



An Investigation Into the Biden Administration's Enforcement Priorities: Analysis Reveals the Administration is Not Following Its Own Guidelines

Freedom for Immigrants is a national nonprofit working to abolish the U.S immigration detention system. We conducted an investigation into Immigration and Customs Enforcement's (ICE) implementation of its interim enforcement priorities through a survey of people inside immigration detention. We found that the priorities have already had lasting and harmful consequences for immigrants of varied backgrounds and circumstances, and their families, including those with longstanding ties to the United States and US-born citizen children. We also found that, even with the administration's broad enforcement priorities, the agency fails to adhere to its stated priorities and continues to arrest and detain people who do not meet the criteria. We recognize the effort and risk that goes into immigrants in ICE custody calling us to share and document this information, and we appreciate the bravery and courage of those who have shared their experience while detained in the U.S. immigration system.

BACKGROUND ON THE BIDEN ADMINISTRATION'S IMMIGRATION ENFORCEMENT PRIORITIES

On January 20th, the Acting Secretary of the Department of Homeland Security (DHS) issued a memorandum announcing a review of DHS's enforcement policies and practices.¹ The memo, among other things, laid out interim priorities for the enforcement of immigration laws to remain in effect for a period of 100 days until the Secretary issues new guidelines as part of a comprehensive review. Specifically, the enforcement priorities focused on 1) Individuals who have engaged in or are suspected of terrorism or espionage 2) individuals incarcerated within federal, state and local prisons and jails released on or after January 20, 2021, who have been convicted of an "aggravated felony," and 3) individuals who arrived in the United States after November 20, 2020 without immigration documents. On February 18th, the Acting Director of Immigration and Customs Enforcement (ICE) issued a memo outlining interim guidance to its field offices on how to apply these DHS enforcement priorities. The new guidance rescinded the requirement that the aggravated felony prioritization only apply to people apprehended on or after January 20 and clarified that ICE agents have full discretion to arrest and detain people irrespective of the priorities, effectively walking back the two elements that would have created the largest reduction in detention and deportation numbers.² As the 100-day review period draws to a close, Freedom for Immigrants is releasing new data to show the impact the administration's interim-priorities have had on people whose lives are directly affected by these policies, and the way that rank and file ICE agents are implementing the policies on the ground. This data and the accompanying personal testimonies should be reviewed and considered as

¹ https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf

² https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim_guidance.pdf

the administration moves to adopt standing enforcement priorities in the days and weeks ahead.

METHODOLOGY

Freedom for Immigrants (FFI) launched a survey through the Freedom for Immigrants National Detention Hotline³ to collect quantitative and qualitative data to analyze who ICE was arrested and detained following the issuance of the interim enforcement priorities. Between February 1 and April 15, each caller was offered the opportunity to participate in the survey and ninety-six (96) callers agreed to participate in the survey. The majority of the people who contact the Freedom for Immigrants National Hotline have been detained for longer periods of time than the average length of detention; approximately 48 percent of people we work with are held in immigration detention for 2 to 4 years.⁴ Comparatively, on average, an individual is held in ICE custody for an average of 55 days.⁵ However, noncitizens who are deported within a short time frame skew this data.⁶

OUR FINDINGS

(1) Less than half of the people surveyed in immigration detention were convicted of an aggravated felony.

Both the DHS and ICE memos use the term “aggravated felonies” to define and determine who are “threats,” and thus, who the agency will prioritize for detention and deportation. The concept of an “aggravated felony” was invented by Congress in 1988 in the Anti-Drug Abuse Act signed into law by President Reagan to combat narcotics trafficking. Subsequent legislation—specifically two laws passed in 1996 under President Clinton—and case law has greatly expanded the definition of an “aggravated felony,” and therefore, who is subject to deportation. Since their inception, these laws were deeply steeped in racism which vilified Black people and contributed to the rise of mass incarceration of communities of color. In fact, Black immigrants make up only 7.2 percent of the noncitizen population in the U.S., yet make up 20.3 percent of immigrants in detention on criminal grounds.⁷ Today, the definition of an “aggravated felony” covers more than thirty types of offenses, including theft, filing a false tax return, and failing to appear in court.⁸

³ The Freedom for Immigrants National Detention Hotline is a dedicated phone line where immigrants in ICE detention, as well as their loved ones or advocates, can reach FFI trained volunteers to report abuse and conditions inside ICE facilities.

⁴ Detention by the numbers, *Freedom for Immigrants*, available at:

<https://www.freedomforimmigrants.org/detention-statistics>

⁵ “Immigration Detention in the United States by Agency,” American Immigration Council, January 2, 2020, available at: <https://www.americanimmigrationcouncil.org/research/immigration-detention-united-states-agency>

⁶ Ibid.

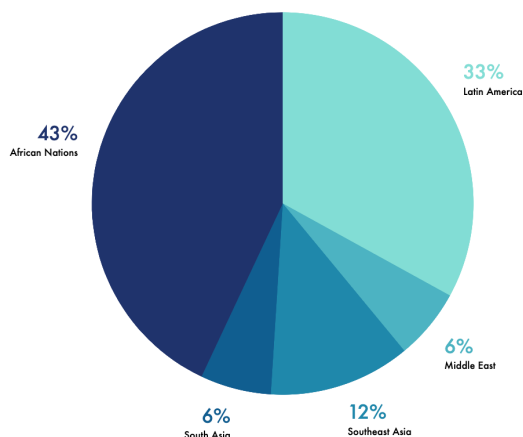
⁷ “The State of Black Immigrants,” Black Alliance for Just Immigration (BAJI), available here:

<http://baji.org/wp-content/uploads/2020/03/sobi-fullreport-jan22.pdf>

⁸ *Aggravated Felonies: An Overview*, The American Immigration Council, available at:

<https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview>

Countries of Origin of Those Convicted of Aggravated Felonies



“Aggravated felonies” is an overly broad and arbitrary category that is deeply steeped in racism and should not guide the agency’s enforcement priorities. The criminal legal system disproportionately impacts Black immigrants and other immigrants of color, meaning harsh aggravated felony provisions disproportionately harm these communities, too.⁹ The use of such an ill-defined category allows

for it to be enforced with wide discretion, ensuring that Black and brown immigrants are disproportionately affected by deportation. Of the individuals who had been convicted of an aggravated felony, almost half (43 percent) were born in African nations, 33 percent were born in Latin America, 12 percent were born in Southeast Asia, and 6 percent were born in the Middle East.

Despite this administration’s prioritization of people with “aggravated felonies,” Freedom for Immigrants found that **of the 96 individuals who completed the survey, less than half (43 percent) had been convicted of an aggravated felony under immigration law.** Aggravated felony convictions punish people twice for the same offense and carry extremely cruel consequences that not only affect individuals but families and communities. The Biden administration should abandon the “aggravated felony” category.

(2) Nearly half of the people convicted of an aggravated felony were not convicted for a violent offense.¹⁰

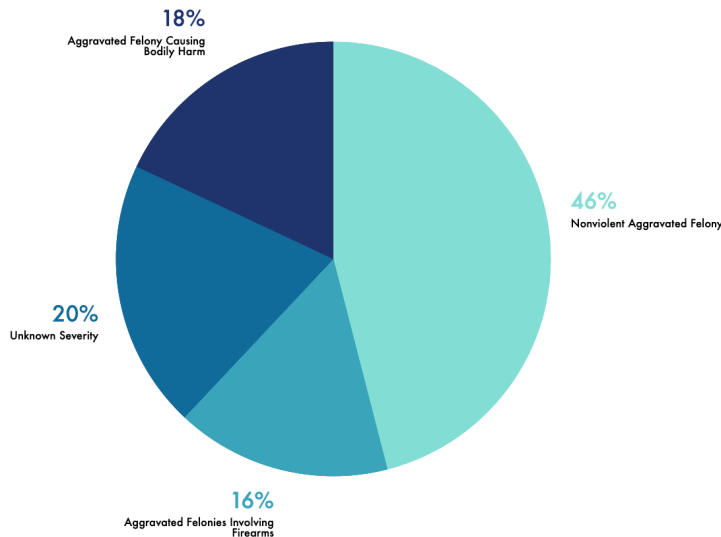
In the public narrative, violent offenses tend to be associated with Black, Indigenous, people of color—this is especially evident in the ways the Trump Administration spoke about immigrants and the many ways politicians have spoken about crime and “superpredators.” The label of the “violent offender” is a racist notion that suggests that “risk” lives within people. People are not the sum of their mistakes and the presumption that someone who will be released from jail will

⁹ “Aggravated Felonies and the Harmful Exclusion of People from Immigration Relief,” National Immigration Project National Lawyers Guild and Immigrant Justice Network, available at: https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2021_21Apr_aggravated-felonies.pdf

¹⁰ In this section, we define “violent offense” as crimes in which a person experienced bodily harm.

cause harm suggests that regardless of what they do to rehabilitate, they are destined to cause

Types of Aggravated Felonies



harm. People convicted of violent offenses have among the lowest rates of recidivism, illustrating again that people who have been convicted of a violent act are not inherently violent and can succeed in the community.¹¹ It is also important to note that the staggering number of citizens and non-citizens incarcerated for violent offenses is due in most part to the lengthy sentences given out to people convicted of violent crimes, rather than the rate at which violent crimes are committed.¹²

Of the 43 percent of survey participants who were convicted of an aggravated felony, nearly half were

convicted for non-violent crimes, such as B.N., C.O., and D.E., whose stories are outlined below.

In contrast, only 13 percent of participants were convicted of crimes in which a person experienced bodily harm. And most of these convictions occurred many years prior. For example, our data shows that 43 percent of the participants who had an aggravated felony, committed the crime over 5 years ago.

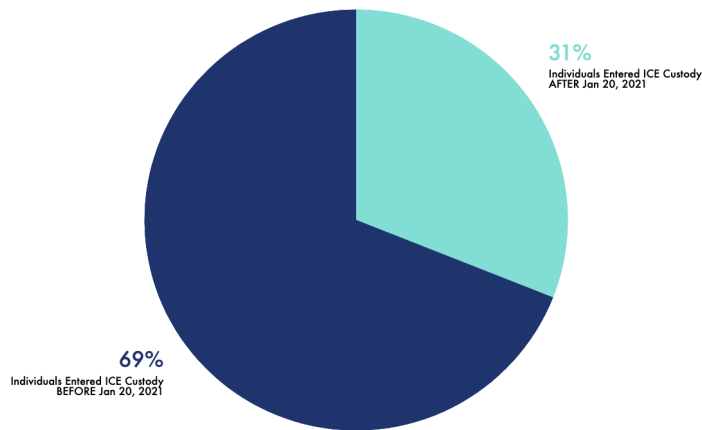
(3) Nearly three-fourths of the people surveyed in immigration detention had been detained under the Trump administration.

The initial DHS memo issued on Jan. 20 prioritized arresting people who had entered the country after November 20, 2020. Presumably, the administration was trying to send an important message to the community that the Biden administration would not honor all of the arrests made under the Trump Administration. However, most of our callers, and indeed the majority of people who participated in this survey, were put into detention by the previous regime.

¹¹ "Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms," Alexi Jones, April 2020, available here: <https://www.prisonpolicy.org/reports/violence.html>.

¹² Ibid.

Individuals Entering ICE Custody



In fact, 69 percent of survey participants were in ICE custody before January 20, 2021. These individuals were detained under an administration that had expansive and all encompassing priorities that placed a target on the backs of all immigrants. This was especially evident when the Acting ICE Director under the Trump Administration, Thomas Homan, said in an interview that undocumented immigrants “should be afraid,” making it very clear that any undocumented person could be arrested and face deportation proceedings at any time.¹³ Many of these individuals we surveyed have been detained for long periods of time like F.G. who

has been in ICE custody for 3 years and 7 months. Under the initial January 20 memo, the vast majority of the participants in our study did not fit under the current administration’s priorities and were eligible for release. But with the subsequent memo issued by the ICE director on Feb 18 undid the eligibility of release for so many people, leaving them stuck in ICE prisons and jails.

PARTICIPANT’S’ NARRATIVES

ICE’s failure to adhere to its own enforcement priorities combined with the current enforcement priorities’ vague and overly broad guidelines has affected many members of our community. We include a few stories to illustrate the real-life effects of these devastating policies and practices and their implementation in real-time.

Narrative #1 A.M. came to the United States when he was only 14 years old, with his family, in search of a better life. He is now 33 years old and has lived in this country for 19 years—most of his life. His parents are both legal permanent residents and his sister became a U.S. citizen. Due to poverty and lack of institutional support, he joined a gang as a teenager, but has since dropped out. Approximately five years ago, A.M. was arrested and charged with assault with a semiautomatic weapon. While incarcerated he received his Associate’s Degree in Business and Social and Behavioral Studies. He then applied to a highly competitive Bachelor’s program in his prison, and he was one of the ten inmates selected to study for a degree in Organizational Studies through Pitzer College. In October 2020, he was going to be released to his family. His family had taken off days at work to pick him up and to reunite as a family. Suddenly, an

¹³ “ICE director: Undocumented immigrants ‘should be afraid,’” Tal Kopan, CNN, June 16, 2017, available here: <https://www.cnn.com/2017/06/16/politics/ice-immigrants-should-be-afraid-homan>

immigration officer interviewed A.M. at the prison and told him that he was going to be transferred to ICE custody. **A.M. was detained by ICE under the Trump administration and would not have been a priority for detention under the initial January 20 memo. Additionally, despite the evidence of rehabilitation, ICE still refuses to release him.**

Narrative #2 B.N. came to the United States from Jamaica at the age of 19. He's lived in California for 20 years and his mother, brother, sister are all United States citizens. He has a U.S. citizen daughter who he has not seen for six years. In 2015, during a routine traffic stop, B.N. was pulled over by the police. The police officer searched his car and found marijuana in his possession. The officer also said that B.N. was in possession of a firearm even though the authorities did not find the firearm in his car or in his apartment. B.N. reported that the officers also charged him with money laundering even though B.N. said that was not true. B.. reports that officers stacked on fake charges on his record and states "out of one arrest, they gave me 8 felony charges and I was found guilty for 7. That is what they do. The officers go along with the lies because I am Black." As a result, B.N. was charged with possession of a firearm, drug trafficking, and money laundering and was arrested while at the post-office. B.N. was in prison for five years and on his release date in 2020, ICE picked him up from jail and transferred him into ICE custody. He has been in ICE detention for over a year. **As a Black man in the United States, B.N. was racially-profiled, stacked on false charges, and convicted of an aggravated felony showing the arbitrary and racist impact of this category. B.N. was also detained by ICE under the Trump administration and would not have been a priority for detention had elements of the initial January 20 memo not been modified by the administration.**

Narrative #3 C.O. came to the United States from Jamaica at the age of 9 years old to be reunited with his mother and grandmother who were already living here. He is now 52-years-old and has spent 45 years living in New York, practically his whole life. He has three U.S. born children who are his "pride and joy." He supported his mother and father who both live in the United States and his mother suffers from a brain tumor. In 1995, C.O. was arrested for possession because he was in the company of a person who had narcotics and they charged them both. He served one year in jail and was paroled. When he was released, ICE picked him up and he fought his case for 5 months and was released. C.O. worked for about 20 years and then in 2014 he violated a restraining order by sending a gift to his son for his birthday; C.O. was on probation for two years. He resettled in New Jersey and got married. In 2019, while arriving home from physical therapy, ICE raided his home, claiming that they had been looking for him for seven years and that they had a federal warrant. This was odd to C.O. because he was able to renew his green card and had had the same address. C.O. has been in detention for over a year and a half. **C.O. was charged with an aggravated felony that was over 25 years old, highlighting the importance of having a washout period to ensure that convictions that happened a long time ago do not continue to harm people. C.O. was also detained by ICE under the Trump administration and therefore would not have been a priority for detention had the initial January 20 memo remained in effect in its entirety.**

Narrative #4 D.E. came to the United States at the age of 15 years old as a refugee, and eventually adjusted his status to a green card holder. His parents fled Laos to go to a refugee

camp in Thailand, but he is neither a citizen of Laos nor Thailand because his parents moved as refugees. He is now 42-years-old and has spent 27 years living in the United States—most of his life. About nine years ago, D.E. was arrested, charged and convicted of possession with intent to sell in the state of Alaska. He was in prison for 9 years and was released from prison in February 2021 where ICE picked him up at the prison and transferred him into ICE custody. **D.E. was charged with an aggravated felony nine years ago for a nonviolent offense, showing the impact of the administration’s decision to use a category as broad and arbitrary as an “aggravated felony” conviction.**

Narrative #5 F.G. came to the United States from Haiti at the age of 15 years old as a lawful permanent resident in 1988. He is now 48 years-years-old and has lived in this country for 33 years—most of his life. His mother and sister are both U.S. citizens. F.G. grew up in New Jersey, went to high school there and built a life for himself and his four U.S. born children who are now adults. In May 2002, he was present when a fight broke which turned into a shooting and someone died. F.G. was arrested for homicide, tried before a jury, and convicted of reckless manslaughter and served more than 18 years behind bars. F.G. remade himself over the following two decades and accepted what he did was wrong and now wishes to become a mentor to other young men of color. F.G. hopes to rejoin his family and his deep community ties. After serving time, he was transferred from federal prison to ICE detention in September 2017 and he has been detained for a total of 3 years and 7 months. He has not been home nor seen his children since 2001. **F.G. was charged with an aggravated felony 19 years ago, highlighting the importance of having a washout period to ensure that convictions that happened a long time ago do not continue to harm people today. Despite the evidence of rehabilitation, ICE still refuses to release him.**

Narrative #6 H.I. arrived in the United States at the age of 5 years old. He and his family fled from Vietnam and arrived in California in 1980. He arrived in the United States at the age of 5 years old in August 1980. He is now 46-years-old and has spent 41 years living in the United States, practically his whole life. He has a daughter that's 27 years old and has not held her or hugged her in 25 years. His father also recently had a stroke and is worried that he will die before he gets released. In 1996, he was convicted of a serious/violent aggravated felony and served time in jail for 25 years. In February 2021, his release date, he was detained by ICE and transferred into ICE custody. **H.I. was charged with an aggravated felony 24 years ago, highlighting the importance of having a washout period to ensure that convictions that happened a long time ago do not continue to harm people today.**

RECOMMENDATIONS AND CONCLUSION

As the Biden administration moves to issue new, standing enforcement priorities, we urge the Department to utilize narrowly defined enforcement categories that do not rely on broad and expansive definitions of “public safety” that have been punitive, harmful and have targeted the Black and brown immigrant community. This should be accompanied by a washout period to ensure that convictions extending far into the past do not continue to harm people, and allow for their continued rehabilitation and reintegration. We strongly urge that the Biden administration honor the messages sent to the immigrant community and not endorse the prior

administration's flawed arrests by readopting the requirement that the public safety priority only apply to people taken into ICE custody after January 20, as outlined in the initial DHS memo.

The responsibility for implementation lies squarely with the administration—DHS and ICE officials and leadership must ensure that all of their rank and file officers comply with Department and agency policies. For this reason, we urge the rescission of the policies outlined in the Feb. 18 ICE memo that further broadened the enforcement priorities and granted ICE officers broad authority to arrest and detain people outside of the priorities.

Specifically, we recommend DHS:

1. Abandon the “aggravated felony” offense as an indicator to determine “public safety risk.”
2. Abandon the use of gang-related allegations to determine public safety.
3. Utilize a washout period to exclude outdated convictions from its assessments.
4. Listen to and include the feedback of those directly impacted by ICE’s enforcement priorities.