In response to a court order, the Department of Justice has finally released its Office of Legal Counsel's April 2002 opinion on state and local enforcement of the immigration laws, which it has repeatedly cited as its legal basis for new initiatives designed to involve state and local police in immigration enforcement.

Advocacy groups, police officials, and members of Congress had asked the Department to release the opinion on numerous occasions beginning in June 2002. However, the Department consistently refused to disclose the document, and a number of groups had to sue the Department under the Freedom of Information Act to obtain its release. The U.S. District Court for the Southern District of New York ordered disclosure (with limited redactions). The government then appealed, and the U.S. Court of Appeals for the Second Circuit affirmed the District Court's decision.

Now that the document has been released, it is apparent that the Department fought so hard to keep the document secret because it wished to protect the opinion's deeply flawed reasoning from public scrutiny. The opinion finds that state and local police may arrest and detain individuals for criminal and non-criminal violations of the immigration laws because states are not preempted from making such arrests and they have the "inherent authority" to do so. As explained below, the opinion, which contradicts at least three of the OLC's own prior formal opinions—including one written for the first Bush Administration—is wholly unconvincing.

Preemption

By virtue of the Constitution's Supremacy Clause, the federal government has the power to "preempt" any state or local immigration arrest authority. In contrast to prior OLC opinions, the April 2002 opinion finds that Congress has not preempted police enforcement of civil immigration laws. That conclusion is based on a number of errors. The opinion:

- Invents a "strong presumption against construing a federal statute" to bar state immigration arrests, based on an out-of-context quote from a 1928 circuit court opinion. The opinion purports to derive this presumption from a sentence fragment in *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928), stating that "it would be unreasonable to suppose that [the United States'] purpose was to deny to itself any help that the states may allow." But *Marsh* was not discussing or setting forth any presumption. Rather, in the sentence quoted, *Marsh* found that the *particular* arrest statute at issue in that case should not be read to "deny … any help" in enforcing federal criminal provisions regarding Prohibition. This was especially true against a backdrop of the "universal practice of police officers in New York to arrest for federal *crimes*" (emphasis added). Neither *Marsh* nor any other case supports any presumption against preemption of state immigration arrests, much less a strong one.

To the contrary, immigration has long been recognized as a distinctly federal concern. *See, e.g., Toll v. Moreno*, 458 U.S. 1 (1982); *Hines v. Davidowitz,* 312 U.S. 52, 69-70 (1941). Thus, preemption doctrines hold special force in this context, and previous OLC memos as well as judicial decisions have accepted at least partial preemption of state authority to enforce the immigration laws. Indeed, even in 1983 a circuit court was willing to "assume that the civil provisions" of immigration law "constitute such a pervasive regulatory scheme" as to preempt state and local arrest authority. *Gonzales v. City of Peoria*, 722 F.2d 468, 472-75 (9th Cir. 1983). Since *Gonzales*, the number and complexity of immigration statutes—both civil and criminal—has grown dramatically, and the evidence that Congress intends to preempt blanket police enforcement of immigration laws is even stronger.

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

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

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

  The opinion makes only a weak attempt at justifying this glaring flaw in its reasoning (and it fails to note that its logic would also deprive §§ 1103(a)(10),

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

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

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

Inherent Authority

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

- Does not address the significant distinction between criminal and non-criminal enforcement set forth in the office's previous opinions and in judicial precedent. Indeed, it willfully obscures that distinction, characterizing *Marsh*, a case involving a *criminal* conviction for violation of the federal Prohibition

statute, as simply involving a question of "warrantless arrests for violation of federal law."

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

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

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

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

  The opinion does not explain how unfettered state and local immigration enforcement authority comports with the President's constitutional obligation to "take Care" that federal immigration law is "faithfully executed." Rather, it states that the principle is broadly inapplicable to state and local immigration enforcement because in enforcing the immigration laws the states are acting as independent sovereigns, like Canada. Given that the opinion can cite no judicial or OLC opinions that actually employ this logic, and that a 1989 OLC opinion contradicts it, its treatment of this constitutional issue is alarmingly superficial.

Policy considerations

The OLC's selective and misleading survey of the law results in an opinion that is much more of a political document than neutral and reliable legal advice. It is worth noting that many law enforcement officers, state and local elected officials, and members of Congress have opposed the result advocated by this opinion for a variety of reasons, including:

- negative effects on public safety resulting from fear of the police in immigrant communities, such as unwillingness of victims and witnesses to talk to police;
- increased cost and liability implications for state and local governments;
- lack of training in immigration law among police officers;
- increased risk of racial profiling; and
- particular dangers for individuals suffering from domestic abuse.

ACLU Immigrants' Rights Project
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