



HISPANIC BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

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May 9, 2012

Via electronic mail

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

RE: B19-585, "Immigration Detainer Compliance Amendment Act of 2011."

Dear Councilmember Mendelson:

On behalf of the Hispanic Bar Association of the District of Columbia ("HBA-DC"), we write to express our support for Bill 19-585, the Immigration Detainer Compliance Amendment Act of 2011, ("Act") because the Act can mitigate some of the harmful consequences of immigration enforcement programs, such as Secure Communities.

I. Overview of the Act

The Act creates requirements that must be satisfied when the U.S. Immigration and Custom Enforcement of the Department of Homeland Security ("ICE") requests that the District detain a person for immigration purposes. First, a person in custody must be an adult.¹ Second, the person must have been recently convicted of a dangerous crime² or crime of violence (homicide convictions are not time-barred).³ Third, an agreement must be in place where the federal government agrees to reimburse the District for all costs associated with honoring the detainer. If all three requirements are met, the District may then agree to hold a person for 24 hours after the person would otherwise be released.

¹ The bill requires a detained person to be 18 years or older.

² The term "dangerous crime" includes felony offenses involving weapons, prostitution, controlled substances, arson, burglary, robbery, and most sexual offenses. *See* D.C. Official Code § 23-1331(3).

³ The term "crime of violence" covers a wide variety of conduct, including felony-level assaults as well as most sexual offenses, arson, and terrorist acts. *See* D.C. Official Code § 23-1331(4).

II. Analysis

A. The Act responds to some concerns raised by Secure Communities.

A request by ICE for the District to detain a person for immigration purposes can be made pursuant to the Secure Communities program, which is one of the federal government's immigration enforcement programs. Secure Communities began as a voluntary program that allowed the Metropolitan Police Department ("MPD") to transmit arrest data of persons arrested in the District to the Federal Bureau of Investigations, which then shares the information with ICE. Both MPD and ICE are notified if there is a positive match for an individual with a criminal record. ICE thereafter decides whether to detain the individual or take other action. The purpose of Secure Communities was ostensibly to identify for removal undocumented persons with serious criminal records.⁴

However, Secure Communities has raised a number of legal problems and otherwise shown adverse consequences in its implementation to date. We have previously written to the Council concerning some of the problems associated with Secure Communities.⁵ For instance, 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 removal proceedings.⁶ Similarly, the fear caused by these consequences negatively impact police models, such as the District's, which rely on trust so that the community may report crimes.

We also noted that the financial costs to the District of implementing Secure Communities are unclear, as the program appears to function as an unfunded mandate. In addition, the imperative to remove for deportation proceedings may have an adverse impact on the ability of courts to employ alternative sentencing methods. Finally, we have observed that, given available data, Secure Communities has not operated as intended, resulting in the deportation of large numbers of individuals who are not serious criminals.

The Act will help to address some of these concerns as we indicate below. But first we note that the question of the Council's authority to pass this type of legislation should be reviewed.

B. The Council may have authority to pass the Act.

Because the Act impacts the manner in which the United States discharges its responsibility over immigration, 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.

⁴ See Secure Communities: A Comprehensive Guide to Identify and Remove Criminal Aliens, http://www.ice.gov/pi/news/factsheets/secure_communities.htm.

⁵ Letter from Patricia Larios, Co-chairperson Legis. & Policy Issues Comm., to Phil Mendelson, Chairperson of Comm. on the Judiciary (Oct. 6, 2010) (on file with author), *available at* http://www.hbadc.org/resource/resmgr/docs/2010.10_sc_letter.pdf.

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

Under the Home Rule Act, the Council is prevented from enacting legislation concerning “the functions or property of the United States.”⁷ This Act, however, properly concerns the District’s policing authority which Congress did not seek to limit.⁸

In addition, an immigration detainer issued by ICE to local law enforcement remains merely a request to hold individuals after they would otherwise be released.⁹ The ICE request is not a warrant or a judicial order. Consequently, the District has room to place reasonable requirements on its participation in federal law enforcement. Should the status of immigration enforcement programs like Secure Communities change to become mandatory in nature, as may be the case, the Council should revisit this analysis to ensure that its authority to enact legislation of this kind is not adversely affected.

C. The Act’s limit on who can be detained strengthens community policing.

Jurisdictions which have implemented Secure Communities have seen an increase in deportations and an increase in transfers to ICE. The threat of detentions and deportations discourage immigrants from reporting crimes and from participating in the prosecution of crimes. For this reason, a number of law enforcement agencies have expressed reservations about their participation in Secure Communities. Many law enforcement agencies, like the MPD, rely on a community policing model that relies on trust established between the immigrant community and the police in order to report crimes.

If Secure Communities were to take effect in the District, the Act would help to alleviate the negative impact of reporting all persons in custody, regardless of criminal activity, by limiting reporting to only those convicted of a dangerous crime or a crime of violence. By restricting the District’s jail holds to adults who committed these serious crimes, the District would send a message to the immigrant community that the District and the MPD remain interested in maintaining and strengthening the community policing model.

D. The Act helps to protect District fiscal resources.

ICE expects the District to participate in its Secure Communities program by 2013.¹⁰ The program, already implemented in 86% of the localities across the country, resulted in a significant increase in the number of detainees issued by ICE.¹¹ Moreover, in the 2010 calendar year, the District held an inmate under an ICE detainer, on average, for 288 days.¹² The increase

⁷ See D.C. Official Code § 1-206.02(a)(3) (2001).

⁸ 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). We construe the traditional police power to encompass jailing individuals who violate the local laws.

⁹ 8 C.F.R. § 287.7(a); Letter from David Venturella to Miguel Márquez (counsel for Santa Clara County) (Sept. 27, 2010), available at <http://www.deportationnation.org/library/>.

¹⁰ See U.S. Immigration and Customs Enforcement, “Secure Communities”, http://www.ice.gov/secure_communities/.

¹¹ See U.S. Immigration and Customs Enforcement, “Activated Jurisdictions”, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

¹² http://dclclims1.dccouncil.us/mendelson/archive_pr/COJ%20performance%20and%20budget%20materials/DOC%20Performance%20Responses%2003.07.11.pdf.

in detainers and the significant number of days required to house an inmate pursuant to these detainers will impact the District's allocation of its resources. The Act helps to protect the District from an unfunded mandate by requiring an agreement with the federal government to reimburse the District for all costs incurred, prior to the District honoring detainer requests.

E. The Act's restrictions on detentions may assist courts with alternate sentencing.

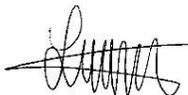
Honoring immigration detainers, even for someone who is charged with a minor offense or traffic ticket, limits the ability of the courts, prosecutors and defense attorneys to utilize alternative sentencing methods, such as participation in a dependency or mental health program. Alternative programs often require a person's release into the community in order to participate in the program. An immigration detainer prevents a release, interfering with the court's discretion to provide an appropriate sentence.

F. The Act is consistent with the intent of Secure Communities to target criminals.

As indicated above, Secure Communities was intended as an immigration enforcement program targeting dangerous criminals. However, during the first seven months of FY 2011, non-criminal detainees made up 32% of those removed by ICE, the highest rate since the inception of Secure Communities.¹³ Only 24%¹⁴ of those removed in this time period could be categorized as a serious criminal as defined by ICE, leaving the other three-quarters of individuals categorized as mid-level or minor offenders, or those without a criminal conviction. The Act would ensure that the District limits the deportations of individuals by excluding those who possess minor, old or no criminal convictions.

The HBA-DC exists in part to promote equal justice and opportunity for all Hispanics. We believe the Act furthers the interest of equal justice by creating protections for detained immigrants who are subject to the negative collateral consequences of programs like Secure Communities. We commend the Council for addressing the potential effects of immigration enforcement in the District and urge the passage of the Act. Thank you for considering our views.

Sincerely,



Lyzka P. DeLaCruz
President

¹³ See U.S. Immigration and Customs Enforcement, "IDENT/IAFIS Interoperability Report", pg. 4. Available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf.

¹⁴ *Id.*