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Ajmel Quereshi

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Hope for Change in Immigration Policy: Recommendations for the Obama Administration

*by Ajmel Quereshi**

HISTORICALLY, AMERICAN IMMIGRATION POLICY HAS BEEN GUIDED BY THREE OVERARCHING PRINCIPLES: 1) the need to replenish the U.S. labor force; 2) a concern to secure U.S. borders from persons who threaten national security; and 3) a humanitarian calling to open U.S. borders to those seeking to enter for occupational or familial purposes.

In the 12 years since the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)¹ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),² immigration policy and enforcement in the United States have become dramatically unbalanced in favor of security concerns. This shift has been particularly marked since September 11, 2001. Immigration policy has become focused on the swift, if often haphazard and inaccurate, removal of persons whom government officials may believe are unlawfully present. The shift’s effects on persons, undocumented, documented, and citizens alike, have been dramatic, raising serious humanitarian and legal concerns.

President Barack Obama’s election provides an opportunity to rebalance the focus of American immigration policy. Specifically, his administration has the chance to reverse four policies whose use has impacted immigrants’ human rights within the United States dramatically: 1) the increased criminalization of persons detained for routine immigration violations; 2) the dilution of due process rights for persons suspected of immigration violations; 3) the use of local police to enforce federal immigration law; and 4) the increased reliance on federal databases as a means of verifying employee’s employment eligibility. While it cannot be expected that the new administration will eliminate these programs, one can be hopeful that some of the suggestions discussed below will be considered as part of a renewed focus on regaining the balance American immigration policy has lost.

I. REVERSE THE CRIMINALIZATION OF IMMIGRATION ENFORCEMENT

Chief among President Obama’s responsibilities will be to reverse the increased use of the criminal justice system to process alleged immigration offenders who otherwise would have passed through civil removal proceedings. To this effect, his administration should: 1) suspend Operation Streamline until a thorough review of its effectiveness, legality, and effect on human rights has been conducted; 2) reinstitute “Catch and



Courtesy of Ed Andrieski

Five suspects arrested in the ICE raid on the Swift beef plant Greeley, Colorado.

Release” for all but those suspected of non-immigration related felonies; 3) eliminate quotas for Immigrations and Customs Enforcement (“ICE”) teams’ detentions; and 4) issue regulations implementing standards for immigration detention facilities. The implementation of Operation Streamline and increased use of quotas, in combination with the termination of Catch and Release, have created an overflow of detainees which the Department of Homeland Security (“DHS”) has been unprepared to handle, thereby creating various problems regarding adequate conditions and access to counsel.

In 2005, DHS’s Customs and Border Protection Unit (“CBP”) launched Operation Streamline, under which federal authorities charge virtually anyone detained for a suspected immigration violation with a misdemeanor immigration count and then detain him/her until deportation. In 2008, DHS prosecuted 79,400 persons for immigration related offenses, a fivefold increase since 2000.

Likewise, in 2006, former DHS secretary Michael Chertoff announced the end of the Department’s Catch and Release program, under which suspected immigration offenders were released under their own recognizance after arrest. In 2005, DHS detained approximately 34 percent of non-Mexicans for routine immigration violations. In 2006, over 99 percent were in custody.

In addition, DHS’s ICE branch has used quotas to drive up detentions. According to internal reports, in 2006, the agency’s fugitive operations program—originally intended to capture violent offenders—required local teams to detain 1,000 persons per year. Unable to meet quotas, agents have reached outside the program’s mandate. Approximately 73 percent of the nearly 97,000 people arrested by ICE fugitive operations teams between

* Ajmel Quereshi is a Skadden Fellow and Director of the Immigrants Rights Project at the American Civil Liberties Union of Maryland in Baltimore and a J.D. graduate of the University of Minnesota Law School.

the program's inception in 2003 and early 2008 were immigrants without criminal records. Arrests of immigrants with criminal convictions have steadily declined, accounting for just 9 percent of total arrests in 2007, down from 32 percent in 2003.

In some cases, teams have resorted to discriminatory enforcement. According to a January 2009 lawsuit filed by CASA de Maryland, an immigrant advocacy non-governmental organization (NGO), ICE agents, during a January 2007 raid, surrounded a Baltimore 7-Eleven convenience store and subsequently detained all Latino patrons within the vicinity regardless of documentation or status. Meanwhile, persons of other races were not detained or questioned.

What makes these tactics even more troubling is that ICE lacks the facilities to account for the increase in detainees. Accordingly, ICE has delegated the responsibility for detaining suspected immigration offenders to privately owned prisons and local county jails which struggle to provide adequate supervision or medical care. At least 90 persons died while in ICE custody between 2003 and 2009. According to one internal study, medical staff members' action or inaction, contributed to 30 deaths. Only six of the detainees were 70 years or older; 32 were under the age of 40.

By ICE estimates, one in four of the nearly 311,000 detainees annually in ICE custody has a chronic health condition. Nonetheless, in 2007, Congress allocated merely 61 million dollars for the Department of Immigration Health Services (DIHS), and as of 2008, nearly 30 percent of all DIHS positions were unfilled. The Willacy County, Texas detention center—the country's largest, with 2,018 detainees—lacks a clinical director and a pharmacist, and has only one part-time psychiatrist on staff.

While, as a statutory matter, standards for medical care and detention of detainees exist, DHS has yet to issue regulations implementing the requirements. Accordingly, facilities have been left to interpret the relevant statutes on their own, leading to inconsistent and substandard results. Numerous groups have since filed petitions for rulemaking as allowed under section 555 of the Administrative Procedures Act (APA),³ entitling them, at a minimum, to a response. In April 2008, the National Immigration Project filed suit alleging that Secretary Chertoff's failure to respond constituted an unlawful delay under section 706(1) of the APA.⁴ In addition, where DHS has created system-wide standards, these standards are inadequate. For example, DHS standards provide that a detainee with a chronic condition may be treated only if the condition will affect his deportability.

Beyond the conditions in which they are detained, detainees are frequently transferred to and between detention centers and the 350 county jails with which ICE has contracted to house immigration suspects, thereby affecting their right to obtain and retain counsel. ICE facilities accommodate merely one in ten of all persons in custody, and only one in ten detainees is represented by counsel, while detainees increasingly face criminal charges as a result of Operation Streamline. Accordingly, these deprivations raise serious concerns over the right to counsel under the Sixth Amendment to the U.S. Constitution. The consequences were apparent after ICE's 2008 Pottsville, Iowa raid in which 389 immigrants were detained. Lacking adequate access to counsel, 297 of the individuals accepted pre-drafted plea bargains within a week of their detention.

In 2005, the American Civil Liberties Union (ACLU) filed Freedom of Information Act (FOIA)⁵ requests pertaining to more than 200 immigration detention facilities, finding widespread problems. The problems faced by thousands of immigrants seeking asylum or other legitimate claims to legal residency, included lack of access to telephones, attorneys, and legal materials.⁶ In July 2007, U.S. District Court Judge Margaret M. Morrow, in a nationwide permanent injunction, ruled that substantial evidence showed many facilities limited plaintiffs' access to counsel by creating restrictions on telephone use, free calls to legal service providers, and in some cases, provided phones which could make only collect telephone calls.⁷ In addition, the court found that at multiple facilities, detainees were not given the right to meet with their counsel in private, were hindered by restrictive meeting hours, and were denied access to legal materials.⁸

II. RESTORE DUE PROCESS RIGHTS

Related to the first set of policies will be the restoration of due process rights for persons in immigration proceedings. Specifically, the administration should: 1) restrict expedited removal to limited areas most dramatically affected by unlawful crossings; 2) annually review which areas are granted such authority; 3) create an independent body which monitors the expedited removal process, with a particular focus on asylum seekers; and 4) restore *Matter of Lozada*—guaranteeing an immigrant the constitutional right to effective counsel in a removal proceeding.

IIRIRA created expedited removal—a process by which a DHS officer, rather than an Immigration Judge, may find an individual removable. The Immigration and Naturalization Service ("INS"), ICE's predecessor agency, initially applied expedited removal only to noncitizens arriving at ports of entry. On August 11, 2004, however, DHS published a notice expanding expedited removal to all immigrants who: lack proper documents; have not been admitted or paroled following inspection by an immigration officer at a designated port of entry; are encountered within 100 miles of a U.S. border; and have not been physically present in the United States for fourteen days.⁹ Expedited removal is generally not applied to nationals from Mexico or Canada.

The lack of independent judicial review means that the only recourse for an asylum applicant wishing to challenge a determination that they lack a credible fear of persecution if they return to their country of origin is DHS. If DHS engages in discriminatory practices, the review procedures provide no alternative. Even assuming discrimination plays no role, whether an individual is found to have a credible fear of persecution is based solely on the facts the asylum officer deems credible and relevant.

Legal scholars dispute whether persons subject to expedited removal have constitutional protection. As noted by the *Orantes* court, however, agents conducting expedited removal interviews have often failed to comply with even the minimal due process procedures that DHS requires. Government officials conducting expedited removal proceedings frequently fail to inform persons of their right to petition for asylum. At the San Ysidro entry point, only 9.7 percent of persons detained were informed of such right.¹⁰ This is particularly troubling in light of the fact that 38 percent of all immigrants placed in expedited removal proceedings are processed through the port.¹¹ Further, the court

The increased delegation [of immigration authority to local officials away from federal authorities], combined with Congress' failure to enact comprehensive immigration reform, has encouraged cities to pass ordinances which they lack the expertise to enforce accurately; spurred discriminatory tactics by local officials; and deterred immigrant communities from reporting crime.

found that in ten percent of interviews, officers raised their voice and/or ridiculed immigrant interviewees.¹²

According to a United States Commission on International Religious Freedom study, in at least one location, immigration officers forcefully encouraged asylum seekers to withdraw applications. Fifteen percent of asylum seekers were not given a credible fear interview despite expressing fear of returning to their country of origin. Further, asylum seekers were often inappropriately detained in jails or detention facilities with criminal inmates. Additionally, it was found that DHS confined one-third beyond 90 days.¹³

Due process protections outside of expedited removal have been weakened by former U.S. Attorney General Michael Mukasey's recent administrative decision holding that an immigrant in removal proceedings has no constitutional right to challenge his or her hearing's outcome if his or her counsel was ineffective.¹⁴ The ruling disposes of a 20-year-old precedent, established in *Matter of Lozada* that allowed immigrants to obtain a new hearing due to lawyer error under the due process clause of the Fifth Amendment.¹⁵ However, a detainee may still advance an ineffective assistance of counsel claim, but he or she must prove that the deficiency was egregious and immigration judges have complete discretion in assessing such claims.¹⁶

III. LIMIT LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW

The Obama administration must re-shift the responsibility for enforcement of immigration law away from local authorities back towards federal officials. Specifically, the Administration should: 1) rescind the 2002 Office of Legal Counsel (OLC) opinion granting local officials the authority to enforce federal immigration law, and in its place reaffirm the OLC's 1996 opinion; 2) immediately halt the expansion of the 287(g) program; 3) conduct a thorough review of discriminatory practices by each locality which has entered into a 287(g) agreement; and

4) remove civil immigration warrants from the National Crime Information Center (NCIC) database. The increased delegation, combined with Congress' failure to enact comprehensive immigration reform, has encouraged cities to pass ordinances which they lack the expertise to enforce accurately; spurred discriminatory tactics by local officials; and deterred immigrant communities from reporting crime.

Congress has plenary powers "in determining what aliens shall be admitted to the United States, the period they remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution, the states are granted no such powers. . . ." ¹⁷ A local regulation of immigration, therefore, is preempted if it: determines who may remain in the United States; directly conflicts with a federal statute or regulation; or relates to a field Congress has preoccupied.¹⁸

In 2002, however, the Department of Justice (DOJ) composed a memo encouraging state and localities to enforce federal immigration law under their alleged inherent authority.¹⁹ In doing so, it explicitly rejected the constitutional preemption analysis from a similar 1996 memo.²⁰ This, combined with the federal government's failure to pass comprehensive immigration reform, resulted in a steep rise in the number of local anti-immigrant initiatives around the country. According to the National Conference of State Legislatures, in 2007, 1,562 pieces of anti-immigrant legislation were introduced in all 50 states. Of these, over 240 passed in 41 states. This marked a dramatic increase from 2005, in which only 300 bills were introduced and 39 were enacted.

Many mirror Hazleton, Pennsylvania's "Illegal Immigration Relief Act" which a U.S. District Court struck down in 2007.²¹ The ordinance, among other things, denies a license to a person who harbors or employs "unauthorized aliens."²² In striking down the housing provision, the court explained the potential pitfalls of delegating immigration determinations to local officials:

Changing status from authorized to unauthorized is complex Some individuals can affirmatively apply for regularization of status. In other instances, regularization of status is only available after an individual has been placed in removal proceedings . . . It may take months or years for an applicant to adjust status, obtain relief or otherwise regularize status. Submitting an application does not change an individual's immigration status, even if the application is bona fide and will ultimately be approved. *A person who is proceeding through the procedure to adjust his immigration status but who currently lacks immigration status frequently will not have any documents to indicate whether he has a valid claim to remain in the country.*²³

Some localities have gone further, entering Memorandums of Understanding with the federal government, commonly termed 287(g) agreements, by which local officers are deputized to act as federal immigration agents. Originally created in 1996, localities expressed little interest prior to September 11, 2001. With former U.S. Attorney General John Ashcroft's encouragement, however, 67 localities in 20 states have entered into such agreements and 80 other localities have applications pending.²⁴

Rather than pursuing violent offenders as proponents have proclaimed is the program's objective, deputized agents have frequently used discriminatory traffic stops to detain suspected immigration offenders. For example, in May 2008, 83 percent of immigrants arrested in Gaston County, North Carolina by authorized agents were charged with traffic violations. In July, 2008, the ACLU of Arizona filed suit against Sherriff Joe Arpaio of Maricopa County, who on multiple occasions, coordinated "crime suppression operations" in which all persons detained were of Latino origin.²⁵

The suspicion of discriminatory intent has been buttressed by deputized officers' statements. Arpaio praised as "patriotic" private groups, including the American Freedom Riders, that have harassed all Latino persons entering and leaving legal centers in the county.²⁶ The Southern Poverty Law Center, a human rights group in Alabama, has categorized the American Freedom Riders as a nativist extremist organization, "meaning that it targets individual immigrants rather than immigration policies." Likewise, Alamance County, North Carolina Sheriff Terry Johnson characterized Mexicans as follows: "Their values are a lot different—their morals—than what we have here. In Mexico, there's nothing wrong with having sex with a 12, 13-year-old girl . . . They do a lot of drinking down in Mexico."²⁷

Even those localities which have not taken affirmative action against suspected illegal immigrants have been affected by the federal government's decision to include civil immigration warrants in the National Crime Information Center (NCIC) database. The NCIC database historically has included persons wanted for felony crimes such as murder and rape or serious misdemeanors. In 2002, DHS began entering into NCIC records persons with outstanding orders of deportation, exclusion, or removal. State and local police regularly access the database during the course of regular patrol duties. When a local police officer stops a driver for a traffic violation, for example, he or she may run the driver's biographical information through the database to check for outstanding arrest warrants. If a warrant is found, ICE, then, issues a detainer allowing for the locality to

detain the person for an additional 48 hours within which ICE must take custody of him/her.

This is problematic because the files on which the DHS and Federal Bureau of Investigation ("FBI") rely for immigration information contain errors. Accordingly, the inclusion of immigration warrants has undermined the validity of the NCIC database. The NCIC database is now considered so problematic that it has been exempted from the Privacy Act's accuracy requirements. While the national error rate of 42 percent is striking, St. Louis; Kansas City; Washington, D.C.; Greenville, South Carolina; and Shelby County, Tennessee had error rates of at least 60 percent when receiving a hit for an immigration warrant.

Furthermore, the perpetual fear that local officials may check their immigration status upon any interaction has deterred immigrant communities from reporting crimes. For example, in January 2009, José Sánchez laid fatally injured for almost 20 minutes on a sidewalk in a predominantly Latino area of Washington, D.C., as more than 150 people walked past. Community residents and leaders said they were afraid to call authorities for fear of being asked about their immigration status.

Not surprisingly, Hispanics also report significantly lower levels of confidence in local police. According to the Pew Hispanic Center, 61% of Hispanics say that they have a great or fair deal of confidence in police, compared with 78% of whites. Similarly, 46% of Hispanics report that they believe police will treat them fairly compared with 74% of whites.

In 2004, the National Council of LaRaza, the nation's largest Hispanic advocacy organization, filed suit alleging that the inclusion of civil immigration warrants: 1) required local officials to make civil immigration arrests which, under *DeCanas v. Bica*,²⁸ they did not have the authority to make; and 2) violated Congressional guidelines which limit the type of information included in the database.²⁹ While the Court initially denied defendant's motion for summary judgment, in 2007, it dismissed the complaint for lack of standing.³⁰

Similarly, in 2008, the ACLU of Northern California filed suit against Sonoma County and ICE alleging among other things that the issuance of immigration detainers to localities for immigrants who had not committed drug offenses exceeded ICE's authority under the relevant federal regulations.³¹

VI. LIMIT RELIANCE ON FEDERAL DATABASES UNTIL THEIR ACCURACY IS VERIFIED

Finally, more generally, the Administration must limit its reliance on federal databases storing immigration information until their accuracy can be verified. Specifically, it should: 1) rescind Executive Order 13465 and related regulations requiring most federal contractors to use the Basic Pilot Program or "E-Verify"; and 2) rescind recent "no-match" regulations creating a presumption of illegality for workers whose information does not match that in the Social Security Administration's (SSA) database. The federal government's increased reliance on the SSA database has perpetuated the wrongful firing of numerous individuals, increased discrimination, and burdened small businesses.

Basic Pilot, or E-Verify, is one of three voluntary electronic employment eligibility verification pilot programs Congress created under IIRIRA. Congress at the time instructed:

“[e]xcept as specifically provided in subsection (e) [referring to the required use of E-Verify by federal agencies, the Legislative Branch and certain immigration law violators], the Secretary of Homeland Security may not require any person or other entity to participate in a pilot program.”³²

Regardless, in June 2008, former U.S. President George W. Bush issued Executive Order 13465, which mandates that public and private contractors and subcontractors that sign contracts with the federal government worth more than \$100,000 and \$3,000, respectively, use E-Verify to verify their employees’ eligibility.³³ A proposed rule implementing the order clarified that not only would employers be required to check the employment eligibility of all newly-hired employees, but also that of existing employees “assigned to the contract.”³⁴

On December 23, 2008, the Chamber of Commerce and a group of contractors’ associations filed suit alleging that the mandate expressly violated IIRIRA’s limitations.³⁵ On March 18, 2009, the Obama administration delayed implementation of the rule until May 21, 2009, subject to its review of the mandate.

Beyond the program’s legality, E-Verify’s error rates are well documented. According to the SSA, approximately 17.8 million of its files include erroneous information; 12.7 million concerning U.S. citizens. The SSA’s Office of Inspector General reports that the SSA database has a 4.1 percent error rate. A DHS-commissioned report, released in 2007, found that 0.1% of native-born citizens and 10% of naturalized citizens would be tentatively non-confirmed because of erroneous data in DHS files. Accordingly, the report concluded that E-Verify “is still not sufficiently up to date” to meet the requirements for “accurate verification.”³⁶

These problems are exacerbated by employers’ hesitation about hiring undocumented persons and the administrative cost associated with such challenges. Under the voluntary program, 9.4 percent of employers failed to inform workers of a non-confirmation notice in 2007. Seven percent of those who did give notice, did not encourage employees to challenge the determination because of the process’s length.

Despite these problems, the Bush Administration expanded the use of the SSA database through other programs. Since 1994, SSA has sent “no-match” letters to employers as a means of correcting information regarding employees who submit inaccurate information.³⁷ In previous years, the receipt of a no-match letter “[did] not imply that you or your employee intentionally gave the government wrong information about the employee’s name or Social Security number. Nor [did] it make any statement about an employee’s immigration status.”³⁸

In 2007, the Bush Administration issued a final rule entitled “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” cautioning that receipt of a no-match letter “may lead to a finding that an employer had . . . constructive knowledge” of an employee’s unauthorized status, thus subjecting him or her to sanction under Immigration Reform and

Control Act of 1986 (IRCA).³⁹ The rule’s safe harbor provision allows an employer to avoid liability by checking his or her own records within 30 days and then asking its employee to submit verification of the information he or she originally submitted within 90 days.⁴⁰

In 2007, the American Federation of Labor successfully persuaded a U.S. District Court in California to preliminarily enjoin the rule. The court explained that the rule was issued without any explanation as to the data the agency had considered, or its basis for concluding, in light of the SSA database’s error rate, why a letter was a reasonable indicator of illegality.⁴¹

Furthermore, DHS independently of DOJ, in contravention of IRCA, determined that if employers complied with the statute they would not be subject to discrimination claims.⁴² Such concerns are not to be taken lightly. A 1990 Government Accountability Office report estimated that 461,000 employers began discriminating on the basis of national origin after the U.S. Congress created the first employer sanctions for hiring undocumented workers in 1986.⁴³

Finally, DHS failed to conduct a final flexibility analysis even though the rule would have a significant impact on small businesses.⁴⁴ A U.S. Chamber of Commerce commissioned analysis concluded that the total societal cost of the regulation would be 10 billion dollars per year, most of which would be felt by small business which have hired between 60 and 80 percent of all new hires in the last ten years. In October 2008, the Bush Administration re-issued the rule, with additional analysis, unchanged.⁴⁵

CONCLUSION

The myriad of policy changes required to rebalance American immigration policy are extensive. Likewise, the problems associated with each of the programs discussed, and the methods which might be used to correct such problems, are diverse. Furthermore, combined with each of these, the Administration must also take proactive steps, including the adjustment of standards for a finding of family hardship, the creation of a viable path to citizenship, and most importantly, reversing trade policies which depress economic conditions in other countries, thereby motivating emigration.

The goal is to highlight those preliminary steps immigration reformers generally agree are necessary to change the most problematic programs. It is not yet clear what steps the new administration will take. President Obama’s decision to suspend the E-Verify requirement pending further review, and Secretary Janet Napolitano’s comprehensive review of DHS’s programs, provide hope for a new direction. That said, DHS’s furtherance of a lawful status requirement for driver’s licenses, and Secretary Napolitano’s support for Secure Communities, a national biometrics database, have tempered enthusiasm. Ultimately, all advocates can be sure that they will have more of a voice in this Administration than the last, making policy recommendations all the more necessary.

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ENDNOTES: Hope for Change in Immigration Policy

- ¹ Pub.L. 104–132, 110 Stat. 1214 (1996).
- ² Pub.L. 104–208, Div. C, 110 Stat. 3009-546 (1996).
- ³ 5 U.S.C. § 555 (1946).
- ⁴ Compl. at 14–15, *Families for Freedom v. Chertoff*, No. 08-40567 (S.D.N.Y. Apr. 30, 2008).
- ⁵ Pub.L. 89-487, 80 Stat. 250 (codified as 5 U.S.C. § 552) (1966).
- ⁶ *Orantes-Hernandez v. Gonzalez*, No. 82-1107, slip op. at 61–67 (C.D. Cal. July 26, 2007).
- ⁷ *Id.* at 63-66.
- ⁸ *Id.* at 61-66.
- ⁹ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48, 877-81 (Aug. 11, 2004).
- ¹⁰ See *Orantes-Hernandez*, *supra* note 6 at 47.
- ¹¹ *Id.* at 49.
- ¹² *Id.* at 52.
- ¹³ *Id.* at 33.
- ¹⁴ *Matter of Campean*, 24 I&N Dec. 710 (A.G. 2009).
- ¹⁵ *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).
- ¹⁶ *Campean*, 24 I &N Dec. at 732.
- ¹⁷ *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948).
- ¹⁸ See *De Canas v. Bica*, 424 U.S. 351 (1976).
- ¹⁹ Office of Legal Counsel, Department of Justice, Memo for the Attorney General: Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations, Apr. 3, 2002, *available at* <http://www.aclu.org/immigrants/gen/202971gl20050902.html>.
- ²⁰ Office of Legal Counsel, Department of Justice, Assistance by State and Local Police in Apprehending Illegal Aliens Feb. 15, 1996, *available at* <http://www.usdoj.gov/olc/immstopo1a.htm>.
- ²¹ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).
- ²² *Id.* at 485.
- ²³ *Id.* at 531.
- ²⁴ U.S. Immigration and Customs Enforcement, Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, *available at* http://www.ice.gov/partners/287g/Section287_g.htm.
- ²⁵ *Ortega Melendres v. Arpaio*, 2009 U.S. Dist. LEXIS 13839, *27 (D. Az. 2009).
- ²⁶ First Am. Compl. at 11, *supra id.*
- ²⁷ American Civil Liberties Union of North Carolina Legal Foundation & Immigration and Human Rights Policy Clinic, University of North Carolina at Chapel Hill, The Policies and Politics of Local Immigration Enforcement Laws 29 (2009), *available at* <http://www.acluofnorthcarolina.org/?q=new-study-finds-dramatic-problems-287g-immigration-program>.
- ²⁸ *DeCanas v. Bica*, 424 U.S. 351 (1976).
- ²⁹ *Nat’l Council of La Raza v. Gonzales*, 468 F. Supp. 2d 429, 435 (E.D.N.Y. 2007).
- ³⁰ *Id.* at 444-45.
- ³¹ Compl. at 17, *Committee for Immigrant Rights of Sonoma County et al. v. County of Sonoma et al.*, No. 08-4220 (N.D. Ca. Sept. 5, 2008).
- ³² Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 104th Cong. § 402(a) (1996).
- ³³ Executive Order 13465, amending Executive Order 12989 [73 Fed. Reg. 33285 (June 11, 2008)].
- ³⁴ Employment Eligibility Verification, 73 Fed. Reg. 67,651 (Nov. 14, 2008) (to be codified at 48 CFR pts. 2, 22, and 52).
- ³⁵ *Chamber of Commerce v. Chertoff*, No. 08-3444 (D. Md. Dec. 23, 2008).
- ³⁶ *Id.* at xxi.
- ³⁷ See 20 C.F.R. § 422.120(a).
- ³⁸ *AFL v. Chertoff*, 552 F. Supp. 2d 999, 1002 (N.D. Ca. 2007).
- ³⁹ Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281-01, 34,281 (June 14, 2006).
- ⁴⁰ *Id.*
- ⁴¹ *AFL*, 552 F. Supp. 2d at 1009-1010.
- ⁴² *Id.* at 1010-11.
- ⁴³ Robert Pear, *Study Finds Bias: Forcing a Review of 1986 Law*, N.Y. TIMES, Mar. 30, 1990, at A1.
- ⁴⁴ *AFL*, 552 F. Supp. 2d at 1011–12.
- ⁴⁵ Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis, 73 Fed. Reg. 63,843 (Oct. 28, 2008).