

Executive Order: Enhancing Public Safety in the Interior of the United States

HIGHLIGHTS FOR THE DEFENDER COMMUNITY

On January 25, 2017, President Trump signed an executive order, “Enhancing Public Safety in the Interior of the United States,” (“Order”), which will significantly impact those individuals who are not U.S. citizens and are currently engaged in a criminal or family court matter. Since the executive order does not explicitly withdraw all existing policies of the U.S. Department of Homeland Security (DHS), it is unclear as to how soon DHS and the U.S. Department of Justice (DOJ) will issue revised guidance to DHS field offices regarding implementation of the executive order. However, the defender community should be aware of several aspects of this order that may alter the legal landscape for noncitizen clients and should closely monitor their implementation with the assistance of the Regional Immigration Assistance Centers (RIACs). Below are three specific highlights from the Executive Order that may be of particular interest to defenders.

I. CHANGES TO IMMIGRATION ENFORCEMENT PRIORITIES:

Some noncitizen clients who were not previously a priority for immigration enforcement may now become a high priority for U.S. Immigration and Customs Enforcement (ICE), Customs and Border Protection (CBP) and Border Patrol (BP) immigration officials. It is important to bear in mind that immigration authorities cannot generally “remove” (i.e., deport) a person from the United States unless he/she is in violation of any U.S. immigration laws, (i.e., a lawful permanent resident/green card holder convicted of a certain crime or an individual who entered the U.S. without authorization). However, the Executive Order includes vastly broader categories for immigration enforcement priority as described in both columns of the chart below:

INDIVIDUALS WHO ARE IMMIGRATION ENFORCEMENT PRIORITIES

Those IN VIOLATION of U.S. immigration laws	Those who MAY BE in violation of U.S. immigration laws
<ul style="list-style-type: none">• Subject to removal for criminal grounds of deportation, (i.e., convicted of deportable crimes such as an aggravated felony, controlled substances offense, a crime involving moral turpitude (CIMT), firearm offense, crime of domestic violence, stalking or a crime against child);• Subject to removal for criminal grounds of inadmissibility, (i.e., admission to or conviction of certain CIMTs and controlled substance offenses);• Subject to removal for deportable or inadmissible security-related (i.e., national security) grounds;• Subject to removal for inadmissible grounds related to fraud or misrepresentation; or• Subject to “expedited” removal (i.e., entered the U.S. without inspection within a 2-year period).	<ul style="list-style-type: none">• have been convicted of any criminal offense;• have been charged with any criminal offense, where such charge has not yet been resolved;• have committed acts that constitute a chargeable criminal offense;• have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;• have abused any program related to receipt of public benefits;• are subject to a final removal order, but have not complied with departing the U.S.; or• in the judgement of an immigration officer, otherwise poses a risk to public safety or national security.

“ICE ACCESS” - FEDERAL-STATE/LOCAL COLLABORATIONS AND AGREEMENTS: Defenders should also be aware that the Executive Order reinstates two programs (i.e., the Secure Communities (S-COMM) and the 287(g) Program), developed by DHS to facilitate closer collaboration with local and state law enforcement agencies. These two programs, along with a number of other DHS programs, are managed by immigration authorities under the rubric of the “ICE ACCESS” initiative, (i.e., Immigration and Customs Enforcement Agreements of Cooperation in Communities to Enhance Safety and Security). ICE ACCESS programs are designed to facilitate voluntary collaborative efforts between DHS and local, state and federal law enforcement agencies for the purposes of assisting immigration authorities in identifying, detaining and transferring noncitizens who may be in violation of U.S. immigration laws to the custody of U.S. immigration authorities. Defenders should monitor how local and state law enforcement engage with DHS to determine whether any collaborative enforcement measures are in violation of any client’s, (i.e., U.S. citizens and noncitizen clients alike), constitutional and/or other legal rights.

The **ICE ACCESS** initiative includes, but is not limited to, several of the following collaborative programs, some of which are currently in operation (i.e., as indicated by the (*)), as mentioned below:

Secure Communities (S-Comm): Currently, any clients who are fingerprinted for criminal or civil (i.e., family court matters) routinely have their prints sent to the NY State Division of Criminal Justice Services (DCJS) to be searched against the NCIC database. These fingerprints are shared routinely between the FBI and DHS. In the past, DHS developed the Priority Enforcement Program (PEP) which would instruct immigration enforcement authorities to pursue specific categories of noncitizens for purposes of civil detention and/or removal. The recently issued Executive Order replaces PEP with S-Comm which requires that any noncitizen who is arrested for a crime or minor violation, ((i.e., regardless of immigration status, guilt or innocence, the seriousness of the charge or lack of prior criminal history), and/or alleged to have engaged in any type of criminal activity should be considered for immigration enforcement purposes (i.e., as identified in the chart above). We are also aware that those fingerprints sent to DCJS in response to civil family court matters (i.e., involving guardianship, custody, etc.) are also subject to referral to DHS for immigration enforcement purposes. Defenders should be consulting with the RIACs to properly advise clients as to how a particular arrest, fingerprinting requirement, court admission to criminal activity and/or disposition may potentially trigger immigration enforcement despite the actual outcome/disposition reached in a criminal or family court matter.

287(g) Program: Section 287(g) of the Immigration and Nationality Act allows an actual shift of authority from the federal government to state and local law enforcement officers to enforce U.S. immigration laws by way of formal agreement accompanied by training or by way of voluntary participation. This would allow state or local law enforcement to be “deputized” to enforce U.S. immigration laws. However, without any formal agreement between DHS and the local or state law enforcement agency, any violations in law (i.e., civil, constitutional, etc.) committed by the state or local law enforcement agency during their collaboration with DHS may leave them open to legal liability. It is our understanding that State Police, New York Parks Police and NY State Environmental authorities have been recently advised that they should continue to follow a 2014 New York State police that instructs them NOT to inquire as to immigration status at the time of initial contact with an individual. Defenders should continue to carefully review how any client is encountered by law enforcement authorities, particularly if it relates to any collaborative enforcement measures between local and state law enforcement and DHS.

***Cross Customs Designation:** This program allows certain law enforcement agencies to be selected and trained as DHS CBP Customs Officers which authorizes the trained law enforcement entity to conducted searches of persons and/or places on behalf of CBP. Currently, this program is in effect in various geographic areas that share a land border with Canada (i.e., such as the Akwesasne (i.e., St. Regis Mohawk) Reservation where local officers have been trained and issued “Cross Customs” designation authority).

***ICE Criminal Alien Program (ICE CAP):** ICE CAP officers are responsible for developing relationships with local and state law enforcement and other agencies to expedite the process of identifying, detaining and transferring individuals to the custody of DHS for immigration enforcement purposes. For instance, ICE CAP officers currently collect arrest dockets from various local county jails, court dockets from specific court houses and other information from various state and local agencies to identify noncitizens for possible immigration enforcement purposes. It is our understanding that ICE CAP officers can reach any local jail or state prison throughout NYS within a max. 2-hour period. ICE CAP officers also work closely with NYS DOCCS to identify any noncitizens in state custody for referral to the Institutional Removal Program (i.e., immigration court hearing process) that is located in Fishkill, Ulster and Bedford Hill Correctional Facilities. Defenders should work with the RIACs to determine the extent, if any, to which an ICE CAP officer is or may become involved in a client’s criminal and/or family court matter.

***ICE Detainers Requests (ICE “Holds”):** ICE CAP officers will often issue immigration detainers (“holds”) to ensure that the local jail or state facility will notify DHS in advance of any release of a noncitizen to the community (i.e., including release on bail, supervision, completion of a sentence or Shock program, parole, probation or even acquittal, etc.) or will hold an individual until ICE can effectuate transfer of a noncitizen to immigration custody. Only upon notification of the release of a noncitizen will DHS make the final determination as to whether the individual should be subject to immigration enforcement and/or transfer to DHS custody. A detainer (“hold”) is a request from ICE to a jail or prison to provide DHS with advance notice of a noncitizen’s release from the jail/prison, ((i.e., Form I-247N, Immigration Advisal – Request for Notification). The detainer (“hold”) can also include a request to the jail/prison to maintain custody of a noncitizen for up to a period of 48 hours, (i.e., excluding weekends and federal holidays), in order to allow for ICE to determine whether transfer to ICE custody is necessary, (i.e., Form I-247D, Immigration Detainer – Request for Action). Neither of these immigration forms are judicial warrants for arrest. Also, neither of these forms guarantee that an individual will be transferred to immigration custody or subject to removal from the United States. Defenders should immediately contact the local facility when a noncitizen is in custody to determine whether there are any “warrants or holds” against their detained clients and should contact the RIACs to determine how the ICE detainer may impact bail, plea negotiations, sentencing alternatives, appeals and post-conviction relief and the ability of a client to engage in a pending family court matter. In addition, defenders should ensure that jails are providing their clients with a copy of the immigration detainer as specified on Form I-247N. Most importantly, RIACs should be notified when a facility or state prison refuses to immediately release an individual who is subject to a Form I-247N Detainer or refuses to release an individual beyond the mandatory 48-hour period, (i.e., excluding weekends and federal holidays) who is subjected to a Form I-247D Detainer.

***REPAT (Removal of Eligible Parolees Accepted for Transfer):** ICE works with NYS DOCCS to identify noncitizens who may be approved by NYS DOCCS for early release/parole in order to expedite their transfer to ICE custody to effectuate removal from the United States. Any noncitizen client currently in state custody who wish to be considered for early release must, at minimum, agree to waive any rights of appeal on a criminal matter and must agree to accept a final order of removal from the United States. Noncitizen clients interested in seeking this option should understand that any subsequent return to the U.S. is highly unlikely and that any efforts to return to the U.S. without authorization will subject him/her to federal prosecution for attempting illegal entry following removal from the U.S.

***Special ICE Task Force Operations:** DHS Task Forces exist to establish collaborative information-sharing efforts with local, state and federal law enforcement agencies to target particular groups of noncitizens which include, but are not limited to, **Operation Community Shield** targeting alleged gang activities involving noncitizens; **Operation Predator** targeting noncitizens suspected of or convicted of a sex offenses accompanied by DHS access to the NYS Sex Offender Registry and **Operation Firewall** targeting cybercrime activities). Defenders, with the assistance of the RIACs, should advise noncitizen clients as to how noncitizens may be identified for immigration enforcement by these designated Task Force Operations.

***Law Enforcement Support Center (LESC):** A DHS Center that provides assistance to local, state and federal law enforcement as to the immigration status and identity information of those in contact with law enforcement.

***State Criminal Alien Assistance Program (SCAAP):** This program provides limited financial support and assistance to those facilities that actively contribute to gathering information and transferring individuals to the custody of DHS (i.e., such as the NYS DOCCS).

***Informal Law Enforcement Collaborations:** Informal voluntary collaborations, unsupported by DHS agreements and/or specialized training programs, may exist among various agencies and/or individuals. Defenders should be aware of the circumstances supporting any level of DHS influence in any criminal and/or family court proceeding and work with the RIACs to determine how to best address this issue within the context of representing his/her client.

II. CONCERN OF “SANCTUARY” JURISDICTIONS:

The Executive Order also empowers the U.S. Attorney General (AG) to take enforcement actions against any entity in violation of 8 USC §1373 (i.e., regarding communication between government agencies and DHS or maintaining a policy, law or practice that will hinder federal immigration enforcement). A weekly publication listing DHS criminal actions committed by noncitizens and any jurisdiction failing to honor ICE detainers/“holds” is expected. Defenders should be aware that misconceptions exist as to what actions qualify as “sanctuary” and should seek the guidance of the RIACs for more information.

III. INCREASED PROSECUTION OF IMMIGRATION VIOLATORS:

The Executive Order calls for increased federal prosecution and law enforcement resources to be devoted to criminal immigration prosecutions (i.e., such as smuggling, harboring, unauthorized entry, illegal entry following removal, misuse of visas, fraud, and other offenses). Defenders should continue to treat any immigration-related information provided by his/her client as privileged particularly if such information could potentially result in a client’s self-incrimination.

DEFENDER PROTOCOL RECOMMENDATIONS

Despite recent measures to increase interior immigration enforcement, not every individual referred to DHS will be subjected to removal from the U.S. Thus, attorneys representing persons who are not U.S. citizens, particularly those involved in criminal proceedings, should continue to maintain strict compliance with the Supreme Court’s mandate in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), in advising their clients as to immigration consequences resulting from a plea/conviction.

- *Gather and document immigration-related information through privileged communications with a client.*
- *Determine whether a client is a “priority” for immigration enforcement purposes (as described above).*
- *Contact a Regional Immigration Assistance Center (RIAC) located nearest you for expert legal advice and assistance. (i.e., visit <https://www.ils.ny.gov/content/regional-immigration-assistance-centers> for RIAC brochures and contact information).*
- *Determine the impact, if any, of any informal law enforcement collaborations resulting in DHS client referral.*
- *Determine if a DHS detainer/“hold” has been lodged and the impact, if any, of the detainer/“hold” at each stage of a client’s criminal or family court proceeding.*
- *Assess and advise a client as to the immigration consequences that may impact each critical stage of a criminal or family court proceeding with expert legal assistance from a designated RIAC.*
- *Seek informed consideration of any mitigating immigration-related information in support of a client’s best interest, when applicable.*