Center for Immigration Studies

Memorandum

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Secure Communities by the Numbers, Revisited
Analyzing the Analysis (Part 3 of 3)

By W.D. Reasoner and Jessica M. Vaughan

Executive Summary

This is the third and final installment of a three-part series examining the outcomes of Immigration and Customs Enforcement's (ICE) Secure Communities program and how those outcomes have been misleadingly described by one widely circulated paper, "Secure Communities by the Numbers: An Analysis of Demographics and Due Process",[1] from the Chief Justice Earl Warren Institute on Law and Social Policy at the University of California, Berkeley, Law School, and then uncritically re-told by major news media outlets. The Warren Institute report and our three analyses of that report are based on the same database of actual case histories provided by ICE in response to a Freedom of Information Act request.

Here we focus specifically on allegations of what the Warren Institute authors call "a lack of due process for the individuals identified for removal by Secure Communities". These allegations are based on certain data gleaned from the sample of ICE cases: "Only 24 percent of individuals arrested through Secure Communities and who had immigration hearings had an attorney compared to 41 percent of all immigration court respondents who have counsel … . Only 2 percent of non-citizens arrested through Secure Communities are granted relief from deportation by an immigration judge as compared to 14 percent of all immigration court respondents who are granted relief … . A large majority (83 percent) of people arrested through Secure Communities is placed in ICE detention as compared with an overall DHS immigration detention rate of 62 percent".

Our findings in brief:

- The statistics cited by the Warren Institute authors do not demonstrate a systematic denial of due process to aliens, but are simply a reflection of the standard operation of immigration law, which establishes significantly different due process rights for alien criminals than for other illegal and removable aliens.

- These statistics rely on invidious "apples and oranges" comparisons. The dataset consists of apprehended individuals with significant adverse criminal and immigration histories, whereas national averages include large numbers of aliens who are in the United States illegally, but who have no history of prior encounters either with police or immigration authorities.

- The data cannot reasonably be interpreted as showing that ICE routinely disregards aliens' due process rights. Aliens who are criminals or who have been removed previously and illegally returned *are not entitled* as a matter of law to the same panoply of due process hearings before an immigration judge as many of the national population of illegal aliens in proceedings. Nor are they as likely to be entitled by law to post a bond or to meet the statutory eligibility requirements for relief from removal than are the many illegal aliens in the national averages who have no prior adverse criminal or immigration histories.

- We were able to determine that about half of the cases in this sample (48 percent) were either multiple or repeat immigration violators, and about one-fourth (26 percent) were individuals who had illegally re-entered after a previous deportation, which is a felony under federal criminal statutes (see 8 U.S.C. § 1326), as well as

W.D. Reasoner (a pseudonym) is a retired government employee with many years of experience in immigration administration, law enforcement, and national security matters. Jessica M. Vaughan is Director of Policy Studies at CIS.

a civil immigration violation. A careful examination of the array of charges, many of them very serious, refutes the notion that "people are being apprehended who should never have been placed in immigration custody", as asserted in the Warren report. We could not find an instance of an individual who clearly should not have been detained or charged. Our findings are corroborated by a recent Department of Homeland Security (DHS) Inspector General's report.

- What the SCBTN authors see as a "half-empty glass" of immigration due process, with only about half of all apprehended aliens in this database receiving a hearing before an immigration judge, we view as a glass too full. Considering that so many in the database are criminal offenders and repeat immigration violators, we believe too many criminal aliens were accorded an immigration judge hearing, as opposed to other more efficient, and perfectly lawful, ways to process their removal. We also note that only 1 percent of these criminal alien cases were dealt with using expedited removal, while in recent years about 30 percent of total DHS removals have been expedited removals.

- The SCBTN authors state with concern that only 24 percent of the individuals in this dataset were represented by an attorney (compared with 41 percent nationally). They fail to discuss the most likely reason this is the case: We found that a very large percentage of the aliens in this caseload (88 percent) were inmates and therefore unlikely to qualify for relief from removal and not ideal candidates for representation, pro bono or otherwise. This is not a systematic deprivation of rights, but a reflection of the objectionable backgrounds and actions of this sub-set of the national population of illegal aliens, most of whom were not entitled to relief from deportation by operation of law.

In sum, the statistics cited in the report (which are described and examined in detail below) have been used misleadingly. The manner and level of due process to which aliens are entitled varies as a function of the operation of immigration law. In the course of our consideration of the statistics cited — and the cases underlying those statistics — we found no proof of systematic disregard of aliens' due process rights, but rather an application of the existing statutory framework.

In fact, based on our review, we believe that DHS officers are not fully or adequately utilizing some non-hearing forms of due process that would aid them in their efforts to stem the flow of illegal aliens into the United States (particularly those with adverse criminal or immigration backgrounds) and concurrently facilitate their expeditious removal, consistent with congressional expectations and existing statutory authorities.

Introduction and Recap

In October 2011, the Earl Warren Institute at the University of California, Berkeley, Law School and the Benjamin N. Cardozo School of Law jointly published a report, "Secure Communities by the Numbers: An Analysis of Demographics and Due Process". The report (hereafter referred to simply as "SCBTN") focuses on the Secure Communities program operated by ICE within DHS. The Secure Communities initiative uses electronic systems to compare fingerprints of individuals taken into custody by state and local police against a DHS fingerprint repository called "IDENT" (the Automated Biometric Identification System) to identify aliens arrested for crimes who may be subject to removal (deportation) from the United States.

The SCBTN report made some disturbing findings and assertions, including:

- **Arrests of United States Citizens:** "Approximately 3,600 United States citizens have been arrested by ICE through the Secure Communities program."

- **Racial/Ethnic Profiling:** "Our analysis … raises serious concerns about the level of screening and potential targeting of certain social groups … . Latinos comprise 93 percent of individuals arrested through Secure Communities though they only comprise 77 percent of the undocumented population in the United States … . Community and advocacy groups have also asserted that Secure Communities is, in some jurisdictions, masking local law enforcement agencies' practice of racial profiling."

- **Due Process and the Operation of Law:** "Only 24 percent of individuals arrested through Secure Communities and who had immigration hearings had an attorney compared to 41 percent of all immigration court respondents who have counsel. … Only 2 percent of non-citizens arrested through Secure Communities are granted relief from deportation by an immigration judge as compared to 14 percent of all immigration court respondents who are granted relief. … A large majority (83 percent) of people arrested through Secure Communities is placed in ICE detention as compared with an overall DHS immigration detention rate of 62 percent."

We decided to review the analysis and findings of the report to determine whether they were well founded. We obtained a dataset from ICE officials that they assured us was the same as that previously given to the report's authors so that we could examine it for ourselves. As a result of our examination, we determined that the SCBTN report is flawed in several areas and decided that publishing our own findings was important because a number of special interest groups, open borders advocates, and members of Congress have quoted the report[2] — including those portions which are most erroneous or suspect — in interviews and articles, many of which uncritically accepted the findings and analyses of the report.

We also concluded that ICE materially contributed to acceptance of the report's findings through its silence and failure to routinely provide timely and accurate statistical information. Thus, ICE in no small measure has only itself to blame for much of the public confusion and controversy surrounding Secure Communities. This is both unfortunate and unnecessary.

Because of our concerns, we decided to prepare a series of papers to discuss the SCBTN analysis and findings made in the report, divided into three broad areas consistent with what we perceive as the main themes addressed in SCTBN:

- Arrests of United States citizens;

- Allegations of racial or ethnic bias; and

- Due process and operation of the rule of law vs. systemic flaws in the program

Our first review, published in December 2011, focused on assertions relating to United States citizens, whom the Warren report erroneously alleged had been taken into custody as a result of the Secure Communities initiative and placed into civil removal (deportation) proceedings.[3] In our review, not only did we find that their allegation of unlawful detentions of U.S. citizens was wrong, we also specifically found that SCBTN's authors did not fully understand the data, resulting in significant errors of review and interpretation; that their methodology in arriving at certain conclusions was unsound; and, consequently, that they engaged in overbroad, insupportable assertions based on their philosophical views rather than the facts.

Our second review, published in March 2012, focused on the set of assertions relating to alleged discrepancies in the number of Latinos taken into custody by Secure Communities vs. national averages, which the Warren report cited as potential evidence of racial or ethnic profiling, and which we showed were inapplicable because the Secure Communities program had not then (and still has not) been activated nationally.[4] We again found that troubling methodology, insupportable assertions, overbroad and inaccurate comparisons, and unsound analogies were used by the SCBTN authors in an attempt to make the case that ICE's Secure Communities program is fundamentally flawed.

In this review, we focus on the set of assertions in the SCBTN report alleging systematic disregard of aliens' rights and due process.

About the Data

In our prior two reports, we expressed concerns over the quality of the data. The data problems are so substantial that the authors of the SCBTN report were moved to observe, "While the data provides no explanation for the detention of individuals without removal charges, it does raise serious questions about whether individuals not subject to removal were wrongfully detained."[5] We do not go so far as that in our conclusions, but agree that it poses a serious obstacle for serious researchers. Indeed, we previously questioned how much of the information in the dataset was actually related to Secure Communities cases at all, given that some of it appeared to relate directly to apprehensions by another DHS agency charged with immigration enforcement — Customs and Border Protection (CBP) — or to arrests made in places that were not yet participating in Secure Communities. We remain concerned on several other levels as well: blank data fields, duplicative records, internally inconsistent information, etc.

Understanding how electronic fingerprint matching works in the Secure Communities context may help explain some of the discrepancies: when digitized fingerprints are forwarded to IDENT for comparison and a match is found, the system collects, and returns to the originator of the print transmission, the last five "events" relating to the person whose biometrics were matched. Such events might consist of a nonimmigrant's entry, a significant action such as granting of a benefit, or, quite frequently, data relating to the individual's prior apprehensions and other adverse immigration actions. With regard to the dataset forming the basis for the SCBTN report and our three analyses we believe, without being certain, it is possible that data from various prior events got commingled into the worksheets, along with data that were specifically Secure Communities related. This would explain, for instance, why we found information in the set that appears to indicate arrests by CBP agents and officers. However, this explanation cannot account for all of the discrepancies and anomalous records we detected.

Whatever the underlying circumstances may be that led to the irregularities, it is the responsibility of the researcher to identify such problems, to seek an explanation from the source (ICE), and to attempt to explain the problems to the reader. The SCBTN authors made no attempt to do so. This suggests that they either did not understand the data enough to recognize the problems or chose to ignore the problems and march onward with their baseless conclusions.

Aliens and Due Process of Law

The United States has had laws dealing with citizenship and alienage from its very founding.[6] Many have been controversial; the Alien and Sedition Acts of 1798 are a prime example. But controversial or not, the Supreme Court has repeatedly said that in the context of civil exclusion and deportation proceedings, due process for aliens is what our elected leaders in Congress choose it to be — no more and no less — provided that the due process falls within the framework laid out by our supreme law of the land, the Constitution.

Congress, in turn, has devised a graduated system of due process to be accorded aliens based on their lawful presence (or lack thereof) and their ties and equities to this country:

- Lawful permanent resident aliens (LPRAs) are accorded the most deference under the laws because they have already been granted the right to live in the United States in perpetuity. Therefore, in attempting to remove their status as lawful residents and expel them, the government carries a heavy burden of proof, and in almost all cases must do so before an immigration judge who takes evidence, hears witnesses, determines whether mitigating circumstances exist that might provide the basis for relief from deportation, and then issues a ruling.

- Nonimmigrants are accorded less deference (and therefore less due process), based on the fact that their admission to the United States, though legal, is for a temporary period of time and under specified conditions that may not be violated. Whether or not the nonimmigrant is entitled to a due process hearing before an immigration judge will depend on several factors, including whether admission was pursuant to the Visa Waiver program. Aliens who enter under the terms of that program have waived their right to such a hearing, and due process in their cases is significantly curtailed by law.

- Illegal entrants are accorded the least deference and are subject in many instances to summary proceedings to confirm their identity and the facts and circumstances surrounding their unlawful entry, after which they may be ordered expeditiously removed by federal immigration officers without referral to an immigration judge.

But Congress also has mandated exceptions to the graduated tier of due process described above. Among the exceptions are two significant categories of aliens whose due process rights are substantially curtailed compared to many others: aliens who have been convicted of criminal offenses defined as "aggravated felonies" under the federal immigration laws and aliens who have been previously removed and then reentered the United States illegally. Recognizing the severity of the offenses in the first instance, and desiring to curb unlawful reentry of previously removed aliens in the second instance, Congress has expressed its will in favor of summary proceedings similar to those used for expeditious removal of illegal entrants, once again without referral to an immigration judge.[7]

In addition, Congress has expressly mandated the detention until removal of certain classes of aliens, such as terrorists and those convicted of aggravated felonies, thus eliminating the possibility of conditional release pending a hearing for these individuals, whether by posting of a bond, electronic monitoring, or other means.

And finally, Congress has eliminated the possibility of relief from removal under the law for a variety of aliens, but particularly those who are convicted of aggravated felonies or who willfully abscond from proceedings.[8]

It is against this statutory backdrop, then, that the SCBTN authors' allegations about disregarding due process rights must be examined.

Alleged Systematic Disregard of Aliens' Rights

The authors of SCBTN have made much of their analysis to assert that ICE routinely disregards the rights of aliens in its push to effect removals under the Secure Communities program. For instance, on page 2 of the report, we find this statement:

> "Overall, the findings point to a system in which individuals are pushed through rapidly, without appropriate checks or opportunities to challenge their detention and/or deportation. This conclusion is particularly concerning given that the findings also reveal that people are being apprehended who should never have been placed in immigration custody, and that certain groups are over-represented in our sample population."

On page 4, they assert:

> "Advocates and immigration lawyers have argued that individuals who enter deportation proceedings through Secure Communities and similar programs experience even more limited due process rights and protections than the already very limited protections in place since IIRIRA. These claims are substantiated by the data in this report."

And on page 6, they state the following:

> "Given that the 'severe penalty' of deportation is at issue for everyone who is apprehended and detained because of Secure Communities we might assume that individuals processed through Secure Communities have access to an immigration judge."

They bolster their argument that the Secure Communities program has impinged on aliens' due process rights with a variety of selected statistics:

- "Only 52 percent of individuals arrested through Secure Communities are slated to have a hearing before an immigration judge";
- "Only 24 percent of individuals arrested through Secure Communities and who had immigration hearings had an attorney compared to 41 percent of all immigration court respondents who have counsel";
- "Only 2 percent of non-citizens arrested through Secure Communities are granted relief from deportation by an immigration judge as compared to 14 percent of all immigration court respondents who are granted relief";
- "A large majority (83 percent) of people arrested through Secure Communities are placed in ICE detention as compared with an overall DHS immigration detention rate of 62 percent, and ICE does not appear to be exercising discretion based on its own prioritization system when deciding whether or not to detain an individual."

A thoughtful consideration of that portion of the SCBTN report dealing with due process, hearings, representation by counsel, etc., obliges us to ask these questions:

1. Are the cited statistics accurate and are they relevant? Both factors are equally important. For instance, does comparison of the cases in the dataset with national averages hold up, or does it fall apart under close scrutiny (as we found was the circumstance with the "Latino" statistics that the SCBTN authors claimed constituted a *prima facie* case of bias)?

2. Can the data reasonably be interpreted as revealing a systematic attempt on the part of ICE to give short shrift to aliens' due process and other constitutional or statutory rights?

3. Was there additional important information contained in the dataset that was either overlooked or ignored in the SCBTN report?

Below is our analysis, following the subheads used in SCBTN: Hearings before an Immigration Judge, Detention Pending Removal, Access to Legal Advice and Representation, and Immigration Arrest Outcomes.

Hearings Before an Immigration Judge

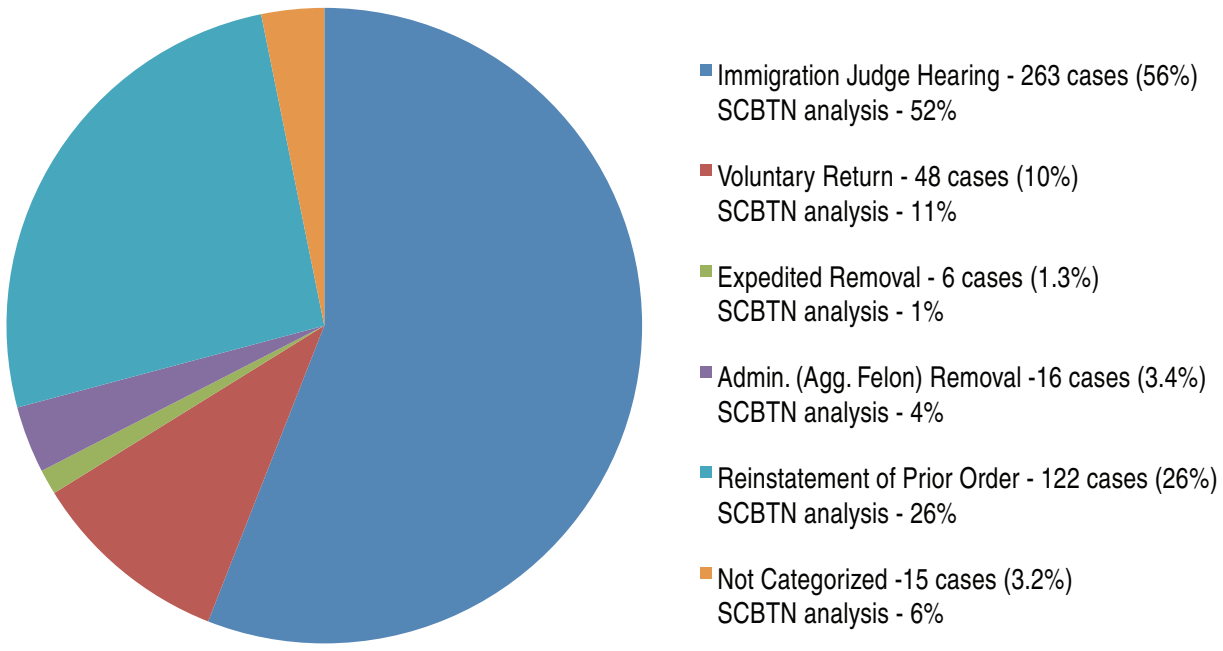
As mentioned earlier, the SCBTN report indicates that immigration judge hearings were used in 52 percent of the cases found in the Secure Communities dataset they received, a figure the authors found disturbingly low. But from our perspective the question to be asked here is: From among the types of removal proceedings authorized by law, which of them were used against aliens in the dataset and were they appropriate to the circumstances?

To determine the answer to that question, we too looked at the data in the tab labeled Item No. 13, "Case Type", which describes the type of removal proceedings that were provided to aliens. We arrived at somewhat different outcomes than those depicted in SCBTN (56 percent received immigration judge hearings, versus 52 percent).[9]

Some of this difference may be due to the fact that, in addition to the dataset, ICE gave the SCBTN authors (apparently redacted) copies of the Form I-213 arrest reports for the aliens whose cases were contained in the dataset, as well as with data from the case management system of the Executive Office for Immigration Review (EOIR), the division of the Justice Department that handles the immigration courts. We did not have access to those forms, which may have been used by the authors to obtain the information that had been left blank in many fields of the dataset.[10] Therefore our figures are based solely on what was available within the spreadsheet.

Figure 1 reflects our analysis of the breakdown of the various types of due process accorded to those aliens, for whom case type was entered in the appropriate field of the dataset. (Where there is a difference between our estimation and that in the SCBTN report, it is noted.)

Figure 1. Breakdown of Due Process Case Types



As can be seen in Figure 1, among those whose due process removal "Case Type" was identifiable, we found that:

- 263 (56 percent of the total) had been accorded hearings before an immigration judge (a difference of +4 percentage points from SCBTN estimations).
- 48 cases (10 percent) were granted voluntary return (a difference of -1 points from SCBTN).
- 6 cases (1.3 percent) were dealt with by the process known as expedited removal (a difference of +.3 points from SCBTN).
- 16 cases (3.4 percent) consisted of administrative removal proceedings accorded to aliens convicted of aggravated felonies (a difference of -.6 points from SCBTN).
- 122 cases (26 percent) were prior removals whose due process consisted of reinstatement of the previous final order (no difference from SCBTN).

This last figure is deeply disturbing: *More than one quarter of the apprehended aliens in this dataset were prior removals who had illegally returned to the United States*. The apparent facility with which previously deported aliens can illegally return to the United States suggests to us that the U.S. border is not at all secure — contrary to the oft-repeated assertions made by DHS and its component agencies, such as CBP and ICE, that the border is more secure than it has ever been. That these individuals were subsequently identified as a result of an arrest for another *criminal* offense demonstrates the public safety problems created by the federal government's failure to secure the border and vigorously enforce immigration laws.

Significantly, in no instance within the dataset did we find that any alien was either deprived of due process or was subjected to a form of due process that was inappropriate to his circumstance or not authorized by statute.

To the contrary, based on specific charges filed against individuals, we believe that there were several instances in which aliens were placed before immigration judges when other more prompt and less costly due process mechanisms might have been used to good effect, such as expedited removal proceedings. We were unable to quantify the number of cases in which this form of due process might have been used due to multiple instances of missing data fields in the relevant tab(s) of the dataset. But our belief as to underutilization of this remedy on a system-wide basis would seem to be borne out by other reliable statistics.

For instance, immigration agencies appear to be making less use of expedited removal proceedings. Expedited removal is a non-judicial form of due process created by Congress in 1996 in an effort to unclog and streamline the immigration court system. It may be used in the case of aliens who are requesting entry or who entered illegally and have been present for less than two years.[11] By policy choice, currently it is applied only to aliens at the ports of entry or who are encountered within 100 miles of the border and have entered within the last two weeks, and so has been of little help in reducing the immigration court backlog.

According to a report prepared for the Administrative Conference of the United States (ACUS) and published in draft form on January 12, 2012, use of expedited removal as a percentage of all removals has declined: "Thirty-seven percent of the 189,000 removals in 2001 were expedited removals. By 2010, that percent was down slightly, to 29 percent of 387,000 total removals." (The report cites the DHS 2010 annual report on immigration enforcement actions as the source of this information.)[12]

As shown in Figure 1, only about 1 percent of the cases in this database were handled by expedited removal. Another 3 percent were accorded administrative removal proceedings (without access to an immigration judge) because they were convicted of aggravated felonies. More than half (56 percent) had hearings before a judge, and another 10 percent were granted Voluntary Return (a very lenient treatment considering these are individuals caught as a result

of local crimes). It is therefore hard to credibly argue that this is a population being whisked through the system without checks or balances, and therefore exposed to unduly harsh penalties or a lack of due process.

Let's go back to the SCBTN authors' statement that, "Given that the 'severe penalty' of deportation is at issue for everyone who is apprehended and detained because of Secure Communities we might assume that individuals processed through Secure Communities have access to an immigration judge." Our question is: Why would we assume that? Because the authors, as advocates for aliens, wish it to be so?

If the law doesn't require it; if Congress has provided other forms of due process outside of the immigration court venue; if immigration judge hearings are lengthy, often delayed, and costly to taxpayers; and if scheduling a hearing substantially prolongs the length of detention for many aliens who are neither entitled to be released on bond nor have any reasonable chance at relief from deportation, then there are few reasons why the government should opt to go the immigration judge hearing route when alternatives exist, whereas there are many sound reasons not to do so.

We do not exaggerate when we emphasize the magnitude of the problems confronting the immigration court hearing system: several organizations, including the Center for Immigration Studies, have reported on them.[13]

The ACUS chartered its own ongoing inquiry as a way of focusing on those problems and, ultimately, offering potential solutions. The authors of the ACUS draft report, for example, state that "there has been a decrease in merits decisions over the past five years (from over 273,000 to about 223,000), and a corresponding decline in removal orders (from slightly over 222,000 to about 166,000)."

Later in the report, they advise that, "According to EOIR, at the end of September 2010, 262,622 proceedings were pending in the immigration courts. The Transactional Records Clearinghouse (TRAC) said that figure rose to 275,316 by early May, 2011 *and the average age for these pending cases was 482 days, up from 467 days at the end of FY 2010."*[14] (emphasis added)

There is one additional subject we wish to address before moving on with our analysis. On page 7 of the SCBTN report, the authors speak to the issue of stipulated removals[15] and suggest, first, that such removals should not count as "hearings", and second, that there is reason for alarm because (they imply strongly, without actually saying) it is possible that some immigration judges may be accepting inappropriate stipulations to meet their completion goals. Although stipulated removals may not be "trials", they are certainly a form of due process, just as surely as a defendant's guilty plea before a judge in a criminal case is a form of due process. To suggest otherwise, even by indirection, is sophistry. And the proper response to any probative evidence that immigration judges are abusing their responsibilities where stipulated removals are concerned is to call for a vigorous inquiry, demand adequate oversight of their judicial conduct, and insist upon discipline if and when required. We find it curious that the authors wage the general case that more hearings should be held in front of immigration judges, while at the same time impugning their integrity and ethical standards where stipulated removals are concerned.

Detention Pending Removal

The following excerpt appears at the beginning of the Detention Pending Removal section of the SCBTN report:

> "Whether or not they are deported, immigrants identified through the Secure Communities program face potential due process infringements arising from their detention while they await the disposition of their cases … . Over eight in 10 (83 percent) of the individuals in our sample were booked into an ICE detention facility as compared to a six in 10 (62 percent) detention rate for all DHS immigration apprehensions."

As we have noted before, the comparison of this dataset with any national average must be looked at with suspicion, not only because the majority of cases in the dataset were derived from a few selected jurisdictions in which Secure

Communities had been activated at the time the sampling was derived, but also because these cases represent individuals who were identified and taken into custody by ICE *as the result of their interaction with state and local criminal justice and correctional systems.* As the authors observe in end note 16, one of the first jurisdictions piloted was Harris County, Texas, which became active on October 27, 2008; statistics from that jurisdiction figure prominently in the dataset. What the authors have not addressed is the fact that the Texas Department of Corrections institution in Harris County was one of the first facilities to go online and that many of their inmates, including some in this dataset, were identified as the result of Secure Communities.[16]

With that backdrop in mind, we conducted a review of where the individuals were identified by ICE, which is contained within Tab No. 26, "Status When Found". After eliminating duplicate records, there remained a pool of 434 cases. Of those cases, 381 (88 percent) were labeled as "In Institution", which is the ICE term for encounters with aliens that take place in the confines of a correctional institution. Thus it is no surprise that SCBTN found that eight out of 10 aliens in the dataset were booked into custody by ICE: quite likely they simply transferred from one place of confinement to another as the result of the change in custodial agency.

On page 7 of the report, the authors state,

> "Examining those in our sample with ICE detention book-out dates and departure dates, we found that only 10 percent were released prior to their departure. A substantial share of those who left the country, 90 percent, were in detention until the date of their departure ... . These data indicate that the vast majority of those who are detained and subsequently removed do not have the opportunity to return to their homes to gather their belongings, get their affairs in order, or say good-bye to family members once they enter detention."

None of this should come as a surprise. The decision to detain an individual is based on a number of factors including criminal history and the impact on public safety if an individual is released — but also on the risk of flight. It would make little sense to hold an alien in detention until an order of deportation is secured, only to release him on nothing more than his promise to return and board the designated aircraft or bus once he has had an opportunity to say his goodbyes because the realistic chance of his returning as promised is at best in the single digits.

How significant in the removal process is this risk of flight? For many years, the issue of immigration absconders has been a particularly acute problem for all segments of the immigration adjudication and enforcement system: "From 1996 through 2009, the United States allowed 1.9 million aliens to remain free before trial and 770,000 of them — *40 percent of the total* — vanished."[17] (emphasis added)

Considered from the point of view of an alien, this is perfectly rational: If the worst that can happen by running is possibly getting caught again and removed — which will happen anyway if you stay around until the end of the proceeding — why not run away and stay to work another day? In such a circumstance, losing the bond money is unfortunate, but simply a part of the overhead like the smuggler's fees to be guided into the country to begin with. There is new evidence that many aliens in proceedings are taking this "deal". A recent investigation by the *Houston Chronicle* found that, since 2006, the federal government has seized $167 million in breached bail bonds from thousands of aliens who failed to appear for their hearings.[18]

But considered from the point of view of a legal system struggling to keep its head above water, a 40 percent fugitive rate is a stark admission of failure. And that is one of the primary reasons why Congress has removed the discretion from immigration officers and immigration judges alike in mandating that various categories of aliens be detained pending their removal from the United States.

Access to Legal Advice and Representation

To bolster their argument for a system without checks and balances, the authors assert that "Only 24 percent of individuals arrested through Secure Communities and who had immigration hearings had an attorney compared to 41 percent of all immigration court respondents who have counsel." We were unable to ascertain any figure whatever as to the extent that aliens were represented by attorneys — at least not by resorting solely to the dataset, because we found nothing in it that reflected which aliens had retained counsel. For this reason, we can only conclude that the SCBTN authors made this determination based on access to materials beyond those provided to us, notably the I-213 forms we mentioned earlier and EOIR records. However, let us assume for the sake of argument that the percentage of represented aliens used in their report is accurate. Is it relevant or meaningful? We think not.

First, it must be understood that although aliens have a right to be represented by counsel at their removal hearings, it is *at no expense to the government*.[19] Thus, aliens must either have the funds to retain counsel or avail themselves of pro bono or other free, accredited representation: the burden rests with them. Generally, federal officers stay far clear from any contacts between aliens and attorneys conducted with an eye toward retaining representation lest they be accused of unauthorized favoritism toward any particular lawyer on the one hand, or of unwarranted interference on the other.

However, to assist aliens in a neutral, even-handed way with their efforts to obtain representation on a pro bono basis when they don't have the funds to retain private counsel, as required by law and regulation,[20] the government:

- Notifies aliens of their right to be represented by counsel;
- Affords them adequate time to secure counsel;
- Provides them with a current list of attorneys and accredited representatives who may be willing to represent them without cost;[21] and
- Gives them an opportunity to make phone calls to attempt to obtain such representation.

For all these reasons, whether an alien is or is not represented by counsel cannot be imputed to establish that the government is depriving him of due process. The government's role in the representational process is carefully delineated, and limited, by law.

There is also a second, more practical, reason that aliens — at least institutionalized criminal aliens — frequently go into immigration judge hearings unrepresented by counsel. It is that such hearings are often conducted in penal institutions and detention centers where members of the private bar, and even accredited pro bono representatives, are reluctant to travel. This is particularly true if they gauge, after speaking with the individual on the phone, that he has no likelihood of relief from removal under the law due to his criminal history. There is little or nothing ICE or other federal immigration enforcement officers can or should do to influence such judgments one way or another.

As indicated, we found nothing in the dataset to give us any idea as to which aliens obtained attorney representation, and conclude this information was derived from the supplemental sources made available to the authors from ICE and EOIR. However, harkening back to the information we derived from Tab No. 26 indicating that 88 percent of the aliens in this dataset consisted of "In Institution" cases, we believe it likely that the high percentage of incarcerated aliens both adversely and inversely affected the percentage who were represented by counsel at hearing — assuming, that is, that the 24 percent representation rate asserted in the SCBTN report is accurate — but by no stretch of the imagination can ICE be blamed for that state of affairs. Thus we reject the "finding" of the SCBTN report that the percentage of aliens represented is evidence of a systematic deprivation of due process rights, given the state of the law and on-the-ground realities.

But there is another dimension to representation of aliens in removal proceedings that bears thought, although it might give only cold comfort to the SCBTN authors: Having a lawyer doesn't necessarily make a difference. We quote the following passage directly from the draft report prepared for the ACUS:[22]

> "Simply having a lawyer, though, does not ensure 'adequate representation'. Various studies, most recently one conducted by the Katzmann Study Group in New York ... with the assistance of the Vera Institute of Justice, have documented the levels of inadequate representation provided by lawyers. According to the recent study covering the 2010-2011 period, New York immigration judges said respondents received 'inadequate' legal assistance in 33 percent of the cases in their courtrooms and "grossly inadequate" assistance in 14 percent of the cases. Generally, the judges thought pro bono attorneys and those from nonprofit organizations and law school clinics performed better than private lawyers."

Immigration Arrest Outcomes

On page 3 of SCBTN, the authors state, "A second major critique is that the program has not stayed true to its stated goal of removing only those serious offenders who pose a threat to public safety. Instead it has led to the mass deportation of low-level offenders, such as people who violate traffic laws and people without criminal histories at all."

First, we do not believe that they have accurately depicted the stated goal of Secure Communities, which might more accurately be described as having a major goal of focusing on serious offenders. However, ICE officials also recognized from the start of the program that additional legitimate goals include the identification and apprehension of previously removed aliens, as well as immigration fugitives who have absconded from proceedings before they could be completed. ICE officials have repeatedly stated that while serious offenders remain the focus, taking custody of lesser offenders would remain at the discretion of local ICE officials as capacity and resources permit.

Second, we would like to speak to the notion of "low-level offenders, such as people who violate traffic laws". While they do not specifically say so, the authors apparently lump Driving Under the Influence (DUI) and Driving While Intoxicated (DWI) charges into that notion. That is apparent from one of the vignettes contained in the sidebar of page 11 of the report:

> "SC-LA-1867 was a Mexican man arrested for driving under the influence in San Bernardino County in August 2009. He had no criminal history and no immigration history in the United States, and when he was handed to ICE in September 2009, they offered him a voluntary return. The respondent was one of the few to have a lawyer, and after obtaining legal advice over the phone, made a conscious decision to stay in custody and await a hearing before an immigration judge."

We found ourselves strangely unmoved by this profile in courage. Each day in America, drunk and stoned drivers, illegal aliens among them, wreak havoc on our roadways. According to the National Highway Traffic Safety Administration, drunk driving is the most frequently committed violent crime in America, killing 10,839 people last year and costing the public billions of dollars annually. When illegal aliens are caught driving under the influence of alcohol or drugs, whether the charge filed against them is a misdemeanor or a felony, it deserves to be treated seriously, and they should not escape either the criminal or immigration consequences of their flagrant disregard for public safety.

For a better understanding of the magnitude of this problem, and a recitation of some of the horrific deaths illegal aliens have caused while driving in an impaired condition, we refer our readers to the recent statement of Jessica Vaughan before the House of Representatives Judiciary Committee, Subcommittee on Immigration Policy and Enforcement, testifying on the "Scott Gardner Act", which is pending before Congress.[23]

The authors would have us believe that because of Secure Communities, too many harmless immigrants have been snared in the net of immigration enforcement, and that the outcome of their cases is somehow outside the norm: "Only 2 percent of non-citizens arrested through Secure Communities are granted relief from deportation by an immigration judge as compared to 14 percent of all immigration court respondents who are granted relief."

Because we did not have the access to the EOIR data records that was granted to the SCBTN authors, we cannot vouchsafe their accuracy, but will accept the figures for the sake of argument. It needs to be understood clearly, though, that the outcomes of an immigration arrest are generally limited as a matter of law:

Table 1. Range of Immigration Charges Filed Against Aliens Found in the Dataset *

Alien Present without Admission or Parole
Alien Smuggler
Arriving Alien Who Was Previously Removed
Conviction of Aggravated Felony
Conviction of Controlled Substance (Drug) Offense
Conviction of Crime Involving Moral Turpitude (CIMT)
Conviction of Firearms Offense
Conviction of Multiple CIMTs
Domestic Violence: Stalking or Child Abuse
Domestic Violence: Violating a Protection Order Through the Threat of Violence
Drug Abuser / Addicts
Failure to Attend Proceeding (Absconder/Fugitive)
False Claim to U.S. Citizenship
Final Order under Section 274C, Immigration & Nationality Act (Document Fraud)
Immigrant without Visa
Misrepresentation/Fraud to Obtain Documents or Admission
Other-than-Arriving Alien Who Was Previously Removed
Present in U.S. in Violation of Law
Previously Removed and Unlawfully Present
Termination of Conditional Residence

* We do not purport that the charges in this table formed the basis of any alien's most recent apprehension, although clearly some were. In fact, some aliens were charged with more than one of the above violations relating to their most recent entry or illegal presence. Others, however, had a history of multiple violations over several illegal entries, which appear to have been collected in the dataset for reasons we suggest in the subsection of this report "About the Data".

- In rare circumstances, a case may be terminated for lack of evidence.
- An alien may be granted voluntary return by a federal officer in lieu of formal removal proceedings, but only with his permission as he retains the right to insist on being formally charged should he so wish.
- An alien may be found removable by an immigration judge, but as a matter of discretion, granted voluntary departure in lieu of a formal order of removal.
- The alien may in fact be removed.
- Or, under limited and exceptional circumstances, an alien may be found removable yet granted relief from the expulsion.

This latter event is rare, as even the 14 percent nationwide figure cited makes evident. What is more, it has become significantly harder as the result of congressional reforms that tightened the requirements for some forms of relief, and eliminated others altogether. Congress did so in the face of increasing evidence that many aliens who had been granted relief from deportation, often stemming from underlying criminal conduct, nonetheless went on to reoffend.

And it is important to understand that removal charges stemming from criminal convictions are *not* the only serious immigration violations than can, and often should, lead to an order of removal and denial of relief — for instance, aliens who smuggle other aliens for gain. To get a better sense of how the cases in the dataset fit into the statutory scheme laid out in the Immigration and Nationality Act (INA), we examined the codes contained in the tab listed as Item No. 8, "INA Charges". Table 1 reflects our findings.

While some of the charges we found were indeed simple Present without Admission (PWA) or equivalent violations as indicated in SCBTN, we also found a disturbingly wide variety of very substantive charges. And even PWA takes on a more serious dimension when committed more than once, as we found with some of the aliens in the dataset — apparently including (if the data is accurate) to our surprise, a few who were eventually expelled by the informal means of voluntary return.

We also looked at the dataset to better understand the kinds of violations that were committed by the aliens whose cases were contained in it, by consolidating the charges contained in Tab 8, per case, and additionally cross-referencing this data with that in Tab 13 relating to reinstatement cases in order to obtain an idea of the number of multiple violators and repeat violators (the recidivists whose prior orders of removal were reinstated).

Looked at from this prism, we were able to determine that 225 out of the total of 470 cases — which is to say, 48 percent of the total — were either multiple violators, repeat violators, or both.[24]

All of the above leads us to conclude that there was nothing anomalous in the percentage differences between aliens granted relief in the dataset vs. aliens in a national sampling. This is particularly true when considering that the focus of Secure Communities is on individuals who are significantly more prone to have complex and adverse criminal or immigration histories, and therefore by operation of law are much less likely to be entitled to relief from removal.

DHS Audit of Secure Communities Finds Case Outcomes to Be Appropriate

A report issued in March 2012 by the DHS Office of the Inspector General (OIG) corroborates our conclusion that ICE officers are dealing with individuals who are identified through Secure Communities appropriately nearly all of the time (in 97 percent of the cases, according to the OIG). If anything, officers are erring on the side of leniency, not severity. According to the report, "Officers generally took enforcement actions consistent with ICE's enforcement policy. However, officers did not always sufficiently document these actions."[25] This contradicts the SCBTN authors' claim that "the data suggest that the government's determinations about whether or not to detain individuals are arbitrary and do not follow the risk-based recommendations".

As part of the audit, the OIG examined a sample of 766 cases from 2011. Their sample is not exactly comparable to the SCBTN data, as it includes individuals who were not detained, but it does call into question some of the conclusions of the SCBTN authors. It reinforces that the majority of aliens processed under the program are convicted criminals, with a much smaller number who are removable mainly for other reasons, such as prior immigration violations. Here are the outcomes of the sample of cases that the auditors found to be correct:

- 45 percent were not detained because they did not fit into ICE's established priorities for action. These included: 88 U.S. citizens, 218 aliens with legal status of some kind, and 21 (presumably illegal) aliens without prior immigration or criminal records.

- 44 percent were detained because they clearly fit ICE priorities, and then were removed or turned out to be non-removable. The vast majority of these (85 percent) were convicted criminals and the rest were serial immigration violators and scofflaws.

- 6 percent were detained even though they were not yet convicted of criminal charges and had no prior immigration violations (but were here illegally).

- 2 percent were detained even though they were legal permanent residents because their criminal convictions were serious or numerous enough to cost them their green cards.

The DHS auditors questioned the actions of ICE officers in 3 percent of the cases. In 24 of the 25 cases, the auditors found that ICE officers did not take action even though the individuals appeared to meet the criteria for removal. Sixteen of these cases involved convicted criminals. In just one case the auditors found that ICE took action to detain a green card holder without documenting a criminal record. So contrary to what critics have suggested, in the few instances when ICE officers are acting outside the parameters of stated ICE priorities, they are actually more lenient than they should be.

The auditors found, as we did, that there are many gaps in the data. They noted that ICE officers do not always enter all information into the case management system, allowing for a full accounting of outcomes. They encountered missing information in 6 percent of their sample and directed ICE to correct this problem.

Conclusion

We understand that, as advocates for illegal aliens, the Warren Institute, the Cardozo Law School's Immigration Law Clinic, and their partners such as the National Day Labor Organizing Network, might prefer hearings to other forms of legally authorized due process. And, while we may disagree with their views from across the philosophical divide, we have no intrinsic dispute with the notion of advocacy — it is part of America's heritage of freedom. But there is a bright line between advocacy and academic analysis, a line that we believe was crossed in "Secure Communities by the Numbers", which in our view is an advocates' report dressed in the clothing of scholarly research.

End Notes

[1] Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, "Secure Communities by the Numbers: An Analysis of Demographics and Due Process", the Chief Justice Earl Warren Institute on Law and Social Policy, Berkeley, Calif., October 2011, http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

[2] See, for instance, the statements made by Felipe Matos of the organization Presente.org during a television interview with Fox News on October 24, 2011, at http://cis.org/TVInterviews/Camarota-FOX102411-SecureCommunities.

[3] W.D. Reasoner and Jessica Vaughan, "Secure Communities by the Numbers, Revisited (Part 1 of 3)", Center for Immigration Studies, December 2011, http://cis.org/SC-by-the-numbers-critique-part1.

[4] Jessica Vaughan and W.D. Reasoner, "Secure Communities by the Numbers, Revisited (Part 2 of 3)", Center for Immigration Studies, March 2012, http://cis.org/SC-by-the-numbers-critique-part2.

[5] Kohli, Markowitz and Chavez, *op. cit.*, at end notes 83 and 84.

[6] Perhaps the first example of an immigration law can be found in the supreme law of the land, the Constitution itself, which in Section 1 of Article 2 states that no one may be elected president who is not a natural-born citizen of the United States.

[7] Both exclusion and deportation are collectively known today as "removal" and the laws governing proceedings used to determine whether an alien will be excluded or deported are civil / administrative in nature. For a more complete description of the various types of due process that may be accorded to aliens in removal proceedings, the circumstances under which they may be used, and the statutory authorities for these alternatives, see W.D. Reasoner, "Deportation Basics: A Primer on How Immigration Enforcement Works (Or Doesn't) in Real Life", Center for Immigration Studies, March 2011, http://www.cis.org/deportation-basics.

[8] See 8 U.S.C. Section 1229B(c) and 8 U.S.C. Section 1229A(b)(7), respectively.

[9] See Figure 1 on page 7 of the SCBTN report.

[10] Out of a total of 407 cases reflected in that tab, we were chagrined to find that the "Case Type" data field had been left blank in 32 percent of the entries. Unfortunately, this lapse is consistent with the data deficiencies that we found, and commented extensively on, in our Part 1 and Part 2 examinations of both the SCBTN report and the underlying DHS dataset.

[11] See W.D. Reasoner, "Deportation Basics: How Immigration Enforcement Works (Or Doesn't) in Real Life", Center for Immigration Studies, July 2011, http://www.cis.org/deportation-basics.

[12] Lenni B. Benson and Russell R. Wheeler, "Taking Steps to Enhance Quality and Timeliness in Immigration Removal Adjudication, Draft [Report] for Committee Review", prepared for the consideration of the Administrative Conference of the United States, January 12, 2012, http://www.acus.gov/research/the-conference-current-projects/immigration-adjudication/, at p. 15.

[13] See, e.g., Mark Metcalf, "Built to Fail: Deception and Disorder in America's Immigration Courts", Center for Immigration Studies, May 2011, http://www.cis.org/immigration-Courts; "Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases", Arnold and Porter, LLP, on behalf of the American Bar Association Commission on Immigration, February 2010, http://www.americanbar.org/groups/public_services/immigration/publications.html; and Donald Kerwin, Doris Meissner, and Margie McHugh, "Executive Action on Immigration: Six Ways to Make the System Work Better", Migration Policy Institute, March 2011, http://www.migrationpolicy.org/pubs/administrativefixes.pdf.

[14] Benson and Wheeler, *op. cit*. at pp. 20 and 31.

[15] A "stipulated removal" in deportation proceedings is the equivalent of a defendant's decision to plead guilty in a criminal proceeding. The alien respondent signs a document that is reviewed and approved by an immigration judge, acknowledging the charges against him, and agreeing that he has in fact committed the violations alleged. On this basis, the judge will issue an order of removal and ICE will take all necessary steps to expeditiously remove the alien from the United States. Why would an alien take this step? The SCBTN authors state that some aliens, particularly those facing mandatory detention, may sign a stipulated agreement in order to avoid prolonged confinement. That is true, but there are many other reasons. For instance, such stipulations are often signed by aliens incarcerated in penal institutions as a way of earning early release, in return for their deportation. In other circumstances, illegal aliens who are also criminal defendants will sign a plea agreement that includes a stipulation not to contest deportation as a way to avoid a jail sentence. One wonders, what such individuals must think of a system that lets them leverage their illegal status to gain a "get out of jail free" card — one that is not available to similarly situated U.S. citizens in trouble with the law — and then return to the United States with impunity after removal (as 26 percent of the aliens in this database have done).

[16] In the section "Age and Gender" on page 5 of the SCBTN report, the authors state, "Previous research indicates that 43 percent of the population of undocumented residents in the U.S. are women and 57 percent are men. By contrast, 93 percent of individuals in our Secure Communities sample were categorized as males … . Since Secure Communities is intended to target criminal aliens, these data might be interpreted to reinforce the notion that men are more likely to commit crime than women. While that is true generally, FBI data indicate that females represented 25 percent of arrests nationwide in 2009. In contrast, the share of females in our sample population is 7 percent. Without more information, it is difficult to reach conclusions as to the significance of the over-representation of males who are being processed through Secure Communities." We see nothing pernicious in the gender percentage differences. The TDC facility in Harris County, which appears to represent such a large portion of the dataset, is a men's institution. Under such circumstances, it would be difficult for the dataset *not* to be weighted significantly toward males.

[17] Metcalf, *op. cit*.

[18] Regina Garcia Cano, "Huge rise seen in ICE cases released on bail", *Houston Chronicle*, March 24, 2012, http://www.chron.com/news/houston-texas/article/Huge-rise-seen-in-ICE-cases-released-on-bail-3432655.php.

[19] See 8 U.S.C. Section 1362.

[20] See 8 U.S.C. Section 1229, subsections (a)(1)(E) and (b).

[21] In a number of locations, the government goes far beyond the minimal legal requirements, by actually encouraging organized pro bono representation efforts, and by permitting accredited representatives to make periodic "Know Your Rights" presentations to detained aliens. A description of some of these efforts can be found in the draft ACUS report, at pp. 59-61.

[22] Benson and Wheeler, *op. cit*. at pp. 57 and 58.

[23] Statement of Jessica M. Vaughan, Director of Policy Studies, Center for Immigration Studies, "Hearing on The Scott Gardner Act: Detention of Illegal Aliens Arrested for Drunk Driving", U.S. House of Representatives, Judiciary Committee, Subcommittee on Immigration Policy and Enforcement, Washington, DC, March 7, 2012, http://www.cis.org/node/3544.

[24] We define "multiple violator" as an individual against whom more than one immigration violation is charged. We define "repeat violator" as an individual who has been charged more than one time with immigration violations, a prime example being aliens who were removed and then illegally returned to the United States.

[25] DHS Office of the Inspector General, "Operations of United States Immigration and Customs Enforcement Secure Communities", OIG 12-64, March 2012, http://cis.org/vaughan/dhs-report-confirms-ice-officers-use-secure-communities-properly.