THE QUINTESSENTIAL FORCE MULTIPLIER: THE INHERENT AUTHORITY OF LOCAL POLICE TO MAKE IMMIGRATION ARRESTS

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I. INTRODUCTION

The terrorist attacks of September 11, 2001 underscored for all Americans the link between immigration law enforcement and terrorism. Nineteen alien terrorists had been able to enter the country legally and undetected, overstay their visas or violate their immigration statuses with impunity, and move freely within the country without significant interference from federal or local law enforcement.[1] The abuse of U.S. immigration laws was instrumental in the deaths of nearly 3,000 people. Moreover, any suicide attack by an alien terrorist in the future will likely entail additional violations of U.S. immigration laws. Either the terrorist will attempt to enter the United States legally and will violate the terms of his nonimmigrant status in the planning and execution of his attack,[2] or the alien terrorist will enter without inspection (EWI), which is itself a violation of U.S. immigration law.[3]

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[1] *See infra* Part II.A for a more detailed description of the 9/11 terrorists and their circumstances.

[2] This would not, however, be the case if the terrorist was an "immigrant" alien who possessed lawful permanent resident status (or, in common parlance, held a "green card," although the document is not actually green). *See* U.S. Citizenship & Immigration Servs., Glossary & Acronyms, http://uscis.gov/graphics/glossary2.htm (last visited Sept. 25, 2005) (defining "lawful permanent resident," also known as "green card holder," as a non-citizen "residing . . . in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant").

[3] 8 U.S.C. § 1201(f) (2000) (requiring nonimmigrants to surrender documentation at the port of entry to immigration officers); *id.* § 1225(a)(3) (requiring all aliens seeking admission to, readmission to, or transit through the United States to be inspected by immigration

The fact that the 9/11 terrorists had been able to exploit weaknesses in the enforcement of immigration laws was not surprising to those engaged in the execution of federal immigration law. Enforcing the immigration laws is one of the most daunting challenges faced by the federal government. With an estimated 7 to 10 million illegal aliens already present in the United States[4] and fewer than 2000 interior enforcement agents at its disposal, the U.S. Bureau of Immigration and Customs Enforcement (ICE) has a Herculean task on its hands—one that it cannot easily accomplish alone.[5] After 9/11, it became clear that an effective domestic war against terrorism would require improvements in the enforcement of immigration laws.

On June 6, 2002, Attorney General John Ashcroft announced the National Security Entry-Exit Registration System (NSEERS), a program that would require high-risk alien visitors to provide fingerprints and extensive biographical information. It would also require such aliens to re-register with U.S. immigration officials periodically and would, for the first time, impose real-time departure controls on such high-risk visitors.[6] Violators of the NSEERS requirements would be listed in the National Crime Information Center (NCIC) database, accessible in the squad cars of most local police departments, allowing local law enforcement officers to make arrests of such high-risk immigration law

officers); *id.* § 1182(a)(9)(B)(ii) (defining "unlawful presence" as presence after expiration of authorized period of stay or presence without admission or parole).

[4] "The INS estimates that the total unauthorized immigrant population residing in the United States in January 2000 was 7.0 million." OFFICE OF IMMIGRATION STATISTICS MATERIAL, U.S. IMMIGRATION & NATURALIZATION SERVS., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000, at 1 (2003), *available at* http://uscis.gov/graphics/shared/aboutus/statistics/Ill_Report_1211.pdf. The Urban Institute estimates that in March 2002 there were 9.3 million illegal aliens in the United States. JEFFERY S. PASSEL ET AL., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES 1 (2004), http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf.

[5] ICE is "the largest investigative arm of the Department of Homeland Security" and "is responsible for identifying and shutting down vulnerabilities in the nation's border, economic, transportation and infrastructure security." U.S. Immigration & Customs Enforcement, ICE Mission, http://www.ice.gov/graphics/about/index.htm (last visited Sept. 25, 2005). ICE is additionally described in the Budget of the United States as "bring[ing] a unified and coordinated focus to the enforcement of Federal immigration . . . laws" and as "[r]esponsible for promoting the public safety and national security by ensuring the departure from the United States of all removable aliens through the fair enforcement of the nation's immigration laws." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006 app. 493 (2005). More than 17,000 people are employed by ICE. *Id.* at 494.

[6] John Ashcroft, Att'y Gen., U.S. Dep't of Justice, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.

violators.[7] Had local police officers had access to the names of the five 9/11 hijackers who violated civil provisions of the Immigration and Nationality Act (INA) prior to the attack, they might have been able to arrest and detain one or more of the hijackers.[8]

The assistance of state and local law enforcement agencies can also mean the difference between success and failure in enforcing the nation's immigration laws generally. The nearly 800,000 police officers nationwide represent a massive force multiplier.[9] This assistance need only be occasional, passive, voluntary, and pursued during the course of normal law enforcement activity. The net that is cast daily by local law enforcement during routine encounters with members of the public is so immense that it is inevitable illegal aliens will be identified. When a local police officer establishes probable cause to believe that an alien is in violation of U.S. immigration law, he may contact the ICE Law Enforcement Support Center in Williston, Vermont, to confirm that ICE wishes to take custody of the alien.[10]

The Department of Justice Office of Legal Counsel (OLC) provides oral advice and written opinions in response to various executive branch requests.[11] When Attorney General Ashcroft announced the NSEERS system, he also announced the unequivocal conclusion of the OLC: "[A]rresting aliens who have violated criminal provisions of [the INA] or civil provisions that render an alien deportable . . . is within the inherent authority of the states."[12] Shortly thereafter,

[7] *Id.* The FBI's National Crime Information Center (NCIC) maintains a computerized database of arrest and identification records developed by local and state police agencies. This database is available nationwide for use by federal, state, and local police officials. THE FBI: A COMPREHENSIVE REFERENCE GUIDE 160, 199, 221 (Athan G. Theoharis et al. eds., 1999).

[8] The five hijackers who either exceeded their B visa periods of authorized stay or committed other identifiable civil violations of the INA were Nawaf al Hazmi, Mohammed Atta, Hani Hanjour, Ziad Jarrah, and Satam al Suqami. *See infra* Part II.A.

[9] Bureau of Justice Statistics, U.S. Dep't of Justice, Law Enforcement Statistics: Summary Findings, *available at* http://www.ojp.usdoj.gov/bjs/lawenf.htm (last visited Sept. 25, 2005). The Department of Defense defines "force multiplier" as "[a] capability that, when added to and employed by a combat force, significantly increases the combat potential of that force and thus enhances the probability of successful mission accomplishment." Def. Technical Info. Ctr., DOD Dictionary of Military Terms (2005), *available at* http://www.dtic.mil/doctrine/jel/doddict.

[10] U.S. Immigration & Customs Enforcement, Fact Sheet, ICE Law Enforcement Support Center (Jan. 21, 2005), *available at* http://www.ice.gov.

[11] The OLC serves as general counsel for the Department of Justice and outside counsel for the other executive branch agencies. Dep't of Justice, OLC Homepage, About OLC, http://www.usdoj.gov/olc/index.html (last visited Sept. 25, 2005).

[12] Ashcroft, *supra* note 6. On September 7, 2005, a slightly redacted version of the 2002 OLC opinion was made available, pursuant to the Freedom of Information Act, via a court

the OLC retracted the relevant section of an erroneous 1996 OLC opinion on the subject. The OLC's 2002 conclusion—that states possess inherent authority to make immigration arrests—was not an extraordinary one. However, it sparked an extraordinary reaction among those in Washington, D.C., who lobby for open borders and less effective enforcement of immigration laws.[13] It also prompted a few critics to opine at length in law review articles.[14]

It had long been widely recognized that state and local police possess the inherent authority to arrest aliens who have violated *criminal* provisions of the INA.[15] Once the arrest is made, the police officer must contact federal immigration authorities and transfer the alien into federal custody within a reasonable period of time. Confusion existed, however, on the question of whether the same authority extends to arresting aliens who have violated *civil* provisions of the INA that render an alien deportable. That confusion had been, to some extent, fostered by the erroneous 1996 OLC opinion, the relevant part of which was withdrawn by OLC in 2002.[16]

As I explain in this Article, the law on this question, however, 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. Additionally, such inherent arrest authority has never been preempted by Congress. This conclusion has been confirmed by

order issued by the Second Circuit. Am. Civil Liberties Union, ACLU Releases DOJ Memo Justifying Controversial Policy Change (Sept. 7, 2005), http://aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=19048&c=22; Nat'l Council of La Raza v. Dep't of Justice, 411 F.3d 350 (2d Cir. 2005).

[13] Articulated concerns include discouraging immigrants from reporting crime or otherwise interacting with the police, diverting resources from public-safety missions, lack of immigration-enforcement training, and racial profiling and discrimination leading to litigation. Am. Civil Liberties Union, *supra* note 12.

[14] *See* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 966 (2004) (describing Attorney General Ashcroft's announcement as a reversal in position); Jill Keblawi, Comment, *Immigration Arrests by Local Police: Inherent Authority or Inherently Preempted?*, 53 CATH. U. L. REV. 817, 817–18 (2004) (describing Attorney General Ashcroft's position as a contradiction of prior OLC opinion); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (describing Attorney General Ashcroft's announcement as legally incorrect).

[15] 8 U.S.C. § 1357(g)(1)–(3) (2000) (authorizing the Attorney General to enter into memoranda of understanding with state and local authorities to enforce immigration laws).

[16] The following statement appears in the 1996 opinion on the OLC website: "Editor's Note: In 2002, the Office of Legal Counsel withdrew the advice set forth in this section." Op. Off. Legal Counsel, Assistance By State and Local Police in Apprehending Illegal Aliens (1996) (withdrawn in part in 2002), *available at* http://www.usdoj.gov/olc/immstopo1a.htm.

every court to squarely address the issue. Indeed, it is difficult to make a persuasive case to the contrary. This inherent arrest authority has been possessed and exercised by state and local police since the earliest days of federal immigration law.

In this Article, I describe the inherent legal authority upon which state and local police may act when making arrests in order to assist federal immigration enforcement.[17] I also answer the challenges of those who insist that such inherent authority has been preempted by Congress. Before describing this legal landscape, I explain in greater detail why the authority of local law enforcement to make immigration arrests, both criminal and civil, is critical both to the success of the war against terrorism and to rebuilding the rule of law in immigration.

II. THE VALUE OF LOCAL LAW ENFORCEMENT

The years that have passed since September 11, 2001, have yielded a wealth of cases in which an immigration-based arrest 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 is often pivotal in the apprehension of aliens who present a terrorist or criminal threat. The nearly 800,000 state and local officers are the eyes and ears of law enforcement across the United States. They are the officers who encounter thousands of aliens daily in traffic stops and other routine law enforcement situations. Federal immigration officers simply cannot cover the same ground. The fact that four of the nineteen 9/11 hijackers had law enforcement encounters with local police in the six months preceding September 11, 2001, is instructive. The following are the most important scenarios in which state and local assistance in making immigration arrests occurs or, in the case of the 9/11 terrorists, should have occurred.

A. The 9/11 Terrorists

The nineteen Al Qaeda terrorists who carried out the 9/11 attacks had their final contacts with federal law enforcement officials at the

[17] This explanation should not be understood as a description of the 2002 OLC opinion on the subject. It is offered solely in the author's capacity as a law professor, not in his former capacity as a U.S. Department of Justice official.

ports of entry when they were legally admitted into the United States. Four members of the 9/11 terrorist group, however, encountered state and local law enforcement while inside the country. In all four of those instances, the state or local officers might have been able to make immigration arrests if the aliens' immigration violations had been communicated to them by federal authorities or if the officers had independently developed probable cause to believe that the aliens were in violation of federal immigration law.

The first case is that of Saudi Arabian Nawaf al Hazmi. Hazmi entered the United States through the Los Angeles International Airport as a B-2 visitor for pleasure[18] on January 15, 2000.[19] He rented an apartment with fellow hijacker Khalid al Mihdhar in San Diego and lived there for more than a year.[20] The authorized period of stay for B-2 visas is six months in almost every instance, as a matter of regulatory policy.[21] Since Hazmi was admitted to the United States for a six-month stay,[22] he would be in the United States illegally after July 15, 2000.[23] In early 2001, he moved to Phoenix, Arizona to join another 9/11 hijacker, Hani Hanjour.[24] On April 1, 2001, Hazmi was stopped for speeding in Oklahoma while traveling cross-country with Hanjour.[25] Had the officer known that Hazmi was in violation of U.S. immigration law at the time, he could have detained him.[26]

The second case is that of Egyptian Mohammed Atta, the ringleader of the 9/11 attacks and the individual who was most

[18] A temporary visitor to the United States for business or pleasure is a nonimmigrant alien. 8 U.S.C. § 1101(a)(15)(B) (2000). This alien may be issued a B-1 or B-2 visa, respectively. 8 C.F.R. § 214.2(b)(1) (2005). This type of visa allows admittance for no more than one year and can be extended by no more than six months. *Id.*

[19] 9/11 AND TERRORIST TRAVEL: A STAFF REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 15 (2004), [hereinafter 9/11 AND TERRORIST TRAVEL].

[20] Barry Wigmore, *War on Terror: Security Failure: 9/11: The 7 Missed Clues; How CIA and FBI Kept On Blundering*, SUNDAY MIRROR, June 9, 2002, at 16–17.

[21] 8 C.F.R. § 214.2(b)(2) (2005).

[22] 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 15.

[23] 8 U.S.C. § 1182(a)(9)(b)(ii) (2000). *See* 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 17 (stating Hazmi's stay expired on July 14, 2000).

[24] Wigmore, *supra* note 20.

[25] *Panel II of the Twelfth Public Hearing of the National Commission on Terrorist Attacks upon the United States*, FED. NEWS SERV., June 16, 2004 (statement by Dietrich ("Peter") Snell) [hereinafter Snell]. Additionally, Hazmi was issued only two tickets because his California driver's license did not show any problems when run through the police crime computers. Wigmore, *supra* note 20.

[26] The officer also could have detained Hani Hanjour on immigration grounds. *See infra* text accompanying notes 37–47.

likely at the flight controls of American Airlines Flight 11 when it crashed into the World Trade Center. Atta entered the United States on numerous occasions, using B1 and B2 visas (temporary visitor for business/pleasure).[27] His first entry into the country was on June 3, 2000, through Newark Airport.[28] As noted above, the normal period of stay for B visa holders is six months, authorized at the time of entry. A B visa holder, however, may gain a "new" six-month period of authorized stay by departing the country and reentering on the same visa.[29] In total, Atta spent more than thirteen months in the United States preparing for the attacks.[30] However, he was unable to completely avoid contact with local law enforcement. On April 26, 2001, a police officer in Broward County, Florida stopped Atta for a traffic violation and ticketed him for possessing an invalid driver's license.[31] The officer did not know that Atta had overstayed his visa on a prior visit to the United States.[32] In May 2001, Atta obtained a valid Florida driver's license, despite his prior illegal presence in the United States.[33] However, Atta failed to appear in court for the April 26 ticket, and a bench warrant was issued for his arrest.[34] On July 5, 2001, Atta was pulled over for a traffic violation in Palm Beach County, Florida.[35] The police officer was unaware of the bench warrant issued by the neighboring jurisdiction; accordingly, he allowed Atta to drive away after issuing Atta a warning.[36]

The third case is that of Saudi Arabian Hani Hanjour, who is believed to have been at the flight controls of American Airlines

[27] *See* note 18.

[28] 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 16.

[29] *See id.* at 23 (describing how terrorist Jarrah left the United States and upon his return a day later was reissued a six-month stay).

[30] *See* 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 15–23 (describing Atta's actions leading up to the 9/11 terrorist attack).

[31] Atta produced an international driver's license. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 231 (2004) [hereinafter 9/11 COMMISSION REPORT]; *see also* Thomas C. Tobin, *Florida: Terror's Launching Pad*, ST. PETERSBURG TIMES, Sept. 1, 2002, at 1A.

[32] *See* 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 23; Mark Krikorian, *Keeping Terror Out: Immigration Policy and Asymmetric Warfare*, 75 NAT'L INT. 5 (2004).

[33] Michael R. Turner, *Intel Bill a Good First Step in Reform but Drivers' License Reform Still Needed*, U.S. FED. NEWS, Dec. 10, 2004; 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 31.

[34] *See* Tobin, *supra* note 31; Charlie Weaver & Robert Ulrich, *Mr. Magoo vs. the Terrorists: America Must Bolster its Tracking Aptitude*, WASH. TIMES, Aug. 5, 2002, at A17.

[35] *See* Weaver & Ulrich, *supra* note 34.

[36] *Id.*

Flight 77 when it hit the Pentagon.[37] Hanjour entered the United States on an F1 student visa[38] on December 8, 2000, at the Cincinnati/Northern Kentucky International Airport.[39] He stated that he intended to take classes at the ELS Language Center in Oakland, California.[40] However, he never went to the ELS Language Center.[41] Hanjour's immigration violation commenced when he failed to show up for classes.[42] Thereafter, he was in the country illegally.[43] On August 1, 2001, Hanjour was pulled over for speeding in Arlington County, Virginia.[44] The police officer apparently did not know that Hanjour had violated his immigration status.[45] Accordingly, Hanjour was issued a ticket and allowed to drive away.[46] He later paid his $100 fine by mail.[47]

The fourth case is that of Lebanese terrorist Ziad Jarrah, the man believed to have been at the flight controls of United Airlines Flight 93, which crashed in rural Pennsylvania.[48] Jarrah first entered the United States on June 27, 2000, at the Atlanta Airport on a B-2 visa.[49] He immediately violated his immigration status by going directly to the Florida Flight Training Center in Venice, Florida, where he would study until January 31, 2001.[50] He never applied to change his immigration status from tourist to student.[51] He was therefore detainable and removable from the United States almost from the moment he entered the country.[52] He successfully avoided contact with state and local police for more than fourteen months. However, at 12:09 a.m. on September 9, 2001, two days before the attack, he was clocked at ninety miles per hour in a sixty-five miles

[37] Tobin, *supra* note 31.

[38] *See* 8 U.S.C. § 1101(a)(15)(F)(i) (2000) (describing who may obtain an "F1" student visa).

[39] 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 23.

[40] *Id.*

[41] *Id.*

[42] *See* Turner, *supra* note 33.

[43] 8 U.S.C. § 1227(a)(1)(C)(i); Turner, *supra* note 33.

[44] *Hijacker Had Been Stopped for Speeding*, MILWAUKEE J. SENTINEL, Jan. 9, 2002, at 8A. Hanjour produced a Florida driver's license and was driving a van with New Jersey license plates. Marsha Kranes, *Md. Cops Let 9/11 Hijacker Go*, N.Y. POST, Jan. 9, 2002, at 7.

[45] *See* Kranes, *supra* note 44 (stating that Hanjour was just issued a $100 ticket and released).

[46] *Id.*

[47] *Id.*

[48] *See* Tobin, *supra* note 31.

[49] *See* 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 17.

[50] *Id.*

[51] *Id.*

[52] 8 U.S.C. § 1227(a)(1)(C)(i). On each of Jarrah's six subsequent entries into the United States, INS inspectors failed to detect his illegal immigration status. 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 17.

per hour zone on Interstate 95 in Maryland, twelve miles south of the Delaware state line.[53] He was traveling from Baltimore to Newark, in order to rendezvous with the other members of his team at their staging point in New Jersey.[54] The Maryland trooper did not know that Jarrah had been attending classes in violation of his immigration status.[55] The trooper also did not know that Jarrah's visa had expired more than a year earlier, a second violation of immigration law that rendered him detainable and removable from the United States.[56] The trooper issued Jarrah a speeding ticket carrying a $270 fine and let him go.[57] The ticket would be found in the glove compartment of the car, left at Newark Airport two days later.[58]

Of critical importance is the fact that *all four of the hijackers who were stopped by local police prior to 9/11 had violated federal immigration laws and could have been detained by the state or local police officers*. Indeed, there were only five hijackers who were clearly in violation of immigration laws while in the United States—and four of the five were encountered by state or local police officers.[59] These were four missed opportunities of tragic dimension. Had information about their immigration violations been disseminated to state and local police through the NCIC system, the four terrorist aliens could have been detained for their violations. Adding even greater poignancy to these missed opportunities is the fact that they involved three of the four terrorist pilots of 9/11. Had the police officers involved been able to detain Atta, Hanjour, and Jarrah, these three pilots would have been out of the picture. It is difficult to imagine the hijackings proceeding without three of the four pilots.[60] The four traffic stops also offered an opportunity to

[53] Kranes, *supra* note 44.

[54] Snell, *supra* note 25. Jarrah was in possession of a valid Virginia driver's license and was driving a rented Mitsubishi Gallant. Kranes, *supra* note 44.

[55] *See* 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 17.

[56] *Building an Agile Intelligence Community to Fight Terrorism and Emerging Threats: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. 2 (2004) (statement of Sen. Susan M. Collins). This was also a fact that should have prevented his numerous reentries into the United States. *Id.*

[57] Kranes, *supra* note 44.

[58] *Id.*

[59] The fifth hijacker who was illegally present in the United States—in addition to Hazmi, Atta, Hanjour, and Jarrah—was Satam al Suqami. *See* 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 31–32. Suqami overstayed his period of authorized stay on his B1 visa on May 20, 2000. *Id.* He would be illegally present in the United States until the attack on September 11. 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 31–32.

[60] *See* 9/11 COMMISSION REPORT, *supra* note 31, at 238–39 (showing photographs of the 9/11 hijackers and labeling the pilots as such). Hazmi also trained as a pilot and is believed

detain the leadership of the 9/11 terrorists. Had the police arrested Atta and Hazmi, the operation leader and his second-in-command would have been out of the picture.[61] Again, it is difficult to imagine the attacks taking place with such essential members of the 9/11 cohort in custody.

Importantly, *all of these transgressions were civil, not criminal, violations* of the INA. Therefore, according to the view of those who contend that Congress has preempted state and local police from making arrests for *civil* violations of the INA, no local police officer would have had the authority to arrest any of these hijackers on the basis of his immigration violation(s). In other words, even if the INS had developed a program to detect such violations and report the names of violators to local law enforcement agencies prior to the 9/11 attacks, the hands of local police would have been tied, and they would have been unable to help stop the attacks. Not only is it implausible to assert that Congress would have intended such a consequence as a policy matter, it is difficult to sustain such an assertion as a legal matter, as discussed in Part IV.

B. Arrests of Suspected Terrorists Listed in the NCIC System

Four of the hijackers were questioned by local police in the most common of law enforcement encounters—the traffic stop.[62] This type of encounter offers a valuable opportunity to locate specific wanted aliens, because most police vehicles are equipped with laptop computers connected to the NCIC system.[63] Had the federal government possessed information regarding the hijackers' immigration violations and possible terrorist connections, and had that information been distributed to police officers via the NCIC system, the terrorist plot that claimed nearly 3,000 lives might have been derailed. Since 9/11, the federal government has developed

to have flown at least reconnaissance flights in the Washington, D.C. area. *Id.* at 242.

[61] Although he did not pilot one of the airplanes on September 11, Hazmi was identified as the second-in-command. *Id.*

[62] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY, at iv, 6 (2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf (estimating that 16.8 million drivers were stopped in 2002 by police in traffic stops).

[63] *See generally* Press Release, Fed. Bureau of Investigation, U.S. Dep't of Justice (July 15, 1999), *available at* http://www.fbi.gov/pressrel/pressrel99/ncic2000.htm; INFO. TECHS., INC., FROM CALLBOX TO COMPUTER: AN ITI WHITEPAPER ON THE CHANGING FACE OF TECHNOLOGY IN LAW ENFORCEMENT 3–4, *available at* http://www.itiusa.com/papers/CallBox.pdf (last visited Jan. 23, 2006) (discussing the use of laptops and other technology available to local police).

information that is being disseminated to state and local police officers through NCIC. For example, NSEERS allows the federal government to determine when a high-risk alien overstays his visa or fails to report his address and activities after thirty days in the United States. The names and details of many NSEERS violators have been entered into the NCIC system. 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 apprehend the alien before he engages in a terrorist act.

In the first two years of its operation, the NSEERS system led to the identification of eleven suspected terrorists.[64] Others with potential involvement in terrorism were also listed in the NCIC system. In addition to the identification of specific terrorists, NSEERS has served to deter and disrupt terrorist activity in the United States. "[T]he proposition that these programs had the potential to disrupt and perhaps to deter terrorist plots forming inside the United States after 9/11 certainly has some support. . . . [R]esearch demonstrates that terrorists often need to break laws in order to successfully complete their operations . . . ."[65] NSEERS also led to the initiation of removal proceedings against approximately 13,000 aliens who were found to be in violation of immigration laws.[66] There is evidence of the disruptive effect that these removals had on terrorist planning. As one Al Qaeda detainee stated, these removals made Al Qaeda operations more difficult.[67]

C. Other Cases Involving Terrorism

The details of actual cases in the wake of 9/11 cannot be discussed without revealing classified information.[68] But a hypothetical fact pattern suffices to 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

[64] James R. Edwards, Jr., *Astray on Amnesty*, WASH. TIMES, Jan. 11, 2004, at B03.
[65] 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 159.
[66] *Id.* at 157.
[67] *Id.* at 160.
[68] 5 U.S.C. § 552(b)(7)(A)–(F) (2000) (granting law enforcement agencies the right to classify certain material due to confidentiality, possible interference with ongoing investigations, or potential endangerment to the life or physical safety of any individual).

significant quantities of fertilizer.[69] He may also learn from other university students that the individual 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.[70] 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.

D. The Absconder Initiative

There are now more than 465,000 absconders at large in the United States.[71] These aliens have had their days in immigration court and have disobeyed their final orders of removal.[72] The absconder problem has made a mockery of the rule of law in immigration. Thousands of absconders have engaged in serious criminal activity in addition to their immigration violations.[73] Many absconders have committed criminal violations of the INA.[74]

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[69] The nations currently designated state sponsors of terrorism by the U.S. Department of State are Iran, Libya, Sudan, Syria, North Korea, and Cuba. Bureau of Consular Affairs, U.S. Dep't of State, Special Visa Processing Procedures—Travelers from State Sponsors of Terrorism (Aug. 22, 2005), http://travel.state.gov/visa/temp/info/info_1300.html; *see also* Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543, 555 (granting the Secretary of State the right to name state sponsors of terrorism based on specified criteria); Press Release, Hinchey Introduces Legislation to Restrict Sale of Bomb-Making Material (Mar. 17, 2005), *available at* http://www.house.gov/apps/list/press/ny22_hinchey/morenews/031705amoniumnitrate.html (discussing a proposal to restrict the sale of ammonium nitrate fertilizer).

[70] This would constitute a civil violation of immigration law, rendering the alien deportable under 8 U.S.C. § 1227(a)(1)(C)(i) (2000).

[71] *11-Day Wisconsin Operation Nets 21 Fugitive Aliens*, U.S. FED. NEWS, Mar. 28, 2005; *see also* WordReference.com, http://www.wordreference.com/definition/alien%20absconder (last visited Jan. 23, 2006) (defining "alien absconder" as "a fugitive remaining in the United States after an immigration judge has ordered them deported").

[72] *See* Susan Sachs, *A Nation Challenged: Deportations; U.S. Begins Crackdown on Muslims Who Defy Orders to Leave Country*, N.Y TIMES, Apr. 2, 2002, at A5.

[73] *See* Mary Beth Sheridan, *Tracking Down Immigrant Fugitives; Md. Squad Part of Get-Tough Effort*, WASH. POST, Jan. 2, 2005, at A1.

[74] *See State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing before the Subcomm. on Immigration, Border Sec. and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. 120 (2004) (testimony of Kris W. Kobach, Professor of Law, University of Missouri (Kansas City) School of Law) [hereinafter Kobach Testimony].

However, others have committed civil violations where the underlying immigration violation was of a civil provision and the refusal to obey the order of removal was not willful.[75] On December 5, 2001, the Department of Justice launched the Absconder Initiative, which has been continued under the Department of Homeland Security.[76] This initiative marked the beginning of the process of listing absconders' names and information in the NCIC system.[77] The presence of these names in the NCIC system gives local police the information necessary to make immigration arrests during the course of routine traffic stops.[78] The existence of the Absconder Initiative is based on the premise that local police have the authority to make immigration arrests—for both civil and criminal violations of the Immigration and Nationality Act.[79]

Beginning in December 2001, absconders from nations associated with Al Qaeda and absconders with criminal records were considered "priority absconders" and were listed in the NCIC system first.[80] As of November 30, 2005, 47,433 absconders had been listed.[81] Thousands of these fugitives have been arrested with the cooperation of state and local law enforcement officers. Between

[75] For example, an absconder may not have resided at the address to which the removal order, rendered in his absence, was delivered.

[76] *Seventh Public Hearing of the National Commission on Terrorist Attacks Upon the United States*, Jan. 26, 2004, http://www.9-11commission.gov/hearings/hearing7/witness_ziglar.htm (statement of James W. Ziglar, INS Commissioner) [hereinafter *Seventh Public Hearing*]; Kobach Testimony, *supra* note 74, at 120.

[77] *Seventh Public Hearing*, *supra* note 76.

[78] *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 108th Cong. 31 (2003) (statement of James R. Edwards, Jr.).

[79] LISA M. SEGHETTI ET AL., CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT FOR CONGRESS: ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 3 n.4, 8 (2004), *available at* http://fpc.state.gov/documents/organization/31349.pdf.

[80] *Immigration and Naturalization Service's (INS) Interior Enforcement Strategy: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 107th Cong. 9 (2002) (statement of Joseph R. Greene, Assistant Comm'r for Investigations, INS) [hereinafter Greene Statement]; Memorandum from the Deputy Att'y Gen. to INS Comm'r et al., Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), *available at* http://news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf (explaining "the process for apprehending and interviewing the priority absconders" under the first phase of the Absconder Initiative).

[81] E-mail from J. Scott Blackman, ICE, to author (Dec. 14, 2005) (on file with author) [hereinafter Blackman E-mail].

> Although the [Absconder 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.

Kobach Testimony, *supra* note 74, at 120.

November 2003 and November 2005, 3,944 absconders were apprehended by state and local law enforcement officers utilizing the NCIC.[82] These arrests have resulted in the removal of many violent criminals from America's streets.

Many of the absconders are murderers. One of the most notorious absconders, whose immigration violations were part of a long and violent criminal record, was Maximiliano Silerio Esparza, arrested by local police in Oregon in the Summer of 2002 for rape and murder.[83] Several absconders have become cop killers. For example, in March 2002, absconder Luis Alberto Gomez Gonzalez killed an off-duty police officer in the Bronx.[84] Fifteen months later, in June 2003, absconder Adrian Camacho killed police officer Tony Zeppetella in Oceanside, California.[85] If the Absconder Initiative had occurred years earlier, their victims might be alive today.

The Absconder Initiative has also contributed to federal government efforts in the war against terrorism. As of early 2003, INS/ICE authorities had reported fourteen absconder cases to the FBI due to apparent links between the absconders and terrorist activity.[86]

It is hard to overstate the importance of the Absconder Initiative in restoring the rule of law in immigration. For years, aliens unlawfully present in the United States have disregarded final orders of removal with impunity. In 2003, the Office of the Inspector General at the U.S. Department of Justice reported that 87 percent of those aliens who were not detained during their

[82] Blackman E-mail, *supra* note 81.

[83] *See* Jim Lynch, *Suspect in Attack on Nuns is Arraigned*, OREGONIAN, Sept. 5, 2002, at A1; Donald L. Bartlett & James B. Steele, *Who Left the Door Open?*, TIME MAG., Sept. 20, 2004, at 51.

[84] Alice McQuillan et al., *Off Duty Officer is Slain: Stabbed to Death in Girlfriend's Apartment*, DAILY NEWS (N.Y.), Apr. 1, 2002, at 7.

[85] *See Deadly Consequences of Illegal Alien Smuggling: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 108th Cong. 26 (2003) (prepared statement of Peter K. Nunez, former U.S. Att'y); Jose Luis Jimenez, *Oceanside Cop's Killer Should Die, Jurors Say; Panel Calls for Execution, Cites Brutality of Shooting*, SAN DIEGO UNION-TRIBUNE, Dec. 1, 2005, at NC-1, NI-1.

[86] 9/11 AND TERRORIST TRAVEL, *supra* note 19, at 154. The 9/11 staff report notes further that none of the absconders who were removed during the first phase of the Absconder Initiative were deported under a terrorism statute or prosecuted for terrorism-related crimes. *Id.* What this statement fails to comprehend is that routine immigration violations are much easier to establish than terrorism-related violations. Federal immigration authorities typically take the path of least resistance when it is determined that the best course of action with a suspected terrorist is to remove him to his country of origin. Consequently, one cannot deduce from the fact that an alien is removed on a violation unrelated to terrorism that the alien was not, in fact, a terrorist.

removal proceedings ignored their final orders of removal and absconded.[87] The Absconder Initiative has demonstrated promising results in tracking down the hundreds of thousands of fugitives who make a mockery of the immigration court system. For the first time, the United States is apprehending absconding aliens in significant numbers. This progress would be impossible without the assistance of state and local police in making immigration arrests.

E. Violent Gangs

On March 14, 2005, ICE announced 103 coordinated immigration arrests that had occurred during the preceding weeks in what was termed "Operation Community Shield."[88] The arrested aliens were members of the Mara Salvatrucha 13 (MS-13) gang, a particularly violent criminal organization involved in drug trafficking, arms smuggling, human smuggling, and inter-gang violence.[89] The MS-13 gang originated in Los Angeles, with a large proportion of its members being natives of El Salvador who entered the United States in the 1980s.[90] The gang now has more than 10,000 members in the United States and operates in at least 33 states.[91] The majority of MS-13 members are illegal aliens.[92] All of the Operation Community Shield arrests were for immigration violations, many of which were civil violations of the INA.[93] Nevertheless, approximately half of the arrested gang members had prior arrests or convictions for violent crimes, including murder, weapons charges, and aggravated arson.[94]

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[87] *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS, Rep. No. I-2003-004, at ii (2003), *available at* http://www.usdoj.gov/oig/reports/INS/e0304/final.pdf.

[88] Press Release, U.S. Immigration and Customs Enforcement, ICE Launches Operation Community Shield with the Arrest of 103 MS-13 Gang Members in Six U.S. Cities (Mar. 14, 2005), *available at* http://www.ice.gov/graphics/news/newsreleases/archive/mar05.htm [hereinafter *Community Shield Arrests*].

[89] *See id.*

[90] *See* Gary Gately, *Indictments in Maryland Single Out MS-13 Gang*, N.Y TIMES, Aug. 26, 2005, at A12.

[91] *Alien Gang Removal Act of 2005: Hearing on H.R. 2933 Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 109th Cong. 11 (2005) (prepared statement of Kris W. Kobach, Professor of Law, University of Missouri (Kansas City) School of Law) [hereinafter Kobach Prepared Statement]; *FBI Announces Coordinated Law Enforcement Action Against Gangs*, U.S. FED. NEWS (Sept. 8, 2005).

[92] *Community Shield Arrests*, *supra* note 88.

[93] *Id.* (noting the criminal and administrative immigration charges in many of the arrests); Kobach Prepared Statement, *supra* note 91, at 13.

[94] *Community Shield Arrests*, *supra* note 88.

Operation Community Shield continued after these initial 103 arrests. In May 2005, it expanded to encompass other violent gangs with a high proportion of illegal alien membership, including the 18th Street Gang, Surenos 13, Pelones 13, the Latin Kings, and others.[95] Operation Community Shield also expanded to other cities, including those far from any national border, such as Omaha, Nebraska.[96] By the end of October 2005, Operation Community Shield had resulted in the arrest of more than 1,600 gang members and associates.[97]

These arrests were the result of coordinated efforts between ICE and local law enforcement. Local police officers and departments reported the names of suspected gang members to ICE, which then ran the lists of gang members against federal immigration databases to determine the immigration statuses of the individuals in question.[98] The arrestees were all present in the United States illegally. All were arrested for immigration offenses, rather than for criminal gang activity. Some had committed criminal violations of the INA, while others had committed civil violations. ICE took the lead in making the arrests, but state and local law enforcement cooperated and participated in the operation. What is painfully clear from Operation Community Shield is that the federal government needed the help of local law enforcement to obtain the names of gang members, and the local police departments needed the help of ICE to verify the illegal alien status of the gang members. The immigration violations served as a valuable tool to remove violent criminals from the streets.

F. Interception of Alien Smuggling

In recent years, the country has witnessed many horrific deaths as a consequence of alien smuggling.[99] Victims of the trade have died from exposure in the desert, from heat and suffocation in

[95] Tom Ford, *Illegal and in Gang? Prepare to Go Home*, MINNEAPOLIS-ST. PAUL STAR TRIB., Nov. 4, 2005; U.S. Immigration and Customs Enforcement, *News Release: Omaha ICE Apprehends 47 Gang Members, Associates as Part of Operation Community Shield* (Nov. 25, 2005), *available at* http://www.ice.gov/graphics/news/newsreleases/articles/051125omaha. htm [hereinafter ICE, *News Release*]; U.S. Immigration and Customs Enforcement, Fact Sheet: Operation Community Shield (Aug. 1, 2005), *available at* http://www.ice.gov/graphics/news /factsheets/opshield031405.htm [hereinafter Community Shield Fact Sheet].

[96] *See* ICE, *News Release*, *supra* note 95.

[97] *See* ICE, *News Release*, *supra* note 95.

[98] *See* Community Shield Fact Sheet, *supra* note 95.

[99] *See, e.g.*, Ginger Thompson & Sandra Ochoa, *By a Back Door to the U.S.: A Migrant's Grim Sea Voyage*, N.Y. TIMES, June 13, 2004, at 1.

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 unless and until enforcement capacity increases. State and local police have provided a critical boost to federal enforcement activities and will continue to play a decisive role in efforts to curtail immigrant smuggling.

Cases of immigrant smuggling arrests made by alert state and local police officers abound. To mention but a few recent examples, in December 2004, officers in El Paso, Texas arrested two alleged smugglers who had transported twenty-six illegal aliens into the United States from Costa Rica and Guatemala.[100] In October 2003, local police officers stopped a Ford Crown Victoria near San Diego after a high speed chase.[101] The sedan had ten suspected illegal immigrants inside.[102] The officers turned them over to the Border Patrol.[103] One of the deadliest and most notorious cases occurred in May 2003, when sheriff's deputies near Victoria, Texas discovered an abandoned trailer filled with illegal immigrants, nineteen of whom died due to the suffocating heat in the closed container.[104]

Immigrant smuggling cases often involve local police officers developing probable cause to believe that immigration violations have occurred. The textbook case occurs when a police officer pulls over a vehicle for a traffic infraction, only to discover that the vehicle is dangerously packed with passengers whose demeanor generates suspicion.[105] Indeed, one of the Tenth Circuit cases discussed below involving inherent arrest authority possessed by state and local law enforcement officers concerned precisely that

[100] Daniel Borunda, *Two Arrested After Immigrants Found*, EL PASO TIMES, Dec. 4, 2004, at 1B.

[101] Mark Arner, *Deputy Stops Driverless Car Loaded with People*, SAN DIEGO UNION-TRIB., Oct. 22, 2003, at B3.

[102] *Id.*

[103] *Id.* The Border Patrol is a part of the unified border agency that protects the points of entry into the United States from illegal entry, terrorism, and other illegal activity. *See* United States Customs and Border Protection, http://www.cbp.gov (last visited Sept. 26, 2005).

[104] *Driver Urged to Free Immigrants, Jury Told*, TULSA WORLD, Dec. 4, 2004, at A5; T.A. Badger, *18 Illegal Immigrants Die in Sweltering Truck Trailer*, N.Y. SUN, May 15, 2003, at 2.

[105] *See, e.g.*, United States v. Favela-Favela, 41 F. App'x 185, 187 (10th Cir. 2002) (involving the discovery of illegal aliens due to a traffic stop for violating the state's seatbelt law); United States v. Vasquez, 298 F.3d 354 (5th Cir. 2002) (upholding an arrest that followed a traffic stop made due to suspicious actions of the driver), *cert. denied*, 537 U.S. 1024 (2002).

scenario.[106]

G. Section 287(g) Authority

This Article discusses the legal basis for the inherent arrest authority possessed by state and local police. It is simply the power to arrest an illegal alien who is removable, detain the alien temporarily, and then transfer the alien to the custody of ICE. This arrest authority must be distinguished from the broader 287(g) authority that may be delegated to state and local law enforcement agencies through a formal Memorandum of Understanding (MOU). Such 287(g) authority includes not only the power to arrest, but also the power to investigate immigration violations, the power to collect evidence and assemble an immigration case for prosecution or removal, the power to take custody of aliens on behalf of the federal government, and other general powers involved in the enforcement of immigration laws. The mechanism to delegate such authority and effectively deputize members of state or local law enforcement agencies to perform such "function[s] of an immigration officer" was created by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which added subdivision (g) to section 287 of the Immigration and Nationality Act:[107]

> [T]he Attorney General may 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 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.[108]

Importantly, Congress recognized that the broad 287(g) enforcement authority differed from the narrower inherent arrest authority already possessed by state and local law enforcement

[106] *Favela-Favela*, 41 F. App'x at 187, 191. *See infra* Part IV.G (discussing the basis for the authority of state and local police to arrest individuals for violations of federal immigration laws).

[107] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 1(a), 133, 110 Stat. 3009-546, 3009-563 (codified as amended in scattered sections of 8 U.S.C.).

[108] 8 U.S.C. § 1357(g)(1) (2000).

officers. In accordance with this distinction, Congress expressly recognized that such inherent arrest authority was not displaced by the new possibility that local police might be deputized to perform all of the functions of immigration officers:

> 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—(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 (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.[109]

Section 287(g) stands as an invitation for state and local governments to contract with federal immigration authorities to exercise powers extending well beyond their inherent power to arrest.

To date, two states—Florida and Alabama—have accepted this invitation. The Florida MOU became effective on July 7, 2002.[110] Under that agreement, thirty-five Florida law enforcement officers were trained and delegated specific immigration enforcement powers, including the power to interrogate, the power to collect evidence, and the power to conduct broad immigration investigations.[111] The officers undertook six weeks of immigration enforcement training and were assigned to seven regional domestic security task forces.[112] Several law enforcement agencies in Florida each have one officer deputized under the program.[113] In the first year of the program in Florida, state and local police officers made 165 immigration arrests, including the bust of a phony document production ring in the Naples area.[114]

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[109] *Id.* § 1357(g)(10).

[110] Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 346 (2005).

[111] The Florida MOU itself is considered a law-enforcement sensitive document and is not a matter of public record. However, the outlines of enforcement powers delegated are evident in the public exercise of such powers, as described in the press. *See, e.g.*, Tanya Weinberg, *1 Year, 35 Agents, 165 Arrests; FDLE: State's Example has Inspired National Expansion*, FORT LAUDERDALE SUN-SENTINEL, Aug. 2, 2003, at 1B (discussing and describing Florida's pilot program in enforcing immigration law).

[112] *Id.*

[113] *Id.*

[114] *Id.*

The Alabama MOU was signed on September 10, 2003.[115] Under the agreement, twenty-one Alabama state troopers undertook five weeks of immigration enforcement training.[116] ICE also agreed to send at least three additional federal supervisory immigration agents to the state.[117] The first class of twenty-one troopers graduated in October 2003.[118] In addition to procedures of investigation, the state officers were trained in using national immigration databases, the details of immigration law, and specific document requirements for illegal aliens.[119] By the end of July 2005, the Alabama troopers vested with 287(g) authority had made approximately 200 immigration arrests, including 44 cases resulting in federal prosecution.[120] In February 2005, the Department of Homeland Security announced that a second class of twenty-five Alabama state troopers would receive the same training.[121] The authority conveyed by section 287(g) is not limited to states. Counties in California have also negotiated section 287(g) MOUs with the Department of Homeland Security.[122]

The distinction between the inherent arrest authority possessed by the states and the much broader immigration enforcement authority conveyed by section 287(g) is one that has been lost on some commentators. As one student comment indignantly asserted: "The INS clearly did not believe Florida had any 'inherent authority;' otherwise, it would not have entered into an MOU only one month after Ashcroft's announcement."[123] The author of the comment either did not bother to explore the difference in scope between inherent arrest authority and the 287(g) authority embodied in the Florida MOU, or did not understand that a

[115] Sessions & Hayden, *supra* note 110, at 346.

[116] *Troopers Graduate Program*, MONTGOMERY ADVERTISER, Oct. 15, 2003, at A8.

[117] *Id.*

[118] *Id.*

[119] Press Release, Office of Sen. Jeff Sessions, Sessions Calls for Expansion of Federal Immigration Enforcement Training in Alabama (Feb. 21, 2005), *available at* http://www.sessions.senate.gov/press.htm.

[120] Mary Orndorff, *Rogers Urges More Trooper Immigration Training: Tells Congress 200 Arrests Prove Program Successful*, BIRMINGHAM NEWS, July 28, 2005, at 6C.

[121] Press Release, Office of Sen. Jeff Sessions, *supra* note 119.

[122] *See The 287(g) Program: Ensuring the Integrity of America's Border Security System through Federal-State Partnerships: Hearing Before the Subcomm. on Management, Integration, and Oversight of the H. Comm. on Homeland Sec.*, 109th Cong. (July 27, 2005) (testimony of Kris W. Kobach, Professor of Law, University of Missouri (Kansas City) School of Law), *available at* http://homeland.house.gov/files/TestimonyKobach.pdf (discussing interest expressed by two California counties in section 287(g) MOU programs).

[123] Keblawi, *supra* note 14, at 840–41.

difference exists.[124] Somewhat less excusably, two articles by law professors similarly failed to make this distinction.[125]

III. THE INHERENT ARREST AUTHORITY POSSESSED BY THE STATES

In assessing the authority of local police to make immigration arrests, the initial question is whether the states have inherent power to make arrests for violations of federal law. That is, may state police, exercising state law authority only, make arrests for violations of federal law, or do they possess the power to make such arrests only if they are exercising delegated federal power? The answer to this question is plainly the former.

The source of this authority flows from the states' status as sovereign governments possessing all residual powers not abridged or superseded by the U.S. Constitution. The source of the state governments' power is entirely independent of the U.S. Constitution.[126] 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 broad "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."[127] Essentially, states may take any action to protect these interests (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.[128]

It is well established that the authority of state police to make arrests for violations of federal law is not limited to situations in which state officers are exercising power delegated by the federal government to the states. Rather, it is a general and inherent

[124] *See id.* at 840 ("Florida had no authority outside the MOU to make civil immigration arrests.").

[125] *See* Pham, *supra* note 14, at 970–71 (discussing Florida's attempt to limit their officers' "warrantless arrests" to "counter-terrorism and domestic security goals"); *see also* Wishnie, *supra* note 14, at 1095 ("Were the Attorney General and OLC correct that state and local police possess the 'inherent authority' to enforce all immigration laws, . . . Congress need not have . . . created emergency and nonemergency procedures for the Attorney General to authorize state and local immigration enforcement . . . .").

[126] *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193 (1819) (finding "powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before").

[127] Manigault v. Springs, 199 U.S. 473, 480 (1905).

[128] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 282–83 (1997).

authority based on the fact that the states retain their sovereignty in the U.S. constitutional framework. The states' arrest authority is derived 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.

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. Further, 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.[129]

The Court's conclusion rests on the assumption that state officers possess the inherent authority to make warrantless arrests of individuals who have committed federal offenses. The same assumption guided the Supreme Court in *Miller v. United States*, a case concerning an arrest for federal offenses by an officer of the District of Columbia.[130] No delegation of federal arrest authority was necessary; "[b]y like reasoning the validity of the arrest . . . [was] to be determined by reference to the law of the District of Columbia."[131] As the Seventh Circuit explained in *United States v. Janik*, "[state] officers have implicit authority to make federal arrests."[132] Accordingly, they may initiate an arrest on the basis of probable cause to believe that an individual has committed a federal offense.[133]

The Ninth and Tenth Circuits have reached the same conclusion in the immigration context specifically. In *Gonzales v. City of*

[129] 332 U.S. 581, 591 (1948).
[130] 357 U.S. 301, 303–05 (1958).
[131] *Id.* at 305–06.
[132] United States v. Janik, 723 F.2d 537, 548 (7th Cir. 1983).
[133] *Id.*

Peoria, the Ninth Circuit opined with respect to immigration arrests that "[t]he general rule is that local police are not precluded from enforcing federal statutes."[134] The Tenth Circuit has reviewed this question on several occasions, concluding squarely in 1984 that "[a] state trooper has general investigatory authority to inquire into possible immigration violations."[135] As the Tenth Circuit characterized this arrest power in 1999, 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."[136] 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.'"[137] None of these Tenth Circuit holdings drew any distinction between criminal violations of the INA and civil provisions that render an alien deportable. Indeed, in all of the cases, the officers involved inquired generally into possible immigration violations, often arresting without certainty as to whether the aliens' immigration violations were of a civil or criminal nature.[138] Rather, the court described an inherent arrest authority that extends generally to all immigration violations.

IV. THE ABSENCE OF CONGRESSIONAL PREEMPTION

A. The Framework of Preemption Analysis

Having established that this inherent state arrest authority exists, the second question is whether such authority has been preempted by Congress. In conducting a 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 make reasonable the inference that Congress left 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

[134] 722 F.2d 468, 474 (9th Cir. 1983) (citations omitted).

[135] United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).

[136] United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999).

[137] United States v. Santana-Garcia, 264 F.3d 1188, 1194 (10th Cir. 2001) (quoting Vasquez-Alvarez, 176 F.3d at 1295).

[138] *See infra* Part IV.D–G.

congressional objectives.[139] In all three categories, manifest congressional intent must be demonstrated for preemption to exist. Every preemption inquiry must "start[] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress."[140] The Supreme Court has consistently reiterated that "'[t]he purpose of Congress is the ultimate touchstone'" of preemption analysis.[141]

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* (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 starting presumption must be that the federal government did not intend to deny itself any assistance that the states might offer. This presumption was articulated in 1928 by Second Circuit 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."[142]

B. Congressional Actions Evincing an Intent to Preserve Inherent State Arrest Authority

Congress has repeatedly legislated in ways that indicate a recognition of the states' inherent arrest authority and an intent not to preempt that authority. Five examples of congressional action in this regard are particularly salient. First, in 1996 Congress expressly put to rest any suspicion that it did not welcome state assistance in making immigration arrests. Congress added section 287(g) to the INA,[143] described above in Part II.G, 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

[139] *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (plurality opinion) (quoting Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982)).

[140] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[141] Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) (quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963)).

[142] Marsh v. United States, 29 F.2d 172, 174 (2d Cir. 1928).

[143] *See* discussion *supra* Part II.G.

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.[144]

Second, in 1996 Congress anticipated that state and local law enforcement agencies would be apprehending and, at the request of federal immigration authorities, detaining illegal aliens. Accordingly, in 8 U.S.C. § 1103(a)(9), Congress authorized the Attorney General to make payments to states for the detention of illegal aliens in non-federal facilities.[145] And in 8 U.S.C. § 1103(c), Congress authorized the Commissioner of the INS to enter into any "cooperative agreements with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws."[146] This was not a provision that delegated federal enforcement powers, as section 287(g) did. Rather it served to provide compensation to states that assisted the federal government by arresting, transporting, and detaining illegal aliens. The federal government has used this provision to enter into hundreds of memoranda of agreement with state and local law enforcement agencies, stipulating the amount of money to be paid to such agencies when they transport and detain illegal aliens.

Third, in 1994 Congress began appropriating funds for the creation of the Law Enforcement Support Center (LESC) in Williston, Vermont, which serves as an INS point of contact with local police officers who apprehend illegal aliens.[147] The purpose of the LESC is expressly that of communicating with local law

[144] 8 U.S.C. § 1357(g)(10) (2000).

[145] *Id.* § 1103(a)(9)(A).

[146] *Id.* § 1103(c).

[147] The LESC was created in order to help local and state law enforcement agencies in ascertaining the immigration status of possible felons. In its first year, it received nearly 15,000 inquiries from its pilot state. *See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 104th Cong. 1140 (1996) (testimony of Doris Meissner, INS Comm'r).

enforcement officers who make immigration arrests:

> The primary mission of the LESC is to support other law enforcement agencies by helping them determine if a person they have contact with, or have in custody, is an illegal, criminal, or fugitive alien. The LESC provides a 24/7 link between Federal, state, and local officers and the databases maintained by the INS.[148]

The existence of the LESC is predicated on the assumption that state and local police will be making immigration arrests:

> When a law-enforcement officer arrests an alien, LESC personnel are able to provide him or her with vital information and guidance, and if necessary, place the officer in contact with an []ICE immigration officer in the field. The partnerships fostered by the LESC increase public safety. Every day, they result in the apprehension of individuals who are unlawfully present in the United States, many of who have committed a crime and pose a threat to the local community or our Nation.[149]

The number of LESC responses to inquiries from state and local police officers has been increasing steadily year after year. In FY 2005, the LESC responded to a staggering 504,678 calls from state and local law enforcement officers.[150] Put differently, that is an average of 1,383 calls per day.

Fourth, in 1998, as part of the FY 1999 INS appropriation, Congress established forty-five "Quick Response Teams" (QRTs) for the express purpose of responding to immigration arrests made by state and local police officers. Two years later, in the FY 2001

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[148] *Law Enforcement: Are Federal, State, and Local Agencies Working Together Effectively?: Joint Hearing Before the Subcomms. on Criminal Justice, Drug Policy and Human Resources; Government Efficiency, Financial Management and Intergovernmental Relations; and National Security, Veterans Affairs and International Relations of the H. Comm. on Government Reform*, 107th Cong. 97 (2001) (testimony of Joseph R. Greene, Acting Deputy Executive Associate Comm'r for Field Operations, INS).

[149] *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the H. Comm. on the Judiciary*, 108th Cong. 12 (2003) (prepared statement of Asa Hutchinson, Under Sec'y for Border and Transp. Sec., Dep't of Homeland Sec.) [hereinafter *DHS Transition Hearing*].

[150] E-mail from Mark Kahanic, LESC Officer, Williston, VT, to author (Dec. 5, 2005) (on file with author). In FY 2004, the LESC responded to 458,711 inquiries from state and local law enforcement agencies. *Id.* In 2003, DHS Under Secretary Asa Hutchinson reported that "[i]n FY 2002, the LESC received 426,895 law-enforcement inquiries. These included 309,489 from state and local law enforcement, 24,646 inquiries regarding foreign nationals seeking to purchase firearms, and 24,646 investigative inquiries." *DHS Transition Hearing*, *supra* note 149, at 12.

budget, Congress was spending $11 million annually on the QRTs.[151]

In some areas, immigration arrests increased by more than 500 percent.[152] Approximately 200 federal immigration officers staffed the 45 QRTs that were spread across the United States.[153] Statistics from the first quarter of FY 2001 reveal the huge number of arrests by local police to which the QRTs were responding. During that three-month period, state and local police requested the assistance of the QRTs 2,532 times.[154] The QRTs responded to over ninety percent of these requests, and responded in less than three hours ninety-eight percent of the time.[155] In total, QRT officers made 2,246 administrative arrests leading to removal (a civil proceeding).[156] A much smaller portion of the aliens, 171, faced criminal prosecution—for crimes such as alien smuggling, document fraud, and illegal entry.[157] These statistics illustrate the extent to which ICE relies on immigration arrests by state and local law enforcement officers.[158] As Under Secretary of Homeland Security Asa Hutchinson reported to Congress in May 2003:

> Another way in which []ICE continues to respond to the needs of the law enforcement community is through Quick Response Teams (QRTs), which have been established across the United States. There are []ICE Special Agents with immigration expertise and Deportation Officers assigned to QRTs. Their primary duty is to work directly with state and local enforcement officers to take into custody and remove illegal aliens who have been arrested for violating state or local laws or who are found to be illegally in the U.S.[159]

Plainly, the existence and expansion of the QRTs evinces a clear congressional intent to continue cooperating with state and local police officers who encounter and arrest illegal aliens in the course

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[151] *INS and the Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. 10 (2001) (prepared statement of Kevin D. Rooney, Acting INS Comm'r) [hereinafter *INS Hearing*].

[152] Deborah Frazier, *INS Arrests in Region up 500%*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Jan. 22, 2001, at 4A; *see also* Michael Riley & Mike Soraghan, *INS Set to Join Homeland Security*, DENVER POST, Mar. 2, 2003, at B4 (reporting that "[t]he number of INS arrests has been rising steadily since 1999, the year the agency set up Quick Response Teams").

[153] Greene Statement, *supra* note 80, at 8.

[154] *INS Hearing, supra* note 151, at 10.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *DHS Transition Hearing*, *supra* note 149, at 12.

of their normal law enforcement duties.[160] A Congress that was intent on displacing local arrest authority certainly would not continue to appropriate funds for the purpose of facilitating, responding to, and benefiting from that arrest authority.

Fifth, in 1996 Congress took steps to discourage those state and local law enforcement agencies that might seek to withhold their cooperation in making immigration arrests. In 1979, the City of Los Angeles had become the first major American city to adopt a so-called "sanctuary policy." Special Order 40 barred Los Angeles police officers from asking individuals about their immigration status and from conveying such information to the federal government.[161] In 1989, New York City enacted a similar policy by mayoral decree.[162] Congress, concerned that such policies might proliferate, enacted two separate provisions designed to smooth the way for closer cooperation with state and local law enforcement, while preventing future sanctuary policies.[163] Under 8 U.S.C. § 1373, enacted in part under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,[164] and 8 U.S.C. § 1644, part of

[160] Many of these encounters with illegal aliens occur during routine traffic stops. For example, in May 2001, a Georgia state patrolman stopped a van that was heading south on Interstate 75 for a traffic violation. The patrolman encountered eleven individuals that he suspected were illegal aliens. He detained the occupants of the vehicle, contacted the INS, and transferred them to INS custody when the QRT arrived. *Traffic Stop on I-75 Nets 11 Illegal Aliens*, CHATTANOOGA TIMES FREE PRESS, May 4, 2001, at B3. The same patrolman had arrested a total of 151 illegal aliens during the previous year. Pat Mahony, *INS Office Opens Permanent Headquarters in Dalton*, CHATTANOOGA TIMES FREE PRESS, Apr. 27, 2001, at B3.

[161] Office of the Chief of Police of the L.A. Police Dep't, Special Order No. 40 (Nov. 27, 1979), *available at* http://keepstuff.homestead.com/Spec40orig.html. The specific text of Special Order 40 states: "[U]ndocumented alien status in itself is not a matter for police action. It is, therefore, incumbent upon all employees of this Department to make a personal commitment to equal enforcement of the law and service to the public, regardless of alien status." *Id.* Special Order 40 further provides that LAPD officers may not "initiate police action with the objective of discovering the alien status of a person," nor may they "arrest [or] book a person for [illegal entry into the United States]." *Id.*; *see also* Patrick McGreevy, *LAPD Passes on Immigration; Commission Spurns Request for Increased Involvement in Handling Illegals*, DAILY NEWS OF L.A., June 25, 1997 (highlighting the LAPD's limited involvement in enforcing immigration laws).

[162] Bankim Kalra & Hsin Yu-Yu, Immigration in Global Cities: A Comparative Study of New York and Toronto as Immigrant Cities 9 (Dec. 2003) (unpublished Masters thesis, University of Michigan), *available at* http://sitemaker.umich.edu/bankimportfolio/files/comparative_analysis.pdf.

[163] *See generally Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 103d Cong. 22, 23 (1993) (Staff Statement of the Permanent Subcomm. on Investigations).

[164] § 1373 reads as follows:

(a) In general. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way

the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,[165] Congress expressly barred federal, state, and local entities from preventing their officials from exchanging information with federal immigration authorities regarding the immigration status or citizenship of any individual. In the Senate report accompanying this legislation, the intent to maximize cooperation between federal immigration authorities and state or local governments was clear:

> Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act.[166]

This statement demonstrates a clear congressional intent to maximize cooperation with state and local authorities in the enforcement of immigration law. Moreover, these statutory provisions plainly assume that local police will have reason to inquire into the immigration statuses of aliens, as well as to share such information with the federal government. Shortly after Congress enacted these statutes, New York City challenged their constitutionality, arguing that the provisions in question violated the Tenth Amendment and exceeded Congress' plenary power over

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restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

(2) Maintaining such information.

(3) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373(a)–(b) (2000).

[165] *See* Pub. L. No. 104-193, §§ 1, 434, 110 Stat. 2105, 2275 (1996). The actual text of § 1644 reads as follows:

> Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

8 U.S.C. § 1644.

[166] S. REP. NO. 104-249, at 19–20 (1996).

immigration.[167] The Second Circuit rejected these challenges, holding that the two federal statutes were facially constitutional.[168]

All of these Congressional actions demonstrate an unmistakable intent to encourage state and local assistance in arresting violators of immigration law. None of these actions suggested any distinction between civil and criminal violations of immigration law. 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*.[169]

C. Gonzales v. City of Peoria *(9th Circuit)*

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.[170] Individuals of Mexican descent challenged a policy of the City of Peoria, Arizona that instructed the city's police officers to arrest and detain aliens suspected of illegally entering the United States in violation of 8 U.S.C. § 1325—a criminal provision of federal immigration law.[171] The court began with the "general rule . . . that local police are not precluded from enforcing federal statutes."[172] The court also observed that, "[w]here state enforcement activities do not impair federal regulatory interests concurrent enforcement activity is authorized."[173] After conducting a preemption analysis to determine whether Congress had displaced this enforcement authority, the court concluded that no such preemption had occurred.[174]

In upholding the city's power to arrest aliens who violate criminal provisions of federal immigration law, the court stated, "There is nothing inherent in that specific enforcement activity that conflicts with federal regulatory interests."[175] In passing, the court "assume[d] that the civil provisions of the [INA] regulating

[167] City of New York v. United States, 179 F.3d 29, 31, 33 (2d Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000).
[168] *Id.*
[169] 722 F.2d 468 (9th Cir. 1983).
[170] *Id.* at 476.
[171] *Id.* at 472–73.
[172] *Id.* at 474.
[173] *Id.*
[174] *Id.* at 475.
[175] *Id.* at 474.

authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration."[176] In other words, the civil provisions might implicitly preempt state arrest authority, under a field preemption theory. However, this possibility of field preemption with respect to civil provisions of the INA was merely an *assumption*, suggested *without any analysis*, and made in *dicta*—entirely outside of the specific holding of the case, which concerned a criminal arrest. It does not constitute binding precedent.[177] Furthermore, even if the Ninth Circuit had squarely reached this conclusion in 1983, such a holding would have been undermined by the court's failure to apply the strong presumption against preemption discussed above.[178] More importantly, the subsequent actions of Congress made such a holding unsustainable.

In contrast, the case law supporting the conclusion that Congress has *not* preempted state arrests of aliens for violations of civil provisions of federal immigration law is solid and on point. The Tenth and Fifth Circuits have 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 federal immigration law.[179] The Tenth Circuit's 1984 holding in the case of *United States v. Salinas-Calderon* was the first to confirm the inherent arrest authority possessed by the states.[180]

D. United States v. Salinas-Calderon *(10th Circuit)*

The defendant in *Salinas-Calderon* was the driver of a pickup truck who was stopped by a highway patrol officer in western Kansas for driving erratically.[181] The officer suspected that Salinas was driving under the influence of alcohol.[182] Salinas and his wife were in the cab; six passengers, none of whom spoke English, were in the bed of the pickup under an aluminum camper shell.[183]

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[176] *Id.* at 474–75.
[177] 20 AM. JUR. 2D *Courts* § 134 (2005).
[178] *See supra* text accompanying notes 140–42.
[179] *See* discussion *supra* Part III.
[180] 728 F.2d 1298 (10th Cir. 1984).
[181] *Id.* 1299.
[182] *Id.*
[183] *Id.*

Salinas did not possess a driver's license and did not speak English.[184] In talking with Salinas' wife, the officer learned that Salinas was from Mexico and that they were traveling from Florida to Colorado.[185] The officer asked her if Salinas possessed a "green card"; he did not.[186] The officer then investigated the circumstances of the six passengers in the bed of the truck.[187] All were from Mexico.[188] None possessed any identification or documentation of their immigration status.[189] The officer testified at trial that he suspected that the occupants of the vehicle were in violation of U.S. immigration law, but that he was unsure what the precise violation was. In his words, "I didn't know exactly what I had."[190] The officer then contacted the INS and transferred the occupants of the vehicle to INS custody.[191] Salinas was later charged with transporting illegal aliens within the United States.[192]

The defendant claimed that the state trooper did not have the authority to detain the transported passengers while he questioned them about their immigration status.[193] In rejecting this claim, the Tenth Circuit held that a "state trooper has general investigatory authority to inquire into possible immigration violations."[194] The court did not differentiate between criminal and civil violations. Plainly, because the officer was unsure what immigration law the aliens in the vehicle had violated, he did not know whether they had violated criminal or civil provisions of the INA.[195] Indeed, because there is no indication in the opinion that there was any reason to believe the alien passengers had committed any criminal violations, the court's affirmation of general investigatory authority applies fully to civil as well as criminal violations.

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[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* at 1299–1300.
[189] *Id.*
[190] *Id.* at 1300.
[191] *Id.*
[192] *Id.*; *see also* 8 U.S.C. § 1324(a)(1) (2000) (defining and outlining the criminal penalties for harboring and transporting aliens).
[193] *Salinas-Calderon*, 728 F.2d at 1301 n.3.
[194] *Id.*
[195] The court also rejected the defendant's contention that, because the officer lacked particular knowledge of immigration laws, "his call to the [INS] was tantamount to a fishing expedition." *Id.* at 1301 n.4. The court held that the officer's "lack of knowledge of the immigration laws does not preclude a finding of probable cause," because "lack of experience does not prevent a police officer from 'sensing the obvious.'" *Id.* (quoting United States v. Strahan, 674 F.2d 96, 100 (1st Cir. 1982)).

E. United States v. Vasquez-Alvarez *(10th Circuit)*

The Tenth Circuit's most salient case on the preemption question is *United States v. Vasquez-Alvarez*, decided in 1999.[196] In that case, an Edmond, Oklahoma, police officer arrested the defendant alien solely because he was an illegal alien.[197] The day before the arrest, an INS agent eating dinner at a restaurant in the same city observed what appeared to be a drug transaction between the defendant and another individual near their vehicles in the restaurant parking lot.[198] The next morning, the INS agent telephoned the police officer, described the vehicles involved, and asked him to investigate the situation.[199] The INS agent also expressed suspicion that the defendant was in the country illegally.[200] That night, the police officer went to the restaurant and saw the vehicles that had been described by the INS officer.[201] He learned from the restaurant manager that the defendant owned one of the vehicles and was an employee of the restaurant.[202] The officer questioned the defendant, who admitted that he was an illegal alien.[203] The officer then arrested the defendant and transported him to the city jail, to be held there until the INS took him into custody.[204]

The officer did not know at the time whether the defendant alien had committed a civil or criminal violation of the INA.[205] It was later discovered that the defendant had illegally reentered the country after three prior deportations,[206] in violation of 8 U.S.C. § 1326—a criminal violation. After his indictment, the defendant moved to suppress his post-arrest statements, fingerprints, and identification.[207] He maintained that a local police officer is without authority to arrest an illegal alien unless the arrest meets the conditions listed in 8 U.S.C. § 1252c, and that because his arrest did not meet those conditions, the officer had arrested him without legal

[196] 176 F.3d 1294 (10th Cir. 1999).
[197] *Id.* at 1295.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 1295–96.
[203] *Id.* at 1296.
[204] *Id.*
[205] *Id.*
[206] *Id.* It was also learned that the defendant had two prior state felony convictions. *Id.*
[207] *Id.* at 1295.

authority.[208] 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.[209] According to the defendant's theory, § 1252c displaced the authority of state police to make any immigration arrest that did not meet those four conditions.

The Tenth Circuit's conclusion was unequivocal: § 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, § 1252c merely creates an additional vehicle for the enforcement of federal immigration law."[210] The court rejected the alien's contention that all arrests by local police not authorized by § 1252c are prohibited by it.[211] The court reviewed the legislative history of § 1252c and analyzed the comments of Representative John T. Doolittle, who sponsored the floor amendment containing the text that would become § 1252c.[212] The court concluded that the purpose of the amendment was to overcome a perceived federal limitation on the states' arrest authority.[213] However, neither Doolittle, nor the government, nor the defendant, nor the court itself had been able to identify any such limitation.[214]

The interpretation of § 1252c urged by the defendant would have grossly distorted 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 utterly at odds 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 § 1252c, Congress passed a series of provisions designed to encourage cooperation between the federal

[208] *Id.*
[209] *Id.* at 1296 & n.2 (citing 8 U.S.C. § 1252c (2000)).
[210] *Id.* at 1295.
[211] *Id.* at 1299.
[212] *Id.* at 1298.
[213] *Id.* at 1298–99.
[214] *Id.* at 1299 n.4.

government and the states in the enforcement of federal immigration laws."[215] 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."[216] This holding is the most comprehensive analysis of the preemption question that any federal court has performed to date. The Supreme Court denied certiorari in *Vasquez-Alvarez* on October 4, 1999.[217]

F. United States v. Santana-Garcia *(10th Circuit)*

In *United States v. Santana-Garcia*, shortly after its decision in *Vasquez-Alvarez*, the Tenth Circuit again confirmed the authority of local law enforcement to arrest individuals for immigration violations.[218] *Santana-Garcia* presented the same question of local immigration arrest authority in a slightly different context. The aliens were not ultimately transferred to the INS; rather, the immigration violation justified continued detention during a traffic stop, which eventually led to the discovery of drugs in the aliens' possession.[219] The incident began when a Utah state trooper pulled a car over for running a stop sign.[220] The driver was not in possession of a driver's license and did not speak English.[221] The passenger spoke only limited English.[222] At that point, the trooper returned to his patrol car to request the assistance of a Spanish-speaking trooper.[223] While waiting for the Spanish-speaking trooper, the original trooper returned to the detained vehicle to ask the occupants about the ownership of the vehicle and their travel plans.[224] They indicated that they were traveling to Colorado from Mexico.[225] The trooper proceeded to ask whether they were "legal."[226] Both answered in the negative.[227] After the second trooper arrived, the troopers questioned the occupants further and

[215] *Id.* at 1300 (citing 8 U.S.C. §§ 1103(a)(9), (c), 1357(g)(1) (2000)).
[216] *Id.* at 1299.
[217] Vasquez-Alvarez v. United States, 528 U.S. 913 (1999).
[218] United States v. Santana-Garcia, 264 F.3d 1188, 1194 (10th Cir. 2001).
[219] *Id.* at 1190–91.
[220] *Id.* at 1190.
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*

obtained their consent to search the vehicle.[228] The troopers discovered drugs in the vehicle, behind the glove compartment and the dashboard radio.[229]

At the suppression hearing, the first trooper testified as to the factors that led him to continue to detain the occupants of the vehicle beyond the initial reason for the stop.[230] He did not mention their illegal presence in the United States.[231] The district court suppressed the physical evidence of the drugs, concluding that the trooper could not have formed the requisite reasonable suspicion of criminal activity to justify the continued detention.[232] The Tenth Circuit considered the question of whether the continued detention of the defendants on the basis of the immigration violation was permissible, regardless of whether the trooper articulated that basis for the detention.[233] The Tenth Circuit concluded that the officer "had probable cause to arrest Defendants for violations of state traffic and federal immigration law," and that the continued detention was lawful.[234] The court reiterated its prior conclusion that "state and local police officers had implicit authority within their respective jurisdictions 'to investigate and make arrests for violations of federal law, including immigration laws.'"[235] Once again, the Tenth Circuit observed that Congress has never preempted this authority: "[F]ederal law as currently written does nothing 'to displace . . . state or local authority to arrest individuals violating federal immigration laws.'"[236] Indeed the court reiterated that the opposite was true: "[F]ederal law 'evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws.'"[237] Once again, the Court did not draw any distinction between criminal and civil provisions of federal immigration laws. Similar facts led the Tenth Circuit to the same conclusion in another 2001 case, *United States v. Hernandez-Dominguez*.[238]

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[228] *Id.*
[229] *Id.* at 1191.
[230] *Id.*
[231] *Id.*
[232] *Id.* at 1191–92.
[233] *Id.* at 1192.
[234] *Id.*
[235] *Id.* at 1194 (quoting United States v. Vasquez-Alvarez, 176 F.3d 1294, 1295 (10th Cir. 1999)).
[236] *Id.* at 1193 (quoting *Vasquez-Alvarez*, 176 F.3d at 1296, 1299 n.4, 1300).
[237] *Id.* (quoting *Vasquez-Alvarez*, 176 F.3d at 1300).
[238] *See* 1 F. App'x 827 (10th Cir. 2001). In this case, a Kansas Highway Patrol officer stopped a car for crossing the center line of Interstate 70 three times. *Id.* at 829. While the

G. United States v. Favela-Favela *(10th Circuit)*

In 2002, the Tenth Circuit continued its unbroken line of case law affirming the power of state and local police to arrest individuals for violations of federal immigration laws in *United States v. Favela-Favela*.[239] In that case, a Clinton, Oklahoma police officer observed a van with two people in the front seats and a female passenger apparently kneeling between the two front seats.[240] The officer concluded that she was not wearing a seatbelt, based on her position in the vehicle.[241] This constituted a violation of Oklahoma law.[242] The officer stopped the van and when he stood near the driver's door, he noticed that there were approximately twenty people inside the vehicle, well beyond the safe capacity of the van.[243] He noted that the passengers avoided looking at him, which he regarded as unusual and suspicious behavior.[244]

The police officer commenced a line of questioning with the driver, Mr. Favela. "First, he asked Mr. Favela if he was on a trip, and Mr. Favela responded affirmatively. Then, the officer asked if the van's passengers were family members or if they were on a church function. To both those questions, Mr. Favela said, 'No.'"[245] The officer knew that other members of the Clinton Police Department had stopped "vans or other large vehicles" and "discovered illegal aliens being transported across the country."[246] Based on all of this information, the officer believed that he had grounds for suspecting that individuals in the van were illegally present in the United States. "Then, he asked Mr. Favela 'if everybody in the van was

officer was checking the identification documents, driver's license, and registration information of the two vehicle occupants, their statements led the officer to suspect that they were present in the country illegally. *See id.* at 829–30. When asked, they conceded that they were illegal aliens. *Id.* at 829. The officer detained the aliens further on this basis. *Id.* Their suspicious behavior while in his custody led the officer to ask permission to search the vehicle. *Id.* They granted the officer permission to search the vehicle, and he discovered packages of methamphetamines hidden in the car battery. *Id.* at 829–30. The aliens were charged with drug crimes. *Id.* at 830. The Tenth Circuit upheld the continued detention on the basis of the immigration violation, noting the officer's "general investigatory authority to inquire into possible immigration violations." *Id.* at 832 (quoting United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984)).

[239] 41 F. App'x 185 (10th Cir. 2002).

[240] *Id.* at 187.

[241] *Id.*

[242] *Id.*; *see also* OKLA. STAT. ANN. tit. 47, § 12-417(A) (West 2000).

[243] *Favela-Favela*, 41 F. App'x at 187.

[244] *Id.* at 187 & n.3.

[245] *Id.* at 187.

[246] *Id.* at 191.

"legal.'" Mr. Favela responded, 'No.'"[247] The officer continued to ask questions, inquiring "whether the passengers were paying Mr. Favela. Mr. Favela responded that each passenger had paid him approximately $180.00."[248]

The officer asked Favela to wait in the van and then called his supervising sergeant.[249] The sergeant came to the scene and questioned Favela, asking him whether the passengers were "legal" and Favela again answered negatively.[250] The officers took Favela and the passengers into custody and transported them to the Clinton police station, where the officers contacted the INS, and INS agents arrived at the police station shortly thereafter.[251] The INS later returned eighteen of the twenty passengers to their country of origin.[252] Favela was convicted for transporting illegal aliens in the United States.[253]

The Tenth Circuit concluded that the officer had formulated an objectively reasonable suspicion of illegal activity and that his question about the passengers' immigration status was justified.[254] More importantly, the court reaffirmed the general investigatory authority of the officer to inquire about possible immigration violations and to arrest and detain individuals on that basis.[255] The officer did not know whether the aliens in the vehicle had committed civil or criminal violations of the INA; he merely suspected, and was later told, that they were not "legal."[256]

H. Lynch v. Cannatella *(5th Circuit)*

The Tenth Circuit is without question the court that has most thoroughly explored the issue of inherent immigration arrest authority and whether such authority has been preempted. However, it is not alone in concluding that state and local law enforcement possess this authority. The Fifth Circuit has also recognized the inherent immigration arrest authority possessed by

[247] *Id.* at 187 (citation omitted).
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.* at 187–88.
[252] *Id.* at 188.
[253] *Id.* at 186, 192; *see also* 8 U.S.C. § 1324(a)(1)(A)(ii) (2000).
[254] *Favela-Favela*, 41 F. App'x at 191.
[255] *Id.* (citing United States v. Santana-Garcia, 264 F.3d 1188, 1193 (10th Cir. 2001); United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984)).
[256] *See id.* (stating the officer's grounds for suspecting illegal activity).

the states and has squarely rejected the suggestion that Congress has preempted such authority. In *Lynch v. Cannatella*, the Fifth Circuit considered a case involving sixteen Jamaican stowaways aboard a barge headed for ports on the Mississippi River.[257] After they were discovered by the crew of the barge, the stowaways were detained for several days by the Port of New Orleans Harbor Police.[258] Among other issues, the Fifth Circuit considered whether 8 U.S.C. § 1223(a) defined the sole process for detaining alien stowaways, thereby preempting the harbor police from detaining the illegal aliens.[259] 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."[260] Like the Tenth Circuit, the Fifth Circuit did not limit this authority to criminal provisions of federal immigration law.

I. United States v. Rodriguez-Arreola *(8th Circuit)*

In addition to the Ninth, Tenth, and Fifth Circuits, one other circuit has weighed in on the matter, albeit indirectly. The Eighth Circuit has offered implicit support for the existence of local arrest and detention authority for violations of immigration law.

In *United States v. Rodriguez-Arreola*, the Eighth Circuit considered a case in which a South Dakota state trooper stopped a vehicle for speeding.[261] The trooper asked the driver a variety of general questions, including whether he was a U.S. citizen or a resident alien.[262] The driver stated that he was legally in the United States, but that he had left his green card at home.[263] The trooper asked the passenger, Rodriguez, whether he was a legal resident.[264] Rodriguez answered, "No."[265] The trooper then asked Rodriguez whether he had a green card, and Rodriguez answered, "No."[266] Then the trooper asked Rodriguez whether he was "here legally,"

[257] 810 F.2d 1363, 1367 (5th Cir. 1987).
[258] *Id.*
[259] *See id.* at 1370–71.
[260] *Id.* at 1371.
[261] 270 F.3d 611, 613 (8th Cir. 2001).
[262] *Id.*
[263] *Id.*
[264] *Id.* at 614 & n.5.
[265] *Id.*
[266] *Id.* at 614 & n.6.

and Rodriquez again answered negatively.[267] The trooper then detained the two individuals while he contacted the INS on his radio.[268] The INS agent confirmed that the driver was a legal alien, but Rodriguez was in the country illegally.[269] The trooper then gave the speeding ticket to the driver and allowed him to go.[270] The trooper placed Rodriguez into custody and took him to a local jail facility to await INS processing.[271] Importantly, as the court noted, the trooper and the INS viewed this detention of the alien "as part of an administrative procedure," rather than as part of a criminal procedure.[272] Accordingly, neither the trooper nor the INS informed Rodriguez of his Miranda rights during the traffic stop.[273] Rodriguez received notification of his Miranda rights later, when the INS elected to pursue criminal charges under 8 U.S.C. § 1326(a).[274] The court held that the trooper "had reasonable suspicion to inquire into Rodriguez's alienage" and that the district court erred in suppressing the evidence obtained during the traffic stop.[275] Thus, the Eighth Circuit implicitly recognized the authority of the state trooper to make an administrative immigration arrest (with the expectation that only civil removal, not criminal prosecution, would follow). If such authority did not exist, the arrest would not have been legal.[276]

[267] *Id.*
[268] *Id.* at 614.
[269] *Id.*
[270] *Id.*
[271] *Id.* at 614–15.
[272] *Id.* at 615.
[273] *Id.*
[274] *Id.* at 613, 615 n.8; *see also* 8 U.S.C. § 1326(a) (2000) (defining the crime of reentry after removal or exclusion).
[275] *Rodriguez-Arreola*, 270 F.3d at 617, 619.
[276] The Eighth Circuit had also previously upheld an immigration arrest by a Nebraska state trooper who arrested the driver of a van after receiving an anonymous tip that said van was speeding and carrying a large number of people. United States v. Perez-Sosa, 164 F.3d 1082, 1083–84 (8th Cir. 1998). Approaching the vehicle at a truck stop gas pump, the trooper learned that the van was full of passengers who did not speak English and did not possess evidence of legal residency in the United States. *See id.* at 1084. The trooper arrested the driver, who was subsequently charged with transporting illegal aliens under 8 U.S.C. § 1324(a)(1)(A)(ii), and the occupants were subsequently deported to Mexico. *Id.* at 1085. Importantly, the Eighth Circuit cited the Tenth Circuit's decision in United States v. Salinas-Calderon, 728 F.2d 1298, 1301 (10th Cir. 1984), in reaching its holding. *Perez-Sosa*, 164 F.3d at 1084.

J. The Untenable Distinction Between Civil and Criminal Violations of the INA

No circuit court has ever directly held that the federal government has preempted the states from making arrests for civil violations of immigration law that render an alien removable. Such a claim of field preemption would have to establish that the civil provisions of federal immigration law create a pervasive regulatory scheme indicating congressional intent to preempt, while the criminal provisions do not. This claim is extremely difficult to make in the wake of Congressional legislation expressly recognizing local arrest authority and inviting local assistance in the enforcement of immigration law—particularly the legislation passed in 1996.[277] The closest that any court has come is the Ninth Circuit, which thirteen years earlier merely assumed in *dicta* that it might be possible to regard civil immigration law as a "pervasive regulatory scheme"—therefore evincing a congressional intent to preempt—while criminal provisions in the INA "are few in number and relatively simple in their terms."[278] Therefore, the Ninth Circuit supposed, this difference in scope and complexity might justify different answers to the preemption question.

The Ninth Circuit's speculation in *Gonzales v. City of Peoria* was faulty in 1983, and it is even more inaccurate today. Indeed, the statement that the criminal provisions of immigration law are "few in number" and "simple" reveals a surprising lack of familiarity with immigration law. The *Gonzales* court identified only three criminal sections of federal immigration law.[279] In fact, there are *at least forty-seven criminal provisions in federal immigration law*.[280] To be sure, immigration law has expanded considerably since the Ninth Circuit made this assertion in 1983, but most of the forty-seven criminal provisions were already in place at that time.[281]

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[277] *See supra* Part IV.B.

[278] Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983).

[279] *Id.* The Ninth Circuit referred to "the specific statutes regulating criminal immigration activities, 8 U.S.C. §§ 1324, 1325, and 1326." *Id.* Although the three sections actually included seventeen distinct crimes, the Court still failed to identify even half of the criminal provisions of immigration law.

[280] In 1994, Linda Yañez and Alfonso Soto criticized the Ninth Circuit for this mistake. Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 26–28 (1994). Yañez and Soto attempted to create a comprehensive list of criminal provisions in federal immigration law at the time, coming up with a total of twenty-five. *Id.* at 27–28. It appears that Yañez and Soto failed to consider those immigration crimes codified outside of Title 8 of the United States Code. *See id.*

[281] *See infra* tbl.1.

TABLE 1[282]
Criminal Offenses in Immigration Law

Statutory Provision	Offense
8 U.S.C. § 1160(b)(6)	Misuse of information—special agricultural workers
8 U.S.C. § 1160(b)(7)	False statements in applications—special agricultural workers
8 U.S.C. § 1253(a)	Failure to depart after final order of removal
8 U.S.C. § 1253(b)	Failure to comply with terms of release under supervision
8 U.S.C. § 1255a(c)(5)	Misuse of information—adjustment of status
8 U.S.C. § 1255a(c)(6)	False statements in applications—adjustment of status
8 U.S.C. § 1282(c)	Overstay of conditional permit issued to alien crewman
8 U.S.C. § 1304(e)	Failure to carry alien registration card
8 U.S.C. § 1306(a)	Failure to register
8 U.S.C. § 1306(b)	Failure to notify of change of address
8 U.S.C. § 1306(c)	False statements in application for registration
8 U.S.C. § 1306(d)	Counterfeiting of registration documents
8 U.S.C. § 1324	Bringing in and harboring certain aliens
8 U.S.C. § 1324(a)(2)(A)	Bringing in and harboring aliens with knowledge they are unauthorized
8 U.S.C. § 1324(a)(2)(B)(i)	Bringing in and harboring aliens with knowledge that they are unauthorized and that they will commit a criminal offense
8 U.S.C. § 1324(a)(2)(B)(ii)	Bringing in and harboring aliens with knowledge that they are unauthorized, for the purpose of commercial advantage or private financial gain
8 U.S.C. § 1324(a)(3)	Hiring unauthorized aliens
8 U.S.C. § 1324a(f)	Engaging in pattern or practice of employing unauthorized aliens
8 U.S.C. § 1324c(e)(1)	Failure to disclose role as document preparer
8 U.S.C. § 1324c(e)(2)	Unlawful preparing of application for immigration benefits
8 U.S.C. § 1325(a)	Initial unlawful entry—improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts
8 U.S.C. § 1325(a)	Subsequent unlawful entry
8 U.S.C. § 1325(c)	Marriage fraud

[282] All statutory citations in Table 1 are to the 2000 edition of the United States Code.

8 U.S.C. § 1325(d)	Immigration-related entrepreneurship fraud
8 U.S.C. § 1326	Reentry after removal or exclusion
8 U.S.C. § 1326(b)(1)	Reentry after removal subsequent to conviction for felony
8 U.S.C. § 1326(b)(2)	Reentry after removal subsequent to conviction for aggravated felony
8 U.S.C. § 1326(b)(3)	Reentry after removal on security grounds
8 U.S.C. § 1326(b)(4)	Reentry of nonviolent offender removed prior to completion of sentence
8 U.S.C. § 1327	Aiding or assisting entry of inadmissible aliens
8 U.S.C. § 1328	Importation of alien for immoral purpose
18 U.S.C. § 1423	Misuse of evidence of citizenship or naturalization
18 U.S.C. § 1424	Personation or misuse of papers in naturalization proceedings
18 U.S.C. § 1425	Procurement of citizenship or naturalization unlawfully
18 U.S.C. § 1426	Reproduction of naturalization or citizenship papers
18 U.S.C. § 1427	Sale of citizenship or naturalization papers
18 U.S.C. § 1428	Failure to surrender canceled naturalization certificate
18 U.S.C. § 1429	Neglect or refusal to answer subpoena to appear at naturalization hearing
18 U.S.C. § 1541	Issuance of passport or other instrument without authority
18 U.S.C. § 1542	False statement in application for and use of passport
18 U.S.C. § 1543	Forgery or false use of passport
18 U.S.C. § 1544	Misuse of passport
18 U.S.C. § 1545	Safe conduct violation
18 U.S.C. § 1546(a)	Forgery or alteration of visa, permit, or other immigration document
18 U.S.C. § 1546(a)	Personation or false statements in application for immigration document
18 U.S.C. § 1546(b)	Use of false immigration document
18 U.S.C. § 2424	Failure to file factual statement about alien harbored for immoral purpose

The Ninth Circuit also suggested, without analysis or explanation, that the criminal provisions of immigration law were "simple in their terms."[283] Again, this characterization is way off the

[283] *Gonzales*, 722 F.2d at 475.

mark. The criminal provisions of immigration are complex, to say the least. Linda Reyna Yañez and Alfonso Soto also highlight the Ninth Circuit's mischaracterization of the criminal provisions of immigration law in this respect, noting that the plethora of cases defining the term "entry" with respect to illegal entry crimes illustrates just how complicated the criminal provisions are.[284] Another illustration of the complexity of the criminal provisions of immigration law can be seen in the crime of reentry after removal on security grounds.[285] This crime applies to aliens removed under the specific expedited removal proceedings for arriving aliens who are inadmissible on security and related grounds—a civil removal process defined in 8 U.S.C. § 1225(c).[286] However, it only applies to those aliens removed because of their inadmissibility stemming from terrorist activity, defined at considerable length in 8 U.S.C. § 1182(a)(3)(B).[287] This immigration crime, which is defined with reference to a specific set of civil immigration proceedings and which involves a complex definition of applicable terrorist activities, can hardly be described as "simple."

This example also illustrates the substantial overlap of civil and criminal provisions of federal immigration law. Numerous immigration crimes are defined with specific reference to civil violations or civil proceedings. Other examples include the crime of reentry of a nonviolent offender removed prior to completion of sentence,[288] the crime of failure to depart after a final order of removal,[289] and the crime of making a false statement in an application for adjustment of status,[290] to name but a few. This interweaving of criminal and civil provisions makes it impossible to regard them as completely separate regulatory schemes in any

[284] Yañez & Soto, *supra* note 280, at 29.

[285] *See* 8 U.S.C. 1326(b).

> Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection . . . who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.

8 U.S.C § 1326(b).

[286] *See id.*

[287] *See id.*

[288] *Id.* § 1326(b)(4).

[289] *Id.* § 1253(a).

[290] *Id.* § 1255a(c)(6).

meaningful sense. Accordingly, the Ninth Circuit's attempt to separate the criminal and civil provisions of immigration law when conducting a preemption analysis simply cannot stand up under scrutiny.

The overlap between civil and criminal provisions of immigration law is also demonstrated by the many actions in the immigration arena that trigger both civil and criminal penalties. For example, the creation of fraudulent or counterfeit immigration documents is a civil violation of immigration law under 8 U.S.C. § 1324c(d)(3),[291] but it is also a criminal violation under 18 U.S.C. § 1546(a).[292] The same may be said of employing illegal aliens. This action carries civil penalties administered through the civil proceedings described in 8 U.S.C. § 1324a(e). However, the employment of illegal aliens is also a crime, as described in 8 U.S.C. § 1324a(f), if the employer engages in a pattern or practice of such hiring. The same act may also be a crime under 8 U.S.C. § 1324(a)(3) if the employer hires ten or more illegal aliens meeting certain requirements.[293] Some provisions of immigration law include civil and criminal penalties *in the same sentence*. For example, making false statements in a registration document (such as that required by the NSEERS program)[294] is a criminal misdemeanor, punishable by a fine of up to $1000 and a prison term of up to six months.[295] The sentence defining this criminal penalty continues with civil consequences in administrative proceedings: ". . . and any alien so convicted shall, upon the warrant of the Attorney General, be taken into custody and be removed."[296] The implication of the Ninth Circuit's assumption, that the first half of the sentence, delineating criminal penalties, invites state assistance, while the second half of the sentence, delineating civil consequences, evinces preemptive intent,[297] is plainly absurd. The notion that Congress created one simple set of provisions, demonstrating an intent not to preempt,

[291] Anyone found to have created such documents in violation of § 1324c(a) is required to "cease and desist from such violations and to pay a civil penalty" of up to $2,000 per document for first time offenders. A repeat offender under the section may face a penalty as high as $5,000 per document. *Id.* § 1324c(d)(3).

[292] Persons who knowingly create or use such counterfeit documents face a fine, imprisonment for up to five years, or both. 18 U.S.C. § 1546 (2000).

[293] The requirements are that the alien be unauthorized, as defined in 8 U.S.C. § 1324a(h)(3), and that the alien have been brought into the United States in violation of 8 U.S.C. § 1324(a). 8 U.S.C. § 1324(a)(3) (2000).

[294] *See supra* Part I.

[295] 8 U.S.C. § 1306(c).

[296] *Id.*

[297] *See* Gonzales v. City of Peoria, 722 F.2d 468, 474–75 (9th Cir. 1983).

while also creating a parallel but distinct set of complex regulatory provisions, evincing an intent to preempt, simply is not reflected in the structure of immigration law.

When the same act carries both civil penalties and criminal penalties under immigration law, it is almost always a single agency that decides which enforcement route to take.[298] ICE agents and attorneys assume the lead role in determining which course to follow.[299] It is not as if two parallel enforcement structures operate alongside one another, with ICE pursuing civil penalties while the Department of Justice pursues criminal penalties. This unified enforcement approach at the federal level further illustrates the fallacy in assuming that civil provisions preempt while criminal provisions do not.

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 in practice. Often, it is not intuitively determinable which immigration violations are criminal and which violations are civil. For example, all of the immigration violations committed by the 9/11 hijackers, described above in Part II.A, were civil violations. However, that fact certainly did not render such violations less significant or less damaging to national security. Overstaying a visa is a civil violation of immigration law,[300] while entering without inspection is a criminal violation.[301] Yet both are means by which millions of illegal aliens have entered and remain in the United States.[302] Therefore, while it is reasonable to expect a police officer to understand generally what the indicators of illegal presence in the United States may be, it is not practical to expect the police officer to remember which immigration violations carry

[298] *See* Dep't of Homeland Sec., Immigration & Borders: Serving Our Visitors, Securing Our Borders, http://dhs.gov/dhspublic/theme_home4.jsp (last visited Sept. 25, 2005); U.S. Immigration & Customs Enforcement, Fact Sheet: Immigration & Customs Enforcement (Apr. 5, 2004), http://www.ice.gov/graphics/news/factsheets/040505ice.htm.

[299] *See* Immigration & Customs Enforcement, Immigration: Interior Enforcement, http://www.ice.gov/graphics/interior (last visited Sept. 25, 2005) (referencing ICE's "comprehensive [interior] enforcement strategy").

[300] *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (2000).

[301] *Id.* § 1325(a).

[302] The Department of Homeland Security has estimated that at least 2.3 million of the estimated 7 million illegal aliens present in the United States in the year 2000 were aliens who entered legally and then overstayed their visas. This figure likely undercounted such visa overstayers. U.S. GEN. ACCOUNTING OFFICE, GAO-04-82, OVERSTAY TRACKING: A KEY COMPONENT OF HOMELAND SECURITY AND A LAYERED DEFENSE 11, 12–13 (2004), *available at* http://www.gao.gov/new.items/d0482.pdf.

criminal penalties and which violations trigger civil proceedings. Indeed, most lawyers are unaware that such distinctions exist. Furthermore, in some scenarios, distinguishing between civil and criminal violations at the time of arrest may be impossible. For example, if a police officer comes into contact with a group of aliens who are being transported within the United States and who are revealed to be illegally present (as in *Favela-Favela*), the aliens may be unable or unwilling to explain to the officer whether they overstayed their visas (a civil violation), entered without inspection (a criminal violation), or presented fraudulent documents at the port of entry (a criminal violation). For these reasons, maintaining a criminal-civil distinction in arrest authority would be utterly unworkable in practice. Fortunately, no court has attempted to compel police officers to do so.

V. THE AUTHORITY OF POLICE TO INQUIRE INTO IMMIGRATION STATUS

Closely related to the authority of state and local police to make arrests on the basis of immigration violations is the authority of state and local police to initiate questioning regarding an individual's immigration status. Police officers may, and do, routinely ask members of the public to provide their names, dates of birth, and other basic information without any suspicion of wrongdoing. Can police also permissibly inquire into immigration status without first establishing reasonable suspicion of an immigration violation? In many cases, such as *United States v. Favela-Favela*,[303] police officers have been careful to establish, and reviewing courts have been equally careful to note, the premises on which suspicions regarding immigration status were generated. But are such premises actually necessary?

In March 2005, the Supreme Court provided an unequivocal answer to this question. In the case of *Muehler v. Mena*,[304] the Court considered a case in which police officers conducted a search of a suspected gang safe house for evidence of gang-related crimes. During the course of the search, police officers asked the four occupants of the house their names, dates of birth, places of birth, and immigration statuses.[305] The Ninth Circuit held that this

[303] *See supra* Part IV.G.
[304] 125 S. Ct. 1465 (2005).
[305] *Id.* at 1468.

questioning about immigration status violated the respondent's Fourth Amendment rights.[306] The Supreme Court emphatically disagreed:

> The Court of Appeals also determined that the officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. But the premise is faulty. We have "held repeatedly that mere police questioning does not constitute a seizure." "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, *the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status*.[307]

The Court made clear that a person's immigration status is the sort of basic information that police officers may inquire about, without first establishing reasonable suspicion, where the person has been lawfully stopped or detained for another reason. The Court also rejected the Ninth Circuit's attempt to read a reasonable suspicion requirement into the Supreme Court's opinion in *United States* v. *Brignoni-Ponce*.[308] "We certainly did not, as the Court of Appeals suggested, create a 'requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status.'"[309] Such inquiry, even if it is unrelated to the initial reason for the stop, is not a "shift in purpose" requiring additional Fourth Amendment justification.[310]

In light of the Court's opinion in *Muehler v. Mena*, it is clear that

[306] Mena v. City of Simi Valley, 332 F.3d 1255, 1264, 1266 (9th Cir. 2003).

[307] *Muehler*, 125 S. Ct. at 1471 (emphasis added) (citations omitted) (quoting Florida v. Bostick, 501 U.S. 429, 434–35 (1991)).

[308] *Id.* at 1472 n.3 (construing United States v. Brignoni-Ponce, 422 U.S. 873 (1975)).

[309] *Id.* (quoting *Mena*, 332 F.3d at 1267).

[310] *Id.* at 1471 (quoting Illinois v. Caballes, 125 S. Ct. 834, 837–38 (2005)).

a police officer is entirely within his rights, in the course of a routine traffic stop, to ask the occupant of a vehicle his immigration status. Although this most often occurs when an officer has generated particularized suspicion about the occupant's immigration status, the Court has held that no such suspicion is necessary. And if, as a result of such questioning, the officer develops reasonable suspicion that the occupant is not lawfully present in the United States, he may detain that alien for a reasonable amount of time in order to determine (by contacting the LESC) whether or not the alien is lawfully present in the United States.[311]

VI. RESPONSES TO COUNTERARGUMENTS

Although the authority of local police to make immigration arrests for both criminal and civil violations of federal immigration law is well-established in case law, the critics of stronger immigration enforcement continue to insist that this authority does not exist—or that it should not be exercised if it does exist. One common misstatement made by such critics is that the federal government has attempted to mandate state and local cooperation in enforcing immigration law. It is essential to recognize that any assistance that state or local police provide to the federal government in the enforcement of federal immigration laws is entirely voluntary.[312] 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.[313] This assertion is false. Indeed, when local law enforcement agencies do

[311] *See* United States v. Tehrani, 49 F.3d 54, 61 (2d Cir. 1995) ("A permissible investigative stop may become an unlawful arrest if the means of detention are 'more intrusive than necessary.'" (quoting United States v. Perea, 986 F.2d 633, 644 (2d Cir. 1993)). It is crucial "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." United States v. Sharpe, 470 U.S. 675, 686 (1985). In order for the detention to be considered reasonable the officers must make "speedy and appropriate inquiries in a reasonable way." *Tehrani*, 49 F.3d at 61.

[312] Ashcroft, *supra* note 6.

[313] *See, e.g.*, Andy Sher, *Area Law Enforcement Agencies not Interested in Policing Immigration Laws*, CHATTANOOGA TIMES FREE PRESS, June 17, 2002, at B1; Paul Coggins, *Foisting Immigration Enforcement on Local Police Won't Work*, FULTON COUNTY DAILY REP., May 9, 2002; Chris McGann, *Police Balk at Watching for Illegal Immigrants: Local Departments Say They Don't Have Time or Money to do Federal Agencies' Work*, SEATTLE POST-INTELLIGENCER, May 2, 2002, at A1.

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.[314] Others claim that cooperating police departments will lose the assistance of illegal aliens in reporting crimes.[315] Of course, this claim is based on the assertion that illegal aliens make a regular practice of contacting the police to report crimes—an unproven assertion that is dubious, at best.[316] Nonetheless it impels some observers to advocate non-cooperation. One student comment, without even mentioning the federal prohibition of sanctuary policies in 8 U.S.C. §§ 1373 and 1644,[317] urges states to withhold virtually all cooperation with ICE by adopting statutes patterned after New York City's sanctuary policy.[318]

While some critics of local immigration arrests refuse to recognize the voluntary nature of such assistance, others focus their opposition to local arrest authority squarely on its voluntary nature. They complain about the inevitable consequence that flows from a system of voluntary cooperation—differences in the enforcement resources devoted to such arrests by various law enforcement agencies.[319] One critic, Huyen Pham, goes so far as to argue that variation in local police interest in making immigration arrests renders all local arrests unconstitutional. According to Pham, "Because of its effect on foreign policy, the immigration power must be exercised exclusively and uniformly by the federal government."[320]

Unfortunately for Pham, there is no case law supporting his

[314] This reimbursement authority is provided in 8 U.S.C. §§ 1103(a)(10), 1103(a)(11), § 1103(c).

> The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized—(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State[.]

8 U.S.C. § 1103(a)(11) (2000).

[315] *See, e.g.*, Sher, *supra* note 313.

[316] *See* Kobach Testimony, *supra* note 74.

[317] *See supra* Part IV.B.

[318] Keblawi, *supra* note 14, at 846–47.

[319] *See, e.g.*, Yañez & Soto, *supra* note 280, at 31. Yañez and Soto criticize inconsistency in enforcement, and argue that this is a reason for Congress to exercise its preemption authority. However, they do not leap to the conclusion that a lack of uniform enforcement is unconstitutional. *See id.* at 31.

[320] Pham, *supra* note 14, at 995.

conclusion. Rather, he relies on the Supreme Court's holding in *Graham v. Richardson* that a state law denying welfare benefits to certain resident aliens encroached on the federal government's exclusive immigration power.[321] Contrary to Pham's assertion, the *Graham* Court did not rely on, or even mention, foreign policy in reaching its conclusion.[322] Rather, the Court found that, because the state law at issue was "inconsistent with federal policy," it "encroach[ed] upon exclusive federal power" to regulate immigration.[323] The crucial qualifier here is the fact that the state law was *inconsistent* with federal policy. The provision of state assistance to the federal government by making immigration arrests for violations of law defined by Congress is in no way inconsistent with federal policy.

The second flaw in Pham's reasoning is his leap from diverse state laws defining the rights and privileges of aliens to diverse state resources used to assist in the enforcement of uniform federal law. Where the former poses an obvious threat to the federal power to define immigration laws in a uniform manner, the latter poses no such threat. The fact that enforcement resources may be concentrated in one part of the country and scattered in another part of the country does not change the reality that the same federal laws govern the entire country. Bizarrely, Pham concludes that because the federal government devotes a lower level of ICE manpower to some interior regions of the country, a decision by local police in that region to assist ICE by making immigration arrests is tantamount to the creation of a new immigration policy.[324] Pham's argument assumes that when ICE devotes a comparatively lower level of manpower to a particular region it is because ICE has made a conscious "policy" decision not to apply the law in that region of the country. On the contrary, such decisions regarding the deployment of limited ICE resources are made because the highest concentrations of law breakers are elsewhere. The law remains the same everywhere.

The third problem with Pham's argument is that it proves too much. If the uneven distribution of state and local enforcement resources really does violate a "constitutional mandate for uniform immigration laws" because it creates "uncertainty as to how a

[321] *Id.* at 994–95 (citing Graham v. Richardson, 403 U.S. 365, 376–77 (1971)).
[322] *See Graham*, 403 U.S. at 378–80.
[323] *Id.* at 380.
[324] Pham, *supra* note 14, at 996.

country's nationals will be treated within the United States,"[325] then the uneven distribution of federal enforcement resources poses the same problem. For example, the forces of the Border Patrol operate only in border states,[326] and ICE agents are distributed to the areas of greatest need, not according to a uniform geographic distribution plan.[327] Pham attempts to answer this argument by saying that the uneven distribution of federal resources is distinguishable because it reflects unitary decision-making by a single federal government.[328] But the uncertainty on the part of foreign nationals is the same, and it is this uncertainty that "in turn, affect[s] that country's relations with the United States" and leads to the constitutional violation imagined by Pham.[329] Although one might object to the uneven distribution of enforcement resources on various policy grounds, a constitutional objection is difficult, if not impossible, to sustain.

Michael J. Wishnie, another academic critic of state and local arrest authority, presents a less fanciful case.[330] But he makes a number of crucial mistakes nonetheless. Wishnie takes the position that Congress has preempted state and local police from arresting aliens not only for civil violations of immigration law, but also for criminal violations of immigration law.[331] The greatest problem for Wishnie is that the case law ostensibly supporting his claim has evaporated. He rests his position chiefly on the Ninth Circuit opinion in *Mena v. City of Simi Valley*, in which the court stated, "[I]t is doubtful that the police officer had any authority to question Mena regarding her citizenship."[332] Wishnie should have waited for

[325] *Id.* at 995.

[326] *See id.* at 972; Jon Bonne, *Huge Gaps Remain on Northern Border*, MSNBC (July 2002), http://www.msnbc.msn.com/id/3070731/.

[327] *See, e.g.*, U.S. Immigration & Customs Enforcement, Fact Sheet: ICE Border Security & Immigration Enforcement (Oct. 13, 2004), http://www.ice.gov.

[328] Pham, *supra* note 14, at 996–97.

[329] *Id.* at 995. Of course the supposition that uncertainty on the part of foreign nationals defeats federal law enforcement interests is itself absurd. If aliens knew with certainty where immigration law enforcement resources were deployed, it would be even easier to break the law and evade law enforcement.

[330] *See* Wishnie, *supra* note 14.

[331] *Id.* at 1089–90.

[332] Mena v. City of Simi Valley, 332 F.3d 1255, 1265 n.15 (9th Cir. 2003); *see* Wishnie, *supra* note 14, at 1091. Wishnie also overstates the effect of this language in the *Mena* decision, implying that the Ninth Circuit somehow reversed its earlier holding in *Gonzales v. City of Peoria* that "nothing in federal law precluded Peoria police from enforcing the criminal provisions of the Immigration and Naturalization Act." 722 F.2d 468, 477 (9th Cir. 1983). In fact, the Ninth Circuit in *Mena* did not even mention *Gonzales*. Apparently, Wishnie believes that the Ninth Circuit was attempting to reverse a precedent without even mentioning that

the Supreme Court to hear the case before writing. The Supreme Court reversed the Ninth Circuit in *Muehler v. Mena*,[333] holding unequivocally that police officers are within their rights to question individuals about their citizenship.[334]

Wishnie's second error is that he fails to distinguish between legislative enactment and executive enforcement. He leans heavily on the oft-quoted statement by the Supreme Court that "[p]ower to regulate immigration is unquestionably exclusively a federal power."[335] But he neglects to mention that in the following sentence the Court made clear that "regulate" referred to "state enactment[s]."[336] Wishnie wrongly equates state *enactment* of independent state laws (which may contradict or undermine federal law) with state assistance to the federal government in the *enforcement* of federal law.[337] He starts with the correct premise that the states may not exercise the "constitutional power to regulate immigration," but then he extends that premise to bar the states from making arrests for violations of federal immigration law.[338] This extension of the premise is unsustainable, because

precedent.

[333] 125 S. Ct. 1465 (2005).

[334] *See supra* Part V. The only other case law that Wishnie can muster is equally flimsy. He attempts to draw some support from the Third Circuit's use of the word "uncertainty" in *Carrasca v. Pomeroy*, 313 F.3d 828 (3d Cir. 2002), a case in which the Third Circuit vacated summary judgment in a § 1983 action contending that New Jersey park rangers engaged in racial profiling when they arrested the plaintiffs for violations of state and federal law and detained them for two to four hours while the rangers contacted federal immigration authorities. *See id.* at 830–34, 837. Wishnie claims that the Third Circuit used the word "uncertainty" to describe the authority of state and local police to make immigration arrests. *See* Wishnie, *supra* note 14, at 1091. However, close examination of the case casts doubt on such a reading. The court stated, "There is too much uncertainty *on this record* of the state of the law with respect to state rangers' authority to detain immigrants in this pre-September 11 period to affirm the District Court's holding of qualified immunity . . . ." 313 F.3d at 837 (emphasis added). The court's use of the phrase "on this record" is instructive—most likely referring to the disputed factual question of whether the park rangers suspected only a violation of state law (swimming in the park after hours) when they made the arrests and only later developed suspicion that the plaintiffs had violated federal immigration laws, or whether the park rangers suspected both state and federal violations from the outset. *Id.* at 836–37. Factual "uncertainty" drove the court's decision: "[T]he true facts as to what happened on August 3, 1998, elude us. But they are the basis for all the legal theories that have developed around this case. . . . [I]n light of the differing versions of the facts, any judgment was premature." *Id.* at 837. Regardless of what the court was referring to when it used the word "uncertainty," the court offered no judgment whatsoever on the question of whether state and local police possess authority to make immigration arrests.

[335] De Canas v. Bica, 424 U.S. 351, 354 (1976), *quoted in* Wishnie, *supra* note 14, at 1088–89.

[336] *Id.* at 354.

[337] *See* Wishnie, *supra* note 14, at 1089.

[338] *Id.* at 1089–95.

while state enactments might well impede federal plenary authority to regulate immigration, state assistance in the form of arrests enhances the federal government's ability to enforce its laws. Indeed, "it would be unreasonable to suppose that [the federal government's] purpose was to deny to itself any help that the states may allow."[339] As the Ninth Circuit has observed, "Although the regulation of immigration is unquestionably an exclusive federal power, it is clear that this power does not preempt every state activity affecting aliens. . . . Federal and local enforcement have identical purposes—the prevention of the misdemeanor or felony of illegal entry."[340]

Wishnie's third error in constructing his argument that Congress has preempted all local arrest authority is that he interprets congressional actions in a selective and untenable way. He completely ignores the congressional recognition and preservation of local arrest authority in 8 U.S.C. § 1357(g)(10), the authorization of compensation for local law enforcement agencies that arrest and detain aliens in 8 U.S.C. § 1103, the prohibition of local policies restricting the sharing of immigration status information in 8 U.S.C. § 1373 and 8 U.S.C. § 1644, and the congressional authorization of funds to create the LESC and QRTs, which facilitate immigration arrests by local police.[341] Instead, Wishnie focuses on a select few provisions of immigration law and attempts to draw a rather strained conclusion from them. He points to 8 U.S.C. § 1324(c) and 8 U.S.C. § 1252c, which expressly convey local enforcement authority (something he claims is constitutionally impermissible, in any case)[342] and declares that Congress intended to implicitly preempt general arrest authority by conveying arrest authority in specific circumstances.[343] His argument assumes that there can be no other explanation for these relatively narrow conveyances of arrest authority. However, the Ninth and Tenth Circuits have analyzed the legislative history of the statutes in question and have found that there are in fact other explanations—explanations that lead to a different conclusion. The Ninth Circuit held that the wording of 8 U.S.C. § 1324(c) was the product of a conference committee that chose to make the enforcement authority

[339] Marsh v. United States, 29 F.2d 172, 174 (2d Cir. 1928); *see supra* Parts III–IV.A.
[340] Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983).
[341] *See supra* Part IV.B; Wishnie, *supra* note 14, at 1092–95.
[342] Wishnie, *supra* note 14, at 1089.
[343] *Id.* at 1092–94.

of that provision consistent with 8 U.S.C. §§ 1325 and 1326, where local arrest authority implicitly existed. Therefore, 8 U.S.C. § 1324(c) was not intended to preclude local arrest authority.[344] The Tenth Circuit reviewed the history of 8 U.S.C. § 1252c at great length and concluded that the wording was chosen to clarify that a "perceived federal limitation" on local arrest authority did not exist.[345] Accordingly, the court concluded, 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."[346]

The only other provisions of federal law that Wishnie points to are those that authorize the federal government to enter into special agreements with state and local law enforcement—section 287(g), which is basis for the Florida and Alabama MOUs,[347] and 8 U.S.C. § 1103(a)(8), which allows enforcement authority to be conveyed in response to a "mass influx of aliens."[348] He asserts that such agreements would be "superfluous" if inherent local arrest authority existed.[349] Here, Wishnie fails to recognize that the comprehensive enforcement authority conveyed by both provisions goes well beyond the inherent arrest authority possessed by local police. The breadth of section 287(g) authority is discussed at length above.[350] As for 8 U.S.C. § 1103(a)(8), the sweeping terms of the provision leave no doubt on this score: state or local police may be authorized "to perform or exercise *any* of the powers, privileges, or duties conferred" on federal immigration officers.[351] This provision allows local police to be effectively transformed into federal immigration officers during periods of mass influx. This broad authority cannot be equated with mere arrest authority. Thus, Wishnie's claim that these statutory provisions would be superfluous in the presence of inherent arrest authority collapses.

VII. CONCLUSION

In summary, the conclusion that state and local police possess

[344] *Gonzales*, 722 F.2d at 475.
[345] United States v. Vasquez-Alvarez, 176 F.3d 1294, 1298–1300 (10th Cir. 1999); *see supra* Part IV.E.
[346] *Vasquez-Alvarez*, 176 F.3d at 1299.
[347] *See supra* Part II.G.
[348] Wishnie, *supra* note 14, at 1094–95.
[349] *Id.* at 1095.
[350] *See supra* Part II.G.
[351] 8 U.S.C. § 1103(a)(8) (2000) (emphasis added).

inherent authority to make immigration arrests where individuals have violated either criminal provisions of the INA or civil provisions of the INA that render an alien deportable rests on a solid legal foundation. All federal circuit courts that have addressed the issue have recognized such inherent arrest authority, and no court has opined to the contrary. The question of whether this inherent arrest authority has been preempted by the federal government is also one on which a relatively stable consensus exists. The Tenth and Fifth Circuits have squarely concluded that no preemption has taken place with respect to arrests for either criminal or civil violations of immigration law. The Eighth Circuit has implicitly reached the same conclusion. And the Ninth Circuit has only suggested a distinction between civil and criminal violations by assuming one in dicta in the case of *Gonzales v. Peoria*.[352] Moreover, as the Ninth Circuit itself acknowledged, any judicial finding of preemption hinges upon the clear demonstration of congressional "intent to preclude local enforcement."[353] In the twenty-three years since *Gonzales v. Peoria*, Congress has done much to dispel any illusion that it intended to displace local assistance. Congress has repeatedly acted to preserve, support, and encourage local arrest authority.[354]

This authority is being exercised regularly throughout the country. The reality on the street is that local police make thousands of immigration arrests for both civil and criminal violations of federal immigration laws every year.[355] Beleaguered ICE agents already rely heavily on this assistance, and improvements in immigration enforcement are likely to depend on even greater state and local participation in federal immigration enforcement efforts. If the rule of law is ever to be restored in immigration, state and local arrest authority will be a crucial component of that restoration. It is important to note that in the four years after 9/11, despite determined federal efforts to expand the number of ICE interior enforcement agents, the total number of such agents remained relatively constant, hovering just below the 2,000 mark. Even if the number of such agents magically doubled in a single year, ICE would still lack the manpower necessary to

[352] Gonzales v. City of Peoria, 722 F.2d 468, 474–75 (9th Cir. 1983).

[353] *Id.* at 474.

[354] *See supra* Part III.B.

[355] This is evident in the statistics provided by ICE regarding the more than 2,300 arrests by QRTs in a three-month period. *See supra* text accompanying note 154.

enforce immigration law single-handedly. The more than 800,000 state and local law enforcement officers in the United States constitute a vital force multiplier.

Most importantly, state and local police officers represent a critical line of defense in the war against terrorism. In the six months before 9/11, there were four tragic missed opportunities to arrest the leaders and pilots of the 9/11 terrorists.[356] Had the federal government acquired and disseminated information about basic civil immigration violations to local law enforcement through the NCIC system, several terrorists might have been arrested, and the 9/11 plot might have unraveled. This reality is instructive. As George Santayana reminded us: "Progress, far from consisting in change, depends on retentiveness. . . . Those who cannot remember the past are condemned to repeat it."[357]

[356] *See supra* Part II.A.

[357] GEORGE SANTAYANA, THE LIFE OF REASON 82 (Charles Scribner's Sons 1953) (1905).