

July 22, 2011

Charles K. Edwards, Acting Inspector General  
Office of the Inspector General  
Department of Homeland Security  
Washington, D.C. 20528

**Re: Questions and concerns regarding Secure Communities**

Dear Acting Inspector General Edwards,

We appreciate your staff taking the time to speak with us about our concerns regarding the Secure Communities program operated by the Department of Homeland Security (DHS). As you know, Secure Communities is part of a growing system of programs which partner local law enforcement agencies with Immigration and Customs Enforcement (ICE) in the enforcement of federal immigration laws. Secure Communities, which was implemented in 2008, checks the fingerprints of criminal arrestees at participating law enforcement agencies against DHS immigration databases. The Secure Communities program is currently activated in over 1,400 jurisdictions in 44 states.<sup>1</sup> Although the program has been rolled out at breakneck speed, it has several flaws which are a great cause of concern and confusion.

Specific issues raised by Secure Communities are listed below. We urge your office to consider each of these issues in the course of your review of the program. It is critical that your review is comprehensive in scope and also examines the operation of Secure Communities both before and after June 17, 2011, when ICE announced changes to the program. Although mindful of delay, we seek to avoid a situation where ICE may point to the changes it announced on June 17 as having resolved any recommendations put forward in your report. Thus, one possible termination date for a post-June 17, 2011 Secure Communities analysis would be at a statistically meaningful point after ICE's "advisory committee" issues its recommendations regarding changes to Secure Communities' treatment of traffic offenders.

***I. Transparency has been lacking throughout the development and implementation of Secure Communities***

During its initial implementation of the Secure Communities program, DHS failed to provide full and accurate details of how the program operates to the public or to jurisdictions approached to participate. More specifically, DHS did not explain the mechanisms for instating the program or the legal authority mandating how the program works. Much of the confusion surrounds the Memoranda of Agreement (MOA) struck between ICE and individual states. Although some states have tried to opt out of these agreements, their decisions have been met with resistance – ICE claims it is not possible for these states to opt out. If ICE is correct and states lack the ability to opt out of Secure Communities, then what is the purpose of the MOAs?

Secure Communities also allows the sharing of fingerprints between law enforcement agencies. This raises the question of which authority owns the actual fingerprints. If fingerprints

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<sup>1</sup> Immigration and Customs Enforcement, Activated Communities, (July 2011) available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>

are the property of individual states, what authority allows DHS to override state attempts to block access? Furthermore, what is the interpretation of statutory authority that allows fingerprint sharing between ICE and the Federal Bureau of Investigation (FBI)?

We recommend that your office speak with local law enforcement agencies to determine what information they received prior to Secure Communities being activated in their jurisdiction, as well as the accuracy of the information provided. Through FOIA requests it is clear that Secure Communities is part of a bigger data sharing program (Next Generation Initiative) that is being launched in 2013. It is essential that the Inspector General explores the connections between NGI and Secure Communities. Furthermore, it is important to investigate whether Secure Communities is truly mandatory and if so, where this statutory authority stems from.

## ***II. The need for better statistical monitoring of Secure Communities.***

As Secure Communities is implemented in a growing number of locales, the need for effective monitoring increases. Although ICE claims the program is of no cost to municipalities, there is currently no way to assess the veracity of this claim. In fact, participating jurisdictions are likely to experience increased incarceration costs as a result of Secure Communities-initiated detainers. Information about the actual and probable costs of the program and the distribution of expenses needs to be made available to the public.

In addition, many of the definitions ICE uses have shifted over time; including key terms such as ‘criminal aliens’ and the levels of offenses as categorized by Secure Communities. These vague terms are frequently used in public relations but their definitions lack consistency. As definitions change, it is essential that statistical monitoring is properly adjusted to maintain accuracy. For example, traffic violations appear to be classified as crimes now, but prior to 2008 they were not categorized among crimes. Clear guidelines must explain how the priority levels of crimes are defined, and the process by which they have evolved. The Inspector General’s audit should examine this data and the way it has transformed over time. The importance of accurate and accessible statistics is essential to revealing potential flaws in the Secure Communities program – especially in terms of racial monitoring and ethnic data, as well as information about 911 calls from victims and witnesses in immigrant communities.

## ***III. Secure Communities’ adherence to stated goals***

Secure Communities has dramatically failed to adhere to its stated goals. DHS officials frequently refer to a “Congressional mandate” for the Secure Communities program, but such a mandate is not clear. Appropriations language from the Fiscal Year 2008 appropriations act instructs that DHS “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them...” and required a plan that “presents a methodology U.S. Immigration and Customs Enforcement will use to identify and prioritize for removal criminal aliens convicted of violent crimes...”<sup>2</sup> Despite this instruction from Congress and early claims by DHS that the program would focus on convicted criminals, it has failed to prioritize non-citizens convicted of the most dangerous crimes. Instead, ICE has used the program to apprehend mostly people with minor offenses or no criminal record at all. 74% of the individuals arrested and removed under Secure Communities do not fit the profile of those committing serious crimes and 60% had committed no criminal offense greater

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<sup>2</sup> The Consolidated Appropriations Act Fiscal Year 2008, Pub. L. No. 110-161 (2007).

than a misdemeanor.<sup>3</sup> Additionally, ICE materials and policies have shifted regarding the target population of Secure Communities. At times the program has been described as and used for targeting people who have been merely charged with offenses, while at other times it said to focus on individuals who have been convicted of serious offenses. As a result, valuable resources have been used to identify, arrest, and remove non-citizens who present no danger to the United States and have little to do with the stated goals of the Secure Communities program.

#### ***IV. The impact of Secure Communities on community policing***

Secure Communities involves running the fingerprints of criminal arrestees against DHS databases to check immigration history. The possibility of immigration consequences resulting from interactions with law enforcement is a deterrent that prevents many immigrants from assisting or contacting law enforcement officials. This fear hinders the effectiveness of community policing programs whose success hinges upon building relationships between law enforcement and community members. There are countless statements by law enforcement professionals illustrating the devastating impact Secure Communities has had on their agencies' relationships with the communities they serve.

#### ***V. Lack of oversight of Secure Communities***

Secure Communities is vulnerable to abuse by local police. Despite its rapid expansion, DHS has failed to properly oversee the implementation and results of Secure Communities. Areas of concern include possible civil rights violations, the destruction of community policing efforts, and reliance on racial profiling. ICE has displayed willful blindness to the effects of implementing Secure Communities. ICE has failed to screen and vet police jurisdictions under investigation or being sued for civil rights violations prior to deployment or during operation of Secure Communities in those jurisdictions. This is especially troubling given the possibility that law enforcement officials may arrest individuals for pretextual reasons and then check their immigration status through Secure Communities when their fingerprints are taken. Through Secure Communities, an individual's immigration history is checked regardless of the severity of the arresting crime or whether the arrest ever results in a conviction or even a formal charge. Thus, a mere arrest is sufficient to lead to detention and deportation in many cases. No safeguards are in place to ensure that state and local law enforcement officials do not arrest individuals who may look or sound "foreign" just so their immigration status can be checked.

Studies have shown that jail screening programs for immigration violations lead to increased rates of arrests of Latinos for petty offenses. For example, a report on the Criminal Alien Program (CAP) by the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at Berkeley School of Law found that implementation of the CAP program in Irving, Texas coincided with a spike in the arrests of Latinos for petty crimes.<sup>4</sup> The Warren Center's report

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<sup>3</sup> Immigration and Customs Enforcement, Secure Communities, IDENT/IAFIS Interoperability Statistics (June 2011) available at [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf) (60% of the individuals arrested and removed were categorized as Level 3 offenders and noncriminal immigration violators, 74% were categorized as level 2, level 3, and noncriminal violators.)

<sup>4</sup> Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (The Warren Institute on Race, Ethnicity and Diversity, Sept. 2009), available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).

concluded that there is compelling evidence that the CAP program tacitly encourages racial profiling.

Measures need to be adopted to ensure that the program is not being used as a conduit to encourage bad policing. John Morton, Director of ICE, announced on Friday June 17, 2011 that the DHS Office for Civil Rights and Civil Liberties (CRCL) would track data to identify effectiveness and monitor any indications of potentially improper use of the program. Statistical monitoring alone is not enough. There has been no commitment to act on the statistics that are gathered, nor does DHS claim to have jurisdiction over local police. The mere collection of statistics is not a sufficient resolution and will not amount to effective oversight. Penalties and repercussions are needed for abuses of law.

To further exacerbate the situation, although CRCL has updated complaint forms, they are still rife with problems. Complaint forms are not confidential nor are they available in jails. The lack of confidentiality makes it less likely that complainants will come forward because they may fear reprisal. Forms are available online, however, it is unlikely potential complainants will be aware of their availability and they will lack the ability to access the form while in jail. Although CRCL has expressed reluctance to make the form available in jails because of hesitance relating to their resource and staffing capacity to receive and respond to a new influx of complaints, the effective result is to ensure that few complaints are filed.

Finally, CRCL lacks jurisdiction over state and local law enforcement agencies. Thus, CRCL cannot investigate complaints of pretextual arrests or racial profiling even if they were filed by individuals who were arrested and detained under Secure Communities. Only the Department of Justice (DOJ) has the authority to handle such investigations, but given limited resources, DOJ has been reluctant to do so. Historically, DOJ has focused its attention not on individual complaints but only on a handful of pattern and practice investigations instead. This is not sufficient monitoring or oversight of Secure Communities which is already in effect in over 1,400 jurisdictions and is expected to be implemented nationwide by 2013.

#### ***VI. The potential that detainers issued through Secure Communities will lead to due process violations***

Secure Communities uses detainers to request local law enforcement personnel hold specified immigrants for up to an additional 48 hours beyond when they otherwise would be released from criminal custody. These detainers have on a number of occasions resulted in violations of due process and liberty interests. Detainers are a major area of concern under the Secure Communities program, as well as all of ICE's partnership programs with state and local law enforcement, and should be the subject of a separate audit.

Furthermore, given the recent June 17, 2011 memos regarding prosecutorial discretion, any audit of detainer practices should examine statistics about individuals who were released without a detainer or a notice to appear as a result of the memo. The proper application of the memo should theoretically narrow the class of individuals subject to a detainer and ultimately taken into ICE custody.

Thank you for your consideration,

Sincerely,

American Civil Liberties Union  
American Immigration Council  
Massachusetts Immigrant and Refugee Advocacy Coalition  
National Immigration Forum  
National Immigration Law Center  
OneAmerica  
Women's Refugee Commission

# APPENDIX