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DHS Secretary Johnson Discontinues Secure Communities "As We Know It"
Clarification Is Critical to Achieve Meaningful Change and Not More of the Same Under a Different Name

Acknowledging the storm of criticism embroiling the Secure Communities program and related ICE enforcement tools, Secretary Johnson's Secure Communities Memo of November 20, 2014 ("S-Comm Memo") announces new rules for ICE's interaction with state and local law enforcement agencies (LEAs) regarding individuals in the LEAs' custody. The memo imposes new limitations that, if properly implemented, could mark a significant policy shift for the agency. Critically, however, the memo contains numerous ambiguities that threaten to undermine its significance unless DHS issues prompt clarification and guidance.

Recognizing "the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment," Secretary Johnson directs ICE to curtail its use of detainers (by which ICE asks an LEA to prolong a person's detention for 2 to 5 days, without a judicial warrant or court order, for immigration enforcement purposes). S-Comm Memo at 2. Under the new policy, ICE will continue to receive fingerprint information for everyone who is booked into state or local custody, regardless of whether they have been formally charged, tried, or convicted of any crime. However, the memo makes clear that ICE should not "seek the transfer" of anyone identified through this process unless he or she fits within a specific elevated subset of the priority categories defined in the new Civil Enforcement Priorities Memo. *Id.* Further, to aid in a person's "transfer" from LEA custody to ICE, the memo directs ICE to request *notification* of the person's impending release date; ICE may no longer request the person's *detention* except in "special circumstances." *Id.*

While Secretary Johnson stops short of fully resolving the constitutional problems with ICE detainers, his memo does appear to narrow the scope of people who will be affected by them—and that could be a real step in the right direction. However, the memo contains several troubling ambiguities that raise serious questions about its implementation. The flow chart below represents what the ACLU believes is the most coherent reading of the memo, giving the Secretary the benefit of the doubt that he does not intend to create huge loopholes that would effectively permit ICE to continue with the status quo. In particular, we assume that ICE's requests for both notification and detention must be limited to elevated "priority" cases. Thus, we read the memo as directing ICE not to request *either* notification *or* detention unless the person is removable *and*, in most cases, has been *convicted* of a qualifying criminal violation. Assuming that is the case, there would still be Fourth Amendment concerns with ICE's more limited use of detainers, as well as policy concerns that fingerprint-sharing and notifications will undermine LEAs' relationships with their communities, but the memo would nevertheless provide more significant limitations on ICE's jail enforcement practices than we have seen to date. If that is not the case, or if the memo is left unclear, then it will fail to achieve the meaningful change we believe Secretary Johnson intends.

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Visualization of the Priority Enforcement Program (PEP) Process

Fingerprint sharing

Secure Communities is rebranded as the Priority Enforcement Program, or "PEP."

As before, the FBI will share *all* arrestees' booking fingerprints with ICE, without limitation.

Determination to seek "transfer" from LEA to ICE custody

ICE may "seek the transfer of an alien" identified through PEP only if the person has been *convicted* of an offense described in Priority 1 (a) (national security), (c) (gang involvement), (d) (most felonies), or (e) (an INA "aggravated felony"), or Priority 2 (a) (three or more separate misdemeanors) or (b) (one "significant misdemeanor").

Requesting "notification" of release date

For anyone who meets the above priorities, ICE may request from LEA notification of the person's release date so that ICE may accomplish his/her transfer to federal custody.

Requesting 48-hour detention

In "special circumstances," if a person meets the above priorities *and* ICE *also* has a final removal order or "other sufficient probable cause" of removability, ICE may ask the LEA to detain him/her to facilitate transfer of custody.

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Serious Questions Remain

Although we believe the flow chart represents the most coherent reading of Secretary Johnson's memo, it is by no means certain that this is how ICE will implement it. The memo contains several **ambiguities that threaten to undermine its significance** without prompt clarification. In particular, the memo leaves the following critical questions unanswered:

- **What will ICE's requests for notification look like? Will ICE create a new form?** ICE's existing detainer form (Form I-247) already has a series of check-boxes that enable issuing agents to request only notification, not detention; or to note that the request is "operative only upon the subject's conviction." Yet ICE's use of these check-boxes in the past has been notoriously inconsistent and ineffective. In practice, many LEAs treat all ICE detainers the same, regardless of what boxes are checked, and inappropriately detain people even when ICE has not explicitly requested it. Therefore, to make Secretary Johnson's policy change effective, ICE should create a **new, dedicated form for notification requests**, separate from the traditional detainer form. That new notification request form must make clear (1) that ICE is not requesting or authorizing any additional detention, (2) that the request should not be taken as an indication that the person is unlawfully present,[1] and (3) that the request should have no effect on the individual's access to bail, diversion or rehabilitation programs, security classifications, parole, or release. Only such clarity will ensure that LEAs treat notification requests correctly, and that these requests do not open the door to unauthorized detention, discriminatory treatment, or abuse by LEAs. Finally, the notification request should not be called a "detainer." Given ICE's years-long practice of requesting detention through "detainers" and the fact that ICE will continue to request detention in some cases (presumably using a form called a "detainer"), calling notification requests "detainers" would increase the risks of confusion and unlawful detention.

- **Will ICE's notification requests be limited to priority cases?** We believe the best reading of the memo is that ICE agents may issue notification requests *only* for people who fall within the elevated subset of priorities enumerated in the memo—which generally means people who have been *convicted* of a qualifying criminal offense.[2] If, however, ICE agents read the

[1] *See, e.g.*, DHS Office for Civil Rights and Civil Liberties, "Briefing Video: Immigration Detainers" at 5:33 (last visited Dec. 15, 2014), available at https://www.ice.gov/secure-communities/crcl ("[A]n immigration detainer does not necessarily mean that an individual will be removed, or will be subject to any ICE enforcement action. In fact, subsequent investigation could reveal that the individual is not removable at all.").

[2] The memo provides that ICE should only seek transfer if the person "has been *convicted* of an offense listed in Priority 1(a), (c), (d), and (e) and Priority 2(a) and (b)." S-Comm Memo at 2 (emphasis added). Thus, even though Priority 1(a) (the national security provision) and Priority 1(c) (gang involvement), as defined in the more general Civil Enforcement Priorities Memo, do not necessarily require convictions, Secretary Johnson's

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memo to permit them to request notification of *anyone*'s release date, even before conviction, it would effectively permit ICE to continue with the status quo. ICE would still be able to cast a wide net and issue notification requests broadly, even against people who have not yet been (and may never be) identified as enforcement priorities. Notification requests will have a variety of adverse impacts on individuals' records, inviting LEAs to discriminate against them in areas such as bail eligibility, security classification, and access to diversion, rehabilitation, and early release programs. Allowing notification requests to be transmitted to LEAs before ICE has determined that the individual falls within an elevated enforcement priority would undermine the basic purpose of Secretary Johnson's memo, which is to ensure that "unless the alien poses a demonstrable risk to national security, enforcement actions through the new program will only be taken against aliens who are *convicted* of specifically enumerated crimes." S-Comm Memo at 2 (emphasis added). *See also* Civil Enforcement Priorities Memo at 2 ("DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process—*from the earliest investigative stage* to enforcing final orders of removal") (emphasis added). If ICE is truly moving to a post-conviction model of detainer enforcement, as Secretary Johnson's memo contends, ICE agents must not issue a notification request unless and until the person has been convicted of a qualifying criminal offense.[3]

- **What does "special circumstances" mean?** The memo states that ICE agents may still request 48 hours of additional detention under unspecified "special circumstances." If this phrase is left undefined, there is a real risk that ICE agents will interpret it unduly broadly—for example, as permitting them to issue detainers whenever there is a removal order, even if the person does not meet the enumerated elevated enforcement priorities. This reading would seriously undermine Secretary Johnson's reforms and render the priorities a dead letter. A far better reading is that "special circumstances" exist only where, due to extraordinary circumstances outside ICE's control, extra detention is necessary to effectuate transfer of an especially

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Secure Communities memo makes clear that, in the PEP context, a *conviction* is required before ICE agents may seek notification and transfer. This is an important limitation, because it ensures that ICE will not target individuals based on unfounded suspicions untethered to any criminal conviction. There is, however, one exception: The memo permits ICE to seek notification and transfer even without a conviction "when, in the judgment of an ICE Field Office Director, the alien otherwise poses a danger to national security." DHS should specify what evidence is necessary for a Field Office Director to find that a person poses a "demonstrable" risk to national security, and ICE Headquarters should review the Field Office Directors' determinations.

We also note that Priority 1(d) includes "aliens convicted of a . . . felony . . . , other than a state or local offense for which an essential element was the alien's immigration status." Limiting the exclusion to cases where immigration status is an "essential element" of the offense fails to address the intended problem; many state convictions based on anti-immigrant practices arise from selective enforcement of more general laws, through racial profiling and pretextual stops. Limiting the exclusion only to *state* or *local* offenses also leaves *federal* felonies involving immigration on the table. Presumably, people with criminal convictions for entry or reentry, no matter how old, may still be targeted for enforcement actions under the memo.

[3] Unless a Field Office Director determines that the person poses a "demonstrable" risk to national security as discussed in footnote 2, above.

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high priority individual, and if there is "reason to believe that [the individual] . . . is likely to escape before a warrant can be obtained for his arrest" as required by 8 U.S.C. § 1357(a)(2). The Field Office Director should pre-approve all requests for detention to ensure that the "special circumstances" requirement is faithfully implemented, and ICE headquarters should review these determinations.

- **What about the Fourth Amendment?** The memo suggests that ICE may still request that a person's detention be extended if there is "**probable cause**" to believe he or she is removable. But this does not solve all the Fourth Amendment problems with ICE's detainer practices. First, several courts have held that because the Fourth Amendment requires probable cause to believe a *crime* has been committed, and removability is a civil matter, LEAs generally lack the authority to detain people on that basis. Second, even assuming probable cause of removability is sufficient, the Fourth Amendment also requires a *judicial* determination of probable cause for the arrest, either before or promptly afterward (no later than 48 hours). ICE does not provide such determinations for people held on ICE detainers. Third, even setting these problems aside, there is good reason for concern about how ICE agents will interpret probable cause in practice. Probable cause has always been the required legal standard—in fact, the former INS recognized as much in a 1993 manual—but ICE's practice in recent years has regularly fallen far short of this constitutional minimum. Without clear training and guidance to ICE agents, there is a real risk that ICE will continue issuing detainers based on insufficient evidence. As Secretary Johnson's memo recognizes, the ACLU and other organizations are actively litigating these issues. Any guidance to ICE agents must be updated to reflect the evolving case-law applying the Fourth Amendment to these circumstances.

- **What does the concluding caveat mean?** The memo concludes by stating that "[**n]othing in this memorandum shall prevent** ICE from seeking the transfer of an alien . . . when ICE has otherwise determined that the alien is a priority [under the general Civil Enforcement Priorities Memo] . . . and the state or locality agrees to cooperate with such transfer." S-Comm Memo at 3. At worst, an ICE agent could read this sentence to suggest that nothing in the memo is binding, and notwithstanding all the preceding instructions establishing special rules for enforcement conducted through PEP, ICE may continue to issue requests for notification and detention for anyone who falls within any of the more generalized priorities. Such a reading would be nonsensical, as it would create an unconstrained exception that swallows the rule. Rather, we think this paragraph refers specifically to situations when ICE seeks to take custody of an individual outside of the PEP program, without making use of any of the PEP architecture—fingerprint sharing, notification requests, or detainers. In such non-PEP cases, ICE agents are constrained by their general enforcement priorities, not the specific requirements set out in this memo.

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Summary and Recommendations:

Without delay, the agency should:

1. Create a new notification-only request form, separate from ICE's existing detainer form (Form I-247). The form should make clear to LEAs that the request is voluntary, that the form does not request or authorize any additional detention whatsoever, that it does not serve as an indication that the person is unlawfully present, and that it should have no effect on the person's eligibility for bail, rehabilitation or diversion programs, security classifications, parole, or release. To avoid any confusion and to ensure that LEAs understand the departure from past practice, the form should expressly state that it is not a "detainer."

2. Clarify that ICE agents may issue a notification request only after determining that the target meets the specified higher enforcement priorities (generally speaking, only *after* a significant qualifying criminal conviction). Further, the agency must clarify what facts are needed to determine that a person poses a "demonstrable" risk to national security, and ICE Headquarters should review the Field Office Directors' determinations.

3. Clarify that "probable cause" is precisely the same standard required for arrests, and provide detailed training for agents on what this standard means in practice. In particular, the agency should clarify that foreign birth plus a "no-match" in ICE's databases is not sufficient to establish probable cause for detention.

4. Clarify that the "special circumstances" required for ICE to request detention exist only where a person otherwise falls within the elevated enforcement priorities and where, due to extraordinary circumstances outside ICE's control, extra detention is necessary to effectuate transfer of an especially high priority individual, and if there is "reason to believe that [the individual] . . . is likely to escape before a warrant can be obtained for his arrest" as required by 8 U.S.C. § 1357(a)(2). Field Office Directors should pre-approve all detainers to ensure that the "special circumstances" requirement is faithfully implemented, and ICE Headquarters should review these determinations.

5. Clarify that the concluding caveat on page 3 of the memo refers only to situations when ICE seeks to take custody of an individual outside of the PEP program, without making use of any of the PEP architecture—fingerprint sharing, notification requests, or in special circumstances detainers—and that in such non-PEP cases, ICE agents continue to be constrained by the agency's general enforcement priorities. Further, ICE should clarify that the phrase "cooperate with [a] . . . transfer" does not

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authorize LEAs to extend a person's detention beyond their lawful period of criminal custody, and that it does not authorize LEAs to unilaterally transport a person to ICE's custody.

6. Direct the Office for Civil Rights and Civil Liberties (CRCL) to seek community input in developing their "plan to monitor state and local law enforcement agencies participating in . . . transfers" of people to ICE custody. S-Comm Memo at 3. The agency should issue an implementation plan describing CRCL's monitoring commitments and a schedule for public reporting, and direct CRCL to issue new FAQs and update the existing Secure Communities briefing materials to educate LEAs on ICE's new policy and requests for notification.

7. Clarify that the memo covers all notification requests and detainers issued by Customs and Border Protection (CBP) as well as ICE. Given that CBP, too, issues detainers, it is puzzling why the memo is directed only at ICE. Just like Secretary Johnson's more general Civil Enforcement Priorities Memo, the S-Comm Memo should apply equally to both ICE and CBP.

8. Recognize that the case law on the Constitutional constraints regarding the use of detainers is still evolving, and commit to ensuring that the agency's use of detainers will similarly evolve as necessary.

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