

Possible Policy Changes In Response to ICE's June 20th Arrest at the Thurston County Courthouse

*Prepared by the Law Enforcement-ICE Working Group of the Strengthening Sanctuary Alliance
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Background

ICE Arrest: On June 20, 2019, a man from El Salvador was arrested by ICE agents near the entrance to buildings at the Thurston County Courthouse. An ICE agent had entered Building 2 before the arrest, identified himself to court personnel, and stood at the back of the courtroom where the individual was appearing as a defendant. He then joined other ICE agents in making the arrest outside the building, where some sort of scuffle ensued. There is no evidence in statements from court personnel and a friend of the man arrested that ICE presented a warrant to anyone before making the arrest. However, whether ICE had a judicial warrant (because of the individual's alleged criminal record), an ICE administrative (civil) warrant, or no warrant at all, the message to the immigrant community is the same: ICE was at the courthouse, so that is a dangerous place to be. The upshot is that the mission of the courthouse to guarantee equal access to justice for all members of the public is seriously compromised.

ICE Sensitive Locations Policy: Generally speaking, ICE will not make arrests, whether for federal criminal immigration violations or civil immigration violations, at what it calls "sensitive locations." These include schools, health facilities, places of worship, and public demonstrations. However, ICE does not place courthouses and the grounds surrounding them in the category of sensitive locations. That means that immigrants may be reluctant to participate in the judicial system for any reason, including as witnesses, for fear that they may encounter ICE agents when doing so. Any arrest by ICE at a courthouse, whether in connection to a judicial or a civil administrative warrant, will have a chilling effect on many people who otherwise are required, or want, to appear at court – or feel they need to for their own safety (as in regard to domestic violence).

Keep Washington Working Act: This Washington State Law went into effect in May of 2019. Regarding courthouses, Section 4 declares that "the attorney general...must publish model policies within twelve months after the effective date of this section for limiting immigration enforcement to the fullest extent possible consistent with federal and state law at...courthouses...to ensure they remain safe and accessible to all Washington residents, regardless of immigration or citizenship status." The AG has not yet developed and/or released these policies. The office's deadline for doing so is May 20th, 2020.

Strengthening Sanctuary's Policy Preferences

In light of this background, Strengthening Sanctuary endorses the following policy proposals, listed in order of preference. The enactment of Policy Preference #1 would obviate the need to act on the two other policy preferences (#2 and #3) detailed here. However, as we do not anticipate that our top preference is likely to be implemented in the immediate term, if at all, we propose concurrently pursuing preferences #2 and #3 as well.

Policy Preference #1: Courthouses should be considered sensitive locations, like schools or hospitals. That would prevent arrests, whether based on a judicial or civil administrative warrant. In all likelihood, it would have prevented the arrest of the individual on June 20th.

What would it take to bring about this policy change?

- 1) A directive from ICE adding courthouses to the list of sensitive locations; or
- 2) a court order resulting from a lawsuit demanding that courthouses be added to the list.

Courthouse policy cannot be used to change federal policy on what is considered a sensitive location. Nor could the Keep Washington Working Act be used for that purpose. However,

- 1) the Washington State Congressional delegation could demand that hearings be held about the importance of courthouses being sensitive locations;
- 2) police and sheriffs associations, associations of prosecuting attorneys, the National Federal Defenders Association and the like could issue strong statements on the issue; and
- 3) public education and action could center on the issue.

Policy Preference #2: Courthouses should require that a valid judicial warrant (based on violation of federal criminal immigration statutes) be presented in order to make an arrest on courthouse property. This may not have prevented the arrest on June 20th, depending on whether ICE had a judicial warrant, but could prevent future arrests based purely on civil immigration offenses.

What would it take to bring about this policy change?

- 1) A court order. A U.S. District Judge in Massachusetts, in response to a lawsuit, granted a preliminary injunction to prevent civil arrests of individuals going to, attending, or leaving Massachusetts courthouses.
- 2) Possibly, policy changes made by the courts themselves. An example from another state is New Mexico, where the Second Judicial District Court has a policy that non-court law enforcement officers or agents display a lawful warrant or lawful court order to deputies upon entering the courthouse. Additionally, New York State Office of Court Administration issued a rule in April that requires ICE to present a judicial warrant to arrest inside NY State courts, though this does not appear to apply to courthouse grounds.

- 3) The Attorney General's model policies for courthouses could have language specifically requiring that ICE present a judicial warrant in order to make an arrest at a Washington courthouse.

A cautionary note: a New Jersey Supreme Court rule on ICE arrests notes that "...federal law does not allow judges and court staff to shield undocumented persons from immigration enforcement activities. Judges and court staff may not forcibly resist, impede, or interfere with a law enforcement officer's performance of official duties. That extends to the arrest of an individual based on a judicial warrant."

- 4) Legislation such as the proposed NY State Protect Our Courts Act that makes it unlawful for any law enforcement officer to arrest a person for a civil violation while that person is going to, attending, or leaving court unless a judicial warrant authorizing the arrest is presented to court staff.

Policy Preference #3: Courthouses adopt various nitty-gritty procedural rules.

- 1) Courts should request that immigration enforcement officials abstain from coming onto court property for the sole purpose of enforcing federal immigration laws.
- 2) Unless necessary to perform their official duties or unless required by law, courthouse staff shall not inquire into the immigration status of individuals, and shall not collect or maintain personal information related to immigration status.
- 3) Courthouse staff shall not provide immigration officials with non-public, sensitive information about an individual unless otherwise required to do so by law.
- 4) The courts shall make available, and post in conspicuous locations, know-your-rights materials regarding immigration enforcement, and a listing of immigration resources, including but not limited to the Northwest Immigrant Rights Project, accredited representatives, immigration lawyers in private practice, and other immigration legal aid agencies.
- 5) Courthouse staff shall make a report for each law enforcement action taken by non-court law enforcement officers in or on courthouse property. For purposes of this guidance, "law enforcement action" includes but is not limited to observation of court proceedings. The record should include the date, time and location of the action, the identity of the law enforcement officer and agency, and a description of the event. The courts shall make this information public.
- 6) Where feasible and permitted by law, the courts shall minimize nonessential in-person court appearances, and shall reduce the frequency with which parties are required to appear. The courts shall minimize appearances by:
 - a) using technology to allow for remote appearances by phone or, if available, video or other available electronic media;

- b) promoting the use of remote audio and video services for hearings without inquiring as to whether the request for remote appearance is related to immigration status; and
 - c) permitting appearances through an attorney rather than requiring the presence of the party.
- 7) Where feasible, the courts shall allow for continuances and not assess penalties for an individual's failure to appear if that person has a credible fear of immigration enforcement.
- 8) The courts shall allow matters to be specially arranged to minimize contact with immigration enforcement officials within and outside of court facilities.
- 9) The courts shall close the courtroom when appropriate and permitted by law.
- 10) The courts shall require that any document that alleges or reveals the immigration status of a person be sealed.
- 11) The courts shall permit the use of pseudonyms under limited circumstances, where feasible and permitted by state law, in order to protect an individual's safety.
- 12) Courts shall identify nonpublic restricted locations within court facilities and shall train court personnel on who may access restricted areas. Court personnel shall notify the appropriate court executive officer, presiding judge, or judge's delegate of any request by immigration enforcement officers for access to nonpublic restricted areas or any requests for review of nonpublic court documents.
- 13) Court facilities shall train staff for possible interaction with immigration enforcement officers, so that staff can be prepared in the event of an immigration enforcement activity, inquiry or request at the courthouse including determining when, if at all, any potential disclosures of information will be necessary. Court personnel shall receive instruction on the different types of warrants, subpoenas, and court orders that may be presented to effect an arrest or to obtain records in immigration enforcement actions. This training shall include the following requirements:
- a) the ability to differentiate between administrative warrants and judicial warrants signed by a judge or magistrate;
 - b) the ability to differentiate between administrative and judicial subpoenas;
 - c) the procedure for responding to any warrant, subpoena, or order issued in connection with immigration enforcement activities; and
 - d) the procedure for responding to a "Notice to Appear" document.
- 14) The Office of the Prosecuting Attorney shall actively support and publicize an accompaniment program for immigrants having to appear in court, such as that being developed by Strengthening Sanctuary (drawing on the proven protocols and practices recommended by the Washington Immigrant Solidarity Network, or WAISN), and make appropriate and timely referrals.

