RECENT DEVELOPMENT

YOU'RE HOT AND THEN YOU'RE COLD: WHY ICE SHOULD ALLOW STATES TO COMMENT ON SECURE COMMUNITIES

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INTRODUCTION

In 2008, the United States Department of Homeland Security (DHS), through its component Immigration and Customs Enforcement (ICE), introduced the Secure Communities program into fourteen jurisdictions.[1]

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1. *Secure Communities*, U.S. DEP'T OF HOMELAND SEC., http://www.ice.gov/

Through this program, local law enforcement share fingerprints of arrestees with the Federal Bureau of Investigation (FBI), which then forwards them to ICE.[2] As stated by ICE, the program is in place to identify criminal aliens for deportation and has been expanded to include 3,000 jurisdictions since 2008.[3] ICE derives its authority to enforce federal immigration law from the 2002 Homeland Security Act that created DHS.[4]

According to memoranda of agreement between state and local communities and DHS, and DHS statements regarding the program, states and local communities understood participation in Secure Communities to be voluntary.[5] Several states with large urban immigrant populations, including Massachusetts, Illinois, and New York, attempted to opt out or reject the program.[6] In addition to program costs,[7] states have expressed concerns about the effectiveness of the program.[8] States have also pointed out that the program disintegrates the fabric of community policing by creating distrust of law enforcement, which in turn compromises public safety.[9] In fact, several organizations that criticize Secure Communities on

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secure_communities/ (last visited Feb. 2, 2013) [hereinafter DHS WEBSITE].

2. *Id*.

3. *Id*. (explaining that the Department of Homeland Security (DHS) prioritizes removal of the most dangerous criminal aliens).

4. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 2192 (codified as amended in scattered sections of 6 U.S.C.); *see also* Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Mar. 5, 2003) (amending past executive orders and transferring responsibilities previously held by other agencies, including Immigration and Naturalization Services (INS), to DHS in an effort to centralize information).

5. *See* Shankar Vedantam, *No Opt-Out for Immigration Enforcement*, WASH. POST, Oct. 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/09/30/AR2010093007268_pf.html (discussing a Sep. 7, 2010 letter from Homeland Security Secretary Janet Napolitano to Congress regarding Secure Communities that largely reinforced the perception that the program was voluntary).

6. Chip Mitchell, *States May Have to Re-adopt Deportation Program*, WBEZ91.5 (Aug. 17, 2011), http://www.wbez.org/story/2011-08-17/states-may-have-re-adopt-deportation-program-90768.

7. *See, e.g.*, Elise Foley, *Secure Communities Costs Los Angeles County More Than $26 Million a Year: Report*, HUFFINGTON POST, (Aug. 23, 2012, 2:53 PM), http://www.huffingtonpost.com/2012/08/23/secure-communities-los-angeles_n_1824740.html (explaining that the high cost of the program is largely the result of jails holding undocumented immigrants an average of twenty days more than they otherwise would). Detainers issued by Immigration and Customs Enforcement (ICE) are supposed to last only forty-eight hours. *See id.*

8. Antonio Olivo, *Illinois Withdraws from Federal Immigration Program*, CHI. TRIB., May 5, 2011, http://articles.chicagotribune.com/2011-05-05/news/ct-met-state-dream-act-0505-20110504_1_illegal-immigrants-numbersusa-dream-act.

9. *See* Kirk Semple, *Cuomo Ends State's Role in Checking Immigrants*, N.Y. TIMES, June 1, 2011, http://www.nytimes.com/2011/06/02/nyregion/cuomo-pulls-new-york-from-us-fingerprint-checks.html; Mitchell, *supra* note 6.

the grounds that it undermines public safety refer to it as "S-Comm,"[10] perhaps identifying the program's official title, Secure Communities, as a misnomer, because it does not in fact make communities more "secure."

Nonetheless, DHS officials announced that the states' participation in Secure Communities is mandatory and scheduled full implementation in all jurisdictions by 2013.[11] Prior to the announcement by DHS and ICE officials that the Secure Communities program was and has always been mandatory, many states and private organizations believed the program to be voluntary.[12] This belief was partially founded on a letter to Congress from DHS department head Janet Napolitano explaining that states that wished to opt out of the program could contact ICE, as well as statements by other ICE officials that DHS was amenable to removing jurisdictions from the program deployment plan.[13] Additionally, in 2011, DHS revoked all memoranda of agreement with local jurisdictions signed under the previous administration,[14] which would seem to indicate that the memoranda of agreement were at least unclear on this point. While DHS has stated that its authority to impose the program on the states is congressionally mandated,[15] it has yet to detail the constitutional source of this authority.

This is not to say that DHS has not attempted to address state concerns about the program. It has emphasized prosecutorial discretion,[16] and it has

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10. *See, e.g.*, Judith A. Greene, *The Cost of Responding to Immigration Detainers in California*, JUSTICE STRATEGIES, 1 (Aug. 22, 2012), http://www.justicestrategies.org/sites/default/files/publications/Justice%20Strategies%20LA%20CA%20Detainer%20Cost%20Report.pdf.

11. DHS WEBSITE, *supra* note 1.

12. Vedantam, *supra* note 5.

13. *Id.*; Letter from Janet Napolitano, U.S. Sec'y of Homeland Sec., to the Honorable Zoe Lofgren, Chairwoman, Subcomm. on Immigration, Citizenship, Refugees, Border Sec. & Int'l Law (Sept. 7, 2010), *available at* http://personal.crocodoc.com/yzmmKP#redirect.

14. Tara Bahrampour, *Immigration Authority Terminates Secure Communities Agreements*, WASH. POST, Aug. 7, 2011, http://www.washingtonpost.com/local/immigration-authority-terminates-secure-communities-agreements/2011/08/05/gIQAlwx80I_story.html (stating that ICE Director John Morton sent letters to state governors terminating the memoranda of agreement "to avoid further confusion" over whether Secure Communities was mandatory).

15. DHS WEBSITE, *supra* note 1.

16. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FEA NO. 306-112-002b, PROSECUTORIAL DISCRETION: CERTAIN VICTIMS, WITNESSES, & PLAINTIFFS (2011), http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf. It is against ICE policy to initiate removal proceedings against those known to be "immediate" victims or witnesses of crime, particularly victims of domestic violence. *Id.* However, there is still a possibility that victims of domestic violence could be detained by ICE through Secure Communities. *Id.* It should be noted that the prosecutorial discretion, not an executive order, is also the basis of the Deferred Action for Childhood Arrivals

created a mechanism to file civil rights complaints.[17] In fact, ICE Director John Morton established a Secure Communities task force in June 2011 to address the concerns of state and local officials.[18] However, several task force appointees later resigned, including retired Sacramento police chief Arturo Venegas Jr., because they could not endorse the task force's final report.[19] Furthermore, DHS has never issued any proposed rules regarding the program, nor has it applied any other form of rulemaking. Thus, the only way state actors accountable to the public can oppose Secure Communities is to publicly disavow it or pass laws designed to limit its effect.[20]

This Article explores the DHS's authority to make state participation in Secure Communities mandatory without giving state and local officials a formal opportunity to affect its implementation. It also explains why, as a matter of policy, DHS should give state and local communities a voice in how the program is run. Part I discusses how Secure Communities operates, and presents recent statistics on deportation proceedings that have

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program announced in June 2012. U.S. DEP'T OF HOMELAND SEC., EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. This program allows children under the age of sixteen who lacked the requisite intent to illegally enter the country and who meet certain criteria to apply for work permits and deferred action on their immigration status, at least temporarily preventing their removal from the United States. *Id.*

17. U.S. DEP'T OF HOMELAND SEC & U.S. IMMIGRATION & CUSTOMS ENFORCEMENT., SECURE COMMUNITIES COMPLAINTS INVOLVING STATE OR LOCAL LAW ENFORCEMENT AGENCIES (2011), http://www.ice.gov/doclib/secure-communities/pdf/complaint protocol.pdf (setting out how DHS will manage civil rights complaints involving state and local law enforcement).

18. Julia Preston & Sarah Wheaton, *Meant to Ease Fears of Deportation Program, Federal Hearings Draw Anger*, N.Y. TIMES, Aug. 25, 2011, http://www.nytimes.com/2011/08/26/us/politics/26immig.html.

19. Paloma Esquivel, *Report Criticizes Deportation Program, Urges Changes*, L.A. TIMES, Sept. 16, 2011, http://articles.latimes.com/2011/sep/16/local/la-me-secure-communities-20110916. Several of the other task force members, including representatives of the AFL-CIO, stated they could not endorse the final report of the task force. *Id.* Mr. Venegas explained that he did not think "it went far enough" and that "people will still get into the system that shouldn't be there." *Id.*

20. *See, e.g.*, Cindy Chang, *Pelosi, California Democrats Urge Gov. Brown to Sign Trust Act*, L.A. TIMES BLOG, (Sept. 13, 2012, 3:16 PM), http://latimesblogs.latimes.com/lanow/2012/09/nancy-pelosi-california-democrats-trust-act-jerry-brown.html (describing a proposed bill that would limit local law enforcement's ability to cooperate with federal immigration agencies); Ben Prawdzik, *Deportation Program Remains Controversial*, YALE DAILY NEWS, Sept. 10, 2012, http://www.yaledailynews.com/news/2012/sep/10/secure-communities-leads-to-mexican-nationals/ (describing how Connecticut Governor Dan Malloy stated that the state would determine whether to honor each ICE detainment request "on a case-by-case basis" (internal quotation marks omitted)).

resulted from the program. Part II addresses whether and how DHS can impose the program on the states constitutionally. Part III discusses whether Secure Communities is a rule[21] that should have been subjected to notice-and-comment rulemaking procedures before being imposed. Part IV sets forth reasons Secure Communities should be subjected to notice-and-comment rulemaking as a matter of policy. Finally, the Article concludes by stating that notice-and-comment rulemaking is a good way for DHS to maintain the legitimacy of the program and restore public faith in its enforcement policies.

I. BACKGROUND

A. The Creation of Secure Communities and How It Operates

Executive authority to run the Secure Communities program was established pursuant to congressional authorization in 2002.[22] However, while commencement of the program was authorized in 2002, funds were not appropriated for it until 2008.[23] Congress conditioned the monies so that none of the funds made available for the program would be used until the Committees on Appropriations for the House and the Senate received an expenditure plan from the Secretary of Homeland Security.[24] The funds were originally appropriated to expand the Criminal Alien Program (CAP),[25] through which ICE identifies incarcerated criminal aliens in federal and state prisons for deportation upon completion of their sentences.[26] Soon after the funds were appropriated for the program, ICE formally submitted its plan, dubbed Secure Communities, to Congress.[27] The following year, $1,000,000,000 was set aside for ICE to "identify aliens

21. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551, 553 (2006).

22. *See* 8 U.S.C. § 1722 (2006) (establishing an interoperable law enforcement and intelligence electronic data system that contains information on aliens and provides access to information in the law enforcement and intelligence communities "relevant to determine . . . [the] deportability of an alien").

23. *See* Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, 121 Stat. 1844, 2050–51 (2007) (setting aside $200,000,000 to "improve and modernize" methods to identify aliens that have been convicted, sentenced to imprisonment, and can be deported).

24. *Id.* (laying out that the expenditure plan was to include, among other things, a strategy for identifying criminal aliens and the establishment of a removal process for criminal aliens).

25. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, SECURE COMMUNITIES CRASH COURSE 4 (2009), http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf [hereinafter CRASH COURSE].

26. U.S. DEP'T OF HOMELAND SECURITY, CRIMINAL ALIEN PROGRAM, http://www.ice.gov/criminal-alien-program/ (last visited Feb. 2, 2013).

27. CRASH COURSE, *supra* note 25, at 4.

convicted of a crime, and who may be deportable."[28] In 2009, David J. Venturella, Executive Director of Secure Communities, stated to Congress that "local law enforcement officials, as well as the local governments, can opt out of participating . . . . [I]t is not a mandatory program, it is certainly voluntary."[29]

Seven jails originally participated in the Secure Communities pilot program.[30] The program later expanded, operating at over 100 locations by October 2009.[31] Consistent with federal law, state and local communities signed memoranda of agreement in conjunction with the program's implementation.[32] In a 2010 statement about Secure Communities, ICE Director John Morton, informed Congress that the memoranda of agreement were being revised to "ensure that all of our . . . partners are using the same standards in implementing the 287(g) program."[33]

However, ICE describes Secure Communities as merely "complementary" to any "on the ground" ICE programs operating pursuant to a memorandum of agreement in a state or local jurisdiction.[34] Under what ICE describes as "287(g) programs," state or local law enforcement officials voluntarily enter into an agreement with ICE to exercise immigration enforcement authority in their jurisdiction on behalf

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28. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110–329, 122 Stat. 3574, 3659 (2008) [hereinafter Consolidated Security Act].

29. *Dep't of Homeland Sec. Appropriations for 2010: Hearings Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 111th Cong. 994 (2009) [hereinafter *DHS 2010 Appropriations Hearings*] (statement of David J. Venturella, Executive Director of Secure Communities, ICE) (responding to the question of what is expected of local law enforcement in the booking process).

30. Kevin Krause, *Database IDs Immigrants*, DALL. MORNING NEWS, Nov. 13, 2008, at 5B.

31. CRASH COURSE, *supra* note 25, at 4.

32. *See* 8 U.S.C. § 1357(g) (2006) (specifying that when a state official performs a function of an immigration officer at the expense of the state, it must be pursuant to a written agreement between the State and the Attorney General); *see also* Consolidated Security Act, *supra* note 28, 122 Stat. at 3659 (referring to the formation of agreements consistent with § 287(g) of the Immigration and Nationality Act, as codified in 8 U.S.C. § 1357(g) (2006)); *cf. Dep't of Homeland Sec. Appropriations for 2011: Hearings Before the H. Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 111th Cong. 247–48 (2010) [hereinafter *DHS 2011 Appropriations Hearings*] (statement of John Morton, Assistant Secretary of ICE) (stating that by January 31, 2010, ICE had signed "287(g) program agreements with law enforcement agencies in 71 jurisdictions in 26 states").

33. *DHS 2011 Appropriations Hearings*, *supra* note 32, at 248 (statement of John Morton, Assistant Secretary of ICE).

34. CRASH COURSE, *supra* note 25, at 18.

of ICE.[35] DHS was later prompted to announce that it was terminating all memoranda of agreement between DHS and jurisdictions made in conjunction with the Secure Communities program "to avoid further confusion" as to the voluntariness of the program,[36] that may have arisen due to misidentification of the program by the states as a voluntary 287(g) program.

The first step in the Secure Communities process begins when a local law enforcement agent (LEA) makes an arrest.[37] An arrestee is usually fingerprinted as part of the booking process. After the arrestee is fingerprinted, the LEA submits the fingerprints to the FBI's Criminal Justice Information Services Division (CJISD) database to retrieve the criminal history of the arrestee.[38] Through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program, the fingerprints are automatically checked against the Automated Biometric Identification System (IDENT).[39] US-VISIT is a program through which the FBI furnishes DHS with fingerprints and other criminal history information.[40]

If a positive identification for the fingerprints is found in the US-VISIT database, a request for analysis is automatically sent to the Law Enforcement Support Center (LESC) of ICE.[41] The LESC analyzes relevant information from the positive identification, such as the nature of the crime leading to arrest, the arrestee's criminal history, and the arrestee's current immigration status, and applies immigration law.[42] ICE then uses its discretion to notify the LEA of the arrestee's immigration status and to

35. *See id*.

36. Bahrampour, *supra* note 14 (stating ICE reported that Director John Morton sent a letter to state governors terminating the agreements). State confusion regarding the voluntariness of the Secure Communities program may have stemmed in part from the fact that the early memoranda or agreement were comparable to those used for the voluntary 287(g) programs.

37. CRASH COURSE, *supra* note 25, at 6 (providing a flow chart which models the process).

38. *See id.*; *see also DHS 2010 Appropriations Hearings*, *supra* note 29, at 948 (identifying all of the information sharing databases and their respective agencies that provide information sharing to state and local law enforcement).

39. *DHS 2010 Appropriations Hearings*, *supra* note 29, at 948–49.

40. *Partners*, FBI BIOMETRIC CTR. OF EXCELLENCE, http://www.biometriccoe.gov/partners.htm (last updated Aug. 1, 2012) (describing the United States Visitor and Immigrant Status Indicator Technology program as a mechanism that facilitates information sharing between federal agencies to improve national border security by determining who is a security risk).

41. CRASH COURSE, *supra* note 25, at 6.

42. *Id.*

provide instruction for detainment.[43] The LEA then takes the appropriate action upon instruction from ICE.[44] Appropriate action may consist of holding the arrestee for forty-eight hours until ICE can take the arrestee into custody.[45] However, some state officials and public interest groups have noted that individuals are sometimes held for weeks under ICE detainers.[46]

Even before Secure Communities was implemented, any person arrested and booked at a state or local jail was fingerprinted and the fingerprints were run against the FBI's CJISD database.[47] The FBI began research on technologies for automated fingerprint matching as early as 1967 and by 1994 began developing the Integrated Automated Fingerprint Identification System, which became operational in 1999.[48] Indeed, the FBI has long recognized the need for information sharing and cooperation between FBI, state, and local officials to increase the effectiveness of law enforcement.[49] The reality is, without information sharing between the FBI and state and local law enforcement, both federal and state law enforcement agencies would lose valuable resources that protect United States citizens on a day-to-day basis.[50]

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43. *See id.*

44. *Id.*

45. Andrew Joseph, *Deportations Miss Mark, Foes Say*, THE OREGONIAN, Oct. 7, 2011, *available at* 2011 WLNR 20409007 (stating that under the Secure Communities program arrestees for whom a match is found in DHS databases must be detained by local law enforcement to cooperate with ICE.)

46. *See* Greene, *supra* note 10, at 2 (noting that the average length of stay for people released from the Los Angeles County Jail to ICE custody was 32.3 days); *see also* Foley, *supra* note 7 (stating that at ICE's request, jails are holding suspected undocumented immigrants twenty days longer than they normally would without Secure Communities).

47. *See DHS 2010 Appropriations Hearings*, *supra* note 29, at 948 (explaining that the process to check immigration status prior to Secure Communities required that a local police officer take the initiative to contact ICE agents separately).

48. *Biometrics in Government Post-9/11: Advancing Science, Enhancing Operations*, NAT'L SCI. & TECH. COUNCIL 8–11 (2008), http://www.biometrics.gov/Documents/Biometrics%20in%20Government%20Post%209-11.pdf (summarizing the historical timeline of the use of "biometrics" among federal law enforcement agencies such as the Federal Bureau of Investigation (FBI)). "Biometrics" refers to "the measurement and analysis of unique physical or behavioral characteristics" such as fingerprints. *See Biometrics Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/biometrics (last visited Feb. 2, 2013).

49. *See* J. Edgar Hoover, *The United States Bureau of Investigation in Relation to Law Enforcement*, 23 J. CRIM. L. & CRIMINOLOGY 439, 440–41 (1932) (recognizing that "actively friendly relations" between the FBI and local police officials result in "mutual aid and assistance" and such relations are important to state and local law enforcement efforts and federal law enforcement efforts alike).

50. *See generally id.* (discussing the successes of information sharing, including fingerprint

B. The Outcomes of Secure Communities

According to ICE, a record number of criminal aliens have been removed from the United States since October 2008.[51] Between October 2008 and October 2011, the number of convicted criminal aliens removed by ICE increased by 89%, while the number of aliens without criminal records who were removed dropped by 29%.[52] ICE credits these trends to the implementation of Secure Communities.[53]

According to ICE, in fiscal year 2012, the percentage of criminal aliens removed slightly outpaced the percentage of aliens removed for other immigration violations.[54] ICE's numbers did not state what percentage of the aliens included in the other immigration categories were discovered under the Secure Communities program.[55] Aliens removed for noncriminal violations include recent illegal entrants and re-entrants, immigration fugitives, and those who do not have any criminal convictions.[56]

In fiscal year 2010, Secure Communities produced more than 248,000 alien matches.[57] The number of matches for fiscal year 2011 surged to 348,000.[58] In just the first eight months of 2012, 395,081 alien matches were produced.[59]

ICE categorizes criminal aliens into "Level 1," "Level 2," and "Level 3," with Level 1 representing the criminal offenders who have committed "aggravated felonies"[60] such as murder, rape, and sexual abuse of

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sharing, in apprehending criminals across state lines and recommending an increase in information sharing at the international level).

51. *See* DHS WEBSITE, *supra* note 1.

52. *Id.*

53. *Id.*

54. *See Secure Communities*, U.S. DEP'T HOMELAND SEC., http://www.ice.gov/removal-statistics/ (last visited Feb. 2, 2013) (showing that 55% of aliens deported in fiscal year 2012 were criminal aliens, while 45% were removed for other immigration violations or concerns).

55. *See id.* (specifying that the numbers included individuals removed for whom there was no record of a criminal conviction in the FBI database, but not whether they were removed as a result of the Secure Communities program).

56. *See id.*

57. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through September 30, 2011*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 1 (2011), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf.

58. *Id.*

59. *Secure Communities Monthly Statistics Through August 31, 2012 IDENT/IAFIS Interoperability*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2 (2012), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf [hereinafter *ICE Statistics Through August 2012*].

60. *See, e.g.*, *id.*; *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, CIVIL

children.[61] However, under the Immigration and Nationality Act (INA), aggravated felonies that render any alien removable also include many offenses that are normally considered to be only misdemeanors for United States citizens.[62] Loose descriptions of offenses listed under the definition of "aggravated felonies" contribute to the inconsistent categorization of offenses committed by citizens versus noncitizens.[63]

The other two categories are primarily composed of those who have committed misdemeanors.[64] Level 2 offenders include aliens convicted of any felony or three or more misdemeanors—crimes that are punishable by less than one year in jail.[65] Level 3 offenders include aliens convicted of any crime that is punishable by less than one year in jail.[66] Thus, Level 1 primarily involves crimes against persons, Level 2 primarily involves crimes against property (such as larceny and fraud), and Level 3 extends to all other crimes.[67]

In fiscal year 2009, 14,482 aliens were removed pursuant to matches in Secure Communities databases.[68] Of those 14,482, non-criminal

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IMMIGRATION ENFORCEMENT: PRIORITIES FOR THE APPREHENSION, DETENTION, AND REMOVAL OF ALIENS (2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf [hereinafter CIVIL IMMIGRATION ENFORCEMENT].

61. *See* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (2006) (listing murder, rape, and sexual abuse of a minor, among others crimes such as drug trafficking, and certain crimes of violence and theft); *see also* CIVIL IMMIGRATION ENFORCEMENT, *supra* note 60, at 2 (specifying that Level 1 offenders are aliens convicted of aggravated felonies under §1101(a)(43)); *ICE Statistics Through August 2012*, *supra* note 59, at 55.

62. *See* 8 U.S.C. §§ 1101(a)(3), 1182(a)(9)(A)(i) (defining aliens as those who are not citizens or nationals of the United States, and classifying aliens convicted of aggravated felonies and ordered removed as inadmissible to the United States and ineligible for visa waivers if, after lawful admittance to the country, they committed an aggravated felony); *cf.* Vashti D. Van Wyke, Comment, *Retroactivity and Immigrant Crimes Since* St. Cyr*: Emerging Signs of Judicial Restraint*, 154 U. PA. L. REV. 741, 749 nn.45 & 47 (2006) (explaining that under the definition of an aggravated felony in § 1101(a)(43), any alien, legal or illegal, may be removed for misdemeanors and low-level offenses such as petty larceny).

63. *See generally Aggravated Felonies and Deportation*, TRAC IMMIGRATION (June 9, 2006), http://trac.syr.edu/immigration/reports/155/ (discussing how the broad language of the Immigration and Nationality Act (INA) with respect to offenses that make an alien "deportable" has caused widespread disagreement among courts making determinations as to whether an offense is an aggravated felony).

64. *Cf.* DHS WEBSITE, *supra* note 1 (stating that over time the percentage of serious offenders removed through Secure Communities will increase, while those convicted of misdemeanors will decrease).

65. *ICE Statistics Through August 2012*, *supra* note 59, at 55.

66. *Id.*

67. *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC.: SECURE COMMUNITIES TALKING POINTS 2 (2010), *available at* http://www.ice.gov/doclib/foia/secure_communities/talkingpointsjanuary122010.pdf.

68. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through April 30,*

immigration violators constituted 3,753 of the aliens removed, which is 392 more than the 3,361 Level 1 criminal offenders removed.[69] Furthermore, 5,835 of the aliens removed were Level 3 offenders.[70] In the first eight months of fiscal year 2012, 76,555 aliens were removed as a result of Secure Communities, with the increase due in large part to the massive expansion of Secure Communities from eighty-eight jurisdictions to 1,479.[71] Of those 76,555, 17,288 were noncriminal immigration violators, and 21,296 were Level 3 offenders who had not committed aggravated felonies.[72] Accordingly, a total of 38,584 of the aliens removed as result of a match in the database were either non-criminal immigration violators or had not been convicted of aggravated felonies or multiple misdemeanors—15,985 more than the number of Level 1 offenders who had been convicted of aggravated felonies.[73]

ICE's statistics through August of fiscal year 2012 divides aliens removed for noncriminal immigration violations into three categories: "ICE fugitives," "prior removals and returns," and "EWIs, visa violators, and overstays."[74] Of those three categories, aliens categorized as "prior removals and returns" had the highest removal rates of those removed for noncriminal immigration offenses from fiscal years 2009–2012.[75] Those with prior removal and returns are defined as aliens who either had a previous removal case or a confirmed return.[76] The category with the second highest removal rate is "EWIs, visa violators, and overstays."[77] "EWIs" refer to those aliens who entered the country without inspection.[78] Finally the category with the lowest removal rates is "ICE Fugitives."[79] "ICE Fugitives" refer to those aliens who did not comply with a final

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2011, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 2 (2011), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-feb28.pdf.

69. *Id.*

70. *Id.*

71. *ICE Statistics Through August 2012*, *supra* note 59, at 2.

72. *See id.*

73. *Id.*

74. *Id.*

75. *Id.* (providing that "prior removals and returns" constituted 2,426 removals in fiscal year 2009, 9,010 removals in fiscal year 2010, 13,638 removals in fiscal year 2011, and 11,632 removals through August of fiscal year 2012).

76. *Id.*

77. *Id.* (showing that "EWIs, visa violators, and overstays" constituted 951 removals in fiscal year 2009, 2,607 removals in fiscal year 2010, and 4,156 removals in fiscal year 2011, and 3,676 removals up through August of fiscal year 2012).

78. *Id.*

79. *Id.* (reflecting that 294 "ICE fugitives" were removed in fiscal year 2009, 1,513 were removed in fiscal year 2010, 2,375 were removed in fiscal year 2011, and 1,980 were removed through August of fiscal year 2012.).

removal order, deportation, or exclusion.[80]

II. CONSTITUTIONAL AUTHORITY TO IMPOSE A FEDERAL PROGRAM ON THE STATES

The constitutional inquiry into the authority of an agency to implement federal programs that affect the states without their consent is what is known as "the anti-commandeering doctrine."[81] This doctrine was established by the Supreme Court in *Printz v. United States*,[82] in which the Court invalidated a provision of the Brady Handgun Violence Prevention Act that required state officers to conduct background checks on prospective gun purchases. The anti-commandeering doctrine provides that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[83] It also establishes that the federal government cannot "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[84]

In its decision, the Court relied extensively on its precedent in *New York v. United States*,[85] in which it held that a provision of Congress's Low-Level Radioactive Waste Policy Act violated the Tenth Amendment by directing the states to either regulate generators and disposers of waste or to accept ownership of the waste themselves.[86] Moreover, the *Printz* Court explicitly rejected any justification for imposing a federal regulatory program on the states under the Article II powers of the Executive Branch and the

80. *Id.*

81. *See, e.g.*, Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1232 (2004); *see also* Daniel Booth, Note, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063, 1073 (2006).

82. 521 U.S. 898, 935 (1997).

83. *Id.* at 925.

84. *Id.* at 935 (explaining that the federal government cannot circumvent the anti-commandeering doctrine, which prohibits it from imposing federal regulatory programs on the states or state officials by conscripting state officers directly).

85. *See generally id.* at 920–35 (discussing the historical record set forth in *New York v. United States*, 505 U.S. 144 (1992), and delineating the historical support for the principle that the federal government was meant to govern individuals and not states, and that the Constitution intentionally set forth a form of government that divided the concentration of power between the federal government and the states).

86. *See* 505 U.S. 144, 176–77, 188 (1992) ("Because an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.").

Supremacy Clause.[87] The Court noted that the President's Article II responsibility[88] could not be "effectively transfer[red] . . . to thousands of [state officers]"[89] and explained that the Supremacy Clause commands that state officers comply only with the Constitution and laws made "in pursuance" of the Constitution.[90]

The Court further explained that even if a federal act removes policymaking discretion from the states, it can "worsen[ ] the intrusion upon state sovereignty" since it "reduc[es] [states] to puppets of a ventriloquist Congress."[91] Additionally, the Court pointed out that "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."[92]

The Court later distinguished between federal regulation that "seek[s] to control or influence the manner in which States regulate private parties," which is subject to the anti-commandeering doctrine, from federal regulation of "state activities," which is not subject to the anti-commandeering doctrine.[93] The Court clarified that regulation of state activities that does not require states to enact laws or regulations or require state officials to assist in the enforcement of federal statutes regulating private individuals, is governed by its precedent in *South Carolina v. Baker*.[94] In *Baker*, the Court noted the principle that "a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect."[95]

Congress delegated its authority to execute immigration and

87. 521 U.S. at 922–25.

88. U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States").

89. *Printz*, 521 U.S. at 922.

90. *See id.* at 924 (rejecting the dissent's argument that Article VI of the Constitution, which requires that both federal and state officers support the Constitution and the laws of Congress, in conjunction with the Supremacy Clause, make laws enacted by Congress binding on state officers).

91. *Id.* at 928.

92. *Id.* at 930 (citing Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994)).

93. Reno v. Condon, 528 U.S. 141, 150 (2000) (explaining that a law restricting states from disclosing a driver's personal information without the driver's prior consent did not violate the anti-commandeering doctrine).

94. *Id.* at 150–51.

95. South Carolina v. Baker, 485 U.S. 505, 514–15 (1988) (holding that a tax provision denying federal income tax exemptions for interest earned on certain state government bonds was constitutional).

naturalization law[96] to the President through passage of the INA.[97] Despite the new challenges posed to immigration and border security by the modern ascension of terrorism, the federal government cannot—out of necessity—go beyond the Constitution by compelling the states to act for it.[98] Moreover, as at least one circuit court has noted, under *Printz*, Congress cannot "hinge [a] state's right to regulate in an area that the state has a constitutional right to regulate on the state's participation in a federal program."[99]

On the surface, it seems the states would be hard-pressed to challenge the authority of DHS under the *Printz* doctrine. Secure Communities does not "compel the States to enact or enforce" a federal regulatory program by legislative or executive action.[100] Under the program, states are not required to take any action to implement Secure Communities; state and local law enforcement merely trigger operation of the program when, and if, they decide to share the fingerprints of the arrestee they have booked. Nor does the program "issue directives requiring the States to address particular problems nor command the States' officers . . . to administer or enforce a federal regulatory program."[101] State and local police enforcement do not communicate with DHS directly when they share fingerprints with the FBI.[102] Furthermore, fingerprint sharing with the FBI is consistent with pre-existing standard operating procedures for booking arrestees.[103]

However, since the program requires state and local law enforcement to change standard operating procedures[104] if they wish to impede

96. U.S. CONST. art. I, § 8, cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization").

97. *See generally* 8 U.S.C. §§ 1101–1357 (2006).

98. *Cf.* Clinton v. City of New York, 524 U.S. 417, 452–53 (1998) (Kennedy, J., concurring) (explaining that even when employed constitutional mechanisms and principles of separation of powers are "insufficient" to address a policy issue, necessity does not "validate an otherwise unconstitutional device").

99. Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1266 (11th Cir. 2011).

100. Printz v. United States, 521 U.S. 898, 935 (1997).

101. *Id.*

102. *See supra* Part I.A.

103. *See id*.

104. *See DHS 2010 Appropriations Hearings*, *supra* note 29, at 948 (noting that through the normal booking process state and local law enforcement fingerprint all arrestees then run the fingerprints against the FBI's criminal database). Secure Communities makes immigration checks part of the regular criminal booking process. *Id*. In order to avoid triggering the fingerprint sharing aspect of Secure Communities, the arresting officer would have to choose not to process the arrestee's fingerprints in the FBI criminal database, putting the officer (or her superiors) in a position of making policy decisions.

administration of Secure Communities, this aspect of the program is unconstitutional. Secure Communities transforms the everyday police officer into a policymaker on behalf of the federal government. When police officers choose to either share or not share an arrestee's fingerprints with the FBI, a police officer is no longer simply administering state policy—he is administering federal policy. Although fingerprint sharing between state and local law enforcement and the FBI is voluntary, the program places state and local law enforcement in a policymaking position that arguably "seek[s] to control or influence the manner in which States regulate private parties."[105]

For example, if the officer decides to share the fingerprints with the FBI, the arrestee, who may have committed a relatively minor offense or no offense at all, may be identified and deported by ICE. Such arrests alienate immigrant communities, resulting in unreported crimes and potentially triggering the deportation of a victim or a witness of crime due to Secure Communities. Alternatively, if the officer decides not to share the fingerprints with the FBI, he loses valuable information about the arrestee's criminal history and outstanding warrants, and he risks releasing a dangerous criminal back into society. Therefore, if states cannot opt out of fingerprint sharing with ICE through Secure Communities, they "are still put in the position of taking the blame for its burdensomeness and for its defects,"[106] because it is action by their officials that sets the operation of Secure Communities in motion. Thus, there exists a valid constitutional challenge to the implementation of Secure Communities under the *Printz* anti-commandeering doctrine.

III. PROCEDURAL, INTERPRETIVE, OR SUBSTANTIVE: IS SECURE COMMUNITIES A RULE UNDER THE ADMINISTRATIVE PROCEDURE ACT?

If it is empowered to do so by Congress, an agency may issue substantive rules that promulgate and articulate legal standards.[107] The Administrative Procedure Act (APA) defines a rule as follows: "[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing

105. Reno v. Condon, 528 U.S. 141, 150 (2000).

106. *Printz*, 521 U.S. at 930.

107. *See* ANDREW F. POPPER ET. AL., ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 65–66 (2d ed. 2010) (explaining, in a broader discussion of the need for rules, that Congress is often not in the best position to articulate with precision the legal standards with which the public must comply, and that the administrative agencies to which Congress delegates rulemaking power are created to fulfill this role).

the organization, procedure, or practice requirements of an agency . . . ."[108] Rulemaking is the mechanism through which an agency formulates, changes, or repeals a rule.[109]

Under most circumstances, notice-and-comment rulemaking is required over other rulemaking procedures.[110] The purpose of notice-and-comment rulemaking is to provide "a procedure that is analogous to the procedure employed by legislatures in making statutes," because "[w]hen agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive."[111] When notice-and-comment rulemaking is required, a Notice of Proposed Rulemaking is published in the Federal Register and includes: "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."[112]

After notice, the agency must give any person or organization interested in the proposed rule an opportunity to participate in its rulemaking through written or oral submission of their arguments or views and the data supporting those views or arguments.[113] However, notice-and-comment rulemaking does not apply to interpretive rules, general statements of policy, rules about agency organization, procedure or practice, or if the agency for good cause finds that notice-and-comment rulemaking is "impracticable, unnecessary, or contrary to the public interest."[114] Moreover, if a rule does not fall into one of the APA exemptions, most courts will not find an exemption implicit in an agency's enabling statutes.[115] Thus, substantive rules that are not promulgated through

108. Administrative Procedure Act, 5 U.S.C. § 551(a)(4) (2006).

109. *See id*. § 551(a)(5).

110. *See id*. §§ 551(a)(4), 553 (requiring notice-and-comment rulemaking for any agency action that does not meet statutory exceptions).

111. *See* Hoctor v. USDA, 82 F.3d 165, 170–71 (7th Cir. 1996) (explaining that because a rule promulgated by the Department of Agriculture, which required an eight-foot fence for the secure containment of animals, could easily be changed to require a different height and still achieve its regulatory purpose, the concerns of thousands of animal dealers and other groups affected by the rule were legitimate and the agency was obliged to listen to them).

112. Administrative Procedure Act, § 553(b).

113. *Id*.

114. *Id*.

115. *See, e.g.*, Yale–New Haven Hosp. v. Leavitt, 470 F.3d 71, 83–86 (2d Cir. 2006) (declining to accept the Department of Health and Human Services' argument that it had implicit authority under the Medicare Act to promulgate a per se rule denying Medicare reimbursement for devices that had not received premarket approval from the Food and Drug Administration); Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1193 (9th Cir. 2000) (rejecting an implied exemption to Administrative Procedure Act (APA) judicial review where Congress was silent as to APA applicability in the agency's enabling

notice-and-comment rulemaking are invalid.[116]

Various courts have held that how the agency characterizes a rule is not dispositive of whether it falls into an APA exception, rather "it is the substance of what the [agency] has purported to do and has done which is decisive."[117] However, while a "rule" and the circumstances under which an agency should initiate notice-and-comment rulemaking are statutorily defined, it is not simple to determine whether an agency action or statement is a rule.[118] Nevertheless, courts have delineated some standards, albeit somewhat "hazy" and "fuzzy,"[119] that distinguish substantive rules from rules that fall into the procedural, interpretive, or general statement of policy APA exceptions.

A substantive rule embodies "underlying policy" that "is not generally subject to challenge before the agency."[120] A rule can be characterized as substantive if it is "agency action . . . [that] encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of

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statute).

116. *Cf.* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 523–24 (1978) (recognizing that the APA generally represents what Congress intended to be the procedural minimum for courts to impose on the agency rulemaking process and rejecting a claim that an agency's enabling statute could implicitly eliminate APA requirements on notice-and-comment rulemaking in granting an agency enforcement power).

117. Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco and Firearms, No. 00CV0273(RBW), 2002 WL 33253171, at *10 (D.D.C. June 24, 2002) (alteration in original) (quoting Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 710 F.2d 842, 846 (D.C. Cir. 1983); *accord* Chamber of Commerce v. OSHA, 636 F.2d 464, 468 (D.C. Cir. 1980) (explaining that even if the agency regarded the rule as interpretive, the label was merely informative as to whether the rule was subject to APA exemptions).

118. *See* Lincoln v. Vigil, 508 U.S. 182, 196–97 (1993) (noting that deciding whether an agency's statement is a "rule" under the APA is a difficult exercise but declining to engage in that determination); *see also* Jacob E. Gersen, Essay, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705, 1705 (2007) ("The distinction between legislative rules [requiring notice-and-comment rulemaking] and nonlegislative rules is one of the most confusing in administrative law.").

119. *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (describing the "spectrum" between interpretive rules and substantive rules as a "hazy continuum," but stating that the purpose in distinguishing between interpretive and substantive rules is "explicating Congress' desires" from substantive content that the agency seeks to add in the exercise of its delegated authority); *see also* Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (describing the distinction between legislative (substantive) and non-legislative (non-substantive) rules as "enshrouded in considerable smog" (internal citation omitted) (internal quotation marks omitted)).

120. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (distinguishing a substantive rule from a general statement of policy by noting that a substantive rule can be waived or applied in a particular instance based on the adjudicated facts in an administrative proceeding).

behavior."[121] As such, substantive rules establish "a standard of conduct" that has the force of law,[122] and they significantly impact private interests by granting rights or imposing obligations on particular individuals or groups.[123]

On the other hand, a rule can be defined as interpretative if it is a "statement[ ] as to what [an] administrative officer thinks the statute or regulation means."[124] Interpretive rules are characterized as those that merely clarify or explain existing laws or regulations, are "essentially hortatory" or "instructional," and explain "particular terms."[125] The interpretive rule exception reflects the idea that when an agency's determination is "not 'what is the wisest rule,' but 'what is the rule,'" public input is not necessary.[126]

Alternatively, a rule can be defined as procedural if it merely "borrow[s] the substantive standards of the [enabling] statute and seek[s] to channel agency enforcement resources toward ferreting out violations of the statute."[127] For example, "enforcement plan[s]" that impose no new burdens on interested parties can be considered procedural.[128] Similarly, "guidelines developed by an agency to aid [its] discretion" can be characterized as either procedural or interpretive.[129] The reason such guidelines and enforcement plans are not considered substantive rules is that they do not create new law or alter statutory standards.[130] However, as courts have noted, "procedure impacts on outcomes and thus can virtually

121. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 99 (D.D.C. 2002) (internal quotation marks omitted) (citing *Bowen*, 834 F.2d at 1047).

122. *Pac. Gas. & Elec. Co.*, 506 F.2d at 38.

123. *Bowen*, 834 F.2d at 1045.

124. *Id.*

125. *Id.*; *see* Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1340–41 (4th Cir. 1995) (finding that an interim rule issued by the Attorney General to the Board of Immigration Appeals was exempt from notice-and-comment rulemaking because it did not establish a binding norm).

126. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005) (explaining that memoranda that did not engage in any policy analysis or otherwise determine which rule is better, more effective, or less burdensome were interpretive rules).

127. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 99 (D.D.C. 2002) (quoting *Bowen*, 834 F.2d at 1057 n.4)

128. *See id.* at 100; *see also* Cal-Almond, Inc. v. USDA, 14 F.3d 429, 447 (9th Cir. 1993) (holding that a California storage requirement was a procedural rule because it was a "'legitimate means of structuring [the agency's] enforcement authority'" (quoting *Bowen*, 834 F.2d at 1055).

129. Md. Dep't of Human Res. v. Sullivan, 738 F. Supp. 555, 560 (D.D.C. 1990) (holding that the program instruction was a nonbinding rule qualifying as exempt from notice-and-comment rulemaking under the APA).

130. *See id.*

always be described as affecting substance."[131]

Finally, a rule can be defined as a general statement of policy if it is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications."[132] At least two courts have framed general statements of policy in terms of an agency's future intentions; a general statement of policy "is not finally determinative of the issues or rights to which it is addressed" and so "[w]hen the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."[133]

The INA[134] is the source from which DHS derives its authority to enforce immigration laws.[135] The INA authorizes DHS and the FBI to share information with each other in furtherance of DHS's enforcement of immigration laws.[136] Furthermore, Congress directed the integration of DHS databases (formerly INS databases) that process or contain information on aliens with an electronic data system that provides DHS access to information in federal law enforcement databases "relevant to determine whether to issue a visa or to determine the admissibility or deportability of an alien."[137]

First, notwithstanding the blurriness of the distinction between substantive rules and nonsubstantive rules, the primary mechanism of the Secure Communities program—automatic forwarding of fingerprints shared by state and local police with the FBI to ICE—likely qualifies as a procedural rule exempt from notice-and-comment rulemaking. DHS is charged with enforcing immigration laws, and Secure Communities could

131. JEM Broad. Co. v. FCC, 22 F.3d 320, 326 (D.C. Cir. 1994); *see also* Tafas v. Doll, 559 F.3d 1345, 1355 (Fed. Cir. 2009).

132. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (likening a general statement of policy to a press release).

133. *See id.* (describing a general statement of policy as an announcement that sets out what the agency seeks to establish as policy); *see also* Dep't of Envtl. Prot. v. Cumberland Coal Res., 29 A.3d 414, 427 (Pa. Commw. Ct. 2011) (holding that the standard conditions listed on permit application forms issued by an agency were not general statements of policy because they required compliance before an application was approved).

134. *See generally* 8 U.S.C. §§ 1101–1357 (2006).

135. *See id.* § 1103 ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . [p]rovided. . . [t]hat determination and ruling by the Attorney General with respect to all questions of law shall be controlling." (emphasis omitted)).

136. *See id.* § 1105(a) (establishing authority for the INS (absorbed by DHS in 2002) to "maintain direct and continuous liaison" with the FBI "for the purpose of obtaining and exchanging information for use in enforcing the provisions of this chapter in the interest of the internal and border security").

137. *Id.* § 1722(a).

well be described as an "enforcement plan."[138] It "borrow[s] the substantive standards"[139] of the INA and "'seek[s] to channel [the] agency enforcement resources'" allocated to it by statute "'toward ferreting out violations of the statute.'"[140] To aid its enforcement of immigration laws, DHS is authorized not only to share its information with the FBI, but to access FBI information relevant to enforcing immigration laws. Furthermore, that Congress intended this information sharing to extend to FBI databases is clear from its direction to integrate DHS electronic databases and federal law enforcement electronic databases "relevant . . . to determine the admissibility or deportability of an alien."[141]

Second, fingerprint sharing under Secure Communities could aptly be considered an interpretive rule exempt from notice-and-comment rulemaking. The announcement that Secure Communities is mandatory could easily be characterized as a clarification by DHS of "what is the rule"[142] because it simply specifies that the CJISD database is included in the electronic databases DHS may access. Furthermore, forwarding fingerprints from the CJISD database does not "establish[ ] a standard of conduct which has the force of law,"[143] rather it explains that the laws authorizing DHS to access FBI electronic databases includes the CJISD database. It does not impose a new requirement on the states to forward fingerprints to the FBI's CJISD database; such actions by the states are no less voluntary under Secure Communities than they were before.

Furthermore, previous statements by DHS officials that states can opt out of the program do not destroy the interpretive or procedural nature of DHS's subsequent announcement that Secure Communities is mandatory. An agency's determination of whether the rule is substantive, although relevant, is not controlling.[144] Thus, prior announcements by DHS representatives that arguably indicate that DHS may have previously regarded Secure Communities as a substantive rule, taken alone, do not transform Secure Communities into a substantive rule that should be subjected to notice-and-comment rulemaking.

However, because the program requires action on the part of the state or

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138. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 100 (D.D.C. 2002).

139. *Id.* at 99 (quoting Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1057 n.4 (D.C. Cir. 1987)).

140. *Id.* (*Bowen*, 834 F.2d at 1057 n.4.)

141. 8 U.S.C. § 1722(a).

142. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005).

143. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

144. Tripoli Rocketry Ass'n v. U.S. Bureau of Alcohol, Tobacco & Firearms, No. 00CV0273(RBW), 2002 WL 33253171, at *10 (D.D.C. June 24, 2002).

local law enforcement officials who send in the fingerprints and detain arrestees longer than they would otherwise be held, and because these actions are not done through a voluntary 287(g) memorandum of agreement, then at least this portion of the program requires notice-and-comment rulemaking. State and local law enforcement officials have private interests in performing their duties and requiring them to engage in a procedure they would otherwise not engage in "establishes a standard of conduct which has the force of law."[145]

For similar reasons, the use of state and local law enforcement cannot properly be described as procedure that is exempt from notice-and-comment rulemaking. While actions taken by state and local law enforcement to aid ICE in apprehending aliens may be part of an "enforcement plan,"[146] it not only imposes new burdens on state and local law enforcement, but also imposes new duties on elected state officials who are accountable to the public for policies performed by law enforcement under their watch.

Finally, the imposition of duties upon state and local law enforcement under Secure Communities does not qualify as a general statement of policy that is exempt from notice-and-comment rulemaking. The mandatory status of Secure Communities was not announced as a general statement of policy, as shown by the termination of the memoranda of agreement between DHS and the states that signed them shortly after the announcement. If making Secure Communities mandatory merely meant creating a statement of general policy to indicate a rule DHS intended to adopt in future rulemaking proceedings, terminating the memoranda of agreement would have been unnecessary. Thus, under the APA, Secure Communities most likely requires notice-and-comment rulemaking because it requires action on the part of state and local law enforcement that is not pursuant to a 287(g) memorandum of agreement.

IV. WHY NOTICE-AND-COMMENT RULEMAKING MAKES SENSE FOR THE SECURE COMMUNITIES PROGRAM

The APA represents the minimum standards for notice-and-comment rulemaking that an agency is expected to conform to; however, agencies have full discretion to grant additional procedural rights to interested parties.[147] Notice-and-comment rulemaking provides "easy access" to the

145. *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1046 (D.C. Cir. 1987); *see also Pac. Gas. & Elec. Co.*, 506 F.2d at 38.

146. Beverly Health & Rehab. Servs., Inc. v. Thompson, 223 F. Supp. 2d 73, 100 (D.D.C. 2002).

147. *See* Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519,

discourse about the rule among interest groups and between those groups and decisionmakers.[148] Additionally, "Notice and comment is the [means] by which the persons affected by legislative rules are enabled to communicate their concerns in a comprehensive and systematic fashion . . . ."[149] Thus, "The greater the public interest in a rule, the greater reason to allow the public to participate in its formation."[150]

Furthermore, notice-and-comment rulemaking is the mechanism through which Executive agencies are held accountable to the public.[151] Rules resulting from notice-and-comment rulemaking provide a check on the "exercise of 'unbridled' discretion by administrative agencies" and make it "easier to achieve the goals of uniformity, continuity, and clarity."[152] Rules and rulemaking further the values of efficiency, fairness, and accountability on the one hand, and a cultural distrust of government and government officials on the other.[153] Thus, the benefits of notice-and-comment rulemaking far outweigh the monetary costs.[154]

Despite the federal government's preeminent authority over immigration policy, states have increasingly taken matters into their own hands in recent years.[155] Some states, such as Arizona and Alabama, have sought to

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523–24 (1978) (discussing that, while the APA is the minimum standard by which the judiciary was meant to review agency rules and rulemaking, agencies still have full discretion to engage in notice-and-comment rulemaking if they so desire).

148. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1560 (1992) (explaining why notice-and-comment rulemaking is one of the greatest advantages and procedural protections available in the rapidly expanding modern bureaucratic state).

149. Hoctor v. USDA, 82 F.3d 165, 171 (7th Cir. 1996) (explaining the common sense rationale behind notice-and-comment rulemaking when the interests affected are widespread and legitimate).

150. *Id*. (noting that the lawyer for the Department of Agriculture had speculated that engaging in notice-and-comment rulemaking for a rule regarding the secure containment of animals would have elicited thousands of comments).

151. *See* Peter J. Henning, Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 GEO. L.J. 1007, 1012 (1985) (stating that the purpose of the APA requirements for notice-and-comment rulemaking is to limit the lack of political accountability inherent in the administrative process).

152. POPPER ET. AL., *supra* note 107, at 66 (explaining that the value in the existence of rules is to provide the public with "participatory rights" and opportunity to challenge rules promulgated by agencies in court).

153. *See* Richard J. Pierce, Jr., *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 185–86 (1996) (explaining that the history of rulemaking in the legal system is characterized by conflicting social and political values in American society that are so deep-rooted that they go back to the Framers of the Constitution).

154. Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165 (2000).

155. *See generally* Keith Cunningham-Parmeter, *Forced Federalism: States as Laboratories of*

require state and local law enforcement officials to stop those they reasonably suspect are illegal aliens.[156] Other states, such as Illinois, have sought to limit cooperation with the federal government by, for example, prohibiting employers from participating in federal programs such as Employment Eligibility Verification Systems.[157] While the Supreme Court's ruling in *Chamber of Commerce v. Whiting*[158] offers some insight into the extent to which states may determine their role in enforcing immigration law, this question is still largely undefined.[159]

Not surprisingly, the public interest in Secure Communities has been enormous. Not only have immigrant rights groups objected to implementation of the program,[160] but the public has as well.[161] States have

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Immigration Reform, 62 HASTINGS L.J. 1673 (2011) (discussing the modern rise of state experimentation with immigration laws and enforcement and the uncertainty as to which state actions are preempted or unconstitutional).

156. *See* ARIZ. REV. STAT. ANN. § 11-1051(A) (Supp. 2010); H.B. No. 56, 2011 Reg. Sess., 2011 Ala. Acts 535; Julia Preston, *In Alabama, a Harsh Bill for Residents Here Illegally*, N.Y. TIMES, June 3, 2011, http://www.nytimes.com/2011/06/04/us/04immig.html. *But see* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339, 344 (9th Cir. 2011) (enjoining enforcement of parts of the Arizona law as preempted by federal law). The Supreme Court struck down the preliminary injunction as to the provision of the law that requires police officers who conduct a stop to validate the immigration status of the individual. Arizona v. United States, 132 S. Ct. 2492, 2509 (2012). However, the Court upheld the preliminary injunction as to the provision of the law that made failure to comply with federal alien registration requirements a state misdemeanor. *Id.* at 2503.

157. *But see* United States v. Illinois, No. 07-3261, 2009 WL 662703, at *1 (C.D. Ill. Mar. 12, 2009) (invalidating the law under the Supremacy Clause).

158. 131 S. Ct. 1968, 1987 (2011) (affirming the legality of an Arizona law employing sanctions for the unauthorized employment of illegal aliens and noting that the law took "the route least likely to cause tension with federal law" because it relies on federal definitions of who is an unauthorized alien and uses the federal government's employment status verification systems).

159. *See* Cunningham-Parmeter, *supra* note 155, at 1691 (explaining that while *Whiting* cast some light on the extent to which states may promulgate immigration laws by allowing states to employ their own immigration verification systems, the line between state and federal involvement in immigration law remains ambiguous).

160. *See, e.g.*, Dan Frosch, *In Colorado, Debate over Program to Check Immigration History of the Arrested*, N. Y. TIMES, July 29, 2010, http://www.nytimes.com/2010/07/30/us/30colorado.html (noting that immigrant rights groups in Colorado pushed to reject Secure Communities after witnessing its impact in twenty-seven other states).

161. *See supra* notes 6–8 and accompanying text for a discussion of the opposition to Secure Communities among states and local communities with large immigrant populations. *Contra* Michael Graham, Op-Ed, *Gov. Deval Patrick Ignores Real Victims*, BOS. HERALD, Aug. 25, 2011, http://bostonherald.com/news_opinion/opinion/op_ed/2011/08/gov_deval_patrick_ignores_real_victims. Massachusetts Governor Deval Patrick declined to implement Secure Communities. *Id.* He has been criticized as ignoring victims of crime committed by criminal aliens in Massachusetts, including a recent violent crime committed by illegal alien Nicolas Guaman in Milford, Massachusetts. *Id.*

challenged the program's overall effectiveness and its interference with important state interests, such as community policing.[162] State and local officials have stated that the program causes fear and mistrust of police and effectively marginalizes immigrant communities.[163] For example, Arturo Venegas[164] stated that at a task force hearing in Los Angeles he heard testimony from a woman who was arrested for selling popsicles without a license and placed into deportation proceedings through Secure Communities; he noted "the wave of fear her arrest and pending deportation has caused in her community."[165] Such "wave[s] of fear" cause victims and witnesses of crime to remain silent for fear of deportation.[166] Indeed, regardless of the intent of the administration in implementing the program, tying the threat of deportation so closely to the presence and discretion of a law enforcement officer may discourage aliens from interacting with the legal system even when doing so is in society's best interests.[167]

In fact, even for communities that have enacted "sanctuary laws," which forbid local law enforcement from enforcing federal immigration laws, fearfulness of police among immigrant communities is a huge concern.[168]

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162. *See supra* notes 6–8 and accompanying text for a discussion of the state interests affected by Secure Communities.

163. *See supra* notes 6–8 and accompanying text.

164. *See supra* note 19 and accompanying text for a discussion of Arturo Venegas' role in the task force.

165. *Task Force Report Criticizes Secure Communities*, DEPORTATION NATION, (Sept. 20, 2011), http://www.deportationnation.org/2011/09/task-force-report-criticizes-secure-communities/ (statement of Arturo Venegas) (explaining why he does not think that the recommendations by the Secure Communities task force will address the marginalization of immigrant communities and explaining his decision to resign from the task force along with other task force members).

166. *See* Michael J. Mishak, *Bill Would Let Counties Opt Out of U.S. Immigration Enforcement Program*, L.A. TIMES, May 31, 2011, http://articles.latimes.com/2011/may/31/local/la-me-immigration-20110531 (pointing out that while federal officials have stated that the purpose of Secure Communities is to increase public safety, state lawmakers have noted that the deportation of low-level offenders has caused immigrant victims and witnesses of crime to not come forward).

167. *See* Telephone Interview with Ellen S. Kief, Attorney, Law Office of Ellen S. Kief (Oct. 25, 2011). "The intent of the administration in implementing Secure Communities is not and should not be the marginalization of immigrants. . . . The government should consider the effect of law enforcement officers random[ly] stopping . . . immigrants on the streets." *Id.* "The threat of deportation discourage[s] aliens from interacting with the legal system even when doing so is in his [or] her best interest for being in compliance with the law." *Id.*

168. *See, e.g.*, Aaron Kraut, *Takoma Park's Sanctuary Policy Threatened by Secure Communities Law*, GAZETTE.NET, (Oct. 5, 2011), http://www.gazette.net/article/20111005/NEWS/710059530/0/gazette&template=gazette (quoting Takoma Park, Maryland Mayor Bruce

One police chief has stated that the sanctuary policy in his community is enormously helpful to maintaining public safety, citing a case involving the robbery of a local dry cleaner.[169] A laborer who witnessed the crime wrote the tag of a suspect's car in the dirt and gave other information to police, helping lead to an arrest.[170]

Furthermore, there is a question as to whether any United States citizens have been deported as result of fingerprint matches in Secure Communities databases.[171] As of 2009, 5,880 people identified through the program were United States citizens.[172] As of 2010, 6% of all IDENT matches identified United States citizens.[173] Recent statistics released by ICE acknowledge that some of the matches found through Secure Communities databases are United States citizens but do not specify the number of United States citizens identified through those databases.[174] Wrongful deportations of United States citizens are not isolated incidents,[175] and often involve individuals of foreign descent or with foreign surnames.[176] As

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Williams saying that when the Secure Communities program becomes mandatory in Montgomery County, the city's longstanding sanctuary policy will become largely ineffective and disrupt public safety by creating distrust of law enforcement in the immigrant community).

169. *Id.* (explaining that the rapport Tacoma Park Police Chief Ronald Ricucci and his law enforcement agency have with the immigrant community is largely due to the longstanding city sanctuary policy).

170. *Id.* (quoting Police Chief Ronald Ricucci pointing to this as illustrative of the rapport law enforcement has with the immigrant community in Takoma Park because "[t]hey see we treat everybody the same" and as a result immigrants are willing to come forward).

171. *Cf.* Julia Preston, *U.S. Identifies 111,000 Immigrants With Criminal Records*, N.Y. TIMES, Nov. 12, 2009, http://www.nytimes.com/2009/11/13/us/13ice.html (noting that Secure Communities database systems still have flaws and have identified United States citizens).

172. *Secure Communities IDENT/IAFIS Interoperability Monthly Statistics Through October 31, 2009*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, (2009), http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2009.pdf.

173. *Secure Communities Overview*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, 4 (Jan. 13, 2010), http://www.ice.gov/doclib/foia/secure_communities/securecommunities presentations.pdf (stating that since October 27, 2008, six percent of Automated Biometric Identification System (IDENT) matches had resulted in the identification of a United States citizen).

174. *See ICE Statistics Through August 2012*, *supra* note 59, at 54.

175. *See* Suzanne Gamboa, *Citizens Deported as Illegals,* FORT WAYNE J. GAZETTE, Apr. 13, 2009, at 3A (discussing how the recent crackdown on illegal immigration has led to the deportation of many United States citizens, including fifty-five in the past eight years, as documented by an Associated Press investigation).

176. *See e.g.*, Kristin Collins, *Feds Wrongly Deport Citizen Living in N.C.*, NEWS & OBSERVER, Apr. 30, 2009, http://www.newsobserver.com/2009/04/30/66184/feds-wrongly-deport-citizen-living.html (divulging that Mark Lyttle, who has a dark complexion and whose biological father is Puerto Rican, was deported to Mexico despite being born in the United

indigent noncitizens facing deportations in the United States do not have a right to appointed counsel,[177] those United States citizens that have been deported are often those with the fewest resources, such as the mentally disabled or ill, children, and the poor.[178]

Given the stakes of the interests affected by Secure Communities, there is little reason for DHS to forego notice-and-comment rulemaking before expanding the program to every jurisdiction across the fifty states. Through notice-and-comment rulemaking, every group from private immigrant advocacy groups, to states, to individual law enforcement officials and politicians, could submit comments to DHS on a level playing field. With the billions of dollars that have been invested in Secure Communities and the considerable energy expended defending it, adopting the program through a congressionally recognized procedure could only improve its implementation.

CONCLUSION

Notice-and-comment rulemaking on this program will certainly not solve the ambiguity surrounding how states may define their level of cooperation with federal immigration enforcement objectives. However, continuing to aggressively defend the Secure Communities program without giving the concerns of affected parties a fair hearing can only undermine the legitimacy of the program. Secure Communities, by all accounts, "got off to a bad start."[179] Small measures taken by DHS to alleviate public apprehension about the mandatory status of the program, such as issuing a memorandum emphasizing prosecutorial discretion and establishing a task force whose recommendations are not binding on DHS, have not gone far

States and speaking no Spanish); Marisa Taylor, *American Citizen Almost Deported—as a Russian*, MODESTO BEE, Jan. 27, 2008, at A1 (describing how Thomas Warziniack was detained despite his Southern accent and repeated claims that he was a United States citizen).

177. 8 U.S.C. § 1229a(4)(a) (2006) ("[T]he alien shall have the privilege of being represented, at no expense to the Government . . . ."); *see* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (characterizing an immigration proceeding as civil, not criminal in nature).

178. Gamboa, *supra* note 175, at 3A; *see, e.g.*, Collins, *supra* note 176 (stating that Mark Lyttle is mentally ill and suffers from mild mental retardation); Taylor, *supra* note 176 (detailing that Thomas Warziniack was a heroin addict arrested on a drug charge before he was wrongful detained as an illegal immigrant).

179. *See* Julia Preston, *Janet Napolitano Takes on Critics of Immigration*, CAUCUS, (Oct. 5, 2011, 7:16 PM), http://thecaucus.blogs.nytimes.com/2011/10/05/janet-napolitano-takes-on-critics-of-immigration/ (recounting Janet Napolitano's description of the public response to the announcement that Secure Communities was mandatory and her acknowledgement that the administration was unclear about the parameters of the program in a speech at American University on October 5, 2011).

enough. The lack of transparency, the wide-ranging implications for public safety, the abrupt announcement that the program is mandatory, and the sudden termination of the memoranda of agreement signed by participating states have understandably aroused great mistrust. Thus, even if Secure Communities is not unconstitutional, and even if it does not require notice-and-comment rulemaking under the APA, notice-and-comment rulemaking is a good starting place for DHS to restore the program's legitimacy as an exercise of its delegated authority in the eyes of the public.