Practical Removal Skills: Throwing Wrenches in the Government's Deportation Machine*

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INTRODUCTION

In this advisory, we provide a toolbox of wrenches to effectively defend your client in removal proceedings by challenging the Immigration Court's jurisdiction, challenging the Notice to Appear (NTA), challenging service of the NTA, denying the charges, pursuing discovery, and filing motions to suppress and subpoena. In doing so, we hold the government to its burden of proof, and we prepare for the strongest wrench in the deportation machine—appeal.

DENYING PROPER SERVICE AND/OR CHARGES

* This practice advisory is an update of the original version published in the *2019 AILA Fall Removal Conference Handbook.* The original version was written by Jan Joseph Bejar, Geoffrey J. Heeren, and Amber L. Weeks. It was previously updated in 2020 by Jeremy McKinney, Susan G. Roy, Michael Sharma-Crawford and Valerie Zukin.

The Notice to Appear

The U.S. Department of Homeland Security (DHS) commences removal proceedings in Immigration Court by serving a respondent with a charging document called a Notice to Appear (NTA).[1] The current version of the NTA is a form document, which contains the following sections that are essentially calculated to meet the legal requirements of INA §239(a) and 8 CFR §1003.15(b):

- A series of checkboxes stating whether DHS alleges that the respondent is:
  - an "arriving alien,"
  - an "alien present without having been admitted or paroled," or
  - a non-citizen who has been admitted or paroled but who is deportable
- A series of factual allegations
- Legal charge(s)
- The time and date for a removal hearing
- Certification of service.

Although NTAs are supposed to state the time and place for the upcoming removal hearing, they rarely do; instead, respondents typically receive notice of an upcoming master calendar hearing via a separate notice of hearing. Whether the failure to state the time and date for a removal hearing on the NTA constitutes a basis for seeking termination based on the logic of the U.S. Supreme Court case, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), is addressed in detail below. Because of *Pereira*, the government has sometimes issued NTAs with "fake" hearing dates, so if an NTA states a time and date for a hearing, it is a best practice to call the Immigration Court to confirm whether or not it is a real hearing.

In addition, it is important to remember that jurisdiction only vests with the Immigration Court after the NTA has been filed with the Court. Service on the Respondent is not enough to place the individual in removal proceedings.[2] Moreover, in some cases there may be more than one NTA—the client may have been served with two, DHS may have two, but DHS only filed one NTA with the Immigration Court. This can impact eligibility for several forms of relief, especially asylum and cancellation of removal, so it is a good practice to always make sure that the parties are all referencing the *same* NTA.

Master Calendar Hearings

The initial hearing in Immigration Court is known as the Master calendar hearings. These hearings are typically brief and involve responding to the allegations and charges in the NTA, which is known as "pleading", some preliminary discussion of relief, the scheduling of another master calendar or a merits, aka "individual calendar," hearing, and some discussion of what the merits will involve. In some cases, it can turn into a factual hearing concerning the client's removability or a legal argument concerning the client's removability or eligibility for relief.

[1] INA §239.
[2] *See Matter of Ordaz*, 26 I&N Dec. 637 (BIA 2015).

It is important to review the allegations in the NTA with your client in advance of a master calendar hearing. Pleading to allegations without discussing them with your client is never a good idea, since it is difficult to withdraw a concession once made by an attorney. You might be able to challenge the NTA, which can result in termination of the removal proceedings if DHS cannot prove the allegations, and in some cases there may be important strategic benefits short of termination reasons to do so—even if it is just a technical challenge that will just result in reissuance of a new NTA. For example, delay may allow your client to meet the residency requirement for cancellation of removal, which requires continuous residence for a certain period prior to service with an NTA. Conceding an allegation that your client entered without being inspected and admitted or paroled can result in them being ineligible for adjustment of status if that form of relief presents itself in the future.

Most immigration judges now require written pleadings in advance of or at the master calendar. The Immigration Court Practice Manual contains a sample written pleading and instructions on how to complete it.[3] In cases in which you think there is a basis for termination (see below), it is also possible to file a written motion to terminate, and it is often a best practice to do so.

Note that in cases where you are seeking a change of venue, the immigration judge (IJ) may require that you concede proper service of the NTA, and enter pleadings and concede removability as well, as a part of the motion to change venue, before the motion will be granted. Therefore, you should discuss this issue with your client prior to asking the Court to change venue.

Most immigration courts now allow, and in some cases require, master calendar hearings to be held telephonically, and in some cases the Respondent's appearance is waived. Attorneys should check the website for the Immigration Court where the hearing is scheduled to see if there are standing orders regarding in person and telephonic appearances, and also call the court clerk or the clerk for the immigration judge before whom the hearing is scheduled to determine what is required.

The Burden of Proof in Removal Proceedings

Before addressing the process and bases for denying the charges in an NTA, review the burden of proof in removal proceedings, as there are different burdens of proof depending on whether or not the NTA charges the person with being inadmissible or deportable. Regardless of the basis of the charge, DHS always bears the burden of proof on the question of alienage.[4] A respondent's admission of foreign birth is sufficient for DHS to meet this burden.[5] If the person is charged with being deportable, under INA Section 237, DHS has the burden of proving all the factual allegations by clear and convincing evidence.[6] In cases involving arriving aliens and other allegedly inadmissible non-citizens, the burden shifts to the respondent to show admissibility once DHS

[3] Please note the template in the Practice Manual "concedes proper service" of the NTA. *See* Appendix L, Immigration Judge Practice Manual, accessed on May 9, 2022 at www.justice.gov/eoir/page/file/1258536/download at p.222. Do not adopt this language if service was improper or the putative NTA does not conform with statutory or regulatory requirements.

[4] 8 CFR §1240.8(c); *Murphy v. INS*, 54 F.3d 605, 608–09 (9th Cir. 1995).

[5] *Matter of Benitez*, 19 I&N Dec. 173, 175 (BIA 1984).

[6] *Woodby v. INS*, 385 U.S. 276 (1966); INA §240(c)(3); 8 CFR §1240.8(a).

establishes alienage.[7] Once removability is resolved, the respondent has the burden of demonstrating prima facie eligibility for any relief being sought.[8]

Procedural Challenges to the NTA: Read Before You Plead

Careful review of the NTA is the starting point. The initial question is whether the document is a legally sufficient NTA.

First, was the NTA issued by an authorized officer or supervisor?[9] As reflected on the certificate of service, respondents are often served with NTAs by agents or adjudicatory officers unauthorized to issue an NTA. The key is the identity of the "issuing" official, as provided at the bottom right of page one. Does the NTA fully identify this individual? Is there a signature? Was the NTA signed *by* an authorized official and not *for* an authorized official? This crucial information may create an argument for termination. In *Kohli v. Gonzales*, the petitioner argued that the lack of a legible signature wholly deprived the immigration court of jurisdiction. The Ninth Circuit rejected this argument and held that there is no regulatory requirement that the signature be legible or that the NTA give the title of the issuing officer.[10] It may be worth revisiting this argument in light of the Supreme Court decisions in *Pereira v. Sessions*[11] and *Niz-Chavez v. Garland*[12] regarding the effect of an NTA which fails to comply with the statutory and regulatory requirements for Notices to Appeal. The purpose of the regulation is to ensure individuals are not placed into removal proceedings by someone lacking authorization, and so the lack of a signature or legible identification of the issuing official is evidence of a potential regulatory violation—and the launching point for further inquiry.

Second, was there proper service?[13] The NTA must be served on the respondent either in person or by mail. If service was not lawfully accomplished but the respondent nevertheless has learned of a hearing date (for example, a person may call the Executive Office for Immigration Review (EOIR) hotline and get surprising news), a motion to terminate proceedings may be in order. However, there is no clear authority for this in immigration court. Courts generally lack jurisdiction if there has been improper service, and it is possible to submit a "motion to terminate" along with a special appearance for the limited purpose of contesting service of process, without the appearance constituting a concession to the court's jurisdiction.[14] Respondents who have never been properly served would be within their rights to not appear for a removal hearing. However, taking this tactic involves a very high degree of risk, as it may result in the issuance of an in absentia order. Where notice is sent to a respondent's last known address, a rebuttable presumption of receipt exists.[15] DHS is no longer required to send notice via certified mail, so it will only have proof that service was not accomplished if it is returned via the post office. The chances seem

[7] INA §240(c)(2); 8 CFR §§1240.8(b) and (c).
[8] INA §240(c)(4)(A).
[9] 8 CFR §239.1.
[10] *Kohli v. Gonzales*, 473 F.3d 1061, 1067-68 (9th Cir. 2007).
[11] 138 S. Ct. 2105 (2018).
[12] 141 S. Ct. 1474 (2021).
[13] Service may be accomplished in person, by mail, or to the respondent's attorney of record. *See* INA § 239(a)(1); 8 CFR § 1003.13.
[14] *See, e.g., Diaber v. Con/Chem, Inc.*, 57 Ill. App. 3d 918, 373 N.E.2d 805 (Ill. App. Ct. 5th Dist. 1978).
[15] *Lopes v. Gonzales*, 468 F.3d 81, 84–85 (2d Cir. 2006).

unacceptably high that either the Post Office will not return an unserved NTA to DHS, or that even if it does so, the DHS attorney in court will not realize this occurred or will choose not to volunteer this information to the court. It is clear that failure to have received an NTA (or a hearing notice) can be a basis for reopening an *in absentia* order of removal,[16] but prior to the issuance of a removal order, the respondent should, if possible, file a motion to terminate the proceedings based on lack of proper service.

Third, does the NTA contain all the specific statutorily required information? NTAs routinely fall short of statutory and regulatory standards beyond the hearing date/time.[17] If the NTA does not contain all of the information specified in INA § 239(a), the document arguably is insufficient to initiate removal proceedings.

Most courts to have considered the question have held that the lack of statutorily-required information on the NTA is not a jurisdictional defect but instead is a violation of a "claims processing rule" which can be waived if the Respondent fails to timely assert the issue.[18] It is also unclear whether DHS can amend or reissue a procedurally insufficient NTA to cure a defect without the proceedings being terminated.[19] This is done with the issuance of an I-261, Additional Charges of Removability. An I-261 can be served on the Respondent during a hearing in Immigration Court, but then the IJ must provide counsel additional time to discuss the new/additional allegations and/or charges with the client.

Sometimes denying service (*i.e.*, you can deny service not based on failure to properly serve your client with the NTA, but instead on the basis that the NTA itself was not a valid NTA[20]), can be an effective part of a broader strategy of contesting the government's charges.[21]

If the case is terminated because DHS has failed to meet its burden of proof regarding deportability, it should be considered an adjudication on the merits, and DHS may not be able to simply re-file an NTA with the same charges, because the doctrine of claim preclusion bars DHS from bringing the same charges or alleging the same facts as it did in prior proceedings, or from bringing charges or raising facts that could have been included in previous proceedings.[22]

Substantive Challenges to the NTA

[16] *Lopes*, 468 F.3d at 84.
[17] INA § 239(a) expressly requires the NTA to contain the nature of the proceedings; the legal authority; factual allegations; grounds of removability; the ability to be represented; notice of obligation to inform the court of address changes; consequences of failing to appear; and the time/place of hearing.
[18] *See generally Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019).
[19] *See, e.g., Dormescar v. U.S. Att'y Gen.*, 690 F.3d 1258, 1269 (11th Cir. 2012) (the regulations permit DHS to amend an NTA to reflect that proceedings are based on deportability rather than inadmissibility).
[20] Rodriguez v. Garland, 15 F.4th 351 (5th Cir. 2021)
[21] AILA members such as Michael Sharma-Crawford and David Antón Armendáriz have developed and successfully pursued a strategy of denying service.
[22] *See Oyeniran v. Holder*, 672 F.3d 800, 806-07 (9th Cir. 2012); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009). *But see Matter of Jasso Arangure*, 27 I&N Dec. 178 (BIA 2017) (res judicata did not bar a second proceeding after the first was terminated in respondent's favor where the second proceeding involved a different aggravated felony category than in the first case).

There may also be substantive grounds for challenging an NTA, and this section gives a quick overview of some of them. Each could be subject to its own practice advisory (and some have); this section is designed merely to provide a quick overview and not detailed treatment.

First, evidence, including evidence of alienage, obtained through an illegal or unconstitutional search, may be subject to suppression. In such a case, the respondent can seek suppression of the improper evidence instead of pleading to the charges, and also seek termination based on the argument that without the suppressed evidence, DHS cannot meet its burden of proof. More detailed information on suppression follows in a section devoted to that topic, below.

Another substantive basis for termination exists where the charge of removal cannot be sustained, for example because a crime that the person committed does not meet the legal definition of an aggravated felony or crime involving moral turpitude. In such a case, the respondent might admit a factual allegation that the respondent has been convicted of an offense but deny the legal charge that the offense constitutes a ground of removal.

Last, it is possible to seek termination where a conviction that formed the basis for the case has been reversed on appeal or through a post-conviction petition. In that instance, the respondent would deny the factual allegation concerning a conviction and also deny the legal charge.

USING PEREIRA & NIZ-CHAVEZ TO CHALLENGE THE GOVERNMENT'S CASE

On June 21, 2018, the Supreme Court decided *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), holding that NTAs failing to specify the time and place of removal proceedings cannot trigger the stop-time rule for non-lawful permanent resident (LPR) cancellation. *Pereira* reasons that "[a] putative notice to appear that fails to designate the specific time or place of the noncitizen's removal proceedings is not a 'notice to appear under section 1229(a)[INA §239(a)]…."[23] Subsequently, in *Niz-Chavez v. Garland*, the Court reiterated that holding and clarified that the deficiency is not addressed by the subsequent service of a Notice of Hearing containing the missing information. [24]

The Board of Immigration Appeals (BIA or Board) subsequently held that the failure to state the time and place of removal proceedings is not a jurisdictional flaw that creates a basis for terminating proceedings,[25] and that decision has been largely upheld by U.S. Courts of Appeals.[26] However, despite the Board's ruling, some IJs have continued to terminate removal proceedings under a claims-processing rule analysis and based upon a timely objection to the NTA.[27, 28]

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[23] 138 S.Ct. 2105, 2113-14 (2018).
[24] *Supra*, n. 12
[25] *Matter of Arambula-Bravo*, 28 I&N Dec. 388 (BIA 2021), *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018).
[26] *Ortiz-Santiago v. Barr*, 924 F.3d 956 (7th Cir. 2019), *Uceda-Alvares v. U.S. Att'y Gen.*, 848 Fed.Appx. 379 (11th Cir. 2021), *United States v. Cortez*, 930 F.3d 350 (4th Cir. 2019), *Hernandez-Perez v. Whitaker*, 911 F.3d 305 (6th Cir. 2018), *Karingithi v. Whitaker*, 913 F.3d 1158 (9th Cir. 2019), *Goncalves Pontes v. Barr*, 938 F.3d 1 (1st Cir. 2019).
[27] *See Ortiz-Santiago v. Barr*, 924 F.3d 956, 963 (7th Cir. 2019) (noting that INA §239(a)(1)(G)(i) says nothing about the agency's jurisdiction and thus constitutes a claims-processing, not a jurisdictional rule).
[28] The panelists note that the Board of Immigration Appeals held oral argument on February 25, 2022 on a case involving termination of proceedings under a claims-processing theory; however, at the time of publication of this practice advisory a decision is yet to be issued.

PURSUING DISCOVERY

Most courts, including most administrative courts, have rules of discovery allowing for each side to obtain relevant information from the other side before trial.[29] Such rules often allow for the same discovery methods to be used in an administrative proceeding as under the Federal Rules of Civil Procedure: interrogatories, requests to admit, document production, and depositions.[30] In contrast, discovery provisions for immigration court are limited. Nonetheless, a creative practitioner can still utilize the rules that exist to their client's advantage.

First, non-citizens have a statutory right to view the unclassified evidence against them.[31] The U.S. Court of Appeals for the Ninth Circuit has interpreted INA §240(c)(2) as requiring DHS to turn over a respondent's "A file" in removal proceedings absent unusual circumstances.[32] However, DHS has decided to only follow *Dent* in the Ninth Circuit, and it appears that in many cases it is not even following it there.[33]

There is a right under the INA to seek subpoenas from an IJ, INA §240(b)(1), and under the regulations to take depositions, 8 CFR §1003.35. Unfortunately, the provisions have odd and antiquated wording. The deposition provision seems to only contemplate "evidence depositions" to preserve testimony for a hearing, rather than "discovery depositions" to learn about witnesses before trial.[34] It also presumes that it will be an "official" taking the deposition, rather than the respondent's attorney.[35] The subpoena provision also includes an exhaustion requirement that the party seeking a subpoena "show affirmatively that he or she has made diligent effort, without success, to produce" the witness or documents.[36] It also seems to contemplate only that a person appears to testify in court, rather than at a deposition outside of court.[37] The provisions are difficult to enforce if witnesses fail to comply; the regulation provides that if a witness fails to appear, the IJ may refer the matter to the United States Attorney to seek the aid of the district court in requiring the witness to appear.[38] Last, there is even bad case law suggesting that DHS is not subject to subpoenas.[39] Nonetheless, advocates have had success with pursuing discovery pursuant to these

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[29] *See, e.g.*, 28 CFR §§68.1, 68.18–25 (allowing for discovery in Department of Justice proceedings concerning sanctions on employers for knowingly hiring an unauthorized worker).
[30] *See, e.g.*, United States Tax Court, Rules of Practice and Procedure, Rule 70(b).
[31] INA §240a(b)(4)(B) (providing that non-citizens in removal proceedings are entitled to "a reasonable opportunity to examine the evidence against" them); INA §240(c)(2) (non-citizens "shall have access to [their] visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to. . .admission or presence in the United States.")
[32] *Dent v. Holder*, 627 F.3d 365, 369 (9th Cir. 2010).
[33] For more information about how to use Dent, *see* American Immigration Council, "Practice Advisory: Dent v. Holder and Strategies for Obtaining Documents from the Government During Removal Proceedings" (June 12, 2012), *available at* https://www.americanimmigrationcouncil.org/practice_advisory/dent-v-holder-and-strategies-obtaining-documents-during-removal-proceedings (last accessed Aug. 22, 2019).
[34] 8 CFR §1003.35(a) (2014).
[35] *Id.*
[36] 8 CFR §1003.35(b)(2).
[37] 8 CFR §1003.35(b)(3).
[38] 8 CFR §§1003.35(b)(6), 1287.4(d) (2014).
[39] *Matter of S-*, 5 I&N Dec. 60, 61 (BIA 1953) ("The issuance of a subpoena by a hearing officer requiring the production of information from records of the Department of Justice (of which the Service is a part) is not authorized by law.")

provisions, and they should do so. Some IJs—particularly those who have practiced in other settings—may be receptive to requests for discovery.

The Immigration Court Practice Manual contains what is essentially a mandatory disclosure requirement, requiring the parties to file a witness list and all proposed exhibits fifteen days prior to a merits hearing.[40] In cases where DHS fails to comply with this provision and later attempts to call witnesses or submit evidence, attorneys should move to bar the witnesses or strike the evidence as being in violation of the Practice Manual.

Realistically, most discovery in immigration court is via the Freedom of Information Act (FOIA).[41] FOIA provides a right to seek government documents, subject to nine statutory exceptions.[42] U.S. Citizenship and Immigration Services (USCIS) is the custodian of the A file, and the simplest FOIA is to file a request directly with USCIS for the entire A file, using the form it has established for this purpose, the G-639. It is also possible to file a FOIA directly with one of the various other DHS sub-agencies, such as U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), or the Office of Biometric Identity Management (OBIM).

OBIM retains all fingerprint data. Each time an individual is fingerprinted that data is stored with OBIM. A potential response may have apprehensions and applications to USCIS or DOS collated together.

EOIR also maintains its own separate file, which is also subject to FOIA. An EOIR FOIA is necessary in examining the court history of a case. This is invaluable and necessary when trying to determine the validity of a motion to reopen an absentia order. A judge's order may or may not be included in an A file.

Counsel can continue to file FOIA requests with EOIR. However, in an effort to streamline and speed up the process of retrieving a copy of the client's Record of Proceedings (ROP), EOIR has implemented a new system designed specifically to obtain a copy of the ROP.

"Request for ROP" is a request made directly to the immigration court or BIA for a copy of the ROP. The "Request for ROP" process is focused on providing each party to proceedings and people with a specific legal relationship to a party with a copy of the file. Both processes will provide you with the portions of your file that you request, subject to legal restrictions that apply.

To receive a copy of an ROP through the "Request for ROP" process, an attorney should file a Form EOIR-59, "Certification and Release of Records," along with a G-28. To utilize this process, you must be the person who is the subject of the ROP or be someone with a specific legal relationship with that person, such as the person's attorney, or a parent or guardian of a minor respondent, Be advised that DHS attorneys are also eligible to receive a copy of files related to cases in which they represent DHS, and therefore it is extremely important to ensure that you have

[40] Immigration Court Practice Manual, §§3.3(b)(i)(A), (g), 4.16(b).
[41] 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.
[42] 5 USC §552.

a complete copy of the ROP, especially if you were not the original attorney, or if your client was pro se at some point during the proceedings.

Note that when you file a "Request for ROP," you will receive a response directly from the court or the BIA, whereas when filing a FOIA request, you will receive a response from the Office of the General Counsel's FOIA Service Center only after the Service Center processes the request, makes a request to the relevant court or BIA for the file, and receives the file from the court or BIA.

FOIA in the immigration context is subject to a host of problems, including lengthy delays, heavy redaction, the dispersion of records among multiple sub-agencies, and a problematic appeals process. Nonetheless, it is a best practice to FOIA all client records in any removal defense case.

When utilizing FOIA for discovery of the A file, remember that USCIS uses a three-track, first-in/first-out (FIFO) processing system.

- **Track 1**: Is for less complex cases in which a requester needs only one or only a few specific documents from the file. If you are seeking the NTA, I-261 or even the I-213, begin with a request to the OCC Duty Attorney for those documents. You will need a G28 to request documents from OCC because they believe that USCIS "owns" the file, thus you must demonstrate your representation with a G28 not an EOIR 28.

- **Track 2**: Is for more complex cases. A complete copy of a file, requests from the news media, or special interest groups are examples of Track 2 cases. If USCIS (the National Records Center) receives a request for specific documents which implies most of the file (for instance, "the asylum application and all supporting documents,") they will assign the request to the complex track. This is the manner to make a non-emergency request for a clients or potential client's complete (as much as will be given) A-file. Remember that USCIS will not release documents they deem to belong to ICE that are contained in the A-file. That request will be forwarded to ICE and the requester will receive an email and password to open those documents ICE saw fit to release. That email from ICE may come many months after the original FOIA request was sent to USCIS.

- **Track 3**: Is an accelerated track for cases involving individuals who are to appear before an immigration judge. In order to receive Track 3 priority processing, you must include one of the following documents with the FOIA request:

    - Form I-862, Notice to Appear, documenting a future scheduled date of the subject's hearing before the immigration judge; or
    - Form I-122, Order to Show Cause, documenting a future scheduled date of the subject's hearing before the immigration judge; or
    - Form I-863, Notice of Referral to IJ; or
    - A written notice of continuation of a future scheduled hearing before the immigration judge.

Again, here a conversation with OCC in front of the IJ about which document you are looking for may be fruitful. As an example, if you are seeking old applications or evidence for your client pursuant to INA §245(i), a conversation in court on the record about the necessity for those documents may spur their release by OCC without having to resort to a FOIA request.

Sometimes the client does not remember whether they were given an A#, or what that number is, and has no documents containing the A#. Trying to obtain records via a FOIA request without an A# is often fruitless. A practical tip is to take your client's fingerprints and file an Identity History Summary Check with the FBI, because often this is the fastest and most reliable way to obtain your client's A#. As this can now be done electronically, you may receive the results in as little as two weeks. Another way to request records without an A# for clients who may have had past encounters with DHS is by filing a FOIA request with OBIM with fingerprints—an OBIM FOIA may reveal encounters that do not appear on FBI Identity History Summary Checks.

SUPPRESSION MOTION: CHALLENGING THE I-213 AND STOP

A motion to suppress in Immigration Court is rooted in a claim that the evidence obtained by DHS and used to commence the removal proceeding was obtained in violation of the respondent's rights under the Fourth and Fifth Amendments. As an initial matter, the respondent should file a suppression motion instead of responding to the factual allegations and charge(s) of removability, because responding to the allegations may well moot out any claim that the evidence in support of the allegations should be suppressed. However, be aware that a successful suppression motion will not result in any immigration benefit for your client, and at most may lead to a termination or dismissal of the proceedings. So if your client has a meritorious application for relief in removal proceedings, it may be counterproductive to seek termination or dismissal of those proceedings.

Suppression motions can be directed not only to the actions of ICE personnel but to local law enforcement as well. Certainly, the actions of an ICE officer who enters a residence without consent are ripe to be suppressed, but information obtained by local law enforcement who stops a driver based on skin color and then surrenders that driver to ICE may also be suppressible as the fruit of a poisonous tree.

It is counsel's job to take a detailed statement from their client and to locate the documents, if any, which support the narrative of events and the claimed violation. In some cases, the absence of documents may be as telling as an actual report. A local law enforcement officer who arrests a non-citizen but does not issue a citation or write a report may telegraph the true nature of that encounter though the absence of the detritus of standard police procedure. Counsel should be prepared to seek police reports, tickets, even the 911 communications of the officers involved. This is especially true where ICE and local law enforcement work in concert. An I-213 that omits the number of agents present at an arrest may be equally suspicious. A thorough questioning of your client and any witnesses and an understanding of their perspective may allow you to see missing details.

Challenging the Stop: Egregious Violations

Government authorities must have sufficient probable cause in order to justifiably "seize" a person and subject that person to custodial interrogation. Probable cause exists where "'the facts and

circumstances within the officer's knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed [by the person to be arrested]."[43] In the Ninth Circuit, immigration officials must make an effort to determine not only an individual's citizenship, but also whether the individual is lawfully present in the United States before they can make an arrest. Immigration officers may only make an arrest when they "have reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States." "'[R]easonable suspicion is defined as 'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" [44] Defendants in criminal proceedings can seek to suppress evidence obtained through a search and seizure or interrogation following a search and seizure which lacked probable cause.

The Supreme Court has determined that the exclusionary rule generally does not apply in the deportation context because the costs of applying this rule in deportation proceedings outweigh the benefits.[45] However, it limited the sweep of its holding by stating "[w]e do not deal here with egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained...."[46] The U.S. Court of Appeals for the Ninth Circuit recognized the egregious violation exception outlined in *Lopez-Mendoza* and stated that "although as a general matter the exclusionary rule does not apply in deportation (and some other types of administrative) hearings, under the clearly established law of this circuit evidence must be suppressed if it was obtained through an egregious violation of the Fourth Amendment."[47]

The law in the U.S. Court of Appeals for the Second Circuit is similar. "Suppression of evidence is warranted in removal proceedings if the record establishes an egregious constitutional violation."[48] . "A constitutional violation may be egregious… if the stop was based on race.", and "[I]f the petitioner offers an affidavit that could support a basis for excluding the evidence in question, it must then be supported by testimony. If the petitioner establishes a prima facie case, the burden of proof shifts to the Government to show why the evidence in question should be admitted.", [49] In deciding when the burden shifts, the evidence and facts alleged must be viewed in the light most favorable to the petitioner.[50]

"The law is settled that in Fourth Amendment terms a traffic stop entails a seizure of the driver,"[51] for which there must be at least "a particularized and objective basis for suspecting the particular person stopped of criminal activity."[52] Even if a line of questioning itself following a race-based

[43] *Maryland v. Pringle*, 540 U.S. 366 (2003).
[44] *U.S. v. Cotterman*, 709 F.3d 952, 968 (9th Cir. 2013)(en banc).
[45] *U.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).
[46] *Id*. at 1050–51.
[47] *Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994).
[48] *Rodriguez v. Barr*, 943 F.3d 134, 141 (2d Cir. 2019).
[49] *Id*. 142, citing *Cotzojay v. Holder*, 725 F.3d 172, 178 (2d Cir. 2013) and *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).
[50] *Id.*
[51] *Brendlin v. California*, 551 U.S. 249, 255, 127 S.Ct. 2400, 2406, 168 L.Ed.2d 132 (2007).
[52] *Kansas v. Glover*, 140 S.Ct. 1183, 1187, 206 L.Ed.2d 412 (2020).

stop a is not a constitutional violation, it may nonetheless be excludable as the fruit of the poisonous tree—the race-based stop.

One of the most important aspects of a successful motion to suppress is showing that the officer(s) did not have probable cause or reasonable suspicion to conduct the stop in the first place. To do this, a practitioner must use the information found in the I-213, Record of Deportable/Inadmissible Alien to isolate the information that was available to the officer(s) at the moment he/she/they decided to initiate the seizure. Practitioners should carefully compare the version of the facts provided by the agents with that provided by the client and find the inconsistencies. The details of the conversation between the client and the officers often prove invaluable. The Supreme Court has ruled that an officer's reliance solely on "the apparent Mexican ancestry of the occupants" of a vehicle does not "furnish[] reasonable grounds to believe that the [] occupants were aliens."[53]

Moreover, the Ninth Circuit has found that the probative value of a person's: foreign sounding name;[54] command of a foreign language;[55] Hispanic appearance, choice of clothing, nature of employment or choice of vehicle are factors too "insignificant to provide a rational basis for stopping vehicles to search for illegal aliens."[56] Practitioners should argue that the stop was based on race, Hispanic appearance or any of the factors the Court has already deemed "insignificant" thereby rendering the stop an egregious violation of your client's Fourth Amendment rights. Practitioners should also argue that any information or evidence obtained or discovered following this unconstitutional seizure of your client should be suppressed, including the I-213. [57]

Challenging the Stop: Violations of DHS Regulations

If the stop was conducted without a warrant, Practitioners should argue that the evidence obtained through the stop must be suppressed due to a violation of DHS' policies. If DHS violates its own rules and regulations, any evidence obtained must be suppressed if: (1) the regulation was promulgated for the benefit or protection of the alien, and (2) the violation has the potential to prejudice the alien's interests.[58] Under INA §287(a)(2), officers may only conduct a warrantless arrest if the officer has reason to believe the arrestee is an alien and is likely to escape before a warrant can be issued.[59] Therefore, if the stop was conducted without a warrant, the officer had no probable cause and there was no chance your client could escape, the evidence obtained through the stop should be suppressed.[60] Moreover, if officers failed to advise the arrestee of his/her right to remain silent, that anything he/she said could be used against him/her in a subsequent proceeding

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[53] *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975).
[54] *Orhorhage* at 503 (finding the respondent's Nigerian sounding name grossly insufficient to establish a suspicion of alienage).
[55] *See U.S. v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006) ("By itself, an individual's inability to understand English will not justify an investigatory stop because the same characteristic applies to a sizable portion of individuals lawfully present in this country.") (citation omitted).
[56] *See Nicacio v. INS*, 797 F.2d 700, 704 (9th Cir. 1985).
[57] *See Nicacio* at 704; *see also Orhorhaghe* at 504 (stating that if the officers' seizure is illegal, "then the I-213 form [is] suppressible as the fruit of the unlawful conduct.").
[58] *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).
[59] *See also* 8 CFR §287.8(c)(2)(i) (warrantless arrest permissible if officer has "reason to believe" (e.g. probable cause) arrestee "is an alien illegally in the United States."); and 8 CFR §287.8(c)(2)(ii) (an arrest warrant "shall" be obtained except if the officer has "reason to believe" suspect is "likely to escape before a warrant can be obtained.").
[60] *Calderon-Medina* at 531.

and that he/she had the right to an attorney, then DHS has violated yet another one of its regulations and any statements made by your client should be suppressed.[61]

Challenging the I-213

The Ninth Circuit has held that information contained in an authenticated immigration form "is presumed to be reliable *in the absence of evidence to the contrary presented by the alien*."[62] The court in *Espinoza* stated that "a petitioner who produced probative evidence that contradicts anything material on the I-213 would cast doubt upon its reliability" and "the factfinder would be hard put to find the I-213 clear and convincing evidence of alien status ...."[63]

First, if the I-213 provided by DHS does not contain the authentication stamp on it, then you can challenge its reliability by highlighting that the document is not authenticated and therefore should not be entitled to the same presumed reliability. Second, highlight any inconsistencies between what your client says happened and what the I-213 states happened. Aside from presenting witnesses or evidence regarding inconsistencies, one of the best ways to undermine the reliability of the I-213 is to compare it to your client's account of what happened. Prepare a detailed, step-by-step declaration from your client and use that to highlight any inconsistencies between what your client says happened and what the I-213 states. The more inconsistencies you can find, the easier it will be to undermine the I-213's presumed reliability. These inconsistencies can be as big as listing the incorrect date of the stop or as small as listing the incorrect street name of where the stop took place. Every inconsistency, no matter how small, should be utilized.

Practitioners may use these same inconsistencies to establish your client's right to cross-examine the officers who participated in the stop. An IJ can rule that the testimony of an ICE agent is necessary to resolve an "apparent conflict" between what Respondent says happened and what the government says happened.[64] Moreover, an alien in removal proceedings "shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government…."[65] The more "apparent conflicts" or inconsistencies you can find between the I-213 and your client's declaration, the more likely the judge will be inclined to order the Government produce their officers for testimony at which point the government itself will often move to terminate proceedings without prejudice to avoid the risk of creating bad law on appeal.

CONCLUSION

By throwing wrenches in the deportation machine, we force the Immigration Court to remember that the government has the initial burden of proof in every case. In some cases, the government is not able to meet that burden, and we may stop the deportation machine altogether. In every case, we can undoubtedly slow down the deportation machine, giving our clients more time in the United

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[61] *See* 8 CFR §287.3; *see also Miranda v. Arizona*, 384 U.S. 436 (1966) and *Rodriguez-Echeverria v. Mukasey*, 534 F.3d 1047 (9th Cir. 2008) (finding that 8 CFR §287.3 applies where an alien is arrested without a warrant).
[62] *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir. 1995) (emphasis added).
[63] *Id*. at 311.
[64] *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1015 (9th Cir. 2008).
[65] INA §240(b)(4)(B).

States, creating the record we want to litigate on appeal, and laying the foundation for stronger law that recognizes due process and fundamental fairness for our clients.