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M E M O R A N D U M

TO: District Court Judges, Clerk-Magistrates and Chief Probation Officers
FROM: Hon. Lynda M. Connolly, Chief Justice
DATE: June 3, 2008
SUBJECT: **State court enforcement of immigration laws**

Issues relating to Federal immigration law and its intersection with Massachusetts law arise frequently in our sixty-two district courts. It is a complex and largely unsettled area of law. The purpose of this memorandum is to provide judges with a ready reference to the law in those areas where it is settled and to provide an overview of some common questions that judges may confront in areas of the law or public policy which are not so firmly settled.

In the past few months General Counsel Michael J. Shea of this office met with the judges of Regions 6 and 7 to discuss these matters at regional meetings, and he is available to speak at other regional meetings if you would find it helpful. Judges are invited to contact their Regional Administrative Judge or Mike if you have an interest in this area of the law.

I particularly look forward to having an opportunity to discuss some of these issues with the judges at our annual judicial conference in Northampton next week.

I. FREQUENTLY ASKED QUESTIONS

1. When is it appropriate for a judge to inquire into a criminal defendant's citizenship or immigration status?

Such questions appear to be permissible and appropriate in making routine bail determinations:

- in order to establish or confirm the defendant's *identity*, and
- to gather information about *other recognized bail factors* (use of an alias or false ID, community and family ties, available resources, likelihood and ease of flight, whether to

require surrender of a passport, etc.)[1]

It is important, of course, that any such inquiries be posed in a manner that avoids any suggestion of racial or ethnic profiling[2] or that gives an impression that the defendant's immigration status might affect the court's neutrality in adjudicating the charges against him or her.

2. May a Massachusetts judge order an individual to be detained based solely on a Federal immigration detainer?

Yes. Federal regulations with the force of law[3] authorize Federal immigration officials to issue an immigration detainer requesting state and local "law enforcement agencies" to detain an alien for up to 48 hours (excluding weekends and holidays) in order to permit the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) to assume custody. The regulation appears implicitly to authorize them to do so.[4]

3. Are Massachusetts judges legally required to enforce Federal immigration detainers?

This is less certain. Federal regulations provide that state and local criminal justice agencies "shall" detain for the 48-hour period a person for whom an immigration detainer is outstanding.

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[1] The standard intake form used by probation officers to gather information about new criminal defendants includes the question: "U.S. Citizen Y___ N___."

[2] The Fourth Amendment does not permit police to single out individuals for questioning regarding their immigration status based on their ethnic or national appearance or ancestry. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975). Racial profiling is a form of selective enforcement that may be the basis of pretrial motions to dismiss or to suppress evidence. *Commonwealth v. Lora*, 451 Mass. 425, — N.E.2d — (2008); *Commonwealth v. Franklin*, 376 Mass. 885, 894-895, 385 N.E.2d 227 (1978); *Commonwealth v. Palacios*, 66 Mass. App. Ct. 13, 18-19, 845 N.E.2d 382 (2006).

[3] 8 U.S.C. § 1103(a)(1) and (3) charge the Secretary of Homeland Security "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens" and authorize the Secretary to "establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this chapter."

[4] **8 Code Fed. Regs. § 287.7 Detainer provisions under [8 U.S.C. § 1357(d)(3)]**

"(a) *Detainers in general.* Detainers are issued pursuant to [8 U.S.C. §§ 1226 and 1357] [see nn. 37 & 38, *infra*]. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer – Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible . . . .

"(d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department."

The terms "law enforcement agency" and "criminal justice agency" are not defined for purposes of this regulation or the two referenced statutes. A different regulation, 8 Code Fed. Regs. § 287.1(e), defines the statutory term "Federal, state or local law enforcement official (or other official)" to include courts for purposes of 8 U.S.C. § 1357(d), which requires immigration officers, upon inquiry by such an official, to make a prompt determination whether to issue a detainer against an alien arrested on a drug charge. See n.38, *infra.*

No Federal or state court has yet made a determination regarding the constitutionality of this regulation. 2007 Op. Ohio Att'y Gen. No. 18 at 13 n.12 (June 28, 2007) (available at http://www.ag.state.oh.us/legal/opinions/2007/2007-018.pdf).

However, the regulations also indicate that a detainer only "serves to advise" other agencies that ICE is seeking custody and "is a request" to notify ICE prior to releasing the alien so that ICE can arrange to assume custody. The Department of Justice routinely argues successfully in Federal courts that, unlike warrants, immigration detainers are ineligible for habeas review because they have no present binding force.[5]

4. May a court share information with or from Federal immigration officials?

Yes. A court may share information about an individual with or from ICE. Federal law bars the states from preventing "any government entity or official" from sending information to ICE or seeking information from ICE about the citizenship or immigration status of an individual. ICE is also required by statute to respond to such inquiries by state or local government agencies, and to designate and train liaisons to state courts regarding the immigration status of defendants charged with drug offenses or aggravated felonies.

If, from whatever source, a judge obtains information suggesting that a defendant is an illegal alien, the judge may have to consider the appropriateness of notifying immigration officials. Presumably, this would be done through the probation department, the local police department, or the prosecutor's office. ICE is statutorily required to cooperate with and respond promptly to such notifications.

5. Absent a Federal immigration detainer, does a Massachusetts judge have authority to detain an individual solely for an alleged *felony* immigration violation?

Yes. The judge may direct a court officer to arrest an individual where there is probable cause that the individual has committed a *felony* immigration violation.

It is generally accepted that Federal law allows state and local police officers to enforce criminal immigration violations as authorized by state law. Massachusetts law authorizes warrantless arrests for *felonies* based on probable cause. By statute, court officers have the same statutory police powers as police officers.[6]

Felony immigration violations include, inter alia, violating a final removal order,[7] illegal reentry after exclusion[8] and smuggling aliens into the country.[9]

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[5] *State v. Sanchez*, 110 Ohio St.3d 274, 279, 853 N.E.2d 283 (2006).

[6] See p.14, *infra.*

[7] 8 U.S.C. § 1253(a).

[8] 8 U.S.C. § 1326.

[9] 8 U.S.C. § 1324.

6. Absent a Federal immigration detainer, does a Massachusetts judge have authority to detain an individual solely for an alleged *misdemeanor* immigration violation?

This is less certain. Massachusetts law authorizes police officers (and court officers) to make warrantless arrests for most *misdemeanors* only if the offense occurs in their presence. The most common misdemeanor immigration violation is probably illegal entry, which is defined as occurring at the time of entry and is therefore not a continuing offense that continues in the court officer's presence.[10]

A Federal statute confers on state judges a general grant of authority to detain and bind over an individual to the local U.S. District Court for criminal prosecution if there is probable cause that the person has committed "any [criminal] offense against the United States." It appears that this statute is rarely used today. Note that it results in the arrestee being bound over to the Federal courts rather than delivered to immigration officials, and commences a criminal prosecution rather than a process of exclusion.

7. Absent a Federal immigration detainer, may a Massachusetts judge detain an individual solely for an alleged *civil* immigration violation?

Probably not. It is disputed whether Federal law allows the states to authorize their law enforcement personnel to enforce immigration violations that are subject only to *civil* exclusion proceedings. In any case, Massachusetts has not authorized its police officers to enforce civil immigration violations.

Note that many immigration violations are not criminal offenses and are subject only to civil exclusion proceedings. These include illegal presence,[11] overstaying an expired visa,[12] failing to depart under a removal order,[13] obtaining a visa by a fraudulent marriage,[14] becoming a public charge,[15] or having a criminal conviction that qualifies for removal.[16] The U.S. Department of Homeland Security estimates that overstayed visas represent 40% of the illegal aliens in the United States.[17]

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[10] 8 U.S.C. § 1325(a). See n.45, *infra.*

[11] 8 U.S.C. § 1227(a)(1).

[12] 8 U.S.C. § 1227(a)(1).

[13] 8 U.S.C. § 1324d.

[14] 8 U.S.C. § 1227(a)(1)(G).

[15] 8 U.S.C. § 1227(a)(5).

[16] 8 U.S.C. § 1227(a)(2).

[17] Reported at http://www.npr.org/templates/story/story.php?storyId=5485917. The Government Accountability Office has questioned whether this estimate is too low. See http://www.gao.gov/new.items/d04170t.pdf.

8. What should a judge do?

At the present time Massachusetts judges are probably on firm ground in (1) *authorizing inquiry into immigration status in order to carry out a recognized judicial function* (such as establishing the defendant's identity and making an appropriate release decision) and not solely in order to enforce the immigration laws; (2) *enforcing Federal immigration detainers* when brought to the court's attention by police, prosecutors or the probation department; and (3) *voluntarily sharing information* with Federal immigration officials when they so request.

A judge should not authorize questions about immigration status to be put to a defendant who is *in custody* if those questions are posed solely in order to enforce the immigration laws. Such questioning might violate the Fifth Amendment unless *Miranda* warnings were first given and a valid waiver of counsel obtained.[18]

With respect to other potential judicial actions, relevant considerations include the following:

- *Right to counsel.* Inquiries into a defendant's immigration status that are posed in order to enforce the immigration laws would not violate the defendant's Fifth and Sixth Amendment rights to counsel if he or she were not in custody. However, some would argue that, even in non-custodial situations, it is inappropriate for a judge to authorize inquiries in the absence of counsel that are specifically intended to elicit information that could be used against that person in future criminal or civil immigration proceedings.

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[18] The Fifth Amendment right to counsel attaches whether or not formal charges have been brought and is not offense-specific, but it applies only to custodial interrogation. Despite their implicit pressures, probation officer interviews have been held to be non-custodial if the probationer is not under arrest and free to leave. However, the United States Supreme Court has indicated that a "different question would be presented" if a probation officer questions a person who is in custody in order to elicit incriminating information. *Minnesota v. Murphy,* 465 U.S. 420, 430 n.5, 104 S.Ct. 1136, 1144 n.5 (1984). See *United States v. Andaverde,* 64 F.3d 1305 (9th Cir. 1995), cert. denied, 516 U.S. 1164 (1996) (probation officer must obtain *Miranda* waiver before questioning defendant in custody about facts of pending charge). But cf. *United States v. Rogers,* 921 F.2d 925 (10th Cir. 1990) (probation officer need not obtain *Miranda* waiver prior to routine, voluntary post-conviction presentence interview with defendant in custody).

The Sixth Amendment right to counsel attaches only when "adversary judicial proceedings" are initiated against an accused. *Estelle v. Smith,* 451 U.S. 454, 469-470, 101 S.Ct. 1866, 1876 (1981); *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 1881 (1972). An indictment does so, even prior to arraignment. *Commonwealth v. Torres,* 442 Mass. 554, 571, 813 N.E.2d 1261, 1275 (2004). In Massachusetts the ex parte issuance of a criminal complaint has been held not to trigger the Sixth Amendment right to counsel, *Commonwealth v. Holliday,* 450 Mass. 794, 813, 882 N.E.2d 309, 325 (2008); *Torres,* 442 Mass. at 571 n.13, 813 N.E.2d at 1275 n.13; *Commonwealth v. Smallwood,* 379 Mass. 878, 884-885, 401 N.E.2d 802, 806-807 (1980), although the Supreme Judicial Court recently acknowledged that other courts are divided as to whether this conflicts with Federal law, *Holliday,* 450 Mass. at 813 n.18, 882 N.E.2d at 325 n.18. Once the Sixth Amendment right to counsel attaches, it bars questions designed to elicit incriminating information about the offense charged in the absence of counsel, *Commonwealth v. Hilton,* 443 Mass. 597, 823 N.E.2d 383 (2005) (postarraignment questions by court officer); *Commonwealth v. Bandy,* 38 Mass. App. Ct. 329, 332-334, 648 N.E.2d 440 (1995) (prearraignment intake questions by probation officer). But see *Commonwealth v. Talbot,* 444 Mass. 586, 830 N.E.2d 177 (2005) (a majority of courts hold that there is no Sixth Amendment right for counsel to attend a presentence interview because it is not a critical stage of the proceedings, but as a supervisory matter counsel is entitled to do so on request). The Sixth Amendment right is specific to the offense charged and does not prevent questioning about unrelated and uncharged offenses in the absence of counsel. *McNeil v. Wisconsin,* 501 U.S. 171, 111 S.Ct. 2204 (1991); *Commonwealth v. Chase,* 42 Mass. App. Ct. 749, 756, 679 N.E.2d 1021 (1997).

- *G.L. c. 278, § 29D.* The alien warning statute prohibits judges from inquiring into the defendant's "legal status in the United States" when taking a guilty plea or admission to sufficient facts.[19] The statute does not address the propriety of such inquiry at other times. Some might suggest that § 29D implies a legislative intent that judges should avoid gratuitous inquiry into a criminal defendant's immigration status, so as to ensure (and demonstrate) that the judge is uninfluenced by the defendant's immigration status in adjudicating the pending charges.

- *Public policy is unsettled.* There is currently fierce public controversy over whether state and local law enforcement personnel should become more involved in enforcing Federal immigration law, or whether doing so would hamper their primary public safety functions, which rest heavily on citizen cooperation. The policy of the Massachusetts State Police is that "[e]nforcing federal immigration law is not a mission of the Massachusetts State Police" and that inquiries about immigration status are permissible when part of a regular criminal investigation but impermissible if their sole purpose is to enforce Federal immigration law.[20] Governor Deval L. Patrick has decided against having the Massachusetts State Police join a Federal program to deputize state and local police as immigration officers,[21] and the *Boston Globe* reports that the Framingham Police Department is the only local police department to do so.[22] The expectation that courts should function not as law enforcement agencies but as "neutral and detached magistrates" may add a further note of caution regarding the appropriateness of their assuming a role in proactive immigration-law enforcement.

- *Limited nature of inherent powers.* The inherent powers of courts are limited to those necessary to the internal functioning of the judiciary or necessary to implement an expressly-granted area of jurisdiction.[23] Given this limited nature of inherent powers, actions taken solely to enforce Federal immigration laws (rather than to carry out a

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[19] ". . . . The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States . . . ." G.L. c. 278, § 29D. The statute "prohibits the judge from even making inquiry as to the defendant's immigration status." *Commonwealth v. Hilaire*, 437 Mass. 809, 819 n.6, 777 N.E.2d 804, 811 n.6 (2002).

[20] See n.51, *infra.*

[21] "With all that the State Police have to do to enforce the laws of this Commonwealth, I do not believe that it is either practical or wise to ask them to enforce Federal laws as well. That is the job of the Federal government, and it should be done by the Federal government." Office of the Governor, Press Release, "Governor Patrick . . . Rescinds State Police Immigration Plan" (January 11, 2007). See Jonathan Saltzman, *Governor Rescinds Immigration Order*, BOSTON GLOBE, January 12, 2007 (available at http://www.boston.com/news/local/politics/candidates/articles/2007/01/12/governor_rescinds_immigration_order/). The Governor of Rhode Island has recently taken the opposite approach. Maria Sacchetti, *Rhode Island Move Stirs Fear Among Illegals*, BOSTON GLOBE, April 6, 2008 (available at http://www.boston.com/news/local/massachusetts/articles/2008/04/06/ri_move_stirs_fear_among_illegals/). The Federal program under 8 U.S.C. § 1357(g) is described at http://www.ice.gov/partners/287g/Section287_g.htm.

[22] Maria Sacchetti, *Deportees With No Criminal Past Grow*, BOSTON GLOBE, Jan. 12, 2008 (available from http://www.boston.com/news/local/massachusetts/articles/2008/01/12/deportees_with_no_criminal_past_grow/).

[23] *School Committee of Worcester v. Worcester Div. of Juvenile Court Dep't*, 410 Mass. 831, 834-835, 575 N.E.2d 1120 (1991); *Brach v. Chief Justice of Dist. Court Dep't*, 386 Mass. 528, 168-169, 437 N.E.2d 164 (1982).

recognized state judicial function) might not qualify.

If, in subsequent civil rights litigation, a judge's actions that were taken solely to enforce Federal immigration laws were held to be gratuitous investigative activities rather than intrinsically "judicial acts," they might fall outside the ambit of his or her inherent powers and perhaps outside the umbrella of absolute judicial immunity. It is well established that judges[24] have absolute immunity for their judicial acts and prosecutors[25] have absolute immunity for prosecutorial decisions, but both have only qualified immunity for administrative or investigative acts.

II. RELEVANT FEDERAL LAW

No Federal law expressly authorizes state courts to enforce Federal immigration laws.[26] A Federal statute confers general authority on state court judges to detain (or bail) and bind over an individual to the local U.S. District Court for prosecution of any Federal criminal offense, and

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[24] See *Forrester v. White,* 484 U.S. 219, 108 S.Ct. 538 (1988) (state court judge has absolute judicial immunity for truly judicial or adjudicatory acts, but not for primarily administrative or executive functions). "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman,* 435 U.S. 349, 362, 98 S.Ct. 1099 (1978).

[25] *Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606 (1993) (prosecutor has absolute immunity for prosecutorial activities but only qualified immunity for investigative activities prior to having probable cause to arrest). See *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502 (1997) (prosecutor has only qualified immunity for factual allegations in affidavit in support of warrant, which involves functioning as complaining witness rather than advocate); *Chicopee Lions Club v. District Attorney for Hampden Dist.,* 396 Mass. 244, 485 N.E.2d 673 (1985) (prosecutor has absolute immunity for activities closely related to judicial phase of criminal proceedings or involving functions of an advocate); *Van de Kamp v. Goldstein*, 481 F.3d 1170 (9th Cir. 2007) (prosecutor has only qualified immunity for information sharing activities), cert. granted, 2008 WL 1699467, 76 U.S.L.W. 3554 (April 14, 2008). See also *Malley v. Briggs,* 475 U.S. 335, 342, 106 S.Ct. 1092 (1986) (police officer applying for arrest warrant has only qualified immunity, since absolute immunity is reserved for functions "intimately associated with the *judicial* phase of the criminal process").

[26] By contrast, Federal district judges are expressly required by statute to detain illegal aliens when they appear before the court for arraignment if they may flee or be dangerous:

18 U.S.C. § 3142. Release or detention of a defendant pending trial

"(a) In General. Upon the appearance before a judicial officer of a person charged with an offense, ...

"(d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion. If the judicial officer determines that--

"(1) such person-- . . .

"(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in . . . the Immigration and Nationality Act (8 U.S.C.1101(a)(20)); and

"(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the . . . appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence."

Massachusetts law requires that a judge have probable cause to do so.[27]

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq., does not grant state and local courts and police any general authority to enforce Federal immigration law. Federal laws give six specific authorizations to state and local law enforcement officials:

- ***Enforce 48-hour immigration detainers.*** A criminal justice agency is authorized to detain for up to 48 hours (pending Federal pick-up) an alien for whom ICE has issued an immigration detainer. Such detainers are notifications that ICE seeks to take custody of that alien, and they provide time-limited authority to detain.[28]

- ***Detain previously-deported felons.*** State and local law enforcement officials are authorized "to the extent permitted by relevant State and local law" to detain (pending Federal pick-up) an alien whom ICE has confirmed as a previously-deported felon.[29]

- ***Arrest for smuggling aliens.*** "[A]ll . . . officers whose duty it is to enforce criminal laws"

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[27] **18 U.S.C. § 3041. Powers of courts and magistrates**

"For any offense against the United States, the offender may, by any . . . judge of a supreme or superior court, . . . or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in [18 U.S.C. §§ 3141-3156], as the case may be, for trial before such court of the United States as by law has cognizance of the offense . . . . Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining, pursuant to the provisions of [18 U.S.C. § 3142], whether to detain or conditionally release the prisoner prior to trial or to discharge him from arrest."

Under this statute, a Massachusetts District Court judge, "while not compulsorily required, may nevertheless at his option act as a committing magistrate . . . . The words of [§ 3041] do not mean that the magistrate must make the arrest in person, but that, acting according to the forms of procedure of the particular State, he shall cause the arrest to be made according to the methods usually there employed. The issuance of a warrant upon complaint duly made, and then a hearing to determine whether there is just cause for holding the accused for trial before the federal court, is the function of the committing magistrate under our criminal practice . . . . It was the duty of the [judge] acting under [§ 3041], if he found probable cause, to hold the accused for trial before the United States District Court for the District of Massachusetts." *Goulis v. Judge of Third Dist. Court of E. Middlesex*, 246 Mass. 1, 6-7, 140 N.E. 294 (1923).

[28] See n.4, *supra*.

[29] "**8 U.S.C. § 1252c. Authorizing State and local law enforcement officials to arrest and detain certain illegal aliens**

"(a) In general

"Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who—

"(1) is an alien illegally present in the United States; and

"(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction,

"but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

"(b) Cooperation

"The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials."

are authorized to arrest for the felony offense of smuggling aliens.[30] This appears to include state and local police.

- ***Share information with ICE.*** State and local officials may not prevent "any government entity or official" from sharing information with ICE, or receiving information from ICE, about the immigration status of any individual.[31] This Federal statute may have been enacted in response to the "sanctuary" laws or ordinances that have been adopted by two states (Alaska[32] and Oregon[33]) and some cities (including the Massachusetts municipalities of Cambridge,[34] Chelsea,[35] Brewster and Orleans[36]).

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[30] **8 U.S.C. § 1324. Bringing in and harboring certain aliens**

. . . "(c) Authority to arrest.

"No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the [Immigration and Naturalization] Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws."

[31] **8 U.S.C. § 1373. Communication between government agencies and the Immigration and Naturalization Service**

"(a) In general.

"Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

"(b) Additional authority of government entities

"Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

"(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

"(2) Maintaining such information.

"(3) Exchanging such information with any other Federal, State, or local government entity.

"(c) Obligation to respond to inquiries

"The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information."

[32] The Alaska Legislative Resolution (May 22, 2003) (providing that "an agency or instrumentality of the state may not . . . use state resources or institutions for the enforcement of federal immigration matters, which are the responsibility of the federal government") is available at http://www.aclu.org/safefree/resources/17218res20030522.html.

[33] The sanctuary provision of Or. Rev. Stat. § 181.850 was amended in 2003 to read:

"(1) No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws.

"(2) Notwithstanding section (1) of this section, a law enforcement agency may exchange information with the United States Bureau of Immigration and Customs Enforcement . . . in order to: (a) Verify the immigration status of a person if the person is arrested for any criminal offense . . . .

"(3) Notwithstanding section (1) of this section, a law enforcement agency may arrest any person who: (a) Is charged by the United States with a criminal violation of federal immigration laws . . . and (b) Is subject to arrest for the crime pursuant to a warrant of arrest issued by a federal magistrate."

[34] April 8, 1985 Cambridge City Council Order No. 4 (April 8, 1985) (available at http://www.rwinters.com/council/sanctuary1985.htm ("no city employee or department, to the extent legally possible, will request information about or otherwise assist in the investigation of the citizenship status of any City resident [or] disseminate information regarding the citizenship of

- ***Obtain information from ICE.*** ICE officials are required to cooperate with state and local law enforcement and court officials in promptly establishing the immigration status of persons accused of aggravated felonies,[37] and in deciding whether to issue immigration detainers for illegal aliens accused of drug crimes.[38]

- ***Deputizing as immigration officers.*** The U.S. Attorney General may enter into memoranda of agreement with states and localities to deputize any specific state or local "officer or employee" as an immigration officer under the direction of Federal officials, after a 5-week

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a City resident"). It was reaffirmed in Amended Order O-16 (May 8, 2006) (available at http://www.cambridgema.gov/cityclerk/PolicyOrder.cfm?item_id=14862).

[35] The June 4, 2007 Chelsea City Council order is hortatory only ("Resolved, That the City of Chelsea go on record as a Sanctuary City; and be it further Resolved, That the City of Chelsea rejects the use of the word 'illegal' and 'alien' to describe any human being) (available at http://www.ci.chelsea.ma.us/Public_Documents/ChelseaMA_CouncilMin/I00F8CE8D.0/Chelsea%20City%20Council%20June%204th,%202007%20Meeting%20Minutes.doc).

[36] The Brewster and Orleans resolutions forbid "all local and non-local officials . . . in the absence of probable cause of criminal activity, to the extent legally permissible, from . . . enforcing immigration matters" in those towns). Brewster Town Meeting Resolution (November 25, 2003) (available at http://www.aclu.org/safefree/resources/16953res20031125.html); Orleans Board of Selectmen Resolution (May 15, 2003) (available at http://www.aclu.org/safefree/resources/17243res20030515.html).

[37] **8 U.S.C. § 1226. Apprehension and detention of aliens**

". . . (d) Identification of criminal aliens

"(1) The Attorney General shall devise and implement a system—

"(A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

"(B) to designate and train officers and employees of the Service to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

"(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony, and indicates those who have been removed."

[38] **8 U.S.C. § 1357. Powers of immigration officers and employees**

". . . (d) Detainer of aliens for violation of controlled substances laws

"In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—

"(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

"(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

"(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

"the officer or employee of the Service shall promptly determine whether or not to issue such a detainer.

"If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local [law enforcement] officials, the Attorney General shall effectively and expeditiously take custody of the alien."

8 Code Fed. Regs. § 287.1(e) purports to define the statutory term "law enforcement official (or other official)" in 8 U.S.C. § 1357(d) to "mean[ ] an officer or employee of an agency engaged in the administration of criminal justice pursuant to statute or executive order, including (1) courts; (2) a government agency or component which performs the administration of criminal justice . . . including performance of any of the following activities: detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders."

training program and certification.[39] As noted above, Governor Deval L. Patrick has decided against having the Massachusetts State Police join this program and only one municipal police department in Massachusetts has done so.[40] A separate Federal statute permits local law enforcement officers to be deputized as immigration officers in the event of a mass influx of aliens.[41]

Criminal vs. civil enforcement by state and local police

Apart from the express statutory provisions noted above, the traditional view was "that state and local officers may enforce the *criminal* provisions of the INA if state law permits them to do so but are precluded from directly enforcing the INA's *civil* provisions."[42] In 1996, the Department of Justice's Office of Legal Counsel issued a formal legal opinion endorsing that traditional view of bifurcated

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[39] **8 U.S.C. § 1357. Powers of immigration officers and employees**

". . . . (g) Performance of immigration officer functions by State officers and employees

"(1) Notwithstanding section 1342 of title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

"(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

"(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General . . . .

"(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

"(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

"(10) 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 . . . ."

A list of such current memoranda of understanding is available at http://www.ice.gov/partners/287g/Section287_g.htm.

[40] See text at n.20, *supra.*

[41] **8 U.S.C. § 1103(a) (10)**

"In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service."

[42] Congressional Research Service, *Enforcing Immigration Law: The Role of State and Local Law Enforcement* 6-7 (Updated May 4, 2006) (available at http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-9729:1).

enforcement.[43]

It has been noted that even the enforcement of *criminal* immigration provisions by state and local police has been hampered by the detailed and changing nature of immigration law,[44] the derivation of such enforcement authority from state rather than Federal law,[45] and uncertainty about civil liability.[46]

After September 9, 2001, the Department of Justice began adding detainers issued for criminal immigration violations and for certain civil immigration violations to the national NCIC police computer system.[47]

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[43] "Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act. 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." U.S. Department of Justice Office of Legal Counsel, *Assistance by State and Local Police in Apprehending Illegal Aliens* (February 5, 1996) (available at http://www.usdoj.gov/olc/immstopo1a.htm). Opinion letters are influential but advisory and not legally controlling. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655 (2000).

[44] In a statement adopted in June, 2006, the Major Cities Chiefs (the organization of police chiefs from the nation's largest cities) noted, "Immigration violations are different from the typical criminal offenses that patrol officers face every day on their local beats . . . . The specific immigration status of any particular person can vary greatly and whether they are in fact in violation of the complex federal immigration regulations would be very difficult if not almost impossible for the average patrol officer to determine. At this time local police agencies are ill equipped in terms of training, experience and resources to delve into the complicated area of immigration enforcement . . . . Given the complexity of the immigration laws, it would be difficult for local police agencies to determine if a particular violation would result in criminal charges or purely civil proceedings and regulation." *M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies* 7 (adopted by M.C.C. in June 2006) (available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf).

[45] "For example, state and local law enforcement officers cannot arrest someone solely for illegal presence for the purpose of deporting them because it is a civil violation, but they can arrest someone for the criminal offense of entering the country illegally . . . . [However,] illegal entry is a misdemeanor under INA § 275 [8 U.S.C. § 1325(a)]. Because many encounters between local police and undocumented aliens involve warrantless arrests, an officer's authority to apprehend a person in violation of § 275 will necessarily depend on whether state arrest statutes permit an arrest for a misdemeanor occurring outside the officer's presence, since the misdemeanor of illegal entry is apparently completed at the time of entry, and is not a 'continuing' offense that occurs in the presence of the officer. A continuing offense may be found under INA § 276, which applies to aliens previously deported who enter or are found in the United States." Congressional Research Service, *supra*, at 7 & n.21.

[46] "In the past, local law enforcement agencies have faced civil litigation and liability for their involvement in immigration enforcement . . . . Because local agencies currently lack clear authority to enforce immigration laws, are limited in their ability to arrest without a warrant, are prohibited from racial profiling and lack the training and experience to enforce complex federal immigration laws, it is more likely that local police agencies will face the risk of civil liability and litigation if they choose to enforce federal immigration laws." *M.C.C. Immigration Committee Recommendations*, *supra*, at 8.

[47] This has been criticized both by immigrant rights groups and by some police groups, including the FBI's Criminal Justice Information System's (CJIS) Advisory Policy Board and the Major City Chiefs association. The latter noted that:

"The N.C.I.C. system had previously only been used to notify law enforcement of strictly criminal warrants and/or criminal matters. The civil detainers being placed on this system by federal agencies notify local officers that the detainers are civil in nature by including a warning that local officers should not act upon the detainers unless permitted by the laws of their state. This initiative has created confusion due to the fact that these civil detainers do not fall within the clear criminal enforcement authority of local police agencies and in fact lays a trap for unwary officers who believe them to be valid criminal warrants or detainers . . . .

"Until the borders are secured and vigorous enforcement against employers who hire illegal immigrants has taken place and the concerns regarding lack of authority and confusion over the authority of local agencies to enforce immigration laws and the risk of civil liabilities are adequately addressed, M.C.C. strongly requests that the federal agencies cease placing civil

On April 3, 2002, the Office of Legal Counsel withdrew its 1996 legal opinion and replaced it with a new opinion concluding that states may authorize their police officers to arrest for civil as well as criminal violations of Federal immigration law.[48] Two months later, Attorney General John Ashcroft made this public at a press conference, announcing that the Office of Legal Counsel had reversed its 1996 opinion and:

> "has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily – arresting aliens who have violated criminal provisions of the 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 states."[49]

The legal reasoning of the revised opinion has received considerable criticism.[50]

III. RELEVANT MASSACHUSETTS LAW

- ***State Police policy.*** As noted above, the policy of the Massachusetts State Police is that "[e]nforcing federal immigration law is not a mission of the Massachusetts State Police." Inquiries about immigration status are permissible as part of a criminal investigation but not

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immigration detainers on N.C.I.C. and remove any existing civil detainers currently on the system. The integrity of the system as a notice system for criminal warrants and/or criminal matters must be maintained. The inclusion of civil detainers on the system has created confusion for local police agencies and subjected them to possible liability for exceeding their authority by arresting a person upon the basis of a mere civil detainer." *M.C.C. Immigration Committee Recommendations, supra,* at 8 & 10.

Even the aggressive immigration law enforcement measures recently adopted by Prince William County, VA will be taken only in the course of routine criminal law enforcement: "Incident to any lawful detention for a violation of a state law or county ordinance, Prince William County Police Officers shall inquire into the citizenship or immigration status of the detained person if there is probable cause to believe that such person is in violation of federal immigration law and when such inquiry will not expand the duration of the detention . . . . pursuant to United States Code Title 8, Subsection 1373(c). If the person is verified to be unlawfully present in the United States, the Police Department shall cooperate with any request by federal immigration authorities to detain the alien or transfer the alien to the custody of the federal government." Board of Supervisors of Prince William County, Resolution 07-608 (July 10, 2007) (available at http://www.pwcgop.org/20070710_PWC_RES07-609-July10ImmigrationReaffirmCountyPolicy.pdf).

[48] The Department of Justice declined to make the new opinion public until a successful FOIA suit by the ACLU forced release of a redacted version in 2005 (available at http://www.aclu.org/FilesPDFs/ACF27DA.pdf). The opinion is even broader than the Attorney General's public characterization of it and reaches an unqualified conclusion that "[s]tates have inherent power, subject to federal preemption" to make arrests for any criminal or civil violation of Federal immigration law where state law confers that authority. "This Office's 1996 advice that federal law precludes state police from arresting aliens on the basis of civil deportability was mistaken."

[49] Quoted in Congressional Research Service, *supra* at 8.

[50] See, e.g., Appleseed, *Forcing Our Blues Into Gray Areas: Local Police and Federal Immigration Enforcement – A Legal Guide for Advocates* (revised January, 2008) (available at http://appleseeds.net/Portals/0/Reports/Forcing_Our_Blues_Into_Gray_Areas2008.pdf); American Civil Liberties Union, Refutation of 2002 DOJ Memo (Sept. 6, 2005) (available at http://www.aclu.org/FilesPDFs/ACF3189.pdf); 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 (2004) (available at http://www.law.fsu.edu/journals/lawreview/downloads/314/Pham_Porter.pdf).

permissible if their sole purpose is to enforce Federal immigration law.[51]

- ***Authority of court officers.*** "[I]n and about" court premises, Massachusetts court officers have the same statutory powers as police officers.[52] Those include the power to arrest pursuant to a warrant, and to make warrantless arrests for felonies. Generally warrantless arrests for misdemeanors are authorized only if they occur in the officer's presence.[53]

  In addition to these statutory powers, court officers probably have additional authority to detain persons at the direction of a judge pursuant to the court's inherent powers, but the limits of such authority have not been explored in the decisional law.[54] Since Massachusetts has not authorized its police to detain persons for *civil* immigration violations, nor expressly

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[51] **Department of State Police, "Travel/Immigration Status Inquiries and Investigations," General Order INV-17 (October 18, 2007)**

"**Policy.** Enforcing federal immigration law is not a mission of the Massachusetts State Police. Accordingly, it is not appropriate for a member of the State Police to inquire about, or investigate a non-citizen's immigration or travel status if the sole purpose is to determine an individual's immigration status or whether the person is in the country lawfully, or to facilitate a person's detention or deportation by the U.S. Immigration & Customs Enforcement (ICE). A member of the State Police may investigate a person's immigration or travel status if the inquiry or investigation is part of, and reasonably likely to facilitate, the investigation of a violation of state criminal law, state motor vehicle law, federal criminal law (excluding federal immigration law), or conduct independent of immigration status that poses a threat to public safety or order."

. . . "**Foreign Licensed Operators.** . . . . If an officer has a reasonable suspicion that an operator is unlawfully operating on a foreign driver's license, the officer may seek to determine how long the operator has been in the U.S., ask about residency and/or employment for the sole purpose of determining if the foreign license may be used to operate in MA . . . ."

. . . "**Passengers.** During a motor vehicle stop . . . . an officer may make inquiries to passengers in the stopped vehicle . . . when the officer has a reasonable suspicion of unlawful conduct, and the inquiry is narrowly focused on furthering the investigation of a suspected violation of state criminal law, state motor vehicle law, or federal criminal law (excluding federal immigration law).

"**Non-Motor Vehicle Encounters.** . . . . It is only appropriate to inquire about, or to investigate immigration status, including contacting ICE, if the inquiry or investigation is part of, and reasonably likely to facilitate, the investigation of a violation of state criminal law, state motor vehicle law, federal criminal law (excluding federal immigration law), or conduct independent of immigration status that poses a threat to public safety or order.

. . . "**Notifying I.C.E.** When officers have questions or concerns that involve a Department of State Police investigation and wish to contact an agent from the ICE, they must first contact their Commanding Officer or the Troop Duty Officer and request permission. Approval must be received prior to contacting agents from ICE." . . .

[52] "Court officers and those authorized to act as court officers within the judicial branch may perform police duties and have police powers in or about the premises of the court or in the immediate vicinity thereof when so designated by the chief administrative justice." G.L. c. 221, § 70A. Following the 1983 enactment of § 70A, Chief Administrative Justice Arthur M. Mason so designated all court officers. Trial Court Administrative Directive No. 1-83 (October 3, 1983).

[53] The most common misdemeanors for which arrest is authorized when they occur outside the officer's presence are listed in G.L. c. 276, § 28.

[54] In announcing the enactment of G.L. c. 221, § 70A, Chief Administrative Justice Mason indicated that he believed it to be "a statutory restatement of duties and powers in existence prior to [§ 70A]. Those powers include the authority to restrain or to take into custody persons who are interfering with the administration of justice, or creating a disturbance within buildings occupied by the judicial branch or in the immediate vicinity thereof, or as directed by the court." Trial Court Administrative Directive No. 1-83 (October 3, 1983).

An example of restraint that is based on the court's inherent authority rather than express statutory authorization is summary criminal contempt. "The power to punish for contempts is inherent in all courts." *Ex parte Robinson,* 19 Wall. 505, 510 (1874).

given that function to its courts,[55] it is doubtful that a judge has any inherent authority to detain an individual solely for a civil immigration matter absent a Federal detainer.

[55] Even if the current position of the Department of Justice is correct, see text at n.48, *supra,* state and local officials are permitted to enforce civil immigration violations only to the extent that their own state authorizes.

Appendix

SELECTED IMMIGRATION VIOLATIONS

FELONIES

- Violating a final removal order (8 U.S.C. § 1253[a])
- Illegal reentry after exclusion (8 U.S.C. § 1326)
- Smuggling aliens (8 U.S.C. § 1324)

MISDEMEANORS

- Illegal entry (8 U.S.C. § 1325[a])

CIVIL VIOLATIONS

- Illegal presence (8 U.S.C. § 1227[a][1])
- Overstaying an expired visa (8 U.S.C. § 1227[a][1])
- Failing to depart under a removal order (8 U.S.C. § 1324d)
- Obtaining a visa by a fraudulent marriage (8 U.S.C. § 1227[a][1][G])
- Becoming a public charge (8 U.S.C. § 1227[a][5])
- Having a criminal conviction that qualifies for removal (8 U.S.C. § 1227[a][2])