

ANOTHER MISSED OPPORTUNITY

How the Long-Awaited S-Comm “Reforms” Are Designed to Fail

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U.S. Immigration and Customs Enforcement (ICE), on April 27, 2012, issued its response to findings and recommendations made by the Homeland Security Advisory Council’s Task Force on Secure Communities.¹ This response comes more than seven months after the task force issued its recommendations to the Department of Homeland Security (DHS) on how to reform Secure Communities (S-Comm), and after ICE, which is part of DHS, has activated S-Comm in nearly double the number of jurisdictions that were participating in S-Comm when the task force issued its report. Despite the time spent deliberating the task force’s recommendations, ICE remains unwilling to truly examine and reform this failed program and has not taken seriously even the task force’s modest recommendations. The following is an examination of the task force’s recommendations and ICE’s—and the Obama administration’s—disappointing response.

■ The Task Force on Secure Communities in Context

In June 2011, DHS secretary Janet Napolitano directed the Homeland Security Advisory Council (HSAC) to create a subcommittee to examine S-Comm. The Task Force on Secure Communities was made up of a broad array of state and local law enforcement officials, immigration attorneys, labor union officials, academics, and others.² The task force’s mandate was to make recommendations about how DHS could “improve the Secure Communities Program” and to assess the program’s “impact on community policing and the possibility of racial profiling.”³

From the task force’s inception, immigrant and civil rights advocates expressed concerns about it, and specifically about whether it was anything more than a political stunt to create the appearance that the agency was appropriately responding to a widespread outcry against S-Comm. Lack of public accountability and transparency with respect to the task force’s

¹ *Protecting the Homeland: ICE Response to the Task Force on Secure Communities Findings and Recommendations* (Office of the Director, U.S. Immigration and Customs Enforcement, April 27, 2012) (hereinafter “ICE Response”), www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf (last accessed May 3, 2012). Secure Communities is a federal immigration enforcement program through which local police and jail officials provide fingerprint information about anyone arrested to federal law enforcement, so that ICE can check that information against immigration databases and take custody of individuals who are removable.

² For a complete list of members, see www.dhs.gov/files/committees/task-force-on-secure-communities-membership.shtm (last accessed May 3, 2012).

³ *Task Force on Secure Communities: Findings and Recommendations* (U.S. Dept. of Homeland Security, Sept. 2011) (hereinafter “Task Force Report”), www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities.pdf (last accessed May 3, 2012), at 4.



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formation and operation prompted over 200 organizations to send a letter detailing their concerns to ICE director John Morton.⁴ As a result, the task force met a few times in Washington, DC, and held four public meetings in Dallas, Chicago, Los Angeles, and Arlington, VA, to solicit testimony and input from individuals and communities affected by S-Comm. The public outcry at these meetings was tremendous. Attendance grew from 200 at the Dallas meeting, to 400 at the Los Angeles meeting, to 500 in Chicago. Attendees spoke movingly about the impact of S-Comm in their communities.

While the task force deliberated, the Obama administration announced several major developments regarding immigration enforcement that had significant implications for S-Comm. First, ICE director Morton announced on August 5, 2011, that the agency was terminating all of the memorandums of agreement (MOAs) it had entered into with the states. Until that point, entering into an MOA had been viewed as a necessary precursor to operation of S-Comm in any given state. This act essentially made S-Comm a mandatory federal program, because ICE's policy, since Morton's announcement, is that states or local jurisdictions do not need to be consulted about or to sign off on participation in the program.⁵

Later that same month, DHS and the White House also announced a review of all deportation cases currently pending to identify those in which "prosecutorial discretion" could be exercised in cases where the person in deportation proceedings would be considered a low priority under new criteria developed by DHS. DHS's purported goal was to "target criminals even further by making sure [it] is not focusing . . . resources on deporting people who are low priorities for deportation."⁶ The fact that this announcement came shortly after participation in S-Comm became mandatory, and while the task force was still deliberating, highlights how at odds the various immigration enforcement policies of the administration are with each other. The administration's plan to shift its focus to the deportation of "high priority" individuals ignored the fact that S-Comm's rapid expansion targets some of the same people who should now benefit from the new criteria under which ICE should exercise its prosecutorial discretion.

⁴ A copy of the letter is available at <https://salsa.democracyinaction.org/o/371/images/FINALSCommMortonLtr.pdf>. A NILC statement issued when the letter was sent to Director Morton is available at www.nilc.org/2011jul20scomm.html. (URLs last accessed May 3, 2012.)

⁵ See, e.g., a letter dated Aug. 5, 2011, from Morton to Gov. Jack Markwell of Delaware, www.nilc.org/document.html?id=681 (last accessed May 3, 2012), at 1: "ICE has determined that an MOA is not required to activate or operate Secure Communities for any jurisdiction. Once a state or local law enforcement agency voluntarily submits fingerprint data to the federal government, no agreement with the state is legally necessary for one part of the federal government to share it with another part. For this reason, ICE has decided to terminate all existing Secure Communities MOAs."

⁶ See www.whitehouse.gov/blog/2011/08/18/immigration-update-maximizing-public-safety-and-better-focusing-resources (last accessed May 3, 2012). Prosecutorial discretion refers to ICE's statutorily derived authority to exercise discretion over the decision of whether to pursue deportation against an individual. Although ICE officials have used this power, for many years, in June 2011 ICE announced a focus on exercise of prosecutorial discretion for individuals the agency considers "low priority"—because the individual has significant ties to the country and does not pose a national security or public safety risk.

■ The Task Force’s Recommendations and Concerns

The task force released its findings and recommendations to DHS on September 16, 2011.

Among the recommendations were the following:

- After finding that “[i]mmigration enforcement against traffic offenders and others arrested for only minor offenses poses the greatest risks of undermining community policing,”⁷ the task force recommended that ICE not issue detainers or initiate deportation proceedings against anyone identified through S-Comm based on an arrest for a traffic offense.⁸ The task force further recommended that DHS consider extending this policy to other minor misdemeanors or, in the alternative, issue only “conditional detainers” that become operational only upon conviction.⁹
- The task force said that DHS must take proactive steps to work with state and local officials to rebuild community trust. This includes devising oversight and management mechanisms to ensure that DHS’s stated goals are adhered to in the field; creating a single document that defines S-Comm in clear, understandable language; and conducting a nationwide, multilingual public education campaign through radio, television, social media, and newspapers.¹⁰
- The task force found that DHS should consider the totality of the circumstances in reviewing, for prosecutorial discretion, individual cases identified through S-Comm—including whether a person is indigent and did not have appointed counsel when pleading to whatever criminal or misdemeanor charge on which he or she was arrested.¹¹ These circumstances should factor into DHS’s decisions regarding whether to issue detainers (or “hold” requests) for particular individuals,¹² take them into custody, or begin removal proceedings against them.
- To further ensure the appropriate exercise of prosecutorial discretion, the task force found that DHS must train and monitor all ICE, Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) field personnel in exercising prosecutorial discretion, and issue more detailed guidance for its officers on when it is appropriate to issue detainers, set bond, or take other enforcement action.¹³
- The task force also found that DHS’s current complaint procedures are inadequate and recommended that the agency create a more robust complaint process.¹⁴

⁷ Task Force Report at 21.

⁸ *Id.* at 22.

⁹ *Id.* at 23.

¹⁰ *Id.* at 16-17.

¹¹ *Id.* at 20.

¹² A detainer is a request by ICE that the local jurisdiction keep a person in custody for an additional 48 hours to allow ICE to take the person into federal custody.

¹³ Task Force Report at 20.

¹⁴ *Id.* at 25.

- Finally, in order to promote transparency, the task force recommended that ICE consider implementing, nationwide, a model that it currently employs in Colorado, where ICE gives the state quarterly reports on S-Comm’s operation, which allows the state to monitor its the impact.¹⁵

Before the task force issued its findings and recommendations, a number of task force members resigned out of frustration that the recommendations did not go far enough.¹⁶ The task force’s recommendations did not address the following critiques:¹⁷

- S-Comm has already undermined community trust in law enforcement and diminished the effectiveness of local policing efforts. Public education alone will not overcome this. By relying on local police to enforce immigration laws against the same communities they are charged with protecting, S-Comm is sending a message to immigrants that any contact with the police could lead to their deportation. Immigrants have become afraid to report crimes or to serve as witnesses for fear that they will be referred to ICE.¹⁸ S-Comm also encourages racial profiling by law enforcement, who may stop and arrest individuals who look “foreign” in order to screen them for immigration status.¹⁹
- ICE’s prosecutorial discretion memos do not prevent ICE from using S-Comm to place individuals in deportation proceedings; instead, they merely provide guidance for ICE agents on the factors they can consider when deciding whether to deport someone who has already been found to be deportable. However, the vast majority of people deported through S-Comm do not have attorneys and are unfamiliar with the process for requesting that ICE exercise its prosecutorial discretion, administratively close their case, or grant some type of relief. So far, the results of the prosecutorial discretion process have been abysmal; a recent report found that fewer than one percent of pending immigration cases reviewed for the exercise of prosecutorial discretion were actually granted relief from deportation.²⁰
- S-Comm encourages a two-tiered system of justice where U.S. citizens and noncitizens are treated differently within the criminal justice system. Once S-Comm identifies a noncitizen for deportation, that person is denied bail, jailed for a longer time, and disqualified from alternative release programs. Due process protections are severely limited.

¹⁵ *Id.* at 21.

¹⁶ See, e.g., resignation letter from Arturo Venegas, former Sacramento police chief, [http://uncoverthetruth.org/wp-content/uploads/Venegas-Final-SCTF-Letter-2 .pdf](http://uncoverthetruth.org/wp-content/uploads/Venegas-Final-SCTF-Letter-2.pdf) (last accessed May 3, 2012).

¹⁷ Many of these criticisms are taken from a report “prepared by a commission made up of national and community-based organizations that have witnessed the impacts of S-Comm on their members and communities” that was issued at about the same time as the task force report. See *Restoring Community: A National Community Advisory Report on ICE’s Failed “Secure Communities” Program* (Aug. 2011), <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf> (last accessed May 3, 2012).

¹⁸ *Id.* at 37-38.

¹⁹ See Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, Sept. 2009), www.law.berkeley.edu/files/policybrief_irving_0909_v9.pdf (last accessed May 3, 2012).

²⁰ *ICE Prosecutorial Discretion Initiative: Latest Figures* (Transactional Records Access Clearinghouse, Apr. 19, 2012), <http://trac.syr.edu/immigration/reports/278/> (last accessed May 3, 2012).

- S-Comm indiscriminately funnels immigrants into an unjust immigration detention and deportation system. The deportation system lacks due process, regardless of whether the people who are subject to it are guilty or innocent or whether they have strong ties to the community. In fact, S-Comm contributed to a record number of detentions and deportations—nearly 400,000—in 2011.²¹
- The program raises privacy concerns related to larger FBI data and biometric collection of which S-Comm is only a part.
- States and localities should not be compelled to participate in immigration enforcement programs such as S-Comm, particularly when such participation has had a documented negative impact on local community policing efforts and public safety.

In addition, although some members of the task force would have recommended terminating S-Comm or suspending S-Comm until major changes were made to it, the task force as a whole did not take this position. From the perspective of many advocates, including NILC, S-Comm should be suspended, and the entanglement of the states' criminal justice systems with federal civil immigration enforcement should be stopped.

■ Summary and Analysis of DHS's Response to Task Force Recommendations

While there was no consensus among the task force members, roughly half of them agreed that S-Comm should be suspended or terminated, and many felt that at the very least DHS should suspend the expansion of S-Comm until the agency could consider and respond to the recommendations made in the task force's report.²² Yet, in the time between the task force's recommendations and DHS's response, DHS nearly doubled S-Comm's reach across the country, expanding the program into an additional 1,222 jurisdictions, which represent 86 percent of jurisdictions nationwide.²³ Alarming, S-Comm is also now activated in every single state that has passed an anti-immigrant law akin to Arizona's SB 1070.²⁴ Essentially, DHS continued its rapid expansion of S-Comm across the country before even paying lip service to the findings and recommendations of the very same task force it commissioned to address some of the program's flaws.

ICE's response to the task force recommendations is even more disappointing. Much of it consists of pointing to measures the agency took before the task force even began its deliberations. For example, in response to the recommendation that DHS work to better ensure

²¹ *ICE Total Removals: Through February 20th, 2012* (U.S. Immigration and Customs Enforcement, undated), www.ice.gov/doclib/about/offices/ero/pdf/ero-removals.pdf (last accessed May 3, 2012).

²² Task Force Report at 27.

²³ The task force's report notes that as of August 2, 2011, S-Comm had been activated in 47 percent of jurisdictions nationwide (1,508 jurisdictions total). Task Force Report at 5, n.4. As of April 17, 2012, 86 percent of the country's jurisdictions have been activated (a total of 2,730 jurisdictions). *Activated Jurisdictions* (U.S. Immigration and Customs Enforcement, Apr. 17, 2012), www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf (last accessed May 3, 2012).

²⁴ Arizona, Georgia, Indiana, South Carolina, and Utah are all 100 percent activated. Only Alabama has not been fully activated; it is 57 percent activated, with 37 out of 67 counties online. See *id.*

prioritization of enforcement resources for individuals identified through S-Comm, ICE points to a memo issued by Director Morton on March 2, 2011, titled “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.”²⁵ The task force, which was convened in June 2011, had found that despite ICE’s stated priorities as detailed in the memo, S-Comm was still resulting in the identification and deportation of individuals who did not pose a threat to national security and public safety. To respond to the task force’s recommendations by simply pointing to the existence of a memo issued before the recommendations were made comprises a nonresponsive, circular argument, and it is insufficient.

In some instances, ICE flatly rejects the task force’s recommendations. The task force had recommended that the agency develop oversight and management mechanisms to ensure agency priorities were being met, and it further recommended creating a nationwide system based on the Colorado model, wherein states become involved in monitoring S-Comm’s impact on communities. ICE rejects these recommendations and indicates that a state has no role in monitoring enforcement actions related to S-Comm, even though the impact of such enforcement actions will certainly affect the ability of state and local police officers to carry out their duties in the community. The task force also criticized DHS’s complaint process as inadequate and recommended making the complaint procedures more robust, accessible, and confidential. ICE has taken some steps to improve the complaint process, but has done nothing to improve the process’s lack of confidentiality, which has had a chilling effect on would-be complainants.

Most significantly, ICE rejects the task force’s recommendation that the agency not issue a detainer or initiate deportation proceedings against individuals who have been convicted only of minor traffic offenses and who do not otherwise fit ICE’s stated priorities. Instead, ICE says that it “will only consider making a detainer operative upon conviction for the minor criminal traffic offense.”²⁶ Presumably, the agency plans to implement this new policy through its new detainer form, which includes a check-box that reads, “Consider this request for a detainer operative only upon the subject’s conviction.”²⁷

ICE’s response creates a system that is designed to fail. A policy that makes detainers operative upon conviction for the underlying traffic offense is both (a) meaningless, because a “conviction” for a traffic offense is easy to obtain and may happen quickly while the individual is still in custody, and (b) unlikely to be understood, because it creates confusion over when the detainer should be honored and when it should be ignored by local authorities. ICE’s response also raises concerns because, if it is implemented in such a way as to allow the detainer’s condition to be met when the individual is no longer in custody—for example, if the point of “conviction” occurs when the individual has appeared at some later date to pay a fine in traffic court—this would be an unprecedented expansion of detainer authority. Detainers have always been considered limited to the custodial setting, and it would be an alarming new position if the agency were to suggest that the detainer’s authority continues after the individual is no longer in custody.

²⁵ ICE Response at 5. The March 2 memo is available at www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (last accessed May 3, 2012).

²⁶ ICE Response at 14.

²⁷ DHS Form I-247 (12/11), www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf (last accessed May 3, 2012), at 1.

And because local practices for handling individuals arrested for traffic offenses are likely to vary across the country, application of this new policy will undoubtedly differ across jurisdictions. Moreover, nothing in the new policy prevents the local agency from notifying ICE before releasing the individual arrested on the traffic offense—a practice that is likely to continue because detainers have become so pro forma that simply checking a box on a form will not change behavior.

In short, if the agency were serious about utilizing its scarce resources according to its own enforcement priorities by not pursuing deportation against individuals convicted of only a traffic offense, it would have accepted the task force's recommendations and declined to issue detainers at all in these cases.

■ Conclusion

Given DHS's history of half-hearted and failed attempts to reform S-Comm, it is time to face reality: Such a deeply flawed program is beyond redemption. Instead, DHS and the Obama administration must refocus their efforts on ensuring that their own enforcement priorities are achieved by (1) putting in place a rigorous implementation process that holds ICE accountable in exercising its prosecutorial discretion in a manner wholly consistent with the administration's priorities and (2) terminating, once and for all, troubled enforcement programs such as S-Comm. The time for cosmetic changes has passed. Immigrant families are suffering greatly under the administration's current enforcement programs, and real administrative reform is needed now.