

New York State Bar Association
Committee on Immigration Representation
Resolution Adopted by House of Delegates
January 28, 2018

WHEREAS, the New York State Bar Association (NYSBA) has long supported and encouraged equal access to justice and to our courts of law for all, including immigrants residing in New York State; and

WHEREAS, in the past, NYSBA has actively promoted and participated in efforts to provide immigrants in New York with access to justice by promoting access to legal representation through the establishment of a committee specifically for that purpose, as well as through partnerships with Governor Cuomo's Liberty Defense Project; and

WHEREAS, since the beginning of 2017 advocates have noticed an increase in the presence of Immigration and Customs Enforcement (ICE) agents in New York's courthouses, with a study by the Immigrant Defense Project (IDP) showing a eight-fold increase in arrests of immigrants on civil immigration charges within our State's courthouses; and

WHEREAS, the same study by IDP showed that 75% of immigration legal service providers in New York have worked with clients who have expressed fears of going to New York courts, including to resolve criminal charges against them, to act as witnesses, or to obtain orders of protection; and

WHEREAS, leading law enforcement voices in New York, including New York State Attorney General Eric Schneiderman and Kings County Acting District Attorney Eric Gonzalez have spoken of the chilling effect these tactics have had by ICE on immigrants seeking justice in our courts; and

WHEREAS, NYSBA believes that true access to justice includes the ability to appear, defend oneself, and obtain protection from our courts free from the fear of ancillary punishment;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby urges Immigration and Customs Enforcement (ICE) to include courthouses as a "sensitive location" in its Sensitive Locations Policy, which enumerates the places in which ICE will not conduct enforcement actions barring exigent circumstances.

RESOLVED, that the New York State Bar Association also urges Congress to pass the "Protecting Sensitive Locations Act" and to amend Section 287 of the Immigration and Nationality Act to codify the Sensitive Locations Policy and to include courthouses as a sensitive location therein.

NYSBA Committee on Immigration Representation
REPORT: Immigration and Customs Enforcement Arrests in Courthouses

The New York State Bar Association (NYSBA) has long supported and encouraged access to justice for all, including unfettered access to our courts of law. While in the past this has meant championing issues relating to access to affordable counsel or language access issues, recent changes at the Federal level have created new and troubling challenges.

One of the communities most targeted by these changes has been New York's immigrant communities, including those who support and champion them irrespective of legal status. Specifically, since January, 2017 when President Donald Trump assumed control of the White House, there has been a noted increase in arrests by U.S. Immigration and Customs Enforcement (ICE) agents at New York's courthouses, including family court, traffic courts and, most significantly, criminal courts.

These actions, in turn, have had a dramatically chilling effect on immigrants' willingness to avail themselves of the justice system and the protections of the Courts. This Report details the findings of advocates and legal service providers across New York State as to both ICE's activities in and around our courthouses and the devastating impact it has had on our immigrant communities. It further supports the issuance of a Resolution by the NYSBA House of Delegates calling upon ICE to declare courthouses as sensitive locations and upon Congress to codify these protections into law.

SENSITIVE LOCATIONS POLICY

U.S. Immigration and Customs Enforcement (ICE) is the agency within the U.S. Department of Homeland Security (DHS) charged with internal enforcement immigration laws and other laws relating to national security. ICE is divided into multiple sub-agencies. Those relevant to this report are Enforcement and Removal Operations (ERO), which is tasked with administrative enforcement of the Immigration and Nationality Act (INA), and Homeland Security Investigations (HSI), which handles criminal investigations of crimes threatening national security, including related immigration enforcement actions that have a criminal component.¹ The provisions of the INA that ICE enforces are civil in nature.² These include: being present in the United States without lawful status, violating the conditions attached to immigration status, or being removable from the United States based on a criminal conviction.³ The incidents described in this report relate to civil arrests either by ERO, or by HSI using their administrative authority to enforce civil immigration laws.

The INA mandates that, absent exigent circumstances, ICE civil arrests be made pursuant to administrative warrants signed by the arresting agent's supervisor.⁴ These warrants are not reviewed or issued by a judge or other neutral party to determine whether probable

¹ Immigration and Customs Enforcement, "Who We Are" (last updated September 26, 2017), <https://www.ice.gov/about>.

² *Arizona v. United States*, 567 U.S. 387, 396 (2012) ("Removal is a civil, not criminal, matter."); see also *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) (characterizing a deportation proceeding as "a purely civil action to determine eligibility to remain in this country").

³ INA § 212.

⁴ Immigration Legal Resource Center, "The Basics on ICE Warrants and Detainers" (May 2017), https://www.ilrc.org/sites/default/files/resources/ice_warrants_summary.pdf.

cause or reasonable suspicion has been objectively established, or to review the accuracy of the charges contained within.⁵

In 2011, then-ICE Director John Morton issued guidance known as the “Sensitive Locations Policy,” enumerating specific places where, barring exigent circumstances, ICE agents may not undertake enforcement actions. These are:

- schools (including preschools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);
- hospitals;
- churches, synagogues, mosques or other institutions of worship, such as buildings rented for the purpose of religious services;
- the site of a funeral, wedding, or other public religious ceremony; and
- a site during the occurrence of a public demonstration, such as a march, rally or parade.⁶

The memorandum also states that this is not an exhaustive list, and that agents should check with their supervisors if a place they intend to conduct an enforcement action could reasonably be viewed as a sensitive location.⁷ Exigent circumstances allowing for enforcement at sensitive locations include when:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.⁸

However, under President Trump, ICE has steadfastly refused to hold courthouses as a sensitive location, stating unequivocally so in a “Frequently Asked Questions” fact sheet

⁵ *Id.*

⁶ Memorandum from ICE Director John Morton, Enforcement Actions at or Focused on Sensitive Locations (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>.

⁷ *Id.*

⁸ *Id.*

updated as recently as June, 2017.⁹ The agency has also made clear that no one is exempt from arrests in courthouses, including victims and witnesses.¹⁰

IMMIGRATION AND CUSTOMS ENFORCEMENT'S INCREASED PRESENCE IN NEW YORK COURTHOUSES

Since early 2017, immigration lawyers and immigrant advocates have noticed a marked increase in the presence of ICE agents seeking to arrest immigrants in courthouses nationwide¹¹

In New York the Immigrant Defense Project (IDP) began tracking ICE arrests, including those made in courthouses across the state and, in June 2017, surveyed 225 attorneys and advocates from 31 New York counties to understand the impact of these increased enforcement actions.¹²

The results of the survey were startling:

- A third of respondents have seen ICE agents in courthouses;
- ICE agents were seen at courthouses in the 5 boroughs of New York City as well as Nassau, Suffolk, Westchester, Columbia, Dutchess, Saratoga, and Putnam Counties¹³;
- 74% of respondents have worked with immigrants who have expressed fear of the courts because of ICE;
- 45% have worked with immigrants who have either failed to file a petition or withdrawn a petition due to fear of encountering ICE in the courts;
- 48% say their clients have expressed fear of calling police for fear of ICE; and
- 29% have worked with immigrants who failed to appear in court due to fear of ICE.¹⁴

⁹ Immigration and Customs Enforcement, "FAQ on Sensitive Locations and Courthouse Arrests" (last updated June 13, 2017), <https://www.ice.gov/ero/enforcement/sensitive-loc>.

¹⁰ Devin Barrett, "DHS: Immigration Agents May Arrest Crime Victims, Witnesses at Courthouse", The Washington Post (April 4, 2017), https://www.washingtonpost.com/world/national-security/dhs-immigration-agents-may-arrest-crime-victims-witnesses-at-courthouses/2017/04/04/3956e6d8-196d-11e7-9887-1a5314b56a08_story.html?utm_term=.5fcacdd0ea34.

¹¹ James Queally, "ICE Agents Make Arrests at Courthouses, Sparking Backlash from Attorneys and State Supreme Court", Los Angeles Times (March 16, 2017), <http://beta.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html>

¹² Immigrant Defense Project, "ICE in New York State Courts Survey", <https://www.immigrantdefenseproject.org/ice-courts-survey>.

¹³ In addition to these counties encompassed in the survey, news reports have also reported ICE arrests at Saratoga County courthouses. See Wendy Liberatore, "ICE Arrests Mexican Man Outside Saratoga City Court", (November 2, 2017), <http://www.timesunion.com/news/article/ICE-arrests-Mexican-man-outside-Saratoga-city-12327064.php>

¹⁴ *Id.*

In one particularly troubling incident, witnessed by a WNYC reporter who happened to be in the building at the time, ICE agents came to arrest a Chinese woman who was appearing at the Human Trafficking Intervention Court in Queens.¹⁵ The woman was appearing in court to accept an adjournment in contemplation of dismissal.¹⁶ In part due to this incident, and another in a Texas Court where a domestic violence victim was arrested by ICE when she appeared to request an order of protection against her abuser,¹⁷ ICE's presence in courthouses have had a particularly terrible effect on survivors. According to the IDP survey:

- 67% of advocates working with survivors of violence have had clients who decided not to seek help from the courts due to fear of ICE;
- 50% have worked with immigrants who are afraid to go to court because their abusive partners have threatened that ICE will be there;
- 37% have worked with immigrants who have failed to pursue an order of protection due to fear of ICE;
- 48% have worked with immigrants who have failed to seek custody or visitation due to fear of ICE;
- 37% have worked with immigrants who have failed to seek a U certification verifying that they are a victim of violence (through the courts, from police, or from a District Attorney's office); and
- 46% have worked with immigrants who have expressed fear of serving as a complaining witness.¹⁸

In addition, ICE's presence in courts results in Immigrant New Yorkers facing criminal charges to choose between equally difficult options. They must either give up their constitutional rights and plead guilty early to avoid future court appearance; fail to appear altogether and risk a warrant being issued; or risk coming back to court in a system that is

¹⁵ Beth Fertig, "When ICE Shows Up in Human Trafficking Court", WNYC (June 22, 2017), <http://www.wnyc.org/story/when-ice-shows-court/>.

¹⁶ *Id.*

¹⁷ Richard Gonzales, "ICE Arrests Alleged Victim of Domestic Abuse at Texas Courthouse," National Public Radio (February 16, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse>

¹⁸ Immigrant Defense Project, "ICE in New York State Courts Survey", <https://www.immigrantdefenseproject.org/ice-courts-survey>.

backlogged and can take months or years to get to trial, exposing themselves to an ICE arrest at each interim court appearance. Moreover, ICE agents have picked up defendants from court and arraignments while cases are ongoing, causing judicial delay in the criminal court, resulting in their inability to defend themselves against the charges they face, and ultimately resulting in a lack of closure for victims and defendants who have not had the opportunity of a final determination on the case.¹⁹ In one such case, a 38-year old Salvadoran man was charged with a DWI but did not appear in Court out of fear of ICE arrests.²⁰ In that instance, ICE came to court multiple times to find the Defendant, who was ultimately issued a bench warrant because of his failure to appear in Court out of fear of being detained by ICE.²¹

NEW YORK'S RESPONSE TO DATE

The Trump Administration, and ICE specifically, have been public about the fact that they are targeting jurisdictions like New York, so-called "Sanctuary Jurisdictions", to send a message that they will not tolerate policies that seek to protect immigrants.²² Nonetheless, across New York State, ICE has made arrests in localities that have no sanctuary policies.²³ New Yorkers have responded by rejecting ICE's presence in court houses.

¹⁹ Justine Olderman, "Trapping Immigrants Using NYC Courts", The New York Daily News (April 10, 2017), <http://www.nydailynews.com/opinion/trapping-immigrants-nyc-courts-article-1.3031295>

²⁰ Liz Robbins, "A Game of Cat and Mouse With High Stakes: Deportation," The New York Times, (August 3 2017), <https://www.nytimes.com/2017/08/03/nyregion/a-game-of-cat-and-mouse-with-high-stakes-deportation.html>.

²¹ *Id.*

²² Maria Sacchetti, "Trump Administration Targets 'Sanctuary Cities' in Latest Wave of Immigration Arrests," The Washington Post (September 28, 2017), https://www.washingtonpost.com/local/immigration/trump-administration-targets-sanctuary-cities-in-latest-wave-of-immigration-arrests/2017/09/28/9b5e7de2-a477-11e7-ade1-76d061d56efa_story.html?utm_term=.6fc2c547ecca

²³ Wendy Liberatore, "ICE Arrests Mexican Man Outside Saratoga City Court", (November 2, 2017), <http://www.timesunion.com/news/article/ICE-arrests-Mexican-man-outside-Saratoga-city-12327064.php>.

In the spring and again in the summer of 2017, 110 organizations submitted letters to state Chief Judge Janet DiFiore and Chief Administrative Judge Lawrence Marks urging them to take steps to prevent ICE from engaging in enforcement actions in courts.²⁴ Over the summer, New York Attorney General Eric Schneiderman and Kings County District Attorney Eric Gonzalez jointly called for ICE to cease enforcement activities in New York’s courts, noting that ICE’s presence interferes with the criminal justice system by making both defendants and witnesses afraid of going to court.²⁵ Similarly, after the incident at the Queens Human Trafficking Intervention Court in June, “state Chief Judge Janet DiFiore said she was ‘greatly concerned’ and that courts should be treated like schools, hospitals and other sensitive locations that the city considers off-limits to ICE.”²⁶

In March, New York Congressman Adriano Espaillat introduced H.R. 1815, the “Protecting Sensitive Locations Act”, in Congress. A similar bill, S. 845, was introduced in the Senate by Connecticut Senator Richard Blumenthal and co-sponsored by New York Senator Kirsten Gillibrand.

Both bills intend to expand upon and codify the sensitive locations memoranda from ICE and CBP by outlawing immigration-related enforcement actions at or near sensitive locations unless (1) exigent circumstances exist; and (2) prior approval is obtained. Both bills would apply

²⁴ Immigrant Defense Project, “ICE Out of Courts New York State Campaign”, <https://www.immigrantdefenseproject.org/ice-courts-nys/>

²⁵ Liz Robbins, “A Game of Cat and Mouse With High Stakes: Deportation,” *Supra*.

²⁶ Beth Fertig, “Should Immigration Agents Be Allowed to Wait Around Courts to Arrest People?” *PRI’s The World*, (June 26, 2017), <https://www.pri.org/stories/2017-06-26/should-immigration-agents-be-allowed-wait-around-courts-detain-people>.

to any agency within DHS and also include local law enforcement officials who have been deputized to conduct immigration enforcement under INA § 287(g).²⁷

Both bills would expand the locations deemed sensitive, as compared to current ICE and CBP guidance. Notably, both bills include the space within 1,000 feet of each location, as well as the location itself.²⁸ Both bills mirror the current guidance in that they include in their list of protected locations schools (including school-related activities), medical facilities, places of worship, public ceremonies and public celebrations or demonstrations²⁹

Both bills would expand beyond current guidance, however, by adding not only courthouses, but also lawyers' offices and probation offices. Specifically, the House bill would prevent DHS enforcement at "any Federal, State, or local courthouse, including the office of an individual's legal counsel or representative, and a probation office."³⁰ The Senate bill would go further by preventing enforcement at "any Federal, State, or local courthouse, including the office of an individual's legal counsel or representative, and a probation, parole, or supervised release office."³¹

Finally, both bills list as sensitive locations places that provide emergency services, shelter, and food as well as domestic violence services, rape crisis centers, and family justice centers.³² The House bill would also include Congressional district offices, public assistance offices, social security offices, and motor vehicle departments.³³

²⁷ H.R. 1815, §§ 2(i)(2)(A)(i)-(ii); S. 845, §§ 2(i)(2)(A)(i)-(ii).

²⁸ H.R. 1815, § 2(i)(7)(E); S. 845, § 2(i)(1)(E).

²⁹ H.R. 1815, § 2(i)(7)(E); S. 845, § 2(i)(1)(E).

³⁰ H.R. 1815, § 2(i)(7)(E)(x).

³¹ S. 845, § 2(i)(1)(E)(vii).

³² *Id.*

³³ H.R. 1815, §§ 2(i)(7)(E)(xi)-(xiv).

If any DHS agent violates the bills, the information gathered during those enforcement actions could not be entered into evidence or used during removal proceedings, and the subject of the removal proceedings could move for immediate termination.³⁴

CONCLUSION

ICE's presence in New York State's courthouses has created a devastating and chilling impact on immigrant New Yorkers' ability to access the judicial system to defend themselves against criminal charges, participate in the prosecution of crimes, and obtain remedies, including sometimes life-saving protections, from our courts. These actions seriously and significantly undermine immigrant New Yorkers' access to justice through our courts, something that is antithetical to the Association's mission and the commitment we have made to our immigrant communities. For these reasons, the Committee on Immigration Representation respectfully urges the New York State Bar Association to request that ICE no longer operate in New York's courthouses, to support and encourage our court system to take all steps available to remove ICE agents from the courts, and to encourage and support our elected members of Congress who are working on passing the "Protecting Sensitive Locations Acts" in their respective chambers.

³⁴ H.R. 1815, § 2(i)(4); S. 845, § 2(i)(2)(C).