Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law[†]

I. Introduction

This memorandum addresses the legal authority of state and local law enforcement officials to arrest persons suspected of committing civil infractions of federal immigration law. The Department of Justice ("DOJ") is reportedly considering a reversal of its opinion on that question. On several occasions, most notably in an opinion of the Office of Legal Counsel in 1996, DOJ has said that state and local officers have no authority under federal law to make such arrests. Now, apparently, DOJ may take the position that state and local officers have inherent authority to make arrests for civil violations of federal immigration law.

We believe DOJ's historical position is correct: state and local officers may effect arrests for violations of the civil provisions of the Immigration and Nationality Act (the "INA") only under circumstances specifically delineated in the INA. Further, even if states had inherent arrest authority, it appears that it would not alter the outcome. As a matter of state law, most of the states with significant immigrant populations do not permit their law enforcement officers to make arrests for civil immigration violations. At the very least, individuals who are arrested by state or local officers on suspicion of having violated civil INA provisions can make serious challenges to the legality of the arrests under both federal and state law, potentially undermining effective immigration and criminal law enforcement.

Since the INA was enacted in 1952, the law has expressly authorized state enforcement of certain of its criminal provisions, but generally not of its civil provisions. Considering both the uniquely federal nature of immigration regulation and the exhaustive scope

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of regulation in the INA, DOJ has historically understood that the absence of express authorization is tantamount to a prohibition on civil enforcement by the states. In 1978, for example, DOJ said that "local police should refrain from detaining any person not suspected of a crime, solely on the ground that they may be deportable aliens." Local Police Involvement in the Enforcement of Immigration Law, 1 Tex. Hisp. J.L. & Pol'y 9, 36 (1994) (quoting Att'y Gen. Bell, Dep't of Justice Press Release, Jun. 23, 1978). The position was confirmed in 1996, when a formal DOJ opinion concluded: "State police lack recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings, as opposed to criminal prosecution." Theresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, Assistance by State and Local Police in Apprehending Illegal Aliens (memorandum for U.S. Atty. for the S.D. Cal.) (Feb. 5, 1996) (the "OLC Opinion") (emphasis in original).

The 1996 amendments to the INA created narrow avenues for additional state and local participation in civil enforcement in close cooperation with DOJ, but did not adopt anything like the broad authorization of unsupervised state and local enforcement that the INA has been interpreted to have granted the states in criminal matters. Deputy Attorney General Larry Thompson in a recent memorandum to the INS Commissioner, the FBI Director, the U.S. Marshals Service Director, and the United States Attorneys, noted that even in the context of criminal arrests, state and local officers' "legal authority is less clear" than that of federal law enforcement agencies such as the FBI. Larry Thompson, Deputy Attorney General, Guidance for Absconder Apprehension Initiative § C(1) (Jan. 25, 2002) ("Deputy Att'y Gen. Memo").

II. Federal Law Considerations

"The power to regulate immigration is unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). As *DeCanas* itself makes clear, the states' police powers do extend to some matters affecting non-citizens; the *DeCanas* Court held that the

states could sanction employers for hiring aliens who were not eligible for employment under federal immigration law. But the core questions of which aliens should be allowed into the country and which should be permitted to remain are, as matters of both constitutional structure and historical practice under the INA, purely federal. *See Toll v. Moreno*, 458 U.S. 1, 10-14 (1982); *id.* at 26-27 (Rehnquist, J., dissenting). The extent of federal power in this area, and the detail with which the INA treats the subjects of admission, detention, and removal of non-citizens, have led most authorities—including DOJ in its 1996 opinion—to conclude that Congress has preempted the field of civil immigration enforcement. *See also Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983); *League of United Latin American Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997). Congress legislates against a longstanding background assumption that the federal government is principally, if not solely, responsible for civil immigration enforcement. That legislative context, and its constitutional underpinnings, strengthen our belief that the states are not intended to exercise enforcement authority outside the express grants of such authority in the INA.

It should be noted that although the federal monopoly on civil enforcement has been near total, the INA has been interpreted to give states the authority to make arrests for criminal immigration violations. Section 274 of the INA, which establishes a number of criminal immigration offenses, states:

> No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and *all other officers* whose duty it is to enforce criminal laws.

8 U.S.C. § 1324(c) (emphasis added). The italicized language has been part of the INA since it was enacted and has been understood to permit criminal arrests by state and local officers

authorized by state law to make such arrests.[1] The absence of any similar express grant of authority in civil cases, we believe, implies that there is no such authority.[2] The same conclusion was reached not only by DOJ in 1996, but also by the Ninth Circuit in the leading case in the area. *See Gonzales*, 722 F.2d at 475.[3] Thus, the established understanding is that there is a significant distinction between civil and criminal provisions when determining the scope of state and local enforcement powers.

Congress substantially amended the INA in 1996. Among the amendments were a handful of new provisions relating to state and local involvement in immigration enforcement. To the extent these new provisions authorize state and local officers to make civil arrests, the authorization is confined to narrowly defined circumstances, with state and local officers always operating under the direction of or pursuant to an explicit agreement with DOJ. The commonplace *expressio unius* canon of statutory interpretation suggests that the states do not have the authority to make civil immigration arrests under other circumstances, particularly without DOJ involvement. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"). The pre-1996 exclusion of state and local authority supports this inference. By troubling to spell out precise requirements for states to make civil arrests,

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[1] Section 274(c) appears to give states the power to make arrests for violations of § 274 only. Nonetheless, courts have generally viewed § 274(c) as a broad grant of state authority to arrest suspected violators of any of the INA's criminal provisions.

[2] Later in 1952, a provision, discussed below, was added to the INA authorizing the Attorney General to involve state agencies in responding to emergencies caused by an imminent or actual influx of a large number of non-citizens in a particular locality.

[3] In *United States v. Santana-Garcia*, 264 F.3d 1188 (10th Cir. 2001), the Tenth Circuit upheld an arrest of two non-citizens who had responded negatively to a state trooper's question whether they were "legal." The court did not consider the distinction between civil and criminal violations of the INA. All of the authorities on which it relied involved arrests for criminal violations. *Santana* should not be read as having decided that the civil/criminal distinction makes no difference, as the court did not address that question.

Congress implied that it did not understand states to have inherent or preexisting authority to make such arrests in the immigration field. If states did have such authority, the new INA provisions would have been meaningless. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("statutes must be interpreted, if possible, to give each word some operative effect"). Finally, the 1996 amendments were adopted only months after the OLC Opinion was issued. If Congress had intended to alter the Executive's interpretation of the INA, it would likely have granted the states broad civil enforcement authority expressly, which it did not.

Provisions authorizing state and local officers to make immigration-related arrests can be grouped into three distinct chapters: those that existed before 1996; the one added by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132; and those added by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208.

As previously noted, the original version of the INA adopted in 1952 authorized only criminal arrests, through § 274(c). Shortly thereafter, the statute was amended to add a provision that, as further amended, is now § 103(a)(8) of the INA:

> In the event that the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States or near a land border presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the service.

Thus, from the early days of the INA, state and local officers could exercise the civil arrest powers of INS officers only when expressly authorized to do so by the Attorney General, only with the consent of the head of the state law enforcement agency, and only in an extraordinary

crisis. In the 50 years this provision has been in effect, it has been used once, in 1994, when over 30,000 Cuban and Haitian refugees fled to Florida's shores.

In 1996, AEDPA § 439 authorized *criminal* arrests by state and local officers in one additional circumstance. Section 439 provides in part:

> [T]o the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—(1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction . . . .

8 U.S.C. § 1252c.[4] AEDPA § 439 authorizes the arrest of aliens who have presumably violated § 276 of the INA (8 U.S.C. § 1326), which provides criminal penalties for reentry into the country by an alien previously convicted of a felony. It was adopted at the urging of the sponsoring Representative, Congressman Doolittle of California, to overcome what he viewed as the existing prohibition on such arrests by state and local officers. As the Tenth Circuit pointed out, there may not in fact have been such a prohibition before 1996, at least under the broad reading of INA § 274(c) as authorizing state and local officers to effect arrests for any criminal violation of the INA. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1299 (10th Cir. 1999). Representative Doolittle's concern does make sense, however, if a plain-language interpretation of § 274(c) is adopted in conjunction with a presumption that, in immigration matters, states have only the arrest powers that are expressly provided in federal law. It is difficult to see in any event how AEDPA § 439 could bolster the argument that the states have inherent authority to arrest non-citizens for *civil* violations of the INA.

[4] Section 439 of AEDPA, though codified in the midst of the INA by the compilers of the United States Code, is not part of the INA.

Finally, IIRIRA added further provisions related to state and local involvement in immigration enforcement, the most significant of which is INA § 287(g).[5] This section of the statute authorizes the Attorney General to

> enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer[6] in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

8 U.S.C. § 1357(g)(1). Sections 287(g)(2) and 287(g)(3) reinforce the understanding that states lack inherent authority to "perform a function of an immigration officer" without some federal oversight.[7] Section 287(g)(2) requires that state officers must "have knowledge of and adhere to" federal law governing immigration officers. Section 287(g)(3) establishes that "[i]n performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General." 8 U.S.C. § 1357(g)(3). These detailed requirements, we believe, must imply that state and local officers do not have a general power to make civil immigration arrests, particularly in the absence of any training in immigration law and without federal supervision.

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[5] Along with enacting § 287(g), IIRIARA amended § 103(c) of the INA, 8 U.S.C. § 1103(c), to permit the INS Commissioner to "enter into cooperative agreements with the State and local law enforcement agencies for the purpose of assisting in the enforcement of immigration laws," and amended 32 U.S.C. § 112 to permit the National Guard to "assist the [INS] in the transportation of aliens who have violated a Federal or State law prohibiting or regulating the possession, use, or distribution of a controlled substance."

[6] Among the "function[s] of an immigration officer" is "to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States." 8 U.S.C. § 1357(a)(2).

[7] The requirement of federal supervision in § 287(g) and the authorization of state-INS cooperative agreements in § 103(c) are grounded in principles of Executive Branch function and authority that can rise to constitutional dimension. *See Printz v. United States*, 521 U.S. 898, 922 (1997).

A contrary conclusion could conceivably be drawn from INA § 287(g)(10), a savings clause, but we believe such an interpretation would render the remainder of § 287(g) meaningless.[8] Section 287(g)(10)(A) explains that even in the absence of the formal agreement described in the remainder of the subsection, states can communicate with the federal government regarding the immigration status of individuals. Section 287(g)(10)(B) provides that § 287(g) does not eliminate the states' right "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens." It is possible to read this provision as authorizing state and local officers to "cooperate" by themselves effecting the "apprehension" of non-citizens for civil immigration infractions—but only by reading it in a vacuum, without considering the context of the rest of § 287(g).[9]

In context, we do not believe the savings clause can reasonably be construed to grant state and local officers the authority to make unsupervised arrests for civil immigration violations. There is a significant difference between the ability to "cooperate with the Attorney General," which is preserved by § 287(g)(10)(B), and the power to "perform a function of an immigration officer," which is granted under limited circumstances by the remainder of § 287(g). The most plausible construction of § 287(g)(10)(B) is that it recognizes state and local officers' ability to assist federal officers in the performance of their duties, but does not give state and local officers new authority to act on their own. If it were otherwise—if § 287(g)(10)(B) bestowed on state and local officers a general power to effect civil arrests, which could be

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[8] Section 287(g)(10) provides:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
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> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
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> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

[9] The Tenth Circuit nonetheless at least suggested such a reading in dicta. *See Vasquez*, 176 F.3d at 1300.

exercised without the training and federal supervision required under § 287(g)(2-3)—then state and local officers operating pursuant to an agreement between the Attorney General and the state would have *fewer* powers than they would have without the agreement, making § 287(g) itself pointless. Section 287(g)(10) uses the classic language of a savings clause, which does not grant state and local officers any authority they did not already have. As previously discussed, state and local officers have not historically been understood to have a general power to make arrests for violations of the INA's civil provisions. In fact, we do not know of any case decided before the enactment of § 287(g) holding that state and local officers do have such a power.

AEDPA and IIRAIRA increased the permissible scope of state and local enforcement activity, but only under narrowly and carefully defined circumstances. As with older provisions of the INA such as § 274(c), the 1996 amendments are meaningful only in the context of a general preemption of state and local enforcement. They strengthen the conclusion that the INA, as amended, implicitly preempts state and local law authorizing state and local officers to make arrests for suspected civil violations of the INA.

II. State Law Considerations

Even if states had general authority to arrest non-citizens for suspected violations of civil immigration provisions, the officer making the arrest would require an affirmative grant of authority under state law to do so. Put another way, while the federal government may *allow* the states to enforce the civil provisions of the INA, it cannot *require* them to do so by commandeering state officers. *See Printz v. United States*, 521 U.S. 898, 922 (1997). Such federal action would encroach upon the sovereignty retained by states under the Constitution, *id.* at 928, while also violating the Executive's prerogatives and duties under Article II, *id.* at 922. It thus appears to be common ground that if an officer lacks state-law authority to make an arrest, the INA cannot be read to give him such authority. *See* Deputy Att'y Gen. Memo, § C(1).

(acknowledging that "some states and municipalities place certain restrictions on the extent to which their officers can be involved in the enforcement of immigration laws").

The scope of law enforcement officers' authority to make arrests varies among the states and is defined by the nature of the offense for which the arrest is made. It is not that states have explicit carve-outs that exclude immigration violations from the general power to arrest; rather, civil immigration violations fall into a general class of infractions for which state and local officers (in some states, at least) cannot make arrests, even when it is state law that has been violated.[10] California, for example, adheres to the common law rule that officers may not make arrests for misdemeanors not occurring in the officers' presence. 75 Op. Att'y Gen. Cal. 270 (1996). That state's Attorney General concluded that California law enforcement officers may not arrest or detain non-citizens solely for the purposes of civil deportation proceedings. *Id.* A recent opinion of the New York Attorney General is to similar effect: officers may arrest without a warrant individuals they have probable cause to believe have committed a criminal violation of the INA, but may not make arrests based on civil violations. 2000 N.Y. AG LEXIS 2 (2000). The Texas and Oklahoma Attorneys General have taken the same position under the laws of their states. 1977 Tex. AG LEXIS 92 (1977); 11 Okla. Opp. Att'y Gen. 345 (1997). As for other states, the considerable variability in the circumstances in which officers may make warrantless misdemeanor arrests make generalization difficult. *See* 5 Am. Jur. 2d Arrest §§ 50-55 (Supp. 2002). Further, civil INA infractions do not rise even to the level of misdemeanors; they are not criminal at all. Therefore, even in states that have relatively liberal requirements for making warrantless misdemeanor arrests, state and local officers still may be precluded from

[10] This analysis pertains to arrests made because of suspected civil immigration violations. It does not examine the power of state officers who have made a valid arrest for a violation of state criminal law to inform federal authorities that an individual in state custody may be subject to removal under the INA.

making arrests for civil violations in many or even all circumstances. It can safely be said, however, that officers in many states and localities certainly lack the authority to make arrests for civil violations of the INA, and that the issue is at best unclear in many others.

Simply removing federal impediments may not significantly increase state and local arrests for civil violations of the INA. Existing restrictions on arrest authority are fundamental to state criminal procedure and often stem from pre-independence English common law. States do not often discard such long-standing and deeply ingrained policies abruptly. Further, leaders of local law enforcement agencies may conclude that along with the resources that would be consumed in making such arrests and processing detainees, potential litigation over officers' authority would cost time and money that the agencies cannot afford. *Castro v. Chandler* demonstrates the likelihood that local police, even when working in cooperation with border patrol agents, will be subject to suit for targeting classes or groups of residents and citizens for inspection.[11] States may be reluctant to incur expense enforcing federal law without any federal reimbursement.[12]

IV. Conclusion

While there is some room for differing interpretation, we believe that DOJ's established position is correct: only in the circumstances expressly defined in federal immigration law may states make arrests for civil violations of the INA. Attempts to put a contrary policy into effect will be complicated by state- and local-law enforcement limitations on the authority of officers to make arrests. The interplay between state and federal law in this area,

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[11] *Gerard Castro et al. v. City of Chandler*, No. 97-1736 (D. Ariz. filed Aug. 18, 1997).

[12] States' concern for the fiscal effects of federal immigration policy has erupted into litigation before. *See Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997); *Arizona v. United States,* 104 F.3d 1095 (9th Cir.1997); *California v. United States,* 104 F.3d 1086 (9th Cir.1997); *New Jersey v. United States,* 91 F.3d 463 (3d Cir.1996); *Padavan v. United States,* 82 F.3d 23 (2d Cir.1996); *Chiles v. United States,* 69 F.3d 1094 (11th Cir.1995).

which has not been tested often in the past, may also lead to considerable litigation if state and local officers make significant numbers of civil immigration arrests outside the bounds of the express authorizations in the INA. Even if, in the end, it is concluded that the officers in a particular state can lawfully make such arrests—a conclusion we consider contrary to both statute and case law—non-citizens will be able to make substantial legal arguments to the contrary. It is also questionable whether Immigration Judges should bear the burden of interpreting state and local law in the context of removal proceedings, especially when such proceedings are held far from the state where the non-citizen was arrested and before an Immigration Judge not trained in the law of that state.

Many policy considerations have been mentioned in the public debate on this issue. On the one side are the potential damage to police-community relations; the diversion of resources from the prevention and punishment of crimes that may be of greater concern to the residents of particular cities and states; the potential for conscious or unconscious racial profiling; the costs to law enforcement of being compelled to release wrongfully arrested individuals; and the distraction of attention from security-related reforms of the INS at a time when that agency is facing radical restructuring. On the other side are the increased detection of immigration violations and the removal of non-citizens unlawfully in the United States at relatively low cost to the federal budget.

Our legal analysis suggests three additional considerations. First, a reversal of position by DOJ would represent a major shift in the traditional division of responsibility between the states and the federal government. Second, such a reversal, if acted upon by the states, could lead to extensive and expensive litigation and the possible voiding of arrests, suppression of evidence, and even awarding of damages in civil rights actions. Finally, the

political, legal, and historical implications of DOJ's actions aside, the practical effect may be minimal in light of established state-law limitations on the authority of law enforcement officers.