arrests for illegal entry,<sup>16</sup> and DHS and DOJ have adopted policies to seek criminal charges against a higher proportion of such aliens, particularly since 2005 through Operation Streamline and related programs.<sup>17</sup> Increased Border Patrol appropriations during this period may also have resulted in a higher proportion of illegal border crossers being apprehended, and thus a

<sup>16</sup> According to CRS's analysis of DHS data, the Border Patrol apprehended an average of 921,000 removable aliens per year during these years, most of whom could be charged with illegal entry, though this figure (like BJS arrest data) includes multiple observations of the same individuals; see Office of Immigration Statistics, *Yearbook of Immigration Statistics FY2011*, Washington, DC, 2012, p. 95.

<sup>17</sup> Operation Streamline is a joint DOJ-DHS program to expedite criminal processing for unauthorized aliens in certain border districts so that a higher proportion face criminal charges; see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Marc R. Rosenblum.

relatively larger pool of aliens who may be charged with illegal entry, though the total number of border apprehensions has fallen sharply since 2005.<sup>18</sup>

## **Federal, State, and Local Incarceration Data**

Incarceration represents a second measure of the criminal alien population. **Table 2** presents CRS tabulations of the total citizen and noncitizen prison and jail populations publicly reported by the Bureau of Justice Statistics for 2001 through 2009 and partly through 2010. Estimates of state and, especially, local incarcerated populations should be interpreted with caution for the reasons noted in **Appendix B**. As of June 30, 2009, however, a total of 2,353,855 prisoners (U.S. citizens and noncitizens) were incarcerated: 209,771 in federal prisons, 1,395,356 in state prisons, and 748,728 in local jails (**Table 2**).<sup>19</sup>

According to BJS data presented in **Table 2**, noncitizens comprised 7.2% of the combined federal, state, and local prisoner population in 2009 (the most recent year for which complete noncitizen data are available), including 23.6% of the federal prison population, 4.5% of the state prison population, and 7.8% of the local jail population. As a basis for comparison, noncitizens comprised 7.1% of the U.S. population in FY2009.<sup>20</sup>

The overall noncitizen proportion of the total prisoner population increased from 6.4% in 2001, with most of the change reflecting the growth of the noncitizen population in local jails. Indeed, the noncitizen proportion of federal prisoners actually declined between 2001 and 2009 (from 25.2% to 23.6%), as total federal incarcerations increased at a faster rate than noncitizen federal incarcerations.<sup>21</sup> The noncitizens proportion of state prisoners increased slightly, growing from 4.3% of the total state-level incarcerated population in 2001 to 4.5% in 2009.<sup>22</sup> And the proportion of noncitizens among those incarcerated in local jails increased substantially, from 6.1% in 2001 to 7.8% in 2009, as the growth rate of noncitizens in local jails far exceeded the native-born growth rate in such institutions.<sup>23</sup>

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<sup>18</sup> Appropriations for the Border Patrol increased by 191%, from \$1.1 billion in FY2000 to \$3.6 billion in FY2010. The 20,558 CBP agents as of September 30, 2010, represented a more than doubling of staff over that decade; see CRS Report R41189, *Homeland Security Department: FY2011 Appropriations*, coordinated by Jennifer E. Lake and William L. Painter. Increased border enforcement also may have a deterrent effect on would-be border crossers.

<sup>19</sup> All incarcerations for 2010 are as of midyear. See notes to **Table 2**.

<sup>20</sup> CRS analysis of 2008 American Community Survey data.

<sup>21</sup> Noncitizen federal incarcerations increased 33.1% (from 36,625 to 48,740) between 2001 and 2009, as total federal incarcerations increased 42.1% (from 145,416 to 206,577); see **Table 2**.

<sup>22</sup> Noncitizen state incarcerations increased 19.5% (from 54,031 to 64,053) between 2001 and 2009, as total state incarcerations increased 13.1% (from 1.2 million to 1.4 million); see **Table 2**.

<sup>23</sup> Noncitizen local jail incarcerations increased 55.5% (from 38,558 to 59,973) between 2001 and 2009 as total local jail incarcerations increased 21.6% (from 631,240 to 767,434); see **Table 2**.

**Table 2. Total and Noncitizen Incarcerated Population, Federal and State Prisons and Local Jails, 2001-2010**

	Total Incarcerated Population				Noncitizen Incarcerated Population				Proportion of Noncitizen to Total Incarcerated Population			
	Total	Federal Prisons	State Prisons	Local Jails	Total	Federal Prisons	State Prisons	Local Jails	Total	Federal Prisons	State Prisons	Local Jails
2001	2,022,501	145,416	1,245,845	631,240	129,214	36,625	54,031	38,558	6.4%	25.2%	4.3%	6.1%
2002	2,069,507	156,993	1,247,039	665,475	140,772	38,927	54,804	47,041	6.8%	24.8%	4.4%	7.1%
2003	2,131,445	163,528	1,276,616	691,301	141,253	40,051	56,112	45,090	6.6%	24.5%	4.4%	6.5%
2004	2,182,591	173,059	1,295,542	713,990	147,481	42,232	57,393	47,856	6.8%	24.4%	4.4%	6.7%
2005	2,244,629	180,328	1,316,772	747,529	142,170	42,803	55,804	43,563	6.3%	23.7%	4.2%	5.8%
2006	2,293,748	187,618	1,340,311	765,819	155,315	44,323	57,352	53,640	6.8%	23.6%	4.3%	7.0%
2007	2,350,119	193,046	1,376,899	780,174	160,583	44,734	55,766	60,083	6.8%	23.2%	4.1%	7.7%
2008	2,383,778	199,618	1,398,627	785,533	163,774	45,756	64,687	53,331	6.9%	22.9%	4.6%	6.8%
2009	2,384,912	206,577	1,410,901	767,434	172,766	48,740	64,053	59,973	7.2%	23.6%	4.5%	7.8%
2010	2,353,855	209,771	1,395,356	748,728	N/A	47,569	N/A	N/A	N/A	22.7%	N/A	N/A

**Sources:** Total federal and state prison population figures: BJS, *Prison Inmates at Midyear 2009-Statistical Tables* report, Table 1; Noncitizen federal prison figures: BJS Federal Criminal Case Processing Statistics online, <http://bjs.ojp.usdoj.gov/fjsrcl/>; Noncitizen state prison figures: BJS National Prison Statistics (NPS) program reported in *Sourcebook of Criminal Justice Statistics, 2009, Table 6.42.2009*; Total local jail figures: BJS *Jail Inmates at Midyear 2010-Statistical Tables* report, Table 1. Local jails' number of noncitizens are derived by CRS from data on the proportion of noncitizens to total number of inmates presented in the *Jail Inmates at Midyear 2007* report online, <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim07.pdf>, for 2001 through 2007 and computed by CRS using the *Annual Survey of Jails* microdata files downloaded from ICPSR's website, <http://www.icpsr.org>, for 2008 and 2009.

**Notes:** Federal and state total prison population figures and federal noncitizen population figures are measures of the incarcerated population as of December 31 of each year—except for 2010, which are measures of the incarcerated population as of June 30. They include inmates under jurisdiction of federal or state prisons or in the custody of federal or state prisons or local jails. (Jurisdiction refers to prisoners under the legal authority of state and federal correctional officials, regardless of where a prisoner is held. Custody refers to the number of inmates held in state or federal prisons or local jails, regardless of sentence length or the authority having jurisdiction.) State noncitizen prison and local jail population figures are measures of the incarcerated population as of June 30 for each year. Because total counts of noncitizens in local jails are not available for many reporting local jurisdictions, CRS imputed the noncitizen local jail figures by multiplying the total local jails figures by the percentages of noncitizens in local jails obtained from the *Annual Survey of Jails* (noted in sources above). In 2008, the difference between mid-year and end-year figures at both the federal and state levels was less than 0.1%. As of December 11, 2012, figures shown in Table 2 for the noncitizen incarcerated population were the most current available.

**Table 3** illustrates the types of crimes for which apprehended criminals were sentenced to federal prison in 2001, 2005, and 2010. It presents data from the U.S. Sentencing Commission by citizenship status and grouped into three categories: violent crimes, nonviolent crimes, and immigration crimes. The data indicate that for all three years shown, violent crimes made up less than 1% of all crimes committed by criminal aliens, compared to 5%-6% of all crimes committed by citizens. For noncitizens, immigration crimes grew as a proportion of total federal offenses for which they received sentences, increasing from 47.3% of all crimes in 2001 to 69.4% by 2010. For citizens, by contrast, immigration crimes made up less than 5% of all crimes for citizens in any of the three years shown. Moreover, the citizen proportion of crime categories changed relatively little over the three years shown.

**Table 3. Offense Category of Sentenced Offenders, by Citizenship, 2001-2010**

	2001		2005		2010	
	Citizen	Noncitizen	Citizen	Noncitizen	Citizen	Noncitizen
Violent crimes	6.3%	0.5%	5.4%	0.5%	5.0%	0.4%
Nonviolent crimes	91.2%	52.2%	90.6%	39.4%	91.6%	30.2%
Immigration crimes	2.6%	47.3%	4.1%	60.1%	3.4%	69.4%
Total	100%	100%	100%	100%	100.0%	100.0%

**Source:** CRS analysis of data from the 2001, 2005, and 2010 *Sourcebook of Federal Sentencing Statistics*, Table 9, United States Sentencing Commission.

**Notes:** Violent crimes include murder, manslaughter, kidnapping, sexual abuse, assault, robbery, and arson. Immigration crimes include alien smuggling, unlawful entering or remaining in the United States, trafficking in immigration documents or making false or fraudulent immigration statements, and acquiring fraudulent immigration documents. Nonviolent crimes refer to all other offenses.

## Estimates from the American Community Survey

The U.S. Census American Community Survey (ACS) represents an additional source of information that can be used to corroborate CRS’s computations of the criminal alien population. The ACS is conducted continuously and yields annual estimates on the size and characteristics of the U.S. population, including a measurement of persons living in institutions, or “group quarters,” which includes correctional facilities as well as juvenile facilities, nursing facilities, and other health care facilities.<sup>24</sup> Although the ACS Public Use Microdata Sample does not distinguish among these various types of institutions, it can be used to derive an estimate of the criminal alien population by selecting characteristics of persons within the institutionalized population that would be most likely to indicate such persons were inmates incarcerated in correctional facilities rather than patients living in health or long-term care facilities. These characteristics include persons ages 18 to 55, living in group quarters, who were noncitizens.<sup>25</sup>

<sup>24</sup> The annual ACS sample is approximately 3 million addresses, and data are collected from roughly one-twelfth of the sample each month. The survey is mandatory, and interviews are conducted via mail, telephone, or personal visits.

<sup>25</sup> This estimate relies on parameters derived from a recent U.S. Census analysis; see Stephanie Ewert and Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS*, U.S. Census Bureau, Housing and Household Economic Statistics Division, SEHSD Working Paper #2011-8, Washington, DC, March 31, 2011. According to Ewert and Wildhagen, correctional facilities accounted for 93% of persons ages 18-55 living in such (continued...)

According to these data, 2,312,031 persons were living in group quarters in 2010, most of which consisted of correctional facilities. This figure closely matches the 2,266,832 figure produced by the Bureau of Justice Statistics for the same year.<sup>26</sup> Of this estimated criminal population, the analysis of ACS data yields an estimate for the noncitizen incarcerated population (between ages 18-55) of 165,855, or 7.17% of the total—an estimate roughly comparable to CRS’s overall figure for 2009 (the most recent figure available) of 172,766 (**Table 2**). ACS data do not distinguish between federal, state, and local institutions.

## Other Estimates of the Criminal Alien Population

While relatively few studies have attempted to quantify the criminal alien population,<sup>27</sup> a body of evidence suggests that the foreign born are less likely to commit crimes<sup>28</sup> and less likely to be incarcerated than the native born.<sup>29</sup> For instance, a 2007 study estimated that the foreign born (including noncitizens and naturalized citizens) made up 35% of California’s adult population but only 17% of its adult prison population.<sup>30</sup> When the analysis expands to include all correctional institutions (not only prisons but also jails, halfway houses, and similar facilities) and to focus on the sub-population most likely to commit crimes (males between ages 18-40) the difference increases, with native-born institutionalization rates 10 times those of the foreign born.<sup>31</sup>

While these studies confront methodological challenges similar to those discussed in **Appendix B**, they suggest that the noncitizen proportion among all U.S. criminals (i.e., the criminal alien population) likely is no more than—and possibly is below—the foreign-born proportion of the total U.S. population, or 12.9% as of 2010. This rate would suggest an upper bound estimate for the incarcerated criminal alien population of 303,600, based on a total incarcerated population of 2,353,855 (from **Table 2**).

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(...continued)

group quarters.

<sup>26</sup> U.S. Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Washington, DC 2010, <http://www.albany.edu/sourcebook/pdf/t612010.pdf>.

<sup>27</sup> See, for example, John Scalia and Marika F. X. Litras, *Immigration Offenders in the Federal Criminal Justice System, 2000*, Bureau of Justice Statistics, Washington, DC, August 2002; A. Wunder, “Foreign Inmates in U.S. Prisons: An Unknown Population,” *Corrections Compendium*, vol. 20, no. 4 (April 1995), pp. 4-18. Foreign born here refers to both noncitizens and naturalized citizens.

<sup>28</sup> See, for example, Kristin F. Butcher and Anne Morrison Piehl, “Cross-City Evidence on the Relationship Between Immigration and Crime,” *Journal of Policy Analysis and Management*, vol. 17, no. 3 (Summer 1998), pp. 457-493; John Hagan and Alberto Palloni, “Sociological Criminology and the Mythology of Hispanic Immigration and Crime,” *Social Problems*, vol. 46, no. 4 (1999), pp. 617-632; Lesley Williams Reid, Harald E. Weiss, and Robert M. Adelman, et al., “The Immigration–Crime Relationship: Evidence Across U.S. Metropolitan Areas,” *Social Science Research*, vol. 34, no. 4 (December 2005), pp. 757-780.

<sup>29</sup> See, for example, Ruben G. Rumbaut, Roberto G. Gonzales, and Golnaz Komaie, et al., “Immigration and Incarceration: Patterns and Predictors of Imprisonment among First-and Second-Generation Young Adults,” in *Immigration and Crime: Race, Ethnicity and Violence*, ed. Ramiro Martinez Jr. and Abel Valenzuela Jr. (New York: New York University Press, 2006), pp. 64-89; and Kristin F. Butcher and Anne Morrison Piehl, *Why Are Immigrants’ Incarceration Rates so Low? Evidence on Selective Immigration, Deterrence, and Deportation*, National Bureau of Economic Research, NBER Working Paper 13229, Cambridge, MA, July 2007, <http://www.nber.org/papers/w13229>.

<sup>30</sup> Kristin F. Butcher, Anne Morrison Piehl, and Jay Liao, *Crime, Corrections, and California: What Does Immigration Have to Do with It?*, California Counts: Population Trends and Profiles, San Francisco, CA, February 2008, [http://www.ppic.org/content/pubs/cacounts/CC\\_208KBCC.pdf](http://www.ppic.org/content/pubs/cacounts/CC_208KBCC.pdf).

<sup>31</sup> *Ibid.*

In 2011, the Government Accountability Office (GAO) estimated the U.S. criminal alien population in federal prisons and criminal alien incarcerations for state prisons and local jails.<sup>32</sup> To enumerate the federal prison population, GAO used Bureau of Prison (BOP) data, which are considered relatively reliable and are collected consistently.<sup>33</sup> To undertake the more challenging task of enumerating the criminal alien population in state prisons and local jails, GAO relied on data from the Department of Justice's State Criminal Alien Assistance Program (SCAAP).<sup>34</sup> SCAAP data provide a direct count of cases for which state and local jurisdictions seek reimbursement for correctional officer salary costs incurred for incarcerating "undocumented criminal aliens" and thus provide an alternative method for estimating the criminal alien population to that presented by CRS above. However, because of the way SCAAP data are recorded, they do not accurately reflect the incarcerated criminal alien population at a given point in time.<sup>35</sup> Based on these sources, GAO reported 52,929 criminal aliens in federal prisons, and 91,823 state prison and 204,136 local jail SCAAP incarcerations in 2009.<sup>36</sup>

Incarceration of the criminal alien population over the past decade has occurred within the context of a foreign-born population that grew from 31.5 million to 39.9 million between 2001 and 2010.<sup>37</sup> While their 2010 proportion of the U.S. population amounted to 12.9%, the foreign born accounted for 32.0% of all U.S. population growth from 2001 to 2010 because their numbers grew more rapidly than those of the native born.<sup>38</sup> **Figure 3** illustrates this demographic context

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<sup>32</sup> U.S. Government Accountability Office, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs*, GAO-11-187, March 24, 2011. Note that "the U.S. criminal alien population" refers to unique individuals, while "criminal alien incarcerations" refers to unique incarcerations that may involve the same individuals being incarcerated multiple times. In addition, the Senate Appropriations Committee reported in 2009 that "ICE extrapolated from various sources and estimated that there are about 300,000 to 450,000 criminal aliens, who are available for removal, detained each year at Federal, State, and local prisons and jails," though the Committee report does not explain the methodology behind this estimate; see U.S. Congress, Senate Committee on Appropriations, Subcommittee on Department of Homeland Security, *Department of Homeland Security Appropriations Bill, 2009*, Report to accompany S. 3181, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., June 23, 2008, S.Rept. 110-396 (Washington: GPO, 2008), p. 49.

<sup>33</sup> See **Appendix B** for more information on the presentation of publicly available data.

<sup>34</sup> SCAAP reimburses states and localities for correctional officer salary costs incurred for incarcerating "undocumented criminal aliens" under certain circumstances. For more information on SCAAP, see CRS Report RL33431, *Immigration: Frequently Asked Questions on the State Criminal Alien Assistance Program (SCAAP)*, by Karma Ester. Also see GAO, *Criminal Alien Statistics*.

<sup>35</sup> SCAAP data may not be representative of the U.S. criminal alien population for at least three reasons. First, reimbursement rules prevent SCAAP data from accurately capturing certain groups of individuals, including legal permanent residents, persons jailed for less than four days, and persons with only one misdemeanor. Second, not all states and eligible localities participate in the program equally. Those with higher costs, such as metropolitan jurisdictions that process large numbers of unauthorized aliens are more likely to do so than smaller localities. Third, individuals may be double-counted because they may appear in more than one jurisdiction if they are processed in several places for the same offense, for instance in a local jail and a state prison, or in different states. Such double counting may explain the sizable differences in the state and local criminal alien SCAAP incarcerations reported by GAO and the number of criminal aliens incarcerated in state prisons and local jails produced in this report, which relies exclusively on BJS data. In addition to the 2011 GAO report cited above, see also U.S. Government Accountability Office (GAO), *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, GAO-05-337R, April 7, 2005.

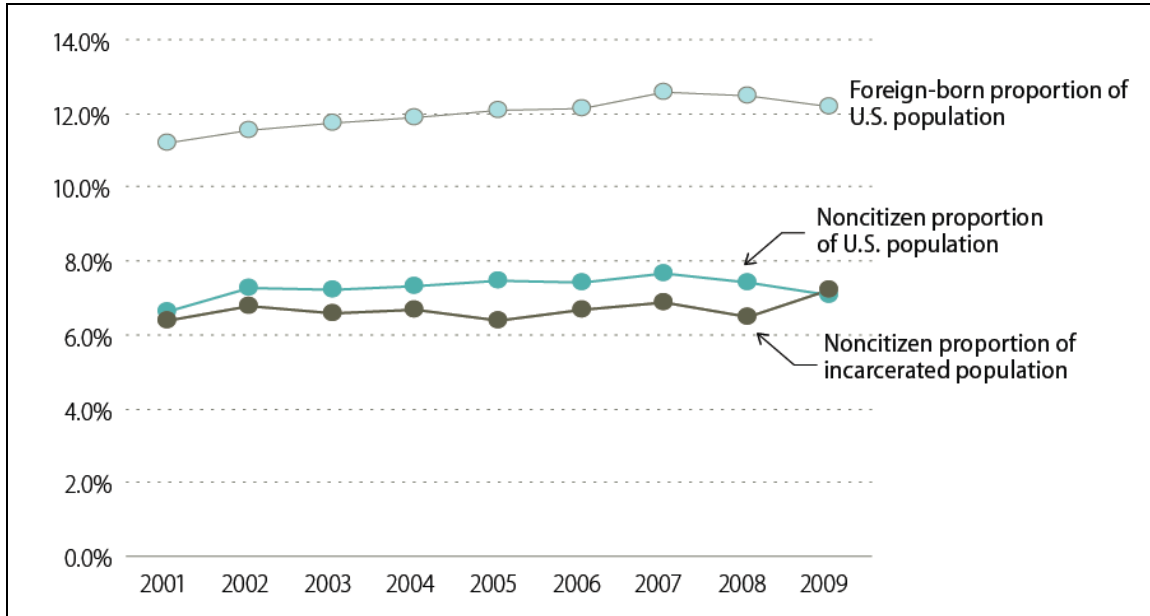
<sup>36</sup> U.S. Government Accountability Office, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs*, GAO-11-187, March 24, 2011.

<sup>37</sup> To obtain a consistent series across individual years for **Figure 3** and corresponding text, CRS used figures obtained from the *Statistical Abstract of the United States*, a reference guide published by the U.S. Census Bureau. Such figures were computed by the Census Bureau using the Current Population Survey (CPS) which produces estimates of the foreign born that are lower than those from the ACS. For instance, the ACS estimate of the foreign-born population for 2009 was 38.5 million.

<sup>38</sup> Moreover, these figures do not include an estimated 13.9 million native-born children born to at least one foreign- (continued...)

for the criminal alien population growth (shown in **Table 2**) and the close correspondence between CRS’s calculation of the proportion of noncitizens in the total prison population and the foreign-born population overall. Such trends receive empirical support from academic studies reviewed above and from the ACS.

**Figure 3. Proportion of the U.S. and Incarcerated Population by Nativity and Citizenship, 2001-2009**



**Source:** Total foreign born, noncitizen foreign born, and U.S. population figures: U.S. Census Bureau, *Statistical Abstract of the United States* (various years); Noncitizen proportion of incarcerated population, see **Table 2**.

**Note:** As of December 2012, published figures from 2009 remain the most up-to-date available on the noncitizen proportion of the total incarcerated population.

Nationally, incarcerated persons represent roughly one-third of the total correctional population, with persons on probation and parole comprising the other two-thirds.<sup>39</sup> As with all persons in the correction population, the relatively larger pool of noncitizens initially interacting with the criminal justice system is filtered down to a smaller population whose crimes are judged to merit prosecution and incarceration.

## History of Criminal Alien Removal Programs

In 1986, with passage of the Immigration Reform and Control Act (P.L. 99-603), Congress made deporting aliens who had been convicted of certain crimes an enforcement priority. The law

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born parent. See CRS Report R41592, *The U.S. Foreign-Born Population: Trends and Selected Characteristics*, by William A. Kandel, pp. 14-16.

<sup>39</sup> In 2010, the total *year-end* correctional population numbered 7,076,200, with 4,055,514 persons on probation, 2,262,832 persons incarcerated, and 840,676 persons on parole. See *Sourcebook of Criminal Justice Statistics Online*, Table 6.1.2010, <http://www.albany.edu/sourcebook/pdf/t612010.pdf>.

required the Attorney General “In the case of an alien who is convicted of an offense which makes the alien subject to deportation . . . [to] begin any deportation proceeding as expeditiously as possible after the date of the conviction.”<sup>40</sup>

The former Immigration and Naturalization Service (INS) established a pair of programs in 1988 to comply with this requirement: the Institutional Removal Program (IRP) and the Alien Criminal Apprehension Program (ACAP).<sup>41</sup> The programs forged partnerships with corrections facilities to identify deportable aliens convicted of crimes before their release from jail or prison. They also worked with the Department of Justice Executive Office for Immigration Review to initiate deportation proceedings against aliens serving sentences for deportable offenses during their period of incarceration.<sup>42</sup>

The IRP and ACAP focused initially on aggravated felons, a class of serious criminal aliens created in immigration law by the Anti-Drug Abuse Act of 1988 (P.L. 100-690) and enumerated in §101(a)(43) of the INA. The Anti-Drug Abuse Act defined aggravated felonies to include aliens convicted of murder, drug trafficking, or illegal trafficking in firearms or destructive devices. Between 1990 and 1996, Congress enacted a series of measures, including the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (P.L. 104-208, Division C), that expanded the definition of aggravated felons and created additional criminal grounds for removal.<sup>43</sup> The mandates of the IRP and ACAP likewise expanded to include this broader list of criminal immigration offenses.

In 1999, the INS issued an Interior Enforcement Strategy, which named as the agency’s top interior enforcement priority the identification and removal of criminal aliens and the minimization of recidivism (i.e., illegal reentry by previously removed aliens).<sup>44</sup> Accordingly, between 1998 and 2002, the INS devoted more resources to the removal of criminal aliens than to all other interior enforcement priorities combined.<sup>45</sup> Nonetheless, INS failed to identify and remove all criminal aliens.<sup>46</sup>

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<sup>40</sup> P.L. 99-603, §701.

<sup>41</sup> Prior to the enactment of the Homeland Security Act of 2002 (P.L. 107-296), immigration enforcement activities were primarily the responsibility of the Immigration and Naturalization Service (INS) within the Department of Justice. The INS was dissolved on March 1, 2003 and made part of the Department of Homeland Security (DHS).

<sup>42</sup> The Institutional Removal Program, originally known as the Institutional Hearing Program, focused on a small number of federal and state prisons that held the largest number of criminal aliens; the Alien Criminal Apprehension Program covered other jails and prisons.

<sup>43</sup> Immigration Act of 1990, P.L. 101-649 (1990); Immigration and Nationality Technical Correction Act of 1994, P.L. 103-416 (1994); Antiterrorism and Effective Death Penalty Act of 1996, P.L. 104-132 (1996); Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, Div. C (1996). See CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>44</sup> U.S. General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, GAO-03-660T, April 2003.

<sup>45</sup> *Ibid.*

<sup>46</sup> CRS Report RL33351, *Immigration Enforcement Within the United States*, coordinated by Alison Siskin; GAO, *Challenges to Implementing the Immigration Interior Enforcement Strategy*.



## ICE Programs Targeting Criminal Aliens

In the wake of the September 11 attacks, the new Department of Homeland Security (DHS) focused its enforcement activities on suspected terrorists and homeland defense, but with the continued growth of the foreign-born population after 2000, programs targeting criminal aliens also remained an enforcement priority. Within DHS, the IRP and ACAP initially were managed jointly by Immigration and Customs Enforcement’s (ICE) Detention and Removal Operations (DRO) (renamed Enforcement and Removal Operations (ERO) in 2010) and its Office of Homeland Security Investigations. Between 2005 and 2007, the IRP and ACAP were combined into a single program within DRO now known as the Criminal Alien Program.<sup>47</sup> ICE currently operates four programs wholly or partly focused on criminal aliens (discussed in more detail below): the Criminal Alien Program (CAP), Secure Communities, the §287(g) program, and the National Fugitive Operations Program (NFOP).

These programs operate at several different points in the criminal justice process, and in some cases at more than one point (**Figure 4**). The CAP, Secure Communities, and certain §287(g) programs are “jail enforcement” programs that screen individuals for possible immigration violations and for criminal-related grounds for removal in federal and state prisons and local jails. Most individuals screened by jail enforcement programs are arrested by state or local officers, not ICE agents, for reasons unrelated to immigration law.<sup>48</sup>

**Figure 4. ICE Enforcement and Removal Programs in the Criminal Justice Process**

Time	Arrest	Booking	Charges/Adjudication	Incarceration	Post-release
Aliens subject to removal	Unauthorized aliens	Unauthorized aliens	Unauthorized aliens	Unauthorized aliens Aliens convicted of deportable criminal offenses	Unauthorized aliens Aliens convicted of deportable criminal offenses
Primary ICE enforcement programs	287(g) task forces NFOP	CAP Secure Communities 287(g) jail screening	NA	CAP	NFOP

**Source:** CRS analysis of ICE enforcement programs.

**Notes:** **CAP** refers to the Criminal Alien Program; **NFOP** refers to the National Fugitive Operations Program; **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs. **NA** indicates “not applicable.”

<sup>47</sup> See U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Border Security, and Citizenship, *Strengthening Interior Enforcement: Deportation and Related Issues*, testimony of Department of Homeland Security Acting Director of Detention and Removal Operations, U.S. Immigration and Customs Enforcement Victor Cerda, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., April 14, 2005.

<sup>48</sup> See U.S. Department of Homeland Security Advisory Council, “Task Force on Secure Communities Findings and Recommendations,” September 2011, p. 4. (Hereinafter DHS Secure Communities Task Force Report.)

Jail enforcement programs conduct immigration-related screening at two main points (**Figure 4**). First, all three of ICE’s jail enforcement programs conduct screening as individuals are being booked into jail. The booking process occurs after an arrest but before an arrestee faces specific criminal charges and typically involves the creation of a biometric record (i.e., capturing photographs and fingerprints). Second, CAP also conducts immigration-related screening later in the criminal justice processing, focusing on individuals who have been convicted of crimes and are incarcerated.

In addition to these jail enforcement programs, two ICE “task force” programs are wholly or partly targeted at criminal aliens outside of jails and prisons.<sup>49</sup> ICE’s NFOP targets at-large criminal aliens, including fugitive aliens who have not been convicted of a crime (i.e., prior to entering the criminal justice process) and aliens who have been convicted of crimes and subsequently released from prison (i.e., at the end of the process; see **Figure 4**). Certain §287(g) programs also include task forces, though most §287(g) task forces are not primarily focused on criminal aliens, as discussed below. Compared to the jail enforcement programs, these task force programs arrest far fewer removable aliens, though they include a higher proportion of high-priority cases (see “Enforcement Statistics”).

## **Jail Enforcement Programs**

### **Criminal Alien Program (CAP)**

The Criminal Alien Program (CAP) is an umbrella program that includes several different systems for identifying, detaining, and initiating removal proceedings against criminal aliens within federal, state, and local prisons and jails. According to ICE, “CAP aims to identify all foreign born nationals incarcerated in jails and prisons in the United States” by interviewing aliens and screening their biographic information against DHS databases. CAP’s mission is to prevent the release of criminal aliens from jails and prisons into the United States by securing final orders of removal prior to the termination of aliens’ criminal sentences and to ensure that aliens are transferred into ICE custody to be removed from the United States upon completion of their criminal sentences.<sup>50</sup>

CAP’s primary jail enforcement program includes 126 ten-person teams that are assigned to federal, state, and local prisons and jails throughout the country to conduct screening operations both during booking and among incarcerated prisoners.<sup>51</sup> In addition to onsite deployment of ICE officers and agents, CAP uses video teleconference (VTC) equipment that connects jails and prisons to ICE’s Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) Center in Chicago, IL.<sup>52</sup> CAP also works with state and local correctional departments

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<sup>49</sup> ICE also operates the Joint Criminal Alien Removal Task Force (JCART) program, located within CAP and established in 2009. The JCART pursues known at-large criminal aliens, including in particular aliens who have been convicted of drug trafficking offenses, violent crimes, and sex offenses and are subsequently released from federal, state or local custody. JCART is an inter-agency program that (in addition to ICE) includes other DHS enforcement branches, probation and parole offices, the United States Marshals Service, the Bureau of Prisons, and local law enforcement agencies. See ICE, “Fact Sheet: Criminal Alien Program,” <http://www.ice.gov/news/library/factsheets/cap.htm>.

<sup>50</sup> ICE, *Fact Sheet: Criminal Alien Program*, March 29, 2011, <http://www.ice.gov/news/library/factsheets/cap.htm>.

<sup>51</sup> ICE, *Congressional Budget Justifications FY2012*.

<sup>52</sup> ICE, *Secure Communities: Quarterly Report FY2010, 4<sup>th</sup> Quarter*, January 3, 2011, <http://www.ice.gov/doclib/foia/> (continued...)

that provide ICE with inmate rosters. ICE analyzes roster data and compares prisoner data to immigration databases. According to ICE, CAP screening systems together with Secure Communities (discussed below) will cover 100% of the country's jails and prisons by the end of FY2013.<sup>53</sup>

Additionally, the CAP program includes several specialized programs related to criminal aliens.<sup>54</sup> CAP's Violent Criminal Alien Section works with U.S. Attorneys to pursue criminal cases against high-priority criminal offenders identified by CAP officers. CAP's Rapid Removal of Eligible Parolees program works with state law enforcement agencies to identify incarcerated criminal aliens eligible for parole and facilitates their early release along with the ensured removal from the United States. CAP maintains a special partnership with Phoenix-area law enforcement agencies (LEAs) through the Phoenix Law Enforcement Area Response program. Under this program, CAP officers are to respond to 100% of Arizona LEA requests 24 hours a day, 7 days a week, which resulted in more than 1,700 arrests in FY2011.<sup>55</sup> CAP also maintains a task force program, the Joint Criminal Alien Removal Taskforces, which identifies and arrests high-priority at-large convicted criminal aliens.

## **Secure Communities**

Secure Communities is an information sharing program between the Departments of Justice and Homeland Security that uses biometric data to screen for removable aliens as people are being booked into jails. Under the program, when participating law enforcement agencies submit the fingerprints of arrestees to the Federal Bureau of Investigation (FBI) for criminal background checks, the fingerprints also are automatically checked against DHS databases, and potential matches are forwarded to ICE's Law Enforcement Support Center (LESC).<sup>56</sup> ICE agents at the LESL confirm the identity of matched prints and screen their records for immigration violations and criminal histories. When the LESL determines that the arrestee may be a removable alien, the LESL evaluates the alien's criminal history and notifies the ICE Enforcement and Removal field office in the arresting jurisdiction about the match.

After being notified that a removable alien has been arrested, the local ICE field office supervisor reviews the record and decides how to proceed based on the priority attached to the case (see "DHS Enforcement Priorities and Discretion") and the office's available resources. If the office decides to initiate removal proceedings against an alien, ICE normally issues an immigration detainer. The detainer is a request that the arresting agency hold the alien following completion of his or her criminal proceeding for up to 48 hours (excluding holidays and weekends) to allow ICE

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[secure\\_communities/congressionalstatusreportfy104thquarter.pdf](#).

<sup>53</sup> ICE, *Congressional Budget Justifications FY2013*, p. 51.

<sup>54</sup> For more information on the Criminal Alien Program, see ICE, "Fact Sheet: Criminal Alien Program," <http://www.ice.gov/news/library/factsheets/cap.htm>.

<sup>55</sup> ICE, *Congressional Budget Justifications FY2013*, p. 50.

<sup>56</sup> The Law Enforcement Support Center (LESL) is ICE's national point of contact for local, state, and federal law enforcement agencies, corrections systems, and court systems seeking information about aliens suspected, arrested, or convicted of criminal activity. The LESL staffs a 24-hour phone line to respond to queries, and provides customs, immigration, and identity information based on ICE records. See ICE, "Law Enforcement Support Center," <http://www.ice.gov/lesl/>.

CAP officers to take custody of the alien and to initiate removal proceedings.<sup>57</sup> In contrast with the other ICE programs discussed in this report, Secure Communities does not include an enforcement component *per se*; removable aliens identified through Secure Communities and identified as enforcement priorities are arrested and placed in removal proceedings by ICE agents operating outside of Secure Communities, typically including agents from the CAP program or agents from §287(g) jail screening programs.

### **§287(g) Jail Screening Program**

Section 287(g) of the INA permits the delegation of certain immigration enforcement functions to state and local law enforcement agencies. Agreements entered pursuant to INA §287(g) (commonly referred to as §287(g) agreements) enable specially trained state or local officers to perform specific functions relating to the investigation, apprehension, or detention of aliens, during a predetermined time frame and under federal supervision.<sup>58</sup> Although §287(g) agreements were authorized as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (P.L. 104-208, Div. C, IIRIRA), the first §287(g) agreement was implemented in 2002, and 50 of the 57 current §287(g) agreements as of December 2012 were signed after 2006.<sup>59</sup>

More than half (32 of 57) of the §287(g) agreements identified in December 2012 are jail enforcement agreements.<sup>60</sup> Under these agreements, specially trained officers within state and local corrections facilities are authorized to identify criminal aliens by interviewing them and screening their biographic information against the same DHS databases used by CAP agents and officers. Section 287(g) officers also use ICE's database and Enforcement Case Tracking System (known as ENFORCE) to enter information about the alien and to generate the paperwork for an immigration detainer and a Notice to Appear (initiating the formal removal process). State and local corrections officers are supervised by CAP agents or other ICE Enforcement and Removal Office agents.

## **Task Force Programs**

### **§287(g) Task Force Program**

Seventeen of the current §287(g) agreements are for task force programs.<sup>61</sup> In these programs, designated law enforcement officers may, during the course of their regular law enforcement duties within the community or under the direction of a supervising federal immigration officer, identify and arrest certain removable aliens on immigration charges.<sup>62</sup> In cooperation with local

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<sup>57</sup> The regulations governing immigration detainees are found at 8 C.F.R. 287.7; also see CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

<sup>58</sup> INA §287(g)(5), 8 U.S.C. §1357(g)(5); see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>59</sup> ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa>.

<sup>60</sup> *Ibid.*

<sup>61</sup> ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g)."

<sup>62</sup> See CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

ICE Homeland Security Investigations offices,<sup>63</sup> the §287(g) task force programs pursue a variety of specific law enforcement targets, including document fraud, human smuggling, and drug enforcement.

In addition to jail enforcement and task force models, eight of the current §287(g) programs are “hybrid” programs that include jail enforcement agreements as well as task forces within the same jurisdiction.<sup>64</sup> For hybrid programs, ICE Enforcement and Removal agents supervise the jail enforcement programs and Homeland Security Investigations agents supervise the task force operations.

### **National Fugitive Operations Program**

The National Fugitive Operations Program (NFOP) pursues known at-large criminal aliens and fugitive aliens. ICE created the NFOP in 2003 to expand the agency’s ability to locate, arrest, and remove fugitive aliens, defined as aliens who have “failed to leave the United States based upon a final order of removal, deportation or exclusion, or who [have] failed to report to ICE after receiving notice to do so.”<sup>65</sup> In 2009, with support from Congress,<sup>66</sup> the NFOP expanded its focus to locating, arresting, and removing at-large convicted criminal aliens, aliens who pose a threat to national security and community safety, members of transnational gangs, child sex offenders, and aliens with prior convictions for violent crimes.<sup>67</sup>

The NFOP consists of 104 fugitive operations teams that use data from the National Crime Information Center (NCIC)<sup>68</sup> and other intelligence sources to pursue criminal aliens and other NFOP priority cases. Based on these leads, NFOP teams conduct enforcement actions at worksites, in residential areas, and at other locations.

### **Differences Among Criminal Alien Enforcement Programs**

**Table 4** summarizes key differences among ICE’s four main programs targeting criminal aliens. One core distinction is between jail enforcement programs—including CAP, Secure Communities, and most §287(g) programs—and task force programs—including NFOP and 17

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<sup>63</sup> ICE Homeland Security Investigations (HSI) directorate oversees ICE’s criminal investigations covering immigration crime, human rights violations and human smuggling, smuggling of narcotics, weapons and other contraband, financial crimes, cybercrime, and export enforcement issues; see ICE, “ICE Homeland Security Investigations,” <http://www.ice.gov/about/offices/homeland-security-investigations/>.

<sup>64</sup> Ibid. and ICE, “Fact Sheet: Delegation of Immigration Authority Section 287(g).”

<sup>65</sup> ICE, “Fact Sheet: ICE Fugitive Operations Program,” <http://www.ice.gov/news/library/factsheets/fugops.htm>.

<sup>66</sup> In 2009, House appropriators moved the NFOP from the general Detention and Removal Operations budget to include it among a set of programs for the Identification and Removal of Criminal Aliens; see U.S. Congress, House Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations Bill, 2009*, Report to Accompany H.R. 6947, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., September 18, 2008, H.Rept. 110-862 (Washington: GPO, 2008), pp. 51-53.

<sup>67</sup> ICE, “Fact Sheet: ICE Fugitive Operations Program,”

<sup>68</sup> The National Crime Information Center (NCIC) is the Federal Bureau of Investigation’s (FBI) national clearinghouse of crime data, including 12 person files including Supervised Release, National Sex Offender Registry, Foreign Fugitive, Immigration Violator, Missing Person, Protection Order, Unidentified Person, U.S. Secret Service Protective, Gang, Known or Appropriately Suspected Terrorist, Wanted Person, and Identity Theft. NCIC includes 15 million active records and averages 7.5 million transactions per day. See FBI, “National Crime Information Center,” <http://www.fbi.gov/about-us/cjis/ncic>.

§287(g) programs. By their nature, jail enforcement programs are not highly targeted: they are designed to screen the entire population of people passing through the criminal justice system. Those screened by jail enforcement programs are typically arrested by state and local law enforcement agents for non-immigration offenses.

Conversely, task force programs tend to be more targeted operations, pursuing specific serious criminal aliens, fugitive aliens, or other criminals who have been targeted by ICE or other law enforcement agencies. Under task force operations, ICE agents or other law enforcement officers with specific immigration training are the arresting agents.

**Table 4. ICE’s Primary Criminal Alien Enforcement Programs**

	Jail Enforcement Programs			Task Force Programs	
	CAP	Secure Communities	§287(g)—Jail Enforcement	§287(g)—Task Force	NFOP
<b>Who makes the arrest?</b>	State or local law enforcement agent (LEA)	LEA	LEA	ICE or LEA, with ICE training and supervision	ICE
<b>Who conducts the immigration screening or selects the enforcement target?</b>	ICE	ICE	LEA, with ICE training and supervision	ICE or LEA, with ICE training and supervision	ICE
<b>When does immigration screening/ targeting occur?</b>	During booking and post-conviction	During booking	During booking	Pre-arrest through booking	Pre-arrest through post-release
<b>How many jurisdictions/ task forces are operating?<sup>a</sup></b>	More than 1,200 CAP officers monitor over 4,300 facilities	3,074 jurisdictions in 50 states	40 jurisdictions in 19 states	25 jurisdictions in 13 states	104 teams

**Source:** CRS Analysis of ICE programs. Secure Communities jurisdictions data as of August 22, 2012, from ICE, “Activated Jurisdictions,” <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>; §287(g) jurisdictions data as of October 16, 2012, from ICE, “287(g) Results and Participating Entities,” <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa>.

**Notes:** **CAP** refers to the Criminal Alien Program; **NFOP** refers to the National Fugitive Operations Program; **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs; **LEA** refers to law enforcement agent; **ICE** refers to the U.S. Immigration and Customs Enforcement agency.

- a. Number of jurisdictions as of March 2012 for CAP, August 2012 for Secure Communities, October 2012 for the §287(g) program, and March 2012 for NFOP. The reported number of §287(g) task forces counts 8 hybrid programs as both jail enforcement and task force models; as of October 13, 2011, ICE has §287(g) agreements with a total of 57 law enforcement agencies in 21 states.

A second, related difference concerns who conducts immigration-related screening and who selects targets for immigration-related enforcement. Under all but the §287(g) program, ICE agents conduct immigration screening either in the jail (under CAP) or remotely (under CAP and Secure Communities); and ICE and DHS select the targets for task force operations based on at-large aliens’ criminal records and immigration histories. Under the §287(g) program, local

corrections officers with ICE training conduct immigration screenings during the booking process (for jail programs), and local law enforcement agencies exercise some discretion about when and how to participate in immigration-related task force enforcement activities.

These ICE programs also target criminal aliens at different points in the criminal justice process, as noted above and summarized in **Table 4**. All three jail enforcement programs conduct screening during the booking process, meaning that many potentially removable aliens are identified even though they have never been charged with or convicted of a crime. (As noted above, unauthorized aliens are potentially removable regardless of whether they are eventually convicted of a criminal offense. Certain legal aliens only become removable if they are charged and convicted of a removable criminal offense.) CAP also conducts screening of persons who have been convicted of crimes and are incarcerated. The enforcement task forces target aliens at different points in the criminal justice process, with the NFOP focusing on at-large convicted criminal aliens (including those who have served jail time and then been released) and fugitive aliens, who may not have been convicted of criminal offenses, and §287(g) task forces focusing on a range of different types of suspected criminals.

## DHS Enforcement Priorities and Discretion

Not all potentially removable aliens who come into contact with DHS and other law enforcement agencies are placed in formal removal procedures. DHS estimates that there were about 11.5 million unauthorized immigrants in the United States in January 2011,<sup>69</sup> and DHS apprehended an average of 827,000 removable aliens per year from FY2008 to FY2011.<sup>70</sup> These apprehension numbers do not include additional removable aliens who are transferred to ICE after being apprehended by other federal, state, and local law enforcement agencies. Yet ICE and its partner agencies only have the detention bed space and institutional capacity to remove about 400,000 aliens per year.<sup>71</sup>

Thus, DHS—like the INS before it—has developed a system to prioritize certain aliens for removal.<sup>72</sup> Accordingly, ICE has published a number of agency guidance memos concerning the agency’s enforcement priorities and prosecutorial discretion, including in March and June of 2011. In August 2011, DHS Secretary Janet Napolitano announced that the recent memos apply to all DHS enforcement agencies. DHS also announced, in June 2012, that the department would exercise prosecutorial discretion by deferring enforcement action in the case of certain individuals who were brought to the United States as children and who meet certain other criteria.

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<sup>69</sup> Michael Hoefler, Nancy Rytina, and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, Office of Immigration Statistics, Department of Homeland Security, 2012.

<sup>70</sup> DHS apprehensions include U.S. Border Patrol apprehensions and ICE administrative arrests; see Department of Homeland Security Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2011*, Washington, DC 2012.

<sup>71</sup> John Morton, *Memorandum on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, US Immigration and Customs Enforcement, Washington, DC, March 2, 2011, <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>.

<sup>72</sup> *Ibid.* On INS policies related to prosecutorial discretion and the prioritization of certain aliens for removal see INS General Counsel Bo Cooper, *INS Exercise of Prosecutorial Discretion*, U.S. INS, Washington, DC, July 11, 2000; INS Commissioner Doris Meissner, *Exercising Prosecutorial Discretion*, U.S. INS, Washington, DC, November 17, 2000; and INS General Counsel Bo Cooper, *Motions to Reopen for Considerations of Adjustment of Status*, U.S. INS, Washington, DC, May 17, 2001.

## March 2011 ICE Guidance Memo

In March 2011, ICE Director John Morton published agency guidelines that define a three-tiered priority scheme that applies to all ICE programs and enforcement activities related to civil immigration enforcement.<sup>73</sup> Under these guidelines, ICE's top three immigration enforcement priorities are to (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,<sup>74</sup> and (3) apprehend aliens who are fugitives or otherwise obstruct immigration controls.

The 2011 guidelines further describe aliens within the first priority category to include aliens who have engaged in or are suspected of terrorism or espionage; aliens convicted of crimes (i.e., criminal aliens), especially violent criminals, felons, and repeat offenders; gang members; aliens subject to outstanding criminal warrants; and aliens who otherwise pose a risk to public safety. Thus, while the memo places all criminal aliens within its top enforcement priority category, it also describes an additional three-tiered system for prioritizing the removal of criminal aliens, with special attention directed to Level 1 and Level 2 offenders:

- Level 1 offenders: aliens convicted of "aggravated felonies," as defined in §101(a)(43) of the Immigration and Nationality Act, or of two or more crimes each punishable by more than one year (i.e., two or more felonies);
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year (i.e., three or more misdemeanors);
- Level 3 offenders: aliens convicted of two or fewer misdemeanors.

The memo specifies that aliens are categorized based on their lifetime criminal records. For example, an alien previously convicted of an aggravated felony is considered a Level 1 offender even if they were most recently arrested for a traffic violation.

## June 2011 ICE Guidance Memo

ICE Director John Morton published an additional memo in June 2011 to provide further guidance to ICE officers, agents, and attorneys to target criminal aliens for enforcement.<sup>75</sup> The

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<sup>73</sup> ICE's mission includes the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration; see ICE, "ICE Overview: Mission," <http://www.ice.gov/about/overview/>. Laws governing the detention and removal of unauthorized aliens generally fall under ICE's civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE's criminal enforcement authority. Also see Hiroshi Motomura, "The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line," *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

<sup>74</sup> The memo does not define "recent illegal entrants," but ICE Deputy Director Kumar Kibble testified on October 4, 2011 that ICE defines the term "in terms of years, not months." U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 4, 2011, Q & A session. DHS regulations permit immigration officers to summarily exclude an alien present in the United States for less than two years unless the alien expresses an intent to apply for asylum or has a fear of persecution or torture; see CRS Report RL33109, *Immigration Policy on Expedited Removal of Aliens*, by Alison Siskin and Ruth Ellen Wasem.

<sup>75</sup> John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, U.S. Department of Homeland Security Immigration and Customs Enforcement, Washington, DC, June 17, 2011, <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. A separate memo published at the same time advises ICE officers, (continued...)



memo clarifies that because ICE “is confronted with more administrative violations than its resources can address, the agency must regularly exercise ‘prosecutorial discretion’ ... to prioritize its efforts.”<sup>76</sup> It states that any law enforcement agency may exercise prosecutorial discretion in the ordinary course of enforcement by deciding “not to assert the full scope of the enforcement authority available to the agency in a given case.” In ICE’s case, prosecutorial discretion may include, among other actions, deciding not to issue or to cancel a detainer; deciding not to issue a Notice to Appear (initiating removal proceedings); deciding to release an alien on bond; permitting an alien to voluntarily depart the country instead of placing the alien in formal removal proceedings; granting deferred action, parole, or a stay of a final removal order; and joining a motion to grant relief from removal. The memo further clarifies that ICE Enforcement and Removal Operations officers, special agents, and attorneys each may exercise discretion in any immigration removal proceeding.<sup>77</sup> Finally, the memo identifies a list of at least 19 factors to consider when exercising prosecutorial discretion, including eight factors that should mitigate in favor of exercising discretion and four factors that should mitigate against exercising discretion.<sup>78</sup>

## **August 2011 DHS Announcement and Review of Backlogged Cases**

On August 18, 2011, DHS Secretary Janet Napolitano announced in a letter to Senator Richard Durbin and others that the March and June ICE guidance memos were Administration policy, and that the same guidance would apply to all DHS immigration agencies.<sup>79</sup> The letter also indicated DOJ resources should be targeted toward high-priority cases.<sup>80</sup> The White House issued a

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special agents, and attorneys to particularly consider prosecutorial discretion for victims of domestic violence, human trafficking or other serious crimes; witnesses involved in pending criminal investigations or prosecutions; plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and individuals engaging in a protected activity related to civil or other rights. See John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, U.S. Department of Homeland Security Immigration and Customs Enforcement, Washington, DC, June 17, 2011, <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

<sup>76</sup> Morton, *Exercising Prosecutorial Discretion*, p. 2.

<sup>77</sup> *Ibid.*, pp. 2-3.

<sup>78</sup> The eight factors mitigating in favor of discretion include humanitarian factors and factors related to aliens’ attachment to their communities in the United States, including whether aliens are veterans or members of the armed forces; whether they are long-time lawful permanent residents; whether they are minors or elderly; whether they have been in the United States since childhood; whether they are pregnant or nursing; whether they are victims of domestic violence, trafficking, or other serious crimes; whether they suffer from a serious disability; and whether they have a serious health condition. The four factors mitigating against discretion include public safety and security concerns, including whether aliens pose a clear risk to national security; whether they are serious felons, repeat offenders, or individuals with lengthy criminal records of any kind; whether they are known gang members or otherwise pose a clear danger to public safety; and whether they have an egregious record of immigration violations. Other factors identified in the memo include the agency’s civil immigration priorities; whether the alien is pursuing an education in the United States; whether the alien has ties to the community; whether the alien has ties to the home country and the conditions there; whether the alien is a primary caretaker of a person with a mental or physical disability; whether the alien’s nationality renders removal unlikely; whether the person is likely to be granted relief from removal; and whether the alien is cooperating or has cooperated with federal, state, or local enforcement authorities. *Ibid.*, pp. 4-5.

<sup>79</sup> Letter from Janet Napolitano, Secretary of Homeland Security, to Richard Durbin, Senator, August 18, 2011; also see Robert Pear, “Few Youths to be Deported in New Policy,” *The New York Times*, August 18, 2011, p. A1, [http://www.nytimes.com/2011/08/19/us/19immig.html?\\_r=2&hp](http://www.nytimes.com/2011/08/19/us/19immig.html?_r=2&hp); U.S. Congress, Senate Committee on the Judiciary, *Oversight of the Department of Homeland Security*, testimony of DHS Secretary Janet Napolitano, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 19, 2011.

<sup>80</sup> *Ibid.*; immigration judges also have some leeway to grant certain forms of relief during the removal process, (continued...)

statement the same day to further clarify that DHS's enforcement priorities were a matter of Administration policy, developed "under the president's direction."<sup>81</sup>

At the same time, the White House and DHS announced that DHS and DOJ would begin to review removal cases that were awaiting hearings in immigration courts.<sup>82</sup> Under the program, an inter-agency group of DHS and DOJ attorneys has reviewed backlogged cases to identify low-priority cases that may be amenable to prosecutorial discretion, with the goal of pulling such cases out of the immigration court docket in order to focus judicial and prosecution resources on higher-priority cases. As of May 29, 2012, the program had reviewed a total of 288,361 of the approximately 300,000 backlogged cases. Of the cases reviewed, about 20,648 (7.2%) were identified as potentially amenable to prosecutorial discretion, and 4,363 (1.9%) had been administratively closed or dismissed, and the remaining cases remain on the immigration court docket.<sup>83</sup>

## **Deferred Action for Childhood Arrivals (DACA)**

On June 15, 2012, DHS issued a memorandum announcing that certain individuals who were brought to the United States as children and meet other criteria would be considered for deferred action for two years, subject to renewal.<sup>84</sup> Deferred action is a "discretionary determination to defer removal action of an individual as an act of prosecutorial discretion."<sup>85</sup> The Deferred Action for Childhood Arrivals (DACA) program builds on the ICE and DHS initiatives discussed above in that it is based on a grant of prosecutorial discretion,<sup>86</sup> but it also relates to a broader policy debate about legalization for certain unauthorized migrants because the eligibility criteria described in the DACA program are similar to those that would grant legal status to certain aliens under legislation known as the "DREAM Act."<sup>87</sup> According to DHS, the DACA program promotes the department's enforcement priorities because granting deferred action to low-priority cases frees up law resources to focus enforcement on higher priority cases.<sup>88</sup> Some Members of

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including through the granting of voluntary departure as an alternative to formal removal.

<sup>81</sup> White House Director of Intergovernmental Affairs Cecilia Muñoz, "Immigration Update: Maximizing Public Safety and Better Focusing Resources," August 18, 2011, <http://www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources>.

<sup>82</sup> *Ibid.*; also see Letter from Janet Napolitano, Secretary of Homeland Security, to Richard Durbin, Senator, August 18, 2011.

<sup>83</sup> ICE, "Case by Case Review Statistics," <http://www.documentcloud.org/documents/367098-ice-review-stats.html>; also see Julia Preston, "Deportations Continue Despite U.S. Review of Backlog," *The New York Times*, June 6, 2012.

<sup>84</sup> DHS, "Deferred Action for Childhood Arrivals," June 15, 2012, <http://www.dhs.gov/deferred-action-childhood-arrivals>. Also see CRS Congressional Distribution Memorandum, *Analysis of June 15, 2012 DHS Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,"* by Andorra Bruno, Todd Garvey, Kate Manuel, and Ruth Ellen Wasem (available from the authors).

<sup>85</sup> *Ibid.*

<sup>86</sup> According to DHS, the exercise of prosecutorial discretion for certain aliens who meet DREAM Act criteria was undertaken as part of the Administration's "unprecedented effort to transform the immigration enforcement system into one that focuses on public safety, border security and the integrity of the immigration system.... [by ensuring] that enforcement resources are not expended on low priority cases"; DHS, "Deferred Action for Childhood Arrivals," June 15, 2012, <http://www.dhs.gov/deferred-action-childhood-arrivals>.

<sup>87</sup> See CRS Report RL33863, *Unauthorized Alien Students: Issues and "DREAM Act" Legislation*, by Andorra Bruno.

<sup>88</sup> See, for example, DHS, "Secretary Napolitano Announced Deferred Action Process for Young People Who Are Low Enforcement Priorities," June 15, 2012, <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-> (continued...)

Congress have expressed frustration about the deferred action announcement and questioned its legality,<sup>89</sup> while others have expressed support for the program.<sup>90</sup> As of December 2012, DHS had received a total of 367,903 applications to participate in the deferred action program; 12,014 (3%) of the applications had been rejected; 102,965 (28%) had been approved; and the remainder remained under review or were being scheduled for review.<sup>91</sup>

## Appropriations

Funding for the identification and removal of unauthorized immigrants has increased substantially since FY2004, the first year in which DHS received dedicated funding for detention and removal operations. **Table 5** presents funding figures for overall ICE DRO/ERO operations and for the CAP, Secure Communities, NFOP, and §287(g) programs. DRO/ERO is ICE's largest Salaries and Expenses subaccount; CAP, NFOP, and Secure Communities ("Identification and removal of criminal aliens") are funded program activities within DRO/ERO; and §287(g) is funded under ICE's Office of State, Local, and Tribal Government Coordination.

The appropriations record confirms Congress's ongoing interest in strengthening these programs. Congress roughly tripled funding for CAP and NFOP in FY2005 and FY2006 over the previous years, and appropriators directed ICE to conduct a study of how the Institutional Removal Program could be expanded nationwide.<sup>92</sup> In 2008, appropriators expressed concern that ICE was "losing perspective on which aliens represent the most significant threat to the nation's social and economic fabric" and questioned "why a significant number of illegal aliens serving sentences in State and local correctional facilities after conviction for various non-immigration crimes are still released from custody without efforts made to deport those who are deportable."<sup>93</sup>

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deferred-action-process-young-people-who-are-low.

<sup>89</sup> See, for example, Letter from Senator Charles Grassley, et al., to Barack Obama, President, June 19, 2012.

<sup>90</sup> See, for example, Letter from the Honorable Luis V. Gutierrez, Representative, et al., to Barack Obama, President, July 19, 2012. For a discussion of the legal issues surrounding prosecutorial discretion in the context of immigration enforcement, see CRS Legal Sidebar, "How Broad is the Executive Branch's Discretion to Enforce Immigration Laws?" June 21, 2012, <http://www.crs.gov/analysis/legalsidebar/pages/details.aspx?ProdId=85>.

<sup>91</sup> U.S. Citizenship and Immigration Services, "Deferred Action for Childhood Arrivals Process," December 13, 2012, <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA%20MonthlyDEC%20Report%20PDF.pdf.pdf>.

<sup>92</sup> U.S. Congress, Senate Committee on Appropriations, Subcommittee on Department of Homeland Security, *Department of Homeland Security Appropriations Bill, 2006*, Report to accompany H.H. 2360, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., June 16, 2005, 109-83 (Washington: GPO, 2005), p. 36.

<sup>93</sup> U.S. Congress, House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2008 H.Rept. 110-181*, 110<sup>th</sup> Cong., 2008 (Washington: GPO, 2008).

**Table 5. Appropriations for Programs Targeting Criminal Aliens, FY2004-FY2011**  
(millions of dollars)

Fiscal Year	CAP <sup>c</sup>	Secure Communities <sup>e</sup>	§287(g) <sup>d</sup>	NFOP	Total: Criminal Aliens Programs <sup>b</sup>	All Other DRO/ERO Operations	Total DRO/ERO Operations <sup>a</sup>
<b>2004</b>	\$6.6	NA <sup>g</sup>	NA <sup>f</sup>	\$16.9	<b>\$23.4</b>	\$936.3	<b>\$959.7</b>
<b>2005</b>	\$33.7	NA	NA	\$35.2	<b>\$69.0</b>	\$1,022.2	<b>\$1,091.1</b>
<b>2006</b>	\$93.0	NA	\$5.0	\$101.9	<b>\$199.9</b>	\$1,160.1	<b>\$1,359.9</b>
<b>2007</b>	\$137.5	NA	\$15.0	\$183.2	<b>\$335.7</b>	\$1,648.7	<b>\$1,984.3</b>
<b>2008</b>	\$180.0	\$200.0	\$42.1	\$218.9	<b>\$641.1</b>	\$1,740.3	<b>\$2,381.4</b>
<b>2009</b>	\$189.1	\$150.0	\$54.0	\$226.5	<b>\$619.5</b>	\$1,861.7	<b>\$2,481.2</b>
<b>2010</b>	\$192.5	\$200.0	\$68.0	\$229.7	<b>\$690.2</b>	\$1,855.0	<b>\$2,545.2</b>
<b>2011</b>	\$192.5	\$200.0	\$68.0	\$229.7	<b>\$690.2</b>	\$1,855.0	<b>\$2,545.2</b>
<b>2012</b>	\$196.7	\$189.1	\$68.0	\$154.6	<b>\$608.4</b>	\$2,142.4	<b>\$2,750.8</b>
<b>2013</b>	\$216.7	\$138.7	\$51.0	\$132.9	<b>\$539.3</b>	\$2,139.5	<b>\$2,678.8</b>
<b>Total</b>	<b>\$1,438.3</b>	<b>\$1,077.8</b>	<b>\$371.1</b>	<b>\$1,529.5</b>	<b>\$4,416.7</b>	<b>\$16,361.2</b>	<b>\$20,777.6</b>

**Sources:** DRO, CAP, Secure Communities, and NFOP data from S.Rept. 108-280, S.Rept. 109-83, S.Rept. 109-273, H.Rept. 109-699, S.Rept. 110-396, S.Rept. 111-31, S.Rept. 111-222, and S.Rept. 112-169; §287(g) data from U.S. Immigration and Customs Enforcement “Fact Sheet: Updated Facts on ICE’s 287(g) Program” and from S.Rept. 111-222.

**Notes:** FY2013 data are requested amounts. **CAP** refers to the Criminal Alien Program; **NFOP** refers to the National Fugitive Operations Program; **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs; **LEA** refers to law enforcement agent; **ICE** refers to the U.S. Immigration and Customs Enforcement agency; **DRO/ERO** refers to Detention and Removal Operations/Enforcement and Removal Operations.

- a. Detention and Removal Operations was renamed Enforcement and Removal Operations in 2010.
- b. Includes funding for CAP, Secure Communities, the §287(g) program, and NFOP.
- c. The Criminal Alien Program was known as the Institutional Review Program prior to FY2007.
- d. Includes §287(g) jail enforcement and §287(g) task force programs.
- e. Secure Communities was known as the Comprehensive Identification and Removal of Criminal Aliens program in FY2008.
- f. The §287(g) program received its first appropriation in FY2006.
- g. The Secure Communities program received its first appropriation in FY2008.

Accordingly, appropriators increased funding for the existing Criminal Alien Program in FY2008; and set aside \$200 million in additional funding for the Comprehensive Identification and Removal of Criminal Aliens, a program to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.”<sup>94</sup> ICE used the additional funding to support CAP and to develop Secure Communities.

<sup>94</sup> U.S. Congress, House Committee on Rules, *Providing for the consideration of the Senate amendment to the bill (H.R. 2764) making appropriations for the Department of State, foreign operations, and related programs for the fiscal* (continued...)

Funding dedicated specifically to the identification and removal of criminal aliens (i.e., funding for CAP and Secure Communities) increased from just \$6.6 million in FY2004 to \$385.8 million in FY2012, a 57-fold increase. This figure understates appropriations targeting criminal aliens since it does not include funding for NFOP and the §287(g) program, both of which also include criminal aliens in their enforcement mandates. Altogether, the four programs targeting criminal aliens saw their funding grow from \$23.4 million in FY2004 to a high of \$690.2 million in FY2011 before declining to \$539.3 million (requested) in FY2013. Funding for DRO/ERO operations overall—all of which treat removable criminal aliens as an enforcement priority—increased from \$960 million in FY2004 to a high of \$2.75 billion in FY2012. More than \$20 billion was appropriated to alien removal programs between FY2004 and FY2013.

## Enforcement Statistics

Enforcement data can be an indicator of the degree to which appropriations for interior enforcement have translated into enforcement actions. **Table 6** presents data on primary enforcement actions by the four enforcement programs discussed in this report from 2004 through 2011. The table presents data on administrative arrests<sup>95</sup> by CAP, §287(g), and NFOP, and on alien identifications as well as returns and removals resulting from Secure Communities. (The four programs do not produce directly comparable enforcement statistics because Secure Communities is only responsible for the identification of removable aliens, while the other programs also encompass measures to arrest removable aliens.)

**Table 6. Primary Interior Enforcement Actions, by Program, FY2004-FY2011**

Fiscal Year	CAP	Secure Communities		§287(g)	NFOP
	Arrests	Identifications	Removals and Returns	Arrests	Arrests
2004	4,269	NA	NA	0	6,584
2005	25,339	NA	NA	2	7,959
2006	28,493	NA	NA	5,685	15,462
2007	164,296	NA	NA	20,815	30,407
2008	221,085	NA	NA	45,105	34,155
2009	232,796	95,664	14,364	56,116	35,094
2010	219,477	248,166	45,907	46,467	35,774
2011	221,122	348,970	79,896	33,180	39,466
Total	1,116,877	692,800	140,167	207,370	204,901

**Source:** CAP, §287(g), and NFOP data received from ICE Legislative Affairs October 12, 2011, except for FY2011 CAP data, which are from ICE Congressional Budget Justification, FY2013; Secure Communities data are from Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through August 31, 2012.

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*year ending September 30, 2008, and for other purposes*, 110<sup>th</sup> Cong., December 17, 2007.

<sup>95</sup> An administrative arrest refers to the arrest of an alien who is charged with an immigration violation and typically placed in removal proceedings.

**Notes:** **CAP** refers to the Criminal Alien Program; **NFOP** refers to the National Fugitive Operations Program; **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs. The same cases may be counted multiple times in Table 6. CAP data are for the Institutional Removal Program in FY2004-FY2006. Data are unavailable for Secure Communities for FY2004-FY2008 because the program was created in FY2008 and reported its first identifications and removals in FY2009. ICE reported Secure Communities administrative arrests in its quarterly reports to Congress through April 2011 but since August 2011 ICE has reported on combined removals and returns through the program rather than administrative arrests. Data for the §287(g) program and NFOP are through October 1, 2011.

Data in **Table 6** should be interpreted with caution, particularly when it comes to Secure Communities, for two reasons. First, while Secure Communities is directly responsible for the identification of potentially removable aliens, the program does not make arrests or place aliens in removal proceedings. Rather, when an ICE field office determines through Secure Communities that an alien should be placed in removal proceedings, the arrest and subsequent enforcement proceedings occur outside of Secure Communities per se, usually by an ICE officer from CAP or a §287(g) program.

Second, for this reason, **Table 6** includes a number of over-counts (i.e., the same case appearing in multiple columns in the table) because the same individual is counted as an identification, removal, or arrest by multiple programs. The same individual may also be identified or arrested on multiple occasions, causing additional over-counts. In addition, some removable aliens are arrested or placed in removal proceedings outside of these four programs, so the data in **Table 6** should not be interpreted as an exhaustive accounting of ICE or DHS enforcement programs.

With those qualifications, the data in **Table 6** indicate consistent increases in the number of aliens identified and arrested by these four programs. Available data indicate that CAP made over 1.1 million administrative arrests between FY2004 and FY2011, while the §287(g) program and NFOP made about 207,000 and 205,000 administrative arrests, respectively.

Secure Communities has quickly grown to identify an even larger number of removable aliens per year than CAP, with just under 350,000 potentially removable aliens identified in FY2011. From FY2009 through the first nine months of FY2012, a total of about 19.9 million sets of biometric data were submitted to Secure Communities, resulting in the identification of about 1.1 million matches in the IDENT database (i.e., potentially removable aliens), and a total of 220,322 aliens removed or returned as a result of those identifications.<sup>96</sup> Thus, about 5% of all submissions to Secure Communities are identified as potentially removable aliens, and about 20% of people so identified (i.e., about 1% of all submissions) had been removed or returned as of August 2012.

**Table 7** presents a rudimentary measure of each program's cost per individual identified, removed and returned, or arrested. The figures were derived by dividing each program's annual appropriations (**Table 5**) by the number of enforcement actions reported for the program in that year (**Table 6**). They indicate that as the number of arrests and identifications for the programs have increased, the cost per case has declined substantially and appears to have stabilized for some programs in the most recent years.

These figures are illustrative and allow broad comparisons across programs, but do not reflect precise estimates of arrest costs given the over-counting of certain arrest data. Moreover, the programs share certain resources and administrative costs. For example, CAP officers oversee

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<sup>96</sup> Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through August 31, 2012, p. 2. An unknown number of individuals may appear more than once in these data.

certain §287(g) programs and are responsible for the administrative arrest and removal of aliens identified through Secure Communities. In addition, funding differences reflect the different scope of enforcement activities under these programs. For example, the NFOP apprehends, arrests, and processes at-large removable aliens, while Secure Communities simply identifies them as they pass through the criminal justice system. With respect to the NFOP and certain §287(g) programs, the higher cost of conducting task force operations relative to jail enforcement may be warranted given their greater focus on high-priority cases and more extensive enforcement activities.

**Table 7. Ratio of Appropriations to Enforcement Actions, by Program, FY2004-FY2011**

Year	CAP	Secure Communities		§287(g)	NFOP
	Arrests	Identifications	Removals and Returns	Arrests	Arrests
2004	\$1,546	NA	NA	NA	\$2,567
2005	\$1,330	NA	NA	NA	\$4,423
2006	\$3,264	NA	NA	\$880	\$6,590
2007	\$837	NA	NA	\$721	\$6,025
2008	\$814	NA	NA	\$933	\$6,409
2009	\$812	\$1,568	\$10,442	\$962	\$6,454
2010	\$877	\$806	\$4,357	\$1,463	\$6,421
2011	\$888	\$573	\$2,503	\$2,049	\$5,820

**Source:** Figures are computed by dividing annual appropriations for the program shown in **Table 5** by the number of identifications and arrests by program shown in **Table 6**.

**Notes:** **CAP** refers to the Criminal Alien Program; **NFOP** refers to the National Fugitive Operations Program; **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs. CAP data are for the Institutional Removal Program in FY2004-FY2006. §287(g) data include jail enforcement and task force programs. Data are unavailable for Secure Communities for FY2004-FY2008 because the program was created in FY2008 and reported its first identifications and arrests in FY2009, and data are unavailable for §287(g) in FY2004-FY2005 because the program received its first appropriation in FY2006. Secure Communities is responsible for the identification of removal aliens, but the administrative arrest, removal, and return of aliens falls outside the scope of the program. Data for the §287(g) program and NFOP are based on enforcement statistics through October 1, 2011.

## Controversies Surrounding Interior Enforcement Programs

While there appears to be a broad consensus that DHS should target serious criminal aliens for removal, ICE’s interior enforcement programs have been controversial, particularly the §287(g) program and Secure Communities. Complaints about the §287(g) program in 2007-2009 prompted reviews of the program by GAO and the DHS Inspector General,<sup>97</sup> and both agencies

<sup>97</sup> U.S. Government Accountability Office, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, GAO-09-109, January 2009, (continued...)

are currently examining Secure Communities. Opponents of Secure Communities called for its termination during field hearings held by a DHS task force in August 2011. A class action lawsuit was also filed in 2011 challenging the constitutionality of DHS's use of immigration detainers against immigrants and U.S. citizens identified through Secure Communities.<sup>98</sup>

This section describes the overall rationale behind ICE's jail enforcement programs and its collaboration with state and local law enforcement agencies and then describes the concerns that have been raised about these programs as well as counter-arguments made by supporters of the programs. The section then discusses whether jurisdictions may choose not to participate in Secure Communities and changes to Secure Communities announced by ICE in June 2011.

## **The Rationale Behind Secure Communities and the §287(g) Program**

DHS supported the expansion of the §287(g) program beginning in 2007, and since 2008 it has supported plans to expand Secure Communities to every law enforcement jurisdiction in the country by the end of 2013.<sup>99</sup> Some Members of Congress, state and local lawmakers, and advocacy groups also support these programs and their expansion.<sup>100</sup>

Jail enforcement programs like Secure Communities, CAP, and certain §287(g) agreements appear to enhance ICE's ability to identify and detain criminal aliens; first, because partnerships with state and local law enforcement agencies can leverage ICE's enforcement capacity, and second, because they can detect potentially removable aliens efficiently and quickly.

### ***Partnerships with State and Local Law Enforcement Agencies Augment ICE's Enforcement Capacity***

Partnerships with state and local law enforcement agencies leverage ICE's enforcement capacity because there are about 150 times more state and local law enforcement officers in the United States than there are ICE agents: 1,133,000 state and local law enforcement personnel, including 765,000 sworn personnel with arrest powers, compared to 20,164 ICE agents, including 5,131 employed in enforcement and removal operations.<sup>101</sup> State, local, and federal law enforcement

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<http://www.gao.gov/new.items/d09109.pdf>; Department of Homeland Security, Office of Inspector General, *The performance of 287(g) Agreements*, OIG-10-63, March 2010, [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf).

<sup>98</sup> See National Immigration Justice Center, "NIJC Sues Department of Homeland Security Over Key Component of Secure Communities Program," [http://immigrantjustice.org/press\\_releases/detainers-lawsuit](http://immigrantjustice.org/press_releases/detainers-lawsuit).

<sup>99</sup> For the Administration's views of Secure Communities see U.S. Immigration and Customs Enforcement, *Secure Communities*, March 2011, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/). Also See, for example, Maria Sacchetti, "U.S. Set to Expand Deportation Program," *Boston Globe*, August 6, 2011.

<sup>100</sup> See, for example, U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Immigration, Refugees and Border Security, *Improving Security and Facilitating Commerce at America's Northern Border and Ports of Entry*, 112<sup>th</sup> Cong., 1<sup>st</sup> Sess., May 17, 2011, pp. 59-60; Jessica M. Vaughan and James R. Edwards, *The 287(g) Program: Protecting Hometowns and the Homeland*, Center for Immigration Studies, Washington, DC, October 2009, <http://www.cis.org/articles/2009/287g.pdf>.

<sup>101</sup> State and local law enforcement data are for full time employees in 2008 according to Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. Department of Justice Bureau of Justice Statistics, NCJ (continued...)



officials made a total of 12,408,899 arrests (citizens and noncitizens) in 2011 compared to a total of about 55,762 arrests by ICE.<sup>102</sup>

Thus, even though most state and local arrests are of U.S. citizens for cases unrelated to immigration enforcement, any policies that forge connections between state and local law enforcement agents and ICE have the potential to increase ICE's presence in U.S. communities and may be substantial force multipliers for ICE. State and local law enforcement agents may also have stronger connections to local communities, further enhancing their ability to contribute to ICE's enforcement efforts.

### ***Jail Enforcement Programs Are Efficient Tools to Identify Criminal Aliens and Other Potentially Removable Aliens***

Jail enforcement programs like Secure Communities, CAP, and certain §287(g) programs conduct immigration-related screening at natural “choke points” in the criminal justice system, including, in particular, during the booking process. As noted above, when people are booked into jail after being arrested, corrections facilities typically create a biographic and biometric record of the arrestee, including the person's name, other identifying information, fingerprints, and photographs. By using these same data to check for possible immigration violations while individuals are already in law enforcement custody, jail enforcement programs can efficiently identify potentially removable aliens as they pass through the criminal justice system.

### ***Jail Enforcement Programs Identify Potentially Removable Aliens Early in the Criminal Justice Process***

By conducting immigration-related screening as people are being booked into jail, Secure Communities and certain CAP and §287(g) programs may identify potentially removable aliens early in the criminal justice process, giving ICE an opportunity to request an immigration detainer and initiate removal proceedings against certain aliens who might otherwise be released back into the community. Screening later in the criminal justice process, as in CAP's screening of prisoners who have already been convicted of crimes, also detects certain criminal aliens who are convicted and sentenced to prison; but if screening is limited to such aliens, jail enforcement programs may fail to detect certain removable aliens who are not convicted of crimes but still fall under one of ICE's enforcement priorities (e.g., because they have previous serious criminal convictions or are recent illegal entrants).

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233982, Washington, DC, July 2011, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslea08.pdf>. ICE data are for full time employees in FY2011 according to U.S. Department of Homeland Security, *U.S. Immigration and Customs Enforcement Fiscal Year 2011 Congressional Justification*.

<sup>102</sup> Total arrest data are from U.S. Department of Justice Federal Bureau of Investigation, “Crime in the United States: Persons Arrested. 2011,” <http://www.fbi.gov/about-us/cjiys/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested>; ICE arrest data are CRS estimate based on FY2011 NFOP arrest data in Table 6 and ICE Homeland Security Investigations apprehension data from Department of Homeland Security Office of Immigration Statistics, “Immigration Enforcement Actions: 2011,” [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement\\_ar\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf).

### ***Additional Potential Advantages of Particular Jail Enforcement Programs***

Each ICE jail enforcement program offers additional potential advantages:

- Secure Communities is an especially efficient tool to identify removable aliens because it exploits existing infrastructure to conduct immigration screening on an automated basis, relying on interoperability between DHS and DOJ databases. Following the identification of a potential match, additional data matching and prioritization occurs at a centralized ICE location, the Law Enforcement Support Center (LESC), creating economies of scale in the screening process. Thus, compared with CAP and the §287(g) program, Secure Communities may identify removable aliens with minimal additional personnel or infrastructure.
- Secure Community's use of biometric matching technology allows records to be checked quickly against a large number of DHS records, including over 148 million records in the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Automated Biometric Identification System (IDENT) database.<sup>103</sup> According to ICE, Secure Communities conducts electronic checks against DHS databases within minutes of fingerprint data from a person's booking being sent to the FBI. The LESL usually reviews any electronic matches and notifies an ICE field office within four hours from when a potentially removable alien has been identified.<sup>104</sup>
- Secure Communities gives ICE greater control over enforcement. Conversely, the §287(g) program has faced criticism because in delegating authority to state and local law enforcement agents, it may give these offices undue discretion to shape immigration enforcement decisions, resulting in different standards for immigration enforcement across jurisdictions.<sup>105</sup> Under Secure Communities, DHS officers make enforcement decisions with respect to aliens identified through the program. Thus, Secure Communities may avoid some concerns that have been raised about the §287(g) program, and may give DHS greater control over how jail enforcement programs are implemented.
- The CAP and §287(g) programs may be more powerful (though less efficient) enforcement tools than Secure Communities because they place additional immigration enforcement agents in state and local jurisdictions: either ICE agents under CAP, or ICE-trained state or local agents under the §287(g) program. In general, CAP and §287(g) officers have access to the same databases that are checked by Secure Communities. CAP and §287(g) agents in the field or

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<sup>103</sup> US-VISIT communication with CRS December 11, 2012. The U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system is a stand-alone division within DHS's National Protection and Programs Directorate which is responsible for the collection of biometric data, including digital photographs and fingerprints, from certain travelers entering the United States and from individuals apprehended at U.S. borders. Biometric data are stored in the Automated Biometric Identification System (IDENT) database. See CRS Report RL32234, *U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Program*, by Lisa M. Seghetti and Stephen R. Vina.

<sup>104</sup> ICE communication with CRS August 17, 2011.

<sup>105</sup> See, for example, U.S. Government Accountability Office, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*, GAO-09-109, January 2009, <http://www.gao.gov/new.items/d09109.pdf>; Randy Capps, Marc R. Rosenblum, and Cristina Rodríguez, et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, Migration Policy Institute, Washington, DC, January 2011, <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>.

connected via teleconference may *also* identify certain removable aliens who *would not* be detected through Secure Communities' automated screening, including unauthorized aliens who enter without inspection and therefore are not in the IDENT database.

- While Secure Communities offers the advantage of centralized control, the §287(g) program offers the converse advantage of greater local control by allowing jurisdictions to devote additional resources to immigration enforcement as they deem necessary. (Local jurisdictions are not required to use any resources of their own to participate in Secure Communities, though they may expend resources to detain aliens identified through the program.) Similarly, while some lawmakers and advocates may question whether state and local jurisdictions are required to participate in Secure Communities, the structure of the §287(g) program unambiguously gives states and localities discretion to opt out or to participate.

## **Concerns About Secure Communities and Other ICE Programs**

Despite the advantages of Secure Communities and the §287(g) program, several stakeholders have raised concerns about these programs. Some Members of Congress have called on jurisdictions to suspend their participation in the Secure Communities and have questioned ICE's characterization of the program.<sup>106</sup> The governors of Illinois, New York, and Massachusetts have taken steps to rescind their states' participation in the program,<sup>107</sup> though their ability to do so is unclear (see below). And numerous pro-immigrant, law enforcement, and civil liberties organizations have criticized the program and/or called for its modification, suspension, or termination.<sup>108</sup> Many of the criticisms of Secure Communities echo concerns raised previously about the §287(g) program and the NFOP.<sup>109</sup>

Four main concerns have been raised by critics of Secure Communities and other ICE programs targeting criminal aliens: first, the programs are not narrowly focused on serious criminals; second, the programs may strain community-police relations; third, the programs may inadvertently lead to racial profiling; and fourth, the programs may result in the wrongful

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<sup>106</sup> See, for example, Letter from Xavier Becerra, Member of Congress, Linda Sánchez, Member of Congress, Maxine Waters, Member of Congress, et al. to The Honorable Jerry Brown, Governor of the State of California, June 10, 2011, [http://becerra.house.gov/images/stories/PDF\\_Forms/Ltr\\_to\\_Gov\\_Brown\\_re\\_Secure\\_Communities\\_06-10-2011\\_final.pdf](http://becerra.house.gov/images/stories/PDF_Forms/Ltr_to_Gov_Brown_re_Secure_Communities_06-10-2011_final.pdf); "Congresswoman Calls for Investigation of Enforcement Program that Screens for Illegal Immigrants in Jails," *Los Angeles Times*, April 22, 2011, <http://latimesblogs.latimes.com/lanow/2011/04/congresswoman-calls-for-investigation-of-enforcement-program-that-screens-for-illegal-immigrants-in-.html>.

<sup>107</sup> Letter from Pat Quinn, Governor of Illinois, to Marc Rapp, Acting Assistant Director, Secure Communities, May 4, 2011; letter from Deval Patrick, Governor of Massachusetts, to Marc Rapp, Acting Assistant Director, Secure Communities, June 3, 2011; letter from Andrew M. Cuomo, Governor of New York, to John Sandweg, Counselor to the Secretary, U.S. Department of Homeland Security, June 1, 2011, <http://www.governor.ny.gov/assets/Secure%20Communities.pdf>.

<sup>108</sup> See, for example, National Community Advisory Commission, *Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities Program*, Washington, DC, August 2011, <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf>.

<sup>109</sup> See, for example, American Civil Liberties Foundation of Georgia, "Brown Is Not a Crime: Stop 287(g) Racial Profiling," <http://www.acluga.org/287gReport.pdf>; Margot Mendelson, Shayna Strom, and Michael Wishnie, "Collateral Damage: An Examination of ICE's Fugitive Operations Program," *Migration Policy Institute*, February 2009, [http://www.migrationpolicy.org/pubs/NFOP\\_Feb09.pdf](http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf).

detention of people who have not been convicted of a criminal offense. Supporters of these programs have offered counter-arguments to many of these concerns, and ICE announced changes to Secure Communities in June 2011 designed to address some of them (see “ICE Has Taken Steps to Address Concerns About Secure Communities and the §287(g) Program,” below).

***Jail Enforcement Programs Are Not Narrowly Focused on Serious Criminals***

A number of observers have raised concerns that ICE’s enforcement programs, which ostensibly focus on identifying and prosecuting the most dangerous criminal aliens, are detaining large numbers of noncriminal aliens whose only offense is having unauthorized status. **Table 8** illustrates the proportions of arrests from the §287(g) program and removals and returns from Secure Communities corresponding to four criminality levels: the three ICE levels described above (see “DHS Enforcement Priorities and Discretion”), and noncriminal offenses.<sup>110</sup> For the §287(g) program, as the number of arrests increased between FY2006 and FY2011, the proportions of arrests involving Level 1 criminal aliens declined, while those for noncriminal arrests increased. Noncriminal offenses accounted for a plurality of §287(g) arrests each year except 2006. For Secure Communities, slightly more than a quarter of aliens removed and returned as a result of the program have been Level 1 criminal aliens, including 30% in the first nine months of FY2012. Slightly over half of the aliens removed and returned as a result of Secure Communities have been Level 3 criminals or noncriminals, with the proportions in these categories falling during each year for which data are available.

**Table 8. Removals and Returns Under Secure Communities and Arrests through the §287(g) Program, by Type of Offense, FY2006-FY2012**  
(percentages)

	Secure Communities					§287(g) Program				
	Total	Level 1	Level 2	Level 3	Non-criminal	Total	Level 1	Level 2	Level 3	Non-criminal
2006	NA	NA	NA	NA	NA	100	41	9	13	37
2007	NA	NA	NA	NA	NA	100	30	8	14	49
2008	NA	NA	NA	NA	NA	100	25	7	11	57
2009	100	24	11	40	26	100	22	8	16	54
2010	100	29	13	32	27	100	23	10	26	41
2011	100	26	20	29	25	100	16	13	21	51
2012	100	30	20	28	23	NA	NA	NA	NA	NA

<sup>110</sup> The 287(g) program did not consistently record data on criminal offense levels prior to 2009, when DHS implemented new memorandums of understanding (MOAs) that included a three-level prioritizing scheme for the program. Under the 2009 MOAs, Level 1 offenders were defined as “aliens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping”; Level 2 offenders as “aliens who have been convicted of or arrested for minor drug offenses, and/or mainly property offenses such as burglary, larceny, fraud, and money laundering”; and Level 3 offender as “aliens who have been convicted of or arrested for other offenses.” See “Memorandum of Agreement between ICE and the Harris County Sheriff’s Office,” October 29, 2009, [http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r\\_287gharriscountysol11609.pdf](http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gharriscountysol11609.pdf). The 2009 scheme was superseded by ICE’s agency-wide enforcement priority scheme beginning in March 2011, discussed above (“March 2011 ICE Guidance Memo”).

**Source:** Secure Communities data are based on CRS calculations from IDENT/IAFIS Interoperability Monthly Statistics through August 31, 2012; §287(g) data are based on CRS calculations from ICE Integrated Decision Support data as of August 8, 2011, received from ICE Legislative Affairs.

**Notes:** **287(g)** refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs; **NA** indicates “data not available.” §287(g) programs did not consistently collect data on criminality levels prior to 2009; data are for a subset of §287(g) administrative arrests. See “March 2011 ICE Guidance Memo” and footnote 106 for definitions of criminality levels.

It bears emphasis that these proportions are based on the subset of unauthorized aliens identified by the program who are placed under administrative arrest or who are removed or returned, and therefore overstate overall criminality levels. When accounting for the broader set of all removable aliens who are initially identified by Secure Communities, the data suggest that just 4-6% of such aliens were convicted of criminal offenses prior to being removed or returned as a result of the program during the first nine months of FY2012.<sup>111</sup>

How to evaluate these statistics is the subject of debate.<sup>112</sup> On one hand, appropriators intended Secure Communities “to improve and modernize efforts to identify aliens *convicted of a crime, sentenced to imprisonment, and who may be deportable*” (emphasis added),<sup>113</sup> and appropriators required DHS to “present a methodology ... to identify and *prioritize for removal criminal aliens convicted of violent crimes*” (emphasis added).<sup>114</sup> Some have argued that using ICE resources to identify and remove aliens who have not committed crimes or have only committed minor offenses and are not viewed as a threat to their communities diverts scarce resources away from high-priority cases.<sup>115</sup>

On the other hand, appropriators also required DHS to “present a strategy for U.S. Immigration and Customs Enforcement to *identify every criminal alien, at the prison, jail, or correctional institution in which they are held*” (emphasis added).<sup>116</sup> And as long as Secure Communities and related programs make serious criminals their top priority, nothing in the programs’ mandates appears to preclude a secondary focus on other removable aliens—a task that falls squarely within ICE ERO’s broader mission “to identify, arrest, and remove aliens who present a danger to

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<sup>111</sup> CRS estimates based on the ratio of convicted Level 1 (6%), Level 2 (4%), and Level 3 (5%) criminals removed or returned during the first nine months of FY2012 relative to the number of alien IDENT matches during the same period according to IDENT/IAFIS Interoperability Monthly Statistics through August 31, 2012, p. 2. The data are not precise percentages because they may refer to somewhat different groups of individuals identified and removed or returned during this period.

<sup>112</sup> A DHS task force convened to review Secure Communities found that “immigration enforcement against traffic offenders and others arrested only for minor offenses poses the greatest risk of undermining community policing” and recommended that ICE not issue detainers for individuals arrested solely for minor traffic offenses; but members of the task force were divided about whether ICE should also refuse to issue detainers for individuals arrested for other minor misdemeanors. See DHS Secure Communities Task Force Report, pp. 21-22.

<sup>113</sup> P.L. 110-161; 121 Stat. 2050.

<sup>114</sup> U.S. Congress, House Committee on Rules, *Providing for the Consideration of the Senate Amendment to the bill H.R. 2764*, Report to accompany H.R. 878, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., December 17, 2007, H.Rept. 110-497 (Washington: GPO, 2008), p. 212.

<sup>115</sup> See, for example, John Morton, *Memorandum on Civil Immigration Enforcement*; also see U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Oversight Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law*, testimony of ICE Director John Morton, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 12, 2011; U.S. Congress, Senate Committee on the Judiciary, *Oversight of the Department of Homeland Security*, testimony of DHS Secretary Janet Napolitano, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 19, 2011.

<sup>116</sup> U.S. Congress, House Committee on Rules, *Providing for the Consideration of the Senate Amendment to the bill H.R. 2764*, Report to accompany H.R. 878, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., December 17, 2007, H.Rept. 110-497 (Washington: GPO, 2008), p. 212.

national security or are a risk to public safety, as well as those who enter the United States illegally or otherwise undermine the integrity of our immigration laws and our border control efforts.”<sup>117</sup> Many of the noncriminal aliens identified and removed or returned through Secure Communities program may be seen as high-priority cases for other reasons, including because they are the subject of a prior removal order or are recent unauthorized aliens.

More generally, some Members of Congress have questioned why ICE would systematically exercise discretion in certain cases involving known unauthorized immigrants who are already in custody.<sup>118</sup> Some Members of Congress have also suggested that the failure to remove certain non-criminal aliens identified by Secure Communities and related programs would constitute an “administrative amnesty” and could encourage further illegal immigration.<sup>119</sup>

### ***Involving State and Local Law Enforcement in Immigration-Related Screening May Harm Community-Police Relations***

ICE’s three jail enforcement programs interact in different ways with state and local law enforcement agencies, but all of them rely on such agencies, at least indirectly, as points of contact with potentially removable aliens as they are processed through the criminal justice system. By adding this filtering task to existing state and local law enforcement practices, jail enforcement programs may damage community-police relationships by undermining immigrant communities’ trust in state and local law enforcement agencies. Some law enforcement professionals have argued that if communities come to associate state and local law enforcement agencies with immigration enforcement, immigrants and others may be reluctant to report crimes or to cooperate in policing activities.<sup>120</sup> Moreover, a DHS task force on Secure Communities found that the program “has had unintended local impacts” that may harm police relationships with immigrant communities.<sup>121</sup>

Maintaining a good relationship and close partnerships with the community being served is a basic principle of community policing, a practice that has been adopted by many state and local law enforcement agencies, with the support of the Department of Justice.<sup>122</sup> Some law enforcement professionals see community policing as particularly important with respect to immigrant communities because many immigrants come from countries and cultures without strong traditions of trust in law enforcement agencies; immigrants may already be fearful of interacting with law enforcement authorities due to concerns about their vulnerability to

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<sup>117</sup> U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations*, <http://www.ice.gov/about/offices/enforcement-removal-operations/>.

<sup>118</sup> See, for example, U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 4, 2011; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Oversight Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 12, 2011.

<sup>119</sup> *Ibid.*

<sup>120</sup> See, for example, Chuck Wexler, “Critical Issues in Policing Series: Police Chiefs and Sheriffs Speak Out,” Police Executive Research Forum, April 2008, [http://www.policeforum.org/library/critical-issues-in-policing-series/Immigration\(\\$25\).pdf](http://www.policeforum.org/library/critical-issues-in-policing-series/Immigration($25).pdf); National Community Advisory Commission, *Restoring Community*.

<sup>121</sup> DHS Secure Communities Task Force Report, p. 24.

<sup>122</sup> U.S. Department of Justice, *COPS: Community Oriented Policing Services*, <http://www.cops.usdoj.gov/Default.asp?Item=34>

immigration enforcement activities; and many immigrants are not proficient in English.<sup>123</sup> Immigrants are disproportionately likely to be victims of crime, and jail enforcement programs may discourage noncitizen crime victims from reporting crimes.<sup>124</sup> Maintaining strong relations between immigrants and local law enforcement agencies also may strengthen the role of local law enforcement agencies in gathering intelligence about potential security threats associated with immigrant communities.<sup>125</sup>

The risk that Secure Communities and related programs may harm community-police relations and discourage crime reporting must be balanced against the public safety benefit from identifying, detaining, and removing unauthorized aliens. While some state and local law enforcement officials see the threat to community relations as outweighing these potential benefits, as noted above, other state and local law enforcement officials and elected officials have embraced Secure Communities and the §287(g) program as powerful tools in their efforts to combat illegal immigration and associated criminal activity.<sup>126</sup>

### ***Involving State and Local Law Enforcement in Immigration-Related Screening May Contribute to Racial Profiling***

Critics argue that while the great majority of law enforcement officers are well-intentioned, involving state and local law enforcement agencies in immigrant enforcement may increase the likelihood that biased officers will engage in racial profiling, as that term is commonly understood.<sup>127</sup> By ensuring that all arrestees are screened for immigration violations, jail enforcement programs may provide an incentive for officers to arrest persons they suspect of being unauthorized aliens based wholly or partly on racial or ethnic characteristics.

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<sup>123</sup> National Community Advisory Commission, *Restoring Community*; Debra A. Hoffmaster, Gerard Murphy, and Shannon McFadden, et al., *Police and Immigration: How Chiefs are Leading Their Communities through the Challenges*, Police Executive Research Forum, Washington, DC, 2010, <http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf>; U.S. Department of Justice, *Enhancing Community Policing with Immigrant Populations: Recommendations from a Roundtable Meeting of Immigrant Advocates and Law Enforcement Leaders*, New Orleans, LA, August 27, 2008, [http://www.cops.usdoj.gov/files/RIC/Publications/e041016266-enhancing-cp-immigrant-populations\\_b.pdf](http://www.cops.usdoj.gov/files/RIC/Publications/e041016266-enhancing-cp-immigrant-populations_b.pdf); US Department of Justice, Office of Justice Programs, *Community Policing and 'The New Immigrants': Latinos in Chicago*, Washington, DC, 1998, <http://www.ncjrs.gov/pdffiles1/nij/189908.pdf>; Wexler, "Critical Issues in Policing."

<sup>124</sup> Hoffmaster et al., *Police and Immigration*.

<sup>125</sup> David A. Harris, "The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America," *Rutgers Law Journal*, Vol. 38, No. 1 (Fall 2006); U.S. Department of Justice, *Enhancing Community Policing*.

<sup>126</sup> See for example Major County Sheriff's Association, "Major County Sheriffs' Association Resolution: Secure Communities," [http://www.ice.gov/doclib/secure-communities/pdf/sc-major\\_county\\_sheriffs\\_assoc.pdf](http://www.ice.gov/doclib/secure-communities/pdf/sc-major_county_sheriffs_assoc.pdf); ICE, "What Others Are Saying About Secure Communities," <http://www.ice.gov/doclib/secure-communities/pdf/what-others-say.pdf>.

<sup>127</sup> See for example Rights Working Group, *Faces of Racial Profiling: A Report from Communities Across America*, Washington, DC, September 2010, <http://www.rightsworkinggroup.org/sites/default/files/rwg-report-web.pdf>; National Community Advisory Commission, *Restoring Community*. On legal issues surrounding the use of race as a factor in immigration enforcement also see CRS Report R41221, *State Efforts to Deter Unauthorized Aliens: Legal Analysis of Arizona's S.B. 1070*, by Kate M. Manuel, Michael John Garcia, and Larry M. Eig. For a discussion of the definition of racial profiling see Jim Cleary, *Racial Profiling Studies in Law Enforcement: Issues and Methodology*, Minnesota House of Representatives Research Department, St. Paul, MN, June 2000, pp. 5-6, <http://www.house.leg.state.mn.us/hrd/pubs/raceprof.pdf>;

ICE and supporters of Secure Communities have emphasized that because the program conducts immigration screening for all individuals arrested in participating jurisdictions, it does not lead to racial profiling.<sup>128</sup> However, universal screening during the booking process does not necessarily prevent selective and potentially biased enforcement by law enforcement agents in the field. Officers may anticipate that arrestees will be subjected to immigration screening, and that some will be placed in removal proceedings regardless of the circumstances of their arrests. The DHS Secure Communities task force found that the program's complaint procedures to guard against such profiling are inadequate.<sup>129</sup>

Racial profiling is difficult to document, especially where jurisdictions may not collect detailed arrest and search data. Previous research by academic researchers and advocacy organizations has found evidence of racial profiling following the implementation of CAP and of immigration enforcement by local law enforcement agencies under the §287(g) program.<sup>130</sup> Yet, most research on racial profiling is anecdotal rather than statistical, and CRS was unable to identify any published studies showing racial profiling in the Secure Communities program.

### ***Jail Enforcement Programs May Result in Wrongful Detentions***

Immigrant rights and civil liberties advocates have raised concerns about the use of immigration detainers to hold suspected unauthorized aliens who have not been charged with a crime.<sup>131</sup> Existing regulations permit immigration officers to issue an immigration detainer to request that a law enforcement jurisdiction hold an alien for up to 48 hours (not including weekends and holidays) in order to allow DHS to take custody of the alien and initiate removal proceedings, and that the jurisdiction notify DHS prior to releasing the alien; but several recently filed court cases have raised questions about ICE's detainer authority.<sup>132</sup>

Critics of Secure Communities and related programs have argued that no clear mechanisms exist for arrestees to challenge their detention on the grounds that they have been erroneously detained.<sup>133</sup> Critics have also argued that no clear policies exist indicating how local law

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<sup>128</sup> See, for example, U.S. Congress, Senate Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations Bill, 2012*, Report to accompany H.R. 2017, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., September 7, 2011, p. 59.

<sup>129</sup> DHS Secure Communities Task Force Report, p. 25.

<sup>130</sup> Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, The Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, Berkeley, CA, September 2009, [http://www.law.berkeley.edu/files/policybrief\\_irving\\_0909\\_v9.pdf](http://www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf); Azadeh Shahshahani et al., *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) has Torn Apart Families and Threatened Public Safety*, American Civil Liberties Union Foundation of Georgia, Atlanta, GA, October 2009, <http://www.acluga.org/287gReport.pdf>

<sup>131</sup> See, for example, National Community Advisory Commission, *Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities Program"*, Washington, DC, August 2011, <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf>; Alexa Alonzo, Kristin Macleod-Ball, and Greg Chen, et al., *Immigration Enforcement Off Target: Minor Offenses with Major Consequences*, American Immigration Lawyers Association, Washington, DC, August 2011, <http://www.aila.org/content/fileviewer.aspx?docid=36646&linkid=236762>.

<sup>132</sup> See CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel. Also see 8 C.F.R. 287.7

<sup>133</sup> See, for example, Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, The Immigration Policy Center, Washington, DC, November 2010, [http://elpasotimes.typepad.com/files/secure\\_communities\\_updated\\_110410-1.pdf](http://elpasotimes.typepad.com/files/secure_communities_updated_110410-1.pdf). IPC Secure Communities report; Alonzo et al., *Immigration Enforcement Off Target*.



enforcement agencies should respond to ICE immigration detainers.<sup>134</sup> In particular, the following concerns have been raised: that some local law enforcement agencies may treat ICE detainers as a requirement not to release an individual on bond even though he or she may otherwise be eligible for bond; that persons with ICE detainers may face added barriers to mount a defense against criminal charges; that detained individuals may face added detention time even if their criminal charges are dropped; and that detained individuals may be held for more than 48 hours.<sup>135</sup>

## Can Jurisdictions “Opt Out” of Secure Communities?

Secure Communities was initially described as an optional program that offered state and local law enforcement agencies discretion about whether or not to participate.<sup>136</sup> As with the §287(g) program, participation by local jurisdictions was initiated after a Memorandum of Agreement (MOAs) was negotiated between DHS and each state-level agency (typically, the state police or the state department of public safety) responsible for managing the interface between state law enforcement agencies and the FBI. According to the MOAs, “either party, upon 30 days written notice to the other party, may terminate the MOA at any time” or may “temporarily suspend activities ... immediately upon receipt” of notification that resource constraints or competing priorities necessitate a suspension.<sup>137</sup>

In light of this background, and partly because of the concerns described above, several jurisdictions have attempted to “opt out” of Secure Communities. In 2011, the governors of Illinois, New York, and Massachusetts announced that their states intended to rescind their Secure Communities MOAs. While the §287(g) program requires the active participation of a state or local partner, however, Secure Communities requires no active participation from local jurisdictions: it is simply an information-sharing system between two federal agencies. Thus, while the Obama Administration makes no claim that it can compel jurisdictions to forward information to the FBI for criminal background checks, the Administration has stated that jurisdictions cannot prevent the FBI from forwarding such data to DHS for immigration screening.<sup>138</sup> An internal ICE memorandum written in October 2010 determined that the department had the authority to make Secure Communities a mandatory program without violating the Tenth Amendment to the U.S. Constitution.<sup>139</sup> In August 2011, partly in response to states’ efforts to rescind their Secure Communities MOAs, ICE Director John Morton sent a letter to all state governors who had signed Secure Communities MOAs indicating that the agreements would be terminated and clarifying DHS’s position that jurisdictions may not opt out of Secure Communities.<sup>140</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Shankar Vedantam, “No opt-out for immigration enforcement,” *The Washington Post*, October 1, 2010, Metro.; also see Waslin, *The Secure Communities Program*, pp. 11-12.

<sup>137</sup> ICE, Memorandum of Agreement between U.S. Department of Homeland Security Immigration and Customs Enforcement and State Identification Bureau, Washington, DC, [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesmoatemplate.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiesmoatemplate.pdf).<http://www.ice.gov/foia/library/>.

<sup>138</sup> ICE, “Secure Communities: Get the Facts,” [http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://www.ice.gov/secure_communities/get-the-facts.htm).

<sup>139</sup> Riah Ramlogan, *Memorandum: Secure Communities—Mandatory in 2013*, Washington, DC October 2, 2010.

<sup>140</sup> Tara Bahrapour, “Immigration Authority Terminates Secure Communities Agreements,” *The Washington Post*, August 7, 2011, [http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx801\\_story.html](http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx801_story.html); Daniel Gonzalez, “U.S. Immigration Officials Call of Deportation Agreement with States,” *The Arizona Republic*, August 6, 2011, <http://www.azcentral.com/news/articles/2011/08/06/> (continued...)

With Secure Communities no longer operating under the state MOAs, some jurisdictions have attempted to limit their participation in the program by refusing to fully cooperate with ICE detainers issued as a result of the program. Citing concerns over both costs and wrongful detention, the Cook County, IL, Board of Commissioners, passed an ordinance in September 2011 to require county jails to disregard immigration detainers unless the federal government agreed in advance to pay the associated detention costs.<sup>141</sup> In 2012, the California legislature passed the TRUST Act, which would have directed law enforcement agencies in the state only to honor ICE detainers for arrestees with serious or violent felony convictions, but California Governor Jerry Brown vetoed the bill. In December 2012, California Attorney General Kamala Harris issued law enforcement guidance that ICE immigration detainers are not mandatory and directing law enforcement agencies in the state to make their own decisions about whether to honor such requests.<sup>142</sup> The New York City Council also reportedly planned to propose new rules that would prevent the city from honoring ICE detainers unless an alien has been convicted of a previous felony or faces a felony charge, is included in a gang database or terrorist watchlist, or is the subject of an outstanding criminal warrant or a prior order of deportation.<sup>143</sup>

## **ICE Has Taken Steps to Address Concerns About Secure Communities and the §287(g) Program**

ICE has implemented several changes to the §287(g) and Secure Communities programs designed in part to address the concerns described above. Beginning in July 2009, ICE required all law enforcement agencies participating in the §287(g) program to sign revised §287(g) Memorandums of Agreement (MOAs) as a condition for their continued participation in the program.<sup>144</sup> The new MOAs were designed to strengthen ICE oversight of §287(g) enforcement and were accompanied by additional training requirements and the deployment of additional ICE supervisors to §287(g) jurisdictions. At the same time, after ICE supported the rapid expansion of the §287(g) program between 2007 and 2009, the agency established an internal advisory committee in 2009 in collaboration with the DHS Office of Civil Rights and Civil Liberties (CRCL). Under these new procedures, ICE has approved new §287(g) agreements at a much slower rate during 2010 and 2011.<sup>145</sup>

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20110806federal-immigration-deportation-program-ends.html#ixzz1URNZ4FQ2.

<sup>141</sup> Chip Mitchell, "Illinois County Defies Feds on Immigrant Detainers," *National Public Radio*, September 12, 2011, All Things Considered, <http://www.npr.org/2011/09/12/140407306/cook-county-ill-bucks-immigration-enforcement>; Don Babwin, "Cook County Defies Government on Immigration," *Associated Press*, October 4, 2011, <http://news.yahoo.com/cook-county-defies-government-immigration-184910659.html>.

<sup>142</sup> Lee Romney and Cindy Chang, "Secure Communities is Optional, Harris Says," *Los Angeles Times*, December 5, 2012, <http://articles.latimes.com/2012/dec/05/local/la-me-secure-communities-20121205>. The legal question of whether or not states and localities can be required to comply with immigration detainers is a subject of ongoing litigation; see CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

<sup>143</sup> Kirk Semple, "2 Bills Before City Council Would Limit Deportations," *The New York Times*, December 12, 2012.

<sup>144</sup> See ICE, *Fact Sheet: Updated Facts on ICE's 287(g) Program*, September 7, 2011, <http://www.ice.gov/news/library/factsheets/287g-reform.htm>; also see Capps, et al., *Delegation and Divergence*.

<sup>145</sup> According to ICE data, out of 69 current 287(g) agreements, one was signed in 2010, seven were signed in 2009, 30 were signed in 2008, 23 were signed in 2007, and eight were signed in 2006 or earlier.

ICE also announced three major changes to the §287(g) program (in July 2009) and Secure Communities (in June 2011) designed to address each of the specific concerns raised above.<sup>146</sup>

First, ICE has taken steps to impose agency-wide enforcement priorities on the §287(g) program and Secure Communities. The 2009 MOAs established a uniform three-level enforcement priority system for the §287(g) program, which was then superseded by the 2011 agency- and department-wide memos and letter (see “DHS Enforcement Priorities and Discretion”). The 2011 guidance memos clarify ICE agents’ ability to exercise discretion throughout the immigration enforcement process, and ICE specifically linked the memos to Secure Communities by releasing them in the context of the other June 2011 reforms to that program.<sup>147</sup>

The reforms also included the creation of a Homeland Security Advisory Council Task Force on Secure Communities composed of law enforcement professionals, ICE agents, and community and immigrant advocates. The task force’s goal was to recommend how to focus the program on high-priority offenders and ensure discretion in Secure Communities jurisdictions, among other issues.<sup>148</sup> The task force issued a report with findings and recommendations in September 2011, and ICE published a formal response to the task force in April 2012.<sup>149</sup>

Second, ICE has developed new record-keeping requirements and other tools to attempt to guard against pretextual arrests and racial profiling. ICE’s ENFORCE tracking system has been modified to track data on the circumstances leading to aliens’ arrests, information which may improve oversight of ICE’s partnership programs. ICE and CRCL have reportedly developed new statistical data to be collected on a quarterly basis to evaluate whether Secure Communities is being implemented in a biased way or otherwise resulting in racial profiling.<sup>150</sup> The new §287(g) MOA also seeks to prevent pretextual arrests by requiring agencies to pursue all charges for which aliens are initially arrested. Nonetheless, media reports indicate that statistical monitoring of the Secure Communities program had been delayed as of November 2012, and that ICE may not be able to implement the statistical monitoring that had been announced in response to the Secure Communities task force recommendation.<sup>151</sup>

Third, ICE and CRCL also have developed new materials and procedures to further reduce the risk of racial profiling and misuse of these enforcement programs.<sup>152</sup> New training materials target ICE agents as well as local law enforcement agents involved in these programs. ICE and CRCL have also developed new immigration detainer forms clarifying that individuals should not be detained for more than 48 hours and that law enforcement agencies must provide detainees

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<sup>146</sup> On the 2009 announcement see ICE, “ICE Announces Standardized 287(g) Agreements with 67 state and Local Law Enforcement Partners,” press release, October 16, 2009, <http://www.ice.gov/news/releases/0910/091016washingtondc.htm>; on the 2011 announcements, see Tara Bahrapour, “ICE Reforms Secure Communities Program,” *Washington Post*, June 17, 2011.

<sup>147</sup> ICE, *Secure Communities: What’s New*, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

<sup>148</sup> *Ibid.*

<sup>149</sup> ICE, *Ice Responses to the Task Force on Secure Communities Findings and Recommendations*, Washington, DC: April 27, 2012, <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>.

<sup>150</sup> *Ibid.*

<sup>151</sup> See for example, Alan Gomez, “Feds Delay Review of Obama Immigration Program,” *USA Today* November 5, 2012.

<sup>152</sup> See ICE “DHS Plan to Provide Training to State and Local Law Enforcement in the Secure Communities Program,” May 2012, <http://www.ice.gov/doclib/secure-communities/pdf/secure-communities-training-plan.pdf>.

with information about how to file a complaint if they believe their civil rights have been violated.

## Legislative Issues

In light of Congress's long-standing support for programs targeting criminal aliens on the one hand, and the controversy surrounding some programs targeting criminal aliens on the other, Congress may consider several legislative issues related to Secure Communities and other ICE programs.

### The Role of State and Local Law Enforcement Agencies in Immigration Enforcement

Congress considered legislation during the 112<sup>th</sup> Congress and may consider legislation in the future to clarify whether local jurisdictions have discretion to participate in Secure Communities. Several bills in the 112<sup>th</sup> Congress were introduced to support the expansion of Secure Communities by denying funding for various Department of Justice programs, including the State Criminal Alien Assistance Program (SCAAP), to jurisdictions that do not participate fully in Secure Communities and/or in other aspects of ICE's Criminal Alien Program.<sup>153</sup>

The question of whether states and localities have discretion to opt out of Secure Communities overlaps with a broader ongoing debate about the role of states and localities in immigration enforcement.<sup>154</sup> Members of Congress have introduced legislation that would recognize that state and local officers have "inherent authority" to enforce federal immigration law,<sup>155</sup> or, conversely, would establish that state and local officers may only enforce federal immigration law pursuant to a written agreement authorized under §287(g) of the INA.<sup>156</sup>

Funding for the §287(g) program also was a point of contention during the FY2013 budget cycle and could be at issue in the 113<sup>th</sup> Congress. In its congressional budget justification for ICE, DHS proposed to reduce the budget for the §287(g) program by \$17 million (a 25% reduction) with the expectation that the Secure Communities program would be fully deployed during FY2013, and because "the Secure Communities screening process is more consistent, efficient and cost effective in identifying and removing criminal and other priority aliens."<sup>157</sup> Thus, the department proposed to discontinue funding for the "least productive" existing task force agreements and to suspend consideration of new 287(g) task force requests.<sup>158</sup> During the FY2013 funding cycle, the Senate Appropriations Committee supported the Administration's proposed reductions to the program; but the House-passed H.R. 5855 maintained the FY2012 funding level of \$68 million,

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<sup>153</sup> See, for example, the Strengthening Our Commitment to Legal Immigration and America's Security Act (S. 332), H.R. 1274/S. 169, and the Enforce the Law for Sanctuary Cities Act (H.R. 1134).

<sup>154</sup> On legal questions surrounding state and local enforcement of immigration law see CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>155</sup> See, for example, Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2011 (H.R. 100).

<sup>156</sup> See, for example, Comprehensive Immigration Reform Act of 2011 (S. 1258).

<sup>157</sup> ICE, *Congressional Budget Justifications FY2013*, p. 76. Also see CRS Report R42644, *Department of Homeland Security: FY2013 Appropriations*, coordinated by William L. Painter.

<sup>158</sup> *Ibid.*

and an amendment adopted during House floor debate would prohibit any funds from the act being used to terminate an existing 287(g) agreement.<sup>159</sup>

## **Prosecutorial Discretion**

Partly in response to the June 2011 ICE guidance memos and other Secure Communities reforms announced at the time,<sup>160</sup> the House Judiciary Committee held a hearing in July 2011 on the Hinder the Administration's Legalization Temptation (HALT) Act (H.R. 2497 in the 112<sup>th</sup> Congress).<sup>161</sup> The HALT Act would have suspended for the remainder of President Obama's term in office (i.e., through January 21, 2013) several provisions of law, including those authorizing cancellation of removal, parole, and deferred action.<sup>162</sup> (The HALT Act also would have suspended a number of provisions of immigration law unrelated to prosecutorial discretion.) At the July 2011 hearing, supporters of the HALT Act described it as a tool to prevent an administrative amnesty, while opponents argued that prosecutorial discretion is a critical tool to prevent the misallocation of agency resources.<sup>163</sup> The House Homeland Security and Judiciary Committees also held hearings on Prosecutorial Discretion on October 4, 2011, and October 12, 2011, respectively;<sup>164</sup> and Members questioned DHS officials about the deferred action for childhood arrivals (DACA) program<sup>165</sup> during DHS oversight hearings.<sup>166</sup> Other bills introduced in the 112<sup>th</sup> Congress would tighten the standards for parole and deferred action.<sup>167</sup> Congress may continue to debate issues surrounding prosecutorial discretion and immigration enforcement in the 113<sup>th</sup> Congress.

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<sup>159</sup> Ibid.

<sup>160</sup> See, for example, Chairman Smith and Senator Vitter Introduce Bill to Stop Backdoor Amnesty, July 12, 2011, <http://republicans.judiciary.house.gov/news/07122011.html>.

<sup>161</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 2497, the "Hinder the Administration's Legalization Temptation Act,"* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., July 26, 2011.

<sup>162</sup> "Cancellation of removal" permits the Attorney General to cancel the removal of an alien who is inadmissible or deportable from the United States and adjust the alien's status to an alien lawfully admitted for permanent residence (INA §240A(b)(1)); "parole" refers to the temporary admission of an alien for urgent humanitarian reasons or significant public benefit (INA §212(d)(5)(A)); and "deferred action" refers to a decision by DHS not to place a removable alien in removal proceedings or not to execute an order of removal (8 C.F.R. §274a.12(c)(14)).

<sup>163</sup> U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on H.R. 2497, the "Hinder the Administration's Legalization Temptation Act,"* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., July 26, 2011.

<sup>164</sup> U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 4, 2011; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law,* 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 12, 2011.

<sup>165</sup> In June, 2012, DHS announced that certain individuals who were brought to the United States as children and met other criteria would be considered for deferred action for two years, subject to renewal. See U.S. Department of Homeland Security, Memorandum to David V. Aguilar, Acting Commissioner, U.S. Customs and Border Protection, Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services, John Morton, Director, U.S. Immigration and Customs Enforcement, from Janet Napolitano, Secretary of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012.

<sup>166</sup> See for example, U.S. Congress, House Committee on the Judiciary, *Oversight Hearing: Department of Homeland Security*, 112<sup>th</sup> Congress, 2<sup>nd</sup> sess., July 19, 2012.

<sup>167</sup> See for example the Strengthening Our Commitment to Legal Immigration and America's Security Act (S. 332).

## Data on Racial Profiling

Congress may consider legislation that would mandate new data collection in response to concerns about whether state and local participation in Secure Communities leads to racial profiling or interferes with police-community relations. In the 112<sup>th</sup> Congress, the Traffic Stops Along the Border Statistics Study Act (H.R. 228), for example, would require the Attorney General to conduct a nationwide study of stops for traffic violations by law enforcement officers; perform an initial analysis of existing data, including complaints alleging, and information concerning, traffic stops motivated by race and other bias; and gather specified data from a nationwide sample of jurisdictions, including the traffic infraction alleged to have been committed that led to the stop, characteristics of the driver stopped, whether immigration status was questioned, and whether any warning or citation was issued as a result of the stop. Such data collection could give Congress and the Department of Justice additional information about whether Secure Communities and other ICE programs targeting criminal aliens contribute to racial profiling.

## Immigration Detainers

Congress also may consider legislation to provide clearer statutory authority for states and localities to detain an unauthorized alien until DHS takes custody of the alien and initiates removal proceedings—an issue that has received increased attention given the growing number of removable aliens identified by Secure Communities and recent court cases. Currently, DHS has explicit statutory authority to issue immigration detainers for controlled substance offenses,<sup>168</sup> and regulations authorize the issuance of immigration detainers to any alien in the custody of a federal, state, or local law enforcement agency in other circumstances.<sup>169</sup> Regulations limit immigration detainers to 48 hours, excluding weekends and holidays.<sup>170</sup> There is some question about whether or not jurisdictions are required to honor detainer requests.<sup>171</sup> The 112<sup>th</sup> Congress considered legislation to broaden the authority of state officials to issue immigration detainers and to allow aliens to be detained for up to 14 days;<sup>172</sup> and Congress may consider legislation to grant DHS express statutory to issue detainers for some or all offenses, to clarify limits on the agency's detainer authority, and/or to link certain federal funding to compliance with ICE detainers.

## Conclusion

The Immigration and Nationality Act requires the expeditious removal of certain criminal aliens, and Congress views such enforcement as a priority. Administrative programs aimed at removing criminal aliens have come under criticism because these programs also target noncriminal aliens and aliens with a limited criminal record (i.e., nonviolent criminal aliens). Proponents maintain, however, that targeted aliens have violated U.S. law.

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<sup>168</sup> 8 U.S.C. §1357(d).

<sup>169</sup> 8 C.F.R. §287.7(a).

<sup>170</sup> 8 C.F.R. §287.7(d).

<sup>171</sup> See CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

<sup>172</sup> See for example in the 112<sup>th</sup> Congress, the Criminal Alien Removal Act of 2011 (H.R. 932).

Incarcerated noncitizens provide a rough measure of the criminal alien population, although inconsistencies in data quality, data collection practices, and definitions hinder its precise quantification. According to the most recently available published statistics, an estimated 173,000 noncitizens were incarcerated in 2009, distributed roughly equally across federal and state prisons and local jails. They represented 7.2% of the total incarcerated population of 2.4 million, a proportion similar to the noncitizen proportion of the foreign-born population. Data from the American Community Survey yield a similar estimate for that year. Nationally, incarcerated persons represent just one-third of the total correctional population, with persons on probation and parole comprising the other two-thirds.

The four main programs targeting criminal aliens have seen a 25-fold funding increase between FY2004 and FY2012, and the number of aliens arrested through these programs has increased by a similar proportion. These programs, however, have been controversial, particularly the §287(g) program and Secure Communities, both of which rely on direct or indirect partnerships with state and local law enforcement authorities.

Arguments favoring and opposing these programs have been clearly articulated. On the one hand, the majority of potentially removable aliens identified by Secure Communities and the §287(g) program are not violent criminal aliens. DHS programs that rely on partnerships with state and local law enforcement agencies may risk damaging relations between immigrant communities and local police and may also lead to racial profiling and wrongful detention.

On the other hand, DHS must conduct robust interior enforcement if it is to remove a substantial proportion of unauthorized aliens living in the United States—now estimated at 10.8 million people. Partnerships with state and local law enforcement agencies greatly expand DHS's enforcement capacity. By relying on existing technology and centralized screening, Secure Communities is an especially efficient way to identify and detain a large number of potentially removable aliens passing through the criminal justice system. These programs appear to be valuable tools in ICE's overall detention and removal operations. Moreover, DHS has taken steps to minimize the unintended consequences of Secure Communities, including issuing new guidance on prosecutorial discretion to ensure that its resources target high-priority cases.

## Appendix A. Glossary of Terms

Despite its widespread use, no consistent definition of the term “criminal alien” exists. In this report, *CRS uses “criminal aliens” to refer to any noncitizen who has ever been convicted of a crime.* Certain crimes also have immigration-related consequences, such as being grounds for removal, and certain categories of criminal (and noncriminal) aliens are also the subjects of special ICE enforcement programs, including those described in this report. The following terms are often discussed in the context of these programs. Definitions are based on CRS’s analysis of statutory definitions where noted and of DHS usage and prevailing definitions in other cases.

**Absconder:** See “fugitive alien.”

**Aggravated felon:** A noncitizen who has been convicted of an aggravated felony (see below); aggravated felons are subject to removal from the United States, ineligible for certain forms of immigration relief, and ineligible to be readmitted to the United States.

**Aggravated felony:** A crime identified in §101(a)(43) of the Immigration and Nationality Act (INA), a list that includes numerous state and federal offenses ranging from murder, rape, and trafficking in controlled substances to theft, bribery, and obstruction of justice. Crimes committed outside the United States may also be considered aggravated felonies if the term of imprisonment was completed within the previous 15 years.

**At-large criminal alien:** A noncitizen who has been convicted of a crime in the United States and is not currently incarcerated. Not all at-large criminal aliens are removable.

**Criminal alien:** A noncitizen who has been convicted of a crime in the United States. Not all criminal aliens are removable.

**Criminal immigration offense:** A violation of federal criminal immigration law under Title 8 or Title 18 of the U.S. Code. The most common such violations for which aliens are convicted are 8 U.S.C. §1326 (reentry of a deported alien), 8 U.S.C. §1324 (bringing in and harboring certain aliens), 15 U.S.C. §1546 (fraud and misuse of visas, permits, and other documents), and 8 U.S.C. §1325 (entry of alien at improper time or place).

**Fugitive alien:** An alien who has failed to leave the United States following the issuance of a final order of removal, deportation, or exclusion. Fugitive aliens were referred to as “absconders” prior to FY2007.

**Removable alien:** An alien subject to formal removal (deportation) from the United States. This includes aliens who are inadmissible under INA §212 or deportable under INA §237, including nonimmigrant aliens who enter legally but violate the terms of their visas or overstay their visas. Most removable aliens have never been convicted of a criminal offense.

**Removable criminal alien:** An alien who has been convicted of a removable criminal offense; such an alien is subject to removal from the United States.

**Removable criminal offense:** A criminal offense described in §237(a)(2) of the Immigration and Nationality Act (INA), including crimes of moral turpitude, aggravated felonies, high-speed flight from an immigration checkpoint, failure to register as a sex offender, drug offenses, firearm offenses, and immigration-related document fraud, among others.



## Appendix B. Data on Arrests and Incarceration of the Criminal Alien Population

### Data Analyzed

At the federal level, arrest data are compiled by the U.S. Marshals Service (USMS) Prisoner Tracking System and published by the Department of Justice (DOJ) Bureau of Justice Statistics (BJS) through its online Federal Justice Statistics Resource Center (FJSRC).<sup>173</sup> Federal incarceration data are published by the Federal Bureau of Prisons (BOP) and compiled by the Sourcebook of Criminal Justice Statistics.

Figures for the federal and state noncitizen prison population from 2001-2008 are as of year-end and include sentenced as well as non-sentenced inmates, and inmates under jurisdiction as well as inmates in custody. In contrast, figures for the local noncitizen jail population for all years (2001-2009) were only available for mid-year. These mid-year figures only include sentenced inmates and inmates in custody. For 2009, however, federal and state figures for the noncitizen incarcerated population were available only as of midyear. Hence, all 2009 figures – federal, state, and local – are as of mid-year. As of December 2012, published data on the noncitizen incarcerated population for 2012 were unavailable at the state and local levels.

State incarceration data come from annually published BJS reports, *Prison Inmates at Midyear*. Data for that report come from the National Prisoner Statistics (NPS) program of BJS, which obtains *mid-year* and *year-end* prisoner counts from correctional departments of all 50 states.

BJS also conducts an *Annual Survey of Jails*, from which it creates national-level estimates of the number of inmates incarcerated in local jails.<sup>174</sup> In addition, it conducts a complete count of the local jail population every five years through its *Census of Jails*. Together, these two local jail counts provide a consistent annual series of the total number of persons incarcerated in local jails, though these local data are problematic, as described below.

### Data Quality and Limitations

Several obstacles challenge and limit the ability of researchers to accurately enumerate the criminal alien population or compare its criminal activity to other U.S. populations.<sup>175</sup> For example, while federal BOP data include information on citizenship status, not all state and local criminal justice systems collect such information, creating substantial inconsistencies in data quality and completeness at the state and local level. There is no single and consistent national enumeration of prisoners in the United States similar to the decennial census or the Current

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<sup>173</sup> PTS contains data on suspects arrested for violations of federal law, by federal enforcement agencies and data about warrants initiated or cleared. The data include information on characteristics of federal arrestees. See page 107 of <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs0407.pdf>.

<sup>174</sup> Jail administrators are asked whether they are holding any inmates for the Immigration and Customs Enforcement (ICE) agency.

<sup>175</sup> For more information on data challenges for quantifying the criminal alien population, see Steven A. Camarota and Jessica M. Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, Center for Immigration Studies, Washington, DC, November 2009, <http://www.cis.org/articles/2009/crime.pdf>.

Population Survey—much less one that focuses on subpopulations such as noncitizens.<sup>176</sup> Hence, attempts to quantify the U.S. criminal alien population have relied on estimation techniques, assumptions about the criminal alien proportion of the total criminal population, and federal surveys and censuses of prison inmates. This section discusses several data limitations associated with collecting data at the various stages of the criminal justice system.

### **Arrests and Incarcerations Are Imperfect Indicators of Immigrant Criminality**

Arrests and incarcerations are both imperfect measures of criminality. Arrest data overestimate criminality because some individuals who are arrested are subsequently released, or if charged, are not ultimately convicted. And local incarceration data also over-count certain individuals because some people are incarcerated in local jails even though they have not yet been charged or convicted of crimes.

Conversely, incarceration data generally underestimate the total number of convicted criminals because they exclude persons on parole and persons sentenced to probation. For instance, of the 7,076,200 individuals included by BJS in its 2010 estimate of the total correctional population, 4,055,514 were on probation, 840,676 were on parole, and 2,262,832 were incarcerated in federal and state prisons or in local jails.<sup>177</sup>

One also must use caution when examining arrest and incarceration data because greater (or lesser) numbers of arrests and incarcerations do not always indicate an increase (or decrease) in criminal activity. They may indicate changes in enforcement policy. For instance, a reduction in arrests or incarcerations for illegal immigration entry may stem from fewer persons attempting to enter the United States illegally, but it may also reflect changes in resources or enforcement priorities. It is also noteworthy that some crimes are never reported: arrests and incarcerations only reflect the number of offenses known to law enforcement.

### **Inconsistent State and Local Data Reporting**

In addition to these limitations with respect to data validity, efforts to estimate the criminal alien population also confront a significant limit with respect to data availability and reliability. First, there are no recent and complete publicly available data on arrests at the state and local levels that distinguish between U.S. citizens and noncitizens.<sup>178</sup> Thus, this report limits its analysis of arrest data to federal statistics.

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<sup>176</sup> Hagan and Palloni, 1999.

<sup>177</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of criminal justice statistics Online*, Washington, DC, 2010, <http://www.albany.edu/sourcebook/pdf/t612009.pdf>. In this particular series, counts for probation, prison, and parole populations are for December 31, and jail population counts are as of June 30. In general, any over- or under-count of the criminal alien population also applies to the native-born population. Hence the degree to which the proportion of criminal aliens changes relative to other criminal populations by using these imperfect metrics depends on the likelihood that aliens are sentenced to probation or released on parole (or arrested and not charged with crimes) relative to other criminal populations.

<sup>178</sup> Recent public-use data on criminal aliens can be obtained from two sources: the U.S. Department of Justice's Bureau of Justice Statistics, which publishes the annual *Prison and Jail Inmates at Midyear* report, and the National Archive of Criminal Justice Data (NACJD), which provides to the public the raw data for analysis. The aggregation of state and local level criminal justice data into meaningful datasets requires consistent definitions of specified populations and criminal activities, as well as consistent reporting practices. Moreover, it often relies on the voluntary participation of state criminal justice agencies. Definitional inconsistencies, reporting differences, and differing (continued...)

Second, BJS's state and local incarceration data are based on the voluntary participation of each state's department of corrections and local jails. While all states contribute data to BJS on their prison population, states vary with respect to how they define terms, which poses challenges to estimating the size and character of the criminal alien population. For instance, some states report foreign-born prisoners and naturalized U.S. citizens rather than strictly noncitizens, potentially inflating counts of the criminal alien population.<sup>179</sup>

Local jail reporting practices are likely to be even more inconsistent than state practices given the far greater number of jurisdictions. And not all local jurisdictions even report on their foreign-born criminal populations. For these reasons, GAO concluded in 2005 that "there [are] no reliable population ... data on criminal aliens incarcerated in all state prisons and local jails."<sup>180</sup>

### **Additional Sources of Bias**

Several additional factors may impede efforts to quantify the criminal alien population. Because criminal activity can lead to removal, criminal aliens could have strong incentives to lie about their legal status or not to provide such information, although biometric technology increasingly permits authorities to identify certain removable aliens. Furthermore, serious crime is frequently intra-racial and intra-ethnic in nature. Unauthorized alien victims may be particularly reluctant to report crime for fear that contact with the criminal justice system may result in their own removal.<sup>181</sup> Such behavior can have nontrivial effects on crime reporting in some jurisdictions, given the frequent intra-racial and intra-ethnic character of serious crime.<sup>182</sup>

### **Presentation of Publicly Available Data**

A separate data-related complication independent of data quality concerns differences between counts of criminal justice data that result from factors such as whether the data come from mid-year or year-end, include persons in privately operated community facilities, include persons convicted in Washington DC, and similar variations. In addition, differences can occur between analyzing raw data and defining criminal aliens with certain decision rules, versus using data published online by BOP that incorporate different decision rules. For instance, figures on federally incarcerated criminal aliens in this report differ slightly from those presented in the GAO report, although it is not clear from the GAO report or from the source for data contained in this CRS report how those different figures would be reconciled.

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participation levels all reduce the reliability and comparability of state level data on the criminal alien population.

<sup>179</sup> Bureau of Justice Statistics, *Prison Inmates at Midyear 2009 - Statistical Tables*, U.S. Department of Justice, Washington, DC, June 2010, p. 23, <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>.

<sup>180</sup> GAO, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, p.2.

<sup>181</sup> Orde F. Kittrie, "Federalism, Deportation, and Crime Victims Afraid to Call the Police," *Iowa Law Review*, vol. 91 (2005), pp. 1449-1508.

<sup>182</sup> *Ibid.*

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