

EXPLAINER

DEPARTMENT OF HOMELAND SECURITY (DHS) ENFORCEMENT OF DEPORTATION PRIORITIES

On September 30, the Department of Homeland Security (DHS) issued a memo on its immigration “enforcement priorities” – creating **three main categories** of people who will be targeted for arrest, detention, and deportation. **This Memo went into effect on November 29, 2021** and will replace the prior memos issued by the Biden administration on its detention and deportation priorities. (ICE has separate policies on [“Protected Areas”](#) and [Courthouses](#) that are not covered in this explainer).

Keep in mind:

- **The categories are very open-ended.** On one hand, this means that within each category, there are possibilities to show Immigration and Customs Enforcement (ICE) why you are not a “priority.” We have done our best to explain the categories and highlight things that ICE may be sympathetic to in deciding what to do in your case. On the other hand, it also gives ICE power to make up the rules around these categories as they go.
- **ICE applies the rules inconsistently.** ICE Field Offices in different locations have a history of applying the priorities differently. Some ICE Field Offices created a catch-all “Other/Priority 4” category to justify enforcement against those who fall outside the priority categories, especially those they believed posed a “public safety threat.” This may happen in the future and we need to monitor the situation on the ground to understand what your local field office is doing.
- **In the past, when ICE acted in conflict with such categories, they did not give a real explanation.** For example, when ICE denied release requests for people in detention based on the interim priorities, most people did not receive a real explanation of why their request was denied.
- **DHS said it will open a case review process.** This process is for cases where DHS takes action against someone, and the person wants to challenge their deportation or detention under this memo. However, no further details about the case review process have been released yet.
- **Some states have filed legal challenges against this memo.** Several states (Arizona, Montana, Texas, and Ohio) have sued the federal government to try and stop them from implementing this memo. For now, the memo is still in effect but these lawsuits could impact the policy in the future. The lawsuits do not change how field offices operate in the states that sued.

CATEGORY 1: THREAT TO NATIONAL SECURITY

What does the policy say?

DHS will target people that are believed to engage in, or are suspected of spying, terrorism, or related activities. This category also includes people who “pos[e] a danger to national security,” but the policy doesn’t give any more detail than that.

What does that actually mean?

In the past, the government’s “national security” actions have targeted Muslim and South Asian immigrants, including through racial profiling and illegal surveillance. There are cases where ICE makes allegations to go after people in these communities, or go after people who may have crossed paths with suspected national security threats. This can be a difficult category to challenge because ICE’s definition of national security is very vague.

CATEGORY 2: THREAT TO PUBLIC SAFETY

What does the policy say?

DHS will target people who they believe are a “current threat to public safety, typically because of serious criminal conduct.” However, ICE is supposed to consider the “totality of the facts and circumstances,” including negative and positive factors before deciding to take action against someone. That means the agency should not go off of someone’s criminal record alone.

FACTORS THAT CAN WORK AGAINST YOUR CASE	FACTORS THAT CAN WORK IN FAVOR OF YOUR CASE
<ul style="list-style-type: none">• “Seriousness” of the crime;• Degree of harm the conduct caused;• “Sophistication” of the crime (i.e., the amount of planning, intent, and resources that went into committing the crime, as well as the number of people involved);• Use or threat to use a gun or other weapon;• Person’s prior record of serious convictions.	<ul style="list-style-type: none">• Age (if a person is young or elderly);• Long presence in the United States;• Mental condition that contributed to the person committing the conduct (like PTSD, cognitive disabilities, or other mental illness);• Mental or physical health condition that requires care or treatment;• Being a victim, witness, or being a part of other legal proceedings;• Impact of the person’s deportation on family members in the United States;• Eligibility for immigration relief;• Military or public service of the person or their immediate family members (parents, spouse, or children);• Time since the offense and evidence of rehabilitation (such as completion of classes, attendance at AA or NA, etc.);• Conviction was expunged or invalidated

What does that actually mean?

Previous ICE policies identified certain types of convictions that automatically put someone in a priority category. This new policy moves away from using specific crimes alone as the basis for deportation and focuses on giving ICE officers “discretion”—freedom to use their own judgment, using the factors above to guide them. This creates opportunities to highlight factors in favor of your case. But in the past, ICE has used increased discretion to arrest, detain and deport more people in the name of “public safety.” Under the Obama administration, ICE’s “discretion” resulted in hundreds of thousands of our community members being deported. If you have a past conviction or convictions, an ICE officer might not fully consider your full situation and overemphasize your record, and ultimately still choose to target you even if you have many positive factors in your favor.

There are still possibilities. Look closely at the factors in the second list—factors that work in your favor—and highlight those aspects of your situation in detail if you are currently facing deportation or face deportation in the future. Case campaigns and advocacy in individual cases will be important to put pressure on the administration and hold them accountable to this policy.

CATEGORY 3: THREAT TO BORDER SECURITY

What does the policy say?

DHS will continue to deport people who are stopped by CBP or ICE at the border or other entry point, as well as people who are arrested by ICE anywhere in the U.S. and ICE finds that they entered the country without permission after November 1, 2020. The policy also reserves the right to pursue other so-called border security cases, but for these cases, they say that ICE will use a similar “totality of the facts and circumstances” approach in Category 2.

What does that actually mean?

This category focuses on people who, moving forward, are arrested crossing the border or at another entry point, and those who entered after November 1, 2020. This is one of the most clear cut parts of the policy. The less well-defined “border security” cases may include cases such as those where ICE alleges that someone is connected to a smuggling or trafficking operation across borders.

For additional information on the priorities, check out [NIPNLG's Quick FAQ](#).

For organizer resources on how to request prosecutorial discretion and pursue a PD campaign, check out [Just Futures Law and Mijente's Deportation Defense Toolkit](#).

For further information and advocacy strategies to challenge these deportation priorities, see [NIPNLG](#), [ILRC](#), and [IDP practice advisories](#).