

# DHS's New "Priority Enforcement Program"



## What is the Priority Enforcement Program (PEP)?

On November 20, 2014, President Obama announced the end of the heavily criticized Secure Communities (S-Comm) program. In its place, DHS created the "Priority Enforcement Program" or PEP. However, PEP works exactly the same way as Secure Communities. PEP sends all fingerprints taken from local law enforcement to be checked against immigration databases and automatically notifies Immigration and Customs Enforcement (ICE) if there is a match. If ICE wants to take action against the arrested person, ICE then issues a notice back to the local jail that requests the jail to let ICE know when the person will be released (called a "notification request"). ICE can also request the jail to hold the person for extra time to allow ICE to come get them (called an "ICE hold" or "detainer"). **Notification and detainer requests work the same in PEP as they did in S-Comm.**

## What is the Difference Between PEP and Secure Communities?

**All the basic mechanisms of S-Comm remain in place under PEP.** PEP presents cosmetic changes to the ICE request form and revised promises about adhering to new enforcement priority categories, which remain overly broad.

Under PEP, ICE rearranged their prior detainer form (Form I-247) into two separate forms: a notification request and a detainer request. The former detainer form included both of these requests in the same document. Both of these new forms help ICE apprehend someone from local jail, just like under S-Comm.

Under PEP, ICE is only supposed to issue requests on certain people whom the agency considers enforcement priorities. A new set of enforcement priorities was developed on November 20, 2014. These enforcement priorities rely on federal standards and are not necessarily aligned with state criminal laws. For example, deportation priorities include misdemeanors that may be years or even decades old.

## What are the Problems with PEP?

**PEP weakens community policing and harms public safety. Under PEP, like its predecessor S-Comm, local law enforcement is the primary gateway to deportation proceedings and will be seen as such by the immigrant community.** This will have negative, long-term effects on community policing and public safety. The President's Task Force on 21st Century Policing stated that building trust with immigrant communities was a central tenant to enhancing public safety, and called for a decoupling of federal immigration enforcement from routine local policing. Ultimately, PEP's undermining of the immigrant community's public trust in local law enforcement will harm public safety for both immigrant and non-immigrant community members.

**PEP relies on unlawful immigration detainer requests.** PEP still asks local jurisdictions to prolong detention based on ICE detainers, even though federal courts agree that prolonging detention based on an immigration detainer is unconstitutional. Such detention constitutes an arrest without probable cause, in violation of the Fourth Amendment. Under PEP, ICE now requires ICE agents to assert that they have

## DHS's New "Priority Enforcement Program"



probable cause before issuing a hold request. However, there is no procedure for review of probable cause by a neutral magistrate, either before or after the detention. The hold request makes blanket, non-specific assertions of probable cause merely by rewording the checkboxes on the form. PEP perpetuates the same problems as S-Comm, and ICE detainer requests still fall far short of actual legal and constitutional requirements. Nonetheless, PEP continues to rely on these requests wherever a local law enforcement agency is willing to comply.

**PEP also relies on requests for notification of release which may lead to constitutional violations and local liability.** Requests for notification are request for notice of when someone is going to be released from criminal custody. While they do not technically require additional detention, they very well could lead to unconstitutional detention in practice. Notification requests are not reviewed by a judge and are likely to lead to prolonged detention if the jail is waiting for ICE to coordinate a person's release, as has already happened in some jurisdictions.

**The agency administering PEP lacks any accountability.** Whether ICE will actually follow the PEP guidance, and whether PEP will result in fewer ICE requests than under S-Comm remains to be seen. ICE's track record in following previous policy directives about enforcement priorities leaves this very much in doubt. Already, the agency has disposed of Secretary Johnson's requirement that ICE issue hold requests only in special circumstances. ICE has made plain that it intends to use detainer requests whenever there is probable cause that the person could be deportable under immigration law. Probable cause, as a minimum constitutional requirement for arrest, is hardly a reasonable understanding of 'special circumstances.' Moreover, based on ICE's long history of failure to implement DHS policy guidance, it is unlikely that ICE will even follow the enforcement priorities. There are no mechanisms in place to track violations or to hold local ICE agents accountable if they do not follow the guidance.

**PEP will interfere with the criminal justice process.** Under PEP, as with S-Comm, ICE requests and ICE involvement in the criminal justice process can lead to the detention of people who need to attend hearings in local court, resulting in confusion in the court system and undermining basic access to justice for defendants and victims alike. Moreover, ICE requests are often used as basis to deny bail or other much needed rehabilitative programs. As a result, immigrants are barred from treatment or counseling programs that they need, and the community is more at risk.

**PEP continues to rely on local governments to do immigration work at their own expense.** DHS employs tens of thousands of ICE agents to carry out immigration enforcement and deportation proceedings. The federal government already spends more money on immigration enforcement than all other federal law enforcement agencies combined. Nonetheless, the agency continues to shunt the burdens of this work onto local law enforcement as much as possible. PEP is very much part of the same scheme that asks local jails to hold people at their own cost, call ICE whenever the jail is releasing a non-citizen, and give ICE agents access to local data. In return, the localities are blamed for bad policing and held liable for unlawful detention, which ICE will not indemnify.

**PEP involves indiscriminate immigration status checks.** S-Comm created an unprecedented mandate for local police to run immigration status checks on every single individual booked into custody. This immigration dragnet incentivized racial profiling by enabling police to make arrests just to funnel people to deportation proceedings, and the program dramatically increased deportations. Errors in DHS databases also led to the unlawful detention and even deportation of numerous U.S. citizens and lawful residents. Shockingly, the forced immigration status checks at the heart of S-Comm remain unchanged

# DHS's New "Priority Enforcement Program"



under PEP. PEP is designed to increase the involvement of local enforcement agencies in immigration enforcement, not scale it back.

**PEP is designed to pull people into deportation proceedings, which lack basic due process protections, and can and often does result in much harsher consequences than a person's criminal conviction.** The PEP enforcement priorities are extremely broad, and thus PEP will continue rounding up large swaths of people for deportation with little discretion. ICE rarely exercises prosecutorial discretion, even where there are strong family ties or evidence of rehabilitation. As a result, under PEP, immigrants and their families remain at risk of indiscriminate detention and deportation, even after they have paid their debt to society.

## How does PEP Affect Local Detainer Policies?

Last year, after federal courts found detention on ICE detainer requests to be unconstitutional, approximately 360 law enforcement agencies across the country stopped complying with immigration detainers or otherwise limited when they would respond to ICE requests.

The replacement of S-Comm with PEP does not change any of these policies. ICE holds remain unconstitutional under PEP. As such, many law enforcement agencies will continue to refuse responding to unconstitutional holds. Nonetheless, DHS is aggressively seeking to sign localities on to the program.

## PEP does not reflect the evolution of our criminal justice system

At a time when criminal justice reform, biased policing, and epidemic rates of mass incarceration are at the forefront of the national agenda, DHS's insistence on relying on the criminal justice system to track and detain immigrants is out of touch. Rather than coercing local jurisdictions to do the job of the federal government, DHS should focus on reining in its own agents who regularly profile, threaten, and abuse immigrants.

For any questions contact Angie Junck, Supervising Attorney at [ajunck@ilrc.org](mailto:ajunck@ilrc.org), (415) 321-8558.

*The Immigrant Legal Resource Center, founded in 1979 and based in San Francisco, California is a national resource center that provides training, technical assistance, and publications on immigration law. The ILRC is one of the lead agencies in the United States with expertise on the immigration consequences of crime and immigration enforcement. The ILRC writes some of the only resources on immigration and criminal law and has counseled judges, law enforcement officials, attorneys, County elected officials, and County Counsel offices throughout California and other states on these and related issues.*