




ACLU-TN Comparison of the Old and New 287(g) Agreements

July 2009


The ACLU of Tennessee (ACLU-TN) is helping to make Tennessee a more open, forward-looking place to live. We are committed to fairness in our laws and their enforcement, including the fair treatment of immigrants. In this analysis, we rated each of the claims ICE made about the July 2009 Memorandum of Agreement (MOA) based on its impact on law enforcement's time and resources; law enforcement's power and accountability; transparency; public safety; due process and fairness. Using the same criteria, we also identified new problems created by the July 2009 MOA that didn't exist under the original 2007 MOA.

 = Better


 = Worse


 = No Change


New Problems Created by the July 2009 287(g) Agreement

Additional problems created by new 287(g) MOA	Davidson County 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
<p>1) New MOA increases list of powers granted to task force officers by adding authority to execute search warrants and to issue arrest warrants (an especially inappropriate power for detention officers to possess)</p>	<p>Powers granted in original MOA include:</p> <ul style="list-style-type: none"> “• The power and authority to interrogate any person believed to be an alien as to his right to be or remain in the United States (INA § 287(a)(1) and 8 C.F.R. §287.5(a)(1)) and to process for immigration violations those individuals who are convicted of State or Federal felony offenses; • The power and authority to serve warrants for arrest for immigration violations pursuant to 8 C.F.R. § 287.5(e)(3); • The power and authority to administer oaths and to take and consider evidence (INA § 287(b) and 8 C.F.R. § 287.5(a)(2)), to complete required criminal alien 	<p>All of the previously granted powers are maintained. Additional powers granted include:</p> <ul style="list-style-type: none"> “• The power to process for immigration violations any removable alien or those aliens who have been arrested for violating a Federal, State, or local offense; • The power and authority to execute search warrants pursuant to INA § 287(a) and 8 C.F.R. § 287.5(e)(1); • The power and authority to issue arrest warrants for immigration violations pursuant to INA § 287(a) and 8 C.F.R. § 287.5(e)(2)” <p>(page 19) (emphasis added)</p>		<p>This is a change for the worse. Under the old agreement, the DCSO only had authority to screen people under 287(g) after conviction of a felony offense. Despite this limitation of authority, the DCSO never followed this mandate. Now the new MOA brings the contract in line with the DCSO’s past practices by allowing all foreign born people who have been arrested—but not yet convicted—of any offense, whether felony, misdemeanor or local ordinance violation—to be run through the 287(g) system.</p> <p>Under the old agreement, only actual ICE agents could execute</p>


Additional problems created by new 287(g) MOA	Davidson County 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
	<p>processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review;</p> <ul style="list-style-type: none"> • The power and authority to prepare charging documents INA Section 239, 8 C.F.R. 239.1; INA Section 238, 8 C.F.R. 238.1, INA Section 241(a)(5), 8 C.F.R. 241.8; INA Section 235(b)(1), 8 C.F.R. 235.3) including the preparation of a Notice to Appear (NTA) application or other charging document, as appropriate, for signature of an ICE officer for aliens in categories established by ICE supervisors; • The power and authority to issue immigration detainers; and • The power and authority to detain and transport arrested aliens to ICE approved detention facilities.” 			<p>immigration search warrants. Under the new agreement, this authority is extended to 287(g) agents.</p> <p>Previously arrest warrants for immigration violations could only be issued by an ICE supervisor. Under the new agreement they can be issued by a 287(g) agent. These expanded authorities are particularly troubling as 287(g) agents are provided with very little training (40 hours) by ICE and are minimally supervised by ICE. Specifically, for the DCSO detention model agreement these expanded powers extend the day to day duties of DCSO officers, who absent powers given to them by ICE, are only authorized to run the jail and execute warrants. This amounts to a major and unnecessary</p>

Additional problems created by new 287(g) MOA	Davidson County 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
	(page 2) (emphasis added)			expansion of DCSO power with little training and accountability.
<p>2) New MOA attempts to shield information from public access or scrutiny by declaring that a very broadly defined group of documents “shall not be considered public records” and requiring agencies to get ICE approval</p>	<p>“The DCSO hereby agrees to coordinate with ICE regarding information to be released to the media regarding actions taken under this MOA.” (page 8)</p>	<p>“The AGENCY hereby agrees to coordinate with ICE prior to releasing any information relating to, or exchanged under, this MOA, including any [Standard Operating Procedure]’s developed for the implementation of this MOA. Information obtained or developed as a result of this MOA is under the control of ICE and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations, and executive orders. Insofar as any documents created by the AGENCY contain information developed or obtained as a result of this MOA, such documents shall not be considered public records. The release of statistical information regarding the 287(g) program must be coordinated with the</p>		<p>This is a change for the worse. Under the old agreement, DCSO was under an obligation to coordinate the release of certain information with ICE. Under the new agreement, many documents will be completely shielded from public review and all documents tangentially related to the 287(g) program, its implementation, complaints or statistics will be prevented from release under Tennessee’s Open Records law and will be under the exclusive control of ICE. This lack of transparency and availability of information to the public makes it difficult for the public to be aware and to</p>


Additional problems created by new 287(g) MOA	Davidson County 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
before releasing information about the program or its implementation.		ICE Office of Public Affairs. The AGENCY hereby agrees to coordinate with ICE regarding information to be released to the media regarding actions taken under this MOA. All contact with the media involving investigations conducted under this MOA by Task Force Officers (TFO) will be done pursuant to ICE policy. The points of contact for ICE and the AGENCY for this purpose are identified in Appendix C.” (page 9) (emphasis added)		monitor the activities of local law enforcement and local government. Good government requires transparency and accountability.
3) New MOA eliminates steering committee and authorizes exclusion of civilians from program reviews.	“The ICE Field Office Director in New Orleans, LA, and Davidson County Sheriff shall establish a steering committee that will meet periodically to review and assess the immigration enforcement activities conducted by the Participating DCSO personnel and to ensure compliance with the terms of this MOA” (page 8)	No longer refers to a “steering committee,” but instead simply periodic meetings between the principals. “When necessary, ICE and the AGENCY may limit the participation of these meetings in regards to non-law enforcement personnel.” (page 9)		This is a change for the worse. Under the old agreement, there was a level of formality associated with an official “Steering Committee”. Presumably more people were members of this committee than just the principals of ICE and the DCSO. The elimination of the formal committee erodes

Additional problems created by new 287(g) MOA	Davidson County 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
				oversight and discussions of complaints and problems with the program.
<p>4) New MOA explicitly does not require data collection, whereas old MOA placed a general obligation on agency to “track and maintain accurate data and statistical information”</p>	<p>“The DCSO will be responsible for tracking and maintaining accurate data and statistical information for their 287(g) program, including any specific tracking data requested by ICE.” (page 6)</p>	<p>“ICE does not require the AGENCY to provide statistical or arrest data above what is entered into ENFORCE¹; however, ICE reserves the right to request the AGENCY provide specific tracking data and/or any information, documents, or evidence related to the circumstances of a particular alien’s arrest.” (page 6)</p>		<p>This is a change for the worse. Though the requirements for data collection were vague under the old agreement, the DCSO was at least required to track data and statistical information about implementation of the program. The new MOA does not require any information to be collected other than the basic personal demographic information needed to run a detainee through the ENFORCE immigration database. Additional info provides a better way to monitor the program.</p>


¹ ENFORCE is ICE’s database of basic information on people in the immigration system.

Additional problems created by new 287(g) MOA	Davidson County 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
<p>5) New MOA does not limit the number of 287(g) designated agents within the jurisdiction.</p>	<p>Limited the DCSO to twelve (12) agents. (page 1)</p>	<p>Has no limitation on the number of agents. (page 1)</p>		<p>This is a change for the worse. The original agreement at least limited the number of agents DCSO could deputize as ICE agents. Under the new agreement, no such limit exists. Each additional agent comes with additional costs for overtime, training and technology.</p>

Side-by-Side Comparison of Old and New 287(g) Memoranda of Agreement (MOA)


ICE claims these changes will better the 287(g) agreements ²	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
<p>A) "ICE priorities [for those people who get screened through 287(g)³] now incorporated into the MOA"</p>	<p>Explained that "ICE ... will assess on a case-by case basis the appropriate removal vehicle⁴ to be employed ... ICE may exercise ... discretion by declining to detain aliens whose detention is not mandated by federal statute." (page 3)</p>	<p>Does include definitions of three levels of "priorities," but states only that "resources should be prioritized to the following levels." It does not provide any mechanism for ensuring "prioritization," such as comparing arrest information to the priority levels or requiring the agency to show that its policies and procedures communicate and implement an effective prioritization system. Plainly does not prevent or discourage arrests for "low-priority" offenses. (Appx. D, page 17)</p>		<p>This is not a change at all. While ICE defines its priority detentions as those who have committed serious crimes (felonies, violent crimes etc.), it still allows each jurisdiction to implement these advisory policies in any way they see fit. In Nashville this has resulted in every single foreign born person booked into the jail being processed through the 287(g) program—resulting in the mass deportation of people whose most serious crimes are misdemeanors such as driving or</p>


² Refers to claims in ICE document titled "2009" 287g Side-by-Side."

ICE claims these changes will better the 287(g) agreements 2	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
				fishing without a license.
<p>B) "Purpose of 287(g) authority is now provided in MOA."</p>	<p>"It is the intent of the parties that these delegated authorities will enable DCSO to identify and process immigration violators in DCSO jail and correctional facilities.... The purpose of this MOA is to set forth the terms and conditions pursuant to which selected DCSO personnel ... will be nominated, trained, and thereafter perform certain functions of an immigration officer" (page 1)</p>	<p>"It is the intent of the parties that these delegated authorities will enable the AGENCY to identify and process immigration violators and conduct criminal investigations under ICE supervision, as detailed herein, within the confines of the AGENCY'S AREA OF RESPONSIBILITY. This MOA sets forth the terms and conditions pursuant to which selected AGENCY personnel ... will be nominated, trained, and approved by ICE to perform certain functions</p>		<p>This is not a change at all. The description of the purpose of the MOA is identical to that of the old MOA. The only difference here is that in the new MOA, ICE has added language discussing a focus on "criminal aliens," which is never defined. This language does not have any apparent operative effect whatsoever.</p>


³ See two memos regarding ICE priorities for detention: Oct. 19, 2004 memo: "Implementation of Detention Prioritization and Notice to Appear Documentary Requirements" and Oct. 18, 2004 memo: "Detention Prioritization and Notice to Appear Documentary Requirements."


⁴ "Removal vehicle" refers to the various ways people are processed through immigration for deportation.


ICE claims these changes will better the 287(g) agreements <small>2</small>	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
		<p>of an immigration officer” (page 1)</p> <p>Includes new language saying that “The purpose of this collaboration is to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community.”</p>		
C) “Expressly limits the law enforcement agency’s 287(g) authority to the	Limited delegated authorities to “DCSO Jail and Correctional Facilities.” (page 1)	Limits delegated authority to “within the confines of the AGENCY’S AREA OF RESPONSIBILITY” (page 1)		This is not a change at all. Authority in the original MOA was confined to DCSO Jail and Detention Facilities and it remains exactly the same in the

ICE claims these changes will better the 287(g) agreements <small>2</small>	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
confines of their area of responsibility”				new MOA. This language seems to conflict however with the expanded authority the new agreement gives discussed above. See New Problems No. 1.
D) Eliminates “[s]eparate templates for both task force and jail enforcement models ⁵ ”	Deals only with “correction setting” (page 7)	Addresses both models (page 18-23)		This change actually makes the new agreement worse. The original MOA dealt only with the “Detention Model” and was specific to the authority granted for those purposes. The new combined model addresses the “task force model” and the “jail enforcement model” while expanding authority of the


⁵ A “task force model” is where traditional police on the street are given immigration authority. A “jail enforcement” or “detention” model is when immigration authority is given to jailers. Davidson County has a “detention” model 287(g) agreement.


ICE claims these changes will better the 287(g) agreements <small>2</small>	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
				<p>287(g) officers as a whole. This only further complicates a 287(g) jurisdiction's understanding of the scope of the authority granted to them under this agreement. See New Problems No. 1.</p>
<p>E) "Federal civil rights not addressed" in old MOA</p>	<p>"Participating DCSO personnel ... are bound by all federal civil rights statutes and regulations, including the U.S. Department of Justice "Guidance Regarding The Use Of Race By Federal Law Enforcement Agencies" dated June 2003." (page 7)</p>	<p>"Participating AGENCY personnel are bound by all federal civil rights laws, regulations, guidance relating to non-discrimination including the U.S. Department of Justice 'Guidance Regarding The Use Of Race By Federal Law Enforcement Agencies' dated June 2003 and Title VI of the Civil Rights Act of 1964, as amended, 42. U.S.C. 2000 et. seq., which prohibits discrimination based upon race,</p>		<p>This is no real change at all. The only difference between the two documents is that the new MOA is more detailed in describing the specifics of civil rights laws and specifically mentions limited English proficiency as being an inappropriate factor in enforcing the agreement. Despite mounting evidence that many of these agreements encourage racial and ethnic profiling, the</p>


ICE claims these changes will better the 287(g) agreements <small>2</small>	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
		<p>color, or national origin (including limited English proficiency) in any program or activity receiving Federal financial Assistance.” (page 8)</p>		<p>new MOA does not mandate additional or more extensive training to prevent civil rights violations.</p>
<p>F) “Interpretation services not addressed in previous MOA”</p>	<p>“Participating DCSO personnel will provide an opportunity for subjects with limited English language proficiency to request an interpreter. Qualified foreign language interpreters will be provided by DCSO as needed.” (page 8)</p>	<p>“Participating AGENCY personnel will provide an opportunity for subjects with limited English language proficiency to request an interpreter. Qualified foreign language interpreters will be provided by the AGENCY, as needed.” (page 8)</p> <p>“The AGENCY will maintain a list of qualified interpreters or companies it contracts with to provide such interpreters. Participating law enforcement</p>		<p>This is no real change. The old MOA mandated that interpreters be made available to 287(g) detainees. The new agreement simply adds language mandating that a list of interpreters be available at the DCSO and that interpreters are to be identified in documents.</p>

ICE claims these changes will better the 287(g) agreements <small>2</small>	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
		<p>personnel will be instructed on the proper administrative procedures to follow to obtain the services of an interpreter. A qualified interpreter means an interpreter who can interpret effectively, accurately, and impartially, using any specialized vocabulary. If an interpreter is used when a designated officer is performing functions under this MOA, the interpreter must be identified, by name, in records." (page 8)</p>		
G) Old MOA "[d]id not clearly state where complaints should be	"In order to simplify the process for the public, complaints ... can be reported in a number of ways. The ICE Headquarters' Office of Professional Responsibility [OPR] and the DCSO's Office of Standards and Accountability	"In order to simplify the process for the public, complaints against participating AGENCY personnel ... can be reported in the following manner" (page 13)		The only discernible difference here is that in the new MOA, complaints are to be made directly to ICE and not to the DCSO.

<p>ICE claims these changes will better the 287(g) agreements 2</p>	<p>Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)</p>	<p>New Memorandum of Agreement (July 2009)</p>	<p>ACLU-TN Opinion</p>	<p>Explanation of Changes</p>
<p>forwarded”</p>	<p>(DCSO OSA) will coordinate complaint receipt and investigation.” (page 12)</p> <p>Gives toll-free number and address for ICE OPR at HQ; and address for ICE OPR office in New Orleans. (page 13)</p> <p>Also gives contact info for DCSO Sheriff and Investigations Division- Office of Standards and Accountability. (page 13)</p> <p>“[T]he DCSO shall, to the extent allowed by state law, immediately notify ICE of the existence and nature of [any relevant] complaint. The resolution of the complaint shall also be promptly reported to ICE.” (page 6)</p>	<p>Provides toll-free number for DHS OIG, toll-free number, mail address and email for ICE OPR at HQ. (page 14)</p> <p>“[T]he AGENCY shall, to the extent allowed by State law, immediately notify ICE of the existence and nature of [any relevant] complaint or allegation. The results of any internal investigation or inquiry connected to the complaint or allegation and the resolution of the complaint shall also be promptly reported to ICE.” (13)</p>		

<p>ICE claims these changes will better the 287(g) agreements 2</p>	<p>Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)</p>	<p>New Memorandum of Agreement (July 2009)</p>	<p>ACLU-TN Opinion</p>	<p>Explanation of Changes</p>
<p>H) "Pursuing charges to completion was not addressed" in previous MOA</p>	<p>"Davidson County authorities expected to pursue to completion prosecution of the state or local charges that caused the individual to be taken into custody." (page 3)</p>	<p>"The AGENCY is expected to pursue to completion all criminal charges that caused the alien to be taken into custody and over which the AGENCY has jurisdiction." (page 2)</p>		<p>This is no change at all. The old 287(g) agreement, by virtue of the way the model is set up, means that 287(g) is not a factor in Davidson County unless authorities were pursuing the charges. In order to be run through the program at the DCSO, the police officer must have already made the decision to arrest an individual and brought them in front of a commissioner to set a bond and determine probable cause. There is no change here.</p>

<p>ICE claims these changes will better the 287(g) agreements 2</p>	<p>Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)</p>	<p>New Memorandum of Agreement (July 2009)</p>	<p>ACLU-TN Opinion</p>	<p>Explanation of Changes</p>
<p>I) Performance of duties by the law enforcement agency was not addressed</p>	<p>"Either party, upon written notice to the other party, may terminate the MOA at any time." (page 8)</p>	<p>"During the MOA's effective period, either party, upon written notice to the other party, may terminate the MOA at any time." (page 10)</p> <p>"...Upon a good faith determination that the AGENCY is not fulfilling its duties, ICE shall notify the AGENCY, in writing, and inform the AGENCY that it has 90 days to demonstrate a continued need for 287(g) program services. If this continued need is not demonstrated by the AGENCY, the authorities and resources given to the AGENCY pursuant to this MOA will be terminated or suspended. Upon a</p>		<p>This is change for the worse. The basic terms of the agreement have not changed substantially (i.e. either side can terminate at anytime). However the additional language in the new agreement creates increased pressure on 287(g) jurisdictions to use it at level ICE finds acceptable, or lose it.</p>

<p>ICE claims these changes will better the 287(g) agreements 2</p>	<p>Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)</p>	<p>New Memorandum of Agreement (July 2009)</p>	<p>ACLU-TN Opinion</p>	<p>Explanation of Changes</p>
		<p>subsequent demonstration of need, all costs to reinstate access to such authorities and/or program services will be incurred by the AGENCY." (page 10)</p>		
<p>J) Previous MOA "[d]id not provide additional detail around criteria for accepting candidates" to become 287(g) agents.</p>	<p>"For each candidate, ICE may request any information necessary for a background check and to evaluate a candidate's suitability ... All candidates must be U.S. citizens. All candidates must have at least two years of DCSO work experience. All candidates must be approved by ICE and must be able to qualify for appropriate federal security clearances." (page 4)</p>	<p>"All candidates must be United States citizens. The AGENCY is responsible for conducting a criminal background check within the last five years for all nominated candidates. ... " (page 3)</p> <p>"In addition to the AGENCY background check, ICE will conduct an independent background check for each candidate. This background check requires all candidates to complete a background questionnaire. The</p>		<p>This is change for the worse, lowering the qualifications necessary to be a participant in the program. In the old 287(g) agreement, officers were mandated to have at least two years law enforcement experience. In the new agreement, participants are only required to have one year of experience. The new agreement, does however, go into more detail on the requirements that applicants</p>

<p>ICE claims these changes will better the 287(g) agreements 2</p>	<p>Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)</p>	<p>New Memorandum of Agreement (July 2009)</p>	<p>ACLU-TN Opinion</p>	<p>Explanation of Changes</p>
		<p>questionnaire requires, but is not limited to, the submission of fingerprints, a personal history questionnaire, and the candidate's disciplinary history (including allegations of excessive force or discriminatory action)." (page 3)</p> <p>Task force participants "should have a minimum of one year of law enforcement experience." (page 21)</p> <p>Detention participants "shall have specific experience that should consist of having supervised inmates." (page 23)</p>		<p>have amore extensive background check and at least some experience supervising detainees.</p>

ICE claims these changes will better the 287(g) agreements <small>2</small>	Davidson County Sheriff's Office (DCSO) 287(g) MOA (February 2007)	New Memorandum of Agreement (July 2009)	ACLU-TN Opinion	Explanation of Changes
K) "Operations plan approval not required" under old MOA	Not applicable for DCSO "detention only" model.	Task force only: "Prior to an AGENCY conducting any enforcement operation that will involve the use of its 287(g) delegation of authority, the AGENCY must provide the ICE supervisor with a copy of the operations plan, and the [Special Agent in Charge/Field Office Director] must concur and approve with the plan prior to it being initiated." (page 20)	<p style="text-align: center;">N/A</p>	This language in the new agreement should not be applicable to the DCSO, which is a "detention" or "jail enforcement" 287(g) jurisdiction.