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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

April 3, 2002

DISCLOSE

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations

[redacted]

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We explain in Part I below that the authority to arrest for violation of federal law inheres in the States, subject only to preemption by federal law. In Part II, we reconsider advice rendered by this Office in 1996, shortly before the enactment of section 1252c. We concluded at that time that although the INA does not preclude

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state police from making arrests for violations of its criminal provisions, it does preclude them from arresting aliens on the basis of civil deportability. We now determine that our 1996 advice was mistaken and that it should not provide the background against which section 1252c is assessed. We conclude in Part III that section 1252c does not preempt state arrest authority in any respect. [redacted]

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We assume for purposes of this memorandum that any arrests by state police comply with Fourth Amendment restrictions. We further assume that States have conferred on state police the necessary state-law authority to make arrests for violation of the federal immigration laws, but note that the existence and extent of such authority is a question of state law.

Except as otherwise noted, this memorandum does not address, and should not be read as limiting, the ability of state police to exercise federal arrest authority pursuant to federal authorization, including, for example, pursuant to the authority of the Attorney General to enter into agreements with States under which state officers or employees perform immigration officer functions subject to the direction and supervision of the Attorney General. *See* 8 U.S.C. § 1357(g) (2000).

I.

We first address whether, in the absence of any affirmative authorization under federal law, States have inherent power (subject to federal preemption) to make arrests for violation of federal law. Otherwise stated, may state police, exercising state law authority only, lawfully make arrests for violation of federal law, or do they have power to make such arrests only insofar as they are exercising delegated federal executive power?

We believe that the answer to this question rests ultimately on the States' status as sovereign entities. The Declaration of Independence proclaims that the States are "FREE AND INDEPENDENT STATES . . . and that as FREE AND INDEPENDENT STATES, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, *and to do all other Acts and Things which INDEPENDENT STATES may of right do*." (Emphasis added.) The United States Constitution conferred on Congress only the powers "herein granted," U.S. Const. art. I, § 1, and "reserved to the States respectively, or to the people," the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States," *id.* amend. X. Thus, although the Constitution did impose some disabilities on the States, it did not purport to confer, or otherwise be the source of, their affirmative authority. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) ("The 'plan of the convention' as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, 'it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America,

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but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.'") (quoting *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819)); *The Federalist No. 32*, at 200 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[T]he plan of the [Constitutional] Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States"). The original States that ratified the Constitution instead obtained their authority from state constitutions or charters that preceded the federal Constitution. And States that entered the Union after 1789 did so on "equal footing" with the original States and thus enjoy the same sovereign status as the original States. *See Coyle v. Smith*, 221 U.S. 559, 573 (1911) ("when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States").

We therefore do not believe that the authority of state police to make arrests for violation of federal law is limited to those instances in which they are exercising delegated federal power. We instead believe that such arrest authority inheres in the States' status as sovereign entities. In the same way that police in Canada do not exercise delegated Article II power when they arrest someone who has violated U.S. law and turn him over to U.S. authorities, state police, too, need not be exercising such federal power when they make arrests for violation of federal law. Instead, the power to make such arrests inheres in the ability of one sovereign to accommodate the interests of another sovereign.

Case law reflects this same conclusion. No act of Congress has authorized state police to arrest for federal offenses when they act without an arrest warrant. Nonetheless, in *United States v. Di Re*, 332 U.S. 581 (1948), the Supreme Court, in the course of holding that "in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity," *id.* at 589, implicitly adopted the position that States have inherent authority to authorize their police to make warrantless arrests for federal criminal violations. *See id.* at 589-90; *see also Miller v. United States*, 357 U.S. 301, 305 (1958) (citing *Di Re* for proposition that "the lawfulness of the arrest without warrant is to be determined by reference to state law"); *Johnson v. United States*, 333 U.S. 10, 15 n.5 (1948) ("State law determines the validity of arrests without warrant") (citing *Di Re*). Similarly, in *Marsh v. United States*, 29 F.2d 172 (2d Cir. 1928), Judge Learned Hand's opinion for the Second Circuit construed a New York statute to authorize state police to make warrantless arrests for violation of federal law. *Id.* at 174. In so doing, Judge Hand specifically rejected the argument that the existence of a federal statute governing state arrests *pursuant to warrant* for federal offenses (the predecessor to current section 3041 of title 18) should be understood to preempt state officers from making *warrantless* arrests for federal offenses: "it would be unreasonable to suppose that [the United States'] purpose was to deny to itself any help that the states may allow." *Id.* Judge Hand's analysis is plainly premised on the understanding that states have inherent authority to make arrests for federal offenses, subject only to federal preemption.

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More recent cases in the specific context of federal immigration law embody this same understanding. In *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), the Ninth Circuit, stating that the "general rule is that local police are not precluded from enforcing federal statutes," *id.* at 474, engaged in a preemption analysis to determine whether Congress had precluded state police enforcement of the criminal provisions of federal immigration law. *See id.* The Tenth Circuit has similarly opined 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), and has applied preemption analysis to determine whether a federal statute "limit[s] or displace[s] the 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).

Indeed, the only contrary suggestion of which we are aware is contained in a footnote in a 1989 opinion of this Office. In that footnote, after stating that "it is not clear under current law that local police may enforce non-criminal federal statutes" and that any exercise of authority granted under state law "would necessarily have to be consistent with federal authority," we opined that "unlike the *authorization* for state and local involvement in federal criminal law enforcement, we know of no similar *authorization* in the non-criminal context." Memorandum for Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Handling of INS Warrants of Deportation in relation to NCIC Wanted Person File* at 4 & n.11 (Apr. 11, 1989) ("1989 OLC Opinion") (emphasis added). We did not further examine or explain the suggestion arising from our use of the word "authorization." Indeed, the contrast that the 1989 OLC Opinion posits between the criminal and non-criminal contexts is belied by its own citations to the *Di Re* case and 18 U.S.C. § 3041 (1994), *see* 1989 OLC Opinion at 9 n.18: the Supreme Court in *Di Re* did not understand state authority to make arrests for federal offenses to be limited to the arrests pursuant to warrant that were authorized (or at least governed by) the predecessor to 18 U.S.C. § 3041. Moreover, the fact that the 1989 OLC Opinion elsewhere applies preemption analysis to the question of state police authority to arrest for federal offenses, *see* 1989 OLC Opinion at 4-5, indicates that the "authorization" language in this footnote should not be regarded as reflecting a considered view of this Office that state arrest authority is dependent on federal authorization.

Beyond lacking any legal support, the contrary conclusion – i.e., that States, through their police, may exercise only the arrest power that Congress has affirmatively authorized – would dramatically upset settled practices. Under such a conclusion, state police would not have any authority to make warrantless arrests for federal offenses. In Judge Hand's words, we would have to "say that there is no means of securing offenders caught in flagrante, a result which would so impair the execution of the laws that it seems to us incredible it should have been intended." *Marsh*, 29 F.2d at 174. Nor is it clear that Congress could delegate such unsupervised authority to the States. *See Printz v. United States*, 521 U.S. 898, 922-23 (1997) (federal executive power may not be delegated to individuals not subject to "meaningful Presidential control").

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II.

In 1996 this Office opined that state police lack the authority to arrest aliens on the basis of civil deportability. *See* Memorandum for Alan D. Bersin, United States Attorney, Southern District of California, from Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Assistance by California Police in Apprehending Illegal Aliens* 6-7 (Feb. 5, 1996) ("1996 OLC Opinion"). Section 1252c was enacted two months after we rendered this advice. Because section 1252c of title 8 must be understood against the backdrop of existing law, we consider it appropriate to re-examine whether the understanding of the law expressed in the 1996 OLC Opinion was accurate. For the reasons explained below, we determine that our 1996 advice was mistaken and that we should instead have concluded that federal statutory law posed no obstacle to the authority of state police to arrest aliens on the basis of civil deportability.

A.

The genesis of this Office's 1996 advice lies in the 1983 ruling in *Gonzales*, where 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 case, 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 are not precluded from enforcing federal statutes and that concurrent enforcement authority is authorized where local enforcement would not impair federal regulatory interests, *see id.* at 474 (citing, inter alia, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963)), the court engaged in a preemption analysis to determine whether Congress had precluded local enforcement of federal immigration law. *See id.* In addressing whether the city possessed "the power to enforce the criminal provisions of federal immigration laws," *see id.*, the Ninth Circuit expressly "assume[d] that the civil provisions of the [INA] . . . constitute . . . a pervasive regulatory scheme" that evidenced a congressional intent to preempt local enforcement, *id.* at 474-75. By contrast, the Ninth Circuit found that the criminal provisions of the INA were "few in number and relatively simple in their terms," *id.* at 475, and were "not, and could not be, supported by a complex administrative structure," *id.* Therefore, the court concluded, the federal government had not preempted local enforcement of the criminal provisions of the INA. *See id.*

The Ninth Circuit then turned to whether state law granted the local police the affirmative authority to make arrests under the criminal provisions of the INA. After ascertaining that Arizona law permitted such arrests, the court "emphasize[d] . . . that this [state law] authorization is limited to criminal violations," and noted that local police had failed to distinguish between civil and criminal violations by using the term "illegal alien" to refer both to an alien who had illegally entered the country (a criminal violation) and an alien who was "illegally present" in the United States (a civil violation). *Id.* at 476.

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This Office first addressed *Gonzales* in the 1989 OLC Opinion, in which we advised the Federal Bureau of Investigation ("FBI") that the existence of an outstanding warrant of deportation for an alien provided an insufficient basis for entering the alien's name into its National Crime Information Center ("NCIC") Wanted Person File. *See* 1989 OLC Opinion at 1. FBI policy provided that only persons who could be arrested by any law enforcement officer with the power to arrest could be included in the NCIC Wanted Person File. Discussing *Gonzales* at length, we concluded that *Gonzales* "makes clear that local police may enforce criminal violations of the [INA]." 1989 OLC Opinion at 5. By contrast, we opined that "it is not clear under current law that local police may enforce non-criminal federal statutes." *Id.* at 4 & n.11. Citing *Gonzales*, we stated that "the pervasively federal nature of immigration control may preempt a state role in the enforcement of civil immigration matters." *Id.* at 4 n.11. Because the issuance of a warrant of deportation did not necessarily indicate that a criminal law had been violated, we concluded that the mere existence of a warrant of deportation for an alien did not, under FBI policy, justify inclusion of the alien's name in the NCIC Wanted Person File.

B.

The 1996 OLC Opinion directly addressed the circumstances in which state police could assist the INS in enforcing the federal immigration laws. In that opinion, we relied on *Gonzales* for the proposition that federal law does not preclude state police from enforcing the criminal provisions of the INA. *See id.* at 4. We concluded, by contrast, that state police "lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability." *Id.* at 7 (emphasis omitted). Our conclusion rested on five authorities. First, we stated that in *Gonzales* "the Ninth Circuit held that the authority of state officials to enforce the provisions of the INA 'is limited to criminal violations,'" *id.* at 6. Second, we cited a California appellate court case, *Gates v. Superior Court*, 193 Cal. App. 3d 205 (1987), that we understood to support the same proposition. Third, we relied on the 1989 OLC Opinion. Fourth, we stated that 8 U.S.C. § 1357(a)(2) "imposes substantial restrictions even upon the authority of *federal* officers to make warrantless arrests for purposes of civil deportation." 1996 OLC Opinion at 7. Fifth, we cited a Ninth Circuit case, *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216 (9th Cir. 1995), that applied 8 U.S.C. § 1357(a)(2). *See* 1996 OLC Opinion at 6-7.

We construe our statement in the 1996 OLC Opinion that state police "*lack recognized legal authority* to stop and detain an alien solely on suspicion of civil deportability" as an affirmative conclusion that state police lack the authority to arrest aliens on the basis of civil deportability. *Id.* at 7 (emphasis added and emphasis omitted). Any possibility that we may have crafted the peculiar phrase "lack recognized legal authority" in order to remain agnostic on the question whether state police possess that authority is foreclosed by our follow-on opinion a mere two weeks later, in which we read the 1996 OLC Opinion to establish "the disability of state police to enforce the *civil*, as opposed to criminal, provisions of the federal immigration laws." Memorandum for Alan D. Bersin, United States Attorney, Southern District of California, from

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Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: State Assistance in Apprehending Illegal Aliens – Part II* at 1 (Feb. 21, 1996).

C.

On re-examination, we believe that the authorities we cited in the 1996 OLC Opinion provide no support for our conclusion that state police lack the authority to arrest aliens solely on the basis of civil deportability. First, our assertion that "the Ninth Circuit [in *Gonzales*] held that the authority of state officials to enforce the provisions of the INA 'is limited to criminal violations,'" *id.* at 6, confuses the court's *holding* on the state-law question of what authority the State of Arizona has conferred on its police officers with the court's mere *assumption in dictum* that the civil provisions of the INA preempt state enforcement. Second, the language that the 1996 OLC Opinion cites from the state appellate court ruling in *Gates* is that court's summary of the trial court's conclusion of law. The *Gates* court itself did not address a contested question, as "[n]either side disputes the exclusive authority of the federal government to enforce the civil provisions of the INA." *Gates*, 193 Cal. App. 3d at 214-15. Third, the 1989 OLC Opinion, notwithstanding its apparent confusion over the need for affirmative federal authorization for state arrests for federal offenses, goes no further than to conclude that "it is *not clear* under current law that local police may enforce non-criminal federal statutes," 1989 OLC Opinion at 4 (emphasis added) – a conclusion,that falls well short of the 1996 OLC Opinion's conclusion that it is *clear* that local police may *not* enforce non-criminal federal statutes. Finally, the restrictions imposed on INS employees by section 1357(a)(2) of title 8 (and recited by the Ninth Circuit in *Mountain High Knitting*) apply equally to warrantless arrests for criminal violations as to warrantless arrests for civil violations. We therefore fail to see how section 1357(a)(2) bears in any way on the question whether state police may arrest aliens for civil deportability.

We note further that the 1996 OLC Opinion failed to take account of the Tenth Circuit's contrary conclusion in its 1984 ruling in *Salinas-Calderon*. There, a defendant who had been arrested for the criminal violation of transporting aliens claimed, inter alia, that a state trooper did not have the authority to detain the transported passengers while he asked 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.

More fundamentally, we believe that the 1996 OLC Opinion failed to appreciate the extremely limited and unusual nature of the preemption question posed with respect to state arrests for violation of federal law. Unlike the typical preemption scenario, this question does *not* involve an attempt by States to enact *state* laws, or to promulgate regulations pursuant to state laws, that arguably conflict with federal law or intrude into a field that is reserved to Congress or that federal law has occupied. What this question instead presents is whether States

can *assist* the federal government by arresting aliens who have violated *federal* law and by turning them over to federal authorities. In this context, we believe that the question posed in dictum by the Ninth Circuit in *Gonzales* – whether the civil provisions of the INA constitute a pervasive regulatory scheme – was entirely misplaced. We instead believe that the principle governing our construction of federal law in this context should have been that voiced by Judge Learned Hand in *Marsh*: that "it would be unreasonable to suppose that [the United States'] purpose was to deny to itself any help that the states may allow." 29 F.2d at 174. Consistent with this principle, we believe that the 1996 OLC Opinion should have applied a strong presumption *against* preemption of state arrest authority. Had it done so, it should have concluded that federal law did not preempt state police from arresting aliens on the basis of civil deportability.

We therefore withdraw the 1996 OLC Opinion's advice that federal law precludes state police from arresting aliens on the basis of civil deportability.

III.

We now address whether section 1252c preempts state arrest authority. We first present the legislative history of section 1252c and the Tenth Circuit's interpretation of section 1252c in *Vasquez-Alvarez*. We then explain why we agree with the Tenth Circuit that section 1252c does not in any respect preempt the inherent authority of the States to make arrests for violations of the immigration laws.

A.

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). Section 439 of the AEDPA, entitled "Authorizing state and local law enforcement officials to arrest and detain certain illegal aliens," *id.* Title IV, § 439(a), 110 Stat. at 1276, is codified as section 1252c of title 8.

Section 1252c was proposed by Representative Doolittle as a floor amendment to H.R. 2703, 104th Cong. (1996), an earlier version of the AEDPA. *See* 142 Cong. Rec. 4619 (Mar. 13, 1996) (comments of Rep. Doolittle). The only legislative history of the provision is the floor debate that accompanied Representative Doolittle's introduction of the amendment. Representative Doolittle explained that his amendment was intended to address the problem of aliens who had been deported following criminal convictions but who return to the United States and commit more crimes:

> In California alone, the INS deports thousands of illegal immigrants every year who have committed felonies in our State, and every year thousands of those same criminal aliens return back again. In fact, the California Department of Justice recently reported that 98 percent of all immigrants who are deported for

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committing felonies in California will eventually return to the State, and of those, 40 percent will commit crimes again.

Unfortunately, this epidemic is not unique to urban areas, but has started to infest rural America as well. Just a few years ago, in the small rural community of Lincoln, [California,] which is located in my district, an illegal alien was found guilty of a driveby shooting, which was the first driveby shooting ever in that area. After spending a short time in prison, the criminal alien was deported out of the country by the INS. Now, despite his deportation, he returned to the area after only 1 week and, without hesitation, committed another crime.

With such a threat to our public safety posed by criminal aliens, one would think that we would give law enforcement all the tools it needs to remove these criminals from our streets, but unfortunately just the opposite is true. In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties.

. . .

Mr. Chairman, you will be interested to know that shortly before my district was victimized for the second time by this criminal alien I spoke of earlier, an area police officer actually stopped him for a traffic violation. With my amendment the police officer would have been able to put him in jail for being back in the country illegally until the INS could take him into Federal custody. Without it, the officer had to release him, and our area became the victim of yet another crime.

. . .

[M]y amendment is very narrow and only covers situations in which the State or local officer encounters criminal aliens within his routine duties. In addition, the subject can only be held if the State or local police have obtained appropriate confirmation from the INS of the illegal status of the individual. Only confirmed criminal aliens are at risk of being taken into custody.

142 Cong. Rec. 4619. The Senate adopted the new provision without discussion. *See* 142 Cong. Rec. 7433-67 (Conference Report on S. 735, 104th Cong. (1996)).

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B.

The only case to address whether section 1252c preempts state arrest authority is the Tenth Circuit's 1999 decision in *Vasquez-Alvarez*.[1] In that case, Oklahoma police arrested the defendant because he was an "illegal alien." *Vasquez-Alvarez*, 176 F.3d at 1295. It was later discovered that the alien had illegally reentered the country after deportation, in violation of section 1326 of title 8, 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 section 1252c. The defendant contended that state and local police officers could arrest an illegal alien only in accordance with the restrictions set forth in section 1252c and that his arrest did not comport with that provision and was therefore unauthorized.

The Tenth Circuit concluded, however, that 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. Citing its earlier decision in *Salinas-Calderon*, the court observed that it had "held that state law-enforcement officers have the general authority to investigate and make arrests for violations of federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1296. The court noted that in addition to this general background authority, Oklahoma law permitted local law enforcement officers to make arrests for violations of federal law.

The Tenth Circuit found no congressional intent in the text of section 1252c to preempt existing state authority to enforce federal immigration laws. *See id.* at 1297-98. The court further opined that the legislative history of section 1252c supported its conclusion. Citing the comments of Representative Doolittle reproduced *supra*, the court stated that "the purpose of § 1252c was to displace a perceived federal limitation on the ability of state and local officers to arrest aliens in the United States in violation of Federal immigration laws." *Id.* at 1298-99. The court noted that Representative Doolittle, the defendant, the government, and the court had not "identif[ied] any pre-§ 1252c limitations on the powers of state and local officers to enforce federal law." *Id.* at 1299 n.4. The court concluded that 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 court also relied on the fact that after enacting 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) (2000)). The court noted that section 1357(g)(10)(B) states that no formal agreement is necessary for state and local officers "to cooperate with the Attorney General

[1] The only other published opinion that cites section 1252c is *United States v. Villa-Velazquez*, 282 F.3d 553, 555-56 (8th Cir. 2002), in which the Eighth Circuit ruled that a local officer had authority to arrest an alien for a criminal violation.

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in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). The court concluded that these provisions "evince[] a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws." *Vasquez-Alvarez*, 176 F.3d at 1300. The court acknowledged that "it might be argued that [the court's] interpretation of § 1252c leaves the provision with no practical effect," *id.*, but the court said that this reason alone was insufficient grounds for the court to find that the provision preempted state law. *See id.*

C.

We agree with the Tenth Circuit that section 1252c has no preemptive effect. For the reasons explained above, we begin with a strong presumption against construing a federal statute "to deny to [the INS] any help that the states may allow." *Marsh*, 29 F.2d at 174. Nothing in the text of section 1252c undercuts this presumption. On the contrary, section 1252c, by its terms, does not purport to override any pre-existing state arrest authority. Rather, it accepts state arrest authority as a given by providing federal "authoriz[ation]" only "to the extent permitted by relevant State and local law." 8 U.S.C. § 1252c(a). And it purports only to override any federal law ("Notwithstanding any other provision of law") that would deprive state police of the ability "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." *Id.* Thus, in context, the federal *authorization* that section 1252c provides ("State and local law enforcement officials *are authorized* to arrest and detain") is expressly redundant of, and dependent on, existing state authority. *Id.* (emphasis added). It is true that section 1252c proceeds to specify two conditions that state police operating pursuant to it must satisfy – namely, obtaining prior confirmation from the INS of the individual's immigration status and transferring such individual promptly into federal custody. But these two conditions apply only to the federal authorization under section 1252c; they do not, by their terms, apply to an exercise of state arrest authority.

It might be objected that our reading of section 1252c would appear to render it meaningless. We think not, for at least two reasons. First, section 1252c provides a limited safeguard against any other provision of federal law (current or future) being construed or applied to preempt state arrest authority for immigration violations that involve illegal presence. If, for example, a court were otherwise inclined (per the Ninth Circuit's assumption in dicta in *Gonzales*) to misconstrue the provisions of the INA as preempting state authority to arrest for civil deportability, section 1252c would operate to ensure that state police at least retained the authority to make such arrests of aliens who had previously been convicted of a felony and had been deported or had left the United States after such conviction. Second, there could well be reasons why state police would choose to operate pursuant to section 1252c with respect to such aliens (and might even operate as though section 1252c applied with respect to non-felon aliens), rather than pursuant to their unrestricted state-law authority. For example, state police might believe that doing so would foster a mutually beneficial relationship of trust and cooperation with the INS and thereby deter the INS from exercising its regulatory authority to preempt state arrest

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authority.[2]

We further note that if section 1252c were somehow to be read to preempt state arrest authority, it would appear that the preemptive effect would have to extend to all state arrests for violations involving illegal presence in the United States. In other words, for all such violations, state police would be able to arrest only those aliens who were felons and who had left the United States after being convicted. Because such aliens are not readily identifiable visually, this would mean "that there is no means of securing offenders caught in flagrante" – whether they were felons or not – "a result which would so impair the execution of the laws that it seems to us incredible it should have been intended." *Marsh*, 29 F.2d at 174. The fact that nothing in the legislative history of section 1252c remotely suggests such an intent confirms our rejection of such a reading.

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[2] Insofar as state police choose to operate pursuant to section 1252c, we believe that section 1252c does not constitute an unconstitutional delegation of federal executive authority to state police. Under section 1252c, the role played by state police is limited to arrest and detention and is clearly under the direction of federal authorities: among other things, state and local officers may arrest an individual only after "obtain[ing] appropriate confirmation from the [INS] of the status of such individual and only for such period of time as may be required for the [INS] to take the individual into Federal custody." 8 U.S.C. § 1252c. We therefore believe that state police acting pursuant to section 1252c are subject to "meaningful Presidential control." *Printz v. United States*, 521 U.S. 898, 922-23 (1997).

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V.

We summarize our conclusions: (1) States have inherent power, subject to federal preemption, to make arrests for violation of federal law. (2) Because it is ordinarily unreasonable to assume that Congress intended to deprive the federal government of whatever assistance States may provide in identifying and detaining those who have violated federal law, federal statutes should be presumed not to preempt this arrest authority. This Office's 1996 advice that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken. (3) Section 1252c does not preempt state authority to arrest for federal violations.

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Jay S. Bybee
by M. Edward Whitaker III
Jay S. Bybee
Assistant Attorney General

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