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State Incarceration of Federal Prisoners After September 11

WHOSE JAIL IS IT ANYWAY?*

Ronald K. Chen[†]

I. INTRODUCTION

In the aftermath of the September 11 terrorist attacks, federal law enforcement authorities made aggressive use of immigration laws to detain aliens suspected of having possible ties to terrorism, detaining more than 1,200 persons within two months.¹ Some were questioned and subsequently released. Many others, however, were held indefinitely, ostensibly for overstaying or being out of status under the terms of their visa, although they normally would not have been incarcerated for

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[†] Associate Dean for Academic Affairs, Rutgers University School of Law–Newark. A.B. Dartmouth, J.D. Rutgers. This Article is part of the David G. Trager Public Policy Symposium, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*. Through the auspices of the Rutgers Constitutional Litigation Clinic, the author was lead counsel in *ACLU of New Jersey v. County of Hudson*, No. HUD-L-463-02 (N.J. Super. Ct. filed Jan. 22, 2002), which is the principal topic of this Article. The author is grateful to Clinical Professor Penny Venetis of the Rutgers Constitutional Litigation Clinic, Edward Barocas, Esq., Legal Director of the ACLU of New Jersey, and Howard Moskowitz, Esq., co-counsel in *County of Hudson*, for their invaluable insights and zealous advocacy during the pendency of the case. The author is also very grateful to Michael Slocum and David Leone, both members of the Rutgers–Newark Class of 2003, for their tireless efforts as members of the clinic litigation team that took this case from initial complaint to final judgment and appeal within the span of four months.

¹ Office of the Inspector General, United States Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, at 1 (April 2003) [hereinafter *OIG Report*], available at <http://www.usdoj.gov/oig/special/0306/full.pdf>.

such relatively minor violations.² The Department of Justice adopted a “no bond” policy to hold those who were “of interest” in the terrorism investigation,³ and as a direct result the Immigration and Naturalization Service (INS)⁴ detained 762 aliens⁵ who were primarily men from Arab or South Asian countries.⁶ Yet the government never charged any of these so-called “special interest” detainees with a terrorism-related offense,⁷ and in the end simply deported almost all to their country of origin.

Although at first willing to give an aggregate count of the INS detainees,⁸ the Justice Department soon ordered that the detainees’ individual names be withheld, and a complete list of those arrested and held by the INS has never been made public. Attorney General Ashcroft gave two reasons for these secret detentions: (1) the release of the identities of the detainees would assist Al Qaeda operatives;⁹ and (2) such

² See Amnesty International, *Amnesty International's Concerns Regarding Post September 11 Detentions in the USA*, at 2 (Mar. 14, 2002) [hereinafter *Amnesty International Report*], available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/\\$File/AMR5104402.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AMR510442002ENGLISH/$File/AMR5104402.pdf).

³ *OIG Report*, *supra* note 1, at 72.

⁴ On March 1, 2003, the Immigration and Naturalization Service became part of the Department of Homeland Security and its functions were divided into various bureaus of that department. Homeland Security Act of 2002, 107 P.L. 296, 116 Stat. 2135 (Nov. 25, 2002).

⁵ “Of these 762 aliens, 24 were in INS custody on immigration violations prior to the September 11 attacks. The remaining 738 aliens were arrested between September 11, 2001, and August 6, 2002, as a direct result of the FBI’s PENTTBOM investigation” into the September 11 attacks. *OIG Report*, *supra* note 1, at 2.

⁶ See *id.* at 20.

⁷ The only person charged with complicity in the terrorist attacks of September 11, Zacarias Moussaoui, was arrested in Minnesota on August 17, 2001, and was not a special interest detainee. Some of the detainees were charged with crimes unrelated to September 11 or other terrorist activity. See, e.g., *Terror Network Remains Crouched in Shadows*, USA TODAY, Sept. 28, 2001, at 8A.

⁸ The total number of aliens detained after September 11 is still the subject of some conjecture. For the first few months after the attacks, the Department of Justice gave regular reports on the number of aliens detained in connection with the September 11 investigation. As of November 5, the Justice Department announced that 1,147 people had been detained. Thereafter, however, the Department of Justice ceased releasing aggregate figures “because the statistics became confusing.” *OIG Report*, *supra* note 1, at 1 n.2; see also Terry Frieden, *Justice Department Can’t Confirm How Many Detainees Released*, CNN.COM, Nov. 5, 2001, available at <http://www.cnn.com/2001/US/11/05/inv.detainee.numbers/>.

⁹ General Ashcroft noted:

I am not interested in providing, when we are at war, a list to Osama bin Laden, the al Qaeda network, of the people that we have detained that would make in any way easier their effort to kill American citizens – innocent Americans. That will remain the policy of this department, which will scrupulously adhere to the law.

release would violate the privacy interests of the detainees.¹⁰ The policy of withholding the names of the INS detainees, however, met with heavy criticism from editorial pages¹¹ and civil liberties groups. The historical antipathy against such secret arrests¹² resonated among those who otherwise occupied opposite ends of the political spectrum. The ACLU sued in federal court, seeking disclosure under the federal Freedom of Information Act as well as under the common law and First Amendment right of access to government information.¹³ The ACLU also sued to overturn a related policy of categorically closing immigration hearings to the public.¹⁴

The focus of this Article, however, is not on the general merits of the federal policy refusing to make public the names of the September 11 detainees, but rather, on the competence of the federal government, in a manner consistent with both

Briefing With Attorney General John Ashcroft, Federal News Service (Nov. 27, 2001) [hereinafter *Ashcroft Briefing*], available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_27.htm.

¹⁰ General Ashcroft further noted:

Now, it's very possible that some individuals that we think might be terrorists might someday, by further investigation, be shown not to be terrorists. I think it would be inappropriate for us to either advertise the fact of their detention or to provide the suggestion that they are terrorists in a way which would be prejudicial to their not only privacy interest but personal interest.

Id.

¹¹ See, e.g., Editorial, *Justice Deformed; War and the Constitution*, N.Y. TIMES, Dec. 2, 2001, at D14; Editorial, *Secret Detainees; Ashcroft Should Be More Forthcoming*, DALLAS MORNING NEWS, Nov. 30, 2001, at 32A; Editorial, *An Un-American Secrecy*, L.A. TIMES, Nov. 21, 2001, at B24; Editorial, *Secret Detentions Needlessly Undercut Public Justice*, USA TODAY Nov. 2, 2001, at 15A.

¹² In a *Federalist Paper*, Alexander Hamilton commented:

To bereave a man of life . . . or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.

THE FEDERALIST NO. 84 (Alexander Hamilton) (emphasis in original) (quoting BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND). "The requirement that arrest books be open to the public is to prevent any 'secret arrests,' a concept odious to a democratic society. . . ." *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969).

¹³ *Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), *aff'd in part and rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 1041 (2004).

¹⁴ *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002) (holding that the First Amendment grants right of public access to immigration proceedings); *North Jersey Media Group, Inc. v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J.), *rev'd*, 308 F.3d 198 (3d Cir. 2002) (holding no First Amendment right of public access to immigration proceedings), *cert. denied*, 123 S. Ct. 2215 (2003).

statutory and constitutional principles illuminating federalism, to extend its decision of secret detention to govern the operation of state jails in which it chooses to house federal detainees, pursuant to voluntary agreements with state governmental authorities. The unprecedented circumstances associated with the incarceration of the September 11 detainees created, at least temporarily, the very practical problem of where to house them when their number exceeded the capacity of federally-operated facilities.¹⁵ Even under normal circumstances federal law enforcement agencies, including the INS, regularly place federal prisoners or detainees in state facilities pursuant to contracts entered into with state officials.¹⁶ Of the 762 special interest detainees, a majority were apparently held in state jails in New Jersey¹⁷ since most of the detainees were arrested in the New York metropolitan area¹⁸ and since various counties of New Jersey, with their excess jail capacity, had previously entered into intergovernmental service agreements with the INS for this purpose.

Part II of this Article describes a civil case, in which I serve as lead counsel, in which plaintiffs sought to enforce longstanding state statutes mandating public access to the identity of county jail inmates, and contesting the power of the federal government to force New Jersey to withhold the names of federal detainees incarcerated in state jails. Part III gives a brief summary of the historical relationship between the federal and state sovereignties when a federal agency chooses

¹⁵ According to Attorney General John Ashcroft, in the ordinary course, approximately 20,000 people are being held at any one time for immigration violations. *Ashcroft Briefing*, *supra* note 9.

¹⁶ See generally 18 U.S.C. § 4002 (2000) (Attorney General may contract with State for imprisonment, subsistence, care, and proper employment of persons held under authority of federal law.); 8 U.S.C.S. § 1103(a)(11) (2004) (Attorney General authorized to make payments for housing, care, and security of persons detained by Service pursuant to Federal law under agreement with a State or political subdivision of a State.).

¹⁷ The Hudson County Correctional Center in Kearny, New Jersey, and the Passaic County Jail in Paterson, New Jersey, housed most of the September 11 detainees, with some others housed in the Middlesex County Jail in North Brunswick, New Jersey. Special interest detainees whom the FBI considered to be especially dangerous were usually housed in the Metropolitan Detention Center in Brooklyn, NY. See Anne-Marie Cusac, *Ill-treatment on Our Shores; Detainees Arrested After Terrorist Attacks Lodge Allegations of Abuse While in Custody*, *THE PROGRESSIVE*, Mar. 1, 2002, at 24.

¹⁸ Of the total 762 detainees, 491 were arrested in New York, and 70 in New Jersey (74%). *OIG Report*, *supra* note 1, at 21. The place of arrest of the remainder has not been disclosed. *Id.*

to house federal prisoners or detainees in state institutions. Part IV addresses the statutory basis for the contention that the Congress empowered the Commissioner of the INS to preempt state law governing the operation of state jails. Finally, Part V describes the argument that, under the Tenth Amendment, the federal government may not coerce state officials to operate a state institution contrary to state law without unconstitutionally "commandeering" the apparatus of state sovereignty and police power.

II. THE CASE: *ACLU OF NEW JERSEY, INC. V. COUNTY OF HUDSON*

In *ACLU of New Jersey, Inc. v. County of Hudson*,¹⁹ the plaintiffs sought to compel the sheriffs and wardens of the county jails of Hudson and Passaic Counties to abide by provisions of New Jersey state law mandating public disclosure of the identities of those committed to their care. Since the nineteenth century, the New Jersey Legislature has mandated that basic pedigree information relating to inmates housed in New Jersey county jails be made public. The so-called New Jersey "Jailkeeper's Statute," enacted in 1898, provides:

The keeper of every jail or other penal or reformatory institution supported by public moneys of any county or municipality, shall keep a book provided by the board of freeholders in the county where the institution shall be, in which he shall set forth the date of entry, date of discharge, the description, age, birthplace and such other information as he may be able to obtain as to the inmates committed to his care, which book shall be exposed in a conspicuous place in the institution and shall be open to public inspection.²⁰

Similarly, New Jersey administrative regulations required that the name, number, place of incarceration, and other objective information regarding inmates in county jails shall be available for public inspection and copying.²¹ And since 1877, a New Jersey statute has required that county sheriffs

¹⁹ No. HUD-L-463-02 (N.J. Super. Ct. filed Jan. 22, 2002).

²⁰ N.J. STAT. ANN. § 30:8-16 (West 2002).

²¹ The administrative provision provided: "The following information and documents regarding an adult inmate or parolee shall be available for public inspection and copying: 1. Name; 2. Number; 3. Sentence; 4. Place of incarceration; 5. Order of commitment; and 6. Any documents filed in a court of competent jurisdiction." N.J. ADMIN. CODE tit. 10A, § 10A:31-6.5(a) (2002).

This administrative provision, however, has since been amended to remove the unconditional right of public access to inmate names.

and jailkeepers record the names of all federal prisoners committed to county jails,²² which records must then be made public pursuant to New Jersey's Right To Know Law.²³ Because the Jailkeeper's Statute, by its terms, creates an unqualified and absolute right of public access to the roster of inmates housed in county jails, it provided a seemingly infeasible mechanism to force the state jailers to disclose the identities of "the inmates committed to his care."

In December 2001, the ACLU of New Jersey made a formal request to inspect the records of inmates held in the Hudson County Correctional Center and the Passaic County Jail, where the largest number of INS detainees were being held. The local sheriffs refused these requests, claiming that such information was under the exclusive control of the INS. The ACLU then filed suit on January 22, 2002, in the Superior Court of New Jersey, Hudson County, naming as defendants only the county sheriffs and wardens who operate the jails according to state law. No federal officer or agency was impleaded.

The cause of action was distinctively local in character. In New Jersey practice, an "action in lieu of prerogative writs"²⁴ is the procedural device by which the state's courts review the actions of state or local governmental agencies and officers to ensure that such agencies are acting within their jurisdiction and according to law. Akin to a common law petition for writ of

²² The statute provides:

Each such sheriff and keeper shall, on or before the first days of April and October, make out the names of all prisoners who, since the last settlement, shall have been committed to his custody, under the authority of the United States, and the time they shall have been respectively confined, with an account of the amount thereof, at fifty cents per month for the use and keeping of such jail, for every person so committed, together with an account of their subsistence, at the rate established by law for state prisoners, and transmit the same to the United States marshal for the proper district, for payment.

N.J. STAT. ANN. § 30:8-2 (West 2002).

²³ N.J. STAT. ANN. § 47:1A-2 (West 2002). The Right-to-Know Law in effect at the time required that "all records which are required by law to be made, maintained or kept on file" by a government body be made public. Since N.J. STAT. ANN. § 30:8-2 expressly requires that the names of federal prisoners housed in New Jersey jails be recorded, the Right-to-Know Law thereby mandated public disclosure of those records.

The Right-to-Know Law has since been superseded by an even more expansive Open Public Records Act, 2001 N.J. Laws 404 (2002), which requires disclosure of any documents regularly kept by a state agency, regardless of whether it was required to do so by law. Both the Right-to-Know Law and the Open Public Records Act contained exemptions for certain documents, including documents related to ongoing law enforcement investigations.

²⁴ See N.J. COURT RULE 4:69 (2002).

mandamus, the complaint demanded the performance of a ministerial act or duty, namely non-discretionary obedience by the county jail officials to the mandate of a state statute requiring disclosure of the names and other identifying information of all the inmates of the jails then in their care, including those housed on behalf of the INS in accordance with intergovernmental service agreements.²⁵ Although the United States was not named as a party to the action, it sought and was granted defendant-intervenor status, and in effect became the principal counsel for the defendants.

On March 26, 2002, Superior Court Assignment Judge Arthur N. D'Italia heard argument on the cross-motions for summary judgment and rendered a bench opinion the same afternoon, granting the plaintiffs partial summary judgment.²⁶ The trial judge found that, in referring to "inmates committed to [the jailer's] care," the New Jersey Legislature intended to include all persons housed in the county jail, including federal prisoners or detainees. He thereby rejected the United States' contention that the statute applied only to inmates incarcerated in county jails pursuant to state criminal processes.²⁷ Initially, Judge D'Italia granted the United States' motion for a stay pending appeal. On April 12, 2002, however, during a hearing to settle the form of order, Judge D'Italia

²⁵ See Intergovernmental Service Agreement between County of Hudson and the U.S. Department of Justice, Immigration and Naturalization Service (Agreement No. ACB-5-I-0001); Intergovernmental Service Agreement between Passaic County Jail and U.S. Department of Justice, Immigration and Naturalization Service (Jan. 28, 1985).

²⁶ The trial judge originally granted summary judgment on the complaint's first cause of action under N.J. STAT. ANN. § 30:8-16 and second cause of action under N.J. ADMIN. CODE § 10A:31-6.5, but granted summary judgment in favor of defendants on the third cause of action under the New Jersey Right-to-Know Law, N.J. STAT. ANN. § 47:1A-1 to 4; and dismissed the fourth cause of action under the common-law right of access to government records. On April 12, 2002, however, Judge D'Italia informed counsel that he was issuing a revised written opinion that would supersede the oral opinion rendered on March 26, and noted that he was entering summary judgment in favor of plaintiffs on the first three causes of action, including the third cause of action based upon the Right-To-Know Law. *ACLU of New Jersey v. County of Hudson*, No. HUD-L-463-02 (N.J. Super. Ct. filed Jan. 22, 2002).

²⁷ In his bench opinion, Judge D'Italia held:

The argument . . . that the statute applies only to inmates charged with state crimes and being held as pre-trial detainees pursuant to state charges or those sentenced to prison pursuant to state law is rejected. The statute contains no such qualifying language. It refers to all inmates committed to the care of the keeper of the jail without regard to the authority by which the inmate is committed, whether it be federal, state or local.

ACLU of New Jersey v. County of Hudson, No. HUD-L-463-02 (N.J. Super. Ct. filed Jan. 22, 2002).

announced that he had reconsidered the stay pending appeal. In light of the need for timely action, he granted a limited stay of ten days, after which he ordered the state jailors to comply with the state law.

On April 17, 2002, the United States and the various county defendants filed notices of appeal and cross-appeal to the Appellate Division of the New Jersey Superior Court. That same day in Washington D.C., however, INS Commissioner James W. Ziglar signed an emergency interim regulation, without following the notice and comment period normally required under the federal Administrative Procedures Act.²⁸ The regulation provided:

No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.²⁹

The rule therefore prohibited all persons, including state jail officials, from disclosing basic identifying information regarding inmates committed to their care, and made clear that it "supersede[d] State or local law relating to the release of such information."³⁰ Moreover, that the regulation applied to "requests that are the subject of proceedings pending as of April 17, 2002," was an obvious reference to the pending appeal in *County of Hudson*.

Faxed copies of Commissioner Ziglar's regulation were provided immediately to the Appellate Division, with a request

²⁸ 5 U.S.C. § 553 (2000).

²⁹ Interim Rule, *Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities*, 67 Fed. Reg. 19,508 (Apr. 22, 2002), as confirmed at 68 Fed. Reg. 4364 (Jan. 29, 2003) (codified at 8 C.F.R. § 236.6) [hereinafter Interim Rule].

³⁰ *Id.* at 19,510.

by the United States that it stay Judge D'Italia's order pending expedited appeal. Mindful of the possibility that INS detainees might be deported or transferred outside of New Jersey during the pendency of the appeal, on April 19, 2003, the Appellate Division held a teleconference with counsel, in which it attempted to fashion a mutually agreeable temporary standstill agreement while the appeal was heard.³¹ When no such agreement could be reached, the appellate court issued a stay of the lower court order on the condition that the status quo be maintained – that no INS detainee be removed from his or her present confinement without consent. The purpose of the requirement, the court later explained, “was simply to forestall the eventuality that the individual rights and interests at the heart of the complaint for relief would become moot in ways that would unreasonably disadvantage the detainees in respect of the fundamental rights asserted on their behalfs.”³²

The response of the INS in the following days to the conditions imposed by the Appellate Division was somewhat draconian. It forbade any detainee housed in the Hudson or Passaic County jails from leaving those facilities, even if the detainee was willing to accept voluntary departure from the United States to their home country, and even if the detainee had been granted release on bond by an immigration judge. At least one detainee who had agreed to voluntary departure and who was literally in the departure lounge of JFK International Airport waiting to return home, was reincarcerated in the county jail where she had been originally kept, ostensibly in order to abide literally by the stay order.³³ A second teleconference with the Appellate Division quickly ensued, in

³¹ As the Appellate Division itself described the teleconference in a subsequent memorandum opinion:

Cognizant of the important and fragile interests and rights claimed on both sides of the case (e.g., the government's claims of national security, etc.; and the needs asserted on behalf of the detainees, *inter alia*, for access to the advice of counsel and the services of consular personnel) this court sought, in a teleconference with counsel on April 19, 2002, to elicit the agreement of the parties to an interim solution which would preserve the status quo, *i.e.*, short of the full disclosure mandated by the trial court, yet, sensibly serving the individual interests in representation to the greatest extent possible. Such an interim solution on an agreed-upon basis could not be achieved, however.

ACLU of N.J. v. County of Hudson, No. A-4100-00T5, 2002 N.J. Super. LEXIS 201 (N.J. Super. Ct. App. Div. Apr. 29, 2002).

³² *Id.*

³³ See Jim Edwards, *Stay on Release of Detainee Names Leads to Chaos for Sept. 11 Cases; ACLU, INS at Odds Over Meaning of Appellate Order*, N.J. L.J., Apr. 29, 2002, at 337.

which the court provided further clarification of its April 19 order: "It is not the court's intention to limit unduly the government's discharge of its essential functions; nor will the court tolerate any steps *pendente lite* that worsen the procedural lot of the detainees before the ultimate issues are resolved."³⁴ The court maintained its original order, but made clear that detainees could be removed from the jails under certain conditions in which they themselves consented to the removal, including voluntary departure or release on bond.³⁵

Oral argument before the Appellate Division was held on May 10, 2002. On June 12, 2002, the court issued an opinion in which it upheld the efficacy of the interim regulation promulgated on April 17, finding that the century-old New Jersey state statute mandating public access to jail rosters had been retroactively pre-empted by Commissioner Ziglar's sweep of the pen, and it therefore reversed the trial court's order based solely on application of the new federal rule.³⁶ The New Jersey Supreme Court ordered expedited consideration of the petition for certification and denied review on July 9, 2002. The ACLU elected not to seek certiorari in the United States Supreme Court.

Of all the statements made by the federal government in the course of the litigation, perhaps the most noteworthy, and also the most troubling, was the statement required under Executive Order 13,132³⁷ when the interim regulation was first promulgated:

³⁴ ACLU of N.J. v. County of Hudson, No. A-4100-00T5, 2002 N.J. Super. LEXIS 201 (N.J. Super. Ct. App. Div. Apr. 29, 2002).

³⁵ The stay order was refined to permit the following:

- (1) The removal of any detainee who has agreed to voluntary departure.
- (2) the removal of any detainee with a final removal order who exhibits his consent to such removal by signing a form setting forth that consent.
- (3) the removal of any detainee who is authorized to leave the jail on bond.
- (4) the temporary removal of any detainee, such as for transportation to immigration or other court hearings, medical matters, or the like.
- (5) the removal of any detainee who is actually represented by counsel.

Id.

³⁶ 799 A.2d 629 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 803 A.2d 1162 (N.J. 2002).

³⁷ Exec. Order No. 13,132 (Aug. 4, 1999), 64 Fed. Reg. 43,255 (Aug. 10, 1999). President Clinton issued the executive order "to ensure that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies. . . ." *Id.* at 43,255. In particular, section 6(c) of the order provides:

To the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation,

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule merely pertains to the public disclosure of information concerning Service detainees housed, maintained or otherwise served in state or local government or privately operated detention facilities under any contract or other agreement with the Service. In effect, the rule will relieve state or local government entities of responsibility for the public release of information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of the Service. Instead, the rule reserves that responsibility to the Service with regard to all Service detainees. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement.³⁸

The contention that a federal regulation expressly preempting a state statute that governs the way that state officers operate state jails will not have serious federalism implications is facially remarkable. Indeed, the observation that “the rule will relieve state or local government entities of responsibility for the public release of information” is functionally equivalent to the observation that the federal rule relieved state and local government entities of the responsibility to abide by the dictates of state law. The result in *County of Hudson* has potentially profound implications for traditional assumptions about the allocation of power between the federal and state sovereignties in one of the most basic governmental functions – operating places of incarceration.

(1) consulted with State and local officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met; and

(3) makes available to the Director of the Office of Management and Budget any written communications submitted to the agency by State and local officials.

Id. at 43,258.

³⁸ Interim Rule, *supra* note 29, at 19,511.

III. THE HISTORICAL FEDERAL/STATE RELATIONSHIP IN HOUSING FEDERAL PRISONERS IN STATE JAILS

As Justice Scalia noted in *Printz v. United States*,³⁹ the practice of voluntarily housing federal prisoners in state jails has a long history:

On September 23, 1789 – the day before its proposal of the Bill of Rights – the First Congress enacted a law aimed at obtaining state assistance of the most rudimentary and necessary sort for the enforcement of the new Government's laws: the holding of federal prisoners in state jails at federal expense. Significantly, the law issued not a command to the States' executive, but a recommendation to their legislatures. Congress "recommended to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States," and offered to pay 50 cents per month for each prisoner. Moreover, when Georgia refused to comply with the request, Congress's only reaction was a law authorizing the marshal in any State that failed to comply with the Recommendation of September 23, 1789, to rent a temporary jail until provision for a permanent one could be made.⁴⁰

From the outset of our constitutional experience, therefore, reception of federal prisoners in state jails was understood to be the result of voluntary assistance provided to the federal government by a coequal sovereign. "The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict."⁴¹ Moreover, incarceration was understood to be one of the most basic tools of governance. In the place of direct federal control over the mechanisms of state government, therefore, federal prisoners were housed in state jails purely at the discretion of state legislatures or state jailers, as a matter of free contract and agreement.

In the exercise of that discretion, most states have provided by statute for housing of federal prisoners in their jails, and have either directed or permitted state jailers to

³⁹ *Printz v. United States*, 521 U.S. 898 (1997).

⁴⁰ *Id.* at 909-10 (internal citations omitted).

⁴¹ *Id.* at 919.

receive federal prisoners.⁴² New Jersey, for instance, included a typical provision in the Sheriff's Act of 1877.

Each sheriff and keeper of a jail in any county of this state shall receive all prisoners committed to his custody by authority of the United States and safely keep them until discharged in due course of the laws of the United States. Any sheriff or keeper who neglects or refuses to perform the services and duties required of him by this section, or who offends in the premises shall be subject to like penalties, forfeitures and actions as if such prisoners had been committed under authority of this state.⁴³

Thus, unlike other states that permitted but did not require its sheriffs and jailers to receive federal prisoners,⁴⁴ New Jersey commands its inferior officers to receive those prisoners, and holds them responsible as if the prisoners were detained by the state. Nevertheless, the state officer was always understood to be acting pursuant to his state legislature's command, rather than as a servant of the federal sovereignty. In *Board of Chosen Freeholders of Hudson County v. Kaiser*,⁴⁵ for instance, a county sheriff claimed that he should be able to keep excess monies paid to him by the federal government for housing federal prisoners, contending that he was an agent of the United States Marshal and not a state official. The state court disagreed:

[T]he county jail is not furnished to the sheriff to conduct a private business in, and . . . if his only authority to receive federal prisoners within its walls was a private bargain made with the United States

⁴² E.g. ALA. CODE § 14-6-4 (2003); ARIZ. REV. STAT. § 31-122 (2004); ARK. CODE ANN. § 12-41-503 (Michie 2003); CAL. PENAL CODE § 2902 (Dearing 2004); COLO. REV. STAT. § 17-26-123 (2003); KAN. STAT. ANN. § 19-1930 (2003); KY. REV. STAT. ANN. § 441.035 (Michie 2004); LA. REV. STAT. ANN. § 15:707 (2004); ME. REV. STAT. ANN. TIT. 30-A, § 1554 (West 2004); MICH. COMP. LAWS § 801.101 (2004); MISS. CODE ANN. § 19-25-81 (2004); MO. REV. STAT. § 221.270 (West 2004); NEB. REV. STAT. ANN. § 83-420 (Michie 2003); NEV. REV. STAT. ANN. § 211.060 (Michie 2004); N.Y. CORRECT. LAW § 612 (Consol. 2004); N.C. GEN. STAT. § 162-34 (2004); OKL. STAT. ANN. TIT. 57, § 16 (West 2004); ORE. REV. STAT. § 169.540 (2003); S.C. CODE ANN. § 23-19-20 (Law. Co-op. 2003); TENN. CODE ANN. § 41-4-105 (2004); TEX. LOCAL GOV'T CODE ANN. § 351.043 (Vernon 2004); VA. CODE ANN. § 53.1-79 (Michie 2004); W. VA. CODE ANN. § 7-8-8 (Michie 2003); WYO. STAT. ANN. § 18-6-305 (Michie 2003).

⁴³ N.J. STAT. ANN. § 30:8-2 (2002). This provision is first found in the Sheriff's Act of 1877, N.J. REV. STAT. § 33, at 1105 (1877).

⁴⁴ Georgia's original reluctance, noted in *Printz*, to house federal prisoners apparently survives to some extent to this day. The current Georgia statute provides: "The keeper of a county jail may decline to receive a person from the custody of anyone acting under the authority of the United States government. He may receive the person if the consent of the authority having control of county matters is first obtained." GA. CODE ANN. § 42-4-9 (2002).

⁴⁵ 69 A. 25 (N.J. Sup. Ct.), *aff'd*, 71 A. 1133 (N.J. 1908).

marshal, his conduct would be a clear violation of official duty. But such is not the case. Section 33 of the act concerning sheriffs (Gen. Stat., p.3117) makes it the duty of the sheriff of every county to receive all persons committed to his custody by the authority of the United States. He takes them into his custody as sheriff; he remains responsible for them as sheriff, and all moneys paid to him on their account are paid to him as, and received by him as, sheriff. That being so, moneys paid to him by the federal government in excess of what was needed for the food and care of federal prisoners was paid to him as compensation for services rendered and duties performed with relation to them as sheriff. . . .⁴⁶

The New Jersey court therefore rejected the contention that, in housing federal prisoners, the sheriff enjoyed a dual existence as part federal officer and part state officer. The state jailer serves a unitary master, and is answerable solely to the state sovereignty.

Federal courts have consistently adopted the same model of state jail officials as acting purely in their capacities under state law. In 1815, the Supreme Court observed in *Randolph v. Donaldson*⁴⁷ that:

The keeper of a state jail is neither in fact nor in law the deputy of the [United States] marshal. He is not appointed by nor removable at the will of the marshal. When a prisoner is regularly committed to a state jail by the marshal, he is no longer in the custody of the marshal, nor controlable by him. The marshal has no authority to command or direct the keeper in respect to the nature of the imprisonment.⁴⁸

This characterization of state jail officials as acting exclusively as creatures of state sovereignty even when housing federal prisoners has been embraced in modern cases as a matter of federal statutory interpretation by the United States Supreme Court. In *Logue v. United States*,⁴⁹ the Court

⁴⁶ *Id.* at 28.

⁴⁷ 13 U.S. 76 (1815).

⁴⁸ *Id.* at 86. Similarly, in *Saunders v. United States*, 73 F. 782 (C.C.D. Me. 1896), the federal court observed:

But the [state] jailer is not an officer of the United States, and the commissioner has no power to call upon him to perform any service. The United States uses the jails of the state for the confinement of prisoners under sentence or awaiting trial. The Revised Statutes of the United States (section 5539) subject prisoners so confined to the same discipline and treatment as convicts sentenced under the laws of the state, and place them under the control of the officer having charge of the jail under the laws of the state.

Id. at 783.

⁴⁹ 412 U.S. 521 (1973). In *Logue*, a federal prisoner confined in a county jail pending trial committed suicide, and his parents sued both the state jailer and the

construed the general federal statute that authorizes federal law enforcement agencies to enter into contracts with state authorities to house federal detainees.⁵⁰ In authorizing such contracts, "Congress . . . clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor, with the [federal] Government's role limited to the payment of sufficiently high rates to induce the contractor to do a good job."⁵¹ Thus, the Court has found that such an intergovernmental service agreement "gives the United States no authority to physically supervise the conduct of the jail's employees."⁵² Each county defendant in this case is an "independent contractor who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."⁵³ Particularly with respect to the policies and practices regarding the treatment of federal prisoners, the Court has made it clear that the state rules govern, an axiom that presumably embraces state laws, such as the Jailkeeper's Statute, which mandate the manner of public disclosure of jail records.⁵⁴

United States marshal for damages under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), contending that both officers' negligence was the proximate cause of their son's death. In finding that the state sheriff was an independent contractor of the United States and therefore not within the control of a federal officer, the Court thereby concluded that the state officer could not be liable under the FTCA.

⁵⁰ The statute currently provides:

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

18 U.S.C. § 4002 (2000).

At the time that *Logue* was decided, the statute named the Director of the Bureau of Prisons as the federal officer authorized to enter into contracts with state authorities for housing federal prisoners. 18 U.S.C. § 4002 (1976). In 1978, the statute was amended to substitute the Attorney General for the Director, thus broadening its scope to include all federal detainees held by the Department of Justice, including those held by the INS. Pub. L. No. 95-624, § 8, 92 Stat. 3459 (1978).

⁵¹ *Logue*, 412 U.S. at 529.

⁵² *Id.* at 530.

⁵³ *Id.* at 527 n.5 (quoting RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958)).

⁵⁴ New Jersey is not unique in providing, by statute, for the public disclosure of the identities of inmates held in state institutions, and the existence of such provisions could hardly have been a surprise to federal authorities. Over fifty years ago, New York adopted a law requiring the maintenance of public records on prisoners, which now provides that:

Each keeper [of a local correctional facility] shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of

To save expense and travel, the Federal Government has found it convenient with the consent of the respective States to use state prisons in which to confine many of its prisoners, and the Attorney General is the agent of the Government to make the necessary contracts to carry this out. In order to render the duty thus assumed by the state governments as free from complication as possible, the actual authority over, and the discipline of, the federal prisoners while in the state prison are put in the state prison authorities. If the treatment or discipline is not satisfactory, the Attorney General can transfer them to another prison, but while they are there, they must be as amenable to the rules of the prison as are the state prisoners.⁵⁵

At the most specific level, the intergovernmental service agreements between the United States and Hudson and Passaic Counties for the housing of INS detainees in effect at the time *County of Hudson* was litigated were fully consistent with the characterization of the Hudson and Passaic County Jails as purely state entities, not under the control of a federal agency. The Hudson County agreement provided, for instance:

all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper.

N.Y. CORRECT. LAW § 500-f (Consol. 2004).

Similarly, a Louisiana statute, initially enacted in 1928, requires every jail to keep a book setting forth the name and other information "as to each prisoner received" and provides that "[t]he book and booking information summaries shall always be open for public inspection." LA. CODE CRIM. PROC. ANN. art. 228(B) (West 2004). A New Mexico statute, successor to a similar law enacted in 1961, provides that "[e]ach county sheriff, jail administrator or independent contractor shall keep a written record showing the exact time of confinement and release of each prisoner incarcerated in the jail under his jurisdiction." N.M. STAT. ANN. § 4-44-19 (Michie 2004). A Nebraska statute, originally part of a law enacted in 1866, requires the sheriff of each jail to keep "a suitable book to be called the jail register, in which he or she shall enter (1) the name of each prisoner, with the date and cause of his or her commitment . . ." NEB. REV. STAT. ANN. § 47-106 (Michie 2003). *See also* MASS. GEN. LAWS ch. 127, § 5, (originally enacted in 1784); ALA. CODE § 36-22-8 (2004); D.C. CODE ANN. § 5-113.01 (2004) (requiring record keeping); D.C. CODE ANN. § 5-113.06 (2004) (stating that the records "shall be open to the public inspection"). Congress, in enacting the predecessor statute to D.C. CODE ANN. § 5-113.01, noted the underlying justification for making arrest records public:

It is felt that the keeping of such records and their availability to the public should be matters of law and not of administrative discretion, both for the protection of the public against secret arrests and to guard against the abuse in any way of the arrest power.

H. REP. NO. 2332, 83rd Cong., 2d Sess. (1954). *See also*, *White v. United States*, 164 U.S. 100, 104 (1896) (recognizing that then-sections 4537, 4538, 4539 and 4555 of the Criminal Code of Alabama required a local jailor to keep such a register).

⁵⁵ *Ponzi v. Fessenden*, 258 U.S. 254, 264 (1922).

The contractor will provide housing, safekeeping, subsistence and other services for INS detainee(s) within its facility . . . consistent with the types and levels of services and programs routinely afforded its own population, and fully consistent with all applicable laws, standards, policies, procedures and court orders applicable to its facility . . . unless, or as specifically modified by this Agreement.⁵⁶

Admission and discharge of INS detainee(s) shall be fully consistent with the Contractors policies and procedures, and shall ensure positive identification and recording of both detainee(s) and officer(s).⁵⁷

Similarly, the Passaic County agreement provided:

The County agrees to accept and provide for the secure custody, care and safekeeping of USINS detainees in accordance with state and local laws, standards, policies, procedures, or court orders applicable to the operations of the facility.⁵⁸

It is evident from the contractual agreement that the United States not only consented to, but indeed mandated, that Hudson and Passaic County Jails keep the records pertaining to inmates committed to their care pursuant to the federal agreements in accordance with state law.

Thus, pursuant to (a) the state statutes that first authorized local jailers to cooperate with federal authorities and receive federal detainees in local facilities, (b) the federal statutes that authorized the Attorney General to solicit such voluntary cooperation from state officers, and (c) the actual agreements entered into by Hudson and Passaic Counties for the housing of INS detainees, two consistent characterizations of the relationship between federal and state officers emerge:

(1) The state jailers were exclusively officers of the state sovereignty, and not subject to the control or command of the federal authorities in the manner in which federal detainees were handled while in state custody.

(2) It was the expectation of the federal authorities when entering into contracts with the state jailers that state and local laws, policies and practices would be applied in the treatment of federal prisoners held by state jails, and that, for

⁵⁶ Intergovernmental Service Agreement between County of Hudson and U.S. Department of Justice, Immigration and Naturalization Service (Agreement No. ACB-5-I-0001) arts. II(1), III(1).

⁵⁷ *Id.* art. IV(1).

⁵⁸ Intergovernmental Service Agreement between Passaic County Jail and U.S. Department of Justice, Immigration and Naturalization Service art. III (Jan. 28, 1985).

all essential purposes, such federal prisoners would be treated identically to state prisoners.

Given the venerable heritage of these two propositions, it would seem to have been well established, both under relevant state and federal statutes, and under the assumptions undergirding federal-state relations since the infancy of the nation, that federal agencies neither sought, nor were empowered, to instruct state jailers on the manner of operation of their institutions. That historical understanding was severely tested by the interim regulation, promulgated on April 17, 2002, in order to address the consequences of one case.

IV. STATUTORY AUTHORIZATION FOR PRE-EMPTION OF THE NEW JERSEY JAILKEEPER'S STATUTE BY ADMINISTRATIVE REGULATION

The weighty considerations of federalism usually invite considerable rhetorical flourish in cases where congressional intent to permit pre-emption is not express. As the Supreme Court held in *Gregory v. Ashcroft*:

[I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."⁵⁹

This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.⁶⁰

Thus, many cases speak of a heavy presumption against pre-emption of state law, particular in areas traditionally committed to state police power.⁶¹ And "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws,

⁵⁹ 501 U.S. 452, 460-61 (1991) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989)) (internal citations omitted).

⁶⁰ *Id.* at 461.

⁶¹ See, e.g., *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985).

regulations, and procedures, than the administration of its prisons.⁷⁶²

In determining whether a federal administrative regulation pre-empts pre-existing state law, however, the cases yield a surfeit of axioms and often conflicting guidance; consequently, they are difficult to rationalize into a coherent framework. It is certainly true that “[f]ederal regulations have no less pre-emptive effect than federal statutes.”⁷⁶³ But the Court also cautions with equal assurance that a federal agency “literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it.”⁷⁶⁴ In determining whether Congress intended to confer that power, however, there is a strange analytical disconnect. When the issue is whether Congress itself intends to displace state law, then the federal statute effecting pre-emption must usually speak with a loud voice,⁶⁵ as the “plain statement” rule operates to create a “presumption against pre-emption.”

But when an individual federal administrator, acting pursuant to a general delegation of regulatory authority by Congress, decides to pre-empt a state law, then the presumption against pre-emption is vitiated.

Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited:

If [his] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears

⁶² *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973).

⁶³ *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984) (quoting *Fidelity Federal*).

⁶⁴ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

⁶⁵ In the absence of an explicit preemption provision, a federal statute will be deemed to have superseded state law only where Congress has legislated so thoroughly across a field “as to make reasonable the inference that Congress left no room for the States to supplement it . . .,” or if an irreconcilable conflict exists between a state law and a federal statute that address the same general subject area. See generally *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190 (1983); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The Court has applied the same interpretive principles to determine the pre-emptive intent of administrative regulations. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.⁶⁶

Thus, "[a] pre-emptive regulation's force *does not depend on express congressional authorization to displace state law*."⁶⁷ So long as an administrative agency is acting within the general scope of rule-making authority granted by Congress, it appears that such delegation implicitly includes within it the power to pre-empt state law, even absent any clear indication that Congress intended to bestow such power.

The Supreme Court recently noted the empirical existence of this odd distinction between legislative and administrative pre-emption in *New York v. FERC*, but did little to justify or explain it.⁶⁸ When Congress – which of course is elected from the several states and is presumably sensitive to the proper balance between federal and state sovereignties – desires to displace state law *itself*, it is held to the requirement that it articulate its intent with convincing clarity. It therefore seems counter-intuitive to not impose a similar requirement of clearly articulated legislative intent when it delegates rule-making powers to an unelected administrator in the executive branch, who is neither inherently responsible nor responsive to the electoral process. As one federal judge noted in rejecting one attempt by the Justice Department to overrule state law by

⁶⁶ *De La Cuesta*, 458 U.S. at 153-54 (citations omitted).

⁶⁷ *Id.* at 154 (emphasis added).

⁶⁸ 535 U.S. 1, 18 (2002). The court stated:

Pre-emption of state law by federal law can raise two quite different legal questions. The Court has most often stated a "presumption against pre-emption" when a controversy concerned not the scope of the Federal Government's authority to displace state action, but rather whether a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority.

.....
The other context in which "pre-emption" arises concerns the rule "that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority[,] . . . [for] an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." . . . Such a case does not involve a "presumption against pre-emption," . . . but rather requires us to be certain that Congress has conferred authority on the agency. As we have explained, the best way to answer such a question – *i.e.*, whether federal power may be exercised in an area of pre-existing state regulation – "is to examine the nature and scope of the authority granted by Congress to the agency." In other words, we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other.

Id. at 17-18.

administrative fiat, "To allow an attorney general – an appointed executive whose tenure depends entirely on whatever administration occupies the White House – to determine the legitimacy of a particular medical practice without a specific congressional grant of such authority would be unprecedented and extraordinary."⁶⁹

In the context of modern statutory schemes in which a general delegation of rule-making power to an administrative agency is often quite broad, the absence of such a requirement that Congress plainly state its intent to permit pre-emption of state law grants potentially sweeping powers to individual administrators whose political legitimacy in overruling the decisions of elected state legislators is questionable at best. Indeed, as a matter of self-imposed restraint the executive branch itself has made at least some attempt to restore the balance of power between the states and the federal government by applying the traditional presumption against pre-emption to limit the scope of an administrative agency's power even when Congress has bestowed it with a general delegation of rule-making authority. In 1999, President Clinton issued Executive Order 13,132, encaptioned simply "Federalism," by which he ostensibly attempted to curb the potentially immense power of administrative agencies to unilaterally displace state legislatures. Among the provisions of Executive Order 13,132 is the following rule of construction:

Section 4. Special Requirements for Preemption.

(a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rulemaking only when the exercise of State authority

⁶⁹ *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1092 (D. Ore. 2002) (finding Congress did not intend to authorize Attorney General to pre-empt Oregon's Death with Dignity Act through administrative regulation), *review granted*, 368 F.3d 1118 (9th Cir. 2004). See generally Comment, *Questioning the Foundation of Attorney General Ashcroft's Attempt to Invalidate Oregon's Death with Dignity Act*, 81 ORE. L. REV. 505 (2002).

directly conflicts with the exercise of Federal authority under the Federal statute or there is clear evidence to conclude that the Congress intended the agency to have the authority to preempt State law.⁷⁰

Thus, Executive Order 13,132 in effect attempts to restore the "presumption against pre-emption" even when Congress has made a general delegation of rule-making authority to an administrative agency, since it requires "clear evidence to conclude that the Congress intended the agency to have the authority to pre-empt State law,"⁷¹ unless the statute itself pre-empts state law.⁷² By its terms however, Executive Order 13,132 creates no legally enforceable rights, since Section 11 provides: "This order is intended only to improve the internal management of the executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."⁷³ The substantive provisions of the presidential edict are therefore completely hortatory. Even the procedural requirements that an agency consult with state officials and prepare a federalism impact statement before promulgating a regulation preempting state law⁷⁴ can be dispensed with unilaterally by the administrator promulgating the regulation, without the possibility of review, by the convenient device of finding that the rule "will not have substantial direct effects on the States,

⁷⁰ Exec. Order No. 13,132, § 4 (Aug. 4, 1999), 64 Fed. Reg. 43,255, 43,257 (Aug. 10, 1999). For a discussion of Executive Order 13,132 and its predecessors, see Note & Comment, *Presidential Power Grab or Pure State Might? A Modern Debate Over Executive Interpretations on Federalism*, 2000 B.Y.U.L. REV. 293.

⁷¹ 64 Fed. Reg. at 43,257.

⁷² Executive Order 13,132 revoked an executive order issued by President Reagan, which contained a virtually identical provision regarding pre-emption of state law by administrative regulation.

Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

Exec. Order No. 12,612 (Oct. 26, 1987), 52 Fed. Reg. 41,685 (Oct. 30, 1987). Whether there is any meaningful difference between President Reagan's requirement of "firm and palpable evidence," and President Clinton's requirement of "clear evidence" of congressional intent to delegate the pre-emption power to an administrative agency is a debatable albeit somewhat abstract inquiry.

⁷³ Exec. Order No. 13,132, § 11, 64 Fed. Reg. at 43,259.

⁷⁴ *Id.* § 6(c), at 43,258.

on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government,”⁷⁵

Applying the rule that a federal administrative agency may pre-empt state law so long as it is acting within the general scope of authority delegated by Congress, the Appellate Division in *County of Hudson* found that New Jersey’s century-old policy against secret detentions had been overridden by the sweep of Commissioner Ziglar’s pen. The court first noted the uncontroversial proposition that Congress has exclusive authority over matters involving naturalization and immigration,⁷⁶ and then observed that the Immigration and Nationality Act (INA) provides that the Attorney General “shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act.”⁷⁷ Combining these two provisions, the Appellate Division found that the Attorney General, through his delegate, the Commissioner of the INS, was authorized to promulgate the interim regulation pre-empting state law mandating public disclosure of the names of inmates in New Jersey county jails.

The Appellate Division did express reservations, however, about the initial contention that the conditions of confinement of INS detainees in state jails fell within the scope of the INA:

Although there can be no question that, under the INA and its implementing regulations, the Commissioner has the authority to promulgate regulations relating to immigration and naturalization, it may be open to question whether 8 C.F.R. § 236.6 actually “relates” to immigration and naturalization, for the rule itself does not purport to regulate the conduct or status of aliens, nor does it address the legal processes afforded INS detainees. Rather, the regulation deals solely with public access to records concerning detainees. Thus, the real focus of the regulation, as evidenced by the

⁷⁵ Interim Rule, *supra* note 29, at 19,511.

⁷⁶ *ACLU of New Jersey v. County of Hudson*, 799 A.2d 629, 647 (N.J. Super. Ct. App. Div. 2002), *cert. denied*, 803 A.2d 1162 (N.J. 2002).

⁷⁷ 799 A.2d at 648 (quoting 8 U.S.C. § 1103(a)(3)). The statute further provided that the Attorney General was empowered to delegate his rule-making authority to the Commissioner of the INS. *Id.* The INA has since been amended to vest general rule-making power in the Secretary for Homeland Security. Homeland Security Act of 2002, 107 Pub. L. No. 296, § 1102, 116 Stat. 2135, 2273 (Nov. 25, 2002).

rationale presented in its preamble, may be seen to be on the facilitation of law enforcement efforts in the wake of September 11.⁷⁸

Nevertheless, the court ultimately concluded that "we would breach faith with overarching principles of our federalism if we were to see this case as an occasion for viewing the grant of authority to the Commissioner as anything but very broad."⁷⁹ It therefore held, albeit in somewhat reserved language,⁸⁰ that the regulation fell within the ambit of federal immigration laws.

The correctness of this conclusion, however, is not self-evident. The authority of the Attorney General and the Commissioner under the INA to issue regulations pertaining to immigration cannot extend any further than the scope of the Act itself. Despite the general breadth of the rule-making authority granted relative to the overall scope of the Act, the boundaries of what Congress actually intended to govern pursuant to the INA are limited. It overstates the law considerably to assert that any regulation dealing with aliens must therefore be a regulation of immigration and thus subject to the plenary power of Congress to legislate and the Attorney General and Commissioner to regulate. As Justice Brennan held for the Court in *DeCanas v. Bica*,⁸¹ "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised." The Court then gave guidance to construing the meaning and scope of the immigration power exercised by Congress under the INA: "[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."⁸²

⁷⁸ ACLU of New Jersey v. County of Hudson, 799 A.2d at 648.

⁷⁹ *Id.* at 648-49.

⁸⁰ The court stated:

We accept as not patently unrealistic the government's assertion that the regulation bears upon the privacy interests of those detainees who may not want to have their names made public and that it tends to affect the safety of the detainees and their families as well as others involved in the detention scheme. The further assertion that the regulation affects ongoing investigations into violations of the immigration laws is also not so far-fetched as to invite disbelief.

Id. at 649.

⁸¹ 424 U.S. 351, 355 (1976) (holding that a state law regulating employment of illegal aliens not pre-empted by INA).

⁸² *Id.*

The Plaintiffs in *County of Hudson* therefore asserted that the Attorney General had not been given the power to regulate in an area beyond the scope of the INA itself. Whether the inmates held for the INS are subject to deportation, voluntary departure, release on bond, are entitled to asylum, or are subject to some other substantive immigration policy, is concededly a matter subject to exclusive federal control. The New Jersey statutes that require that a county jail's inmate records be open to public inspection, however, do not address "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Substantive immigration issues are not implicated by the requirement that the names of all inmates in New Jersey jails (including but not limited to inmates held pursuant to contract with the INS) be subject to public disclosure.

Once the Appellate Division concluded that the public disclosure of the identities of INS detainees in county jails fell within the ambit of federal immigration laws, however, it quickly concluded that the general grant of authority delegated to the Attorney General to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this Act"⁸³ empowered him to adopt the interim regulation.⁸⁴

But while the INA certainly bestows broad rule-making authority, that authority has its limits, and authorizes the Attorney General only to promulgate regulations necessary "for carrying out his authority under the provisions of this chapter." The only relevant reference contained in the INA to federal interaction with state government is the empowerment of the Attorney General to arrange for "the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State."⁸⁵ This authorization to enter into a *voluntary* agreement or contract with a state (or its political subdivisions) hardly qualifies as a clear statement authorizing the Attorney

⁸³ 8 U.S.C. § 1103(a)(3) (2000).

⁸⁴ The United States also asserted the Attorney General has authority under 8 U.S.C. § 1103(a)(2) to "control, direct[], and supervis[e] . . . all [of] the files and records of the Service," empowering him to adopt the interim regulation. The Appellate Division, however, declined to base its ruling on that provision, thus perhaps accepting the argument that § 1103(a)(2) does not apply to the records maintained by Hudson and Passaic Counties, because those records are not "records of the Service."

⁸⁵ 8 U.S.C. § 1103(a)(9)(A) (2000).

General to pre-empt state law governing the substantive conditions under which state jails are operated. To the contrary, such language circumscribes the Attorney General's power by authorizing him to enter only into those contractual relationships to which the State *chooses to agree*. The relationship intended by Congress between the federal government and state entities expressed in the INA is therefore one of arms-length contracting partners, not one of a superior pre-empting authority over an inferior one.

Interpreting the INA as imposing such a limitation on the grant of rule-making authority is consistent with – and perhaps constitutionally mandated by – the longstanding historical understanding that federal prisoners are kept in state jails purely at the sufferance of state sovereignty.⁸⁶ Indeed, not only is the limitation on the Attorney General's rule-making power with regard to state-operated jails inherent in the text of the INA itself, but that is how the Attorney General himself interpreted his power – a least before the exigencies of the September 11 detainees arose – when he entered into contracts with the Hudson and Passaic County jail facilities expressly providing that the manner of detention of the inmates shall be governed by state law and local policies and procedures.⁸⁷ The interim regulation of April 17 was therefore not only not “necessary for carrying out his authority under the provisions of this Act,”⁸⁸ but in fact was in direct contradiction to that authority under 8 U.S.C. § 1103(a)(9)(A), as both the Attorney General himself exercised it when he entered into intergovernmental service agreements with the state jails,⁸⁹ and as Congress intended it under the general statutory scheme permitting such agreements. Even under the less deferential standards currently applied in determining the efficacy of federal administrative regulations that endeavor to pre-empt state law, therefore, the Attorney General's attempt

⁸⁶ See *supra* Part III.

⁸⁷ See *supra* notes 56-58 and accompanying text.

⁸⁸ 8 U.S.C. § 1103(a)(3) (2000).

⁸⁹ The practical explanation as to why the INS often insisted in its agreements that its detainees be treated under the same state and local laws and procedures as state prisoners was to enhance its argument that state officials, not the INS, were responsible for any substandard living conditions. See, e.g., Human Rights Watch, *Locked Away: Immigration Detainees In Jails In The United States* (Sept. 1998), available at <http://www.hrw.org/reports98/us-immig/>; Amnesty International, *Lost In The Labyrinth: Detention of Asylum-Seekers* (Sept. 1999), available at <http://www.amnesty-usa.org/rightsforall/asylum/ins/ins-01.html>.

to regulate the manner in which New Jersey state authorities record and disclose the identities of inmates held in their care represents a marked departure not only from the text of the relevant statutes, but perhaps more importantly, from the consistent historical practice, which the federal government had itself promoted, of exclusive local control of federal prisoners in state jails.

V. CONSTITUTIONAL LIMITATIONS ON FEDERAL REGULATION OF THE OPERATION OF STATE JAILS: ANTI-COMMANDEERING

Perhaps the most novel claim raised by the plaintiffs in *ACLU of New Jersey v. County of Hudson* was the constitutional argument that “commandeering” state officials to engage in secret detentions of federal inmates in a manner contrary to state law is an unconstitutional derogation of state autonomy and sovereignty that violates the Tenth Amendment of the United States Constitution. The actual defendants in the case, the Counties of Hudson and Passaic and the wardens and keepers of the respective county jails, are entities and offices created under the authority of the State of New Jersey. Their power arises solely from the sovereignty of the State, and they owe their obligations to the State. Even when they act as jailors of federal prisoners, they do so in their capacity as state officers, not federal employees.⁹⁰ For the federal government to enact a regulation that forbids state officials from complying with the dictates of state law raises at least the suggestion of federal assumption of the powers of the state sovereign over its own state officials.

Several recent United States Supreme Court cases have rediscovered previously unexplored constitutional limits on the ability of the federal government to control the apparatus of state government. In *New York v. United States*,⁹¹ the Court held unconstitutional a provision of federal law regulating the disposal of radioactive wastes. The law required a state to “take title” to any wastes within its borders that were not otherwise properly disposed of. Justice O’Connor, writing for the Court, found that putting states to the choice of “either accepting ownership of waste or regulating according to the instructions of Congress” would impermissibly “commandeer”

⁹⁰ See *supra* Part III.

⁹¹ 505 U.S. 144 (1992).

state government to implement federal law.⁹² The scheme embodied in the original Constitution was that the federal sovereignty could regulate individuals but not the States.⁹³ "While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."⁹⁴

New York's somewhat metaphorical reference to "commandeering" state governments into the service of federal regulatory purposes left some uncertainty concerning the type of federal mechanisms it intended to forbid, and in *Printz v. United States*⁹⁵ the Court attempted to provide greater clarity. *Printz* struck down a provision in the Brady Act requiring state law enforcement officers to conduct background checks on prospective handgun purchasers. The Court held that:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.⁹⁶

Thus, in the words of one commentator, *Printz* "expressly rejected functionalism as a consideration in the state sovereignty context, replacing it with a structural formalism."⁹⁷ The Court expressly rejected the United States' argument that "The Brady Act serves very important purposes, is most efficiently administered by [local law enforcement officers] . . . and places a minimal and only temporary burden upon state officers."⁹⁸ *Printz* therefore declared "categorically" that the "Federal Government may not compel the States to

⁹² *Id.* at 161, 175.

⁹³ *Id.* at 166.

⁹⁴ *Id.* at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

⁹⁵ 521 U.S. 898 (1997).

⁹⁶ *Id.* at 935.

⁹⁷ Andrew S. Gold, *Formalism and State Sovereignty in Printz v. United States: Cooperation by Consent*, 22 HARV. J.L. & PUB. POL'Y 247, 247 (1998).

See also Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998) (criticizing *Printz* for its "categorical" approach and arguing for more flexible multifactored standard).

⁹⁸ 521 U.S. at 931-32.

enact or administer a federal regulatory program,”⁹⁹ regardless of the salutary purposes it might serve or the harm to federal interests that might result as a consequence.

Definitional problems still arose after *Printz*, however, as to the meaning of “commandeering,” and the limits of federal compulsion of state activities. In *Reno v. Condon*,¹⁰⁰ the Court resolved the conflict among lower courts on the application of *New York* and *Printz* to the Driver’s Privacy Protection Act of 1994,¹⁰¹ which banned disclosure of state driver’s license personal information without the driver’s consent.¹⁰² The Act’s provisions did not apply solely to States; it also regulated the resale and redisclosure of drivers’ personal information by private persons who had obtained that information from a state agency.¹⁰³ The Court unanimously held that the federal statute did not run afoul of the federalism and dual sovereignty principles embodied in its previous cases. Although it agreed that compliance with the federal law would “require time and effort on the part of state employees,” it rejected the State’s argument that the Act violated the principles laid down in either *New York* or *Printz*.¹⁰⁴

We think, instead, that this case is governed by our decision in *South Carolina v. Baker*, 485 U.S. 505 (1988). In *Baker*, we upheld a statute that prohibited States from issuing unregistered bonds because the law “regulate[d] state activities,” rather than “seek[ing] to control or influence the manner in which States regulate private parties.”

....

Like the statute at issue in *Baker*, DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.¹⁰⁵

⁹⁹ *Id.* at 933.

¹⁰⁰ 528 U.S. 141 (2000).

¹⁰¹ 18 U.S.C. §§ 2721-2725 (1994).

¹⁰² Some states had historically sold driver’s information for use by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. *Condon*, 528 U.S. at 141.

¹⁰³ *Id.* at 146.

¹⁰⁴ *Id.* at 150.

¹⁰⁵ *Condon*, 528 U.S. at 150-51.

The Court further noted that the Driver's Privacy Protection Act regulated not merely the States, but "the universe of entities that participate as suppliers to the market for motor vehicle information," and thus was a law of general application that did not regulate the States *qua* States.¹⁰⁶

With only three modern cases to serve as points of reference for a somewhat opaque constitutional doctrine, it might be overreaching to assert the existence of a clear outcome with respect to the April 17 interim regulation. The Appellate Division relied exclusively on *Condon* to reject the plaintiffs' contention that the April 17 interim regulation promulgated by Commissioner Ziglar amounted to federal "commandeering" of state officers to enforce federal law under *New York*, and amounted to the Federal Government compelling the States to "administer a federal regulatory program" under *Printz*.¹⁰⁷ But apart from the April 17 regulation's superficial similarity with the statute at issue in *Condon* – both of which forbade disclosure of personal information – there are several factors that separate the two. *Condon* distinguished *Printz* and *New York* by noting that the statute at issue "does not require state officials to assist in the enforcement of federal statutes regulating private individuals."¹⁰⁸ Nor did the federal government in that case seek "to control or influence the manner in which States regulate private parties."¹⁰⁹ But that is precisely what the Commissioner Ziglar's directive did in this case, since it affirmatively

¹⁰⁶ *Id.* at 151.

¹⁰⁷ The Appellate Division rejected plaintiff's Tenth Amendment argument on the basis of similarities with *Condon*.

In *Reno v. Condon*, the United States Supreme Court upheld a federal statute that established a regulatory scheme to restrict the authority of the states to disclose personal information contained in the records of state motor vehicle departments. The Court observed that the Tenth Amendment precludes the federal government from issuing directives requiring states to address particular problems or commanding state officers to administer or enforce federal regulatory programs. . . . Similarly, 8 C.F.R. § 236.6 does not require New Jersey to enact any legislation, nor does it require State officials to administer a federal regulatory scheme, or even to accept federal prisoners or detainees. N.J.S.A. 30:8-2 represents a choice made by the State of New Jersey, not one imposed by the federal government. Viewed in this light, 8 C.F.R. § 236.6 simply controls the type of information the State can release to the public in respect of a subject matter committed to the plenary authority of the federal government.

ACLU of New Jersey v. County of Hudson, 799 A.2d 629, 654-55 (N.J. Super. Ct. App. Div. 2002) (citations omitted), *cert. denied*, 803 A.2d 1162 (N.J. 2002).

¹⁰⁸ 528 U.S. at 151.

¹⁰⁹ *Id.* at 150.

enmeshed state officials in a federal regulatory program – there being no clearer example of “regulation” than incarceration – in a manner that affirmatively violated state law. Requiring that holders of private individual information, including state agencies, not disclose that information is one thing; but both as an aspect of historical understanding and doctrinal application, requiring that state jailers physically incarcerate inmates in secret in contravention of state law is quite another. Thus, a federal mandate that county jails take custody of federal inmates in the secretive manner required by federal policies and procedures appropriates the apparatus of state government to implement a federal policy.

In *Condon*, the restraints placed upon state officials (as well as private vendors in possession of the drivers license data) were purely passive; they were not required to engage in any affirmative activity in furtherance of a federal program, but merely to refrain from distributing such information. Here, however, the inexorable effect of the April 17 regulation and the post hoc reneging on the terms of the intergovernmental service agreements with Hudson and Passaic Counties, is that state officials must now engage in the affirmative activity of maintaining INS inmates in secret detention according to the commands of their new federal superiors. And thus, unlike the statute in *Condon*, the federal regulation “require[s] state officials to assist in the enforcement of federal statutes regulating private individuals.”¹¹⁰

As a practical matter, local state officials are attracted to dealing directly with the federal government through lucrative intergovernmental service agreements¹¹¹ and have little incentive to be passionate about state policy against secret detentions. But the willingness of jail officials in Hudson and Passaic Counties to cede their authority to the federal government should be constitutionally irrelevant. “Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by

¹¹⁰ *Id.* at 151.

¹¹¹ The intergovernmental service agreements with Hudson and Passaic Counties provided for \$77 per day per inmate to be paid by the United States. Housing two hundred detainees for one hundred days would therefore yield over \$1,500,000 paid directly into the local county sheriff's budget. Intergovernmental Service Agreement between County of Hudson and the U.S. Department of Justice, Immigration and Naturalization Service (Agreement No. ACB-5-I-0001); Intergovernmental Service Agreement between Passaic County Jail and U.S. Department of Justice, Immigration and Naturalization Service (Jan. 28, 1985).

the 'consent' of state officials."¹¹² The state autonomy and sovereignty that is at issue in this case is not for any individual state official to give away. Moreover, state officials cannot unilaterally abrogate a controlling state statute. Inmates detained pursuant to the INS directive were held at the Hudson and Passaic County jails only because county officials entered into voluntary contracts with the INS. The express terms of the service agreements between the counties and the INS provide that local laws govern the manner of identification and recording of detainees.¹¹³

The structural "detour" mechanism validated by the April 17 regulation has profound implications for federal-state programs in the future, since it allows federal officials to (1) contract with individual local state officials, (2) excise by appropriate pre-empting regulation any inconvenient limitations imposed by state law on the conduct of its own officers, and (3) thereby effectively bypass the state as the empowering sovereignty. The United States can thus provide immunity from a state official's obligation to abide by state law, simply by promulgating a regulation that forbids him from doing so. In light of ongoing attempts to shift, or at least share, law enforcement responsibilities previously exercised by federal officers with state officials in connection with the war on terrorism,¹¹⁴ validation of this mechanism of federal-local cooperation, thereby bypassing state limitations, could have significant federalism implications.

¹¹² *New York v. United States*, 505 U.S. 144, 182 (1992).

¹¹³ Intergovernmental Service Agreement between County of Hudson and U.S. Department of Justice, Immigration and Naturalization Service (Agreement No. ACB-5-I-0001) art. IV(1).

¹¹⁴ See, e.g., Clear Law Enforcement for Criminal Alien Removal Act of 2003, H.R. 2671, 108th Cong. ("CLEAR Act"). The controversial CLEAR Act would authorize "law enforcement personnel of a State or a political subdivision of a State . . . to investigate, apprehend, detain, or remove aliens in the United States . . . in the enforcement of the immigration laws of the United States." *Id.* § 101. The bill further provides, however, that a State

that fails to have in effect a statute that expressly authorizes law enforcement officers of the State, or of a political subdivision within the State, to enforce Federal immigration laws in the course of carrying out the officer's law enforcement duties shall not receive any of the funds that would otherwise be allocated to the State under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i)).

Id. § 102(a). Moreover, state and local law enforcement must provide information about apprehended illegal aliens to the Department of Justice and the Department of Homeland Security within 10 days "in such form and in such manner as the Attorney General may by regulation or guideline require." *Id.* § 105(a). Failure to provide such information likewise would result in deprivation of federal funding.

But counties and their officials are bound whenever possible to exercise their prerogatives and official discretion consistent with state law and policy, and thus could not initially enter into a voluntary contract that requires them to violate such state law. To do so would amount to a breach of a fiduciary duty owed by state officials to their sovereign. The only solution to this conundrum would be for county officials, in order to reconcile their obligations to the State of New Jersey with the proscriptions of the Ziglar directive, to terminate immediately the intergovernmental service agreements with the INS and refuse to enter into any further contracts that require them to violate state law prohibiting secret detentions. But a federal agency should not, through unilateral and retroactive imposition of a “secret detention” rule upon state officials, be able to force those state officials to become complicit in a federal detention program whose terms violate a state statute’s policy.

VI. CONCLUSION

The directive of Commissioner Ziglar of April 17, 2002, is an attempt to turn a *voluntary* obligation assumed by a state official pursuant to an intergovernmental contract into an *involuntary* duty to violate state law. For the federal government to be able to impose conditions on the county jails to compel them to engage in secret detention – conduct that the New Jersey Legislature has declared to be against public policy – signals a significant reworking of the structures by which federal and state agencies engage in cooperative efforts. It is unclear that Congress, in granting rule-making power to the Attorney General, intended to authorize such restructure. Moreover, the practical implications of permitting direct agreements between federal and local law enforcement officials to bypass state control over those local officials may encourage a novel method of intergovernmental cooperation that could dilute the historical and constitutional understandings underlying our federalism.

