



ICE Out of Courts in New York!

A Policy Overview

Over the past decade, ICE has become increasingly embedded in systems of policing and incarceration. This trend is clear in New York State, where ICE has escalated its community raids, including arrests and surveillance at courthouses. Through our hotline, we carefully collected data from the frontlines about ICE raids at state courthouses and documented trends in ICE policing, including physical location, geographic location, use of force, prevalence of surveillance, and compliance with ICE's own regulations. IDP confirmed details of raids reports by speaking with witnesses of raids or those with direct knowledge, the individuals arrested by ICE themselves, or their attorneys.

IDP began to build a [campaign coalition](#) around the issue. As our coalition galvanized, we approached key policymakers in New York to educate them about the courthouse arrest crisis and to engage them about possible state and local interventions. Three years later, in December 2020, the Protect Our Courts Act was signed into law.

What does the bill do, and how did we get here?

Our broad-based coalition of stakeholders worked with clients and members at all different points in the system, and our demands protected the rights of all immigrants attending criminal, family, and civil courts regardless of whether they are defendants, witnesses, or survivors of violence. We took a three-pronged approach to policy change, outlined below:

1. State Court Rule Change

Coalition members met with New York's Chief Judge, Chief Administrative Judge, and their counsel, and advocated for them to promulgate rules on behalf of the court system to ensure that access to the courts and to legal proceedings would not become dependent on immigration status, country of birth, or indigence. Our advocacy campaign initially focused on New York's Chief Judge, and grew to include a parallel track with the state legislature. To help make the case, we issued a [report](#) measuring the harmful impact of ICE policing at courthouses.

In April 2019, the New York State Office of Court Administration (OCA) issued [new rules](#):

- ICE is prohibited from arresting individuals inside New York state courthouses without a judicial warrant
- Law enforcement agents must report to court personnel and state their law enforcement purpose and proposed law enforcement action upon entering the courthouse

- Court personnel must inform the judge if a law enforcement agent is present with the intent of arresting a party or participant in the case before them
- No law enforcement actions can be taken inside the courtroom, except in extraordinary circumstances
- Court personnel must make a record of any law enforcement action taken in the courthouse pursuant to these court rules, including observation of court proceedings
- Law enforcement must provide a copy of any judicial warrant or court order to court personnel, and a judge or appropriate personnel must review it
- Chief administrator must publish for the governor, speaker of the assembly, and senate president a summary of specified information on judicial warrants

While the new rule made a significant change inside courthouses across the state, ICE agents still waited in parking lots and stood outside court buildings to try to pick up immigrant New Yorkers as they attended or as they left court. In 2018, most ICE courthouse arrest actions took place immediately outside of courthouses. In addition, certain town and village courts outside of OCA's jurisdiction were not subject to the rules. So we continued to urge for state-level legislation, the Protect Our Courts Act, which would keep ICE out of the area surrounding all court buildings.

2. Litigation

ICE's courthouse policing practices did not just damage the interests of the state and its court system. The practice also violated rights guaranteed by the Constitution and a longstanding common law privilege against civil arrest of people attending court. With partners, IDP first pursued litigation in the immigration courts, challenging ICE's courthouse arrest policy as violating fundamental rights, and calling on immigration judges to prohibit ICE from pursuing deportations in these cases. Federal court was an additional battleground where we could challenge the courthouse arrest policy. Building on legal theories developed by IDP, litigation partners, and law professors, coalition members sued the Trump Administration, bringing claims under the Administrative Procedure Act (APA); the First, Fifth, and Sixth Amendments; and the common law privilege against civil arrest. Attorney General Letitia James and Brooklyn District Attorney Eric Gonzalez also became focused on the issue and filed a lawsuit on behalf of New York State. IDP supported both lawsuits with amicus briefs highlighting the data we had collected and submitting stories of egregious ICE tactics and inhumane treatment of community members.

On June 10, 2020, in the Attorney General's lawsuit, [the court issued the first permanent injunction barring the practice of ICE courthouse arrests in the nation and ruled](#) that ICE's dangerous practice of conducting courthouse arrests is illegal. The court held:

- ICE is enjoined from conducting civil arrests at New York State courthouses, their premises, or grounds. (Order at 24)
- ICE is enjoined from conducting civil arrests of anyone "required to travel to a New York State courthouse as a party or a witness to a lawsuit...." (Order at 24)

- The common law privilege against civil arrest for anyone present on courthouse premises and grounds or necessarily coming and going to a court proceeding applies in the context of civil immigration arrests. (Order at 12)
- The Immigration and Nationality Act, incorporates the common-law privilege against civil immigration arrest for those present in New York state courthouses, or on courthouse grounds, or necessarily traveling to or from court proceedings. Therefore, ICE’s Directive on courthouse arrests exceeds its statutory authority in violation of the APA. (Order at 13)
- The adoption of the Directive by ICE, as well as less formal shift in practice and policy in 2017, were arbitrary and capricious, in violation of § the APA. (Order at 23)

As of this writing (December 2020), this decision is on appeal before the U.S. Court of Appeals for the Second Circuit. The lawsuit brought by the Legal Aid Society on behalf of a community member and coalition member organizations is also pending in the U.S District Court for the Southern District of New York.

3. Legislation: The Protect Our Courts Act

At the heart of the Protect Our Courts Act is the same legal theory the court sustained: the common law privilege against civil arrests protects immigrants from ICE’s practice of arresting people while they are attending court (i.e. setting a trap at the courthouse). With the law on our side, the coalition continued to press on for a permanent, statewide solution that would enshrine the privilege in our laws.

In July 2020, the legislature passed the Protect Our Courts Act with bipartisan support, and Governor Cuomo signed the bill into law in December 2020. The bill codifies the OCA court rule protections and protocol outlined above, encompasses the key protections provided by the injunction, and more. Under the [Protect Our Courts Act](#), the following people and places are protected from civil arrest without a judicial warrant:

Who is protected?

- “A party or potential witness, or a family or household member is a party or potential witness, is privileged from civil arrest...” NYCRL § 28(1). These protections are more specific than the language of the injunction, which does not name *potential* witnesses.
- The above list of individuals are protected if they are attending a court proceeding. The definition of court proceeding includes:
 - 1) A mandatory or scheduled court date (“any appearance” in a state court “before a judge or justice or judicial magistrate of this state ordered and scheduled by such judge or justice or judicial magistrate...”) NYCRL § 28(6)(b).
 - 2) Filing a complaint or application that initiates a court case (“...filing of papers designed to initiate such an appearance before a judge or justice or judicial magistrate of this state...”) *Id.*

This inclusive definition of court proceeding provides protections to many people who aren’t required to go to court by law, but for whom it is necessary: survivors of violence seeking orders of protection,

people filing complaints against abusive landlords, victims of fraud, and employees who are denied wages.

When and where are people protected?

- The privilege against civil arrest applies “while going to, remaining at, and returning from” a court proceeding. NYCRL § 28(1). This means that people are protected at any point of transit to or from a court proceeding, as defined above. The privilege attaches to the person and is not bound to a specific physical space. This language, taken verbatim from existing New York civil rights law, covers the areas surrounding courts where ICE enforcement is most common, and recognizes that access is not equal if people are afraid to walk out their front door to go to court.

Are there any exceptions to the privilege?

- The bill includes an exception for arrests authorized by judicial warrant or judicial order. In practice, ICE agents almost never have a judicial warrant or order when making an arrest.

How will the law be enforced?

- State courts have the power “to issue appropriate judicial orders to protect the privilege from civil arrest” as set forth in the civil rights law. NY Judiciary Law 4-a.
- The Attorney General is authorized to bring a civil action seeking equitable and declaratory relief if POCA is violated. NYCRL 28(3)(b).

What legal remedies are available to individuals who are arrested in violation of POCA?

- The law includes a civil right of action for equitable and declaratory relief for anyone who has “reasonable cause to believe” that the privilege against civil arrest set forth in POCA has been violated. NYCRL 28(3)(a).
- The law also declares the violation of a court order protecting the privilege, and execution of an unlawful arrest in violation of POCA (or willful assistance in such arrest) to be contempt and false imprisonment. NYCRL 28(2). This may allow a covered individual to initiate a state action for civil contempt. These torts may also provide a basis to bring a federal civil action under the Federal Tort Claims Act.

The Protect Our Courts Act means that regardless of whether the injunction is upheld by the Republican-packed federal courts, New Yorkers’ right to access courts will be protected under state law.