



# 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 serious 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, with state prisons and local jails 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 other § 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 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 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 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.

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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. DHS 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 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 \$690 million for these four programs in FY2011, 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 289,000.

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 the Department of Homeland Security (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 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 removal under the INA even if they are otherwise legally present.<sup>7</sup> For example, a legal

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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 11.2 million in 2010; 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; see “Quantifying the Criminal Alien Population.” 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.”

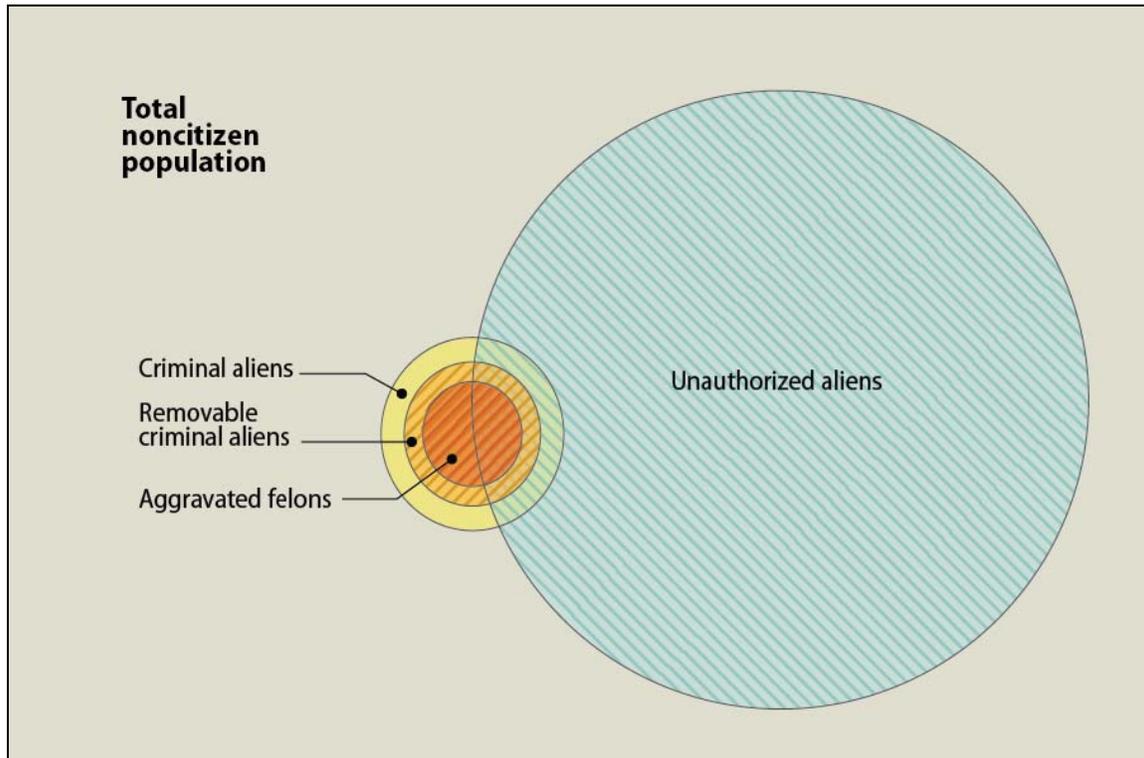
<sup>5</sup> Unauthorized aliens are foreign nationals who have entered the United States without inspection or with fraudulent documents, or who overstayed a nonimmigrant visa.

<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.

<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.

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 additional factors is a civil violation, not a criminal offense.<sup>12</sup>) The smaller circles in **Figure 1**

<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.

<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.

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 2009.<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 2009. Of the 183,986 persons arrested for federal offenses in 2009, 46% were not U.S. citizens and 15% 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 2009**

	Number of Persons			Percent of Total		
	2001	2005	2009	2001	2005	2009
U.S. Citizen	68,200	74,985	71,412	57%	53%	39%
Noncitizen	41,499	56,492	84,640	35%	40%	46%
Status unknown	9,197	8,723	27,934	8%	6%	15%
Total records	118,896	140,200	183,986	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 2009 were for illegal entry. As **Figure 2** illustrates, while federal arrests with *known* citizenship information increased 42%, from 109,699 to 156,052, 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 4% in 2009.<sup>15</sup> 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 46% in 2009) even as the total number of U.S. citizens arrested on federal charges increased during this period (from 68,200 in 2001 to 71,412 in 2009).

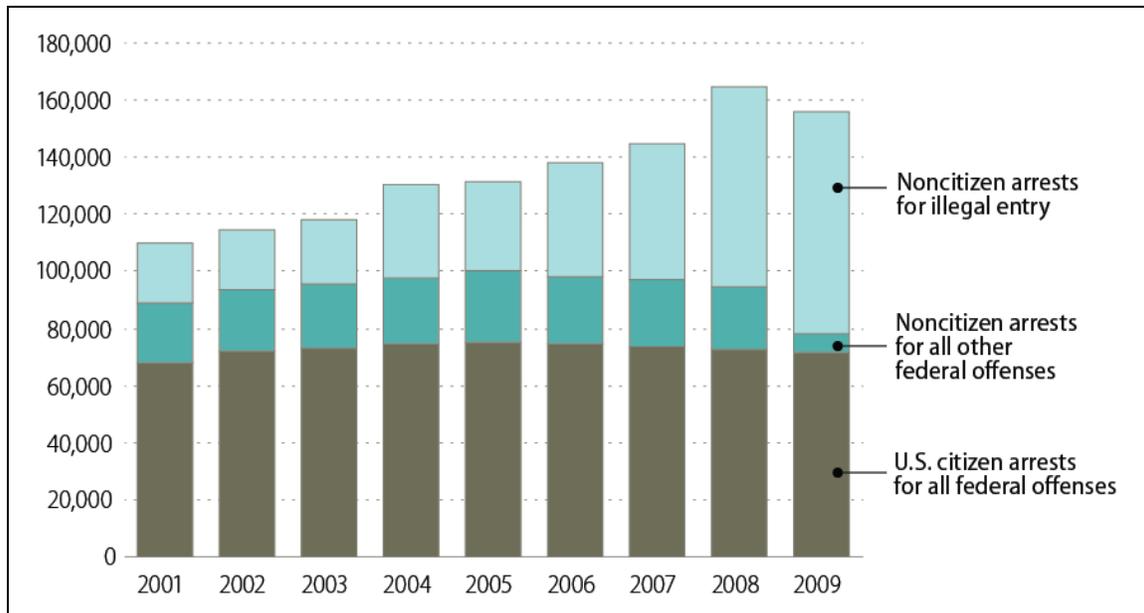
<sup>13</sup> Individuals housed by Immigration and Customs Enforcement (ICE) are beyond the scope of this report because they are not officially part of the U.S. criminal justice system. This report also does not present data on convictions.

<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. Marshall Service to a new prisoner tracking system beginning in 2008 temporarily increased the number of cases with unreported offense types.

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 relatively larger pool of aliens who may be charged with illegal entry, even though the total number of apprehensions fell during this period.<sup>18</sup>

**Figure 2. Federal Arrests by Citizenship Status and Type of Offense, 2001-2009**



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

**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. 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.

<sup>16</sup> According to CRS’s analysis of DHS data, the Border Patrol apprehended an average of 972,000 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 FY2010*, Washington, DC, 2011, p. 93.

<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 U.S. Customs and Border Protection, “DHS Launches ‘Operation Streamline II,’” press release, December 16, 2005, [http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/archives/2005\\_press\\_releases/122005/12162005.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/archives/2005_press_releases/122005/12162005.xml).

<sup>18</sup> Appropriations for the Border Patrol increased by 191%, from \$1.1 billion in FY2000 to \$3.5 billion in FY2009. The 20,202 CBP agents as of November 2009 represented a more than doubling of staff over that decade; see CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake. Increased border enforcement also may have a deterrent effect on would-be border crossers.

## 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. 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 2,384,912 prisoners (U.S. citizens and noncitizens) were incarcerated: 206,577 in federal prisons, 1,410,901 in state prisons, and 767,434 in local jails (**Table 2**).<sup>19</sup> Of this total, 172,766 were noncitizens, including 48,740 in federal prisons, 64,053 in state prisons, and 59,973 in local jails.

Thus, according to BJS data presented in **Table 2**, noncitizens comprised 7.2% of the combined federal, state, and local prisoner population in 2009, 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>19</sup> All incarcerations for 2009 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) 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, 2001-2009**

	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
<b>2001</b>	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%
<b>2002</b>	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%
<b>2003</b>	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%
<b>2004</b>	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%
<b>2005</b>	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%
<b>2006</b>	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%
<b>2007</b>	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%
<b>2008</b>	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%
<b>2009</b>	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%

**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 2009, 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%.

**Table 3** illustrates the types of crimes for which apprehended criminals were sentenced to federal prison in 2001, 2005, and 2009. 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 68.2% by 2009. 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, 2001-2009**

	2001		2005		2009	
	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%	90.9%	31.4%
Immigration crimes	2.6%	47.3%	4.1%	60.1%	4.0%	68.2%
Total	100%	100%	100%	100%	100.0%	100.0%

**Source:** CRS analysis of data from the 2001, 2005, and 2009 *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 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 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, 2,271,036 persons were living in group quarters in 2009, most of which consisted of correctional facilities. This figure closely matches the 2,284,913 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 161,960, or 7.13% of the total—an estimate comparable to CRS’s overall figure of 172,766 (**Table 2**). ACS data do not distinguish between federal, state, or 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 12.6% as of 2009. This rate would suggest an upper bound estimate for the incarcerated criminal alien population of 300,500, based on a total incarcerated population of 2,384,912 (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/t612009.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.

The Government Accountability Office (GAO) recently enumerated 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.<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 36.8 million between 2001 and 2009.<sup>37</sup> While their 2009 proportion of the U.S. population amounted to 12.2%, the foreign born accounted for 26.4% of all U.S. population growth from 2001 to 2009 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, Apr. 7, 2005.

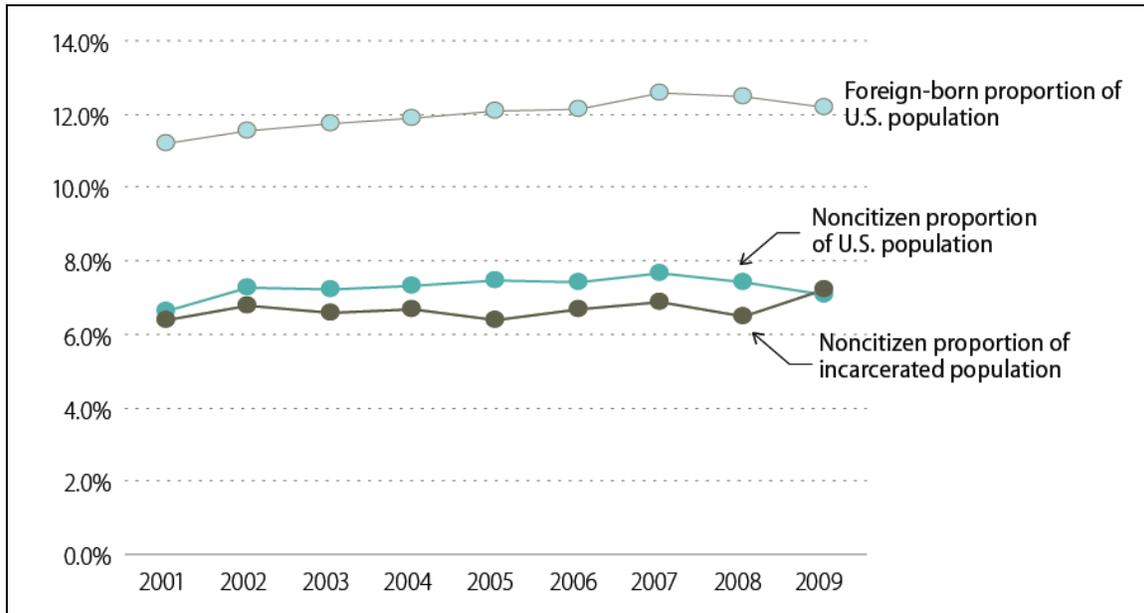
<sup>36</sup> U.S. Government Accountability Office, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs*, GAO-11-187, March 24, 2011.

<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**.

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 required the Attorney General “In the case of an alien who is convicted of an offense which

(...continued)

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 2009, the total *year-end* correctional population numbered 7,225,800, with 4,203,967 persons on probation, 2,284,913 persons incarcerated, and 819,308 persons on parole. See *Sourcebook of Criminal Justice Statistics Online*, Table 6.1.2009, <http://www.albany.edu/sourcebook/pdf/t612009.pdf>.

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>

## **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

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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*.

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 program 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.”

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

<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.)

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 10-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. As of January 2011, more than 545 VTC units had been installed to support such remote screening.<sup>52</sup> CAP also works with state and local correctional departments that provide ICE with inmate rosters. ICE analyzes roster data and compares prisoner data to immigration databases. Additionally, CAP maintains a special partnership with Phoenix-

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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 Marshal’s 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/secure\\_communities/congressionalstatusreportfy104thquarter.pdf](http://www.ice.gov/doclib/foia/secure_communities/congressionalstatusreportfy104thquarter.pdf).

area law enforcement agencies (LEAs) through the Phoenix Law Enforcement Area Response program. Under this program, CAP officers respond to 100% of Arizona LEA requests 24 hours a day, 7 days a week.<sup>53</sup> According to ICE, these CAP screening systems together with Secure Communities (discussed below) covered persons being booked into 76% of all U.S. jails and prisons as of August 2011, including 100% of the 1,244 federal and state prisons in the United States and 64% (1,959 out of 3,047) of all local jails.<sup>54</sup>

## **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 they 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>55</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 CAP officers to take custody of the alien and to initiate removal proceedings.<sup>56</sup>

## **§ 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>57</sup> Although § 287(g) agreements were authorized as part of the 1996 Illegal Immigration Reform and Immigrant

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<sup>53</sup> ICE, *Congressional Budget Justifications FY2012*.

<sup>54</sup> ICE email to CRS, August 8, 2011.

<sup>55</sup> The Law Enforcement Support Center (LESC) 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/lesc/>.

<sup>56</sup> The regulations governing immigration detainees are found at 8 C.F.R. 287.7.

<sup>57</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.

Responsibility Act (P.L. 104-208, Div. C, IIRIRA), the first § 287(g) agreement was implemented in 2002, and 61 of the 69 current § 287(g) agreements were signed after 2006.<sup>58</sup>

About half (34 of 69) of the current § 287(g) agreements are jail enforcement agreements.<sup>59</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 case management system (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**

Twenty of the current § 287(g) agreements are for task force programs.<sup>60</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>61</sup> In cooperation with local ICE Homeland Security Investigations offices,<sup>62</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, 15 of the current § 287(g) programs are "hybrid" programs that include jail enforcement agreements as well as task forces within the same jurisdiction.<sup>63</sup> For hybrid programs, ICE ERO 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

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<sup>58</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>59</sup> Ibid.

<sup>60</sup> ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g)."

<sup>61</sup> See CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>62</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>63</sup> Ibid. and ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g)."

receiving notice to do so.”<sup>64</sup> In 2009, with support from Congress,<sup>65</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>66</sup>

The NFOP consists of 104 fugitive operations teams that use data from the National Crime Information Center (NCIC)<sup>67</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 20 § 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.

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<sup>64</sup> ICE, “Fact Sheet: ICE Fugitive Operations Program,” <http://www.ice.gov/news/library/factsheets/fugops.htm>.

<sup>65</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>66</sup> ICE, “Fact Sheet: ICE Fugitive Operations Program,”

<sup>67</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>.

**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>	126 teams + remote screening	1,518 jurisdictions in 44 states	49 jurisdictions in 21 states	35 jurisdictions in 17 states	104 teams

**Source:** CRS Analysis of ICE programs. Secure Communities jurisdictions data as of September 20, 2011, from ICE, “Activated Jurisdictions,” <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>; § 287(g) jurisdictions data as of September 2, 2011, 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 2011 for CAP, September 2011 for Secure Communities and § 287(g) program, and August 2009 for NFOP. The reported number of § 287(g) task forces counts 15 hybrid programs as both jail enforcement and task force models; as of October 13, 2011, ICE has § 287(g) agreements with a total of 69 law enforcement agencies in 24 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 10.8 million unauthorized immigrants in the United States in January 2010,<sup>68</sup> and DHS apprehended an average of 641,000 removable aliens per year from FY2008 to FY2010.<sup>69</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>70</sup>

Thus, DHS—like the INS before it—has developed a system to prioritize certain aliens for removal.<sup>71</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.

### **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>72</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

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<sup>68</sup> Michael Hofer, Nancy Rytina, and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2010*, Office of Immigration Statistics, Department of Homeland Security, February 2011.

<sup>69</sup> DHS apprehensions include U.S. Border Patrol apprehensions and ICE administrative arrests; see Department of Homeland Security Office of Immigration Statistics, “Immigration Enforcement Actions: 2010,” June 2010, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

<sup>70</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>71</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.

<sup>72</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.

to public safety, (2) apprehend and remove recent illegal entrants,<sup>73</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>74</sup> The 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>75</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

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<sup>73</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>74</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, 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>75</sup> Morton, *Exercising Prosecutorial Discretion*, p. 2.

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>76</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>77</sup>

## **August 2011 DHS Announcement**

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>78</sup> The letter also indicated DOJ resources should be targeted toward high-priority cases.<sup>79</sup> The White House issued a 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>80</sup> DHS and DOJ are reportedly initiating an interagency review of cases of individuals already in removal proceedings, and a DHS-DOJ interagency working group will issue further guidance on how to provide for discretionary relief in certain cases involving final orders of removal.<sup>81</sup>

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<sup>76</sup> Ibid, pp. 2-3.

<sup>77</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>78</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>79</sup> Ibid.; immigration judges also have some leeway to grant certain forms of relief during the removal process, including through the granting of voluntary departure as an alternative to formal removal.

<sup>80</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>81</sup> Letter from Janet Napolitano, Secretary of Homeland Security, to Richard Durbin, Senator, August 18, 2011.

## Recent 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>82</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>83</sup>

**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>Total</b>	\$1,025.0	\$750.0	\$252.1	\$1,241.9	<b>\$3,269.0</b>	\$12,079.1	<b>\$15,348.1</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, and S.Rept. 111-222; § 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:** **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**

<sup>82</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>83</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).

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>84</sup> ICE used the additional funding to support CAP and to develop Secure Communities.

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 \$392.5 million in FY2011, a 58-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 \$690.2 million in FY2011; and funding for DRO/ERO operations—all of which treat removable criminal aliens as an enforcement priority—increased from \$960 million in FY2004 to \$2.55 billion in FY2011.

## 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>85</sup> by CAP, § 287(g), and NFOP and alien identifications and administrative arrests as a result of Secure Communities. (Secure Communities is not responsible for administrative arrests per se because the program itself is only responsible for the identification of removable aliens; Secure Communities arrest data refer to aliens identified by that program who subsequently were administratively arrested by ICE.)

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<sup>84</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 year ending September 30, 2008, and for other purposes*, 110<sup>th</sup> Cong., December 17, 2007.

<sup>85</sup> An administrative arrest refer to the arrest of an alien who is charged with an immigration violation and typically placed in removal proceedings.

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

Fiscal Year	CAP	Secure Communities		§ 287(g)	NFOP
	Arrests	Identifications	Arrests	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	42,135	56,116	35,094
2010	219,477	248,166	111,093	46,467	35,774
2011	216,894	318,308	73,466	33,180	39,466
Total	1,112,649	662,138	226,694	207,370	204,901

**Source:** CAP, § 287(g), and NFOP data received from ICE Legislative Affairs October 12, 2011; Secure Communities identification data from Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through August 31, 2011; Secure Communities administrative arrest data from Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011.

**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 arrests in FY2009; ICE reported Secure Communities administrative arrests in its quarterly reports to Congress through April 2011 but no longer includes this data in its reports to Congress because Secure Communities is responsible for the identification of removal aliens but the administrative arrest of removable aliens falls outside the scope of the program. As a result, Secure Communities identifications and administrative arrests for FY2011 refer to different time periods: Secure Communities identification data are through August 31, 2011, and arrest data are through April 30, 2011; neither figure includes the entire fiscal year that ends on September 30. Secure Communities reported 192,318 removable alien identifications through April 30, 2011. § 287(g) 2011 arrest data are as of September 11, 2011, and do not include the entire fiscal year.

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 itself does not make arrests. Indeed, ICE’s most recent quarterly report to Congress includes data on removable aliens identified by the program, but it no longer includes data on the number of administrative arrests resulting from Secure Communities. When an ICE field office determines that an alien identified by Secure Communities should be placed in removal proceedings—about 42% of the time in FY2009-FY2011 (through April 30)—<sup>86</sup> the arrest occurs 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 or arrest by multiple programs. The same individual may also be identified or arrested on multiple

<sup>86</sup> Secure Communities identified a total of 536,148 aliens through April 30, 2011, resulting in 226,694 administrative arrests; the data differ from those reporting in **Table 6** because the table includes identification data through August 31, 2011.

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. As of October 2011, available data indicate that CAP had made over 1.1 million administrative arrests since 2004, while NFOP and the § 287(g) program made about 207,000 and 40,000 administrative arrests, respectively. Secure Communities has quickly grown to identify an even larger number of removable aliens per year than CAP (and FY2011 data for Secure Communities do not include the full fiscal year, so the actual number is larger than the **Table 6** indicates). Yet, fewer than half of aliens identified by Secure Communities through April 2011 were administratively arrested by ICE (i.e., fewer than half were placed in removal proceedings).

**Table 7** presents a rudimentary measure of each program’s cost per individual arrested or identified. 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 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	Arrests	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	\$3,560	\$962	\$6,454
2010	\$877	\$806	\$1,800	\$1,463	\$6,421
2011	\$888	NA	NA	NA	\$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. FY2011 data cannot be calculated for Secure Communities and § 287(g) because enforcement data are not yet available for the full fiscal year. Secure Communities is responsible for the identification of removal aliens, but the administrative arrest of removable aliens falls outside the scope of the program.

## 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>87</sup> and both agencies 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>88</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 the expansion of Secure Communities. DHS describes Secure Communities as an efficient and effective tool of immigration enforcement, and the Obama Administration has repeatedly emphasized plans to expand both programs to every law enforcement jurisdiction in the country by the end of 2013.<sup>89</sup> Some Members of Congress, state and local lawmakers, and advocacy groups also support these programs and their expansion.<sup>90</sup>

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<sup>87</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, <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>88</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>89</sup> For the Administration's views of Secure Communities see U.S. Immigration and Customs Enforcement, *Secure* (continued...)

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 leverage ICE's enforcement capacity, and second, because they 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>91</sup> State, local, and federal law enforcement officials made a total of 13,687,241 arrests in 2009 compared to a total of 56,971 arrests by ICE, including 35,094 arrests by ICE's NFOP targeting criminal aliens.<sup>92</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 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, most corrections facilities create a biographic and biometric record of the arrestee, including the person's name, other identifying information, fingerprints, and photographs. By

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*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>90</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>91</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 233982, Washington, DC, July 2011, <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslla08.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>92</sup> Total arrest data are from U.S. Department of Justice Federal Bureau of Investigation, *Crime in the United States*, Washington, DC, September 2010, p. Table 29, [http://www2.fbi.gov/ucr/cius2009/data/table\\_29.html](http://www2.fbi.gov/ucr/cius2009/data/table_29.html); ICE arrest data are from Department of Homeland Security Office of Immigration Statistics, "Immigration Enforcement Actions: 2010," June 2010, <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

using these same data to check for possible immigration violations while individuals are already in law enforcement custody, jail enforcement programs are efficient tools for identifying 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 such screening may fail to detect certain removable aliens who are not sentenced to prison but still fall under one of ICE's enforcement priorities (e.g., because they have previous serious criminal convictions or are recent illegal entrants).

### ***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 230 million records in the U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) Automated Biometric Identification System (IDENT) database.<sup>93</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>94</sup>
- Secure Communities gives ICE greater control over enforcement. Conversely, the § 287(g) program has faced criticism because in delegating authority to state and

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<sup>93</sup> US-VISIT communication with CRS August 25, 2011. 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>94</sup> ICE communication with CRS August 17, 2011.

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>95</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 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 apparent 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>96</sup> The governors of Illinois, New York, and Massachusetts have taken steps to rescind their states' participation in the program,<sup>97</sup> though their ability to do so

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<sup>95</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>.

<sup>96</sup> See, for example, Letter from Xavier Becerra, Member of Congress, Linda Sanchez, 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>97</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 (continued...)

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>98</sup> Many of the criticisms of Secure Communities echo concerns raised previously about the § 287(g) program and the NFOP.<sup>99</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 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 Secure Communities corresponding to four criminality levels: the three ICE levels described above (see “DHS Enforcement Priorities and Discretion”), and noncriminal offenses.<sup>100</sup> As the number of arrests under these programs increased between FY2006 and FY2011, the proportions of arrests involving Level 1 criminal aliens declined across both programs, while those for noncriminal arrests increased across both programs. Moreover, noncriminal offenses accounted for most § 287(g) arrests each year except 2006, and they have comprised an increasing share of arrests under Secure Communities, including the largest share of arrestees in FY2011.

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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>98</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>99</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).

<sup>100</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”).

**Table 8. Arrests Under Secure Communities and § 287(g), by Type of Offense, FY2006-FY2011**  
(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	34	11	30	24	100	22	8	16	54
2010	100	32	13	25	30	100	23	10	26	41
2011	100	22	15	21	42	100	16	13	21	51

**Source:** CRS calculations based on IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011; 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 98 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 and overstate overall criminality levels. When accounting for the broader set of all removable aliens who are initially identified by Secure Communities, these data suggest that about 8%, 6%, and 8% of all removable aliens, respectively, had committed or been charged with Level 1, Level 2, and Level 3 offenses in the first half of FY2011.<sup>101</sup>

Whether this outcome is problematic is the subject of debate.<sup>102</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>103</sup> and appropriators required DHS to “present a methodology ... to identify and *prioritize for removal criminal aliens convicted of violent crimes*” (emphasis added).<sup>104</sup> Some have argued that using ICE resources to identify and remove aliens who have not committed crimes and are not viewed as a threat to their communities diverts scarce resources away from high-priority cases.<sup>105</sup>

<sup>101</sup> CRS calculations are based on the proportion of aliens identified by Secure Communities placed under administrative arrest (see footnote 86) and the data presented in **Table 8**.

<sup>102</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>103</sup> P.L. 110-161; 121 Stat. 2050.

<sup>104</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>105</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> (continued...)

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>106</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 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>107</sup> Many of the noncriminal aliens identified by Secure Communities and arrested through Secure Communities and the §287(g) 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>108</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>109</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. In particular, 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>110</sup> Moreover, a DHS task force on Secure

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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>106</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>107</sup> U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations*, <http://www.ice.gov/about/offices/enforcement-removal-operations/>.

<sup>108</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>109</sup> *Ibid.*

<sup>110</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*.

Communities found that the program “has had unintended local impacts” that may harm police relationships with immigrant communities.<sup>111</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>112</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 immigration enforcement activities; and many immigrants are not proficient in English.<sup>113</sup> Immigrants are disproportionately likely to be victims of crime, and jail enforcement programs may discourage noncitizen crime victims from reporting crimes.<sup>114</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>115</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>116</sup>

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<sup>111</sup> DHS Secure Communities Task Force Report, p. 24.

<sup>112</sup> U.S. Department of Justice, *COPS: Community Oriented Policing Services*, <http://www.cops.usdoj.gov/Default.asp?Item=34>

<sup>113</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>114</sup> Hoffmaster et al., *Police and Immigration*.

<sup>115</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>116</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>.

### ***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>117</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.

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>118</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.

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>119</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>120</sup>

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

Immigrant rights and civil liberties advocates have raised concerns about the use of immigration detainees to hold suspected unauthorized aliens who have not been charged with a crime.<sup>121</sup>

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<sup>117</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>;

<sup>118</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>119</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., Sept. 7, 2011, p. 59.

<sup>120</sup> DHS Secure Communities Task Force Report, p. 25.

<sup>121</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, (continued...)

Existing regulations apparently 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.<sup>122</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>123</sup> Critics have also argued that no clear policies exist indicating how local law enforcement agencies should respond to ICE immigration detainers.<sup>124</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>125</sup>

Some jurisdictions also have raised concerns about the costs of holding aliens subject to immigration detainers. Citing concerns over both costs and wrongful detention, the Cook County, IL, Board of Commissioners, for instance, 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>126</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>127</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

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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>122</sup> 8 C.F.R. 287.7

<sup>123</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*.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</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>127</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.

priorities necessitate a suspension.<sup>128</sup> In light of this background, and partly because of the concerns described above, several jurisdictions have attempted to opt out of Secure Communities, culminating with the 2011 announcements by the governors of Illinois, New York, and Massachusetts that their states intended to rescind their Secure Communities MOAs.

Yet ICE also emphasized from the beginning of Secure Communities that it planned to activate the program in every jail and prison in the country.<sup>129</sup> While the § 287(g) program requires the active participation of a state or local partner, 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>130</sup> In August 2011, ICE Director John Morton reportedly 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>131</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>132</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>133</sup>

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<sup>128</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>129</sup> Ibid.

<sup>130</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>131</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/gIQA1wx80I\\_story.html](http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQA1wx80I_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/2011/08/06/20110806federal-immigration-deportation-program-ends.html#ixzz1URNZ4FQ2>.

<sup>132</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>133</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>134</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>135</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>136</sup> The task force issued a report with findings and recommendations in September 2011, but DHS had not responded to the report as of October 20, 2011.

Second, ICE has developed new record-keeping requirements and other tools to attempt to guard against pretextual arrests and racial profiling. ICE’s Enforcement Case Tracking System (ENFORCE) 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 also 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>137</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.

Third, ICE and CRCL have developed new materials and procedures to further reduce the risk of racial profiling and misuse of these enforcement programs. 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 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.

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<sup>134</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>135</sup> ICE, *Secure Communities: What’s New*, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

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

Congress may consider clarifying whether local jurisdictions have discretion to participate in Secure Communities. Several bills in the 112<sup>th</sup> Congress would support the Administration's plans to expand the program to every law enforcement jurisdiction in the country 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>138</sup>

The question of whether states and localities have discretion to opt out of Secure Communities overlaps with a broader debate about the role of states and localities in immigration enforcement.<sup>139</sup> Members of Congress have introduced legislation that would recognize that state and local officers have "inherent authority" to enforce federal immigration law,<sup>140</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>141</sup>

### **Prosecutorial Discretion**

Partly in response to the June 2011 ICE guidance memos and other Secure Communities reforms announced at the time,<sup>142</sup> the House Judiciary Committee held a hearing in July 2011 on the Hinder the Administration's Legalization Temptation (HALT) Act (H.R. 2497).<sup>143</sup> The HALT Act would suspend 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>144</sup> (The HALT Act also would suspend a number of provisions of immigration law unrelated to prosecutorial discretion.) At the July 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>145</sup> The House Homeland and Judiciary Committees also held hearings on Prosecutorial Discretion on

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<sup>138</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>139</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>140</sup> See, for example, Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act of 2011 (H.R. 100).

<sup>141</sup> See, for example, Comprehensive Immigration Reform Act of 2011 (S. 1258).

<sup>142</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>143</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>144</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>145</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.

October 4, 2011, and October 12, 2011, respectively.<sup>146</sup> Other bills introduced in the 112<sup>th</sup> Congress would tighten the standards for parole and deferred action.<sup>147</sup>

## **Data on Racial Profiling**

Congress also may consider proposed 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. 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 may consider proposed 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. Currently, DHS has explicit statutory authority to issue immigration detainers for controlled substance offenses,<sup>148</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>149</sup> Regulations limit immigration detainers to 48 hours, excluding weekends and holidays.<sup>150</sup> There is some question about whether or not jurisdictions are required to honor detainer requests.<sup>151</sup> Proposed bills, including for example the Criminal Alien Removal Act of 2011 (H.R. 932), would broaden detainer authority to permit state officials to issue immigration detainers and would allow aliens to be detained for up to 14 days.

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<sup>146</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., Oct. 12, 2011.

<sup>147</sup> See for example the Strengthening Our Commitment to Legal Immigration and America's Security Act (S. 332).

<sup>148</sup> 8 U.S.C. § 1357(d).

<sup>149</sup> 8 C.F.R. § 287.7(a).

<sup>150</sup> 8 C.F.R. § 287.7(d).

<sup>151</sup> See, for example, American Civil Liberties Union of Michigan, "ACLU, MIRC Send Letters to all Michigan Jails Warning of Costly, Illegal Immigration Holds," press release, August 1, 2011, <http://www.aclumich.org/issues/immigrant-rights/2011-08/1596>.

## 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.

Incarcerated noncitizens provides a rough measure of the criminal alien population, although inconsistencies in data quality, data collection practices, and definitions hinder its precise quantification. According to 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 29-fold funding increase between FY2004 and FY2011, 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>152</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.

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>153</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>154</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>152</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>153</sup> Jail administrators are asked whether they are holding any inmates for the Immigration and Customs Enforcement (ICE) agency.

<sup>154</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>155</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 7,225,800 individuals included by BJS in its 2009 estimate of the total correctional population, 4,203,967 were on probation, 819,308 were on parole, and 2,284,913 were incarcerated in federal and state prisons or in local jails.<sup>156</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>157</sup> Thus, this report limits its analysis of arrest data to federal statistics.

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<sup>155</sup> Hagan and Palloni, 1999.

<sup>156</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>157</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>158</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>159</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>160</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>161</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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(...continued)

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

<sup>158</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>159</sup> GAO, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, p.2.

<sup>160</sup> Orde F. Kittrie, "Federalism, Deportation, and Crime Victims Afraid to Call the Police," *Iowa Law Review*, vol. 91 (2005), pp. 1449-1508.

<sup>161</sup> *Ibid.*

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