

## NOTES

### FEDERALISM ON ICE: STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAW

#### I. INTRODUCTION

In October 2002, Lee Malvo, a young illegal alien from Jamaica, who along with John Allen Muhammed became known as the “D.C. Snipers,” went on a deadly shooting spree in the Washington, D.C. area.<sup>1</sup> From 1996 to 1999, Angel Resendiz, an illegal immigrant later nicknamed the “Railway Killer,” committed a series of gruesome murders in the United States.<sup>2</sup> In February 2004, a woman was gang-raped and murdered in New York by five illegal aliens.<sup>3</sup> And on September 11, 2001, nineteen Arab hijackers flew commercial airplanes into the World Trade Center. These crimes share a common attribute: they were all committed, at least in part, by illegal aliens who, before committing their offenses, had previously been detained by local or state police officers.<sup>4</sup> Had these officers enforced the immigration laws that provided for these illegal aliens’ possible deportations, these aliens would not have been free to carry out their crimes.

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1. See generally WASH. POST, *Sniper Shootings*, <http://www.washingtonpost.com/wp-srv/metro/daily/oct02/snipershootings.htm> (last visited Mar. 17, 2006).

2. Resendiz murdered twelve people in a serial killing spree, as documented in MICHELLE MALKIN, *INVASION* 87–89 (2002).

3. James Gordon Meek, *City: Cops Stymied by Feds*, N.Y. DAILY NEWS, Feb. 28, 2003, available at <http://www.nydailynews.com/news/local/story/63287p-59035c.html>.

4. Lee Malvo had been detained and fingerprinted after local authorities responded to a domestic disturbance report. Michelle Malkin, *The Lesson of Lee Malvo’s Fingerprint*, VDARE.COM, Nov. 26, 2002, <http://www.vdare.com/malkin/malvo.htm>. Angel Resendiz had been arrested and deported on several occasions throughout his prolonged stay in the United States. MALKIN, *supra* note 2, at 87–88. Three of the four New York gang-rapists who were illegal aliens had been detained by local officials—one on a felony charge and the other two on minor offenses. Meek, *supra* note 3. Three of the 9-11 hijackers had been stopped for various reasons, including minor traffic offenses. See 149 CONG. REC. S15294 (daily ed. Nov. 20, 2003) (statement of Sen. Sessions).

Some suggest that more stringent immigration policies, including relying on state and local officials to enforce federal immigration laws, would promote national security and prevent crime.<sup>5</sup> To accomplish these goals, members of both houses of Congress have proposed legislation that would facilitate cooperation among federal, state, and local officials, and create incentives for state and local police officers to assume increased responsibility in enforcing immigration laws. First, in July 2003, the U.S. House of Representatives introduced H.R. 2671, the Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act).<sup>6</sup> In November 2003, the U.S. Senate introduced S. 1906, the Homeland Security Enhancement Act of 2003 (HSEA).<sup>7</sup> Nearly two years later, in June 2005, congressmen reintroduced both pieces of legislation in substantially similar form as the Clear Law Enforcement for Criminal Alien Removal Act of 2005<sup>8</sup> and the Homeland Security Enhancement Act of 2005.<sup>9</sup> These bills affirm that state and local law enforcement are entitled to support the federal government in enforcing immigration laws. More significantly, the CLEAR Act of 2005 proposes making the distribution of federal funds to local authorities dependent on whether local authorities assist in or stymie the enforcement of immigration laws.

Proponents of these laws argue that they are necessary to ensure homeland security after 9-11.<sup>10</sup> Opponents suggest that the laws will overburden local law enforcement, unwisely divert limited resources, and destroy the beneficial relationships that law enforcement officers have established with local immigrant communities, thus hindering these officials' ability to enforce the law and solve crimes.<sup>11</sup> Opponents also suggest that state

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5. *See, e.g.*, 149 CONG. REC. S15293 (daily ed. Nov. 20, 2003) (statement of Sen. Sessions) (claiming that state and local police are "critical to the success of our immigration system").

6. H.R. 2671, 108th Cong. (2003).

7. S. 1906, 108th Cong. (2003).

8. H.R. 3137, 109th Cong. (2005).

9. S. 1362, 109th Cong. (2005).

10. *See, e.g.*, 151 CONG. REC. S7853-54 (daily ed. June 30, 2005) (statement of Sen. Sessions) (claiming that state and local police are "absolutely critical to the success of our immigration system" and that "to leave them out of the enforcement system . . . eliminates our most effective weapon against criminal and terrorist aliens").

11. NAT'L IMMIGRATION FORUM, THE CLEAR ACT AND HOMELAND SECURITY ENHANCEMENT ACT: DANGEROUS PUBLIC POLICY ACCORDING TO POLICE,

and local enforcement of immigration laws violates constitutional principles of federalism by allowing or requiring state and local officials to assume distinctly federal roles.<sup>12</sup>

This Note addresses the degree to which the proposed legislation raises federalism concerns. Specifically, it answers whether federal law preempts states from enforcing federal immigration law, or whether the states have the inherent authority to enforce such laws. It also addresses the degree to which the proposed uses of the Spending Clause constitute coercion and commandeering of the states.

## II. SHOULD STATE AND LOCAL LAW ENFORCEMENT BE INVOLVED IN ENFORCING IMMIGRATION LAWS?

### A. *The Case for State and Local Enforcement*

With a limited force of approximately 2,000 federal agents,<sup>13</sup> the federal government is unable to enforce federal immigration law effectively across the entire country. On June 30, 2005, Senator Jeff Sessions described the problem during debate on the Senate floor.<sup>14</sup> It is estimated that there are between eight and twelve million illegal immigrants living in this country, with an additional 800,000 joining that number each year.<sup>15</sup> Of the total number of illegal aliens, 450,000 are estimated to be alien absconders: illegal aliens that have been issued deportation orders, but have not yet been deported because they did not appear at their hearing.<sup>16</sup> Moreover, an estimated 86,000 of these illegal aliens have been convicted of deportable crimes, yet remain in the United States.<sup>17</sup>

That there are 86,000 criminal illegal aliens living in this country may itself be cause for some alarm, but Senator Ses-

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GOVERNMENTS, OPINION LEADERS, AND COMMUNITIES (2004), <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/CLEARHSEAQuotes.pdf>.

12. See, e.g., Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–90 (2004).

13. NumbersUSA, Hot Topic: State and Local Police in Immigration Law Enforcement, <http://www.numbersusa.com/hottopic/clearact.html> (last visited Mar. 17, 2006).

14. 151 CONG. REC. S7852 (daily ed. June 30, 2005).

15. *Id.*

16. *Id.*

17. *Id.*

sions ominously tied the problem to the war on terror when he added that “3,000 of the ‘alien absconders’ within our borders are from one of the countries that the State Department has designated to be a ‘state sponsor of terrorism.’”<sup>18</sup> Furthermore, the number of illegal aliens “outweighs the number of federal agents whose job it is to find them within our borders by 5,000 to 1.”<sup>19</sup> Given the vast number of illegal aliens in this country, the federal government simply does not have the manpower to enforce immigration laws. It is against this backdrop that proposals to allow or require state and local police officers to assist in enforcing immigration laws have been grounded. Such proposals increase the overall capability of the federal government to enforce the federal immigration laws by essentially adding 700,000 pairs of eyes and ears to the force of federal immigration agents.<sup>20</sup> The addition of these officers could be essential to effective enforcement of our immigration laws.<sup>21</sup>

### B. *The Case for the Status Quo*

Although the arguments in favor of requiring or allowing state and local law enforcement to enforce immigration laws may initially seem compelling, policy makers must evaluate several countervailing considerations. If state and local police divert limited resources to the enforcement of federal immigration law, then fewer resources will remain for typical law enforcement functions,<sup>22</sup> including those on which our national security policies depend, such as protecting industrial facilities, channels of commerce, and serving as “first responders.”<sup>23</sup>

Additionally, requiring state and local officials to enforce immigration laws may actually destroy the relationships that

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18. *Id.*

19. *Id.* at S7853.

20. *Id.*

21. *Id.*

22. See Joe Cantlupe, *Proposal Targets Migrants’ Offenses; Police Say They Lack Resources to Make Arrest*, SAN DIEGO UNION-TRIB., Nov. 29, 2003, at A1 (“[T]he biggest argument from most big-city chiefs (against immigration enforcement) is simply the lack of resources.”).

23. See generally Nat’l Immigration Forum, *Why Shouldn’t Local Police Enforce Federal Immigration Laws? Congressional Legislation Would Harm, Not Help, Public Safety*, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=575> (last visited Mar. 17, 2006); Human Rights First, *Broad Based Concern About Local Law Enforcement of Federal Immigration Laws*, [http://www.humanrightsfirst.org/us\\_law/us\\_law\\_16.htm](http://www.humanrightsfirst.org/us_law/us_law_16.htm) (last visited Mar. 17, 2006).

these officials have with the aliens in their communities, thus making it less likely that illegal aliens, fearing deportation, will come forward with information about crimes.<sup>24</sup> This conflict is particularly problematic when victims of crime—especially sexual assault and domestic abuse—are afraid to report such crimes for fear of subsequent deportation.<sup>25</sup> If police are perceived as agents of Immigration and Customs Enforcement (ICE),<sup>26</sup> their ability to enforce laws and fight crime could be seriously undermined.<sup>27</sup>

### III. STATE AND LOCAL POWER TO ENFORCE IMMIGRATION LAWS

Assuming *arguendo* that it is a good idea for state and local authorities to enforce immigration laws, it is worth evaluating the degree to which these officials already have the authority to enforce such laws.

#### A. *Constitutional Preemption of State Authority*

The Constitution does not directly define the scope of federal power to regulate immigration,<sup>28</sup> but possible textual sources of the federal power include the Naturalization Clause<sup>29</sup> and the

24. NAT'L IMMIGRATION FORUM, *supra* note 11.

25. Anand Swaminathan, *Outside View: New Laws Scare Immigrants*, UNITED PRESS INT'L, July 29, 2004 (describing the case of battered immigrant women who often remain silent in the face of domestic abuse because of fear of deportation).

26. U.S. Immigration and Customs Enforcement, formerly operating as the Immigration and Naturalization Service (INS).

27. *See, e.g.*, Letter from Ray Samuels, Police Chief, Newark, Cal. to U.S. Representative Pete Stark (Sept. 17, 2003), available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=568> ("Police agencies in California have worked very hard over the years to gain the confidence of their diverse population . . . . By turning police into immigration agents, all of our agency's efforts to gain the trust of immigrants—both legal and illegal—would be undermined as immigrants would be discouraged from coming forward to report crimes and suspicious activity."). *But see* Jeff Sessions & Cynthia Hayden, *The Growing Role for State and Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL'Y REV. 323, 338–40 (2005).

28. *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 81 (2002).

29. U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization.").

Migration Clause.<sup>30</sup> However, although the Naturalization Clause addresses citizenship, it does not directly mention the regulation of aliens. Moreover, whereas some nineteenth-century commentators may have cited the Migration Clause for the proposition that immigration regulation was an exclusively federal power, this explanation was largely discredited after the Civil War, and most modern scholars view the Migration Clause as dealing primarily with slavery.<sup>31</sup>

The earliest debate regarding the distribution of powers over immigration between the federal and state governments arose in the context of the Alien Act of 1798.<sup>32</sup> Debate surrounding this law focused on whether Congress could supersede the authority of states to regulate immigration.<sup>33</sup> Proponents of the Virginia and Kentucky Resolutions—which opposed the Alien and Sedition Acts—claimed that the states, not the federal government, retained general power over aliens. Supporters of the Act alluded to international norms, which suggested that one of the inherent powers of a sovereign was the power to control alien populations.<sup>34</sup> The Act’s supporters claimed that this international norm was embodied in various elements of the Constitution, including the Commerce Clause, the Necessary and Proper Clause, and the War Powers Clause.<sup>35</sup>

On the other hand, some suggest that states, as sovereign entities, possess the inherent authority to enforce immigration

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30. U.S. CONST. art. I, § 9, cl. 1. One commentator has suggested that “other plausible enumerated sources of the immigration power [are] the treaty, foreign commerce, and war powers [clauses].” Cleveland, *supra* note 28, at 83.

31. See, e.g., Cleveland, *supra* note 28, at 81.

32. Ch. 58, 1 Stat. 570 (1798). The Act established a federal registration program for aliens and authorized the President “to order all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States.” *Id.*

33. See Cleveland, *supra* note 28, at 87–90.

34. See EMMERICH DE Vattel, THE LAW OF NATIONS 169–70 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1867) (1758) (“The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty.”).

35. See Cleveland, *supra* note 28, at 90.

laws and regulate immigration.<sup>36</sup> In other words, the states retain police power that is “entirely independent of the U.S. Constitution,”<sup>37</sup> a power that includes “protect[ing] the lives, health, morals, comfort, and general welfare of the people.”<sup>38</sup> And whereas the federal government is a government of enumerated powers, the state governments’ powers are limited only to the extent that the Constitution or federal law preempts such power.<sup>39</sup> Since the Constitution does not clearly define the source of immigration power, some conclude that the states retain this power.<sup>40</sup> Although a state’s police power unquestionably includes the ability to promulgate and enforce criminal laws, it is less clear that a state has the ability to enact and enforce civil laws regarding immigration. Several states have enacted civil statutes on immigration, but many of these statutes have been invalidated by courts<sup>41</sup> or preempted by federal legislation.<sup>42</sup>

Moreover, even if immigration law is substantially linked to foreign policy, the argument that states have “inherent power” over immigration is strongly countered by *United States v. Curtiss-Wright Export Corp.*,<sup>43</sup> which noted that exclusive federal

36. *State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing before the Subcomm. on Immigration, Border Security, and Citizenship*, 108th Cong. 113 (2004) [hereinafter Kobach testimony] (testimony of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City).

37. *Id.* at 111. This argument seems to parallel traditional arguments in favor of state sovereign immunity, namely, that states possess an inherent dignity that precludes them from liability in private lawsuits. See Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 52–57.

38. *Id.* at 111 (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)).

39. U.S. CONST. amend. X; see also *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

40. See Kobach testimony, *supra* note 36, at 111.

41. Many courts have concluded that the regulation of immigration is an exclusively federal concern. See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (invalidating state inspection and bond requirements for arriving noncitizens); see also *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) (noting “the authority to control immigration is . . . vested solely in the Federal Government, rather than the States”); *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (noting that “whatever power a state may have [over immigration] is subordinate to supreme national law”); *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 273 (1876) (invalidating state tax and bond rules for arriving noncitizens); *The Passenger Cases*, 48 U.S. (7 How.) 282 (1849) (invalidating state taxes on arriving immigrants).

42. See *infra* Part III.B.

43. 299 U.S. 304 (1936).

control over foreign policy was not a power “carved out” of the states’ powers because the states never actually had any power over foreign relations.<sup>44</sup> Along the same lines, others have suggested that states are precluded from regulating immigration because of the constitutionally recognized need to conduct foreign policy with a single voice.<sup>45</sup>

### B. Statutory Preemption

As alluded to in the previous section, separate from the issues of whether states have been constitutionally preempted or whether they have the inherent authority to enforce civil immigration laws, Congress may have statutorily preempted state and local officials from doing so. Congress can preempt the states in three ways. First, it can issue legislation that explicitly preempts state authority.<sup>46</sup> Absent explicit preemptive language, however, the Court has recognized two other types of implied preemption:

field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state

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44. *Id.* at 316 (“And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, ‘the Representatives of the United States of America’ declared the United (not the several) Colonies to be free and independent states, and as such to have ‘full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do.’”). Note, however, that the logic of *Curtiss-Wright* does not necessarily apply to states other than the original thirteen colonies. For example, prior to entering the Union, the Republic of Texas certainly possessed international powers. TEX. CONST. of 1836 art. II, § 4 (power to declare war, grant letters of marque and reprisal, and to regulate captures).

45. 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, 998–1005 (2004) (noting that permitting state and local officials to enforce immigration law could lead to non-uniformity and a “thousand borders” problem).

46. See *Gregory v. Ashcroft*, 501 U.S. 454, 464 (1991).

law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.<sup>47</sup>

In the case of state and local enforcement of immigration laws, the most plausible argument in favor of preemption is in the context of field preemption, and the most likely statutory candidate is the Immigration and Naturalization Act (INA).

The INA establishes both criminal and civil penalties for immigration law violations. Criminal violations include bringing in and harboring illegal aliens,<sup>48</sup> reentering after removal,<sup>49</sup> and importing an alien for an immoral purpose.<sup>50</sup> Civil violations include failing to depart after a removal hearing, and other similar offenses.<sup>51</sup> The breadth of the INA, some argue, demonstrates that Congress has fully occupied the field, preempting states from enforcing civil immigration laws.<sup>52</sup>

In *Gonzales v. City of Peoria*,<sup>53</sup> for example, the Ninth Circuit noted that although states had the ability to enforce criminal violations arising under the INA, as well as state criminal law violations that did not conflict with the federal statute, this did not necessarily mean that states could enforce *civil* violations.<sup>54</sup> The court posited, but did not hold, that because Congress had enacted a “pervasive regulatory scheme” that regulated “authorized entry, length of stay, residence status, and deportation,” it had reserved exclusive federal control over the enforcement of civil immigration laws and had preempted the states through field preemption.<sup>55</sup> In other words, because Congress had promulgated extensive rules regarding civil immigration penalties, it could be assumed that Congress had intended the federal government, not the states, to enforce the rules.

As an initial matter, it should be noted that preemption usually involves a situation where there is a state law or regulation

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47. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal citations and quotation marks omitted).

48. 8 U.S.C. § 1324 (2000).

49. *Id.* § 1326.

50. *Id.* § 1328.

51. *Id.* § 1229(d).

52. See Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1089–90 (2004).

53. 722 F.2d 468 (9th Cir. 1983).

54. *Id.* at 474–76.

55. *Id.*

that is potentially preempted by a conflicting federal law or regulation. Preemption in this case, however, necessarily depends on an assertion that state and local officials are preempted from enforcing federal laws, not on a belief that states are trying to regulate immigration in a manner preempted by Congress.<sup>56</sup> Many commentators cite the Ninth Circuit's inference that Congress has preempted state and local enforcement of civil immigration laws through field preemption. However, in doing so, these commentators base their conclusion on dicta.<sup>57</sup> Not only did that court not hold that this was a case of field preemption, it also neglected to address the mechanism by which field preemption, assuming it did exist, would prevent the enforcement of federal law by state and local officials who had no role in promulgating a legal or regulatory scheme.<sup>58</sup> Furthermore, subsequent acts of Congress indicate that Congress foresaw the possibility of allowing state and local officials to enforce immigration law.<sup>59</sup>

Although the issue of whether Congress has preempted the states from enforcing civil immigration laws may still be up for debate, the CLEAR Act and the HSEA both declare that the states' authority in this area "has never been displaced or pre-

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56. See Kobach testimony, *supra* note 36, at 113 ("Normal preemption cases involve: (1) state legislation or regulation (2) that is at odds with federal purposes or statutes" whereas this case involves "(1) state *executive* action (2) that is intended to *assist* the federal government in the enforcement of federal law.").

57. See, e.g., Memorandum from the ACLU on Refutation of Department of Justice April 2002 Opinion (Sept. 6, 2005), <http://www.aclu.org/FilesPDFs/ACF3189.pdf>; see also Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel 26, 31 (1996) (citing the Ninth Circuit's assertions in *Gonzales* regarding the "pervasive regulatory scheme" for the conclusion that "state and local police lack recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws") (citing *Gonzales*, 722 F.2d at 475). *But see* Memorandum for the Att'y Gen. on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations (Apr. 3, 2002), available at <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>.

58. See *Gonzales*, 722 F.2d at 474-75.

59. See, e.g., 8 U.S.C. § 1252(c) (authorizing state and local law enforcement officials to arrest and detain aliens illegally present in the United States who have been previously convicted of a felony); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 133, 110 Stat. 3009 (1996) (amending 8 U.S.C. § 1357(g) to allow the U.S. Attorney General to enter into "a written agreement with a State" in which certain approved officers of the state can "perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States").

empted” by Congress.<sup>60</sup> If these bills are enacted in their current form, such language may prove helpful in concluding that preemption does not exist. Although the arguments against preemption seem stronger, the issue is clearly not settled. Nevertheless, assuming that state and local authorities either have the power to enforce civil immigration laws, or are not preempted by Congress from doing so, the question becomes whether Congress can *require* such enforcement.

#### IV. CAN THE FEDERAL GOVERNMENT REQUIRE STATES TO ENFORCE IMMIGRATION LAW?

As is widely recognized and understood, the federal government cannot commandeer the machinery of state governments.<sup>61</sup> It seems apparent, however, that there may be some limits to the force of the anti-commandeering doctrine. For example, it seems possible that the federal government could enlist the support of state and local officials or governments if a truly dire matter of national security was at stake.<sup>62</sup> If this is true, does the current war on terror affect the application of the anti-commandeering doctrine?<sup>63</sup>

Justice Scalia’s majority opinion in *Printz* dismisses assertions that enlisting state and local officials was necessary to deal with the “emergency” of handgun violence that the Brady Bill sought to mitigate.<sup>64</sup> He stressed that when it is the “*object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty,” the court should not balance concerns about exigencies, efficiencies, and burdens.<sup>65</sup> Rather, the court should “resist

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60. H.R. 3137, 109th Cong. § 2 (2005); S. 1362, 109th Cong. § 3 (2005). This language, which was not present in the earlier 2003 versions of the bills, was presumably added after questions arose regarding whether preemption exists.

61. *Printz v. United States*, 521 U.S. 898, 925 (1997); *New York v. United States*, 505 U.S. 144, 161–62 (1992).

62. See, e.g., *Printz*, 521 U.S. at 940 (Stevens, J., dissenting) (“Matters such as the enlistment of air raid wardens, the administration of a military draft, the mass inoculation of children to forestall an epidemic, or perhaps the threat of an international terrorist, may require a national response before federal personnel can be made available to respond.”).

63. See Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004).

64. *Printz*, 521 U.S. at 931–33.

65. *Id.* at 932.

the temptation to concentrate power in one location as an expedient solution to the crisis of the day.”<sup>66</sup>

Under this rationale, the anti-commandeering doctrine should remain in full force, even during the war on terror, without exceptions for national emergencies that may make state and local “enlistment” a prudent policy decision. Justice Scalia’s rationale is logical to the extent that preserving the formalism inherent in the doctrine creates a consistent and forceful way of protecting state autonomy and individual rights.<sup>67</sup> Allowing ad hoc exceptions to the doctrine would inevitably weaken it, as the availability of the exception would turn on the definition of “emergency.” Thus, from a policy perspective, there is value in maintaining a rigorous anti-commandeering doctrine, even during the war on terror.

Even absent the policy arguments for strict adherence to the doctrine, it is not clear that allowing exceptions to the doctrine is necessary to fulfill pragmatic ends. The assistance of state and local governments would be essential in the case of a biological or chemical attack, and, in such an emergency situation, non-federal law enforcement would likely cooperate. In fact, the number of localities that would resist cooperation would be inverse to the severity of emergency, as political pressures to comply would force localities to cooperate, notwithstanding their ability to refuse to do so.<sup>68</sup> Ironically, this argument appears to rely on political safeguards—a principle often used to argue against judicial oversight of the federal distribution of powers<sup>69</sup>—to support a judicially created federalism doctrine.

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66. *Id.* at 933 (quoting *New York*, 505 U.S. at 187).

67. *Cf.* *Korematsu v. United States*, 323 U.S. 214 (1944) (disregarding formalistic rules in upholding conviction for violation of Japanese internment).

68. *Althouse*, *supra* note 63, at 1271. One of the policy rationales for the anti-commandeering doctrine—that it provides political accountability to the federal government by not allowing the government to delegate enforcement of its laws—appears, in this situation, to be acting in reverse. Anti-commandeering can normally be thought of as relieving local officials of the wrath associated with disfavored policies. In this situation, local officials will suffer the “wrath” of *not* enforcing programs the public sees as essential in times of emergency. Either way, the doctrine places political accountability where it belongs.

69. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–52 (1985).

Given the relatively robust anti-commandeering doctrine expressed in *Printz* and *New York*, it does not appear that there could be an “emergency exception” to the general rule. Moreover, even if there were such a rule or exception, local enforcement of immigration law does not rise to the level of emergency in which such an exception would apply. Although one could possibly make a case for abandoning the rule when there is a biological attack, that case is much less compelling when what is at stake is the enforcement of civil immigration violations, notwithstanding the possibility that local enforcement of such violations could hypothetically prevent a terrorist attack by removing the attackers from the country. Rather, the argument that enlisting local officials to enforce immigration laws is necessary for national security (the efficiency of having 700,000 additional officers, decreasing the ratio of aliens to federal agents, and so on) seems strikingly similar to the argument explicitly rejected in *Printz* (that local officials were required to implement the registration program mandated by the Brady Bill). As such, it does not appear that Congress could require state and local officials to enforce immigration laws, notwithstanding the arguments about national security.

#### V. “VOLUNTARY” ASSISTANCE IN ENFORCING IMMIGRATION LAWS

Having made the decision that as a policy matter, it is a good idea for state and local officials to be involved in enforcing immigration law, and that there may be doubts about whether state and local authorities have this authority, some members of Congress have proposed legislation that would confirm this authority and facilitate cooperation among state, local, and federal officials in the enforcement of immigration laws.

##### A. *Congressional Policy Proposals*

On June 30, 2005, Representative Norwood introduced legislation to correct some of the perceived problems with U.S. immigration policy.<sup>70</sup> The CLEAR Act of 2005 provides that state and local law enforcement personnel “have the inherent authority of a sovereign entity to investigate, identify, apprehend,

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70. H.R. 3137, 109th Cong. (2005).

arrest, detain, or transfer to Federal custody aliens in the United States . . . for the purposes of assisting in the enforcement of the immigration laws of the United States,"<sup>71</sup> and that any state that "has in effect a statute, policy, or practice that prohibits law enforcement officers . . . from assisting or cooperating with Federal immigration law enforcement" shall not receive certain federal funding.<sup>72</sup> The bill was referred to the House Judiciary Committee, and no further action has been taken.

Also on June 30, 2005, Senator Sessions introduced the Homeland Security Enhancement Act of 2005,<sup>73</sup> which was substantially similar to the CLEAR Act introduced in the House. As with the CLEAR Act, the HSEA affirms states' authority to enforce immigration laws,<sup>74</sup> and conditions certain federal funding on the states' not preventing state and local enforcement of such laws.<sup>75</sup> The HSEA was referred to the Senate Judiciary Committee, and no further action has been taken.

One of the main differences between the 2003 and 2005 versions of the legislation is that, in the 2003 versions, federal funding is conditioned upon states' enacting legislation that expressly authorizes state and local officials to enforce civil immigration laws, while the 2005 versions condition the funding on states *not* having laws, guidelines, or procedures that *prevent* officers from enforcing the immigration laws. The 2005 approach is most likely directed at localities that are so-called "sanctuary cities," where local governments have made the policy decision to prevent law enforcement officials from enforcing immigration laws.<sup>76</sup> In either manifestation, the analysis of the congressional use of the spending power is substantially the same.

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71. *Id.* § 2.

72. *Id.* § 3(a).

73. S. 1362, 108th Cong. (2005).

74. *Id.* § 2.

75. *Id.* § 3(a).

76. Several cities across the country, including Cambridge, Austin, and San Francisco, have passed resolutions effectively making these cities "sanctuary cities." See, e.g., S.F. BD. OF SUPERVISORS RES. 389-20 (2002), available at <http://www.sfgov.org/site/uploadedfiles/bdsupvrs/resolutions02/r0389-02.pdf>.

B. *Congressional Use of the Spending Power*

Legislators have apparently decided that requiring state and local officials to enforce immigration laws would violate the anti-commandeering doctrine.<sup>77</sup> Senator Sessions made it clear that the legislation “is not about the commandeering of State and local police forces or about forcing them to dedicate resources toward immigration law enforcement when they have other priorities, it is simply about welcoming their assistance in the realm of immigration law enforcement if they choose to give it.”<sup>78</sup> In support of the contention that state cooperation under these proposals is voluntary, proponents emphasize that both the CLEAR Act and the HSEA do not require that state and local officials assist in enforcement of immigration laws, but merely tie certain federal funds to the decision on whether to permit it.<sup>79</sup>

Specifically, states or political subdivisions that have provisions prohibiting such assistance would not be eligible to receive money allocated through the State Criminal Alien Assistance Program (SCAAP). The program is the manifestation of the statutory provisions contained in 8 U.S.C. § 1231(i), which provide that

(1) If the chief executive officer of a State . . . exercising authority with respect to the incarceration of an undocumented criminal alien, submits a written request to the Attorney General, the Attorney General shall, as determined by the Attorney General—

(A) enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, with respect to the incarceration of the undocumented criminal alien;

. . . .

(2) Compensation under paragraph (1)(A) shall be the average cost of incarceration of a prisoner in the relevant State as determined by the Attorney General.<sup>80</sup>

Both the CLEAR Act and the HSEA would seek to deny funding through section 1231(i) to any state that restricts the ability

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77. *See supra* Part IV.

78. 151 Cong. Rec. S7852 (2005).

79. *Id.*

80. 8 U.S.C. § 1231(i) (2000).

of state and local law enforcement to enforce immigration laws. Thus, although states do have a “choice” in the matter, the legislation would create disincentives for continuing so-called sanctuary policies. Because the CLEAR Act and the HSEA implement conditional funding, their constitutionality is best analyzed under the test in *South Dakota v. Dole*:<sup>81</sup> congressional use of the spending power must meet the following conditions: (a) be in the pursuit of the general welfare; (b) be unambiguous in its conditions; (c) be not “unrelated to the federal interest in particular national projects or programs”; (d) impose no unconstitutional conditions; and (e) be non-coercive.<sup>82</sup> The CLEAR Act and the HSEA easily satisfy the first, second, and fourth prongs of this test. Given the relatively deferential nature of the first prong,<sup>83</sup> any act that deals with the regulation of criminal aliens is in pursuit of the general welfare. Likewise, the CLEAR Act and the HSEA are unambiguous in their conditions and impose no unconstitutional restraints on the states. The acts present a closer case with regards to the third and fifth prongs.

In *Dole*, the Court determined that establishing a minimum drinking age was sufficiently related to interstate highway construction to allow the conditioning of funds under the Spending Clause.<sup>84</sup> In the CLEAR Act and the HSEA, federal funds for the incarceration of criminal aliens are conditioned upon the states’ cooperation in enforcing immigration violations. Though not directly related, it is difficult to say that the condition is “unrelated” to the “national project,” especially given the relatively forgiving *Dole* standard. Enforcing immigration laws necessarily involves detaining individuals for violations, and the funding at issue deals directly with the costs of such detentions. The germaneness requirement of *Dole* is thus met.

The fifth prong, the no-coercion requirement, is somewhat difficult to analyze. In *Dole*, the conditioning of five percent of federal highway funds was considered non-coercive.<sup>85</sup> The Court recognized, however, that “in some circumstances the

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81. 483 U.S. 203 (2000).

82. *Id.* at 207–11 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

83. *Id.* at 207.

84. *Id.* at 209. But Justice O’Connor in dissent questioned the Court’s “ cursory and unconvincing” analysis of this issue. *Id.* at 213 (O’Connor, J., dissenting).

85. *Id.* at 211.

financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>86</sup> As has been noted, however, the Court gave very little guidance about the point at which restricting federal funding becomes coercive.<sup>87</sup> Perhaps the governing metric is the percentage of federal funding that is in question, as *Dole* seems to suggest. This statistic seems relatively unhelpful when analyzing the CLEAR Act and the HSEA, however, because the federal government is conditioning 100% of the federal funds provided through SCAAP on participation in the program. Because the funding decision is binary and not one of degree, little can be gained from analyzing the percentage of federal funding at stake. Another possible metric could be the percentage of total state expenditures that the federal funds represent.<sup>88</sup> This second metric seems more helpful when analyzing the coerciveness of the CLEAR Act and the HSEA.

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86. *Id.*

87. See Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to "Fix" Florida Prepaid (And How Not To)*, 79 TEX. L. REV. 1037, 1136 (2001).

88. For a criticism of this metric, see Va. Dep't of Educ. v. Riley, 106 F.3d 559, 570 (4th Cir. 1997) (en banc) (Luttig, J., dissenting) ("The percentage of the total monies expended by the States . . . that is represented by the federal grant is irrelevant in assessing the coerciveness of the inducement, at least as it appears from the Court's opinion in *Dole*.").

**Table 1. SCAAP Funding Statistics, 2003<sup>89</sup>****States with Greatest SCAAP Use**

| <i>State</i>  | <i>SCAAP Funding as % of<br/>Total Expenditures</i> |
|---------------|---|
| New York      | 4.1   |
| Massachusetts | 3.2   |
| California    | 3.2   |
| Nevada        | 1.6   |
| Colorado      | 1.4   |
| Arizona       | 1.4   |
| New Jersey    | 1.4   |
| Washington    | 1.3   |
| Nebraska      | 1.3   |
| Utah          | 1.1   |

**Counties with Greatest SCAAP Funding**

| <i>County (State)</i>      | <i>SCAAP Funding</i> |
|----------------------------|----------------------|
| Los Angeles (California)   | \$13,876,508         |
| Orange (California)        | 4,593,198            |
| Harris (Texas)             | 2,795,228            |
| Nassau (New York)          | 2,584,492            |
| Cook (Illinois)            | 1,957,320            |
| Suffolk (New York)         | 1,489,818            |
| Clark (Nevada)             | 1,486,607            |
| San Francisco (California) | 1,405,674            |
| Santa Clara (California)   | 1,382,031            |
| Montgomery (Maryland)      | 1,356,919            |

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89. This table is based on data from the Bureau of Justice Statistics and the SCAAP program. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2003 (2004), available at <http://www.ojp.usdoj.gov/bjs/abstract/p03.htm>; Bureau of Justice Assistance, Programs: State Criminal Alien Assistance Program (SCAAP), <http://www.ojp.usdoj.gov/BJA/grant/scaap.html> (last visited Mar. 17, 2006). Total expenditures per state is based on the number of inmates in the state multiplied by the national average cost for an inmate, about \$21,000. Percentage of state expenditures represented by SCAAP is the total state and local funding for a state divided by the total expenditures.

As shown in Table 1, SCAAP funding, even for the most SCAAP-dependent states, constitutes less than five percent of annual budget allocations for state incarceration programs. The national average was 0.6%, and SCAAP funding for thirty-nine states represented less than 1% of total expenditures. Without additional data, it may be inappropriate to make normative judgments about the level of coercion based solely on the figures above. At a minimum, though, it would seem that SCAAP funding would have to be more than the totals listed in Table 1 in order for withholding to “pass the point at which ‘pressure turns into compulsion.’”<sup>90</sup>

On the other hand, given that so many police departments view the CLEAR Act and the HSEA as coercive,<sup>91</sup> there may be specific reasons to think that denial of SCAAP funding for some localities could constitute the type of coercion that would fail the *Dole* test. Notably, Table 1 does not take into account situations specific to certain localities. For example, there may be a specific county where SCAAP funding represents a considerable portion of the county’s budget for incarceration. In these situations, it is much more likely that the CLEAR Act and the HSEA could constitute coercion in violation of the *Dole* standard. Additionally, that states such as California are attempting to fight any decrease in the total amount of SCAAP allocations<sup>92</sup> shows that the states do see this funding as valuable and necessary.

It is also worth considering the extent to which the CLEAR Act and the HSEA represent a “back door” approach to commandeering. In other words, whereas *Printz* may prevent the

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90. *Dole*, 483 U.S. at 211.

91. See, e.g., INT’L ASS’N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL, AND LOCAL LAW ENFORCEMENT (2004), <http://www.theiacp.org/documents/pdfs/Publications/ImmigrationEnforcementconf%2E.pdf> (asserting that CLEAR is a “proposal[] that seek[s] to coerce cooperation”); Letter from Federal Hispanic Law Enforcement Officers Association, National President Sandalio Gonzalez to President Bush and Congress (Sept. 30, 2003), available at <http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/CLEARHSEAQuotes.pdf> (“The CLEAR Act bullies and burdens State and Local governments by coercing them into participating, even though it means burdensome new reporting and custody requirements, because failure to do so means further loss of already scarce federal dollars.”).

92. *Unanimous California Delegation Urges Greater SCAAP Funding*, 10 CAL. CAPITOL HILL BULL. 11 (2003), available at <http://www.calinst.org/bulletins/b1011a.htm>.

federal government from commandeering state and local officials, *Dole* may allow them to achieve the same result through the Spending Clause.<sup>93</sup> Of course, *Printz* was decided after *Dole*, and to a certain extent, the *New York-Printz* doctrine seems to have replaced the coercion test in *Dole* with a more stringent “compulsion” test. Nevertheless, if courts begin—or in some cases continue<sup>94</sup>—to enforce loosely the “no coercion” prong of the *Dole* test, the anti-commandeering doctrine will lose much of its strength. In the context of using state and local authorities to enforce immigration laws, the anti-commandeering doctrine may provide little protection.

## VI. CONCLUSION

The CLEAR Act and the HSEA both face a significant amount of public derision and criticism from state and local officials.<sup>95</sup> Whether the bills constitute good public policy remains an open question. And whether provisions like those in the CLEAR Act and the HSEA will be passed into law is still in doubt. If they are passed into law, however, it seems probable that they will be challenged on constitutional grounds. If the laws are challenged, litigants will be forced to address many issues. They must first define the inherent rights possessed by states, and, in doing so, determine whether states already have the authority to enforce immigration laws. Second, the litigants must evaluate the degree to which Congress may or may not have preempted the states from enforcing immigration laws. Third, they must deal with the apparent conflict between the anti-commandeering doctrine and the conditional spending power. In the end, however, it seems like those opposing such legislation on legal or constitutional grounds face an uphill battle in convincing a court that the apparently small amount of conditioned funds constitutes coercion. As such, it appears that proposals such as the CLEAR Act and the HSEA should be upheld. Opponents of the bills, instead of arguing that the laws are illegal, would do better to argue that the laws are bad pol-

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93. For a similar argument analyzing the effects that *Dole* has on the *Lopez* line of Commerce Clause cases, see Lynn Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918 (1995).

94. See, e.g., *Kansas v. United States*, 24 F. Supp. 2d 1192 (D. Kan. 1998) (holding that a 100% denial of federal funding did not constitute coercion).

95. See *supra* notes 22–27 and accompanying text.

icy. They should seek victory on the floors of Congress, not in courthouses.

As the war on terror continues, there will be increased calls for securing our nation's borders and regulating immigration more forcefully. As Congress reacts to such public demand, it will necessarily have to rely on state and local governments to get the job done. And as the Court deals with federal attempts to facilitate cooperation among the federal, state, and local governments, it will likely face some pressure to adapt its principles to the realities of modern events. The Court's ability to resist or adapt to such pressure could very well determine the next chapter in the evolving history of our nation's federalist system.

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