



# Interior Immigration Enforcement: Programs Targeting Criminal Aliens

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## Summary

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

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. The Congressional Research Service (CRS) estimates the number of noncitizens incarcerated in federal and state prisons and local jails—a subset of all criminal aliens—at 183,830 in 2011 (the most recent year for which complete data are available), with state prisons and local jails each accounting for somewhat more incarcerations than federal prisons. The overall proportion of noncitizens in prisons and jails corresponds closely to the proportion of noncitizens in the total U.S. population.

DHS's U.S. Immigration and Customs Enforcement (ICE) operates four programs designed in part to target criminal aliens: the Criminal Alien Program (CAP), Secure Communities, the §287(g) program, and the National Fugitive Operations Program (NFOP). CAP, Secure Communities, and the §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 is a task force program 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 of identifying and removing serious criminal aliens, these programs have generated controversy, in part because many of the aliens identified by ICE have never been convicted of a crime, or have been convicted only of minor criminal offenses. Thus, the programs focus attention on questions about when—if ever—DHS should exercise “prosecutorial discretion” by not asserting its full enforcement authority in certain cases. ICE and DHS officials have testified that resource constraints mean that the department can deport only about 400,000 aliens per year—far fewer than the total number of potentially removable aliens identified. Officials have released a series of memoranda describing criteria to prioritize certain aliens for removal, and to consider exercising discretion in other cases. Some Members of Congress have objected to the Obama Administration's exercise of discretion, and some have proposed legislation that effectively would limit such discretion.

A second set of questions concerns the role of state and local law enforcement agencies in immigration enforcement. Supporters of jail enforcement programs, including the Obama Administration, see them as efficient and even-handed ways to identify criminal aliens. The Administration has particularly focused on Secure Communities, which was deployed in every law enforcement jurisdiction in the country in FY2013. Yet some have raised concerns that jail enforcement programs are not narrowly targeted at serious criminal offenders. Critics also argue that involving state and local law enforcement agencies in immigration enforcement may damage police-community relations, may result in racial profiling, and may result in the wrongful detention of people who have not been convicted of criminal offenses and may not be subject to removal. Although ICE and DHS have taken steps to address both sets of questions, they remain topics of legislative interest in the 113<sup>th</sup> Congress.

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## Introduction

Congress has a long-standing interest in the criminal alien population and has supported efforts since the late 1980s to identify, detain, and remove these individuals. The Congressional Research Service (CRS) estimates that about 184,000 non-citizens were incarcerated in 2011 (**Table 2**) and that the total non-citizen correctional population—which represent a subset of all aliens ever convicted of a crime—may be about 572,000 (see “**Other Estimates of the Criminal Alien Population**” below). More generally, all unauthorized immigrants within the United States are potentially subject to removal, and alien removals originating within the United States (i.e., “interior enforcement”) are a basic element of immigration control.

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

Funding for interior enforcement and programs targeting criminal aliens has expanded considerably since FY2005 as has the number of aliens arrested through them. Congress appropriated a total of about \$567 million to ICE for these four programs in FY2013, up from \$23 million in FY2004 (see “**Appropriations**” below). At the same time, the number of aliens arrested through ICE’s major interior enforcement programs increased during these years from about 11,000 to about 270,000 (**Table 6**).

While ICE’s interior enforcement programs are designed to focus in particular on criminal aliens, the majority of unauthorized aliens in the United States have not been convicted of a crime (**Figure 1**). Some have criticized these programs because most of the aliens they identify have no criminal record or have committed only nonviolent crimes. Others note, however, that all unauthorized aliens have violated U.S. immigration law and may be subject to removal.

Partly for these reasons, interior enforcement and programs targeting criminal aliens raise two key policy issues for Congress. First, when, if ever, should DHS exercise its “prosecutorial discretion” by not asserting its full enforcement authority? ICE’s interior enforcement programs have greatly increased the agency’s ability to identify potentially removable aliens, but the Obama Administration has argued that it only has resources to deport about 400,000 aliens per year (see “**DHS Enforcement Priorities and Discretion**”). The Administration has published formal guidelines to prioritize certain types of cases for enforcement and to exercise discretion in other cases. Some Members of Congress have objected to these policies, and some support legislation to limit the exercise of discretion (see “**DHS Enforcement Priorities and Discretion**”).

A second set of questions concerns the role of state and local law enforcement agencies in immigration enforcement. While some Members of Congress and some local governments and

law enforcement agencies favor a larger role for states and localities in immigration enforcement, others are concerned that such enforcement practices may undermine civil rights and may have a chilling effect on community-police relations. Certain jurisdictions have sought to limit their participation in such programs. But after initially treating Secure Communities as a voluntary federal-local partnership, the Obama Administration no longer permits local jurisdictions to “opt out” of it (see “**The State and Local Role in ICE’s Interior Enforcement Programs**”).

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.

## 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. Such crimes include crimes of “moral turpitude,” crimes involving controlled substances, certain firearm offenses, and crimes related to espionage, sabotage, and related offenses.<sup>1</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>2</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 most removable aliens are not criminals (see **Figure 1**).<sup>3</sup> Three groups of criminal aliens can be distinguished. First, the set of *all criminal aliens* includes both unauthorized aliens,<sup>4</sup> all of whom are potentially removable, and

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<sup>1</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. For a fuller discussion, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia; and CRS Legal Sidebar, *An Overview of Immigration-Related Crimes*, by Michael John Garcia.

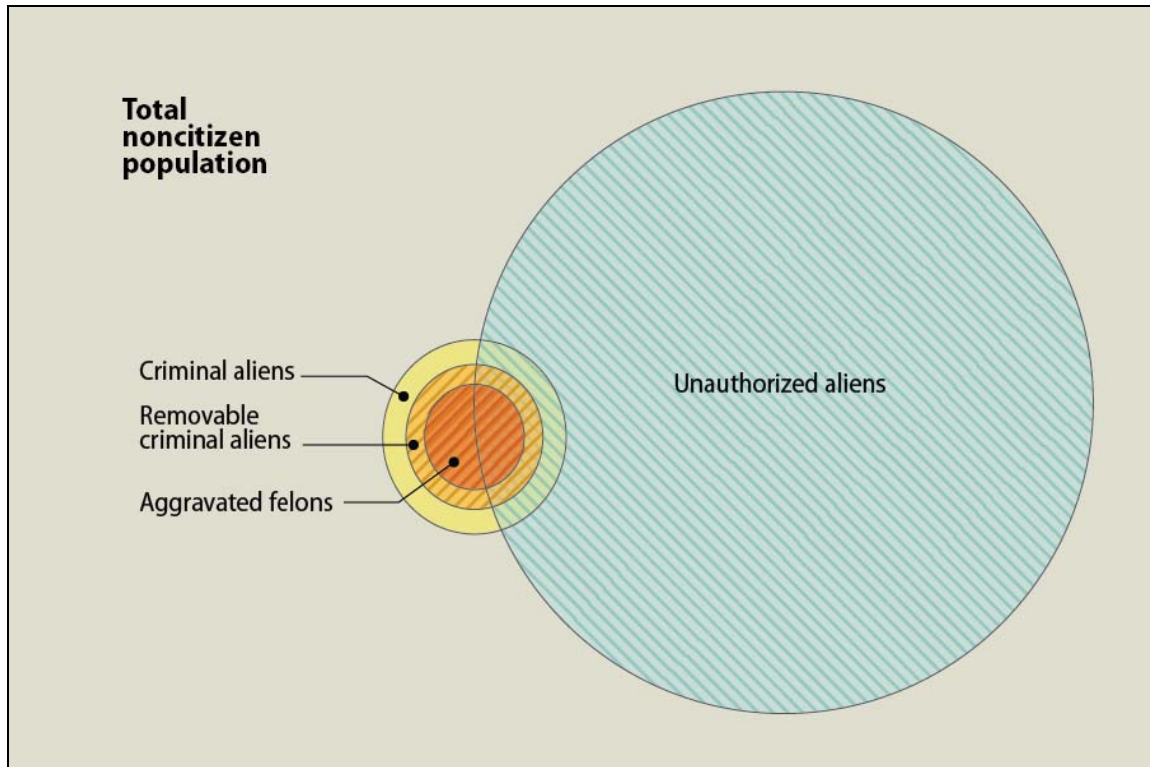
<sup>2</sup> Noncitizens include permanent immigrants (i.e., aliens admitted as legal permanent residents (LPRs), or “green card” holders), legal nonimmigrants (i.e., aliens admitted on temporary visas), and unauthorized aliens (i.e., aliens who enter without an inspection or overstay a temporary visa).

<sup>3</sup> Estimates of the unauthorized resident alien population in the United States range from 10.8 to 11.5 million in 2011; see CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem. By comparison, the CRS estimate of the criminal alien population in jails and prisons computed in this report was 184,000 in 2011 (the latest year for which complete data are available); see “Quantifying the Criminal Alien Population” in this report. Nationally, incarcerated persons represent roughly one-third of the total correctional population, with persons on probation and parole comprising the other two-thirds; see footnote 37. Assuming the same ratio applies to foreign-born criminals, the estimated total foreign-born correctional population would be 573,000. This estimate includes legal and unauthorized immigrants, and does not include aliens previously convicted of crimes who have already completed their criminal sentences. Also see “Other Estimates of the Criminal Alien Population” in this report.

<sup>4</sup> Unauthorized aliens are foreign nationals who have entered the United States without inspection or with fraudulent (continued...)

legal aliens.<sup>5</sup> Second, some *criminal aliens who have been convicted of removable criminal offenses* are subject to removal under the INA even if they are otherwise legally present.<sup>6</sup> For example, a legal permanent resident (LPR) convicted of cocaine possession is subject to removal,<sup>7</sup> but an LPR convicted of public intoxication is not. Third, a subset of these removable criminal aliens are *aggravated felons*, and therefore are ineligible for most forms of relief from removal and ineligible to be readmitted to the United States.<sup>8</sup>

**Figure I. Criminal and Unauthorized Aliens**



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

**Notes:** Figure I 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.

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documents, or who overstayed a nonimmigrant visa.

<sup>5</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>6</sup> Section 237(a)(2) of the Immigration and Nationality Act (INA, codified at 8 U.S.C. §1227 (a)(2)) enumerates a list of criminal offenses that make aliens subject to removal. Criminal offenses in the context of immigration law cover violations of federal, state, or, in some cases, foreign criminal law. See CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

<sup>7</sup> INA §237(a)(2)(B)(i); 8 U.S.C. §1227(a)(2)(B)(i).

<sup>8</sup> INA §§238(b) and 212(a)(9); 8 U.S.C. §§1228(b) and 1182(a)(9). Aggravated felonies refer to a class of serious criminal alien offenses defined by §101(a)(43) of the INA. For a more exhaustive discussion, see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia.

As **Figure 1** illustrates, all unauthorized aliens are potentially removable, indicated by cross-hatches in the figure, but the majority of unauthorized aliens have not been convicted of a crime and are not classified as criminal aliens.<sup>9</sup> (Unlawful presence in the United States absent additional factors is a civil violation, not a criminal offense.<sup>10</sup>) The smaller circles in **Figure 1** illustrate that some criminal aliens are removable on the basis of the specific crimes committed, and that some are 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 2011.<sup>11</sup> Following CRS’s quantification of the criminal alien population, the section reviews other studies that produced comparable estimates. **Appendix B** describes related data issues in greater detail.

### Federal-Level Arrest Data

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

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

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

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

**Notes:** Data do not distinguish between legal noncitizens, such as LPRs, and unauthorized aliens. Data from 2010 were the most recent arrest data available from the Bureau of Justice Statistics as of August 2013.

Most federal arrests of noncitizen between 2001 and 2010 were for illegal entry. As **Figure 2** illustrates, while federal arrests with *known* citizenship information increased 42%, from 109,699

<sup>9</sup> See footnote 3.

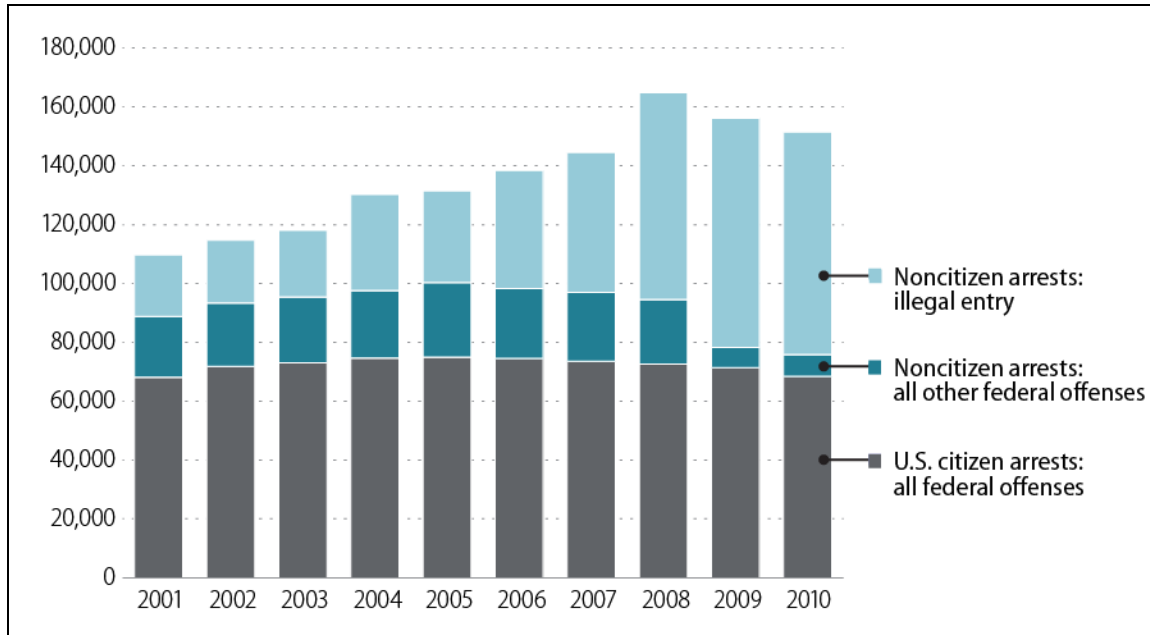
<sup>10</sup> Unlawful presence is only a criminal offense when an alien is found in the United States after having been formally removed or after departing the U.S. while a removal order was outstanding; see CRS Report RL32480, *Immigration Consequences of Criminal Activity*, by Michael John Garcia. Some Members of Congress have proposed legislation to redefine unlawful presence as a criminal offense; see for example, the Strengthen and Fortify Enforcement Act (SAFE Act, H.R. 2278).

<sup>11</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.



to 151,456 during this period, noncitizen arrests for illegal entry—which increased noticeably after 2003—accounted for virtually all of this increase.<sup>12</sup> Noncitizen arrests for all other federal offenses accounted for a declining share of all federal arrests, from 19% in 2001 to 5% in 2010.<sup>13</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 45% in 2010).

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



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

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

These trends may reflect changes in enforcement and prosecution policies rather than increased noncitizen criminality. The number of Border Patrol apprehensions has always far exceeded the number of arrests for illegal entry,<sup>14</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>15</sup>

<sup>12</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>13</sup> According to BJS analysts, the transition by the U.S. Marshals Service to a new prisoner tracking system beginning in 2008 temporarily increased the number of cases with unreported offense types.

<sup>14</sup> According to CRS’s analysis of DHS data, the Border Patrol apprehended an average of 921,000 removable aliens per year during these years, most of whom could be charged with illegal entry, though this figure (like BJS arrest data) includes multiple observations of the same individuals; see Office of Immigration Statistics, *Yearbook of Immigration Statistics FY2011*, Washington, DC, 2012, p. 95.

<sup>15</sup> Operation Streamline is a joint DOJ-DHS program to expedite criminal processing for unauthorized aliens in certain (continued...)

## 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 2011 (the most recent year for which complete data are available). Estimates of state and, especially, local incarcerated populations should be interpreted with caution for the reasons noted in **Appendix B**. As of June 30, 2011, a total of 2,334,381 prisoners (U.S. citizens and noncitizens) were incarcerated: 216,362 in federal prisons, 1,382,418 in state prisons, and 735,601 in local jails (**Table 2**).<sup>16</sup>

According to BJS data presented in **Table 2**, noncitizens comprised 7.9% of the combined federal, state, and local prisoner population in 2011, including 26.9% of the federal prison population, 5.2% of the state prison population, and 7.3% of the local jail population. As a basis for comparison, noncitizens comprised 7.1% of the total U.S. population in FY2011.<sup>17</sup>

The overall noncitizen proportion of the total prisoner population of 7.9% was up from 6.3% in 2001, with this change reflecting growth of the noncitizen population throughout federal and state prisons as well as local jails. Between 2001 and 2010, the noncitizen proportion of federal prisoners remained relatively stable at around 23% before increasing to 27% in 2011.<sup>18</sup> The noncitizens proportion of state prisoners increased more slowly, growing from 4.3% of the total state-level incarcerated population in 2001 to 5.2% in 2011.<sup>19</sup> And the proportion of noncitizens among those incarcerated in local jails increased at a rate comparable to that of state prisoners, from 6.1% in 2001 to 7.3% in 2011. Among federal and state prisons as well as local jails, the growth rate of noncitizens exceeded that of the native-born.<sup>20</sup>

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border districts so that a higher proportion face criminal charges; see CRS Report R42138, *Border Security: Immigration Enforcement Between Ports of Entry*, by Marc R. Rosenblum.

<sup>16</sup> See notes to **Table 2**.

<sup>17</sup> CRS analysis of 2010 American Community Survey data.

<sup>18</sup> Noncitizen federal incarcerations increased 58.9% (from 36,625 to 58,201) between 2001 and 2011, as total federal incarcerations increased 37.8% (from 156,993 to 216,362); see **Table 2**.

<sup>19</sup> Noncitizen state incarcerations increased 33.7% (from 54,031 to 72,265) between 2001 and 2011, as total state incarcerations increased 10.9% (from 1.25 million to 1.38 million); see **Table 2**.

<sup>20</sup> Noncitizen local jail incarcerations increased 38.4% (from 38,558 to 53,363) between 2001 and 2011 as total local jail incarcerations increased 16.5% (from 631,240 to 735,601); see **Table 2**.

**Table 2. Total and Noncitizen Incarcerated Population, Federal and State Prisons and Local Jails, 2001-2011**

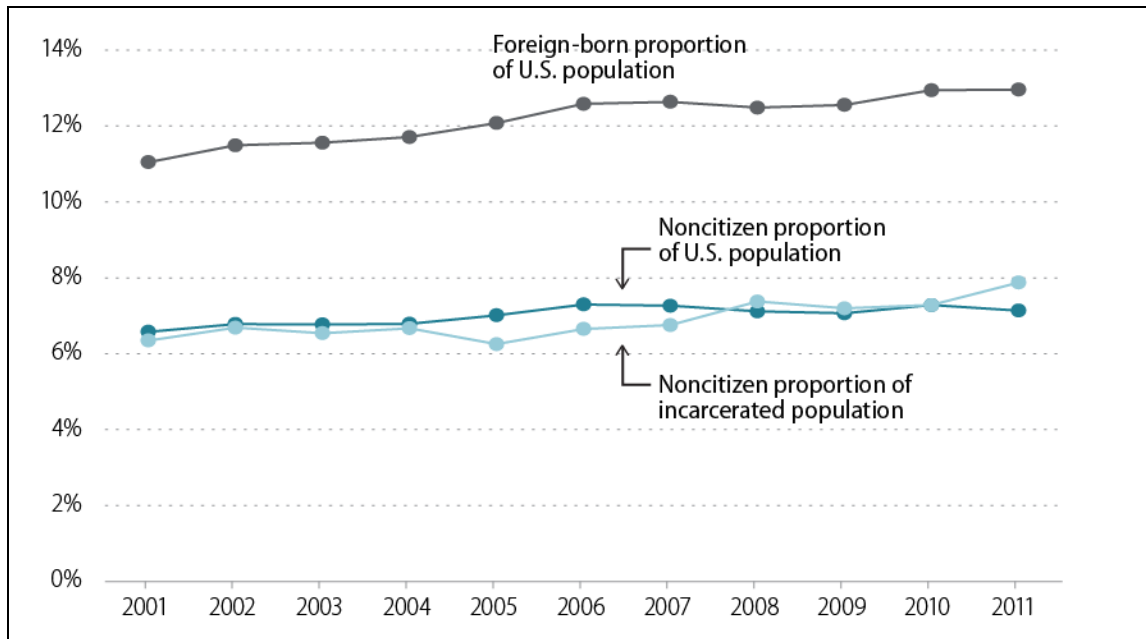
	Total Incarcerated Population				Noncitizen Incarcerated Population				Proportion of Noncitizen to Total Incarcerated Population			
	Total	Federal Prisons	State Prisons	Local Jails	Total	Federal Prisons	State Prisons	Local Jails	Total	Federal Prisons	State Prisons	Local Jails
<b>2001</b>	2,035,272	156,993	1,247,039	631,240	129,214	36,625	54,031	38,558	6.3%	23.3%	4.3%	6.1%
<b>2002</b>	2,105,619	163,528	1,276,616	665,475	140,772	38,927	54,804	47,041	6.7%	23.8%	4.3%	7.1%
<b>2003</b>	2,159,902	173,059	1,295,542	691,301	141,253	40,051	56,112	45,090	6.5%	23.1%	4.3%	6.5%
<b>2004</b>	2,211,090	180,328	1,316,772	713,990	147,481	42,232	57,393	47,856	6.7%	23.4%	4.4%	6.7%
<b>2005</b>	2,273,439	187,618	1,338,292	747,529	142,170	42,803	55,804	43,563	6.3%	22.8%	4.2%	5.8%
<b>2006</b>	2,334,493	193,046	1,375,628	765,819	155,315	44,323	57,352	53,640	6.7%	23.0%	4.2%	7.0%
<b>2007</b>	2,377,009	199,618	1,397,217	780,174	160,583	44,734	55,766	60,083	6.8%	22.4%	4.0%	7.7%
<b>2008</b>	2,393,815	201,280	1,407,002	785,533	163,774	45,756	64,687	66,077	7.4%	22.7%	4.6%	8.4%
<b>2009</b>	2,382,921	208,118	1,407,369	767,434	175,401	48,740	66,688	56,011	7.3%	23.4%	4.7%	7.3%
<b>2010</b>	2,362,531	209,771	1,404,032	748,728	175,107	47,569	65,641	58,850	7.3%	22.7%	4.7%	7.9%
<b>2011</b>	2,334,381	216,362	1,382,418	735,601	183,830	58,201	72,265	53,363	7.9%	26.9%	5.2%	7.3%

**Sources:** **Total federal and state prison population figures:** BJS, *Prison Inmates at Midyear 2011 Statistical Tables* report, Table 1; **Total local jail figures:** BJS *Jail Inmates at Midyear 2011-Statistical Tables* report, Table 1; **Noncitizen federal prison figures:** BJS Federal Criminal Case Processing Statistics online; **Noncitizen state prison figures:** BJS National Prison Statistics (NPS) program reported in *Sourcebook of Criminal Justice Statistics, 2011, Table 6.42.201 and Table 6.0022.2011 for just 2011*; **Noncitizen local jail figures:** The number of noncitizens in local jails 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, for 2001 - 2007 and computed by CRS using the *Annual Survey of Jails* microdata files for 2008-2011.

**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 2011, which are measures of the incarcerated population as of July 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 all 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 2011, the difference between mid-year and end-year figures at both the federal and state levels was less than 0.1%. As of August 1, 2013, figures shown in **Table 2** for the noncitizen incarcerated population were the most current available.

This growth in the noncitizen incarcerated population corresponds closely with broader demographic changes. The total foreign-born population grew from 31.5 million to 40.4 million between 2001 and 2011, and represented 13.0% of the U.S. population in 2011.<sup>21</sup> Thus, as **Figure 3** illustrates, the noncitizen proportion of the incarcerated population in 2001-2011 mapped closely to the proportion of noncitizens in the U.S. population overall.

**Figure 3. Proportion of the U.S. and Incarcerated Population by Nativity and Citizenship, 2001-2011**



**Source:** Census National Intercensal Estimates (2001-2009 national population figures); American Community Survey (2010-2011 national population figures and 2001-2011 foreign born and noncitizen foreign born figures); for Noncitizen proportion of incarcerated population, see **Table 2**.

**Note:** As of August 2013, published figures from 2011 remain the most up-to-date available on the noncitizen proportion of the total incarcerated population.

**Table 3** illustrates the types of crimes for which apprehended criminals were sentenced to federal prison in 2002, 2007, and 2012. 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 4.5%-6% of crimes committed by citizens. For noncitizens, immigration crimes grew as a proportion of total federal offenses for which they received sentences, increasing from 50% of all crimes in 2001 to 66% in 2012. For citizens, by contrast, immigration crimes made up less than 5% of all crimes in any of the three years shown. Moreover, the citizen proportion of crime categories changed relatively little over the three years shown.

<sup>21</sup> Moreover, these figures do not include an estimated 13.9 million native-born children who were born to at least one foreign-born parent (as of 2010). See CRS Report R41592, *The U.S. Foreign-Born Population: Trends and Selected Characteristics*, by William A. Kandel, pp. 14-16.

**Table 3. Offense Category of Sentenced Offenders, by Citizenship, 2002-2012**

	2002		2007		2012	
	Citizen	Noncitizen	Citizen	Noncitizen	Citizen	Noncitizen
Violent crimes	6.0%	0.6%	4.9%	0.6%	4.5%	0.4%
Nonviolent crimes	91.5%	59.6%	90.9%	41.0%	92.5%	33.3%
Immigration crimes	2.5%	49.9%	4.2%	58.4%	2.9%	66.3%
Total	100%	100%	100%	100%	100.0%	100.0%

**Source:** CRS analysis of data from the 2002, 2007, and 2012 *Sourcebook of Federal Sentencing Statistics*, Table 9, United States Sentencing Commission.

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

## Estimates from the American Community Survey

The U.S. Census American Community Survey (ACS) represents an additional source of information that can be used to corroborate CRS’s computations of the criminal alien population. The ACS is conducted continuously and yields annual estimates on the size and characteristics of the U.S. population, including a measurement of persons living in institutions, or “group quarters,” which includes correctional facilities as well as juvenile facilities, nursing facilities, and other health care facilities.<sup>22</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 likely correspond with this group. These characteristics include persons ages 18 to 55 living in group quarters who were noncitizens.<sup>23</sup>

According to these data, 2,319,019 persons were living in group quarters in 2011, most of which consisted of correctional facilities. This figure closely matches the 2,334,381 figure produced by the Bureau of Justice Statistics for the same year.<sup>24</sup> Of this estimated criminal population, the analysis of ACS data yields an estimate for the noncitizen incarcerated population (between ages 18-55) of 187,684, or 8.09% of the total—an estimate similar to CRS’s overall figure for 2011 (the most recent figure available) of 183,830 (**Table 2**).

<sup>22</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>23</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 group quarters.

<sup>24</sup> U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012 – Advance Counts*, Washington, DC, July 2013, <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

## Other Estimates of the Criminal Alien Population

While relatively few studies have attempted to quantify the criminal alien population,<sup>25</sup> a body of evidence suggests that the foreign born are less likely to commit crimes<sup>26</sup> and less likely to be incarcerated than the native born.<sup>27</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>28</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>29</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) is no greater than—and possibly less than—the foreign-born proportion of the total U.S. population. In 2011, that proportion was 13.0%. Applying this proportion to the total incarcerated population of 2,334,381 (from **Table 2**) yields an upper bound estimate for the incarcerated criminal alien population of 303,470.

DHS has produced its own estimates of the criminal alien population. Most recently, ICE has estimated that approximately 900,000 aliens are arrested for crimes every year, and that approximately 550,000 criminal aliens convicted of crimes exit law enforcement custody every year.<sup>30</sup> ICE also estimates that 1.9 million criminal aliens currently reside in the United States.<sup>31</sup>

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<sup>25</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>26</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>27</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>28</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>29</sup> Ibid.

<sup>30</sup> Department of Homeland Security, *U.S. Immigration and Customs Enforcement Salaries and Expenses, Fiscal Year 2013 Congressional Submission*, 2013, p. 61. The estimates for the number of arrests and the number of criminal aliens exiting law enforcement custody each year were computed using the Secure Communities Criminal Alien Population Projection Analysis (CAPP), which reportedly relied on data from the 2007 FBI Uniform Crime Report, the 2008 Census Bureau American Community Survey (ACS), the 2006 Bureau of Justice Statistics Felony Defendants in Large Urban Counties, and the 2008 Federal Justice Statistics Resource Center.

<sup>31</sup> Ibid. This estimate reportedly used the 2008 ACS adjusted for the undercount of the non-citizen population using the DHS OIS methodology and data and methods from Thomas P. Bonczar, *Prevalence of Imprisonment in U.S. Population, 1974-2001*, Bureau of Justice Statistics, Special Report, August 2003, <http://www.bjs.gov/content/pub/pdf/> (continued...)

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

Nationally, incarcerated persons represent roughly one-third of the total correctional population, with persons on probation and parole comprising the other two-thirds.<sup>37</sup> Thus, CRS’s estimate of the foreign-born incarcerated population (about 184,000 people) implies a total foreign-born correctional population of about 572,000; and CRS upper-bound estimate of about 303,500

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piusp01.pdf., 8/2003, <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>

<sup>32</sup> U.S. Government Accountability Office (GAO), *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 differences between the state and local criminal alien SCAAP incarcerations reported by GAO and the estimated number of criminal aliens incarcerated in state prisons and local jails in this report. In addition to the 2011 GAO report cited above, see also GAO, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, GAO-05-337R, April 7, 2005.

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

<sup>37</sup> In 2011, the total year-end correctional population numbered 6,977,700, with 3,971,319 persons on probation (57%), 2,239,751 persons incarcerated (31%), and 853,852 persons on parole (12%). See U.S. Department of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States, 2011*, November 2012, <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>. The *correctional population* figures for incarcerated persons in this footnote differ from those for *prisoners under federal state jurisdiction* shown in **Table 2**. See **Appendix B** for more information on data analyzed in this report.

foreign-born incarcerated persons implies an upper-bound estimate foreign-born correctional population of no more than about 945,000.

## 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 a formal enforcement priority. The law required the Attorney General “In the case of an alien who is convicted of an offense which makes the alien subject to deportation . . . [to] begin any deportation proceeding as expeditiously as possible after the date of the conviction.”<sup>38</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>39</sup> The programs forged partnerships with corrections facilities to identify deportable aliens convicted of crimes before their release from 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>40</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 that expanded the definition of aggravated felons and created additional criminal grounds for removal.<sup>41</sup> The mandates of the IRP and ACAP likewise expanded to include this broader list of 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>42</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>43</sup>

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<sup>38</sup> P.L. 99-603, §701.

<sup>39</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>40</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>41</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>42</sup> U.S. General Accounting Office, *Homeland Security: Challenges to Implementing the Immigration Interior Enforcement Strategy*, GAO-03-660T, April 2003.

<sup>43</sup> *Ibid.*



In the wake of the September 11 attacks, the new Department of Homeland Security (DHS) focused its enforcement activities on suspected terrorists and homeland defense, but with the continued growth of the foreign-born population after 2000, programs targeting criminal aliens also remained an enforcement priority. Within DHS, the IRP and ACAP initially were managed jointly by Immigration and Customs Enforcement's (ICE) Detention and Removal Operations (DRO) (renamed Enforcement and Removal Operations (ERO) in 2010) and its Office of Homeland Security Investigations. Between 2005 and 2007, the IRP and ACAP were combined into a single Criminal Alien Program (CAP) program within DRO.<sup>44</sup>

ICE currently operates four programs wholly or partly focused on criminal aliens (discussed in more detail below): CAP, Secure Communities, the §287(g) program, and the National Fugitive Operations Program (NFOP). The CAP, Secure Communities, and §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. NFOP is a “task force” program that 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.<sup>45</sup>

## **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” and 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 by taking custody of aliens to complete their removal upon completion of their criminal sentences.<sup>46</sup>

CAP jail enforcement officers screen people to identify and prioritize potentially removable aliens as they are being booked into jails and prisons and while they are serving their sentences. CAP officers conduct biometric and biographic database searches to identify matches in DHS databases; and they interview arrestees and prisoners to identify potentially removable aliens without previous DHS records.<sup>47</sup> When CAP officers identify removable aliens, they may issue an immigration detainer. The detainer is a request that the arresting agency hold the alien following

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<sup>44</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>45</sup> Certain task force-style operations also are conducted through the CAP Joint Criminal Alien Removal Task Force (JCART) program and were conducted, prior to FY2013, through the 287(g) program; see in this report, “Criminal Alien Program” and “287(g) Program.”

<sup>46</sup> ICE, *Fact Sheet: Criminal Alien Program*, March 29, 2011, <http://www.ice.gov/news/library/factsheets/cap.htm>.

<sup>47</sup> Aliens who overstay a nonimmigrant visa or who have been previously removed typically have records in one or more DHS databases, and may be identified through a biographic or biometric search. A person who enters without inspection and has had no previous contact with DHS often can only be identified as an unauthorized alien based on an interview with an experienced immigration officer.

completion of his or her criminal proceeding for up to 48 hours (excluding holidays and weekends) to allow ICE to take custody of the alien and to initiate removal proceedings.<sup>48</sup>

As of July 2013, there were 1,260 CAP officers monitoring 100% of U.S. jails and prisons, a total of over 4,300 facilities, including through the Secure Communities program (see “Secure Communities”).<sup>49</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. 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. CAP also is responsible for managing the Law Enforcement Support Center (LESC), a 24/7 call-center that conducts database searches to check the identity and immigration status of arrestees on behalf of ICE officers as well as for state and local law enforcement agencies. And CAP is scheduled to take full responsibility for Secure Communities in FY2014.<sup>50</sup>

The CAP program also encompasses several specialized programs related to high priority criminal aliens. CAP’s Violent Criminal Alien Section (VCAS) works with U.S. Attorneys to pursue criminal cases against recidivist criminal aliens; the program secured 8,761 indictments and 9,103 convictions in FY2012.<sup>51</sup> CAP’s Rapid Removal of Eligible Parolees (REPAT) program works with state law enforcement agencies to identify incarcerated criminal aliens eligible for parole and to facilitate their early release if the alien waives state-level appeals and agrees to be removed from the United States.<sup>52</sup> CAP maintains a special partnership with Phoenix-area law enforcement agencies through the Law Enforcement Area Response (LEAR) program. Under this program, CAP officers are to respond to 100% of local agency requests 24 hours a day, 7 days a week. In FY2012, the LEAR program encountered over 4,200 aliens, resulting in more than 2,900 arrests and 1,500 immigration detainers.<sup>53</sup> CAP also maintains Joint Criminal Alien Removal Taskforces (JCART) in the New York and Los Angeles field offices. The JCART program partners with ICE investigators; with the United States Marshals Service, CBP, and the Bureau of Prisons (BOP); and with local law enforcement agencies to identify and arrest high-priority at-large convicted criminal aliens. In FY2012, JCART encountered 948 aliens resulting in more than 550 arrests, and 250 immigration detainers.<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 people are being booked into jails. The program was initiated in about a dozen jurisdictions in late 2008, with

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<sup>48</sup> The regulations governing immigration detainers are found at 8 C.F.R. 287.7; for a fuller discussion see CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

<sup>49</sup> ICE Office of Congressional Affairs, February 21, 2013.

<sup>50</sup> See ICE, *Congressional Budget Justification FY2014*, pp. 93-94.

<sup>51</sup> ICE, *Congressional Budget Justifications FY2014*, p. 61.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, p. 60.

<sup>54</sup> *Ibid.*

additional jurisdictions added over time; and in FY2013 it became operational in 100% of the approximately 3,180 state and local law enforcement jurisdictions in the country.<sup>55</sup>

Under the program, when law enforcement agencies book (i.e., take custody of) an arrestee and submit the person's fingerprints to the DOJ's Federal Bureau of Investigation (FBI) for criminal background checks,<sup>56</sup> the fingerprints also are automatically checked against DHS's Automated Biometric Identification System (IDENT) database.<sup>57</sup> Potential matches are forwarded to the LESC (see "Criminal Alien Program (CAP)").<sup>58</sup> ICE agents at the LESC confirm the identity of matched prints and screen their records for immigration violations and criminal histories. When the LESC determines that the arrestee may be a removable alien, the LESC evaluates the alien's criminal history and notifies the ERO field office for the arresting jurisdiction about the match.

After being notified that a removable alien has been arrested, the local ERO supervisor reviews the record and decides how to proceed based on the priority attached to the case and based on the office's available resources (see "DHS Enforcement Priorities and Discretion"). If the office decides to initiate removal proceedings against an alien, ICE normally issues an immigration detainer. In contrast with the other ICE programs discussed in this report, Secure Communities does not include an enforcement component. Instead, removable aliens identified through Secure Communities are arrested and placed in removal proceedings by ICE agents outside of Secure Communities, typically including agents from the CAP program. CAP is scheduled to manage all Secure Communities operations beginning in FY2014.<sup>59</sup>

## **§287(g) 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>60</sup> Although §287(g) agreements

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<sup>55</sup> ICE Office of Congressional Affairs, February 21, 2013.

<sup>56</sup> The Integrated Automated Fingerprint Identification System (IAFIS) conducts criminal and terrorist background checks in response to requests from federal, state, and local law enforcement agencies by checking fingerprints against the IAFIS database of fingerprints, criminal histories, photographs, and biographic information. The IAFIS database includes the records of more than 66 million subjects in its criminal master file along with more than 25 million civil fingerprints. See Federal Bureau of Investigation, "Integrated Automated Fingerprint Identification System," [http://www.fbi.gov/about-us/cjis/fingerprints\\_biometrics/iafis/iafis](http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis).

<sup>57</sup> The Automated Biometric Identification System (IDENT) database is DHS's primary department-wide biometric database, and includes photographs, fingerprints, biographic name and personal identifier data, citizenship and nationality information, and derogatory information, if applicable. See DHS, *Privacy Impact Assessment Update for the Biometric Interoperability between the U.S. Department of Homeland Security and the U.S. Department of Justice, DHS/NPPD/USVISIT/PIA-007(b)*, October 13, 2001, [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_nppd\\_visit\\_update-b.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_nppd_visit_update-b.pdf). According to US-VISIT Office of Congressional Affairs (December 12, 2012), IDENT included over 148 million unique records as of December 2012.

<sup>58</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 LESC 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>59</sup> See ICE, *Congressional Budget Justification FY2014*, p. 57.

<sup>60</sup> INA §287(g)(5), 8 U.S.C. §1357(g)(5); see CRS Report R41423, *Authority of State and Local Police to Enforce* (continued...)

were authorized as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (P.L. 104-208, Div. C, IIRIRA), the first §287(g) agreement was implemented in 2002, and 36 of the 39 current §287(g) agreements (as of August 2013) were signed in 2006 or later.<sup>61</sup> As of December 31, 2012, more than 1,300 state and local law enforcement officers had completed ICE's four-week §287(g) training program and had been certified to conduct certain immigration enforcement duties.<sup>62</sup>

Prior to 2013, the §287(g) program encompassed both task force programs and jail enforcement agreements, but in February 2012 the Obama Administration announced plans to discontinue the task force programs, and the last of these agreements expired on December 31, 2012 (also see "ICE's Efforts to Address Concerns about §287(g) and Secure Communities"). Under the remaining jail enforcement agreements, specially trained officers within state and local corrections facilities are authorized to identify criminal aliens by interviewing them and screening their biographic information against the same DHS databases used by CAP agents and officers. Section 287(g) officers also use ICE's database and Enforcement Case Tracking System (known as ENFORCE) to enter information about aliens in their custody and to generate the paperwork for an immigration detainer and a notice to appear (NTA, initiating the formal removal process). State and local corrections officers are supervised by CAP officers.

## **National Fugitive Operations Program**

The National Fugitive Operations Program (NFOP) pursues known at-large criminal aliens and fugitive aliens.<sup>63</sup> ICE created the NFOP in 2003 to expand the agency's ability to locate, arrest, and remove fugitive aliens. In 2009, with support from Congress,<sup>64</sup> the NFOP expanded its focus to include 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>65</sup>

As of July 2013, the NFOP consisted of 129 fugitive operations teams (FOTs) covering all 24 ICE field offices.<sup>66</sup> FOTs use data from the National Crime Information Center (NCIC)<sup>67</sup> and other

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(...continued)

*Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>61</sup> CRS analysis based on data provided by ICE Office of Congressional Affairs, July 12, 2013.

<sup>62</sup> ICE, "Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act," <http://www.ice.gov/news/library/factsheets/287g.htm>.

<sup>63</sup> ICE defines a fugitive alien as "any alien who has failed to leave the U.S. following the issuance of a final order of removal, deportation or exclusion, or has failed to report to ICE after receiving notice to do so." See ICE, *Congressional Budget Justification FY2014*, p. 53.

<sup>64</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>65</sup> ICE, "Fact Sheet: ICE Fugitive Operations Program,"

<sup>66</sup> ICE Office of Congressional Affairs, July 11, 2013.

<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 (continued...)

intelligence sources and work in partnership with federal, state, local, and international law enforcement partners to pursue criminal aliens and other priority cases. Based on these leads, NFOP teams make arrests and conduct other enforcement actions at worksites, in residential areas, and at other locations. According to ICE, the NFOP has contributed to a reduction in the total backlog of fugitive alien cases from 632,726 cases in FY2006 to 469,157 cases in FY2012.<sup>68</sup>

## 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 the §287(g) program—and task force programs—including NFOP. By their nature, jail enforcement programs are not highly targeted: they are designed to screen the entire population of people passing through some part of the criminal justice system. Those screened by jail enforcement programs are typically arrested by state and local law enforcement agents for non-immigration offenses.<sup>69</sup> Conversely, task force programs tend to be more targeted operations, pursuing specific serious criminal aliens, fugitive aliens, or other criminals who have been identified by ICE. Under task force operations, ICE agents or other law enforcement officers with specific immigration training are the arresting agents.

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

	CAP	Secure Communities	§287(g) Program	NFOP
<b>Type of Program</b>	Jail Enforcement <sup>a</sup>	Jail Enforcement	Jail Enforcement <sup>b</sup>	Task Force
<b>Who makes the arrest?</b>	LEA	LEA	LEA	ICE
<b>Who conducts the immigration screening?</b>	ICE	ICE	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 post-release
<b>How many jurisdictions/ task forces are operating?</b>	1,260 CAP officers monitor over 4,300 facilities	3,180 jurisdictions in 50 states	39 jurisdictions in 19 states	129 teams

**Source:** CRS Analysis of ICE programs. Secure Communities jurisdictions data as of August 22, 2012, from ICE, “Activated Jurisdictions,” <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>; §287(g) jurisdictions

(...continued)

active records and averages 7.5 million transactions per day. See FBI, “National Crime Information Center,” <http://www.fbi.gov/about-us/cjis/ncic>.

<sup>68</sup> ICE, *Congressional Budget Justification FY2014*, pp. 55-56. The fugitive backlog is reduced through alien removals and by eliminating cases related to individuals who are known to have left the country, adjusted to legal status, died, or been taken into custody.

<sup>69</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.)

data as of October 16, 2012, from ICE, “287(g) Results and Participating Entities,” <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa>.

**Notes:** Jurisdiction data current as of July 12, 2013. **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); **LEA** refers to state and local law enforcement agencies; **ICE** refers to the U.S. Immigration and Customs Enforcement agency.

- a. The CAP also encompasses certain task force operations through the Joint Criminal Alien Removal Task Force (JCART) program.
- b. Prior to 2013, the 287(g) program also included certain task force operations.

A second, related difference concerns who conducts immigration-related screening and who selects targets for immigration 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.

Third, ICE programs target criminal aliens at different points in the criminal justice process. 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 with and convicted of a removable criminal offense.) CAP also conducts screening of persons who have been convicted of crimes and are incarcerated. The NFOP program targets fugitive aliens at any point in the criminal justice process—including fugitive aliens who have never been convicted of criminal offenses—but focuses primarily on at-large convicted criminal aliens (including those who have served jail time and been released).<sup>70</sup>

## Appropriations

Funding for the identification and removal of unauthorized immigrants has increased substantially since FY2004, the first year in which DHS received dedicated funding for detention and removal operations.<sup>71</sup> **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 are funded program activities within DRO/ERO; and §287(g) is funded under ICE’s Office of State, Local, and Tribal Government Coordination.

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<sup>70</sup> Of the 469,157 cases in the backlog as of Oct. 1, 2012, 8,791 had been previously convicted of an aggravated felony or of two or more felony crimes; 11,955 had been convicted of one felony crime or of three or more misdemeanors; 9,338 had been convicted of one or two misdemeanors; and 439,073 had no criminal record; see ICE, *Congressional Budget Justification FY2014*, pp. 55-56.

<sup>71</sup> For a fuller discussion, see CRS Report R43147, *Department of Homeland Security: FY2014 Appropriations*, coordinated by William L. Painter, and other CRS reports on DHS appropriations.

**Table 5. Appropriations for Programs Targeting Criminal Aliens, FY2004-FY2013**  
(millions of dollars)

Fiscal Year	CAP <sup>a</sup>	Secure Communities <sup>b</sup>	§287(g) <sup>c</sup>	NFOP	Total: Criminal Aliens Programs <sup>d</sup>	Total DRO/ERO Operations <sup>e</sup>
<b>2004</b>	\$6.6	NA <sup>f</sup>	NA <sup>g</sup>	\$16.9	<b>\$23.4</b>	<b>\$959.7</b>
<b>2005</b>	\$33.7	NA	NA	\$35.2	<b>\$69.0</b>	<b>\$1,091.1</b>
<b>2006</b>	\$93.0	NA	\$5.0	\$101.9	<b>\$199.9</b>	<b>\$1,359.9</b>
<b>2007</b>	\$137.5	NA	\$15.0	\$183.2	<b>\$335.7</b>	<b>\$1,984.3</b>
<b>2008</b>	\$180.0	\$200.0	\$42.1	\$218.9	<b>\$641.1</b>	<b>\$2,381.4</b>
<b>2009</b>	\$189.1	\$150.0	\$54.0	\$226.5	<b>\$619.5</b>	<b>\$2,481.2</b>
<b>2010</b>	\$192.5	\$200.0	\$68.0	\$229.7	<b>\$690.2</b>	<b>\$2,545.2</b>
<b>2011</b>	\$192.5	\$200.0	\$68.0	\$229.7	<b>\$690.2</b>	<b>\$2,545.2</b>
<b>2012</b>	\$196.7	\$189.1	\$68.0	\$154.6	<b>\$608.4</b>	<b>\$2,750.8</b>
<b>2013</b>	\$216.2	\$138.1	\$68.0	\$145.1	<b>\$567.4</b>	<b>\$2,750.0</b>
<b>Total</b>	<b>\$1,437.8</b>	<b>\$1,077.2</b>	<b>\$388.1</b>	<b>\$1,541.7</b>	<b>\$4,444.8</b>	<b>\$20,848.8</b>

**Sources:** U.S. Immigration and Customs Enforcement “Fact Sheet: Updated Facts on ICE’s 287(g) Program,” S.Rept. 108-280, S.Rept. 109-83, S.Rept. 109-273, H.Rept. 109-699, S.Rept. 110-396, S.Rept. 111-31, S.Rept. 111-222, S.Rept. 112-169, P.L. 113-6, and Senate Explanatory Statement accompanying P.L. 113-6.

**Notes:** FY2013 data reflect across-the-board rescissions included in P.L. 113-6 to comply with discretionary budget caps, but do not include the effects of sequestration as required by P.L. 112-25 because post-sequester data were not available for all programs. **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); **DRO/ERO** refers to Detention and Removal Operations/Enforcement and Removal Operations.

- a. The Criminal Alien Program was known as the Institutional Review Program prior to FY2007.
- b. Secure Communities is also known as the Comprehensive Identification and Removal of Criminal Aliens (CIRCA) program.
- c. Includes §287(g) jail enforcement and §287(g) task force programs. §287(g) task force programs were discontinued during FY2012.
- d. Includes funding for CAP, Secure Communities, the §287(g) program, and NFOP.
- e. Detention and Removal Operations was renamed Enforcement and Removal Operations in 2010.
- f. The Secure Communities/CIRCA program received its first appropriation in FY2008.
- g. The §287(g) program received its first appropriation in FY2006.

The appropriations record confirms Congress’s interest in 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>72</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

<sup>72</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.

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>73</sup>

Accordingly, appropriators increased funding for the existing Criminal Alien Program in FY2008; and set aside \$200 million in additional funding for 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>74</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 FY2010, a 58-fold increase, before dropping to \$354.3 million in FY2013. This figure excludes funding for NFOP and the §287(g) program, both of which also include criminal aliens in their enforcement mandates. Altogether, the four programs targeting criminal aliens saw their funding grow from \$23.4 million in FY2004 to a high of \$690.2 million in FY2010 and FY2011, before declining to \$567.4 million (pre-sequester) in FY2013. Funding for DRO/ERO operations overall increased from \$959.7 million in FY2004 to a high of \$2.75 billion in FY2012 and FY2013.<sup>75</sup> More than \$20 billion was appropriated to DRO/ERO programs between FY2004 and FY2013.

## Enforcement Statistics

Enforcement data are an indicator of how interior enforcement appropriations and programs have translated into enforcement actions. **Table 6** presents data on primary enforcement actions by the four programs discussed in this report from 2004 through 2011. The table presents data on administrative arrests<sup>76</sup> by CAP, Secure Communities, §287(g), and NFOP, as well as data on alien identifications, and removals and returns resulting from Secure Communities.

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<sup>73</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).

<sup>74</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>75</sup> The largest sub-account in ICE’s ERO account (\$2.0 billion in FY2013) is for custody operations—spending to detain certain aliens in removal proceedings and aliens under removal orders not yet executed; see CRS Report R43147, *Department of Homeland Security: FY2014 Appropriations*, coordinated by William L. Painter.

<sup>76</sup> An administrative arrest refers 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-FY2012**

Fiscal Year	CAP		Secure Communities		§287(g)	NFOP
	Arrests	Identifications	Arrests	Removals and Returns	Arrests	Arrests
2004	4,269	NA	NA	NA	0	6,584
2005	25,339	NA	NA	NA	2	7,959
2006	28,493	NA	NA	NA	5,685	15,462
2007	164,296	NA	NA	NA	20,815	30,407
2008	221,085	NA	NA	NA	45,105	34,155
2009	232,796	95,664	42,135	14,364	56,116	35,094
2010	219,477	248,166	111,093	49,511	46,467	35,774
2011	221,122	348,970	73,466	79,900	33,180	40,102
2012	200,253	436,377	98,117	83,815	31,478	37,371
Total	1,317,130	1,129,177	324,811	227,590	238,848	242,908

**Source:** Data provided by ICE Office of Congressional Affairs July 22, 2013, except for Secure Communities Removal and Return data, which are from Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through May 31, 2013.

**Notes:** CAP refers to the Criminal Alien Program; NFOP refers to the National Fugitive Operations Program; 287(g) refers to agreements entered pursuant to INA §287(g) for jailing screening or task force programs. The same cases may be counted multiple times in Table 6. CAP data are for the Institutional Removal Program in FY2004-FY2006. Data are unavailable for Secure Communities for FY2004-FY2008 because the program was created in FY2008 and reported its first identifications and removals in FY2009.

Data in Table 6 should be interpreted with caution, particularly when it comes to Secure Communities, because, as noted elsewhere (see “Secure Communities”), Secure Communities is responsible for the identification of potentially removable aliens, but the program does not make arrests or place aliens in removal proceedings. Partly for this reason, the same individual may be counted as an identification, removal, or arrest by multiple programs in Table 6. An individual also may be identified or arrested on multiple occasions, causing additional over-counts. In addition, some removable aliens are arrested or placed in removal proceedings outside of these four programs, and some aliens are returned or removed in a fiscal year after the year in which they are identified and/or arrested.

With those qualifications, the data in Table 6 indicate consistent increases in the number of aliens identified and arrested by these four programs. Available data in Table 6 indicate that CAP made over 1.3 million administrative arrests between FY2004 and FY2012, while the §287(g) program and NFOP made about 240,000 and 243,000 administrative arrests, respectively.

Secure Communities has quickly grown to identify an even larger number of removable aliens per year than CAP, with over 436,000 potentially removable aliens identified in FY2012. From FY2009 through FY2012, about 20.8 million sets of biometric data were submitted to Secure Communities, resulting in the identification of about 1.1 million matches in the IDENT database (i.e., potentially removable aliens).<sup>77</sup> These identifications led to 324,811 administrative arrests

<sup>77</sup> Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through May 31, 2013, p. 2. An unknown number of individuals may appear more than once in these data.

and (through FY2012) 227,590 aliens removed or returned.<sup>78</sup> Thus, about 5% of all submissions to Secure Communities have been identified as potentially removable aliens, and about 20% of people so identified (i.e., about 1% of all submissions) have been removed or returned.

**Table 7** presents a rudimentary measure of each program’s cost (in dollars) per individual identified, arrested, and removed or returned. 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**). These figures do not reflect precise estimates of arrest costs given the over-counting of certain arrest data and given that the programs share certain resources and administrative costs. Nonetheless, the figures are illustrative and allow broad comparisons across programs. In general, this analysis indicates that as the number of arrests and identifications for the programs have increased, the cost per case has declined substantially—particularly for Secure Communities identifications and for CAP arrests. After stabilizing at slightly over \$800 per arrest in FY2007-FY2009, CAP’s cost per arrest increased somewhat in FY2010-FY2012, reaching \$982 per arrest in FY2012.

**Table 7. Ratio of Appropriations to Enforcement Actions, by Program, FY2004-FY2012**  
(Dollars)

Year	CAP	Secure Communities			§287(g)	NFOP
	Arrests	Identifications	Arrests	Removals and Returns	Arrests	Arrests
2004	\$1,546	NA	NA	NA	NA	\$2,567
2005	\$1,330	NA	NA	NA	NA	\$4,423
2006	\$3,264	NA	NA	NA	\$880	\$6,590
2007	\$837	NA	NA	NA	\$721	\$6,025
2008	\$814	NA	NA	NA	\$933	\$6,409
2009	\$812	\$1,568	\$3,560	\$10,443	\$962	\$6,454
2010	\$877	\$806	\$1,800	\$4,040	\$1,463	\$6,421
2011	\$871	\$573	\$2,722	\$2,503	\$2,049	\$5,728
2012	\$982	\$433	\$1,927	\$2,256	\$2,116	\$4,137

**Source:** Figures were computed by dividing annual program appropriations from **Table 5** by program identifications, arrests, and removals/returns from **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 for FY2006-FY2012, and include only jail enforcement programs in FY2012. Data are unavailable for Secure Communities for FY2004-FY2008 because the program was created in FY2008 and reported its first identifications and arrests in FY2009, and data are unavailable for §287(g) in FY2004-FY2005 because the program received its first appropriation in FY2006. Secure Communities is responsible for the identification of removal aliens, but the administrative arrest, removal, and return of aliens falls outside the scope of the program.

<sup>78</sup> Ibid.

## Policy Issues

Investments since 2004 in ICE’s interior enforcement programs have resulted in a substantial increase in potentially removable aliens identified within the United States, and have contributed to DHS removing a record number of aliens in eight of the last nine years. Partly for this reason the Obama Administration has supported Secure Communities in particular. The growth and development of Secure Communities and the §287(g) program have been somewhat controversial, however, for at least two reasons discussed in greater detail below.

First, because both of these programs screen 100% of people passing through certain law enforcement jurisdictions, they identify a large number of potentially removable aliens—including criminal aliens as well as aliens who have never been convicted of a crime. The Obama Administration has published a series of memoranda to prioritize certain aliens for removal and to exercise prosecutorial discretion in other cases (see “DHS Enforcement Priorities and Discretion”). Nonetheless, some Members of Congress have criticized these enforcement programs as casting too broad a net, while others have objected to the Administration’s systematic exercise of discretion.

Second, Secure Communities and the §287(g) program both rely on partnerships, to different degrees, with state and local law enforcement agencies (see “The State and Local Role in ICE’s Interior Enforcement Programs”).<sup>79</sup> Such partnerships have proven to be a powerful tool for expanding ICE’s enforcement capacity, and some Members of Congress favor additional steps to expand the role of state and local law enforcement agencies in immigration enforcement, as discussed below. On the other hand, some Members of Congress have raised civil rights concerns about these partnerships, and concerns about their impact on police-community relations. ICE has taken certain steps to address these concerns.

## 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 proceedings. DHS estimates that there were about 11.5 million unauthorized immigrants in the United States in January 2011,<sup>80</sup> and the department apprehended or identified (at the border and within the United States) an average over 700,000 removable aliens per year from FY2008 to FY2012.<sup>81</sup> Yet ICE and its partner agencies only have the detention bed space and institutional capacity to remove about 400,000 aliens per year.<sup>82</sup>

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<sup>79</sup> Secure Communities does not involve formal partnerships with arresting jurisdictions, but the program requires some degree of cooperation if aliens are to be transferred from the local jurisdiction to ICE custody; see in this report, “Proposals to Limit the State and Local Role in Immigration Enforcement.”

<sup>80</sup> Michael Hofer, Nancy Rytina, and Bryan C. Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, Office of Immigration Statistics, Department of Homeland Security, 2012.

<sup>81</sup> CRS calculations from data in Department of Homeland Security Office of Immigration Statistics, *Yearbook of Immigration Statistics: 2011*, Washington, DC 2012; CBP, “U.S. Border Patrol Apprehensions, FY1925-FY2012”; and **Table 6** in this report.

<sup>82</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> (hereafter: Morton, *Civil Enforcement Priorities* memo.)

Thus, DHS—like the INS before it—has developed a system to prioritize certain aliens for removal.<sup>83</sup> Since 2011, ICE has published a number of agency guidance memos concerning the agency’s enforcement priorities and its criteria for exercising prosecutorial discretion in certain cases (see “ICE Memoranda”).<sup>84</sup> DHS has announced that the ICE memos apply to all DHS enforcement agencies, and DHS also has invoked prosecutorial discretion in its policy to defer enforcement action in the case of certain individuals who were brought to the United States as children and who meet certain other criteria (so-called DREAMers; see “DHS Policies”).

## ICE Memoranda

### *Civil Immigration Enforcement Priorities*

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>85</sup> Under these guidelines, ICE’s top three immigration enforcement priorities are to (1) apprehend and remove aliens who pose a danger to national security or a risk to public safety, (2) apprehend and remove recent illegal entrants,<sup>86</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.

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<sup>83</sup> Ibid.

<sup>84</sup> For a fuller discussion, also see CRS Report R42924, *Prosecutorial Discretion in Immigration Enforcement: Legal Issues*, by Kate M. Manuel and Todd Garvey.

<sup>85</sup> Morton, *Civil Enforcement Priorities* memo. Laws governing the detention and removal of unauthorized aliens generally fall under ICE’s civil enforcement authority, while laws governing the prosecution of crimes, including immigration-related crimes, fall under ICE’s criminal enforcement authority. Also see Hiroshi Motomura, “The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line,” *UCLA Law Review*, vol. 58, no. 6 (August 2011), pp. 1819-1858.

<sup>86</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.

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.

### *Exercising Prosecutorial Discretion*

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>87</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>88</sup> It states that any law enforcement agency may exercise prosecutorial discretion in the ordinary course of enforcement by deciding “not to assert the full scope of the enforcement authority available to the agency in a given case.” In ICE’s case, prosecutorial discretion may include, among other actions, deciding not to issue or to cancel a detainer; deciding not to issue an NTA (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 ERO officers, special agents, and attorneys each may exercise discretion in any immigration removal proceeding.<sup>89</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>90</sup>

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<sup>87</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> (hereafter: Morton, *Exercising Prosecutorial Discretion* memo). 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>88</sup> Morton, *Exercising Prosecutorial Discretion* memo, p. 2.

<sup>89</sup> *Ibid.*, pp. 2-3.

<sup>90</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.

## ***Guidance on the Use of Detainers***

In December 2012, Director Morton published a memo concerning ICE's use of immigration detainers related to CAP, Secure Communities, the §287(g) program, and all other ICE enforcement efforts. Consistent with the March 2011 memo on civil enforcement priorities (see "Civil Immigration Enforcement Priorities"), the 2012 memo directs ICE officers to issue immigration detainers only against individuals who: have been previously convicted of or charged with a felony offense; have three or more prior misdemeanor convictions; are charged with or were previously convicted of a misdemeanor involving certain significant threats to public safety; have committed certain immigration offenses; or pose a significant risk to national security, border security, or public safety. The memo requires officers to indicate on a revised detainer form the specific reason (from the previous list) that is the basis for the detainer being filed. And the memo also reiterates that detainers are not required in these cases, directing ICE personnel to evaluate the merits and consider the exercise of discretion on a case-by-case basis.<sup>91</sup>

## **DHS Policies**

### ***Prosecutorial Discretion and Review of Backlogged Immigration Cases***

On August 18, 2011, DHS Secretary Janet Napolitano announced in a letter to Senator Richard Durbin and others that the March and June ICE guidance memos were Administration policy, and that the same guidance would apply to all DHS immigration agencies.<sup>92</sup> The letter also indicated DOJ resources should be targeted toward high-priority cases.<sup>93</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>94</sup>

At the same time, the White House and DHS announced that DHS and DOJ would begin to review removal cases that were awaiting hearings in immigration courts.<sup>95</sup> Under the program, an inter-agency group of DHS and DOJ attorneys has reviewed backlogged cases to identify low-priority cases that may be amenable to prosecutorial discretion, with the goal of pulling such cases out of the immigration court docket in order to focus judicial and prosecution resources on higher-priority cases. According to data from Syracuse University, a total of 23,063 cases had

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<sup>91</sup> John Morton, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice System*, U.S. Department of Homeland Security Immigration and Customs Enforcement, Washington, DC, December 21, 2012, <https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>.

<sup>92</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>93</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>94</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>95</sup> *Ibid.*; also see Letter from Janet Napolitano, Secretary of Homeland Security, to Richard Durbin, Senator, August 18, 2011.

been closed based on prosecutorial discretion as a result of the backlog review as of July 31, 2013, while the immigration court docket included 325,044 pending cases.<sup>96</sup>

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

On June 15, 2012, DHS issued a memorandum announcing that certain individuals who were brought to the United States as children and meet other criteria would be considered for deferred action for two years, subject to renewal.<sup>97</sup> Deferred action is a “discretionary determination to defer removal action of an individual as an act of prosecutorial discretion.”<sup>98</sup> The Deferred Action for Childhood Arrivals (DACA) program builds on the ICE and DHS initiatives discussed above in that it is based on a grant of prosecutorial discretion,<sup>99</sup> but it also relates to a broader policy debate about legalization for certain unauthorized migrants because the eligibility criteria described in the DACA program are similar to those that would grant legal status to certain aliens under legislation known as the “DREAM Act.”<sup>100</sup> According to DHS, the DACA program promotes the department’s enforcement priorities because granting deferred action to low-priority cases frees up law resources to focus enforcement on higher priority cases.<sup>101</sup> As of June 7, 2013, DHS had received a total of 539,128 applications to participate in the deferred action program; 22,787 (4%) of the applications had been rejected or denied; 365,237 (68%) had been approved; and the remainder remained under review or were being scheduled for review.<sup>102</sup>

### **Legislative Issues**

Some Members of Congress have objected to the Immigration and Customs Enforcement (ICE) and Department of Homeland Security (DHS) policies on prosecutorial discretion, including the Deferred Action for Childhood Arrivals (DACA) program. During the 112<sup>th</sup> Congress, some

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<sup>96</sup> Syracuse University Transaction Records Access Clearinghouse (TRAC), “Immigration Court Cases Closed Based on Prosecutorial Discretion,” [http://trac.syr.edu/immigration/prosdiscretion/compbacklog\\_latest.html](http://trac.syr.edu/immigration/prosdiscretion/compbacklog_latest.html). TRAC’s count of cases closed is based on an analysis of raw data provided by the Immigration Court’s official record keeping system, using codes provided by the court system to describe cases closed through prosecutorial discretion. DHS does not regularly publish statistics on such case closures. TRAC is a data gathering, data research and data distribution organization at Syracuse University. TRAC publishes court closure data as part of its Immigration Project, which describes its mission as being to “go after very detailed information from the government; check it for accuracy and completeness; and then make it available in an understandable way to the American people, Congress, immigration groups and others”; see <http://trac.syr.edu/immigration/about.html>.

<sup>97</sup> DHS, “Deferred Action for Childhood Arrivals,” June 15, 2012, <http://www.dhs.gov/deferred-action-childhood-arrivals>.

<sup>98</sup> *Ibid.*

<sup>99</sup> According to DHS, the exercise of prosecutorial discretion for certain aliens who meet DREAM Act criteria was undertaken as part of the Administration’s “unprecedented effort to transform the immigration enforcement system into one that focuses on public safety, border security and the integrity of the immigration system... [by ensuring] that enforcement resources are not expended on low priority cases”; DHS, “Deferred Action for Childhood Arrivals,” June 15, 2012, <http://www.dhs.gov/deferred-action-childhood-arrivals>.

<sup>100</sup> For a fuller discussion, see CRS Report RL33863, *Unauthorized Alien Students: Issues and “DREAM Act” Legislation*, by Andorra Bruno.

<sup>101</sup> See, for example, DHS, “Secretary Napolitano Announced Deferred Action Process for Young People Who Are Low Enforcement Priorities,” June 15, 2012, <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

<sup>102</sup> U.S. Citizenship and Immigration Services, “Deferred Action for Childhood Arrivals Process,” June 10, 2013, <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-13-6.pdf>

Members argued that the policies amounted to “administrative amnesty,”<sup>103</sup> and legislation in both chambers would have suspended or tightened several provisions of law related to prosecutorial discretion in immigration policy.<sup>104</sup>

The 113<sup>th</sup> Congress also has held hearings on ICE’s exercise of prosecutorial discretion,<sup>105</sup> and legislation under consideration in the 113<sup>th</sup> Congress would seek to limit DHS’ discretion during immigration enforcement. For example, section 588 of the House-passed FY2014 DHS appropriations bill (H.R. 2217) would prohibit DHS from using any funds to implement the ICE and DHS policy guidance on prosecutorial discretion and deferred action discussed in this report. Section 1201 of the Senate-Passed Border Security, Economic Opportunity, and Immigration Modernization Act (S. 744) would limit DHS’ prosecutorial discretion with respect to certain removable aliens by requiring the department to place 90% of aliens identified as visa overstays in removal proceedings or otherwise resolve their cases.<sup>106</sup>

The Strengthen and Fortify Enforcement Act (SAFE Act, H.R. 2278), as ordered reported by the House Judiciary Committee in June 2013, would limit ICE’s discretion in several ways. With respect to immigration detainers, sections 108 and 111 would authorize states and localities to initiate their own immigration detainers against aliens identified through DHS jail enforcement programs; permit states and localities to detain such aliens for up to 14 days; and require DHS to take custody of such aliens within 48 hours. The sections also would require DHS to reimburse states and localities for all reasonable expenses of detaining such aliens. In addition, section 605 of the SAFE Act would require DHS and the Department of Justice to report annually on the number of notices to appear that were cancelled and to identify individual aliens benefitting from such an exercise of discretion. And section 608 would prohibit DHS from using any funds to implement the prosecutorial discretion and deferred action discussed in this report.

## **The State and Local Role in ICE’s Interior Enforcement Programs**

Programs that involve state and local law enforcement agencies—directly or indirectly—in identifying and detaining removable aliens have enhanced ICE’s enforcement capacity by allowing certain localities to devote their own resources to certain enforcement goals (see “Advantages of State and Local Enforcement”). Yet the involvement of state and local law enforcement agencies in immigration enforcement also may raise concerns about the effects of such programs on police-community relations and about civil rights issues (see “Concerns about

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<sup>103</sup> See for example, 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; U.S. Congress, House Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border?*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 4, 2011; U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law*, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 12, 2011; Letter from Senator Charles Grassley, et al., to Barack Obama, President, June 19, 2012.

<sup>104</sup> See for example, the Hinder the Administration’s Legalization Temptation (HALT) Act (H.R. 2497/S. 1380 in the 112<sup>th</sup> Congress) and the Strengthening Our Commitment to Legal Immigration and America’s Security Act (S. 332 in the 112<sup>th</sup> Congress).

<sup>105</sup> See for example, U.S. Congress, House Committee on the Judiciary, *the Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?* 113<sup>th</sup> Cong., 1<sup>st</sup> sess., March 19, 2013.

<sup>106</sup> For a fuller discussion, see CRS Report R43097, *Comprehensive Immigration Reform in the 113<sup>th</sup> Congress: Major Provisions in Senate-Passed S. 744*, by Marc R. Rosenblum and Ruth Ellen Wasem.



State and Local Enforcement”). (Certain state and local laws designed to deter unlawful immigration also have raised constitutional questions and have been the subjects of legal challenges; these legal issues and selected court cases are discussed in other CRS reports,<sup>107</sup> and are beyond the scope of this report.) Concerns about the §287(g) program and Secure Communities have prompted reviews of the program by the Government Accountability Office (GAO) and the DHS Inspector General (IG) and by an independent DHS Task Force,<sup>108</sup> and ICE has taken steps to address concerns about the programs (see “ICE’s Efforts to Address Concerns about §287(g) and Secure Communities”). While some Members of Congress share certain concerns about §287(g) and Secure Communities, others support these programs and some favor a broader state and local role in immigration enforcement (see “Legislative Issues”).

## **Advantages of State and Local Enforcement**

### *State and Local Enforcement as a Force Multiplier*

Interior enforcement programs that involve cooperation between ICE and state and local law enforcement agencies allow a relatively small number of ICE agents to leverage a much larger number of state and local law enforcement agents. Overall, there are about 150 times more state and local LEAs 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>109</sup> State, local, and federal law enforcement officials made a total of 12,408,899 arrests (citizens and noncitizens) in 2011 compared to a total of about 55,762 arrests by ICE.<sup>110</sup>

Thus, even though most state and local arrests are of U.S. citizens and are unrelated to immigration enforcement, any policies that forge connections between ICE and state and local law enforcement agents may be 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.

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<sup>107</sup> See for example, CRS Report R42719, *Arizona v. United States: A Limited Role for States in Immigration Enforcement*, by Kate M. Manuel and Michael John Garcia; CRS Report R41423, *Authority of State and Local Police to Enforce Federal Immigration Law*, by Michael John Garcia and Kate M. Manuel.

<sup>108</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/mgmtrpts/OIG\\_10-63\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf); DHS Secure Communities Task Force Report.

<sup>109</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/cslea08.pdf>. ICE data are for full time employees in FY2011 according to U.S. Department of Homeland Security, *U.S. Immigration and Customs Enforcement Fiscal Year 2011 Congressional Justification*.

<sup>110</sup> Total arrest data are from U.S. Department of Justice Federal Bureau of Investigation, “Crime in the United States: Persons Arrested. 2011,” <http://www.fbi.gov/about-us/cjiys/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested/persons-arrested>; ICE arrest data are CRS estimate based on FY2011 NFOP arrest data in Table 6 and ICE Homeland Security Investigations apprehension data from Department of Homeland Security Office of Immigration Statistics, “Immigration Enforcement Actions: 2011,” [http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement\\_ar\\_2011.pdf](http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf).

### ***The Efficiency of Jail Enforcement Programs***

Jail enforcement programs like Secure Communities, CAP, and §287(g) programs are particularly efficient tools to identify criminal aliens and other potentially removable aliens because they take advantage of natural “choke points” in the criminal justice system. When people are booked into jail after being arrested, corrections facilities typically create a biographic and biometric record of the arrestee, including the person’s name, other identifying information, fingerprints, and photographs. By using these same data to check for possible immigration violations while individuals are already in law enforcement custody, jail enforcement programs can efficiently identify potentially removable aliens as they pass through the criminal justice system. According to ICE, electronic checks against DHS databases occur within minutes of fingerprint data being submitted to LESC (directly in the case of §287g program and CAP screening, or following submission of prints to the FBI in the case of Secure Communities). The LESC usually reviews any electronic matches and notifies an ICE agent or ICE field office within four hours from when a potentially removable alien has been identified.<sup>111</sup>

Moreover, because Secure Communities and the §287(g) program perform this screening as persons are being booked into jail, potentially removable aliens may be identified early in the criminal justice process. Thus, screening at booking gives 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, may allow certain removable aliens to evade detection (i.e., removable aliens who are arrested but not convicted of a crime).

### ***Additional Advantages of Secure Communities***

Secure Communities exploits existing infrastructure to conduct immigration screening on an automated basis, relying on interoperability between DHS and DOJ databases. Data matching and prioritization occurs at the centralized LESC, creating economies of scale in the screening process. Thus, compared with CAP and the §287(g) program, Secure Communities may require minimal additional personnel or infrastructure, and minimal direct coordination between ICE and state and local LEAs.

Because screening occurs at the LESC and information about removable aliens is transmitted to ICE field offices, Secure Communities gives ICE a degree of control over enforcement. Conversely, the §287(g) program has faced criticism because in delegating authority to state and local law enforcement agents, it may give these offices undue discretion to shape immigration enforcement decisions, potentially resulting in different standards for immigration enforcement across jurisdictions and raising civil liberties concerns.<sup>112</sup>

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<sup>111</sup> ICE communication with CRS August 17, 2011.

<sup>112</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>.

### ***Additional Advantages of CAP and §287(g)***

Conversely, the CAP and §287(g) programs have a potential advantage over Secure Communities because they place additional immigration enforcement agents directly in state and local jurisdictions. Such officers may identify, interview, and process removable aliens, and so represent a more significant force multiplier for ICE than does Secure Communities on its own.<sup>113</sup> CAP and §287(g) officers also may identify certain removable aliens (e.g., unauthorized aliens who enter without inspection and therefore are not in the IDENT database) who are not identified by Secure Communities. And while Secure Communities offers the advantage of more centralized control, the §287(g) program offers greater *local* control by allowing jurisdictions—at their own initiative—to devote additional resources to immigration enforcement as they deem necessary.

### **Concerns about State and Local Enforcement**

#### ***State and Local Enforcement Programs May Not Focus 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, also detain large numbers of noncriminal aliens and aliens convicted only of minor offenses. **Table 8** illustrates the proportions of arrests from the §287(g) program and removals and returns from Secure Communities corresponding to four criminality levels: the three levels described above (see “Civil Immigration Enforcement Priorities”), and noncriminal offenses.<sup>114</sup> For the §287(g) program, as the number of arrests increased between FY2006 and FY2011, the proportions of arrests involving Level 1 criminal aliens declined, while those for noncriminal arrests increased. Noncriminal offenses accounted for a plurality of §287(g) arrests each year between FY2007-FY2011. In FY2012, when the program was scaled back to include only jail screening programs, the proportion of non-criminal arrests fell sharply, to just 6%.

For Secure Communities, slightly more than a quarter of aliens removed and returned as a result of the program have been Level 1 criminal aliens, including 30% in FY2012. Slightly over half of the aliens removed and returned as a result of Secure Communities have been Level 3 criminals or non-criminals, with the proportions in these categories falling in each program year.

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<sup>113</sup> DHS Inspector General, *The Performance of 287(g) Agreements FY2012 Follow-Up*, OIG-12-130, September 2012, [http://www.oig.dhs.gov/assets/Mgmt/2012/OIG\\_12-130\\_Sep12.pdf](http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-130_Sep12.pdf).

<sup>114</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.” The 2009 scheme was superseded by ICE’s agency-wide enforcement priorities. See in this report, “ICE Memoranda.”

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

	Secure Communities					§287(g) Program				
	Total	Level 1	Level 2	Level 3	Non-criminal	Total	Level 1	Level 2	Level 3	Non-criminal
2006	NA	NA	NA	NA	NA	100	41	9	13	37
2007	NA	NA	NA	NA	NA	100	30	8	14	49
2008	NA	NA	NA	NA	NA	100	25	7	11	57
2009	100	24	11	40	26	100	22	8	16	54
2010	100	29	13	32	27	100	23	10	26	41
2011	100	26	20	29	25	100	16	13	21	51
2012	100	30	21	29	20	NA	22	29	43	6

**Source:** Secure Communities data are based on CRS calculations from IDENT/IAFIS Interoperability Monthly Statistics through May 31, 2013; §287(g) data are based on CRS calculations from ICE Integrated Decision Support data as of August 8, 2011, received from ICE Legislative Affairs.

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

It bears emphasis that these Secure Communities data are based on the subset of unauthorized aliens identified by the program who are removed or returned, and therefore overstate criminality levels. Overall, a total of 15% of aliens identified by Secure Communities are classified as criminal aliens (i.e., have ever been convicted of a crime) and have been removed or returned.<sup>115</sup>

How to evaluate these statistics is the subject of debate. 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>116</sup> and appropriators required DHS to “present a methodology ... to identify and *prioritize for removal criminal aliens convicted of violent crimes*” (emphasis added).<sup>117</sup> Some have argued that using ICE resources to identify and remove aliens who have not committed crimes or have only committed minor offenses diverts scarce resources away from high-priority cases.<sup>118</sup>

<sup>115</sup> CRS estimates based on the total number of ratio of convicted Level 1 (81,989), Level 2 (52,193), and Level 3 (83,529) criminal aliens removed or returned through May 2013 relative to the total number of alien IDENT matches (1,473,676) according to IDENT/IAFIS Interoperability Monthly Statistics through May 31, 2013, p. 2. The data should not be interpreted as a lower limit because some persons are removed or returned in a later fiscal year than that in which they are identified.

<sup>116</sup> P.L. 110-161; 121 Stat. 2050.

<sup>117</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>118</sup> See, for example, John Morton, *Memorandum on Civil Immigration Enforcement*; also see U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *Oversight Hearing on U.S. Immigration and Customs Enforcement: Priorities and the Rule of Law*, testimony of ICE Director John Morton, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 12, 2011; U.S. Congress, Senate Committee on the Judiciary, *Oversight of the Department of Homeland Security*, testimony of DHS Secretary Janet Napolitano, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., October 19, 2011.

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>119</sup> 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 already in police custody—a task that falls squarely within ICE’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.”<sup>120</sup> Among the noncriminal aliens removed or returned as a result of Secure Communities, 79% were either ICE fugitives or persons with prior removal orders or confirmed returns.<sup>121</sup>

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

ICE’s three jail enforcement programs interact in different ways with state and local law enforcement agencies, but all of them rely on such agencies, at least indirectly, as points of contact with potentially removable aliens as they are processed through the criminal justice system. By adding this filtering task to existing state and local law enforcement practices, jail enforcement programs may damage community-police relationships by undermining immigrant communities’ trust in state and local law enforcement agencies. Some law enforcement professionals have argued that if communities come to associate state and local law enforcement agencies with immigration enforcement, immigrants and others may be reluctant to report crimes or to cooperate in policing activities.<sup>122</sup> Moreover, a DHS task force on Secure Communities found that the program “has had unintended local impacts” that may harm police relationships with immigrant communities;<sup>123</sup> and surveys conducted in several immigrant communities in 2012 found evidence that “increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities.”<sup>124</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>125</sup>

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<sup>119</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>120</sup> U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations*, <http://www.ice.gov/about/offices/enforcement-removal-operations/>.

<sup>121</sup> Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through May 31, 2013, p. 2.

<sup>122</sup> See, for example, Chuck Wexler, “Critical Issues in Policing Series: Police Chiefs and Sheriffs Speak Out,” Police Executive Research Forum, April 2008, [http://www.policeforum.org/library/critical-issues-in-policing-series/Immigration\(\\$25\).pdf](http://www.policeforum.org/library/critical-issues-in-policing-series/Immigration($25).pdf); National Community Advisory Commission, *Restoring Community*.

<sup>123</sup> DHS Secure Communities Task Force Report, p. 24.

<sup>124</sup> Nik Theodore, “Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement,” University of Illinois at Chicago, Department of Urban Planning and Policy, May 2013, p. i, [http://www.uic.edu/cuppa/gci/documents/1213/Insecure\\_Communities\\_Report\\_FINAL.pdf](http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf).

<sup>125</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/> (continued...)

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>126</sup>

The risk that Secure Communities and related programs may have a chilling effect on community-police relations must be balanced against the public safety benefit from identifying, detaining, and removing a larger number of 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>127</sup>

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

Critics argue that while the great majority of law enforcement officers are well-intentioned, involving state and local law enforcement agencies in immigrant enforcement may increase the likelihood that biased officers will engage in racial profiling, as that term is commonly understood.<sup>128</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.

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>129</sup> However, universal screening during the booking process does not necessarily

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(...continued)

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>126</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>127</sup> See for example Major County Sheriff's Association, "Major County Sheriffs' Association Resolution: Secure Communities," [http://www.ice.gov/doclib/secure-communities/pdf/sc-major\\_county\\_sheriffs\\_assoc.pdf](http://www.ice.gov/doclib/secure-communities/pdf/sc-major_county_sheriffs_assoc.pdf); ICE, "What Others Are Saying About Secure Communities," <http://www.ice.gov/doclib/secure-communities/pdf/what-others-say.pdf>.

<sup>128</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>129</sup> See, for example, U.S. Congress, Senate Committee on Appropriations, Subcommittee on Homeland Security, *Department of Homeland Security Appropriations Bill, 2012*, Report to accompany H.R. 2017, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., September 7, 2011, p. 59.

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 were inadequate.<sup>130</sup>

Racial profiling is difficult to document, especially where jurisdictions may not collect detailed arrest and search data. Previous research by academic researchers and advocacy organizations has found evidence of racial profiling following the implementation of CAP and of immigration enforcement by local law enforcement agencies under the §287(g) program.<sup>131</sup> Yet, most research on racial profiling is anecdotal rather than statistical, and CRS was unable to identify any published studies showing racial profiling in the Secure Communities program.

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

Immigrant rights and civil liberties advocates have raised concerns about the use of immigration detainers to hold suspected unauthorized aliens who have not been charged with a crime.<sup>132</sup> Existing regulations permit immigration officers to issue an immigration detainer to request that a law enforcement jurisdiction hold an alien for up to 48 hours (not including weekends and holidays) in order to allow DHS to take custody of the alien and initiate removal proceedings, and that the jurisdiction notify DHS prior to releasing the alien; but several court cases have raised questions about ICE's detainer authority.<sup>133</sup>

Critics of Secure Communities and related programs have argued that no clear mechanisms exist for persons detained under DHS's detainer authority to challenge their detention.<sup>134</sup> Critics have also argued that no clear policies exist indicating how local law enforcement agencies should respond to ICE immigration detainers.<sup>135</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

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<sup>130</sup> DHS Secure Communities Task Force Report, p. 25.

<sup>131</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>132</sup> See, for example, National Community Advisory Commission, *Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities Program*, Washington, DC, August 2011, <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf>; Alexa Alonzo, Kristin Macleod-Ball, and Greg Chen, et al., *Immigration Enforcement Off Target: Minor Offenses with Major Consequences*, American Immigration Lawyers Association, Washington, DC, August 2011, <http://www.aila.org/content/fileviewer.aspx?docid=36646&linkid=236762>.

<sup>133</sup> See CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.. Also see 8 C.F.R. 287.7

<sup>134</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>135</sup> Ibid.

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>136</sup>

### **ICE's Efforts to Address Concerns about §287(g) and Secure Communities**

The agency- and department-wide guidance memos and policies discussed above (see “DHS Enforcement Priorities and Discretion”) were intended in part to address concerns about the §287(g) program and Secure Communities. ICE also has implemented additional changes to these to address the concerns described above (“Concerns about State and Local Enforcement”). 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>137</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 approved new §287(g) agreements at a much slower rate during beginning in 2010, and the agency discontinued §287(g) task force agreements in 2012.<sup>138</sup>

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>139</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 “ICE Memoranda”). The March and June 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>140</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>141</sup> The task force issued a report with findings and recommendations in September 2011,<sup>142</sup> and ICE published a formal response to the task force in April 2012.<sup>143</sup>

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<sup>136</sup> Ibid.

<sup>137</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>138</sup> The §287(g) program peaked at about 72 agreements in 2011, and 69 agreements remained in effect in December 2012; but only 39 agreements were renewed following their expiration at the end of that month.

<sup>139</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>140</sup> ICE, *Secure Communities: What's New*, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/).

<sup>141</sup> Ibid.



Second, ICE has developed new record-keeping requirements and other tools to attempt to guard against pretextual arrests and racial profiling. ICE's ENFORCE tracking system has been modified to track data on the circumstances leading to aliens' arrests, information which may improve oversight of ICE's partnership programs. ICE and CRCL reportedly are developing 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, though such monitoring reportedly remains in the development stage as of July 2013.<sup>144</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 also have developed new materials to further reduce the risk of racial profiling and misuse of these enforcement programs.<sup>145</sup> New training materials target ICE agents as well as local law enforcement agents involved in these programs. ICE and CRCL have also developed new immigration detainer forms clarifying that individuals should not be detained for more than 48 hours and that law enforcement agencies must provide detainees with information about how to file a complaint if they believe their civil rights have been violated.

## **Legislative Issues**

The evolving nature of the §287(g) program and Secure Communities highlights a broader legislative debate about the role of states and localities in federal immigration enforcement.<sup>146</sup> Recent legislative developments include proposals both to limit and to expand the state and local role in immigration enforcement.

### ***Proposals to Limit the State and Local Role in Immigration Enforcement***

As part of its effort to scale back the §287(g) program, the Obama Administration proposed cuts to the program's budget in each of the last two appropriations cycles. For FY2013, DHS proposed to reduce spending on the §287(g) program from \$68 million to \$51 million (a 25% reduction). The Senate supported the proposed cuts, but the Consolidated and Further Continuing Appropriations Act, FY2013 (P.L. 113-6) included the House-passed funding level of \$68 million.<sup>147</sup> For FY2014, the Administration proposed a larger cut to the program, to \$24 million. Some Members proposed additional cuts to the program during the House's floor debate on the

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<sup>142</sup> DHS Secure Communities Task Force Report.

<sup>143</sup> ICE, *Ice Responses to the Task Force on Secure Communities Findings and Recommendations*, Washington, DC: April 27, 2012, <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>.

<sup>144</sup> *Ibid.*

<sup>145</sup> See ICE "DHS Plan to Provide Training to State and Local Law Enforcement in the Secure Communities Program," May 2012, <http://www.ice.gov/doclib/secure-communities/pdf/secure-communities-training-plan.pdf>.

<sup>146</sup> This section focuses exclusively on proposals to limit or expand state and local participation in immigration enforcement through participation in ICE's interior enforcement programs and on current proposed federal legislation concerning states' and localities' role in immigration enforcement. On state and local initiatives concerning immigration enforcement and 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>147</sup> CRS Report R42644, *Department of Homeland Security: FY2013 Appropriations*, coordinated by William L. Painter.

Department of Homeland Security Appropriations Bill, 2014 (H.R. 2217); but the House-passed version of the bill would continue to fund the program at the FY2012 level of \$68 million.

Secure Communities initially was described as an optional program, and state and local law enforcement agencies only participated after signing a memorandum of agreement (MOA) with ICE.<sup>148</sup> Some Members of Congress opposed the program and called on jurisdictions to suspend their participation,<sup>149</sup> and in 2011 the governors of Illinois, New York, and Massachusetts sought to rescind their Secure Communities MOAs.<sup>150</sup> In contrast with the §287(g) program, however, Secure Communities operates as an information sharing program among federal agencies, and requires no active participation from local jurisdictions. Thus, ICE has determined that the department has the authority to operate Secure Communities as a mandatory program,<sup>151</sup> and in August 2011, ICE terminated existing Secure Communities MOAs and clarified DHS's position that jurisdictions could not opt out of the program.<sup>152</sup>

Following this development, some jurisdictions have limited their participation by refusing to fully cooperate with ICE detainers issued as a result of Secure Communities.<sup>153</sup> Citing concerns over fiscal costs and wrongful detentions, Cook County (Chicago), IL 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>154</sup> New York City, Los Angeles, Newark, NJ, and Washington, DC also have passed measures limiting their cooperation with ICE detainers.<sup>155</sup> And an August 2013 court settlement requires the Orleans Parish (New

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<sup>148</sup> As with the §287(g) program, participation by local jurisdictions was initiated after a Memorandum of Agreement (MOAs) was negotiated between DHS and each state-level agency (typically, the state police or the state department of public safety) responsible for managing the interface between state law enforcement agencies and the FBI. According to the MOAs, "either party, upon 30 days written notice to the other party, may terminate the MOA at any time" or may "temporarily suspend activities ... immediately upon receipt" of notification that resource constraints or competing priorities necessitate a suspension. See 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>149</sup> See, for example, Letter from Xavier Becerra, Member of Congress, Linda Sánchez, Member of Congress, Maxine Waters, Member of Congress, et al. to The Honorable Jerry Brown, Governor of the State of California, June 10, 2011, [http://becerra.house.gov/images/stories/PDF\\_Forms/Ltr\\_to\\_Gov\\_Brown\\_re\\_Secure\\_Communities\\_06-10-2011\\_final.pdf](http://becerra.house.gov/images/stories/PDF_Forms/Ltr_to_Gov_Brown_re_Secure_Communities_06-10-2011_final.pdf); "Congresswoman Calls for Investigation of Enforcement Program that Screens for Illegal Immigrants in Jails," *Los Angeles Times*, April 22, 2011, <http://latimesblogs.latimes.com/lanow/2011/04/congresswoman-calls-for-investigation-of-enforcement-program-that-screens-for-illegal-immigrants-in-.html>.

<sup>150</sup> Letter from Pat Quinn, Governor of Illinois, to Marc Rapp, Acting Assistant Director, Secure Communities, May 4, 2011; letter from Deval Patrick, Governor of Massachusetts, to Marc Rapp, Acting Assistant Director, Secure Communities, June 3, 2011; letter from Andrew M. Cuomo, Governor of New York, to John Sandweg, Counselor to the Secretary, U.S. Department of Homeland Security, June 1, 2011.

<sup>151</sup> Riah Ramlogan, *Memorandum: Secure Communities—Mandatory in 2013*, Washington, DC October 2, 2010.

<sup>152</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>153</sup> The legal question of whether or not states and localities can be required to comply with immigration detainers is a subject of ongoing litigation; see CRS Report R42690, *Immigration Detainers: Legal Issues*, by Kate M. Manuel.

<sup>154</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>155</sup> James Queally, "Newark Police First in N.J. to Refuse to Detain Undocumented Immigrants Accused of Minor (continued...)"

Orleans), LA sheriff's office to decline ICE detainer requests unless the subject is being held on certain felony charges; to notify detainees' lawyers prior to allowing ICE to interview detainees; and to prevent ICE from entering certain parts of county jails absent a criminal warrant or court order.<sup>156</sup> At the state level, California Attorney General Kamala Harris issued law enforcement guidance in December 2012 that ICE detainers are not mandatory and directed law enforcement agencies in the state to make their own decisions about whether to honor such requests.<sup>157</sup> And in June 2013, the state of Connecticut enacted a law permitting cooperation with ICE detainers only when detainer subjects have felony convictions, belong to gangs, are on terrorist watch lists, are subject to existing removal orders, or otherwise are considered safety risks.<sup>158</sup>

### ***Proposals to Enhance the State and Local Role in Immigration Enforcement***

The SAFE Act (H.R. 2278) includes several provisions to increase state and local participation in ICE's interior enforcement programs and to broaden the state and local role in immigration enforcement generally. Among other provisions, the act would authorize states and localities to enact and enforce criminal penalties that mirror federal immigration law, and would permit state and local law enforcement agencies to investigate, identify, arrest, and detain aliens for the purposes of enforcing immigration law to the same extent as federal law enforcement personnel.<sup>159</sup> In support of this authorization, the act would require DHS: to provide states with direct access to federal programs and technology to identify removable aliens; to enter into a §287(g) agreement with any jurisdiction requesting such an agreement unless DHS has a "compelling reason" to deny the request; to provide state and local law enforcement agents with relevant training materials; and to reimburse states and localities for the costs of such enforcement.<sup>160</sup> The act also would require states and localities to provide DHS with certain identifying information about removable aliens, reimbursing jurisdictions for the costs of such reporting,<sup>161</sup> and would withhold certain federal funds from jurisdictions that fail to cooperate fully with federal immigration enforcement efforts.<sup>162</sup>

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Crimes," *The Star-Ledger*, August 15, 2013, [http://www.nj.com/essex/index.ssf/2013/08/newark\\_police\\_first\\_in\\_nj\\_to\\_refuse\\_to\\_detain\\_illegal\\_immigrants\\_accused\\_of\\_minor\\_crimes.html](http://www.nj.com/essex/index.ssf/2013/08/newark_police_first_in_nj_to_refuse_to_detain_illegal_immigrants_accused_of_minor_crimes.html). These jurisdictions were identified by CRS in August 2013 as having taken steps to limit their cooperation with immigration detainers; this list may not be exhaustive.

<sup>156</sup> Campbell Robertson, "New Orleans and U.S. in Standoff on Detentions," *The New York Times*, August 12, 2013.

<sup>157</sup> Lee Romney and Cindy Chang, "Secure Communities is Optional, Harris Says," *Los Angeles Times*, December 5, 2012, <http://articles.latimes.com/2012/dec/05/local/la-me-secure-communities-20121205>. Previously in 2012, the California legislature passed the TRUST Act, which would have directed law enforcement agencies in the state only to honor ICE detainers for arrestees with serious or violent felony convictions, but California Governor Jerry Brown vetoed the bill. The state assembly passed a modified version of the TRUST Act in 2013.

<sup>158</sup> John Christoffersen, "State Will Detain Only Immigrants Considered Safety Threats," *Associated Press*, June 26, 2013.

<sup>159</sup> SAFE Act (H.R. 2278) §102.

<sup>160</sup> *Ibid.*, §§104, 112, 109, and 106.

<sup>161</sup> *Ibid.*, §105.

<sup>162</sup> *Ibid.*, §114.

## 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>163</sup> Federal incarceration data are published by the Federal Bureau of Prisons (BOP) and compiled by the Sourcebook of Criminal Justice Statistics. As of August 2013, the most recent published data available on noncitizen arrests were as of 2010.

Figures for the federal noncitizen prison population from 2001-2011 are as of year-end and include sentenced as well as non-sentenced inmates, and inmates under jurisdiction as well as inmates in custody. Figures for the state noncitizen prison population from 2001-2011 are as of mid-year and include the same types of inmates as those in the federal figures. Figures for the local noncitizen jail population for all years (2001-2011) are as of mid-year and only include sentenced inmates and inmates in custody. For 2011, however, federal figures for the noncitizen incarcerated population were available only as of midyear. Hence, all 2011 figures – federal, state, and local – are as of mid-year. As of August 2013, published data on the noncitizen incarcerated population for 2012 were unavailable at the federal, state and local levels.

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

BJS also conducts an *Annual Survey of Jails*, from which it creates national-level estimates of the number of inmates incarcerated in local jails.<sup>164</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>165</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

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<sup>163</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>164</sup> Jail administrators are asked whether they are holding any inmates for the Immigration and Customs Enforcement (ICE) agency.

<sup>165</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>.

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 Population Survey—much less one that focuses on subpopulations such as noncitizens.<sup>166</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 6,977,700 individuals included by BJS in its 2011 estimate of the total correctional population, 3,971,319 were on probation, 853,852 were on parole, and 2,239,751 were incarcerated in federal and state prisons or in local jails.<sup>167</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>168</sup> Thus, this report limits its analysis of arrest data to federal statistics.

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<sup>166</sup> Hagan and Palloni, 1999.

<sup>167</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/t612011.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>168</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 (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>169</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>170</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>171</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>172</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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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 participation levels all reduce the reliability and comparability of state level data on the criminal alien population.

<sup>169</sup> Bureau of Justice Statistics, *Prison Inmates at Midyear 2011 - Statistical Tables*, U.S. Department of Justice, Washington, DC, June 2012, <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.

<sup>170</sup> GAO, *Information on Criminal Aliens Incarcerated in Federal and State Prisons and Local Jails*, p.2.

<sup>171</sup> Orde F. Kittrie, "Federalism, Deportation, and Crime Victims Afraid to Call the Police," *Iowa Law Review*, vol. 91 (2005), pp. 1449-1508.

<sup>172</sup> *Ibid.*

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