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A Rose by Any Other Name: The Chilling Effect of ICE’s “Secure” Communities Program

STEPHANIE KANG*

Introduction

Since the September 11, 2001, attack on United States soil, both the federal government and its citizens have felt a renewed urgency to police United States borders and push undocumented immigrants out of the country in the name of national security. For example, a recent study conducted in February 2011 found that 35% of survey respondents say that the priority in dealing with illegal immigration should be tightening border security and more strictly enforcing immigration laws. Since 2001, Congress has passed numerous appropriations bills to implement immigration enforcement measures, while resoundingly striking down immigrant-friendly acts.2

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2. For example, the Development, Relief and Education of Alien Minors (“DREAM”) Act first introduced on August 1, 2001, would have provided conditional permanent residency to undocumented students who were brought to the United States as minors, graduated from a U.S. high school, and subject to other conditions — such as military service or completing higher education at a four-year institution. S. 1291, 107th Cong. (2001). After failing to proceed past the Senate in 2001, the DREAM Act was reintroduced on March 26, 2009. S. 729, 111th Cong. (2009). An amended version of the DREAM Act was considered throughout 2010, but disappointingly, a Senate filibuster blocked the passage of the DREAM Act on December 18, 2010. S. 3992, 111th Cong. (2010). See also Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006) (would have allowed undocumented immigrants present in the United States for a long
One of the more controversial state and federal collaborative efforts to enforce immigration laws is the Secure Communities program; the program mandates all participating jurisdictions to submit fingerprint biometrics to Immigration and Customs Enforcement (“ICE”), enabling ICE to run the fingerprints through their own immigration database and identify deportable immigrants. Despite ICE stating that the primary goal of the program is to remove the most dangerous criminals from local communities, the data illustrates a divergent result. An overwhelming majority of individuals that ICE has deported under the Secure Communities program are identified as noncriminals or individuals who committed only minor infractions or petty offenses. Moreover, there is a growing concern surrounding potential and existing due process and civil rights violations — namely, racial profiling at the forefront of those concerns. Finally, local and state authorities do not have an option to opt out from the program, and this raises concerns that the Secure Communities program may be in violation of the Tenth Amendment’s anti-commandeering rule.

Part I of this note will discuss the federal authority to enforce immigration law and the evolution of federal enforcement policy to include more extensive cooperation with state and local law enforcement agencies. This note will provide background on ICE’s umbrella initiative, ICE Agreements of Cooperation in Communities to Enhance Safety & Security (“ACCESS”), with a focus on three programs in particular: 287(g) Agreements, the Criminal Alien Program, and Secure Communities. Part II of this note will provide an in-depth analysis of the Secure Communities program and its purported goals and priorities. Part III of this note will examine the


significant legal and social consequences of implementing Secure Communities, including potential Tenth Amendment violations and allegations of due process and civil rights violations. Finally, Part IV of this note will propose solutions to the existing problems inherent in the Secure Communities program.

I. Authority to Enforce Immigration Laws and Current Enforcement Programs

Under the United States Constitution, it is within the sole purview of Congress to regulate immigration by promulgating laws and establishing enforcement policies. Acting within its powers, Congress has enacted numerous pieces of immigration legislation, with one of the most seminal and comprehensive being the Immigration and Nationality Act ("INA"). The INA dictates federal immigration law and sets forth the "rules for legal immigration, naturalization, deportation, and enforcement" in the United States.

Pursuant to section 287 of the INA, any officer or employee of the Immigration and Nationality Service ("INS"), now the Department of Homeland Security ("DHS"), has the authority to enforce immigration laws in conformity with Attorney General's regulations. Effective March 1, 2003, Congress passed the Homeland Security Act of 2002, which reorganized and reformed the immigration agency by eliminating the INS and establishing the new DHS. The majority of the INS's functions were transferred to newly-formed agencies within DHS. DHS is currently comprised of seven agencies, amongst which the immigration services and enforcement functions are divided within three agencies: ICE, U.S. Citizenship and Immigration Services ("USCIS"), and U.S. Customs and Border Protection ("CPB").

10. See id., for a list of the specific and limited powers of immigration officers and employees.
12. SISKIN, supra note 11, at 4 n.11.
As set out by the U.S. Constitution and the INA, the federal government is the branch that traditionally enforces immigration laws. However, after the September 11, 2001, attacks on the U.S., there has been an expansion of immigration enforcement efforts in the last ten years, particularly in ICE's use of state and local law enforcement to further these efforts. In 1996, Congress granted state and local law enforcement the authority to enforce federal immigration law. Since then, there has been much confusion surrounding state and local law enforcement's role in immigration enforcement. In particular, there is confusion as to whether local and state law enforcement agencies have the authority to enforce only criminal violations of the INA or civil violations as well. Currently, under ICE ACCESS there are several programs that involve state and local law enforcement cooperation with the federal government, and the three most well-known programs are Immigration Cross-Designation - 287(g) (287(g) Agreements), Criminal Alien Program (CAP), and Secure Communities.

A. ICE ACCESS Initiative

According to DHS, the ICE ACCESS initiative was developed in response to widespread interest from state and local law enforcement agencies in combating specific challenges in their communities. Accordingly, when ICE implemented the ACCESS initiative, it was designed to promote the programs that ICE offers to assist state and local law enforcement agencies with such challenges.

i. Section 287(g) Agreements

The most well-known program under the ACCESS initiative is the 287(g) program, which Congress established through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 that amended the INA by adding Section 287(g). Section 287(g)
expressly allows, but does not compel, state officers and employees designated by the Secretary of Homeland Security to perform the enforcement functions of an immigration officer.\textsuperscript{21} To institute partnerships, the Secretary of Homeland Security enters into voluntary joint agreements with state and local law enforcement agencies under a Memorandum of Agreement ("MOA"); this allows designated officers to perform immigration law enforcement functions.\textsuperscript{22} These agreements are commonly referred to as 287(g) agreements and require that state or local law enforcement officers who will perform such functions receive training on federal immigration law and be certified as having received such "adequate training."\textsuperscript{23} ICE offers a four week training program with certified instructors teaching the program.\textsuperscript{24}

As of September 2011, ICE has signed MOAs with sixty-nine law enforcement agencies in twenty-four states and has trained over 1,500 officers to enforce federal immigration law.\textsuperscript{25} According to ICE's fact sheet, since January 2006, these 287(g) agreements have resulted in the identification of over 217,300 potentially removable undocumented immigrants — most of whom are already in jail.\textsuperscript{26} Despite these seemingly impressive numbers, communities are voicing legitimate concerns of rampant due process and civil rights violations, especially racial profiling.\textsuperscript{27} Critics of 287(g) agreements believe that these agreements enable law enforcement officers to use racial profiling as a means of targeting immigrant populations.\textsuperscript{28} Critics contend that police officers arrest perceived immigrants for alleged criminal activity merely as a pretext to initiate removal proceedings.\textsuperscript{29} Moreover, a report published by the Government Accountability Office in January of 2009, concluded that ICE had left the 287(g) program objectives ambiguous and had not provided information to the public on how local law enforcement officers

\begin{thebibliography}{99}
\setcounter{enumiv}{22}
\bibitem{21} Id.
\bibitem{23} MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., RL41423, AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW 4 (2010).
\bibitem{24} Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, supra note 22.
\bibitem{25} Id.
\bibitem{26} Id.
\bibitem{27} NAT'L IMMIGRATION FORUM, supra note 5.
\bibitem{28} Chacon, supra note 14, at 1584-85.
\bibitem{29} Id.
\end{thebibliography}
were using their privileges.\textsuperscript{30}

In response, DHS conducted an audit of the 287(g) agreements and substantially reformed the program; for example, DHS revised the MOAs to clarify the scope of powers authorized to the state and local law enforcement agencies and added significantly more oversight provisions to the program.\textsuperscript{31} Additionally, ICE has explicitly stated that racial profiling will not be tolerated and any claims of profiling will be fully investigated.\textsuperscript{32} In fact, if proof of racial profiling is established, individual officers or even entire departments could potentially have their 287(g) agreements revoked.\textsuperscript{33}

Still, civil rights organizations are dubious as to the effectiveness of the reformed 287(g) program and argue that ICE's revisions are minor and unlikely to address concerns of racial-profiling.\textsuperscript{34} There is no concrete evidence to confirm or dispel these fears, but despite its flaws, the 287(g) agreements stand apart from the other ICE ACCESS programs because they are transparent; partnerships are consummated with publicly-available written documents, are limited in scope, and contain specific complaint procedures for reporting abuses of power.\textsuperscript{35}

\textit{ii. Criminal Alien Program}

Unlike the 287(g) program, CAP does not involve granting state or local law enforcement the power to enforce immigration laws. CAP focuses on cooperation between state and federal agencies in identifying, processing, and removing criminal undocumented immigrants incarcerated in prisons and jails throughout the U.S.\textsuperscript{36} The program's objective is to "[prevent the] release [of criminal aliens] into the general public by securing a final order of removal prior to the termination of their sentences."\textsuperscript{37}

CAP begins with ICE assigning agents to different federal, state,
and local prisons or jails who will be responsible for identifying criminal noncitizens who have already been arrested, but not necessarily convicted.\textsuperscript{38} After an ICE agent has identified such a person, the agent is authorized to issue a detainer against the noncitizen.\textsuperscript{39} A detainer is a DHS request that another law enforcement agency contact ICE before releasing an undocumented immigrant, so that ICE may make arrangements to assume custody of the immigrant for deportation.\textsuperscript{40}

Much like the Secure Communities initiative, CAP is often criticized because individuals are screened by ICE for immigration status upon arrest, not upon conviction.\textsuperscript{41} The concern is that local and state law enforcement may be racially profiling individuals by seeking out persons of a certain race or ethnic group who appear to be unlawfully present and arresting them for petty offenses.\textsuperscript{42} Indeed, the University of California, Berkeley conducted a study on the CAP program in Irving, Texas, and found “strong evidence to support claims that Irving police engaged in racial profiling of Hispanics in order to filter them through the CAP screening system.”\textsuperscript{43} Specifically, the study found that within twenty-four hours after CAP was implemented, discretionary arrests of Hispanics for minor offenses — such as traffic offenses — rose dramatically.\textsuperscript{44} Local police arrested Hispanics for misdemeanor offenses at a higher rate than Caucasians or African Americans.\textsuperscript{45} While this study was geographically limited to one city in Texas, an inference can be made that the same potential for abuse of power exists in the Secure Communities program. After all, CAP and Secure Communities are similar initiatives in that they appear to be facially neutral programs, but both hold the potential for police abuse of discretion via racially profiling perceived immigrants.
II. Summary of the Secure Communities Program

This note focuses on the Secure Communities program, which has been seen as an extension or expansion of CAP. Under Secure Communities, participating jails and prisons submit arrestees’ fingerprints to both criminal and immigration databases, essentially enabling ICE to have a technological presence, whereas, under CAP, ICE only has a physical presence within penitentiaries. Additionally, unlike the 287(g) agreements, Secure Communities does not give local and state law enforcement the power to enforce immigration law.

A. Goals of Secure Communities

On December 26, 2007, President George W. Bush signed the fiscal year 2008 DHS appropriations bill into law. In this bill, Congress provided ICE approximately $200 million to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.” Pursuant to Congress’ directive, ICE implemented Secure Communities in March 2008, with three primary objectives:

Identify aliens in federal, state and local custody charged with or convicted of a serious criminal offense who are subject to removal and those aliens who have prior convictions for serious criminal offenses and are subject to removal who are currently at large;

Prioritize enforcement actions to ensure apprehension and removal of aliens convicted of serious criminal offenses; and,

Transform criminal alien enforcement processes and systems to achieve lasting results.

As of September 27, 2011, Secure Communities has been...
activated in 1,595 jurisdictions in forty-four states and territories. ICE expects Secure Communities to be fully implemented and operational in all states by 2013.

i. Identify Aliens in Custody Charged with a Serious Criminal Offense

Before Secure Communities, most state and local law enforcement officers submitted an arrestee’s fingerprints through a booking process that automatically compared that fingerprint with fingerprints in the Federal Bureau of Investigation’s (“FBI”) Integrated Automated Fingerprint Identification System (“IAFIS”). Now, in jurisdictions where Secure Communities has been activated, arrestees’ fingerprints are also checked against the U.S. Visitor and Immigrant Status Indicator Technology Program and the Automated Biometric Identification System (“IDENT”). This fingerprint check automatically and immediately searches the three databases for an individual’s criminal and immigration history. The local law enforcement and FBI relationship stays the same, and the results of the FBI IAFIS fingerprint check will be provided to the local law enforcement agency as it normally would.

However, if there is a match in the immigration databases, the system will automatically notify ICE even if the individual is not ultimately charged with a criminal offense or charges are eventually dismissed. Once ICE is notified, it makes an “immigration status determination” on the individual and sends that to the FBI, who then passes it along to the local law enforcement agency.

51. The Secure Communities website contains no clear definition of what it means to be “activated” and does not specify how a jurisdiction becomes activated. However, it seems safe to assume that “activated” can be used interchangeably with “implemented.”


53. SECURE COMMUNITIES: ACTIVATED JURISDICTIONS, supra 52 (as of September 27, 2011, seventeen states and territories are 100% activated in every jurisdiction within the state: Arizona, California, Delaware, Florida, Hawaii, Michigan, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Virginia, West Virginia, Wisconsin, and Puerto Rico).


55. Id.

56. WASLIN, supra note 46, at 7.

57. SECURE COMMUNITIES STANDARD OPERATING PROCEDURES, supra note 54, at 4.

58. WASLIN, supra note 46, at 7.

59. SECURE COMMUNITIES STANDARD OPERATING PROCEDURES, supra note 54, at 4.
ii. Prioritize Removal of Aliens Convicted of Serious Criminal Offenses

Secure Communities’ second objective is to prioritize the removal of undocumented immigrants who are convicted of serious criminal offenses. To meet this objective, ICE conducts the appropriate measures using a risk-based approach to determine whether the criminal alien will be removed.\(^6\) ICE has identified three priorities: (1) aliens who pose a danger to national security or a risk to public safety, (2) recent illegal entrants, and (3) aliens who are fugitives or otherwise obstruct immigration controls.\(^6\) Priority one uses a risk-based approach that classifies convicted aliens into three levels:

Level 1: Aliens convicted of “aggravated felonies,” as defined in §101(a)(43) of the Immigration and Nationality Act, or two or more crimes each punishable by more than one year, commonly referred to as “felonies”;

Level 2: Aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as “misdemeanors”; and

Level 3: Aliens convicted of crimes punishable by less than one year.\(^6\)

According to an ICE Memo directed at all ICE employees, Level 1 and Level 2 offenders should receive principal attention.\(^6\)

iii. Transform Criminal Alien Enforcement Processes and Systems

Through Secure Communities, ICE hopes to “optimize capacity” and maximize efficiency in immigration enforcement by using automated systems that “speed the removal of criminal aliens from the United States, reducing the amount of time they spend in ICE custody.”\(^6\) ICE’s plan for modernization includes using “video teleconferencing to conduct interviews and immigration hearings, [and using] computer technology to track the use of detention beds and transportation systems.”\(^6\)


\(^6\) Id. at 1–2.

\(^6\) Id.

\(^6\) Id.

\(^6\) Secure Communities Fact Sheet, supra note 50.

\(^6\) Id.
III. Problems with the Secure Communities Initiative

Secure Communities was purportedly developed to facilitate the removal of some of the most dangerous alien criminals. Although the Secure Communities program’s overarching objective appears promising, its implementation and lack of public transparency has garnered fear amongst immigrant communities and advocates of immigrant rights.66 Recently released information regarding the actual deportation results of Secure Communities indicate that ICE has not acted in accordance with its purported goals and priorities.67 In fact, contrary to ICE’s stated policy, the majority of removals done through Secure Communities involve low-level or noncriminal immigrants.68

As a result of the program’s flaws and ICE’s lack of transparency, a number of localities rejected its implementation and attacked the program on legal and constitutional grounds.69 Some localities discussed the possibility of Secure Communities violating the anti-commandeering clause of the Tenth Amendment, while others are worried about rampant civil rights violations. Immigrant rights groups fear that Secure Communities has become a tool to promote discrimination and racial profiling and will discourage undocumented victims of crimes from seeking police protection.70

A. Lack of Transparency

Critics attack ICE and Secure Communities for the lack of transparency in their operations. According to the Center for Constitutional Rights, National Day Laborer Organization Network, and the Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law, “information about the nascent program has been scarce, and the development of operational details

67. Id.
70. NATIONAL IMMIGRATION FORUM, supra note 5.
has been shrouded in secrecy.\textsuperscript{71} These three organizations instituted a lawsuit against ICE, requesting information pertaining to Secure Communities under the Freedom of Information Act ("FOIA").\textsuperscript{72} Prior to the lawsuit, few documents were available to the public, but since the filing of the suit ICE has released over Twenty-five documents.\textsuperscript{73}

B. Contradictions Between Stated Goals and Actual Results

Although ICE specified that Secure Communities will primarily focus on the most dangerous criminal aliens that are a serious threat to communities, the most recent data does not support this statement. According to the most recently released Secure Communities statistics, from October 2008 to September 2011 a majority of deported immigrants were either noncriminals or Level 3 offenders (aliens convicted of crimes punishable by less than one year).\textsuperscript{74} Out of a total number of 142,090 Secure Communities removals, 37,271 (or 26.2\%) of deported immigrants were noncriminal and 44,388 (or 31.2\%) were Level 3 offenders.\textsuperscript{75} This means that roughly 60\% of the undocumented immigrants that ICE removed through Secure Communities are labeled as low-priority under the professed goals of the program, a fact that ICE has conceded.

These same proportions are reflected in individual state numbers. California, which has the largest number of fingerprint submissions and removals, had a cumulative total of 55,233 removals since its activation in 2009, with 29,319 (approximately 53\%) of these removals being of individuals identified as noncriminals or Level 3 offenders.\textsuperscript{76} Texas, the second largest in fingerprint submissions and removals, had 18,671 (approximately 56\%) noncriminal or Level 3 offenders removed of a total of 33,447

\textsuperscript{71} Center for Constitutional Rights, supra note 66.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 5.
individuals. In fact, in Texas, there are more Level 3 offenders removed (12,650) than Level 1 (8,597) or Level 2 (6,179) offenders.

This data is troubling and shows a direct contradiction between Secure Communities' stated goals and its actual implementation. If nationwide 59% of ICE removals under Secure Communities are low-priority or noncriminals, ICE is hardly meeting its purported goal of eliminating the most dangerous criminals in local communities. Moreover, ICE is not meeting Congress’ mandate for ICE to dedicate at least $1.5 billion “to identify aliens convicted of a crime who may be deportable . . . [and to] prioritize the identification and removal of aliens convicted of a crime by the severity of that crime.”

C. Constitutional Concerns

Given the misgivings spawned from the Secure Communities program, many states and localities are left wondering whether they have the option to refuse to implement the program. Several immigrant rights groups and localities asked ICE for clarification, and DHS officials gave conflicting responses as to whether states or localities may opt out of the program. At first, in September 2010, ICE released a publication outlining the procedures that jurisdictions who wanted to opt out should follow, indicating that Secure Communities was optional. Then, in November 2010, the David Venturella, then Director of ICE, stated at a press conference that ICE’s position was that localities would not be able to opt out of Secure Communities. A year later, in August 2011, John Morton, new Director of ICE, informed state governors that MOAs would no longer be required to activate or operate Secure Communities, essentially confirming that the program is mandatory.

78. Id.
82. Deportation Nation, supra note 80.
of publication, Secure Communities does not appear to have an opt out option, which raises potential Tenth Amendment concerns.

i. Erosion of Trust in Local Authorities

Members of various localities\(^8\) have been wary of Secure Communities since its inception. Many localities, or its government officials, argue that implementing the program would infringe on state sovereignty because it may interfere with ongoing efforts to build positive relationships with resident immigrants. In particular, the National Immigration Forum stated that if immigrant communities believe that local police are involved with ICE, it will be risky for undocumented immigrants to call the authorities.\(^8\) This would result in unreported crimes and unprotected victims.\(^8\)

San Francisco’s Board of Supervisors voiced numerous concerns regarding Secure Communities. In a proposed resolution, the Board encourages local law enforcement to opt out of Secure Communities, for several reasons. First, the San Francisco Board of Supervisors recognized that Secure Communities could “compromise the safety of local communities by eroding hard-earned trust built over the past decades between community members and local law enforcement by making individuals fearful of reporting crimes and to [sic] cooperating with the police in solving crimes.”\(^8\) San Francisco leaders are concerned that undocumented and documented immigrants will be less likely to report domestic violence or other serious crimes due to fear of incriminating themselves or their families in the process.\(^8\)

Moreover, San Francisco is a sanctuary city, which means it has ordinances in place to protect local undocumented immigrants by refusing to help enforce federal immigration law. In 1989, San Francisco passed an ordinance which prohibits city employees from assisting ICE with immigration investigations or arrests unless required by federal or state law or a warrant.\(^8\) This ordinance was passed in response to the Sanctuary Movement initiated by churches

\(^8\) San Francisco County, Santa Clara County, and Washington D.C. have been among the strongest opponents to implementing Secure Communities. \textit{Waslin}, \textit{supra} note 46, at 11.

\(^8\) National Immigration Forum, \textit{supra} note 5, at 2.

\(^8\) Ibid.


\(^8\) Ibid.

throughout the U.S. that provided refuge to Central America immigrants who were fleeing from civil wars and struggling to obtain refugee status in the United States. More recently, in February 2007, Mayor Gavin Newsom issued an Executive Order mandating that city departments develop training on the Sanctuary Ordinance. However, Secure Communities threatens to eviscerate San Francisco’s ordinance by causing the ordinance to lose its practicability.

Although San Francisco County and Santa Clara County voiced their desire to opt out of Secure Communities, former California Attorney General and now present Governor, Jerry Brown, denied San Francisco’s request. In fact, Governor Brown has refused to allow any counties to opt out, stating that he wanted state-wide uniformity. However, we will not go into a detailed discussion of the state versus local sovereignty issues reflected in this decision because these are beyond the focus of this note.

Additionally, the District of Columbia also expressed similar concerns with regard to Secure Communities. ICE activated the District of Columbia in November 2009, but on May 4, 2010, District of Columbia Council members Phil Mendelson and Jim Graham introduced a bill titled the “Secure Communities Bill of 2010.” The bill prohibited District of Columbia police from sharing information with ICE through Secure Communities. The bill was unanimously supported by the Council, making the District of Columbia one of the first jurisdictions to reject Secure Communities by local legislation. ICE has yet to release any information on whether it plans to reactivate Secure Communities in the District of Columbia or if, in general any jurisdiction that refuses to implement the program will face any consequences.

91. Id.
93. Id.
95. Id.
96. Id.
97. Id.
ii. Lack Opt Out Option Implicates Tenth Amendment Concerns

The Tenth Amendment of the U.S. Constitution explicitly states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." Each state has the power to craft laws and enforce them within its own boundaries. As set out by the Supreme Court in two cases, New York v. United States and Printz v. United States, the federal government cannot compel or commandeer any state or local government to enforce or adopt federal programs.

At issue in New York, was whether Congress had the power to compel States to provide for the disposal of radioactive waste generated within their borders. Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985 (Radioactive Waste Act) in anticipation of a shortage of radioactive waste disposal sites. The Radioactive Waste Act contained three incentives for the states to provide for the disposal of waste generated within their borders: (1) monetary incentives, (2) access incentives, and (3) a take title provision, requiring states to conform to federal regulations or take title to low-level radioactive waste. The Court held that while Congress could offer incentives to promote its programs and encourage a state’s cooperation, it would be unconstitutional for Congress to commandeer or coerce the states into cooperation. Specifically, the Court found that the take-title provision of the Act was coercive and “inconsistent with the Constitution’s division of authority between federal and state governments.”

Despite finding the take-title provision unconstitutional, the Court did emphasize that Congress could use many other means to solicit state cooperation with federal programs. Congress can directly regulate the states pursuant to the Commerce Clause or preempt state law pursuant to the Supremacy Clause. Moreover, Congress can also attach conditions on the receipt of federal funds to influence a state’s choices.

98. U.S. CONST. amend. X.
102. Id. at 152-54.
103. Id. at 173-75.
104. Id. at 174-76.
105. Id. at 157-59.
106. Id. at 167 (quoting South Dakota v. Dole, 483 U.S. 203, 206 (1987)).
The rationale behind the anti-commandeering rule set out in *New York* is that if the federal government coerces states into administering federal programs, “the accountability of both state and federal officials is diminished.” 107 Indeed, state officials may “bear the brunt of public disapproval and the federal officials who devised the regulatory program remain insulated from the electoral ramifications of their decision.” 108

The decision in *New York* was later reinforced by the Supreme Court’s decision in *Printz*. In *Printz*, Congress enacted the Brady Act, which required the Attorney General to establish a system to conduct background checks of anyone who tried to purchase a handgun. 109 However, Congress recognized that the Attorney General would need time to create and implement the program so in the meantime, the Brady Act also required state chief law enforcement officers to conduct background checks of prospective gun buyers. 110 Two state law enforcement officers challenged the Brady Act, claiming it was unconstitutional because it forced them to perform administrative functions for the federal government. 111 The Court agreed and held that mandatory enforcement of the Brady Act was unconstitutional because it infringed on state sovereignty violating the Tenth Amendment. 112

In *Printz*, the Court rejected the government’s novel argument but that argument is particularly relevant in the context of Secure Communities. The government attempted to draw a distinction between federal regulations that force states to create law and regulations that force states to enforce federal law. 113 The government tried to distinguish the Brady Act from the Radioactive Waste Act in *New York* by arguing that while the take-title provisions in the Radioactive Waste Act forced states to enact policy, the Brady Act merely commanded state and local officials to assist in implementing federal law and was thus constitutional. 114 Writing for the majority, Justice Antonin Scalia expressly rejected the argument stating, “[w]e fail to see how that improves rather than worsens the intrusion upon state sovereignty.” 115 Justice Scalia reasoned that there was no distinction between forcing states to enact legislation

108. *Id.* at 168–69.
110. *Id.* at 903.
111. *Id.* at 904.
112. *Id.* at 935.
113. *Id.* at 926–27.
114. *Id.*
115. *Id.* at 928.
and coercing states into enforcing federal regulations.116

Here, the Secure Communities program is similar to the Brady Act because the federal government is attempting to coerce a state into enforcing a federal program. The reasoning in Printz applies to Secure Communities, and the federal government should not be allowed to encroach on state sovereignty by making decisions for the alleged well-being of state citizens and its communities. ABC legal analyst Dean Johnson agreed and stated that, “[a] federal program cannot commandeer the resources of state and local government for the administration of that program, and that’s true even if the resources that are taken from local and state officials are very small, minimal and ephemeral. They just can’t do it.”118

Furthermore, since Secure Communities relies upon state and local funding, these entities should be given greater leverage to determine whether Secure Communities is an initiative they want to adopt. A major component of Secure Communities is the detainment of potential deportees in law enforcement custody until ICE can take federal custody.119 While law enforcement officers typically have the discretion to cite and then let arrestees go, in Secure Communities jurisdictions once there is a hit in one of ICE’s databases, local law enforcement must detain the individual upon ICE’s request. The cost of this additional incarceration falls on the local and state law enforcement.120 Given the recent economic downturns, major budget deficits, and limited resources, this is another reason why ICE should give state and localities deference in determining whether Secure Communities is right for their community.

In keeping with the Supreme Court’s decisions in both the New York and Printz cases, state and local authorities seeking to opt out of the Secure Communities program should be entitled to do so under

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117. While it is unclear what consequences may belie a state’s decision to reject Secure Communities, ICE has affirmatively stated that it plans for the program to be fully implemented nationwide by 2013. See SECURE COMMUNITIES: ACTIVATED JURISDICTIONS, supra note 52.
118. Louie, supra note 92.
120. See e.g., April Castro, Perry Bills Feds $349 Million for Illegal Immigrants, THE WASHINGTON TIMES (Aug. 27, 2011), http://www.washingtontimes.com/news/2011/aug/27/perry-bills-feds-349m-illegal-immigrants (discussing Texas Governor’s request for DHS to reimburse him $350 million to cover the costs that Texas incurred for detaining undocumented immigrants in state prisons and county jails, as well as Arizona Governor’s suit to recover incarceration costs).
the Tenth Amendment. The anti-commandeering doctrine is rooted in the idea that states and local governments are in the best position to gauge their community’s needs and interests. Because states and localities are more in tune with their community’s best interest, their decisions to opt in or opt out of Secure Communities should be respected under the Constitution.

D. Potential for Civil Rights Violations

i. Racial Profiling

ICE claims that Secure Communities actually reduces the possibility of racial or ethnic profiling because it relies on the biometric information of all individuals who are arrested and have their fingerprints run through the system. However, this simplifies the problem and fails to take into account the actions and motivations of local law enforcement officers. While Secure Communities may be a facially neutral policy that treats all arrestees the same, a major problem with the program is that in activated jurisdictions ICE lacks oversight in regards to how and why individuals are arrested. Immigrant advocacy groups have voiced valid concerns that local law enforcement officers with prejudices toward people of color will find a pretext to arrest someone they think looks undocumented, bring them to jail, and check their fingerprints in anticipation of finding a match through ICE.

There is insufficient data on areas where Secure Communities is implemented, but allegations of racial profiling in CAP are corroborated by a study conducted by U.C. Berkley Law School’s The Center for Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity. The research focused largely on the CAP initiative, but considering the critical similarities between the programs, it provides probative evidence of how Secure Communities can also be used as a tool for racial profiling.

The information and numbers in this study are gathered from Irving, Texas, a city located in Dallas County. In 2006, of the 196,000 residents in Irving, 41.2% were Hispanic, 34.4% were Caucasian, 12.2% were African-American, and 10.1% were Asian.

122. National Immigration Forum, supra note 5.
124. Id.
125. Id. at 3.
The study analyzed how local law enforcement and ICE were using the CAP program. Researchers found evidence that through CAP, ICE was "tacitly encourage[ing] local police to arrest Hispanics for petty offenses." The report states that "these arrests represent one part of an implicit, but relatively clear logic: the higher the number of Hispanics arrests, the larger the pool of Hispanic detainees; the larger the pool of detainees, the more illegal immigrants that can be purged from the city via the CAP screening system."

The following findings particularly support the study's final conclusions. First, between April 2008 and October 2008, the largest spike of misdemeanor arrests and traffic violations involving Hispanics occurred simultaneously with local law enforcement's twenty-four seven access to ICE officials. Second, there existed a strong correlation between the removal of procedural constraints on local law enforcement and the high rates that Hispanics were being arrested for minor infractions and petty crimes. This signified a "fast-track" effort to allow and encourage local officers to increase the number of Hispanic detainees to remove as many undocumented immigrants as possible. Finally, the study shows that since CAP's implementation in the area, only 2% of the total amount of detainees consisted of those charged with serious crimes and felonies.

Unfortunately, this data provides compelling evidence that racial profiling is used by some law enforcement officers and agencies when implementing federal immigration programs. Secure Communities, like CAP, gives local law enforcement the opportunity to discriminate without providing oversight and disciplinary procedures for possible civil rights violations.

ii. Due Process Violations

Under the Fifth Amendment, "no person shall be... deprived of life, liberty, or property, without due process of law." Regardless of citizenship or immigration status, all persons are guaranteed both procedural and substantive due process. Despite the rights afforded by the Due Process Clause, many undocumented

127. Id. at 4.
128. Id.
129. Id.
130. Id. at 5, 8.
131. Id. at 8.
132. Id.
133. U.S. CONST. amend. V.
immigrants and immigrant rights advocates have reported due process violations from unnecessary or prolonged detention under Secure Communities.\textsuperscript{134}

As previously mentioned, once there is a fingerprint match in one of ICE's databases, ICE will evaluate the case and decide whether or not to issue a detainer.\textsuperscript{135} When ICE issues a detainer, it is requesting that local authorities notify ICE prior to releasing the individual in custody and to hold the individual up to forty-eight hours (excluding weekends and holidays) past their scheduled time of release to give ICE an opportunity to take the individual into immigration custody.\textsuperscript{136}

However, many law enforcement agencies and prisons treat ICE detainers not as a request but as a requirement to not release the individual.\textsuperscript{137} This can translate to significant due process violations; for example, if an immigrant is arrested and issued a detainer but charges are dropped or a court finds them not guilty, the immigrant could still remain in law enforcement custody.\textsuperscript{138} Finally, there are reports that some immigrants have been detained for longer than the forty-eight-hour allowance, regardless of whether they were found guilty of the crime they were alleged to have committed.\textsuperscript{139}

\textbf{IV. Proposed Solutions}

Secure Communities has significant legal and social ramifications as an immigration enforcement initiative. There is debate over whether these problems can be addressed by a few simple yet significant changes or whether the program should be abolished all together.

\textbf{A. Allow Jurisdictions to Opt Out of Secure Communities}

First, ICE should provide an opt out provision to eliminate concerns of states and counties who do not wish to participate in Secure Communities because they view the program as a threat to public trust in law enforcement authorities. Moreover, if ICE

\textsuperscript{134. NATIONAL IMMIGRATION FORUM, supra note 119.}
\textsuperscript{135. WASLIN, supra note 46, at 12.}
\textsuperscript{136. Id.}
\textsuperscript{137. Id.}
\textsuperscript{138. Id.}
\textsuperscript{139. See NATIONAL IMMIGRATION FORUM, supra note 119, at 2-4 (discussing three cases where the government has settled and ten pending cases in regards to illegal detainers and due process violations).}
continues to mandate that Secure Communities be implemented in all jurisdictions, Tenth Amendment concerns are implicated. Indeed, sanctuary cities, or communities who do not believe the benefits of Secure Communities outweigh the consequences, will have their Tenth Amendment rights trampled.

ICE should revert to past policy. Just over a year ago, ICE allowed jurisdictions unsure about implementing Secure Communities to sit down with ICE officials and discuss the possible benefits and consequence of executing Secure Communities in that jurisdiction.140 This allowed for a mutually considered exchange and ensured that all dissenting voices were heard. If after this process, a county or state is still not convinced that Secure Communities is right for their jurisdiction, they should be allowed to opt out in accordance with the Tenth Amendment. Thus, providing an opt out provision is one way in which ICE can eliminate the problem of a Tenth Amendment violation.

B. Compile and Post Accurate and Detailed Data for Public Access

ICE should routinely, as it has been doing after the FOIA request, post documents to its website that allow public access to all its data. ICE is required to submit quarterly reports to Congress, and these mandatory reports should be posted on its website so the public can see the actual numbers of matches, arrests, and removals.

Moreover, in response to allegations of civil rights violations, ICE should compile further data on the ethnicity of those identified, arrested, and removed. ICE should also provide the ending disposition for the underlying offenses. Collecting data on whether deportees were ever convicted of the crimes for which police arrested them would be practical research on whether ICE is acting in accordance to Secure Communities’ objectives. This will increase transparency, while providing more information on the potential for racial profiling.

C. Send Fingerprints to ICE After Conviction

ICE’s current policy is flawed, as law enforcement is obligated to send fingerprints for ICE database identification upon arrest. The problem with this procedure is that law enforcement officers can make pre-textual arrests for minor crimes to usher in people of color

140. SECURE COMMUNITIES: SETTING THE RECORD STRAIGHT, supra note 81.
who they suspect to be undocumented. Since there only needs to be an arrest to run an individual’s fingerprints, such officers have the incentive to arrest as many suspected undocumented immigrants as possible.

A more equitable process would be to have fingerprints sent to ICE after the accused has been convicted. This compromise helps ensure that ICE is at least partly meeting its policy goals of identifying and removing convicted criminals from local communities. The proposed process would also eradicate at least some of the concerns surrounding racial profiling and civil rights violations by allowing the prosecutor to review the charges. Law enforcement officers may be less inclined to make pre-textual arrests if they know that a prosecutor must assess the charges, bring charges, then plea bargain or obtain a conviction before the arrestee’s fingerprints can be sent to ICE.

If ICE is unwilling to compromise and wait until after a conviction to run fingerprints, a less ideal solution would be to have jurisdictions submit fingerprints after an indictment. With an indictment prosecutorial review still exists. However, preferably, fingerprints should be submitted after a conviction, because this helps to ensure that ICE is working toward meeting its stated objectives and priorities of removing the most dangerous felons and criminals first. At present, ICE is deporting low-level offenders and noncriminal immigrants at a higher rate than Level 1 and Level 2 convicted criminals. In fact, noncriminal immigrants constitute 37,271 (or approximately 26%) of the 142,090 individuals being deported under Secure Communities.141 Having the safeguard of prosecutorial review could serve as a deterrent to law enforcement officers to make pre-textual arrests.

D. Institute More Stringent Requirements and Training Programs

To avoid due process and civil rights violations, ICE should provide adequate education and training to police officers to ensure that they understand exactly what a detainer is. At minimum, ICE officials should clarify three things: (1) that a detainer is not a mandate, but a request; (2) a detainer can only lawfully last forty-eight hours; and (3) distinguish immigration detainers from criminal or other types of detainers. This way, there will be no confusion over how many hours an individual can be detained and this will

reduce prolonged detentions. Finally, ICE should provide training programs narrowly tailored to educate law enforcement officers about civil rights violations and racial profiling. ICE has recently made several new changes to the Secure Communities program, including collaborating with the DHS Office for Civil Rights and Civil Liberties to develop a new training program that emphasizes civil rights. This is an important step towards protecting individual liberties and human rights.

E. The Obama Administration’s Newly Announced Immigration Policy

On August 18, 2011, President Barack Obama’s senior administration officials announced a change in immigration enforcement policies. The administration would now require a case-by-case review for all deportations and removals, focusing particularly on prosecutorial discretion. Additionally, the Obama Administration has promised to conduct a review of all pending deportation and removal cases and close “low-priority cases, so immigration courts can focus on the most serious ones.” While this commitment seems promising, a closer review shows that significant positive change for victims of the improperly utilized Secure Communities is unlikely.

First, the Obama Administration is merely reiterating what ICE’s purported objectives have always been: To identify, apprehend, and remove the most dangerous undocumented immigrants convicted of serious criminal offenses. This policy is, in theory, no different than the policy ICE already follows. In practice though, the administration’s promise of reviewing individual cases and closing deportation cases against low-priority immigrants has the potential to create change. After all, this means that noncriminal or Level 3 offenders currently ensnared in Secure Communities’ wide net could potentially have their cases dismissed, but under the

144. Id.
145. Id.
administration’s stated policy, current Level 2 or even Level 3 offenders would likely be unable to get relief.

This is because the Obama Administration’s change in enforcement policy seems to be a direct response to the DREAM Act’s failure to pass.\textsuperscript{146} As evidenced by a memorandum from John Morton, Director of ICE, some of the factors that ICE officers, agents, and attorneys should consider include length of presence, military service, family ties, ties to home country, age, family members with status, criminal history, and “[ICE’s] civil immigration enforcement priorities.”\textsuperscript{147} “Positive factors” include veterans and members of the military, long-time lawful permanent residents, minors, individuals present in the U.S. since childhood, pregnant women, victims of serious crimes, individuals with a serious mental or physical disability or health condition.\textsuperscript{148} “Negative factors” consist of individuals who pose a risk to national security, serious felons/repeat offenders/individuals with a length criminal record, known gang members, or individuals with an “egregious record of immigration violations.”\textsuperscript{149}

The overwhelming majority of relevant factors are directly related to the problems the DREAM Act was meant to address; the deportation of nondangerous undocumented immigrants who were brought into the U.S. at an early age, with little to no ties to their home countries, and who are actively pursuing an education or willing to enlist in military service. Therefore, it appears that the Obama Administration’s new enforcement policy will primarily affect, and possibly benefit, only noncriminal immigrants. It remains to be seen what effect this policy will have for Level 3 offenders who are only convicted of petty offenses.

Conclusion

Secure Communities dictates that all activated jurisdictions must submit and run fingerprint biometrics through ICE’s database. While the purpose of the program is to identify and remove dangerous criminals from local communities, the data shows that ICE does not seem to be removing individuals based on its own

\textsuperscript{146} Foley, \textit{supra} note 143.
\textsuperscript{147} Memorandum from John Morton, Assistant Sec’y, U.S. Immigration & Customs Enforcement, to All Field Office Directors, Special Agents in Charge, and Chief Counsel 4 (June 17, 2011), \textit{available at} http://www.ice.gov/doclib/securecommunities/pdf/prosecutorial-discretion-memo.pdf
\textsuperscript{148} Id. at 5.
\textsuperscript{149} Id.
identified priorities. Since its inception, more than 56% of individuals removed under Secure Communities were identified as noncriminals or Level 3 offenders who had committed only petty offenses.

Furthermore, there are allegations of civil rights and due process violations. Immigrant rights advocacy groups are extremely concerned with the potential for police abuse in their discretionary power and power of detainers. Finally, ICE seems to maintain that there is no opt out procedure for Secure Communities, and many jurisdictions are being activated despite worries among community members. This implicates the a potential Tenth Amendment’s anti-commandeering clause violation because Secure Communities seems to force states to enforce federal regulations.

In order to resolve these problems, ICE should either abolish the program or temporarily halt the program until it can implement effective solutions. First, ICE should allow jurisdictions to opt out of Secure Communities. Second, ICE should collect data on the ethnic background of those who are arrested and assemble data on the final disposition of the individual’s case. This data should be made available to the public to increase transparency while making sure officers are not participating in racial profiling. Third, law enforcement officers should not send fingerprints to ICE until after the individual has been convicted. This ensures that ICE is meeting its purported priority that the most dangerous convicted felons are removed. Finally, ICE must institute more stringent requirements and also provide education and training to law enforcement on civil rights violations, dangers of racial profiling, and the truth about immigration detainers.

Secure Communities has the potential to be a fair and effective program, but currently it targets minority communities and there are too many loopholes for the program to succeed to be a long-term plan for immigration enforcement in the future. President Obama’s announced immigration policy with regard to case-by-case review of deportation cases could eradicate some of the concerns implicated by Secure Communities, but the impact of this policy remains to be seen.