

PRIORITY ENFORCEMENT PROGRAM

Why 'PEP' Doesn't Fix S-Comm's Failings

JUNE 2015

On November 20, 2014, President Obama announced executive actions to change some aspects of our immigration system. One of these announcements, outlined in a memo whose subject is "[Secure Communities](#),"¹ eliminated the widely discredited Secure Communities (S-Comm) program and replaced it with the Priority Enforcement Program (PEP).

We continue to learn more details about PEP, but what we already know raises serious concerns that PEP suffers from the same problems that led to S-Comm being terminated. Like S-Comm, PEP will result in the permanent separation of families through deportation and will threaten public safety by eroding trust between communities and the police.

S-Comm v. PEP

	S-Comm	Priority Enforcement Program (PEP)
Timeline	S-Comm began as a pilot program in 2008, with nationwide coverage as of January 22, 2013. Dept. of Homeland Security (DHS) Secretary Jeh Johnson terminated the program on November 20, 2014.	PEP is being rolled out as S-Comm's replacement. U.S. Immigration and Customs Enforcement (ICE) released a brochure on PEP ² and the two forms associated with PEP (I-247N , request of notification, ³ and the I-247D , request for detention ⁴) on June 12, 2015. ICE is currently training its officers on implementation of PEP.
Fingerprint Sharing	Begins with fingerprint information obtained when a person is booked into a state or local jail. The fingerprints are sent to DHS to be checked against immigration databases.	No change. (Fingerprints taken at booking will continue to be shared with DHS.)
ICE Request to State or Local Agency	If the submitted fingerprints match a record in the DHS databases, ICE may issue an immigration detainer . The detainer asks the state or local law enforcement agency to voluntarily continue to detain (hold) the person for a period not to exceed 48 hours after he or she would otherwise be released.	Generally, ICE will replace detainers (requests for detention) with requests for notification —a request that the local agency notify ICE of a pending release during the time the person is in custody under state or local authority—using Form I-247N. In "special circumstances," ICE may issue a request for detention using Form I-247D if the person has a final removal order or "there is other sufficient probable cause to find that the person is a removable alien" (but see concerns below about ICE's interpretation of "special circumstances").

LOS ANGELES (Headquarters)
 3435 Wilshire Blvd., Suite 2850
 Los Angeles, CA 90010
 213 639-3900
 213 639-3911 fax



WASHINGTON, DC
 1121 14th Street, NW, Suite 200
 Washington, DC 20005
 202 216-0261
 202 216-0266 fax

	S-Comm	Priority Enforcement Program (PEP)
Enforcement Priorities	ICE was instructed to prioritize enforcement according to a memo on prosecutorial discretion issued in 2011. ⁵ The memo lays out various factors to consider in deciding whether to pursue deportation and suggests that ICE focus resources on certain categories of people, including “known gang members” and people with a record of “illegal re-entry.”	A November 20, 2014, memo lays out the new enforcement priorities . ⁶ ICE should seek the transfer only of people who have been convicted of certain offenses, ⁷ or who have intentionally participated in an organized gang to further the illegal activities of the gang, or people whom ICE has found present a “demonstrable risk to national security.”

Concerns about PEP

Among other concerns that PEP raises, the form used to request detention (I-247D), like its predecessor detainer form, does not comply with the Fourth Amendment’s requirements, thus exposing local law enforcement agencies to legal liability. Moreover, PEP, like S-Comm before it, threatens to erode trust in local law enforcement, making all communities less safe.

PEP Is Too Broad

The “Secure Communities” memo says that ICE may seek the transfer into its custody of a person “otherwise determined [to be a priority] under the November 20, 2014” enforcement priorities memo, if the state or local agency agrees to “cooperate” with such a transfer.⁸ People deemed to be a priority under the memo include those who have not been convicted of a crime, such as people who entered the U.S. after January 1, 2014, without being inspected by an immigration officer. In addition, the memo does not define what it means to “cooperate” with the transfer. This opens the door for anti-immigrant jurisdictions to enter into agreements to transfer over to ICE anyone who might be an enforcement priority, regardless of whether that person has ever been convicted of a crime.

Constitutional Deficiencies

[Federal court decisions](#) have made it clear that detainer-based detentions by law enforcement agencies violate the Fourth Amendment and that an independent judicial finding of probable cause is constitutionally required every time ICE seeks to detain someone based on a detainer.⁹ The November 20, 2014, “Secure Communities” memo states that in “special circumstances” ICE may issue detainers asking a local law enforcement agency to hold a person.

However, nothing in the new detainer form institutes this limitation or requires ICE officers to justify the request for detention based on a “special circumstance.” The memo does not define “special circumstances,” nor does the new detainer form require a judicial determination of probable cause, leaving room for ICE to make subjective and overbroad determinations of what these circumstances might be. “Special circumstances” should be a standard above and beyond probable cause and should be limited to very rare exigent circumstances.

Further Entanglement of Local Law Enforcement with ICE

The [President's Task Force on 21st Century Policing](#) recently recommended that federal immigration enforcement be “decoupled” from local policing based on the recognition that involving local law enforcement in immigration enforcement lessens public safety and community well-being.¹⁰ Entanglement also destabilizes homes and communities: Notifying ICE of a person’s release date and home address facilitates the deportation of people who are integral to their families and communities.

Eroding Trust

Widely acknowledged effective policing practices are based on building trust between local police and immigrant communities. The increasing entanglement of local law enforcement with immigration enforcement has caused immigrant communities to perceive local police officers as immigration/deportation agents. A 2013 University of Illinois report surveying Latinos from various counties found that 70 percent of undocumented Latino immigrants and 28 percent of Latino U.S. citizens were less likely to contact the police if they were victims of a crime for fear that the responding officers would inquire about their immigration status or the immigration status of people they know.¹¹

Incentivizing Racial Profiling

Some local law enforcement officers could use the knowledge that anyone booked would have their fingerprints checked to target immigrants. This will incentivize racial profiling, as jurisdictions with a proven track record of engaging in racial profiling of immigrants feel emboldened to continue funneling people into the deportation system.

Advocacy Opportunities

There are multiple ways in which you can fight back against PEP.

Develop No-Notification Policies

Over [362](#) state, counties, and cities across the country have passed policies limiting local law enforcement compliance with detainer requests.¹² You can urge your local law enforcement agency to adopt a policy of refusing notification to ICE. Read our “[Defeating ICE Hold Requests](#)” to get ideas on how to launch a local campaign.¹³

Public Statements against PEP

Press releases, press conferences, petitions, sign-on letters, and public statements are ways to make your PEP-related demands public. These can come from directly impacted individuals, organizations, and other stakeholders in your area.

Federal Advocacy

You can urge your elected officials to express their opposition to PEP through statements and letters. They can also request that ICE make publicly available statistics about PEP’s implementation and urge ICE, at minimum, to adhere to local and state laws that limit the extent to which local jurisdictions and agencies may collaborate with ICE.

Track ICE's Actions and PEP Implementation

You can track the implementation of PEP in your area by requesting data from local law enforcement, meeting with local law enforcement, and documenting stories of people funneled from jails into the detention and deportation system. Gathering and publicizing information will create momentum for suspending or terminating PEP.

You should also track ICE's other actions. ICE has picked up people outside of jails, at their homes, and at courthouses. Identifying and stopping these actions through public pressure and campaigns is critical to ending the deportation of our communities' members.

¹ www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

² www.catrustact.org/uploads/2/5/4/6/25464410/pep_brochure_june_2015_v4.1%5B1%5D.pdf.

³ www.catrustact.org/uploads/2/5/4/6/25464410/i-247n_request_for_notification_sample.pdf.

⁴ www.catrustact.org/uploads/2/5/4/6/25464410/i-247d_immigration_detainer_sample.pdf.

⁵ www.nilc.org/document.html?id=215.

⁶ www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁷ Those include: an offense for which an element was active participation in a criminal gang; an offense classified as a felony, other than a state or local offense for which an essential element was the individual's immigration status; an offense classified as an "aggravated felony" according to section 101(a)(43) of the Immigration and Nationality Act; conviction of three or more misdemeanors, other than minor traffic offenses or offenses for which an essential element was the individual's immigration status; and a conviction of a "significant misdemeanor" (defined in the memo).

⁸ "Nothing in this memorandum shall prevent ICE from seeking the transfer of an alien from a state or local law enforcement agency when ICE has otherwise determined that the alien is a priority under the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum and the state or locality agrees to cooperate with such transfer."

⁹ www.catrustact.org/uploads/2/5/4/6/25464410/galarza_third_circuit_decision.pdf.

¹⁰ www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf.

¹¹ www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

¹² www.ilrc.org/enforcement.

¹³ www.nilc.org/document.html?id=673.