



Advising immigrant clients after the 2016 presidential election: FAQs for criminal defense attorneys

For non-citizens in the criminal legal system, defenders are the first – and sometimes only – guard against devastating immigration consequences. This FAQ provides information about how the announced policies of President-Elect Trump affect the practice of defense attorneys in this transition period. IDP will continue to create and update advisories as we get more information.

What has President-elect Trump said he will do when in office?

He has promised to (1) immediately and dramatically increase the number of people deported, particularly those with criminal histories; and (2) end President Obama's executive action programs like DACA (Deferred Action for Childhood Arrivals) that provide work authorization and protection against deportation to undocumented people brought to the U.S. as children.

What does he have the power to change and when would these changes happen?

- The existing immigration laws dictate who is legally removable and which convictions subject people to deportation or prevent them from eligibility to remain in the U.S. President-elect Trump **cannot redefine who is removable without an act of Congress.**
- However, for people removable under existing law, the Trump administration **can implement policies to expand which categories of people to target for actual deportation.** Some advisors to President-elect Trump have said he may prioritize detaining and deporting removable people accused, but not yet convicted, of crimes. Any policy change can happen immediately after inauguration on January 20, 2017 but not before then.
- President-elect Trump **can eliminate DACA** once inaugurated on January 20, 2017.

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

Yes! Since President-elect Trump will focus on deporting removable immigrants with convictions, it is even more crucial to negotiate dispositions that minimize immigration consequences and exposure to enforcement agents. This applies to immigrants **with and without lawful status!** Your advice may even help clients with prior orders of deportation 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.

Who is at risk of being deported once President-elect Trump takes office? Are my clients with lawful status (like green card holders, refugees, or people here on valid visas) safe?

Trump has focused public remarks on deporting people without lawful status. But under federal immigration law, **those with lawful status can also be at risk of deportation** – now and under the new administration – based on certain criminal convictions or conduct. We do not have enough concrete information to know how broad a deportation dragnet Trump will create. However, we expect criminal dispositions will be a significant factor in determining those the federal government pursues for detention and deportation going forward. It is crucial to complete individual analyses to determine the risk of deportation for each client.

President-elect Trump said he's focusing on "criminal aliens." If my undocumented client pleads guilty to a non-criminal disposition, is s/he safe?

The immigration law, not state law, controls which dispositions will be considered convictions for immigration purposes. As a result, **minor dispositions are not always safe for immigration.**

Whether any disposition will be a “safe” resolution depends on your client’s facts and an analysis of the immigration consequences of the 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.

What should I do about clients who have DACA or are eligible for it?

President-elect Trump has announced his intention to eliminate DACA. However, we do not know when or how that may happen. There is a possibility that people already granted DACA will not lose their status immediately. Until there is more clarity, it is crucial to refer clients who have DACA or are currently eligible for DACA to an immigration attorney, as any immigration applications filed now risk exposing clients to arrest and deportation.

Should I continue to avoid dispositions that make my clients an enforcement priority under the current Priority Enforcement Program (PEP)?

Yes. The current enforcement priorities under President Obama remain in force until President-elect Trump takes office and implements any changes. Continue to avoid dispositions that make removable clients a current enforcement priority or expose them to enforcement agents. After the inauguration, President-elect Trump will likely broaden priorities, but we cannot be certain how or when. IDP will issue advisories as soon as we learn more about any changes.

What should I tell immigrant clients who are afraid of enforcement right now?

IDP has produced Know Your Rights materials for people who may encounter immigration enforcement (ICE) agents, accessible on our website via this link: <http://bit.ly/2g1nK6T>. Also posted there are emergency planning materials for those at risk of deportation (e.g. undocumented; lawful status but deportable conviction), including an Action Plan created by Make the Road NY.

Will President-elect Trump change local or state detainer laws or policies?

Detainer laws and policies adopted by local and state governments **remain in effect unless rescinded.** President-elect Trump has said he will use financial and other pressure to persuade localities to rescind these laws. Several localities have responded that they will resist this pressure. IDP is working to support New York City and advocates in other places in their efforts to protect immigrants.

What should I tell clients who want to apply for immigration status or citizenship?

Clients should be strongly advised to consult with a reputable attorney experienced in criminal immigration law before submitting any immigration applications. Clients should also be warned to avoid relying on “notarios” or attorneys who advise them to file applications without warning about the risk of triggering removal proceedings. If your client is removable (for example, because of a conviction) or ineligible for an immigration benefit, then **submitting an application could trigger removal proceedings.**

Do I need to change my advice to clients about traveling abroad?

Continue to counsel clients that traveling with an open criminal case is not advisable and will likely become even riskier after January 19, 2017. Advise removable clients that if they travel abroad they risk being put in to removal proceedings or denied admission. For clients who have received “advance parole” permission to travel abroad, confirm with an immigration attorney that it is still safe for them to travel and ensure they plan to return to the U.S. before January 19, 2017.