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About the Warren Institute

The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity is a multidisciplinary, collaborative venture to produce research, research-based policy prescriptions, and curricular innovation on issues of racial and ethnic justice in California and the nation.

THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM

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SUMMARY

The goal of the Criminal Alien Program (CAP) is to improve safety by promoting federal-local partnerships to target serious criminal offenders for deportation.¹ Indeed, the U.S. Congress has made clear that Immigration and Customs Enforcement (ICE) “should have no greater immigration enforcement priority than to remove deportable aliens with serious criminal histories from the United States, ...”² The Warren Institute’s analysis of arrest data pursuant to an ICE-local partnership in Irving, Texas demonstrates that ICE is not following Congress’ mandate to focus resources on the deportation of immigrants with serious criminal histories.

This study also shows that immediately after Irving, Texas law enforcement had 24-hour access (via telephone and video teleconference) to ICE in the local jail, discretionary arrests of Hispanics for petty offenses — particularly minor traffic offenses

— rose dramatically. This report probes the marked rise in low-level arrests of Hispanics. Specifically, the report examines whether there was an increase in lawless behavior in the Hispanic community in Irving or whether there was a change in local policing priorities. The Warren Institute’s study of arrest data finds strong evidence to support claims that Irving police engaged in racial profiling³ of Hispanics in order to filter them through the CAP screening system.

In September 2006, the Irving Police Department officially partnered with ICE through the agency’s popular Criminal Alien Program. Pursuant to CAP, local jail officials hold people in jail until ICE can screen arrestees and issue a detainer against those who cannot prove lawful presence. The data shows that ICE consistently issued detainers for fewer individuals than were referred by the local police, indicating that local officials were likely referring lawful residents to ICE.

* The Warren Institute acknowledges the very generous support of the Atlantic Philanthropies, which has made this research possible. Trevor Gardner, a former public defender, is currently a Ph.D. student in the Department of Sociology at the University of California, Berkeley. Aarti Kohli is Director of Immigration Policy at the Warren Institute.

1. U.S. Immigration and Customs Enforcement. “State/Local Coordination,” accessible at http://www.ice.gov/pi/news/factsheets/section287_g.htm (last viewed August 12, 2009).

2. House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2010*, 111th Cong. 1st sess., 2009, H. Rep. 111-157, 49-50.

3. The study defines racial profiling as the racially disparate exercise of police discretion in the decision to stop, investigate and/or arrest.

Moreover, the Warren Institute’s analysis demonstrates that once CAP was implemented in Irving, felony charges only accounted for 2% of ICE detainees, while 98% of ICE detainees were issued for individuals charged with misdemeanor offenses.

The data analysis also reveals that with the 24-hour access to ICE, local police arrested Hispanics for Class-C misdemeanor offenses in significantly higher numbers than Whites and African-Americans. The Class-C misdemeanor offense — the least serious class of misdemeanor — affords officers a substantial amount of discretion in the decision to stop, investigate and/or arrest local residents.⁴

RECOMMENDATIONS

1. Congress should order an investigation of the implementation of the Criminal Alien Program in other jurisdictions before allocating additional sums for the expansion of the program. Particularly, the investigation should concentrate on whether local law enforcement is increasing its focus on high-level criminal alien offenders as a result of the CAP program.

2. ICE should institute a bright-line rule prohibiting CAP screenings for individuals arrested for non-felony offenses, in order to eliminate racial profiling in the implementation

of the Criminal Alien Program. This recommendation is in line with Congress’s mandate to focus on serious criminal offenders.

3. Congress should mandate that local jurisdictions who partner with ICE record stop and arrest data by race, ethnicity and level of offense.

In addition, ICE should disclose on its website where it has implemented the Criminal Alien Program to provide full disclosure to local communities who may be impacted by police practices.

INTRODUCTION

Traditionally, immigration enforcement has been a function of the federal government. Since 2006, however, the Immigration and Customs Enforcement (ICE) agency has begun to partner more frequently with local law enforcement agencies, ostensibly, to “prioritize the removal of dangerous criminal aliens.”⁵ The Criminal Alien Program (CAP)⁶ is one of thirteen federal-local immigration enforcement programs that are included in ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). At its inception, CAP deployed ICE agents in teams to visit detention facilities and identify undocumented immigrants for deportation. The program expanded when ICE agents began to review cases by video teleconference,

as an alternative to in-person contact.⁷ While ICE detainer decisions were initially made in-person at the Irving Jail, in late 2007, ICE officers began making these decisions remotely. ICE refers to this practice of remote communication with Bureau of Prisons (BOP) and local jail facilities as the Detention Enforcement and Processing Offenders by Remote Technology (DEPORT) program. The DEPORT program allows ICE officials to screen and process detainees in 87 BOP facilities and an increasing number of local jails from its hub in Chicago, Illinois.

In an effort to maximize its limited resources, ICE split the 4,259 BOP and state prison facilities into four tiers (Tier 1, Tier 2, Tier 3 and Tier 4) according to each facility’s suspected “criminal alien” population. ICE now claims screening capabilities in all Tier 1 and Tier 2 facilities, the two tiers with the highest concentration of suspected undocumented immigrants. These two tiers make up 13.8% of the total prison facilities. ICE hopes to achieve 100% coverage across the four tiers by attracting additional federal and local resources and forging new federal-local bureaucratic partnerships through initiatives like CAP. The systematic expansion of CAP appears to be central to ICE’s immigration enforcement strategy.⁸

4. This study analyzes Irving arrest data, not the broader categories of stops and cursory investigations, many of which do not involve an arrest.

5. Senate Committee on Judiciary, Subcommittee on Immigration. *Securing the Borders and America’s Points of Entry, What Remains to be Done*, 111 Cong., 1st sess., 2009, Statement of John P. Torres. Deputy Assistant Secretary, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

6. ICE now claims to have CAP or CAP-equivalent programs in 10% of the 3,100 jails in the U.S. Programs include Asset Forfeiture, Fugitive Operation Team, and Document and Benefit Fraud Task Force. See U.S. Immigration and

Customs Enforcement, “ICE Access: State/Local Coordination,” at www.ice.gov/partners/dro/iceaccess.htm (last viewed July 24, 2009).

7. Carrie L. Arnold, “Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law,” *Arizona Law Review*, Vol. 49 (Spring 2007), 128.

8. U.S. Immigration and Customs Enforcement, “Secure Communities: Fact Sheet,” accessible at www.aila.org/content/default.aspx?docid=25045 (last viewed March 29, 2009).

Though formal federal-local partnerships,⁹ requiring a Memorandum of Agreement and training of local police, were authorized by Congress in 1996, other immigration enforcement collaborations did not attract much interest until 2006. In 2006, ICE federal-local partnerships sprouted up across the country and immigrant detentions, detainers and deportations increased substantially. For example, in 2006, ICE charged 67,000 persons detained for criminal offenses with immigration violations. That number rose to 164,000 in 2007, and ICE charged more than 220,000 persons detained for criminal offenses with immigration violations in 2008.¹⁰ Immigration detainers will continue to rise as technological innovations developed by ICE accelerate local immigration investigations and referrals. At the local level, 30 law enforcement agencies now have Department of Homeland Security (DHS) databases, which allow local law enforcement to begin removal proceedings without ICE consultation. ICE currently seeks to distribute “integrated technology” as widely as possible to streamline the detainer/deportation process. In the near future, every detainee fingerprint will be processed through the DHS biometrics database, allowing DHS to systematically search the nation’s pool of criminal detainees for suspected undocumented immigrants.¹¹ With

This study offers compelling evidence that the Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses.

the advent of increased cooperation and technological innovations, there needs to be a greater understanding of the profile of arrestees who are being referred to ICE and the impact these partnerships have on local policing.

CAP IN IRVING, TEXAS

Irving is a city in Dallas County with a population of just over 196,000. In 2006, Hispanics made up 41.2% of the general population in Irving. Non-Hispanic Whites were the second largest ethnic group at 34.4%, followed by African-Americans (12.2%) and Asian-Americans (10.1%).¹² The City of Irving began its Criminal Alien Program in the fall of 2006. The partnership with ICE specifically granted the city the authority to investigate the immigration status of persons detained at the Irving Jail. Local police initiated ICE referrals for those arrestees whom they suspected of being undocumented. After a telephone or video teleconference, ICE then issued detainers for a subset of arrestees who were referred by local police. These

detainers¹³ are requests from the federal government to local police to retain custody of the individual for up to 48 hours so that ICE may determine whether to take custody once his or her local criminal case is dismissed or otherwise resolved.

The American Civil Liberties Union (ACLU) of Texas provided the Warren Institute with a raw data file of arrest records obtained through a public records request from Irving, Texas spanning a 23-month period from January 2006 to November 2007. The Irving Police Department formally began its immigration enforcement partnership with ICE in September of 2006, the ninth month of the 23-month data time series.

The Irving arrest records are unique for a number of reasons. First, it is extremely rare to obtain police department arrest data. Departments fear that such data will be used to scrutinize department policy or reveal patterns of misconduct. Second, to our knowledge, the Irving data offers the first opportunity for a

9. U.S. Immigration and Customs Enforcement. “Delegation of Immigration Authority Section 287g,” accessible at http://www.ice.gov/partners/287g/Section287_g.htm (last viewed August 12, 2009).

10. Department of Homeland Security, “Border Security and Immigration Enforcement Fact Sheet,” accessible at http://www.dhs.gov/xnews/releases/pr_1224777640655.shtm (last viewed August 13, 2009).

11. U.S. Immigration and Customs Enforcement, “Secure Communities: Fact Sheet,” accessible at www.aila.org/content/default.aspx?docid=25045 (last viewed March 29, 2009).

12. 2006 American Community Survey – Irving, Texas.

13. 8 C.F.R. § 287.7 See also American Civil Liberties Union of Florida, “ACLU ICE Detainers Unlawful and Pose Risks to Local Governments,” accessible at http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=3763. (last viewed August 14, 2009).

quantitative assessment of how local law enforcement participation in immigration enforcement — historically the responsibility of the federal government — affects Hispanic arrests.

The study focuses on arrests for petty offenses before and after the adoption of CAP in Irving and ICE detainers issued during the CAP program. This study offers compelling evidence that the Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses. These arrests represent one part of an implicit, but relatively clear logic: the higher the number of Hispanic arrests, the larger the pool of Hispanic detainees; the larger the pool of detainees, the more illegal immigrants that can be purged from the city via the CAP screening system.

TIMELINE

The study identifies three phases of Irving CAP from January 2006 through January of 2008, suggesting that the Irving CAP program expanded and retracted at various points in the time sequence. (For example, the program expanded when jail officials were given 24-7 access to ICE officials. It retracted after ICE claimed to end the practice of screening detainees arrested for Class-C misdemeanor offenses.) In the spring of 2007, ICE officials began reviewing immigration cases remotely via phone or video teleconference rather than through in-person jail visits. The shift in review policy showed immediate results. The City of Irving

reported that in April 2007, the first month of round-the-clock ICE access, Irving immigration referrals jumped from 80 to 100 per month to nearly three times this rate.¹⁴ An analysis of Irving arrest data indicates that Hispanic arrests for petty offenses also began a steady upward trend around the same time. (The study defines “petty” or “minor” offenses as incidents in which the most serious charge in the case is for a Class-C misdemeanor infraction, which is the least serious of the three types of misdemeanor offenses.) This rise was especially steep for traffic offenses (See Figure 2). Data analysis reveals that the shift to 24-7 ICE access and the rise in Hispanic arrests for minor offenses occurred at the same point in the time series — April of 2007. **The correlation between ICE’s shift to round-the-clock availability to Irving officials and the rise in local Hispanic arrests for minor offenses supports the contention that the aggressive profiling of Hispanics in the city began sometime during March or April of 2007.**

In November, in response to complaints about Hispanic profiling, ICE publicly stated that it had ended its practice of conducting immigration reviews for individuals in custody for Class-C misdemeanors. However, two months later, in January of 2008, ICE spokesman Carl Rusnok admitted that ICE still processed numerous detainers for petty offenses and would continue to do so indefinitely.¹⁵

Newspaper reports, Irving city reports and data analysis of Irving arrest records together suggest three

phases in the implementation of the Irving CAP program.

Phase 1 (September 2006 to March 2007): Irving CAP begins. ICE officials visit the local jail up to five times per week for consultation, investigation and to make final detainer decisions.

Phase 2 (April 2007 to September 2007): Irving CAP shifts from periodic, in-person ICE consultation to 24-7 ICE availability via phone and video teleconference. Detainer decisions by ICE are made remotely rather than at the detention facility. Class-C misdemeanors and ICE detainers simultaneously reach their peak over the 23-month interval.

Phase 3 (October 2007 to November 2007): Irving CAP is scaled back as complaints of racial profiling of Hispanics intensify.

DATA ANALYSIS

The analyses below are based on “on view” arrests records in Irving, Texas that span from January 2006 to November 2007.¹⁶ “On view” arrests occur when the police officer claims to have observed the criminal violation first-hand. We exclude witness-reported arrests and warrant arrests because they typically do not allow for police discretion, a particular concern in this study of racial profiling. We define racial profiling as the racially disparate exercise of police discretion in the decision to stop, investigate and arrest individuals.

This analysis pays particular attention to minor offenses including Class-C misdemeanors. In addition to

14. City of Irving, Public Safety Report: “Criminal Alien Program Recognized by U.S. Congressman Sessions,” accessible at: <http://cityofirving.org/corporate-communications/key-focus/articles/public-safety/CAP%20-%20US%20Congressman%20Sessions.pdf> (last viewed March 24, 2009).

15. Brandon Formby, “Criminal Alien Program Still Taking Illegals Arrested for Minor Offenses,” *Dallas Morning News*, January 20, 2008.

16. See *Methodological Notes* for additional details regarding the data.

FIGURE 1 | Class-C Misdemeanor Arrests by Race-Ethnicity

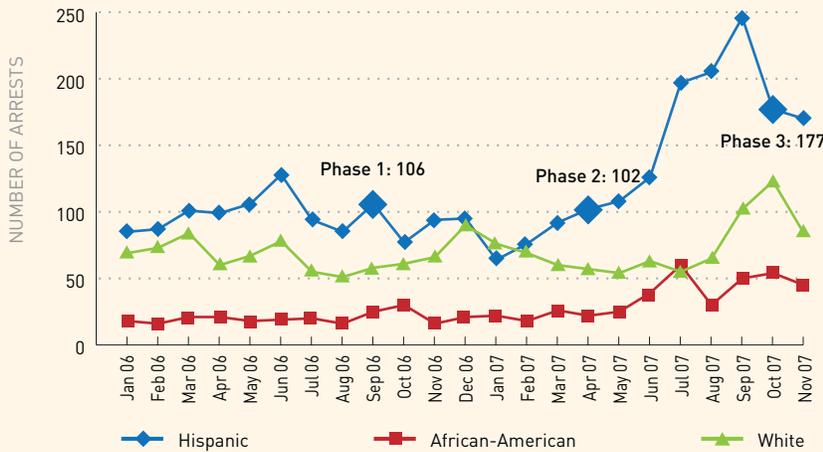
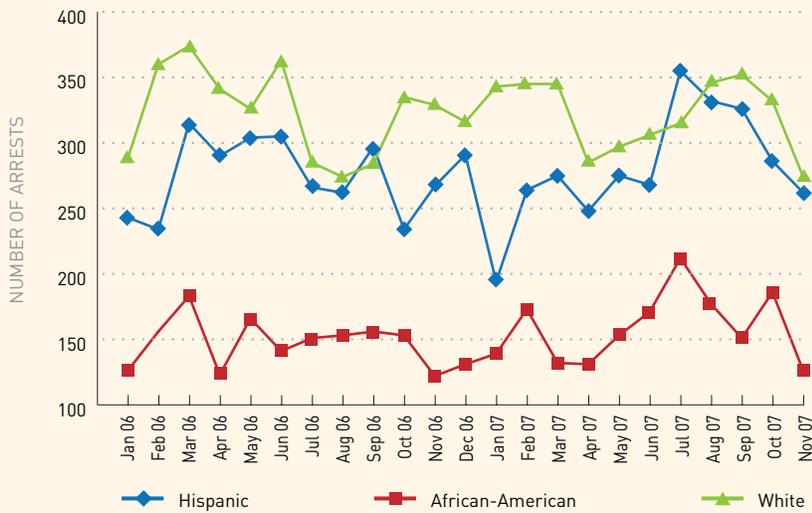


FIGURE 2 | Total Arrests by Race-Ethnicity



being the least serious misdemeanor offense, Class-C misdemeanors are also the most frequent basis for arrest. Given their frequency and relatively light penalty, officers are typically given broad discretion in whether to stop, investigate, and arrest for a Class-C misdemeanor offense. The punishment for a Class-C misdemeanor violation is a fine, not to exceed \$500.¹⁷

In 2007, local community groups complained that Irving police stopped and arrested Hispanic residents for Class-C misdemeanor offenses, such as public intoxication and minor traffic violations. Community leaders alleged that these charges served as a pretext, allowing officers to probe citizenship and immigration status.¹⁸

Minor Offenses

Our analysis of 2006 and 2007 Irving arrest data supports the contention that the Irving Police Department racially profiled Hispanics at particular time intervals after the implementation of the Irving CAP program. A sharp upward trend in Hispanic arrests for Class-C misdemeanor offenses during Phase 2 of CAP implementation suggests that racial profiling was most aggressive in the period between April and September of 2007 (see Figure 1). In April 2007, 102 Hispanics were arrested for petty offenses whereas in September 2007, 246 Hispanics were arrested representing a nearly 150 percent increase.

While Hispanic Class-C misdemeanor arrests rose dramatically and exceeded Whites between March and September of 2007, *total* arrests during this period show that arrests for Whites exceeded arrests of Hispanics (see Figure 2). The rise in Hispanic Class-C arrests in March of 2007 correlates with the shift in ICE policy from in-person consultation to 24-7 access via phone or teleconference. This finding shows that discretionary arrests of Hispanics spiked when the Criminal Alien Program expanded to become a round-the-clock initiative. It suggests that racial profiling began or perhaps intensified in the second phase of the program.

In the fall of 2007 (Phase 3), the correlation between Hispanic arrests for petty offenses and ICE detainees continued, but in the opposite direction. In September, the Irving Police Department made more arrests for Hispanic Class-C misdemeanors than

17. "Class C Misdemeanor," Texas Penal Code § 12.23.

18. Isabel Morales, "Irving Mayor Defends Increased Deportations," *Dallas Morning News*, September 21, 2007.

FIGURE 3 | Traffic Arrests by Race-Ethnicity

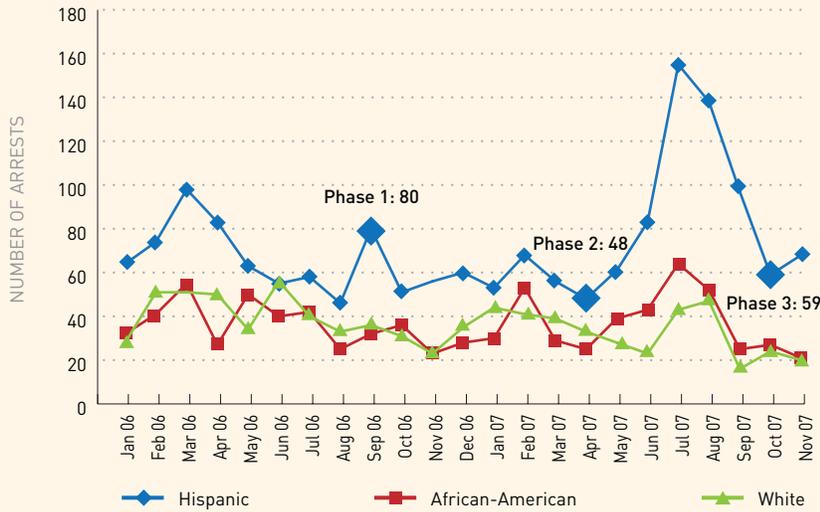


FIGURE 4 | Total ICE Detainers Issued for “On-View” Arrests



in any other month in the time series. In the same month, ICE detainers reached their highest total. However, between September and November of 2007, both Hispanic arrests for petty offenses and the number of ICE detainers decreased (though these arrests remained high relative to whites). Newspaper reports in the

fall of 2007 show community protests against Irving Police immigration enforcement tactics. News reports also document ICE’s claim that it would discontinue its policy of screening individuals arrested for petty offenses in Irving.¹⁹ ICE made public statements that it would instead target immigrants charged with “more serious”

offenses. The events in the fall of 2007 offer at least anecdotal evidence that Hispanic arrests for petty offenses and ICE detainers are likely to be *inversely* correlated with community pressure against law enforcement regarding perceived racial profiling tactics. As community protest against racial profiling goes up, Hispanic arrests for petty offenses are likely to go down.

Hispanic arrests for traffic infractions match the Phase 2 increase shown by Hispanic arrests for Class-C offenses (see Figure 3). The most dramatic rise in Hispanic traffic arrests over the 23-month interval begins in April of 2007 and peaks in July of 2007. For example, in April of 2007, Hispanic traffic arrests stood at 48, with Whites at 33 and African-Americans at 25. In July of 2007, only three months later, police arrested 155 Hispanics for traffic offenses (a 223 percent increase), but only 43 Whites and 64 African-Americans. Moreover, as previously mentioned, *total* White arrests exceeded those of both Hispanic and African-Americans at nearly every other point of the 23-month time series. These data underscore the peculiarity of Hispanic arrests for Class-C misdemeanors between April and November of 2007.

ICE Detainers

The ICE detainer time series serves as an important reference point for the trend lines for Hispanic arrests. As noted above, a detainer is a request from ICE to local police to retain custody of an individual so that ICE may determine whether to take custody once detention based on the local

19. Brandon Formby, “Criminal Alien Program Still Taking Illegals Arrested for Minor Offenses,” *Dallas Morning News*, January 20, 2008.

FIGURE 5 | Type of Charge Among All ICE Detainers

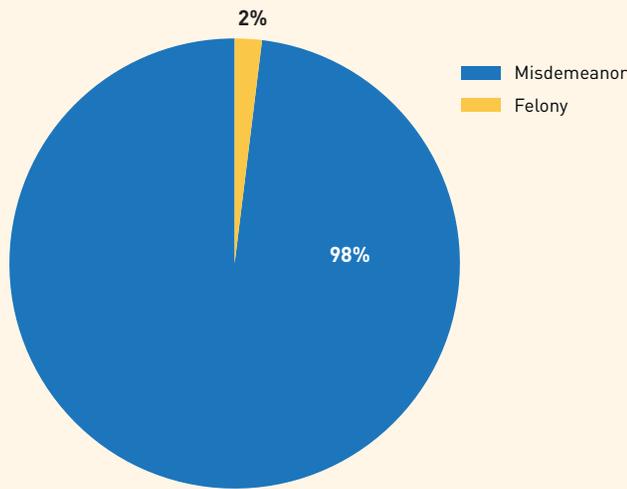


TABLE 1 | ICE Referrals and Detainers

	Referrals	Detainers
September 2006	80-100*	9
September 2007	269	186
October 2007	146	107
November 2007	140	88

Note: ICE referral data comes from Brandon Formby, "Criminal Alien Program Still Taking Illegals Arrested for Minor Offenses," Dallas Morning News, January 20, 2008. The referral data for September 2006 is based on the article's reported average of 20-25 per week for that month. The ICE detainer data was drawn from the Irving, Texas arrest data analyzed for this study and includes detainers resulting from all types of arrests including "on view" and warrant. As a result, the number of detainers by month reported in this table is slightly higher than those reported in Figure 4.

arrest is resolved. After being transferred to ICE, the person is likely to be placed in removal (deportation) proceedings. ICE detainers sit at zero for the first eight months of 2006 (see Figure 4). ICE detainers ranged between three and eleven in the first seven months of the program but jumped to 44 in April of 2007 and to a high of 171 detainers in September of 2007. This trend matches the April rise in Hispanic traffic-related arrests

and Hispanic Class-C misdemeanor arrests more generally.

Of the 883 ICE detainers recorded in the "on view" arrest data, 96% were issued to Hispanics, the majority of whom self-reported a Latin American country as their country of origin. Significantly, only 2% of all the detainers issued in the 15 month time period that CAP was implemented in Irving were issued for individuals charged with felony offenses.

In contrast, misdemeanors (the majority of which were Class-C) accounted for 98% of detainers issued by ICE in the same time period. The data strongly negates assertions by ICE that federal-local partnerships are resulting in the identification and removal of persons with serious criminal histories.

The overbroad and punitive nature of racial profiling on the Hispanic community is evidenced by comparing the number of referrals to detainers. In contrast to detainers, local police issue referrals of individuals they suspect of being undocumented for further investigation from ICE. As shown in Table 1, ICE consistently issued detainers for fewer individuals than were referred by the local police, indicating that local officials were likely referring lawful residents to ICE. For example, in September 2007, Irving police referred 269 individuals to ICE, yet ICE issued detainers for just 186 individuals. In fact, a broader analysis of all arrest data also indicates that the majority of Hispanics arrested after the implementation of CAP, mainly for minor misdemeanor offenses, were lawfully present in the U.S.²⁰ If, as our research suggests, CAP creates incentives for local police to target Hispanics for discretionary arrests for minor offenses, then lawfully residing Hispanics are inevitably impacted by these enforcement measures. In addition to facing arrests for minor violations, such as knocking over a cone or driving without lights, Hispanics who are lawfully in the U.S. bear the burden of proving their status, first to local police and then to ICE.

20. For the purposes of this analysis, "lawfully present" includes U.S. citizens, lawful permanent residents and other non-citizens authorized to be in the U.S.

FINDINGS

1. The data on traffic arrests and arrests for petty misdemeanor offenses more generally, indicate that Hispanic arrests rose substantially — and relative to whites — beginning in the spring of 2007. This rise was matched by a shift in ICE referral policy in Irving from in-person consultation to 24/7 ICE access via remote consultation, and a sharp increase in ICE detainers. Together, these facts offer compelling evidence of racial profiling by the Irving Police Department between April and October of 2007.

2. The study shows a strong correlation between a) the removal of procedural constraints on local officials (e.g., in-person ICE detainer decisions), and b) the rate at which Irving Hispanics were arrested for petty offenses. A “fast-track” immigrant removal process encourages local officers to expand the pool of detained Hispanics in an effort to remove as many undocumented immigrants as possible. When officers use race as an indicator of illegal immigration status, it is virtually inevitable that Hispanic U.S.

citizens and lawful residents will also be funneled through this vetting process. Moreover, the study likely undercounts the number of racial profiling incidents given that it uses arrest data, and excludes the larger number of police stops and investigations that do not result in an arrest but cause inconvenience and embarrassment to great numbers of persons who are Hispanic or perceived to be Hispanic.

3. The data also demonstrates that after the implementation of CAP in Irving, Texas, that of all the detainers issued by ICE, only 2%, regardless of race, were for individuals charged with felonies. The federal-local partnership in Irving is demonstrably failing to adhere to Congress’ directive to target serious criminal offenders.

RECOMMENDATIONS

1. Congress should order an investigation of the implementation of the Criminal Alien Program in other jurisdictions before allocating additional sums for the expansion of the program. Particularly, the investigation should concentrate on whether local law enforcement is increasing its focus on high-level criminal alien offenders as a result of the CAP program.

2. ICE should institute a bright-line rule prohibiting CAP screenings for individuals arrested for non-felony offenses, in order to eliminate racial profiling in the implementation of the Criminal Alien Program. This recommendation is in line with Congress’s mandate to focus on serious criminal offenders.

3. Congress should mandate that local jurisdictions who partner with ICE record stop and arrest data by race, ethnicity and level of offense. In addition, ICE should disclose on its website where it has implemented the Criminal Alien Program to provide full disclosure to local communities who may be impacted by police practices.

Methodological Notes

The Irving, Texas arrest records used for this study contain a total of 27,380 records spanning January 2006 through November 2007. Records used for the analyses were limited to those where the first charge listed in the arrest record was the result of an “on view” arrest, namely those where the police officer claims to have observed the criminal violation first-hand, thus producing a working data file of 17,322 cases. Our

analysis of 883 ICE detainers was limited to those for which the first arrest charge was either a misdemeanor or a felony.

The data file contained a three-category data field that described race-ethnicity; the three categories were (“white,” “black” and “Asian.”). For analytical purposes, we identified “Hispanics” in the data file (and recoded records from “white” or “black” to “Hispanic”) if

they met the following conditions: 1) the surname matched a list of Hispanic surnames identified by the 2000 U.S. Census as belonging to 80% of all Hispanics, or 2) the arrestee self-identified their country of origin as one of 16 Latin American countries including Argentina, Costa Rica, Honduras and Nicaragua.²¹

21. See File A “Top 1000 Names” at <http://www.census.gov/genealogy/www/freqnames2k.html>