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Practice Advisory for Criminal Defense Attorneys: The Biden Administration's Interim Enforcement Priorities

I. Introduction

On January 20, 2021, the Biden Administration ordered a review of Department of Homeland Security (DHS) policies and practices and issued a set of priorities for DHS's enforcement and removal operations in the interim.¹ The current interim enforcement priorities, applicable to U.S. Immigration and Customs Enforcement (ICE), are described in the memorandum issued by Acting ICE Director Tae D. Johnson ("Johnson memo") on February 18, 2021² and will remain in effect until DHS Secretary Alejandro Mayorkas issues new or updated guidance, which the memo states is anticipated in less than 90 days.³

For criminal defense attorneys, these policy guidelines around immigration enforcement may affect defense strategy and advice to noncitizen clients.⁴

The Supreme Court's 2010 decision in *Padilla v. Kentucky* clarified that criminal defense counsel's Sixth Amendment duty includes advising immigrant clients on the immigration consequences that could stem from a criminal case.⁵ The ever-changing policies on immigration enforcement are a reminder to criminal defense counsel of the significance of collaboration with immigration experts in order to properly advise noncitizen clients on the risks and vulnerabilities they may face in the immigration system, including whether a client is a priority for an ICE arrest. It remains important as ever to have open dialogue with noncitizen clients about their priorities, including how their immigration priorities may be impacted by the decisions and negotiations in their criminal case.

¹ See David Pekoske "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities", January 20, 2021, available at

https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

² See Tae D. Johnson, "Interim Guidance: Civil Immigration Enforcement and Removal Priorities", February 18, 2021, available at https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

³ Johnson memo at p. 1.

⁴ Certain naturalized U.S. citizens could become at risk of denaturalization based on criminal convictions. For more information on identifying U.S. citizens who could be at risk of denaturalization, see IDP's advisory: https://www.immigrantdefenseproject.org/wp-content/uploads/Advisory-for-Defense-Attorneys_-_Identifying-clients-at-risk-of-denaturalization3-1.pdf.

⁵ *Padilla v. Kentucky*, 559 U.S. 356 (2010). Where defense counsel does not have the expertise to provide affirmative, individualized, and accurate advice, they must work with immigration counsel to provide this. It has become a standard of practice for defense attorneys to ask all clients where they were born during the intake process to determine whether advice on immigration consequences will be required.

The purpose of this advisory is to identify issues and advocacy strategies for defense counsel representing noncitizen clients in light of this administration’s interim enforcement priorities memo, specifically in the context of assessing risks of potential immigration enforcement during and after a criminal case.

II. Summary of ICE’s Interim Enforcement Priorities Guidance

Effective immediately, the Johnson memo instructs ICE to prioritize people in the following three categories for ICE enforcement-related activities⁶ and removal⁷:

- Those whom ICE claims are involved in spying or terrorism, or otherwise considers threats to “national security.”⁸
- Anyone who entered the United States unlawfully, or attempted to enter unlawfully at a port of entry,⁹ on or after November 1, 2020, or was not physically present before November 1, 2020.
- Anyone whom ICE claims poses a threat to public safety¹⁰ AND meets at least one of the below criteria:
 - Has an “aggravated felony” conviction,¹¹ or
 - Has a conviction where “active participation in a criminal street gang”¹² is an element of the offense, or
 - Is at least 16 years old and “intentionally participated in an organized criminal gang or transnational criminal organization” to further its illegal activities.¹³

⁶ This includes issuance of a detainer, ICE’s assumption of custody based on previously issued detainers, the decision to stop, question or arrest individuals for administrative violations of immigration laws, the decision whether or not to institute removal proceedings, decisions to detain or release individuals, grants or denials of deferred action or parole, and execution of final orders of removal. *See* Johnson memo at p. 3.

⁷ This guidance reflects a change in formal ICE policy from the Trump administration, which had generally designated all noncitizens as a priority for enforcement action.

⁸ According to the memo, “general criminal activity does not amount to a national security threat.” *See* Johnson memo at p. 4.

⁹ For example, individuals who attempted to enter the United States after Nov. 1, 2020 by presenting false documents at a port of entry would be considered an enforcement priority.

¹⁰ The guidance requires ICE to take into consideration the extensiveness, seriousness, and recency of “criminal activity” as well as mitigating information such as personal and family circumstances, community ties, health and medical factors, evidence of rehabilitation, and availability of immigration relief. *See* Johnson memo at 5.

¹¹ The conviction must be defined in INA 101(a)(43) and be based on a “good-faith belief” of a final administrative determination, available conviction records, or the advice of ICE counsel. The analysis of whether a conviction is an aggravated felony under immigration law is complex, and crimes that fall under that label need not be “aggravated” nor “a felony.”

¹² As defined in 18 USC 521(a). Notably, 18 USC 521(a) defines a conviction to include juvenile adjudications.

¹³ This determination must be based on “reliable evidence” and be in consultation with the ICE Field Office Director and Special Agent in Charge. A person whom ICE alleges has intentionally participated in a “gang,” but who did not further its criminal activity, should argue that the association does not fall within this definition. *See* Johnson memo at p. 5.

For those who fall into any one of the three priority categories, ICE agents generally do not need advance approval from supervisors to make arrests or take other enforcement actions.¹⁴ In order to take enforcement action against people who do *not* fall within ICE’s enforcement priorities, ICE is supposed to get pre-approval from the Field Office Director or a Special Agent in Charge (SAC).

Despite the need for pre-approval to take enforcement action against individuals who do not constitute priorities for ICE, defense attorneys should assume that noncitizen clients who do not fall within the priority categories are still at risk for enforcement action. The Johnson memo does not prohibit civil immigration enforcement activities against individuals who do not fall within the priorities. In requesting pre-approval from the Field Officer Director or Special Agent in Charge, ICE agents must provide a written justification for the action and must consider the nature and recency of convictions, type and length of sentences imposed, resources required, and “other relevant factors.”¹⁵ The memo also states that ICE agents should consider whether alternate channels exist, such as recourse to criminal law enforcement or state or local civil authorities, such as public health authorities.¹⁶

III. What Has Not Changed

Although the Johnson memo appears to be a shift in policy, it’s important to remember that there has been no change in either immigration law nor in the application of *Padilla* to defense counsel. As part of the *Padilla* duty, counsel providing immigration advice on criminal cases should remain up to date on immigration policy changes to most accurately advise clients. Individuals who do not fall under the listed priorities may still be vulnerable to ICE arrest and removal from the United States under the Immigration and Nationality Act (INA). Although the Johnson memo provides guidance to ICE agents about who to prioritize for immigration enforcement action, immigration agents retain discretion as to who they arrest or detain. **This may result in the arrest of individuals who don’t fall under the stated enforcement priorities.**

Furthermore, the existing immigration enforcement machinery remains in place. ICE relies heavily on the criminal system in order to identify, detain, and deport people. In particular, ICE is automatically notified every time anyone is booked into jail anywhere in the country, because their fingerprints are sent to ICE to be checked against its databases. ICE uses this information to

¹⁴ Exceptions are covered in the companion practice advisory for immigration advocates, also by IDP, ILRC and NIPNLG, available at www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Advisory-on-BIDEN-Enforcement-Priorities-Immigration-Attorneys-Final.pdf.

¹⁵ Johnson memo at p. 6.

¹⁶ Johnson memo at p. 3.

target people for detainers and removal or for further investigation. Over the past decade, ICE has increasingly relied on courthouses, homes, and workplaces as locations to conduct raids and arrest people.

IV. Criminal Defense Strategies to Avoid “Public Safety” Enforcement Priority Designation

Criminal defense attorneys can employ several strategies to avoid bringing their clients within the so-called “public safety” enforcement priorities in the Johnson Memo. If your client does not fall within any of the priority enforcement categories, this may reduce the chance that they will be arrested by ICE. The advice below discusses how to avoid bringing your client within the enforcement priorities and provides advocacy tools against future enforcement actions. Many of these strategies may also help the attorney meet their obligations to avoid or mitigate negative immigration consequences of the criminal case.

However, these strategies will not address all immigration issues your client may face. A separate and equally (or more) important question is how to resolve the criminal case in a way that does not harm their current lawful immigration status, or hopes to acquire status in the future. This is an individual determination for each client. Seek expert advice for how to handle the criminal case consistent with your client’s immigration goals.

A. Avoid an Aggravated Felony Conviction

Avoiding an aggravated felony may prevent your client from becoming an enforcement priority. Note that while this usually aligns with clients’ goals and priorities for case resolution, this may not always be the case.

According to the Johnson memo, people who have been convicted of an “aggravated felony” as defined by INA § 101(a)(43) and who are also determined to be a “public safety” threat are deemed enforcement priorities. The memo specifies a conviction is needed. Therefore, a pending charge or outright dismissal without an up-front plea is insufficient.

The term “aggravated felony” is defined at 8 U.S.C. § 1101(a)(43) and includes dozens of common-law terms and references to federal statutes. Both federal and state offenses can be aggravated felonies, as can misdemeanors or even some lower-level dispositions. While some offenses only become aggravated felonies by virtue of a sentence imposed of a year or more, others are considered aggravated felonies regardless of sentence, and some can even fall in this category because of the case circumstances. ***The analysis is complex, case-specific, can hinge on unsettled law, and varies from state to state.*** Defenders should seek advice from experts who have a deep understanding of the potential immigration consequences of criminal offenses to assess whether a specific offense may be an aggravated felony.

B. Avoid “Criminal Gang Participation” Designation

Gang-related offenses are typically damaging to an immigration case, while additionally triggering the enforcement priorities. The Johnson memo states that individuals fall under this category if (1) they have been *convicted* of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a); or (2) they are 16 years of age or older and have intentionally participated in an organized criminal gang or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization (*no conviction required*).¹⁷ This definition is convoluted and it’s unclear how ICE will apply it. Furthermore, law enforcement labeling of a person as gang-involved (such as through inclusion in local “gang databases”) has long been based on arbitrary factors and documented as inflected with racial bias. The important takeaway is that while not all gang-related convictions or enhancements will necessarily meet this definition, almost any marker of gang affiliation can have negative impacts on a noncitizen’s immigration case, so avoiding such designations will be important regardless of the current enforcement risk.

C. Consider Finality of Conviction and Diversion Adjudications

Convictions are not final for immigration purposes until direct appellate rights have been exhausted.¹⁸ It is unclear from the Johnson memo how ICE will apply this rule in the context of enforcement actions. If your client has an aggravated felony conviction on appeal and may be at risk of ICE action, make sure your client has evidence to demonstrate to ICE that their conviction is not final.

In some *but not all* cases, a state diversion or other alternative program may avoid a conviction altogether. Federal immigration law has its own definition of conviction.¹⁹ If before being diverted the person pleads not guilty, or there is no plea or finding regarding guilt, and there is no plea or finding of guilt thereafter, then there is no conviction for immigration purposes. If the person must plead guilty before being diverted, however, there very likely is a conviction for immigration purposes, even if state law would not classify the final disposition as a conviction.

¹⁷ In 18 USC § 521(a), “criminal street gang” is defined as an ongoing group, club, organization, or association of five or more persons—(A) that has as one of its primary purposes the commission of one or more of the criminal offenses described in subsection (C); (B) the members of which engage, or have engaged within the past five years, in a continuing series of offenses described in subsection (C); and (C) the activities of which affect interstate or foreign commerce. The continuing series of offenses include federal felony drug offenses, some felonies involving force or violence against a person, human trafficking and sexual abuse crimes, and a conspiracy of the above.

¹⁸ *Matter of JM Acosta*, 27 I&N Dec. 420 (BIA 2018). For more information, see IDP, *The Conviction Finality Requirement in Light of J.M. Acosta* (Jan. 2019) at www.immigrantdefenseproject.org/wp-content/uploads/IDP-Conviction-Finality-Practice-Advisory-FINAL-1.24.19.pdf.

¹⁹ See 8 USC 1101(a)(48)(A) and see, e.g., ILRC, *What Qualifies as a Conviction for Immigration Purposes?* (April 2019) at <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>.

D. Consider Whether Post-Conviction Relief (PCR) Might Help

For people whose convictions make them an enforcement priority, vacating the conviction in criminal court *may* render them no longer a priority for ICE. Additionally, post-conviction relief may reopen other opportunities in the client's case such as access to immigration relief or avoiding deportability. In assessing PCR opportunities, commonly the defect lies with a noncitizen defendant's failure to understand or have been advised or defended against a conviction's immigration consequences, as the Supreme Court held in *Padilla v. Kentucky* that a defense counsel's failure to provide this immigration advice renders a conviction unconstitutional.²⁰

Different states, however, may have different post-conviction relief vehicles that impact their value in immigration adjudications.²¹ Defenders should engage in any post-conviction relief efforts in consultation with an immigration attorney, particularly if the goal is also to preserve immigration options, in addition to ensuring the individual is not an enforcement priority. We believe that vacatur for legal error should be effective for removing someone from the enforcement priorities, as it typically is for other immigration case needs. To gauge the effectiveness of other forms of PCR, however, practitioners should confirm local enforcement trends.

V. Continue Best Practices for Representing Immigrant Clients in Criminal Court

In addition to the strategies outlined above, defense attorneys should continue to follow best practices to advise their clients of immigration consequences and defend against detention and deportation triggers, as consistent with their client's priorities. Some of the key best practices are introduced below, but defense attorneys are encouraged to seek local resources and experts for a more thorough understanding and guidance based on local practices and trends.

A. Determine Client's Immigration Priorities.

It is vital to speak with your client about their priorities and goals in resolving their criminal case. In many instances, the client's highest priority may be to preserve their immigration status and avoid potential deportation. A client's goals, however, may sometimes be in conflict with preventing them from becoming a priority for immigration enforcement. The client should always be the one to determine their priorities in their case. **Remember that both the enforcement priorities and the regular immigration analyses require considering all prior convictions as well as current charges.**

²⁰ 559 U.S. 356 (2010).

²¹ For more information, see IDP, *Post-Conviction Relief State Summary Chart: Guide for Select States* (Oct. 2020) at www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Post-Conviction-Relief-State-Summary-Chart-10.2020.pdf.

B. Detainer Advocacy: Avoid or Lift an ICE Detainer

An immigration detainer, or “ICE hold,” is a voluntary request from Immigration and Customs Enforcement (ICE) to a jail or prison to facilitate transfer of custody of a person in the jail’s custody directly to immigration authorities. The detainer requests the current custodian to do two primary things: 1) contact ICE in advance to let them know when the person will be released, and 2) continue detaining that person after they would have been released for up to an additional 48 hours, to give ICE time to arrive and take custody.²²

When a detainer exists, ICE may take custody of the individual even before the criminal case resolves, such as upon payment of bail. The risk of ICE arrest presented by a detainer often affects criminal defense strategy and considerations, such as pre-trial release, bail strategy and ability to participate in diversion programs.

ICE detainers can be lifted or rescinded by ICE at any time while the person is in criminal custody.²³ If the detainer is rescinded, the client can post bail or seek other release from custody without significant worry about being transferred directly to ICE. Under the Johnson memo, ICE’s enforcement priorities apply to all enforcement-related decisions, including issuing and rescinding ICE detainer. Therefore, if a client is not an enforcement priority under the Johnson Memo, but still has an ICE hold, defense and immigration counsel may advocate with ICE to lift the hold.²⁴

Many states and localities have enacted rules limiting or mandating compliance with ICE detainers. The ICE enforcement priorities do not affect law enforcement agencies’ obligations and limitations under applicable local and state laws.²⁵

- Ask the jail for a copy of the detainer.** The detainer states that it is not valid if not served on the person who is the subject of the detainer. If the jail won’t give it to you, try and get it from your client.
- Ask the jail to decline the detainer:** Detainer requests are voluntary.²⁶ Ask the jail to commit to ignoring/declining the detainer request, based on defectiveness of the

²² An annotated ICE detainer form I-247A is available here: <https://www.ilrc.org/annotated-detainer-form-2020>.

²³ “Lifting” a detainer might also be called cancelling, rescinding, or withdrawing.

²⁴ The Johnson memo also states that it does not *require* the arrest, detention or removal of people within the enforcement priority categories, so attempts to lift detainers need not be limited to people who fall outside of priority categories. See Johnson memo at 3, 5.

²⁵ Some states and localities have laws either prohibiting or mandating law enforcement agency compliance with ICE detainer requests.

²⁶ A few states have state laws requiring compliance with ICE detainers, but the detainer creates no federal legal obligations.

detainer,²⁷ local or state law limitations,²⁸ or because the person does not fall under ICE enforcement priorities.

- ❑ **Ask ICE to lift the detainer:** Ask ICE to exercise prosecutorial discretion and lift the detainer. Submit a written request to the local ICE field office explaining why your client does not fit within the priorities, noting positive equities, and requesting that the detainer be lifted. For a sample request, see the appendix.

For advocacy to ICE on behalf of an individual, ICE may require the attorney to enter their appearance in the case by filing Form G-28, so you may want to partner with an immigration attorney who can ‘represent’ a person before ICE. Form G-28 allows representation to be limited to certain matters, such as a request to lift a detainer.

Advocating with ICE may require community pressure in order to get ICE to act.

Partnering with local community groups and organizers can be a tremendous asset.

They may be able to provide support for your client and determine, with your client, whether a public advocacy campaign could help them.

C. Consider Immigration Issues Before Posting Bail.

Consider the existence of a detainer, including whether local law enforcement will cooperate with the detainer request, before proceeding on release on personal recognizance or posting bail. While the existence of a detainer request typically should not affect eligibility for the *granting* of bail or other pretrial release,²⁹ advising the client on whether to post bail may depend on whether or not the client is likely to be arrested by ICE upon release. Speak with an immigration attorney about local practices regarding bail, detainers, and local law enforcement cooperation with ICE to understand how seeking bail and/or release from criminal custody could impact your client.

D. Provide Know Your Rights Information to Client.

Discuss your client’s rights with them, in the event that they are confronted by ICE. In particular, advise on the Fifth Amendment right to remain silent in front of ICE officials, the Fourth

²⁷ For more details on reviewing and analyzing ICE detainers, see: <https://www.ilrc.org/explaining-gonzalez-v-ice-injunction>. For TX attorneys, see: <https://www.ilrc.org/explaining-gonzalez-v-ice-guide-advocates-texas-november-2020>. For more information on some of the legal and constitutional problems with ICE detainers, see: <https://www.ilrc.org/ice-detainers-are-illegal-so-what-does-really-mean>.

²⁸ For initial, but not conclusive, information on how a county is likely to respond to an ICE detainer, see: <http://www.ilrc.org/local-enforcement-map>. Otherwise, ask the sheriff or custodial agency directly about their policy regarding ICE detainers.

²⁹ The detainer form specifically says that it should not be a factor in bail considerations, but judges often take immigration status or the presence of an ICE detainer into account, even if it does not prevent bail eligibility. In some jurisdictions, judges deny release or personal recognizance bonds for individuals who have ICE holds, to avoid immediate transfer to ICE. In other cases, judges consider an ICE detainer as a factor relating to flight risk.

Amendment right against search and seizure if ICE agents come to a person's home without a judicial warrant,³⁰ and other rights.

- Some defender offices distribute “red cards” (cards that assert these rights), to help the client assert their rights if it becomes necessary. To order red cards in bulk, <https://www.ilrc.org/red-cards>
- IDP Know your Rights materials: immdefense.org/kyr
- NIPNLG community resources and advisories: <https://nipnlg.org/practice.html> and <https://nipnlg.org/tools.html>
- ILRC community-facing materials: <https://www.ilrc.org/community-resources>

³⁰ ICE almost never has a judicial warrant; it generally carries an administrative warrant which doesn't give agents the right of entry to a private space. For more information about administrative warrants, see <https://www.ilrc.org/ice-warrants-basics>.

APPENDIX
SAMPLE DETAINER RESCISSION REQUEST FROM A PUBLIC DEFENDER

[Date]

Criminal Alien Program, Dallas County Jail
U.S. Immigration and Customs Enforcement
Department of Homeland Security

Re: Detainer Rescission Request for NAME XXXXXX

Dear Officer:

Pursuant to the January 20, 2021 Memorandum from David Pekoske, Acting Secretary of Homeland Security (hereafter “Pekoske Memo”) and the February 18, 2021 Memorandum from ICE Acting Director Tae Johnson (hereafter “Johnson Memo”), we request the detainer be lifted for Mr. NAME XXXXXX, who is currently detained with the Dallas County Sherriff’s Office.

On January 20, 2021, President Biden issued an Executive Order on civil immigration enforcement policies and priorities, which established new policies for the administration with regard to federal immigration enforcement, and rescinded Executive Order 13768. The Memo established interim immigration enforcement priorities for ICE and all DHS components. Although the portion of the Memo that related to the 100-day moratorium on deportations is currently under injunction in the District Court, the interim priorities are not in any way enjoined by the District Court’s order. In turn, on February 18, 2021, ICE Acting Director Tae Johnson issued an agency-wide memo regarding how ICE will interpret and implement the Pekoske memo.

Under the Johnson Memo, the federal government’s civil immigration enforcement priorities are focused only on certain categories of people. These categories are defined as follows:

1. Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States.
2. Individuals arrested at the border or ports of entry on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020.
3. Individuals pose a threat to public safety AND
 1. who have been convicted of an "aggravated felony," as that term is defined in section 101(a) (43) of the Immigration and Nationality Act; or
 2. who have participated in a criminal street gang or have a gang related conviction.

The custody of Mr. XXX does not adhere to the ICE enforcement priorities outlined in the Johnson Memo. Mr. XXX is a person who is not “engaged in or suspected of terrorism or espionage,” nor do his charges relate to national security. He did not attempt “to unlawfully enter

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the United States on or after November 1, 2020” and was present in the U.S. before that date. Finally, he does not have any aggravated felony or gang convictions, and he has never participated in gang related activity. It should be noted the only charge Mr. XXX could face, Driving with License Invalid, does not fall within the INA definition of an “aggravated felony,” and he has no other criminal history.

The Pekoske and Johnson Memoranda state clearly that these enforcement priorities apply to all discretionary enforcement actions when identifying and detaining noncitizens. This includes any enforcement in a jail setting, such as the issuance of ICE detainers and transfers of individuals into ICE’s custody.

Moreover, Mr. XXX is married to a U.S. citizen, entered on a visa and his family has already contracted an immigration attorney to represent him. He is not a flight risk nor is he a danger to the community.

Mr. XXX is not a threat to national security, he entered the U.S. well before November 1, 2020, and he is not a threat to public safety; thus, we request the Mr. XXXX’s detainer be lifted immediately, as he is no longer a priority for removal under the Pekoske and Johnson Memoranda.

Thank you for your attention to this matter. You may reach me at [email address] or [phone number] if you have any questions.

Sincerely,

Jordan Pollock
Assistant Public Defender/Immigration Specialist
Dallas County Public Defender’s Office