

**CJIS ADVISORY POLICY BOARD
WORKING GROUP MEETINGS
SUMMER 2012**

TOPIC PAPER

PURPOSE: The purpose of this paper is to resolve unintended problems stemming from the Advisory Policy Board’s (APB) June 2009 decision to authorize automated searches of the Department of Homeland Security’s (DHS) Automated Biometric Identification System (IDENT) regardless of the Criminal Justice Information Service (CJIS) Division stakeholder’s request (June 2009 APB Recommendation #15).

As described herein, that decision enabled the DHS’s Immigration and Customs Enforcement (ICE) agency to mandate participation in its “Secure Communities” deportation program over strong state and local objection, and to the detriment of public safety.

Request

First, we request that the Working Group review the enclosed information regarding the problems that mandatory participation in ICE’s “Secure Communities” program has caused for CJIS users. These problems were not taken into account at the time of the June 2009 Recommendation, which considered only the technological benefits to interoperability associated with record-linking.

Second, we request the Working Group recommend that, in light of the negative effects that Secure Communities has had on CJIS Division stakeholders, the APB reverse its June 2009 recommendation and provide for searches of DHS’s IDENT database only at the request of the local submitting agency.

Third, we request that the Working Group recommend that the FBI not automate IDENT searches in jurisdictions where the Department of Justice or other credible bodies have made documented allegations or findings of civil rights abuses.

Description of Problem Being Solved

Background

“Secure Communities” is a controversial deportation program launched in 2008 by ICE. In May and June of 2011, the governors of New York, Illinois, and Massachusetts requested that their states be removed from “Secure Communities.”¹ The governors decried the program’s negative impact on public safety and community policing. Municipal governments across the country—including the Los Angeles and DC City Council—have also requested to “opt out” of Secure Communities.² At the federal level, the DHS Taskforce on Secure Communities issued a sharply critical report of the program in September 2011.³ Investigations by the Government Accountability Office

and the DHS Office of the Inspector General are also underway.⁴ The investigations were triggered by evidence that ICE misrepresented Secure Communities to state and local participants; that the program's scope is broader than described; that it may be encouraging racial profiling; and that it is undermining community policing efforts.⁵

Secure Communities works by harnessing interoperability between Federal Bureau of Investigation (FBI) and DHS databases. More specifically, Secure Communities depends on a form of *automated* interoperability between Integrated Automated Fingerprint Identification System (IAFIS) and IDENT originally authorized by the APB in June 2009. At that time, the APB recommended that, for record-linking purposes, all arrestee fingerprints submitted to the FBI by local law enforcement agencies be automatically searched against IDENT. Secure Communities uses this automatic search for immigration enforcement purposes. Active in less than 70 jurisdictions in June 2009,⁶ Secure Communities is now active in over 2,187 jurisdictions, and is scheduled for nationwide deployment by 2013.⁷

Through Secure Communities, the FBI alerts ICE's Law Enforcement Support Center (LESC) to any "matches" in the IDENT database. A match indicates that a person has had prior contact with immigration officials. The LESL then determines whether the person may be deportable. If so, it alerts the local ICE Field Office, which issues an immigration detainer, or "ICE hold." An ICE hold is a request that the local law enforcement agency detain a person for 48 hours longer than it otherwise would, in order to facilitate transfer to ICE. This detention is generally at the expense of the local law enforcement agency. Since Secure Communities began, it has resulted in the deportation of over 162,900 people.⁸

It is concerning that the overall effect of Secure Communities has been to transform local jails into gateways to deportation. As described in more detail below, many states and localities object to the program's harmful consequences for community policing and public safety. But to date, all state and local requests to opt out of participation in Secure Communities have been denied. These denials are due in large part to the June 2009 APB recommendation authorizing automatic IDENT searches. That recommendation means that states have no choice but to automatically check the immigration status of every arrestee, triggering enforcement action by ICE. But the APB's recommendation was made without considering the harmful effects of the program. In order to ensure that CJIS fulfills its role as a partner to state and local law enforcement agencies, it is imperative that the APB now reconsider its recommendation.

Public Safety and Community Policing

Governor Cuomo has asked to suspend New York's participation in Secure Communities because he found that the program was "actually undermining law enforcement."⁹ Governor Patrick of Massachusetts cited similar concerns in requesting that his state not be forced to participate in the program.¹⁰ At the federal level, the problem has been ably described by the Homeland Security Taskforce on Secure

Communities. The Taskforce found that:

Secure Communities has had unintended local impacts. Secure Communities and other federal enforcement and removal programs do not operate in a vacuum. In many localities, police leaders have said that immigration enforcement policies are disrupting police-community relationships that are important to public safety and national security. Law enforcement experts have stated that the trust that exists between police and immigrant communities can take years to develop and can remain tenuous despite the hard work of local law enforcement agencies. When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information. This may have a harmful impact on the ability of the police to build strong relationships with immigrant communities and engage in community policing, thereby negatively impacting public safety and possibly national security. To the extent that Secure Communities may damage community policing, the result can be greater levels of crime. If residents do not trust their local police, they are less willing to step forward as witnesses to or victims of crime.¹¹

The threat to public safety is exacerbated by Secure Communities' overbroad scope. As Illinois' Governor Quinn explained when he requested that his state be removed the program, there is a "conflict between the stated purpose of Secure Communities and the implementation of the program."¹² Secure Communities was promoted as a program to deport aliens "who have been convicted of serious criminal offenses." But ICE's own data on Secure Communities show that over 26% of those deported have never been convicted of a crime.¹³ Another 30% have only minor misdemeanor convictions.¹⁴

The following are real—and common—scenarios by which individuals have been placed into deportation as a result of Secure Communities¹⁵:

On April 30, 2010, Susana Ramirez, a single mother living in Northern Illinois, was pulled over because her car had touched the yellow line in the middle of the road. When she could not produce a driver's license, she was arrested. Three hours later, her friend arrived to post bail. However, through Secure Communities, Susana had already been issued an ICE hold. She remained in jail and, two days later, was transferred to immigration detention. She is now facing deportation, along with the prospect of leaving behind her 5-year-old US citizen daughter. This was her first arrest.

On April 20, 2010, Florinda, a Maryland resident, was arrested by an undercover police officer for operating an unauthorized business after she sold him a \$2

phone card. The charges were subsequently dropped. But through Secure Communities, Florinda was placed into deportation proceedings. Like Susana, she is the mother of US citizen children. She has no criminal record.

On June 12, 2011, Reina's husband, who had lived in the US for almost 20 years, was pulled over by Miami-Dade police for "failure to drive within a single lane." He was arrested for driving with a suspended license. Through Secure Communities, he was transferred to ICE detention. Under incorrect legal advice, he agreed to forego a hearing and accepted his deportation. Reina is now struggling to support her three US citizen children alone.

In addition to the many non-criminals and low-level offenders deported through Secure Communities, crime victims and witnesses have also been targeted.¹⁶ The problem is particularly acute with domestic violence crimes. In some jurisdictions, it is common police practice to arrest both parties to a domestic dispute. Once the true perpetrator is determined, charges against the victim are dropped. But that comes too late to prevent the victim from being placed into deportation through Secure Communities. Women who call the police for protection from an abusive partner may thus find themselves being deported as a result—a strong deterrent to seeking help. Isaura Garcia, a 20-year-old woman who was placed into deportation proceedings through Secure Communities after calling the police to protect her from her abusive boyfriend, explains: "My 911 call for help resulted in the worst possible punishment I could have suffered. . . I never would have called had I known I could face deportation."¹⁷

In response to the problem of deportation of crime victims, in June 2011, ICE announced a new policy by which it purports to use a policy of prosecutorial discretion to limit placing crime victims in deportation proceedings.¹⁸ But ICE continues to pursue the deportation of non-criminals and individuals whose arrest charges are dropped. The agency has not identified a reliable mechanism for identifying victims and even where a person has been identified as a victim, implementation of the policy has been inconsistent.¹⁹

Stories like those of Susana, Florinda, Reina, Isaura, and the 43,028 other "non-criminals" deported through Secure Communities spread widely and encourage a perception that local police are indiscriminately enforcing immigration laws. The result is to decrease trust between police and immigrant communities. Crime victims and witnesses become discouraged from cooperating with the police. In the words of a Texas woman who was the victim of identity theft:

I was afraid that if I approached the victims unit of the police department they would ask me about my documentation status and for a social security number, which I do not have. I know people who have been arrested for something as simple as a broken taillight, like my friend's husband who was incarcerated unjustly for three months. It's awful. We have no guarantee that the police will not act as federal immigration officers and ask us about our documentation status.²⁰

As former Los Angeles Police Chief William Bratton has explained, “criminals are the biggest benefactors when immigrants fear the police. We can't solve crimes that aren't reported because the victims are afraid to come forward to the police.”²¹

The APB did not consider these serious public safety and community policing concerns when it voted to recommend automated searches of IDENT regardless of the request of the submitting agency. Indeed, at that time, the incidents described above had not yet become widely known. Now that they have, it is essential that the APB take them under consideration.

Detention of US Citizens and Racial Profiling concerns

In addition to eroding trust between police and immigrant communities, Secure Communities has led to other unanticipated problems that the APB should now take under consideration. A recent study found that 3600 U.S. citizens have been tagged and mistakenly arrested through Secure Communities.²² In one example, American college student Romy Campos was arrested on a minor misdemeanor charge in Torrance, California in November 2011. She was denied bail, however, and detained for four days in a Los Angeles County jail due to a federal immigration detainer. DHS only released Ms. Campos after her attorney provided her Florida birth certificate. Her fingerprints had triggered a match in Secure Communities because she is a citizen of both the United States and Spain and once entered the United States on her Spanish passport, creating a DHS record.²³

Problems related to racial profiling were also not considered at the time the APB considered automated searches of IDENT but have since come to light. In December 2011, after a three-year investigation, the (DOJ) found discriminatory policing and detention practices in Maricopa County, Arizona. DHS subsequently suspended its 287(g) agreement with Maricopa County.²⁴ However, Secure Communities remains active in Maricopa County and is active or scheduled for activation in other jurisdictions where civil rights investigations or challenges to discriminatory police practices are pending.²⁵ The APB should have a particular interest in preventing even the specter of misuse of Secure Communities through racial profiling to avoid the FBI's involvement in such allegations.

Suggested Solution

States and localities should be allowed to choose if and when Secure Communities is right for their communities. Civil rights investigations and challenges by the DOJ should also be taken into account in determining whether to activate Secure Communities in a jurisdiction. Thus, the Working Group should recommend that the APB vote to allow for IDENT search/record updates to be performed *only* at the request of the submitting agency, and only where no DOJ civil rights investigation or systemic police misconduct complaints or litigation is underway.

Scenario/Example

The suggested solution would work in one of two ways depending on whether the jurisdiction has initiated Secure Communities. First, for agencies where Secure Communities is already implemented, if a state or local CJIS user decided that, in its judgment, Secure Communities was causing more harm than benefit to public safety, was being misused by law enforcement or otherwise interfered with local law enforcement priorities, that state or local user could choose not to participate in the program by choosing not to query the IDENT database. Second, in jurisdictions where Secure Communities has not been implemented, law enforcement agencies would be required to positively sign up for implementation of the program through a transparent process.

Benefit(s) to the Law Enforcement

Law enforcement will benefit from the enumerated suggested solution in many ways. Most importantly, trust between police and immigrant communities would be restored, and community policing strategies preserved. In addition, state and local police would be spared the significant burdens Secure Communities imposes on local agencies, including the need to respond to expensive and greatly increased immigration detainer requests.

Preservation of Community Policing Strategies

Many local and state law enforcement agencies, including those in Chicago, Los Angeles, New York City, Washington, D.C., and Vermont have policies of keeping their police separate from immigration enforcement so as to ensure immigrants' willingness to report crimes and aid in police investigations.²⁶ Sherriff Michael Hennessey of San Francisco summarized the need for trust in communities can be maintained with appropriate community policing strategies:

I know that maintaining public safety requires earning community trust. We rely heavily on the trust and cooperation of all community members—including immigrants—to come forward and report crimes, either as victims or as witnesses. Otherwise, crimes go unreported—and this affects everyone, citizens and noncitizens alike. It also leads to “street justice,” in which residents who are too afraid to go to the police decide to take justice into their own hands, often with deadly results.²⁷

Immigrants' fear of reporting when they are the victim of a crime, or coming forward as a witness, damages the entire community that law enforcement agencies are sworn to protect. If agencies are allowed to make their own decision about participating in Secure Communities, they will retain the autonomy to set priorities for safety in their communities.

Reduction of Burdens on Local Law Enforcement Agencies

ICE officials claim that Secure Communities imposes no additional burdens on state and local law enforcement agencies. In reality, state and local agencies face many social and economic hardships as a result of the program, such as housing immigrants as detainees in overcrowded local jails on ICE detainers. Police Chief Chris Burbank of Salt Lake City, Utah, noted some of the burden that has been imposed on his agency:

The resulting priority adjustment [from Secure Communities and local immigration legislation] places emphasis upon civil immigration action over community policing and all criminal enforcement. Additionally, the program sets an unhealthy priority for much needed jail space. Individuals are being held for civil immigration purposes, causing criminal violators to be released. In Salt Lake County, between 700 and 900 criminal offenders are released monthly due to overcrowding. Civil detainers often supersede criminal charges.²⁸

Local law enforcement agencies should have the option to preserve their scarce resources for detecting and preventing crime. Local police should be able to decide to use their jail space and officer time to make communities safer from crime, rather than enforcing federal immigration law.

Impact on state or local agencies, users and systems

State and local agencies and users would benefit from this suggested solution. Allowing IDENT searches upon jurisdictions' request will ameliorate the above-described concerns, respect state and local autonomy, and restore the role of state and local agencies as full, respected CJIS partners.

No legal limitations on permitting state and local choice

While ICE has represented that state and local participation in Secure Communities is required, no federal law mandates automatic immigration background checks for every fingerprint submitted to the FBI by state and local stakeholders. Instead, interoperability between IAFIS and IDENT requires only that the DOJ and DHS databases be compatible for the sharing of information. Thus no legal limitations prevent the APB from reversing its 2009 recommendation and allowing automated IDENT searches only at the request of a submitting agency.

¹ See Letter from Gov. Quinn to Secure Communities Acting Assistant Director Marc Rapp, May 4, 2011, available at <http://crocodoc.com/JedzqSN>; Governor Cuomo Suspends Participation in Federal Secure Communities Program, June 1, 2011, available at <http://www.governor.ny.gov/press/06012011FederalSecureCommunitiesProgram>; Letter from Secretary Heffernon to Secure Communities Acting Assistant Director Marc Rapp, available at <http://altopolimigra.com/2011/06/06/massachusetts-gov-patrick-letter-to-marc-rapp-icedhs-regarding-opt-out-of-s-comm/>.

² See Collected Local Resolutions Opposing S-Comm, at <http://altopolimigra.com/s-comm-shadow-report/#letters>.

³ See Task Force on Secure Communities, Findings and Recommendations, available at <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf>.

⁴ See Lee Romney, *U.S. to investigate Secure Communities deportation program*, Los Angeles Times, May 18, 2011.

⁵ *Id.*

⁶ Secure Communities: Quarterly Report, Fiscal Year 2009 Report to Congress, Third Quarter, Aug. 27, 2009, at 4, available at [http://ccrjustice.org/files/7.%203rd%20Quarter%20FY2009%20Report%20to%20Congress%20\(part%201%20of%202\).pdf](http://ccrjustice.org/files/7.%203rd%20Quarter%20FY2009%20Report%20to%20Congress%20(part%201%20of%202).pdf).

⁷ See ICE, Secure Communities: Activated Jurisdictions, January 24, 2012, at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

⁸ Secure Communities Nationwide Interoperability Statistics, December 31, 2011, at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2012-to-date.pdf.

⁹ Governor Cuomo Suspends Participation in Federal Secure Communities Program, June 1, 2011, available at <http://www.governor.ny.gov/press/06012011FederalSecureCommunitiesProgram>.

¹⁰ Letter from Secretary Heffernon to Secure Communities Acting Assistant Director Marc Rapp, available at <http://altopolimigra.com/2011/06/06/massachusetts-gov-patrick-letter-to-marc-rapp-icedhs-regarding-opt-out-of-s-comm/>.

¹¹ See Task Force on Secure Communities, Findings and Recommendations, at 24, available at <http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf>.

¹² Letter from Gov. Quinn to Secure Communities Acting Assistant Director Marc Rapp, May 4, 2011, available at <http://crocodoc.com/JedzqSN>.

¹³ Secure Communities Nationwide Interoperability Statistics, December 31, 2011, at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2012-to-date.pdf.

¹⁴ *Id.*

¹⁵ Each of these stories is reported in more detail in Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities" Program, Aug. 2011, available at <http://altopolimigra.com/s-comm-shadow-report/>.

¹⁶ See also America's Voice, *Public Safety on ICE: How do You Police a Community that Won't Talk to You?*, at http://americasvoiceonline.org/research/entry/public_safety_on_ice_how_do_you_police_a_community_th_at_wont_talk_to_you.

¹⁷ Restoring Community, *supra* note XIV, at 37-38.

¹⁸ John Morton, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" (June 17, 2011).

¹⁹ See Restoring Community, *supra* note XIV, at 38-39.

²⁰ See The Real Impact of Police-ICE Collaboration, at <http://altopolimigra.com/2011/08/16/the-real-impact-of-police-ice-collaboration/>.

²¹ See William Bratton: Immigration reform vital to community safety, trust, Omaha World Herald, Jan. 28 2011.

²² See Julia Preston, Immigration Crackdown Also Snares Americans, New York Times, Dec. 13, 2011, at http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?pagewanted=1&_r=3.

²³ *Id.*; see also Aarti Kohli, Peter L. Markowitz, Lisa Chavez, Secure Communities By the Numbers: An Analysis of Demographics and Due Process, October 2011, at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

²⁴ Statement by Secretary Napolitano on DOJ's Findings of Discriminatory Policing in Maricopa County (Dec. 15, 2011), at <http://www.dhs.gov/ynews/releases/20111215-napolitano-statement-doj-maricopa-county.shtm>.

²⁵ See Activated Jurisdictions, *supra* note 7.

²⁶ See, e.g., Los Angeles Police Department Manual, Special Order 40.

²⁷ Sheriff Hennessey: Secure Communities Destroys Public Trust, San Francisco Chronicle, Opinion, May 1, 2011.

²⁸ See Restoring Community, *supra* note 14, at 8.