



THE SECURE COMMUNITIES PROGRAM:

UNANSWERED QUESTIONS AND CONTINUING CONCERNS

By Michele Waslin, Ph.D.

(Updated) NOVEMBER 2011

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ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's *Special Reports* are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

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Supported in part by a grant from the Foundation to Promote Open Society

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INTRODUCTION

The Secure Communities program, which launched in March 2008, has become a centerpiece of immigration enforcement efforts by Immigration and Customs Enforcement (ICE). Its rapid expansion coupled with serious concerns about the design, goals, and implementation of the program has resulted in a great deal of controversy.

Under Secure Communities, participating jurisdictions submit arrestees' fingerprints not only to criminal databases, but to immigration databases as well, allowing ICE access to information on individuals held in jails. While state and local law-enforcement officers are not directly enforcing federal immigration law or making arrests for immigration violations, the transmission of fingerprints allows ICE to tap into information about detainees and make determinations about additional ICE enforcement action.

While some may claim that Secure Communities is an improvement over other federal-local partnerships—such as the 287(g) program, which deputizes state and local police officers to enforce immigration laws through agreements with the Department of Homeland Security (DHS)¹—the Secure Communities program still faces many of the same criticisms. A Task Force appointed by DHS to make recommendations regarding the program concluded that Secure Communities is fundamentally flawed.² While roughly half of the Task Force members favored a suspension or termination of the program and half believed the program must be continued while reforms are being made, all Task Force members agreed that the program must be reformed.

This paper describes the Secure Communities program, identifies concerns about the program's design and implementation, and makes recommendations for the future of the program.

The Origins of the Secure Communities Program

For years, some have looked for ways in which ICE can better overlap with the criminal justice system for immigration enforcement purposes. Representative David Price (D-4th/NC), former chairman of the House Appropriations Subcommittee on Homeland Security, and currently ranking Member, has been the main proponent of a system to identify and remove "criminal aliens" from jails and prisons. According to Price, who also favors comprehensive immigration reform:

No matter what one's opinion about the broader illegal immigration problem and how to address it, we should all be able to agree that ICE's highest priority should be to identify and deport unlawfully present aliens who have already shown themselves to be a danger to our communities and have been convicted of serious crimes.³

The Fiscal Year (FY) 2008 appropriations for DHS provided funding to "improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable." The FY 2009 DHS appropriations provided \$200 million for Secure Communities, which is only a small portion of the \$1 billion ICE received to identify and remove immigrants with criminal convictions. The FY 2010 DHS appropriations bill contained \$1.5 billion for identifying and removing criminal aliens, including \$200 million for Secure Communities.⁴

In accordance with Congress's mandate, ICE launched the Secure Communities program in March 2008⁵ to allow ICE access to the fingerprints of individuals booked into local jails throughout the United States in order to identify immigrants subject to removal. On March 24, 2008, ICE submitted its plan for Secure Communities in a report to Congress entitled "Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens." The first Executive Director of Secure Communities, David Venturella, was named on September 8, 2008. What began as a relatively small program in North Carolina and Texas⁶ was rapidly expanded. As of September 27, 2011, Secure Communities was available in [1,595 jurisdictions in 44 states and territories](#).⁷ ICE plans to implement Secure Communities in each of the 3,100 state and local jails across the country by 2013.

How does Secure Communities work?

Generally, when an individual is arrested and booked in a police station or jail, his or her fingerprints are sent—via the state's identification bureau—to the Federal Bureau of Investigation (FBI) to be checked against criminal databases. When Secure Communities is activated, the FBI then sends those fingerprints to DHS to be checked against immigration databases: the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT) and the Automated Biometric Identification System (IDENT). If there is a database "hit," meaning that the arrested person is matched to a record in the immigration databases, ICE and the local law-enforcement authorities are automatically notified. ICE reported that as of September 30, 2011, [11,124,789 fingerprint submissions](#) had resulted in **692,788** database matches and **142,090** removals.⁸ ICE then "evaluate[s] each case to determine the individual's immigration status and take appropriate enforcement action."⁹ In most cases where enforcement action will be taken, ICE will issue a detainer against the jailed individual.¹⁰ A detainer is a request from ICE that the arresting agency notify ICE before it releases the noncitizen so that ICE has the opportunity to decide whether or not the individual should be transferred to ICE custody.¹¹

A database hit does not necessarily indicate an immigration violation or that the immigrant is deportable. The databases contain all biometric records of immigrants' encounters with DHS, including applications and petitions, naturalizations, border crossings, etc. It is also important to note that Secure Communities is not limited to unauthorized immigrants. The immigration databases contain the fingerprints of legal permanent residents and other lawfully present immigrants (and even naturalized citizens). Furthermore, a legal immigrant may be identified for deportation on the basis of the current arrest, or for a past conviction which may make him deportable. Some immigrants will have no records in the immigration databases because they entered the U.S. illegally and have never had an encounter with DHS. However, ICE may still investigate the immigrant through other means¹² and take enforcement actions if ICE believes the immigrant is unlawfully present.

According to ICE, Secure Communities only involves the sharing of information (interoperability) between the FBI and DHS databases. Once the fingerprints are run against DHS databases, any subsequent enforcement action taken by ICE agents is technically outside of the parameters of the Secure Communities program. However, at a practical level, most people understand Secure Communities to be the entire process, starting with the arrest by the local law-enforcement officer, and ending with enforcement actions taken by ICE.

Through Secure Communities, ICE hoped to transform "the way the federal government cooperates with state and local law enforcement agencies to identify, detain, and remove all criminal aliens held in custody," and thus optimize capacity and efficiency.¹³ According to Rep. Price:

Secure Communities offers a productive approach for Federal immigration agents to work closely with State and local law enforcement while distinguishing the traditional Federal role of enforcing immigration law from the local role of prosecuting criminal violations. We have heard from many law enforcement and community groups about the importance of keeping a bright line between immigration enforcement and local community policing, and the Secure Communities program does just that.¹⁴

However, local communities have discovered that the line between immigration enforcement and local community policing is not so bright. Similar to other immigration enforcement partnerships with state and local law-enforcement agencies, Secure Communities has a negative impact on the police and the communities they serve.

Recent Changes to Secure Communities and ICE Processes

Before reviewing the problems and concerns surrounding Secure Communities, the following is a recap of recent announcements from ICE that will have a profound effect on the future of the program. Since its inception, there have been multiple changes to the program and to ICE enforcement generally. Two developments in particular—an ICE memo on civil enforcement priorities which created a new priority structure for Secure Communities, and an ICE memo on the use of prosecutorial discretion—will impact whether ICE takes enforcement action against a person identified through the program.

June 30, 2010 Memo on ICE Priorities

On June 30, 2010, ICE issued a memo entitled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, setting forth new enforcement prioritization objectives.¹⁵ The memo outlines civil immigration enforcement priorities as they relate to the apprehension, detention, and removal of aliens.

- **Priority 1.** Aliens who pose a danger to national security or a risk to public safety. Non-citizens who pose a danger to national security or a risk to public safety, including those suspected of terrorism, convicted of violent crimes, and gang members.
- **Priority 2.** Non-citizens who recently crossed the border or a port of entry illegally, or through the knowing abuse of a visa or the visa waiver program.
- **Priority 3.** Noncitizens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls.

For non-citizens convicted of crimes, the 2010 Morton Memo further prioritizes enforcement within Priority 1 into three “Levels” based on the following criminal convictions. These Levels are used by Secure Communities to categorize identifications and deportations:

- **Level 1:** “aggravated felonies as defined in [the immigration statute], or two or more crimes each punishable by more than one year” in prison.
- **Level 2:** “any felony or three or more crimes punishable by less than one year” in prison.
- **Level 3:** “crimes punishable by less than one year” in prison.

It is important to note that the memo also specifically states that “ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States.” This opens the door to ICE taking enforcement action on any individual identified through Secure Communities who is unlawfully present in the U.S., regardless of the severity of the criminal offense. And, in fact, ICE is doing so. An August 2011 report by the American Immigration Lawyers Association documented 127 cases from around the country in which DHS initiated removal proceedings against immigrants who did not present a threat to national security or public safety and have not been convicted of serious criminal violations.¹⁶ While ICE’s enforcement efforts prioritize convicted criminal aliens, ICE maintains the discretion to take action on any alien it encounters.”¹⁷

June 17, 2011 Announcements and Prosecutorial Discretion

A. Changes to Secure Communities

On June 17, 2011, ICE released a series of changes to the Secure Communities program, as well as a memo on the use of prosecutorial discretion. ICE announced that, in conjunction with the DHS Office of Civil Rights and Civil Liberties (OCRCL), it was creating new training materials regarding the program and respect for civil rights; it had revised the detainer form that ICE sends to local jurisdictions; it had created a new complaint system; and it would conduct regular data collection and monitoring.

Finally, ICE announced that it would create an advisory task force to advise the Director of ICE on “ways to improve Secure Communities, including making recommendations on how to best focus on individuals who pose a true public safety or national security threat,” and to “provide recommendations on how ICE can adjust the Secure Communities program to mitigate potential impacts on community policing practices, including how to implement policies stopping the removal of individuals charged with, but not convicted of, minor traffic offenses who have no other criminal history or egregious immigration violations.”¹⁸ Task force members included law-enforcement officials, state and local prosecutors, ICE agents, immigration advocates, and academics.¹⁹

B. Prosecutorial Discretion

On June 17, 2011, ICE Director John Morton also released a new memo providing guidance for ICE law-enforcement personnel and attorneys on their authority to exercise prosecutorial discretion. This memo is intended to help the agency use its limited resources to target criminals and those who pose a risk to public safety or national security. The memo includes a list of factors that are to be taken into account when making an enforcement-related decision.²⁰ A separate memo provides policy and guidance regarding the use of discretion intended for the protecting victims and witnesses of domestic violence and other crimes.

The use of prosecutorial discretion is critical in the Secure Communities context. While ICE may identify many immigrants who may be deportable, ICE is not obligated to—and does not have the resources to—take enforcement action (including issuing a detainer or a Notice to Appear) against every single person. The Morton memo clarifies that ICE has the authority to exercise discretion when deciding whether or not to act against each person identified through the program.

While these changes and memos are steps in the right direction, questions remain about how ICE is using the prioritization memo and the prosecutorial discretion memo in the Secure Communities context. According to the latest ICE data, large percentages of persons identified and deported through Secure Communities continue to be low-level offenders or non-criminals.

August 5, 2011 Announcement

On August 5, prior to completion of the Task Force's recommendations, ICE announced that it was rescinding all existing Memoranda of Agreement (MOAs) with state identification bureaus and that "an MOA is not required to activate or operate Secure Communities in any jurisdiction."²¹ ICE also announced it would "continue to operate and expand the program in new jurisdictions."²²

Report of the Secure Communities Task Force

Members of the Task Force met for two months, took expert testimony, and convened information-gathering sessions in Dallas, TX; Los Angeles, CA; Chicago, IL; and Arlington, VA to hear from individuals and organizations about their experiences with the Secure Communities program.

After weeks of discussion and drafting, several Task Force members felt they could not support the final report and its recommendations and resigned. The remaining Task Force members released their final report in September 2011. To a large extent, the findings and recommendations in the report track the findings and criticisms included in reports issued by civil rights and immigrants' rights organizations.²³

The overall recommendations of the Task Force were:

- ICE must clarify the goals and objectives of the Secure Communities program, as well as the parameters and functioning of the program, and accurately relay this information to participating jurisdictions, future participating jurisdictions, and the communities they serve. Regardless of whether ICE has legal authority to operate Secure Communities without local agreement, ICE must work to develop good working relationships with states, cities, and communities.
- ICE must improve the transparency of the program.
- There is broad consensus in the nation that persons convicted of serious crimes who are in the United States illegally should be subject to deportation. ICE must build on that consensus by implementing systematic mechanisms to ensure that Secure Communities adheres to its stated enforcement objective of prioritizing those who pose a risk to public safety or national security.
- ICE should clarify that civil immigration law violators and individuals who are convicted of or charged with misdemeanors or other minor offenses are not top enforcement priorities unless there are other indications that they pose a serious risk to public safety or national security.
- DHS must exercise its prosecutorial discretion, in all its immigration enforcement endeavors, in line with stated enforcement priorities, and take systematic steps to train and monitor field officers and attorneys as they implement Departmental policies on prosecutorial discretion.
- DHS must strengthen accountability mechanisms, including remedies for and prevention of civil rights and civil liberties violations.

The Task Force did not, however, recommend termination of the program, noting that "the Task Force was split on this question, with roughly half of the members in favor of some degree of suspension or termination of Secure Communities, and the other half believing that reforms are necessary but that the program out of necessity must continue to function."²⁴

The Task Force report was sent to the Homeland Security Advisory Committee (HSAC), which approved it, including its recommendations, and sent it to Secretary Napolitano on September 22, 2011. While it is up to the Secretary to determine whether she will implement the Task Force's recommendations in whole or in part, some clues about her current perspective on the program are found in a speech delivered at American University on October 5, 2011:

Secure Communities is a program that helps ICE identify those who have been arrested by state and local law enforcement for non-immigration state or local crimes, who are also in the country unlawfully. It bestows no additional authorities onto local law enforcement and only identifies those who have been booked into jails. Literally, in jails.

I know there has been a lot of discussion about Secure Communities—and to be perfectly candid, this program got off to a bad start. We did not explain clearly how it works and who is required to participate... Despite the misleading commentary about this program, it has proven to be the single best tool at focusing our immigration enforcement resources on criminals and egregious immigration law violators.

Termination of this program would do nothing to decrease the amount of enforcement. It would only weaken public safety, and move the immigration enforcement system back towards the *ad hoc* approach where non-criminal aliens are more likely to be removed than criminals.²⁵

Concerns about Secure Communities

As the Task Force concluded, there are numerous concerns over Secure Communities, even among its proponents. Because Secure Communities is an information-sharing program and does not employ or deputize agents to enforce immigration laws, ICE has argued that it eliminates many of the most controversial aspects of the 287(g) program. In a Secure Communities jurisdiction, local police officers are not deputized by ICE to initiate and perform immigration-enforcement activities, nor are they authorized to make arrests for violations of civil immigration law. Consequently, concerns about misapplication of immigration law, profiling, resource management, and community relations would be expected to decrease. However, a growing body of evidence suggests otherwise. The following section outlines the most pressing issues, some but not all of which were addressed in the Task Force report: inability to opt out, lack of prioritization, obstacles to community policing, costs associated with the program, due process and civil rights concerns, and lack of transparency and oversight.

A. Prioritizing or Casting a Wide Net?

According to ICE statements and materials, Secure Communities is intended to target dangerous criminals and those who pose threats to public safety. A September 1, 2009, fact sheet, as well as other press releases and documents, states that "ICE is focusing efforts first and foremost on the most dangerous criminal aliens currently charged with, or previously convicted of, the most serious criminal offenses."²⁶ A Secure Communities brochure claims that "ICE prioritizes the removal of criminal aliens by focusing efforts on the most dangerous and violent offenders. This includes criminal aliens determined to be removable and charged with or convicted of crimes such as homicide, rape, robbery, kidnapping, major drug offenses, or those involving threats to national security."²⁷ However, there is evidence that many of the immigrants identified and deported through the program are not serious or violent criminals, do not pose a threat to public safety, and may not have any criminal history at all.²⁸

In an August 2011 publication, ICE defines “criminal aliens” as “immigrants who have been convicted of a crime by a court of law. “Criminal convictions” include everything from convictions for murder or rape to criminal traffic convictions. This conviction may occur in the United States or overseas, provided that the overseas conviction is one that is recognized in the United States.”²⁹ According to DHS statistics, in FY 2010, nearly 31,000 “convicted criminal aliens” were removed with criminal traffic violations listed as their crime.³⁰ “Criminal traffic violations” was the third most common category of criminal conviction, after convictions for dangerous drug offenses and criminal immigration violations.

According to DHS data, in FY 2011, 26% of all Secure Communities deportations were immigrants with Level 1 convictions; 19% of those deported had Level 2 convictions; and 29% were individuals convicted of Level 3 crimes (minor crimes resulting in sentences of less than one year). Twenty-six percent of those deported had immigration violations and no criminal convictions.³¹ Moreover, ICE statistics show that some jurisdictions’ numbers for low level-offenders and non-criminal deportations are well above the national average. For example, between October 2008 and September 30, 2011, in Maricopa County, Arizona, 60% of those deported were Level 3 or non-criminals; in Alameda County, California, it was 64%; in Gwinnett County, Georgia, it was 66%; in Jefferson Parish, Louisiana, 87% were Level 3 or non-criminals.³²

The Secure Communities Task Force concluded that Secure Communities has resulted in the arrest and deportation of minor offenders and non-criminals.³³ Moreover,

The Task Force’s public hearings, other hearings, and news media accounts have produced many stories of deportations of persons who had violated no law other than a civil immigration violation and who did not apparently fall into ICE’s other categories of priorities for enforcement. The apparent “disconnect” between the DHS documents describing a tight focus on dangerous criminal offenders and the actual operation of Secure Communities has led to criticism of the program and is a key reason for opposition to the program in a number of cities, counties, and states.³⁴

In his letter requesting that Illinois’ Secure Communities’ MOA be terminated, Illinois Governor Pat Quinn referred specifically to the failure of Secure Communities to focus on serious criminals: “...the implementation of the Secure Communities program in Illinois is contrary to the stated purpose of the MOA...less than 20% of those who have been deported from Illinois under the program have ever been convicted of a serious crime.”³⁵

This is why the use of prosecutorial discretion as outlined in the June 17, 2011, Morton memo is so critical to the Secure Communities program. While ICE may identify large numbers of immigrants who may be subject to enforcement and deportation, ICE has the authority to exercise its discretion to choose which immigrants to process for deportation. Those immigrants who have low-level convictions or no criminal history and do not pose a threat to public safety or national security can be spared deportation. ICE has the authority to use discretion and consider the circumstances of even those immigrants with criminal convictions when making enforcement decisions. If ICE exercises its prosecutorial discretion, some of the concerns about the Secure Communities program may be overcome.

Unfortunately, experience shows that past efforts to prioritize violent offenders have met with little success. There are multiple examples of ICE failing to stick to its own priorities.³⁶ Given the Secretary’s clear commitment to this program, despite the history of problems, the question going forward will be whether she will adopt the reforms proposed by the Task Force and HSAC, and will ensure that ICE meets its responsibilities with respect to prosecutorial discretion.

B. The Pre-conviction Model

The stated purpose of the Secure Communities program is to identify convicted criminals and those who pose a threat to public safety or national security. However, the program is designed to identify immigrants at the point of booking, not conviction, and data from ICE have shown that the program is not solely focused on convicted criminals. The brief history of the program reveals major shifts with respect to its target and the definition of “criminal alien.”

There were discrepancies and questions right from the start. In April 2009, then-Secure Communities Executive Director Venturella stated that of the more than 12,000 “criminal aliens” identified in a five-month period, only 7.2% were **charged or convicted** of Level 1 offenses.³⁷ The mere mention of those “charged” with offenses raised eyebrows because of ICE’s claim that Secure Communities was focused on individuals with convictions.³⁸ Even Rep. Price expressed concerns, pointing out that “in 2007, the number of individuals ICE deported because they crossed the border illegally or overstayed their visas was 91 percent higher than in 2003, while the number of criminal aliens identified for deportation by the agency rose by only 16 percent.”³⁹

Rather than changing the program to focus strictly on convicted criminals, ICE changed the Secure Communities Fact Sheet to reflect a broader definition of those being targeted. A September 1, 2009, fact sheet, as well as other press releases and documents, stated that “ICE is focusing efforts first and foremost on the most dangerous criminal aliens currently *charged with*, or previously convicted of, the most serious criminal offenses” (emphasis added).⁴⁰ Later Secure Communities materials claimed that “ICE prioritizes the removal of criminal aliens by focusing efforts on the most dangerous and violent offenders. This includes criminal aliens determined to be removable and *charged with* or convicted of crimes such as homicide, rape, robbery, kidnapping, major drug offenses, or those involving threats to national security” (emphasis added).⁴¹

More recently, with the clarification of ICE priorities by the 2010 Morton memo, it is no longer necessary to distinguish between those convicted or charged with a crime, as long as the individual falls somewhere within the listed priorities. ICE explains that individuals who have not been convicted of a crime may still be deported through the program because “although they have not been convicted of a crime, they still fall within ICE’s enforcement priorities—for example by repeatedly violating U.S. immigration law or because they are fugitives from immigration court.”⁴² In other words, persons identified through Secure Communities who are found to have violated civil immigration laws may be deported regardless of a criminal conviction.

Thus it appears that ICE changed the stated objectives of the program several times and updated its website and materials to reflect new thinking. The fact remains that immigrants who are booked in jails, regardless of the outcome of the predicate charges, can and will be identified through Secure Communities and moved into ICE custody. Again, the use of prosecutorial discretion is critical to ensuring that the Secure Communities program adheres to its stated objective and focus on those who pose a threat to public safety or national security.

C. Opting Out of Secure Communities

Secure Communities raises serious questions about the relationship between federal and local law-enforcement agencies, and about a local community’s ability to weigh in on important decisions that affect it. Because of concerns over the program’s impact on community policing, and the fact that

the program's implementation does not match its stated goals, communities across the U.S. have expressed interest in opting out of Secure Communities. Since the program's inception, ICE has provided confusing, and sometimes contradictory, statements about whether localities could decline to participate in the program. Much of the confusion was due to the fact that the Secure Communities MOA was between DHS and the state identification bureaus, which act as a conduit through which information from local law-enforcement agencies is sent to federal agencies. Thus local jurisdictions were unsure whether their permission was even required for Secure Communities to be in place.

Several local jurisdictions—including the Santa Clara (CA) Board of Supervisors, the Arlington County (VA) Board, and the Sheriff of San Francisco—asked to opt-out of the program, and were given different and conflicting responses.⁴³ Washington, D.C. also opted out of the program in 2010.⁴⁴ In response, on August 17, 2010, ICE released a memo entitled "Setting the Record Straight," which set forth an opt-out policy:

If a jurisdiction does not wish to activate on its scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing (email, letter, or fax). Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date in or removing the jurisdiction from the deployment plan.

DHS Secretary Janet Napolitano later confirmed that process to be accurate in a letter written in response to Rep. Zoe Lofgren (D-CA).⁴⁵ However, in a September 30, 2010, *Washington Post* article, a senior ICE official stated that:

Secure Communities is not based on state or local cooperation in federal law enforcement. The program's foundation is information sharing between FBI and ICE. State and local law enforcement agencies are going to continue to fingerprint people and those fingerprints are forwarded to FBI for criminal checks. ICE will take immigration action appropriately.⁴⁶

When asked about opting out of Secure Communities during an October 6, 2010, press conference, Secretary Napolitano confirmed that ICE could work with jurisdictions on implementation, but she did not see Secure Communities as an "opt-in/opt-out" program. "Setting the Record Straight" has since been removed from the ICE website.

Yet the battle over opting out continued. In 2011, the governors of Illinois⁴⁷ and New York⁴⁸ sent letters to ICE stating that they wished to invoke the termination clause of their Secure Communities MOAs, and the governor of Massachusetts declined to enter into an agreement.⁴⁹ On August 5, 2011, ICE announced that it was rescinding all existing MOAs with state identification bureaus and that "an MOA is not required to activate or operate Secure Communities in any jurisdiction."⁵⁰ ICE also announced it would "continue to operate Secure Communities for jurisdictions where it is already deployed and will continue to activate the program for new jurisdictions."⁵¹ ICE cited a 2002 law, 8 U.S.C. §1722(a)(2), as the legal basis for information sharing between federal agencies.⁵² This section relates strictly to information sharing between government agencies stating that "the President shall develop and implement an interoperable electronic data system to provide current and immediate access to information in databases of Federal law enforcement agencies and the intelligence community that is relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien (also known as the "Chimera system")."⁵³ The law does not

refer to mandatory information sharing between local jurisdictions and the federal government. Furthermore, ICE reported that:

Secure Communities is mandatory in that, once the information-sharing capability is activated for a jurisdiction, the fingerprints that state and local law enforcement voluntarily submit to the FBI to be checked against the DOJ's biometric identification system for criminal history records are automatically sent to DHS's biometric system to check against its immigration and law enforcement records. The U.S. government has determined that a jurisdiction cannot choose to have the fingerprints it submits to the federal government processed *only* for criminal history checks.⁵⁴

ICE also confirmed that a local jurisdiction may choose not to receive information about database hits from ICE, but doing so would not affect ICE's ability to take enforcement actions against those immigrants identified.

Documents made available in response to Freedom of Information Act (FOIA) litigation have revealed that the FBI was also involved in the expansion of Secure Communities as a mandatory program because it is an integral part of the FBI's Next Generation Identification (NGI) project.⁵⁵ NGI is intended to replace current databases and serve as the "world's largest biometric fingerprint database." In addition to fingerprints, NGI will collect other biometrics including palm prints, iris scans, and scar, tattoo, and facial recognition. This personal biometric information will be available to be shared between federal government agencies as part of a national, searchable database.

There has been a great deal of anger and criticism voiced by immigrant advocates and others in response to the August 2011 announcement. Congressman José E. Serrano (D/16th-NY) sent a letter to ICE Director Morton stating:

The fact that three states, including my home state of New York, recently withdrew from the program should have been a signal that there are grave concerns about the program from those who implement it. I am troubled that instead of responding to these legitimate concerns, you are instead choosing to bypass the states and localities altogether. Far from addressing Secure Communities' fundamental flaws, your August 5th letters to governors have only heightened suspicion, undermined trust, and created more confusion. Indeed, there is growing concern that your announcement may invite further legal challenges.⁵⁶

It is likely that states and local jurisdictions will continue to challenge DHS and attempt to opt-out of Secure Communities, particularly since some may feel that DHS should not impose the program unilaterally without the consent of the local communities.

Concerns of Local Law Enforcement Agencies

A. Obstacles to Community Policing

Secure Communities raises questions about local police authorities' ability to build strong, trusting relationships with their communities. If a police agency cannot assure its immigrant community that there will be no immigration consequences to providing information or cooperating with police, immigrants will be less likely to come forward to report crimes, making the job of police more difficult. Many localities and police agencies have determined that it is in their best interest to provide such assurances to immigrant communities.⁵⁷ Secure Communities has the potential to erode the ability of police to make these kinds of assurances.

The Secure Communities Task Force found that:

When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information. This may have a harmful impact on the ability of the police to build strong relationships with immigrant communities and engage in community policing, thereby negatively impacting public safety and possibly national security.⁵⁸

Law-enforcement officials have been vocal about their concerns with the Secure Communities program. For example, Ron Hampton, President of Black Law Enforcement in America, has questioned Secure Communities' impact on public safety: "Local law enforcement's mission is to keep communities safe...how is deporting people for committing simple traffic infractions making our communities more safe? It doesn't."⁵⁹ Hampton called for a moratorium on Secure Communities at least until a thorough investigation of the program has been concluded. Sheriff Michael Hennessey of San Francisco has been an outspoken critic of the program and was among those who requested that his jurisdiction be allowed to opt-out of Secure Communities. According to Hennessey, Secure Communities "violates this hard-earned trust with immigrant residents" and "casts too wide a net and scoops up the fingerprints of everyone...whether or not they pose a criminal risk."⁶⁰

Police Chief Chris Burbank of Salt Lake City, Utah, echoed these sentiments: "The Secure Communities program has not accomplished its intended goal. During the short time the program has been in practice, it has raised community concern and mistrust of law enforcement even in locations where the program has yet to take effect...The Secure Communities program combined with misguided state legislation has promoted a shift in local law enforcement's mission across the country and driven a wedge between the police and the public. The resulting priority adjustment places emphasis upon civil immigration action over community policing and all criminal enforcement."⁶¹ Burbank concluded, "I do not believe Secure Communities has positively contributed to the mission of local law enforcement."⁶²

In his letter opting out of Secure Communities, New York Governor Andrew Cuomo eloquently described the irony inherent in the program when he wrote: "The heart of the concern is that the program, conceived of as a method of targeting those who pose the greatest threat to our communities, is in fact having the opposite effect and compromising public safety by deterring witnesses to crime and others from working with law enforcement."⁶³

According to these law-enforcement officials and others, if ICE maintains a presence—even a technological presence—in a local jail, the public will likely associate the local law-enforcement agency with immigration enforcement, and this has a negative impact on community policing and public safety. Thus the Task Force concluded that "Secure Communities must be implemented in a way that supports community policing and sustains the trust of all elements of the community in working with local law enforcement agencies."⁶⁴

B. Costs of Implementing Secure Communities

ICE has repeatedly stated that "Secure Communities imposes no new or additional requirements on state and local law enforcement..."⁶⁵ The State Identification Bureau Deployment Briefing

presentation states that implementation of Secure Communities “requires little or no change to current procedures.”⁶⁶ And the “Guidance for Handling Sensitive Jurisdictions,” which was obtained through FOIA, says that Secure Communities “leverages existing communication channels and does not require special equipment or incur costs to participate.”⁶⁷

However, multiple reports have pointed to high costs associated with the program that are incurred by localities. These costs might force police to devote scarce resources to immigration enforcement rather than on fighting crime. For example, in Colorado, 39% of the state’s counties do not have the digital electronic scanners that are necessary for the program, and some of the scanners they do have are at the end of their life span. The cost to each county to purchase updated equipment is approximately \$50,000.⁶⁸

There are also costs associated with the detention of immigrants. An ICE detainer requests the law-enforcement agency to hold the immigrant for a maximum of 48 hours after the local criminal charges have been resolved (and some LEAs violate the 48-hour rule and hold individuals much longer). There are other reasons an immigrant may be held in detention for an extended period of time. For example, some may not be able to afford bail, or may be denied bail from a judge because they have an immigration detainer. The cost of this detention is paid for by the locality, not the federal government.⁶⁹ Some jails may get funding for some immigrant detainees from the federal government through the SCAAP program⁷⁰ or through Intergovernmental Service Agreements, but this only covers immigrants in federal custody, not immigrants held on local charges who are also subject to a detainer.

In addition to costs for equipment and detention, there are additional costs associated with the officers’ time spent on immigration matters. While ICE portrays Secure Communities as a program that imposes no additional duties on local law-enforcement agencies, the Secure Communities Standard Operating Procedures outlines an eight-point plan detailing what participating law-enforcement agencies must do.⁷¹ Time must be spent following up on detainers, gathering and transmitting additional booking information, and performing outreach to communities. Sheriffs who have implemented the program report other time-consuming activities such as waiting for responses from ICE, calling federal agencies for clarification, and taking palm prints.⁷² All of this takes time away from other law-enforcement duties,⁷³ and law-enforcement agencies are not reimbursed by the federal government for their officers’ time.

Due Process and Civil Rights Concerns

A. Unnecessary or Prolonged Detention

If Secure Communities results in a database “hit,” meaning the person in custody matches a record with an immigration violation, ICE can evaluate the case and decide to impose a detainer on the individual. This detainer is a request from ICE that local authorities not release the arrestee without notifying ICE, and ICE can put a 48-hour hold (not counting weekends and holidays) on the individual after he or she would normally be released from criminal custody (e.g. released on bail, recognizance, completion of sentence, or dismissal of charges) and proceed with removal proceedings.⁷⁴ However, many jails and police departments treat an ICE detainer as a requirement that the individual not be released, and therefore deny bond in his or her criminal case, misdemeanor, or traffic violation. It may also mean that when an unauthorized immigrant is arrested but subsequently found innocent of the predicate offense, or when charges have been dropped, the immigrant remains in jail until ICE takes action. In addition, reports suggest that when

ICE takes custody of arrested individuals, it is more difficult for them to exercise their right to go to criminal court and challenge their criminal charges from within custody. It may also mean that individuals who would otherwise be released are ineligible for release on bail. In addition to raising obvious due-process problems, any warrants of arrest or judgments of conviction could make the individuals ineligible for future immigration benefits (such as receiving a visa).⁷⁵

Furthermore, ICE often violates the 48-hour detainer time limit and immigrants remain jailed, unable to challenge the underlying charges or the immigration detainer. Perhaps most problematic, there are no mechanisms for an arrested person with a detainer to challenge ICE on the grounds that the detainer was issued in error.⁷⁶

An October 2011 report by the Chief Justice Earl Warren Institute on Law and Social Policy confirms that those immigrants identified through the Secure Communities program are indeed subject to prolonged detention and are frequently denied due process.⁷⁷ The Warren Institute found that a mere two percent of immigrants booked into detention under Secure Communities were given bond by ICE.⁷⁸ A full 83 percent of those arrested through Secure Communities were placed in ICE detention, regardless of the charges on which they are being held, compared with an overall DHS immigration detention rate of 62 percent.⁷⁹ Only 52 percent of noncitizens arrested through Secure Communities were scheduled to have a hearing before an immigration judge.⁸⁰ Of those who have hearings, 24 percent were represented by an attorney, compared to 41 percent of all immigration court respondents.⁸¹ Only two percent of noncitizens arrested through Secure Communities were granted some form of immigration relief, compared to 14 percent of all immigration court respondents. Notably, only 10 percent were released prior to their departure from the country, meaning they did not have the opportunity to return to their homes and settle their affairs.⁸²

On June 17, 2011, ICE announced that it had revised the detainer form it sends to local jurisdictions to emphasize that local authorities may not detain an individual for more than 48 hours. It also requires local officials to provide arrestees with a copy of the form, and includes information about how to make a complaint if the person believes his or her civil rights have been violated.⁸³

B. Profiling and Pretextual Arrests

ICE claims that Secure Communities does not lead to racial/ethnic profiling because Secure Communities is simply a technological identification program through which all persons arrested are fingerprinted and checked against various databases. Since Secure Communities does not employ agents or deputize local agents, and is not involved in the actual arrests of individuals or in the detainer and removal process, Secure Communities does not pose the possibility for racial/ethnic profiling. However, there is concern that police officers working in areas that have Secure Communities in their local jails may have an incentive, or at least the ability, to make arrests based on race or ethnicity, or to make pretextual arrests of persons they suspect to be in violation of immigration laws, in order to have them run through immigration databases once they are jailed.⁸⁴ The October 2011 Warren Institute report found that, although they comprise 77 percent of the unauthorized population, Latinos made up 93 percent of individuals arrested through Secure Communities.⁸⁵

Profiling and pretextual arrests have precedent in other jail-based programs. A September 2009 report by the Warren Institute examining ICE's Criminal Alien Program (CAP), which screens individuals in prisons, found that discretionary arrests of Hispanics for petty offenses, particularly minor traffic offenses, rose dramatically in Irving, Texas, after the CAP program in the local jail was expanded.⁸⁶ In their report detailing ICE enforcement actions, the American Immigration Lawyers

Association found that in 61 of 127 cases examined, the primary reason for the initial stop by police may have been to assess immigration status.⁸⁷

Secure Communities statistics show that some jurisdictions see large numbers of immigrants with no criminal history identified through the program and deported by ICE—numbers much larger than the national average.⁸⁸ This may indicate profiling and/or pretextual arrests in those jurisdictions. ICE has repeatedly stated that the local police officers who make the initial arrests are not under ICE jurisdiction, and that ICE has little ability to respond to profiling allegations.

On June 17, 2011, ICE announced that OCRCL would develop training materials for state and local law-enforcement agencies which provide information on how Secure Communities works and how it relates to civil rights.⁸⁹ ICE and CRCL will also conduct a quarterly statistical review of Secure Communities data to evaluate “effectiveness and any indications of potentially improper use of the program.”⁹⁰ Immigrant advocates will be monitoring these developments and their impact on profiling and pretextual arrests.

C. Lack of Clear Complaint Mechanisms

Given the wide range of concerns about Secure Communities, having a clear and functioning complaint process is critical. In June 2011 ICE announced a new complaint procedure which directs individuals to file complaints with OCRCL. Yet there has been little publicity regarding this complaint procedure, and it is unlikely that many immigrants know to access it on the Secure Communities webpage. Furthermore, OCRCL is a small office with a limited budget. It is unclear whether OCRCL has the capacity to adequately respond to the complaints it may receive.

Concerns with Program Management

A. Lack of Transparency

Oversight and transparency continue to be a major concern. A FOIA request and subsequent lawsuit to obtain information about Secure Communities from DHS and other federal agencies has led to over 40,000 documents being disclosed by DHS, ICE, FBI, and other agencies.⁹¹ The sheer number of documents received and their content point to the lack of transparency surrounding the program and, at times, misleading information disseminated by ICE. In fact, a federal district judge found that “there is ample evidence that ICE and DHS have gone out of their way to mislead the public about Secure Communities.”⁹² This lack of transparency, coupled with frequent course reversals, has resulted in ICE and Secure Communities losing a great deal of credibility with the public.

The Secure Communities Task Force found that ICE provided “inaccurate or incomplete information” to states and localities regarding the program. The “poorly managed rollout of Secure Communities coupled with incorrect statements from DHS/ICE representatives and unilateral policy changes, has created confusion among state and local government and law enforcement officials.”⁹³

B. Lack of Oversight

With respect to oversight and project management, the 287(g) experience is worth reviewing for what it reveals about ICE. A Government Accountability Office (GAO) review of the 287 (g) program found that oversight was severely lacking. Richard Stana, GAO Director of Homeland Security and Justice, testified before the House Committee on Homeland Security in March 2009 that:

[287(g)] program objectives have not been documented in any program-related materials, guidance on how and when to use program authority is inconsistent, guidance on how ICE officials are to supervise officers from participating agencies has not been developed, data that participating agencies are to track and report to ICE has not been defined, and performance measures to track and evaluate progress toward meeting program objectives have not been developed. Taken together, the lack of internal controls makes it difficult for ICE to ensure that the program is operating as intended.⁹⁴

A 2009 report on the 287(g) program by Justice Strategies similarly found that ICE has a very uneven track record of supervising the 287(g) MOAs.⁹⁵ In most cases, ICE personnel do not directly oversee the deputized agents or 287(g) arrests. There are also concerns about DHS's management of the large and growing immigration-detention system. There have been many disturbing reports of poor detention conditions and a growing number of detainee deaths. Because of poor management of other programs, questions have arisen regarding DHS's ability to manage the growing Secure Communities program and the numerous detainees involved.

CONCLUSION

While the Secure Communities program is intended to identify and remove immigrants with criminal convictions who are in local jails, experience and data from similar ICE enforcement programs indicate that Secure Communities has run into familiar criticisms about prioritization, profiling, community policing, costs, due process, and program management.

The Secure Communities Task Force report states strongly that the Secure Communities program is deeply flawed. Both the DHS Office of Inspector General (OIG) and the GOA are conducting audits of Secure Communities that are expected to be released in 2012. Yet, despite the ongoing concerns with Secure Communities and the public outcry, ICE has opted to continue to expand it rather than await the findings and recommendations of the OIG and GAO and make necessary reforms.

While designed to prioritize violent criminals and threats to the community, the data show that Secure Communities has resulted in the identification and deportation of tens of thousands of immigrants with relatively minor criminal histories or no criminal convictions at all. While Secure Communities aims to transform the relationship between local police and federal authorities (ICE), the fact that Secure Communities is defined as federal database "interoperability" does not alleviate the fear and mistrust of the police that immigrant communities experience when immigration-enforcement activity is conducted at local jails.

It remains to be seen whether newly instituted changes to the program, the clarification of ICE's enforcement priorities, and guidance on the exercise of prosecutorial discretion will have a positive impact on how the program is implemented.

RECOMMENDATIONS

- Secure Communities must become a program that focuses solely on those immigrants who have been convicted of serious criminal offenses, or who have been identified by law-enforcement officials to pose a threat to national security or public safety. It is acknowledged that ICE has a broader immigration enforcement mandate, but those objectives must be pursued outside of

Secure Communities. Secure Communities must be focused on public safety, which is the common objective shared between DHS and local law-enforcement agencies.

- The various prosecutorial discretion memos issued by ICE are an important step toward focusing Secure Communities on serious criminal offenders. However, DHS and ICE must take additional steps to ensure that discretion is actually being used. Immigrants and their attorneys must be given clear instructions about the process and how to request the exercise of prosecutorial discretion. DHS must train its law-enforcement officers and others in the proper use of prosecutorial discretion.
- At a minimum, expansion of Secure Communities should be suspended until DHS has reviewed and implemented the recommendations of the Secure Communities Task Force report which has been adopted by the Homeland Security Advisory Committee. DHS must also review upcoming reports from DHS, OIG, and the GAO. Further expansion should not be continued until recommended reforms are completed and there is evidence that the stated goals and objectives of the program will be met. Before expanding Secure Communities to a jurisdiction, DHS should consider the direct and indirect effects that the program could have on public safety and community policing in that jurisdiction.
- ICE must be more transparent and clarify the statutory authority for Secure Communities, the purpose and goals of the Secure Communities program, how the program works, and whether it is mandatory. The public should receive consistent information about the operation of Secure Communities. Public outreach, community meetings, and information-sharing should be a central element of program implementation.
- ICE must make every effort to prevent racial or ethnic profiling. Before expanding the program to a jurisdiction, OCRCL should review any investigations or lawsuits regarding alleged violations of civil rights and civil liberties. All jurisdictions participating in Secure Communities should receive training on civil rights and illegal racial or other profiling. OCRCL must examine data from all activated jurisdictions for possible profiling and aggressive action must be taken against those jurisdictions or officers found to be engaging in profiling or other violations of civil rights, including termination of Secure Communities and/or other ICE partnerships.
- DHS must create and implement a strong complaint and redress mechanism for individuals who believe they have been wrongly arrested, detained, or otherwise mistreated under the Secure Communities program.

Endnotes

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