AUTHORITY OF POLICE TO ARREST FOR NON-CRIMINAL IMMIGRATION VIOLATIONS

WORK SESSION X: ILLEGAL IMMIGRANTS

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I. Introduction and Background – The Distinct Issue of Civil Arrest Authority.

A. State and local police involvement with immigration matters has increased since 9/11, due to:

1. Increasing concerning about terrorism;

2. Increasing concern about unauthorized aliens;

3. Changed Department of Justice position on preemption of local immigration enforcement authority; and

4. Entering of civil immigration violation data into NCIC system.

B. Civil nature of most immigration violations raises legal issues:

1. In most cases, explicit arrest authority is for crimes rather than civil violations:

a) State and local legal opinions concerning arrest authority on immigration violations; and

b) Report of International Association of Chiefs of Police raises significant questions about arrest authority on evidence of civil deportability.

2. Questions about civil arrest authority may raise liability issues and risk evidence suppression.

C. Contexts where civil arrest issues arise:

1. Arrests based on data in NCIC database; and

2. Arrest/detention based on other evidence of immigration violations.

D. Section 287(g) of the Immigration and Nationality Act provides a clear legal route for immigration enforcement.

II. Federal Law Governing State and Local Participation in Immigration Enforcement.

A. Federal Law does not require State and local officers to arrest based on civil deportability.

B. Areas of explicit permission for certain state enforcement activities:

1. 8 U.S.C., 1252c(a), authorizes state and local arrests of prior deportees, stating:

> Notwithstanding any other provision of law, and to the extent permitted by State and local law, State and local law enforcement officers are authorized to arrest and detain an individual who –
>
> (1) is an alien illegally present in the United States; and
>
> (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction. . . .

2. 8 U.S.C., § 1324(c), allows "all . . . officers whose duty it is to enforce criminal laws" to make arrests for smuggling, transporting or harboring criminal aliens.

3. 8 U.S.C., §1103(a)(10), states that the Attorney General may authorize state and local police, if the head of the local law enforcement agency agrees, to enforce immigration law upon a determination that "an actual or imminent mass influx of aliens" off the coast or a land border creates an urgent situation requiring immediate Federal response.

4. Under 8 U.S.C., § 1357(g),(287(g)), the Attorney General is authorized to enter into a written agreement with a state or political subdivision to permit an officer or employee of the state or subdivision to perform immigration enforcement functions at the state or locality's expense and to the extent consistent with state and local law.

C. General immigration arrest authority is reserved to designated federal officers – 8 C.F.R. 287.5(e)(3)provides:

> *Service of warrant of arrests for immigration violations.* The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the power pursuant to section 287(a) of the Act to execute warrants of arrest for administrative immigration violations issued under section 236 of the Act or to execute warrants of criminal arrest issued under the authority of the United States:
>
> (i) Border patrol agents, including aircraft pilots;
> (ii) Special agents;

(iii) Deportation officers;
(iv) Detention enforcement officers or immigration enforcement agents (warrants of arrest for administrative immigration violations only);
(v) Immigration inspectors;
(vi) Adjudications officers when in the uniform of an immigration inspector and performing inspections or supervising other immigration inspectors performing inspections;
(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and
(viii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the BCIS.

D. Detainer Regulations Under Immigration and Nationality Act.

1. 8 C.F.R. 287.7 (Attachment A) requires detention upon request by ICE of "an alien not otherwise detained by a criminal justice agency" for a period not to exceed 48 hours.

2. Financial responsibility for detention rests with local or state facility.

E. Shifting Department of Justice position on whether federal immigration law preempts state and local authority enforcing federal immigration law.

1. 1996 Department of Justice Office of Legal Counsel Opinion - "Assistance by State and Local Police in Apprehending Illegal Aliens" opinion holds that state and local police officers may arrest and hold individuals for criminal violations of federal immigration law, but not merely on evidence of civil deportability, finding that the Immigration and Nationality Act ("INA") preempted state and local participation in the latter. (Attachment B)

2. 2002 Department of Justice Office of Legal Counsel Opinion reverses the 1996 opinion, concluding that earlier opinion erroneously found the INA to preempt state arrest authority based on evidence of civil deportability. (Attachment C)

3. See *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999); *U.S. v. Salinas-Calderon*, 728 F.2d 1298 (10th Cir. 1984); *Gonzales v.*

City of Peoria, 722 F.2d 468 (9th Cir. 1983) (Cases discussing whether federal law preempts state and local authority on immigration matters, generally in the criminal context).

F. Federal Criminal Arrest Authority Covers State and Local Law Enforcement Officers:

1. Federal Rule of Criminal Procedure 4(c)(1) provides: "Only a marshal or other authorized officer may execute a warrant." – (See *People v. LaFontaine*, 92 N.Y.2d 470 (1998)) (New Jersey officer may not make arrest in New York based on a federal warrant).

III. The NCIC Database.

A. Historically, database contained information relating strictly to criminal justice matters. Until August 2003, system only included information about prior deportees. In August 2003, other immigration warrants were introduced into the NCIC system.

B. NCIC Database User Instructions - Three Classes of NCIC Hits: Deported Felon, Absconders (Persons Remaining in U.S. in violation of warrant of removal), and NSEERS (Non-registrants in National Security Entry-Exit Registration System). (Attachment D)

C. See *Doe v. Immigrations and Custom Enforcement*, 2006 U.S. Dist. Lexis 28300 (S.D.N.Y. 2006) (District Court determines no authority for inclusion of civil records in NCIC, but determines that plaintiff's claim is moot).

IV. Do States Authorize Arrest Based on Civil Deportability?

A. International Association of Chiefs of Police, Police Chief's Guide to Immigration Issues, Legal Appendix (Attachment E), indicates that arrest authority for warrants of a civil nature depends on state law (citing *Miller v. U.S.*, 301, 305 (1958), and arrest authority may not exist in those cases (p.37)). Appendix further states: "Even if state law authorizes taking a person into custody for a criminal violation, it is possible – even likely – that state law does not authorize taking a person into custody for a civil immigration violation."

B. The Maryland Example - Explicit warrantless arrest authority only for criminal violations.

1. Md. Code Ann., Crim. Proc. Art.,§ 2-202(a) - "a police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of the police officer."

2. Md. Code Ann., Crim. Proc. Art., § 2-202(b) - "a police officer who has probable cause to believe that a felony or misdemeanor is being committed in the presence or within the view of the police officer may arrest without a warrant any person whom the police officer reasonably believes to have committed the crime."

3. Md. Code Ann., Crim. Proc. Art. § 2-202(c) - Also, "a police officer without a warrant may arrest a person if the police officer has probable cause to believe that a felony has been committed or attempted and the person has committed or attempted to commit the felony whether or not in the presence or within the view of the police officer."

4. Md. Code Ann., Crim. Proc. Art. § 2-203 - Provides additional statutory authority to a police officer to make a warrantless arrest, based on probable cause, for certain specified misdemeanors that are not committed within the presence or view of the police officer.

5. See also *In re Calvin S.*, 175 Md. App. 516 (2007) – Civil violation of cigarette smoking insufficient to provide probable cause for arrest and search.

C. Legal Opinions Concerning Arrest Authority for Civil Immigration Violations.

1. Prince William County, Virginia – County Attorney opines that police officers have no direct authority to arrest on immigration violations, but can detain individuals issued citations based on risk of non-appearance (Attachment F – Police Department Immigrant Arrest Policy).

2. Miami-Dade County, Florida (February 14, 2007) – Prohibits Miami-Dade police officers from arresting or detaining individuals solely on basis of civil "holds" or "detainers" issued by ICE. (Attachment G)

3. New York State (March 21, 2000) – States that New York law enforcement officials can arrest for criminal violations of the Immigration and National Act but not civil ones. (Attachment H)

4. Wisconsin Department of Justice – Authorizes arrests of deported felons and absconders, but not NSEERS violators, on basis that reentry after deportation and intentional failure to depart are criminal violations. (Attachment I)

D. Section 287(g) of the Immigration and Nationality Act.

1. Permits designated state and local law enforcement to perform functions of immigration office.

2. State and local law enforcement agencies enter into Memoranda of Agreement ("MOA") which provide for:

   a) Cross-designation of local/state officers as federal immigration officers.

   b) Supervision of cross-designated officer by ICE in exercising immigration authorities.

   c) Designated officers participate in training programs at ICE academy.