

**Testimony on behalf of the
American Civil Liberties Union Of the Nation's Capital**

By

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Before the

Committee on Public Safety and the Judiciary

of the

Council of the District of Columbia

on

Bill 18-795, the
"Secure Communities Act of 2010"

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Introduction

Bill 18-795 prohibits the District of Columbia government from participating in the "Secure Communities" program of the U.S. Immigration and Customs Enforcement Agency (ICE). As explained below, Secure Communities causes tangible harms to individual arrestees and to the community at large. Secure Communities also contradicts the District of Columbia's longstanding policy and practice of avoiding entanglement in federal immigration enforcement. Bill 18-795 makes clear that policing the nation's borders and enforcing immigration laws against individuals who have violated them is and should remain a federal responsibility. We support that principle and urge the Council to approve the bill.

Background

In late 2008, ICE launched Secure Communities in selected counties in Texas and North Carolina. ICE has since expanded the program to 18 additional states, and intends to expand the program nationwide by the end of 2013.

The program differs from its better-known counterpart, the 287(g) program,¹ which formally deputizes local law enforcement officers to enforce federal immigration laws. Instead, Secure Communities relies on recent technological advances that allow fingerprints taken by local police to be checked against multiple databases maintained by the federal government.

Most individuals arrested by local authorities have long had their fingerprints automatically run through the FBI's master criminal database. Now, however, new technology allows fingerprints to be simultaneously checked against the FBI database and a Department of Homeland Security (DHS) database that contains the fingerprints of every non-citizen who has, for any of a number of reasons, come in contact with federal immigration authorities.

In jurisdictions that participate in Secure Communities, the fingerprints of individuals *arrested* by local police will be run against both databases. If an arrestee's fingerprints appear in the DHS database, ICE agents investigate and ultimately may decide to seek deportation.²

In many cases, when ICE suspects that an arrestee may be a non-citizen subject to deportation, it sends the custodial agency a document known as an "ICE detainer," which requests—but does not require—the agency to maintain custody of the individual for up to 48 hours after he or she would otherwise be released from custody, so that he or she can be picked up by ICE. The standards that ICE applies in deciding whether to issue a detainer have not been made public.

Secure Communities Makes the District Less Safe, Not More Safe

Secure Communities is not a benign technological upgrade. Because it entangles the Metropolitan Police Department (MPD) and the Department of Corrections (DOC) in civil immigration enforcement, it is inconsistent with two decades of the District government's policies and practices. Additionally, Secure Communities endangers the District government's relationship with immigrant communities, lacks adequate oversight, and has not been implemented in a manner consistent with ICE's own public promises. For these reasons, the ACLU supports Bill 18-795 and further urges the Council to create reporting mechanisms that will facilitate Council oversight of the relationship between ICE and the District government.

¹ The 287(g) program is authorized by Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g), a provision added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). The 287(g) program has led to widespread racial profiling and civil rights abuses in the jurisdictions that have implemented it. See OFFICE OF THE INSPECTOR GENERAL, DEP'T OF HOMELAND SECURITY, THE PERFORMANCE OF 287(G) AGREEMENTS, OIG-10-63 (March 2010), available online at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf. See also *Hearing on "Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law,"* U.S. House of Representatives, Committee on Homeland Security (Mar. 4, 2009) (statement of Caroline Fredrickson, Director, ACLU Washington Legislative Office), available online at http://www.aclu.org/files/images/asset_upload_file717_39062.pdf.

² ICE claims that the purpose of the program is to identify and deport dangerous criminals who pose serious risks to public safety. The data ICE has made available so far, however, suggest that only a small fraction of those targeted for deportation by the program have been convicted of or even charged with the offenses ICE identifies as the most serious ones. See MICHELE WASLIN, THE SECURE COMMUNITIES PROGRAM: UNANSWERED QUESTIONS AND CONTINUING CONCERNS (Immigration Policy Center, Nov. 2009), available online at http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_112309.pdf.

Since 1984, a series of mayoral executive orders have generally prohibited the District government and its employees from inquiring into the citizenship or immigration status of those whom the District government serves. In line with these mayoral directives, the MPD has long maintained a policy of not involving itself in civil immigration law enforcement. Even if, as MPD Chief Lanier argues, participation in Secure Communities conforms to the *letter* of such executive orders, it violates their spirit. These policies do not exist in a vacuum. They are an important part of MPD's strategy of community policing, which requires a spirit of cooperation, respect, and trust between MPD and the communities it serves, including immigrant communities. By not involving itself in the enforcement of civil immigration laws, MPD preserves this relationship. This ensures that *all* D.C. residents will feel free to report crimes to MPD and come forward as witnesses, without fearing that such actions could lead to immigration consequences for them or their families.³ But Secure Communities erodes the line between civil immigration enforcement and the MPD's criminal investigatory work. It therefore undermines the spirit of community policing and endangers the District government's relationship with immigrant communities—which makes the District less safe for all of us.

First, Secure Communities creates improper incentives for MPD officers to arrest individuals whom they suspect are non-citizens, as a pretext to obtain their fingerprints and send them to ICE. Although Secure Communities is too new to have been analyzed, a predecessor initiative—the Criminal Alien Program (CAP), in which ICE agents visit local jails and prisons in teams to identify potentially deportable individuals—provides a useful comparison, because it creates the same kinds of incentives to engage in pretextual arrests. The Warren Institute at the University of California, Berkeley, recently conducted a study of police department arrest records to evaluate the impact of CAP in Irving, Texas, for a 23-month period.⁴ They found that Irving's adoption of the program resulted in a substantial increase in petty misdemeanor arrests of Hispanics, but no similar increase for arrests of whites—strongly suggesting that the program increased racial profiling of Hispanics.⁵

Individuals who have been arrested based on this kind of racial profiling have limited channels for legal recourse. The Supreme Court has given police effectively unlimited discretion to

³ See Craig E. Ferrell, Jr., *Immigration Enforcement: Is It a Local Issue?*, 71 THE POLICE CHIEF 2, Feb. 2004, available online at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=224&issue_id=22004 (“Local police agencies depend on the cooperation of immigrants, legal and illegal, in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families.”). See also ACLU OF NORTH CAROLINA, *ET AL.*, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA 32-35 (Feb. 2009), available online at http://acluofnc.org/files/287gpolicyreview_0.pdf (describing the chilling effect that ICE collaboration with local law enforcement agencies has on crime reporting and other cooperation with law enforcement).

⁴ TREVOR GARDNER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE CRIMINAL ALIEN PROGRAM (Sept. 2009), available online at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

⁵ *Id.* at 8.

conduct pretextual stops and arrests, even if the underlying offense carries no jail time.⁶ Additionally, even if individual victims of racial profiling can have their rights vindicated in court, such arrests alienate immigrant communities and make it more difficult for immigrant crime victims to trust the police. The better policy—and the one embodied by Bill 18-795—is to prevent such problems in the first place by eliminating these kinds of bad incentives for police.

A second and related concern is that police will improperly “up-charge” arrests of suspected immigrants—that is, initially charge suspected immigrants with more serious crimes, even if the charges are unjustified and will later be withdrawn, for the purpose of sending their fingerprints to ICE. At present, there are 21 offenses for which MPD does not collect fingerprints, such as panhandling or driving an unregistered vehicle. The ACLU agrees that ICE should not have access to the fingerprints of persons charged with minor offenses. However, we are concerned that participation in Secure Communities could prompt police officers to up-charge suspected immigrants with more serious crimes that do require fingerprinting simply to bring those individuals to ICE’s attention.

Third, Secure Communities is likely to increase the use and abuse of ICE “detainers.” Unlike traditional interstate detainers, these are not warrants issued by a judge and supported by probable cause. Instead, they are issued by ICE officials unilaterally, without judicial review, and subject to no fixed or publicly available evidentiary standards.⁷ Under federal regulations whose very validity is questionable,⁸ ICE detainers permit local jails to maintain custody of suspected non-citizens for “a period not to exceed 48 hours, excluding Saturdays, Sunday, and holidays.”⁹ According to our information, however, it is already commonplace for ICE to take two weeks or more to assume custody of individuals held under a detainer at the D.C. Jail. During this time, DOC typically continues to hold the person under the purported authority of the detainer—even though the detainer has already expired. Poor recordkeeping and a lack of transparency by DOC make it difficult to determine how frequently such overdetention occurs. But if the District implements Secure Communities, the number and frequency of these detainers—and overdetention based on them—is certain to increase.

Parenthetically, it seems to us that the District government is plainly violating the constitutional rights of individuals who are held in custody on no authority except that of an *expired* ICE detainer. Considering how much concern the Attorney General has expressed about the District’s liability for damages in cases in which D.C. Jail inmates are held for even a few hours past their release dates, we do not understand why the Executive Branch is willing to accrue enormous potential liability by holding individuals far longer than 48 hours (excluding Saturdays, Sunday, and holidays) on an ICE detainer that expired after 48 hours (excluding

⁶ See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that police may arrest a person for even nonjailable offenses); *Whren v. United States*, 517 U.S. 806 (1996) (holding that police officer’s ulterior motives for stopping a car are irrelevant as long as he has probable cause to stop the car).

⁷ See Letter from ACLU, *et al.*, to John T. Morton, Assistant Secretary of Homeland Security for U.S. Immigrations and Customs Enforcement, June 23, 2010 (urging ICE to adopt procedural protections and appropriate standards governing ICE detainers), available online at http://www.aclu.org/files/assets/Detainers_revised.pdf.

⁸ See Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 191 (2008) (arguing that ICE lacked statutory authority to issue these regulations).

⁹ 8 C.F.R. 287.7(d).

Saturdays, Sunday, and holidays). We urge the Council to look into this situation and take steps to ensure that individuals of any nationality are not being held in custody by the District of Columbia when there is no legal basis for such custody.

ICE Lies — But Numbers Don't

Secure Communities lacks adequate oversight, and has not been implemented in a manner consistent with ICE's public rhetoric. ICE claims that Secure Communities relies on a "risk-based approach" that focuses "first and foremost on the most dangerous criminal aliens."¹⁰ Yet according to ICE's own figures, out of the 111,000 noncitizen individuals identified in the program during its first year of operation, the vast majority—more than 100,000—were charged with or convicted of lesser crimes. Those supposedly targeted by the program—the "dangerous criminal aliens" charged with or convicted of more serious crimes—comprised less than 10% of the total. And less than one-fifth of these "dangerous" individuals—1.7% of the total number of noncitizens identified by the program—ended up being deported.¹¹ ICE has not identified how many non-dangerous individuals it has deported as a result of Secure Communities. If Secure Communities operates similarly to other ICE programs, however, then most of those deported or subjected to lengthy detentions are probably hapless individuals who have been arrested (rightly or wrongly) for minor offenses.

The Earl Warren Institute's CAP study illustrates the alarming differences between ICE's public rhetoric and the actual impact of their "criminal alien" dragnet. The issuance of an ICE detainer is a sign that, after identifying a person as a noncitizen, ICE has taken an interest in deporting that person. Yet during the 23-month study period, 98% of the ICE detainers issued under CAP targeted people arrested for misdemeanors—and most of those arrests were for petty crimes punishable only by a small fine. Only 2% of the detainers targeted people arrested for felonies.¹² There is little reason to believe that the issuance of detainers under Secure Communities would differ significantly. Indeed, ICE's recent practice of setting high quotas for total deportations, rather than focusing their efforts on deporting smaller numbers of more dangerous convicted criminals, increases the likelihood that it will continue indiscriminately to detain and deport large numbers of people who have not committed serious crimes.¹³

Finally, the debate over Secure Communities points to the need for greater Council oversight of the District government's collaboration with ICE. Currently, this oversight is hampered by the lack of information. The relevant agencies do not keep adequate records or compile reports that would facilitate such oversight. The ACLU therefore urges the Council to require both MPD and DOC to report information to the Council that would make it easier for the Council to identify

¹⁰ IMMIGRATIONS AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES FACT SHEET (Sept. 1, 2009), available online at http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

¹¹ Dep't of Homeland Security, Press Release, *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), online at <http://www.ice.gov/pi/nr/0911/091112washington.htm>.

¹² GARDNER & KOHLI, *supra* note 4, at 7.

¹³ See Spencer S. Hsu & Andrew Becker, *ICE officials set quotas to deport more illegal immigrants*, WASH. POST (Mar. 27, 2010) (describing ICE's quota system).

problem areas and provide appropriate guidance to these agencies. At a minimum, we hope the Council will want to know, with respect to each individual subject to an ICE detainer, what crime or crimes the person was charged with or convicted of, and how long he or she was held after he or she would otherwise have been released. We would be happy to identify additional kinds of information that would assist this oversight.

Thank you for considering our views.