

June 20, 2011

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

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON

Dear General Edwards:

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
rLetter from Charles K. Edwards, Acting Inspector General, U.S. Department of Homeland Security (June 20, 2011), [http://www.dhs.gov/xoas/ohrp/ohrp-ice-secure-communities-audit-report-06-20-11.pdf](#) (last visited June 20, 2011).
Zoe Lofgren, Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement (June 20, 2011), [http://www.house.gov/lofgren/secure_communities_audit_report_062011.pdf](#) (last visited June 20, 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

into the database, it often does not reflect changes in status. For example, if an individual naturalizes, obtains a new visa, or adjusts

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

²¹ Immigration Detainer Form I-247, sample *available at* <http://www.defensenet.org/immigration--e>

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

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

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low-level arrests of Hispanics.³⁷

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.^{42gr44Tdc 0 Asa sat2.05at2.05ed(g)2-2(o a)4(1)immig}

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

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

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 pol

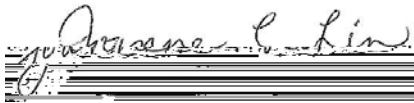
Conclusion

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,



Laura W. Murphy
Director, ACLU Washington Legislative Office



Joanne Lin
Legislative Counsel, ACLU Washington Legislative Office

cc: Anne Richards
Assistant Inspector General for Audits, Office of Inspector General, Department of
Homeland Security

Stephanie Saenger
Senior Policy Advisor, Office of Inspector General, Department of Homeland
Security