



COMMONWEALTH of VIRGINIA

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October 15, 2007

The Honorable Kenneth W. Stolle
Member, Senate of Virginia
2101 Parks Avenue, Suite 700
Virginia Beach, Virginia 23451

The Honorable David B. Albo
Member, House of Delegates
6367 Rolling Mills Place, Suite 102
Springfield, Virginia 22152

Dear Senator Stolle and Delegate Albo:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire concerning the authority of Virginia law-enforcement agencies to detain and arrest individuals based on violations of federal immigration law. Specifically, you ask whether there is inherent authority to arrest; and, if so, whether that authority extends both to criminal and civil violations of federal immigration law.

Response

It is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding a state's authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.

Applicable Law and Discussion

The law relating to the authority of state and local law-enforcement agencies to enforce violations of federal immigration law is complex and, in part, unclear. Although it appears that Virginia possesses authority to make arrests for federal criminal violations, including criminal violations of certain federal immigration laws, the authority to enforce civil violations requires clarification by Congress or the federal appellate courts.

I. Inherent Authority

The power to enforce federal law belongs exclusively to the President and his subordinates.¹ However, states may cooperate in the enforcement of federal law.² Indeed, such cooperation has taken place since the framing of the Constitution of the United States.³ Thus, to the extent that state and local law-enforcement officers work in cooperation with federal officials, they have inherent authority to enforce federal law.⁴ It is not necessary under federal law to have explicit statutory authority for such enforcement.⁵

Although Congress has enacted legislation in the field of immigration enforcement and preempted state and local enforcement in certain areas, it has not preempted the field. For example, 8 U.S.C. § 1357 expressly authorizes state and local law-enforcement agencies to enter into cooperative agreements with federal agencies for enforcement of federal immigration law. These agreements commonly are known as “287(g)” agreements, referring to § 287 of the Illegal Immigration Reform and Immigrant Responsibility Act.⁶ Section 1357 further provides that:

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.^[7]

Moreover the federal circuits “have never ruled that the states are preempted from arresting aliens for criminal immigration violations”⁸ and have recognized the states’ authority to make federal arrests, generally.⁹ The United States Court of Appeals for the Fourth Circuit has not addressed the specific issue

¹ *Printz v. United States*, 521 U.S. 898 (1997).

² *See, e.g.*, 8 U.S.C.S. § 1357 (LexisNexis 1997 & Supp. 2007).

³ *Printz*, 521 U.S. at 907-12.

⁴ *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983).

⁵ *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001).

⁶ *See* U.S. Immigration & Customs Enforcement, “Fact Sheets,” at <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogoover.htm> (last visited Oct. 5, 2007).

⁷ 8 U.S.C.S. § 1357(g)(10) (LexisNexis (1997)).

⁸ Jeff Session & Cynthia Hayden, *Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-first Century: The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323, 332 (2005).

⁹ *Janik*, 723 F.2d at 548 (noting that court has never invalidated such arrest; thus, inferring that “[state] officers have implicit authority to make federal arrests”).

of whether states possess authority to make arrests for violations of federal immigration law. However, the United States Courts of Appeals for the Ninth and Tenth Circuits have held that when there is cooperation with federal authorities, the “general rule is that local police are not precluded from enforcing federal statutes”¹⁰ and “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.’”¹¹

The federal circuits are not as clear on the issue of whether the states possess authority to arrest for *civil* violations of federal immigration law. Although no federal appellate court has held that state and local officials are prevented from doing so, several competing authorities suggest that the authorization is not clear. For example, the Ninth Circuit, has assumed, in *dicta*, “that the civil provisions of the [Immigration and Nationalization] Act ... constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration,”¹² thereby limiting state authority to arrests for only criminal immigration violations. The *Gonzales* court¹³ does not adequately explain how the Immigration and Nationalization Act is so pervasive that it preempts civil arrests while leaving unscathed the states’ authority to arrest for criminal violations.

Further complicating matters is the effect of an opinion letter issued by the Office of Legal Counsel¹⁴ (“OLC”) of the United States Department of Justice (“Justice Department”) and the subsequent reversal of a portion of the Department’s position. In a 1996 opinion, OLC concluded that “state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability.”¹⁵ The fact that the Attorney General of the United States subsequently reversed the Department’s position¹⁶ does little to clarify this area of the law.

¹⁰ *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

¹¹ *Santana-Garcia*, 264 F.3d at 1194 (quoting *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999)).

¹² *Gonzales*, 722 F.2d at 474-75.

¹³ *Id.* at 475 (noting that statutes relating to criminal activities “are few in number and relatively simple in their terms”).

¹⁴ Mem. Op. Off. Legal Counsel, U.S. Dep’t of Justice, for U.S. Att’y, S. Dist. Cal., “Assistance by State and Local Police in Apprehending Illegal Aliens,” available at <http://www.usdoj.gov/olc/immstopo1a.htm> (Feb. 5, 1996).

¹⁵ *Id.* at *10.

¹⁶ See “Attorney General Prepared Remarks on the National Security Entry-Exit Registration System,” p. 5 (June 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (stating that “we are asking state and local police to undertake voluntarily – arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC — is within the inherent authority of the states”); see also *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the H. Comm. On the Judiciary* (Oct. 1, 2003) (statement of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City), p. 2, available at <http://judiciary.house.gov/HearingTestimony.aspx?ID=238> (last visited Sept. 28, 2007) (noting that Counsel issued “an erroneous 1996 opinion,” which was corrected by unpublished opinion in 2002).

While it is important to note that authority exists for Virginia law-enforcement officers to arrest for criminal violations of federal law,¹⁷ there are significant unanswered questions regarding arrest procedures. When acting under the authority of 8 U.S.C. § 1357, federal procedure would apply. Similarly, Virginia law provides a procedure to detain and initially process a limited group of criminal illegal aliens in the Commonwealth until federal authorities can take custody of such aliens or until a specified period of time has elapsed.¹⁸ That process, however, does not apply to the vast majority of aliens who are unlawfully present in the United States and are in violation of federal criminal law pursuant to 8 U.S.C. § 1325.¹⁹ Ostensibly, under their inherent authority to arrest and with the knowledge of sufficient facts, Virginia law-enforcement officers could detain an alien who has unlawfully entered the United States and is present within the Commonwealth. However, without proper training in applicable federal criminal procedure, it would be difficult for such officers to arrest solely on the basis of a federal criminal violation without assistance from federal authorities. Additionally, as explained hereafter in greater detail, there are state law limitations on the exercise of such authority.

II. Express Congressional Authority

In addition to the authority previously discussed, Congress has enacted statutes that expressly permit states and localities to enforce certain immigration laws.²⁰

A. 8 U.S.C. § 1252c

Section 1252c(a) expressly authorizes states and localities to arrest and detain individuals provided the individual: (1) is illegally present in the United States; and (2) has previously been convicted of a felony and deported or left the United States after such conviction. Additionally, a state or locality must confirm the status of the individual with Immigration and Customs Enforcement prior to arrest or detainment. To facilitate cooperation, § 1252c(b) compels the United States Attorney General to share information that would assist state and local law-enforcement officials in the performance of these duties.

B. 8 U.S.C. § 1324

Section 1324(c) expressly allows “all ... officers whose duty it is to enforce criminal laws” to arrest for violations of 8 U.S.C. § 1324, the “anti-harboring” statute. Specifically, § 1324(a)(1)(A) mandates punishment for persons who knowingly (or in some instances who demonstrate a reckless

¹⁷ See *supra* notes 8-9 and accompanying text.

¹⁸ See VA. CODE ANN. § 19.2-81.6 (2004) (authorizing enforcement of immigration laws of the United States); § 19.2-82(B) (2004) (establishing procedure for arrest without warrant and providing limitation of seventy-two hours).

¹⁹ Pursuant to 8 U.S.C. § 1325(a)(3), a first offense for improper entry by an alien into the United States is punishable by up to six months imprisonment while a subsequent offense is punishable up to two years.

²⁰ Sessions & Hayden, *supra* note 8, at 341-42 (noting that “[w]hile most sections of the INA do not expressly delineate which law enforcement officers have the authority to enforce them, several sections expressly recognize general state and local authority to enforce federal immigration law”); see also 8 U.S.C.S. § 1252c(a) (LexisNexis 1997) (granting authority “to the extent permitted by relevant State and local law”).

disregard): (1) transport an alien into the United States through an undesignated point of entry; (2) transport an alien within the United States; (3) harbor, conceal, or otherwise shield an alien from detection; or (4) encourage an alien to enter the United States in violation of federal law. Because state and local law-enforcement officers have the duty to enforce criminal laws, they would encompass the group expressly designated by Congress in § 1324(c) to enforce § 1324.

C. 8 U.S.C. § 1357(g)

Section 1357(g)(1) expressly authorizes the United States Attorney General to enter into agreements with states and localities to permit qualified officers or employees to serve as immigration officers in relation to the investigation, apprehension, or detention of aliens. Importantly, § 1357(g)(1) provides authorization beyond any inherent arrest authority or other express authority granted in other federal statutes because it includes both criminal and civil authority for the investigation and apprehension of aliens. Two important caveats to consider are that the state or local agency will bear the cost of federal enforcement activities, and such activities must be consistent with both state and local law. The rationale behind § 1357(g)(1) is that due to the vast number of aliens in the United States compared to the relatively few federal immigration officers, state and local law-enforcement officers may be utilized for the detection and the apprehension of aliens. Further, § 1357(g)(10) provides that the express authority granted to states in no way diminishes their inherent authority to assist in immigration enforcement.²¹

D. 8 U.S.C. § 1103(a)(10)

Although § 1103(a)(10) contains a mechanism for triggering its application, it also involves an express grant of power to states or localities. If the United States Attorney General determines that an actual or imminent influx of aliens requires an immediate federal response, he may authorize any state or local law-enforcement officer to perform certain federal immigration functions. The head of the state or local law-enforcement agency must consent to the “emergency” provision before it may be utilized.

III. Pertinent Virginia Authority

The federal statutes analyzed above outline the basic parameters of the federal immigration enforcement power delegated to states and localities. Specifically, these statutes and authority delineate the “outer boundaries” of acceptable state enforcement action in the area.²² However, the delegation of authority from the federal government to states and localities is contingent upon the specific limitations of

²¹ See *supra* note 7 and accompanying text.

²² See generally Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 920-21 (1997). “[T]he only question that remains to be resolved where Congress explicitly grants state and local authority to enforce the [Immigration and Nationality Act]’s provisions is whether state and local immigration enforcement is authorized by state law.” *Id.* at 920.

a state's or locality's own laws and regulations.²³ Thus, to enforce federal immigration laws or to legislate in areas where no federal regulations exist, federal approval coupled with state authorization is required.²⁴

The General Assembly of Virginia has enacted several statutes pursuant to federal authority that provide guidelines and parameters for state and local action. Although not an exhaustive list, the following statutes detail the major substantive procedures and constraints that Virginia has enacted.

A. VA. CODE ANN. § 15.2-1726

Section 15.2-1726 authorizes localities to enter into agreements for cooperation in the furnishing of police services, generally. It sets forth a procedure and gives broad discretion for local law-enforcement agencies, including the state police, to enter into agreements with federal law-enforcement agencies to cooperate in the furnishing of police services.²⁵ However, local law-enforcement agencies cannot enforce federal law unless authority is provided by federal statute.²⁶ In the context of immigration enforcement policy, § 15.2-1726 would provide authority to Virginia law-enforcement officers to execute the express federal authorization under 8 U.S.C. § 1357(g).²⁷

B. VA. CODE ANN. §§ 19.2-81.6 and 19.2-82(B)

Collectively, §§ 19.2-81.6 and 19.2-82(B) formalize authority for Virginia law-enforcement officers to exercise the express grant of arrest authority given to state and local law-enforcement officers by 8 U.S.C. § 1252c. Specifically, §§ 19.2-81.6 and 19.2-82(B) authorize state and local law-enforcement officers, in the course of their regular duties, to detain an individual illegally present in the United States who previously has been convicted of a felony and has been deported or left the county upon such conviction. In § 19.2-82(B), Virginia specifically restricted the use of this federal authority by mandating that such a person may only be held for a maximum of seventy-two hours.

C. VA. CODE ANN. § 15.2-1704

Section 15.2-1704 delineates the powers and duties of local law-enforcement officers and provides certain constraints. First, under § 15.2-1704(A), local law-enforcement officers are vested with the power to prevent and detect crime, apprehend criminals, safeguard life and property, preserve peace, and enforce "state and local laws, regulations and ordinances." In limiting the authority of local law-enforcement officers to the enforcement of state and local laws, regulations, and ordinances, § 15.2-1704(A) ostensibly prohibits such officers from enforcing federal laws and regulations. However, the responsibilities granted to local law-enforcement officers "for the prevention and detection of crime,

²³ See *Gonzales*, 722 F.2d at 475-77 (requiring that state law grant state police authority that is delegated from federal government).

²⁴ *Id.*

²⁵ See 2007 Op. Va. Att'y Gen. No. 07-016, available at <http://www.vaag.com/OPINIONS/2007opns/07-016-Rust.pdf>.

²⁶ *Id.*

²⁷ Such authority exists in the context of "287g" agreements pursuant to 8 U.S.C. § 1357(g)(1) and general agreements to cooperate pursuant to § 1357(g)(10).

the apprehension of criminals, the safeguard of life and property, [and] the preservation of peace”²⁸ appears to provide the necessary authority to cooperate in the enforcement of federal laws and regulations despite the limiting language.²⁹ Furthermore, this limiting language does not affect the ability of the state or localities to enter into agreements with federal authorities, as specifically detailed in § 15.2-1726 and 8 U.S.C. § 1357(g).

Additionally, § 15.2-1704(B) provides that

[a] police officer has no authority in civil matters, except (i) to execute and serve temporary detention and emergency custody orders ..., (ii) to serve an order of protection ..., (iii) to execute all warrants or summons as may be placed in his hands by any magistrate for the locality ..., and (iv) to deliver, serve, execute, and enforce orders of isolation and quarantine[.]

The bar for local police officers to participate in civil matters appears to limit the enforcement of federal civil immigration violations outside the scope of any agreement under § 15.2-1726 and 8 U.S.C. § 1357(g). The statutory language employed in granting specific exceptions to this general rule may allow such federal civil enforcement by local law-enforcement officers to occur.³⁰ However, in light of the current judicial uncertainty³¹ regarding the scope of federal authority granted to localities to make arrests based solely on suspicion of a civil violation, coupled with the specific limitations in § 15.2-1704, would make local enforcement of federal civil immigration laws imprudent at this juncture.

D. VA. CODE ANN. § 15.2-530

Section 15.2-530 delineates the powers and duties of sheriffs. Specifically, “[t]he sheriff shall exercise the powers conferred and perform the duties imposed upon sheriffs by general law.” Similar to the analysis regarding § 15.2-1704, the ability of sheriffs to enforce federal civil immigration law, without a specific statutory grant, is unclear. However, in the absence of specific powers and duties, as in § 15.2-1704 for local law-enforcement officers, a stronger argument exists that sheriffs are permitted to conduct such civil enforcement activities. Again, the prudent course of conduct is that sheriffs refrain from enforcement of federal civil immigration law outside the scope of § 15.2-1726 and 8 U.S.C. § 1357(g) until such authority is clarified by federal courts or statute. For example, a specific mandate from Congress or direction from the appellate courts would provide such clarification coupled with any necessary amendments to the *Virginia Code*.

E. VA. CODE ANN. § 52-8

Section 52-8 outlines the powers and duties of the Virginia state police. In pertinent part, § 52-8 provides that state police officers “are vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this Commonwealth.” Because the powers of state police officers are tied to those of sheriffs, the previous analysis for § 15.2-530 would apply equally to state police officers.

²⁸VA. CODE ANN. § 15.2-1704(a) (Supp. 2007).

²⁹While authority arguably exists within the existing language of § 15.2-1704, clarification by the General Assembly ultimately may be necessary.

³⁰See VA. CODE ANN. § 15.2-1704(B)(iii) (authorizing execution of all warrants or summons from magistrates).

³¹See *supra* notes 8-13 and accompanying text.

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IV. Summary

Virginia, as a sovereign within the constitutional framework of dual sovereignty, has the inherent authority to cooperate with the federal executive branch in the enforcement of criminal violations of federal immigration, unless otherwise expressly preempted. Although the Fourth Circuit has not issued a ruling on states' inherent authority, the Ninth and Tenth Circuits have ruled that the states' authority to arrest for criminal violations has not been preempted by federal action.³² However, it is unclear whether arrest authority extends to civil violations of federal immigration law. Absent an express agreement with federal authorities to make arrests for civil violations of federal immigration laws, it is my opinion that Virginia law-enforcement officers should refrain from making such arrests for such civil violations until the law is clarified. Additionally, Congress has granted express authority to the states to assist in the enforcement of federal immigration law; however, Virginia law limits the ability of Virginia law-enforcement officers to arrest and detain individuals for violations of federal immigration.

Conclusion

Accordingly, it is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding a state's authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Robert F. McDonnell

3:831; 1:941/07-086

³² See *supra* notes 10-11 and accompanying text.