From: ACLU Immigrants' Rights Project
Date: March 6, 2009
Re: 2002 OLC opinion on state and local immigration enforcement

The Office of Legal Counsel should rescind its deeply flawed 2002 opinion on state and local authority to make immigration arrests.

Background

Prior to 2002, at least three formal OLC opinions had concluded that state and local police generally lack authority to enforce the civil (i.e. non-criminal) provisions of federal immigration law.[1] The Bush Administration, however, aggressively sought to expand the involvement of state and local police in immigration enforcement. As a key part of that effort, OLC prepared a new, secret opinion reversing its previous opinions and concluding that state and local police have inherent and un-preempted authority to enforce the civil provisions of federal immigration law. Jay S. Bybee, Non-preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (April 3, 2002), http://www.aclu.org/FilesPDFs/ACF27DA.pdf.[2]

The Bush Administration relied on the 2002 OLC opinion to enlist state and local police across the country in immigration enforcement efforts. For example, after obtaining the opinion, the government began listing certain individuals suspected of violating civil immigration laws in the National Crime Information Center ("NCIC") database and instructing state and local police to arrest them if encountered. (A previous OLC opinion had found that listing such individuals in the NCIC was inappropriate.)[3]

Notably, the "inherent authority" posited by the 2002 opinion is wholly separate from authority delegated under "287(g) MOAs" – agreements pursuant to 8 U.S.C. § 1357(g) under which designated state and local officials receive limited authority to undertake certain immigration enforcement functions, subject to federal oversight and training. The

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[1] Richard L. Shiffrin, State Assistance in Apprehending Illegal Aliens – Part II (Feb. 21, 1996) (unreleased, but discussed in 2002 memo); Teresa Wynn Roseborough, Assistance by State and Local Police in Apprehending Illegal Aliens (Feb. 5, 1996), http://www.usdoj.gov/olc/immstopo1a.htm; Douglas W. Kmiec, Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File (Apr. 11, 1989), http://www.aclu.org/pdfs/immigrants/1989_olc_opinion.pdf; *see also Bronx Defenders v. DHS*, No. 04 CV 8576 HB, 2005 WL 3462725, at *2 (S.D.N.Y. Dec. 19, 2005) (noting that in 1974, INS concluded that state and local police could not arrest an individual on the basis of a civil deportation warrant).

[2] A coalition of immigrants' rights groups obtained the opinion, with limited redactions, through litigation under the Freedom of Information Act. *National Council of La Raza v. Dep't of Justice*, 411 F.3d 350 (2d Cir. 2005).

[3] *See* "Handling of INS Warrants…," *supra* note 1.

2002 opinion endorses the view that even *absent* a 287(g) MOA and *absent* any training or oversight at all, state and local police can and should nonetheless arrest and detain individuals suspected of committing only *civil* violations.

This approach has been highly controversial and has attracted opposition from police, elected officials, and community advocates. There are serious reasons to think state and local immigration enforcement is unwise as a policy matter.

Equally important, however, is the fact that the legal reasoning in the 2002 opinion is deeply flawed and wholly unconvincing. Below, we briefly outline the shortcomings of the opinion's preemption and inherent authority analyses, and note some of the policy concerns raised by its approach.

Preemption

In contrast to prior OLC opinions, the 2002 opinion concluded that Congress had not preempted police enforcement of civil immigration laws. That conclusion was based on a number of errors. The opinion:

- Fails to acknowledge that immigration has long been understood as a distinctly federal concern. *See, e.g.*, *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (recognizing "preeminent role of the federal Government" in immigration regulation); *Graham v. Richardson*, 403 U.S. 365, 382 (1971) (noting "explicit constitutional requirement of uniformity" in immigration matters); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) ("[T]he supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution.").

  Instead, based on an out-of-context quote from a 1928 circuit court opinion, the 2002 OLC opinion invents a "strong presumption against preemption of state [immigration] arrest authority." The opinion purports to derive this presumption from a sentence fragment in *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928), stating that "it would be unreasonable to suppose that [the United States'] purpose was to deny to itself any help that the states may allow." But *Marsh* was not discussing or setting forth any generally applicable presumption. Rather, in the sentence quoted, *Marsh* found that the *particular* arrest statute at issue in that case should not be read to "deny … any help" in enforcing federal criminal provisions regarding Prohibition. This was especially true against a backdrop of the "universal practice of police officers in New York to arrest for federal *crimes*" (emphasis added). Here, prior to the 2002 opinion and in accordance with the federal government's longstanding position on the matter, the "universal practice" was *not* to arrest

for civil immigration violations, and the relevant federal statutes are consistent with that practice.[4]

- Dismisses *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) as dicta but does not engage its reasoning – that the civil provisions of immigration law "constitute such a pervasive regulatory scheme" as to preempt state and local arrest authority. Indeed, since *Gonzales*, the number and complexity of immigration statutes – both civil and criminal – has grown dramatically, and the evidence that police enforcement of immigration laws is generally preempted has grown even stronger.

  Courts, too, have continued to question or reject the proposition that state and local police have inherent immigration enforcement authority. *See*, *e.g.*, *United States v. Urietta*, 520 F.3d 569, 574 (6th Cir. 2008) ("local law enforcement officers cannot enforce completed violations of civil immigration law unless specifically authorized to do so by the Attorney General under special conditions"); *Mena v. City of Simi Valley*, 332 F.3d 1255, 1266 n.15 (9th Cir. 2003) (*vac'd on other grounds*, 544 U.S. 93 (2005)); *Carrasca v. Pomeroy*, 313 F.3d 828, 836-37 (3d Cir. 2002).

- Fails to mention, much less address, several statutes specifically designed to provide state and local police with the authority to enforce immigration laws. Sections 1103(a)(10), 1324(c), and 1357(g) of Title 8 of the U.S. Code allow state and local police to engage in immigration enforcement in certain circumstances. Specifically, § 1103(a)(10) allows the Attorney General to authorize "any State or local law enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens…." Section 1324(c) allows "all … officers whose duty it is to enforce criminal laws" to make arrests for smuggling, transporting, or harboring criminal aliens. And, as noted above, § 1357(g) sets forth a procedure whereby the federal government and a state or local government may enter into a written agreement providing for immigration enforcement by state and local officers who have received specialized training and act under the direction and supervision of the Attorney General.

  These statutes clearly indicate that the federal government authorizes state and local enforcement of the immigration laws only in specific circumstances, not broadly. Yet the OLC opinion does not even acknowledge their existence, much less explain why Congress would have enacted specific, narrowly-tailored, and wholly superfluous provisions for police enforcement of immigration law if police already possess the wide-ranging powers claimed in the opinion.

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[4] Any suggestion that reaching a contrary result in the 2002 opinion would have "drastically upset settled practices" is, accordingly, wrong.

- Adopts an interpretation of the one statute it does address, 8 U.S.C. § 1252c, that renders the statute meaningless. Section 1252c's purpose, as indicated by its title, is to "[a]uthoriz[e] state and local law enforcement officials to arrest and detain certain illegal aliens"—that is, previously deported felons who have illegally re-entered the United States. The opinion concludes that state and local police have that authority even *without* § 1252c. But if that were true, the statute would be superfluous.

  The opinion makes only a weak attempt at justifying this glaring flaw in its reasoning (and fails to note that its logic would also deprive §§ 1103(a)(10), 1324(c), and 1357(g) of meaning). It argues, first, that Congress may have passed § 1252c simply as a protective measure to provide arrest authority "[i]f, for example, a court were otherwise inclined … to misconstrue the provisions of the INA as preempting state authority to arrest…." Second, the opinion argues that "there could well be reasons why state police would choose to operate pursuant to section 1252c." The plain text of the statute, however, belies no merely protective intent on the part of Congress. Nor does it reflect any opportunity to provide state police with a choice of operating modes. Instead, the statute is clearly meant to do precisely what it says it does: provide police with authority to make immigration arrests with respect to a defined group of criminal immigration offenders.

- Evades, and ignores, legislative history that directly contradicts the interpretation proffered. Congressional statements regarding §§ 1252c and 1357(g) further illustrate that those laws were passed precisely because any general immigration enforcement authority *is* preempted by federal law. Representative Doolittle, on introducing a floor amendment that became § 1252c, explained that he did so because "the Federal Government has tied the hands of our State and local law enforcement officials" and "current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encounter[] through their routine duties." 142 Cong. Rec. H2191-04 (daily ed. Mar. 13, 1996). Similarly, Representative Latham, on introducing a floor amendment that became § 1357(g), explained that "[t]here is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case." 142 Cong. Rec. H2475-01, at H2476-77 (1996).

  The opinion simply ignores Rep. Latham's comments, and attempts to dismiss Rep. Doolittle's by citing the Tenth Circuit's observation that he had not specifically identified the source of the prohibition against state and local enforcement. Again, the opinion's logic forces its authors to argue that words do not mean what they appear to mean, and Rep. Latham, Rep. Doolittle, and the congressional majorities that approved their amendments were wrong.

Inherent Authority

The opinion's conclusion that state and local police have inherent authority to arrest individuals for non-criminal violations of the federal immigration laws is similarly unsupported by OLC or judicial precedent. The opinion:

- Does not address the significant distinction between criminal and non-criminal enforcement set forth in the office's previous opinions and in judicial precedent. Indeed, it willfully obscures that distinction, characterizing *Marsh*, a case involving a *criminal* conviction for violation of the federal Prohibition statute, as simply involving a question of "warrantless arrests for violation of federal law." *See also, e.g.*, *United States v. Di Re*, 332 U.S. 581 (1948) (involving criminal violation of Second War Powers Act of 1942).

  In fact, the opinion does not cite a single case upholding a state or local arrest on the basis of a violation of a non-criminal federal statute. At most, it offers quotes from a pair of Tenth Circuit cases that do not distinguish between criminal and non-criminal violations. But in both of those cases, the individual challenging his arrest was actually charged with a criminal offense. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999) (previously deported felon); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1299 (10th Cir. 1984) (knowing transportation of illegal aliens).

- Has implications far beyond the immigration context. The opinion takes the sweeping and unprecedented position that that state and local police have the inherent authority to arrest individuals for any violation of any federal law, without regard to whether federal law authorizes such an arrest or even whether federal law would permit federal officers to make the same arrest.

  Thus, by the logic of this opinion, the violation of any federal statute – as to taxation, the environment, finance, food safety, education, or any other topic – would serve as a basis for lawful arrest by state and local police. That result is simply absurd.

- Ducks constitutional concerns raised by the course it recommends. The Executive Branch is obliged to ensure the responsible implementation of federal statutes. See *Printz v. United States*, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints").

  The opinion does not explain how unfettered state and local immigration enforcement authority comports with the President's constitutional obligation to "take Care" that federal immigration law is "faithfully executed." Rather, it states that the principle is broadly inapplicable to state and local immigration

enforcement because in enforcing the immigration laws the states are acting as independent sovereigns, like Canada. Given that the opinion can cite no judicial or OLC opinions that actually employ this logic, and that the 1989 OLC opinion contradicts it, its treatment of this constitutional issue is alarmingly superficial.

Policy considerations

The OLC's selective and misleading survey of the law results in an opinion that is much more of a political document than neutral and reliable legal advice. It is worth noting that experience over the past six years with state and local immigration enforcement has validated the concerns that many law enforcement officers, state and local elected officials, and members of Congress have expressed,[5] including:

- negative effects on public safety resulting from fear of the police in immigrant communities, such as unwillingness of crime victims and witnesses to talk to police;
- increased cost and liability implications for state and local governments;
- diversion of federal resources for processing, detention, adjudication, and removal of low-priority violators;
- lack of understanding of immigration law among police officers;
- racial profiling;
- illegal arrests, detention, and deportation of U.S. citizens;
- decreased access to education, health, fire, and other services by immigrants and members of their families and communities; and
- heightened vulnerability of individuals suffering from domestic abuse.

[5] *See, e.g.*, National Immigration Forum, "Proposals to Expand the Immigration Authority of State and Local Police: Dangerous Public Policy According to Law Enforcement, Governments, Opinion Leaders, and Communities," http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/CLEARHSEAQuotes.pdf; Major Cities Chiefs position statement, http://www.majorcitieschiefs.com/pdfpublic/mcc_position_statement_revised_cef.pdf.