

enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens"); see *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999). Pursuant to those responsibilities, the Attorney General possesses broad and express authority to promulgate appropriate immigration regulations. See 8 U.S.C. 1103(a)(3) (the Attorney General "shall 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 chapter."). In addition, the Attorney General has explicit statutory authority to detain aliens in connection with removal proceedings, 8 U.S.C. 1226(a), 1231, and to enter into agreements with State and local governments for the housing of aliens detained under provisions of the immigration laws. 8 U.S.C. 1103(a)(9)(A). The Attorney General has delegated substantial immigration responsibilities to the Commissioner of the INS. See 8 U.S.C. 1103(c); 8 CFR 2.1.

These provisions plainly authorize the Attorney General or the Commissioner to set the terms of alien detention contracts and to provide by regulation that persons housing INS detainees on behalf of the federal government shall not publicly disclose the names and other information regarding those detainees, particularly where such disclosure would threaten harm to vital national interests. The regulation is further supported by the plenary federal authority with respect to matters of national security. See, e.g., *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the nation") (citation omitted); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 76 n.16 (1964) (noting "the paramount federal authority in safeguarding national security") (citation and internal quotation marks omitted). The rule is necessary because, as the New Jersey appellate court, in reviewing the legality and effect of interim rule, pointed out, "The counties are not privy to the character and extent of federal investigations in progress nor, apparently, do they possess any independently acquired information regarding the role of the INS detainees in those investigations." *ACLU v. County of Hudson*, 799 A.2d 629, 643 (N.J. Super. App. Div.), certification denied, 803 A.2d 1162 (N.J. 2002).

Moreover, to the extent that the rule implicates contracts between the federal government and state, local or private entities, to house federal detainees, those contracts are governed by federal

law. The "rights of the United States under its contracts are governed exclusively by federal law," *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). With respect to contracts to house INS detainees, the regulation confirms what should always have been evident: that federal contractors with the INS may not use the information obtained in housing federal detainees to impair the federal government's enforcement of the immigration and criminal laws.

Further, the issue is not whether a non-federal entity consents to the regulation. Any non-federal entity providing housing for federal detainees may take steps to terminate its relationship with the Service if it so chooses. The rule simply relieves the non-federal entity of responsibility for releasing or withholding information regarding the detainees, and places that responsibility with the federal government subject to standards established by federal law.

The validity of the interim rule has recently been confirmed by the Superior Court of New Jersey, Appellate Division, in *ACLU v. County of Hudson*, 799 A.2d 629, 643 (N.J. Super. App. Div.), certification denied, 803 A.2d 1162 (N.J. 2002). In that decision, the court relied on the interim rule to reverse the judgment of a lower court requiring disclosure of information by county officials. The New Jersey court confirmed that "the regulation falls within the authority delegated to the Commissioner by Congress through the Attorney General." *Id.*, at 649; see also, at 650. The court found that it need "not assess the strength of the government's argument that national security interests create a generalized authority within the government to promulgate 8 CFR 236.6 or any other measures limiting the rights of individuals, for we view the government's argument based upon the delegation of authority under the INA to provide a sufficiently authoritative independent basis of support for the Commissioner's action." *Id.*, at 650.

2. Some of the commenters asserted that the interim rule was improperly promulgated under the Administrative Procedure Act (APA). As the Service explained in promulgating the interim rule, implementation of the rule as an interim rule, with provisions for post-promulgation public comments, was properly based on the APA's "good cause" exceptions found at 5 U.S.C. 553(b)(B) and (d)(3). 67 FR at 19510.

The statement accompanying the promulgation of the interim rule easily satisfied the requirements of 5 U.S.C. 553(b)(B) and (d)(3). The "good cause" exceptions may be used in "emergency

situations," *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001), and the circumstances surrounding promulgation of the interim rule easily met that criterion. Public disclosure of the information at issue would have endangered national security and undermined crucial federal law enforcement interests. Immediate promulgation of a rule to clarify federal law and ensure the protection of those national interests was vital. In those circumstances, the government was not required to await completion of a notice-and-comment period to take immediate action.

With the adoption of this final rule, it is the final rule, and not the interim rule, that is operative. Even if a court were to find that the interim rule was improperly adopted, the court would look to this final rule in determining the rule's legal efficacy.

3. The commenters' constitutional challenges lack force. First, the Tenth Amendment is not implicated. The rule against commandeering applies only when the federal government requires state legislatures to enact regulatory schemes, *New York v. United States*, 505 U.S. 144, 168–69, 173 (1992), or "conscripts" state officials to execute a federal program, *Printz v. United States*, 521 U.S. 898, 935 (1997). The rule has no application where the federal government requires a state *not* to release information pursuant to a framework, such as this rule, that applies equally to both state and private actors. Thus, in *Reno v. Condon*, 528 U.S. 141 (2000), the Supreme Court unanimously rejected a Tenth Amendment challenge to a federal law that prohibited states from disclosing a driver's personal information, such as a person's name and address.

The Supreme Court has also made clear that the "anti-commandeering" principle places no constraint on the federal government's ability to impose conditions on the receipt of federal funds. See *New York*, 505 U.S. at 168–69, 173. Pursuant to explicit congressional authority, the federal government has expended and is expending substantial funds in connection with the housing of immigration detainees by non-federal entities. The conditions attached to the receipt of those funds—funds which recipients are free to accept or reject as they please—do not implicate the Tenth Amendment. See *id.*

Second, the commenters' invocation of the Guarantee Clause of Article IV of the Constitution also fails. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form