



The American Civil Liberties Union

Written Statement
For a Hearing on

I. Introduction

The ACLU is a nationwide, nonpartisan organization of more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. The Washington Legislative Office (WLO) represents the interests of the ACLU before Congress and the Executive Branch of the federal government. The ACLU submits this statement to express its concerns about the daily harms caused by Secure Communities ("S Comm") to U.S. citizens, lawful permanent residents, temporary admitted visitors ranging from students to business executives, and undocumented persons who often have mixed status families with U.S. citizen children.

The Departments of Justice (DOJ) and Homeland Security (DHS) jointly operate S Comm. Under SComm, the FBI, which DOJ oversees, sends the fingerprints of every arrested person – which it receives from states and localities for criminal purposes – to DHS for civil immigration enforcement purposes. SComm causes localities to expend their already strained law enforcement resources on detaining low-level offenders who would otherwise be released; encourages racial profiling in jurisdictions that are being investigated by DOJ for discriminatory police practices; and recklessly endangers the fundamental prerequisite to effective policing: community trust. The Governors of Illinois, New York, and Massachusetts have asked unsuccessfully for DHS to end their states' involvement in SComm, citing the public safety problems SComm presents for state and local law enforcement agencies. SComm is under review by both the Government Accountability Office and the DHS Office of Inspector General to examine programmatic failings and official misrepresentations to members of Congress and governors.

In short, S-Comm is a failed program, with extensive statistical and qualitative documentation of its ill effects and widespread state and local resistance to its intrusive dictates. It must be terminated immediately.

II. S-Comm fails to meet its own stated goals and has wasted taxpayers' money.

S-Comm originated in Congress's instructions attached to the 2008 budget, requiring that DHS "improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them." Congress requested "a

methodology U.S. Immigration and Customs Enforcement will use to identify and prioritize for removal criminal aliens convicted of violent crimes.¹ In 2010, the annual House Homeland Security Appropriations report emphasized that ICE's priority should be the removal of aliens "convicted of serious crimes."² When SComm was originally implemented, it was to target "the worst of the worst,"³ and the ICE brochure on SComm continues to assert that ICE focuses its efforts on "the most dangerous and violent offenders."⁴

DHS's rhetoric, however, bears no relation to the realities of SComm's implementation. In May 2011, Illinois Governor Pat Quinn officially sought to withdraw his state's participation in SComm "[d]ue to the conflict between the stated purpose . . . and the implementation of the program." He noted that "by ICE's own measure, less than 20% of those who have been deported from Illinois under the program have ever been convicted of a serious crime. . . . [M]ore than 30% of those deported . . . have never been convicted of any crime, much less a serious one."⁵

These statistics are replicated around the country. As of October 31, 2011, 27% of those removed or returned under SComm were, in ICE's terms, non-criminals—that is, they had no record of any criminal conviction. An additional 31% had been convicted only of Level 3 (misdemeanor) offenses. These numbers are not appreciably improving. In 2011, the combined percentage of non-criminal and Level 3 removals or returns was still 55%, with the non-criminal portion at 26%.⁶ Despite DHS Secretary Napolitano's October 5, 2011, speech asserting that SComm is "track[ing] down criminals and gang members on our streets," DHS has not adhered to Congress's requirement that DHS prioritize violent convicted criminals.

¹ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 110th Cong. (2008) (emphasis added).

² H.R. REP. 114157, at 8 (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr157.111 ("Since 2007, the Committee has emphasized how ICE should have no higher immigration enforcement priority than deporting those who have proved their intent to do harm and have been convicted of serious crimes.").

³ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2008 ANNUAL REPORT 5 (2008).

⁴ U.S. Immigration and Customs Enforcement, "Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens" (Jan. 2010), available at www.ice.gov/doclib/securecommunities/pdf/sc-brochure.pdf

⁵ Letter from Governor Quinn to ICE's Marc Rapp (May 4, 2011), available at <http://uncoverthetruth.org/wp-content/uploads/2010/05/ilterminate.pdf>

⁶ U.S. Immigration and Customs Enforcement, Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through September 30, 2011, available at http://www.ice.gov/doclib/foia/sc/stats/nationwide_interoperability_stats_2011-to-date.pdf

convicted of misdemeanors.¹⁴ This combined rate of 81% far exceeds the national average, making New Orleans one of the worst performing jurisdictions in the country when measured against SComm's Congressionally mandated focus on the most dangerous and violent convicted criminals. DHS has taken no remedial steps regarding CCR in New Orleans in the wake of DOJ's report.

police. You know, I cannot prosecute crimes without witnesses.¹⁸ New York Governor
Andrew

California drew attention to her case. “I still don’t understand why I was arrested, but had I realized I could be arrested after calling 911 for help and deported, I never would have called,” she said. As reported in the Los Angeles Times, “Because police often arrest both parties in domestic disputes, her fingerprints were submitted to immigration officials; despite having no criminal record, she was flagged for deportation proceedings.”²⁰

- x Veronica had a serious argument with her brother when he refused to let her leave a party with her daughter. Veronica called the police, who arrived and briefly questioned her before arresting her. They took her to jail, where they fingerprinted her and held her for three hours, releasing her after a hearing.

partner hit her. But the undocumented mother of a 18-month-old toddler was too fearful of police and too broken of spirit to do so. In October, she finally worked up the courage to call police – and paid a steep price.²⁴ The police arrested her and, because of S-Comm, she was taken into ICE custody. She was placed on electronic monitoring pending a deportation proceeding, despite never being charged with any crime.

V. S-Comm's enforcement dragnet is ensnaring U.S. citizens.

The Warren Institute's October 2011 report, *Secure Communities by the Numbers*, details the numerical toll that S-Comm has exacted on all who enter the immigration enforcement system as a result of its operations. The report found that S-Comm has resulted in the detention of a significant number of U.S. citizens. In addition, 39 percent of individuals apprehended through Secure Communities have a U.S. citizen spouse or child, "meaning that approximately 88,000 families with U.S. citizen members have been impacted by Secure Communities."²⁵

Antonio Montejano was born in Los Angeles in 1971. On November 5, 2011, he and his family were at Sears in Santa Monica. They purchased several hundred dollars worth of merchandise and were continuing to shop when one of Antonio's children asked if he could buy a \$10 bottle of perfume. Antonio agreed and placed the bottle in a bag of purchased merchandise, intending to pay for it on departure. His young children also took some chocolate candies in the store and began eating them. When Antonio saw this, he told his kids they shouldn't have indulged and said he would have to pay for the candies. He put the wrappers in his pocket, but forgot about them when he checked out, at which time the store clerk found the perfume. Antonio immediately realized his mistake and offered unsuccessfully to pay for the items.

Arrested for petty theft, Antonio was informed by the police that he would be taken to the station for fingerprinting and then released in a few hours. But because of S-Comm, ICE issued

Antonio was held for two days in the Inmate Reception Center, which is only a booking facility and not meant to house inmates. The facility does not have beds, only chairs. He was not provided any blankets and was forced to sleep on the floor. Antonio was finally released once the ACLU of Southern California intervened to get his ICE detainee. He was freed after four days of unlawful detention.

S-Comm has led to a state of affairs in which the detention of a person born in the United States is an unexceptional occurrence. That is unacceptable. U.S. citizens should never spend time in ICE custody.

VI. DHS's proposed reforms have not been implemented and do not address S-Comm's inherent flaws.

Just as the promise of post facto discretion by DHS is inadequate to address the fear inspired by S-Comm, DHS's other purported "fixes" are illusory. Consider ICE's actions with respect to racial profiling. After more than a year of DHS denials that S-Comm was susceptible to racial profiling, ICE Director John Morton testified to Congress in March 2011: "I totally recognize the concern on racial profiling. We are instituting a whole series of analytical steps working with the Civil Rights Division [of DOJ], the OCRCL [Office for Civil Rights and Civil Liberties] at DHS, inviting them to literally be part of the analysis with us so that we can root out and identify any jurisdictions that are misusing Secure Communities." Three months later, ICE announced that "[f]our times a year, beginning in June 2011, CRCL and ICE will examine Secure Communities data to identify law enforcement agencies that might be engaged in improper police practices."

No such data review has yet taken place, leaving it to nongovernmental analysts to investigate S-Comm's impact on people of color.²⁷ Furthermore, even if DHS does belatedly begin reviewing the data for every S-Comm jurisdiction (1,729 and counting), it is unclear what remedial action DHS would take when faced with evidence of racial profiling. OCRCL has no authority to investigate racial profiling by local law enforcement agencies. In addition, despite Director Morton's mention of DOJ's Civil Rights Division, DOJ has had no involvement in S

enforcement agencies is optional, thereby making it highly unlikely that those local agencies with histories of racial profiling will ever participate. ICE's promised oversight thus remains thoroughly illusory five months after its announcement, and Comm's scale and structure make it impossible to place confidence in OCRCL's ability to detect, much less prevent, the program's abuses.

VII. Conclusion

By every metric, Comm is an irreparably flawed and damaging program. Lacking meaningful oversight and adrift from its congressionally mandated priorities, Comm has led to confrontations with governors, county commissioners, city council members, law enforcement leaders, and victims' advocates who know better than ICE how to promote public safety in their communities. DHS's heavy-handed implementation of Comm has deeply damaged the cooperation that is essential to smart policing at a time when violence rates, across the country, are at the lowest levels in nearly 40 years.²⁹

It is incumbent on Congress to rein in this abusive and costly program, which has caused rampant constitutional and humanitarian violations. To rebuild damaged community trust and end the incentives for racial profiling, Congress must defund and end Comm.

²⁹ Richard A. Oppel, Jr., "Steady Decline in Major Crime Baffles Experts." New York Times (May 23, 2011).