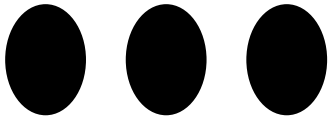
Written by **Joe Wolverton, II, J.D.** on May 6, 2011

States Ready to Fight Feds on Immigration Program

President Obama may soon have to expend some of that recently earned bin Laden capital in convincing states to participate in one of the programs central to his oft-mentioned "comprehensive immigration reform" package.



According to reports published Friday, state legislators and executives nationwide are re-examining their participation in the Secure Communities program. Governor Pat Quinn of Illinois announced that his state was bailing out, and the state legislature of California (where the plan has been in place statewide for a while) is considering a measure that would empower individual counties and law enforcement agencies to choose whether or not to cooperate in the immigration program.

Secure Communities was initiated as a pilot program in 2008 under the administration of George W. Bush. Upon being rolled out, fourteen jurisdictions signed on as a partner with the Department of Homeland Security. By March 2011, over 1,200 state, county, and municipal jails and prisons were a part of the scheme.

The program relies upon jails and prisons to implement the measures devised to further the goals of the plan. As reported to Congress, the goals of Secure Communities are:

> IDENTIFY criminal aliens through modernized information sharing;
>
> PRIORITIZE enforcement actions to ensure apprehension and removal of dangerous criminal aliens; and
>
> TRANSFORM criminal alien enforcement processes and systems to achieve lasting results.

Basically the program works as follows. For every person booked into jail, local law enforcement agents run fingerprints, matching them against federal immigration and criminal databases. IDENT is a voluminous cache of data controlled by Immigration Customs Enforcement (ICE) that stores biometric records of immigration applicants, certain criminals, and those suspected of terrorist activity. A companion database, IAFIS, is an FBI-owned collection of biometric criminal records.

Prior to the establishment of the Secure Communities program, the fingerprints of county and state arrestees were shared only with the Federal Bureau of Investigation (FBI). Under the rules set out by Secure Communities, however, the prints are uploaded and matched with the databases maintained by ICE, as well.

If an person's fingerprints match those of a non-U.S. citizen (including legal residents), an automated process sends an alert to the Law Enforcement Support Center (LESC) of ICE. The case is then

examined and a rap sheet is produced.

If a submitted print matches one in the above-referenced federal databases, ICE has discretion to place a "hold" on the individual. Basically, this is a request by ICE for the local jail or prison to keep that person in custody for up to 48 hours beyond the scheduled release date. These two days are designed to give ICE a chance to assume responsibility for the individual and initiate the federal deportation process.

Legal immigrants convicted of certain crimes are subject to deportation. Undocumented immigrants can be deported even if they have committed no crime. According to a story in the the *New York Times* errors in the database system have resulted in "about 5,880 people identified through SComm [Secure Communities] turned out to be United States citizens by 2009."

What is the purpose of such an unconstitutional federal immigration authority's subordination of state and local police power? According to former ICE Secretary Julie L. Meyers, it is to create a virtual ICE presence at every local jail."

The above narrative describes reason enough for states to balk at giving such assistance to the feds. Then, there is the cost. While precise figures are unavailable, an article published in *The Houston Chronicle* reported in 2008 that, according to ICE officials, "cost [is] between $930 million and $1 billion. Congress dedicated $200 million for the program in 2008 and set aside $150 million for fiscal year 2009."

The states' cost of cooperation is substantial, too. As presently administered, Secure Communities (including ICE and DHS) does not reimburse states, counties, or local facilities for the expenses incurred in complying with the demands of the program.

Predictably, then, many jurisdictions are contemplating legislative efforts to "opt out" of the program. The problem they have encountered, however, is that the Department of Homeland Security subscribes to the notion that participation on the part of localities (including states and counties) is mandatory.

That position hasn't been static, however. According to an August 2010 DHS memo entitled "Secure Communities: Setting the Record Straight" municipalities and counties may opt out of the program, regardless of the decisions of the states in which they are located.

> If a jurisdiction does not wish to activate on its scheduled date in the Secure Communities deployment plan, it must formally notify its state identification bureau and ICE in writing (email, letter of facsimile). Upon receipt of that information, ICE will request a meeting with federal partners, the jurisdiction, and the state to discuss any issues and come to a resolution, which may include adjusting the jurisdiction's activation date in or removing the jurisdiction from the deployment plan.

To the contrary, an article published last year in the *Washington Post* article quoted an anonymous senior ICE official who declared:

> Secure Communities is not based on state or local cooperation in federal law enforcement…State and local law enforcement agencies are going to continue to fingerprint people and those fingerprints are forwarded to FBI for criminal checks. ICE will take immigration action appropriately.

Department of Homeland Security Secretary Janet Napolitano attempted to clarify the "official" position: "What my letter said was that we would work with them on the implementation in terms of

timing and the like…But we do not view this as an opt-in, opt-out program."

The marriage of federal overreaching and indecision has beget this growing resistance to Secure Communities (and other immigration-related impositions) in the states. As the movement spreads, a battle between the feds and states is looming, particularly regarding Secretary Napolitano's intractable assertion that compliance is mandatory.

As the *Times* story relates the situation, the central issue in the forthcoming sovereignty skirmish will be Napolitano's position that "Secure Communities is mandatory and will be extended to all jurisdictions in the country by 2013." According to available data, there are 3,141 state, county, and local jurisdictions in the United States.

States such as Massachusetts, Illinois, California (to some extent), and others consider that the original compact between themselves and the federal government has been violated repeatedly by ICE and DHS and therefore they are at liberty to rescind the contract completely and act in their own financial and security interests.

Regarding the fed's misuse of data and misleading of states as to the purpose of collection of the data, the director of ICE, John T. Morton said that his agency "takes full responsibility for the confusion and inconsistent statements…."

It should be of interest to constitutionalists that the Secure Communities program was created by an act of the executive branch bureaucracy and not by a law passed by the people's representatives in Congress. There is no provision in the Constitution for extension of the lawmaking power to the executive branch. In fact, Article I plainly states that "All legislative Powers herein granted shall be vested in a Congress of the United States…." No enumeration is made of an executive policy-making power that obviates the legislative branch.

Perhaps Congress will assert their constitutional authority and abolish the Secure Communities program.