

October 6, 2010

Richard L. Skinner, Inspector General  
Office of the Inspector General  
Department of Homeland Security  
Washington, D.C. 20528

**Re: Request for Audits of Department of Homeland Security programs, Secure Communities and the Criminal Alien Program**

Dear Inspector General Skinner,

We are writing to request that the Office of the Inspector General (OIG) conduct audits into whether the Department of Homeland Security (DHS) programs, Secure Communities and the Criminal Alien Program (CAP) comport with basic constitutional protections, their Congressional mandates, and the agency's stated priorities. This request follows a related meeting with your office on July 22, 2010.

Secure Communities and CAP are 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. Through Secure Communities, which was implemented in 2008, the fingerprints of criminal arrestees at participating law enforcement agencies are run against DHS databases for checks on immigration history. Secure Communities is ICE's fastest growing immigration enforcement program, with anticipated nationwide implementation by 2013. Secure Communities has radically changed the relationship that states and localities have with ICE by linking the criminal justice system to immigration enforcement in an unprecedented manner. As of April 2010, Secure Communities has resulted in over 2 million fingerprint submissions, with matches found on just over 200,000 of those submitted. Immigration holds have been placed on over 50,000 individuals and nearly 40,000 have been deported pursuant to Secure Communities.<sup>1</sup> By ICE's own description, Secure Communities is the future of immigration enforcement.<sup>2</sup> Therefore, it deserves and necessitates careful review to determine the extent of the abuses that are occurring.

The Criminal Alien Program, by comparison, is one of ICE's oldest immigration enforcement programs, currently operating in most local, state, and federal jails and prisons throughout the country. Under CAP, ICE agents physically present in jails and prisons or by telephone screen inmates flagged by jail or prison officials as being foreign-born to determine if they are removable. CAP results in a significant number of immigration enforcement actions – according to a report by ICE's Office of Detention Policy and Planning, nearly half (48 percent) of the admissions and the average daily population in ICE custody for

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<sup>1</sup> ICE Nationwide Interoperability Statistics, *available at* [http://www.ice.gov/doclib/foia/secure\\_communities/nationwideinteroperabilitystatsapr10.pdf](http://www.ice.gov/doclib/foia/secure_communities/nationwideinteroperabilitystatsapr10.pdf) (last visited Sept. 2, 2010) (attached).

<sup>2</sup> See ICE Official Webpage, "About Secure Communities," [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (describing as one of the program's strategic goals to "[t]ransform criminal alien enforcement agency wide").

fiscal year 2009 were identified through the CAP program.<sup>3</sup> Therefore, review of this enforcement program is also warranted and necessary.

As explained by advocates present at the July 22nd meeting, ICE has been less than transparent about these programs. ICE has not shared how these programs operate, and what they actually achieve (as compared to what ICE claims are the program's goals). The limited information that ICE has made publicly available about Secure Communities and CAP indicates that the programs operate with few if any formal guidelines<sup>4</sup>, take a hands-off approach to the circumstances that lead to the person's contact with ICE (even when those circumstances include racial profiling), and focus in practice on persons arrested for minor offenses instead of those convicted of serious offenses who pose a danger to the community.

Both Secure Communities and CAP are largely unstudied programs. In the case of CAP, the program has been in operation for more than 25 years; however no real audit has been conducted to examine the program's operation and impact. Although there is scant information publicly available on these programs, piecing together what information is currently available leads to serious concerns about how these programs operate and whether their results are properly aligned with program goals.

The specific grounds for audits of these programs are as follows:

***I. Concerns with program's vulnerability to abuse and lack of oversight***

Secure Communities and CAP overwhelmingly result in identification and referral to ICE of persons arrested on minor or less serious charges. Both programs are susceptible to abuse because there are no safeguards to ensure that racial profiling or related abuses do not result or are not implicitly encouraged. An individual's immigration history can be checked regardless of the severity of the arresting crime or whether the arrest ever results in a conviction or even a formal charge. Thus, mere arrest is sufficient to lead to detention and deportation in many cases. As a result, these programs provide perverse incentives to state and local police to arrest individuals who look or sound "foreign" so that their immigration status can be checked.

Indeed, 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 CAP program 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>5</sup> The report concluded that there is compelling evidence that the CAP program "tacitly

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<sup>3</sup> Dora Schriro, *Immigration and Detention Overview and Recommendations* (U.S. Dept. of Homeland Security, Oct. 6, 2009), at 12, [www.ice.gov/doclib/091005\\_ice\\_detention\\_report-final.pdf](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf) (last visited Sept. 1, 2010) (attached).

<sup>4</sup> We recognize that Assistant Secretary John Morton recently issued an official policy memo outlining the agency's priorities for all enforcement programs; however, these programs are so large in scope and sweep in such large numbers of individuals that an internal memorandum lacks the authority needed to establish adequate controls and guidelines. See Memorandum from John Morton, Assistant Sec'y of Homeland Security for U.S. Immigration and Customs Enforcement to All ICE Employees (June 30, 2010) (attached).

<sup>5</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).

encourages local police to arrest Hispanics for petty offenses.”<sup>6</sup> It further noted that ICE is not following the program’s congressional mandate to focus resources on the deportation of immigrants with serious criminal histories.

Figures released by ICE for the Secure Communities program’s first two years of operation reveal a similar pattern. Figures from October 2008 through June 2010 show that the vast majority (79 percent) of those deported under Secure Communities were either non-criminal<sup>7</sup> or arrested or convicted for non-serious crimes, such as driving without a license. In fact, only 20 percent of the approximately 47,000 individuals deported under the program were charged or convicted of the most serious, Level 1 offenses. These figures are particularly alarming in certain localities. In Travis County, Texas, 82 percent of individuals deported pursuant to Secure Communities had no criminal record. In Maricopa County, it was 54 percent. Yet, ICE continues to persistently tout Secure Communities as a program that successfully targets serious criminal aliens.<sup>8</sup> Indeed, Congress has allocated money for expansion of the program for just this purpose.<sup>9</sup>

Individual stories further illustrate the program’s harmful impact on individuals charged with minor traffic offenses and its susceptibility to abuse. In Prince George’s County, Maryland, Perla Maradiaga was separated from her 17-day-old, nursing infant when she was arrested by local police officers for “driving or attempting to drive without a license”. Ms. Maradiaga’s fingerprints were checked against DHS databases as a result of Secure Communities, and she was subsequently handed over to ICE. Despite her requests to be reunited with her newborn child and for medical attention as a result of having recently given birth, Ms. Maradiaga was held for three days before being handed over to ICE agents and processed for deportation proceedings. Similarly, in Miami Dade County, a mother of two U.S. citizen children was arrested for driving without a license, handed over to ICE as a result of Secure Communities, and subsequently deported.<sup>10</sup> While we highlight only two individual stories, here, there are countless other stories like these that demonstrate the operation of this program in a manner that does not comport with stated priorities, but instead works against the public interest.

ICE maintains a hands-off policy regarding the nature and circumstances of arrests, a kind of willful blindness that precludes systematic examination of the program’s operation. To our knowledge, ICE has not put into place any mechanisms to ensure that the program’s purported focus on noncitizens convicted of serious offenses is achieved. If such mechanisms do exist, they are not functioning to keep the program on course for alignment with its stated goals and priorities. ICE also does not monitor or supervise the local agencies partnering in these programs to ensure that civil rights and programmatic violations do not occur. Moreover, the way these programs are currently deployed does not ensure that

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<sup>6</sup> *Id.* at 3.

<sup>7</sup> The term “non-criminal” comes from the Interoperability Reports issued by ICE. Although ambiguous, we understand it to mean individuals without any criminal history.

<sup>8</sup> “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.” House Committee on Appropriations, *Department of Homeland Security Appropriations Bill, 2010*, 111th Cong. 1<sup>st</sup> sess., 2009, H. Rep. 111-157, 8, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_reports&docid=f:hr157.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr157.111.pdf).

<sup>9</sup> Secure Communities was funded for FY1020 at \$200,000,000. *See id.* at 49.

<sup>10</sup> Marcos Restrepo, *Secure Communities under scrutiny*, THE FLORIDA INDEPENDENT, Aug. 11, 2010, <http://floridaindependent.com/5703/secure-communities-under-scrutiny> (attached).

local agencies with proven problematic civil rights records don't operate the program, or at minimum are specifically monitored.

### ***Lack of agency transparency and information accessible to the public***

Despite the reach and impact of Secure Communities, which currently operates in 552 jurisdictions in 29 states, the program remains shrouded in mystery. This is a result of ICE's lack of transparency about how the program operates, notice to local communities that the program is being deployed, and what sort of ability local communities have to decline or limit their participation.

For example, communities often do not learn that the Secure Communities program has been implemented in their local jails or prisons until after the fact and even then, only through an announcement on the ICE webpage. In New Mexico, which began operating the program in October 2009, 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. The remaining three counties did not have any documentation or records relating to their participation in the program.<sup>11</sup>

Moreover, ICE has shown a repeated pattern of making information about Secure Communities available only after advocates expend the time and resources to file an official Freedom of Information Act (FOIA) request. Even then, ICE fails to adequately respond, compelling groups to file suit just to obtain access to the documents to which they are legally entitled.<sup>12</sup>

Similarly, ICE has not been transparent about the CAP program. The only information that ICE has publicly released regarding how this program operates appears in a one-page description on ICE's website.<sup>13</sup> This is simply insufficient for a program of this size and scope. ICE does not provide information about where the program operates or how advocates can raise concerns about the manner in which it operates.

ICE's secrecy effectively chills public debate on the wisdom of adopting these programs in a given community and prevents communities from tracking their impact. As discussed in greater detail in the sections that follow, ICE has kept secret how the technology used in Secure Communities works, despite numerous requests from advocates.

### ***Serious problems resulting from lack of governing rules***

ICE has never issued regulations or guidance regarding operation of either the Secure Communities or CAP programs. Nevertheless, ICE continues to expand these programs throughout the country at record speed. In fact, the only guidelines governing the operation of Secure Communities appear in written Memoranda of Agreement (MOAs) struck between ICE and individual states and in the June 30th policy

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<sup>11</sup> This information came out of a Request to Inspect Public Records submitted by the American Civil Liberties Union of New Mexico. One of the agencies receiving the request responded, "I do not have any knowledge of any Hidalgo County Department participating in this program. To be honest, I did not even know what it was. I had to research it on the internet." (documents on file with author).

<sup>12</sup> See, e.g., *National Day Laborer Organizing Network v. US Immigration and Customs Enforcement*, 1:10-cv-03488-SAS (S.D.N.Y. Apr. 27, 2010), available at <http://www.ccrjustice.org/secure-communities>.

<sup>13</sup> ICE Official Webpage, "Criminal Alien Program," [http://www.ice.gov/pi/news/factsheets/criminal\\_alien\\_program.htm](http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm) (last visited Sept. 2, 2010).

memo referenced above. The Secure Communities MOAs set out, in broad terms, the roles and responsibilities with regard to operation of the program and contain a perfunctory prohibition against racial profiling.<sup>14</sup>

ICE has always represented to the public that participation in Secure Communities is predicated on the state identification bureau signing an MOA, but in the case of at least one state, ICE agreed to proceed without an MOA, a fact which hid the operation of the program from the public.<sup>15</sup> In documents obtained through a FOIA request by the National Immigration Law Center, ICE notes that it permitted Pennsylvania to participate in the program without an MOA and that it would pursue this same approach with other states. In short, this means that ICE permits the Secure Communities program to operate in certain states without adequate rules to govern its operation.

After a state has signed an MOA with ICE, rollout of Secure Communities on the local level proceeds according to ICE's deployment strategy. Initially ICE required that local agencies opting to participate in Secure Communities sign a statement of intent to abide by the program's Standard Operating Procedures, but ICE has since abandoned this practice. Indeed, although the local agency is the entity actually charged with operating the day to day elements of the program, this partnership is not memorialized in any written agreement. Importantly, ICE also does not require or provide any training for local law enforcement officials participating in either the Secure Communities or CAP programs.

In the case of the CAP program, ICE has never formalized their presence in the local, state or federal jails through any sort of written agreement. Coupled with the lack of regulations to guide the program's operation, CAP, like Secure Communities, operates without any meaningful limitations. In fact the only principle guiding the operation of these programs is ICE's stated enforcement priorities; however, as already discussed in greater detail above, neither program operates in compliance with these priorities.<sup>16</sup>

### ***Civil rights and civil liberties concerns compounded by ICE's detainer practices***

ICE's practice regarding immigration detainers compounds other problems underlying the Secure Communities and CAP programs. An immigration detainer is an official request from ICE to another law enforcement agency, that the agency notify ICE prior to releasing an individual from custody. Detainers are the primary tool through which ICE effectuates the initiation of removal proceedings and deportation under both the Secure Communities and CAP programs.

However, ICE issues detainers without regard for constitutional violations that may have occurred at the point of arrest. For example, in Sonoma County, California, an immigrant was arrested by local police, but the criminal case was later dismissed because of serious Fourth Amendment violations occurring prior

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<sup>14</sup> 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](http://www.ice.gov/doclib/foia/secure_communities-moa/r_arizona_120909.pdf) (attached).

<sup>15</sup> Through a FOIA request filed in late 2009, the National Immigration Law Center discovered that ICE negotiated with the state of Pennsylvania to implement the program without an MOA. ICE, Secure Communities Weekly Executive Report Dec. 15-19, 2008, available at <http://immigrationimpact.com/upload/docs/Secure%20Communities.pdf> (attached).

<sup>16</sup> ICE has established three risk-based classifications aimed at ensuring that resources are appropriately allocated to target non-citizens convicted of crimes who pose the greatest risk to the public. See, e.g., Secure Communities Memorandum of Agreement with Arizona Dept. of Public Safety, *supra* note 14.

to the arrest. However, before this individual could be released from criminal custody, he was identified by the Secure Communities program and an ICE detainer prevented his release.

Detainers are also issued regardless of the basis for the arrest. Although ICE's policy regarding issuance of detainers<sup>17</sup>, like its stated goals for the Secure Communities and CAP programs, purports to target individuals posing the most serious risk to the public, ICE has not instituted any controls to actually achieve this specific goal. The lack of safeguards in the Secure Communities program means that a significant number U.S. citizens and lawful permanent residents who are not removable are identified through the operation of this program.<sup>18</sup> After an individual is identified through Secure Communities, a detainer is often placed without more investigation. As a result, the program indiscriminately targets noncitizens and ICE's use of immigration detainers far too often results in prolonged and unjustified detention.

Advocates across the country have raised these and other concerns regarding ICE's detainer practices in formal comments submitted to the agency.<sup>19</sup> The issues raised in these comments further underscore the ways in which ICE's detainer practices exacerbate problems in the Secure Communities and CAP programs.

### ***Serious need for clarity regarding local agency ability to control or limit participation in Secure Communities***

In response to the concerns about the Secure Communities program, some communities have asked not to participate or to limit their participation. Yet, despite repeated public statements that participation in Secure Communities is voluntary, ICE has been unclear as to the procedure for opting out or limiting participation in the program. As a result, once the state signs an MOA with ICE, local agencies find themselves participating in the program whether they want to or not.

Several jurisdictions have recently voted to decline participating in, or "opt-out" of, the Secure Communities program, including San Francisco, Santa Clara, Arlington, and the District of Columbia. Yet, only one has been able to effectuate its request to opt-out whereas the others have instead been given the run-around from ICE. Originally, localities were told to direct their requests to the state identification bureau, the entity responsible for receiving the fingerprints and which signed the Secure Communities MOA with ICE. However, these efforts proved unsuccessful and localities were left with no answers about how to seize upon the supposed voluntary nature of this program. Efforts by members of Congress to obtain clarification about a local agency's ability to decline or control participation in Secure Communities have been similarly frustrated. U.S. Representative Zoe Lofgren (Democrat-California), Chair of the House Judiciary Committee's Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law wrote to Secretary of Homeland Security Janet Napolitano and U.S.

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<sup>17</sup> See U.S. Immigration and Customs Enforcement, "Interim Policy Number 10074.1: Detainers" (Aug. 2, 2010); U.S. Immigration and Customs Enforcement, "Draft Policy Number [TBD]: Detainers".

<sup>18</sup> Julia Preston, "U.S. Identifies 111,000 Immigrants with Criminal Records," N.Y. TIMES (Nov. 12, 2009), <http://nytimes.com/2009/11/13/us/13ice.html> (detailing a 5% hit rate for U.S. citizens whose fingerprints were scanned).

<sup>19</sup> A copy of the comment submitted by national groups and that submitted by California groups is attached to this request.

Attorney General Eric Holder requesting clarification about the program's opt-out procedure and waited several months for a response.<sup>20</sup>

ICE purported to address confusion regarding the opt-out provision in its August 17, 2010 memo, "Setting the Record Straight."<sup>21</sup> However, the process ICE outlined for a locality to pursue opting-out, namely sending a written request to the state and to ICE, has already been pursued by San Francisco County and did not lead to any success in declining participation (the program went live in San Francisco County in June 2010). In yet another example of ICE's obfuscation, Secure Communities Executive Director, David Venturella remarked in an LA Times article that ICE was not currently matching fingerprints from unwilling counties out of "political sensitivity."<sup>22</sup> Moreover, in a recent press conference announcing the deportation figures for fiscal year 2010, DHS Secretary Janet Napolitano declared that Secure Communities operates on an agreement between DHS and the Department of Justice and that the agency does not view it as an opt-in/out-out "kind of a program."<sup>23</sup> According to Secretary Napolitano, the program does not require the cooperation of state or local agencies and localities do not have the option of declining participation. This directly contradicts ICE's prior public statements about the voluntary nature of the program and the purported process for opting-out outlined in the August 17th memo. There is a serious need for clarity regarding whether the program is voluntary and, assuming this is the case, the process by which a locality can decline participation.

### ***Conclusion***

Theoretical concerns and anecdotal evidence of fundamental flaws with the Secure Communities and CAP program abound.<sup>24</sup> But the problems endemic to both programs are of unknown proportions. Absent audits and resulting recommendations, the programs will continue to be implemented without oversight and the violations, misinformation, and human costs will continue to accumulate.

Given the concerns enumerated above, we feel that OIG audits of the Secure Communities and CAP programs are both necessary and warranted. We suggest that the OIG specifically examine and make concrete recommendations on the following:

- (1) Access to and accuracy of information provided to the public on these programs;

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<sup>20</sup> Representative Lofgren received a response to her request on Sept., 8, 2010, however the opt-out procedure outlined in this letter mirrors that discussed in the ICE press release, "Secure Communities: Setting the Record Straight," discussed *infra*. See Letter from Janet Napolitano, Sec'y, Department of Homeland Security, to Rep. Zoe Lofgren, U.S. House of Rep. (Sept. 8, 2010) (attached).

<sup>21</sup> ICE, "Secure Communities: Setting the Record Straight" (Aug. 17, 2010), at 6-7, available at [http://www.ice.gov/doclib/secure\\_communities/pdf/sc-setting\\_the\\_record\\_straight.pdf](http://www.ice.gov/doclib/secure_communities/pdf/sc-setting_the_record_straight.pdf) (last visited Sept. 2, 2010) (attached).

<sup>22</sup> Ken Dilanian, *Jailed illegal immigrants pose policy dilemma: A U.S. program to check the immigration status of everyone booked into jail runs into local rules against such actions*, LA TIMES, June 7, 2010, <http://www.latimes.com/news/nationworld/nation/la-na-immigrant-felons-20100607,0,1053301,print.story> (attached).

<sup>23</sup> Janet Napolitano, Sec'y of the Dept. of Homeland Security, Press Conference (Oct. 6, 2010). See also Shankar Vedantam, *Local jurisdictions find they can't opt out of federal immigration enforcement program*, WASH. POST, Sept. 30, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007225.html> (attached).

<sup>24</sup> Indeed, we have collected additional stories that demonstrate the serious flaws with both the Secure Communities and CAP programs, which can be provided upon request.

- (2) Whether these programs operate in compliance with ICE's stated priorities, with particular regard to whether this varies by locality; and
- (3) What controls currently operate to address civil rights and civil liberties concerns (including mechanisms for oversight, and data collection and reporting) and what controls need to be put in place.

Thank you for your consideration. For follow-up please contact Melissa Keaney at the National Immigration Law Center, (213) 674-2820.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)  
American Civil Liberties Union  
American Immigration Council  
American Immigration Lawyers Association  
Asian American Justice Center  
Catholic Legal Immigration Network, Inc  
Florida Immigrant Advocacy Center  
Massachusetts Immigrant and Refugee Advocacy Coalition  
Muslim Public Affairs Council  
National Immigrant Justice Center  
National Immigration Forum  
National Immigration Law Center  
National Immigration Project of the National Lawyers Guild  
Rights Working Group  
South Asian Americans Leading Together