

## STATE COURTS, IMMIGRATION, AND POLITICS IN THE TRUMP ERA

*Cynthia Boyer\**

With its long tradition of welcoming foreigners from all continents, John Fitzgerald Kennedy defined America as a “nation of immigrants.”<sup>1</sup> An observation that still resonates nowadays.<sup>2</sup> The history of immigration in the United States has focused on attempts to control legal and illegal immigration.<sup>3</sup> Legislation enacted in 1790 was already beginning to regulate both.<sup>4</sup> Since then, many immigration laws have been passed, and these laws are a reflection of the historical context, corresponding to the fears and hopes of the era.<sup>5</sup> However mass immigration also generates many myths and the concept of mass immigration is deeply politicized.<sup>6</sup> Although international migration is gaining momentum, no global mechanism has been put in place to regulate the movement of people, and state sovereignty remains to this day the fundamental principle that frames immigrants and the appreciation of their rights.<sup>7</sup>

The political debate and its scale are decisive elements and the outcome of political conflicts “are frequently won or lost by the success that the contestants have in getting the audience involved in the fight or in excluding it, as the case may be,”<sup>8</sup> and this is even more fundamental in connection with immigration that mobilizes an

---

\* PhD in Political Science Assistant Professor, Institut Champollion/Institut Maurice Hauriou (University Toulouse Capitole), France.

<sup>1</sup> JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1964).

<sup>2</sup> See, e.g., Deborah Schildkraut, *Immigrants Are More Welcome than You'd Think*, TUFTSNOW (July 3, 2019), <https://now.tufts.edu/articles/immigrants-are-more-welcome-you-d-think>.

<sup>3</sup> See Robert H. Wood, *The Crushing of a Dream: DACA, DAPA, and the Politics of Immigration Law Under President Obama*, 22 BARRY L. REV. 27, 27 (2016).

<sup>4</sup> See *id.*

<sup>5</sup> See *id.* at 28.

<sup>6</sup> See, e.g., David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 526 (2007).

<sup>7</sup> See John C. Eastman, *The Power to Control Immigration is a Core Aspect of Sovereignty*, 40 HARV. J.L. & PUB. POL'Y 9, 11 (2017).

<sup>8</sup> E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 4 (1960).

important part of the political discourse, particularly from the executive branch. The judiciary has always shown great deference to the executive branch and its margin of appreciation in immigration matters.<sup>9</sup> The plenary power doctrine on immigration continues to recognize the political branches as having a very wide discretion in immigration matters.<sup>10</sup>

This power varies, but the judiciary's deference to Congress or the executive branch is undeniable but not systematic.<sup>11</sup> Also, in the United States, major variation exists between liberal states, and conservative states and the judiciary is not one uniform institution.<sup>12</sup> State courts are influenced by politics and ideology and exhibit significant variation in decision outcomes and their appreciation of due process.<sup>13</sup> The triadic model of justice in Martin Shapiro's approach—two parties presenting a conflict to a neutral third—that typically balances between the interests of the state with individual liberties<sup>14</sup> is not available to mediate the political debate to which immigrants are subject. What, therefore, is the role of the judiciary particularly in light of the dualism of American courts, and can we talk about state courts' "activism"?

This Article discusses the intersection between policy that regulates immigrant inflows and outflows; politics and its myths; and the judiciary at the state level in the Trump era. The difficulty of generating the balance between human dignity and the right of a state to manage its migration policy in accordance with the U.S. Constitution in a globalized situation. This Article further seeks to address the role of the state courts as a rampart to the political branches and guardian of fundamental freedoms of the state judiciary, as an adjunct to the policy and initiatives of the federal executive in the Trump era, the rule of law, and the judiciary, in the exercise of its prerogatives.

---

<sup>9</sup> See Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007).

<sup>10</sup> See *id.*

<sup>11</sup> See Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 1, 3 (2010).

<sup>12</sup> See Alicia Bannon, *How Secretive Money Is Influencing the Judicial System*, TIME (Dec. 14, 2017), <http://time.com/5063724/state-supreme-court-elections-dark-money/>.

<sup>13</sup> See Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 31; Bannon, *supra* note 12.

<sup>14</sup> See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1, 63 (1981).

## I. STATE COURTS' RESISTANCE TO TRUMP'S IMMIGRATION POLICY

At the state level, Donald Trump's immigration orientation generates virulent disapproval.<sup>15</sup> This position of opposition is accompanied by a reaffirmation of the sanctuary status of state or city, a position based on a corpus of practical and administrative measures.<sup>16</sup> It is mainly founded upon the principle of subsidiarity as well as the degree to which power is divided between the federal state and the federated states, with the battle of the adoption of "sanctuary" status located both outside and within state courts.<sup>17</sup>

### A. *Immigration in the Trump Era*

According to the U.S. Department of Justice (DOJ), a sanctuary jurisdiction is one which "may have state laws, local ordinances, or departmental policies limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws."<sup>18</sup>

Even though Berkeley embodies the first U.S. city to become a "sanctuary city," due to the fact that it passed a resolution in 1971 to protect sailors resisting the Vietnam War,<sup>19</sup> the first application of sanctuary principles to immigration enforcement appeared in 1979 when the city of Los Angeles issued Special Order No. 40.<sup>20</sup> Indeed, this police mandate implemented by the Los Angeles Police Department stated that "[o]fficers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest nor book persons for violation of Title 8, Section 1325 of the United States Immigration Code (Illegal Entry)."<sup>21</sup> Furthermore,

---

<sup>15</sup> See, e.g., Dara Lind, *Sanctuary Cities, Explained*, VOX (Mar. 8, 2018), <https://www.vox.com/policy-and-politics/2018/3/8/17091984/sanctuary-cities-city-state-illegal-immigration-sessions>.

<sup>16</sup> See, e.g., William Cummings, *Federal Appeals Court Rules Trump Sanctuary City Order Unconstitutional*, USA TODAY (Aug. 1, 2018), <https://www.usatoday.com/story/news/politics/2018/08/01/sanctuary-cities-trump-cant-pull-federal-funds-court-rules/883354002/>.

<sup>17</sup> See Christina Goldbaum, *State Courts Become Battleground over Trump's Sanctuary Cities Policy*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/nyregion/sanctuary-cities-state-courts.html>; Ilya Somin, *Fight Over Sanctuary Cities Is Also a Fight over Federalism*, HILL (Apr. 7, 2018), <https://thehill.com/opinion/immigration/381998-fight-over-sanctuary-cities-is-also-a-fight-over-federalism>.

<sup>18</sup> OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 7 n.44 (2007), <https://www.justice.gov/oig/reports/OJP/a0707/final.pdf>.

<sup>19</sup> Harold Bauder, *Sanctuary Cities: Policies and Practices in International Perspective*, 55 INT'L MIGRATION 174, 176 (2016).

<sup>20</sup> See OFFICE OF THE CHIEF OF POLICE, L.A. POLICE DEP'T, SPECIAL ORDER NO. 40 (Nov. 27, 1979), [http://assets.lapdonline.org/assets/pdf/SO\\_40.pdf](http://assets.lapdonline.org/assets/pdf/SO_40.pdf).

<sup>21</sup> *Id.*

the mandate stated that “[t]he Department also recognizes that the Constitution of the United States guarantees equal protection to all persons within its jurisdiction. In view of those principles, it is the policy of the Los Angeles Police Department that undocumented alien status in itself is not a matter for police action.”<sup>22</sup> Many jurisdictions have followed this same direction in nine U.S. states<sup>23</sup> and more than 500 jurisdictions,<sup>24</sup> with these numbers having constantly risen since the inauguration of President Trump.<sup>25</sup> It was in 2015 that this concept burst into the national debate surrounding immigration.<sup>26</sup> Indeed, during the course of July 2015, an undocumented Mexican immigrant shot and killed a woman walking on a pier in San Francisco.<sup>27</sup> The man had been convicted on several occasions of immigration and drug crimes.<sup>28</sup> Since a non-cooperation policy with the immigration authorities existed at the local level, he had been released on all of these occasions, with San Francisco officials ignoring the request to hand him over to their federal counterparts.<sup>29</sup>

This seemingly for-nothing murder<sup>30</sup> revived the debate surrounding the cooperation between federal law enforcement agencies responsible for the fight against illegal immigration and state, county, and city police whose focus is delinquency and not control (papers).<sup>31</sup> The approach of the presidential election

---

<sup>22</sup> *Id.*

<sup>23</sup> See Brian Griffith & Jessica M. Vaughan, *Maps: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGR. STUD., <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> (last visited July 1, 2019).

<sup>24</sup> Stephen Dinan, *Number of Sanctuary Cities Nears 500*, WASH. TIMES (Mar. 14, 2017), <https://www.washingtontimes.com/news/2017/mar/14/number-sanctuary-cities-nears-500-report/>.

<sup>25</sup> *See id.*

<sup>26</sup> See Jeremy Stahl, *The Exploitation of “Beautiful Kate”*, SLATE (Aug. 10, 2017), <https://slate.com/news-and-politics/2017/08/the-death-of-kate-steinle-and-the-rise-of-donald-trump.html>.

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> The jury acquitted Jose Ines Garcia Zarate of the murder of Kathryn Michelle Steinle, the victim killed by a ricocheting bullet fired from a gun held by Zarate. See Richard Gonzales, *Immigrant Acquitted of San Francisco Killing Sentenced on Lesser Gun Charge*, NAT’L PUB. RADIO (Jan. 5, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/05/576123068/immigrant-acquitted-of-san-francisco-killing-sentenced-on-lesser-gun-charge>. However, the jurors found him guilty of being an ex-felon in possession of a firearm. *Id.* Zarate was sentenced in January 2018 to time served, roughly thirty months. *Id.*

<sup>31</sup> Compare Stahl, *supra* note 26 (analyzing 2016 Republican presidential candidate Donald Trump’s rhetoric on sanctuary cities), with CNN Exclusive: *Hillary Clinton’s First National Interview of 2016 Race*, CNN: PRESS ROOM (July 7, 2015), <http://cnnpressroom.blogs.cnn.com/2015/07/07/cnn-exclusive-hillary-clintons-first-national-interview-of-2016-race/> (discussing 2016 Democratic presidential candidate Hillary Clinton’s position on sanctuary cities).

immediately gave a national dimension to the case. Indeed, then-Democratic presidential candidate Hillary Clinton, who became the most high-profile Democrat, declared that San Francisco should have cooperated with agents at Immigration and Customs Enforcement (ICE) who requested his detention.<sup>32</sup> “The city made a mistake, not to deport someone that the federal government strongly felt should be deported,” she stated in an interview.<sup>33</sup> “So I have absolutely no support for a city that ignores the strong evidence that should be acted on.”<sup>34</sup> During the 2016 presidential election campaign, Donald Trump frequently highlighted the case as he took a stand with respect to tighter immigration controls and penalizing the so-called sanctuary cities for their absence or lack of cooperation with federal agents.<sup>35</sup>

In remarks delivered in Phoenix, Arizona, on August 31, 2016, then-Republican presidential candidate Donald Trump devoted the most detailed and precise speech of his campaign to the issue of immigration. “Tonight is not going to be a normal rally speech,” he said. “Instead, I am going to deliver a detailed policy address on one of the greatest challenges facing our country today: immigration.”<sup>36</sup> The issue of immigration was a major topic during the electoral campaign, as “70% of registered voters [said] that immigration [was] very important to their vote for president in 2016, up from 41% in September 2012 and 54% in May 2008.”<sup>37</sup>

Donald Trump’s position has allowed him to gain significant voter support with a simple and effective rhetorical image: building a wall separating the United States from Mexico, not only as a physical barrier of protection but also a mental barrier of identity conservation aligned with the slogan “Make America Great Again.”<sup>38</sup>

---

<sup>32</sup> *CNN Exclusive: Hillary Clinton’s First National Interview of 2016 Race*, *supra* note 31.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Daniel Arkin & Corky Siemaszko, *Shooting of Kathryn Steinle: San Francisco Pier Killing Suspect Found Not Guilty of Murder*, NBC NEWS (Dec. 1, 2017), <https://www.nbcnews.com/news/us-news/jose-ines-garcia-zarate-san-francisco-pier-killing-suspect-found-n823351>.

<sup>36</sup> *Full Text: Donald Trump Immigration Speech in Arizona*, POLITICO (Aug. 31, 2016), <https://www.politico.com/story/2016/08/donald-trump-immigration-address-transcript-22761>.

<sup>37</sup> PEW RESEARCH CTR., 2016 CAMPAIGN: STRONG INTEREST, WIDESPREAD DISSATISFACTION 34 (2016), <http://www.people-press.org/wp-content/uploads/sites/4/2016/07/07-07-16-Voter-attitudes-release.pdf>.

<sup>38</sup> See Aoife Barry, *What Made Trump’s ‘Make America Great Again’ Slogan So Powerful?*, JOURNAL (Nov. 9, 2016), <https://www.thejournal.ie/trump-slogan-make-america-great-again-3071552-Nov2016/>; John Gramlich, *Trump Voters Want to Build the Wall, but Are More Divided on Other Immigration Questions*, PEW RES. CTR. (Nov. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/11/29/trump-voters-want-to-build-the-wall-but-are-more-divided-on-other-immigration-questions/>.

Tinged with nostalgia, it concerned an America not lulled by the multicultural revolution.<sup>39</sup> During the transition period between the election of Donald Trump and his inauguration, cities and states concerned about Donald Trump's approach to immigration started to organize their opposition.<sup>40</sup> New York State announced enhanced legal assistance for immigrants.<sup>41</sup> The California Senate initiated proceedings to adopt the California Values Act.<sup>42</sup> As soon as he was inaugurated in January 2017, Donald Trump concentrated his immigration policy with a series of executive orders,<sup>43</sup> as the U.S. Constitution assigns responsibility for the regulation of immigration to the federal government because immigration concerns aspects of the country's external relations with other countries.<sup>44</sup> However, the challenge of immigration on American territory is characterized by a multi-scalar aspect, and the modes of regulation at the level of the federated states fragment and divide the country substantially.<sup>45</sup>

In January 2017, President Trump issued a series of executive orders that have provided additional resources for border security and immigration law enforcement. On January 27, 2017, to implement this policy, Donald Trump issued Executive Order 13,769 entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States," which suspended for ninety days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.<sup>46</sup> This travel ban on certain foreign

---

<sup>39</sup> See Barry, *supra* note 38; Thomas D. Kligenstein, *Our House Divided: Multiculturalism vs. America*, AM. MIND (Oct. 31, 2018), <https://americanmind.org/essays/our-house-divided-multiculturalism-vs-america/>.

<sup>40</sup> See, e.g., Matthew DeFour, *Madison Won't Change Immigration Policies if Donald Trump Cracks Down on 'Sanctuary Cities'*, J. TIMES (Nov. 16, 2016), [https://journaltimes.com/news/state-and-regional/madison-won-t-change-immigrant-policies-if-donald-trump-cracks/article\\_4f4981fe-1267-5e6b-a452-e332b8f2f1a1.html](https://journaltimes.com/news/state-and-regional/madison-won-t-change-immigrant-policies-if-donald-trump-cracks/article_4f4981fe-1267-5e6b-a452-e332b8f2f1a1.html); Kori Rumore, *Chicago's History as a Sanctuary City*, CHI. TRIB. (Oct. 13, 2017), <https://www.chicagotribune.com/news/ct-chicago-sanctuary-history-htmlstory.html?>

<sup>41</sup> See *NY Expands Legal Aid Program for Immigrants*, U.S. NEWS (Dec. 23, 2018), <https://www.usnews.com/news/best-states/new-york/articles/2018-12-23/ny-expands-legal-aid-program-for-immigrants>.

<sup>42</sup> California Senate Bill 54, the California Values Act, became law in January 2018. See S.B. 54, 2017-18 Leg., Reg. Sess. (Cal. 2018); Jazmine Ulloa, *California Becomes 'Sanctuary State' in Rebuke of Trump Immigration Policy*, L.A. TIMES (Oct. 5, 2017), <https://www.latimes.com/politics/la-pol-ca-brown-california-sanctuary-state-bill-20171005-story.html>; Press Release, Am. Civil Liberties Union N. Cal, ACLU Applauds Governor Brown for Signing California Values Act (SB 54) (Oct. 5, 2017), <https://www.aclunc.org/news/aclu-applauds-governor-brown-signing-california-values-act-sb-54>.

<sup>43</sup> See, e.g., Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

<sup>44</sup> See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

<sup>45</sup> See Claire Felter & Danielle Renwich, *The U.S. Immigration Debate*, COUNCIL ON FOREIGN REL. (July 2, 2018), <https://www.cfr.org/backgrounder/us-immigration-debate-0>.

<sup>46</sup> See 8 U.S.C. § 1187(a)(12) (2012); Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27,

nationals and refugees generated a nationwide reaction of opposition.<sup>47</sup> It was then revoked by Executive Order 13,780 of March 6, 2017, entitled “Protecting the Nation From Foreign Terrorist Entry Into the United States.”<sup>48</sup> Following the results of a review that was ordered in Executive Order 13,780, on September 24, 2017, President Trump issued Presidential Proclamation 9645, entitled “Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats,” which aimed “to restrict and limit the entry of nationals of [seven] countries found to be ‘inadequate’ with respect to the baseline described in subsection (c) of this section: Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen.”<sup>49</sup> The battleground appeared in federal courts with respect to opposition to the ban, considering that it targeted Muslims in particular (the “Muslim ban”), interpreting its elements as unconstitutional elements.<sup>50</sup> Several suits reached the federal circuit courts of appeals,<sup>51</sup> and the Supreme Court upheld the travel ban, Presidential Proclamation 9645, in *Trump v. Hawaii*<sup>52</sup> on June 26, 2018, as constitutional.<sup>53</sup>

At the local level, it was the Executive Order 13,768 issued on January 25, 2017, entitled “Enhancing Public Safety in the Interior of the United States,” that targeted sanctuary jurisdictions, outlining their unlawfulness with regard to federal legislation and their negative impact on the security of the country.<sup>54</sup> Through this executive order, President Trump reiterated his position, stating: “Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm

---

2017); *Trump’s Executive Order: Who Does Travel Ban Affect?*, BBC NEWS (Feb. 10, 2017), <https://www.bbc.com/news/world-us-canada-38781302>.

<sup>47</sup> See, e.g., Lauren Gambino et al., *Thousands Protest Against Trump Travel Ban in Cities and Airports Nationwide*, GUARDIAN (Jan. 29, 2017), <https://www.theguardian.com/us-news/2017/jan/29/protest-trump-travel-ban-muslims-airports>.

<sup>48</sup> Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

<sup>49</sup> Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

<sup>50</sup> See, e.g., *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 573, 577, 603, 605 (4th Cir. 2017) (en banc) (affirming a preliminary injunction against the Muslim ban in part and vacating the injunction only to the extent it was directed at the President), *vacated and remanded on other grounds*, 138 S. Ct. 353 (2017).

<sup>51</sup> See, e.g., *Hawaii v. Trump*, 859 F.3d 741, 756 (9th Cir.), *cert. granted sub nom. Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017), *and vacated and remanded*, 138 S. Ct. 377 (2017); *Washington v. Trump*, 858 F.3d 1168, 1169 (9th Cir. 2017).

<sup>52</sup> *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>53</sup> *Id.* at 2423.

<sup>54</sup> Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 30, 2017).

to the American people and to the very fabric of our Republic.”<sup>55</sup> Furthermore, it ensured “that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law . . . .”<sup>56</sup>

Through section 9 of the executive order, President Trump recalled the executive’s prerogative by asserting: “It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.”<sup>57</sup> This federal statute prohibits local and state governments and agencies from enacting laws or policies that shall limit with the Department of Homeland Security (DHS) “information regarding the citizenship or immigration status” of individuals.<sup>58</sup> Yet, there is no requirement on actions to be taken for cooperation. President Trump in his fight against illegal immigration targeted sanctuary cities, asserting: “Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States,” and by ceasing their eligibility to receive federal grants as directed in section 9(a).<sup>59</sup> Section 9(a) provides,

In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.<sup>60</sup>

The executive order does not define the term “sanctuary.”<sup>61</sup> This position seems deliberate in order to encourage jurisdictions whose local policy would otherwise protect local illegal immigration to cooperate with ICE for fear of losing federal funding. The designation

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 8 U.S.C. § 1373(a) (2012).

<sup>59</sup> Exec. Order No. 13,768, 82 Fed. Reg. at 8,799.

<sup>60</sup> *Id.*

<sup>61</sup> *See id.* (omitting definition of sanctuary); *see also Summary of Executive Order “Enhancing Public Safety in the Interior of the United States”*, AM. IMMIGR. COUNCIL (May 19, 2017), <https://americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order> (“[Executive Order 13,768] authorizes DHS to designate ‘sanctuary jurisdictions,’ without providing any definition of the term, but does not immediately strip funding from ‘sanctuary cities.’”).



of a sanctuary city is left to the discretion of the Secretary of DHS: “The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction.”<sup>62</sup>

House Bill 3003, “No Sanctuary for Criminals Act,” with support from President Trump, was passed by the House of Representatives following the same perspective.<sup>63</sup> It was received in the Senate on July 10, 2017, and has been on standby ever since.<sup>64</sup>

These various measures have led the state courts to position themselves. The immigration structure is almost completely intertwined with the criminal justice system, which is both a state and a local phenomenon.<sup>65</sup>

### B. *The Intersection of ICE Detainers with State Law*

A few state courts in the Trump era have ruled on the degree to which state sovereignty limits the degree to which state and local law authorities may enforce federal immigration policy, sometimes resulting in discord.<sup>66</sup> State judiciaries have remained critical components of political resistance.<sup>67</sup>

#### 1. *Lunn v. Commonwealth*

*Lunn v. Commonwealth* is a ruling that is part of an activist movement advanced by several courts of opposition, which have become sanctuary courts with regard to the executive branch’s position and defiant of a series of other state court decisions.<sup>68</sup> The

---

<sup>62</sup> Exec. Order No. 13,768, 82 Fed. Reg. at 8801.

<sup>63</sup> H.R. 3003, 115th Cong. § 2 (2017).

<sup>64</sup> See *id.*; see also *All Actions – H.R. 3003 — 115<sup>th</sup> Congress (2017-2018)*, LIBR. OF CONGRESS, <https://www.congress.gov/bill/115th-congress/house-bill/3003/all-actions> (last visited Mar. 6, 2019) (showing that House Bill 3003 was received in the Senate on July 10, 2017).

<sup>65</sup> See, e.g., *Cisneros v. Elder*, No. 18CV30549, 2018 Colo. Dist. LEXIS 3388, at \*1–2 (Dist. Ct. Dec. 6, 2018).

<sup>66</sup> See Jonathan Miller, *Beyond the Courts: The Role of State and Local Governments in Supporting Immigrant Communities in the Trump Era*, AM. CONST. SOC’Y (July 17, 2018), <https://www.acslaw.org/acsblog/beyond-the-courts-the-role-of-state-and-local-governments-in-supporting-immigrant-communities-in-the-trump-era/> (“[State] [c]ourts and others have been seeking to find the right balance between the reluctance to cooperate and the mandates of federal law. These cases have been about a number of issues, but they generally boil down to states and localities preserving their access to federal funds without being required to align their resources with new federal immigration enforcement priorities.”); see, e.g., *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017).

<sup>67</sup> See Miller, *supra* note 66.

<sup>68</sup> See Sean Turley, Note, *Death by Fifty Cuts: Exporting Lunn v. Commonwealth to Maine and the Prospects for Waging a Frontal Assault on the ICE Detainer System in State Courts*, 70

*Lunn* ruling represents the first ruling issued by the highest judicial court at the state level.<sup>69</sup> The legal ground in this case rests on the interpretation of the intersection between ICE detainer law and state law.<sup>70</sup>

In response to the terrorist attacks perpetrated on U.S. soil on September 11, 2001, the Bush administration reorganized the federal government's agencies.<sup>71</sup> ICE and Customs and Border Protection (CBP) agencies were established by President George W. Bush with an antiterrorism mandate.<sup>72</sup> Following this reorganization, a new Department of Homeland Security was created, and at the same time, ICE was formed in 2003 and placed under the supervision of the Department of Homeland Security.<sup>73</sup> ICE conducts enforcement and referral operations, which are operations that involve location activities for undocumented immigrants in the United States, as well as detention and deportation activities that are carried out by 20,000 people employed by the U.S. agency.<sup>74</sup> However, ICE delegates some immigrant screening to back-end enforcement,<sup>75</sup> whose primary criteria in the screening process is criminality.<sup>76</sup> Prior to the Trump administration, the Obama administration's activities focused primarily on undocumented immigrants who had committed serious crimes.<sup>77</sup> The Trump administration has expanded this mandate to

---

ME. L. REV. 236, 238–39 (2018); *infra* Part II.

<sup>69</sup> See *Lunn v. Commonwealth: Massachusetts Supreme Judicial Court Holds that Local Law Enforcement Lacks Authority to Detain Pursuant to ICE Detainers*, 131 HARV. L. REV. 666, 667 (2017).

<sup>70</sup> See *id.* at 666–67.

<sup>71</sup> See EXEC. OFFICE OF PRESIDENT GEORGE W. BUSH, THE DEPARTMENT OF HOMELAND SECURITY 1 (June 2002), <https://www.dhs.gov/xlibrary/assets/book.pdf>.

<sup>72</sup> See 6 U.S.C. § 111 (2012) (establishing the Department of Homeland Security with the mission to prevent terrorist attacks and other functions related to securing the U.S.); Haley Hinkle & Rachel Levinson-Waldman, *The Abolish ICE Movement Explained*, BRENNAN CTR. FOR JUST. (July 30, 2018), <https://www.brennancenter.org/blog/abolish-ice-movement-explained> (explaining that ICE and CBP were created by President George W. Bush in response to September 11 terrorist attacks).

<sup>73</sup> See *History*, U. S. IMMIGR. & CUSTOM ENFORCEMENT, <https://www.ice.gov/history> (last updated July 10, 2018).

<sup>74</sup> See *Enforcement and Removal Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/ero> (last updated July 31, 2018); *What We Do*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/overview> (last updated Dec. 4, 2018).

<sup>75</sup> See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 846 n.135 (2007).

<sup>76</sup> See Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 115, 125–30 (2012) (exploring possible reasons of the U.S. criminal-immigration convergence).

<sup>77</sup> See Anna O. Law, *This Is How Trump's Deportations Differ from Obama's*, WASH. POST: MONKEY CAGE (May 3, 2017), [https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm\\_term=.ed1200d65527](https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm_term=.ed1200d65527).

target anyone illegally in the United States.<sup>78</sup> Secure communities formalize cooperation with the U.S. government by having their local police inform the federal authorities when they have apprehended illegal aliens.<sup>79</sup> Additionally, they retain the illegal aliens in detention for the purpose of organizing their deportation.<sup>80</sup>

The operations of ICE revolve around two modes of operation to control illegal immigrants in the U.S. The first mode of operation is the notification given by local authorities to ICE in advance of the release date of an illegal immigrant who has been arrested and incarcerated.<sup>81</sup> Thus, the ICE agents receive timely notice and then come directly to take custody of an illegal immigrant.<sup>82</sup> The second alternate mode of operation is the immigration detainer, which consists of a request for an extension of the immigrant's detention for an additional forty-eight hours beyond the planned release date.<sup>83</sup> The detainer appears to be the primary mode of enforcement for ICE.<sup>84</sup> As Judge Hirsh for the Eleventh Judicial Circuit Court of Florida clarified, "Such detainers or requests are not evidence that a crime has been committed, or that someone is in this country illegally. They are not evidence of anything. They simply indicate that ICE believes it has a basis to inquire further as to the status of the person sought."<sup>85</sup>

*Lunn* uses state law to address the constitutionality raised by ICE detainers, which is leading the way for other states and their jurisdictions to address the constitutionality of ICE detainers.<sup>86</sup> The constitutionality of the issue was brought to the Massachusetts Supreme Judicial Court after Sreynuon Lunn, an immigrant arrested by Boston police on larceny charges, was "held by Massachusetts court officers . . . at the request of a Federal immigration officer,

---

<sup>78</sup> *See id.*

<sup>79</sup> *See Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/secure-communities> (last updated Mar. 20, 2018).

<sup>80</sup> *See id.*

<sup>81</sup> *See* U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., DHS FORM 1-247A, IMMIGRATION DETAINER – NOTICE OF ACTION, <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf> (last updated Mar. 2017) [hereinafter ICE, IMMIGRATION DETAINER–NOTICE OF ACTION].

<sup>82</sup> *See Detainers*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/detainers> (last updated Jan. 1, 2019).

<sup>83</sup> *See* ICE, IMMIGRATION DETAINER – NOTICE OF ACTION, *supra* note 81.

<sup>84</sup> *Compare* U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5–6 (2018) (showing 40,536 at-large administrative arrests in FY2018), *with id.* at 9 (showing 177,147 detainers issued in the same period).

<sup>85</sup> *LaCroix v. Junior*, Nos. F17-376 & 17-1770, slip op. at 2 (Fla. Cir. Ct. Mar. 3, 2017), *rev'd*, 263 So. 3d 159 (Fla. Dist. Ct. App. 2018).

<sup>86</sup> *See* Turley, *supra* note 68, at 238–41.

pursuant to a Federal civil immigration detainer.”<sup>87</sup> Lunn appealed his detention and even though he was taken into federal custody, the Massachusetts Supreme Judicial Court agreed to hear the case to set a precedent for future cases on the issue raised in this case.<sup>88</sup> The issue was whether local law enforcement officials as a matter of state law can detain someone at the request of federal immigration authorities via an ICE detainer.<sup>89</sup> First, the court introduced the issue of the case and then clarified its legitimacy on presiding over the matter since it was operating under the state law of Massachusetts:

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.<sup>90</sup>

The rationale espoused in *Lunn* has been cited by other state courts, thus characterizing it as a major ruling in the federal-state political relationship.<sup>91</sup> This case also highlights the importance and weight of state courts in an area that is intended to be reserved for the federal government, but which directly implicates the competences and jurisdictions of the state sovereigns.<sup>92</sup> The decision is based on a legal loophole in the Massachusetts common and statutory law regarding specific arrests of non-U.S. citizens for civil violations of federal laws in Massachusetts.<sup>93</sup> This assessment of the legal vacuum allows the state court to play a major role in the balance of power between the federal and state governments, and positions the state courts in the political foreground on the highly politicized and the undisputedly polarized field of immigration.

---

<sup>87</sup> See *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017).

<sup>88</sup> See *id.* at 1148.

<sup>89</sup> See *id.* at 1146.

<sup>90</sup> See *id.*

<sup>91</sup> See, e.g., *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 532 (App. Div. 2018) (citing *Lunn*, 78 N.E.3d at 1158).

<sup>92</sup> See *Lunn*, 78 N.E.3d at 1159.

<sup>93</sup> See *id.* at 1154–55.

The principle of the Massachusetts court's decision is based on the characterization of the offense, the distinction made between a civil law offense and a criminal law offense that results in a different extended or exclusive jurisdiction.<sup>94</sup> In fact, an offense premised on an illegal presence in the U.S. by an individual is a federal offense.<sup>95</sup> Indeed, the Supreme Court in *Arizona v. United States*<sup>96</sup> held that “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States.”<sup>97</sup> In *Lunn*, the court makes the clear distinction between civil and criminal offenses by asserting that “[t]he detainers are not criminal detainers or criminal arrest warrants,” and thus, become a matter of Massachusetts law.<sup>98</sup>

In the instant ruling, the court concludes that “Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody,”<sup>99</sup> reasserting that “their authority to do so is a question of State law.”<sup>100</sup> The court accentuates this point again by reminding in its decision “[u]nder 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.”<sup>101</sup> Additionally, this is identical to the regulations of Massachusetts's statutes.<sup>102</sup> Narrowing the issue of

---

<sup>94</sup> See *id.* at 1149, 1151, 1159.

<sup>95</sup> 8 U.S.C. § 1227(a)(1)(B) (2012).

<sup>96</sup> *Arizona v. United States*, 567 U.S. 387 (2012).

<sup>97</sup> See *id.* at 407 (citing *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)).

<sup>98</sup> See *Lunn*, 78 N.E.3d at 1146, 1153–54 (“What happened in this case, therefore, 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.”).

<sup>99</sup> *Id.* at 1160.

<sup>100</sup> See *id.* at 1154 (first citing *Commonwealth v. Craan*, 13 N.E.3d 569, 573 (Mass. 2014), and then citing *United States v. Di Re*, 332 U.S. 581, 589–90 (1948)); see also Memorandum from Lynda M. Connolly, Chief Justice of Mass. Dist. Courts, to Mass. Dist. Court Judges, Clerk-Magistrates, and Chief Probation Officers, State Court Enforcement of Immigration Laws (June 3, 2018) (“[T]he policy of the Massachusetts State Police is that ‘[e]nforcing federal immigration law is not a mission of the Massachusetts State Police.’ Inquiries about immigration status are permissible as part of a criminal investigation but not permissible if their sole purpose is to enforce Federal immigration law.”). Indeed, “[i]t is disputed whether Federal law allows the states to authorize their law enforcement personnel to enforce immigration violations that are subject only to *civil* exclusion proceedings.” *Id.* at 4.

<sup>101</sup> See *Lunn*, 78 N.E.3d at 1154.

<sup>102</sup> See *id.* at 1156.

ICE's detainer mandating local enforcement action to the state's own sovereignty, this action left the door open for the Massachusetts legislature to enact legislation on the issue. Even though it seems in the court's rationale avoids the issue of federal prerogatives<sup>103</sup> (which might be an attempt to not interfere in the Trump administration's immigration policy), that is far from the case. Indeed, by interpreting the issue on its own grounds, the court retains its legitimacy and full power; thereby, it is choosing not to address the federal government's authority and clearly avoiding controversy.

Massachusetts Attorney General Maura Healey summarized this opinion in her statement on the Massachusetts Supreme Judicial Court's decision in the case of *Lunn*: "Today's decision is a victory for the rule of law and smart immigration and criminal justice policies, and a rejection of anti-immigrant policies that have stoked fear in communities across the country."<sup>104</sup>

## 2. *People ex rel. Wells v. DeMarco*

In December of 2017, the New York Civil Liberties Union Foundation filed an emergency petition on behalf of Susai Francis.<sup>105</sup> Francis had been arrested for a disorderly conduct violation for which he pled guilty and received a sentence of "time served."<sup>106</sup> Upon his arrest, Francis was fingerprinted by police, and the prints were submitted to a federal database.<sup>107</sup> They revealed that he was an Indian national who had entered the country in 1996 and had been living in the United States with a B2 visitor visa, which had expired.<sup>108</sup> The Suffolk County Sheriff's Office took Susai Francis into custody refusing to release him after his guilty plea.<sup>109</sup> He was held in jail for nearly two days until ICE took him into custody.<sup>110</sup> During that time, the state appeals court heard the New York Civil Liberties Union's petition for release but did not rule in time to prevent his custody by federal officials.<sup>111</sup> Nevertheless, the appellate court held that Susai Francis's detention constituted an

---

<sup>103</sup> See *id.* at 1146, 1151, 1153–54, 1156.

<sup>104</sup> Sarah Jorgensen, *Massachusetts Court: State Officers Cannot Hold Immigrants for ICE*, CNN (July 24, 2017), <https://www.cnn.com/2017/07/24/us/massachusetts-ice-detainer-court-decision/index.html>.

<sup>105</sup> See *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 524 (App. Div. 2018).

<sup>106</sup> See *id.* at 523.

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* at 522–23.

<sup>109</sup> See *id.* at 523–24.

<sup>110</sup> See *id.* at 524.

<sup>111</sup> See *id.*

arrest not within the authority of the Sheriff's Office.<sup>112</sup>

On November 14, 2018, the Supreme Court of New York, Appellate Division, Second Department, in *People ex rel. Wells v. DeMarco*, ruled that "New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violations."<sup>113</sup>

In the first place, the court expressed the importance of the issue that was raised and the necessity to remain within the scope of the "precise question" of law, "narrow and important,"<sup>114</sup> so it can be assumed that the court does not want to enter into a field of politicized controversy. The central issue in the case was the legality of New York State local law enforcement officers' civil immigration arrest according to New York State law.<sup>115</sup>

Firstly, the court reports a change of policy in the Sheriff's Office, which, in 2014, was against the ICE detainer, but it opted for a change of course following the election of President Trump in 2016 in reinforcing cooperation with ICE.<sup>116</sup> In this case, the sheriff was supported by the DOJ.<sup>117</sup> In the 2016 presidential election, the voters in Suffolk County voted 51.77% for then-Republican presidential candidate Donald Trump and 44.89% for then-Democrat presidential candidate Hillary Clinton.<sup>118</sup> The court addresses the judicial review and its arguing need: "It is evident that this issue is likely to reoccur."<sup>119</sup> Then, the court focuses on the status of ICE detainer, thus considering whether a "[d]etention [p]ursuant to an ICE [d]etainer or [w]arrant [c]onstitutes an [a]rrest."<sup>120</sup> It then questions the conformity of such arrest and detention in the context of the legislation in force in New York State.<sup>121</sup> In this respect, according to the court, the ICE detainer "is not a stand-alone document[, i]t must be accompanied by an administrative arrest warrant."<sup>122</sup> However, "even if viewed as a stand-alone document, the detainer does not convey any authority or command to actually detain

---

<sup>112</sup> *See id.* at 536.

<sup>113</sup> *Id.* at 522.

<sup>114</sup> *See id.* at 522, 526.

<sup>115</sup> *See id.* at 522.

<sup>116</sup> *See id.* at 523–24.

<sup>117</sup> *See id.* at 526.

<sup>118</sup> *See Final Results of General Election on Tuesday, November 8, 2016, SUFFOLK COUNTY BOARD ELECTIONS*, <https://apps2.suffolkcountyny.gov/boe/eleres/16ge/default.htm> (last visited May 19, 2019).

<sup>119</sup> *Wells*, 88 N.Y.S.3d at 525.

<sup>120</sup> *Id.* at 526.

<sup>121</sup> *See id.* at 528.

<sup>122</sup> *Id.*

anyone.”<sup>123</sup>

This nevertheless corresponds to a civil arrest: “[S]uch warrants are civil and administrative, and not judicial, in nature.”<sup>124</sup> “New York [s]tatutory [l]aw [d]oes [n]ot [a]uthorize [s]tate and [l]ocal [l]aw [e]nforcement [o]fficers to [e]ffectuate [a]rrests [p]ursuant to ICE [a]dministrative [d]etainers and [a]rrest [w]arrants”<sup>125</sup> because of its civil character. The rare occasions where civil-type arrest and detention can take place are rare but rely on the fact that they are conducted under a court supervision.<sup>126</sup> “[I]n all of these situations the issuing authority is a judicial or quasi-judicial officer of the court.”<sup>127</sup>

After stating that this was not the case, the court turned to the New York’s Criminal Procedure Law<sup>128</sup> to frame Francis’s arrest.<sup>129</sup> It considered that the sheriff could not make such an arrest or continue detention “[s]ince the administrative warrant issued by ICE was not issued by a judge or a court, the [s]heriff lacked New York statutory authority to effectuate an arrest pursuant to the ICE warrant.”<sup>130</sup>

Because the sheriff was a police officer, as defined by New York’s Criminal Procedure Law section 1.20(34)(b), he can make the two types of arrest defined in section 140.10(1):

Subject to the provisions of subdivision two, a police officer may arrest a person for: (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence; and (b) A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise.<sup>131</sup>

The court also refers to the stare decisis of the U.S. Supreme Court in the case *Arizona v. United States*, and within its own jurisprudence in *People v. Cesar*,<sup>132</sup> stating that “[i]mmigration violations, as

---

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 527 (citing *Abel v. United States*, 362 U.S. 217, 234, 236 (1960)).

<sup>125</sup> *Wells*, 88 N.Y.S.3d at 528.

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> *See* N.Y. CRIM. PROC. LAW § 1.20(34)(b) (McKinney 2019).

<sup>129</sup> *See Wells*, 88 N.Y.S. at 529–30.

<sup>130</sup> *Id.* at 529.

<sup>131</sup> *Id.* (quoting CRIM. PROC. § 140.10(1)).

<sup>132</sup> *People v. Cesar*, 14 N.Y.S.3d 100 (App. Div. 2015).



2018/2019] State Courts, Immigration, and Politics

1427

considered in the matter sub judice, are not crimes but rather are civil matters”<sup>133</sup> and thus “[a]rrests for [c]ivil [i]mmigration [v]iolations [m]ay [n]ot [b]e [j]ustified by [r]esort to [r]esidual [p]olice [p]ower[.]”<sup>134</sup> It should be noted that the court makes very few references to the *Lunn* ruling.<sup>135</sup> In doing so, the court focuses on its own jurisdiction independently of other states in order to be confine its analysis to New York legislation and sovereignty. Having refuted the conformity of the civil arrest under New York state law, the court turns to the Congress:

New York law does not authorize state and local law enforcement officers to execute arrests for federal civil immigration violations[. We must now consider whether federal law conveys such authorizations. Assuming, without deciding, that the Congress may constitutionally convey authority to state and local officials to effectuate arrests which state law does not authorize, we conclude that the Congress has not done so with regard to the circumstances presented by this case.<sup>136</sup>

The Supreme Court and the federal courts are mentioned before the final decision, and cabined its holding to the narrow issue before it:

We reiterate what we said at the outset: The narrow issue in this case is whether New York law permits New York state and local law enforcement officers to effectuate civil immigration arrests, and not whether federal civil immigration officers have the authority to effectuate such arrests. Nor do we decide any issues under federal law deputizing state and local law enforcement officers to act as federal immigration officers.<sup>137</sup>

The New York court has opted for a very limited approach so as not

---

<sup>133</sup> *Wells*, 88 N.Y.S.3d at 529 (first citing *Arizona v. United States*, 567 U.S. 387, 396 (2012), and then citing *Cesar*, 14 N.Y.S.3d at 105).

<sup>134</sup> *Wells*, 88 N.Y.S.3d at 530.

<sup>135</sup> *See, e.g., id.* at 535 (citing *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158 (Mass. 2017)) (invoking *Lunn* for its finding that Massachusetts state law does not allow state and local authorities to enforce ICE detainees, and then holding similarly for New York).

<sup>136</sup> *Id.* at 532.

<sup>137</sup> *Id.* at 536.

to interfere with politics and remain in the field of law as it indicates, knowing the thorny and highly politicized issue in the light of the different political orientations present in the state of New York, exercising local pressure on different jurisdictions to comply with President Trump's position or to vehemently oppose.<sup>138</sup> The approach of the New York court is based on a model relatively similar to that of the decision of the Supreme Judicial Court of Massachusetts, conferring on it a legal locked reasoning also representing a model transposable to other federal jurisdictions.<sup>139</sup> Even if the methodology used is outside the controversy, the subject, by itself, has seized the course with politics. By its inclusive rationale and remaining within the framework of its own legislation and only of the conformity of such practices within this precise framework, the course nevertheless asserts its authority by this prism indirectly and without obvious confrontation of a judicial review vis-a-vis the politics of politics; the executive.

### 3. *Cisneros Rodriguez v. Elder*

In early 2017, Colorado State Representative Joseph Salazar<sup>140</sup> introduced the Ralph Carr Freedom Defense Act in the Colorado House of Representatives with the goal to protect Colorado residents from government overreach.<sup>141</sup> He stated: "What we're saying is we're not going to allow the federal government to commandeer, co-opt[] or otherwise take control of our state and local resources for immigration enforcement."<sup>142</sup> He characterized it as "federal over reach."<sup>143</sup> Yet, Colorado is a closely divided state and its legislature is one of the most closely divided in the country, especially over

---

<sup>138</sup> See *id.* at 522, 536 (deciding the matter only with regards to New York law, and not deciding the national issue of whether federal law gives the state law enforcement officials the power to act as federal immigration officers).

<sup>139</sup> See *id.* at 535 (citing *Lunn*, 78 N.E.3d at 1158–60) (relying on the Supreme Judicial Court of Massachusetts's holding in *Lunn* as guidance in state immigration arrest issues).

<sup>140</sup> Joseph Salazar represented District 31 from 2013 to January 2019 as a Democratic member of the Colorado House of Representatives. *Joseph Salazar*, BALLOTPEDIA, [https://ballotpedia.org/Joseph\\_Salazar](https://ballotpedia.org/Joseph_Salazar) (last visited May 20, 2019).

<sup>141</sup> The Ralph Carr Freedom Defense Act was later renamed by Representative Salazar and called the Colorado Freedom Defense Act. See Erica Meltzer, *Colorado Freedom Defense Act, Which Supports "Sanctuary" Policies, Heads to the Senate without its Namesake*, DENVERITE (Mar. 30, 2017), <https://denverite.com/2017/03/30/colorado-freedom-defense-act-supports-sanctuary-type-policies-heads-senate-without-namesake/>.

<sup>142</sup> *Sanctuary State Bill Moves Forward at State Capitol*, CBS DENVER (Apr. 10, 2017) <https://denver.cbslocal.com/2017/04/10/sanctuary-state-bill-moves-forward-at-state-capitol/>.

<sup>143</sup> *Id.*

immigration.<sup>144</sup> In 2018, the Public Safety Protection From Sanctuary Policies Act<sup>145</sup> was introduced in the Senate so as to eliminate sanctuary policies statewide, while in the House, Salazar's bill, H.B. 1273, was also introduced in order to make Colorado a sanctuary state.<sup>146</sup> Both of them failed or died out in chambers, but they revealed the two oppositions.<sup>147</sup> As the legislature could not come to a position, the judiciary therefore has even become more the central focus of attention in this polarized and divided state.<sup>148</sup> Yet, Colorado does not seem to be a swing state anymore.<sup>149</sup> As the last election demonstrated, it is shifting toward blue and has entered the stage in the state's rights defense against the federal administration through the judiciary.<sup>150</sup>

With a solid majority won in his November 2018 retention election,<sup>151</sup> non-partisan Judge Bentley of the Fourth Judicial District in Colorado issued a final ruling in the controversial political case over immigration enforcement stepping up state courts in their role as first-line defenders of civil liberties.<sup>152</sup> In the case of *Cisneros Rodriguez v. Elder*, the Colorado District Court, Fourth Judicial District, held on December 6, 2018, that Sheriff Bill Elder was barred from holding people in jail at the request of federal immigration enforcement after they had posted bond, fully completed their sentence, or resolved their criminal case.<sup>153</sup> The court was fully

---

<sup>144</sup> See Jesse Paul & John Frank, *The Top 10 Issues to Watch in Colorado's 2019 Legislative Session*, COLO. SUN (Jan. 4, 2019), <https://coloradosun.com/2019/01/04/2019-colorado-legislature-issues-important/> (discussing the debate between republican and democratic parties over immigration in the state of Colorado).

<sup>145</sup> S. 18-220, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

<sup>146</sup> See H.R. 18-1273, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

<sup>147</sup> See *Protect Colorado Residents from Federal Government Overreach*, COLO. GEN. ASSEMBLY, <https://leg.colorado.gov/bills/hb18-1273> (last visited May 20, 2019) (showing that House Bill 18-1273 was not adopted); *Public Safety Protection from Sanctuary Policies*, COLO. GEN. ASSEMBLY, <https://leg.colorado.gov/bills/sb18-220> (last visited May 20, 2019) (showing that Senate Bill 18-220 was not adopted).

<sup>148</sup> See Goldbaum, *supra* note 17.

<sup>149</sup> See Dante Chinni & Sally Bronston, *New Election Map: Ohio, Colorado No Longer Swing States*, NBC NEWS (Nov. 18, 2018), <https://www.nbcnews.com/politics/first-read/new-election-map-ohio-colorado-no-longer-swing-states-n937646>.

<sup>150</sup> See, e.g., *Cisneros v. Elder*, No. 18CV30549, 2018 Colo. Dist. LEXIS 3388, at \*31–32, \*40–41 (Dist. Ct. Dec. 6, 2018); see also Pam Zubeck, *Sheriff Elder Loses Court Case Regarding ICE Holds*, COLO. SPRINGS INDEP. (Dec. 7, 2018), <https://www.csindy.com/TheWire/archives/2018/12/07/sheriff-elder-loses-court-case-regarding-ice-holds> (discussing the *Cisneros* holding that Colorado sheriffs have no legal authority to hold inmates beyond their release dates at the request of ICE).

<sup>151</sup> See *Eric Bentley*, BALLOTPEDIA, [https://ballotpedia.org/Eric\\_Bentley](https://ballotpedia.org/Eric_Bentley) (last visited July 6, 2019).

<sup>152</sup> See *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at \*1, \*43.

<sup>153</sup> See *id.* at \*41–43.

aware of the novel issue raised statewide, asserting: “This is a case of first impression in Colorado.”<sup>154</sup> It pointed out that precedent is currently crafting nationwide and at the state level, and the importance of filling the legal blank canvas in Colorado.<sup>155</sup> The issue raised in *Cisneros Rodriguez v. Elder* was similar to that in *Lunn v. Commonwealth*<sup>156</sup> and *People ex rel. Wells v. DeMarco*.<sup>157</sup> From the same viewpoint, the court ruling notes that precedents at the state level are not numerous, citing New York and Massachusetts cases which, under the same circumstances, considered that a detainer represents a new detention.<sup>158</sup> Likewise, the few courts that have addressed the issue under the laws of other states have concluded that continued detention under an ICE detainer constitutes a new arrest.<sup>159</sup>

The rationale was based on the Colorado Supreme Court’s precedent, *People v. Hamilton*,<sup>160</sup> which established that “the authority of peace officers to effectuate arrests is now defined by legislation.”<sup>161</sup> Thus, under Colorado law, continued detention is the same as for the two previous courts in a new arrest. District court judge Eric Bentley “conclude[d] that continued detention of an inmate under an immigration detainer, after the inmate has reached his or her release date, constitutes an arrest under Colorado law and a seizure under the Fourth amendment,”<sup>162</sup> thus not complying with Colorado’s arrest statute, which states,

- (1) A peace officer may arrest a person when: (a) He has a warrant commanding that such person be arrested; or (b) Any crime has been or is being committed by such person in his presence; or (c) He has probable cause to believe that an offense was committed and has probable cause to believe that

---

<sup>154</sup> *See id.* at \*1.

<sup>155</sup> *See id.* at \*1–2.

<sup>156</sup> *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017).

<sup>157</sup> *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 522 (App. Div. 2018).

<sup>158</sup> *See Cisneros*, 2018 Colo. Dist. LEXIS 3388, at \*16 (citing *Lunn*, 78 N.E.3d at 1153–54; *Wells*, 88 N.Y.S.3d at 526–27).

<sup>159</sup> *See Lunn*, 78 N.E.3d at 1153–54 (determining that the detention of an inmate on an immigration detainer after he was entitled to release was an arrest under Massachusetts law); *Wells*, 88 N.Y.S.3d at 526–27 (finding that when an inmate was retained in custody per ICE detainer after his release date, a new arrest and seizure occurred under New York law and the Fourth Amendment).

<sup>160</sup> *People v. Hamilton*, 666 P.2d 152 (Colo. 1983).

<sup>161</sup> *See id.* at 154.

<sup>162</sup> *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at \*16–17.

2018/2019] State Courts, Immigration, and Politics 1431

the offense was committed by the person to be arrested.<sup>163</sup>

The Colorado District Court, Fourth Judicial District, concluded on the unconstitutionality of the ICE detainer enforcement by local officers under Colorado state law and expanded its ruling to “Sheriff Elder’s practices as of March 8, 2018, but also to the broader practices that were in place at the time this case was filed . . . .”<sup>164</sup>

## II. STATE COURTS’ ASSISTANCE: THE MIRROR IMAGE APPROACH

State courts are confronted with a positional legitimation that is difficult to find in the balance between optimal cooperation with the mandates of federal law and a reluctance to comply with a form of alignment. It is even more difficult in states that present a significant conflict between an active minority and majority, be it Republican or Democratic.<sup>165</sup> Consequently, the power of state supreme courts continues to grow every year.<sup>166</sup> Their power relies on different elements among its popular accountability and citizens’ support is essential and their activism with the mirror-image approach is fundamental for federal immigration enforcement.<sup>167</sup> With their significant gains in political power, state courts have been involved in forms of activism, gaining significant political power and providing a fertile ground for establishing authority through the use of state constitutions.<sup>168</sup>

### A. *The Mirror Image Theory of State Immigration Enforcement*

In North Carolina, the *Chavez v. Carmichael*<sup>169</sup> case drew the state into a position of support for Donald Trump’s immigration policy by symbolically ruling the day of the mid-term elections in November 6, 2018, with regard to the controversial and highly politicized issue of the ICE detainer at the state level.<sup>170</sup> Anteriorly, the 2016 election

---

<sup>163</sup> See COLO. REV. STAT. § 16-3-102 (2018).

<sup>164</sup> See *Cisneros*, 2018 Colo. Dist. LEXIS 3388, at \*41–43.

<sup>165</sup> Cf. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 57–58, 78 (2011).

<sup>166</sup> See Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 592 (2007).

<sup>167</sup> See Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251, 253–54 (2011); Williams, *supra* note 166, at 680–81; *infra* Sections II.A–B.

<sup>168</sup> See Williams, *supra* note 166, at 592; *supra* Part I.

<sup>169</sup> *Chavez v. Carmichael*, 822 S.E.2d 131 (N.C. Ct. App. 2018).

<sup>170</sup> See *Chavez*, 822 S.E.2d at 145; Jonathan Holbrook, *Habeas Relief for Immigration Detainers Gets Put on Ice*, U.N.C. SCH. GOV’T: N.C. CRIM. L. (Dec. 11, 2018, 4:20 PM), <https://www.ncschofgov.com/nc-crim-l/2018/12/11/habeas-relief-for-immigration-detainers-gets-put-on-ice/>

had somewhat changed the political landscape of North Carolina following the election of Democrat Roy Cooper as governor of the state.<sup>171</sup> Previously, the Republican Party had been at the head of a government trifecta; however, the general orientation still remains in favor of a Republican ideology.<sup>172</sup> In the 2016 presidential election, the plurality of voters (49.83%) cast their ballots for Donald Trump, while candidate Hillary Clinton received 46.17% of the votes in North Carolina.<sup>173</sup> Despite the election of Governor Cooper, the state remains under Republican global orientation.<sup>174</sup> Indeed, Republicans hold a majority in the Senate and the House of Representatives, which form the legislature of the state, the North Carolina General Assembly.<sup>175</sup> The position of the Republicans prior to the November 2018 election, nevertheless, allowed them to override the veto of the governor with a majority of 3/5<sup>th</sup> vote in each house.<sup>176</sup> The North Carolina Court of Appeals, composed of elected judges, is also predominantly Republican, with Republicans holding a 10:5 edge on the court<sup>177</sup> when, on November 6, 2018, the North Carolina Court of Appeals decided *Chavez v. Carmichael*, which brought the state of North Carolina into the debate surrounding the state court's stand on the mechanism of ICE enforcement.<sup>178</sup>

This case was an appeal by the Mecklenburg County Sheriff with respect to orders of the Mecklenburg County Superior Court to release from his custody two undocumented immigrants, Luiz Lopez, who had been arrested for common law robbery and other charges

---

nccriminallaw.sog.unc.edu/habeas-relief-for-immigration-detainers-gets-put-on-ice/.

<sup>171</sup> See Monica Davey & Alan Blinder, *In North Carolina, a Governor's Race Is Too Close to Call*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/governors-races-statehouses-eric-holcomb.html>; David A. Graham, *The North Carolina Governor's Race Is Finally Over*, ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/north-carolina-governor-pat-mccrory-concedes-to-roy-cooper/509603/>.

<sup>172</sup> See Janelle Bouie, *The Lame-Duck Power Grab*, SLATE (Dec. 4, 2018), <https://slate.com/news-and-politics/2018/12/republican-democracy-stress-test-michigan-wisconsin-north-carolina.html>; Jim Morrill & Paul A. Specht, *Blue Waves in Urban North Carolina Help Democrats Break GOP 'Supermajorities'*, CHARLOTTE OBSERVER (Nov. 7, 2018), <https://www.charlotteobserver.com/news/politics-government/election/article221279270.html>.

<sup>173</sup> See *11/08/2016 Official General Election Results—Statewide*, N.C. ST. BOARD ELECTIONS & ETHICS ENFORCEMENT, [https://er.ncsbe.gov/?election\\_dt=11/08/2016&county\\_id=0&office=FED&contest=0](https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=FED&contest=0) (last visited May 21, 2019).

<sup>174</sup> See Bouie, *supra* note 172; Morrill & Specht, *supra* note 172.

<sup>175</sup> See *North Carolina Election Results*, N.Y. TIMES (Jan. 28, 2019), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-north-carolina-elections.html>.

<sup>176</sup> Morrill & Specht, *supra* note 172.

<sup>177</sup> See Josh Shaffer, *Here Are the Candidates for 3 Seats on the NC Court of Appeals*, NEWS & OBSERVER (Oct. 4, 2018), <https://www.newsobserver.com/news/politics-government/article219351665.html>.

<sup>178</sup> See *Chavez v. Carmichael*, 822 S.E.2d 131, 145 (N.C. Ct. App. 2018); Holbrook, *supra* note 170.

(felony conspiracy, resisting a public officer, and misdemeanor breaking and entering), and Carlos Chavez for impaired driving and other charges (having no operator's license, interfering with emergency communications, and assault on a female).<sup>179</sup> The sheriff's appeal argued that the superior court did not have jurisdiction "to consider Petitioners' petitions for writs of habeas corpus, or to issue the writs, because of the federal government's exclusive control over immigration under the United States Constitution, the authority delegated to him under the 287(g) Agreement, and under the administrative warrants and immigration detainers issued against Petitioners."<sup>180</sup> The appreciation of jurisdiction is the central point of the intersection between politics and law because it leads to a closed position and leaves no room for political ambiguity.

The North Carolina Court of Appeals in its decision recalled a recital establishing the principle which articulates the first part of the motivation of the court. Indeed, § 287(g) of the Immigration and Nationality Act has authorized the Director of ICE to enter into agreements with state and local law enforcement agencies.<sup>181</sup> It enables deputizing local trained officers to perform immigration law enforcement functions during the course of their daily activities.<sup>182</sup> The use of 287(g) agreements has expanded rapidly under the Trump administration.<sup>183</sup> As of July 2019, ICE has entered into 287(g) agreements with seventy-nine law enforcement agencies in twenty-one states.<sup>184</sup> ICE has also trained and certified more than 1,514 state and local officers in the enforcement of immigration law.<sup>185</sup> These 287(g) agreements are contracts between local law enforcement agencies and ICE and set out authority and obligation at the local level.<sup>186</sup> North Carolina law gives county sheriffs broad powers of appreciation for complying with § 287(g).<sup>187</sup>

---

<sup>179</sup> *See Chavez*, 822 S.E.2d at 134–35.

<sup>180</sup> *Id.* at 137.

<sup>181</sup> *See id.* at 134.

<sup>182</sup> *See id.*

<sup>183</sup> *See* Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1253–54 (2018).

<sup>184</sup> *Immigration Enforcement: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> (last updated July 1, 2019).

<sup>185</sup> The figure is from the August 10, 2018, version of the ICE website, available at <https://web.archive.org/web/20190313143229/https://www.ice.gov/287g>. ICE has not provided an updated number of trained local officers. *See Immigration Enforcement: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra*, note 184.

<sup>186</sup> *See Immigration Enforcement: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra*, note 184.

<sup>187</sup> *See Chavez*, 822 S.E.2d at 140.

With respect to the jurisdiction in the case of *Chavez*, a 287(g) agreement was signed by Sheriff Irwin Carmichael and by Matthew Albence (Executive Associate Director of Enforcement and Removal Operations, U.S. Immigration and Customs Enforcement, Department of Homeland Security) on February 28, 2017.<sup>188</sup> That Sheriff Carmichael ran as a Democrat in the elections for the sheriff's post may represent a current of this party with local particularities that differ from the more general positions of the party at the national level.<sup>189</sup>

In Mecklenburg County, Democrats have been more willing to support conservative members of their party in law enforcement and military positions.<sup>190</sup> Beyond the assessment of the relevance of an agreement signed with ICE which falls within the sole powers and prerogatives of the sheriff by the extensive powers conferred by North Carolina, the fact that he was prone as a Democrat to subscribing to a reinforcement of the repression of illegal immigration initiated by Republican President Trump is not antinomic.<sup>191</sup> Indeed, the Democrats of North Carolina stand out considerably from the direction taken by the party at the national level.<sup>192</sup> In terms of registration, with respect to electoral registers, Democrat's number of registered voters is considerably higher than that of their Republican counterparts.<sup>193</sup>

Nevertheless, the results of the elections, with the latest ones of the American presidential election attesting thereto, demonstrate a Republican orientation.<sup>194</sup> One of the reasons for this distinction

---

<sup>188</sup> See *id.* at 134; U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEPT OF HOMELAND SEC., MECKLENBURG MEMORANDUM OF AGREEMENT 12 (2017) [hereinafter MECKLENBURG MEMORANDUM OF AGREEMENT].

<sup>189</sup> But see Claudia Flores, *Progressive Wins Re-Envision Immigration Enforcement at the Local Level*, CTR. AM. PROGRESS (Feb. 21, 2019), <https://www.americanprogress.org/issues/immigration/news/2019/02/21/466534/progressive-wins-re-envision-immigration-enforcement-local-level/>; Alex Seitz-Wald, *North Carolina Voters Dump Democratic Sheriff Who Backed ICE Deportation Program*, NBC NEWS (May 13, 2018), <https://www.nbcnews.com/politics/elections/north-carolina-voters-dump-democratic-sheriff-who-backed-ice-deportation-n873651>.

<sup>190</sup> See Katie Glueck, *A Democrat Who Talks Like a Republican Could Steal a Major NC Race from the GOP*, MCCLATCHY DC BUREAU (June 5, 2018), <https://www.mcclatchydc.com/news/politics-government/election/article212479684.html>.

<sup>191</sup> See Seitz-Wald, *supra* note 189.

<sup>192</sup> But see Flores, *supra* note 189; Seitz-Wald, *supra* note 189.

<sup>193</sup> See *Voter Registration Statistics*, N.C. ST. BOARD OF ELECTIONS, <https://vt.ncsbe.gov/RegStat/Results/?date=05%2F18%2F2019> (last visited May 21, 2019).

<sup>194</sup> See *North Carolina Election Results*, *supra* note 175 (showing that Republicans hold a majority in the North Carolina General Assembly); *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 9, 2017), <https://www.nytimes.com/elections/2016/results/president> (showing that Trump won 50% of the vote in North Carolina and reclassifying



could be found in the concept of gerrymandering or in a large number of undecided or floating voters in the counties of North Carolina, who would have had a fluctuating and politically variable position.<sup>195</sup> This remains a plausible explanatory element but the explanatory element peculiar to the historical particularism of North Carolina. In fact, voters characterized as Democrats are part of the ideological lineage initiated by Jesse Helms and were nicknamed by State Republican Party Chairman Frank Rouse the “Jesseocrat[s]” due to their electoral support for and political adherence to Republican Helms.<sup>196</sup>

First, the court questioned the compliance of state agents with the application of federal immigration laws.<sup>197</sup> In that regard, the court stated that Mecklenburg County had an agreement at the material time and that the state officers were allowed to enforce federal immigration law in accordance with North Carolina General Statutes § 128.1.1.<sup>198</sup> North Carolina General Statutes sections 128-1.1(c)(1) provides that

[w]here authorized by federal law, any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. § 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency. State and local law enforcement officers authorized under this provision are authorized to hold any office or position with the applicable federal agency required to perform the described functions.<sup>199</sup>

Under this provision, state agents have federal jurisdiction and, thus, can act within the framework of the federal statute transferred to them, enabling them to detain an individual in the context of a

---

North Carolina as somewhat more Republican following the 2016 presidential election).

<sup>195</sup> See Paul Specht, *Woodhouse Says GOP Is Winning Unaffiliated Voters in NC*, POLITIFACT (Sept. 27, 2017), <https://www.politifact.com/north-carolina/statements/2017/sep/27/dallas-woodhouse/woodhouse-says-gop-winning-unaffiliated-voters-nc/>; Mark Joseph Stern, *Democrats Are Poised to Wipe Out Republicans’ North Carolina Gerrymander in Time for the 2020 Election*, SLATE (Nov. 13, 2018), <https://slate.com/news-and-politics/2018/11/north-carolina-gerrymandering-lawsuit-anita-earls.html>.

<sup>196</sup> See Interview by Joseph Mosnier, Univ. of N.C.-Chapel Hill, with Frank Rouse, Former N.C. Republican Party Chairman, in Emerald Isle, N.C. (Nov. 14, 1996), <https://cdr.lib.unc.edu/indexablecontent/uuid:d9068d1d-80e4-46c2-b2a8-537a16abee88>.

<sup>197</sup> See *Chavez v. Carmichael*, 822 S.E.2d 131, 139–40, 143 (N.C. Ct. App. 2018).

<sup>198</sup> See *id.* at 134, 140.

<sup>199</sup> N.C. GEN. STAT. § 128-1.1(c)(1) (2019).

federal detainer, acting in their federal capacities.<sup>200</sup> For the court of appeals, contrary to the superior court's interpretation, the habeas corpus petitions should therefore not have been granted.<sup>201</sup>

In this respect, the court has held a relatively virulent position in relation to the decision of the superior court. The court has highlighted all of the political tension and the political stakes that the question of detainers generates in each of the states and, in particular, in the states with strong local political disparities, as is the case with the state of North Carolina.<sup>202</sup> These disparities include divergent political orientations both between the county and the legislature and within the judiciary through the prism of the elections of judges.<sup>203</sup> A major element that comes into play in the various interpretations also lies in the electoral accountability that positions judicial decisions in a political debate. For the Court of Appeals, the superior court had no ability "to grant habeas relief to individuals detained by federal officers acting under federal authority."<sup>204</sup> Even more broadly, the appellate court held that "[a] state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters,"<sup>205</sup> so the state court had no jurisdiction to hear the writs and they should have been dismissed.

There is a difficult and polarized balance between the general trend within the state toward a lower degree of cooperation between immigration investigation and state agencies in charge of state law enforcement.<sup>206</sup> On the other hand, the Republican legislature which continues to be prolix in this domain, guiding the state's laws toward cooperation with ICE, thus subjecting the judiciary in this battle to

---

<sup>200</sup> See *Chavez*, 822 S.E.2d at 143 ("It is undisputed the Sheriff's continued detention of Petitioners, after they were otherwise released from state custody, was pursuant to the federal authority delegated to his office under the 287(g) Agreement.").

<sup>201</sup> See *id.* at 145.

<sup>202</sup> See *id.* at 138; see also Holbrook, *supra* note 170 (mentioning the contentious political and policy issue caused by the *Chavez* decision).

<sup>203</sup> See Anne Blythe, *A Judge, a Vegas Phone Call and the NC GOP Legislative Effort to Remake the Judicial Branch*, NEWS & OBSERVER (Aug. 22, 2017), <https://www.newsobserver.com/news/politics-government/state-politics/article168661047.html>.

<sup>204</sup> *Chavez*, 822 S.E.2d at 142.

<sup>205</sup> *Id.* (first citing *Plyler v. Doe*, 457 U.S. 202, 225 (1982); and then citing *De Canas v. Bica*, 424 U.S. 351, 354 (1976)).

<sup>206</sup> See Deborah M. Weissman et al., *The Politics of Immigrant Rights: Between Political Geography and Transnational Interventions*, 2018 MICH. ST. L. REV. 117, 145–46; Tim Henderson, *As Urban Sheriffs Leave ICE Program, Small Counties Join Trump's Deportation Plan*, GOVERNING (Jan. 14, 2019), <http://www.governing.com/topics/public-justice-safety/sl-urban-rural-sheriffs-trumped-immigration-push.html>.

obvious political stakes.<sup>207</sup> In this appeal by the Mecklenburg County Sheriff with respect to two orders entered on October 13, 2017 by Democratic Judge Yvonne Mims-Evans of the superior court<sup>208</sup> ordering Sheriff Irwin Carmichael to release two individuals from his custody, the court, in a unanimous opinion delivered by Republican Judge Tyson<sup>209</sup>, vacated and remanded the trial court to dismiss the habeas corpus petitions due to the lack of subject matter jurisdiction.<sup>210</sup>

In *Chavez*, the Court of Appeals of North Carolina evaded the fundamental question of the legality of such practices under the law and constitution of North Carolina, similar to the decision of a Florida court that entered a conformity of the provisions in force.<sup>211</sup> In order not to have to decide on the merits of the case, the court focused on an analysis of the form as it was presented to it, i.e., on the one hand, the validity of the actions of the sheriff as the local delegated representative of the state pursuant to an agreement with ICE and, on the other hand, the jurisdiction of the superior court in this exercise.<sup>212</sup>

The substantive elements, that is, the conformity of the detention with the laws in force in North Carolina, are not the main line chosen by the court and allow setting a precedent while being able to maintain a margin of different or similar appreciation in the future in a county that has not signed an agreement.<sup>213</sup> This denotes the difficulty of positioning with regard to a subject that floods the law of the states but, nonetheless, demonstrates an approach tending to support Donald Trump's immigration policy through the implementation of the mirror-image approach. While the case was under review in the Court of Appeals of North Carolina in Mecklenburg County, the issue raised in *Chavez* was a central issue in the campaigns of the incumbent Sheriff Carmichael, who embraced it, and his two challengers, who wanted to put an end to it with active opposition from advocates for immigrants' rights.<sup>214</sup> His

---

<sup>207</sup> See Weissman et al., *supra* note 206, at 146–47.

<sup>208</sup> See *NC 2004 Judicial Candidates with Party Affiliations*, MOORE GOP, [http://www.mooregop.org/judicial\\_with\\_party\\_2004a.htm](http://www.mooregop.org/judicial_with_party_2004a.htm) (last visited May 21, 2019).

<sup>209</sup> See *id.*

<sup>210</sup> See *Chavez*, 822 S.E.2d at 134, 145.

<sup>211</sup> See *id.* at 140–41; see generally *Ricketts v. Palm Beach Cty. Sheriff*, 985 So. 2d 591, 592–93 (Fla. Dist. Ct. App. 2008) (failing to consider conformity of local law enforcement's actions with state constitution and law).

<sup>212</sup> See *Chavez*, 822 S.E.2d at 137, 140–141, 142.

<sup>213</sup> See *id.* at 134, 140–41, 145 (discussing substantive elements of the case but deciding the case on procedural grounds).

<sup>214</sup> See *id.* at 138; Nick De La Canal, *New Meck Sheriff's First Act Ends Participation in*

opponent Gary McFadden, a former long-time Charlotte-Mecklenburg Police Department detective whose vow in the campaign was to sever the agreement, was elected.<sup>215</sup> McFadden directly ended the program on his first full day as sheriff.<sup>216</sup> From now on, it will be necessary for ICE to possess court-issued warrants or detainers in order to access the jail, which keeps the doors open for the state court's consideration and power.<sup>217</sup>

### *B. State Courts Between Law and Republican Activism?*

Although the federal government has the power to regulate immigration, states and local governments have used many means to counterbalance new policy approaches to immigration.<sup>218</sup> However, they may not be able to express a concordant voice on the sensitive issue of immigration because of local particularism and political orientation, sometimes antagonistic or poles apart.<sup>219</sup> The ability and willingness of each of the entities within a state to exercise full sovereignty in resonance with Donald Trump's presidential decrees, and the degree of cooperation with the federal authorities on this issue, has created a significant conflict.<sup>220</sup> This conflict engages state courts in direct legal action staging one of the two local or state actors with delegated and specific powers, thus accentuating the role of the judiciary as a political player in the triptych federal, state, and local governments.

#### *1. City of Huntington Beach v. State of California*

The issue of immigration in the state courts is even more relevant in municipalities that enjoy a greater degree of autonomy than other

---

287(g). WFAE 90.7 (Dec. 5, 2018), <https://www.wfae.org/post/new-meck-sheriffs-first-act-ends-participation-287g#stream/0>.

<sup>215</sup> See Ashley Hackett, *A County Sheriff Election in North Carolina Sheds Light on a Controversial Ice Policy*, PAC. STANDARD (May 10, 2018), <https://psmag.com/social-justice/a-county-sheriff-election-in-north-carolina-sheds-light-on-a-controversial-ice-policy>.

<sup>216</sup> See Reuben Jones, *Mecklenburg County Sheriff McFadden Says He's Doing His Own Thing Now*, SPECTRUM NEWS: CHARLOTTE (Dec. 15, 2018), <https://spectrumlocalnews.com/nc/charlotte/news/2018/12/15/exclusive--sheriff-mcfadden-says-he-s-doing-his-own-thing-now>.

<sup>217</sup> *How Sheriff's Office Deals with ICE Post-287(g)*, WFAE 90.7 (Jan. 7, 2019), <https://www.wfae.org/post/how-sheriffs-office-deals-ice-post-287g#stream/0>.

<sup>218</sup> See KRSNA AVILA ET AL., IMMIGRATION LEGAL RES. CTR., THE RISE OF SANCTUARY: GETTING LOCAL OFFICERS OUT OF THE BUSINESS OF DEPORTING IN THE TRUMP ERA 8 (2018), [https://www.ilrc.org/sites/default/files/resources/rise\\_of\\_sanctuary-lg-20180201.pdf](https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf).

<sup>219</sup> See *id.* at 13 (showing a map of the United States broken down into counties and displaying counties' involvement with ICE).

<sup>220</sup> See Somin, *supra* note 17.

average general law cities.<sup>221</sup> These municipalities are called charter cities, and the illustration, where state courts interact politics and law over immigration involving charter cities in the Trump era, is within the State of California.<sup>222</sup> There are 121 charter cities in California and they have more control over municipal affairs than other cities.<sup>223</sup> When the State of California passed Senate Bill 54 in opposition to the Trump Administration over immigration enforcement, Republican jurisdictions immediately expressed opposition.<sup>224</sup> The City of Los Alamitos, a municipality also in Orange County, took a different tack from Huntington Beach, by voting to exempt itself from Senate Bill 54, which limits local law enforcement's cooperation with federal immigration authorities.<sup>225</sup> The Ordinance No. 2018-03, "Adding Chapter 9.30 Constitution of the United States Compliance,"<sup>226</sup> was introduced by City Councilor Warren Kusumoto, who affirmed that "as a [c]harter city[,] Council owed the community clear direction and this discussion was regarding Los Alamitos only."<sup>227</sup> The City Council conducted the first reading of the ordinance in its regular meeting of March 19, 2018, with a second hearing on April 16, 2018.<sup>228</sup>

The city was then sued by the ACLU over its ordinance.<sup>229</sup> The case has been put on hold (both parties agreed) by Judge Crandall, Orange County Superior Court, pending the appeal filed in the California Fourth District Court of Appeal for the case *City of*

---

<sup>221</sup> See *California Research In-Depth, Local Governments*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/california-in-depth/local-governments> (last visited May 22, 2019); see, e.g., Petitioner's Memorandum of Points and Authorities in Support Petition for Writ of Mandamus and Complaint at 1, *City of Huntington Beach v. State*, No. 30-2018-00984280 (Cal. Super. Ct., Orange Cty. Sept. 27, 2018) [hereinafter Petitioner's Memorandum].

<sup>222</sup> See Don DeBenedictis, *California Can't Enforce Sanctuary Law Against Charter Cities*, COURTHOUSE NEWS SERV. (Sept. 28, 2018), <https://www.courthousenews.com/california-cant-enforce-sanctuary-law-against-charter-cities/>.

<sup>223</sup> See *id.*

<sup>224</sup> See Sarah Holder, *As California Protects Immigrants, Cities Revolt*, CITYLAB (Apr. 3, 2018), <https://www.citylab.com/equity/2018/04/california-cities-fight-their-sanctuary-state/556973/>.

<sup>225</sup> See City of Los Alamitos, City Council Meeting Minutes 8 (April 16, 2018, 10:24 PM), [hereinafter April 16 City Council Meeting Minutes]; see also Los Alamitos, Cal., Ordinance 2018-03 § 2 (Apr. 16, 2018) (codified at LOS ALAMITOS, CAL., CODE § 9.30 (2018)) [hereinafter Ordinance 2018-03] (showing ordinance passed by city of Los Alamitos to exempt the city from Senate Bill 54).

<sup>226</sup> See Ordinance 2018-03, *supra* note 225; City of Los Alamitos, City Council Meeting Minutes 6 (Mar. 19, 2018, 6:00 PM) [hereinafter March 19 City Council Meeting Minutes].

<sup>227</sup> See March 19 City Council Meeting Minutes, *supra* note 226, at 6.

<sup>228</sup> See April 16 City Council Meeting Minutes, *supra* 225, at 6.

<sup>229</sup> See *ACLU Sues Los Alamitos over Sanctuary State Law Put on Hold*, NBC SOUTHERN CAL. (Oct. 31, 2018), <https://www.nbcalosangeles.com/news/local/ACLU-Sues-Los-Alamitos-Over-Sanctuary-State-Law-Put-on-Hold-499118391.html>.

*Huntington Beach v. State of California*, also presided over by Judge Crandall.<sup>230</sup> Indeed, Huntington Beach, California, located in Orange County, is the first place in the state of California to have formally challenged state justice on the position of state sanctuary and its limits.<sup>231</sup> Orange County has been under Republican dominance for eighty years.<sup>232</sup>

Legal action was initiated in April 2018 by the city against the state, as well as against Governor Jerry Brown and Attorney General Xavier Becerra.<sup>233</sup> Huntington Beach is the first place to formally challenge the California Values Act SB 54, arguing that it violates the state's constitution by contravening the right of cities to allocate their own revenues.<sup>234</sup> Filed in April by Huntington Beach City Attorney Michael Gates, the complaint alleges that SB54 unconstitutionally violates the city's power under the Charter to enforce local laws and regulations including law enforcement personnel by restricting the local police from "notifying federal officials about the impending release of immigrants in custody who may be deported."<sup>235</sup> In addition to opposing the state's ban on retaining immigrants until apprehended by federal authorities, the city is challenging its obligation to create safe areas for undocumented migrants in public facilities, such as schools, libraries and courthouses.<sup>236</sup> The complaint also recalls the principles making immigration a prerogative of the federal government, according to Huntington Beach, in conformity with the principles of the U.S. Constitution and refers to the case *Chy Lung v. Freeman*, which

---

<sup>230</sup> See *id.*; see also *Docket (Register of Actions) – City of Huntington Beach v. Los Alamitos Community United et al.*, CAL. CTS.: JUD. BRANCH CAL.: APP. CTS. CASE INFO., [https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=43&doc\\_id=2275824&doc\\_no=G057209&request\\_token=NiIwLSikTkW8WzApSCM9XEPIIEA7UFxbJiMuTzPpRiCagCg%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=43&doc_id=2275824&doc_no=G057209&request_token=NiIwLSikTkW8WzApSCM9XEPIIEA7UFxbJiMuTzPpRiCagCg%3D%3D) (last visited May 22, 2019) (showing that California Fourth District Court of Appeal is considering the appeal).

<sup>231</sup> See Priscella Vega, *Judge Rules for Huntington Beach in Its Challenge to State's 'Sanctuary' Immigration Law*, L.A. TIMES (Sept. 27, 2018), <https://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-sb54-hearing-20180927-story.html>.

<sup>232</sup> See Philip Bump, *Orange County Isn't Only a Mark of the GOP's Bad 2018. It May Be a Warning About the Future.*, WASH. POST (Nov. 16, 2018), [https://www.washingtonpost.com/politics/2018/11/16/orange-county-isnt-only-mark-gops-bad-it-may-be-warning-about-future/?utm\\_term=.6878a2af0283](https://www.washingtonpost.com/politics/2018/11/16/orange-county-isnt-only-mark-gops-bad-it-may-be-warning-about-future/?utm_term=.6878a2af0283).

<sup>233</sup> Petition for Writ of Mandamus & Complaint for Declaratory Relief & Injunctive Relief, *City of Huntington Beach v. State* at 1, 16, No. 30-2018-00984280 (Cal. Super. Ct., Orange Cty. Apr. 4, 2018) [hereinafter *Petition & Complaint*].

<sup>234</sup> See *id.* at 3; Priscilla Vega, *State Not Backing Down After Judge Rules Sanctuary Law Doesn't Apply in Charter Cities*, L.A. TIMES (Sept. 28, 2018), <https://www.latimes.com/local/lanow/la-me-oc-sanctuary-state-20180928-story.html>.

<sup>235</sup> See Vega, *supra* note 234; *Petition & Complaint*, *supra* note 233, at 3.

<sup>236</sup> See *Petition & Complaint*, *supra* note 233, at 8.

2018/2019] State Courts, Immigration, and Politics

1441

granted this authority prerogative to the federal government because immigration is based on relations with foreign states.<sup>237</sup>

Mike Posey, who was the Republican mayor of Huntington Beach until November 2018,<sup>238</sup> explained that the major purpose of the case was not political support for Trump's immigration but

was to challenge the constitutional overreach of Senate Bill 54 in precluding us from communicating voluntarily with the feds. This isn't an immigration issue. This is a public safety issue.

....

This isn't about politics. This is about constitutional overreach. And I think that protecting the constitution is really an interest to both sides of the aisle. And that's what I—that was my message.<sup>239</sup>

The Superior Court held on September 27, 2018 that the Sanctuary State law was an unconstitutional invasion of charter city authority and autonomy.<sup>240</sup> In the hearing, Judge Crandall asserted that “Laws are protections for the little guy, in this case, the city.”<sup>241</sup> The charter city's autonomy and authority is provided for in § 103 of the City Charter, which states that “[t]he City shall have the power to make and enforce all laws and regulations in respect to municipal affairs, subject only to such restrictions and limitations as may be provided in this Charter or in the Constitution of the State of California.”<sup>242</sup> Judge Crandall considered that the original constitutional intention behind allowing cities to create their own charters was to limit “the ever-extending tentacles of state government.”<sup>243</sup> The violation of the municipal affairs doctrine is at the core of the case,<sup>244</sup> as article XI of the California Constitution

---

<sup>237</sup> See *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); Petition & Complaint, *supra* note 233, at 4.

<sup>238</sup> *List of Mayors Historically*, CITY OF HUNTINGTON BEACH CAL., [https://www.huntingtonbeachca.gov/government/elected\\_officials/mayors\\_historical/](https://www.huntingtonbeachca.gov/government/elected_officials/mayors_historical/) (last visited May 25, 2019).

<sup>239</sup> *Huntington Beach Mayor Disagrees with California's Sanctuary Law*, NAT'L PUB. RADIO (Apr. 8, 2018), <https://www.npr.org/2018/04/08/600616583/huntington-beach-mayor-disagrees-with-californias-sanctuary-law>.

<sup>240</sup> See Susan Christian Goulding, *Judge Rules Huntington Beach Can Defy California's Sanctuary Law*, ORANGE COUNTY REG., (Sept. 27, 2018), <https://www.ocregister.com/2018/09/27/judge-rules-huntington-beach-can-defy-californias-sanctuary-law/>.

<sup>241</sup> *Id.*

<sup>242</sup> HUNTINGTON BEACH, CAL., CHARTER § 103.

<sup>243</sup> Goulding, *supra* note 240.

<sup>244</sup> See Petition & Complaint, *supra* note 233, at 7–8.

provides a Charter City's sovereignty over municipal affairs, and, as ruled in *California Federal Savings & Loan Ass'n v. City of Los Angeles*,<sup>245</sup> that its laws are "supreme and beyond the reach of [State] legislative enactment."<sup>246</sup> The issue revolved around section 5, article 11 of the California Constitution, on the definition of charter powers.<sup>247</sup> Article XI, section 5(a) states that cities may "make and enforce all ordinances and regulations in respect to municipal affairs . . . and with respect to municipal affairs [city charters] shall supersede all [State] laws inconsistent therewith."<sup>248</sup>

The judge complained that legislators "want to keep bossing people around" and that they "haven't tied [local law enforcement's] hands and feet, [but] just taped their mouths."<sup>249</sup> After the announcement of the court's decision, the court's political activism in enforcing the Trump administration's policy was noticeable when the judge, after repeatedly recognizing during the hearing the presence of Huntington Beach Chief Police Robert Handy in the courtroom, said that Chief Police officer desired to "get out there and do his good police work as soon as possible."<sup>250</sup>

Nevertheless, the Court's arguments demonstrate a mirror image approach on the matter of immigration while denouncing, on the other side, the state majority power, leading to a local counter-majoritarian power adjuvant to the majoritarian executive power. This provides an illustration of the checks and balance system, and of the state court's activist posture in the Trump-era on immigration. The debate will be further fueled as Deputy Attorney General Jonathan Eisenberg's Notice of Appeal (filed in November 2018) will move the case to the California Fourth District Court of Appeal as the lower court ruling could affect other municipalities.<sup>251</sup>

Miami-Dade County was the first in the United States to comply with President Trump's Executive Order of January 25, 2017, in which the President affirmed his intention to withhold federal grants from the federal government.<sup>252</sup> Indeed, the mayor of Miami-Dade County, Carlos Gimenez, was the first to include a county in the

---

<sup>245</sup> Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916 (Cal. 1991).

<sup>246</sup> *Id.* at 922 (quoting *Ex parte Braun*, 74 P. 780, 781 (Cal. 1903)); see CAL. CONST. art. XI.

<sup>247</sup> See Petition & Complaint, *supra* note 233, at 8.

<sup>248</sup> CAL. CONST. art. XI, § 5(a).

<sup>249</sup> Goulding, *supra* note 240.

<sup>250</sup> *Id.*

<sup>251</sup> See Vega, *supra* note 234.

<sup>252</sup> See Alan Gomez, *Miami-Dade Commission Votes to End County's 'Sanctuary' Status*, USA TODAY (Feb. 17, 2017), <https://www.usatoday.com/story/news/nation/2017/02/17/miami-dade-county-grapples-sanctuary-city-president-trump-threat/98050976/>.



federal immigration debate by directing the Miami-Dade County Department of Corrections to cooperate with requests from ICE,<sup>253</sup> and, thus, to maintain in detention for a period of 48 hours individuals who were under investigation by ICE.<sup>254</sup> His memorandum was sent to the Interim Director of the Miami-Dade Corrections and Rehabilitation Department on January 26, 2017.<sup>255</sup> It was “in response to what appeared to be an urgent threat to the County’s funding.”<sup>256</sup>

As Carlos Gimenez pointed out to Miami-Dade Board of County Commissioners on February 17, 2017, while discussing the memorandum and assessing the potential loss of federal funds, “non-compliance could potentially result in the loss of approximately \$355 million of federal funding that the County received for critical programs, and non-compliance would definitely put the community at risk of losing discretionary funding.”<sup>257</sup> At this same meeting, the Mayor also clarified the purpose of his memorandum qualifying it as “a simple directive to honor Detainer Requests received from federal immigration authorities. He explained that this was a directive to suspend County policy implemented in 2014 . . . .”<sup>258</sup> The directive of Carlos Gimenez was approved on February 17, 2017, by Resolution R-163-17<sup>259</sup> following a vote of the commission of the county which largely pronounced in favor of such a position by nine votes in support and three dissenting.<sup>260</sup> This directive firmly placed the county in the federal immigration debate as it became the first in the country to officially bow to Trump’s threats against “sanctuary cities” in order to bring “the county in line with federal law to ensure it is no longer incorrectly labeled a ‘sanctuary city,’” according to Gimenez.<sup>261</sup>

In the judicial ruling of the case *Lacroix v. Junior* in March 2017, the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County held that Miami-Dade Mayor Carlos Gimenez’s decision

---

<sup>253</sup> *See id.*

<sup>254</sup> *See id.*

<sup>255</sup> *See* Miami-Dade Cty., Fla., Bd. of Cty. Comm’rs Minutes (Feb. 17, 2017, 10:00 AM), <http://www.miamidade.gov/govaction/comminute.asp?cmbmeetdate=3905&file=false> [hereinafter Miami-Dade Bd. of Cty. Comm’rs Minutes].

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *See* Memorandum from Abigail Price-Williams, Cty. Attorney, to Esteban L. Bovo, Jr., Chairman, & Members, Bd. of Miami-Dade Cty. Comm’rs, Resolution No. R-163-17, at 1, 7 (Feb. 17, 2017).

<sup>260</sup> *See* Miami-Dade Bd. of Cty. Comm’rs Minutes, *supra* note 255; Memorandum from Abigail Price-Williams to Esteban L. Bovo, Jr. & Members, *supra* note 259, at 6–7.

<sup>261</sup> Gomez, *supra* note 252.

to allow county jails to hold undocumented immigrants awaiting deportation by federal agents was unconstitutional.<sup>262</sup> The petitioner was James Lacroix, a Haitian national<sup>263</sup> who pleaded guilty to a felony charge of driving with a suspended license, was supposed to be released on time served, but remained in custody because of an ICE detainer in a suit against Daniel Junior, director of Miami-Dade County Department of Corrections.<sup>264</sup>

Judge Hirsh underlined the correlation between the change of local policy direction in cooperation with ICE and the recent financial threats of the Trump administration against sanctuary jurisdictions, arguing, “The present petition is a consequence of an important change in the policy of the Miami-Dade County Department of Corrections (‘the Department’). That change in policy is in turn a consequence of a recent presidential order.”<sup>265</sup>

The decision of Judge Hirsh was based on the constitutionality of the procedure adopted by the county in relation to the Tenth Amendment of the U.S. Constitution.<sup>266</sup> The judgment clearly stated, “It has everything to do with the separation of powers between the state and federal governments as reflected in the Tenth Amendment to, and in the very structure of, the United States Constitution.”<sup>267</sup> It also dismisses the idea of Miami as a sanctuary city by referring, in particular, to the detailed footnotes on the etymology and historical uses of the term, stating, “But Miami is not and never was a ‘sanctuary city,’ and the issue raised by the petition at bar has nothing to do with affording ‘sanctuary’ to those unlawfully in this country.”<sup>268</sup> The court refers in this perspective to the United States Supreme Court’s precedent set in the case of *Printz v. United States*.<sup>269</sup> Judge Hirsh referred to this precedent when arguing the continued detention was based solely on the interests inherent to the ICE so that it could investigate the status of the individual in question, stating, “Neither the state nor the county makes any claim on Petitioner. But Miami-Dade correctional facilities and Miami-

---

<sup>262</sup> See *LaCroix v. Junior*, Nos. F17-376 & 17-1770, slip op. at 7 (Fla. Cir. Ct. Mar. 3, 2017).

<sup>263</sup> *Junior v. LaCroix*, 263 So. 3d 159, 161 (Fla. Dist. Ct. App. 2018). According to his lawyer, Lacroix legally entered the United States under emergency status given to Haitian nationals following the 2010 earthquake. See David Ovalle, *Haitian Facing Deportation After ‘Habitual’ Traffic Offenses Latest Test of Trump Immigration Policy*, MIAMI HERALD (Feb. 28, 2017), <https://www.miamiherald.com/news/local/community/miami-dade/article135571653.html>.

<sup>264</sup> See *LaCroix*, 263 So. 3d at 161.

<sup>265</sup> *Lacroix*, Nos. F17-376 & 17-1770, slip op. at 1.

<sup>266</sup> See *id.* at 5.

<sup>267</sup> *Id.*

<sup>268</sup> See *id.* at 4–5.

<sup>269</sup> See *id.* at 5–6 (quoting *Printz v. United States*, 521 U.S. 898, 902, 904 (1997)).

Dade correctional personnel have been conscripted to lock him up for and on behalf of the federal government, and to do so at county expense.”<sup>270</sup> Thus reiterating that

Lacroix was a county prisoner, but at present the county has neither a reason nor a basis in law to keep him its prisoner. A federal agency wants Lacroix to be a federal prisoner, but demands that the county do the imprisoning on the federal government’s behalf. That is a demand that the federal government is constitutionally prohibited from enforcing, and it is a demand with which the local government is constitutionally prohibited from complying.<sup>271</sup>

The judge’s rationale was based on the Supreme Court’s jurisprudence in the cases of *Prigg v. Pennsylvania*<sup>272</sup> and *Ashton v. Cameron County Water Improvement District*.<sup>273</sup> He considered that the county should not have imprisoned a Haitian national detained solely for ICE purposes.<sup>274</sup> Judge Hirsch said the county violated the Tenth Amendment of the Constitution by arresting the man, based solely on the ICE’s interest in investigating his status.<sup>275</sup> Reminding the county of the meaning and origin of the Statue of Liberty, the political resistance of the Court is increasingly visible in the course of his reasoning, which he inscribes to the history of the country and its relationship to immigration in such a way that pictured the notion of the American dream as having led legal and illegal immigrants to the United States in opposition to a federal authority in search of increasing power.<sup>276</sup> In this respect, Judge Hirsh argued, “But America was not made for those who dream of power. America was made for those with the power to dream.”<sup>277</sup> The latter clearly directs his argument against a presidency that would be imperial which means placing this decision as protector of historical and constitutional American essence. “Of course we must protect our country from the problems associated with unregulated immigration. We must protect our country from a great many things; but from

---

<sup>270</sup> *Lacroix*, Nos. F17-376 & 17-1770, slip op. at 4.

<sup>271</sup> *Id.* at 8.

<sup>272</sup> *See id.* at 8 (quoting *Prigg v. Pennsylvania*, 41 U.S. 539, 541 (1842)).

<sup>273</sup> *See Lacroix*, slip op. at 9 (quoting *Ashton v. Cameron Cty. Water Improvement Dist.*, 298 U.S. 513 (1936)).

<sup>274</sup> *See Lacroix*, Nos. F17-376 & 17-1770, slip op. at 10.

<sup>275</sup> *Id.* at 13, 15.

<sup>276</sup> *Id.* at 14 & n.6.

<sup>277</sup> *Id.* at 9.

nothing so much as from the loss of our historic rights and liberties.”<sup>278</sup> The position of resistance of the court against Donald Trump is all the more revealing that this ruling did not improve the situation of James Lacroix as his lawyer summarizes, “This doesn’t help [Lacroix]—he’s probably going to be deported, but this will help everyone else. [The ruling] is a direct blow to the president and his executive order,” Attorney Reizenstein said.<sup>279</sup> “It’s a courageous blow by this judge.”<sup>280</sup>

The rationale of the judge was based on elements not inherent in Florida state law, but with regard to the Tenth Amendment.<sup>281</sup> In the appeal for the case of *Junior v. Lacroix*, the Third District Court of Appeals, under mainly Republican jurisdiction and political inspiration, has reduced the jurisprudential scope of the decision of the circuit court by using an approach oriented on procedure and not on the merits.<sup>282</sup> The court thus put an end to any attempt within its jurisdiction including Miami-Dade and Monroe Counties, in Florida’s Eleventh and Sixteenth Circuits, to use this argument.

#### CONCLUSION

The framers of the U.S. Constitution intended the separation of powers and checks and balances to maintain a thriving democratic system which would provide intrinsic foundational pillars of the federal and state government structure.<sup>283</sup> As James Madison states in *The Federalist* No. 51, “This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.”<sup>284</sup> It has endured for centuries and is a perfect illustration regarding the issue of immigration, which is not a particularly recent topic in American history as it appeared at every stage of the nation’s construction, but has currently peaked during the Trump era.<sup>285</sup> Indeed, the Trump presidency is very atypical and diverges in many

---

<sup>278</sup> *Id.* at 15.

<sup>279</sup> Kalhan Rosenblatt, *Miami-Dade’s Policy of Holding Inmates for ICE is Unconstitutional: Florida Judge*, NBC NEWS (Mar. 3, 2017), <https://www.nbcnews.com/news/us-news/miami-s-policy-holding-inmates-ice-unconstitutional-florida-judge-n728786> (alteration in original).

<sup>280</sup> *Id.*

<sup>281</sup> *See Lacroix*, Nos. F17-376 & 17-1770, slip op. at 5.

<sup>282</sup> *See Junior v. LaCroix*, 263 So. 3d 159, 163 (Fla. Dist. Ct. App. 2018) (citing *Ricketts v. Palm Beach Cty. Sheriff*, 985 So. 2d 591, 591 (Fla. Dist. Ct. App. 2008)); Brandon Larrabee, *Scott Shifts Courts of Appeals to Right*, ORLANDO SENTINEL, Sept. 28, 2016, at B1.

<sup>283</sup> *See THE FEDERALIST NO. 51*, at 320 (James Madison) (Clinton Rossiter ed., 1961).

<sup>284</sup> *Id.* at 322.

<sup>285</sup> *See PEW RESEARCH CTR.*, *supra* note 37, at 34.

ways from previous presidencies, especially with his major media communication via social networking.<sup>286</sup> His different, controversial or straightforward tweets have fueled debate and further polarized the American people on this issue, driving activism on both sides.<sup>287</sup>

Jurisdictions and states have manifested themselves in both camps holding deeply opposing positions, some jurisdictions qualifying as sanctuaries, as was the case with California, so as not to collaborate on this issue with the authorities responsible for civil arrest without interfering in the work of the relevant agencies.<sup>288</sup> On the other side of the pendulum, the various presidential edicts have led cities, for fear of a decline in their federal funding, to strengthen their collaboration, such as Miami-Dade.<sup>289</sup> The additional difficulties arose within the states because of differences in political orientation within the various levels of the state and the weight of voters at the local level resulting in conflicts between municipalities and the state.<sup>290</sup> This is amply illustrated by the conflict between the municipality of Huntington and the state of California, stressing even more the question of the sovereignty of the states, but also displacing the issue within a state with regard to the sovereignty of the jurisdictions, vis-à-vis the position of the state.<sup>291</sup>

This debate has spread to the state courts that have been increasingly compelled, since Donald Trump came to power, to rule on increased cooperation with the Immigration and Customs Enforcement agency in the arrest of undocumented individuals in their jurisdictions through the ICE detainer.<sup>292</sup> Two models of reasoning have defined and constructed the framework of state courts on the issue of immigration. The first approach operates through the prism of the distinction between a civil and criminal arrest and the conformity of a civil arrest carried out by the sheriff's office with regard to the legislation in force in the state.<sup>293</sup> This guideline reinforces the element of sovereignty of state laws with regard to the federal government.<sup>294</sup> The other approach is oriented

---

<sup>286</sup> See Sara Swartzwelder, *Taking Orders from Tweets: Redefining the First Amendment Boundaries of Executive Speech in the Age of Social Media*, 16 FIRST AMEND. L. REV. 538, 540–41 (2018).

<sup>287</sup> See, e.g., Philip Rucker & Felicia Sonmez, *Trump Dials Up the Racial Rhetoric*, WASH. POST, Nov. 2, 2018, at A1.

<sup>288</sup> See Vega, *supra* note 234.

<sup>289</sup> See Gomez, *supra* note 252.

<sup>290</sup> See Vega, *supra* note 234.

<sup>291</sup> See *id.*

<sup>292</sup> See *id.*

<sup>293</sup> See, e.g., *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 522 (App. Div. 2018).

<sup>294</sup> See, e.g., *id.* at 531–32 (citing *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158 (Mass.

through the jurisdiction, or absence of jurisdiction, posing once more the major question of sovereignty.<sup>295</sup> Thus, separate courses have been taken by the state courts, from a resistance to the Trump administration with regard to its immigration policy and a position of mirror-imaging from a perspective of majority power, or counter-majoritarian, depending on the situation.<sup>296</sup>

These two approaches in the major decisions made to date by the state courts correspond finely with the antagonistic political positions, but are articulated around the thread of the sovereignty of the jurisdictions that cannot be disconnected from the popular sovereignty by the prism of the electoral accountability.<sup>297</sup> In turn, this cannot be omitted as a pivotal element, certainly independent but operating by definition even in a political and politicized environment. State courts are increasingly becoming major players in the political debate on immigration.

---

2017)).

<sup>295</sup> *See, e.g.*, Chavez v. Carmichael, 822 S.E.2d 131, 145 (N.C. Ct. App. 2018).

<sup>296</sup> *See supra* Parts I–II.

<sup>297</sup> *See* Christina Goldblum, *Sanctuary City Defenders Find Edge in State Courts*, N.Y. TIMES, Dec. 13, 2018, at A27.