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Media Advisory: Legal Scholars Weigh in on Immigration Enforcement Controversy in California and the ICE’s "Secure Communities" Program

WHO:
Law Professors Hiroshi Motomura and Bill Ong Hing, and Director of Immigration Policy Aarti Kohli

WHAT:
Legal scholars weigh in on recent developments surrounding immigration enforcement in California and the “Secure Communities” (S-Comm) an ICE program that automatically shares fingerprints at the point of arrest by local law enforcement.

WHY:
Local authorities in California and across the country are turning against S-Comm because they argue that it overburdens local law enforcement with civil immigration enforcement, resulting in high budgetary and social costs. Community advocates and several elected officials assert that S-Comm harms community policing strategies by eroding trust between victims and witnesses of crime and police who fear immigration consequences. They cite examples of high-profile cases of domestic violence victims in San Francisco and Maryland who have been placed in deportation proceedings after calling for help.

San Francisco Sheriff Michael Hennessey has asked to opt out of S-Comm because it casts “too wide a net”. The S-Comm program calls for fingerprinting and federal immigration database checks of people jailed for minor offenses like a broken taillight and can result in deportation without conviction or a trial.

Recent statements by the Secretary of Homeland Security claiming that states and localities have no power to decide whether to participate in the program raise serious concerns about overreaching by the federal government and intrusion into local police power. Noted professors and researchers weigh in on the issue to provide accurate and important analysis on the legal terrain surrounding S-Comm.

WHEN: Immediately upon interview request.

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"[Secure Communities] undermines trust between local law enforcement and immigrant communities; and
it may overstep the constitutional authority of the federal government to tell local governments how to run its police departments. But Secure Communities has a more basic flaw, with both policy and constitutional dimensions. It is that the program delegates to local police the discretion to decide who—through stops and arrests—will be put into the immigration enforcement system, and who will not. **Even if the federal government retains the theoretical power to decide not to deport some non-citizens, local police will become the gatekeepers.** As a practical matter, their decisions to arrest some residents but not others, to get tough with some neighborhoods but not others, will drive and direct federal immigration policy. The constitutional command that U.S. citizenship is national citizenship means that immigration enforcement decisions can’t be left to local preferences—and local prejudices. The local government proponents of opt-out aren’t arguing that they should be allowed to make immigration decisions. Instead, they are arguing that no local officials should be allowed to make what must ultimately be national policy."

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Regarding ICE’s stated position that states and local governments must participate in S-Comm:

“In the immigration field, the concept of preemption is an appropriate check on over-zealous local enforcement efforts that directly affect immigration regulation, while the Tenth Amendment is a check on federal intrusion on a local jurisdiction’s attempt to be more protective of individual rights and when the locality has a legitimate non-immigration-related purpose such as public safety.”

“The central teaching of the Tenth Amendment cases is that ‘even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.’” Congress may not, therefore, directly compel states or localities to enact or to administer policies or programs adopted by the federal government. It may not directly shift to the states enforcement and administrative responsibilities allocated to the federal government by the Constitution. Such a reallocation would not only diminish the political accountability of both state and federal officers, but it would also ‘compromise the structural framework of dual sovereignty,’ and separation of powers. **Thus, Congress may not directly force states to assume enforcement or administrative responsibilities constitutionally vested in the federal government.**

Regarding California’s current agreement with DHS concerning S-Comm:

“The current Secure Communities program Memorandum of Agreement (MOA) between ICE and the State of California provides that it may be ‘modified at any time by mutual written consent of both parties.’ The implication of this provision is clear: the terms of the MOA are negotiable.”

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2. See *New York*, 505 U.S. at 168; *Printz*, 117 S. Ct. at 2382.
4. See *id. at 2378* ("The power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.")
5. See *New York*, 505 U.S. at 166-68.
“The Warren Institute’s initial research indicates that Secure Communities does implicate the use of local resources. Data indicates that the majority of non-citizens who are booked into ICE custody through Secure Communities have been accused of low-level offenses, including traffic-related misdemeanors. Under typical circumstances, localities would allow low-level arrestees to post bond soon after an arrest. However, if ICE issues a request for the local jurisdiction to hold the person, then bond is often denied and the person must remain in the local jail until the case comes before a judge. Because of ICE holds, local jurisdictions use their own limited resources to feed, detain, and manage low-level offenders who would ordinarily not remain in custody. All of this occurs before the person is even taken into custody by ICE. Secure Communities has resulted in a dramatic rise in ICE holds issued to local jails, thereby overburdening local law enforcement with the detention of those arrested on minor offenses who would not normally be held for extended periods.”

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