U.S. Departme. of Just
Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 11, 1989

Memorandum for Joseph R. Davis
Assistant Director - Legal Counsel
Federal Bureau of Investigation

Re: Handling of INS Warrants of Deportation in relation to NCIC Wanted Person File

This memorandum is in response to your request for our opinion on whether the Federal Bureau of Investigations (FBI) may enter into its National Crime Information Center (NCIC) Wanted Person File the names of persons for whom an Immigration and Naturalization Service (INS) warrant of deportation is outstanding.[1] FBI policy limits use of the NCIC Wanted Person File only to those persons for whom warrants have been issued and who may be arrested by any law enforcement officer with the power to arrest.[2] We have concluded that, under this current policy, the FBI may only enter into its Wanted Person File the names of those persons who are alleged to have violated criminal laws. Because not everyone for whom a warrant of deportation is outstanding has violated a criminal law, we believe that a warrant of deportation fails to constitute a sufficient basis for including in the NCIC Wanted Person File all persons subject to such a warrant.

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[1] A warrant of deportation is issued only after there has been a determination by an immigration judge that an alien is in the country in violation of either civil or criminal immigration laws. 8 C.F.R. 243.2.

[2] In a Memorandum for the Assistant Attorney General, Office of Legal Counsel of October 21, 1988, the Assistant Director -- Legal Counsel, FBI, wrote that "it remains the current policy of NCIC to enter only those warrants into the NCIC system which may be executed by any law enforcement official with general arrest powers. Please accept this letter as confirmation of that fact."

I. Background

The propriety of placing INS warrants of deportation into NCIC is not a new issue. In December 1972, the FBI requested a legal opinion from the Attorney General on whether INS warrants could be executed by other federal or state law enforcement officers. The matter was referred to INS, which responded by stating that warrants of deportation were administrative warrants of arrest and could be executed only by Department of Justice employees to whom that power had been delegated.[3] Based on that INS position, the NCIC Advisory Board recommended, and the FBI determined, that it would not place or retain INS warrants of deportation in its NCIC Wanted Person File.

> The Wanted Person File is designed to index persons for whom warrants have been issued and who may be arrested by any law enforcement officer with arrest power. The service of INS warrants is so restrictive that serious problems could result from police officers taking individuals into custody who have been indexed in NCIC at the request of INS.

Letter to Hon. Leonard F. Chapman, Commissioner, INS, from Clarence M. Kelley, Director, FBI, January 16, 1974.

In 1986, INS urged a reversal of this policy based on changes in the law.[4] The INS stated that "federal, state and local officers are not proscribed from assisting in the apprehension of these wanted aliens through detention and surrender to immigration agents for execution of the warrant(s)."[5] The legal developments were set forth in an

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[3] Memorandum for the Acting Director, FBI from Raymond F. Farrell, Commissioner, INS, January 11, 1973, at 2. ("Although [8 U.S.C. 1603(a)] authorizes the Attorney General to confer upon any employee of the United States any of the powers or duties conferred upon officers or employees of INS, there is no statutory authority for such delegation to any non-federal employee. Therefore state or local law enforcement officials are not authorized to execute INS warrants of arrest.")

[4] Letter to David Nemecek, Chief, NCIC, from John F. Shaw, Assistant Commissioner, INS, April 23, 1986.

[5] Id.

accompanying memorandum.[6] That memorandum concluded that recent case law indicated that even though INS warrants are civil or administrative in nature, state and local officers may place a "hold" on aliens under warrant. The authority for such a hold "results from whatever authority a state has delegated to its law enforcement agencies."[7] In other words, whether an individual may be held by state or local officials depends on state or local law. The INS memorandum did not address the differences, if any, between a "hold" and an arrest, but simply concluded that a state's ability to "hold" an alien eliminated the FBI's concern that serious problems might arise if the NCIC computer were used to take aliens into custody.[8]

The Legal Counsel Division of the FBI reviewed INS' new position and agreed that INS warrants of deportation could be placed in the NCIC system but reached this conclusion for reasons significantly different than those relied upon by INS.[9] The FBI concluded that the existence of such a warrant provided local, state, and federal officers with probable cause to believe that a given individual had committed a federal criminal offense, and that they could, therefore, under current federal law arrest that person. As support for this proposition, the FBI noted that the Supreme Court had indicated that "entering or remaining unlawfully in this country is itself a crime." INS v. Lopez-Mendoza, 462 U.S. 1032, 1038 (1983). Because the conclusion in the FBI Memorandum was based on a rationale different than that relied upon by INS, however, you have requested that we analyze the issues involved.

II. Analysis

The FBI's current policy, established upon recommendation of the NCIC Advisory Policy Board, requires, as noted above, that for a person to qualify for placement in the Wanted Person File, "any law enforcement officer with arrest power" must be able to arrest that person. Thus, the individual must be subject to arrest not only by federal law enforcement officers but also by any state and local law enforcement officer. We turn, therefore, to the issue of whether state and local enforcement officers can

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[6] Memorandum for John F. Shaw, Assistant Commissioner, INS, from Maurice C. Inman, General Counsel, INS, November 25, 1985.

[7] Id.

[8] Id.

[9] Memorandum for the Assistant Attorney General, Office of Legal Counsel, from Joseph R. Davis, Assistant Director -- Legal Division, February 12, 1987 (FBI Memorandum).

arrest individuals on the basis of an outstanding warrant of deportation.

The central check on the ability of a law enforcement official to arrest is contained in the reasonableness requirements of the Fourth Amendment, with the basic rule being that a police officer can arrest an individual only if the arrest is based on probable cause to believe the individual has committed a crime. Dunaway v. New York, 442 U.S. 200, 211 (1979). Brief detentions that are substantially less intrusive than arrests -- the momentary, limited intrusion of the so-called Terry-stop, see Terry v. Ohio, 392 U.S. 1 (1968) -- may be justified by reasonable suspicion of criminal activity. We concur in your conclusion that a "hold" on an alien of more than a few minutes will be treated by the courts as an arrest.[10] Accordingly, it is necessary that the arresting officer have probable cause before placing the person in such a "hold." As discussed below, we question whether state or local law enforcement officers may make such arrests where the alien has not committed a criminal offense.

While it may now be said that "the general rule is that local police are not precluded from enforcing federal statutes," Gonzales v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983), it is not clear under current law that local police may enforce non-criminal federal statutes.[11] The principle to be used when determining the scope of state or local police authority was

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[10] FBI Memorandum, supra note 8, at 4, n.2.

[11] We have not analyzed whether state and local law enforcement officers are, or could be, authorized by their states to enforce non-criminal federal statutes. Even if state authorization existed with respect to federal non-criminal law, it would necessarily have to be consistent with federal authority. In this regard, unlike the authorization for state and local involvement in federal criminal law enforcement, see infra n. 18, we know of no similar authorization in the non-criminal context. In addition, the pervasively federal nature of immigration control may preempt a state role in the enforcement of civil immigration matters. For example, the federal court in Gonzales indicated that it assumed that the pervasive regulatory scheme "would be consistent with . . . exclusive federal power over immigration." Gonzales, at 475. Contrary to the suggestion in the FBI Memorandum, we do not believe the Supremacy Clause of the Constitution can be interpreted to generally confer authority upon state and local municipalities to execute federal law. The Supremacy Clause is not a grant of authority but a principle that federal law is to be complied with, even if in conflict with state law. See e.g., Gibbons v. Ogden, 9 Wheat. (22 U.S.) 1, 210-211 (1824).

established by the Supreme Court in Florida Avocado Growers v. Paul, 373 U.S. 132 (1963), where it indicated that state enforcement activities were authorized if they did not impair federal regulatory interests. Using this principle, the Ninth Circuit in Gonzales agreed with the plaintiffs' assertion that in the context of the Immigration and Naturalization Act, it "assume[d] that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute[d] such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration." Gonzales, 722 F.2d at 474-475 (emphasis added). The court proceeded to distinguish the "narrow and distinct element" of criminal immigration from the "broad" civil elements, holding "that federal law does not preclude local enforcement of the criminal provisions of the Act." Id. at 475 (emphasis added). Furthermore, the court noted:

> We firmly emphasize . . . that this authorization [to enforce the Act] is limited to criminal violations. Many of the problems arising from implementation of the City's written policies have derived from a failure to distinguish between civil and criminal violations of the Act. Several of the policy statements use the term "illegal alien," which obscures the distinction between the civil and the criminal violations. . . . There are numerous reasons why a person could be illegally present in the United States without having entered in violation of section 1325. Examples include expiration of a visitor's visa, change of student status, or acquisition of prohibited employment. Arrest of a person for illegal presence would exceed the authority granted Peoria police by state law.

Gonzales, 722 F.2d at 476 (emphasis added). We believe this opinion makes clear that local police may enforce criminal violations of the Immigration and Naturalization Act. As discussed below, however, not all warrants of deportation are issued for criminal violations.

The critical event in the deportation process is the deportation proceeding. This proceeding "is a purely civil action to determine eligibility to remain in this country," INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1983); its purpose is "not

to punish an unlawful entry. . . ." Id.[12] The proceeding to determine deportability is commenced by the filing of an Order to Show Cause with the Office of the Immigration Judge, 8 C.F.R. 242.1, who may determine that the alien is deportable only if "it is found by clear, unequivocal evidence that the facts alleged as grounds for deportation are true." 8 C.F.R. 242.13(a).[13] Currently, there are nineteen different bases upon which an alien can be found to be deportable. 8 U.S.C. 1251(a). Not all of these bases, however, as the court in Gonzales emphasized, are because the alien violated a criminal law.[14] Thus, the issuance

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[12] Occasionally, it is necessary to use a warrant of arrest, which is not the same as a warrant of deportation, to secure the attendance of the individual whose legal presence in the country is being challenged. See 8 U.S.C. 1252(a). While not before us, we see no reason why such arrest warrants may not be placed in the NCIC Wanted Person File.

[13] When an alien is determined by an immigration judge to be unlawfully in the country, "a warrant of deportation based upon the final administrative order of deportation in the alien's case shall be issued." 8 C.F.R. 243.2. In certain circumstances, the alien may request a stay of deportation, 8 C.F.R. 243.4, an extension of time to depart, 8 C.F.R. 244.2, or an adjustment of status to that of a person admitted for permanent residence, 8 C.F.R. 245. Depending on the grounds upon which an alien is found to be deportable, however, an alien who willfully fails or refuses to depart from the United States within six months of the final order of deportation shall be guilty of a felony. 8 U.S.C. 1252(e).

[14] Section 1251 of title 8 provides generally for the deportation of any alien who: (1) at the time of entry was a member of an excludable class; (2) entered the United States without proper inspection; (3) within five years of entry became institutionalized for mental disease; (4) within five years of entry is convicted of a crime of moral turpitude and sentenced to confinement for a year or more; (5) fails to notify within 30 days the proper officials of a change of address pursuant to 8 U.S.C. 1305; (6) is at any time after entry a member of a class of aliens who believe in anarchy, opposition to all organized government, the Communist Party, etc., (7) has engaged in activity prejudicial to the national interest; (8) in the opinion of the Attorney General has within five years become a public charge from causes not shown to have arisen after entry; (9) was admitted as a nonimmigrant but failed to maintain that status; (10) is or was a drug addict after entry or was convicted of conspiracy to violate any state or federal law relating to controlled substances; (11) is a prostitute or manager of prostitutes; (12) has aided the illegal entry of another alien;

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of a warrant of deportation does not necessarily indicate that a criminal law has been violated. For example, an alien whose student status has changed or whose visitor's visa has expired may be ordered to depart the country, though he or she has broken no criminal law.

The FBI Memorandum justifying the inclusion of deportation warrants in the NCIC file placed substantial reliance upon the Supreme Court's observation in INS v. Lopez-Mendoza, 468 U.S. 1032 (1983), that "a deportation proceeding is a purely civil action to determine eligibility to remain in this country . . . though entering or remaining unlawfully in this country is itself a crime. 8 U.S.C. sections 1302, 1306, 1325." Lopez-Mendoza, at 1038. Later, the majority stated that "Sandoval-Sanchez is a person whose unregistered presence in this country, without more, constitutes a crime." Id., at 1047. Careful examination of the statutory provisions cited in Lopez-Mendoza does reveal that the alien in that case had committed a crime by being unregistered. But as discussed below, we do not believe that the Court's statements can be read to classify all aliens subject to deportation as criminals.

Section 1325 of title 8, the first provision cited in Lopez-Mendoza, provides in part:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation . . . shall be guilty of a [crime].

This section makes clear that it is in fact a crime to enter the United States illegally. Many aliens who may be lawfully ordered

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[14](...continued)
(13) has been convicted for possession of a firearm; (14) is convicted within five years of entry for violating title I of the Alien Registration Act, 1940; (15) is convicted twice of violating title I of the Alien Registration Act, 1940; (16) the Attorney General finds to be an undesirable resident because of statutorily specified reasons; (17) is convicted of importing aliens for immoral purposes in violation of 8 U.S.C. 1328; (18) was associated with the Nazi government of Germany; or (19) has obtained the status of an alien lawfully admitted for temporary residence but who failed to meet the requirement that he or she prove to the Attorney General that they provided 90 man-days of seasonal agricultural service within a specified time period, 8 U.S.C. 1161(d)(5)(A).

to depart, however, have not violated section 1325. These aliens may be defined as those who enter the country lawfully but who for one of the reasons provided in section 1251 may, nevertheless, be deported. Similarly, the registration provisions of sections 1302 and 1306, also cited by the majority in Lopez-Mendoza, also fail to establish that all aliens subject to deportation are criminals. Section 1306 provides in part that "any alien required to apply for registration . . . who willfully fails or refuses to make such application . . . shall be guilty of a [crime]." 8 U.S.C. 1306(a). Section 1302, in turn, defines who must register:

> it shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not registered [previously], and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

8 U.S.C. 1302(a). The plain language of these provisions makes clear that sections 1302 and 1306 do not provide a basis for concluding that all aliens in this country who may be ordered to depart have committed a criminal offense. Indeed, some aliens who have been lawfully ordered to depart have complied with these registration requirements. Thus, this Office believes that the mere existence of a warrant of deportation for an alien does not provide sufficient probable cause to conclude that the criminal provisions cited by the Court in Lopez-Mendoza, or others, have in fact been violated.[15] Unlike the more sweeping class of aliens subject to a warrant of deportation, the majority concluded that the alien in Lopez-Mendoza had failed to register as required and may, therefore, have committed a criminal offense.[16]

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[15] In dissent, Justice White even disputed the majority's conclusion with respect to Sandoval-Sanchez, noting that "contrary to the view of the majority, it is not the case that Sandoval-Sanchez' 'unregistered presence in this country, without more, constitutes a crime' . . . ." Lopez-Mendoza, 468 U.S. at 1056. In this regard, Justice White noted that failure to register is only a crime under section 1306 if the failure was willful.

[16] The only other basis for believing generally that aliens have committed a criminal offense is 8 U.S.C. 1326, which prohibits the reentry into the United States of any alien previously deported. As with the provisions cited previously, the class of aliens who are deportable is not coterminous with

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Lastly, we note that the continued presence in the United States of an alien who has been ordered to depart does not, without more, constitute a criminal offense. Only in the circumstances described in 8 U.S.C. 1252(e) does an alien commit a criminal offense by remaining in this country beyond the date ordered for deportation. That section provides that aliens who have been ordered to depart for certain of the reasons specified in section 1251 commit a felony by willfully failing or refusing to depart within six months of the order to do so.[17] The existence of a warrant of deportation for aliens found to have violated these particular provisions of section 1251, however, does not substantially prove that the criminal provision in section 1252(e) has been violated. Not only may the warrant of deportation be issued within six months of the order to depart, which would be before section 1252(e) could be violated, but even if issued more than six months after the order, the warrant will not indicate whether the failure to depart was "willful," also a prerequisite to finding a section 1252(e) violation.

Because 8 U.S.C. 1251 makes clear that an alien who has lawfully entered this country, lawfully registered, and who has violated no criminal statute may still be deported for noncompliance with noncriminal or civil immigration provisions, the mere existence of a warrant of deportation does not enable all state and local law enforcement officers to arrest the violator of those civil provisions. It follows from this that the FBI, under its current policy, may not automatically include in the NCIC Wanted Person File the names of aliens who are the subject of a warrant of deportation.

We do believe that the FBI may include in the NCIC File those aliens who are the subject of a warrant of deportation where they are found by an immigration judge to have violated a criminal provision of the Immigration and Naturalization Act. Again, this is because courts have determined that violators of federal criminal law may be arrested by local, state, and federal law enforcement officers.[18] The issuance by an immigration judge

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[16](...continued)
those who have violated this criminal provision.

[17] Aliens ordered to depart for having violated 8 U.S.C. 1251(4)-(7), (11), (12), (14)-(17), (18) or (19) and who have willfully refused to do so for six months, commit a felony. 8 U.S.C. 1252(e).

[18] See e.g. United States v. Di Re, 332 U.S. 581, 589 (1947)("in absence of an applicable federal statute the law of (continued...)

of a warrant of deportation for such violators, which has, by statutory command, been based on "reasonable, substantial, and probative evidence," 8 U.S.C. 1252(b)(4), provides law enforcement officials with the probable cause necessary to make the arrest. Thus, we believe that the narrower category of aliens found in violation of federal criminal law and subject to arrest by all law enforcement officials may be entered into the NCIC Wanted Person File in accordance with FBI policy.

III. Conclusion

For the foregoing reasons, this Office concludes that the FBI may not, pursuant to its established policy, enter into the NCIC Wanted Person File persons subject to warrants of deportation unless the warrant pertains to persons who are in violation of a federal criminal provision.

Please let me know if we can be of further assistance.

Douglas W. Kmiec
Assistant Attorney General
Office of Legal Counsel

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[18](...continued)
the state where an arrest without warrant takes place determines its validity"); U.S. v. Bowdach, 561 F.2d 1160, 1168 (5th Cir. 1977)("state law enforcement officers have the power to arrest citizens for crimes against the United States, and this would be especially true when the state officers have knowledge of the fact that the person being arrested is wanted by the federal authorities and that a federal arrest warrant has been issued for that person's arrest."). Moreover, federal authority exists for certain state and local participation in the enforcement of federal criminal statutes. See 18 U.S.C. 3041. We have not explored herein whether the making of an arrest by a state law enforcement officer under the authority of state law but premised upon a prior federal determination that such person is in violation of a federal criminal statute could ever be said to run afoul of the Appointments Clause. Art. II, sec. 2, cl. 2. See Buckley v. Valeo, 424 U.S. 1, 26 (1976).