Center for Immigration Studies

Backgrounder

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State and Local Authority to Enforce Immigration Law

A Unified Approach for Stopping Terrorists

By Kris W. Kobach

The terrorist attacks of September 11, 2001, underscored for all Americans the need to restore the rule of law in the immigration arena. Terrorists were able to enter the country undetected, overstay their visas with impunity, and move freely within the country without interference from local law enforcement officers. Each of these realities created a vulnerability that the hijackers exploited.

Enforcing our nation's immigration laws is one of the most daunting challenges faced by the federal government. With an estimated 8-10 million illegal aliens already present in the United States and fewer than 2,000 interior enforcement agents at its disposal, the Bureau of Immigration and Customs Enforcement (BICE) has a Herculean task on its hands — one that it simply cannot accomplish alone.

The assistance of state and local law enforcement agencies can mean the difference between success and failure in enforcing immigration laws. The more than 650,000 police officers nationwide represent a massive force multiplier.

This *Backgrounder* briefly summarizes the legal authority upon which state and local police may act in rendering such assistance and describes the scenarios in which this assistance is most crucial. It does not cover the provisions of Section 287(g) of the Immigration and Nationality Act (INA) (that is, Section 133 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996 titled "Acceptance of State Services to Carry Out Immigration Enforcement"), since the scope of such delegated authority is evident on the face of the Act. Rather, this *Backgrounder* describes the inherent arrest authority that has been possessed and exercised by state and local police since the earliest days of federal immigration law.

It has long been widely recognized that state and local police possess the inherent authority to arrest aliens who have violated *criminal* provisions of the INA. Once the arrest is made, the police officer must contact federal immigration authorities and transfer the alien into their custody within a reasonable period of time. Bear in mind that the power to arrest — and take temporary custody of — an immigration law violator is a subset of the broader power to "enforce." This is an important distinction between inherent *arrest* authority and 287(g) authority to *enforce* — which includes arresting, investigating, preparing a case, and all of the other powers exercised by BICE agents.

Where some confusion has existed in recent years is on the question of whether the same authority extends to arresting aliens who have

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violated *civil* provisions of the INA that render an alien deportable. This confusion was, to some extent, fostered by an erroneous 1996 opinion of the Office of Legal Counsel (OLC) of the Department of Justice, the relevant part of which has since been withdrawn by OLC. However, the law on this question is quite clear: arresting aliens who have violated either criminal provisions of the INA or civil provisions that render an alien deportable "is within the inherent authority of the states."[1] And such inherent arrest authority has never been preempted by Congress.

This conclusion has been confirmed by every court to squarely address the issue. Indeed, it is difficult to make a persuasive case to the contrary. That said, I will proceed to offer my personal opinion as to why this conclusion is correct. I offer this legal analysis purely in my private capacity as a law professor and not on behalf of the Bush Administration.

State Arrest Authority

The preliminary question is whether the states have inherent power (subject to federal preemption) to make arrests for violation of federal law. That is, may state police, exercising state law authority only, make arrests for violations of federal law, or do they have power to make such arrests only insofar as they are exercising delegated federal executive power? The answer to this question is plainly the former.

The source of this authority flows from the states' status as sovereign entities. They are sovereign governments possessing all residual powers not abridged or superceded by the U.S. Constitution. The source of the state governments' power is entirely independent of the U.S. Constitution. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819). Moreover, the enumerated powers doctrine that constrains the powers of the federal government does not so constrain the powers of the states. Rather, the states possess what are known as "police powers," which need not be specifically enumerated. Police powers are "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people…" *Manigault v. Springs*, 199 U.S. 473, 480 (1905). Essentially, states may take any action (consistent with their own constitutions and laws) unless there exists a prohibition in the U.S. Constitution or such action has been preempted by federal law.[2]

It is well established that the authority of state police to make arrests for violation of federal law is not limited to those situations in which they are exercising delegated federal power. Rather, such arrest authority inheres in the States' status as sovereign entities. It stems from the basic power of one sovereign to assist another sovereign. This is the same inherent authority that is exercised whenever a state law enforcement officer witnesses a federal crime being committed and makes an arrest. That officer is not acting pursuant to delegated federal power. Rather, he is exercising the inherent power of his state to assist another sovereign.

Abundant Case Law. There is abundant case law on this point. Even though Congress has never authorized state police officers to make arrest for federal offenses without an arrest warrant, such arrests occur routinely; and the Supreme Court has recognized that state law controls the validity of such an arrest. As the Court concluded in *United States v. Di Re*, "No act of Congress lays down a general federal rule for arrest without warrant for federal offenses. None purports to supersede state law. And none applies to this arrest which, while for a federal offense, was made by a state officer accompanied by federal officers who had no power of arrest. Therefore the New York statute provides the standard by which this arrest must stand or fall." 332 U.S. 581, 591 (1948). The Court's conclusion presupposes that state officers possess the inherent authority to make warrantless arrests for federal offenses. The same assumption guided the Court in *Miller v. United States*. 357 U.S. 301, 305 (1958). As the Seventh Circuit has explained, "[state] officers have implicit authority to make federal arrests." *U.S. v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983). Accordingly, they may initiate an arrest on the basis of probable cause to think that an individual has committed a federal crime. *Id.*

The Ninth and Tenth Circuits have expressed this understanding in the immigration context specifically. In *Gonzales v. City of Peoria*, the Ninth Circuit opined in an immigration case that the "general rule is that local police are not precluded from

enforcing federal statutes," 722 F.2d 468, 474 (9th Cir. 1983). The Tenth Circuit has reviewed this question on several occasions, concluding squarely that a "state trooper has general investigatory authority to inquire into possible immigration violations," *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984). As the Tenth Circuit has described it, there is a "preexisting general authority of state or local police officers to investigate and make arrests for violations of federal law, including immigration laws," *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999). And again in 2001, the Tenth Circuit reiterated that "state and local police officers [have] implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'" *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (citing *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295). None of these Tenth Circuit holdings drew any distinction between criminal violations of the INA and civil provisions that render an alien deportable. Rather, the inherent arrest authority extends generally to both categories of federal immigration law violations.

No Congressional Preemption

Having established that this inherent state arrest authority exists, the only remaining question is whether such authority has been preempted by Congress. In conducting preemption analysis, courts must look for (1) express preemption by congressional statement, (2) field preemption where the federal regulatory scheme is so pervasive as to create the inference that Congress intended to leave no room for the states to supplement it, or (3) conflict preemption, where compliance with both state and federal law is impossible or state law prevents the accomplishment of congressional objectives. See *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion). In all three categories, there must exist manifest congressional intent for preemption to exist.

Moreover, in the context of state arrests for violations of federal law, there is a particularly strong presumption against preemption. Normal preemption cases involve: (1) state legislation or regulation (2) that is at odds with federal purposes or statutes. However, state arrests for violations of federal law involve: (1) state *executive* action (2) that is intended to *assist* the federal government in the enforcement of federal law. The critical starting presumption must be that the federal government did not intend to deny itself any assistance that the states might offer. This presumption was explained in 1928 by Judge Learned Hand, who stated that "it would be unreasonable to suppose that [the federal government's] purpose was to deny itself any help that the states may allow." *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928).

In 1996, Congress expressly put to rest any suspicion that it did not welcome state and local assistance in making immigration arrests. Congress added section 287(g) to the INA, providing for the establishment of written agreements with state law enforcement agencies to convey federal immigration enforcement functions to such agencies. In doing so, Congress reiterated its understanding that states and localities may make immigration arrests regardless of whether a 287(g) agreement exists. Congress stated that a formal agreement is *not necessary* for "any officer or employee of a State or political subdivision of a state… 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 "otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10).

Consequently, it is hardly surprising that no appellate court has expressly ruled that states are preempted from arresting aliens for civil violations of the INA. The only case that even comes close is the 1983 opinion of the Ninth Circuit in *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983). In *Gonzales*, the Ninth Circuit held that local police officers have the authority to arrest an alien for a violation of the criminal provisions of the INA if such an arrest is authorized under state law. In that instance, a group of persons of Mexican descent challenged a policy of the City of Peoria, Arizona, that instructed local police to arrest and detain aliens suspected of illegally entering the United States in violation of the criminal prohibitions of Section 1325 of Title 8. *See* 722 F.2d at 472-73. Observing that local police generally

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are not precluded from enforcing federal statutes and that concurrent enforcement authority is authorized where local enforcement would not impair federal regulatory interests, the court engaged in a preemption analysis to determine whether Congress had precluded local enforcement of this criminal provision of the INA. The court concluded that no such preemption had occurred. *See id.* at 475. In passing, the Ninth Circuit "assume[d] that the civil provisions of the [INA]… constitute… a pervasive regulatory scheme" that suggested a congressional intent to preempt local enforcement, *id.* at 474-75. However, this possibility of field preemption was merely an *assumption*, asserted without any analysis, and made in *dictum* — entirely outside of the holding of the case (which concerned a criminal offense). It does not constitute binding precedent. And even if the Ninth Circuit had squarely reached this conclusion in 1983, such a holding would have been fatally undermined by the court's failure to apply the strong presumption against preemption discussed above. In addition, the subsequent actions of Congress in 1996 made such a holding unsustainable.

Solid Case Law. In contrast, the case law supporting the conclusion that Congress has *not* preempted state arrests of aliens for violations of civil provisions of the INA is solid and on point. The Tenth Circuit has issued several opinions on the subject, all pointing to the conclusion that Congress has never sought to preempt the states' inherent authority to make immigration arrests for both criminal and civil violations of the INA. Its 1984 ruling in the case of *United States v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984), confirmed the inherent arrest authority possessed by the states. The defendant in that case was the driver of a pickup who had been arrested for the criminal violation of transporting illegal aliens. He had been stopped by a state trooper for driving erratically. The driver and his wife were in the cab; and six passengers, none of whom spoke English, were in the back of the pickup. The defendant claimed that a state trooper did not have the authority to detain the transported passengers while he questioned them about their immigration status. In rejecting this claim, the Tenth Circuit held that a "state trooper has general investigatory authority to inquire into possible immigration violations." 728 F.2d at 1301 n.3. The court did not differentiate between criminal and civil violations. Indeed, because there is no indication in the opinion that there was any reason to believe that the alien passengers had committed any criminal violations, the court's statement appears to apply fully to civil as well as criminal violations.

The Tenth Circuit's most salient case on the preemption question is *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999). In that case, an Oklahoma police officer arrested the defendant because he was an "illegal alien." The officer did not know at the time whether the defendant had committed a civil or criminal violation of the INA. *Id.* at 1295. It was later discovered that the alien had illegally reentered the country after deportation, in violation of 8 U.S.C. § 1326, a criminal violation. When the government indicted the defendant, he moved to suppress his post-arrest statements, fingerprints, and identity, arguing that he was arrested in violation of 8 U.S.C. § 1252c. The defendant claimed that a local police officer could arrest an illegal alien only in accordance with the conditions set forth in Section 1252c and that because his arrest was not carried out according that provision it was unauthorized. Section 1252c authorizes state and local police to make a warrantless arrest and to detain an illegal alien if (1) the arrest is permitted by state and local law, (2) the alien is illegally present in the United States, (3) the alien was previously convicted of a felony in the United States and subsequently was deported or left the country, and (4) prior to the arrest the police officer obtains appropriate confirmation of the alien's status from federal immigration authorities. 8 U.S.C. § 1252c.

The Tenth Circuit's conclusion was unequivocal: Section 1252c "does not limit or displace the preexisting general authority of state or local police officers to investigate and make arrests for violations

of federal law, including immigration laws. Instead, Section 1252c merely creates an additional vehicle for the enforcement of federal immigration law." *Vasquez-Alvarez*, 176 F.3d at 1295. The court rejected the alien's contention that all arrests not authorized by Section 1252c are prohibited by it. The court reviewed the legislative history of Section 1252c and analyzed the comments of Rep. Doolittle (R-Calif.), who sponsored the floor amendment containing the text that would become Section 1252c. The court concluded that the purpose of the amendment was to overcome a perceived federal limitation on this state arrest authority. However, neither Doolittle, nor the government, nor the defendant, nor the court itself had been able to identify any such limitation. *Id.* at 1298-99.

The interpretation of 1252c urged by the defendant would have grossly perverted the manifest intent of Congress, which was to encourage more, not less, state involvement in the enforcement of federal immigration law. Reading into the statute an implicit congressional intent to preempt existing state arrest authority would have been entirely inconsistent with this purpose. Moreover, such an interpretation would have been inconsistent with subsequent congressional actions. As the Tenth Circuit noted, "in the months following the enactment of Section 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal government and the states in the enforcement of federal immigration laws." *Id*. at 1300 (citing 8 U.S.C. §§ 1103(a)(9), (c), 1357(g)). Put succinctly, the "legislative history does not contain the slightest indication that Congress intended to displace any preexisting enforcement powers already in the hands of state and local officers." *Id*. at 1299.

The Fifth Circuit has also rejected the notion that Congress has preempted the inherent arrest authority possessed by the states. In *Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987), the court considered whether 8 U.S.C. §1223(a) defined the sole process for detaining alien stowaways, thereby preempting harbor police from detaining illegal aliens as occurred in that case. The Fifth Circuit's conclusion was broad and unequivocal: "No statute precludes other federal, state, or local law enforcement agencies from taking other action to enforce this nation's immigration laws." *Id*. at 1371.

Finally on the subject of preemption, it must be noted that the distinction between arrests by state police for criminal violations of the INA and arrests by state police for civil violations of the INA is utterly unsustainable. Any claim of field preemption would have to establish that the civil provisions of the INA create a pervasive regulatory scheme indicating congressional intent to preempt, while the criminal provisions do not. No court has ever attempted to justify such a conclusion. The INA is not separated neatly into criminal and civil jurisdictions. Nor have the regulations promulgated pursuant to the INA or the executive agencies charged with its enforcement attempted such a separation. The structure of the INA, with its numerous overlapping civil and criminal provisions, simply cannot support such a distinction.

Voluntary State and Local Assistance

It bears reiterating that any assistance that state or local police provide to the federal government in the enforcement of federal immigration laws is entirely voluntary. There is no provision of the U.S. Code or the Code of Federal Regulations that obligates local law enforcement agencies to devote any resources to the enforcement of federal immigration laws. This fact seems to escape those who assert that the federal government has by statute or policy imposed costly enforcement burdens on state and local government. This assertion is false. Indeed, when local law enforcement agencies do arrest and detain aliens for violations of immigration law prior to transfer to federal immigration authorities, it has been the regular practice of the federal government to reimburse such agencies for any detention costs incurred.

Local Enforcement Is Essential

The two and a half years that have passed since September 11, 2001, have yielded a wealth of cases in which the arrest of an alien by a state or local police officer was crucial in securing the capture of a suspected terrorist, a career criminal, or an absconder

fleeing a final removal order. The role that state and local police officers play simply cannot be overstated. They are the eyes and ears of law enforcement that span the nation. They are the officers who encounter aliens in traffic stops and other routine law enforcement situations. Federal law enforcement officers simply cannot cover the same ground. The following are the most important scenarios in which state and local assistance in the enforcement of immigration law occurs:

Observations of Potential Terrorist Activity. I cannot describe the details of actual cases in this report. But I can offer hypothetical fact patterns that illustrate the point. For example, suppose that a police officer learns that a university student from a country that is a state sponsor of terrorism has made several purchases of significant quantities of fertilizer. He may also learn from other university students that the alien has not been attending classes. Neither of these actions constitutes a crime. However, from these circumstances, the officer may reasonably suspect that the alien has violated the terms of his student visa. His arrest and questioning of the alien, founded on the immigration violation but reflecting larger concerns about terrorist activity, would be lawful and would serve the security interests of the United States. Without the immigration violation, the officer would possess no legal basis to make the arrest. In this type of situation, the authority to make the immigration arrest is a powerful tool that the local police officer can use when necessary to protect the public.

Arrests of Suspected Terrorists. One of the most disturbing aspects of the story of the September 11 terrorists is the fact that three of the hijackers were accosted by local police in routine law enforcement encounters. Had the federal government possessed information regarding their possible terrorist connections, and had that information been distributed to police officers via the National Crime Information Center (NCIC), the terrorist plot might have been derailed. Now, the federal government does possess information that should be disseminated to state and local police officers through NCIC. For example, the National Security Entry-Exit Registration System (NSEERS) allows the federal government to determine when a high-risk alien overstays his visa or fails to report his address and activities after 30 days in the United States. The names and details of some of these NSEERS violators are now being entered into the NCIC. It is absolutely essential that state and local police officers have access to this information and that they act upon it when encountering an NSEERS violator in a traffic stop. If the alien is actively avoiding contact with law enforcement, this may be the only opportunity to stop a terrorist attack. In order for this system to work effectively, four things need to happen: First, the vast majority of NSEERS violators need to be entered into NCIC, not just a small subset. This will require that the Compliance Office of BICE be allocated adequate resources to do the job. Secondly, the 30-day reporting requirement of NSEERS must be maintained. Without the 30-day requirement, the potential of the system to identify terrorists would be dramatically reduced. Indeed, many of the most important national security leads that have been generated by NSEERS were triggered by the failure of the aliens to report in after 30 days. At the end of 2003, the Department of Homeland Security announced that the 30-day reporting requirement would be suspended and that such reporting would only be requested on an ad hoc basis in the future. This decision, driven primarily by considerations of administrative convenience, will impair efforts to identify and apprehend terrorists operating within the United States. Congress should correct this vulnerability by re-imposing the 30-day reporting requirement statutorily. Thirdly, the Departments of State and Homeland Security must enter the names of aliens in the TIPOFF terrorist database into NCIC (something that has not yet occurred). Finally, state and local law enforcement agencies must not adopt ill-considered policies barring their officers from making immigration arrests.

Arrests of Absconders. There are now more than 400,000 absconders at large in the United States. These aliens have had their day in immigration court and have disobeyed a final order of removal. The absconder problem has made a mockery of the rule of law in immigration. A substantial number of absconders have engaged in serious criminal activity in addition to their immigration violations. Most absconders have committed criminal violations of the INA. Others have committed civil violations only, if the underlying immigration violation was of a civil

provision and the refusal to obey the order of removal was not willful. At the end of 2001, the Department of Justice and the INS launched the absconder initiative, which has continued under the Department of Homeland Security. Under this initiative, the process of listing absconders in NCIC was begun. Although the initiative has yielded many valuable arrests with the cooperation of state and local law enforcement, the effort has been hamstrung by the fact that the entry of names into NCIC has occurred at an alarmingly slow rate. Indeed, the number of absconders is growing faster than the entry of absconders into NCIC. Nonetheless, the entry of absconders' names and information has already yielded success. As of March 1, 2004, the names of 28,304 absconders had been listed in NCIC; and 8,542 had been arrested, including 261 sexual predators.

Interception of Alien Smuggling. In recent years, the country has witnessed a number of truly horrific deaths as a consequence of alien smuggling. Victims of the trade have died from exposure in the desert, from heat and suffocation in railroad cars, and in highway accidents in overloaded and unsafe vehicles. It is often the case that smuggling activities become evident far from the border, where the only law enforcement officers likely to observe them are state or local police. Smuggling will not decrease until and unless enforcement abilities increase. State and local police can provide a critical boost to federal enforcement activities. For this to occur, officers across the country need to be made aware that they have the authority to initiate immigration smuggling arrests; and alertness to the activity of smugglers needs to be encouraged.

Enforcement in Remote or Under-served Areas. Because BICE's interior enforcement agents are spread so thinly across the country, there are states that experience substantial illegal immigration but do not receive adequate enforcement attention from BICE agents. Such communities may be ill equipped to bear the costs of illegal immigration (e.g., in health care expenses and the provision of other social services). When local law enforcement agencies can undertake limited enforcement actions in coordination with BICE officials, the resulting deterrent effect can alleviate these local costs and enable BICE to extend its enforcement reach.

Conclusion

In summary, it is clear that state and local police possess substantial inherent authority to make immigration arrests, in addition to the delegated powers available through Section 287(g). It is also clear that the potential for closer cooperation with state and local law enforcement has not been fully exploited. Consequently, there has been a cost in the national security of the United States, as well as in the enforcement of immigration laws.

Endnotes

[1] "Attorney General's Remarks on the National Security Entry-Exit Registration System," Washington, D.C., June 6, 2002.

[2] Chemerinsky, Erwin. *Constitutional Law: Principles and Policies.* Aspen Law & Business (1997, 1st ed.), pp. 166, 282.

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