

## BRIEFING GUIDE TO ICE'S MINOR "SECURE COMMUNITIES" MODIFICATIONS

### **Background**

On June 17, 2011, Immigration and Customs Enforcement (ICE) announced a set of adjustments to its controversial "Secure Communities" program (S-Comm), which puts local police on the frontlines of immigration enforcement as "force-multipliers" for ICE. The announcement came in the wake of a growing wave of opposition to the deportation program. Over the past several months, the Congressional Hispanic Caucus, the Congressional Progressive Caucus, and the Los Angeles Congressional Delegation have called for a national moratorium on S-Comm. Illinois, New York, and Massachusetts have respectively, terminated, suspended, and refused to sign up for S-Comm. In addition, U.S. Representative Zoe Lofgren has asked the Inspector General to conduct an official investigation into "false and misleading statements to local governments, the public, and Members of Congress in connection with the deployment of the Secure Communities program."<sup>1</sup>

Law enforcement officials across the country have raised serious concerns that S-Comm incentivizes racial profiling and threatens public safety by sweeping up victims of crime. State and local officials have also criticized the complete disconnect between S-Comm's stated target – serious convicted criminals – and ICE's own data, which show that the vast majority of people deported through S-Comm have no, or very minor, criminal convictions. It is increasingly clear that S-Comm serves primarily to funnel people into an unjust detention and deportation system and to help ICE reach its deportation quota of 400,000 people for 2011. These and other problems, including the lies ICE told to sell S-Comm to states and localities, are slated for a broad investigation by the Inspector General, currently set to begin on July 11, 2011. By announcing superficial adjustments before the investigation even gets under way instead of responding to the call for a national moratorium on S-Comm, ICE has made clear that its real priority is to stem the growing tide of political opposition to S-Comm, rather than to repair the program's underlying policy flaws.

This briefing guide analyzes the cosmetic adjustments proposed by ICE and explains why they are woefully inadequate to solve the problems with this troubled deportation program.

### **Summary: The Tweaks Fall Short**

1. ICE's new memos regarding prosecutorial discretion do not set any real restrictions on who ICE will deport. ICE has always had the power to exercise prosecutorial discretion but has rarely done so despite similar memos issued in the past.

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<sup>1</sup> See Lee Romney, Blog Post: "Inspector general asked to investigate alleged misconduct by federal immigration officials," *LA Times*, April 28, 2011. Available at <http://latimesblogs.latimes.com/lanow/2011/04/congresswoman-calls-for-formal-investigation-into-misconduct-by-federal-immigration-officials.html>.

2. ICE has yet to identify Advisory Committee members, goals, and processes for running the committee in an unbiased way. We question the validity of a process in which ICE itself handpicks the individuals who will propose adjustments to this highly controversial program.
3. The video on S-Comm for law enforcement does not alleviate the burden the program places on already-stretched police departments. And the video purports to advise police not to profile based on race or nationality, while at the same time repeatedly showing images of Latinos as “illegal” and non-Latinos as law enforcement.
4. CRCL, which has a staff of only 100 individuals and a small budget, lacks the resources, capacity, and authority to oversee the 1,400 jurisdictions that are currently participating in S-Comm.
5. The adjusted ICE detainer form continues to misrepresent detainers, also known as “holds,” implying that they are mandatory, and fails to acknowledge that immigration holds are merely *requests* by ICE, to which local law enforcement do not have to submit.

## **Analysis**

**1. Prosecutorial Discretion Memos:** At the center of the ICE adjustments to S-Comm are memos from ICE Director John Morton, which mostly reiterate existing memos that purport to guide ICE personnel in the exercise of prosecutorial discretion<sup>2</sup>.

***Why These Are Inadequate:*** These memos do not prevent ICE from using S-Comm to deport individuals with no or minimal criminal histories (including undocumented immigrants with no convictions, permanent residents, and visa holders). Rather, they remind ICE officials that they may consider a broad range of factors in deciding whether to initiate deportation proceedings. Previous similar memos have been woefully ineffective. For over a year, a memo from Director Morton has instructed ICE to focus on serious offenders. But the majority of people deported through S-Comm continued to be individuals with minor convictions, or no convictions at all.<sup>3</sup> The new memo offers no reason to believe the future will be any different. In fact, it promises more of the same. Indeed, the last paragraph states: “As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States . . . .”<sup>4</sup>

In a second memo, ICE seeks to address, again through prosecutorial discretion, what has been a constant complaint about S-Comm: that the program has made immigrants reluctant to report crime or cooperate with police investigations out of fear of deportation.

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<sup>2</sup> The two Morton memos issued June 17, 2011: “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” and “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs”

<sup>3</sup> See Immigration Policy Center, Reading the Morton Memo (describing and critiquing the June 2010 Morton prosecutorial discretion memo). Available at <http://www.immigrationpolicy.org/special-reports/reading-morton-memo-federal-priorities-and-prosecutorial-discretion>.

<sup>4</sup> See John Morton, Memo, RE: “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,” June 17, 2011. Available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

As ICE now recognizes, it is common practice for police to arrest both parties to a domestic dispute and sort out the true perpetrator later. But because of S-Comm, “later” is too late for domestic violence victims, who are caught up by the deportation program as soon as their fingerprints are taken and transmitted to ICE at booking, and who thus have to choose between seeking police protection and facing deportation.

The new “Certain Victims” reform memo states that “[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”<sup>5</sup> But ICE puts forth no practical plan for ensuring that its agents *know* when an arrestee is a victim or witness. The great majority of people deported through S-Comm never have access to a lawyer. They have no way of knowing that the fact that they are a victim or witness is relevant to ICE. Moreover, vast numbers of people are pressured into quickly signing away their rights to an immigration hearing under threats of indefinite detention, and thus they never have the opportunity to inform relevant ICE personnel of their victim or witness status.<sup>6</sup> It is clear from this general, two-and-a-half-page memo that ICE has not given serious consideration to the practicalities of instituting its proposed policy. Without a practical plan, the memo remains a largely meaningless gesture for solving a deadly serious problem. Moreover, concrete changes need to be implemented to prevent the fingerprints of victims of crime from being transmitted to ICE in the first place, so victims are not funneled into ICE detention and essentially punished for reporting a crime.

**2. Advisory Committee:** ICE will create an Advisory Committee to advise itself on how to improve S-Comm. The Committee is tasked with producing a report within 45 days. The report will provide recommendations on how to “adjust the Secure Communities program to mitigate potential impacts on community policing practices.” The report will also suggest a policy to prevent the deportation of people who have been charged with, but not convicted of “minor traffic offenses.”

***Why this is Inadequate:*** While this adjustment shows that ICE finally recognizes S-Comm’s deleterious impact on community policing and the attendant risk of pretextual arrests, an advisory committee is wholly insufficient to remedy the program’s fundamental flaws. ICE has yet to identify the members of the Committee, other than to say that the panel “will be composed of chiefs of police, sheriffs, state and local prosecutors, court officials, ICE agents from the field, and community and immigration advocates.” Questions have been raised about the validity of a process in which ICE itself handpicks the individuals who will propose adjustments to this highly controversial program. Moreover, the Advisory Committee appears to be replicating—and perhaps seeking to minimize the

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<sup>5</sup> See John Morton, Memo, Re: “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” June 17, 2011. Available at <http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf>.

<sup>6</sup> See, e.g., Stephen Magagnini, “Deported Mexicans leave two small kids in Lodi,” *Sacramento Bee*, Nov. 2, 2010. Available at <http://www.sacbee.com/2010/11/02/v-print/3151148/deported-mexicans-leave-two-small.html>. Victim of domestic violence was separated from her two young children and deported because of S-Comm after having been forced to take “voluntary” departure. Sacramento’s Mexican Consul General Carlos González Gutiérrez explains, “She was told no bond was possible and she would have to stay in jail for an indefinite amount of time without her kids – the worst of both worlds . . . . Illegal immigrants have to make quick decisions with not enough information and no counsel. We asked ICE to grant her bail, but it was too late.”

significance of—the already-scheduled OIG investigation. Finally, the exclusion of individuals who have not been convicted of traffic offenses from S-Comm’s reach is patently inadequate to address widespread concerns about how S-Comm is operating as a mass deportation program. Including minor traffic offenders – convicted or not -- within the reach of a program advertised as focused on “serious criminals” is misleading and offensive. It does little to bring the program back in line with its stated purpose, and it has the potential to encourage racial profiling by local law enforcement.

**3. Training Videos:** ICE announced its intention to create a series of training videos and briefings for local law enforcement agencies. The videos and briefings seek to mitigate some of the harms associated with S-Comm. For example, some videos will instruct police on how to conduct outreach to immigrant communities, and others will provide background on immigration laws that offer protections to victims of domestic violence and other crimes.

*Why this is Inadequate:* This adjustment does little more than emphasize the burden that S-Comm places on local police at a time when most police departments are thinly stretched and underfunded. Local police cannot be expected to learn the complexities of federal immigration law – and they should not have to. Moreover, the challenges associated with effective community policing vary tremendously from place to place, and they cannot be effectively addressed by a one-size-fits-all video produced by a federal agency with no experience in the problem it seeks to solve. It also is highly problematic and telling that the video purports to advise police not to racially profile based on race or nationality, while at the same time repeatedly showing images of Latinos as “illegal” and non-Latinos as law enforcement. The visual message to law enforcement from this video is to single out Latinos for arrest and harassment, thereby resulting in the disproportionate transmission of their biometric information to ICE.

**4. Complaint Process:** ICE tasked the Department of Homeland Security’s Office of Civil Rights and Civil Liberties (CRCL) with responding to complaints about S-Comm, including complaints regarding the behavior of state and local police in S-Comm-activated jurisdictions. CRCL will investigate complaints by individuals as they are filed. CRCL will also conduct a quarterly statistical review to detect patterns of racial profiling. Finally, CRCL will respond to complaints submitted by NGOs or documented in the media.

*Why this is Inadequate:* CRCL, which has a staff of only 100 individuals and an annual budget which constitutes less than one thousandths (.0003) of DHS' \$55 billion budget for 2011,<sup>7</sup> lacks the resources, capacity, and authority to oversee the 1400 jurisdictions which are currently participating in S-Comm, let alone to oversee the entire country, which is set to be activated into S-Comm by 2013. Also, CRCL is an arm of DHS and is not an independent watchdog agency with enforcement capabilities. CRCL has put forth no concrete plan for ensuring that individuals caught up by S-Comm are aware of or have access to the CRCL complaint process. It is also unclear how CRCL will investigate

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<sup>7</sup> Department of Homeland Security, “Congressional Budget Justification, FY 2012.” Available at [www.dhs.gov/xabout/budget/dhs-budget.shtm](http://www.dhs.gov/xabout/budget/dhs-budget.shtm).

complaints, given that many individuals who file will almost certainly be deported before investigations can even begin. Finally, CRCL has failed to identify the remedies that will be imposed when problems are found. In Arizona for example, CRCL has yet to take any action to remedy well-documented abuses of S-Comm by the Maricopa County Sheriff's Office.

**5. Detainer Form:** ICE has produced a new “detainer” form.<sup>8</sup> Like the old form, the new form asks local law enforcement agencies to continue to detain a person in jail after the point at which the criminal matter no longer requires it, so that that he or she may be transferred to ICE for possible deportation. This new form emphasizes that the additional imprisonment is to last no more than 48 hours. In addition, ICE has stated that it will direct local law enforcement agencies to inform people when there is an immigration detainer placed on them.

*Why this is Inadequate:* ICE detainers, or holds, are a key tool of S-Comm. They provide the means for transferring an individual identified by S-Comm to ICE. But holds are subject to a host of problems beyond those associated with S-Comm itself. First and foremost, the ICE “detainer” form continues to be ambiguous and contradictory as to whether holds are mandatory or simply requests. The form fails to make clear that ICE has no legal power to force a locality to expend its limited local resources on imprisoning immigrants in order to facilitate their deportation. Immigration holds are merely *requests* by ICE to which local law enforcement does not have to submit. The new form retains the same misleading mandatory language as the prior “detainer” form. It also does nothing to address the racial profiling, mission creep, and threats to public safety associated with S-Comm. Finally, it should be noted that informing people why they are being imprisoned is a basic requirement of due process. ICE’s recently announced intention to comply with this constitutional requirement by requesting that local law enforcement agencies notify individuals who are subject to ICE holds should be a basic expectation of any government agency, not a cause for praise. But because it is the local law enforcement agency that now bears the responsibility—and the burden—of notifying individuals about ICE holds, it is unclear whether ICE will be able to ensure that notice is provided. Moreover, ICE continues to violate due process rights by causing differential treatment in the criminal justice system; for example, detainees with immigration holds are routinely denied bail and jailed longer.

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<sup>8</sup> See ICE Detainer Form. Available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.