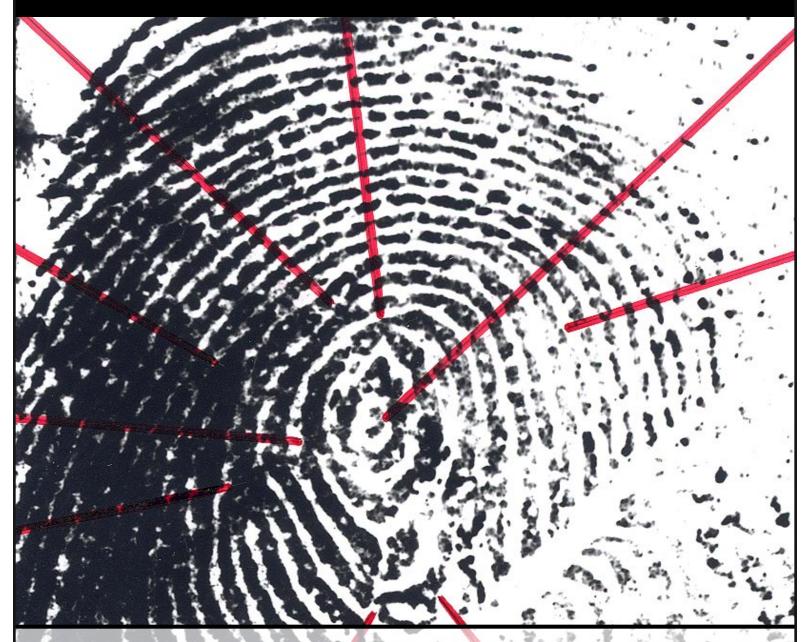# THE SECURE COMMUNITIES PROGRAM:

UNANSWERED QUESTIONS AND CONTINUING CONCERNS

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EXECUTIVE SUMMARY

What is Secure Communities?

Secure Communities is a DHS program designed to identify immigrants in U.S. jails who are deportable under immigration law. Under Secure Communities, participating jails submit arrestees' fingerprints not only to criminal databases, but to immigration databases as well; allowing ICE access to information on individuals held in jails. Unlike other ICE-local partnerships, Secure Communities gives ICE a technological, not physical, presence in prisons and jails. No Memoranda of Agreement (MOAs) with local law-enforcement agencies are required, and no local law-enforcement agents are deputized to enforce immigration laws through Secure Communities.

As of October 2010, Secure Communities is available in 686 jurisdictions in 33 states. ICE plans to have a Secure Communities presence in every state by 2011, and 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?

When an individual is booked into a jail, his or her fingerprints are checked against the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT), and the Automated Biometric Identification System (IDENT), in addition to the other databases that are generally checked following an arrest. This fingerprint check allows state and local law enforcement and ICE automatically and immediately to search the databases for an individual's criminal and immigration history.

If there is a database "hit," meaning that the arrested person is matched to a record indicating an immigration violation, ICE and the local law-enforcement authorities are automatically notified. ICE then evaluates each case to determine the individual's immigration status and take appropriate enforcement action. In most cases, ICE will issue a detainer against the jailed individual. A detainer is a request from ICE to the arresting agency to notify ICE before it releases the noncitizen so that ICE has the opportunity to decide whether the individual should be transferred to federal custody rather than released.

ICE reported that as of September 30, 2010, 4,204,862 fingerprint submissions resulted in 343,829 database matches. As a result of Secure Communities, ICE had removed 64,072 persons.

What are the concerns about Secure Communities?

Identification and prioritization. ICE claims to base action on an individual hit on the following priority order:

- **Level 1 offenders:** aliens convicted of "aggravated felonies," as defined in section 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as "felonies."
- **Level 2 offenders:** aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors;" and
- **Level 3 offenders:** aliens convicted of crimes punishable by less than one year.

ICE has stated that Secure Communities is focused on dangerous "Level 1" criminals, but there is concern about whether or not such prioritization is taking place. In Fiscal Year 2010 there were more than 248,000 database hits, compared to 95,000 in FY2009. Fifteen percent of all database matches identified immigrants charged or convicted of a Level 1 offense, and 85% were charged or convicted of a Level 2 or 3 offense.

Obstacles to community policing. Unlike the 287(g) program, Secure Communities does not require an MOA between ICE and the local jail, sheriff, or police department. Nonetheless, there are still concerns about local police being seen as immigration agents. 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.

Unnecessary or Prolonged Detention. The existence of a Secure Community detainer may limit an individual's ability to access a lawyer, fight criminal charges, or get out of jail on bail.

Profiling and pretextual arrests. While Secure Communities is a technological identification program through which all persons arrested are fingerprinted and checked against the various databases, there is a 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.

Lack of complaint mechanisms. Given the wide range of concerns about Secure Communities, it is essential that there be a complaint or redress procedure for individuals who believe they have been erroneously identified by DHS databases or who believe a DHS detainer has been issued in error. Currently there is no clear complaint procedure for persons who believe they have been victims of an error.

Lack of Oversight and Transparency. Various reports have found that ICE has an uneven track record in terms of supervising its local partnerships. As with other programs, there are concerns about the level of oversight and transparency associated with Secure Communities.

Lack of Data. Much more data about Secure Communities and the individuals it identifies is necessary. Without accurate data, it is difficult, if not impossible, to determine how Secure Communities is being implemented or how effective it is.

Recommendations

In light of what is known about Secure Communities—and the experience that immigration attorneys, civil-rights organizations, and other experts have had with similar ICE programs—IPC offers the following policy recommendations.

1. ICE must reinforce its commitment to prioritize those immigrants who have been convicted of egregious felony offenses, or who truly pose a threat to the community.

2. DHS should clarify that an immigration detainer is not the equivalent of a criminal arrest warrant or criminal detainer, and is simply a non-mandatory request that police maintain custody of an individual for a maximum of 48 hours to facilitate DHS's picking that person up. DHS should clarify that the local jail is not authorized to detain the subject for a period exceeding 48 hours, excluding weekends and holidays.

3. ICE should be required to issue reports to Congress on a regular basis, with statistics on the crimes for which identified non-citizens are arrested, the disposition of each underlying criminal case, and the nationality and ethnicity of identified non-citizens. Jurisdictions participating in Secure Communities should be required to report their arrest and identification statistics to ICE supervisors for oversight and management purposes.

4. Congress should request that the GAO or another neutral agency conduct an audit of the Secure Communities program. The report should contain an assessment of Secure Communities goals and objectives, performance measures, supervision and oversight, data tracking, and reporting mechanisms.

5. 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.

6. All jurisdictions participating in Secure Communities should receive training on civil rights and illegal racial or other profiling.

7. 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.

8. 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. Secure Communities should also ensure that any jurisdiction has the option to refuse to participate in the program, and that local authorities be given instructions for opting out.

INTRODUCTION

While the implementation by Immigration and Customs Enforcement (ICE) of the state/local partnership agreements known as the 287(g) program has been a source of great controversy, it is far from the only tool ICE uses to engage state and local law enforcement in immigration control. Most notably, the Secure Communities Program, which launched in March 2008, has been held out as a simplified model for state and local cooperation with federal immigration enforcement.

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, many of whom are not necessarily subject to removal. While state and local law-enforcement officers are not making arrests for immigration violations, they are allowing ICE to tap into information about detainees and make determinations about additional ICE enforcement action.

Although the program may allow ICE to identify genuine criminal threats, critics have pointed out that it suffers from many of the same problems plaguing 287(g). This paper lays out the limited information available on Secure Communities, identifies concerns raised over its operations, and makes recommendations for improving the program.

What is Secure Communities?

Representative David Price (D-4th/NC), chairman of the House Appropriations Subcommittee on Homeland Security, 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.[1]

The Fiscal Year (FY) 2008 appropriations for the Department of Homeland Security (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 contains $1.5 billion for identifying and removing criminal aliens, including $200 million for Secure Communities.[2]

In accordance with Congress's mandate, ICE launched the Secure Communities program in March 2008[3] to allow ICE to access local jails throughout the United States to identify immigrants subject to removal. On March 24, 2008, ICE submitted to Congress a report 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 Texas[4] has been expanded: As of October 2010, Secure Communities is available in 686 jurisdictions in 33 states.[5] ICE plans to have a Secure Communities presence in every state by 2011, and plans to implement Secure Communities in each of the 3,100 state and local jails across the country by 2013.[6] ICE also announced plans for a pilot program in Florida which will extend to all individuals on parole or probation.[7]

According to ICE, the Secure Communities program is based on three "pillars":

1. **Identify** criminal aliens through modernized information sharing;

2. **Prioritize** enforcement actions to ensure apprehension and removal of dangerous criminal aliens; and

3. **Transform** criminal alien enforcement processes and systems to achieve lasting results.[8]

Identify: Under Secure Communities, arrestees' fingerprints are automatically checked against the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT), and the Automated Biometric Identification System (IDENT), in addition to the other databases that are generally checked following an arrest. This fingerprint check allows state and local law enforcement and ICE automatically and immediately to search the databases for an individual's criminal and immigration history.

If there is a database "hit," meaning that the arrested person is matched to a record indicating an immigration violation, ICE and the local law-enforcement authorities are automatically notified. ICE has stated that its officers will "evaluate each case to determine the individual's immigration status and take appropriate enforcement action,"[9] which may mean, in most cases, that 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 the individual should be transferred to ICE custody rather than released.[11] ICE reported that as of September 30, 2010, 343,829 fingerprint submissions resulted in a database match.[12]

Prioritize: According to ICE statements and materials, Secure Communities is intended to target dangerous criminals and those who pose threats to public safety. The program's mission is, "Secure Communities is charged by Congressional mandate with improving and modernizing ICE's efforts to remove identified aliens convicted of a crime who have been sentenced to imprisonment."

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.[13] The memo outlines the civil immigration enforcement priorities as they relate to the apprehension, detention, and removal of aliens. According to the memo, Secure Communities bases action on an individual hit on the following priority order:

- **Level 1 offenders:** aliens convicted of "aggravated felonies," as defined in section 101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as "felonies." (ICE notes that the definition of aggravated felony includes serious, violent offenses as well as less serious, non violent offenses, and ICE personnel should prioritize the former within Level 1 offenses.)
- **Level 2 offenders:** aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors;" and
- **Level 3 offenders:** aliens convicted of crimes punishable by less than one year.[14]

This priority system causes a great deal of concern among immigrant advocates and others who have pointed out that ICE had no articulated mechanism for ensuring that Level 1 offenses are in fact prioritized, or how resources would be allocated among the three levels. Furthermore, Level 3 is exceedingly broad, and could have included large numbers of individuals who do not really fit into ICE's stated goal of targeting dangerous criminals and threats. Finally, fingerprints are checked through Secure Communities at the point of detention, not conviction, and detainers may be issued pre-conviction.

Transform: Through Secure Communities, ICE hopes 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. Unlike other ICE-local partnerships, Secure Communities gives ICE a technological, not physical, presence in prisons and jails. No Memoranda of Agreement (MOAs) with local law-enforcement agencies are required, and no local law-enforcement agents are deputized to enforce immigration laws through Secure Communities. However, MOAs between DHS and state identification bureaus are necessary. Local jails must have digital fingerprint equipment in order to participate in the program. Typically, local law-enforcement agencies do not submit fingerprints directly to federal databases (such as FBI databases), but do so through their state identification bureaus.

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.[15]

While some may claim that Secure Communities is an improvement over other federal-local partnerships such as the 287(g) program,[16] this new program still faces many of the same criticisms and problems as 287(g). Thus, to understand Secure Communities, we must first review its predecessor, the 287(g) program.

Precursor to Secure Communities: The 287(g) Program

Section 133 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), also known as section 287(g) of the Immigration and Nationality Act (INA), created a new method to engage state and local police in the enforcement of federal immigration law. Section 287(g) allows the Secretary of Homeland Security to enter into agreements that delegate immigration powers to local police, but only through negotiated agreements that are documented in MOAs.[17]

While there is strong support in some sectors for the 287(g) program, there has also been strong opposition from across the political spectrum: advocates for victims of domestic abuse, faith-based organizations, conservatives, immigrant-rights groups, elected officials, and law-enforcement officials. Criticism generally falls into three categories: the increased potential for costly mistakes and discrimination, the strain on already-limited police resources, and the harmful impact on community relations and community policing.

> ➢ **Mistakes, profiling, discrimination, and litigation.** Critics argue that involving local police in immigration law-enforcement activities is likely to lead to mistakes, racial profiling, discrimination, and costly litigation. Immigration law is extremely complex and subject to constant change, and documents used to prove immigration status are not uniform. Even with extensive training and experience, mistakes are very likely, and legal immigrants and U.S. citizens can be the victims of costly errors.[18]

> ➢ **Stretching limited resources.** The terrorist attacks of 9/11 and consequent security concerns placed a large fiscal burden on already overburdened cities, counties, and states. Respondents to a 2008 survey of law-enforcement executives ranked resources as their highest agency

concern, followed by staffing.[19] New policies encouraging or requiring state and local police departments to enforce civil immigration law add to the strain on resources. Training, arrest, processing, detention, and transport all require additional officer time, supervision, and money. Time spent processing immigration violations is also potentially time away from emergency responses, criminal investigations, and other critical needs.[20]

➤ **Immigrants' fear of cooperating with the police makes everyone less safe.** The mere suggestion that local police may have the authority to enforce immigration law sends a chill through Latino and immigrant communities, resulting in decreased willingness to cooperate with law enforcement, to report crimes, or to come forward as witnesses.[21] Fear is not limited to immigrants in violation of immigration law: millions are affected when law-enforcement officers, who may be untrained in immigration law, stop and question Latinos and other Americans who "look" or "sound" like they might be foreign. As a result of potential mistakes, discrimination, and profiling, the trust and communication built between the police and large segments of the community erode.

Secure Communities: Antidote to 287(g) or More of the Same?

Because Secure Communities is an information-sharing program and does not employ or deputize agents to enforce immigration laws, it arguably 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, early anecdotal data suggest otherwise.

Prioritization or Casting a Broad Net?

While ICE claims that Secure Communities is intended to identify immigrants who have been convicted of crimes, there is evidence that persons who have not been convicted of any crime have been targeted through the program. Although ICE has stated that Secure Communities is focused on violent or dangerous "Level 1" criminals, there is concern about whether or not such prioritization is taking place. At an April 2009 hearing, David Venturella, Executive Director of Secure Communities, testified that from October 2008 through February 2009 ICE had processed more than 117,000 fingerprint submissions, resulting in the identification of more than 12,000 "criminal aliens," **only 862 of whom (7.2%) were charged or convicted of Level 1 offenses**. Those 862 had either already been removed or were in removal proceedings.[22] Venturella did not state the nature of the offenses of the remaining individuals identified through the system, nor whether they had been placed in removal proceedings. A November 2009 ICE press release announced that, since its inception, Secure Communities had identified more than 111,000 criminal aliens in local custody, of which more than 11,000 were charged with or convicted of Level 1 crimes, while more than 100,000 had been convicted of Level 2 and 3 crimes.[23]

Questions remain about how ICE is prioritizing persons convicted of Level 1 offenses over persons arrested for Level 2 or 3 offenses. According to the latest ICE data, between October 2009 and September 10, 2010, Secure Communities resulted in 49,638 removals, 23% of which were for Level 1 crimes, 49% were Levels 2 and 3, and 28% were non-criminals. During the same time period, 24% of Secure Communities arrests were Level 1 while 30% were non-criminals.[24] ICE does not provide statistics detailing the crime for which each person was arrested or convicted, nor do they provide data on the number of Legal Permanent Residents identified and deported through Secure Communities for recent or past crimes.

Past efforts to prioritize violent offenders have met with little success. A September 2009 report by the Warren Institute on Race, Ethnicity, and Diversity at the University of California, Berkeley documents ICE's Criminal Alien Program (CAP) in Irving, Texas over a 15-month period.   Similar to Secure Communities, CAP focuses on identifying removable immigrants within federal, state, and local prisons and jails.[25]   The report finds, however, that ICE has failed to target serious criminal immigrants for deportation.[26] The data show that over the 15-month period studied, only 2% of all the detainers issued by ICE were for individuals charged with felony offenses. Misdemeanors accounted for 98% of detainers issued.[27]

A 2009 report by the Migration Policy Institute (MPI) examined ICE's Fugitive Operations Teams (FOTs), which were created to locate and detain fugitive immigrants who pose a threat to the nation or the community or who have a violent criminal history. MPI found that while the number of immigrants apprehended by FOTs has increased, they have netted fewer violent criminals and arrested greater numbers of unauthorized immigrants with no criminal history. Specifically, MPI found that 73% of the individuals apprehended by FOTs had no criminal convictions.[28] In 2007, fugitives with criminal convictions represented just 9% of total FOT arrests.[29] Many of these individuals were "ordinary status violators" —individuals which the FOTs believe are unauthorized or in violation of immigration laws, but who have not been charged with anything. The number of ordinary status violators detained by FOTs increased in 2006 when ICE instituted a quota system requiring agents to arrest a certain number of immigrants during a specified time period. Ordinary status violators now constitute approximately 40% of all FOT arrests.[30]

In North Carolina, a report on the state's 287(g) program found that, while the 287(g) partnership program with DHS was intended to target immigrants convicted of violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling, and money laundering, the federal/local partnerships are actually being used to "purge towns and cities of 'unwelcome' immigrants."[31]   During May 2008, 83% of the immigrants arrested by officers deputized to perform immigration enforcement duties in Gaston County, NC were charged with traffic violations.[32]

In summary, DHS's track record on prioritizing violent criminals is far from stellar, leaving much doubt about ICE's compliance with the stated intentions of the Secure Communities program.

Furthermore, there is concern about the point at which immigrants are identified in the process. Secure Communities' materials originally claimed to focus on convicted criminals.[33]   However, subsequent information and data from ICE have shown otherwise. For example, in April 2009, 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.[34]   The mere mention of those "charged" with offenses raised eyebrows because of ICE's claim that Secure Communities was focused on individuals with convictions.[35]   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."[36]

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, 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."[37]   The most recent 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."[38] Thus it appears that ICE has changed the stated objectives of the program several times and continually updates 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.

Obstacles to Community Policing

Similar to the 287(g) program, 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.[39] But like the 287(g) program, Secure Communities has the potential to erode the ability of police to make these kinds of assurances to their communities.

Unlike the 287(g) program, Secure Communities does not require an MOA between ICE and the local jail, sheriff, or police department. Nonetheless, many of the concerns voiced by police associations regarding the potential reluctance of immigrant communities to cooperate with the police remain. 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.

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 affecting the community. Since the program's inception, it has been unclear exactly how ICE has approached local authorities to participate in Secure Communities, and whether localities can decline to participate in the program. Given ICE's stated intention to eventually install the system in all state and local detention facilities nationwide, it has been unclear whether the program will be mandatory or optional for all law-enforcement agencies, or if there are penalties for law-enforcement agencies that opt not to participate. Much of the confusion is due to the fact that the Secure Communities MOA is 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. According to the *Secure Communities Standard Operating Procedures*, local law-enforcement agencies submit the fingerprints to the state identification bureau, which then forwards the prints to the Department of Justice (DOJ), which then sends the fingerprints to both the FBI crime databases and immigration databases.[40] If states sign the MOAs, the question is whether each jurisdiction within the states must also participate because all fingerprints are going through the state agency. This also raises questions about whether local law-enforcement agencies may be unknowingly submitting fingerprints to Secure Communities through the state agency.

Several local jurisdictions -- including the Santa Clara (CA) Board of Supervisors, the Arlington County (VA) Board, and the Sheriff of San Francisco -- have asked to opt-out, and were given different and conflicting responses.[41] Finally 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 in response to Rep. Lofgren.[42]

However, in a September 30 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.[43]

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.

Thus it appears that local jurisdictions are unable to opt-out of Secure Communities for technological and policy reasons.

Due Process and Civil Rights Concerns

- ➢ **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.[44] 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 be more difficult for persons with ICE detainers to defend themselves against charges that have been made. 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. 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.[45]

  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. 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, this causes courts to issue warrants of arrest or judgments of conviction. This in turn makes the individuals ineligible for future immigration benefits.

- ➢ **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 the various

databases. Since Secure Communities does not employ agents or deputize local agents, and since Secure Communities is not involved in the actual arrests of individuals or the detainer and removal process, Secure Communities does not pose the possibility for racial/ethnic profiling. However, there is a 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.[46]

While there is not sufficient data on areas where Secure Communities has been implemented to determine whether or not profiling has taken place, a pattern of profiling and pretextual arrests has precedent in other jail-based programs. The 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.[47] As more data becomes available, researchers will be able to look for similar patterns in states and jurisdictions that participate in Secure Communities.

> **Lack of complaint mechanisms.** Given the wide range of concerns about Secure Communities, particularly this early in its implementation, the lack of any clear complaint process is a major weakness in the program. Nothing in the public materials ICE has released provide for a complaint or redress procedure for individuals who believe they have been erroneously identified by DHS databases or who believe a DHS detainer has been issued in error. Nor is there a complaint procedure for persons who believe they have been wrongly arrested.[48]

Concerns with Program Management

> **Lack of Oversight and Transparency.** Secure Communities is still in its early stages, so it is difficult to assess the level of oversight and transparency that the program will support. Once again, the 287(g) experience is worth reviewing: 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.[49]

> 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.[50] 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.

In July 2009, DHS announced modifications to the 287(g) program designed to address these concerns.[51] However, to date, ICE has not issued regulations governing the implementation of Secure Communities. Furthermore, the fact sheets and press releases that DHS has issued do not include any requirements for data collection, audits, or oversight.

➢ **Lack of Data.** Without accurate data, it is difficult, if not impossible, to determine how Secure Communities is being implemented or how effective it is. The materials ICE has published to date do not mention any record-keeping requirements or procedures. Needed are statistics on the crimes for which identified non-citizens are arrested, the disposition of the underlying criminal case, and the nationality and ethnicity of those identified.

A further complication is the existence of multiple ICE programs in a state or locality. For example, one locality can participate in Secure Communities, have a 287(g) MOA, and participate in the Criminal Alien Program or any of the other ICE ACCESS community partnerships with ICE. If an inmate has a detainer, it is impossible to determine if the detainer is the result of Secure Communities or another program, or if the individual simply confessed to an immigration-status violation, making it extremely difficult to determine the effectiveness of any one program or initiative.

CONCLUSION

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

Research has shown that other ICE programs designed to prioritize violent criminals and threats to the community have resulted in the identification and deportation of more non-criminal immigrants than immigrants with criminal histories. Rather than re-tool the program to truly focus on the most dangerous criminals, ICE has broadened its language to include persons simply charged with crimes of any kind.

The mechanism for identifying individual immigrants for ICE action means that every person booked into a local jail will be screened. While this appears to eliminate the possibility of racial and ethnic profiling, experience has demonstrated that once such immigration programs are put into place, the likelihood of pretextual arrests increases, as police seek to expand the universe of individuals to be screened.

While Secure Communities aims to transform the relationship between local police and federal authorities (ICE), the fact that Secure Communities does not include an MOA to deputize local police officers does not alleviate the fear and mistrust of the police that immigrant communities experience when immigration-enforcement activity is conducted at local jails. Concerns about pretextual arrests, profiling, and an ICE presence in the jails is likely to result in a community that is hesitant to cooperate with the police, report crimes, or share important information. In this sense, Secure Communities may make the job of local police more difficult.

Furthermore, there are serious due-process concerns surrounding the issuance of ICE detainers. The fact that individuals may be unable to seek justice or may be detained for long periods of time should raise red flags in the legal and civil-rights communities, as well as for the general public interested in preserving Constitutional rights. The lack of a functioning complaint mechanism for those who feel they have been wronged only underscores the need to revisit Secure Communities' policies and procedures, as well as ICE's detainer procedures.

Finally, ICE's less-than-ideal management and oversight track record poses serious concerns about the agency's ability to oversee Secure Communities. The seeming lack of data collection and transparency only makes it more difficult to evaluate the program, either to confirm or dismiss criticism from advocates and the public. ICE has recently engaged in outreach and communication with immigrant-advocacy groups and others, and has made some key documents and information public. This is a good sign that ICE intends to be open and transparent about Secure Communities. However, the program must still be carefully monitored and evaluated. In light of what is known about Secure Communities— and the experience that immigration attorneys, civil-rights organizations, and other experts have had with similar ICE programs—IPC offers the following policy recommendations.

RECOMMENDATIONS

1. ICE must reinforce its commitment to prioritize those immigrants who have been convicted of egregious felony offenses, or who truly pose a threat to the community, by issuing strict guidelines that include:

   - Secure Communities should not be focused on individuals convicted of non-felony offenses.

   - Secure Communities screening should take place upon conviction, not during the pre-conviction stage.

2. DHS should clarify that an immigration detainer is not the equivalent of a criminal arrest warrant or criminal detainer, and is simply a non-mandatory request that police maintain custody of an individual for a maximum of 48 hours to facilitate DHS's picking that person up. DHS should clarify that the local jail is not authorized to detain the subject for a period exceeding 48 hours, excluding weekends and holidays.

3. ICE should be required to issue reports to Congress on a regular basis, with statistics on the crimes for which identified non-citizens are arrested, the disposition of each underlying criminal case, and the nationality and ethnicity of identified non-citizens. Jurisdictions participating in Secure Communities should be required to report their arrest and identification statistics to ICE supervisors for oversight and management purposes.

4. Congress should request that the GAO or another neutral agency conduct an audit of the Secure Communities program. The report should contain an assessment of Secure Communities goals and objectives, performance measures, supervision and oversight, data tracking, and reporting mechanisms. It is important that officials overseeing the Secure Communities program review the GAO report on 287(g) and make every effort to ensure that this vast new national program be properly defined, documented, evaluated, and supervised. Given the documented shortcomings of the 287(g) and CAP programs, mechanisms should be put into place on the front end, and not delayed until another damaging report is issued on the failures of Secure Communities.

5. 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.

6. All jurisdictions participating in Secure Communities should receive training on civil rights and illegal racial or other profiling.

7. 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.

8. 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. Secure Communities should also ensure that any jurisdiction has the option to refuse to participate in the program, and that local authorities be given instructions for opting out.

Endnotes

[1] Rep. David Price, "Homeland Security Challenges Facing the Next Administration," speech at the Center for American Progress (CAP) Action Fund, Washington, DC, June 23, 2008.

[2] U.S. Congress, *FY2010 Conference Summary: Homeland Security Appropriations*, October 7, 2009.

[3] U.S. Immigration and Customs Enforcement, "News Release: ICE unveils sweeping new plan to target criminal aliens in jails nationwide," March 28, 2008.

[4] U.S. Immigration and Customs Enforcement, "News Release: Harris County Sheriff's Office first of several sites in the nation to receive full interoperability technology to help identify criminal aliens," October 29, 2008.

[5] U.S. Immigration and Customs Enforcement, "Secure Communities: Deployment," updated October 19, 2010.

[6] U.S. Immigration and Customs Enforcement, "News Release: Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 110,000 criminal aliens in its first year," November 12, 2009.

[7] Testimony of David Venturella, Executive Director, Secure Communities, Immigration and Customs Enforcement, before the House Appropriations Committee, Subcommittee on Homeland Security, April 2, 2009.

[8] Ibid.

[9] U.S. Immigration and Customs Enforcement, *Fact Sheet: Secure Communities*, March 28, 2008. A more recent description is *Secure Communities Fact Sheet*, September 1, 2009 (no longer available).

[10] Note that Secure Communities does not issue the detainer. Secure Communities is a technology that identifies the individual. Other ICE officers must then take over the removal process after the identification is made.

[11] 8 CFR 287.7(a) and 8 CFR 287.7(d).

[12] See U.S. Immigration and Customs Enforcement, Monthly Statistics through September 30, 2010. October 4, 2010.

[13] Morton, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens."

[14] John Morton, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens."

[15] Rep. David Price, "Statement on Passage of FY2010 Appropriations," July 25, 2009.

[16] For information, see Immigration Policy Center, *Local Enforcement of Immigration Laws Through the 287(g) Program: Time, Money, and Resources Don't Add Up to Community Safety*," April 1, 2009.

[17] See U.S. Immigration and Customs Enforcement, "*Fact Sheet: Delegation of Immigration Authority Section 287(g)*," May 19, 2009. After significant criticism of the program, DHS recently announced that it has standardized the MOA and is renegotiating all current MOAs. DHS also announced that it expanded the 287(g) program to 11 additional jurisdictions. See Department of Homeland Security, "Press Release: Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements," July 10, 2009.

[18] For example, see Suzanne Gamboa, "Citizens Held as Illegal Immigrants," Associated Press, April 12, 2009; "Native Was Threatened with Deportation," Associated Press, September 1, 2007.

[19] Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* (Washington, DC: Police Foundation, April 2009), p. 26.

[20] See Ryan Gabrielson, "Public Safety Shortchanged Throughout County," *East Valley Tribune*, July 12, 2008.

[21] For example, see American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic of the University of North Carolina at Chapel Hill, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, February 2009; Aarti Shahani and Judith Greene, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement* (Brooklyn, NY: Justice Strategies, February 2009).

[22] Testimony of David Venturella, Executive Director, Secure Communities, Immigration and Customs Enforcement, before the House Appropriations Committee, Subcommittee on Homeland Security, April 2, 2009.

[23] U.S. Immigration and Customs Enforcement, "News Release: Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 110,000 criminal aliens in its first year," November 12, 2009.

[24] Ibid. It is the case that fewer people commit Level 1 crimes than Level 2 or 3 crimes, and the number of persons deported for Level 1 offenses will likely continue to be relatively smaller. Furthermore, most Secure Communities programs have had the system in place for less than two years. Serious criminal offenders serving lengthy sentences are likely still imprisoned and will appear in the removal statistics at a future date while those convicted of lesser crimes serve shorter sentences and are removed more quickly. See U.S. Immigration and Customs

Service, "Setting the Record Straight," August 17, 2010. For more criticism of Secure Communities, see www.uncoverthetruth.org.

[25] See ICE Fact Sheet on the Criminal Alien Program, November 19, 2010.

[26] Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Berkeley, CA: University of California, Berkeley Law School, September 2009).

[27] Ibid.

[28] Margot Mendelson, Shayna Strom, and Michael Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program* (Washington, DC: Migration Policy Institute, February 2009).

[29] Ibid.

[30] Ibid.

[31] American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic of the University of North Carolina at Chapel Hill, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*, February 2009.

[32] Ibid.

[33] From U.S. Immigration and Customs Enforcement, "News Release: ICE unveils sweeping new plan to target criminal aliens in jails nationwide," March 28, 2008.

[34] Testimony of David Venturella, Executive Director, Secure Communities, Immigration and Customs Enforcement, before the House Appropriations Committee, Subcommittee on Homeland Security, April 2, 2009.

[35] National Immigration Law Center, *More Questions Than Answers about the Secure Communities Program* (Washington, DC: March 2009).

[36] Rep. David Price, "Homeland Security Challenges Facing the Next Administration," speech at the Center for American Progress (CAP) Action Fund, Washington, DC, June 23, 2008.

[37] U.S. Immigration and Customs Enforcement, *Secure Communities Fact Sheet*, September 1, 2009. (No longer on the ICE website)

[38] U.S. Immigration and Customs Enforcement. "Secure Communities: A Modern Approach to Identifying and Removing Criminal Aliens." Brochure found at http://www.ice.gov/doclib/about/offices/secure-communities/pdf/sc-brochure.pdf.

[39] Lynn Tramonte, *Debunking the Myth of "Sanctuary Cities." Community Policing Policies Protect American Communities* (Washington, DC: Immigration Policy Center, March 2009)

[40] U.S. Immigration and Customs Enforcement, *Memorandum of Agreement Between U.S. Department of Homeland Security, Immigration and Customs Enforcement, And [State Identification Bureau]*.

[41] Shankar Vedantum, "No Opt-Out for Immigration Enforcement." *Washington Post*, October 1, 2010.

[42] U.S. Department of Justice, letter to Congresswoman Zoe Lofgren, September 8, 2010. Also see www.uncoverthetruth.org for additional background information including the letters sent from elected officials to ICE.

[43] Shankar Vedantum, "No Opt Out for Immigration Enforcement," *Washington Post*, October 1, 2010.

[44] 8 CFR 287.7(a) and 8 CFR 287.7(d).

[45] National Immigration Law Center, *More Questions Than Answers about the Secure Communities Program* (Washington, DC: March 2009).

[46] See James C. McKinley, "Debate Intensifies over Deportations," *New York Times*, July 25, 2009.

[47] Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Berkeley, CA: University of California, Berkeley Law School, September 2009).

[48] National Immigration Law Center, *More Questions Than Answers about the Secure Communities Program* (Washington, DC: March 2009).

[49] U.S. Government Accountability Office, *Immigration Enforcement: Controls over Program Authorizing State and Local Enforcement of Federal Immigration Laws Should Be Strengthened*, GAO-09-381T, March 4, 2009.

[50] Aarti Shahani and Judith Greene, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement* (Brooklyn, NY: Justice Strategies, February 2009).

[51] Department of Homeland Security, "Press Release: Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements," July 10, 2009.