

**CHAPTER 1**  
**INTRODUCTION**

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**§ 1.1 Introduction**

In its fifteen years of existence, Department of Homeland Security (DHS) has fueled the most massive surveillance, policing, prosecution, detention and removal efforts of immigrants in American history. Since the creation of DHS in the wake of the September 11 attacks, the U.S. deported more people than in the previous 100 years combined. These deportations have been driven by dramatic increases in funding for immigration enforcement. In 2017, the federal government spent \$19.6 billion on Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), two agencies within DHS.<sup>1</sup> This is more than the U.S. spends on the FBI, DEA, US Marshal Service, ATF, and the Federal Bureau of Prisons combined.<sup>2</sup> Deportations in 2013 were at an all-time high at 438,421.<sup>3</sup> There has also been an increase in the number of immigrants being removed through expedited removal, meaning the expedited execution of an individual’s deportation without a hearing before an immigration judge.<sup>4</sup> Since the beginning of 2017, there has been a significant increase in immigration arrests and detention, although removal numbers have dropped.<sup>5</sup>

A major portion of these federal funds have been spent on security and surveillance operations at the U.S.-Mexico border and increased immigration detention. In addition, the record-breaking

<sup>1</sup> Department of Homeland Security *FY 2018 Budget in Brief*. Available at: [www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf](http://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf) (last accessed November 2017).

<sup>2</sup> U.S. Department of Justice *FY 2018 Budget Request At A Glance*. Available at: [www.justice.gov/jmd/page/file/968216/download](http://www.justice.gov/jmd/page/file/968216/download) (last accessed November 2017).

<sup>3</sup> See DHS Yearbook of Immigration Statistics: 2013 Enforcement Actions, [www.dhs.gov/publication/yearbook-immigration-statistics-2013-enforcement-actions](http://www.dhs.gov/publication/yearbook-immigration-statistics-2013-enforcement-actions).

<sup>4</sup> Transactional Records Access Clearinghouse (TRAC) Reports Inc., *ICE Bypassing Immigration Courts? Deportations Rise as Deportation Orders Fall* (August 13, 2012). Available at: <http://trac.syr.edu/immigration/reports/291/> (last accessed November 2017).

<sup>5</sup> Nick Miroff, “Deportations slow under Trump despite increase in arrests by ICE,” *The Washington Post* (September 28, 2017), available at [www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22\\_story.html?utm\\_term=.314148ecfb22](http://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.314148ecfb22) (last accessed November 2017).

deportation numbers have been possible because of the conscription of local police and jails to identify immigrants and transfer them to Immigration & Customs Enforcement (ICE), the interior enforcement arm of DHS. All of these enforcement activities implicate, and often infringe on, immigrants' fundamental constitutional rights.

Aside from the growth of border enforcement, the biggest development in immigration enforcement in the 21<sup>st</sup> century has been the steady encroachment of immigration into local law enforcement operations and into the criminal justice system itself. This began with 287(g) agreements under the Bush administration, which deputized local police and sheriffs to act as immigration agents and thereby, carry out certain immigration enforcement activities. DHS also steadily expanded the "Criminal Alien Program" (CAP), in which ICE agents check local, state, and federal prisons to find immigrants who might be deportable. Then in 2008, DHS launched the Secure Communities program (S-Comm), which allowed ICE to immediately detect every person taken into custody throughout the country, and to automatically check them against immigration databases. Based on Secure Communities checks and the longstanding operations of ICE CAP officers combing jails, ICE issued millions of immigration detainers. Detainers request a jail to notify ICE before the person will be released, and to hold that person after he or she otherwise would be released in order for ICE to apprehend the person. This mechanism for ensuring convenient ICE arrest was, and in many places still is, key to the mass deportation infrastructure.

However, as government spending and enforcement efforts increased, so did advocacy to fight deportations and disentangle immigration enforcement from local policing. Civil rights groups and even police chiefs spoke out against S-Comm because it was limiting the immigrant community's willingness to contact police, undermining public safety. Several large jurisdictions passed local ordinances limiting their compliance with detainers, and the state of California enacted the Trust Act, prohibiting jails from holding certain immigrants for ICE. After federal courts found immigration detainers to be unconstitutional—specifically, they caused warrantless arrests without probable cause in violation of the Fourth Amendment—hundreds of sheriffs stopped complying with detainers. Immigrant rights activists stepped up protests calling for immigration reform and for DHS to stop tearing families apart. In 2017, following the election of Donald Trump and the institution of aggressive anti-immigrant policies throughout DHS and the Department of Justice, the pressure on local police and jails continued to mount. While more states and localities have passed policies limiting detainers or other involvement in immigration enforcement, the federal government has tried to coerce communities to do ICE's bidding at the risk of losing federal funding. Most of these efforts have thus far not survived review in federal courts, but the fight over local law enforcement's role in immigration and "sanctuary" policies continues. At the same time, ICE enforcement tactics have gotten more aggressive and opportunities to obtain favorable prosecutorial discretion from the agency are few and far between.

As communities fight back against ICE's presence in local jails and the deportation dragnet, ICE's strategies are constantly shifting. Where they are unable to have the convenience of local law enforcement delivering immigrants directly into their custody, ICE enforcement agents have returned to older tactics of arresting immigrants at their homes, at work sites, and on the street. ICE frequently conducts large-scale arrests, often under "Operation Cross-Check," in which they round up people who were encountered through the various immigration data-gathering

programs. But ICE continues to depend on the assistance of local law enforcement and to seek greater involvement in the criminal justice system.

Fighting back to protect immigrants and defend individual constitutional rights occurs at both the policy level and in individual cases. Immigration attorneys and representatives can zealously defend clients in removal and bond proceedings, seek to suppress illegally obtained evidence and terminate cases where ICE has violated the constitution or its own regulations, and sue agents and agencies that violate immigrants' rights for damages. Lawyers can work with organizers and the immigrant community to help understand the systems that put them at risk and the laws that they can invoke to defend themselves. This manual will discuss both the law governing individual constitutional rights in arrests, detention and deportation, and the policies and structures that underlie immigration enforcement. With these tools and explanations, we hope that immigrant advocates can hold the government accountable and protect immigrant communities.

### § 1.2 Recent Immigration Enforcement Policy Changes

In November of 2014, then President Obama announced a number of Executive Actions related to immigration, including a broad prosecutorial discretion program to provide work permits to undocumented parents of U.S. citizens and permanent residents. Included in these announcements was the promulgation of a list of "enforcement priorities."<sup>6</sup> The Enforcement Priorities Memo outlined the factors that would cause people to be targeted for detention and deportation. These enforcement priorities were not law, and many of the enforcement priorities were tied to criminal convictions or suspicion that the individual was a danger to public safety or security. The memo established three tiers of priority for enforcement actions. These tiers had different standards for when a discretionary exception might apply, and what resources ICE should devote to pursuing deportation. But the different tiers had little effect in practice. Anyone who fell into *any* of the enforcement priorities was likely to be targeted for enforcement, even if they fell within an exception.

Another enforcement policy change in November 2014 was to the S-Comm program, which is an information-sharing program where fingerprints taken by state and local law enforcement are shared with ICE so that ICE can request custody of individuals to put them in removal proceedings. Because of the mass-deportation dragnet this program created, it was extremely controversial, and many jurisdictions around the country limited their cooperation with ICE's requests to hold people for ICE. For more about S-Comm and the role of local police in immigration enforcement, see **Chapter 3**.

In his 2014 memo on S-Comm, then DHS Secretary Jeh Johnson recognized the enormous backlash that S-Comm had provoked, and officially "terminated" the program.<sup>7</sup> However, Secretary Johnson wrote that: "The overarching goal of Secure Communities remains in my view

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<sup>6</sup> See Jeh Johnson, Secretary of Homeland Security, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014) available at [www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) (last accessed November 2017).

<sup>7</sup> See Jeh Johnson, Secretary of Homeland Security, "Secure Communities" (November 20, 2014) available at [www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) (last accessed November 2017).

a valid and important law enforcement objective...”<sup>8</sup> As a result, none of the essential architecture of S-Comm changed. Instead, DHS created a new program in its place: The “Priority Enforcement Program” (PEP). The basic mechanisms of S-Comm remained in place under PEP. When a person was arrested, the police took his or her fingerprints. All fingerprints taken by police were sent to ICE to check against immigration databases, and the local ICE office is notified if there is a match. If ICE wanted to take action against the arrested person, ICE issued a custody request, or detainer, to the local jail. The detainer may ask the jail to let ICE know when the person will be released (also called a “notification request”). It may also request the jail to hold the person for extra time to allow ICE to come get them (also called a “hold request”). For a more detailed analysis of the detainer form and their legal implications, see **Chapter 4**. The main change to S-Comm under the PEP name was that in seeking transfers of custody from local jails to ICE, agents were supposed to follow the above-mentioned enforcement priorities.

In January of 2017, one of the Trump administration’s first acts related to immigration was to rescind the Enforcement Priorities Memo and end the PEP program, while reinstating S-Comm and focusing on the expansion of the 287(g) program.<sup>9</sup> The administration has correspondingly increased issuing detainers again, as well as expanded ICE enforcement operations at people’s homes and on the streets. On top of aggressive arrests and enforcement tactics, the federal government now regularly demonizes and threatens immigrants in the media, at press conferences, and through new policy announcements targeting immigrant communities.

### **§ 1.3 Background of Immigration Enforcement Operations**

Although Secure Communities in some ways became synonymous with all immigration enforcement operations, ICE has many other programs for gathering information and apprehending people. Much of the focus is on transfers from local jails, but ICE agents also regularly conduct home raids, worksite raids, and other enforcement actions in the field.

#### **A. Criminal Alien Program**

The Criminal Alien Program (CAP) is an umbrella term for all of ICE’s operations that find and apprehend immigrants in jails and prisons and put them in removal proceedings. CAP has existed since the 1980s as a “jail check” program, where ICE agents receive lists of all the prisoners in local, state, and federal prisons and jails and investigate their immigration status. ICE may merely screen them against immigration databases and then issue a detainer, or they may come to the jail to question inmates more thoroughly. ICE agents initiate removal proceedings, and in many cases convince people to agree to deportation or voluntary departure, while they are still incarcerated on their criminal sentence or in pending criminal proceedings. As needed, ICE agents working under CAP would take custody upon the person’s release from jail and transport them directly to immigration detention.

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<sup>8</sup> *Id.*

<sup>9</sup> See The White House Office of the Press Secretary, “Executive Order: Enhancing Public Safety in the Interior of the United States” (January 25, 2017) available at [www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united](http://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united) (last accessed November 2017).

S-Comm is part of CAP operations, but is in some ways distinct. Until S-Comm, ICE agents had to do more searching and questioning to find deportable immigrants in jails and prisons. Most often, ICE relied on booking lists from the jails that provided data on all the inmates' places of birth. Under S-Comm, ICE uses fingerprint data to crosscheck against information already in their databases, allowing them to determine immigration status and issue detainers much faster. But if a person has no fingerprint match in DHS databases, or the information is inconclusive, ICE officers still go to the jails to interrogate them. Under CAP, ICE agents establish formal and informal relationships with jails to get access to information on inmates. ICE agents may be permanently stationed in some jails to make sure they can access information, question inmates, and be available to take custody if the person is released by the state or county. CAP and PEP work hand in hand to identify the most number of individuals subject to possible deportation and make sure they are transferred to ICE custody.

A fundamental problem with CAP and all of ICE's efforts to enlist local jails and police into immigration enforcement is that the results are very racially biased.<sup>10</sup> For example, in one jurisdiction, police arrests of Hispanics for low-level traffic offenses rose substantially after CAP was implemented and ICE agents were regularly available in the jail.<sup>11</sup> The evidence clearly suggested that police engaged in racial profiling to filter Latinos through the CAP screening system. ICE also perpetuates racial profiling within the jails. For example, ICE has been known to screen booking sheets for Latino surnames and target those individuals for interviews to assess their deportability, even where the individual may have legal status or even be a U.S. Citizen. A FOIA of CAP arrests from 2010 to 2013 showed that more than 93% of all the people apprehended by ICE in local jails were from Mexico and Central America.<sup>12</sup>

## **B. 287(g) Program**

The 287(g) program gets its name from the section in Immigration and Nationality Act (INA), authorizing agreements between local jurisdictions and DHS, which was enacted with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.<sup>13</sup> Local law enforcement is typically limited in its ability to assist federal immigration enforcement to those programs discussed in this chapter or through notifying ICE directly. Thus, local law enforcement is generally unable to independently enforce federal immigration law, whether by carrying out deportations or even detaining people to ask them about their immigration status. Under the 287(g) program, however, ICE contracts with local law enforcement to deputize their police and jail officers to help enforce immigration law inside local jails. Local officers are trained in some basic immigration law, and then they are authorized to question inmates about immigration status

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<sup>10</sup> See Trevor Gardner and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, Warren Institute on Race, Ethnicity and Diversity, (September 2009), available at [www.motherjones.com/files/policybrief\\_irving\\_FINAL.pdf](http://www.motherjones.com/files/policybrief_irving_FINAL.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> See Guillermo Cantor, Mark Noferi, and Daniel E. Martínez, *Enforcement Overdrive: An Evidence-Based Assessment of ICE's Criminal Alien Program*, American Immigration Council (November, 2015).

<sup>13</sup> 1996 Illegal Immigration Reform and Immigrant Responsibility Act, 8 USC § 1357(g); and ICE Fact Sheet, "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act." Available at [www.ice.gov/287g](http://www.ice.gov/287g) (last visited November 2017).

and screen them against ICE databases. For more details about the extent of enforcement authority for local and state law enforcement officers, see **Chapter 3**.

However, not all jurisdictions participate in 287(g). To do so, jurisdictions must enter into a written “Memorandum of Agreement” with ICE, which is entirely voluntary. Thus far, more than 1,822 state and local officers have been trained to enforce immigration law.<sup>14</sup> As of December, 2017, 60 jurisdictions in 18 states have active 287(g) agreements with ICE.<sup>15</sup> More than 20 such agreements are pending, and it is expected that the current administration will continue to pursue more in the coming years.

### **C. Immigration Detainers**

Where S-Comm, CAP, and the 287(g) program might bring an immigrant to the attention of ICE, the detainer is the vehicle to bring that person into ICE custody for removal. In essence, the aforementioned programs are primarily information gathering tools through which ICE can identify people in order to issue immigration detainers and take people into immigration custody. The issuance of the immigration detainer indicates that ICE requests that the local law enforcement agency inform ICE when the person is due for release, and/or hold the person for an extra 48 hours until ICE can take custody of the person. The detainer forms have changed recently and the current versions of the immigration detainer forms appear at **Appendix 1-A**. For an in-depth discussion of immigration detainers and related legal issues, see **Chapter 4**.

Immigration detainers have been subject to much abuse by local and state law enforcement as well as federal immigration authorities. For example, certain law enforcement agencies have been known to keep people detained for days or weeks based on a detainer, and even months, in violation of the detainee’s constitutional rights and the detainer regulations at 8 CFR § 287.7(d). In fact, as is discussed in depth in **Chapter 4**, immigration detainers are not warrants, and do not meet Fourth Amendment requirements for arrest, and federal courts have found that holding someone on an immigration detainer is an unlawful seizure. Courts and jails also misuse detainers by limiting access to bail and denying eligibility for work release or rehabilitative programs, solely because of ICE detainers or perceived lack of immigration status.

Advocates and immigrant communities have responded to these abuses and to the enormous numbers of immigration detainers through state and local advocacy to enact policies limiting local and state collaboration with immigration authorities,<sup>16</sup> filing motions to suppress in immigration court, and filing constitutional and other legal challenges in federal and state courts.<sup>17</sup> These efforts to challenge detainers are critical in responding to increased immigration enforcement, and will remain so until there is drastic change at the federal level.

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<sup>14</sup> ICE Fact Sheet, “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act.” Available at [www.ice.gov/news/library/factsheets/287g.htm](http://www.ice.gov/news/library/factsheets/287g.htm) (last visited November 2017).

<sup>15</sup> *Id.*

<sup>16</sup> For a map of existing policies limiting compliance with ICE detainers, see [www.ilrc.org/enforcement](http://www.ilrc.org/enforcement).

<sup>17</sup> For additional resources on detainer litigation, visit ILRC’s Enforcement page at [www.ilrc.org/immigration-enforcement](http://www.ilrc.org/immigration-enforcement).



**D. Fugitive Operations**

The National Fugitive Operations Program (NFOP) is what most people think of when they think of ICE enforcement: ICE agents that go and arrest people at homes, at work, and on the street. Although it is often called “Fugitive Operations,” this work is not limited to “fugitives” or even to people who have outstanding orders of removal. As described by ICE, the NFOP helps “locate, arrest, and reduce the population of at-large removable aliens within the U.S.”<sup>18</sup>

For example, FOIA results have shown that fugitive operations teams commonly collaborate with other ICE enforcement agents to do “CAP surges,” i.e., to make mass arrests of deportable immigrants in a particular area of responsibility.<sup>19</sup> Usually the targets have had some contact with the criminal justice system, but did not end up in ICE custody at the time. When individuals with prior order of removals are apprehended, they often do not have a right to see an immigration judge and are instead summarily deported, despite mitigating factors such as having lived in the U.S. for many years or having U.S. citizen family members.

#### **§ 1.4 Why Motions to Suppress & Other Legal Challenges Are Important to Combat Unlawful Immigration Enforcement**

While ICE has many resources at its disposal to pursue deportation, immigration advocates should also be aware of their own tools to combat unlawful and unfair practices. Filing motions to suppress, federal or state lawsuits challenging immigration detainers and other immigration enforcement actions by local police, and *habeas corpus* petitions to free clients from unlawful detention are among the tools that have been effective in combating unlawful and unfair enforcement actions.

One critical advocacy tool is the motion to suppress. With a motion to suppress, advocates can combat some of the immigration enforcement abuses mentioned in this chapter by moving to suppress illegally obtained evidence regarding alienage. In individual cases, it can be the key to success if your client has no other or better relief, but was apprehended in a way that violated his or her constitutional, statutory, or regulatory rights. Because immigration enforcement is becoming increasingly aggressive, the opportunities for such cases are mounting. A motion to suppress can also dramatically change the dynamic of removal proceedings. Instead of the focus being on your client and his or her past wrongs or removability, the focus is on ICE or other law enforcement agents and their illegal behavior.

Other tools available to advocates include *habeas* petitions and individual advocacy. For example, if your client is held under an immigration detainer, you can demand release of your client through an emergency *habeas corpus* with the local court. Further, even before your client is transferred to ICE custody, you can advocate to lift or remove an immigration detainer with ICE directly and sometimes the local county sheriff, so as to avoid apprehension by ICE in the first place.

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<sup>18</sup> Website for Fugitive Operations. Available at: [www.ice.gov/fugitive-operations/#](http://www.ice.gov/fugitive-operations/#) (last accessed November 2017).

<sup>19</sup> FOIA of the Criminal Alien Program by the American Immigration Council, see [www.legalactioncenter.org/litigation/criminal-alien-program-cap](http://www.legalactioncenter.org/litigation/criminal-alien-program-cap) (last accessed November 2017).

Additionally, there are class action suits combating increased immigration enforcement. In Los Angeles, for example, a class action lawsuit, *Roy v. Los Angeles*,<sup>20</sup> alleged that immigration detainers resulted in violations of plaintiffs' Fourth and Fourteenth Amendment rights, as well as subjecting them to false imprisonment. In response to a demand letter even before the lawsuit was filed, the LA County Sheriff's Department changed the unlawful practice of not allowing individuals with immigration detainers to post bail.<sup>21</sup> Advocates should be mindful of such litigation in the event that the facts and evidence underlying a motion to suppress are appropriate for a larger lawsuit.

Motions to suppress and related litigation provide an important means to combat the increasingly growing and unlawful immigration enforcement practices. This practice manual aims to provide advocates with knowledge and ability to utilize such tools, in particular motions to suppress.

### § 1.5 Contents of This Manual

This manual discusses important rights guaranteed to immigrants by law. It describes the constitutional rights of immigrants and suggests what to do when rights have been abused. Recognizing when a government action is unconstitutional or when rights have been violated is an important skill for any immigrant advocate. We hope to introduce the fundamentals of litigation strategies in immigration, state, and federal courts to challenge increased immigration enforcement in the U.S., with a particular focus on local law enforcement collaboration with federal immigration authorities.

In addition to this chapter, this manual contains seven other chapters and appendices that correspond to the respective chapters. **Chapter 2** discusses the rights of immigrants and applicable law to pursuing motions to suppress evidence. This includes an overview of constitutional rights under the Fourth and Fifth amendments of the U.S. Constitution and rights under statutory and administrative law. **Chapter 3** discusses the authority of different levels of government and includes a review of the rights of immigrants when confronted by enforcement officers in various contexts, for example at the border, public places, and schools. **Chapter 4** provides an overview of local law enforcements' role in immigration enforcement and opportunities for suppression in removal proceedings when non-immigration agencies committed the constitutional violations. **Chapter 5** covers the procedure for filing and litigating a motion to suppress in removal proceedings. This includes how to screen for such cases, practical considerations in immigration court, and preparing the motion to suppress. **Chapter 6** covers other actions to challenge enforcement and unlawful practices, including Freedom of Information Act requests to gather evidence and damages suits against particular government officers. **Chapter 7** reviews the rights of immigrants in detention. This includes rights covered by the national immigration detention standards, legislative and legal responses to detention abuses, and additional considerations for detained immigrants such as alternatives to detention, mandatory detention and rights of juveniles. Finally, **Chapter 8** covers various administrative complaints. This chapter discusses in which situations to file a complaint, how to file a complaint, and where to file a complaint, so as to document abuses for further advocacy or litigation. Additionally, the

<sup>20</sup> *Roy v. Los Angeles*, No. CV12-9012 BRO (FFMX) 2015 WL 12582637 (C.D. Cal. Nov. 20, 2015)).

<sup>21</sup> See [www.aclu.org/immigrants-rights/aclu-files-lawsuit-against-los-angeles-county-sheriffs-department](http://www.aclu.org/immigrants-rights/aclu-files-lawsuit-against-los-angeles-county-sheriffs-department).



multiple appendices include various resources, especially sample motions and litigation to assist you in pursuit of these skills.

