Kris W. Kobach

Professor of Law

University of Missouri (Kansas City) School of Law

July 27, 2005

Testimony on

"The 287(g) Program: Ensuring the Integrity of America's Border Security System through Federal-State Partnerships"

Before the

House Committee on Homeland Security

Subcommittee on Management, Integration, and Oversight

Mr. Chairman and Members of the Committee, it is an honor and privilege to appear before you today to discuss a proven mechanism for securing our homeland and restoring the rule of law in immigration: Section 287(g) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1357(g). I was involved in overseeing the first application of Section 287(g) during my service as Counsel to the U.S. Attorney General from September 2001 through July 2003. After Florida's successful Section 287(g) agreement, I did everything I could to ensure that Alabama's request for a Section 287(g) agreement was met with a timely and satisfactory commitment from the Justice Department, which was then carried out by the Department of Homeland Security. However, my testimony should not be taken to represent the past or present position of the U.S. Department of Justice. I offer my testimony solely in my private capacity as a Professor of Law.

Section 287(g) Authority Versus Inherent Arrest Authority

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

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

In contrast, Section 287(g) delegates authority that is considerably broader than the power to merely arrest an alien and transfer him to ICE custody. Section 287(g) encompasses the spectrum of basic enforcement powers. Such 287(g) authority includes not only the power to arrest and transfer, but also the power to investigate immigration violations, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved the routine enforcement of immigration laws. This broader enforcement authority can only be delegated to state and local law enforcement agencies through a formal Memorandum of Understanding (MOU), which effectively deputizes members of state or local law enforcement agencies to perform the "function[s] of an immigration officer." 8 U.S.C. § 1357(g).

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

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State –

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

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10).

The Success of Section 287(g) Thus Far

To date, two states—Florida and Alabama—have signed Section 287(g) agreements with the federal government. The Florida MOU became effective on July 7, 2002. Under that agreement, 35 Florida law enforcement officers were trained for six weeks and were delegated specific immigration enforcement powers, including the power to interrogate, the power to collect evidence, and the power to conduct broad immigration investigations. The success of the program was immediately apparent. In the first year under the Florida MOU, the trained state officers made 165 immigration arrests, including the bust of a phony document production ring in the Naples area.

The Alabama MOU was signed on September 10, 2003. Under the agreement, the first group of 21 Alabama state troopers undertook five weeks of immigration enforcement training, which they completed in October 2003. The Alabama officers received training in the procedures of immigration investigations, the identification of fraudulent immigration documents, the use of national immigration databases, the details of immigration law, and specific document requirements for illegal aliens. Since then, the Alabama troopers have made nearly 200 immigration arrests. A second class of 25 troopers will receive training in October 2005.

Targeting Different Problems in Different Jurisdictions

Although there are many similarities between the MOUs of Florida and Alabama, it is important to recognize that the law enforcement environments of the two states were different, and the MOUs in each met different needs. Florida's initial interest in seeking a Section 287(g) agreement was driven in part by the exigencies of 9/11 and the recognition that state and local law enforcement can increase their effectiveness in the war against terrorism with the addition of Section 287(g) enforcement authority. State and local police officers are often in the best position to come into contact with alien terrorists operating in the United States. Four members of the 9/11 terrorist cohort were stopped by state and local law enforcement in the United States for routine traffic violations. In all four of those instances, the aliens were illegally present in the United States. (The four hijackers who were stopped by police were Nawaf al Hazmi, Mohammed Atta, Hani Hanjour, and Ziad Jarrah.) Also relevant was the fact that several of the 9/11 hijackers had either entered the United States through Florida or had operated in Florida while preparing for the attack. The suspected twentieth hijacker, Mohamed Al Khatani, also flew to Orlando International Airport; but he was denied entry by a vigilant immigration inspector. Accordingly, the desire to counter alien terrorists was central to the Florida MOU at the time of its inception.

In contrast, Alabama faced a different challenge. Alabama had experienced widespread and increasing violations of federal immigration law by aliens in its jurisdiction. However, the

distribution of INS manpower left Alabama underserved, in the judgment of Alabama's law enforcement leadership and members of its congressional delegation. At times, as few as three INS interior enforcement agents were operating in the state. Recognizing that breakdown of the rule of law in immigration carries with it attendant public safety threats, Alabama addressed the INS manpower shortage by committing its own officers to the task.

These are not the only needs that Section 287(g) authority can address. Other jurisdictions will find other uses for an MOU. Perhaps the greatest law enforcement threat of recent years is the rise of violent alien street gangs. A few statistics illustrate the scope of the problem. Mara Salvatrucha-13 (MS-13), the most notorious and fastest-growing alien gang, started as a Salvadoran gang in Los Angeles in the late 1980s. MS-13's more than 10,000 members now operate in at least 33 states. And MS-13 still remains smaller than the largest alien gang, the 18th Street Gang—which started in Los Angeles with primarily Mexican membership and then expanded nationwide. It is estimated to have more than 20,000 members in the Los Angeles area alone. In both gangs, the majority of members are *illegal* aliens. The gangs generate cash in different ways in different parts of the country. But by far, the most common forms of activity are drug trafficking, theft, gun trafficking and immigrant smuggling. Where MS-13 or the 18th Street Gang establish a presence, the killings inevitably follow. In Los Angeles, the various street gangs accounted for 291 of the city's 515 homicides in 2004—an increase of 12.4% in gang killings over 2003.

Because so many of these gang members are aliens without lawful presence in the United States, sustained enforcement of immigration laws can have a massive impact in fighting this national scourge. This was demonstrated in March 2005, when ICE announced the arrest of 103 members of MS-13 in an effort spanning several weeks known as Operation Community Shield. Although all of the aliens were arrested for violations of federal immigration laws, approximately half had prior arrest records of prior convictions for violent crimes.

Local police departments provided to ICE lists of names of known alien gang members. ICE then ran those lists through its databases to determine which of those aliens were legally present in the country. After determining that the alien gang members were illegally present, ICE conducted a series of arrests with the help of local law enforcement. This operation demonstrated powerfully how immigration enforcement can serve as an invaluable tool to combat gangs when illegal aliens comprise a substantial proportion of gang members. In dealing with these deadly gangs, state and local police need every law enforcement tool at their disposal.

Section 287(g) authority can be particularly useful in dealing with alien street gangs. Operation Community Shield was a successful episode, but its limitation is precisely that—it was an episode. Every day, police officers in gang-ridden jurisdictions encounter alien gang members who are known to have been previously deported or who are suspected of being unlawfully present in the United States. Section 287(g) authority would enable those jurisdictions to continuously and routinely remove those illegally-present gang members from the streets of our communities. With police officers trained in immigration enforcement, the checking of gang members' names against national databases and the enquiring into immigration violations could be done locally, quickly, and regularly.

Another need that Section 287(g) agreements can address is the problem of massive numbers of removable felons incarcerated in state prison systems across the country. ICE's institutional removal program is intended to identify and take custody of such felons before they are released. Unfortunately, many felons slip through the cracks. Training state law enforcement officers to screen incarcerated felons and determine which ones are removable can

fill in the gaps and ensure that criminals who are not entitled to remain in the United States are, in fact, removed. The agreement being considered in Los Angeles County, California, is an example of an MOU that addresses this need.

Existing Infrastructure and Additional Funding

With the demonstrated success of Section 287(g) authority in Florida and Alabama, we are now in a position as a nation to expand this program. Indeed, we need to expand this program. Despite the statutory improvements ushered in by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the breakdown of the rule of law has only worsened in the intervening nine years. In addition, the attacks of 9/11 highlighted the importance of securing our borders in the war against terrorism.

The infrastructure for additional MOUs is already in place. The training model has been developed. And the success of Florida and Alabama is prompting law enforcement agencies across the country to knock on ICE's door. Interest has been expressed publicly in leaders in Arizona, Connecticut, Orange County and San Bernardino County, California, and other jurisdictions. However, two things are missing. First, ICE needs to dedicate personnel to the task of responding to such requests for Section 287(g) agreements in a timely manner. Second, state and local law enforcement agencies need assurance that they will be compensated for their expenses. The costs of transportation to the training location and providing temporary replacements for law enforcement personnel who are participating in the training can be substantial. Indeed, the existing wording of Section 287(g) deters some local law enforcement agencies from enquiring further: the immigration enforcement functions are to be "carr[ied] out … at the expense of the State or political subdivision." While many some jurisdictions are willing to foot the bill in the short run, because they realize that better immigration enforcement will prevent other more costly law enforcement problems from arising in the long run, other jurisdictions are unable to contemplate any additional expenses. The infusion of federal dollars into the Section 287(g) program will remove that impediment for jurisdictions that would otherwise seek to participate.

It has become a cliché since 9/11 to say that enhanced state-federal cooperation is essential if we are to improve our homeland security. All too often those words are devoid of real meaning. However, Section 287(g) is a program that facilitates systematic, structured cooperation with proven results. I wholeheartedly urge this Committee to support its expansion.