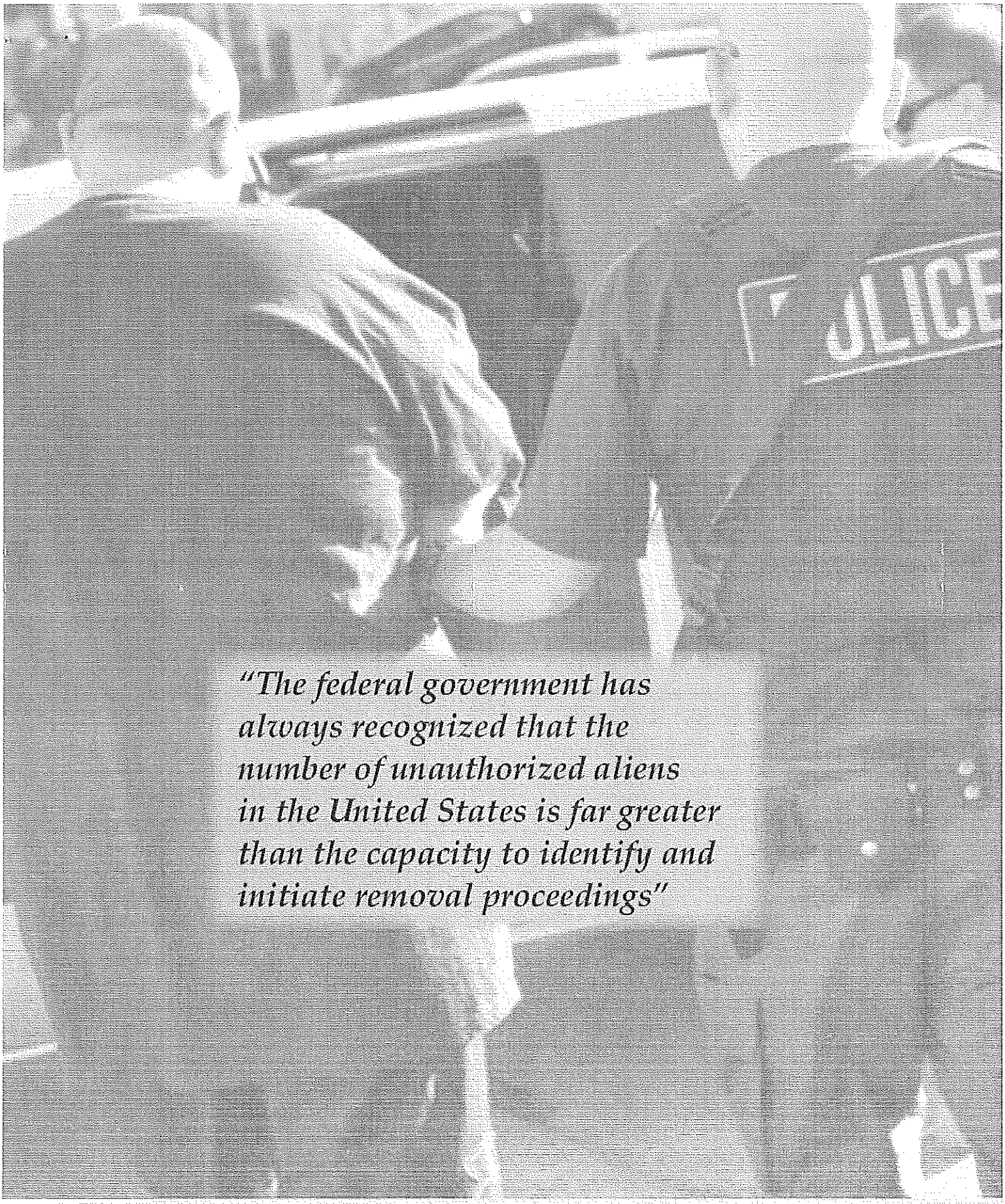
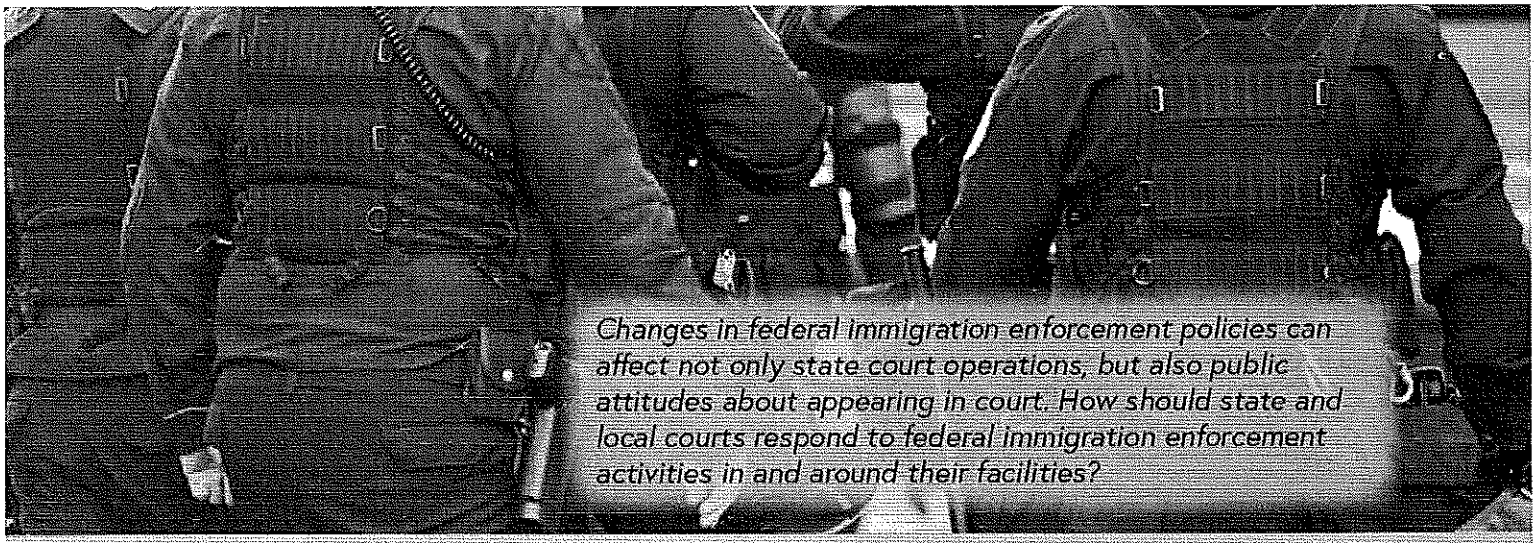


"The federal government has always recognized that the number of unauthorized aliens in the United States is far greater than the capacity to identify and initiate removal proceedings"

from National Center for State Courts



Changes in federal immigration enforcement policies can affect not only state court operations, but also public attitudes about appearing in court. How should state and local courts respond to federal immigration enforcement activities in and around their facilities?

Responding to the Clash Between Access to Justice and Immigration Arrests in State Court Facilities

James D. Gingerich, Founding Director, State Courts Partnership, University of Arkansas at Little Rock William H. Bowen Law School and National Center for State Courts

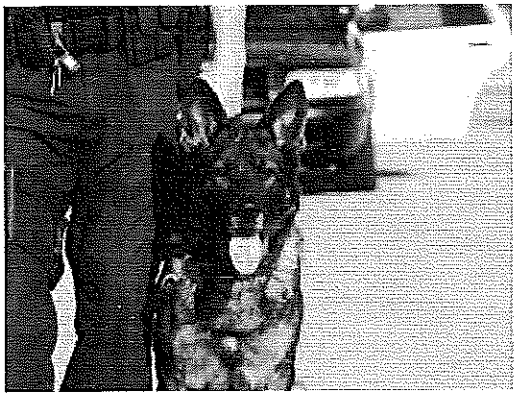
Changes in priorities, policies, and procedures of the U.S. Department of Homeland Security (DHS) and its Immigration and Customs Enforcement Agency (ICE) during 2017 prompted policy responses from some state and local governments and increased the number of enforcement actions by federal immigration officials in and around state court facilities. In some locations, these activities generated significant public controversy and created concern among court officials that the arrests could jeopardize the public's perception of the courthouse as a safe and secure location for resolving disputes and decrease the willingness of some members of the public to appear in court as parties, witnesses, or jurors. This conflict between the obligation and authority of federal officials to diligently enforce the nation's immigration policies and the power and responsibility of state court officials to both ensure free and open access to the courts and provide a safe and secure location for resolving disputes presents a classic example of the clashes that can result from our constitutional structures of federalism and separation of powers.

The Conference of Chief Justices (CCJ) appointed a special committee, chaired by Nebraska Chief Justice Michael Heavican, to study the issues; communicate with and provide recommendations to federal officials; and offer information, guidance, and advice to state court leaders. One recommendation from the committee is that court leaders, judges, and administrators in every state take action to better understand the legal and practical issues and to develop and implement responsive policies consistent with federal requirements, with any relevant law and policies adopted by their state and local governments, and with the state judiciary's overriding obligation and goal of ensuring access to justice for all.

What Changed?

On January 25, 2017, President Trump signed and released three executive orders that changed the scope and enforcement of federal immigration policies. The revision with the most impact on the increase in arrests in and around courts was a change in the enforcement priorities used by DHS and ICE in targeting aliens

subject to removal. The federal government has always recognized that the number of unauthorized aliens in the United States is far greater than the capacity to identify and initiate removal proceedings. In addition, there has been a tacit recognition of the economic and other benefits that the individuals bring to the communities in which they work and reside. While all presidential administrations have balanced these interests in different ways, each has adopted policies that established some system of priority for immigration enforcement activities.



> *"In some locations, these activities [by federal immigration officials] generated significant public controversy and created concern among court officials that the arrests could jeopardize the public's perception of the courthouse as a safe and secure location for resolving disputes ..."*

Most recently, the policy directed ICE officers to focus on unauthorized aliens who were suspected of terrorism, who had been convicted of a felony, or who had been convicted of three or more misdemeanors or of a "significant" misdemeanor, such as domestic violence. Following President Trump's 2017 executive order, then-DHS Director John Kelly immediately released a new policy, which greatly expanded the scope of immigration enforcement by eliminating the priority system and extending it to any person who could be subject to removal, providing that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement."

Because earlier policies focused on aliens who had been *convicted* of specific crimes, ICE focused its apprehension efforts at local jails and state detention facilities, because those who were in state custody were likely to match the profile of convicted individuals set out in the immigration enforcement policy. Under the new policy, one of the groups added to the broadened scope includes "those who have been *charged* with any criminal offense that has not been resolved." The obvious location at which to seek individuals who have been charged with an offense is the local courthouse. With the availability of public dockets, many of which may be accessed online, the search for targeted individuals and the added information that they may be in a specific location at a specific time now makes the local court facility an obvious choice for immigration enforcement officers. It is likely that this revision and expansion of enforcement priorities is one cause of the increase in enforcement activities at many state and local court facilities.

Many state and local executive- and legislative-branch officials responded to the changes to federal immigration practice by adopting local policies to limit the role of local agencies and employees in assisting federal immigration efforts. In some instances, the actions have caused federal administration officials to label the communities as "sanctuary" jurisdictions. While the term is not a legal one and has no formal or agreed-upon definition, the designation has been used to describe any agency, city, county, or state that has adopted a policy or practice that in any way limits the action local officials take toward supporting or assisting federal immigration enforcement efforts or attempts to limit the federal activities that can occur in their communities. The U.S. attorney general has attempted to use the designation as a basis for denying federal grant awards, a decision that is the

subject of litigation. ICE officials have also stated that it is the refusal of local officials to assist in their efforts that has caused them to increase the number of enforcement actions at court facilities.

What Is the Feared Impact?

The elimination of enforcement priorities was only one of several changes in immigration policy resulting from the 2017 executive orders. Immigration policy became one of the most contested, divisive, and politically charged issues of the last year. While state court judges and administrators have no role or direct interest in the policy choices and goals surrounding immigration issues, the potential impacts upon court facilities and the public's access to justice are central to the primary responsibility of state court leaders. For this reason, court officials in many states expressed their concerns and requested that immigration officials refrain from enforcement actions in and around court facilities. Since March 2017, five of the nation's chief justices have written to federal officials asking that such enforcement actions be limited. New Jersey Chief Justice Stuart Rabner described the potential impacts upon courts in his state:

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

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

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

One specific request made by several court leaders and court-related organizations involves the DHS policy on "sensitive locations." The statutory authority of federal immigration officials to make arrests is quite broad. Through its own administrative regulations, DHS has self-imposed some limitations on where arrests should take place, recognizing that some locations are so "sensitive" as to make enforcement activities in these locations inappropriate. The current limitations, in place since 2011, include schools, hospitals, places of worship, and public demonstration sites. The policy does not completely bar arrests in these locations but presumes that they will be avoided absent a showing of exigent circumstances. While courthouses have never been included within the policy, the recent increase in courthouse arrests has led to calls for the expansion of the policy to include court facilities or proceedings. Early in the year, members of the CCJ committee raised the issue with federal officials, but the response, communicated in a letter sent in June from acting ICE Director Thomas Homan to NCSC President Mary McQueen, indicated that the agency was not willing to change the policy. In August the House of Delegates of the American Bar Association adopted a resolution requesting that the courthouse be included as a sensitive location and called upon Congress to adopt the policy change through legislation.

"When people are afraid to appear for court hearings, out of fear of apprehension by immigration officials, their ability to access justice is compromised."

On January 31, 2018, ICE publicly released a new policy, Directive Number 11072.1: "Civil Immigration Enforcement Actions Inside Courthouses." It, for the first time, sets out in a public document the policies and procedures immigration officers will use for enforcement activities in court facilities. While not as protective as a "sensitive location" designation, it does provide for some important limitations in response to the concerns expressed by judicial leaders:

- Because the response was released as a "policy directive," it is available to the public. Previous ICE policies on courthouse enforcement activities were not available to the public, causing both confusion and concern about their nature and scope. This new level of transparency will improve the ability of local courts to develop their own policies and provide for more consistency in enforcement practices.
- The scope of individuals who are targets of enforcement activities in court facilities is more limited than in other areas. ICE will only seek individuals in court facilities who 1) have criminal convictions, 2) are gang members, 3) are national security threats, or 4) have already been judicially ordered removed from the United States.
- Only the targeted individuals will be subject to enforcement actions in the court facility. Family members, friends, or others who may be with targeted individuals will not be questioned or subject to any enforcement activity.
- Officers will only engage in enforcement activities in court facilities or areas of court facilities dedicated to criminal proceedings and will avoid enforcement activities in noncriminal facilities or areas (such as family court and small-claims court).
- Enforcement activities will only take place in nonpublic areas of the courthouse and will be conducted in collaboration with court security staff.

How Should State and Local Courts Respond?

As state and local court officials review and consider what, if any, actions should be taken, care must be given to both understand and comply with applicable federal law and policy and all laws and policies adopted by state and local officials. Because the issue is surrounded by such heated and contentious political debate, it is not surprising that, irrespective of legitimate concerns, only a few court systems have enacted new policies. Following are a few actions and responses courts may want to consider.

> *"...some jurisdictions have enacted policies that limit the action local employees may take in response to requests for information from federal immigration officials...in other jurisdictions, local governments have taken action to increase their cooperation with federal immigration officials through the adoption of cooperative agreements..."*

1. Every court should undertake a comprehensive review of the state laws, city and county ordinances, or policy statements that may have been enacted in their jurisdiction involving immigration issues. Such actions may guide or limit actions that can or should be taken by the court or may otherwise impact the court and any planned responses. For example, some jurisdictions have enacted policies that limit the action local employees may take in response to requests for information from federal immigration officials, including the provision of information or access to facilities. In some jurisdictions, these actions impact local jails and detention facilities,

probation officials, and even court security officers, where those officers are executive- rather than judicial-branch employees. In other jurisdictions, local governments have taken action to increase their cooperation with federal immigration officials through the adoption of cooperative agreements sanctioned under 8 U.S.C. §1357(g). The authority to enter into these agreements may require approval through the traditional process for the adoption of local law but, in some locations, only requires a decision by an agency head, such as a county sheriff or city police commissioner. In most cases, the judicial branch and court officials have no role in the discussion or adoption of such policies; yet the courts are affected as a result. For those courts whose geographical jurisdiction encompasses multiple cities or counties, different policy and legal choices may have been made in each jurisdiction.

2. Each court should be aware of the authority and limitations under their state law on the ability to limit access or activities in their court facilities. Greater attention to issues of courthouse security have caused courts to enact policies and restrict certain access to protect public safety. For this reason, every court should already have a written facility-access policy, which provides guidance on all issues of access to the court facility and grounds, a description of all security procedures, and any restrictions on authorized activities. In light of the new ICE directive, these policies should be reviewed and potentially clarified. The policies should be reduced to writing and clearly communicated to court officers and employees, justice partners, and the public.

3. Meetings should take place in each state involving the offices of the chief justice and state court administrator and the designated state-level ICE field office director and DHS special agent in charge to discuss the implementation of the new ICE directive. Discussions should also include a description of the policies and practices being used by immigration enforcement officials that may involve court facilities and any policies that have been adopted by the courts that may impact immigration enforcement. Special concerns should be raised to develop procedures that honor and respect the separate and unique responsibilities of both federal immigration officials and the state courts. Communication protocols should be developed, including potential agreements for prior notification about significant activities or in response to special problems or incidents. In those states with nonunified judicial systems or with large urban court systems, similar meetings between local court leaders and the appropriate representatives of federal immigration agencies should also be established.

4. Where local court policy authorizes courthouse access to immigration officials and allows subsequent enforcement activities to take place in the court facility, consideration should be given to additional policies for communication to and from court security officers, as is required by the ICE directive. Courts should also consider whether court security will then be required to notify the judge should the intended target of the arrest be expected to appear as a party, as a witness, or in another capacity on a scheduled court docket.

5. Each court should adopt a requirement for the reporting of courthouse enforcement events after they occur. Many courts have already adopted incident-reporting systems for court security. If so, the current forms and process should be

reviewed in light of the special issues surrounding immigration-related arrests. Where no incident-reporting system is in place, this issue can be the catalyst for its introduction. States should consider adopting a uniform report to be used by all courts to allow the collection and comparison of state-level data. The report should include the time and date of the incident, the agency initiating the arrest, and a description of the activity. If available, the name and nationality of the target, the basis for the arrest (e.g., they have been convicted of theft or charged with a drug offense), and the reason they are in the court facility (called as a witness, a party, or defendant, present as a family member) are all helpful information in the future consideration of policies and their impacts.

6. Courts must ensure that all judges, administrators, and court security officers have access to training and education about immigration law and procedures and their potential impacts on court operations. As state and local policies are adopted, training about the policies will be necessary to ensure accurate and consistent application.

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

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

CALIFORNIA COURTS
NEWSROOM **NEWS RELEASE**

Chief Justice Cantil-Sakauye Objects to Immigration Enforcement Tactics at California Courthouses

Expresses concerns in letter to Attorney General Sessions and Secretary Kelly

March 16, 2017

Contact: Cathal Conneely 415-865-7740

Dear Attorney General Sessions and Secretary Kelly:

As Chief Justice of California responsible for the safe and fair delivery of justice in our state, I am deeply concerned about reports from some of our trial courts that immigration agents appear to be stalking undocumented immigrants in our courthouses to make arrests.

Our courthouses serve as a vital forum for ensuring access to justice and protecting public safety. Courthouses should not be used as bait in the necessary enforcement of our country's immigration laws.

Our courts are the main point of contact for millions of the most vulnerable Californians in times of anxiety, stress, and crises in their lives. Crime victims, victims of sexual abuse and domestic violence, witnesses to crimes who are aiding law enforcement, limited-English speakers, unrepresented litigants, and children and families all come to our courts seeking justice and due process of law. As finders of fact, trial courts strive to mitigate fear to ensure fairness and protect legal rights. Our work is critical for ensuring public safety and the efficient administration of justice.

Most Americans have more daily contact with their state and local governments than with the federal government, and I am concerned about the impact on public trust and confidence in our state court system if the public feels that our state institutions are being used to facilitate other goals and objectives, no matter how expedient they may be.

Each layer of government – federal, state, and local – provides a portion of the fabric of our society that preserves law and order and protects the rights and freedoms of the people. The separation of powers and checks and balances at the various levels and branches of government ensure the harmonious existence of the rule of law.

The federal and state governments share power in countless ways, and our roles and responsibilities are balanced for the public good. As officers of the court, we judges uphold the constitutions of both the United States and California, and the executive branch does the same by ensuring that our laws are fairly and safely enforced. But enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair. They not only compromise our core value of fairness but they undermine the judiciary's ability to provide equal access to justice. I respectfully request that you refrain from this sort of enforcement in California's courthouses.

—Chief Justice Tani G. Cantil-Sakauye

AOPC

ADMINISTRATIVE OFFICE of PENNSYLVANIA COURTS

ADVISORY RE: TITLE VI OF THE CIVIL RIGHTS ACT

As a recipient of federal funds, the Unified Judicial System (UJS), including every judicial district, is required to adhere to Title VI of the federal Civil Rights Act of 1964. In furtherance of diligent compliance with Title VI, the UJS is committed to ensuring meaningful access to all limited English proficient ("LEP") users of judicial services. To that end, the Supreme Court of Pennsylvania in March 2017 adopted a Language Access Plan ("LAP") for the UJS (http://www.pacourts.us/assets/files/setting-5486/file-5972.pdf?cb=11e5cd).

The purpose of this advisory is to aid judicial districts as they endeavor to administer their programs and activities consistent with the requirements of Title VI and UJS policy as they relate to individuals' national origin and inquiries about federal immigration status.

Title VI & UJS Policy

Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or ***national origin***, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (emphasis added).

The LAP mandate that courts provide meaningful language access for all LEP individuals is designed "to ensure that all persons have due process and equal access to all judicial proceedings, court services, programs and activities. Ensuring meaningful language access," the LAP explains, "means providing timely, accurate, and effective language services at no cost." (LAP, p.2).

An inquiry by a judicial officer or employee into the federal immigration status of an individual based on language ability or otherwise on the basis of an individual's perceived national origin may be regarded as *discrimination* and possibly a violation of Title VI. Discrimination is a particular concern in those matters in which an individual's immigration status is not relevant to the matter before the court or judicial agency.

Potential violation of Title VI for discrimination on the basis of national origin arises when (1) a court's decision to inquire into immigration status is influenced by an individual's actual or perceived national origin; and (2) the inquiry reasonably might result in the denial of access to court programs or

activities. Potential Title VI liability can be triggered, for example, if a court's policy or practice of inquiring into an individual's immigration status reasonably could have a chilling effect on an individual seeking or accepting the language assistance to which he or she is entitled under Title VI and the LAP.

Suggested Practice

It is best practice not to make inquiry into a court user's federal immigration status, unless immigration status is relevant to the matter before the court or judicial agency.

When determining whether it is appropriate to provide an interpreter, it is best practice simply to assess how comfortable an LEP court user is in speaking English. Immigration status is not relevant to this assessment.

AOPC has provided judicial bench cards that include a sample *voir dire* to aid judicial officers in determining language access needs. See http://www.pacourts.us/assets/files/page-139/file-6226.pdf?cb=1528136497487. By using the bench cards, a judicial officer most assuredly can provide appropriate language access without discriminating on the basis of national origin.

Questions

Questions relating to this advisory may be directed to AOPC's Legal Department (c/o Chief Counsel Gregory Dunlap at (717) 231-3286 or gregory.dunlap@pacourts.us).

Questions about the UJS Language Access Policy may be directed to Mary Vilter, AOPC Coordinator of Court Access, at (215) 560-6657 or mary.vilter@pacourts.us.