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

I. Introduction

On September 20, 2021, the Secretary of Homeland Security, Alejandro Mayorkas, issued guidelines to the Department of Homeland Security (DHS) enforcement and removal operations.[1] The enforcement priorities laid out by Secretary Mayorkas ("Mayorkas memo") apply to U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection, and U.S. Citizenship and Immigration Services, and went into effect on November 29, 2021.[2]

For criminal defense attorneys, these policy guidelines around immigration enforcement may affect defense strategy and advice to noncitizen clients who are already or may become removable.[3] For example, this includes any client who is undocumented as well as any client with valid immigration status who has or is about to be convicted of certain criminal offenses.

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.[4] 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

[1] *See* Alejandro Mayorkas "Guidelines for the Enforcement of Civil Immigration Law", September 30, 2021, available at https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf.
[2] Several states challenged the legality of the Biden administration's immigration enforcement priorities, but, on June 23, 2023, the Supreme Court held in *United States v. Texas*, 599 U.S. ___ (2023) that states, here Texas and Louisiana, lacked standing. Although the decision did not automatically reinstate the priorities laid out under the Mayorkas Memo, it appears likely that the Biden administration will reinstate these priorities. At the time of updating this advisory, that timeline remains unclear.
[3] 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.
[4] *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.

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 decisions and negotiations in their criminal case may impact their immigration priorities.

The purpose of this advisory is to identify issues and advocacy strategies for defense counsel representing noncitizen clients in light of the Mayorkas memo, specifically in the context of assessing risks of potential immigration enforcement during and after a criminal case.[5]

II. Summary of the New Enforcement Priorities[6]

Effective on November 29, 2021, Secretary Mayorkas instructs ICE officers to prioritize ICE-enforcement-related activities[7], which includes ICE policing, arrest, and detention practices, and removal against people who ICE claims fall into any of the following categories:

1. Threat to National Security - people the agency alleges are involved in terrorism or espionage, or related activities, or who otherwise poses a danger to national security.

2. Threat to Public Safety - "people who pose a *current* threat to public safety, "typically because of serious criminal conduct"

3. Threat to Border Security - people apprehended at the border or a port of entry trying to enter unlawfully and people apprehended in the United States who entered unlawfully after Nov. 1, 2020.

This advisory focuses on the "Public Safety" priority and does not address the others in detail.

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[5] DHS may issue further guidance and clarification on the implementation of this memo, and specific implementation trends are likely to emerge in the coming months and years. Defense attorneys are encouraged to keep abreast of how this might impact the issues identified and strategies included in this advisory.

[6] The new policy went into effect on November 29, 2021. DHS personnel were directed to continue following the interim priorities until that date. For more information on the interim priorities and constraints imposed by the Fifth Circuit's September 15th ruling, see**:** https://www.immigrantdefenseproject.org/wp-content/uploads/2020/10/Advisory-on-BIDEN-Enforcement-Priorities-Criminal-Defenders-LG-Final-Version.pdf; https://www.ilrc.org/enforcement-priorities-litigation-update-september-2021; https://nipnlg.org/PDFs/practitioners/practice_advisories/gen/2021_16September-explainer-5circuit-enforcement.pdf

[7] 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* Mayorkas memo at p. 2.

Details of the "Public Safety" priority:

Assessing whether ICE believes someone is a "current public safety threat" is now within the discretion of ICE officers. This means that under the memo, no particular behavior, criminal conviction, or other conduct should automatically designate someone a "public safety threat," and therefore a priority for enforcement action. This is a departure from the interim memo, which included presumptive categorical priorities for deportation, such as a conviction of an aggravated felony or gang participation.

Instead, Secretary Mayorkas directs ICE officers to use the following undefined "aggravating" and "mitigating" factors in making this determination. This list is provided in the memo, and ICE officers in their discretion may consider other factors, including the "broader public interest":

- Aggravating factors that weigh toward ICE arresting, detaining, or trying to remove an individual:
    - The gravity of the offense and sentence imposed;
    - Nature and degree of harm caused by the offense;
    - Sophistication of the criminal offense;
    - Use or threatened use of a firearm or dangerous weapon;
    - A serious prior criminal record.

- Mitigating factors that weigh in favor of the individual and against ICE arresting, detaining, or trying to deport them:
    - Advanced or tender[8] age;
    - Lengthy presence in the United States;
    - Mental condition that may have contributed to the conduct, physical or mental condition requiring care or treatment;
    - Status as a victim of crime or a witness/victim or party in legal proceedings;
    - Impact of the removal on family in the US, such as loss of caregiver or provider;
    - Whether they are eligible for humanitarian protection or other immigration relief;
    - Military or public service of the noncitizen or their immediate family;
    - Time since an offense and evidence of rehabilitation;
    - Conviction was vacated or expunged;
    - A person's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute.[9]

[8] "Tender age" refers to very young children. This is not defined in the guidelines, but the Office of Refugee and Resettlement and U.S. Border Patrol have most recently defined "tender age" as children who are less than 13 years old.

[9] On October 12, 2021, DHS issued a memo further instructing the department on worksite enforcement actions and protections for exploited workers.

Additionally, the Mayorkas memo directs ICE officers to "obtain and review the entire criminal and administrative record and other investigative information" to assess whether an enforcement action is warranted and states that officers should not rely on the fact of a conviction or a database search alone.

Historically, however, ICE agents have not identified mitigating factors on their own, and advocates are skeptical whether they will affirmatively identify and consider this information. Advocates should be prepared to monitor carefully and present their own evidence of any mitigating factors.

The Mayorkas memo does not prevent ICE officers from arresting noncitizens who do not fall within the broad categories delineated in the memo as priorities for enforcement action.

III. What Has Not Changed

A. Although the Mayorkas memo may shift ICE enforcement practices, immigration law has not changed. This means that whether a person is subject to deportation because of their immigration status or because of a criminal contact, or whether a conviction bars access to an immigration benefit, has not changed. For example, the memo does not change whether a conviction is an "aggravated felony" under immigration law, and whether that conviction subjects your client to deportation. This analysis is governed by the Immigration and Nationality Act (INA) and agency and federal court interpretations of the INA and other relevant statutes. **Thus, individuals who do not appear to fall under the memo's listed priorities may still be vulnerable to arrest and removal from the United States. Similarly, a person who has valid immigration status and does <u>not</u> have a conviction or other factor that subjects them to deportation under immigration law should not be subject to ICE enforcement action, regardless of the memo (although this sometimes needs to be litigated in immigration court).**

B. The Mayorkas memo also does not change the application of *Padilla* to defense counsel. Criminal defense counsel continue to have a duty to advise immigrant clients on the immigration consequences that could stem from a criminal case.[10] As part of the *Padilla* duty, counsel providing immigration advice on criminal cases should consult with immigration experts and remain up-to-date on immigration policy changes to most accurately advise clients.

https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf

[10] See Section VI., infra, for best practices on representing immigrant clients in criminal court.

C. The existing immigration enforcement machinery also 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 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. Although the Mayorkas memo provides guidance to ICE agents about who to prioritize for immigration enforcement action, immigration agents retain broad discretion and use of this deportation machinery.

IV. Criminal Defense Strategies to Reduce Risk of "Public Safety" Enforcement Priority Designation

Criminal defense attorneys can employ several strategies to reduce the risk that their clients who are or become removable will be within the so-called "public safety" enforcement priorities or enhance the arguments for prosecutorial discretion. It's important to note that the "public safety" designation does not track the statutory grounds of removability. Thus, there may sometimes exist a tension between avoiding this designation and avoiding grounds of removability.

The language in the Mayorkas memo makes it clear that ICE agents will determine whether there is "serious criminal conduct," meaning that they may not necessarily rely on the outcome of a criminal case to determine this. The memo lists a set of "aggravating factors" to be considered including the gravity of the offense of conviction and the sentence imposed, the nature and degree of harm caused by the offense, the sophistication of the offense, use or threatened use of a firearm or dangerous weapon, and/or a serious prior criminal record. At the time of this advisory's publication, these terms have not yet been publicly defined by DHS. **Local immigration experts may also understand recent trends in ICE policing, including how the local ICE field office is using their discretion, that could inform the risk analysis.**

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 their hopes to acquire status in the future. <u>This is an individual determination for each client.</u> Seek expert advice for how to handle the criminal case consistent with your client's immigration goals.

A. Identify Clients Who Could Be At Risk

First identify the place of birth of all clients during your first meeting with them to determine if they were born outside the US, whether they are noncitizens and if they could be at risk of an ICE arrest and/or face removal. Once you identify a client who is a noncitizen, reach out to local immigration or *Padilla* counsel for support with advising on the immigration consequences of the case and with identifying whether the client could be considered a priority for arrest, detention, or deportation.

B. Consider the Record of Conviction

Depending on your individual client's situation, there are considerations and strategies about what is part of the record of conviction in their criminal case or otherwise raised in the context of the criminal case. Mitigating whether a noncitizen could be considered a "current threat to public safety" for purposes of arrest or detention may be separate from avoiding or mitigating grounds of removability and could require a different analysis. Sometimes these may be in conflict and you need to speak with your client and an immigration attorney to determine what your client's priorities are.

The "aggravating factors" that may be considered by DHS may appear as part of a plea or sentencing hearing, which would be part of a client's record of conviction. As part of a general immigration strategy and one that may impact whether a client could be deemed an enforcement priority by ICE, best practice is to keep the record of conviction clean as to specific allegations or conduct outside of the statute of conviction. In certain cases, there may be strategic reasons for the record of conviction to include more information and that should be discussed with your client and the immigration attorney advising you on the case. Defense counsel should work with immigration counsel in considering if any of the listed mitigating factors in the Mayorkas memo should be affirmatively allocuted as part of the record of conviction.

C. Consider Firearms and Weapons Charges and Convictions

The Mayorkas memo lists "use or threatened use of a firearm or dangerous weapon" as an aggravating factor militating in support of enforcement action. This could cover any allegations or accusations that involve a firearm or "dangerous weapon", even if criminal charges covering this are not formally brought.[11]

[11] DHS may issue further guidance and clarification on the implementation of this memo, and specific implementation trends are likely to emerge in the coming months and years. Defense attorneys are encouraged to keep abreast of how this might impact the issues identified and strategies included in this advisory.

This consideration is different and broader than the analysis as to whether a conviction falls under the "firearm offense" or other ground of removability, which is a federal circuit and state case law specific-inquiry. Be prepared to strategize with an immigration attorney to mitigate the "firearm or dangerous weapon" factor for enforcement and to avoid a conviction that could trigger grounds of removability, if needed in your client's specific situation.

D. Consider Whether a Conviction Exists For Immigration Purposes

Generally, convictions are not final for immigration purposes until direct appellate rights have been exhausted.[12] Check with local immigration counsel if courts in your jurisdiction have different holdings on conviction finality.

It is unclear from the language of the Mayorkas Memo whether ICE will be aware of a conviction on direct appeal in the context of enforcement actions. **If your client's conviction which may make them removable or fall under the priorities for ICE arrest, detention, or deportation is on direct appeal, make sure your client is aware of the appeal and has information to advocate with ICE that their conviction is not final.** It's important to examine your client's full immigration and criminal history as their current criminal case may not be what could put them at risk of an ICE arrest.

E. Consider Post-Conviction Relief (PCR)

The Mayorkas memo identifies expungement or vacatur as a mitigating factor militating in favor of declining enforcement action. For people whose convictions make them a priority for an ICE arrest, detention, or deportation, vacating or expunging the conviction in criminal court *may* render them no longer a priority for ICE.

Additionally, post-conviction relief (PCR) may remove ICE's basis for believing the individual is removable in the first instance and/or may reopen other opportunities in the client's case such as access to immigration relief or eligibility for affirmative applications. Immigration law has more strict standards to determine whether a disposition can be considered a "conviction" under immigration law for these purposes. The BIA has held that a vacatur of a conviction must be based on legal or procedural error in order to have effect for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). With few exceptions, a vacatur of a conviction based solely on rehabilitative grounds or to avoid immigration consequences will not be deemed valid in immigration court.

[12] *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.

Remember: an expungement or vacatur may impact whether something is considered a conviction for purposes of ICE's enforcement priorities but a separate analysis is necessary to determine whether a vacated conviction remains a "conviction" under the INA in analyzing removability and eligibility for status or relief.

VI. 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 priority, however, may sometimes be in conflict with preventing them from becoming an immigration enforcement *priority*. 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 about removability and access to immigration benefits require considering all prior convictions as well as current charges.**

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.[13] 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.[14] 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. ICE's enforcement priorities apply to all enforcement-related decisions, including issuing and rescinding an ICE detainer.

[13] An annotated ICE detainer form I-247A is available here: https://www.ilrc.org/annotated-detainer-form-2021.
[14] "Lifting" a detainer might also be called cancelling, rescinding, or withdrawing.

Therefore, if a client is not a priority for an ICE enforcement action, but still has an ICE hold, defense and immigration counsel may consider advocating with ICE to lift the hold. The priorities laid out in the Mayorkas memo do not affect law enforcement agencies' obligations and limitations under applicable local and state laws.[15]

- ❑ **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, obtain it from your client.
- ❑ **Ask the jail to decline the detainer:** Detainer requests are voluntary. Ask the jail to commit to ignoring/declining the detainer request, based on defectiveness of the detainer,[16] local or state law limitations,[17] or because the person does not fall under ICE enforcement priorities. You can also submit an equities packet.
- ❑ **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 - especially the mitigating factors listed in the memo - and requesting that the detainer be lifted. ICE often requires 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. Here, 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 your client.

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,[18] advising the client on whether to post bail may depend on whether

[15] Some states and localities have laws either prohibiting or mandating law enforcement agency compliance with ICE detainer requests.
[16] 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.
[17] For initial, but not conclusive, information on how a county is likely to respond to an ICE detainer, see www.ilrc.org/local-enforcement-map. Otherwise, ask the sheriff or custodial agency directly about their policy regarding ICE detainers.
[18] In some jurisdictions, judges deny release or personal recognizance bonds for individuals who have ICE holds, to avoid immediate transfer to ICE.

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 Amendment right against search and seizure if ICE agents come to a person's home without a judicial warrant,[19] 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
- NIP community resources and advisories: https://nipnlg.org/practice.html and https://nipnlg.org/tools.html

[19] 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.