



HISPANIC BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

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Via Electronic Mail (pmendelson@dccouncil.us)

Councilmember Phil Mendelson
Chairperson, Committee on the Judiciary
1350 Pennsylvania Avenue, N.W., Suite 402
Washington, D.C. 20004

Re: Bill 18-795, "Secure Communities Act of 2010".

Dear Councilmember Mendelson:

On behalf of the Hispanic Bar Association of the District of Columbia ("HBA-DC"), we respectfully offer comments on Bill 18-795, the Secure Communities Act of 2010, ("Act"). The Act would prohibit the District of Columbia from transmitting arrest data to the U.S. Immigration and Customs Enforcement ("ICE") of the Department of Homeland Security ("DHS").

We will first present an overview of the Secure Communities program. We will subsequently discuss two questions related to the Act. Specifically, we will assess the Act's impact on the Secure Communities program. In addition, we will explore the Council's authority to enact this legislation. In the event that the bill is not enacted, we will explore several serious questions raised by the implementation of the Secure Communities program that counsel rejection of the program.

I. Secure Communities overview.

Secure Communities is a voluntary DHS-ICE program that will allow the Metropolitan Police Department ("MPD") to transmit arrest data of persons arrested in the District to the Federal Bureau of Investigations ("FBI"), which will then share the information with ICE. Both MPD and ICE will be notified if there is a positive match for an individual with a criminal record. ICE will thereafter decide whether to detain the individual or take other action. The purpose of Secure Communities is ostensibly to identify for removal undocumented aliens with serious criminal records.¹

¹ See Secure Communities: A Comprehensive Guide to Identify and Remove Criminal Aliens, http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

II. Analysis of the Act.

Because the Act seeks to restrict information to an agency of the United States, a question may be raised about the Council's authority to enact such legislation under the power granted to it by the District of Columbia Home Rule Act. Under the Home Rule Act, the Council is prevented from enacting legislation concerning "the functions or property of the United States."² However, this Act properly concerns the District's traditional local police power, which was not affected by the explicit limitations imposed by Congress.³ Therefore, this Act appears to be the proper subject of Council legislation. The fact that Secure Communities is a voluntary program – the District may opt out altogether from participation – supports the authority of the District to share or not share its local arrest data as the program would require.⁴

Since Secure Communities is portrayed as a program through which arrest data is shared between a local jurisdiction and ICE, the Act appears to halt the implementation of the program in the District with its prohibition of such sharing. However, under Secure Communities, arrest data are transferred by MPD to the FBI, not ICE. Thus, the Council may need to further explore limitations on the sharing of arrest data if the Act is to accomplish its apparent goal. The current language may not accurately capture the manner in which the Secure Communities program actually functions.⁵

III. Issues raised by Secure Communities.

The application of the Secure Communities program in the District raises a number of questions. First, the program places immigrants at a heightened risk of the collateral consequences of an unlawful arrest because the protections of the Fourth Amendment of the U.S. Constitution are not available to them at civil deportation hearings.⁶ Prohibiting transmission of arrest data to ICE would have the effect of limiting the consequences of a possibly unlawful arrest to the criminal process where the Fourth Amendment applies, thereby providing for the exclusion of evidence wrongfully obtained.

Second, Secure Communities raises the threat of racially-motivated arrests because there is no mechanism to control the abuses of any biased police officers who may proceed with the knowledge that the program can result in the deportation of immigrants.⁷ Although we understand that MPD declared that arrest data for certain lesser offenses would not be

² See D.C. Official Code § 1-206.02(a)(3) (2001).

³ See *District of Columbia v. Greater Washington Central Labor Council*, 442 A.2d 110, 113 (D.C. 1982) (discussing Council's legislative limitations as restricted to local matters); *McConnell v. United States*, 537 A.2d 211, 215 (D.C. 1988).

⁴ See U.S. Immigration and Customs Enforcement, "Setting the Record Straight", http://www.ice.gov/doclib/secure_communities/pdf/sc-setting_the_record_straight.pdf.

⁵ Certain federal statutes may raise the issue of whether they preempt the Act; however, this is unlikely, as the statutes concern immigration data, while Secure Communities concerns arrest data. See 8 U.S.C.S. § 1373 (a) (Supp. 1997); 8 U.S.C.S. § 1644 (Supp. 2006).

⁶ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1042 (1984).

⁷ See, e.g., National Immigration Law Center, More Questions Than Answers about the Secure Communities Program (Washington, DC: March 2009) (no redress mechanism for individuals wrongfully identified by DHS).

transmitted, those limitations are not mandated by law and are subject to change at any time. We would therefore urge the Council to explore the institution of a complaint mechanism if the program were to be in effect in the District, since available data on Secure Communities shows that, despite its professed goal of removing dangerous criminal aliens, an astounding 79% of those the program actually captures are lower level (misdemeanor) offenders.⁸

Third, the application of Secure Communities appears contrary to MPD's own community policing model, which relies on trust established between the immigrant community and the police in order to report crimes. Immigrants would have every incentive under Secure Communities to refrain from reporting crimes if such contact could lead to removal proceedings. This tension has the effect of making District communities less, not more, secure.

Fourth, the financial costs to the District of implementing Secure Communities are unclear. Although the program allows for the District to fully prosecute individuals accused of criminal offenses after arrests, it is unclear how long these individuals may remain in District custody awaiting transfer to ICE. Likely, any additional period of detention will result in additional cost to the District, as the agreement between the MPD and ICE specifies no federal funding for MPD. Given the District's current financial challenges, the costs of the program may be unwarranted, especially in the face of the issues it raises.

The HBA-DC exists in part to promote equal justice and opportunity for all Hispanics. We commend the Council for its efforts to address the possible harmful effects of the Secure Communities voluntary program and respectfully request that this letter be made a part of the Council's legislative record on the legislation. Thank you for your consideration.

Sincerely,



Patricia Larios
Co-chairperson
Legislative & Policy Issues Committee

CC: Councilmembers (dccouncil@dccouncil.us)

⁸ U.S. Immigration and Customs Enforcement, "News Release: Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 110,000 criminal aliens in its first year," November 12, 2009. *See also* Margaret Mendelson, Shayna Strom, and Michael Wishnie, *Collateral Damage: An Examination of ICE's Fugitive Operations Program* (Washington, DC); Migration Policy Institute, February 2009 (finding that ICE's fugitive operation teams apprehended primarily unauthorized immigrants with no criminal history despite intention to apprehend high risk aliens).