

# More Questions Than Answers about the Secure Communities Program

MARCH 2009

In March 2008, U.S. Immigration and Customs Enforcement (ICE) announced the initiation of the Secure Communities program.<sup>1</sup> The critical element of the program (now called Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens) is that, during booking in a jail, arrestees' fingerprints will be checked against U.S. Department of Homeland Security (DHS) databases, rather than just against FBI criminal databases. ICE will automatically be notified if the fingerprints match fingerprints in the DHS system. It will then do follow-up interviews and "take appropriate action."<sup>2</sup>

ICE implementation of the program began in October 2008 in North Carolina and Texas. The agency expects it to be fully implemented in all jails and prisons throughout the country within the next four years.<sup>3</sup>

Secure Communities is just one of the programs included under Immigration and Customs Enforcement Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS), which ICE describes as an "umbrella of services and programs" that "provide local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities."<sup>4</sup> One of the other ICE ACCESS programs is cross-designation of state and local law enforcement officers to enforce immigration law under section 287(g) of the Immigration and Nationality Act (INA).<sup>5</sup>

Secure Communities has a deceptively benign appearance because of its name and purported focus on criminals. But the program applies to immigrants regardless of guilt or innocence, how

<sup>1</sup> U.S. Immigration and Customs Enforcement, "Fact Sheet: Secure Communities," Mar. 28, 2008, [www.aila.org/content/default.aspx?docid=25045](http://www.aila.org/content/default.aspx?docid=25045). The program's most recent description is "Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens," Nov. 19, 2008, [www.ice.gov/pi/news/factsheets/secure\\_communities.htm](http://www.ice.gov/pi/news/factsheets/secure_communities.htm) (hereinafter "Secure Communities, Nov. 19, 2008").

<sup>2</sup> *Id.*

<sup>3</sup> S. Carroll, "Harris Jailers Can Access Huge Immigration Database," *Houston Chronicle*, Oct. 27, 2008; L. Berestain, "County to Check Immigration Status of Arrestees in Jail," *San Diego Union-Tribune*, Nov. 13, 2008; M. Tremoglie, "Bucks, Montco Join New Immigration Enforcement Program," *The Bulletin*, Dec. 24, 2008, [http://thebulletin.us/articles/2008/12/26/news/local\\_state/doc4951fef399af8005627282.prt](http://thebulletin.us/articles/2008/12/26/news/local_state/doc4951fef399af8005627282.prt); E. Sullivan, "Homeland Secretary Wants Criminal Aliens Out of U.S.," *Associated Press*, Jan. 29, 2009.

<sup>4</sup> Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security, ICE ACCESS, [www.ice.gov/doclib/pi/news/factsheets/iceaccess\\_factsheet.pdf](http://www.ice.gov/doclib/pi/news/factsheets/iceaccess_factsheet.pdf).

<sup>5</sup> For more information on 287(g) agreements, see Immigration Policy Center, "Local Enforcement of Immigration Laws Through the 287(G) Program: Time, Money, and Resources Don't Add Up to Community Safety," Mar. 3, 2009, [www.immigrationpolicy.org/images/File/factcheck/287\(g\)%20fact%20sheet%203-2-09.pdf](http://www.immigrationpolicy.org/images/File/factcheck/287(g)%20fact%20sheet%203-2-09.pdf).



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or why they were arrested, and whether or not their arrests were based on racial or ethnic profiling or were just a pretext for checking immigration status. ICE fact sheets and press releases leave many critical questions unanswered: How will ICE ensure that the program's priorities — giving highest priority to persons convicted of serious crimes — are implemented and enforced? What auditing and oversight will be conducted? How will racial and ethnic profiling be prevented? How will the civil rights of targeted persons be protected? What redress exists for those wrongly identified? When will detainers be imposed and how will abuses be prevented? What will be the effects on community policing, and the willingness of victims and witnesses to report crime?

The following questions and answers take a look at these issues.

### ■ Has ICE issued regulations governing implementation of the program?

- No. The program's operation has been announced by press releases and fact sheets posted on the ICE website, but no regulations have been issued, even though the program has been put into operation.

### ■ What is the relationship between Secure Communities and the 287(g) program?

- They are separate but related and sometimes overlapping programs.
- Section 287(g) is a provision of the INA that permits police to enforce civil immigration law provisions after their jurisdiction enters into a memorandum of agreement (MOA) with DHS. It requires training and certification of local law enforcement participants, and their immigration enforcement activities must be conducted under the supervision of ICE agents. Section 287(g) has existed since 1996, but was unused until 2002, when Florida entered into the first agreement. ICE has reported that as of November 2008, 67 jurisdictions had entered into MOAs and 950 officers had been trained.<sup>6</sup>
- ICE has included the section 287(g) program as one of the components of Secure Communities, to “increase local law enforcement partnerships through 287(g) cross-designation that allows trained officers to interview and initiate removal proceedings of aliens processed through their detention facilities.”<sup>7</sup>
- It is conceivable that a community would have both a 287(g) program based either in or outside a jail, as well as access to DHS databases in a jail through Secure Communities. If the 287(g) program is in a jail, then jail officers might be the ICE officers who “conduct follow-up interviews and take appropriate action.” The ICE fact sheets and press releases do not clarify whether this is the case.

### ■ What are ICE's priorities for the Secure Communities program?

- ICE reports that under the program's “risk-based” approach, it will use the following three levels to ensure that resources are appropriately allocated to identify and determine the immigration status of non-U.S. citizens arrested for crime who pose the greatest risk to the public:
  - ❖ Level 1 – Individuals who have been *convicted* of major drug offenses and violent offenses, such as murder, manslaughter, rape, robbery, and kidnapping;

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<sup>6</sup> U.S. Immigration and Customs Enforcement, “The ICE 287(g) Program: A Law Enforcement Partnership,” Nov. 18, 2008, [www.ice.gov/pi/news/factsheets/section287\\_g.htm](http://www.ice.gov/pi/news/factsheets/section287_g.htm).

<sup>7</sup> Secure Communities, Nov. 19, 2008.

- ❖ Level 2 – Individuals who have been *convicted* of minor drug offenses and mainly property offenses, such as burglary, larceny, fraud, and money laundering; and
- ❖ Level 3 – Individuals who have been *convicted* of other offenses.<sup>8</sup>

According to ICE, Level 1 offenses will be the “top priority.”<sup>9</sup>

### ■ How will DHS ensure that it goes after Level 1 persons who have been convicted of Level 1 major drug and violent crimes, not simply arrested for Level 3 minor offenses?

- ICE fact sheets and press releases say nothing about this.

### ■ What is ICE’s track record for focusing enforcement on violent criminals who pose a threat to the community?

- Although ICE claims that it is focusing enforcement efforts on violent criminals, it has done a bad job of focusing enforcement on the “worst of the worst.” In fact, analyses of the National Fugitive Operations Program (NFOP), which is meant to improve national security by locating and removing dangerous fugitives, and of the 287(g) program have found that these programs largely target those accused of immigration status violations and traffic offenses. For example:
  - ❖ According to a recent Migration Policy Institute report, NFOP “has failed to focus its resources on the priorities Congress intended when it authorized the program. In effect, NFOP has succeeded in apprehending the easiest targets, not the most dangerous fugitives. Furthermore, the program’s structure and design appear to encourage officers to jeopardize their own safety, alienate communities, and misdirect expensive personnel resources.”<sup>10</sup>
  - ❖ According to a recent report by the American Civil Liberties Union of North Carolina Legal Foundation and the Immigration and Human Rights Clinic of at the University of North Carolina at Chapel Hill, police use agreements under INA section 287(g) to “purge towns and cities of ‘unwelcome’ immigrants.”<sup>11</sup>
- According to a recent Justice Strategies Report about 287(g) partnerships, “Traffic violators and day laborers are the program’s central targets.”<sup>12</sup>
- On March 4, 2009, the Government Accountability Office criticized ICE’s supervision of the 287(g) program, pointing out the agency’s failure to ensure that the program targeted serious criminal activity, to adequately supervise the program’s participants, to systematically collect data about the program’s operation, and to develop performance measures to fully evaluate the program.<sup>13</sup>

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<sup>8</sup> *Id.*, emphasis added.

<sup>9</sup> U.S. Immigration and Customs Enforcement, “New Program Enhances Identifying and Deporting Criminal Aliens: Now Criminal and Immigration Records of All Detainees to be Checked” (news release), Feb. 25, 2009, [www.ice.gov/pi/nr/0902/090225dallas.htm](http://www.ice.gov/pi/nr/0902/090225dallas.htm).

<sup>10</sup> M. Mendelson, S. Strom, and M. Wishnie, *Collateral Damage: An Examination of ICE’s Fugitive Operations Program* (Migration Policy Institute, Feb. 2009), p. 2.

<sup>11</sup> American Civil Liberties Union of North Carolina Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina, *The Policies and Politics of Local Immigration Enforcement Laws*, Feb. 2009 (hereinafter “North Carolina report”), p. 8.

<sup>12</sup> A. Shahani and J. Greene, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Enforcement* (Justice Strategies, Feb. 2009), p. 2.

<sup>13</sup> U.S. Government Accountability Office, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Immigration Law* (GAO-09-109, Jan. 2009).

- GAO’s criticisms of the 287(g) program provide an essential lens with which to evaluate Secure Communities, in order to ensure that the same deficiencies in standards, oversight, internal controls, and mechanisms to ensure compliance with stated priorities are not repeated.

#### ■ What will ICE do if there is a match with DHS records?

- According to ICE, it will then “evaluate each case to determine the individual’s immigration status and take appropriate enforcement action.”<sup>14</sup>
- In practice, this means that ICE will likely impose a detainer against the arrested person.

#### ■ What happens when ICE places a detainer on an individual?

- A detainer is simply a request from ICE that the arresting agency notify ICE before its release of the noncitizen so that ICE can assume custody,<sup>15</sup> and authority for a temporary, 48-hour hold if the noncitizen is not already subject to detention.<sup>16</sup>
- But many jails and police departments treat detainers as a requirement that the jailed person not be released, and deny bond in the criminal case, including in minor cases such as traffic offenses or misdemeanors.
- ICE procedures provide no mechanism for an arrested person with a detainer to challenge the wrongfulness of a detainer.
- ICE frequently does not comply with the 48-hour time limit within which to assume custody of jailed persons against whom detainers have been issued, leaving them in detention limbo but often without the means to challenge their unlawful detention.

#### ■ How will ICE ensure that police do not make arrests based on racial or ethnic profiling, or that they do not make arrests simply as a pretext to check immigration status under Secure Communities?

- ICE fact sheets and press releases do not even indicate a recognition of this issue or concern that it might occur.
- Complaints of racial/ethnic profiling and pretextual arrests have been common under the 287(g) program and signal that concern is warranted under related programs such as Secure Communities.
- For example, Phoenix mayor Phil Gordon asked that the U.S. Attorney General order an FBI and U.S. Justice Department Office of Civil Rights investigation of Maricopa County sheriff Joe Arpaio, charging the sheriff with using traffic stops as a means to investigate immigration status.<sup>17</sup> On March 14, 2009, the Justice Department announced a civil rights investigation of the sheriff.<sup>18</sup>

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<sup>14</sup> U.S. Immigration and Customs Enforcement, “New Program Enhances Identifying and Deporting Criminal Aliens: Now Criminal and Immigration Records of All Detainees to be Checked.”

<sup>15</sup> 8 CFR 287.7(a).

<sup>16</sup> 8 CFR 287.7(d).

<sup>17</sup> Apr. 4, 2008, letter from Mayor Phil Gordon to Attorney General Michael Mukasey, [www.aclu.org/images/asset\\_upload\\_file202\\_35981.pdf](http://www.aclu.org/images/asset_upload_file202_35981.pdf); and <http://ndlon.org/images/documents/usdojlettertoarpaio.pdf>.

<sup>18</sup> R. Gabrielson, “Changes in D.C. Put Arpaio on Hot Seat,” *East Valley Tribune*, Mar. 14, 2009, [www.eastvalleytribune.com/story/136700](http://www.eastvalleytribune.com/story/136700).

- According to the North Carolina report, “Instead of focusing on those people who commit the violent crimes as stated by ICE, local law enforcement officers seem to be targeting drivers of a particular race or national origin and stopping them for traffic violations. For example, during the month of May 2008, eighty-three percent of the immigrants arrested by Gaston County ICE authorized officers pursuant to the 287(g) program were charged with traffic violations. This pattern has continued as the program has been implemented throughout the state. The arrest data appears to indicate that Mecklenburg and Alamance Counties are typical in the targeting of Hispanics for traffic offenses for the purposes of a deportation policy.”<sup>19</sup>

#### ■ Can a police department opt out of participation in Secure Communities?

- The ICE fact sheets and press releases do not say whether a police department can opt out of participation in Secure Communities.
- Advocates for victims fear that they will not report domestic violence if they believe that the arrest of the abuser on whom they are economically dependent will result in deportation.<sup>20</sup>

#### ■ What else do the ICE fact sheets and press releases leave out?

- Any requirement for audits and oversight.
- Ensuring that the DHS databases contain accurate information.
- Providing redress for arrested persons who have been wrongly identified by DHS databases or against whom ICE detainers have been wrongly issued.
- Whether a complaint procedure is available for persons who have been wrongly arrested.
- Ensuring that victims of crimes such as domestic violence can file criminal complaints without their complaints leading to immigration consequences.

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<sup>19</sup> North Carolina report, pp. 28–29.

<sup>20</sup> See, e.g., Jamie Duffy and Tanya Drobness, “Deportation Fears in Morris County Hamper Efforts to Probe Domestic Abuse,” *The Star-Ledger*, Mar. 09, 2009, [www.nj.com/news/index.ssf/2009/03/deportation\\_fears\\_in\\_morris\\_co.html](http://www.nj.com/news/index.ssf/2009/03/deportation_fears_in_morris_co.html).