AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism/Non-Commandeering

**Lunn v. Commonwealth, 477 Mass. 517** (MA 2017)

*Sreynuon Lunn was arrested in Boston for unarmed robbery and held in jail awaiting trial in 2016. Lunn was born to Cambodian parents in a refugee camp in Thailand and brought to the United States as a child and received legal residence. As an adult, however, he had been convicted of several crimes, and so his legal residency was revoked. Nonetheless, efforts to deport him had failed since no other country would accept him as a citizen.*

*While he was being held in Boston, the United States Department of Homeland Security issued a civil immigration detainer against him, requesting that the Massachusetts authorities hold him for up to two days after he would otherwise be released so that arrangements could be made to transfer him to federal custody. When Lunn’s trial date arrived in 2017, the state was not ready to mount a prosecution and so the charges against him were dismissed. The local judge declined Lunn’s request that he be released at that point, and after being detained in a holding cell for several hours the federal government was able to take custody of him.*

*The next day Lunn petitioned the Boston municipal court to release him on the grounds that his detention in the Boston jail after his state criminal charges were dismissed was unlawful. Although Lunn was no longer in state custody at that point, the local court held the matter over for resolution and the state appealed to the state supreme court asking that the petition be dismissed as moot. The state supreme court unanimously determined that Lunn’s petition should be dismissed as moot since he was no longer in state custody, but also ruled that state officials had no authority to hold individuals in state custody in pursuance of a federal civil immigration detainer.*

*Since efforts to deport Lunn continued to fail, he was again released by federal authorities. He was later arrested on new robbery charges in Massachusetts.*

JUDGE LENK.

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The United States Supreme Court has explained that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," *Arizona* v. *United States* (2012), and that the Federal administrative process for removing someone from the country "is a civil, not criminal, matter." . . .

It is undisputed in this case that holding someone in circumstances like this, against his or her will, constitutes an arrest under Massachusetts law. The question before us, therefore, is whether Massachusetts court officers have the authority to arrest someone at the request of Federal immigration authorities, pursuant to a civil immigration detainer, solely because the Federal authorities believe the person is subject to civil removal. There is no Federal statute that confers on State officers the power to make this kind of an arrest. The question we must answer is whether the State law of Massachusetts authorizes such an arrest. . . .

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Significantly, the administrative proceedings brought by Federal immigration authorities to remove individuals from the country are civil proceedings, not criminal prosecutions. . . . This is true even where the alleged basis for removal is the commission of a criminal offense. . . . Removal proceedings are heard and decided by executive branch immigration judges appointed by the United States Attorney General, who operate within the Department of Justice's Executive Office for Immigration Review.

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The United States, in its brief as amicus curiae, concedes that compliance by State authorities with immigration detainers is voluntary, not mandatory. The government's concession is well founded for at least two reasons. First, the act nowhere purports to authorize Federal authorities to require State or local officials to detain anyone. . . . Second, the Tenth Amendment to the United States Constitution prohibits the Federal government from compelling States to employ their resources to administer and enforce Federal programs. *Printz v. United States* (1997). . . .

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What happened in this case . . . was plainly an arrest within the meaning of Massachusetts law. Lunn was physically detained in a holding cell, against his will, for several hours. He was otherwise entitled to be free, as no criminal charges were then pending against him and there was no other basis under Massachusetts law to hold him. The sole basis for holding him was the civil immigration detainer. The question, then, is whether the court officers who held him had the authority to arrest him on the basis of a civil detainer.

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Under the common law of Massachusetts, police officers have the authority to make warrantless arrests, but only for criminal offenses, and then only in limited circumstances. First, an officer has authority to arrest without a warrant any person whom he or she has probable cause to believe has committed a felony. Second, an officer has authority to arrest without a warrant any person who commits a misdemeanor, provided the misdemeanor involves an actual or imminent breach of the peace, is committed in the officer's presence, and is ongoing at the time of the arrest or only interrupted by the arrest.

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. . . . [N]o party or amicus has identified a single Massachusetts statute that authorizes a Massachusetts police officer or court officer, directly or indirectly, to arrest in the circumstances here, based on a Federal civil immigration detainer. Simply put, there is no such statute in Massachusetts.

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The United States, as amicus curiae, asks us to hold that officers in Massachusetts have "inherent authority" to carry out the detention requests made in Federal civil immigration detainers — essentially, to make arrests for Federal civil immigration matters as a form of cooperation with the Federal authorities.

. . . . [I]t is questionable whether a theory of "inherent" or "implicit" State authority continues to be viable in the immigration context after the United States Supreme Court's decision in *Arizona,* which severely curtailed, on Federal preemption grounds, the power of State and local police to act in Federal immigration matters. . . .

As we have said, the common law and the statutes of this Commonwealth are what establish and limit the power of Massachusetts officers to arrest. There is no history of "implicit" or "inherent" arrest authority having been recognized in Massachusetts that is greater than what is recognized by our common law and the enactments of our Legislature. Where neither our common law nor any of our statutes recognizes the power to arrest for Federal civil immigration offenses, we should be chary about reading our law's silence as a basis for affirmatively recognizing a new power to arrest — without the protections afforded to other arrestees under Massachusetts law — under the amorphous rubric of "implicit" or "inherent" authority. Recognizing a new common-law power to effect a Federal civil immigration arrest would also create an anomaly in our common law. . . .

The prudent course is not for this court to create, and attempt to define, some new authority for court officers to arrest that heretofore has been unrecognized and undefined. The better course is for us to defer to the Legislature to establish and carefully define that authority if the Legislature wishes that to be the law of this Commonwealth.

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