

HOUSE No. 3870

The Commonwealth of Massachusetts



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August 1, 2017

To the Honorable Senate and House of Representatives,

Last week, the Supreme Judicial Court issued a decision in *Commonwealth v. Lunn*. The Court ruled that, in the absence of express statutory authority, state and local law enforcement officers may not honor requests from United States Immigration and Customs and Enforcement to detain removable aliens.

The *Lunn* decision is contrary to the past consistent practice of many state and local agencies. For years, many local police departments and the Trial Court have cooperated with Immigration and Customs Enforcement to ensure that dangerous criminals can be removed from the United States by the federal authorities in order to keep our Commonwealth and its communities safer.

I have long believed and repeatedly said that local officials are in the best position to decide whether and to what extent they should cooperate with the federal government on immigration detention matters. In order to ensure the ability of cities and towns to decide for themselves whether to cooperate with Immigration and Customs Enforcement requests for detention, I am submitting for your consideration “An Act Empowering Law Enforcement to Cooperate with the United States to Transfer Custody of Convicted Criminals.”

This legislation fills the statutory gap identified by the SJC. It authorizes, but does not require, state and local law enforcement to honor detention requests from Immigration and Customs Enforcement for aliens who pose a threat to public safety. The legislation sets forth

minimum criteria for a person to be deemed such a threat, focusing our efforts on those who have been convicted of serious crimes such as murder, rape, domestic violence and narcotics or human trafficking. Any agency seeking to use this new authority would be required to issue a policy identifying supervisory officers who would initially authorize detention of people who pose a threat to public safety and have been previously convicted of one or more of the serious crimes set forth in the legislation. Any detention in excess of 12 hours would be subject to judicial review.

Finally, any detention authorized by this bill would be limited to aliens already independently in state custody because of new state criminal charges or sentences: state and local police would not be empowered to proactively arrest people for immigration law violations. Rather, they would be empowered to detain a person who is a threat to public safety for a limited period of time if that person were about to be released and the federal authorities were unable to immediately take the person into their custody.

I urge your prompt enactment of this legislation.

Respectfully submitted,

Charles D. Baker,
Governor

HOUSE No. 3870

Message from His Excellency the Governor recommending legislation relative to empowering law enforcement to cooperate with the united states to transfer custody of convicted criminals.

The Commonwealth of Massachusetts

In the One Hundred and Ninetieth General Court
(2017-2018)

An Act empowering law enforcement to cooperate with the United States to transfer custody of convicted criminals.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 276 of the General Laws is hereby amended by inserting after
2 section 20R the following section:-

3 Section 20S. (a) Any employee of the Commonwealth, or a public instrumentality or
4 political subdivision thereof, who holds police powers or the powers of a sheriff or deputy
5 sheriff, including but not limited to municipal police officers, court officers, and state troopers,
6 and who has lawful custody of a person may, upon receipt of (1) a written request from United
7 States Immigration and Customs Enforcement requesting detention of such person on the
8 grounds that there is probable cause that such person is a removable alien and (2) an
9 administrative warrant for arrest or warrant of removal/deportation, detain such person for a
10 reasonable period of time after such person would otherwise be released from custody in order to
11 transfer custody of such person to United States Immigration and Customs Enforcement,
12 provided that a supervisory officer of such employee’s agency has, in accordance with a policy
13 promulgated in accordance with subsection (c), first determined that there are specific facts

14 indicating that the person to be detained poses a threat to public safety; and further provided that
15 such person be provided with a copy of such written request; and further provided that in no
16 circumstances shall such detention exceed 12 hours unless an appropriate judicial officer shall
17 have made a probable cause determination under the procedure set forth in subsection (d).

18 (b) As used in subsection (a), “specific facts indicating that the person to be detained
19 poses a threat to public safety” shall mean that, at a minimum, any of the following facts are true
20 with respect to such person:

21 (1) the person has engaged in or is suspected of terrorism or espionage, or otherwise
22 poses a danger to national security;

23 (2) the person has been convicted of an offense of which an element was active
24 participation in a criminal street gang, as defined in 18 U.S.C. § 521(a);

25 (3) the person has been convicted of an offense classified as a felony, other than a state or
26 local offense for which an essential element was the person’s immigration status;

27 (4) the person has been convicted of an aggravated felony, as defined under 8 U.S.C. §
28 1101(a)(43); or

29 (5) the person has been convicted of a crime of (i) domestic violence; (ii) sexual abuse or
30 exploitation; (iii) trafficking in persons in violation of sections 50 or 51 of chapter 265 or like
31 violations of the law of another state, the United States or a military, territorial or Indian tribal
32 authority; (iv) burglary; (v) unlawful possession or use of a firearm; (vi) drug distribution or
33 trafficking; (vii) second or subsequent operating or driving under the influence; or (viii) any
34 other offense for which the person has been sentenced to time in custody of 180 days or more.

35 (c) Each agency of the Commonwealth or any public instrumentality or political
36 subdivision of the Commonwealth that chooses to allow its employees to exercise the authority
37 granted by subsection (a) shall promulgate a written policy designating which supervisory
38 officers may make the determination required by subsection (a) before a person is detained and
39 the criteria such supervisory officer shall use in making such determination.

40 (d) A determination of probable cause for detention shall be made by an appropriate
41 judicial officer and promptly reduced to writing. The appropriate judicial officer shall consider
42 any information presented by the detaining agency, whether or not known at the time of initial
43 detention. The detaining agency shall present the information under oath or affirmation or under
44 the pains and penalties of perjury, and may present the information orally, in person or by any
45 other means, or in writing. If presented in writing, the information may be transmitted to the
46 appropriate judicial officer by facsimile transmission or by electronic mail or by such other
47 electronic means as may be found acceptable by the court. The determination of probable cause
48 for detention shall be an ex parte proceeding. The person detained shall have no right to appear,
49 either in person or by counsel. If the judicial officer determines that there is not probable cause
50 to believe the person detained is a removable alien, then the judicial officer shall order that the
51 person be released forthwith. Such a determination and order shall be filed in the District Court
52 having jurisdiction over the location of the detention, together with all written information
53 submitted by the detaining agency. Such documents shall be filed separately from the records of
54 criminal cases, and shall be open for inspection by the public. If a determination under this
55 subsection is necessary, the detaining agency shall present the information necessary to obtain
56 such determination to the appropriate judicial officer as soon as reasonably possible after the
57 detention begins, but no later than 12 hours after the detention begins.

58 (e) This section shall not be construed to give rise to a private right of action and shall not
59 be construed so as to make unlawful any arrest in this commonwealth which would otherwise be
60 lawful.