



Washington Defender Association's Immigration Project
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Trump Administration's 1/25/17 Immigration Enforcement Executive Order

Consult WDA's website for additional information on the issues outlined in this advisory – www.defensenet.org

On January 25, 2017, the President signed an executive order (EOs) expanding the group of people who will now be priorities for deportation.¹ The EO specifically targets “removable” immigrants who have been accused or convicted of criminal offenses. The EO reflects an intent to pressure local law enforcement agencies to act as immigration officers through formal agreements and by attempting to threaten to deny federal funds to “sanctuary jurisdictions” like Seattle that do not comply with requests to assist Immigration and Customs Enforcement (ICE) to detain and deport immigrants.

Does this Executive Order change who is legally subject to deportation (i.e. “removable”)? **No.** The existing immigration law governs who is legally “removable.” It allows deportation of 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 convictions. The president **cannot redefine who is legally “removable” without an act of Congress.** For people who are “removable” under existing law, such as undocumented workers, the policies announced can and do **expand whom immigration authorities will target for placement in removal proceedings and deportation.**

Does this Executive Order change which of my clients ICE will seek to detain and deport? **Yes.** Some clients who would not have been an ICE enforcement priority before will now become so. **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/misrep. in applications to government, or have “abused” public benefits.**

For clients with pending or past charges, it is important to note that **the EO makes no distinction between the types of crime or level of offenses that will make a person a target. It is likely ICE will prioritize people with prior convictions, regardless of how old it is or what it was for.** The Order left many things undefined (e.g., what constitutes a “sanctuary jurisdiction”); advocates are seeking clarification. We will update you as we get information.

Who is *not* a priority under the January 25 interior enforcement EO? Noncitizens in a lawful immigration status who have not been convicted of an offense that makes them removable are not affected. For example, the following

¹ On 2-15-17 the President also signed an additional Executive Order entitled, **[“Border Security and Immigration Enforcement Improvements.”](#)** That order is not discussed in this advisory but is available on the WDA's Immigration Project resources page.

groups (among others) if they are not removable for a prior conviction, are NOT affected unless they *become* removable because of a new conviction: Lawful permanent residents; Asylee or refugee; Temporary Protected Status; DACA (Deferred Action for Childhood Arrivals); Special Immigrant Juvenile; Student or visitor or other temporary visa.

Does this Executive Order change how/when ICE issues detainers and/or Notification Requests? Yes. Previous guidelines directed ICE to act on detainers (Form I-247D) only when a person met the Obama Administration's more limited priorities for removal. The new priorities 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." Courts across the country have ruled that local jails have no authority to detain people post-release for ICE. Doing so constitutes a 4th Amendment violation. ICE notification requests (Form I-247N) are also likely to be filed against your clients.

Does this Executive Order change how Washington jails respond to detainers? Not necessarily. Currently almost all WA jails do NOT hold people post-release on I-247D detainers (they fear liability for 4th amendment violations after court decisions). Although nothing remains certain, this is unlikely to change. Many do, however, notify ICE when person will be released (per I-247N Notification Requests). ICE also attempts to apprehend people by issuing **Administrative Arrest Warrants**. Local jails and law enforcement have no authority to arrest people pursuant to these administrative warrants, although local law enforcement are often unaware of this. Detainer laws and policies adopted by local and state governments **remain in effect unless rescinded**. The order does not change the growing body of caselaw that holds that post-release detention without a federal judicial warrant (based upon probable cause) constitutes a 4th amendment violation. The EO threatens to use financial and other pressure to persuade localities to rescind these laws. Numerous localities are taking steps to resist this pressure. WDAIP is working to support these efforts.

This Executive Order targets people accused or convicted of crimes. If my client pleads guilty to a non-criminal disposition, is she or he safe? Not necessarily. Minor or even "non-criminal" dispositions can make your client a priority for deportation. Whether any disposition will be a "safe" resolution depends on your client's individual history and status. Consult an immigration attorney or the Washington Defender Association Immigration Project (WDAIP), even if the offer is a minor violation, infraction, or will result in another non-criminal outcome.

How does this Executive Order change what criminal defense attorneys should do? Because DHS now prioritizes people who have had any contact with the criminal legal system, even when charges are still pending, it is more critical than ever to seek advice about immigration consequences as early as possible. Criminal defenders are the first line of defense for immigrants, who are not provided 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. Emphasize to clients that information about immigration status that clients provide to a defense attorney is privileged and confidential.

Should I keep trying to negotiate pleas that reduce (or eliminate) 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 that **preserve potential paths to legal status or relief from deportation**. This applies to immigrants **with and without lawful status!** Determining your client's immigration status ASAP will help your client exercise their rights in the event of ICE action. The EO does not change defense council's 6th Amendment duty under *Padilla v. Kentucky*, to advise clients about the immigration consequences of convictions.

My client is "removable." ICE has issued a detainer. What should I do? *Insist on getting a copy of the detainer, if possible.* Some of the forms are titled requests for voluntary notification, and some are voluntary detainer requests. Sometimes they issue administrative "warrants" (which have to be served on the client by an authorized ICE agent) which are not more legally compelling than a detainer. We need to know if the jails start to detain people past their court-determined release date, based on ICE requests alone, because that is unlawful detention.

Do the orders affect people with DACA (Deferred Action for Childhood Arrivals)? Not directly, if they can avoid a disqualifying conviction. DACA has not been cancelled; the EOs do not address DACA. If you represent a person with DACA who has been arrested, consult the WDAIP as soon as to discuss the immigration consequences & risks.