APPENDIX A

23-116. Civil arrests in courthouses. (NEW MATERIAL)

A. No civil arrests shall be made upon any person, including witnesses, plaintiffs, defendants, counsel, petitioners, respondents, victims, or family or household members of parties or potential witnesses, on any court property in New Mexico, or *en route* to or from any court in New Mexico unless judicially issued.[1] Execution or attempted execution of such non-judicially issued civil arrests shall constitute contempt of Court.

B. In order for a judicially-issued arrest warrant to be executed in a courthouse, such judicial warrant must first be presented to, and the execution approved by, the presiding Judge over the proceedings for which the person sought is attending. To be considered valid, the arrest warrant must be signed by a Judge.

[1] This Rule does not preclude a Court, in its jurisdiction, from issuing and enforcing orders pursuant to its inherent right and authority including contempt citations.

23-117. Writ of Protection. (NEW MATERIAL)

A. Any person or party in a judicial proceeding may petition the court, under seal, for the issuance of a writ of protection to secure the person from civil arrest in coming to, staying, and returning from the court.

1. For judicial proceedings in a district court, a writ of protection shall be sought from the judge presiding over the proceeding.
2. For judicial proceedings in a magistrate, municipal, or metropolitan court, a writ of protection shall be sought from the district court of the same judicial district.
3. A writ of protection may also be sought from the New Mexico Supreme Court for a person or party in a judicial proceeding in the Court of Appeals or Supreme Court or upon denial of a petition for writ of protection from a district court.

B. The Court shall issue a writ of protection upon a showing by preponderance of the evidence that:

1. The person or party has reason to believe that he or she may be subject to a civil arrest at, or en route to or from the courthouse; and
2. Arrest of the person would likely impede his or her access to the courts, including but not limited to, participating in his or her own defense, attending or testifying a hearing or trial as a witness or victim, filing a lawsuit, petitioning for divorce, custody, child support, or protection order, or risk the person receiving a warrant for failing to appear in court.

C. Execution or attempted execution of such civil arrests in any court in New Mexico, or en route to or from any court in New Mexico on a person secured by a writ of protection shall constitute criminal contempt of Court.

APPENDIX B

ICE COURTHOUSE ARRESTS IN NEW MEXICO 2017-2018
(as of August 15, 2018)

1. February 1, 2017: Ms. B.C.: Metro Court, Albuquerque
B.C., mother of two U.S. citizen children ages 7 and 10, came to the Metro Court for a jury trial on a misdemeanor case. She had no prior convictions, just this pending charge. The court continued the case to permit her lawyers to file dispositive motions. B.C. left the courtroom and went to the restroom. ICE officers entered the restroom and arrested her. A public defender who witnessed the situation believes that the ICE officers had come into the courtroom, identified the woman, and then secured the assistance of the courthouse security staff to locate her elsewhere in the courthouse. Kelly Villanueva, supervising attorney at the Law Office of the Public Defender, asked the ICE agents for a warrant to which they replied, "It's in the car." Court security was nearby. ICE agents told Ms. Villanueva that they were going to fingerprint B.C. and let her go, but two hours later B.C. was on a bus to an immigration detention center in El Paso.

2. February 1, 2017: Mr. C.G., Metro Court, Albuquerque
C.G. came to the Metro Court for a pre-trial conference on a misdemeanor case. Immediately after his court setting he was arrested by ICE on the courthouse grounds. His lawyer was informed of the arrest by his sister.

3. February 15, 2017: Mr. J.O., Metro Court, Albuquerque
J.O.'s family members informed his attorney's paralegal that after a pre-trial conference, J.O. was arrested by ICE directly outside the courthouse. He had a previous speeding ticket and no-license violation that had been dismissed and no other criminal history.

4. February 15, 2017: Mr. E.C., Metro Court, Albuquerque
E.C. appeared with his lawyer Lupe Preciado for a jury trial, at which time the State dismissed all pending charges. E.C. and his lawyer walked out of the courthouse together and went their separate ways outside. A couple hours later E.C.'s sister called and advised Mr. Preciado that ICE was parked on a side street of courthouse and arrested E.C. as he walked away from the courthouse.

5. February 17, 2017: Mr. E.M., Second District Court, Albuquerque
E.M. appeared for docket call in a single count drug trafficking case on February 17, 2017 in the Second Judicial District Court in Albuquerque. His wife was also present. Approximately fifteen minutes after the hearing E.M. was arrested on 4th street immediately to the east of the courthouse.

6. April 20, 2017: Name Not Provided, Metro Court, Albuquerque
DWI defendant arrested outside court after a pretrial conference.

7. April 21, 2017: Mr. R.P, Metro Court, Albuquerque
R.P. was arrested at the courthouse after pleading not guilty to his DWI at his bond arraignment.

8. May 9, 2017: Name Not Provided, Metro Court, Albuquerque
ICE agents were in Judge Castillo-Dowler's courtroom seeking to arrest one of the Public Defender's clients. That client left the courthouse before the case was called and a bench warrant was issued.

9. June, 12, 2017: Mr. J.P., Metro Court, Albuquerque
J.P. was arrested after his pretrial conference directly outside the courthouse before his case was adjudicated. He was charged with DWI, failure to maintain traffic lane and no driver's license.

10. August 1, 2017: Name Not Provided, Metro Court, Albuquerque
Public Defender Perry Klare's client was arrested just outside the courthouse. It appeared from the circumstances that APD courthouse security was allowing the ICE agents to view the control room television screens to effectuate the arrest.

11. October 31, 2017: Mr. F.C., Metro Court, Albuquerque
F.C. was arrested outside the Metropolitan court. He was followed out by ICE agents who sat with him in the courtroom.

12. December 9, 2017: Name Not Provided, Metro Court, Albuquerque
A Public Defender client was arrested outside the courthouse by ICE after he had scheduled his appointment for his forensic evaluation (the evaluations are conducted at the courthouse).

13. January 11, 2018: Name Not Provided, Metro Court, Albuquerque
Attorney received call from a client's mother informing attorney that ICE detained her son outside of Metro Court that morning after appearing for a hearing on a traffic ticket. No previous criminal records or removals/deportations.

14. January 11, 2018: Name Not Provided, Metro Court, Albuquerque
Defendant's mother called attorney's office to inform attorney that ICE arrested her son outside of Metro Court after appearing for a hearing on a traffic ticket.

15. January 23, 2018: Mr. D.A., Metro Court, Albuquerque
D.A. was arrested in the hallway outside Judge Jill Martinez' courtroom after his case was continued. After court, his attorney, David Reyes, observed Deputy Schlanger who was a witness on the case was talking to some men in the hallway. Those men turned out to be ICE agents and approached D.A. and started questioning him in the hallway and arrested him in the hallway. His case was ultimately dismissed because it could not be adjudicated since D.A. was in ICE custody.

16. April 17, 2018: Name Not Provided, Metro Court, Albuquerque
Attorney Mesa Lindgren's client was being observed by an ICE agent inside the courtroom. When asked by the attorney what he was there for, the ICE agent responded that he was just a "spectator." The client had a newborn in her arms so that is why her attorney believes that ICE did not apprehend her.

17. April 18, 2018: Mr. F.M., Metro Court, Albuquerque
F.M. reported to probation at Metro Court for a drug test. He was due to be released from supervised probation after successful completion of drug court soon thereafter. F.M. left the courthouse and walked to his car parked at 4th Street and Lomas where he noticed a car following him. The car engaged red and blue lights and pulled him over at 2nd Street and Central. F.M. was

asked for his license and told that they had been looking for him. Another car pulled up and F.M. was handcuffed. The agents were wearing civilian clothes and carried guns.

18. May 1, 2018: Mr. J.D., Metro Court, Albuquerque
J.D., who was represented by Attorney Ousama Rasheed, was arrested directly outside the courthouse doors after his case was continued. The case had not yet been adjudicated. J.D. had no convictions at the time other than traffic charges.

19. May 31, 2018: Mr. J.B., Metro Court, Albuquerque
J.B., a Public Defender client, appeared for a bench trial in Judge Rogers' courtroom. The case was reset. Later, Public Defenders Sarah Gallegos and Tess Williams spoke to J.B.'s family on June 20, 2018 and were told that ICE was waiting for him outside the courthouse and he was arrested directly outside the courthouse after the hearing.

20. June 4, 2018: Mr. I.B., Metro Court, Albuquerque
I.B. pled guilty to a DWI (First Offense). After the plea, he left the courtroom. Later, I.B.'s mother came in to the Public Defender's office and told the paralegal, Emelly Torres, that ICE was waiting for I.B. directly outside the courthouse and arrested him there.

21. July 23, 2018: Name Not Provided, Metro Court, Albuquerque
A Public Defender client, who had a work permit, was set for trial on a DWI in Judge Gonzales' courtroom. Attorney Perry Klare observed that all the other courtrooms on that floor were done with court and the hallways were empty except for four ICE agents who appeared to be waiting to see if the client was going to be convicted. The client was not convicted so they did not arrest her.

22. July 25, 2018: Name Not Provided, Metro Court, Albuquerque
ICE agents arrested a man in the courthouse. Attorneys Ousama Rasheed and Joseph Sanchez observed ICE agents escorting the gentleman in handcuffs out of the elevator on the first floor of courthouse. When asked if arresting inside the courthouse was permitted, the courthouse administrator said that he did not feel there was anything he could do about it.

23. July 30, 2018: Name Not Provided, Metro Court, Albuquerque
Attorney Alexandria Allen's client plead guilty to a DWI (First Offense). As soon as he walked out of Judge Dominguez's courtroom, an ICE agent arrested him.

24. August 8, 2018: Name Not Provided, Metro Court, Albuquerque
Unknown defendant was thrown against a wall outside Judge Montoya's courtroom. When Attorney Andrew Magida asked the individuals what they were doing and who they were, they declined to identify themselves and closed distance getting very close to Mr. Magida and asked in a threatening manner whether he represented the gentleman. The man who had been thrown against the wall was arrested and taken by ICE within the courthouse.

25. August 8, 2018: Name Not Provided, Metro Court, Albuquerque
Unknown defendant was arrested by ICE directly outside of Judge Gonzales' courtroom.

APPENDIX C

Policy Number: 10029.2
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

OCT 24 2011

MEMORANDUM FOR: Field Office Directors
Special Agents in Charge
Chief Counsel

FROM: John Morton
Director

SUBJECT: Enforcement Actions at or Focused on Sensitive Locations

Purpose

This memorandum sets forth Immigration and Customs Enforcement (ICE) policy regarding certain enforcement actions by ICE officers and agents at or focused on sensitive locations. This policy is designed to ensure that these enforcement actions do not occur at nor are focused on sensitive locations such as schools and churches unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the "*Exceptions to the General Rule*" section of this policy memorandum, or (c) prior approval is obtained. This policy supersedes all prior agency policy on this subject.[1]

Definitions

The enforcement actions covered by this policy are (1) arrests; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance. Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits, or participating in official functions or community meetings.

The sensitive locations covered by this policy include, but are not limited to, the following:

[1] Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, "Field Guidance on Enforcement Actions or Investigative Activities At or Near Sensitive Community Locations" 10029.1 (July 3, 2008); Memorandum from Marcy M. Forman, Director, Office of Investigations, "Enforcement Actions at Schools" (December 26, 2007); Memorandum from James A. Puleo, Immigration and Naturalization Service (INS) Acting Associate Commissioner, "Enforcement Activities at Schools, Places of Worship, or at funerals or other religious ceremonies" HQ 807-P (May 17, 1993). This policy does not supersede the requirements regarding arrests at sensitive locations put forth in the Violence Against Women Act, see Memorandum from John P. Torres, Director Office of Detention and Removal Operations and Marcy M. Forman, Director, Office of Investigations, "Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (January 22, 2007).

- schools (including pre-schools, 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.

This is not an exclusive list, and ICE officers and agents shall consult with their supervisors if the location of a planned enforcement operation could reasonably be viewed as being at or near a sensitive location. Supervisors should take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing significant disruption to the normal operations of the sensitive location. ICE employees should also exercise caution. For example, particular care should be exercised with any organization assisting children, pregnant women, victims of crime or abuse, or individuals with significant mental or physical disabilities.

Agency Policy

General Rule

Any planned enforcement action at or focused on a sensitive location covered by this policy must have prior approval of one of the following officials: the Assistant Director of Operations, Homeland Security Investigations (HSI); the Executive Associate Director (EAD) of HSI; the Assistant Director for Field Operations, Enforcement and Removal Operations (ERO); or the EAD of ERO. This includes planned enforcement actions at or focused on a sensitive location which is part of a joint case led by another law enforcement agency. ICE will give special consideration to requests for enforcement actions at or near sensitive locations if the only known address of a target is at or near a sensitive location (e.g., a target's only known address is next to a church or across the street from a school).

Exceptions to the General Rule

This policy is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities. The policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action as outlined below. ICE officers and agents may carry out an enforcement action covered by this policy without prior approval from headquarters when one of the following exigent circumstances exists:

- 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.

When proceeding with an enforcement action under these extraordinary circumstances, officers and agents must conduct themselves as discretely as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the sensitive location.

If, in the course of a planned or unplanned enforcement action that is not initiated at or focused on a sensitive location, ICE officers or agents are subsequently led to or near a sensitive location, barring an exigent need for an enforcement action, as provided above, such officers or agents must conduct themselves in a discrete manner, maintain surveillance if no threat to officer safety exists and immediately consult their supervisor prior to taking other enforcement action(s).

Dissemination

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision receive a copy of this policy and adhere to its provisions.

Training

Each Field Office Director, Special Agent in Charge, and Chief Counsel shall ensure that the employees under his or her supervision are trained (both online and in-person/classroom) annually on enforcement actions at or focused on sensitive locations.

No Private Right of Action

Nothing in this memorandum is intended to and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

This memorandum provides management guidance to ICE officers exercising discretionary law enforcement functions, and does not affect the statutory authority of ICE officers and agents, nor is it intended to condone violations of federal law at sensitive locations.

APPENDIX D

March 29, 2017

The Honorable Tani G. Cantil-Sakauye
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Dear Chief Justice Cantil-Sakauye:

Thank you for your March 16, 2017 letter regarding concern about reports from some California trial courts that suggest law enforcement officers, engaged in the performance of their duties with U.S. Immigration and Customs Enforcement (ICE), are "stalking" individuals at courthouses to make arrests.

As the chief judicial officer of the State of California, your characterization of federal law enforcement officers is particularly troubling. As you are aware, stalking has a specific legal meaning in American law, which describes criminal activity involving repetitive following or harassment of the victim with the intent to produce fear of harm. The arrest of persons in a public place based upon probable cause has long been held by the United States Supreme Court as constitutionally permissible. *See U.S. v. Watson*, 432 U.S. 411 (1976). Further, ICE officers and agents are authorized by federal statute to make arrests of aliens where probable cause exists to believe that such aliens are in violation of immigration laws. *See* 8 U.S.C. § 1357.

To be clear, the arrest of individuals by ICE officers and agents is predicated on investigation and targeting of specific persons who have been identified by ICE and other law enforcement agencies as subject to arrest for violations of federal law. ICE does not engage in "sweeps" or other indiscriminate arrest practices.

Some jurisdictions, including the State of California and many of its largest counties and cities, have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests. Such policies threaten public safety, rather than enhance it. As a result, ICE officers and agents are required to locate and arrest these aliens in public places, rather than in secure jail facilities where the risk of injury to the public, the alien, and the officer is significantly increased because the alien can more readily access a weapon, resist arrest, or flee. Because courthouse visitors are typically screened upon entry to search for weapons and other contraband, the safety risks for the arresting officers and persons being arrested are substantially decreased.

We agree with you that the enforcement of our country's immigration laws is necessary, and that we should strive to ensure public safety and the efficient administration of justice. Therefore, we would encourage you to express your concerns to the Governor of California and local officials who have enacted policies that occasionally necessitate ICE officers and agents to make arrests at courthouses and other public places.

The men and women of federal law enforcement perform their duties with the highest degree of professionalism and public service. As ICE undertakes the necessary enforcement of our country's immigration laws, its officers and agents will continually improve their operations to meet the challenges to effective enforcement, including state and local policies that hinder their efforts. While these law enforcement personnel will remain mindful of concerns by the public and governmental stakeholders regarding enforcement activities, they will continue to take prudent and reasonable actions within their lawful authority to achieve their mission.

Sincerely,

Jefferson B. Sessions III
Attorney General

John F. Kelly
Secretary of Homeland Security

APPENDIX E

April 4, 2017

Attorney General Jeffrey Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, NW

Secretary of Homeland Security John Kelly
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW

Dear Attorney General Sessions and Secretary Kelly:

As prosecutors with extensive experience protecting communities with immigrant populations, we write in strong support of California Supreme Court Chief Justice Tani Cantil-Sakauye's objections to immigration enforcement arrests in and around California courthouses.

ICE courthouse arrests make all Californians less safe. These practices deter residents concerned about their immigration status from appearing in court--including as crime victims and witnesses--jeopardizing effective prosecution of criminals who may then re-offend. Courthouse enforcement by ICE also risks confrontations that could endanger members of the public at courthouses throughout our state.

No one should fear that their immigration status prevents them from seeking justice, whether as a crime victim or otherwise. ICE's practice is antithetical to a fair system of justice that must protect all of us.

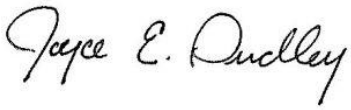
We urge you to reconsider your position, and include areas in and around courthouses among the sensitive sites where immigration enforcement actions are discouraged.

Thank you.

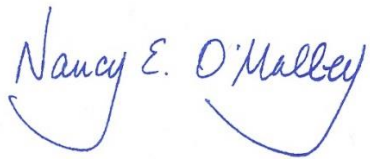
Mike Feuer
Los Angeles City Attorney

Jackie Lacey
Los Angeles County District Attorney

Bonnie Dumanis
San Diego County District Attorney



Joyce E. Dudley
Santa Barbara County District Attorney



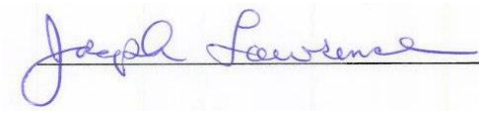
Nancy E. O'Malley
Alameda County District Attorney

Russell I. Miyahira
Hawthorne City Attorney

Amy Albano
Burbank City Attorney

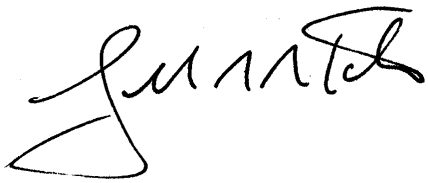
Maria Elliott
San Diego City Attorney

Doug Haubert
Long Beach City Prosecutor



Joseph Lawrence
Santa Monica City Attorney

George Gascon
San Francisco District Attorney



Jill Ravitch
Sonoma County District Attorney

APPENDIX F

Thomas A. Balmer
Chief Justice

1163 State Street
Salem, OR 97301-2563
Phone: 503.986.5717
Fax: 503.986.5730
Oregon Relay Service: 711
Thomas.Balmer@ojd.state.or.us

OREGON SUPREME COURT

April 6, 2017

Attorney General Jeff Sessions
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable John F. Kelly
Secretary of Homeland Security
Washington, DC 20528

Dear Attorney General Sessions and Secretary Kelly:

On behalf of the Oregon Judicial Department, I write to urge you to direct federal law enforcement agencies, including Immigration and Customs Enforcement (ICE), not to arrest individuals inside or in the immediate vicinity of Oregon's county courthouses. If you are unwilling to adopt that policy, then at a minimum, I request that you formally expand the definition of "sensitive locations" in the Homeland Security Policy to include these areas.

Let me explain. Our courthouses are open to the public, as a matter of tradition and as required by the Oregon Constitution, which provides that "justice shall be administered openly." ICE agents and other law enforcement officers have the same access to the public areas of our courthouses as all members of the public.

I fully recognize the scope of the statutory authority of ICE and other federal law enforcement agencies. OJD's policy is scrupulous neutrality -- just as we will not hinder federal, state, or local law enforcement agencies, including ICE, in the exercise of their enforcement authority, neither can we assist federal (or other) law enforcement in apprehending those who may have violated the law. As you know, the courts strive to be -- and must be -- impartial and neutral forums for the resolution of criminal and other cases.

To help the Oregon courts preserve their mandated impartial and neutral role, I respectfully request that you exercise your broad discretion in enforcing federal immigration and criminal laws, and *not* detain or arrest individuals in or in the immediate vicinity of the Oregon courthouses.

As I am sure you appreciate, the Oregon courts must be accessible to all members of the public. The safety of individuals and families, the protection of economic and other rights, and the integrity of the criminal justice system all depend on individuals being willing and able to attend court proceedings: a witness who is subpoenaed to testify in a criminal case; a victim seeking a restraining order against an abusive former spouse; a driver paying a traffic fine; a landlord seeking an eviction or a tenant defending against one; or a small claims court plaintiff in a dispute with a neighbor.

The State of Oregon needs to encourage, not discourage, court appearances by parties and witnesses, regardless of their immigration status. However, ICE's increasingly visible practice of arresting or detaining individuals in or near courthouses for possible violations of immigration laws is developing into a strong deterrent to access to the courts for many Oregon residents. A number of our trial courts report that even attendance at scheduled hearings has been adversely affected because parties or witnesses fear the presence of ICE agents. The chilling effect of ICE's actions deters not only undocumented residents, but also those who are uncertain about the implications of their immigration or residency status or are close family, friends, or neighbors of undocumented residents. ICE's actions also deter appearances in court by those who are legal residents or citizens, but who do not want to face the prospect of what they see as hostile questioning based on perceived ethnicity, cases of misidentification, or other intrusive interactions with ICE agents.

I understand and appreciate the difficulty of the law enforcement work that you do. I trust that you understand as well the central role that the Oregon courts play in our state's criminal justice system, our efforts to protect children and families, and our daily work to ensure the rule of law for all Oregon residents. ICE's detention or arrest of undocumented residents in and near Oregon's courthouses seriously impedes those efforts. It deters individuals, some undocumented and some not, from coming to court when they should. For that reason, I urge you to adopt a policy of *not* arresting individuals for alleged immigration violations in or near Oregon's courthouses, or, at a minimum, to formally include courthouses in your definition of "sensitive locations" where ICE will thoroughly review the implications of and alternatives to making such arrests.

We appreciate the discussions that our judges and staff have had with ICE officials in Oregon about their policies and practices, but believe this current and prospective interference with the administration of justice in Oregon calls for policy changes that only you can direct.

Thank you for your attention to this serious problem for the Oregon courts.

Sincerely,

Thomas A. Balmer
Chief Justice

cc: Governor Kate Brown
Attorney General Ellen Rosenblum
Senator Ron Wyden
Senator Jeff Merkley
Oregon Congressional Delegation
Oregon Presiding Judges

APPENDIX G

Michael B. Hancock
Mayor

City and County of Denver
OFFICE OF THE MAYOR
CITY AND COUNTY BUILDING
DENVER, CO 80202-5390
TELEPHONE: (720) 865-9090 • FAX: (720) 865-8787
TTY/ TTD: (720) 865-9010

April 6, 2017

Jeffrey D. Lynch
Acting Field Office Director
U.S. Immigration and Customs Enforcement
12484 East Weaver Place
Centennial, CO 80111

Mr. Lynch:

The undersigned officials for the City and County of Denver and Denver Public Schools strongly endorse the letter and the spirit of the policies adopted by Immigration and Customs Enforcement in the memorandum dated October 24, 2011 and titled ***"Enforcement Actions at or Focused on Sensitive Locations."*** To the extent the current administration has announced its intention to increase and broaden immigration enforcement efforts throughout the United States, we believe it is going to be more important than ever for Immigration and Custom Enforcement (ICE) officers to respect "sensitive locations" when carrying out their duties, for all of the reasons set forth in the 2011 policy memorandum.

We especially appreciate the wisdom of these elements of your 2011 sensitive locations policy:

- The admonition to ICE officers and agents to "make substantial efforts to avoid unnecessarily alarming local communities" when carrying out enforcement actions.

- The direction to ICE supervisors to "take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing a significant disruption to the normal operations of the sensitive location."

- The direction to all ICE employees to take "particular care" when taking enforcement actions that might affect any organization that assists victims of crime or abuse.

We are writing today to express our concerns about recent ICE enforcement actions in Denver which we believe may be inconsistent with the letter and the spirit of your sensitive locations policy.

ICE enforcement actions in Denver Courthouses

As you know, recent media accounts in Denver have called attention to the presence of ICE agents in the hallways of Lindsay-Flannigan Courthouse, deployed in the courthouse for the express purpose of arresting individuals going to or from a courtroom on a state or local criminal matter.

The sanctity of the courtroom has traditionally been recognized by law enforcement and judicial officers and the deference given to courthouses allows for the fair and effective administration of justice. We acknowledge that, even before the recent media accounts, ICE has used courthouses in Denver as staging areas for enforcement activities. However, we believe this practice has and will increasingly lead to an environment of fear for victims and witnesses. Already, we have victims of domestic violence refusing to come to court for fear of immigration consequences which results in violent criminals being released into the community. Unless ICE has a criminal warrant, we respectfully request you consider courthouses sensitive locations and follow your own directive which states that particular care should be given to organizations assisting victims of crime.

Denver officials are not alone in expressing this concern about the deleterious effect that immigration enforcement in or near courtrooms has on the administration of justice at the state and local level. For example, the statement issued by the chief justice of California Supreme Court on March 16, pleading with ICE agents in her state to refrain from enforcement actions within California court facilities, reflects the same concerns we are expressing in this letter.

ICE enforcement actions at or near Denver schools

On March 14, Denver officials were alerted by the principal of Colorado High School Charter of a possible ICE enforcement action at a residence directly adjacent to the school's campus during the traditional drop off time for the school, and in plain view of parents and children coming to and from the school. Colorado High School Charter is located in a Denver neighborhood that serves a large immigrant population. We investigated the incident and confirmed that ICE did in fact notify local dispatch and initiate an action near the school between 5:30am and 8:30am. We believe this enforcement action, particularly because it was scheduled to occur during the morning drop-off period, may have violated both the letter and the spirit of your sensitive location policy. The hour and location of this action potentially put children, staff and parents in danger should your agents have encountered resistance, and clearly caused alarm to the principal and the community served by the school. We are not aware of any exigency that would have required the enforcement action to occur at that location and at that hour. We strongly urge ICE to refrain from future enforcement actions near schools in Denver that do not comport with the sensitive locations policy.

The March 14 incident also raises a related concern. Video taken during the incident shows ICE agents wearing black uniforms with the word "POLICE" in large white block letters. The word "ICE" was much smaller and below the word "POLICE." These types of uniforms lead to confusion and fear within our community as many mistakenly assume that our local police are involved in immigration enforcement actions.

The Denver Police Department has worked tirelessly to reassure the immigrant community that they should feel comfortable calling the police and reporting crimes. Our local police rely on information and cooperation from our immigrant community to protect the entire city. Identifying yourselves as "police" confuses and erodes the trust between our local police and the immigrant community endangering the community at large. Again, Denver's concerns in this regard are being increasingly expressed by city leaders and local law enforcement officials elsewhere in the United State. Like our counterparts in other cities, we respectfully request that ICE agents carrying out their duties in Denver cease identifying themselves as police and clearly identify themselves as ICE in any official action where display of a law enforcement insignia is deemed operationally necessary.

We look forward to continuing to communicate about these and other issues. We all share the common goal of keeping our community safe from those that would do harm to our residents. Please do not hesitate to contact us regarding these or any other issues.

Respectfully,

Michael B. Hancock
Mayor

Tom Boasberg
Superintendent, Denver Public Schools

Judge Theresa Spahn
Presiding Judge, Denver County Court

Beth McCann
Denver District Attorney

Kristin Bronson
City Attorney, City and County of Denver

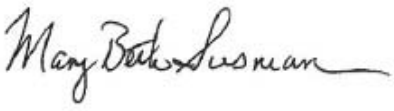
Albus Brooks
City Council President, District 9

Rafael G. Espinoza
City Council, District 1

Kevin Flynn
City Council, District 2

Paul D. López
City Council, District 3

Kendra Black
City Council, District 4



Mary Beth Susman
City Council, District 5

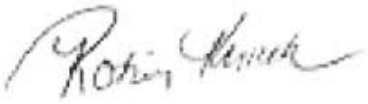
Paul Kashmann
City Council, District 6

Jolon Clark
City Council, District 7

Christopher J. Herndon
City Council, District 8

Wayne New
City Council, District 10

Stacie Gilmore
City Council, District 11



Robin Kniech
City Council, At Large

Deborah "Debbie" Ortega
City Council, At Large

APPENDIX H

American Civil Liberties Union of Maine
121 Middle Street, Suite 200
Portland, Maine 04101

April 10, 2017

The Honorable Jefferson B. Sessions
The Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Honorable John F. Kelly
Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Avenue, NW
Washington, DC 20528

Re: Immigration and Customs Enforcement Arrests at Maine Courthouses

Dear Mr. Attorney General and Mr. Secretary Kelly:

We were deeply disturbed to learn of the seizure by Immigration and Customs Enforcement ("ICE") agents of a person at Cumberland County Superior Court in Portland, Maine on April 6, 2017. We write to add our names to the growing chorus of attorneys from across the country and across the political spectrum speaking out against the practice of ICE arrests at courthouses.

ICE arrests at courthouses undermine the fundamental constitutional guarantee that all people have the right to seek redress from our court system—including people accused of crimes, witnesses to crimes, and victims of crimes. No one should be afraid to seek justice because of his or her immigration status.

The Department of Homeland Security currently regards places of worship (such as churches, synagogues, mosques, and temples) as well as religious

ceremonies (such as funerals and weddings) as "sensitive locations" where ICE enforcement actions should be avoided. Courthouses are sacred to our democracy, and they should also be included on the Department's list of sensitive locations.

We urge you to end this practice immediately, and to communicate this directive to your staff throughout the country and to the public.

Thank you for your attention to this important matter.

Sincerely,

Eben Albert	Ryan C. Almy	Oamshri Amarasingham
Nancy Anderson	Jennifer A. Archer	Cynthia C. Arn
Michael Asen	Emily G. Atkins	Amber R. Attalla
John C. Bannon	Joseph Barbieri	Connor Beatty
Henry Beck	Rachael Becker McEntee	Seth Berner
Alison Beyea	Timothy H. Boulette	Lauri Boxer-Macomber
Lee K. Bragg	Christopher B. Branson	Max I. Brooks
Juliet T. Browne	E. James Burke	Barbara A. Cardone
Michael E. Carey	Teresa M. Cloutier	Sarah E. Coburn
Catherine R. Connors	Emily L. Cooke	Mary E. Costigan
Carrie Cote	Stephanie Cotsirilos	Robert P. Cummins
Roberta L. de Araujo	Kevan Lee Deckelmann	Anthony R. Derosby
Jared S. des Rosiers	Amy Dieterich	Benjamin Donahue
Elaine Driscoll	Paul F. Driscoll	Susan B. Driscoll
Andrew S. Edwards	Meredith C. Eilers	Brian Eng
Angus Ferguson	Joan Fortin	Maria Fox
Carol J. Garvan	John W. Geismar	Philip Gleason
Kyle Glover	Abigail Greene Goldman	Betts J. Gorsky
Rachel E. Green	Rebecca West Greenfield	Gordon F. Grimes
Suzanne Grosh	James B. Haddow	Thomas Hallett
Daphne Hallett Donahue	Wendy Harlan	William S. Harwood
Danna Hayes	Zachary L. Heiden	Sara S. Hellstedt
Merritt T. Heminway	Michael C. Hernandez	Peter F. Herzog
Melissa A. Hewey	Toby Hollander	Martha Howell
Marcus B. Jaynes	Lee Johnson	Katherine A. Joyce
Charles J. Kahill	David M. Kallin	Stacey Mondschein Katz
Dennis C. Keeler	Daniel Keenan	Ronald Kreisman
Amy D. Kuhn	Matthew J. LaMourie	Peter J. Landis

Nelson J. Larkins
T. Griffin Leschefske
Ariel Linet
David A. Lourie
Anne Macri
Andrea Mancuso
Robyn G. March
Kelly W. McDonald
Powers McGuire
Robyn Merrill
Stephen W. Moriarty
Peter S. Murray
Christopher Northrop
Wendy Paradis
John Paterson
Russell B. Pierce
Patrice Putman
Nolan L. Reichl
Susan Roche
Michael C. Ryan
Ronald W. Schneider, Jr.
Leonard Sharon
Theodore Small
Michael S. Smith
Stacy O. Stitham
Louise K. Thomas
Vendean Vafiades
Matthew S. Warner
Michael J. Welch
Lucinda E. White
Judith Fletcher Woodbury
Jeffrey N. Young

Ken Lehman
Michael J. Levey
Paul Linet
Suzanne Breselor Lowell
Jana K. Magnuson
Peter G. Mancuso
Christopher Marot
Linda McGill
Alysia Melnick
M. Kathleen Minervino
Joseph D. Moser
Tina Heather Nadeau
Phil Notis
Cheryl Parker
Patricia A. Peard
Peter S. Plumb
Vivek J. Rao
Kimberly Richardson
Daniel J. Rose
Mary Schendel
Tina Schneider
Leslie Silverstein
Beth A. Smith
David Soley
Meagan Sway
Michael D. Traister
Virginia G. Villa
Robin Watts
David Weyrens
Valerie Z. Wicks
Jack Woodcock
Timothy Zerillo

Margaret Coughlin LePage
Molly Putnam Liddell
Elizabeth Little
Arnold Macdonald
Elizabeth Mahoney
Charles W. March
Jeana M. McCormick
Kai McGintee
Jonathan G. Mermin
Matthew D. Morgan
Sara Murphy
Stacey D. Neumann
Richard L. O'Meara
Liam J. Paskvan
Logan E. Perkins
Jeremy Pratt
Stephen M. Rappaport
Luke S. Rioux
Robert J. Ruffner
Andrew Schmidt
Sigmund D. Schutz
Ellen Simmons
Deirdre M. Smith
Annie E. Stevens
Chistopher C. Taintor
Sharon Anglin Treat
Sally Wagley
Anna R. Welch
Michael Whipple
Lauren Willie
Andrew Wright

APPENDIX I

SUPREME COURT OF NEW JERSEY

STUART RABNER
CHIEF JUSTICE

RICHARD J. HUGHES JUSTICE COMPLEX
PO BOX 023
TRENTON, NEW JERSEY 08625-0023

April 19, 2017

The Honorable John F. Kelly
U.S. Department of Homeland Security
Secretary of Homeland Security
Washington, D.C. 20528

Dear Secretary Kelly:

In recent weeks, agents from the Immigration and Customs Enforcement agency arrested two individuals who showed up for court appearances in state court. As Chief Justice of the New Jersey Supreme Court and the administrative head of the state court system, I write to urge that arrests of this type not take place in courthouses.

ICE recognizes that arrests, searches, and surveillance only for immigration enforcement should not happen in "sensitive locations." Policy Number 10029.2 extends that principle to schools, hospitals, houses of worship, public demonstrations, and other events. I respectfully request that courthouses be added to the list of sensitive locations.

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 a courthouse, serious consequences are likely to follow. Witnesses to violent crimes may decide to stay away from court and remain silent. Victims of domestic violence and other offenses 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.

To ensure the effectiveness of our system of justice, courthouses must be viewed as a safe forum. Enforcement actions by ICE agents inside courthouses would produce the opposite result and effectively deny access to the courts.

For years, state courts and corrections officials have cooperated with detainer requests from ICE and other agencies for the surrender of defendants who are held in custody. That practice is different from carrying out a public arrest in a courthouse for a civil immigration violation, which sends a chilling message. Instead, the same sensible approach that bars ICE enforcement actions in schools and houses of worship should apply to courthouses.

I worked closely with ICE and Customs agents when I served in the United States Attorney's Office for the District of New Jersey and, later, as the State's Attorney General. Like you, I believe in the rule of law. But I respectfully urge that we find a thoughtful path to further that aim in a way that does not compromise our system of justice.

Thank you for your attention to this matter. I would be pleased to discuss the issue further.

Very truly yours,

Stuart Rabner
Chief Justice

cc: Thomas D. Homan, Acting Director, ICE
John Tsoukaris, ICE Field Office Director, Newark, NJ

APPENDIX J

April 24, 2017

U.S. Commission on Civil Rights Expresses Concern with Immigrants' Access to Justice

The Commission is concerned that some of the most vulnerable individuals' access to justice is hindered by the recent actions of the federal government. The Commission urges Attorney General Sessions and Department of Homeland Security Secretary Kelly to consider the fair administration of justice when determining how and where they send Immigration and Customs Enforcement (ICE) agents.

In the last few months, troubling reports have emerged of federal immigration agents following, confronting, and in some instances, arresting undocumented immigrants in state and local courthouses when some of those immigrants were seeking help from authorities and the local justice system. For example, in Texas, ICE agents reportedly arrested a woman just after she obtained a protective order against her alleged abuser.[1] In Colorado, video footage of ICE agents with an administrative arrest warrant waiting in a Denver courthouse was widely circulated.[2] Similar reports have been made about courthouses in California,[3] Washington,[4] Arizona,[5] and Oregon.[6]

Stationing ICE agents in local courthouses instills needless additional fear and anxiety within immigrant communities, discourages interacting with the judicial system, and endangers the safety of entire communities. Courthouses are often the first place individuals interact with local governments. It is the site of resolution for not only criminal matters, where a victim might seek justice when she has been harmed or

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[1] Marty Schladen, *ICE detains alleged domestic violence victim*, El Paso Times, February 15, 2017, http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/.
[2] Erica Meltzer, *A video shows ICE agents waiting in a Denver courthouse hallway. Here's why that's controversial.*, Denverite, February 23, 2017, https://www.denverite.com/ice-agents-denver-courthouse-hallway-video-30231/.
[3] James Queally, *ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court*, March 16, 2017, http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html.
[4] Natasha Chen, *More ICE agents seen waiting around local courthouses to intercept people*, KIRO 7, March 23, 2017, http://www.kiro7.com/news/local/more-ice-agents-seen-waiting-around-local-courthouses-to-intercept-people/505226120.
[5] *Supra* note 3.
[6] Aimee Green, *Men won't say they're federal agents, follow immigrant through Portland courthouse*, January 31, 2017, http://www.oregonlive.com/portland/index.ssf/2017/01/men_wont_say_theyre_federal_ag.html.

wronged, but also for resolution of civil matters, including family and custody issues, housing, public benefits, and numerous other aspects integral to an individual's life.

The chilling effect on witnesses and victims is already apparent. According to Denver City Attorney Kristin Bronson, four women dropped their cases of physical and violent assault for fear of being arrested at the courthouse and subsequently deported. Bronson stated that video footage of ICE officers waiting to make arrests at a Denver courthouse has "resulted in a high degree of fear and anxiety in our immigrant communities, and as a result, we have grave concerns here that they distrust the court system now and that we're not going to have continued cooperation of victims and witnesses."[7]

The response from Attorney General Sessions and Secretary Kelly to these concerns is that local officials "have enacted policies that occasionally necessitate ICE officers and agents to make arrests at courthouses and other public places," and such policies "threaten public safety."[8] Contrary to this claim regarding jurisdictions that are refusing to hold individuals solely based on ICE detainer requests, it appears that these tactics have been deployed even where local law enforcement has indicated that they are willing to act in concert with federal immigration agents. In El Paso County, Texas, for instance, Sheriff Richard Wiles signed a letter requiring his office to hold any individuals with an ICE detainer request.[9] Despite this, ICE agents entered a courthouse in El Paso County to arrest a woman after she left the courtroom where she secured a protective order against her alleged abuser.[10]

More importantly, even if this strategy were used exclusively in jurisdictions refusing to cooperate regarding enforcement of ICE detainers, studies have shown that public safety is in fact undermined when members of the community are fearful of local law enforcement and therefore less likely "to report crimes, make official statements to police or testify in court."[11]

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[7] Heidi Glenn, *Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver*, NPR, March 21, 2017, http://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver.

[8] Letter from Attorney General Sessions and Secretary Kelly to the Honorable Tani G. Cantil-Sakauye, dated March 29, 2017, *available at* https://www.nytimes.com/interactive/2017/03/31/us/sessions-kelly-letter.html.

[9] Aileen B. Flores, *Sheriff honors US immigration detention requests*, El Paso Times, January 23, 2017, http://www.elpasotimes.com/story/news/local/el-paso/2017/01/23/sheriff-honors-us-immigration-detention-requests/96972384/.

[10] *See supra* note 1; Jonathan Blitzer, *The Woman Arrested By ICE In A Courthouse Speaks Out*, The New Yorker, February 23, 2017, http://www.newyorker.com/news/news-desk/the-woman-arrested-by-ice-in-a-courthouse-speaks-out.

[11] Wayne A. Cornelius, Angela S. Garcia, and Monica W. Varsanyi, *Giving sanctuary to undocumented immigrants doesn't threaten public safety – it increases it*, L.A. Times, February 2, 2017, http://www.latimes.com/opinion/op-ed/la-oe-sanctuary-cities-trump-20170202-story.html (citing Doris Marie Provine, Monica W. Varsanyi, Paul G. Lewis, and Scott H. Decker, Policing Immigrants: Local Law Enforcement on the Front Lines, University of Chicago Press, 2016).

In the words of California Supreme Court Chief Justice Tani G. Cantil-Sakauye: "Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws."[12] Chair Catherine E. Lhamon adds: "The fair administration of justice requires equal access to our courthouses. People are at their most vulnerable when they seek out the assistance of local authorities, and we are all less safe if individuals who need help do not feel safe to come forward."

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The U.S. Commission on Civil Rights is an independent, bipartisan agency charged with advising the President and Congress on civil rights matters and issuing an annual federal civil rights enforcement report. For information about the Commission, please visit http://www.usccr.gov and follow us on Twitter and Facebook.

[12] Letter from Chief Justice Tani G. Cantil-Sakauye to Attorney General Sessions and Secretary Kelly, dated March 16, 2017, *available at* http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses.

APPENDIX K

Enforcement and Removal Operations

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

MAY 2 5 2017

The Honorable Michael B. Hancock
Mayor of the City of Denver
City and County Building
Denver, CO 80202

Mayor's Office
JUN 05 2017
City and County of Denver

Dear Mayor Hancock:

Thank you for your April 6, 2017 letter to U.S. Immigration and Customs Enforcement (ICE) regarding ICE activity near schools and courthouses in Denver, Colorado, and the sensitive locations policy.

On October 24, 2011, ICE implemented the policy memorandum entitled *Enforcement Actions at or Focused on Sensitive Locations*. This memorandum remains in effect, and provides that enforcement actions at or focused on sensitive locations, such as schools, hospitals, and places of worship, should generally be avoided. The memorandum explains that such actions may only take place when prior approval is obtained from an appropriate supervisory official, or there are exigent circumstances necessitating immediate action without supervisor approval.

This memorandum is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement actions. In situations where the risk of injury to the public, alien, and the officer is significantly increased, because the alien can more readily access a weapon, resist arrest, or flee, ICE officers and agents are required to locate and arrest these aliens in public places. Because courthouse visitors are typically screened upon entry to search for weapons and other contraband, the safety risks for the arresting officers and persons being arrested are substantially decreased.

When carrying out the immigration law enforcement mission, ICE remains sensitive to the needs of victims of crimes. ICE operations are guided by our commitment to public safety. ICE conducts targeted enforcement actions to seek out and arrest law violators who may have criminal histories or past violent behavior, or exhibit attempts to elude law enforcement with a disregard for community safety. Determinations about where and how ICE officers conduct both administrative and criminal arrests are made on a case-by-case basis, taking into account all aspects of the prospective action, including the intended target's criminal history, safety considerations, and any sensitivities involving the arrest location, pursuant to U.S. immigration law and consistent with ICE policies.

I want to assure you that we will continue to be respectful of, and work closely with, the courts in carrying out the ICE mission. The men and women of federal law enforcement perform

their duties with the highest degree of professionalism and public service. As ICE undertakes the necessary enforcement of our country's immigration laws, its officers and agents will continually improve their operations to meet the challenges to effective enforcement, including state and local policies that hinder their efforts. While these law enforcement personnel will remain mindful of concerns by the public and governmental stakeholders regarding enforcement activities, they will continue to take prudent and reasonable actions within their lawful authority to achieve their mission.

To perform their jobs safely and effectively, ICE officers must be publicly recognizable as law enforcement officers. The word "police" is the most universally recognizable term for law enforcement agencies around the world. ICE officers and special agents are—in fact—law enforcement personnel who perform law enforcement duties, such as carry firearms, make arrests, serve warrants, and conduct searches. Therefore, ICE officers must continue to identify themselves as "police," as well as "ICE," so that they are recognizable as law enforcement authority. This policy is enacted for the safety of our law enforcement officers, the individuals they encounter, and the public they serve.

Should an individual fail to recognize or acknowledge an ICE officer as a legitimate police entity due to a lack of proper identification, the individual may attempt to flee or take other action resulting in injury to the individual, harm to the officer, or danger to the public at large. ICE would fall short of its duty to promote public safety by branding itself with any marking that could lead a person to believe he or she is observing or encountering anyone other than a sworn law enforcement officer. ICE officers' proper identification is crucial to our agency's mission in enforcing federal immigration law and protecting public safety.

Thank you again for your letter and your interest in this important matter. Please share the response with the co-signers of your letter.

Sincerely,

Matthew T. Albence
Executive Associate Director

APPENDIX L

THE YALE LAW JOURNAL FORUM
October 24, 2017

A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis

Christopher N. Lasch

ABSTRACT. Under the Trump presidency, Immigration and Customs Enforcement (ICE) officers have been making immigration arrests in state and local courthouses. This practice has sparked controversy. Officials around the country, including the highest judges of five states, have asked ICE to stop the arrests. ICE's refusal to do so raises the question: can anything more be done to stop these courthouse immigration arrests?

A common-law doctrine, the "privilege from arrest," provides an affirmative answer. After locating courthouse immigration arrests as the latest front in a decades-long federalism battle born of the entanglement of federal immigration enforcement with local criminal systems, this Essay examines treatises and judicial decisions addressing the privilege from arrest as it existed from the fifteenth to the early twentieth century. This examination reveals that the privilege had two distinct strands, one protecting persons coming to and from their business with the courts, and the other protecting the place of the court and its immediate vicinity.

Although the privilege is firmly entrenched in both English and American jurisprudence, the privilege receded from the body of modern law as the practice of commencing civil litigation with an arrest fell by the wayside. However, the recent courthouse arrests make this privilege newly relevant. Indeed, there are several compelling reasons to apply the common-law privilege from arrest to immigration courthouse arrests. First, immigration arrests are civil in nature, and civil arrests were the chief focus of the privilege. Second, the policy rationales underlying the common-law privilege—facilitating administration of justice and safeguarding the dignity and authority of the court—are equally applicable to immigration courthouse arrests. Third, the federal courts have a shared interest with state and local courts in enforcing the privilege to advance those policy rationales.

This deeply entrenched common-law privilege demonstrates that local courts have legal authority to regulate courthouse immigration arrests and would be standing on firmly recognized policy grounds if they did so.

INTRODUCTION

Since the Trump Administration promised to "take the shackles off" immigration enforcement officers,[1] arrests in state and local courthouses around the country have sparked controversy. In February 2017, the Meyer Law Office, an immigration law firm, released a video filmed in a Denver courthouse that depicted Immigration and Customs Enforcement (ICE) officers admitting they were in the courthouse to make an immigration arrest.[2] The video, viewed over 17,000 times on YouTube,[3] increased awareness of the issue of courthouse arrests and reportedly surprised local officials who were unaware of ICE's practice.[4]

In April 2017, top Denver officials including the Mayor, City Attorney, and all members of the City Council, sent a letter to the local ICE office.[5] Citing the "recent media accounts" of courthouse arrests,[6] the letter asked ICE to "consider courthouses sensitive locations" and "follow [its] directive . . . that par-

1. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, PRESS BRIEFING BY PRESS SECRETARY SEAN SPICER (Feb. 21, 2017), http://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13 [http://perma.cc/G89C-GJFF].

2. Erica Meltzer, *A video Shows ICE Agents Waiting in a Denver Courthouse Hallway. Here's Why That's Controversial,* DENVERITE (Feb. 23, 2017), http://www.denverite.com/ice-agents-denver-courthouse-hallway-video-30231 [http://perma.cc/3SGW-UCH4]; Chris Walker, *ICE Agents Are Infiltrating Denver's Courts, and There's a Video to Prove It,* WESTWORD (Feb. 24, 2017), http://www.westword.com/news/ice-agents-are-infiltrating-denvers-courts-and-theres-a-video-to-prove-it-8826897 [http://perma.cc/BVM3-86U6].

3. *ICE in Court*, YOUTUBE (February 23, 2017), http://www.youtube.com/watch?v=35YUQbq5uBo (reporting 17,521 views on October 9, 2017).

4. Meltzer, *supra* note 2 (noting that the issue of courthouse arrests had come up at a February forum, where the City Attorney reported she "suspect[ed] there might be some instances" of courthouse arrests but that she was unable to confirm the practice, and reported that the presiding county judge was also unaware of the practice); Walker, *supra* note 2 (reporting earlier February forum at which a Deputy City Attorney responded affirmatively when asked if it was "safe to enter courthouses without risking a run-in with ICE"). The day after the video was publicized, the Denver City Attorney reported that four domestic violence cases would be "dropped as victims fear ICE officers will arrest and deport them." Mark Belcher, *Denver Prosecutor: ICE Agents in Courthouses Compromising Integrity of Domestic Violence Cases,* DENVER CHANNEL (Feb. 24, 2017), http://www.thedenverchannel.com/news/local-news/denver-prosecutor-ice-agents-in-courthouses-compromising-integrity-of-domestic-violence-cases [http://perma.cc/B2LL-WDTQ].

5. Letter from Michael Hancock, Mayor of Denver, to Jeffrey D. Lynch, Acting Field Office Director, U.S. Immigration and Customs Enf't (Apr. 6, 2017), http://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids [http://perma.cc/WB2C-FT2V].

6. *Id.* at 1. The letter also "acknowledged" that ICE previously used Denver courthouses "as staging areas for enforcement activities"—a fact that went unmentioned in either of the community forums at which courthouse arrests were publicly discussed. *Id.* at 2.

ticular care should be given to organizations assisting victims of crime."[7] For over six weeks, ICE did not respond while continuing courthouse arrests,[8] two of which were captured on video.[9]

In late May 2017, ICE finally responded to the Denver officials' letter, assuring the Mayor that ICE would "continue to be respectful of, and work closely with, the courts."[10] But following shortly on these assurances was the suggestion that ICE's courthouse arrests might be retaliation for Denver's policy of not detaining suspected immigration violators at ICE's request[11]—ICE's letter described "state and local policies that hinder [ICE's] efforts" as among the "challenges to effective enforcement" causing ICE to "continually improve [its] operations."[12] Taken in its entirety, the letter made clear there would be no actual change to ICE's practice of courthouse arrests.[13]

Similar stories have unfolded around the country.[14] By June 2017, the chief justices of the highest courts of California,[15] Washington,[16] Oregon,[17] New Jer-

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7. *Id.* at 2. The references to "sensitive locations" and the "directive" was to the Department of Homeland Security's (DHS) "sensitive locations policy," which generally precludes ICE enforcement at schools, hospitals, "institutions of worship," "public religious ceremon[ies]" and public marches. Courthouses are not specifically mentioned in the policy, though the list is non-exhaustive. Memorandum from John Morton, Director, Dep't of Homeland Sec., "Enforcement Actions at or Focused on Sensitive Locations" (Oct. 24, 2011), http://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf [http://perma.cc/G5KH-7R25] [hereinafter DHS Sensitive Locations Policy].

8. *See* Chris Walker, *ICE Courthouse Busts Ten Times Higher Than City Knew,* WESTWORD (Sept. 19, 2017), http://www.westword.com/news/immigration-agents-breaking-protocol-during-courthouse-arrests-in-denver-9499512 [http://perma.cc/7LZL-LUK8] (releasing records documenting six arrests at the Denver County Court from April 20 through May 8, 2017).

9. Erica Meltzer, *New Videos Show ICE Arresting Immigrants at Denver Courthouse, despite local leaders' requests,* DENVERITE (May 9, 2017), http://www.denverite.com/new-videos-show-ice-arresting-immigrants-denver-county-court-something-local-officials-asked-not-35314 [http://perma.cc/3RNN-E5GL].

10. Letter from Matthew T. Albence, Exec. Assoc. Dir., Immigration and Customs Enf't, to Michael B. Hancock, Mayor, City of Denver (May 25, 2017) [hereinafter Albence Letter], *available at* http://www.denverpost.com/2017/06/08/ice-denver-courthouse-arrests-will-continue [http://perma.cc/H43L-PRUJ]; *but see* Meltzer, *supra* note 2 (reporting that the presiding judge was unaware of courthouse arrests by ICE officers).

11. *See* Memorandum from Gary Wilson, Sheriff, Denver City and County, "48-Hour ICE Holds" (Apr. 29, 2014), http://www.ilrc.org/sites/default/files/resources/denver_county.pdf. [http://perma.cc/7G72-V5X2]; *see also infra* notes 41-43 and accompanying text (describing immigration "detainers").

12. Albence Letter, *supra* note 10, at 2.

13. *Id.*

14. *See, e.g.,* Maria Cramer, *ICE Courthouse Arrests Worry Attorneys, Prosecutors*, BOS. GLOBE (June 16, 2017), http://www.bostonglobe.com/metro/2017/06/15/ice-arrests-and-around

sey,[18] and Connecticut[19] had asked the federal government to stop ICE's courthouse arrests.[20] Meanwhile, Democrats in Congress introduced bills to include courthouses as "sensitive locations"[21] to prevent ICE enforcement actions.[22] Nevertheless, federal officials showed no sign of stopping the courthouse ar-

-local-courthouses-worry-lawyers-prosecutors/xxFH5vVJnMeggQaoNMi8gI/story.html [http://perma.cc/NK9P-9BSJ]; Aaron Holmes, *House Democrats Seek Answers After ICE Agents Arrest Possible Victim of Human Trafficking,* N.Y. DAILY NEWS (July 14, 2017), http://www.nydailynews.com/news/politics/dems-seek-answers-ice-arrests-human-trafficking-victim-article-1.3326930 [http:/perma.cc/L3DJ-XAHC].

15. Letter from Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court, to Jeff Sessions, U.S. Attorney Gen. (Mar. 16, 2017) [hereinafter Cantil-Sakauye Letter], http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses [http://perma.cc/6YXM-PLRT].

16. Letter from Mary E. Fairhurst, Chief Justice, Wash. Supreme Court, to John F. Kelly, Secretary, Dep't of Homeland Sec. (Mar. 22, 2017) [hereinafter Fairhurst Letter], http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/KellyJohnDHSICE032217.pdf [http://perma.cc/2Y7Q-BP9E].

17. Letter from Thomas A. Balmer, Chief Justice., Or. Supreme Court, to Jeff Sessions, Att'y Gen., & John F. Kelly, Sec'y, Dep't of Homeland Sec. (Apr. 6, 2017) [hereinafter Balmer Letter], http://media.oregonlive.com/portland_impact/other/CJ%20ltr%20to%20AG%20Sessions-Secy%20Kelly%20re%20ICE.pdf [http://perma.cc/7EE6-JTB2].

18. Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y, Dep't of Homeland Sec., (Apr. 19, 2017), http://assets.documentcloud.org/documents/3673664/Letter-from-Chief-Justice-Rabner-to-Homeland.pdf [http://perma.cc/ZLT5-DPDM] [hereinafter Rabner Letter].

19. Letter from Chase T. Rogers, Chief Justice., Conn. Supreme Court, to Jeff Sessions, Att'y Gen., & John F. Kelly, Sec'y, Dep't of Homeland Sec. (May 15, 2017) (on file with author) [hereinafter Rogers Letter].

20. Advocates in other states urged their courts to take action to stop ICE's courthouse arrests. *E.g.*, Matthew Chayes, *Ban ICE Arrests of Immigrants at New York Courthouses, Advocates Say,* NEWSDAY (June 22, 2017, 8:46 PM), http://www.newsday.com/news/new-york/advocates-ban-ice-arrests-of-immigrants-at-new-york-courthouses-1.13757452 [http://perma.cc/Y8UX-9RAZ]; Letter from Ivan Espinoza-Madrigal, Exec. Dir., Lawyers' Comm. for Civil Rights and Econ. Justice, to Ralph D. Gants, Chief Justice, Mass. Supreme Judicial Court, et al. (June 16, 2017), http://lawyerscom.org/wp-content/uploads/2017/06/Letter-Regarding-ICE-in-Courthouses.pdf [http://perma.cc/4Y5H-AY8P].

21. *See* DHS Sensitive Locations Policy, *supra* note 7.

22. Protecting Sensitive Locations Act, S. 845 § 2, 115th Cong. (2017) (modifying 8 U.S.C. § 1357(i)(1)(E) by defining "sensitive location" to include the area within one thousand feet of "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"); Protecting Sensitive Locations Act, H.R. 1815 (2017) (defining "sensitive location" to include the area within one thousand feet of any "Federal, State, or local courthouse, including the office of an individual's legal counsel or representative, and a probation office").

rests.[23] On October 17, 2017, Acting ICE Director Thomas Hohman defended ICE's courthouse arrests, stating, "I won't apologize for arresting people in courthouses. We're going to continue to do that."[24]

This Essay examines the current impasse over courthouse immigration arrests. Part I briefly describes the decades-long "crimmigration" crisis. Part II contextualizes courthouse arrests as the latest front in the federalism battle fueled by federal efforts to co-opt local criminal justice systems to serve the immigration enforcement mission. Part III examines a longstanding common-law doctrine establishing a privilege against courthouse arrests, and discerns two strands of this privilege. The first strand protects persons coming to and from the courts, while the second protects the place of a court and its environs. Part IV contends that this common-law privilege empowers states and localities to break the current impasse for three main reasons. First, courthouse immigration arrests fall within the privilege's core concern with civil arrests. Second, they raise many of the same policy concerns—facilitating administration of justice and safeguarding the dignity and authority of the court—underlying the rationale for the privilege. And finally, case law indicates that federal courts will likely respect the privilege of state and local courts even in a federalism contest triggered by federal arrests.

I. THE CRIMMIGRATION CRISIS AND THE FEDERALISM BATTLE IT CREATED

In 2006, Juliet Stumpf described a "crimmigration crisis" in which the merger of criminal law and immigration law "brings to bear only the harshest elements of each area of law," resulting in "an ever-expanding population of the

23. *See, e.g.*, Letter from Jefferson B. Sessions III, Att'y Gen., & John F. Kelly, Sec'y, Dep't of Homeland Sec., to Tani G. Cantil-Sakauye, Chief Justice, Cal. Supreme Court (Mar. 29, 2017), http://assets.documentcloud.org/documents/3533530/Attorney-General-and-Homeland-Security-Secretary.pdf [http://perma.cc/JN7H-7NLE] [hereinafter Sessions Letter]; Matt Katz, *Defying N.J.'s Top Judge, ICE Continues Courthouse Arrests*, NJ.COM (May 5, 2017, 4:36 PM), http://www.nj.com/news/index.ssf/2017/05/defying_njs_top_judge_ice_continues_courthouse_arr.html [http://perma.cc/3PMY-EHQ6]. After the Attorney General and DHS Secretary wrote to the California Chief Justice indicating they would not change their practice, California prosecutors wrote in support of the Chief Justice, asking General Sessions and DHS Secretary Kelly to reconsider. Letter from Mike Feuer, L.A. City Att'y, et al., to Jeffrey Sessions, Att'y Gen., & John Kelly, Sec'y, Dep't of Homeland Sec. (Apr. 4, 2017), http://freepdfhosting.com/b3da7bbbf5.pdf [http://perma.cc/J9FM-9TNM].

24. Thomas Homan, Acting Dir., Immigration & Customs Enf't, Keynote Address at the Heritage Foundation: Enforcing U.S. Immigration Laws: A Top Priority for the Trump Administration, at 1:10:05 (Oct. 17, 2017), http://www.c-span.org/video/?435827-1/acting-ice-director-discusses-immigration-enforcement [http://perma.cc/94QE-SRZ7].

excluded and alienated."[25] The crisis has intensified since the 1980s, making the record deportation numbers Stumpf cited[26] seem modest in comparison with the 2.7 million deportations under the Obama Administration[27]—more than all twentieth-century administrations combined.[28] And Donald Trump, in his presidential campaign, promised even more intense enforcement.[29]

One dimension of the "crimmigration" regime has been an enduring federalism battle resulting from increasing downward pressure from the federal government on state and local criminal justice systems to cooperate with and participate in immigration enforcement. Courthouse immigration arrests are some of the more recent fault lines broken open by this downward pressure.

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25. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 378 (2006). Stumpf saw a convergence in the substance, enforcement mechanisms, and procedural regimes of criminal and immigration law. *See id.* at 379-92; *see also* Jennifer M. Chacón, *Managing Migration Through Crime,* 109 COLUM. L. REV. SIDEBAR 135, 137 (2009) (describing the regulation of migration through criminal proceedings and the subsequent "importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm"); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1459 (arguing that "[c]rimmigration law . . . developed in the closing decades of the twentieth century due to a shift in the perception of criminal law's proper place in society combined with a reinvigorated fear of noncitizens that occurred in the aftermath of the civil rights movement"); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599, 599 (2015) (analyzing "the way in which crimmigration restructures the relationship between Latinos and dominant society to ensure their marginalized status").

26. Stumpf, *supra* note 25, at 372 (noting almost 200,000 deportations in 2004).

27. César Cuauhtémoc García Hernández, *Removals & Returns, 1892-2015*, CRIMMIGRATION (Feb. 16, 2017, 4:00 AM), http://crimmigration.com/2017/02/16/removals-returns-1892-2015 [http://perma.cc/RXP5-FRJB]. Every year the Obama Administration posted between 135% and 180% of the 2004 number of removals. *Id.*

28. Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM), http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [http://perma.cc/U2PH-5D9S]; *see also* Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 247 (2017) ("By every measure, immigration enforcement reached its historic peak in the Obama years.").

29. Trump promised on his campaign to deport all undocumented immigrants. Alexandra Jaffe, *Donald Trump: Undocumented Immigrants 'Have to Go,'* MSNBC (Aug. 15, 2015, 10:23 PM), http://www.msnbc.com/msnbc/donald-trump-undocumented-immigrants-have-go [http://perma.cc/SJ2M-X5HL]. In his "immigration" speech in Phoenix in August 2016, Trump promised to deport "at least 2 million . . . criminal aliens" as well as "gang members, security threats, visa overstays, public charges—that is, those relying on public welfare or straining the safety net, along with millions of recent illegal arrivals and overstays who've come here under the current administration." Donald Trump, *Speech on Immigration* (Aug. 31, 2016), *in* Domenico Montanaro et al., *Fact Check: Donald Trump's Speech on Immigration,* NPR (Aug. 31, 2016, 9:44 PM ET), http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration [http://perma.cc/68P6-YQEW].

There have been no reports of immigration arrests in *federal* courthouses (and no outcry from federal judges), for the simple reason that federal immigration officials can count on the cooperation and support of federal criminal justice agencies like the U.S. Marshals Service and the Bureau of Prisons.[30] The absence of such cooperation on the state and local level was explicitly cited by ICE as a reason for sending officers to make arrests in state and local courthouses.[31]

Historically, the federal government increased pressure on local governments slowly at first. In 1996, Congress passed legislation that simply *invited* local criminal justice agencies to enter into "287(g) agreements" that would allow local officers to enforce immigration law.[32] After 9/11, however, the federal government opined that local law enforcement had "inherent authority" to enforce immigration laws[33] and encouraged the activation of this dormant authority.[34] The ever-increasing identification of noncitizens with criminals observed by Stumpf and others[35] worked to transform immigration into a

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30. ICE can count on these agencies to provide notification of the upcoming release of suspected immigration violators, for example, and to detain suspected immigration violators for transfer to ICE when the law permits it. *See, e.g.*, Letter from Peter J. Kadzik, Asst. Att'y Gen. to Rep. John A. Culberson, Chairman, Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations (Feb. 23, 2016), http://culberson.house.gov/uploadedfiles/doj_february_23_letter.pdf [http://perma.cc/S9TA-2QX6] (describing new procedures giving ICE the "right of first refusal" over inmates being released from Bureau of Prisons custody).

31. Albence Letter, *supra* note 10, at 2 (suggesting courthouse arrests were response to local policies that "hinder" immigration enforcement); Sessions Letter, *supra* note 18, at 2 (same).

32. 287(g) agreements are named after Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) (2012), enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 133, 110 Stat. 3009, 563. Section 287(g) allows states or localities to enter into written agreements whereby local officers can perform immigration enforcement functions. *Id.*

33. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to the Att'y Gen. (Apr. 3, 2002), http://perma-archives.org/warc/AXV3-V8FV/http://www.aclu.org/sites/default/files/field_document/ACF27DA.pdf [http://perma.cc/4DF6-PVDH].

34. *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws,* 6 U. PA. J. CONST. L. 1084, 1084-88 (2004) (describing the "federal effort to enlist, or even conscript, state and local police in routine immigration enforcement").

35. *See* Stumpf, *supra* note 25, at 419 (2006) (noting that "aliens become synonymous with criminals"); *see also* Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm,* 63 UCLA L. REV. 594, 598 (2016) (observing that crimmigration "requires the constant production of populations who can be labeled 'criminal aliens'" and that "this production of 'criminal aliens' occurs along lines of race, class, and other vectors of social vulnerability"); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Sec*urity, 39 CONN. L. REV. 1827, 1839-43 (2007) (describing the construction of immigrants as criminals and perpetuation of "images of migrant criminality"); César Cuauhtémoc García Hernández, *Creating Crimmigration,* 2013 B.Y.U. L. REV. 1457, 1458 (describing how the "emblems of

criminal problem, and therefore a problem appropriately solved by state and local police.[36] The "inherent authority" argument, though, was susceptible to challenge based on principles of federalism,[37] and was ultimately discredited in the Supreme Court's 2012 decision striking down portions of Arizona's Senate Bill 1070.[38]

Meanwhile, by 2008, as enforcement numbers soared, the federal appetite for crime-based immigration enforcement could no longer await voluntary or even encouraged local participation. The "Secure Communities" program, initially depicted as a voluntary data-sharing program from which localities could "opt out" if they did not want to be part of the local-federal immigration enforcement team, was finally unmasked in 2011 (three years into the program) as a mandatory regime.[39] This brought the federalism battle to the fore, as unwilling participants at both the local and state level turned to the Tenth Amendment to disentangle local law enforcement from federal immigration enforcement.[40] After a federal court decision in early 2014[41] made clear that the federal government could not use immigration "detainers" to command localities to prolong the detention of noncitizens otherwise entitled to release from local custody, a wave of policies limiting detainer compliance engulfed the

crimmigration law" work to "abandon framing noncitizens as contributing members of society" and instead "reimagine[] noncitizens as criminal deviants and security risks").

36. *See* S. Karthick Ramakrishnan & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism,* 44 ARIZ. ST. L.J. 1431, 1475 (2012) (noting that the trope of immigrant criminality leads to the conclusion that "states and cities could and should be part of the solution, thereby justifying local police participation in immigration enforcement.").

37. *See, e.g.,* Wishnie, *supra* note 34, at 1088-95 (arguing that legislative history shows that Congress understands it "has preempted all state and local power to make immigration arrests except where specifically authorized"); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 967 (2004) (arguing that the Constitution demands that immigration enforcement power, "because of its effect on foreign policy, must be exercised exclusively and uniformly at the federal level.").

38. Arizona v. United States, 132 S.Ct. 2492, 2506 (2012) (rejecting the inherent authority theory and finding that state-level immigration enforcement was largely preempted in light of the INA's specification of "limited circumstances in which state officers may perform the functions of an immigration officer"). *See also* Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 34 (2013) (finding "no force" to the "inherent authority" argument after *Arizona*).

39. Christopher N. Lasch, *Rendition Resistance,* 92 N.C. L. REV. 149, 154-59 (2013).

40. *Id.* at 160-63 (describing the resistance of Santa Clara County, California, and other jurisdictions characterized by "legal reliance on the Tenth Amendment, and the argument that the federal government—particularly in the absence of compensation—cannot compel enforcement of federal law by state and local officials").

41. Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014).

country.[42] Currently, over twenty-five percent of counties decline to hold prisoners based on immigration detainers.[43]

The Trump Administration, apparently intent on exceeding the record deportation numbers of the Obama Administration,[44] has not retreated from the federalism battle. Instead, President Trump has attempted to pressure localities into immigration enforcement at every turn. A January 2017 Executive Order suggests that accomplishing the Administration's enforcement goals depends on the participation of state and local criminal justice actors.[45] The Order promised a return to the Secure Communities program[46] (which the Obama Administration had abandoned after losing the federalism fight it engendered[47]), expressed a policy authorizing 287(g) agreements "to the maximum extent permitted by law,"[48] and directed the DHS Secretary to "on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers

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42. *See* Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities,* 64 AM. U. L. REV. 1259, 1279–81 (2015) (describing policy changes following *Galarza* and the decision in *Miranda-Olivares v. Clackamas Cnty.,* No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014), granting summary judgment on the claim that a prisoner's detention based on an immigration detainer violated the Fourth Amendment).

43. *National Map of Local Entanglement With ICE*, IMMIGRANT LEGAL RESOURCE CTR., (Dec. 19, 2016), http://www.ilrc.org/local-enforcement-map [http://perma.cc/8WW6-WWMG].

44. Early in his campaign, candidate Trump said he would deport all of the estimated eleven million undocumented immigrants in the United States. *See* Jeremy Diamond, *Trump's Immigration Plan: Deport the Undocumented, 'Legal Status' for Some,* CNN (July 30, 2015, 8:48 AM ET), http://www.cnn.com/2015/07/29/politics/donald-trump-immigration-plan-healthcare-flip-flop [http://perma.cc/38WD-VP6Z]. After he was elected, he vowed to deport two to three million undocumented people with criminal records "immediately" on taking office. Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants,* WASH. POST (Nov. 14, 2016), http://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants [http://perma.cc/R27K-JNUG].

45. Exec. Order 13,768 at § 5, 82 Fed. Reg. 8799 (Jan. 25, 2017); Walter Ewing, *Understanding the Dangerous Implications of President Trump's Immigration Executive Order*, IMMIGR. IMPACT (Jan. 26, 2017), http://immigrationimpact.com/2017/01/26/understanding-dangerous-implications-president-trumps-immigration-executive-order [http://perma.cc/966S-LJBR] (stating that the priorities in the Executive Order were "defined so expansively as to be meaningless").

46. Exec. Order 13,768, *supra* note 45, § 10.

47. Memorandum from DHS Secretary Jeh Charles Johnson to Acting ICE Director Thomas S. Winkowski, "Secure Communities" (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [http://perma.cc/R6A6-9EQY].

48. Exec. Order 13,768, *supra* note 45, § 8.

with respect to such aliens."[49] Finally, the Order appeared to make good on Trump's campaign promise to "end . . . sanctuary cities"[50] by starving them of federal funding.[51] This latter provision spawned immediate litigation and was enjoined by a federal judge in part because it "attempts to conscript states and local jurisdictions into carrying out federal immigration law,"[52] and its coercion of local governments "runs contrary to our system of federalism."[53]

Three decades of crimmigration have thus set the stage for the current conflict, as the federal government moved from strategies of coaxing and cajoling states and localities to participate in immigration enforcement to strategies of co-opting, coercing, and commandeering them.

II. COURTHOUSE IMMIGRATION ARRESTS: THE LATEST FRONT IN THE FEDERALISM BATTLE

Courthouse arrests represent the latest front, with some new twists, in crimmigration's ongoing federalism battle. One such twist has been the emergence of state-court judges at the front lines of this conflict: where the federalism battlefield was previously on the street (when entanglement of local police was at issue[54]) or in the jails (when detainer policies were contested), it is now in state and local courthouses. In addition, the Tenth Amendment has not been invoked—yet. But a closer look at the complaints of state and local govern-

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49. Exec. Order 13,768, *supra* note 45, § 9(b). This "name and shame" report was abandoned after three weeks, due to numerous inaccuracies. Darwin BondGraham, *ICE 'Public Safety Advisory' Criticizing Local Law Enforcement for Immigration Policies Appears to Contain Bad Data*, EAST BAY EXPRESS (Mar. 21, 2017), http://www.eastbayexpress.com/SevenDays/archives/2017/03/21/ice-public-safety-advisory-criticizing-local-law-enforcement-for-immigration-policies-appears-to-contain-bad-data [http://perma.cc/5R4P-CE4G]; David Nakamura & Maria Sacchetti, *Trump Administration Suspends Public Disclosures of 'Sanctuary Cities,'* WASH. POST (Apr. 11, 2017), http://www.washingtonpost.com/politics/trump-administration-suspends-public-disclosures-of-sanctuary-cities/2017/04/11/7ea7f078-1ec8-11e7-ad74-3a742a6e93a7_story.html [http://perma.cc/US9D-VCT4].

50. Montenaro et al., *supra* note 29 ("We will end the sanctuary cities that have resulted in so many needless deaths.").

51. Exec. Order 13,768, *supra* note 45, § 9(a).

52. County of Santa Clara v. Donald J. Trump, No. 5:17-cv-00574, 2017 WL 1459081, at *23 (N.D. Cal. Apr. 25, 2017).

53. *Id.* (quoting Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519, 577-78 (2012)).

54. *See New Orleans: How the Crescent City Became a Sanctuary* City *Hearing Before the H. Subcomm. on Immigration and Border Security of the H. Comm. on the Judiciary*, 114th Cong. (2016), http://judiciary.house.gov/wp-content/uploads/2016/09/114-96_22124.pdf [http://perma.cc/V2F7-BYKW] (compiling testimony concerning the New Orleans Police Department policy against participating in immigration enforcement).

ments—and the response of the federal government—reveals that the controversy over courthouse arrests is merely a continuation of crimmigration's federalism battle.

State-court judges primarily feared that civil immigration arrests would cause witnesses,[55] criminal defendants,[56] and civil litigants[57] to avoid the courthouse.[58] Deterring people from coming to court, they argued, in turn interferes with the state and local courts' administration of justice,[59] deprives them of their ability to adjudicate cases effectively,[60] and threatens to cut off access to justice.[61] In sum, state-court judges believed their "fundamental mis-

55. *E.g.* Cantil-Sakauye Letter, *supra* note 15, at 1 (mentioning crime victims and witnesses); Fairhurst Letter, *supra* note 16, at 1 (noting that "witnesses summoned to testify" may no longer find state courthouses to be a trustworthy public forum).

56. Fairhurst Letter, *supra* note 16, at 1 (describing how immigration officials in the courthouse may erode the trust of "criminal defendants being held accountable for their actions," reducing their likelihood to "voluntarily appear to participate and cooperate in the process of justice); Rabner Letter, *supra* note 18, at 1 (noting that "defendants in state criminal matters may simply not appear").

57. *E.g.*, Cantil-Sakauye Letter, *supra* note 15, at 1 (mentioning "unrepresented litigants"); Balmer Letter, *supra* note 17, at 2 (mentioning "a driver paying a traffic fine; a landlord seeking an eviction or a tenant defending against one; or a small claims court plaintiff in a dispute with a neighbor" and "a victim seeking a restraining order against an abusive former spouse"). A number of the letters referenced domestic violence victims, who could be appearing either as witnesses or as litigants seeking a protective order. *E.g.*, Fairhurst Letter, *supra* note 16, at 1 (referencing "victims in need of protection from domestic violence"); *see also* P.R. Lockhart, *Immigrants Fear a Choice Between Domestic Violence and Deportation*, MOTHER JONES (Mar. 20, 2017, 10:00 AM), http://www.motherjones.com/politics/2017/03/ice-dhs-immigration-domestic-violence-protections [http://perma.cc/A6M2-H73M] (documenting concerns about the underreporting of domestic violence).

58. *See* Rogers Letter, *supra* note 19, at 1 (expressing concern that "having ICE officers detain individuals in public areas of our courthouses may cause litigants, witnesses and interested parties to view our courthouses as places to avoid, rather than as institutions of fair and impartial justice").

59. *See* Balmer Letter, *supra* note 17, at 3 (describing courthouse arrests as a "current and prospective interference with the administration of justice in Oregon"); Fairhurst Letter, *supra* note 16, at 2 (suggesting courthouse arrests "impede" the "mission, obligations, and duties of our courts").

60. *See* Balmer Letter, *supra* note 17, at 2 ("The safety of individuals and families, the protection of economic and other rights, and the integrity of the criminal justice system all depend on individuals being willing and able to attend court proceedings . . . ."); Cantil-Sakauye Letter, *supra* note 15, at 2 (noting that courthouse arrests "compromise our core value of fairness").

61. Rabner Letter, *supra* note 18, at 1 ("Enforcement actions by ICE agents inside courthouses would . . . effectively deny access to the courts."); Balmer Letter, *supra* note 17, at 2 ("Oregon courts must be accessible to all members of the public."); Fairhurst Letter, *supra* note 16, at 1-2 ("When people are afraid to appear for court hearings . . . their ability to access justice is compromised."); Cantil-Sakauye Letter, *supra* note 15, at 2 (stating that courthouse

sion"[62] and "ability to function"[63] were undermined by courthouse arrests. Federal courts have not faced similar problems, as federal immigration officials can count on the cooperation and support of federal criminal justice agencies in lieu of making courthouse arrests.

The federal response made no effort to address the concerns of state-court judges that courthouse immigration arrests erode and undermine justice in state and local courts. Instead, administration officials suggested that the courthouse arrests might in some sense be retaliation for earlier federal defeats in the ongoing federalism battle fueled by the rise of crimmigration. "Some jurisdictions," wrote Attorney General Sessions and then-DHS Secretary Kelly in response to California's Chief Justice, "have enacted statutes and ordinances designed to specifically prohibit or hinder ICE from enforcing immigration law by prohibiting communication with ICE, and denying requests by ICE officers and agents to enter prisons and jails to make arrests."[64] It was because of such policies, General Sessions and Secretary Kelly insisted, that "ICE officers and agents are required to locate and arrest these aliens in public places."[65]

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arrests "undermine the judiciary's ability to provide equal access to justice"). Notably absent from the chief justices' letters was any discussion of the discriminatory intent or effect of the courthouse immigration arrests. The chief justices' reticence contrasts with state officials' allegations that other Trump Administration immigration programs are motivated by animus. *See, e.g.,* State of Hawai'i, et al. v. Donald J. Trump, et al., No. 1:17-cv-00050, Document 64 ("Second Amended Complaint for Declaratory and Injunctive Relief") at 32 (D. Haw. Mar. 8, 2017) (arguing March 6 executive order imposing travel ban was "motivated by animus and a desire to discriminate on the basis of religion and/or national origin, nationality, or alienage"); States of New York, Massachusetts, et al. v. Donald Trump et al., No. 1:17-cv-05228, Document 1 ("Complaint for Declaratory and Injunctive Relief") at 2-3, 52 (E.D.N.Y. Sep. 6, 2017) (arguing President's decision to end Deferred Action for Childhood Arrivals program "is a culmination of President's Trump's oft-stated commitments . . . to punish and disparage people with Mexican roots" and violates equal protection principles because it was grounded in anti-Mexican animus).

62. Fairhurst Letter, *supra* note 16, at 1; *see also* Balmer Letter, *supra* note 17, at 2 (arguing that courthouse immigration arrests "seriously impede[]" efforts to "ensure the rule of law for all Oregon residents").

63. Fairhurst Letter, *supra* note 16, at 1; *see also* Rabner Letter, *supra* note 18, at 2 (suggesting that courthouse arrests "compromise our system of justice").

64. Sessions Letter, *supra* note 23, at 2. As one commentator trenchantly observed, the Attorney General and DHS Secretary arrived at this explanation only after "needlessly mansplain[ing] the elements of the federal crime of 'stalking' (and basic Fourth Amendment doctrine on public arrests) to the Chief Justice . . . ." Jennifer Chacón, *California v. DOJ on Immigration Enforcement,* TAKE CARE (Apr. 11, 2017), http://takecareblog.com/blog/california-v-doj-on-immigration-enforcement [http://perma.cc/YHT3-J8XB].

65. *Id.* The federal response also indicated that courthouse arrests were a way to decrease risk to federal immigration officers, since arrests could take place behind the security screening provided by the state courts. *Id.*

ICE later suggested courthouse arrests would be directly correlated to a locality's cooperation with (or resistance to) federal immigration enforcement: "As ICE undertakes the necessary enforcement of our country's immigration laws, its officers and agents will continually improve their operations to meet the challenges to effective enforcement, *including state and local policies that hinder their efforts*."[66] The suggestion in both letters that courthouse arrests were a response to local "sanctuary" policies reveals that the federal government viewed courthouse arrests as another weapon in the ongoing federalism battle, deployed simultaneously with the defunding threat.[67]

The current federalism impasse raises several questions: Can state and local courts do anything more to protect those coming before them, beyond simply pleading with ICE to change its practice?[68] Or does the classification of a courthouse as a "public place" end the inquiry, as the Attorney General and DHS Secretary have argued?[69] And, even if the courthouse itself can be protected, will ICE lurk outside the courthouse and render such protection meaningless?[70]

A legal doctrine from the past—the common-law privilege from arrest—suggests possible answers to these questions. Mainly concerned with the practice of arresting the defendant to commence a civil suit, which fell into disuse when civil arrests largely disappeared from the American legal landscape,[71] the

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66. Albence Letter, *supra* note 10, at 2 (emphasis added).

67. *See supra* notes 50-53 and accompanying text.

68. In Denver, for example, the City Council enacted legislation prohibiting city employees (specifically including "Denver County Court administrative and clerical employees") from using city resources to assist in immigration enforcement, declaring that "courts serve as a vital forum for ensuring access to justice and are the main points of contact for the most vulnerable in times of crises, . . . who seek justice and due process of law without fear of arrest from federal immigration enforcement agents." Council Bill No. 17-0940 (Denver, Colo. Aug. 31, 2017) (enacted). And Mayor Hancock issued an executive order committing the City and County to "strongly advocate" that areas including courthouses "should be respected as 'sensitive locations' to ensure the fair and effective administration of justice." Michael B. Hancock, Mayor of Denver, Colo., Exec. Order No. 142 (Aug. 31, 2017).

69. *See* Sessions Letter, *supra* note 23, at 1 (discussed *infra* at notes 153-159 and accompanying text).

70. *See* Balmer Letter, *supra* note 17, at 1 (requesting that ICE officials not "detain or arrest individuals *in or in the immediate vicinity of* the Oregon courthouses" (emphasis added)).

71. *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 61-68 (1968) (describing the rise and fall of this civil procedure). *But see* Hale v. Wharton, 73 F. 739, 740-41 (W.D. Mo. 1896) (suggesting that "[t]he rule in the English courts at first was limited to exemption from arrest in a criminal proceeding"). This Essay does not address whether and to what extent the privilege from arrest might be applied to prevent criminal arrests, because immigration arrests are civil in nature. *See infra* Section IV.A. Likewise, this Essay is concerned with arrests, and therefore does not address many of

privilege from arrest has become newly relevant in light of the Trump Administration's increased use of courthouse arrests.[72]

III. THE ANCIENT COMMON-LAW PRIVILEGE FROM ARREST

The common-law privilege from arrest dates back at least to the early fifteenth century.[73] Blackstone succinctly described it as follows:

> Suitors, witnesses, and other persons, necessarily attending any courts of record upon business, are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting.[74]

Blackstone's first sentence describes a strand of the privilege pertaining to *persons* conducting business with the courts, while his second sentence describes a strand more generally pertaining to *places*—courthouses and their surroundings. Each is addressed here in turn.

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the nuances attendant to the doctrine as it was extended beyond arrest to service of process and then to the question of how personal jurisdiction might or might not be obtained over non-residents. *See infra* notes 91-93 and accompanying text.

72. *See* Liz Robbins, *A Game of Cat and Mouse with High Stakes: Deportation*, N.Y. TIMES (Aug. 3, 2017), http://www.nytimes.com/2017/08/03/nyregion/a-game-of-cat-and-mouse-with-high-stakes-deportation.html [http://perma.cc/XA2A-LLJG] (reporting the Immigration Defense Project's assertion that compared to 14 courthouse arrests in 2015 and 11 in 2016, there had been 53 courthouse arrests in the state of New York in the first seven months of 2017).

73. Sampson v. Graves, 203 N.Y.S. 729, 730 (N.Y. App. Div. 1924) (noting that "[t]he doctrine of the immunity from arrest of a litigant attending the trial of an action to which he was a party found early recognition in the law of England, and in Viner's Abridgment (2d Ed.) vol. 17, p. 510 et seq., is to be found a very interesting collection of cases asserting the privilege dating back to the Year Book of 13 Henry IV, I. B."), *overruled on other grounds* by Chase Nat. Bank of City of New York v. Turner, 199 N.E. 636 (N.Y. 1936); *see also* Meekins v. Smith (1971) 126 Eng. Rep. 363, 364; 1 H. Bl. 636, 637 (referencing a yearbook from the reign of King Edward IV as supporting the notion that "a mainpernor [surety] shall have the privilege of the Court").

74. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 766 (1877) (footnote omitted).

A. The Privilege as Applied to Persons Attending Court

A leading English case from 1791 set forth the general rule reported by Blackstone, "that all persons who had relation to a suit which called for their attendance, whether they were compelled to attend by process or not, . . . were intitled to privilege from arrest eundo et redeundo,[75] provided they came bonâ fide."[76] A decade later, *Spence v. Stuart* demonstrated the breadth of this privilege.[77] The court found the defendant "clearly privileged" from his arrest, even though the proceeding he had attended was an arbitrator's examination at a coffee house.[78] Application of the privilege to the arrest occurring the morning after the proceeding[79] showed the liberality with which "eun-

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75. "Eundo et redeundo" means "going and returning." BLACK'S LAW DICTIONARY (2d ed. 1910). Another common formulation of the privilege was to say it applies "eundo, morando, et redeundo" (with "morando" meaning "remaining," *id.*). *See* Person v. Grier, 66 N.Y. 124, 125 (1876) ("It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo.*"); *Spence v. Stuart,* 102 Eng. Rep. 530, 531; 3 East at 89, 91 ("[T]he privilege extends to one redeundo as well as eundo et morando."); SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 316, at 474 (Lawbook Exchange, Ltd. 2001) (16th ed. 1899) (emphasis added) (footnote omitted) ("Witnesses as well as parties are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home, *eundo, morando, et redeundo.*") (footnote omitted). As will be shown below, *see infra* Section III.B, a privilege preventing arrests at the courthouse and its environs addressed much of what might be encompassed by "morando."

76. *Meekins,* 126 Eng. Rep. at 363; 1 H. Bl. at 637. The privilege was not extended to the habeas petitioner in *Meekins,* on the ground that he was "an uncertificated Bankrupt, and in desperate circumstances," and showed "a manifest intention . . . to impose upon the Court . . . ." *Id.* at 363-364.

77. (1802) 102 Eng. Rep. 530; 3 East 89.

78. *Id.* at 90.

79. *Id.* at 89-90 (reporting that the arbitrator's examination concluded at 11 o'clock in the evening, whereupon the defendant, "having intimat[ed] that bailiffs were lying in wait to arrest him . . . slept at the coffee-house that night, and was arrested there early the next morning").

do et redeundo" was interpreted.[80] This served the rule's policy "to encourage witnesses to come forward voluntarily."[81]

The breadth of this component of the privilege was sustained upon its arrival in America. Greenleaf's influential treatise on evidence, citing the leading English and American cases, noted that the rule was interpreted broadly to encompass "all cases" and "any matter pending before a lawful tribunal" (including proceedings before arbitrators, bankruptcy proceedings, and the like).[82] Additionally, the courts were "disposed to be liberal" with respect to "going . . . and returning."[83] And neither a writ of protection nor a subpoena compelling one's attendance was a prerequisite for enjoyment of the privilege.[84]

At common law a court might issue a "writ of . . . protection" to a litigant or witness who feared arrest while coming to court.[85] But obtaining the writ was not a precondition for exercise of the privilege; rather, it served simply to provide "convenient and authentic notice to those about to do what would be a violation of the privilege. It neither establishes nor enlarges the privilege, but merely sets it forth, and commands due respect to it."[86]

The Supreme Court has addressed the common-law privilege from arrest in a series of decisions in two closely related contexts—in construing the privilege afforded legislators under the Constitution, and in assessing the extent to which out-of-state residents are immune from service of process while in a state for the purpose of attending court. The Court's discussions demonstrate that the English common-law privilege from arrest has been firmly entrenched in American law from the outset.

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80. The court noted that "it does not appear that [the defendant] has been guilty of any negligence in not availing himself of his privilege redeundo within a reasonable time; for he was arrested early the next morning, before it could be known whether he were about to return home or not." *Spence*, 102 Eng. Rep. at 531; 3 East at 91; *see also* Lightfoot v. Cameron, 96 Eng. Rep. 658, 658 (1776); 2 Black W. 1113, 1113 (collecting similar cases and holding that a party who was dining with his counsel and witnesses after court recessed for the day was privileged from arrest).

81. Walpole v. Alexander (1782) 99 Eng. Rep. 530, 531; 3 Dougl. 45, 46.

82. GREENLEAF, *supra* note 75 § 317, at 475 (footnotes omitted).

83. *Id.* at § 316, at 459.

84. *Id.* at § 316, at 474 (noting that a writ of protection served only to prevent an arrest and perhaps lay the groundwork for subjecting the arresting officer to punishment for contempt for disobeying the writ).

85. *See* Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("At common law a writ of privilege or protection would be granted to the party or witness by the court in which the action was pending, which would be respected by all other courts.").

86. Bridges v. Sheldon, 7 F. 17, 44 (D. Vt. 1880) (citations omitted).

In *Williamson v. United States*, the Court addressed whether the privilege for legislators extended to arrests for criminal offenses, and quoted Joseph Story, who likened the legislator's privilege to the common-law privilege from arrest described by Blackstone: "*This privilege is conceded by law to the humblest suitor and witness in a court of justice;* and it would be strange indeed if it were denied to the highest functionaries of the State in the discharge of their public duties."[87] And in *Long v. Ansell*, addressing the same question, the Court said that the legislator's privilege "must not be confused with the common law rule that witnesses, suitors and their attorneys, while in attendance in connection with the conduct of one suit, are immune from service in another."[88] The Court noted that "arrests in civil suits were still common in America" when the Constitution was adopted, and cited several treatises as authority for this proposition,[89] each of which explicitly recognized the privilege from arrest for those attending court.[90]

Similarly, in the context of immunity for out-of-state residents traveling to a state to attend court, the Court in *Lamb v. Schmitt* noted the "general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another."[91] Here, and in two other cases addressing jurisdiction over nonresidents, the Court adverted to the seminal American decisions concerning the common-law privilege

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87. 207 U.S. 425, 443 (1908) (emphasis added) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 859, at 608 (4th ed. 1873)).

88. 293 U.S. 76, 83 (1934).

89. *Id.* at 83 & n.4 (citing WILLIAM WYCHE, PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK 50 et seq. (2d ed. 1794); CONWAY ROBINSON, PRACTICE IN COURTS OF LAW AND EQUITY IN VIRGINIA 126-30 (1832); SAMUEL HOWE, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS AT LAW IN MASSACHUSETTS 55-56, 141-48, 181-87 (1834); FRANCIS J. TROUBAT & WILLIAM W. HALY, PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN SUPREME COURT OF PENNSYLVANIA 170-89 (1837)); *see also supra* note 71.

90. HOWE, *supra* note 89, at 143-44 ("[A]ll persons connected with a cause, which calls for their attendance in court, and who attend *bonâ fide*, – are protected from arrest, *eundo, morando, et redeundo*"; ROBINSON, *supra* note 89, at 133 (providing that witnesses should be exempt from arrest) (citing, *inter alia*, Ex Parte McNeil, 6 Mass. Rep. 245 (1810)); TROUBAT & HALY, *supra* note 89, at 178 ("The parties to a suit, their attorneys, counsel and witnesses, are, for the sake of public justice, privileged from arrest in coming to, attending upon, and returning from the court; or as it is usually termed, *eundo, morando, et redeundo*."); WYCHE, *supra* note 89, at 36 ("The parties to a suit, and their witnesses, are, for the sake of public justice, protected from arrest, in coming to, attending upon, and returning from the court. Nor have the courts been nice in scanning this privilege, but have given it a large and liberal construction.") (citations omitted).

91. 285 U.S. 222, 225 (1932).

from arrest.[92] Those decisions recognized the firm entrenchment of the privilege as it pertained to all persons (whether resident or nonresident) attending court.[93]

The Court's decisions, and the lower court rulings upon which they relied, articulated the policy rationale behind the privilege. Quoting a "leading" New Jersey decision, the Court in *Stewart v. Ramsay* said that "[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them."[94] And in *Lamb*, the Court described the privilege as

> proceed[ing] upon the ground that the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, *or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation*.[95]

The Court also characterized the privilege as "founded in the necessities of the judicial administration"[96] and the notion that the courts should be "available to

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92. *See e.g.*, *id.* (citing Hale v. Wharton, 73 F. 739 (C.C.W.D. Mo. 1896); Bridges v. Sheldon, 7 F. 17 (C.C.D. Vt. 1880)); *Stewart* v. Ramsay, 242 U.S. 128, 131 (1916) (citing *Hale*, 73 F. 739 and Peet v. Fowler, 170 F. 618 (C.C.E.D. Pa. 1909)); Page Co. v. MacDonald, 261 U.S. 446, 447 (1923) (citing Larned v. Griffin, 12 F. 590, 590 (C.C.D. Mass. 1882)).

93. *Peet*, 170 F. at 618 ("It is a well-established principle of law that parties to a suit, for the sake of public justice, are privileged from the service of process upon them in coming to, attending upon, and returning from the court, or as it is usually termed, eundo, morando, et redeundo."); *Hale*, 73 F. at 740 ("[N]o rule of practice is more firmly rooted in the jurisprudence of United States courts than that of the exemption of persons from the writ of arrest and of summons while attending upon courts of justice, either as witnesses or suitors." (citations omitted)); *Larned*, 12 F. at 590 ("It has long been settled that parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning." (citations omitted)); *Bridges*, 7 F. at 43 ("The privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary and returning wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced.").

94. *Stewart*, 242 U.S. at 129 (quoting Halsey v. Stewart, 4 N.J.L. 366, 367 (1817)).

95. *Lamb*, 285 U.S. at 225 (emphasis added) (citations omitted).

96. *Id.* Similarly, when addressing the legislative privilege, the Court found the privilege *necessary* for the functioning of the legislative branch. *See* Williamson v. United States, 207 U.S. 425, 443 (1908) ("It seems absolutely indispensable for the just exercise of the legislative power in every nation purporting to possess a free constitution of government, and it cannot be surrendered without endangering the public liberties as well as the private independence of the members.").

suitors, fully available, neither they nor their witnesses subject to be embarrassed or vexed while attending, the one 'for the protection of his rights', the others 'while attending to testify.'"[97]

An early New York decision went further and expressed the privilege as an *obligation* of the courts: "We have power to compel the attendance of witnesses, and when they do attend, we are bound to protect them *redeundo*."[98]

B. The Privilege as Applied to the Courthouse and Its Environs

Blackstone's second sentence—"And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting"[99]— addresses the sanctity of the court as a *place*, rather than formulating the privilege as attaching to certain people.[100]

An English case from 1674, in which a person was arrested while "entering his coach at the door of Westminster hall," was cited in a leading treatise in support of an expansive view of the privilege: "[I]t was agreed, that . . . *all persons whatsoever*, are freed from arrests, so long as they are in view of any of the courts at Westminster, or if near the courts, though out of view, lest any disturbance may be occasioned to the courts or any violence used . . . ."[101]

The salient points of this aspect of the privilege—that it applies to "all persons whatsoever" and that it precludes arrest not only in the courts but also "near the courts, though out of view"—are confirmed in other English cases. In *Orchard's Case*,[102] a person was arrested on civil process[103] either inside the court or "in the space between the outer and the inner doors" of the court.[104] Although Orchard was an attorney, he had no business before the court at the time of his arrest.[105] Thus, there was no claim (and could have been no claim) that Orchard enjoyed the privilege of someone "necessarily attending any

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97. *Page Co.*, 261 U.S. at 448 (quoting *Stewart*, 242 U.S. at 130).

98. Norris v. Beach, 2 Johns. 294, 294 (1807).

99. BLACKSTONE, *supra* note 74, at *290.

100. *See also* JAMES FRANCIS OSWALD, CONTEMPT OF COURT, COMMITTAL, AND ATTACHMENT, AND ARREST UPON CIVIL PROCESS, IN THE SUPREME COURT OF JUDICATURE: WITH THE PRACTICE AND FORMS 193 (London, William Clowes & Sons, Ltd., 2d ed. 1895) (discussing "[p]laces in which persons are privileged from arrest").

101. 6 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 530 (London, A. Strahan, 7th ed. 1832) (emphasis added and omitted).

102. (1828) 38 Eng. Rep. 987, 987; 5 Russ. 159.

103. The arrest was pursuant to a writ of *capias ad satisfaciendum*. *Id.*

104. *Id.*

105. *Id.* ("It was admited that *Orchard* was not in court for the purpose of professional attendance, or of discharging any professional duty.").

courts of record upon business."[106] Instead, the case was argued and decided on the basis of a privilege of *place,* with Orchard's representative submitting:

> that every place, in which the Judges of the King's superior courts were sitting, was privileged, and that no arrest could be made in their presence or within the local limits of the place where they were administering justice. To permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.[107]

In addition to quoting the sentence from Blackstone referencing a privilege "where the King's justices are actually sitting,"[108] Orchard's counsel cited *Long's Case*,[109] wherein arrest had been made "in the palace-yard, not far distant from the hall gate, the Court being then sitting."[110] The arresting officer in this case was "committed to the *Fleet,* that he might learn to know his distance."[111] In *Orchard's Case,* the court (after discharging Orchard from custody) "admonished the officer to beware of again acting in a similar manner."[112]

The common-law privilege surrounding the court was deemed sufficiently important that it extended beyond arrest, to mere service of process. In *Cole v. Hawkins*, for example, the court held that an attorney attending court was privileged from service made on the courthouse steps, because "service of a process in the sight of the Court is a great contempt."[113]

American jurists likewise recognized this component of the privilege protecting the *place* of the court. In *Blight v. Fisher*, a federal judge explained that

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106. BLACKSTONE, *supra* note 74, at 288.

107. 38 Eng. Rep. at 987.

108. *Id.* (quoting BLACKSTONE, *supra* note 74, at 289).

109. (1676-77) 86 Eng. Rep. 1012; 2 Mod. 181.

110. 38 Eng. Rep. at 987 (quoting *Long's Case,* 86 Eng. Rep. at 1012).

111. *Id*. The reference was to the Fleet Prison, the "most venerable of all English prisons." Margery Bassett, *The Fleet Prison in the Middle Ages,* 5 U. TORONTO L.J. 383, 383 (1944).

112. 38 Eng. Rep. at 988.

113. (1738) 95 Eng. Rep. 396, 396; Andrews 275, 275. The court rejected the argument that service of process on the courthouse steps "did not hinder, or tend to hinder" the court's business. *Id.* In the New Jersey case of *Halsey v. Stewart,* 4 N.J.L. 366, 368 (1817), a "leading authority" cited by the Supreme Court, *Stewart v. Ramsay*, 242 U.S. 128, 129 (1916), the court took a similarly expansive view of the privilege, discrediting "the idea, that the interruption of the court, must arise from noise, disturbance, or confusion created by the service, in its presence." The court afforded the privilege to a person who was initially read the summons by the sheriff "while descending the steps" from the courthouse, but upon whom the summons was not served until later when he was meeting with counsel in his office. *Id.* at 367.

"[t]he service of process . . . in the actual or constructive presence of the court, is a contempt, for which the officer may be punished."[114] The decision relied on *Cole v. Hawkins* and on the Pennsylvania Supreme Court's decision in *Miles v. M'Cullough* setting aside process served on a person attending oral argument.[115]

These seminal cases—*Blight*, *Cole*, and *Miles*—were cited in Greenleaf's 1864 treatise on evidence, which likewise understood the privilege as heightened at the courthouse and its surroundings, encompassing protection not only from arrest but also from service of process. "[I]t is deemed as a contempt to serve process upon a witness, even by summons, if it be done in the immediate or constructive presence of the court upon which he is attending; though any service elsewhere without personal restraint, it seems, is good."[116]

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The tendency of American courts was to expand the privilege,[117] and the privilege as it pertained to persons expanded in some instances to encompass protection from service of process even if it occurred beyond the "actual or constructive presence of the court."[118] This expansion of the privilege as applied to some *persons* attending court,[119] did not diminish or otherwise alter the privilege as to *place* described in *Blight* and established in other English and American decisions. The broad contours of the privilege as to *place* were that it ap-

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114. 3 F. Cas. 704, 704-05 (C.C.D.N.J. 1809) (No. 1,542). The court noted that the strand of the privilege pertaining to *persons* "extends only to an exemption from arrest." *Id.* at 704.

115. *Id.* at 705 (citing *Cole*, 95 Eng. Rep. 396; *Miles v. M'Cullough*, 1 Binn. 77 (Pa. 1803)).

116. GREENLEAF, *supra* note 75, at § 316, at 475 (footnote omitted); *see also In re* Healey, 53 Vt. 694, 696 (1881) (noting a similar understanding of the privilege); *Cole*, 95 Eng. Rep. at 396 (same); *Blight*, 3 F. Cas at 704 (same); *Miles*, 1 Binn. at 77 (same).

117. Larned v. Griffin, 12 F. 590, 592 (C.C.D. Mass. 1882) (describing "the tendency in this country . . . to enlarge the right of privilege so as to afford full protection to suitors and witnesses from all forms of process of a civil character during their attendance before any judicial tribunal, and for a reasonable time in going and returning").

118. *Blight*, 3 F. Cas at 704-05. In *Parker v. Hotchkiss*, the court understood *Miles v. M'Cullough* as applying the privilege pertaining to persons, and "plac[ing] the case of a summons on precisely the same ground as that of an arrest on the score of privilege." 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849) (No. 10,739) (discussing *Miles*, 1 Binn. 77). The Supreme Court later noted that *Parker* had expanded the protection from service beyond that recognized in *Blight* and had given rise to a line of federal decisions that "consistently sustained the privilege" to protect *persons* from service of process regardless of their proximity to the *place* of the court. *Stewart*, 242 U.S. at 130-31 (citing *Parker*, 18 F. Cas. at 1138, as "overrul[ing]" *Blight*, 3 F. Cas. 704; other citations omitted).

119. As noted above, the Supreme Court's decisions were addressing the immunity of nonresidents from service of process. *See supra* notes 91-93 and accompanying text.

plied to prevent arrest and service of process, both at the courthouse or near it, and to all persons regardless of whether or not they were pursuing business before the court.

IV. APPLYING THE COMMON-LAW PRIVILEGE TO CONTEMPORARY COURTHOUSE IMMIGRATION ARRESTS

As arrest gave way to summons as the principal means for initiating a civil suit, the privilege from arrest fell into disuse, and courts increasingly concerned themselves with questions of immunity from service of process.[120] ICE's courthouse arrests justify awakening the doctrine for three compelling reasons. First, the common-law privilege was typically used to address arrests commencing civil litigation. As immigration proceedings are civil, the privilege maps well onto courthouse arrests for immigration violations. Second, the policy objectives underlying the privilege align significantly with the concerns expressed regarding courthouse immigration arrests. And third, the American incorporation of the privilege demonstrates that federal and state courts alike have an interest in enforcing the privilege, making the doctrine particularly apt for resolving the federalism conflict created by courthouse arrests.

Thus, state and local courts not only have the legal authority to protect their courthouses and people coming and going on court business, but also their authority is likely to be respected.

A. Immigration Enforcement Is Largely Civil Enforcement

The Supreme Court has explained that immigration arrests that initiate deportation proceedings are civil in nature.[121] In *Arizona v. United States,* the Court noted that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," and that where a person is seized "based on nothing more than possible removability, the usual predicate for an arrest is

120. *See supra* note 71.

121. There are, of course, immigration crimes that may be enforced through criminal arrests and criminal prosecutions. *See* Ingrid V. Eagly, *Prosecuting Immigration,* 104 NW. U.L. REV. 1281 (2010) (describing rise of criminal immigration enforcement); *see also* Chacón, *supra* note 25, at 137 ("In recent years . . . the U.S. government has increasingly handled migration control through the criminal justice system."); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment,* 103 CALIF. L. REV. 1449, 1470 (2015) (documenting the rise of criminal immigration prosecutions). This Essay does not address the applicability of the common-law privilege from arrest to arrests for crimes.

absent."[122] Such an arrest must find justification in federal immigration statutes and regulations, which generally require that trained federal immigration officers perform the arrest.[123] And the proceedings that such an arrest initiates are also characterized as civil: "Removal is a civil, not criminal, matter."[124]

The legal categorization of immigration arrests and proceedings as civil supports application of the common-law privilege, which was largely used to address civil arrests.[125] Furthermore, important similarities exist between civil immigration arrests and civil arrests commencing private litigation. They are both arrests—physical seizures of a person—made by public "officers."[126] For the privilege to apply, the arrests occur either in or near the courthouse,[127] or the arrests are of people who are attending the courts on business.[128] The arrests are followed by jail. And they are accomplished in order to commence a second, unrelated legal proceeding in a different court.[129] These similarities, particularly when considered in light of the policy rationales supporting the privilege,[130] and the shared federal and state interest therein,[131] support application of the privilege.

Reframing immigration arrests as somehow criminal in nature—based on, for example, the fact that immigration proceedings are initiated by the federal government rather than a private litigant—could conceivably support an argument against application of the privilege. But doing so would turn existing precedent on its head and undermine a premise currently used to justify denying criminal-style procedural protections to immigrants in removal proceedings, making this an argument unlikely to come from the federal government.[132]

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122. 132 S.Ct. 2492, 2505 (2012) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)).

123. *Id.* at 2505-06. This Essay does not examine whether the statutory basis for a lawful civil immigration arrest is being met in the courthouse immigration arrests that are occurring. The privilege against arrest would apply even in the face of an otherwise lawful arrest.

124. *Id.* at 2499; *see also Lopez-Mendoza,* 468 U.S. at 1038 ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country.").

125. *See supra* note 71.

126. *See* Orchard's Case, (1828) 38 Eng. Rep. 987, 987; 5 Rus. 158 (referring to the "officer" who made the arrest); *Long's Case*, (1676-77) 86 Eng. Rep. 1012, 1012; 2 Mod. 181, 181 (referring to the same).

127. *See supra* Section III.B.

128. *See supra* Section III.A.

129. *See supra* note 91 and accompanying text.

130. *See infra* Section IV.B.

131. *See infra* Section IV.C.

132. *Lopez-Mendoza,* 468 U.S. at 1038 (explaining that "[c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a

B. Significant Policy Alignment

The policy reasons underlying the common-law privilege from arrest dovetail nicely with the objections raised to courthouse immigration arrests. The privilege was principally concerned with protecting the business of the court.[133] The privilege pertaining to the place of the court—preventing all arrests in the "face"[134] or "view"[135] of the court, or "near the courts, though out of view"[136] (in the "constructive presence"[137])—prevented "violence" and "disturbance" in or near the courts.[138] This preservation of decorum[139] upheld the dignity and authority of the court generally.[140] But the privilege of place attaching to the courthouse was also deemed essential to the administration of justice itself:[141]

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deportation hearing"). Some have argued that the rise of a "crimmigration" enforcement system justifies importation of criminal procedural protections into immigration proceedings. *See, e.g.*, Yafang Deng, *When Procedure Equals Justice: Facing the Pressing Constitutional Needs of a Criminalized Immigration System,* 42 COLUM. J.L. & SOC. PROBS. 261, 291 (2008) (describing immigration enforcement as "a system of criminal investigation and punishment held only to civil law standards" and arguing for application of criminal protections); Allegra M. McLeod, *Immigration, Criminalization, and Disobedience,* 70 U. MIAMI L. REV. 556, 558-59 (2016) (describing the push to "extend[] to immigrants enhanced judicially enforced procedural protections" but arguing that "[j]ust as the Warren Court revolution in constitutional criminal procedure failed to ameliorate the harshness of substantive criminal law, more robust immigration procedural protections would likely fail to reorient immigration enforcement in a more humane and sustainable direction").

133. *Long*, 293 U.S. at 83 (describing the privilege as "founded upon the needs of the court").

134. Whited v. Phillips, 126 S.E. 916, 917 (W. Va. 1925).

135. BACON, *supra* note 101, at 530.

136. *Id.*

137. *Blight,* 3 F. Cas. at 704.

138. BACON, *supra* note 101, at 530 ("[L]est any disturbance may be occasioned to the courts or any violence used.").

139. *See Orchard's Case*, 38 Eng. Rep. at 987; 5 Russ. at 159 (arguing that "[t]o permit arrest to be made in the Court would give occasion to perpetual tumults, and was altogether inconsistent with the decorum which ought to prevail in a high tribunal.").

140. *See* Bramwell v. Owen, 276 F. 36, 41 (D. Or. 1921) (citation omitted) (stating that the "rule is even buttressed upon a broader principle, namely, that it is a privilege of the court as affecting its dignity and authority, and is founded upon sound public policy."); Bridges v. Sheldon, 7 F. 17, 44 (C.C.D. Vt. 1880) ("The privilege arises out of the authority and dignity of the court where the cause is pending"); Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity . . . .").

141. *See, e.g.*, *Parker*, 32 N.E. at 989 (stating the privilege "is deemed necessary . . . in order to promote the due and efficient administration of justice . . . .").

> This rule is buttressed with the high conception that as courts are established for the ascertainment of the whole truth, and the doing of exact justice, as far as human judgment can attain, in disputes between litigants, every extraneous influence which tends to interfere with or obstruct the trial for the attainment of this sublime end should be resisted by the ministers of justice to the last legitimate extremity in the exercise of judicial power.[142]

Justice was thought to be hindered in two ways by courthouse arrests. First, the threat of arrest and additional litigation might "disturb and divert the witness so that on the witness stand his mind might not possess that repose and equipoise essential to a full and true deliverance of his testimony."[143] Proceedings might even be interfered with, interrupted, or delayed by the arrest of a witness or party.[144] Second, the fear of arrest might deter parties and witnesses from coming to court at all.[145] To borrow the words of Chief Justice Lee in *Cole v. Hawkins,* "it would produce much terror."[146]

This last reason, of course, was why the privilege pertaining to *people* attending court was extended "eundo et redeundo."[147] Protection at or near the courthouse was deemed insufficient, so the threat of arrest was removed as a possibility (and a deterrent) during the journey to and from the courthouse. Only in this way could the courts be made "available to suitors, *fully available,* neither they nor their witnesses subject to be embarrassed or vexed while at-

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142. Hale v. Wharton, 73 F. 739, 741 (C.C.W.D. Mo. 1896)

143. *Id.*

144. Stewart v. Ramsey, 242 U.S. 128, 129 (1916) (quoting Parker v. Hotchkiss, 18 F. Cas. 1137, 1138 (C.C.E.D. Pa. 1849)) (stating that the privilege "is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify").

145. *Id.* at 130-31 ("Witnesses would be chary of coming within our jurisdiction . . . and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense . . . ." (quoting *Parker*, 18 F. Cas. 1137, 1138)); Person v. Grier, 66 N.Y. 124, 126 (N.Y. Ct. App. 1876) ("Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done."); Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (stating that "justice requires the attendance of witnesses cognizant of material facts, and hence that no unreasonable obstacles ought to be thrown in the way of their freely coming into court to give oral testimony."); Bramwell v. Owen, 276 F. 36, 40 (D. Or. 1921) (noting that deterring witnesses "would result many times in a failure of justice").

146. (1738) 95 Eng. Rep. 396, 396; Andrews 275, 275.

147. Meekins v. Smith (1791) 126 Eng. Rep. 363, 363; 1 H. Bl. 636, 636.

tending, the one 'for the protection of his rights,' the others 'while attending to testify.'"[148]

All of these policy reasons support application of the privilege to courthouse immigration arrests, given the shared features of immigration arrests and arrests to which the privilege was applied at common law.[149] The prospect of arrest and jail—whether at the hands of an eighteenth-century English or American lawman or a twenty-first-century ICE officer—provides a powerful deterrent to the attendance of parties and witnesses in court. Indeed, echoing the concern of "terror" raised by Chief Justice Lee in *Cole v. Hawkins*[150] (who was merely discussing service of process), those chief justices objecting to ICE's courthouse arrests have principally complained about the "chilling effect" of ICE arrests.[151] Furthermore, the prospect of violent courthouse arrests, like those captured on video in Denver, for example, offers no less a threat today to the decorum, dignity, and authority of the courts than it has in the past.[152]

The ancient foundations of the common-law privilege also neatly address the argument put forth by the Attorney General and DHS Secretary: that courthouse arrests are lawful because they take place in a "public place based on probable cause."[153] Attorney General Sessions and Secretary Kelly relied on a Supreme Court case, *United States v. Watson*, in which postal officers conducted a warrantless arrest of the defendant in a restaurant.[154] In *Watson*, the Court relied heavily on an examination of common-law sources (including Black-

148. Page Co. v. MacDonald, 261 U.S. 446, 448 (1923) (emphasis added).

149. *See supra* Section IV.A.

150. Cole v. Hawkins (1738) 95 Eng. Rep. 396; Andrews 275.

151. *E.g.*, Balmer Letter, *supra* note 17, at 2 (noting the "chilling effect" of courthouse arrests); Rabner Letter, *supra* note 18, at 1 (same); Rogers Letter, *supra* note 19, at 1 (worrying that courthouses will be seen "as places to avoid"). The common-law privilege, in its application "eundo et redeundo," *Meekins,* 126 Eng. Rep. at 363, addresses the concern that even if ICE ceases arrests in courthouses it will simply wait outside the courthouse to make its arrests. *Cf.* S. 845, 115th Cong. § 2 (2017) (proposing a 1,000-foot penumbra around "sensitive locations" including courthouses).

152. *See* Meltzer, *supra* note 9.

153. Sessions Letter, *supra* note 23, at 1.

154. 423 U.S. 411, 412-13 (1976). Note that the case is cited incorrectly as 432 U.S. 411 in Sessions Letter, *supra* note 23, at 1. A critique of *Watson* is beyond the scope of this Essay, as is the question of *Watson*'s suitability as authority to justify ICE courthouse arrests. The assertion by the Attorney General and Secretary Kelly that *Watson* supports ICE courthouse arrests because ICE is "authorized by federal statute" to arrest based upon probable cause of removability, Sessions Letter *supra* note 23, at 1 (citing 8 U.S.C. § 1357), is at best incomplete. The statute, as the Supreme Court has pointed out, indicates such warrantless arrests are permissible "only where the alien 'is likely to escape before a warrant can be obtained.'" Arizona v. United States, 132 S. Ct. 2492, 2506 (2012) (quoting 8 U.S.C. § 1357(a)(2)).

stone) and ultimately held that its Fourth Amendment jurisprudence "reflect[s] the ancient common-law rule" regarding warrantless arrest, and that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact."[155]

But to say that an arrest in a restaurant is consonant with "the ancient common-law rule" is to prefer the more general rule (concerning arrest on probable cause in a public place) to the more specific—but equally ancient and well-established in the common law—rule examined here, the common-law privilege from arrest. Indeed, these two rules can coexist comfortably, as the former is a rule for determining when an arrest is lawful and the latter a rule for determining when there is a privilege from even lawful arrests.

This is not to say the common law rejected the notion of the courthouse as a public place. Rather, to ensure that the courts remained truly accessible to the public, it was deemed necessary to proscribe arrests at or near courthouses,[156] and of those coming and going from the court.[157] The Supreme Court acknowledged the wisdom of this "balance struck by the common law"[158] when it quoted a leading early American case grounding the privilege in the notion that "[c]ourts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them."[159]

C. Shared Interests of Federal and State Courts

Because ICE can work closely with other agencies in the federal criminal justice system, it has not found it necessary to make arrests in federal courthouses, and the federal courts will likely have little need to assert the privilege from arrest in order to protect their own administration of justice. But American judicial decisions demonstrate the aligned interests of federal and state tribunals in advancing the public policy goals of the common-law privilege from arrest. First, federal, state, and local governments historically demonstrated a shared interest in applying the privilege from arrest to protect their own courts and those attending them, and therefore a shared interest in the idea that those courts are sufficiently empowered to do so. Second, all courts—federal, state,

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155. *Watson*, 423 U.S. at 418, 421.

156. *See supra* Section III.B.

157. *See supra* Section III.A.

158. *Watson*, 423 U.S. at 421.

159. Stewart v. Ramsey, 242 U.S. 128, 129 (1916) (quoting Halsey v. Stewart, 4 N.J.L. 366, 367 (N.J. 1817)).

and local—demonstrated a shared interest in enforcing the privilege as to other courts, that it might likewise be enforced by other courts as to their own.

The privilege from arrest has been deemed necessary to preserve courts' ability to administer justice.[160] The jurisprudence surrounding the privilege unsurprisingly establishes that protecting the courthouse and its environs from disruption and violence (as accomplished by the privilege as to place) and protecting the administration of justice by privileging those with business before the court (as accomplished by the privilege as to people) is deemed a necessary power belonging to all courts.[161]

The most obvious demonstration of this power, at common law, was each court's power to issue a writ of protection. That the power to issue such writs was held by American courts at common law is demonstrated by numerous authorities.[162] A Rhode Island case recounted that a writ of protection had issued

> in the ordinary form, commanding the sheriffs of the several counties, and their deputies, that they "let the said William T. Merritt of and from all civil process, whether original or judicial, so long as he shall attend said court, and until he shall be discharged from the protection aforesaid by this court at the present term."[163]

But the writ of protection was not deemed necessary[164]—the power to grant privilege from arrest was deemed "*a power inherent in courts*."[165] This inherent power flowed necessarily from the understanding that courts could not do justice without "preventing delay, hindrance, or interference with the orderly ad-

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160. *See supra* Section IV.B.

161. Beyond the scope of this Essay is the question of whether a sovereign government can exercise power over the privilege through nonjudicial action, or whether the power over the privilege is limited to the courts themselves. *Cf.* Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (describing the privilege as "a prerogative exerted by the sovereign power through the courts for the furtherance of the ends of justice").

162. *See, e.g.*, Bridges v. Sheldon, 7 F. 17, 44 (D. Vt. 1880) ("A writ of protection issued out of that court is proper . . . "); Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) ("We cannot find that the power to issue such a writ has been abrogated by legislation, and it doubtless exists, and the writ may still be granted by courts possessing a common-law jurisdiction . . . ."); HOWE, *supra* note 89, at 144-46 (describing Massachusetts procedure with respect to writs of protection).

163. Waterman v. Merritt, 7 R.I. 345, 345-46 (1862); *see also Ex parte* Hall, 1 Tyl. 274 (Vt. 1802) (issuing a writ and upholding liberal reading of the writ).

164. *See* Thompson's Case, 122 Mass. 428, 429 (1877) (recognizing the privilege "whether they have or have not obtained a writ of protection" (citations omitted)).

165. Wemme v. Hurlburt, 289 P. 372, 373 (Or. 1930) (citations omitted) (emphasis added).

ministration of justice"[166]—and that courts could not expect the attendance of parties and witnesses, even pursuant to court order, without the power (or obligation)[167] to also offer protection.[168]

Courts needed this power to operate, but they also needed other courts to recognize it. Indeed, the privilege can be understood as a rule governing the relationship of courts, whereby courts follow the rule out of a categorical imperative, respecting other courts' dignity[169] to ensure their own:

> Out of the enforcement of this policy has sprung the doctrine of comity. No court will direct its process to be served upon litigants before another court where it would protect its own litigants from a like service. Every court will aid every other court by permitting attendance upon one free from the danger of service of process by another. All courts recognize this principle of immunity involved.[170]

A leading case from New York put it similarly: "[T]his court ought not to suffer its process to be executed in violation of the privileges of other courts . . . ."[171] Moreover, the Supreme Court was emphatic in its endorsement of comity as applied to the privilege in a case where service of process in a federal case was served on a nonresident present in Massachusetts to attend state-court proceedings. The Court was asked to uphold the service of process on the ground that the federal lawsuit and the state-court proceedings were taking place in different jurisdictions, but the Court rejected this, holding that "[a] federal court in a State is not foreign and antagonistic to a court of the State within the principle . . . ."[172] The privilege against service of process

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166. *Id.*

167. An important early decision from New York described the privilege as an obligation of the court, owing to the court's power to compel the attendance of persons before the court. Norris v. Beach, 2 Johns. 294 (N.Y. 1807).

168. Bridges v. Sheldon, 7 F. 17, 46 (D. Vt. 1880) (holding a writ of protection unnecessary, because "[t]he order to take testimony issued under the authority of the court carried with it the protection of the court"); United States v. Edme, 9 Serg. & Rawle 147, 151 (Pa. 1822) ("[T]he court must necessarily possess the power to protect from arrest all who are necessarily attending the execution of their own order.").

169. *See* Kaufman v. Garner, 173 F. 550, 554 (W.D. Ky. 1909) (stating that the rule is based on "the dignity and independence of the court first acquiring jurisdiction").

170. Feister v. Hulick, 228 F. 821, 823 (E.D. Pa. 1916).

171. Bours v. Tuckerman, 7 Johns. 538, 539 (N.Y. Sup. Ct. 1811); *see also* Vincent v. Watson, 30 S.C.L. (1 Rich.) 194, 198 (S.C. Ct. App. 1845) (describing *Bours* as expressing "[t]he rule most consistent with the courtesy due from the courts to each other, and with a proper care for the liability of the citizen").

172. Page Co. v. Macdonald, 261 U.S. 446, 447-48 (1923).

rests on "the necessities of the judicial administration," the Court wrote.[173] "[T]he courts, federal and state, have equal interest in those necessities."[174]

These decisions have two important implications for the current impasse over courthouse immigration arrests. First, state and local courts have the power "inherent in courts" to privilege from arrest those who attend their courts on business (in their coming, remaining, and returning) as well as those people present in and around the courts.[175] The letters asking ICE to stop making courthouse arrests need not be the last step taken—ICE's refusal to stop these arrests cannot deprive courts of a power they derive simply from being courts. Second, if ICE refuses to respect the power of state and local courts concerning the privilege, once asserted, state and local courts can reasonably expect to be supported by the federal courts, if not the immigration courts, because of the federal courts' shared interest in upholding rules that address the administration of justice and therefore must be universally enforced. This is so even though the federal courts are not identically situated, as ICE arrests have not yet become a problem for federal courts. This difference is insufficient to make the federal courts "antagonistic" to the state courts.[176] That the privilege is thus universally followed[177] as a matter of comity[178] makes it a uniquely suitable solution to the federalism clash caused by immigration courthouse arrests.

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173. *Id.* at 448 (quoting Stewart v. Ramsay, 242 U.S. 128, 130 (1916)).

174. *Id.* at 448.

175. Wemme v. Hurlburt, 289 P. 372, 373 (Or. 1930).

176. *Page Co.*, 261 U.S. at 447.

177. *See* People *ex rel.* Watson v. Judge of Superior Court of Detroit, 40 Mich. 729, 733 (1879) ("If any court were disposed to suffer its own process to be employed for such a purpose, any other court with competent authority should interfere to correct the wrong."); Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) (noting that a writ of protection "would be respected by all other courts"); Sofge v. Lowe, 176 S.W. 106, 108 (Tenn. 1915) (applying the privilege in an interstate setting, and concluding: "Justice, in such connection, is to be conceived of as a thing integral and not partible by state or jurisdictional lines; all courts must be presumed to interest themselves alike in promoting and keeping unhampered its fair administration . . . . The courts of this state will see to it that their processes are not used to thus embarrass the administration of justice in a sister state, and we shall expect the courts of other states to rule in reciprocation. Thus, by a species of comity, a common end will be served."); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & ADAM N. STEINMAN, 4A FEDERAL PRACTICE AND PROCEDURE § 1078 (4th ed. 2015) (addressing the privilege as applied to service of process on non-residents, stating that "the objectives of the immunity doctrine and notions of judicial cooperation dictate that state courts should grant immunity to persons who have entered the jurisdiction for the purpose of attending federal proceedings and that federal courts should quash service made on those who are in the jurisdiction to attend pending state proceedings" (footnotes omitted)).

CONCLUSION

The common-law privilege from arrest provides a rule of law that could break the federalism impasse caused by immigration courthouse arrests. This Essay has attended to the substance and grounding of the rule,[179] demonstrating that state and local courts have the power to regulate courthouse arrests and in doing so, would be pursuing policy goals recognized by state and federal courts. But numerous questions for future study remain.

First, what are the procedural mechanisms by which the privilege against courthouse immigration arrests can be invoked? Perhaps the most obvious mechanism suggested by the analysis here would be for a court to issue some form of writ of protection. But might the privilege also be implemented by state or local legislative enactments?[180]

Second, what remedies are available for violations of the privilege (or of a writ of protection)? Certainly, the cases surveyed would suggest ICE agents making arrests in violation of the privilege might be held in contempt.[181] But

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178. A question beyond the scope of this Essay is whether federalism under the Constitution would *require* federal actors to refrain from interfering with state and local sovereign governments by making arrests in violation of the common-law privilege.

179. There are many nuances in American jurisprudence, not explored here, which are artifacts of the doctrine's migration into the question of interstate personal jurisdiction. I have attempted to canvass the core of the privilege from civil arrest, which came into American law largely unquestioned. *See, e.g.*, Greer v. Young, 11 N.E. 167, 169-70 (Ill. 1887) (distinguishing between the question at hand, involving service of process, and the entrenched doctrine of privilege from civil arrest); Jenkins v. Smith, 57 How. Pr. 171, 173 (N.Y. Supr. Ct. 1878) (noting "[i]t is also well settled that a resident witness is privileged from arrest, but not from the service of a summons.").

180. There are some state statutes addressing privilege from arrest. *E.g.*, IDAHO CODE § 9-1303 (2017) (establishing privilege from arrest for subpoenaed witness); OR. REV. STAT. § 44.090 (2017) (same); ARIZ. REV. STAT. ANN. § 12-2213 (2017) ("A witness shall be privileged from arrest, except for treason, felony and breach of the peace, during his attendance at court, and in going to and returning therefrom, allowing one day for each twenty-five miles from his place of abode."). Such statutes raise additional questions—are they supplements to the common-law privilege or displacements of it? *See, e.g.*, Davis v. Hackney, 85 S.E.2d 245, 247 (Va. 1955) (interpreting Uniform Act regarding out-of-state witnesses as enacted in aid of the common-law privilege). If the latter, can state or local legislatures displace the common-law privilege without violating separation of powers principles? *See, e.g.*, State *ex rel.* Veskrna v. Steel, 894 N.W.2d 788, 801 (Neb. 2017) ("It is for the judiciary to say when the Legislature has gone beyond its constitutional powers by enacting a law that invades the province of the judiciary.").

181. This is certainly suggested by the common-law cases surveyed herein. *E.g.*, *Larned*, 12 F. at 594 (stating that the "offender may be punishable for contempt if the arrest is made in the actual or constructive presence of the court . . . ."); *Ex parte* Hall, 1 Tyl. at 281 (in case where a writ of protection was violated, holding "the constable be in mercy for his contempt

could a violation of the privilege also support discharge from custody,[182] suppression of evidence or termination of immigration proceedings,[183] or a damages lawsuit?[184] Could declaratory or injunctive relief be available to prevent further violations?

Third, what is the relation between the privilege and other constitutional provisions guaranteeing individual rights[185] or trial rights for civil or criminal litigants,[186] or prescribing the structures of government?[187]

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of the Court"); *Long's Case*, 2 Mod. 181 (committing officer to the Fleet prison for making arrest in the yard of the court).

182. *E.g.*, *Larned*, 12 F. at 591 (noting an English common-law remedy whereby "writ of privilege" would result in prisoner's discharge); *id.* (collecting cases where discharge was accomplished by motion or by plea in abatement); Thompson's Case, 122 Mass. 428, 430 (1877) (noting that "any one arrested in violation of privilege may, like any other person unlawfully imprisoned or restrained of his liberty, be discharged by this court, or by any justice thereof, in the exercise of the general power to issue writs of habeas corpus." (citations omitted)); *Ex parte* Hall, 1 Tyl. At 281 (granting habeas petition and ordering discharge of the prisoner).

183. *See, e.g.*, Bramwell v. Owen, 276 F. 36 (D. Or. 1921) (quashing service made in violation of the privilege and dismissing suit); *Larned*, 12 F. at 594 (allowing a plea in abatement of civil suit initiated in violation of the privilege because such remedy "in our opinion is necessary to the due administration of justice, that this immunity extends to all kinds of civil process, and affords an absolute protection" (citation omitted)).

184. *See, e.g.*, Mary E. O'Leary, *11 Immigrants Arrested in 2007 Raids in New Haven Win $350K Settlement with Feds, Won't Be Deported*, NEW HAVEN REG. (Feb. 14, 2012), http://www.nhregister.com/news/article/11-immigrants-arrested-in-2007-raids-in-New-Haven-11527436.php [http://perma.cc/VU9K-3422] (reporting the settlement of claims alleging, *inter alia*, wrongful arrests by ICE agents).

185. *See supra* notes 153-155 and accompanying text (describing the use of common-law authorities to inform Fourth Amendment analysis); *see also* Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667 (2003) (arguing that law enforcement policies that deter noncitizens from reporting crimes may be unconstitutional).

186. Trial rights implicated could include the right to a public trial; the right to testify, see Diamond v. Earle, 105 N.E. 363, 363 (Mass. 1914) (noting that a party's right to testify on his own behalf might be "hampered by the hazard that he may become entangled in other litigation"); the right to compulsory process, see Halsey v. Stewart, 4 N.J.L. 366, 367-68 (N.J. 1817) (noting that the privilege enables a litigant "to procure, without difficulty, the attendance of all such persons as are necessary to manifest his rights"); the right to be present at critical stages of the case, see Parker v. Marco, 32 N.E. 989, 989 (N.Y. 1893) **("**It is the right of the party, as well as his privilege, to be present whenever evidence is to be taken in the action which may be used for the purpose of affecting its final determination."); and the right to present claims or defenses.

187. *See* New York v. United States, 505 U.S. 144, 155 (1992) (describing Tenth Amendment inquiry into "whether [the federal government] invades the province of state sovereignty reserved by the Tenth Amendment."); U.S. CONST. art. IV, § 4 (directing the United States to "guarantee to every State . . . a Republican Form of Government . . . .").

And finally, could the privilege be applied or extended to protect other government institutions by preventing arrests at probation offices, administrative courts, public legislative assemblies or offices, or government offices where benefits are sought or distributed?[188]

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The search for a solution to the courthouse-immigration-arrests problem requires blowing the dust off ancient treatises and delving into centuries-old English cases. But there is a good reason the existence of the privilege from arrest now comes as breaking news. The privilege receded from the body of modern law not because the doctrine fell by the way, but rather because the practice of commencing civil litigation with an arrest did.[189] The privilege from arrest was firmly entrenched and undisputed in both English and American jurisprudence when the need for its application waned, and the courts moved on to busy themselves with questions concerning extension of the doctrine to the service of civil process. *Arrests* under circumstances in which the privilege would apply all but disappeared.[190]

The need to resort to ancient authority stands not as evidence of weakness in the doctrine, but rather as an attestation to how aberrational courthouse immigration arrests are. The poor instincts of those who have directed these arrests, and those who have defended them, desperate to harness local criminal systems even at the risk of harming their integrity, stand rebuked by this rule that has been "sustained by [an] almost unbroken current of authority."[191] Those who have expressed outrage at ICE's courthouse arrests and decried the harm they threaten to state and local courts, on the other hand, are fully vindicated by the privilege, its unquestioned status, and its policy justifications that echo undiminished across the centuries.

Their outrage, it seems, would have been shared by judges in every age.

Christopher Lasch is an Associate Professor at the University of Denver Sturm College of Law. His scholarship focuses on the intersection of criminal and immigration law.

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188. Other privileges from arrest, such as that for state legislators, *see* Thompson's Case, 122 Mass. 428 (involving legislative privilege), or relating to elections, *e.g.* KY. CONST. § 149 ("Voters, in all cases except treason, felony, breach of surety of the peace, or violation of the election laws, shall be privileged from arrest during their attendance at elections, and while they are going to and returning therefrom."), exist to protect government functions.

189. *See supra* note 71.

190. *Id.*

191. *Greer,* 11 N.E. at 187.

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APPENDIX M

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Directive Number 11072.1: Civil Immigration Enforcement Actions Inside Courthouses

Issue Date: January 10, 2018
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Superseded: None
Federal Enterprise Architecture Number: 306-112-002b

1. Purpose/Background. This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding civil immigration enforcement actions inside federal, state, and local courthouses. Individuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband. Accordingly, civil immigration enforcement actions taken inside courthouses can reduce safety risks to the public, targeted alien(s), and ICE officers and agents. When practicable, ICE officers and agents will conduct enforcement actions discreetly to minimize their impact on court proceedings.

Federal, state, and local law enforcement officials routinely engage in enforcement activity in courthouses throughout the country because many individuals appearing in courthouses for one matter are wanted for unrelated criminal or civil violations. ICE's enforcement activities in these same courthouses are wholly consistent with longstanding law enforcement practices, nationwide. And, courthouse arrests are often necessitated by the unwillingness of jurisdictions to cooperate with ICE in the transfer of custody of aliens from their prisons and jails.

2. Policy. ICE civil immigration enforcement actions inside courthouses include actions against specific, targeted aliens with criminal convictions, gang members, national security or public safety threats, aliens who have been ordered removed from the United States but have failed to depart, and aliens who have re-entered the country illegally after being removed, when ICE officers or agents have information that leads them to believe the targeted aliens are present at that specific location.

Aliens encountered during a civil immigration enforcement action inside a courthouse, such as family members or friends accompanying the target alien to court appearances or serving as a witness in a proceeding, will not be subject to civil immigration enforcement action, absent special circumstances, such as where the individual poses a threat to public safety or interferes with ICE's enforcement actions.[1]

[1] ICE officers and agents will make enforcement determinations on a case-by-case basis in accordance with federal law and consistent with U.S. Department of Homeland Security (DHS) policy. *See* Memorandum from John Kelly, Secretary of Homeland Security, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017); Memorandum from John Kelly, Secretary of Homeland Security, *Implementing the President's Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017).

AILA Doc. No. 18013140. (Posted 1/31/18)

ICE officers and agents should generally avoid enforcement actions in courthouses, or areas within courthouses that are dedicated to non-criminal (e.g., family court, small claims court) proceedings. In those instances in which an enforcement action in the above situations is operationally necessary, the approval of the respective Field Office Director (FOD), Special Agent in Charge (SAC), or his or her designee is required.

Civil immigration enforcement actions inside courthouses should, to the extent practicable, continue to take place in non-public areas of the courthouse, be conducted in collaboration with court security staff, and utilize the court building's non-public entrances and exits.

Planned civil immigration enforcement actions inside courthouses will be documented and approved consistent with current operational plans and field operations worksheet procedures. Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI) may issue additional procedural guidance on reporting and documentation requirements; such reporting and documentation shall not impose unduly restrictive requirements that operate to hamper or frustrate enforcement efforts.

As with any planned enforcement action, ICE officers and agents should exercise sound judgment when enforcing federal law and make substantial efforts to avoid unnecessarily alarming the public. ICE officers and agents will make every effort to limit their time at courthouses while conducting civil immigration enforcement actions.

This policy does not apply to criminal immigration enforcement actions inside courthouses, nor does it prohibit civil immigration enforcement actions inside courthouses.

3. Definition The following definitions apply for the purposes of this Directive only.

3.1. Civil immigration enforcement action. Action taken by an ICE officer or agent to apprehend, arrest, interview, or search an alien in connection with enforcement of administrative immigration violations.

4. Responsibilities.

4.1. The **Executive Associate Directors** for **ERO** and **HSI** are responsible for ensuring compliance with the provisions of this Directive within his or her program office.

4.2. ERO FODs and **HSI SACs** are responsible for:

1) Providing guidance to officers and agents on the approval process and procedures for civil immigration enforcement actions at courthouses in their area of responsibility beyond those outlined in this Directive; and

2) Ensuring civil immigration enforcement actions at courthouses are properly documented and reported, as prescribed in Section 5.1 of this Directive.

AILA Doc. No. 18013140. (Posted 1/31/18)

4.3. **ICE Officers and Agents** are responsible for complying with the provisions of this Directive and properly documenting and reporting civil immigration enforcement actions at courthouses, as prescribed in Section 5.1 of this Directive.[2]

5. **Procedures/Requirements.**

5.1. **Reporting Requirements.**

1) ICE officers and agents will document the physical address of planned civil immigration enforcement actions in accordance with standard procedures for completing operational plans, noting that the target address is a courthouse.[3]

2) Unless otherwise directed by leadership, there will be no additional reporting requirements in effect for this Directive.

6. **Recordkeeping.** ICE maintains records generated pursuant to this policy, specifically the Field Operations Worksheets (FOW) and Enforcement Operation Plan (EOP). ERO will maintain the FOW in accordance with the Fugitive Operations schedule DAA-0567-2015-0016. HSI will maintain EOPs in accordance with the Comprehensive Records Schedule N1-36-86-1/161.3. The EOPs will be maintained within the Investigative Case Files.

7. **Authorities/References.**

7.1. DHS Directive 034-06, *Department Reporting Requirements,* October 23, 2015.

7.2. DHS Instruction 034-06-001, Rev. 1, *Department Reporting Requirements*, March 28, 2017.

8. **Attachments.** None.

9. **No Private Right.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.

[2] *See also* ICE Directive No. 10036.1, *Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005* (Jan. 22, 2007), for additional requirements regarding civil immigration enforcement actions against certain victims and witnesses conducted at courthouses.
[3] ERO will use the Field Operations Worksheet and HSI will use the Enforcement Operation Plan.

AILA Doc. No. 18013140. (Posted 1/31/18)

Thomas D. Homan
Deputy Director and
Senior Official Performing the Duties of the Director
U.S. Immigration and Customs Enforcement

AILA Doc. No. 18013140. (Posted 1/31/18)

APPENDIX N

UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 Pennsylvania Avenue, NW• Suite 1150 • Washington, DC 20425 www.usccr.gov

March 16, 2018

Thomas D. Homan
Deputy Director and Senior Official Performing the Duties of the
Director for U.S. Immigration and Customs Enforcement
U.S Immigration and Customs Enforcement
500 12th St., SW
Washington, D.C. 20536

Re.: Immigration Enforcement Actions in Courthouses

Dear Deputy Director Homan:

The undersigned members of the United States Commission on Civil Rights write to express our continuing concern with U.S. Immigration and Customs Enforcement's (ICE) policy allowing immigration enforcement actions inside courthouses and its dangerous consequences that undermine our judicial system. The Commission previously issued a majority-approved statement raising concern that conducting immigration enforcement actions inside courthouses instills needless additional fear and anxiety within immigrant communities, discourages interacting with the judicial system, and endangers the safety of entire communities.[1] We have attached our statement for your consideration.

ICE's recent guidance[2] on when and how it will conduct civil immigration enforcement actions in courthouses is a step in the right direction but falls short of ensuring the fair administration of justice and the safety of communities. Specifically, ICE's policy does not consider courthouses "sensitive locations," such as it has for schools, hospitals, or places of worship, where ICE will conduct immigration enforcement actions "in limited circumstances, [such as exigent circumstances,] but will generally be avoided."[3] The failure to classify courthouses as "sensitive places" is perplexing when ICE's sensitive location policy is meant "to enhance the public understanding and trust, and *to ensure that people seeking to participate in activities or utilize services provided at any sensitive location are free to do so, without fear or hesitation.*"[4]

[1] U.S. Commission on Civil Rights, U.S. Commission on Civil Rights Expresses Concern with Immigrants' Access to Justice (Apr. 24, 2017), http://www.usccr.gov/press/2017/Statement_04-24-2017-Immigrant-Access-Justice.pdf.
[2] ICE, Directive No. 110721.1: Civil Immigration Enforcement Actions Inside Courthouses (Jan. 10, 2018), https://www.ice.gov/sites/default/files/documents/Document/2018/ciEnforcementActionsCourthouses.pdf.
[3] ICE, FAQ on Sensitive Locations and Courthouse Arrests (last updated Jan. 31, 2018), https://www.ice.gov/ero/enforcement/sensitive-loc.
[4] *Id.* (emphasis added).

The failure to exclude courthouses from ICE enforcement actions achieves exactly the opposite effect and prevents victims of violent crime, domestic abuse, and work exploitation from seeking justice. The policy unnecessarily increases the disruptive presence of ICE agents in courthouses, sowing fear and mistrust of our justice system among immigrant and vulnerable communities, when such enforcement actions could be conducted elsewhere with less harmful impact. Moreover, immigrants such as family members and friends accompanying the targeted immigrant may still be arrested on a case-by-case basis.[5] Finally, the policy does not apply only to criminal immigration enforcement actions and does not further distinguish which immigrants would be targeted for criminal enforcement actions.[6]

As an independent, bipartisan federal agency charged with advising the President and Congress on civil rights matters and the administration of justice, the Commission strongly urges ICE to reconsider its guidance on courthouse arrests and classify courthouses as sensitive locations.

Thank you for your consideration and we look forward to your response.

Very truly yours,

Catherine E. Lhamon, Chair

Patricia Timmons-Goodson, Vice-Chair

Debo Adegbile, Commissioner

Michael Yaki, Commissioner

Enclosure

cc:

The Honorable Chuck Grassley
Chairman, Senate Committee on the Judiciary

[5] Directive 110721.1 at Section 2, n1.
[6] *Id.* at Section 2.

The Honorable Dianne Feinstein
Ranking Member, Senate Committee on the Judiciary
The Honorable Bob Goodlatte
Chairman, House Judiciary Committee
The Honorable Jerry Nadler
Ranking Member, House Judiciary Committee
The Honorable John Cornyn
Chairman, Senate Subcommittee on Border Security and Immigration
The Honorable Dick Durbin
Ranking Member, Senate Subcommittee on Border Security and Immigration
The Honorable Raúl Labrador
Chairman, House Subcommittee on Immigration and Border Security
The Honorable Zoe Lofgren
Ranking Member, House Subcommittee on Immigration and Border Security

Kristjen Nielsen
Secretary, U.S. Department of Homeland Security

APPENDIX O

NACDL

Home > About > Governance > Board Resolutions > Board of Directors ~ 4/21/2018

Board of Directors ~ 4/21/2018

Concerning ICE in the Courthouse

New York
April 21, 2018

WHEREAS the National Association of Criminal Defense Lawyers (NACDL) continues to be committed to advancing public policies that ensure complete access to the criminal justice system for all;

WHEREAS the President of the United States, through the Executive Order issued on January 25, 2017 ("Enhancing Public Safety in the Interior of the United States"), targeted immigration populations who are residing in the U.S. illegally, who have a conviction record, and/or who have otherwise violated the terms of their visa;

WHEREAS the above Executive Order threatened federal funding for those U.S. cities deemed "sanctuary cities" that "willfully refuse to comply with 8 U.S. Code § 1357 - Powers of immigration officers and employees";

WHEREAS U.S. Immigration and Customs Enforcement (ICE) Directive Number 11072.1 ("Civil Immigration Enforcement Actions Inside Courthouses"), issued January 10, 2018, directs ICE officers and agents to conduct civil immigration enforcement actions inside courthouses;

WHEREAS documented cases of ICE arrests in, immediately outside, and in route to courthouses have resulted in detention that has caused residents to miss parole obligations, drug treatment services, mental health evaluations, court hearings, and other critical services and obligations;

WHEREAS access to courts – by accused persons who are presumptively innocent, their families, supporters, and members of their communities, purported victims, and neutral witnesses – is essential to the cause of justice, public safety, and the preservation of civil society;

WHEREAS bar associations, legal services providers, and policymakers around the U.S. have documented heightened and widespread fear from resident clients that accessing the court system will lead to arrest, deportation, and/or otherwise negative immigration consequences;

WHEREAS bar associations, legal services providers, and policymakers around the U.S. have voiced their concerns with the interference in access to the judicial system that the presence of ICE agents create by carrying out the aforementioned directive;

WHEREAS members of the judiciary have formally raised concerns about the negative effects on due process and legal access that the aforementioned directive is facilitating;

IT IS HEREBY RESOLVED that NACDL joins bar associations, legal services providers, policymakers, and judges in calling for an immediate and complete halt to the implementation of Directive Number 11072.1, including:

1. A directive establishing a formal, physical demarcation in and around courthouses – of all jurisdictions – and other justice system venues to be recognized as sensitive areas in which ICE activities are not to take place;
2. A formal renunciation of any federal policy threatening to tie federal funding to a state or locality in whether that entity carries out federal immigration activities;
3. A formal commitment from the federal government recognizing the negative consequences of pursuing immigration activities in and around court venues and to cease any and all interference with access to local and state justice system functions by ICE officials monitoring non-immigration proceedings; and
4. An amendment to INA: ACT 287 - POWERS OF IMMIGRATION OFFICERS AND EMPLOYEES, guaranteeing certain "sensitive locations,' including courthouses and their immediate vicinity, in which ICE officers are not permitted to pursue immigration duties

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APPENDIX P

ARTICLE: FEDERALISM AND THE STATE POLICE POWER: WHY IMMIGRATION AND CUSTOMS ENFORCEMENT MUST STAY AWAY FROM STATE COURTHOUSES

Spring, 2018

Reporter
54 Willamette L. Rev. 323 *

Length: 3987 words

Author: George Bach*

* Associate Professor of Law, University of New Mexico School of Law. Many thanks to my research assistant, Taylor Bui, and Professor Dawinder Sidhu.

Text

[*323]

I. Introduction

The Trump Administration's rhetoric and increased immigration enforcement actions have raised the level of fear in immigrant communities. The increased enforcement has included having United States Immigration and Customs Enforcement (ICE) agents appear at state and local courthouses to detain undocumented immigrants when they arrive for court. [1] This enforcement tactic has had a chilling effect on the prosecution of domestic violence, as undocumented victims wish to avert encountering ICE agents at the courthouse. [2] In El Paso, for example, ICE agents detained a woman who was bringing a case **[*324]** of domestic violence against her abuser. There were claims that ICE was tipped off about the victim's immigration status by her alleged abuser. [3]

The direct effect of the presence of federal ICE agents at state and local courthouses extends beyond the victims of domestic violence. It also hampers the ability of state and municipalities to enforce their domestic violence laws. This interference, in turn, undermines state sovereignty and the exercise of the states' police power, both of which are critical in our federalist system.

This Article argues that the ICE initiative to detain undocumented individuals at state and local courthouses runs afoul of the constitutional limits on federal action, as made clear by United States v. Lopez [4] and United States v.

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[1] See Jennifer M. Chacon, Immigration and the Bully Pulpit, *130 Harv. L. Rev. F. 243, 267 (2017).*

[2] Heidi Glen, Fear of Deportation Spurs 4 Women to Drop Domestic Abuse Cases in Denver, NPR (March 21, 2017, 4:43 AM), *http://www.npr.org/2017/03/21/520841332/fear-of-deportation-spurs-4-women-to-drop-domestic-abuse-cases-in-denver*.

[3] Marty Schladen, ICE Detains Alleged Domestic Violence Victim, El Paso Times (Feb. 15, 2017, 3:49 PM), *http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/*.

[4] *514 U.S. 549 (1995).*

Morrison [5] and, to a lesser extent, other Tenth Amendment cases that robustly protect state police powers and that have set forth a reinvigorated sense of the state's role in our federalism. Accordingly, under the revived notion of state sovereignty and police power in our federalism structure, ICE should be kept away from the state and local courthouses.

II. Revived federalism principles have strengthened states' police powers against federal encroachment.

A.

A.Lopez and Morrison re-drew the lines between federal and state sovereignty.

In 1995, the Supreme Court signaled a shift in its approach to federalism in the context of its Commerce Clause jurisprudence. At issue in Lopez was the Gun-Free School Zones Act of 1990, which made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." [6] Reversing the tide of Supreme Court opinion that had flowed since N.L.R.B. v. Jones & Laughlin Steel Corp., [7] United States v. Darby, [8] and Wickard v. Filburn, [9] the Court **[*325]** held that the Act was not a proper exercise of Congress's Commerce Clause power. In doing so, the Court revived the importance of state sovereignty and, in particular, the ability of states to exercise their police powers without federal interference, principles that the majority of the Court found (and continues to find) embedded in the Tenth Amendment.

We start with first principles. The Constitution creates a federal government of enumerated powers. As James Madison wrote:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. [10]

The Court emphasized the importance of "meaningful limits" on Congress's power under the Commerce Clause. [11] Those limits are pressed when "national power seeks to intrude upon an area of traditional state concern." [12] The line in Lopez was easy to draw, "for it is well established that education is a traditional concern of the States." [13] The Court reiterated that, in such cases, it possesses a "particular duty to ensure that the federal-state balance is

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5 *529 U.S. 598 (2000).*

6 *514 U.S. at 551* (quoting ***18 U.S.C. § 922*** (2012)).

7 *301 U.S. 1, 37 (1937).*

8 *312 U.S. 100 (1941).* For example, the Court in Darby noted that:

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

Id. at 114.

9 *317 U.S. 111, 128-29 (1942).*

10 *Lopez, 514 U.S. at 552* (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

11 *Id. at 580.*

12 Id.

13 *Id. at 580* (citing *Milliken v. Bradley, 418 U.S. 717, 741-42 (1974);* see also *Epperson v. Arkansas, 393 U.S. 97, 104 (1968).*

not destroyed." [14] The need for the states to retain flexibility to address such complex issues was highlighted by the Court: "If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those **[*326]** measures." [15] The Court has repeatedly emphasized this flexibility (i.e., preserving the ability of states to serve as "laboratories"). [16]

Morrison involved Congress's creation of a civil cause of action for damages resulting from gender-motivated crimes under the Violence Against Women Act of 1994. [17] In striking down the provision, the Court emphasized that regulation of such crimes falls soundly within the state's police powers. The Court "accordingly rejects the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." [18]

The Court noted that it could "think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." [19] The Court further explained that even the Fourteenth Amendment, which was drafted to address bad behavior by the states, contains limitations to protect against undue federal intrusion into the arena of state police powers. [20] The Court noted that "these limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." [21]

As Professor Lash has explained, Lopez and Morrison signaled a significant resurgence of a "narrow construction of federal power to interfere with matters believed best left under state control." [22] Relying on James Madison's Report of 1800, Lash has argued that **[*327]** following the Rehnquist Court's rulings, jurisprudence is returning to the original, 1800 understanding of the Tenth Amendment. [23]

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[14] *Lopez, 514 U.S. at 581.*

[15] Id.

[16] See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2673 (2015)* (acknowledging that the Court has recognized the role of states as laboratories for solving complex legal problems); *New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932)* (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[17] *42 U.S.C. § 13981* (1994).

[18] *United States v. Morrison, 529 U.S. 598, at 617 (2000).*

[19] *Id. at 618.*

[20] *Id. at 661* (Breyer, J., dissenting).

[21] *Id. at 621;* see also *McCarthy v. Hawkins, 381 F.3d 407, 433 (5th Cir. 2004)* ("Title II of the ADA is not permissible Commerce Clause legislation to the extent that it regulates states' decisions regarding who will participate in or receive the benefits of state entitlement programs.").

[22] Kurt T. Lash, James Madison's Celebrated Report of 1800: The Transformation of the Tenth Amendment, *74 Geo. Wash. L. Rev. 165, 165 (2006).*

[23] Id. In contrast, Dean Erwin Chemerinsky has argued that the holdings in those cases are founded upon "unsupported assumptions" and that overcoming those basic assumptions is the role of the Courts and the Tenth Amendment to develop a true understanding of federalism. Erwin Chemerinsky, The Assumptions of Federalism, *58 Stan. L. Rev. 1763, 1764 (2006).*

In split opinions, a majority of the Court re-affirmed this approach to federalism in the challenge to the Affordable Care Act in National Federation of Independent Business v. Sebelius. [24] In his opinion, Chief Justice Roberts explained:

The States thus can and do perform many of the vital functions of modern government - punishing street crime, running public schools, and zoning property for development, to name but a few - even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power. [25]

... .

Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. [26]

In refusing to extend the Commerce Clause to cover the passage of the Affordable Care Act, the Court emphasized that "any police power to regulate individuals as such, as opposed to their activities, remains vested in the States." [27]

[*328] Thus, steadily since 1995, the Court has revived the importance of protecting state police power and insuring that it remains free of federal interference. Although this revival has occurred within the context of Commerce Clause cases, there can be little doubt that protecting the police power of the states remains of paramount importance to the Court.

III. Why State Courthouses Must Be Off-Limits

Traditionally, one of the most important exercises of state police powers has been the adjudication of misdemeanor crimes and, in particular, domestic violence. Various scholars and organizations have documented the effect of immigration enforcement on domestic violence victims. This Part explains why the interference of ICE agents at state and local courthouses intrudes in the area of state sovereignty, as protected by the Supreme Court under its Tenth Amendment jurisprudence.

ICE enforcement policies have resulted in declining reports for sexual assaults and domestic violence, particularly in Spanish-speaking, Latino communities. [28] The heads of some state high courts have expressed concern (in ways that echo the United States Supreme Court) about state sovereignty and police power in the context of ICE enforcement and undocumented victims. Chief Justice Stuart Rabner of New Jersey, for example, criticized the United States Department of Homeland Security (DHS) and ICE immigration enforcement policies at state courthouses. [29] Chief Justice Rabner argued that these arrests and searches undermine the courts' functions and

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[24] *567 U.S. 519 (2012).*

[25] *Id. at 536.*

[26] Id. (quoting The Federalist No. 45, at 293 (J. Madison) (Clinton Rossiter ed., 1961)).

[27] *Id. at 557.*

[28] Dean DeChairo, Democrats Want Congress to Limit ICE Enforcement at Sensitive Locations, Cong. Q. Roll Call, June 5, 2017, at 1, 2017 WL 2415384.

[29] Letter from Stuart Rabner, Chief Justice, Supreme Court of N.J., to John F. Kelly, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec. (April 19, 2017), http://2hqyh93y2sj32 lqbnw40aoj0.wpengine.netdna-cdn.com/wp-content/uploads/00069527.pdf.

the legal system. [30] He touched upon how it directly impacts domestic violence cases and requested that courthouses be listed in DHS's list of "sensitive locations." [31] Chief Justice Mary Fairhurst of Washington **[*329]** also sent a letter to then-DHS Secretary John Kelly arguing that ICE enforcement at state court houses is directly impacting due process. [32]

More broadly, Professor Vishnuvajjala has articulated how ICE's "Secure Communities" policies have a disproportionate impact on battered women in immigrant communities. [33] She explained why victims in immigrant communities are already vulnerable to domestic violence due to social, linguistic, and cultural barriers. [34] Further, the cooperative relationships between local law enforcement and ICE directly compounds the problem by bringing federal immigration enforcement to the local level, discouraging these victims from coming forward. [35]

Civil rights activists and organizations have also explained in detail why immigration enforcement at state courthouses affects local law enforcement. [36] The common thread in these pieces is that ICE enforcement causes increased fear, which results in under-reporting and a failure to appear for court. This all results in a lack of state enforcement of domestic violence laws and thus results in increased **[*330]** crime. This is exactly the type of federal interference that was at the heart of cases like Lopez and Morrison.

IV. ICE presence is tantamount to commandeering of the state judicial processes

In addition to the renewed focus on state sovereignty and federalism adopted by the Court in Lopez and Morrison, other cases have strengthened these principles by relying on the Tenth Amendment. New York v. United States [37] and Printz v. United States [38] both addressed the limit of federal regulation of states. In those cases, the Supreme Court held that the federal government could not commandeer the legislative and executive arms of the states. [39]

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[30] Id.

[31] ICE has promulgated a policy that limits enforcements actions at "sensitive locations" such as churches and schools. Memorandum from Jon Morton, Dir., U.S. Immigration and Customs Enf't (Oct. 4, 2011), *https://www.ice.gov/doclib/ero-outreach* /pdf/10029.2-policy.pdf.

[32] Washington State Chief Justice Objects to Immigration Enforcement Tactics at State Courthouses, 94 Interpreter Releases 1, 6 (March 27, 2017).

[33] Radha Vishnuvajjala, Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women to Stay Silent, *32 B.C. J. L. & Soc. Just. 185 (2012).*

[34] Id.

[35] Id. Christina Carr has also addressed the impact immigration enforcement has on survivors of domestic violence and sexual assaults. Christina Carr, Advocates: Female Abuse Victims Need More Help, Cong. Q. Roll Call, Sept. 23, 2014, at 1, 2014 WL 4723862. She did so by analyzing the structural components of immigration enforcement policies that fail to provide support for those survivors. Id. The lack of appropriate counseling limits the survivors' ability to access mental health services, petition for asylum, and may in fact, compound trauma. Id.

[36] See Thirteen Organizations Call on Top State Officials to Protect RI Immigrants, ACLU of R.I. (May 9, 2017), *http://www.riaclu.org/news/post/thirteen-organizations-call-on-top-state-officials-to-protect-ri-immigrants*; Joanne Lin, Immigration Arrests at State Courthouses Rise in 2017. Here's Why That's Dangerous - For All of Us, ACLU: Speak Freely (April 6, 2017, 2:45 PM), *https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/immigration-arrests-state-courthouses-are-rise*; National LGBTQ Organizations Denounce Arrest of Transgender Survivor of Domestic Violence by ICE El Paso, El Paso

To do so violates the notion of dual sovereignty built into our federalist system. [40] Although not precisely on point to the topic at **[*331]** hand, it informs the Court's increasingly bright-line approach to demarcating the boundary between federal and state sovereignty.

Permitting ICE agents to appear and to detain immigrants at state and local courthouses is tantamount to commandeering the state police power to do the bidding of federal law. Commandeering of the legislative and executive arms of the states was soundly rejected as a violation of Tenth Amendment principles in New York v. U.S. and Printz v. U.S. In New York, Congress was deemed to have unlawfully commandeered the legislative arms of the state by requiring the states to implement a federal program or to "take title" of low-level radioactive waste. [41] In Printz, local chief law enforcement officers were required by federal law to run background checks. As in New York, the federal government was found to have unlawfully commandeered the executive arms of the states. [42]

By allowing state and local courthouses to serve as a "round-up" point for undocumented immigrants who are compelled to be present to testify in state or local prosecutions, ICE is, in essence, commandeering the state judicial process and the states' exercise of their police power. This affront to federalism is worsened by the reality that ICE's presence at state and local courthouses undermines the ability of states to enforce their laws at those courthouses.

Specifically, in the context of immigration, the federal courts have made clear that direct commandeering of state and local officials to do federal bidding runs afoul of federalism principles. "Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the **[*332]** request of the federal government." [43] The Third Circuit went on to explain as follows:

Herald-Post (Feb. 16, 2017), *https://elpasoheraldpost.com/lgbtq-orgs-denounce-transgender-ice-arrest/*; Katie McDonough, Here's the Chilling Effect When ICE Targets Domestic Violence Victims, Splinter (Feb. 16, 2017, 2:58 PM), https://fusion.kinja.com/heres-the-chilling-effect-when-ice-targets-domestic-vio-1793858690 (analyzing how ICE at state court houses are driving down domestic violence reports and resulting in increased fear); Review of Feb. 20, 2017 DHS Memoranda: Possible Impacts on Survivors of Domestic and Sexual Violence, 2017 Tahirih Justice Center 3,*http://www.ncdsv.org/TJC_Review-of-February-20-2017-DHS-Memoranda_2-21-2017.pdf* (explaining how the new DHS enforcement policies would directly hinder and discourage domestic and sexual violence survivors from reporting their claims).

[37] *New York v. United States, 505 U.S. 144, 149 (1992).*

[38] *Printz v. United States, 521 U.S. 898, 902 (1997).*

[39] The Court in New York explained that:

A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, "the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.

505 U.S. at 176. The Court in Printz explained that:

We adhere to that principle today, and conclude categorically, as we concluded categorically in New York: "The Federal Government may not compel the States to enact or administer a federal regulatory program." The mandatory obligation imposed on CLEOs to perform background checks on prospective handgun purchasers plainly runs afoul of that rule.

As we have previously recognized, "all powers not explicitly conferred to the federal government are reserved to the states, a maxim reflected in the text of the Tenth Amendment." It follows that "any law that commandeers the legislative processes [and agencies] of the States by directly compelling them to enact and enforce a federal regulatory program is beyond the inherent limitations on federal power within our dual system." In other words, a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment.

… .

As in New York and Printz, immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme. [44]

Indeed, the seminal immigration case of recent years, Arizona v. United States, underscores the need to clearly demarcate the lines of dual sovereignty. [45] "Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." [46]

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521 U.S. at 933 (internal citation omitted).

[40] The Court in New York explained that:

If a state official is faced with the same set of alternatives - choosing a location or having Congress direct the choice of a location - the state official may also prefer the latter, as it may permit the avoidance of personal responsibility. The interests of public officials thus may not coincide with the Constitution's intergovernmental allocation of authority. Where state officials purport to submit to the direction of Congress in this manner, federalism is hardly being advanced.

505 U.S. at 182-83. The Court in Printz noted that:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

521 U.S. at 935.

[41] *New York, 505 U.S. at 175-76.*

[42] "Under the Tenth Amendment, federal officers may not conscript or commandeer state officials into administering and enforcing a federal regulatory program." *United States v. White, 782 F.3d 1118, 1127 (10th Cir. 2015).*

[43] *Galarza v. Szalczyk, 745 F.3d 634, 643 (3d Cir. 2014).*

[44] *Id. at 643-44* (internal citations omitted).

[45] *Arizona v. United States, 567 U.S. 387 (2012).*

[46] *Id. at 398.* As Professor Gerken has argued, the strengthening of the Tenth Amendment represents the new nationalism. Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L. J. 1889 (2014). She argues that as federalism grows, states will begin to be used to accomplishing national goals. Id. Professor Jennifer Chacon has argued that the coercive funding strategies by Congress violate the Tenth Amendment. See Chacon, supra note 1. Bill Ong Hing has analyzed how sanctuary polices fall within reserved police powers of the state. Bill Ong Hing, Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy, *2 U.C. Irvine L. Rev. 247 (2012).* Relatedly, Shirley Lin has also argued that "the REAL ID Act requires states to implement the sheer majority of its regulatory scheme, also arguably in violation of the Tenth Amendment." Shirley Lin, States of Resistance: The Real ID Act and Constitutional Limits Upon Federal Deputization of State Agencies in the Regulation of Non-Citizens, *12 N.Y. City L. Rev. 329, 351 (2009).*

V. Conclusion

If state police power is to mean anything, it must mean the ability of state and local entities to enforce laws against domestic violence without federal interference. Even in areas where Congress has enumerated authority, such as, commerce and immigration, there must be a stopping point that protects the states in our federalism structure. As members of the Court have repeatedly emphasized, it is the states that need the ability to protect their citizens from such criminal acts, free from federal interference. ICE's overreach undermines this ability and threatens the boundaries that set apart the dual sovereigns in our federalism.

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