

## MEMORANDUM

**FROM:** Pennsylvania Interbranch Commission on Gender, Racial and Ethnic Fairness

**DATE:** April 5, 2018

**RE:** Reports of State Court Judicial Officers' Assumption of Jurisdiction Over Immigration Issues and the Impact of the Presence of Immigration Enforcement Agents in Courthouses on Litigants' Constitutional Rights

### I. Introduction

The Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness ("Commission") is dedicated to promoting the equal application of the law for all Pennsylvanians, particularly those with Limited English Proficiency ("LEP"). These individuals often face linguistic and cultural barriers that prevent their equal access to justice in our state courts.<sup>1</sup> The Commission's Interpreter Services Committee recently received reports of state court judicial officers overstepping their jurisdictional authority, and of the presence of federal immigration enforcement agents in Pennsylvania courthouses, each of which has had a chilling effect on the constitutional rights of immigrants throughout the Commonwealth.

### I. Recent Reports of Pennsylvania State Judicial Officers Assisting Federal Immigration Enforcement Actions

Over the past few months, the Interpreter Services Committee has received reports from attorneys representing immigrants in Pennsylvania courts that state judicial officers have inquired into the immigration status of LEP litigants, with no relevance to the case before them, and then improperly considered that information to deny Hispanic and other LEP litigants access to alternative disposition programs, in violation of Title VI of the Civil Rights Act of 1964.<sup>2</sup> Even more alarming are reports that some of these judicial officers appear to have passed on this information to local

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<sup>1</sup> For more information on the mission of the Commission, see *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, 2003, available online at [http://www.pa-interbranchcommission.com/\\_pdfs/FinalReport.pdf](http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf)

<sup>2</sup> A core requirement of Title VI of the Civil Rights Act of 1964 is that no person shall be denied participation in, or benefit of, a service or program based upon his/her national origin.

Immigration and Customs Enforcement (“ICE”) agents, and detained the defendants in state court facilities until the ICE agents could arrive to take the defendants into federal custody.

Moreover, as these reports make clear, when state court jurists insert themselves into federal immigration enforcement actions, the impact is felt not only by undocumented criminal defendants, but by the wider community of court users as well, such as undocumented victims or witnesses to crimes. These individuals are unwilling to appear in state courts due to their well-founded fear of ICE agents’ presence there. Their reluctance to come forward has seriously hindered or prevented the prosecution of the criminal cases that rely upon their testimony. Victims of domestic abuse may not seek the protections of the court for them or their children if they fear doing so would result in adverse immigration action. The following anecdotes shed light onto the ongoing problems that immigrant Pennsylvanians face in our state courts, and demonstrate the need for clear jurisdictional guidance for officers throughout our judicial system.

#### **A. Reports Regarding Impact on Defendants**

- A West Chester Attorney reported an incident in which a Lancaster County Magisterial District Judge (“MDJ”), while conducting an arraignment of an LEP individual for a traffic infraction (tinted car windows), repeatedly asked the defendant about his immigration status. The individual was not represented by counsel and his understanding of English was obviously limited. Nevertheless, the judge proceeded to conduct the arraignment without counsel or an interpreter. When the defendant admitted that he was undocumented, the judge asked the charging police officer if he had notified ICE agents in Lancaster. The judge then ordered the defendant held on a \$750 bond for the traffic violation. Before the defendant’s family could post the bond, the judge ordered that the defendant be taken to Lancaster County Prison, where he was held under an ICE detainer, despite the fact that he was stopped for a normally pre-payable traffic offense.
- A Chester County Attorney reported that during two hearings involving the sentencing of a Hispanic client for a first time, DUI violation, the presiding judge repeatedly asked the attorney’s client, as well as the attorney himself, to reveal his client’s immigration status. The attorney stated that he did not know the immigration status of his client, and objected to the judge asking the question of his client, as the judge had not asked any non-Hispanic defendants in the courtroom about their immigration status. In addition, he stated that his client’s immigration status was not material to the case before the judge. In response, the judge stated that he asks if defendants who appear before him are in the U.S. legally because if they are not, he considers it to be a violation of federal law, which in his mind, renders them ineligible for admission into the Intermediate Punishment (“IP”) program. He stated that he only asks this question of

defendants "...if I have any suspicions." (Tr. at 8.) In response to the attorney's ethical concerns about breaching attorney/client confidentiality by revealing the immigration status of his clients to the judge, the judge stated, "...as a matter of fact, if your client is here and you don't tell me about that, then I consider that to be a breach of your obligation to the court, as an officer to the Court, to inform me that your client is not legal in this country." (Tr. at 8.) The judge acknowledged the differing opinions among his colleagues on the bench about inquiring into the immigration status of state court defendants, stating, "And the judges of this bench -- to my dismay -- are all over the line on this because they have -- in my mind -- crossed the separations of power, which seems to be rather prevalent." (Tr. at 4.) He later added, "...everybody has said we are elected to exercise our discretion, we will exercise our discretion as elected judges as we see fit. That means everybody is going to do what they deem is appropriate." (Tr. at 7.) Ultimately, the judge sentenced the defendant to jail, where he was detained by ICE, sent to York's Federal Detention Center and finally, deported.

- The same Chester County attorney also reported that he had a similar experience with a different Chester County Common Pleas Court Judge during a sentencing hearing for another undocumented Hispanic client charged with a first time, DUI offense. The judge asked the attorney and his client about the client's immigration status. Although the client should have been eligible for admission into the Accelerated Rehabilitation Disposition Program ("ARD") as a first time offender with a nonviolent offense (DUI), the judge indicated that the client was not eligible as a result of his undocumented status. When the attorney requested that the judge allow his client to complete his sentence through the Electronic Home Monitoring Program as an alternative, the judge refused that request as well, based on the client's immigration status. The judge ultimately sentenced the client to jail through the IP program. The client was incarcerated, detained by ICE and was sent to York's Federal Detention Center. He is currently challenging the removal proceedings.
- The same Chester County attorney continues to represent many clients of Hispanic descent in the criminal and civil courts. He reports that his clients often express the concern that if they request an interpreter, or if he does so on their behalf, the request will prompt the judicial officer who is presiding over the case to inquire into their immigration status, and possibly, even alert ICE agents about the presence of an undocumented immigrant in their courtroom. This has had a chilling effect on their due process rights to interpretation services in court proceedings.
- A Philadelphia attorney reported that his client was detained by ICE agents in the hallway of the Philadelphia Criminal Justice Center ("CJC") on his way to a first

appearance as a defendant in a DUI case. The client now has an open bench warrant lodged against him, should he return to court as he is required to do.

- Another Philadelphia attorney reported on two separate cases involving undocumented clients being detained by ICE after interaction with probation officers. In the first case, her client pled guilty to two misdemeanor charges and was sentenced to one year of probation. The client had overstayed her visa, although both her husband and child were citizens. She was arrested by ICE agents at her first appointment at the probation office. In the second case, another client completed a program for a DUI case, and was told by the probation officer to begin checking in at the ICE office. The client was taken to the York Federal Detention Center after his second check-in with ICE, even though the client had no prior contact with law enforcement prior to the DUI.
- An attorney from southeastern Pennsylvania reported that her undocumented juvenile client was adjudicated delinquent in February 2017. Subsequently, although the juvenile had been doing well in foster care, the attorney received a call from an ICE agent alerting her that the juvenile would be detained by ICE at the next Master's hearing.
- A Philadelphia attorney reported that his undocumented client was accepted into the ARD program for three misdemeanor property crimes. The client was compliant with all probation requirements and regularly reported to his probation office. The client was then arrested by ICE agents outside of his home in front of his wife, who was seven months pregnant. He was detained in York for more than two weeks before his bond hearing was scheduled, at which time he posted a \$7,000 bond and was released pending the next hearing.

## **B. Victims and Witnesses of Crimes**

- A Philadelphia victim advocacy organization reported that a victim in an aggravated assault and robbery case refused to come to court to testify, even after multiple attempts by the District Attorney's office to encourage his presence. He made numerous excuses for failing to appear in court to testify, such as having a doctor's appointment, until finally admitting to a staffer that he was fearful of being detained by ICE at the CJC. The victim indicated that he had heard that "people get picked up in court all the time in every city daily."
- Another staffer at the same victim advocacy organization reported that two witnesses to a racially-motivated assault against a Hispanic victim have likewise refused to testify in the case, due to fear of immigration agents' presence in state courthouses. The witnesses are the brother and cousin of the victim, but will not

come to court to aid with the prosecution of the case because they are undocumented and fear that ICE agents will be waiting at the courthouse to detain them.

### **C. Other Potential Court Users**

- A Philadelphia legal organization that works with immigrant communities reports a significant drop in immigrant domestic violence survivors filing for Protection from Abuse orders, due to articulated fears regarding ICE presence in courts. Attorneys from that organization have spoken to many victims who have chosen not to file for this reason, in addition to fears of putting other relatives at risk of deportation. Two clients agreed to attend court only because they had pending U-Visa applications and only when the PLA Office arranged for escorts in and out of court. This was a service that their clients did not require prior to the new administration taking office in Washington.
- A different legal organization representing many clients who are immigrants reported a 35% drop in undocumented workers seeking their services for assistance with wage theft or other types of cases, such as discrimination.
- A Philadelphia attorney reported that a worker was killed at his job in a work-related accident, but that the worker's wife and the witnesses to the workplace accident were too fearful of immigration enforcement agents to proceed in a claim against the employer for wrongful death benefits.
- Another Philadelphia attorney reported that earlier this year, his client decided not to pursue his wage case after the client's former employer called him and threatened to report him to ICE. Although the client's brother decided to continue with his own claim against the same employer, the client decided that he would not be a witness for his brother, due to fear of the retaliation threatened by his employer. Even though the client was owed about \$20,000 in unpaid wages, he decided it was not worth pursuing his case because the employer knew where he lived and the client's family also would be at risk for deportation.
- A Franklin County attorney reported that in January 2017, her 17-year old client was brutally attacked by a neighbor in Chambersburg, Pennsylvania. The police were contacted, but because of a language barrier and the lack of an interpreter at the police station, no charges were filed against the neighbor, even though her client was physically assaulted and knocked unconscious. Her client was treated for his injuries at a local hospital emergency room, and has been on medical leave from school due to a head injury and continuing complications stemming from the attack. The attorney and her client discussed applying for a U-Visa, for which the client would be eligible, but the family was too frightened to follow up with police or report the continuing threats due to fears of immigration enforcement.

This conduct obviously reflects an unconstitutional exercise of federal jurisdiction by state court judicial officers over matters relating to immigration, as well as a chilling effect the fear of deportation has had on the due process rights of LEP court users. It also raises a growing concern about a shifting political climate that encourages discrimination against LEP Pennsylvanians, who are often recent immigrants, based on xenophobic fears and stereotypes. This type of conduct has no place in our state courts, as it violates constitutional promises of due process and undermines public confidence in the judiciary.

## **II. Immigration in State Courts: An Ongoing National Challenge**

Across the country, state courts are grappling with addressing the increasing pressure from federal immigration enforcement. Although traditionally an area reserved for federal authority, immigration issues frequently arise in state court proceedings, some of which call for constitutionally permissible state court action, and some of which clearly do not, as evidenced by the reports detailed above. The State Justice Institute (SJI) has partnered with the Center for Public Policy Studies (CPPS) to identify the challenges that state courts face when dealing with immigration, and effective resources and policies that can be used to improve the state court response. In releasing their initial findings, the SJI/CPPS noted that, “state courts across the nation are being challenged by the size, diversity, and complexity of the expanding populations of both legal permanent residents and undocumented immigrants the courts must serve. As a result, fundamental notions of justice - including long-held beliefs and values about equal access to the courts, equal and consistent justice for court users, the independence of the judiciary, and the appropriate relationship between federal and state judiciaries - are being severely tested. Moreover, when combined with a lack of national consensus about immigration generally, the complexity of challenges posed by immigration is making it especially difficult for courts across the nation to assess the impacts that serving diverse immigrants are now having on courts and subsequently[,] to develop effective strategies for better serving all those who use courts.”<sup>3</sup>

The SJI/CPPS study points out two major concerns with state courts entering the traditionally federal arena of immigration: (1) “the independence of state judiciaries may be threatened in numerous ways by the nexus of federal, state, and local immigration law, policy, and practice;” and (2) “achieving procedural fairness can be a

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<sup>3</sup> Martin, John, et. al., *Addressing Immigration in the State Courts*, The Court Manager, Volume 24 Issue 1, p. 16, available online at <http://library.niwap.org/wp-content/uploads/IMM-Qref-AddressingImmInstateCourts.pdf>

challenge to courts in dealing with aliens. Procedural fairness encompasses how the courts behave towards litigants and how people are treated in court, as opposed to what the courts decide.”<sup>4</sup>

### **III. Legal Principles**

It is a well-settled principle that enforcement of immigration law falls to federal authorities and courts.<sup>5</sup> The United States Supreme Court has carefully considered this topic, holding that “[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer. The principal example is when the Attorney General has granted that authority to specific officers in a formal agreement with a state or local government.”<sup>6</sup> As of this date, no state or local law enforcement agency in Pennsylvania has been granted such authority. Thus, absent a clear delegation of federal authority, Pennsylvania’s state courts and law enforcement agencies do not have jurisdiction to address matters, such as the immigration status of a state court criminal defendant, that are within the exclusive jurisdiction of federal authorities and courts.<sup>7</sup>

Moreover, even the appearance of state courts acting in conjunction with federal immigration enforcement can be detrimental to providing equal access for immigrant communities. As the SJI/CPPS study noted, court users who are immigrants are already affected by “fear of reprisals, including arrest and possible deportation, for appearing in court,” which limits their access to justice.<sup>8</sup> It is important that immigrants who are victims of crimes, or who have suffered civil wrongs, feel that they can seek state court remedies without Pennsylvania judges acting as de facto ICE agents.

### **IV. Recommendations for Clarifying the Role of State Judicial Officers in Addressing Immigration Issues and Protecting Constitutional Rights for Pennsylvania Court Users**

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<sup>4</sup> *Id.* at 21.

<sup>5</sup> See *Hines v. Davidowitz*, 312 U.S. 52 (1941), *Arizona v. United States*, 56 U.S. \_\_\_\_ (2012).

<sup>6</sup> *Arizona v. U.S.*, slip. op. at 8.

<sup>7</sup> The Washington State Supreme Court has recently adopted Rule 413 (attached to this memo), which bars admission of immigration status in civil and criminal cases unless it “is an essential fact to prove an element of, or a defense to [the claim or charge], or to show bias or prejudice of a witness.” Such a rule would ensure that a factfinder is not inappropriately influenced by bias held against immigrants, while still allowing for a party or witness’ immigration status to be admitted when it is pertinent to the case at bar.

<sup>8</sup> Note 3, *supra*, at 21.

The Commission has made recommendations to the Supreme Court of Pennsylvania, requesting that Court consider taking the following actions to address the problems identified in this memorandum:

#### Short-Term Recommendations

1. Issue clear and immediate guidance to all members of the state judiciary regarding their jurisdictional limitations, advising them that any action they take to assume responsibilities related to federal immigration enforcement, that are not specifically delegated to the state courts by federal authority directly, violates United States Supreme Court precedent and could result in violations of Title VI of the Civil Rights Act of 1964, which could put the judiciary at risk for legal challenges and civil rights lawsuits.
2. Consider adopting changes to the Pennsylvania Rules of Evidence to limit the admissibility of a party or witness' immigration status. Washington State recently adopted Rule 413 (attached to this memo), which bars admission of such status in civil and criminal cases unless it "is an essential fact to prove an element of, or a defense to [the claim or charge], or to show bias or prejudice of a witness." Such a rule would ensure that a factfinder is not inappropriately influenced by bias held against immigrants, while still allowing for a party or witness' immigration status to be admitted when it is pertinent to the case at bar.
3. Take all possible actions to prohibit or, at a minimum, restrict immigration enforcement officers from entering state courtrooms or court-related offices, such as adult or juvenile probation offices, for purposes of detaining state court users for immigration violations. See, for example, attached letters from the Chief Justice Tani G. Cantil-Sakauve, Supreme Court of California, and Chief Justice Stuart Rabner, Supreme Court of New Jersey.
4. Require that the topics of state court jurisdictional limits regarding immigration issues and promoting access to the courts for LEP individuals be included in every court-sponsored training session, as well as in one Mandatory Continuing Legal Education course, for every judicial officer in the Commonwealth.

#### Long-Term Recommendations

5. Ensure that training and monitoring of the Pennsylvania Language Access Plan ("LAP") are a priority moving forward, particularly with MDJs, who often face unrepresented LEP individuals in their courts. Pennsylvania has made progress in improving access to justice for LEP and immigrant populations by adopting the statewide LAP. However, not all members of the Pennsylvania judiciary are



complying entirely with the requirements of the LAP, as illustrated by the report concerning an MDJ who failed to provide an interpreter for a hearing, among other actions, that resulted in the detention of an LEP defendant. The LAP does call for training, monitoring, and statewide enforcement of its requirements, which is crucial for its success.

6. Consult and implement the SJI/CPSS study's recommendation for state courts to conduct an individualized, statewide assessment of court users and policies affected by immigration.

The accounts listed above comprise only a few examples of the potentially disastrous outcomes that can occur when state court judges take it upon themselves to assume jurisdiction over complex and life-threatening matters that are constitutionally reserved for the federal courts and authorities. The chilling impact of this jurisdictional overreach can be seen in both the criminal and civil courts. It is crucially important that Pennsylvania's state courts remain accessible to all potential users, regardless of their immigration status, especially during changing political climates.