

A BRIEFING GUIDE TO THE SECURE COMMUNITIES OCTOBER 2, 2010 “MANDATORY MEMO”

WHAT IS THE MANDATORY MEMO AND WHY WAS IT WRITTEN?

The Mandatory Memo is Immigration and Customs Enforcement’s (ICE) attempt to defend its decision to force participation in Secure Communities (S-Comm). The final version of the Mandatory Memo is a 9-page legal memo, dated October 2, 2010, from ICE Deputy Principal Legal Advisor Riah Ramlogan to ICE Assistant Deputy Director Beth Gibson. It was drafted after Gibson directed ICE attorneys to “rewrite” an earlier memo that had supported opt-out and raised constitutional concerns about making S-Comm mandatory.¹ ICE needed to rewrite the earlier memo to justify its changed policy to force S-Comm on unwilling jurisdictions. ICE attorneys were asked to “gather legal support” for the agency’s policy change.² The result was the Mandatory Memo, dated a few days before Department of Homeland Security (DHS) Secretary Janet Napolitano’s first public statement confirming the agency’s view that S-Comm was not intended to be voluntary.³ ICE should have released the Mandatory Memo in January 2011. Since then, ICE unilaterally revoked its S-Comm Memoranda of Agreements with individual states in August 2011 and declared its intention to expand S-Comm nationwide by 2013.

HOW DID ADVOCATES FINALLY GET THE MANDATORY MEMO AND WHY DID IT TAKE SO LONG?

ICE fought tooth and nail to keep the Mandatory Memo secret. As a result of Freedom of Information Act litigation brought by the National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Cardozo Immigration Justice Clinic,⁴ ICE released heavily redacted versions of the memo on January 17, 2011. ICE claimed that the redacted material—essentially, the entire content of the memo—was exempt from disclosure. After a lengthy court battle, on October 24, 2011, a federal district court judge disagreed with ICE. She ordered ICE to release all versions of memo with very minor redactions.

Again resisting transparency, ICE appealed the judge’s decision. But on December 28, 2011, ICE unexpectedly filed a motion to withdraw its appeal. The reason? ICE had provided “inaccurate” information to the court. Originally, ICE told the court, in a sworn declaration, that the memo was “privileged” attorney-client information that had never been released outside of the DHS. But in fact, the memo had been shared with others outside the agency. Accordingly, ICE’s claim of privilege was severely weakened. With little basis to continue to refuse disclosure of the memo, ICE decided not to pursue the appeal. ICE then released 19 versions of the memo

WHAT DOES THE MEMO SAY?

The Mandatory Memo has three key takeaways:

- **The Memo confirms that the decision to make S-Comm mandatory was a policy choice, not a decision required by law.** The Memo does not—and cannot—argue that Congress required S-Comm to be mandatory. Instead, it argues—employing dubious, glib, and shallow legal reasoning—that Congress *authorized* ICE to make S-Comm mandatory if it so chose.
- **The Memo identifies three statutes that it claims authorize the mandatory imposition of S-Comm:**
 - *28 U.S.C. § 534.* Enacted in the 1960’s, this very general statute gives the Attorney General the authority to collect and exchange “criminal identification, crime, and other records” with “authorized” federal officials.

¹ See Sept. 29, 2010 ICE email, ICE FOIA 10-2674.0003726. See also *National Day Laborer Organizing Network v. U.S. Immigration & Customs Enforcement*, No. 10 Civ. 3488 (SAS), 2011 WL 5056989, at *9 (S.D.N.Y. Oct. 24, 2011).

² See Sept. 9, 2010 ICE email, ICE FOIA 10-2674.0002999-3000.

³ See Shankar Vedantam, U.S. Deportations Reach Record High, *Washington Post*, Oct. 7, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html>.

⁴ Visit www.ccrjustice.org/secure-communities to learn more about the litigation or view other Secure Communities documents.

- 42 U.S.C. § 14616, *the National Crime Prevention and Privacy Compact*. Enacted in 1998, this statute establishes a “cooperative” framework for states and the federal government to exchange criminal history information for non-criminal justice purposes.
- 8 U.S.C. § 1722, *a provision of the Enhanced Border Security and Visa Entry Reform Act of 2002*. The provision requires that DHS and FBI databases be “interoperable.” That is, the databases should be compatible -- information from one database should be capable of comparison with information in the other. The provision further directs the president to allow for access to information in federal databases “that is relevant to determine the admissibility or deportability of an alien.”

None of these statutes mention S-Comm. None require local police departments to become gateways to deportation. None require ICE to ignore official requests to opt out of S-Comm. None even require that an immigration background check be run on every individual booked into state or local custody. In fact, these statutes predate S-Comm by between six and sixty years. To the extent that they have any relationship to the mandatory imposition of S-Comm, it is as a post-hoc justification for a policy designed to serve the politically expedient goals of merging the criminal and immigration systems and using state and local police as “force multipliers” for an ever-expanding deportation dragnet.

- **The Mandatory Memo argues that mandatory imposition of S-Comm probably does not violate the Tenth Amendment—reversing ICE’s earlier analysis, which concluded that mandatory imposition of S-Comm raised Tenth Amendment concerns.**⁵ In an earlier memo assessing the constitutionality of forcing S-Comm on states and localities, ICE concluded that “a court may find that [S-Comm’s] infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate.”⁶ The Mandatory Memo revisits this question, but reaches an opposite conclusion. In the Mandatory Memo, ICE continues to acknowledge several reasons why a court might conclude that S-Comm violates the Tenth Amendment. But ICE argues that a Tenth Amendment challenge would most likely fail. In so doing, the memo’s authors disregard concerns raised in the earlier memo and attempt to re-cast S-Comm as merely about information-sharing technology.⁷ ICE’s new argument is just that—an argument. The ultimate decision on the constitutionality of the mandatory imposition of S-Comm can come only from a court. The Mandatory Memo is not a legal conclusion reached by a court of law. It has no binding authority.

WHAT *DOESN’T* THE MANDATORY MEMO SAY?

- **The Mandatory Memo fails to acknowledge that S-Comm is a deportation program. The memo characterizes S-Comm as an information-sharing program.** This is, at best, an understatement. S-Comm is about much more than just government information-sharing. It is about harnessing the power of state and local police to facilitate the deportation at unprecedented numbers—over one million since President Obama took office.
- **The Mandatory Memo fails to acknowledge the extraordinary burden that S-Comm places on state and local law enforcement agencies.** By destroying trust between police and immigrant residents, S-Comm threatens public safety by eroding community policing. Already overburdened state and local law enforcement officers must work overtime to mitigate the damage.
- **The Mandatory Memo fails to acknowledge the key role that ICE holds play in S-Comm. ICE holds (“detainers”) are the lynchpin of S-Comm.** An ICE hold is a request that a state or local law enforcement agency detain an individual suspected of being deportable. ICE holds are *requests*. By deciding not to submit to these requests, states and localities can opt out of a key component of S-Comm. Many are doing just that.⁸
- **Regardless of whether ICE’s legal arguments ultimately succeed or fail, ICE’s decision to ignore state and local concerns about S-Comm will continue to spur pushback from all corners of the country.** States and localities have roundly rejected the “Arizonification” of their police departments. No legal memo can resolve the political and policy issues raised by this failed program. The Mandatory Memo makes it more clear than ever before that S-Comm can and should be terminated, and the entanglement between ICE and local police should end.

For more information, and to read the Mandatory Memo for yourself, visit <http://uncoverthetruth.org/?p=2092>

⁵ See ‘Opt-Out’ Background, ICE FOIA 10-2674.0002927.

⁶ *Id.*

⁷ *Id.*

⁸ For more information about ICE holds, visit <http://altopolimigra.com/detainers>