



June 20, 2011

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

Dear General Edwards:

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We are writing to commend the Office of Inspector General (OIG) for its prioritization of an audit of the Immigration and Customs Enforcement (ICE) program, Secure Communities. We support the OIG's intended focus on how effectively Secure Communities focuses, as it claims to, on the removal of "dangerous criminal aliens." In addition, we support the OIG's commitment to investigate "the cost of the program, equitable use at different communities, the accuracy of ICE's data collection, and . . . the controversy regarding communities' requirement to participate and ability to 'opt out' of the program."¹

We write to urge the OIG to interpret its mandate to include a thorough investigation of whether the program comports with basic constitutional protections and the agency's stated priorities. This would include investigating the ways in which Secure Communities:

- facilitates racial profiling and unconstitutional arrests
- creates the risk of unlawful detention
- unfairly impacts offenders charged with minor crimes and individuals charged with no crime at all, including victims and witnesses
- denies equal protection of the laws to immigrants and people of color by discouraging them from seeking the protection of the criminal justice system
- fails to establish meaningful oversight procedures

We offer examples below of several problems that have emerged regarding Secure Communities, which cumulatively necessitate a detailed, comprehensive investigation.

¹ Letter from Charles K. Edwards, Acting Inspector General, U.S. Department of Homeland Security, to Rep. Zoe Lofgren, Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, (May 10, 2011).

A. Failure to Implement Priorities

Secure Communities lacks a statutory mandate, and no federal regulations govern its operations. DHS created Secure Communities pursuant to an appropriations bill that dedicated funds to “improv[ing] and moderniz[ing] efforts to identify and remove 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.”² In 2010, an appropriations bill clarified that ICE’s priority should be the removal of aliens “convicted of *serious crimes*.”³ When Secure Communities was originally implemented, it was supposed to target “the worst of the worst,”⁴ and the ICE brochure on Secure Communities currently proclaims that ICE focuses its efforts on “the most dangerous and violent offenders.”⁵

The basic design of Secure Communities, however, directly contradicts the premise that the program is directed at serious criminal offenders. The program identifies people and submits them to investigation at the point of *arrest*, before they have been charged with or convicted of any crime. The statistical data on who is processed by the program completely refutes ICE’s claims regarding its mission. Only a quarter of individuals who have been removed or returned since Secure Communities was initiated have been “Level 1” offenders, supposedly the principal targets of the program, and 60% of those removed or returned were either noncriminal immigrants or individuals convicted of low-level offenses like traffic violations. As the program has expanded rapidly into new jurisdictions (a 68% increase in the last six months), the percentage of “Level 1” offenders removed has decreased, while the percentage of noncriminals removed has increased.⁶ When Governor Pat Quinn of Illinois terminated the existing Secure Communities Memorandum of Agreement between the Illinois State Police and ICE this May, he expressed particular concern that “by ICE’s own measure, less than 20% of those who have been deported from Illinois under the program have ever been convicted of a serious crime. . . . [M]ore than 30% of those deported . . . have never been convicted of *any* crime, much less a serious one.”⁷

It is imperative that OIG determine whether ICE in practice prioritizes removals of “Level 1” offenders. ICE has never demonstrated any mechanisms to ensure that the program’s supposed focus on immigrants convicted of serious offenses is maintained;

² Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 110th Cong. (2008) (emphasis added).

³ H.R. REP. 111-157, at 8 (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr157.111.pdf (“Since 2007, the Committee has emphasized how ICE should have no higher immigration enforcement priority than deporting those who have proved their intent to do harm and have been convicted of serious crimes.”).

⁴ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT 5 (2008).

⁵ U.S. Immigration and Customs Enforcement, “Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens” (Jan. 2010), available at www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf.

⁶ Using the most recent data released by ICE, the percent of “Level 1” offenders removed compared to the total number of Secure Communities removals in October 2010 was 27.5%. In April 2011, that number had decreased to 22.3%, which is below the program’s cumulative average of 25.8%. The percent of noncriminal offenders removed compared to the total number of Secure Communities removals in October 2010 was 28.5%. In April 2011, that number had increased to 36.8%, which is above the program’s cumulative average of 29.2%. U.S. Immigration and Customs Enforcement, *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011* (May 23, 2011), available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf.

⁷ Letter from Pat Quinn, Governor of Illinois, to Marc Rapp, Acting Assistant Director, Secure Communities, Immigration and Customs Enforcement (May 4, 2011).

instead, the agency states that it will process as many arrestees as resources allow. The only guidelines governing the operation of Secure Communities appear in written Memoranda of Agreement (MOAs) between ICE and individual states and a memorandum written by John Morton, director of ICE, regarding ICE's general civil immigration enforcement priorities.⁸ The Secure Communities MOAs set out, in broad terms, the parties' roles and responsibilities and contain a perfunctory prohibition of racial profiling.⁹ There is nothing in any of these documents that suggests a comprehensive mechanism at the Law Enforcement Support Center (LESC) or in local ICE offices to ensure that convicted Level 1 offenders are prioritized for removal. Instead, as discussed further below, ICE uses immigration detainers to ensure that any arrestee is channeled into the immigration enforcement system, regardless of criminal history.

One particularly problematic aspect of ICE's management of this program involves the ever-changing definition of what is a "dangerous criminal alien." In November 2009, ICE announced that during the first year of the program it had identified 110,000 criminal aliens through Secure Communities. Shortly thereafter, ICE corrected its press release to say that it had identified more than 111,000 aliens "charged with or convicted of crimes."¹⁰ Initially, ICE considered anyone "identified" by Secure Communities a "criminal alien." Only after the numbers were challenged did ICE specify that these were actually not all "criminals."

ICE acknowledges the high number of "noncriminals" who receive detainers and who are eventually removed. However, ICE has argued that approximately one-third of these "noncriminals" are "illegal reentrants," fugitives, and others who "have a lengthy immigration history or have been encountered multiple times at the border."¹¹ Even if one-third of the noncriminal violators removed or returned in April 2010 were excluded, however, the remaining noncriminal offenders would still constitute 25% of all removals.

B. *Failures in Execution*

1. *Erroneous Identifications*

There are also serious issues with erroneous identifications using the IDENT database that Secure Communities uses. In 2004, the OIG explained that DHS officials were opposed to full interoperability with the FBI's IAFIS database because of concerns regarding the reliability of information in IDENT.¹² Even where data is correctly entered

⁸ Memorandum to ICE Employees from John Morton, Director of U.S. Immigration & Customs Enforcement (Mar. 2, 2011).

⁹ See, e.g., Secure Communities Memorandum of Agreement with Arizona Dept. of Public Safety (Dec. 9, 2009), available at http://www.ice.gov/doclib/foia/secure_communities-moa/r_arizona_120909.pdf (attached).

¹⁰ Press Release, U.S. Immigration and Customs Enforcement, "Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Aliens Charged with or Convicted of Crimes in Its First Year" (Nov. 12, 2009), available at www.ice.gov/news/releases/0911/091112washington.htm. When it was first issued, however, this press release's headline was "Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 110,000 Criminal Aliens in Its First Year."

¹¹ Shankar Vedantam, *Disparities in deportation program raise questions*, WASH. POST, Dec. 21, 2010.

¹² Office of the Inspector General, Department of Justice, *Follow-up Review of the Status of IDENT/IAFIS Integration* 40-41 (2004), available at www.justice.gov/oig/reports/plus/e0501/final.pdf.

into the database, it often does not reflect changes in status. For example, if an individual naturalizes, obtains a new visa, or adjusts status, failure to update their information in IDENT would mean that they appear removable. Perla, a naturalized U.S. citizen, was detained by local police after a traffic violation because her IDENT records had not been updated.¹³ In Secure Communities' first year alone, five percent of matches were U.S. citizens.¹⁴ As discussed further below, this means that citizens and lawful permanent residents can be subject to detainers which can lead to several days of unlawful detention, which must be paid for by the local law enforcement agency.¹⁵ For example, Ernesto Galarza, a U.S. citizen born in New Jersey, was held at Lehigh County Prison in Pennsylvania on an ICE detainer based on an erroneous identification. His Pennsylvania driver's license and U.S. social security card were in his wallet at the time of his arrest.¹⁶

2. *Costs*

ICE insists that law enforcement agencies "incur little to no cost"¹⁷ in implementing Secure Communities. However, police on the ground have reported that there are significant costs. Sheriff's Lieutenant Michael Barry in Martin County, FL reports, "Time is . . . a factor for our staff. Sending I.A.Q.'s [Immigration Alien Queries], waiting for responses, making phone calls to different immigration officials for clarification on detainees['] status, gathering additional information for immigration such as photos, booking sheets, fingerprints, and palm prints [for Secure Communities] takes away from the deputies['] regular duties within the [jail] facility."¹⁸ LEAs also bear the costs of detaining any individuals who do not qualify for limited federal reimbursements available only for detainees convicted of one felony or two misdemeanor offenses.¹⁹

3. *Detainer Policies*

The failures of Secure Communities are inextricably intertwined with ICE's inability to promulgate and enforce a lawful detainer policy which reflects the program's stated goals and priorities. A detainer is a request from ICE that the arresting agency notify ICE before it releases a noncitizen so that ICE can assume custody.²⁰ Detainers pursuant to 8 C.F.R. § 287.7(a) can be issued by any authorized immigration official to any other federal, state or local law enforcement agency. They are requests, not commands, but the mandatory

¹³ ACLU OF NORTHERN CALIFORNIA, COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 22 (2011), available at

http://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf.

¹⁴ U.S. Immigration and Customs Enforcement, *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics through November 30, 2009* (Dec. 9, 2010), available at

http://www.ice.gov/doclib/foia/secure_communities/nationwideinteroperabilitystatsnov09.pdf.

¹⁵ See *infra* notes 30-32 and accompanying text.

¹⁶ J.D. Malone, *Allentown man, ACLU sue for alleged civil rights breach*, EXPRESS TIMES (Easton, Pa), Dec. 2, 2010, available at

http://www.lehighvalleylive.com/allentown/index.ssf/2010/12/allentown_man_aclu_sue_police.html.

¹⁷ U.S. Immigration and Customs Enforcement, "Benefitting Law Enforcement throughout the United States", available at www.ice.gov/doclib/secure-communities/pdf/lea-benefits.pdf.

¹⁸ Memorandum from Lt. Michael Barry, Martin County, FL, Sheriff's Office, to Major Steve Chase (Feb. 28, 2008), available at www.fiacfla.org/Quote%201%20-%20Martin%20County%20Memo.pdf.

¹⁹ See *infra* notes 30-32 and accompanying text.

²⁰ 8 C.F.R. § 287.7(a).

language on the I-247 form has long led to confusion.²¹ Though ICE has taken steps to clarify that detainers are discretionary,²² they continue to be problematic.

As discussed above, it is unclear what the standards are at LESC for determining who should be issued a detainer. The OIG should evaluate any statistics available on when detainers are issued, and what information those decisions are based on. In particular, the ACLU is concerned because the definition of a “Level 1” offender includes “aliens convicted of ‘aggravated felonies,’ as defined in § 101(a)(43) of the Immigration and Nationality Act.” This is a legal conclusion, which is impossible to determine at the time of arrest, and ICE has provided no evidence of how LESC officials making decisions about arrestee categorization and the issuance of detainers are making this complex determination.

Once a detainer is issued, it allows the LEA to retain custody for an additional 48 hours (excluding weekends and holidays) after local jurisdiction ends.²³ It is unlawful for someone to be held in custody after the detainer expires, but there are complaints from across the country from individuals detained unlawfully beyond the authorized time period. For example, Antonio Ocampo spent three months in jail for a misdemeanor, but spent another 97 days imprisoned by the New Orleans sheriff based on an ICE detainer, despite numerous complaints and grievances filed by Mr. Ocampo.²⁴ Similar stories have been reported in New York, Washington, Colorado, Florida, Indiana, Kansas, Pennsylvania, and Tennessee.²⁵

Even if the LEA doesn’t hold the individual beyond the authorized detainer period, the existence of detainers is often used in the criminal justice system to increase or deny bail, to deny other alternatives to incarceration, and to prevent access to rehabilitation programs while in jail.²⁶ A four-year study in Travis County, Texas found that noncitizens subject to

²¹ Immigration Detainer Form I-247, sample *available at* <http://www.defensenet.org/immigration-project/immigration-resources/immigration-detainers-and-ice-enforcement-actions/Sample%20Immigration%20Detainer%20Form%20I-247.pdf/view> (noting that federal regulations “require that you detain the alien for a period not to exceed 48 hours”); Memorandum from Beth Arthur, Sheriff, Arlington County Sheriff’s Office, to Paul Larsen, Chief Deputy (Feb. 28, 2011) (noting that Warden of San Miguel Detention Center “suggested that not accepting the detainer would be a violation of law.”).

²² Memorandum from John Morton on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens Interim (June 2010); Letter from David J. Venturella, Executive Director of Secure Communities, to Miguel Márquez, County Counsel for the County of Santa Clara, California (undated), *available at* <http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2010/September%2028,%202010/203157342/TMPKeyboard203242932.pdf>.

²³ 8 C.F.R. § 287.7(d).

²⁴ Laura Maggi, *Federal judge orders release of Orleans Parish inmate who was jailed too long*, TIMES-PICAYUNE (New Orleans, LA), Nov. 15, 2010, *available at* http://www.nola.com/crime/index.ssf/2010/11/federal_judge_orders_release_o.html.

²⁵ National Immigration Forum, *Backgrounder: Quick Information on Immigration Detainers* (Dec. 30, 2010), *available at* <http://www.immigrationforum.org/images/uploads/2010/DetainersBackgrounder.pdf>.

²⁶ Immigration Policy Center, *Immigration Detainers; A Comprehensive Look*, *available at* <http://www.immigrationpolicy.org/just-facts/immigration-detainers-comprehensive-look>; *see, e.g., State v. Fajardo-Santos*, 199 N.J. 520, 973 A.2d 933 (July 8, 2009) (affirming trial court’s determination that issuance of detainer against defendant heightened risk that he would not appear at trial, warranting increase in bail amount).

detainers were held in local custody three times longer than inmates without detainers.²⁷ This leads to an increase in the number of people staying in jail for prolonged periods of time, which contributes to overcrowding. Overcrowding is a serious problem for many local jails around the country, and exacerbates issues such as lack of adequate medical and mental health services, increased risk of infectious disease, and struggles to maintain jail discipline.²⁸

The costs of this additional incarceration often fall on local jails and LEAs, despite ICE's assertions to the contrary.²⁹ The federal government reimburses local jails for some of the costs of holding "criminal aliens" through the Department of Justice's State Criminal Alien Assistance Program (SCAAP) and through local contracts with DHS. However, these payments are insufficient to fully cover the costs of extra local detention. SCAAP only reimburses localities for a narrowly-defined category of inmates, detainees who have been *convicted* of one felony or two misdemeanor offenses and who are held for at least 4 consecutive days.³⁰ This means that even the two days of incarceration permissible under the detainer must be paid by the locality for all other arrestees. In Sacramento County, for example, screening and arraignment, including pretrial jail booking and incarceration, cost on average \$1,948 per arrestee in 2005 and 2006.³¹ Finally, the local jail is legally liable if the arrestee is held over the 48-hour period authorized under the detainer,³² or if the detainer is mistakenly placed on a U.S. citizen.

In December 2010, San Miguel County, New Mexico, changed its detainer policy to *only* honor detainers when federal reimbursement will be available. In January 2011, Taos County, New Mexico decided that the county will only honor detainers regarding inmates for whom the county will receive federal reimbursement. However, there have been complaints that federal reimbursements are inconsistent across jurisdictions.³³ The OIG should investigate the extent to which ICE educates participating communities about which detention will be reimbursed, and their rights to refuse to detain.

There appears to be no evidentiary standard used by ICE for lodging a detainer, a standardless void which has led to U.S. citizens being held illegally on immigration

²⁷ Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas* (Feb. 2010), available at <http://www.immigrationpolicy.org/special-reports/criminal-alien-program-immigration-enforcement-travis-county-texas>.

²⁸ See, e.g., *Brown v. Plata*, No. 09-1233 (U.S. May 23, 2011) (discussing serious overcrowding in California prisons and deleterious effects of overcrowding).

²⁹ See *supra* note 17 (claiming that "Law enforcement agencies incur little to no cost" when ICE implements Secure Communities in their jurisdiction).

³⁰ U.S. Department of Justice, *State Criminal Alien Assistance Program (SCAAP)*, <http://www.ojp.usdoj.gov/BJA/grant/scaap.html>.

³¹ Memorandum from Sacramento County Criminal Justice Cabinet to Sacramento County Board of Supervisors (June 3, 2009), available at http://www.budget.saccounty.net/coswcm/groups/public/@wcm/@pub/@obdm/@shared/documents/webcontent/sac_019246.pdf.

³² *Cacho et al. v. Gusman*, No. 11 Civ. 225 (E.D. La. filed Feb. 2, 2011) (civil rights action for damages based on violation of the 48-hour time period); *Quezada v. Mink et al.*, No. 10 Civ. 879 (D. Colo. Dec. 12, 2010) (same); *Ramos-Macario v. Jones et al.*, No. 10 Civ. 813 (M.D. Tenn. filed Sept. 28, 2010) (same); *Rivas v. Martin et al.*, No. 10 Civ. 197 (N.D. Ind. filed June 16, 2010) (same); *Florida Immigrant Coalition et al. v. Bradshaw*, No. 9 Civ. 81280 (S.D. Fla. filed Sept. 3, 2009) (same).

³³ Memorandum from Beth Arthur, Sheriff, Arlington County Sheriff's Office, to Paul Larsen, Chief Deputy (Feb. 28, 2011).

detainers.³⁴ Individuals are rarely informed of why they are held, and there is no clear process for discovering if one is subject to a detainer, challenging the basis of a detainer, or having an erroneous detainer removed.³⁵ Many ICE field offices reportedly lodge detainers as a matter of course even when they have insufficient information, and postpone the need to figure out which individuals they believe are actually removable until later.³⁶ This raises serious due process concerns.

Changes announced by ICE to the detainer issuance form on June 17, 2011 are mostly superficial and do not solve the underlying problems regarding how the LESC decides to issue detainers and the costs that detainers force onto local jails.

4. *Racial Profiling*

One of the most troubling elements of the program is its failure to provide any check based on the circumstances that lead to the person's contact with ICE, even when those circumstances include racial profiling or other constitutional violations. Law enforcement agencies understand that an arrest for a minor offense will subject an individual to the same high risk of ICE detainer and attention, regardless of their eventual charge and conviction. This makes pretextual arrests a powerful tool for the oppression and intimidation of immigrant communities with no consequences.

OIG must investigate the absence of safeguards to ensure that racial profiling or related abuses neither result nor are implicitly encouraged. Local law enforcement officers have no authority to arrest individuals for suspected civil immigration violations. Because fingerprints are brought to ICE's attention due to arrests, rather than convictions, police can engage in pretextual arrests. These arrests lead to a check of an individual's immigration history regardless of the severity of the arresting crime, whether the arrest results in a conviction or even any formal charge, and whether the arrest is later found to be unconstitutional. Thus, mere arrest is sufficient to lead to detention and deportation. As a result, Secure Communities creates perverse incentives for state and local police to arrest individuals who appear "foreign" in order to check their immigration status.

DHS has suggested that, since all arrestees are fingerprinted, the program is not susceptible to misuse by officers attempting to racially profile. However, studies have shown that jail screening programs for immigration violations lead to increased arrests of Latinos for minor offenses. After ICE's Criminal Alien Program, a close relative of Secure Communities, was initiated in Irving, Texas, an independent study found a "marked rise in

³⁴ See supra notes 13-**Error! Bookmark not defined.**

³⁵ This is true despite the fact that U.S. citizens are subjected to detainers, though ICE can only issue detainers against "alien[s]." 8 C.F.R. § 287.7(a). See, e.g., Suzanne Gamboa, *Citizens Held as Illegal Immigrants*, ASSOCIATED PRESS (Apr. 12, 2009), available at <http://abcnews.go.com/print?id=7318392>; Native Was Threatened with Deportation, ASSOCIATED PRESS (Sept. 1, 2007), available at http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-mistaken_01met.ART.West.Edition1.4274132.html. ICE has provided no assurances that U.S. citizens have not been erroneously subjected to detainers under Secure Communities.

³⁶ Jacqueline Stevens, *Thin ICE*, THE NATION (June 5, 2008), available at <http://www.lawso.ucs.edu/faculty/jstevens/113/ICENationArticleStevens>.

low-level arrests of Hispanics.³⁷ After evaluating alternative explanations, the study concluded there was strong evidence that police engaged in racial profiling of Hispanics in order to subject them to immigration screening.³⁸

It is particularly troubling that there is no evidence that ICE evaluates jurisdictions for problematic relationships with Latino and immigrant communities before implementing Secure Communities. When OIG evaluated the 287(g) program, which has also been accused of facilitating and encouraging racially motivated harassment of immigrant communities, it noted that “[o]ne aspect of DHS’ primary mission is to ensure that civil rights and civil liberties are not diminished by its efforts, activities and programs aimed at securing the homeland.”³⁹ It noted with concern that 287(g) applications did not include “information concerning civil rights complaints, lawsuits, or consent decrees that applicant jurisdictions are subject to, or other information that may be useful in assessing the civil rights and civil liberties standing of the applicant.” The same is true with implementation of Secure Communities in various jurisdictions.

Secure Communities has been activated in a number of jurisdictions which have troubling histories regarding racial profiling and harassment of Latino communities. One of the most egregious examples is Maricopa County Sheriff’s Office (“MCSO”) where the 287(g) jail authority granted to Sheriff Arpaio seems to directly contradict the Justice Department Civil Rights Division’s ongoing investigation into MCSO’s policing practices and failure to comply with Title VI for Limited English Proficient populations.

Another troubling example is the Secure Communities jurisdiction of Orleans Parish in Louisiana. The Department of Justice recently issued a report on the New Orleans Police Department (NOPD) detailing the Latino community’s sense that law enforcement officials target Latinos in order to harass them regarding their immigration status: “Latinos in New Orleans, especially young Latino males, reported that NOPD officers stop them for unknown reasons or for minor offenses that would not ordinarily merit police attention, and then question them regarding immigration status. . . . We heard reports of specific incidents in which immigrant workers called to request police assistance after being victimized by crime, but instead of providing assistance, NOPD officers questioned them about their immigration status.”⁴⁰ Secure Communities contributes to and worsens these problems: The most recent April 2011 ICE statistics show that in Orleans Parish, 69% of individuals arrested and booked into ICE custody and 64% of those removed or returned were non-criminals. Only 6% had committed “Level 1” offenses.⁴¹

³⁷ TREVOR GARDNER II & AARTI KOHLI, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM I (September 2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

³⁸ *Id.*

³⁹ Department of Homeland Security, Office of Inspector General, *The Performance of 287(g) Agreements* (March 2010), at 22, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf (citing 6 U.S.C. § 111 (b)(1)(G)).

⁴⁰ United States Department of Justice, *Investigation of the New Orleans Police Department* (Mar. 16, 2011), at 36, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf. Louisiana has seen a “significant influx of Latino immigrants” in the wake of Hurricane Katrina. *Id.* at xii.

⁴¹ U.S. Immigration and Customs Enforcement, *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011* (May 23, 2011), available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf.

At a minimum, OIG should recommend that ICE require LEAs to “collect and report on the prosecutorial or judicial disposition of the initial arrests that led to aliens’ subsequent immigration processing” as OIG recommended regarding the 287(g) program.⁴² As stated in the OIG report on 287(g), “This information could help to establish how local prosecutors and judges regarded an officer’s original basis for arresting aliens. Without this type of information, ICE cannot be assured that law enforcement officers are not making inappropriate arrests to subject suspected aliens to vetting . . . for possible removal.”

5. *Deterrence of Crime Reporting*

Secure Communities has inspired a widespread loss of trust of local police among immigrant communities. Community members who see local law enforcement officers cooperating with ICE to determine immigration status will be reluctant to approach law enforcement officers to report crimes or to act as witnesses. This undermining of community policing efforts has been criticized by numerous law enforcement leaders and organizations from across the country.⁴³ The Department of Justice report on the NOPD described how discriminatory targeting by police instills fear:

We heard reports of specific incidents in which immigrant workers called to request police assistance after being victimized by crime, but instead of providing assistance, NOPD officers questioned them about their immigration status. Consequently, we found a strong belief among some segments of the Latino community that reporting crime to NOPD may subject the reporter to unwanted attention or harassment. As one participant in a community meeting told us: “Out of fear, we stay quiet.”⁴⁴

In Davidson County, TN, where extremely high rates of arrest for traffic or minor crimes under the 287(g) program have led to serious criticisms, a local attorney reported that “people are still scared to come out. They get stopped for playing their music too loud, they get stopped for a tail light allegedly out, they get stopped for tinted windows that are maybe too dark. . . . Parents are afraid to engage

⁴² See supra note 39, at 26.

⁴³ See, e.g., William J. Bratton, *The LAPD Fights Crime, Not Illegal Immigration*, L.A. TIMES (Oct. 27, 2009) (“My officers can’t prevent or solve crimes if victims or witnesses are unwilling to talk to us because of the fear of being deported. . . . When officers can speak freely with victims and witnesses, it goes a long way toward making every American neighborhood much safer.”); Anita Khashu, The Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* (2009), at 23 (“Policing experts and project participants have expressed concern that local police involvement in immigration enforcement could have a chilling effect on immigrant cooperation. Immigrant witnesses and victims of crime . . . would be less likely to report crimes and cooperate as witnesses”); Major Cities Chiefs, *Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 5-6 (June 2006) (“Immigration enforcement by local police would likely negatively effect and undermine the level of trust and cooperation between local police and immigrant communities.”); Testimony of Salt Lake City Police Chief Chris Burbank before the House Subcommittee on Civil Liberties (June 2010); Susan Carroll, *HPD Fighting Lack of Trust on Some Calls*, HOUSTON CHRONICLE (Feb. 22, 2010), available at <http://www.chron.com/disp/story.mpl/metropolitan/6878331>.

⁴⁴ United States Department of Justice, *Investigation of the New Orleans Police Department* (Mar. 16, 2011), at 36, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf.

in their children's education."⁴⁵ This phenomenon risks reversing recent nationwide gains that reduced crime rates to their lowest rate in forty years.⁴⁶

This fear of unreasonable harassment and arrest is exacerbated in contexts where there are language issues or in domestic violence situations where police policy is to arrest everyone on the scene.⁴⁷ The stories are harrowing: (1) During a party, Veronica had a serious argument with her brother when he refused to let her leave a party with her daughter. Veronica called the police, who arrived and briefly questioned her before arresting her. They took her to jail, where they fingerprinted her and held her for 3 hours, releasing her upon discovering that she was legally in the country. Veronica reports that she would never call the police again.⁴⁸ (2) Hun, a Japanese national, finally called 911 for assistance after being abused by her husband for years. When the police arrived, Hun could not speak English and defend herself when her husband accused her of instigating the fight. The police arrested Hun and turned her information over to ICE. While Hun was in ICE custody, her one-year-old daughter was placed in foster care.⁴⁹ (3) When Maria Magdalena Perez-Rivera's sister called the San Francisco police to report bruises and scratches on Maria, Maria was taken into custody along with her abuser. Her fingerprints were sent to ICE via Secure Communities and Maria was deported in forty-eight hours. She was forced to leave her two children behind despite the fact that she was never tried or convicted of any crime.⁵⁰ (4) Isaura Garcia, an immigrant in Los Angeles, called 911 in February to report abuse by her partner. As reported in the Los Angeles Times, "[b]ecause police often arrest both parties in domestic disputes, her fingerprints were submitted to immigration officials; despite having no criminal record, she was flagged for deportation proceedings."⁵¹

The Violence Against Women Act (VAWA) created visas for victims of domestic violence to "strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of [crimes] while offering protection to victims."⁵² These visas were supported by law enforcement officials to increase the probability of apprehension for violent criminals, reducing recidivism, and saving police resources.⁵³ Local law enforcement officials participate in the process by certifying to U.S. Citizenship and Immigration Services that victims cooperated in the investigation or prosecution of a

⁴⁵ *Fewer deportations put 287(g) immigration program at risk*, THE TENNESSEAN (Nashville), May 26, 2011.

⁴⁶ Evan Perez, *Violent Crime Falls Sharply*, WALL ST. J. (May 25, 2010), available at <http://online.wsj.com/article/SB10001424052748704113504575264432463469618.html>

⁴⁷ Statement of Angela Chan, Staff Attorney at the Asian Law Caucus, Bay Area Chapter of the American Constitution Society *Panel discussion: Secure Communities: Federal Immigration Enforcement, Cooperation, and Conflict* (Sept. 22, 2010).

⁴⁸ See *supra* note 13, at 9.

⁴⁹ *Id.*

⁵⁰ Stephen Magagnini, *Deported Mexicans leave two small kids in Lodi*, Sacramento Bee (Nov. 2, 2010).

⁵¹ Lee Romney & Paloma Esquivel, *Noncriminals swept up in federal deportation program*, L.A. TIMES (Apr. 25, 2011), available at <http://articles.latimes.com/2011/apr/25/local/la-me-secure-communities-20110425>.

⁵² Violence Against Women Act of 2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 115 Stat. 1464, 1533, (2000), available at http://www.ovw.usdoj.gov/laws/vawo2000/stitle_b.htm#title5.

⁵³ Law Enforcement Bulletin, Federal Bureau of Investigation, *The U Visa: An Effective Resource for Law Enforcement*, (Oct. 2009), at 3, available at http://www2.fbi.gov/publications/leb/2009/october2009/visa_feature.htm.; Agenda Report from the Oakland Police Department and City Attorney to the Office of the City Administrator (Jan. 22, 2008) (explaining that police department expected U Visa program "to strengthen the ties between the immigrant community and the police, overcoming the traditional suspicion and distrust of police that immigrants often bring from abroad.").

crime.⁵⁴ However, incidental local immigration enforcement can create a climate of fear which thwarts the intent of such programs.⁵⁵ Safe Horizon, the largest assistance agency for victims of domestic violence in New York City, has now begun to caution victims *against* contacting the police because of immigration concerns.⁵⁶ The OIG should investigate what steps ICE is taking to ensure that detainers are not issued against victims of domestic violence.

6. *Complaint Procedures*

Oversight of Secure Communities is woefully inadequate. Currently, the complaint procedure requires individuals to file complaints with the DHS Office for Civil Rights and Civil Liberties (OCRCL).⁵⁷ However, there is no publicity regarding this procedure, and there has not been any indication that OCRCL has either the capacity or the inclination to provide meaningful oversight over the Secure Communities program. Indeed, OIG must include in its report an analysis of what jurisdiction OCRCL perceives it has over Secure Communities participants. For example, there has been no evidence that OCRCL has begun investigations into troubling jurisdictions like New Orleans or Maricopa County. There is also no indication that complaints of discrimination under 287(g) filed with OCRCL or allegations of racial profiling or discriminatory policing are cross-referenced against Secure Communities jurisdictions.

In addition, ICE and DHS have pointed to the Department of Justice Civil Rights Division as sharing oversight responsibility for Secure Communities. However, it is unclear what that oversight would entail. It is troubling that the program continues to press expansion into jurisdictions where the Civil Rights Division has begun investigations into racial profiling, and/or brought charges alleging racial profiling. For example, the report on the New Orleans Police Department, which polices a Secure Communities jurisdiction in Orleans Parish, documents profiling of Latino communities.⁵⁸ OIG should issue recommendations for how to rein in deviant jurisdictions and what additional steps, ranging from training and supervision to termination, should be applied to those jurisdictions.

Finally, OIG should investigate whether OCRCL complaints regarding racial profiling and targeting of Latino communities under the auspices of the 287(g) program are used to evaluate particular jurisdictions for implementation of Secure Communities. Both 287(g) and Secure Communities raise troubling problems of racial profiling and pretextual arrests,

⁵⁴ Attestation by a local law enforcement agency enables the victim to meet one of the eligibility requirements of the

visa program. *U Visa Toolkit for Law Enforcement*, Legal Momentum and Vera Institute, 6, Dec. 12, 2010, <http://iwp.legalmomentum.org/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/Law%20Enforcement%20ToolKit%20U-Visa.pdf/view?searchterm=u%20visa%20toolkit>.

⁵⁵ Anita Khashu, The Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties* (2009), at 11, available at <http://www.policefoundation.org/strikingabalance/strikingabalance.html>.

⁵⁶ *Safe Horizon*, Homeland Security Laws Create Danger for Victims of Domestic Violence, (Feb. 24, 2011), available at <http://www.safehorizon.org/index/pressroom-5/safe-horizon-in-the-news-28/news/homeland-security-laws-create-danger-for-victims-of-domestic-violence-52.html>.

⁵⁷ U.S. Immigration and Custom Enforcement, Secure Communities website,

http://www.ice.gov/secure_communities/ (click on “Civil Rights and Civil Liberties” menu button).

⁵⁸ See *supra* note 44.

and it is shocking that in jurisdictions with proven violations, ICE has allowed both programs to go on without any intervention.

C. *Public Integrity*

When Secure Communities was launched in March 2008, ICE characterized the program as voluntary. During that period, localities evaluated whether to participate based on the assumption that the program could not be imposed on them against their will. On August 17, 2010, ICE released a memorandum entitled “Setting the Record Straight,” where it confirmed the voluntary nature of the program:

“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 facsimile). 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.”⁵⁹

However, the process ICE outlined was pursued by San Francisco County and they proved unsuccessful at preventing implementation.⁶⁰ On September 7, 2010, DHS again confirmed the voluntary nature of Secure Communities in a letter from DHS Secretary Janet Napolitano to Representative Zoe Lofgren, then-Chair and now Ranking Member of the House Judiciary Committee’s Subcommittee on Immigration Policy and Enforcement, which stated that a jurisdiction which does not wish to participate must formally notify both ICE and the state identification bureau.⁶¹ Assistant Attorney General Ronald Weich confirmed the availability of opt-out procedures in a letter to Rep. Lofgren the same day.⁶²

Two months after ICE attempted to “set the record straight,” the Secretary surprisingly declared that Secure Communities is based on an agreement between DHS and the Department of Justice, and that DHS did not “view this as an opt-in, opt-out program.”⁶³ She stated that the program does not require the cooperation of local law enforcement agencies. This directly contradicted ICE’s prior public statements, including the memorandum issued only two months earlier. To date, DHS has not issued any written explanations of its new position.

⁵⁹ U.S. Immigration and Customs Enforcement, *Secure Communities: Setting the Record Straight* (Aug. 17, 2010), at 6, available at www.nilc.org/immlawpolicy/LocalLaw/ice-scomm-setting-record-straight-2010-08-17.pdf.

⁶⁰ According to ICE data, San Francisco county was activated on June 8, 2010. U.S. Immigration and Customs Enforcement, *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011* (May 23, 2011), at 11, available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf

⁶¹ Letter from Janet Napolitano, Dept. of Homeland Security, to Rep. Zoe Lofgren. (Sept. 8, 2010).

⁶² See Letter from Ronald Weich, Assistant Attorney General, to Rep. Zoe Lofgren, Chairwoman of the House Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (Sept. 7, 2010).

⁶³ See Press Release, “Secretary Napolitano Announces Record-Breaking Immigration Enforcement Statistics Achieved Under the Obama Administration,” (Oct. 5, 2010).

Efforts by members of Congress to obtain clarification about localities' ability to decline participation in Secure Communities have been similarly frustrated. After ICE and the FBI released thousands of documents related to Secure Communities in response to a Freedom of Information Act request, Rep. Lofgren wrote to you and Timothy Moynihan, Assistant Director of the Office of Professional Responsibility for ICE regarding the revelation of potentially "false and misleading statements to local governments, the public, and Members of Congress" regarding whether Secure Communities is a mandatory program or whether localities can "opt out."⁶⁴ The OIG has confirmed that it will be looking into "the controversy regarding communities' requirement to participate and ability to 'opt out' of the program."⁶⁵

There are other issues regarding ICE's communication with the public and affected communities. Despite ICE's stated policy of "conduct[ing] outreach" to local jurisdictions before activating Secure Communities,⁶⁶ officials from several localities have expressed frustration with ICE's failure to communicate with them before the program went into effect.⁶⁷ In New Mexico, a public records request submitted in May 2010 revealed that two of the five counties participating in Secure Communities were not even aware of the program's existence, despite the fact that it had been in operation in New Mexico since October 2009. The remaining three counties did not have any documentation or records relating to their participation in the program.⁶⁸ ICE implemented Secure Communities in Pennsylvania without waiting for the traditional memorandum of agreement (MOA) process, whereby the state investigation bureau signs an agreement with DHS,⁶⁹ Now, ICE has taken the position that the MOA with a state is "an unnecessary formality."⁷⁰ Apart from examining the "opt-out" issue, the OIG should investigate the way in which ICE activates new jurisdictions and explore whether local law enforcement agencies are aware that any arrest of an individual can and likely will lead to detention and deportation.

⁶⁴ Letter from Rep. Zoe Lofgren, to Charles K. Edwards, Acting Inspector General, Department of Homeland Security and Timothy Moynihan, Assistant Director of Office of Professional Responsibility, Immigration and Customs Enforcement (April 28, 2011).

⁶⁵ Letter from Charles K. Edwards, Acting Inspector General, U.S. Department of Homeland Security, to Rep. Zoe Lofgren, Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement (May 10, 2011).

⁶⁶ See *supra* note 59, at 2.

⁶⁷ See, e.g., Santa Clara County, *Transmittal of the County Counsel: U.S. Immigration and Customs Enforcement's Secure Communities Program*, submitted to the Public Safety and Justice Committee, at 3 (Sept. 1, 2010), available at http://www.sccgov.org/portal/site/scc/boardagenda?contentId=6f36e02884baa210VgnVCM10000048dc4a92_&agendaType=Committee+Agenda (stating that Secure Communities was implemented without County's authorization and with minimal forewarning); Arlington Virginia, *Secure Communities in Arlington: FAQs* (updated Sept. 29, 2010), available at <https://www.arlingtonva.us/departments/Communications/page77460.aspx> (stating that "Arlington County did not have a choice of whether or not to become an 'activated community' under the Secure Communities Program, and we were given 24 hours notice by the Virginia State Police and DHS that fingerprints collected in Arlington would now be checked against the federal immigration database."); ND LON, *Briefing Guide to Secure Communities*, at 2-3, available at <http://uncoverthetruth.org/secure-communities-briefing-guide> (discussing emails from Florida jurisdictions obtained through FOIA requests, expressing frustration with ICE's lack of communication).

⁶⁸ Information on file with the ACLU.

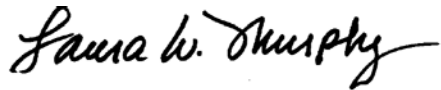
⁶⁹ See U.S. Immigration and Customs Enforcement, *Secure Communities Weekly Executive Report: Dec. 15-19, 2008*, available at <http://immigrationimpact.com/upload/docs/Secure%20Communities.pdf>.

⁷⁰ Maria Sacchetti, *U.S. Pushes State to Join Security Plan*, BOSTON GLOBE, Oct. 6, 2010, available at www.boston.com/news/local/massachusetts/articles/2010/10/06/us_asks_mass_police_to_join_ice_plan/.


Conclusion

We urge OIG to conduct a detailed, comprehensive investigation that examines how Secure Communities comports with both constitutional protections and ICE's own stated priorities. To this end, we strongly encourage OIG to use this investigative opportunity to analyze thoroughly the program's dangerous lack of training, protocols, and safeguards against constitutional violations. Thank you for your consideration. For follow-up please contact Joanne Lin, Legislative Counsel, at jlin@dcaclu.org or 202/675-2317.

Sincerely,



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