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Advising immigrant clients after President Trump's 1.25.17 Executive Orders: FAQs for criminal defense attorneys

KEY PRACTICE DEVELOPMENT: DONALD TRUMP'S EXECUTIVE ORDERS

On January 25, 2017, President Trump signed two executive orders (EOs) on immigration policy. These orders directed the Department of Homeland Security (DHS) to enlarge the deportation dragnet and further militarize the southern border of the U.S. The administration expanded the group of people who will be priorities for deportation, specifically noting “removable” immigrants who have been accused or convicted of committing criminal offenses. The EOs also reflected a focus on having local law enforcement agencies perform the functions of immigration officers through formal agreements and by denying federal funds to “sanctuary jurisdictions” like New York City that do not comply with requests to help Immigration and Customs Enforcement (ICE) detain and deport immigrants.

Do the EOs change who is legally subject to deportation (i.e. “removable”)?

No. The existing immigration laws dictate who is legally “removable.” Current law allows the federal government to deport people who lack lawful immigration status (i.e. undocumented people) as well as those **with** status (e.g. green card holders, refugees, visa holders) who have certain criminal convictions. The president **cannot redefine who is legally “removable” without an act of Congress.** However, for people who are “removable” under existing law, the policies announced can and do **expand whom immigration authorities will target for deportation.**

Do the EOs change which of my clients ICE will seek to detain and deport?

Yes. Some clients who would not have been ICE enforcement priorities before may now be high priorities for removal, even pre-conviction. **Of note, any “removable” person who has been accused or convicted of a crime is now a priority for deportation.**

Immigration authorities will prioritize deporting the following categories of “removable” people:

- Those with **any criminal conviction(s);**
- Those with **pending criminal charges – even if such charges have not been resolved;**
- Those who have **“committed acts that constitute a chargeable criminal offense;”**
- Those believed by immigration officers to pose a **threat to public safety** or national security;
- Those who have a final order of removal; and
- Those who have engaged in fraud/misrepresentation in applications to government, or who have “abused” public benefits.

For clients currently in the criminal legal system, it is important to note the EO makes **no distinction between the types of crime or level of offenses that will make a person a target for deportation.** Also, it is likely ICE will prioritize people with prior convictions regardless of how long ago the conviction occurred or the level of the prior conviction. Many of the terms used in the EOs are subject to interpretation and appear without definition; advocates will seek clarification and we will update you as we get information.



How should these EOs change my practice?

Because DHS now prioritizes people who have had any contact with the criminal legal system, even those whose charges are still pending, it is more important than ever to seek advice about immigration consequences as early as possible. Criminal defense attorneys are the first line of defense for immigrants, who are not provided with a free attorney in deportation proceedings. You can help “removable” clients by providing them with information about the risk of immigration enforcement and how to prepare. Information on emergency planning for immigrants is available on IDP’s website; see additional resources below for link.

It is also important to remember that information about immigration status and history that clients provide to their defense attorney is privileged and confidential. You should remind clients that you will not divulge this sensitive information without their permission, especially considering the plans for expanded enforcement actions.

Should I keep trying to get clients pleas that reduce (or eliminate, when possible) immigration consequences?

Yes! The executive orders confirm that immigrants with convictions will be targeted as a top priority for deportation. It is crucial to negotiate dispositions that minimize immigration consequences and exposure to enforcement agents. This applies to immigrants **with and without lawful status!** Finding out about your client’s immigration status as soon as possible could help your client exercise their rights in the event of ICE action. In addition, under *Padilla v. Kentucky*, defense attorneys still have a duty to advise clients about the immigration consequences of convictions.

The EO targets people accused or convicted of crimes. If my client pleads guilty to a non-criminal disposition, is s/he safe?

No. Dispositions considered to be minor or even “non-criminal” can make your client a priority for deportation. For example, **DHS considers New York violations to be misdemeanor convictions.** Whether any disposition will be a “safe” resolution depends on your client’s individual history and an analysis of the immigration consequences of the criminal laws of your jurisdiction. If you represent a non-citizen in a criminal matter, consult an immigration attorney, even if the offer is a minor violation, infraction, or another non-criminal outcome, and then advise your client accordingly.

Will these executive orders change how/when ICE issues detainers?

Yes. The previous policy guidance directed Immigration and Customs Enforcement (ICE) to issue detainers only when a person was a priority for removal. The priorities have expanded and now include any “removable” person charged, convicted, or believed to have committed a crime. This means ICE is likely to issue detainers for any clients they identify as “removable.”

My client is “removable.” ICE has issued a detainer. What should I do?

It is best practice to get a copy of the detainer, if possible. Consult an immigration attorney and guidance on local detainer policy to determine how to advise your client about whether s/he would be turned over to ICE upon release (either by paying bail, being ordered released by a



judge, or completing a sentence) from criminal custody. IDP has information about New York City policies and laws available on its website; see additional resources below for link.

Will these executive orders change how NYPD or NYC DOC responds to detainers?

Not necessarily. Detainer laws and policies adopted by local and state governments **remain in effect unless rescinded.** The EO threatens to use financial and other pressure to persuade localities to rescind these laws. Several localities, including New York City, have responded that they will resist this pressure. The New York State Attorney General has issued legal guidance to assist local jurisdictions in shaping local laws and policies to protect immigrants from jail roundups. IDP is working to support New York City and advocates in other places in their efforts to protect immigrants.

Do the orders affect people with DACA (Deferred Action for Childhood Arrivals)?

Not directly. The orders do not address DACA, a program that gave work authorization to undocumented people who came to the U.S. as children. However, if you represent a person with DACA who has been arrested, consult an immigration attorney as soon as possible to discuss the immigration consequences of the arrest and any disposition as well as the risk of immigration enforcement.

Additional resources

- The full text of the January 25, 2017 Executive Orders can be found at whitehouse.gov/briefing-room/presidential-actions/executive-orders. They are entitled, “Border Security and Immigration Enforcement Improvements” and “Enhancing Public Safety in the Interior of the United States.”
- For resources on emergency planning for immigrants at risk of deportation, visit <http://www.immdefense.org/emergency-preparedness/>.
- For guidance on New York City’s detainer law and policies, visit <http://bit.ly/2jenF2k>.
- For an immigration consult, contact IDP at immdefense.org/psc or 212-725-6422.