

Recent Changes in Federal Policy Will Decrease Immigration Arrests at State and Local Courthouses

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Changes in the policies and procedures of the U.S. Department of Homeland Security (DHS) and the Immigration and Customs Enforcement Agency (ICE) enacted in early 2017 increased the number of enforcement actions by federal immigration officers in state and local courthouses across the U.S.¹ Many court leaders expressed concerns about the negative impacts of the arrests on the public's access to justice. Several state supreme court chief justices wrote letters expressing their concerns in letters to federal immigration officials. The Conference of Chief Justices established a special workgroup to study and document the incidents and their impacts on the courts and created a mechanism and process for communication between state court leaders and ICE officials. While ICE eventually adopted a new courthouse enforcement policy, incidents in and around courthouses continued.² Lawsuits challenging the policies were filed in multiple federal courts. Some states revised court rules and enacted laws to ban immigration arrests in courthouses. The closing of almost all courthouses in the U.S. in 2020 due to the pandemic brought a practical end to the conflict, although efforts to challenge the policies continued.

In 2021, President Biden issued executive orders repealing several of the policies enacted by the previous administration. DHS and ICE have now released new policies involving immigration enforcement priorities generally and courthouse enforcement actions specifically.³ The new policies recognize the importance of the courthouse and the public's access to justice as a "core principle" and will likely cause a marked decrease in the level of ICE activity and arrests in and around state and local courthouses in the future.

IMMIGRATION LAW BACKGROUND RELEVANT TO COURTHOUSE ARRESTS

While not expressly mentioned in the U.S. Constitution,⁴ the regulation of immigration is now clearly understood as a federal responsibility and within the power of the U.S. Congress. Congress adopted the first immigration legislation in 1790.⁵ In the late nineteenth century, the U.S. Supreme Court made clear that states had limited power to regulate immigration while the powers of Congress and the federal government were broad.⁶ This principle was reaffirmed in 2012 when, in *Arizona v. US*, the Supreme Court struck down several immigration statutes enacted in Arizona, declaring the federal government's primacy over the regulation of immigration.⁷

Federal immigration laws are found primarily in Title 8 of the United States Code.⁸ Significant revisions of the law last occurred in 1996 when the process for expelling non-citizens was restructured, eliminating the former "exclusion" and "deportation" hearings and substituting them with a procedure now defined as "removal."⁹

The immigration removal system is a *civil*—not a criminal—process. There is often confusion about the civil nature of the process since many of the legal grounds to support the removal of an individual involve proof of conviction of a state or federal crime. "Improper entry" is defined as a federal criminal offense under 8 U.S.C. § 1325; however, the crime occurs only at the time of entry and does not "continue." Since it is not a continuing crime, individuals can only be prosecuted for illegal entry if apprehended at the time of entry.¹⁰ Thus, a non-citizen's mere presence in the country without legal authority—whether having entered without authority or entered with authority and

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Footnotes

1. See Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 27, 2017) (directing "executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States).
2. U.S. Immigration and Customs Enforcement, Directive Number 11072.1, *Civil Immigration Enforcement Actions Inside Courthouses*, Jan. 10, 2018.
3. See Exec. Order No.13993, 86 Fed. Reg. 7051 (Jan. 25, 2021); see also Tae Johnson & Troy Miller, *Memorandum: Civil Immigration Enforcement Actions in or near Courthouses*, U.S. DEP'T OF HOMELAND SEC. (Apr. 27, 2021).
4. U.S. CONST. art. I, § 8. (granting Congress the power to establish "uniform rules of naturalization").

5. An Act to establish an uniform Rule of Naturalization, 1 Stat. 103 (1790).
6. See, e.g., *Smith v. Turner*, 48 U.S. 283, 463-64 (1849) ("[T]he power . . . to prohibit the immigration of foreigners to other States . . . is not a police power, nor necessary for the preservation of the health, the morals, or the domestic peace of the States who claim to exercise it."); *Ping v. United States*, 130 U.S. 581 (1889) (establishing that Congress has the power to exclude or deport immigrants from the United States for any reason).
7. 567 U.S. 387 (2012).
8. See 8 U.S.C. §§ 1101-1537 (2006 & Supp. V. 2011).
9. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, Div. A, § 304, 1996 U.S.C.C.A.N. (110 Stat.) 3009-546 [hereinafter *Illegal Immigration Act*].
10. *United States v. Rincon-Jiminez*, 595 F.2d 1192, 1193 (9th Cir. 1979); *United States v. Pruitt*, 719 F.2d 975, 978 (9th Cir. 1983).

remained after the authority expired—is not a crime but rather a civil immigration violation.¹¹

Federal immigration officials have broad authority to make arrests.¹² Under 8 U.S.C. § 1357(5)(B), agents can interrogate and arrest individuals where reasonable grounds exist to believe the individual is in violation of immigration law. It provides that an immigration officer may arrest and detain an alien who is subject to removal upon issuance of a “Warrant for Arrest of Alien.”¹³ These warrants are purely administrative and do not require approval by a judge or magistrate. Therefore, they do not have the same authority as judicial arrest warrants.¹⁴

The primary federal agency responsible for immigration enforcement is DHS, created by Congress in 2002.¹⁵ Two DHS agencies have responsibility for immigration enforcement and removal.¹⁶ ICE is responsible for enforcement within the interior of the U.S. and Customs and Border Protection (CBP) along U.S. borders and points of entry.¹⁷ The U.S. Attorney General and the Department of Justice (DOJ) also play a role.¹⁸ The nation’s immigration judges and courts and the Board of Immigration Appeals are located within DOJ.¹⁹ Federal district and circuit courts are also involved, having jurisdiction to hear criminal prosecutions and appeals involving illegal entry and illegal reentry.²⁰ These two crimes make up a significant percentage of the criminal caseload of federal district courts.²¹

THE 2017 POLICY CHANGES AND IMPACTS ON COURTHOUSE INTERACTIONS

President Trump signed and released three Executive Orders in 2017 that changed the scope and enforcement of federal immigration policies. The most impactful revision on the increase in arrest activities in and around court facilities was a change in the enforcement priorities utilized by DHS and ICE in

targeting those aliens subject to removal.²² The federal government has long recognized that the number of unauthorized aliens in the U.S. is far greater than the system’s capacity to identify and initiate removal proceedings against all of them.²³ In addition, there has been a tacit recognition of the economic and other benefits that many of the individuals bring to the communities in which they work and reside.²⁴ While all presidential

administrations have balanced these interests in different ways, each has adopted immigration enforcement policies that have established some system of priority for enforcement activities.²⁵

During the Obama administration, DHS adopted such a priority system.²⁶ In the first priority were aliens suspected of terrorism, those apprehended at the border, and those who had been convicted of a felony.²⁷ In the second priority were those convicted of three or more misdemeanors or of a “significant” misdemeanor, such as domestic violence.²⁸ The third priority included anyone who had received a recent order of removal.²⁹ Following President Trump’s 2017 Executive Order, DHS Secretary Kelly immediately adopted a new policy that rescinded the previous priority system and greatly expanded the scope of immigration enforcement.³⁰ It provided:

Department personnel shall faithfully execute the immigration laws of the United States against *all* removable aliens. Except as specifically noted above, the Department no longer will exempt classes or categories of removable aliens from potential enforcement, . . . Department personnel should

“President Trump signed ... three Executive Orders ... that changed ... enforcement of federal immigration policy.”

11. See Illegal Immigration Act, *supra* note 9.

12. See 8 U.S.C. § 1357.

13. *Id.*

14. CONG. RSCH. SERV., *Immigration Arrests in the Interior of the United States: A Primer*, (updated Jun. 3, 2021), <https://fas.org/sgp/crs/homeseclsb10362.pdf>.

15. Immigration and Ethnic History Society, *Immigration History: Homeland Security Act*, UNI. OF TEXAS AT AUSTIN, DEP’T OF HISTORY (2002), <https://immigrationhistory.org/item/homeland-security-act/>.

16. *Id.*

17. *Immigration Enforcement Along U.S. Borders and at Ports of Entry: Federal, State, and Local Efforts*, PEW RSCH. (Feb. 6, 2016), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/02/immigration-enforcement-along-us-borders-and-at-ports-of-entry>.

18. See generally Exec. Office for Immigr. Rev., *About the Office*, U.S. DEP’T OF JUSTICE (updated Feb. 3, 2021), <https://www.justice.gov/eoir/about-office>.

19. *Id.*

20. *Fact Sheet: Immigration Courts*, NAT’L IMMIGR. FORUM (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts/>.

21. In 2020 criminal filings in U.S. District Courts rose by 11% over the previous year and constituted 36% of all criminal filings—the most of any of the criminal case types. Drug offenses followed, making up 27% of all filings. See *Federal Judicial Caseload Statistics 2020*, ADMIN. OFF. OF THE U.S. COURTS (2020), [https://www.uscourts.gov/statistics-](https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020)

[reports/federal-judicial-caseload-statistics-2020](https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020).

22. *Supra* note 1.

23. See generally Daniel Costa, *Overloaded Immigration Courts: With Too Few Judges, Hundreds of Thousands of Immigrants Wait Nearly Two Years for a Hearing*, ECON. POL’Y INST. (Jul. 24, 2014), <https://www.epi.org/publication/immigration-court-caseload-skyrocketing/>.

24. See, e.g., Luis A. Aguilar, *The Important Role of Immigrants in Our Economy*, U.S. SEC. AND EXCH. COMM’N (May 18, 2013), <https://www.sec.gov/news/speech/2013-spch051813la.htm>.

25. See generally *The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL (Mar. 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities_under_the_trump_administration.pdf.

26. See John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, U.S. DEP’T OF HOMELAND SEC. (Jun. 20, 2010), <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>.

27. *Id.* at 2.

28. *Id.*

29. *Id.*

30. Memorandum From DHS Secretary John Kelly, *Enforcement of the Immigration Laws to Serve the National Interest*, DHS PUB. LIBRARY (Feb. 20, 2017); see Exec. Order No. 13768, 82 Fed. Reg. 8799, 8800 (Jan. 30, 2017).

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prioritize removable aliens who (1) have been convicted of any criminal offense; (2) *have been charged with any criminal offense that has not been resolved*; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful in connection with any official matter before a government

agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security.³¹

ICE previously focused its apprehension efforts on local jails and detention facilities because those who were in state custody likely matched the profile of individuals set out in the agency's enforcement priority policy—those who had been “convicted.” The new enforcement policy included individuals who had only been “charged” and were therefore unlikely to be in state custody. The obvious location at which to seek individuals who have been charged with an offense is at the local courthouse. The availability of public court dockets, many of which could be viewed online, simplified the search for targeted individuals and made it possible to ascertain that they would be in a specific location at a specific time. This made the local court facility a preferred site for immigration enforcement officers. It is likely that this revision and expansion of enforcement priorities was the primary reason for the increase in the frequency of immigration enforcement activities at many state and local court facilities.

THE FEARED IMPACT ON COURTS AND THE DHS RESPONSE

The elimination of enforcement priorities was only one of many changes in immigration policy that resulted from the 2017 Executive Orders. Immigration policy became one of the most contested, divisive, and politically charged issues during the Trump presidency. While state court judges and administrators have no responsibility or direct interest in the policy choices and goals surrounding federal immigration issues, the impact of these choices upon court facilities and the public's access to justice *are* central to the primary responsibility of state court lead-

ers. For this reason, court officials in many states expressed concerns and requested that immigration officials refrain from conducting enforcement actions in and around court facilities. Five of the nation's Chief Justices wrote to federal officials asking that such enforcement actions be limited.³² New Jersey Chief Justice Stuart Rabner described the potential impacts upon courts in his state:

A true system of justice must have the public's confidence. When individuals fear that they will be arrested for a civil immigration violation if they set foot in the courthouse, serious consequences are likely to follow. Witnesses to violent crime may decide to stay away from court and remain silent. Victims of domestic violence may choose not to testify against their attackers. Children and families in need of court assistance may likewise avoid the courthouse. And defendants in state criminal matters may simply not appear.³³

Similar comments were expressed by former Chief Justice Mary Fairhurst of Washington:

When people are afraid to access our courts, it undermines our fundamental mission Our ability to function relies on individuals who voluntarily appear to participate and cooperate in the process of justice. When people are afraid to appear for court hearings, out of fear of apprehension by immigration officials, their ability to access justice is compromised. Their absence curtails the capacity of our judges, clerks and court personnel to function effectively.³⁴

Several court leaders and court-related organizations suggested a change to the DHS policy on “sensitive locations.” Through administrative regulations, DHS had self-imposed limitations on where arrests should take place, recognizing that some locations are so “sensitive” as to make enforcement activities in these locations inappropriate.³⁵ The policy, in place since 2011, defines sensitive locations as schools, hospitals, places of worship, public ceremonies such as weddings and funerals, and the site of public demonstrations.³⁶ The underlying rationale for the policy is a recognition that immigration enforcement actions at these locations might deter individuals from attending and/or participating in activities deemed as basic and fundamental—education, health, religion, and the exercise of First Amendment rights.³⁷ The

31. Memorandum from DHS Secretary John Kelley, *Enforcement of the Immigration Laws to Serve the National Interests*, DHS PUB. LIBRARY (Feb 20, 2017). (emphasis added).

32. Letters have been written by California Chief Justice Cantil-Sakauye, former Washington Chief Justice Fairhurst, former Oregon Chief Justice Balmer, New Jersey Chief Justice Rabner, and former Connecticut Chief Justice Rogers. *Improving Relationships with ICE: Resource Center*, NAT'L CENT. STATE COURTS, <https://www.ncsc.org/topics/courthouse-facilities/improving-relationships-with-ice/ice>.

33. Letter from Stuart Rabner, Chief Justice, Supreme Court of New Jersey, to John F. Kelly, Sec. of Homeland Sec., U.S. Dep't of Homeland Sec. (Apr. 19, 2017), https://www.ncsc.org/_data/assets/pdf_file/0018/11925/nj-letter.pdf.

34. Letter from Mary Fairhurst, Chief Justice, Supreme Court of Washington, to John F. Kelly, Sec. of Homeland Security, U.S. Dep't of Homeland Sec. (Mar. 22, 2017), https://www.ncsc.org/_data/assets/pdf_file/0022/11938/wa-letter.pdf.

35. See Memorandum from John Morton, Director, U.S. Immigr. and Customs Enft, *Enforcement Actions at or Focused on Sensitive Locations*, (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

36. *Id.* at 2.

37. Sarah Rogerson, *Sovereign Resistance to Federal Immigration Enforcement in State Courthouses*, 32 GEO. IMMIGR. L.J. 275, 283-86 (2018) (detailing the origins of the “Sensitive Locations Memo”)

policy does not completely bar enforcement activities in these locations but creates a presumption against enforcement actions in these locations, absent a showing of exigent circumstances and requiring prior agency approval.³⁸ While the policy has never included courthouses the increase in courthouse arrests led to calls for the expansion of the policy to include court facilities and/or proceedings.³⁹ The members of the CCJ committee raised the issue with federal officials, but the response, communicated in a letter sent in June 2017 from acting ICE Director Thomas Homan to NCSC President Mary McQueen, indicated that the agency was not willing to change the policy.⁴⁰ In August 2017, the House of Delegates of the American Bar Association adopted a resolution requesting that the courthouse be included as a sensitive location, calling upon Congress to adopt such a policy through legislation.⁴¹

On January 10, 2018, ICE did, however, adopt the agency's first public Directive regarding courthouse enforcement policies.⁴² Before the Directive, the existence and content of agency policy guidance about the subject was confidential. ICE developed and released the Directive, in part, as a response to concerns communicated by members of the Conference of Chief Justices. It begins by stating that ICE has clear responsibility for the enforcement of federal immigration law, and carrying out that responsibility requires enforcement actions in court facilities.⁴³ It also notes that because entrances to courthouses require security screening, courthouse locations offer a safer and more secure option for ICE enforcement actions.⁴⁴ Even so, the Directive does restrict some courthouse activities.⁴⁵ First, it narrows the scope of enforcement actions to those against specific, targeted individuals with criminal convictions or who are gang members, national security threats, or have been ordered to be removed from the country.⁴⁶ Second, it provides that when courthouse enforcement actions against priority targets are underway, and other non-citizens (such as family members, friends, or witnesses) are encountered, only the target will be subject to arrest.⁴⁷ Third, it advises agents to avoid actions in areas of the courthouse that are dedicated to non-criminal proceedings, such as juvenile, family, and small-claims proceedings, and, to the extent possible, to only undertake actions in non-public areas. Finally, it directs that actions should be taken in collaboration with courthouse security staff.⁴⁸

While the Directive responded to some of the concerns raised

by court leaders, the number and frequency of courthouse arrests continued to grow, becoming one of many controversial issues that were a part of politically charged disagreements and disputes between state and local officials regarding federal immigration law and enforcement policies across the country. Attempts to limit federal access to state and local courthouses thus became the subject of litigation, state legislative activity, and changes in court rules.

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LITIGATION AND THE COMMON-LAW “PRIVILEGE”

Litigation against ICE was one of the methods used to challenge immigration arrests in and around courthouses. While several constitutional and statutory arguments have been asserted in support of the claims, the common-law privilege against civil arrest has been central to the litigation.⁴⁹ The privilege has existed for over five hundred years but was largely forgotten during the last century as a result of the adoption of modern rules and methods of processing civil litigation.⁵⁰ The purpose of the privilege was twofold: to protect individuals traveling to and from the court to participate in court proceedings and the actual building and the surrounding areas of the courthouse.⁵¹ Courts invoked the privilege to protect an individual's access to justice and provide a safe and secure location for the resolution of disputes.⁵² In the midst of the controversy over immigration arrests at local courthouses, an article published in the *Yale Law Journal Forum* first promoted the idea of applying this common-law privilege to civil immigration arrests.⁵³ The argument soon became the primary basis for federal court litigation in four states seeking to restrain ICE from making arrests and undertaking related enforcement actions in and around state and local courthouses.

In *Ryan v. U.S. Immigr. & Customs Enf't*, Middlesex County District Attorney Marian Ryan and Suffolk County District Attorney Rachael Rollins, along with other civil-rights lawyers in the Boston area, sued ICE and DHS in federal court, alleging that arresting undocumented immigrants at courthouses violates the common-law privilege against civil courthouse arrests.⁵⁴ In addition, the plaintiffs argued that ICE's practices violated the Tenth Amendment and the Right of Access to the Courts under

38. *Id.* at 1. (“ICE's enforcement activities in these same courthouses are wholly consistent with longstanding law enforcement practices, nationwide.”).

39. See *ABA House Urges Congress Add Courthouses to “Sensitive Locations” to ICE Guidelines*, American Bar Ass'n (Aug. 18, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/aba_house_urges_cong/.

40. Letter from Thomas D. Homan, Director, U.S. Immigr. and Customs Enf't. to Mary C. McQueen, President, National Center for State Courts. (Jun. 5, 2017) (on file with the National Center for State Courts).

41. *Supra* note 39.

42. See U.S. IMMIGRATION & CUSTOMS ENF'T. DIRECTIVE NO. 11072.1, CIVIL IMMIGRATION ENFORCEMENT ACTIONS INSIDE COURTHOUSES (Jan. 10, 2018), <https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf>.

43. *Id.* at 1.

44. *Id.*

45. *Id.* at 1-2.

46. *Id.* at 1.

47. *Id.*

48. *Supra* note 42, at 2.

49. See *infra* notes accompanying text at 54-80.

50. *Infra* note 54, at 439.

51. *Id.*

52. *Id.*

53. Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 *YALE L.J.* F410(2017).

54. Complaint at 9-15, *Ryan et al v. U.S. Immigration and Customs Enforcement et al*, 974 F.3d 9 (Apr. 29, 2019) (No. 1:19-CV-1103).

“It alleged that courthouse arrests ... interfere with ... rights of access to state courts.”

the First, Fifth, and Fourteenth Amendments.⁵⁵

In June of 2019, the federal court granted a preliminary injunction prohibiting ICE from making arrests at Massachusetts courthouses, finding that the plaintiffs had standing to sue and a probability of success in their suit on their common-law privilege claim.⁵⁶ ICE appealed, and

in September of 2020, the First Circuit overturned the district court’s preliminary injunction, holding that ICE had the authority to conduct civil arrests.⁵⁷ It reasoned that Congress had not stated an intent to prohibit courthouse arrests in the Immigration and Nationality Act (INA), and the plaintiffs could not prove ICE had no statutory authority to conduct arrests.⁵⁸ Following the Biden administration’s policy revisions regarding courthouse arrests, the court placed the case on hold until 2022.⁵⁹ Subsequently, the plaintiffs decided to drop the lawsuit, reasoning that their claims are now moot under the new federal guidance.⁶⁰

In *The State of N.Y. & Eric Gonzalez v. United States Immigration & Customs Enft*, a New York state prosecutor and Kings County District prosecutor sought to invalidate ICE Directive No. 11072 (the Trump administration courthouse arrest policy) on September 25, 2019.⁶¹ These prosecutors argued that the Directive violated the common-law privilege against civil arrests at courthouses, exceeding the authority granted to ICE under the INA, and was arbitrary and capricious.⁶² On the same date, in *Doe v. United States Immigration & Customs Enft*, Plaintiffs John Doe and Organizational Plaintiffs The Door, Make the Road New York, New York Immigration Coalition, Sanctuary for Families, and the Urban Justice Center sued ICE, DHS, and several other federal officials for violations of the APA and the First, Fifth, and Sixth Amendment.⁶³ On June 10, 2020, the United States District Court in the Southern District of New York held that the Directive exceeded ICE’s authority under the INA and violated the common-law privilege against civil courthouse arrests.⁶⁴ It also held that the adoption of the

policy, in general, was arbitrary and capricious.⁶⁵ As a result, the court barred ICE from conducting civil arrests at New York State courthouses.⁶⁶

Other cases, such as *Mathurin v. Barr*, have cited to *State of N.Y. v. U.S. Immigration & Customs Enft*, and *Ryan*. In *Mathurin*, the case differed from these two cases in that Mathurin’s case was a habeas corpus petition challenging the legality of his detention.

On December 17, 2019, the State of Washington in *Washington v. United States Dep’t of Homeland Sec.* brought an action against DHS, ICE, and CBP to challenge civil courthouse arrests in Washington State in the United States District Court for the Western District of Washington.⁶⁷ It alleged that courthouse arrests violate the APA and interfere with constitutional and statutory rights of access to state courts.⁶⁸ The State requested a motion for a preliminary injunction, to which the Court denied without prejudice, subject to refiling upon the Courts resuming non-emergency operations after the COVID-19 pandemic.⁶⁹ The Court set the bench trial for June 7, 2021.⁷⁰

In February of 2021, the defendants requested additional time to “evaluate whether any new immigration enforcement priorities may be issued that may impact the case.”⁷¹ In June of 2021, the plaintiffs and defendants produced a Joint Status Report, requesting the court continue to stay the matter at hand and citing to the new DHS interim guidance pertaining to civil courthouse arrests of undocumented immigrants.⁷² The parties agreed to await DHS’s final guidance to determine whether a new scheduling order should be issued or if the matter should be dismissed.⁷³ The court extended the deadline for another Joint Status Report until October 18, 2021.⁷⁴

In *Velazquez-Hernandez v. United States Immigration & Customs Enft*, a group of plaintiffs, all individuals charged in the Southern District of California with illegal entry into the United States, sought a temporary restraining order to prevent civil arrests at courthouses, arguing that these arrests violate the Administrative Procedure Act (APA).⁷⁵ The court reasoned that the plaintiffs are likely to succeed on the merits since the INA includes a “common-law privilege against civil arrest at the courthouse.”⁷⁶ In November of 2020, the court granted a fourteen-day restraining

55. *Id.* at 42-46.

56. *Ryan v. U.S. Immigr. & Customs Enft*, 974 F.3d 9, 15 (1st Cir. 2020).

57. *Id.* at 33.

58. *Id.*

59. Order Denying Petition for Rehearing, *Ryan, et al v. ICE, et al*, 974 F.3d 9 (May 18, 2021) (No. 19-1838).

60. Motion to Dismiss Appeal as Moot, *Ryan, et al v. ICE, et al*, 974 F.3d 9 (May 18, 2021) (No. 19-1838).

61. 466 F. Supp. 3d 439, 443-44 (S.D.N.Y. 2020).

62. *Id.*

63. 490 F. Supp. 3d 672 (S.D.N.Y. 2020).

64. *Id.* at 447.

65. *Id.* at 449.

66. *Id.* at 449-50.

67. 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2043 TSZ).

68. *Id.*

69. Plaintiff’s motion for a preliminary injunction, dkt 135, *Washington v. United States Dep’t of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585

(W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).

70. *Washington v. United States Dep’t of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).

71. Defendants’ Motion to Stay, dkt 142, *Washington v. United States Dep’t of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).

72. Joint Status Report at 1, dkt 149, *Washington v. United States Dep’t of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).

73. *Id.* at 2.

74. Defendants’ Motion to Stay, dkt 142, *Washington v. United States Dep’t of Homeland Sec.* 2020 U.S. Dist. LEXIS 64585 (W.D. Wash Apr. 10 2020) (No. C19-2034 TSZ).

75. 500 F. Supp. 3d 1132, 1137 (S.D. Cal. 2020). The Plaintiffs stated that the APA was violated because the directive was arbitrary and capricious, violated the common-law rule against civil courthouse arrests, Plaintiffs’ rights of access to the court under the First, Fifth, and Sixth Amendments, the Sixth Amendment right to present a defense, the Immigration and Nationality Act, and the Fourth Amendment. *Id.*

76. *Id.* at 1141.

order, ordering the parties to attempt resolving the matters.⁷⁷

Following this ruling in *Velasquez-Hernandez*, other litigation in California included requests to require that ICE halt courthouse arrests of undocumented immigrants. In *United States v. Oregel-Orozco* and *United States v. Fernandez*, the defendants, both awaiting trial on the charge of attempted improper entry by an alien, asked the court to bar immigration arrests at the courthouse where the trials were taking place, fearing being arrested at the courthouse even if he was acquitted at trial. In *Fernandez*, the Court dismissed the case for lack of jurisdiction.⁷⁸ In *Oregel-Orozco*, the defendant argued that courtroom immigration arrests violate a common-law privilege against civil arrests at courthouses and his right to a fair criminal trial.⁷⁹ Though the plaintiff's motions to bar courthouse arrests were denied, the court stated that the defendant could pursue relief in a separate civil action.⁸⁰

BANS ON COURTHOUSE ARRESTS—COURT RULES AND STATE LEGISLATION

Several state legislatures have also considered and enacted statutory limitations on activities by federal immigration officers in and around state and local courthouses.⁸¹ In addition, the Oregon Supreme Court and New York Office of Court Administration have adopted rules that similarly restrict the activity in court facilities in their states.⁸²

In January 2020, California became the first state to adopt legislation prohibiting civil arrest in courthouses, and its law is the narrowest.⁸³ It prohibits a civil arrest “in a courthouse,” protecting individuals who are “attending a court proceeding or having legal business.”⁸⁴ The Colorado legislature followed in March 2020, expanding the limitation to any “person . . . present at a courthouse or on its environs” and also prohibiting the arrest of a person “while going to, attending, or coming from a court proceeding.”⁸⁵ In April 2020, the State of Washington enacted a more far-reaching statute that dealt with activities beyond civil arrests at courthouses.⁸⁶ It prohibited courts from inquiring about or collecting information about an individual's immigration status or sharing court information with federal immigration officials. It also required courts to develop forms and collect data about any law enforcement actions that take place in and around courthouses.⁸⁷ Like Colorado's law, its civil-arrest prohibitions extend to any person in or traveling to or from a courthouse in connection with a judicial proceeding or other business with the court.⁸⁸ In New

York, Governor Andrew Cuomo signed the “Protect our Courts Act” in December 2020.⁸⁹ “It limits state law enforcement agencies and state public bodies in the performance of certain actions, such as collecting and sharing immigration-related information, using state resources in aid of federal immigration authorities, or entering into agreements with federal immigration agencies.”⁹⁰ It also prohibits the civil arrest of anyone who is inside a court facility and also of individuals and their family or household members who are parties or witnesses whenever they are going to, remaining at, or returning from a court proceeding.⁹¹ Most recently, in July 2021, the Oregon legislature adopted limitations on federal immigration activities in the state, including civil arrests in courthouses.⁹² Like the New York and Washington laws, it prohibits the civil arrest of anyone in or around the courthouse and also protects parties, witnesses, and their family or household members when traveling to and from the courthouse.⁹³

State courts in at least two states have also revised court rules to limit arrest activities in court facilities.⁹⁴ In 2019 the Oregon Supreme Court adopted revisions to the Uniform Trial Court Rules, providing that “no person may be subject to civil arrest without a judicial warrant or judicial order when the individual is in a courthouse or within the environs of a courthouse.”⁹⁵ In 2017, the Chief Administrative Judge of the New York Unified Court System issued a Memorandum applicable to all courts in New York prohibiting arrests of any kind inside a courtroom and requiring all law enforcement officers to first notify court security officers before undertaking enforcement activities inside a courthouse.⁹⁶ In 2019 a revised Directive was issued prohibiting any arrests by federal immigration authorities inside a New York courthouse absent an arrest warrant signed by a federal judge or magistrate.⁹⁷

THE NEW ICE MEMORANDUM ON COURTHOUSE ARRESTS

Changes in immigration policies enacted in 2021 by the Biden administration will greatly reduce the number of immigration arrests and enforcement actions in and around state and local court facilities and have, at least for now, lessened the need for

“State courts in at least two states ... limit arrest activities in court facilities.”

77. *Id.* at 1148.

78. 2020 U.S. Dist. LEXIS 172085 at *1 (S.D. Cal. Sep. 18, 2020) (No. 19-mj-24594-AGS.); 2020 U.S. Dist. LEXIS 201959, at *1-2 (S.D. Cal. Oct. 29, 2020) (No. 20mj20456-MSB-JLS).

79. *Id.*

80. *Id.* at *3.

81. See *infra* notes accompanying text at 83-93.

82. See *infra* notes accompanying text at 94-97.

83. See CAL. CIV. CODE § 43.54 (2020).

84. CAL. CIV. CODE § 43.54(a) (2020).

85. COLO. REV. STAT. § 13-1-403 (2020) (emphasis added).

86. See WASH. SESS. LAWS 2020, ch. 37.

87. See Wash. Legis. Serv. Ch. 17 (S.H.B. 2567) (West 2020).

88. Wash. Legis. Serv. Ch. 37, § 3(a) (S.H.B. 2567) (West 2020).

89. Wash. Legis. Serv. Ch. 37, § 3(b) (S.H.B. 2567) (West 2020).

90. See Wash. Legis. Serv. Ch. 17 (S.H.B. 2567) (West 2020).

91. Wash. Legis. Serv. Ch. 37 § 5(1) (S.H.B. 2567) (West 2020).

92. See H.B. 3265, 2021 Leg., 81st Sess. (Ga. 2021) (enacted).

93. H.B. 3265, 2021 Leg., 81st Sess., § 3 (Ga. 2021) (enacted).

94. See OR. UNI. TRIAL. CT. R. § 3.190 (2021); see also *infra* notes 96-97.

95. OR. UNI. TRIAL. CT. R. § 3.190(1) (2021).

96. Memorandum from N.Y. State Unified Ct. Sys., Office of the Chief Administrative Judge, *Policy and Protocol Governing Activities in Courthouses by Law Enforcement Agencies* (Apr. 26, 2017), available at https://www.ncsc.org/__data/assets/pdf_file/0023/14189/nys-court-house-activity-by-leas.pdf.

97. Directive from N.Y. Unified Court Sys., Office of the Chief Administrative Judge, *Protocol Governing Activities in Courthouses by Law Enforcement Agencies* (Apr. 17, 2019), available at <https://www.immi grantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdf>.

“The new policy begins by establishing a ‘core principle’ ... —the importance of the courthouse and access to justice.”

the statutory changes, court rule revisions, and litigation discussed previously.

On January 20, 2021, President Biden issued Executive Order 13993, repealing most of the Executive Orders that the previous administration had issued and announced a new set of immigration-related priorities.⁹⁸ One of the changes involved the adoption of a pri-

ority system for future immigration enforcement.⁹⁹ Similar to policies that had been in place during prior administrations, the new policy dedicates agency enforcement efforts and resources toward (1) non-citizens suspected of engaging in terrorism or espionage, (2) non-citizens apprehended at the border while attempting unlawful entry, and (3) non-citizens who have been convicted of an aggravated felony or an offense involving participation in a gang.¹⁰⁰ This shift in enforcement priorities will have a dramatic impact on the need for ICE to focus the location of enforcement actions in courthouses. No longer are those who are only *charged* with crimes and who are thus often easily found in a court facility the targets of routine ICE enforcement actions. Individuals who have been convicted of aggravated felonies, are not incarcerated, and appear in a courthouse for sentencing or post-conviction matters could still be targets of enforcement. In most cases, however, this policy shift will move the location of ICE enforcement actions from courthouses to probation agencies and jails.

In addition to revision of the enforcement priority policy, on April 27, 2021, Tae Johnson, Acting Director of ICE, and Troy Miller, Acting Director of CBP, issued a new memorandum providing guidance to their agencies on enforcement actions in or near courthouses.¹⁰¹ The Memorandum revoked ICE Directive 11072.1 (“Civil Immigration Enforcement Inside Courthouses”) that had been issued during the previous administration.¹⁰² It then outlined a new policy that severely curtails courthouse enforcement actions in ways that are responsive to many of the specific concerns that had been raised by the workgroup and individual members of the Conference of Chief Justices.¹⁰³

The new policy begins by establishing a “core principle” that guides the spirit and interpretation of the policy—the importance of the courthouse and access to justice.¹⁰⁴

The courthouse is a place where the law is interpreted, applied, and justice is to be done. As law enforcement officers and public servants, we have a special responsibility to ensure that access to the courthouse—and therefore access to justice, safety for crime victims, and equal protection under the law—is preserved.¹⁰⁵

Noting that enforcing immigration law remains an important federal interest that may sometimes require activity in or near court facilities, the new policy requires that the activities “be executed in or near a courthouse so as not to unnecessarily impinge upon the core principle of preserving access to justice.”¹⁰⁶ The policy also expands the scope of the previous order, including “the entrance and exit of a courthouse, and in adjoining or related areas such as an adjacent parking lot or transportation point,”¹⁰⁷ in addition to the inside of the courthouse.

Using the core principle as an initial presumption, the policy further limits courthouse arrest activities to target only those involved in 1) a national security threat, 2) an imminent risk of death, violence, or harm to any person, 3) hot pursuit of an individual who poses a threat to public safety, or 4) an imminent risk of destruction of evidence material to a criminal case.¹⁰⁸ When the policy allows courthouse arrest activity, it must be undertaken in a non-public area of the courthouse outside of public view and conducted in collaboration with courthouse security personnel.¹⁰⁹ The timing of the arrest is also limited so that it takes place only at the conclusion of the judicial proceeding in which the arrestee is involved.¹¹⁰

The Memorandum is temporary and will be replaced after the DHS Secretary issues his final guidance.¹¹¹ On August 11, 2021, Rhode Island Chief Justice Paul A. Suttell, President of the Conference of Chief Justices, and Minnesota State Court Administrator Jeff Shorba, President of the Conference of State Court Administrators, submitted a letter to ICE and CBP in support of the new policy and, specifically, its adoption of the Core Principle.¹¹²

While there have been and remain differences in the legal and policy perspectives among the members of the Conferences and between some members of the Conferences and ICE and DHS, there is a shared recognition that 1) the regulation and enforcement of immigration policy is a constitutional responsibility of the federal government and that 2) state court systems have a constitutional obligation to support the rule of law, preserve access to justice, and provide a safe, fair and open forum for the resolution of disputes. For this reason, we welcome and support the

98. Exec. Order No.13993, 86 Fed. Reg. 7051 (Jan. 25, 2021).

99. *Id.*

100. See Law Enforc. Immigr. Task Force, *Comparison of the Obama, Trump, and Biden Administration Immigration Enforcement Priorities* (Apr. 22, 2021), <https://leif.org/wp-content/uploads/2021/04/Enforcement-Priorities-Memo.pdf>.

101. Tae Johnson & Troy Miller, *Memorandum: Civil Immigration Enforcement Actions in or near Courthouses*, U.S. DEP’T OF HOMELAND SEC. (Apr. 27, 2021).

102. See *supra* note 42.

103. *Supra* note 101.

104. *Id.* at 1.

105. *Id.*

106. *Id.*

107. *Id.* at 2.

108. *Id.*

109. See *supra* note 101, at 3.

110. *Id.*

111. *Id.*

112. Letter from Paul A. Suttell & Jeff Shorba, Presidents, Conference of Chief Justices & Conference of State Court Administrators, to Tae Johnson, Acting Director, U.S. Immigr. & Customs Enf’t & Troy Miller, Acting Commissioner, U.S. Immigr. & Customs Enf’t (Aug 11, 2021) (on file with the National Center for State Courts).

adoption of the “Core Principle” outlined in the Memorandum, recognizing the importance of the courthouse and the public’s access to justice as the foundation from which limited civil immigration enforcement actions in and around a courthouse are to be evaluated. The Memorandum’s balance between important state and federal interests “so as not to unnecessarily impinge upon the core principle of preserving access to justice” provides appropriate recognition of the state courts’ most important obligations and responsibilities.¹¹³



J.D. Gingerich is the Director of the State Courts Partnership, a collaboration between the UALR Bowen School of Law and the National Center for State Courts. As a part of his work with the NCSC, he provides support for several committees of the Conference of Chief Justices and Conference of State Court Administrators, including a special workgroup appointed to review concerns and provide recommendations regarding interactions between federal immigration officials and the state courts.

CONCLUSION

The last significant change in the nation’s immigration laws occurred during the Presidency of Ronald Reagan. The inability of Congress to agree on changes to federal immigration law and procedures has resulted in the President assuming a greater responsibility for immigration policy through the use of executive orders. The nature and scope of the policies implemented through executive order have also grown. While this extension of presidential powers has allowed for timelier federal responses to significant national and world events, changes in immigration patterns, and other evolving challenges, it has also produced major shifts in immigration policies, goals, and objectives with each changing administration. These shifts in policy every four years have created their own problems and challenges. While action by Congress could create greater stability and consistency, the prospect of new federal legislation is unlikely. The 2021 policy changes related to arrests in state and local courthouses are responsive to many of the concerns raised by court leaders and are consistent with the goals and objectives contained in state legislation and court rules adopted in many states. These policies, however, are only in place via executive order and agency memoranda and could be easily changed in the future.



113. *Id.*

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Answers to Crossword

from page 231

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