

TESTIMONY OF TOVA INDRITZ
BEFORE
THE COURTS, CORRECTIONS & JUSTICE COMMITTEE
OF THE NEW MEXICO LEGISLATURE
JULY 10, 2019
ON THE NEED FOR ALL PERSONS
TO BE ABLE TO ACCESS THE NEW MEXICO COURTS

Madame Co-Chair and Mr. Co-Chair, Members of the Committee, my name is Tova Indritz. I am a criminal defense lawyer in Albuquerque.

Thank you for the opportunity to come before you to express the critical need for legislation to insure that all persons be able to access the courts in New Mexico, that such access is important to the public safety of all of us, and why and how that is now being threatened by arrests that U.S. Immigration and Customs Enforcement (called ICE) is making in and around New Mexico courthouses. I want to note that these arrests by ICE are civil arrests, and not founded in any criminal charges against the person being arrested.

These arrests are so much of a threat that this past August sixty-one (61) legal associations and community advocacy organizations, two hundred forty-three (243) members of the State Bar of New Mexico, forty-one (41) law firms, and five (5) retired members of the New Mexico judiciary, including two retired New Mexico Supreme Court justices, submitted a petition to the New Mexico Supreme Court seeking two new rules, one to require a judicial warrant to make an arrest in a courthouse, and one to provide for a procedure known as a writ of protection to protect someone going to, at, and coming from a courthouse from arrest. That request was denied, so we are turning to the legislative process here.

1. Victims of domestic violence are afraid to go to court to seek a domestic violence restraining order.

When I met with the Chief Judge at Metro Court in Albuquerque about this problem, a woman who was there at the meeting tearfully talked about her dear friend who is being physically abused by that friend's husband and each attack escalates in seriousness, that she tries to persuade her friend to seek a domestic violence restraining order, but that her friend is afraid she will be arrested if she comes to the courthouse. That woman is not alone in her fear, and I believe that there will be deaths of such people who are afraid to seek the legal process for such restraining orders.

The ICE offices in New Mexico are a division of, and supervised out of, the ICE office in El Paso, Texas. There was an instance in El Paso in February, 2017, of a woman who was going to the El Paso courthouse to seek a domestic violence restraining order. But the boyfriend who was the object of the order notified ICE that she would be at the courthouse at a certain time, and in fact, ICE came and arrested her. This was denounced by the El Paso County Attorney. See <https://www.npr.org/sections/thetwo-way/2017/02/16/515685385/ice-detains-a-victim-of-domestic-abuse-at-texas-courthouse>.

As a consequence, the numbers of people seeking such domestic violence restraining orders dropped significantly, as that community is afraid. It is particularly important that victims of crime, including domestic violence, feel free to access the courts in order to seek justice and any appropriate measures of relief, all while free from the threat of immigration enforcement. In 2006, the immigration committee of the Major Cities Chiefs Association (MCCA), a professional association that includes many of the largest law enforcement agencies in the United States, concluded that, “[i]mmigration enforcement by local police would likely negatively effect and undermine the level of trust and cooperation between local police and immigrant communities.”¹ This impact, they concluded, “would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes or preventing future terroristic acts.”² See also <https://www.cato.org/blog/cities-notice-decline-latino-crime-reporting-post-trump>.

2. Witnesses are afraid to come to court to testify.

Persons who would come to court to testify either on their own behalf or called as witnesses by the parties in civil or criminal cases are afraid to come to court.

3. Litigants are afraid to come to court to testify.

Persons who are litigating civil cases, either as the plaintiff or defendant, and persons who are charged in criminal cases have the due process right to participate in their cases, to see and hear in person the testimony offered by the other side of the case and to participate in their side of the case as well, whether or not they choose to testify.

Other states agree with this assessment; for example, the California Attorney General has written: “Immigration enforcement actions at or near the state’s court facilities have resulted in a chilling effect on immigrant residents who need access to California’s courts.” See *Securing Equal Access to Justice for All, Guidance and Model Policies to Assist California’s Superior Courts in Responding to Immigration Issues*, <https://oag.ca.gov/sites/all/files/agweb/pdfs/immigration/court.pdf>.

New Jersey Supreme Court Chief Justice Stuart Rabner said, in setting forth new rules which require that court personnel ask federal immigration agents to present a warrant before they arrest anyone in courthouses on civil immigration offenses, and which also limits the information the judiciary collects about individuals’ immigration status, “[t]o ensure the effectiveness of the justice system, courthouses must be viewed by the public, all parties,

¹ Major Cities Chiefs, M.C.C. Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies, (June 2016) https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf (as of Sept. 7, 2018).

² Id.

victims, and witnesses as a neutral and safe forum to resolve disputes', <https://www.northjersey.com/story/news/new-jersey/2019/05/23/new-rules-limit-ice-new-jersey-state-courthouses/1209600001/>.

4. This fear in the community affects U.S. citizens as well as non-citizens.

If U.S. citizens want to litigate a matter, but the witnesses are afraid to come to court, then the U.S. citizens won't get a fair opportunity to have the court resolve their case. Or if one side's witnesses will appear and the other side's witnesses are too afraid to appear, then there cannot be a fair trial.

5. This fear of going to court goes a step back in the process to make people afraid to report crimes to the police and afraid to talk as witnesses to the police.

When victims and witnesses are afraid to talk to the police or be involved in the early stages, as well as the later stages, of the justice system, then we all suffer from less safety.

6. These arrests are really happening; in the courtroom, in the courthouse hallways and lobbies, on the courthouse grounds as people leave the courthouse, and as they walk back to their parking places.

ICE issued a policy directive, number 11072.1, entitled Civil Immigration Enforcement Actions Inside Courthouses, on January 10, 2018, which is contained in our materials, which basically says they like arresting people at courthouses, because

“Individuals entering courthouses are typically screened by law enforcement personnel to search for weapons and other contraband.”

Our initial submission to the court contained 25 specific examples, with dates and specific locations, of arrests at courthouses between February 1, 2017, and August 8, 2018; that is Appendix B to our petition. Then we submitted supplements dated October 13, 2018, February 22, 2019, and April 8, 2019, detailing at least 8 other ICE arrests.

We know of many, many instances where ICE officers, generally in plainclothes, attend a court hearing to see who identifies as a particular person, then follows the person out of the courtroom and makes an arrest in the hallway, leaving the courthouse, or while the person is walking back to his or her vehicle. Thus ICE arrests are occurring

- in the courtroom,
- in the courthouse hallway outside the courtroom,
- in the lobby of the courthouse,
- just when a person is leaving the courthouse, and still on courthouse grounds, and
- as a person walked back to his or her attorney's office or the person's vehicle.

Sometimes the arrest occurs when the case is still ongoing, so the arrest interferes with the next scheduled court proceedings.

I want to tell you about two of those cases:

The first demonstrates the need for a judicial warrant, because in this case no judge would have ever signed a warrant for someone who is not deportable: On the morning of February 12th, 2019, a University of New Mexico student who is pursuing his Ph.D. appeared at Metro Court before Judge Christina Rodriguez with his attorney, Ray Twohig. The individual has legal status in the United States and has no prior criminal record. He entered a plea to a first DWI and was ordered to participate in the DWI First Offender Program. After obtaining the court documents which required him to go to another office at Metro Court to register for the required programs, he left the courtroom to do as he was ordered. In the hallway outside the courtroom he was approached by three ICE agents, handcuffed and arrested. Mr. Twohig explained to the ICE officers that his client still had to report to the DWI First Offender Program offices, but nevertheless ICE arrested his client then and there. The individual was subsequently released once ICE agents realized that he had legal status in the country and was not deportable.

The second one demonstrates the need for protection on the way to, at, and from the courthouse. On March 21, 2019, attorney Karlos Ulibarri accompanied his client to Metro Court where he was appearing on a DWI charge. The individual had no prior convictions. The case was set for trial on that date but because the State was not prepared to proceed, the Court granted a continuance. The client and his lawyer exited the courthouse and walked to the attorney's office a block away. It appears that the officers identified the individual when he presented himself in court and proceeded to follow him to his counsel's office after his hearing. At that point ICE approached him, arrested him, and shipped him to an immigrant detention center in El Paso. Before his arrest, his attorney requested a judicial warrant from the ICE officer, who informed him that he did not possess one. Because of his arrest, this individual will be unable to attend his upcoming trial. This situation speaks to the need for the adoption of a rule that would provide an avenue for someone wishing to visit a state courthouse to obtain a Writ of Protection, which would protect that individual from arrest going to or coming from court. This case is an illustration of the principle of "privilege from arrest", in U.S. law dating from Halsey v. Stewart, 4 N.J.L. 366, 367 (N.J. 1817), cited approvingly by the U.S. Supreme Court in Stewart v. Ramsey, 242 U.S. 128, 129 (1916), which quashed the summons personally served upon defendant Colorado citizen while he was returning from the courtroom after testifying as a plaintiff in an unrelated case pending in the same district.

As two scholarly law review articles that I have submitted to the Legislative Council Service show, there existed at common law a doctrine called the "privilege from arrest"; this has two distinct aspects; one protects the place of the court and its immediate vicinity, because the court is an institution run by the state with distinct purposes that must be protected as an institution for the society to function well, and other aspect protects persons coming to and from their business with the courts. Back in the days when our common law originated, a civil suit was begun by arresting the person being sued; but a person coming to court on one case could not be arrested on a different case, because that would discourage people from participating in the court process.

New Mexico statutory law is that the common law applies in our courts:

NMSA §38-1-3, Common law is rule of practice and decision
“In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.”

We are asking the New Mexico legislature to simply take action in accordance with this common law privilege from arrest. From the fifteenth century to the early twentieth century, the courts system itself and also the people who were coming to court had this protection from arrests occurring at the courthouse. Democracy includes transparency, and so the business of the courts is public; we read about court cases in the newspaper every day. But also all people who want to come to court, either because they want to testify, or litigate, or are concerned about issues, or are the family or neighbors of people involved in cases and want to watch, must be protected in coming to, being at, and returning from the courts.

We ask this committee to clearly set forth the continuing applicability of the common-law privilege, and also clarify that courts have a mechanism for effectuating the privilege by issuing writs of protection.

_____The NM Constitution, Article VI, section 3, sets forth that courts have” power to issue ... all . . . writs necessary or proper for the complete exercise” of jurisdiction.

We ask for legislation to require a judicial warrant before an arrest can be made in a courthouse, and we ask for legislation to set out that a person can apply for a writ of protection while the person is coming to, at, and going from the court. A writ could be requested by any party litigant or the individual who seeks that protection.

A judicial warrant is issued by a judge, based on a finding of probable cause authorizing the search or seizure of property, the entry into a nonpublic place to arrest a person named in an arrest warrant, or the arrest of a named person. In contrast, an ICE administrative “warrant” is the most typical type used by immigration enforcement officers. Such a document, which is signed only by a law enforcement officer and not by a judge, authorizes an immigration enforcement officer to arrest a person suspected of violating immigration laws, but it is a civil matter and not a warrant on any criminal case. An ICE warrant can be issued by any authorized immigration enforcement officer. An ICE administrative warrant is not a warrant within the meaning of the Fourth Amendment to the U.S. Constitution, because an ICE warrant is not supported by a showing of probable cause of a criminal offense. An ICE warrant is not issued by a court judge or magistrate.

Here is what we are asking for:

Civil arrests in courthouses

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. Execution or attempted execution of such non-judicially issued civil arrests shall constitute contempt of Court and is an unlawful arrest.

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.

Writ of Protection.

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 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. An arrest in violation of the privilege from arrest is an unlawful arrest.

Here is some language of proposed legislation from other states:

California:

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB668

New York:

https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A02176&term=2019&Summary=Y&Text=Y

Massachusetts court case: On June 20, 2019, in the case of Ryan v. U.S. Immigration and Customs Enforcement, Civil Action No. 19-11003-I, the U.S. District Court in Massachusetts entered a preliminary injunction enjoining ICE from “civilly arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse.” We have furnished a copy of the Preliminary Injunction and the Memorandum & Order Granting Plaintiffs’ Motion for Preliminary Injunction.

Also, some states have proceeded by court rule:

New York’s court rule is available here:

<https://www.immigrantdefenseproject.org/wp-content/uploads/OCA-ICE-Directive.pdfrules>

New Jersey has a court rule:

<https://www.northjersey.com/story/news/new-jersey/2019/05/23/new-rules-limit-ice-new-jersey-state-courthouses/1209600001/>

California has determined that any state or local participation in immigration enforcement activities “diverts state resources, blurs lines of accountability, and erodes trust between immigrant communities and state and local agencies that provide critical public services.” Security Equal Access to Justice for All, page 1, and therefore California law, Senate Bill (SB) No. 54 (2017-2018 Regular Session), mandates that the State Attorney General publish model policies “limiting assistance with immigration enforcement to the fullest extent possible consistent with federal and state law” at several locations, including courts. That guide, Securing Equal Access to Justice for All, Guidance and Model Policies to Assist California’s Superior Courts in Responding to Immigration Issues, is available here: <https://oag.ca.gov/sites/all/files/agweb/pdfs/immigration/court.pdf>.

Here is an index of the materials we have provided to the Legislative Council Service in preparation for this hearing:

New Mexico

1. February 20, 2019, letter from Governor Michelle Lujan Grisham and her counsel Matt Garcia to Metro Court Chief Judge Sandra Engel expressing support for keeping ICE from making arrests at Metro Court.

2. Petition for Adoption of New Rule 1065

3. Appendix to that Petition:

Appendix A: language of proposed rules

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

Appendix C: U.S. Immigration and Customs Enforcement Policy Number I 0029.2, Enforcement Actions at or Focused on Sensitive Locations

Appendix D: Letter from Attorney General Jefferson Sessions and U.S. Department of Homeland Security John F. Kelly to California Chief Justice Tani G. Cantil-Sakauye dated March 29, 2017.

Appendix E: Letter to Attorney General Jefferson Sessions dated April 4, 2017, from 12 California chief prosecutors or district attorneys

Appendix F: Letter from the Oregon Supreme Court Chief Justice Thomas Balmer dated April 6, 2017, to Attorney General Jefferson Sessions and U.S. Department of Homeland Security John F. Kelly.

Appendix G: Letter from Denver mayor Michael Hancock, the Denver District Attorney, and numerous Denver city officials dated April 6, 2017, to Acting Field Officer Director of U.S. Immigration and Customs Enforcement.

Appendix H: Letter from ACLU of Maine and numerous attorneys to Attorney General Jefferson Sessions and U.S. Department of Homeland Security John F. Kelly dated April 10, 2017.

Appendix I: Letter from New Jersey Supreme Court Chief Justice Stuart Rabner dated April 19, 2017, to John Kelly, director of the U.S. Department of Homeland Security.

Appendix J: Statement by the U.S. Commission on Civil Rights, of April 24, 2017, entitled U.S. Commission on Civil Rights Expresses Concern with Immigrants' Access to Justice.

Appendix K: Letter to Denver Mayor Michael Hancock dated May 25, 2017, from U.S. Immigration and Customs Enforcement.

Appendix L: Law Review article in THE YALE LAW JOURNAL FORUM dated October 24, 2017, entitled A Common-Law Privilege To Protect State and Local Courts During the Crimmigration Crisis, by Professor Christopher N. Lasch.³

³ "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

Appendix M: U.S. Immigration and Customs Enforcement Policy Directive Number 11072.1: Civil Immigration Enforcement Actions Inside Courthouses dated January 10, 2018.

Appendix N: Letter from U.S. Commission on Civil Rights dated March 16, 2018, to Director of U.S. Immigration and Customs Enforcement regarding Immigration Enforcement Actions in Courthouses.

Appendix O: Resolution of the National Association of Criminal Defense Lawyers regarding Immigration Enforcement Actions in Courthouses dated April 21, 2018.

Appendix P: Law Review Article entitled Federalism and the State Police Power: Why Immigration and Customs Enforcement must Stay Away from State Courthouses, Spring, 2018, 54 Willamette L. Rev. 323, by Professor George Bach, Associate Professor of Law, University of New Mexico School of Law.⁴

4. October 13, 2018, Supplemental letter to the New Mexico Supreme Court.
5. February 22, 2019, second Supplemental letter to the New Mexico Supreme Court.
6. April 8, 2019, third Supplemental letter to the New Mexico Supreme Court.
7. April 18, 2019, New Mexico Supreme Court clerk's letter of denial.

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.”

4

“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.”