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Challenges and Strategies Beyond Relief

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As immigration attorneys, it is frustrating—often heart-breaking—to sit down for a consultation with a foreign national who is in removal proceedings and, at the end of the meeting, have no choice but to say, "I'm sorry, but there is nothing that can be done under our current laws to help you." However, attorneys should not jump to this conclusion too quickly. Even before considering relief, there are challenges and strategies that every attorney should consider in order to zealously and effectively advocate for respondents' rights before the U.S. immigration courts. This practice advisory will provide guidance for challenging the Notice to Appear and the Form I-213, timing and using motions to suppress, and making due process challenges.

READ BEFORE YOU PLEAD

The U.S. Department of Homeland Security's (DHS) filing of a Form I-862, Notice to Appear (NTA), with the immigration court initiates removal proceedings before the U.S. immigration courts.[1] Although the NTA must be served on the foreign national respondent,[2] proceedings do

[1] 8 CFR §1003.14.
[2] INA §239(a); 8 CFR §§239.1(a), 1239.1(a).

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not commence until it has been filed with the immigration court.[3] Prior to initiating proceedings, DHS prepares a Form I-213, Record of Deportable/Inadmissible Alien, which sets forth information to support the respondent's alleged alienage and removability from the United States. These two documents are essential to any case before a U.S. immigration court, as they are the starting point for removal proceedings. A careful analysis of the procedures used to issue these two documents, as well as their content, should be the starting point for any attorney representing a respondent in removal proceedings.

Challenging the Notice to Appear

The NTA must be served on the respondent in a particular manner, and it must contain specific factual and procedural information.[4] If service is improper, if the content is deficient or inaccurate, if there are grounds to contest the respondent's removability, or if the evidence has been unconstitutionally obtained, it is important for attorneys to object to and otherwise challenge the NTA on the record of proceedings. Doing so can (1) hold DHS to its burden of proof and/or shift the burden of proof to DHS,[5] (2) preserve the respondent's rights on appeal,[6] (3) lead to the termination of removal proceedings against the respondent,[7] (4) preserve the respondent's eligibility for relief from removal, and (5) assist the respondent in contesting mandatory detention under Immigration and Nationality Act (INA)[8] §236(c).

First, the NTA must be properly served on the respondent.[9] The INA and regulations require that the NTA be served on the respondent in person, or if personal service is not practicable, by mail to the respondent *or* the respondent's counsel of record.[10] Thus, if the respondent did not receive the NTA in person or by mail, and if the respondent's attorney did not receive the NTA by mail, service was improper. If service was improper and the respondent never received the NTA, the respondent was never notified of the initiation of removal proceedings, and an immigration judge may not order the respondent removed *in absentia* for failure to appear.[11]

Second, in addition to being properly served on the respondent, the NTA must contain specific information, including: the nature of the proceedings; the legal authority for the proceedings; the acts or conduct alleged to be in violation of law; the charges against the respondent and the statutory provisions alleged to have been violated; a statement that the respondent may be

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[3] *See Arenas-Yeses v. Gonzales*, 421 F.3d 111, 116-17 (2d Cir. 2005); *Dandan v. Ashcroft*, 339 F.3d 567, 576 (7th Cir. 2003); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118-21 (9th Cir. 2002); *Asad v. Reno*, 242 F.3d 702, 705 (6th Cir. 2001); *Costa v. INS*, 233 F.3d 31 (1st Cir. 2000); *Morales-Ramirez v. Reno*, 209 F.3d 977 (7th Cir. 2000).

[4] INA §239(a)(1); 8 CFR §1003.13.

[5] 8 CFR § 1240.8.

[6] *See Chambers v. Mukasey*, 520 F.3d 445 (5th Cir. 2008); *Matter of Velasquez*, 19 I&N Dec. 377, 380 (BIA 1986).

[7] *See Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990).

[8] Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).

[9] INA §239(a)(1); 8 CFR §1003.13.

[10] INA §239(a)(1); 8 CFR §1003.13. Note that, for cases commenced prior to April 1, 1997, the Form I-221, Order to Show Cause, initiated proceedings before the immigration court. The regulations require that an Order to Show Cause be served "in person to the alien, or by *certified mail* to the alien or the alien's attorney." 8 CFR §1003.13 (emphasis added). However, certified mail is no longer required for service of a Notice to Appear. *See id.*

[11] *Matter of G–Y–R–*, 23 I&N Dec. 181 (BIA 2001).

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represented by counsel and will be provided a list of counsel and a period of at least ten days to procure counsel;[12] a statement that the respondent must immediately provide a written address and telephone number where he or she may be contacted; a statement that the respondent must immediately provide a written record of any change of address or telephone number;[13] a warning of the consequences of failure to provide address and telephone information pursuant to INA §240(b)(5); the time and place of the proceedings;[14] and a warning that a removal order will be entered *in absentia* if the respondent fails to appear, unless there are exceptional circumstances.[15] If the NTA filed with the immigration court does not contain all of this specific information, it does not meet the requirements for the initiation of removal proceedings under INA § 239(a)(1).

Third, the facts alleged in the NTA must be accurate. When DHS alleges that certain acts or conduct by the Respondent were in violation of the law and charges the Respondent with alleged violations of the INA,[16] these allegations are not evidence and DHS's conclusions concerning inadmissibility or deportability based on those allegations are not always correct. In fact, it is not uncommon for DHS to allege a fact that is not accurate or to overreach in its charges against the Respondent. Thus, attorneys should not automatically accept those allegations and conclusions in an effort to focus on any relief from removal that might be available to the Respondent. Rather, attorneys should meet with the Respondent and discuss each factual allegation as it has been presented in the NTA. If there are any inaccuracies, these should be raised on the record of proceedings before the immigration court.

Practice Pointer: Below is a list of considerations that attorneys should discuss with Respondents in reviewing factual allegations listed in the NTA. Please note that this list is not all-inclusive, as considerations should be specific to the allegations in a particular case.

- Is the respondent's country of citizenship correct?
- Are the date and manner of entry correct?
- Is the respondent's current immigration status correct?
- Was the respondent inadmissible at the time of his or her entry or adjustment of status?
- Are the alleged immigration status violations accurate and true?
- Is the respondent truly a public charge?
- Is the respondent truly a security risk to the United States?
- Did the respondent actually make a willful misrepresentation of a material fact or false claim to U.S. citizenship?

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[12] After 10 days, the Attorney General may proceed. INA §239(b).
[13] INA §239(a)(1)(F)(ii). *See* 8 CFR §1003.15(d)(2) (stating that the notice of change of address should be provided to the immigration court on Form EOIR-33).
[14] *But see* INA §239(a)(2)(A) (noting that the time and place of the proceedings may be postponed or may change, and stating that written notice must be given to the Respondent in person or, if personal service is not practicable, by mail to the Respondent or the Respondent's counsel). Failure to note the date and time of the hearing on the NTA does not render the NTA ineffective, as long as a subsequent notice of the hearing was sent to the Respondent. *Popa v. Holder*, 571 F.3d 890 (9th Cir. 2009); *Dababneh v. Gonzales*, 471 F.3d 806 (7th Cir. 2006); *Guamanrrigra v. Holder*, 670 F.3d 404 (2d Cir. 2012); *Haider v. Gonzales*, 438 F.3d 902, 906-08 (8th Cir. 2006). The subsequent notice must state the new time and place for the hearing and the consequences of failing to appear. INA §239(a)(2)(A)(ii). Notice is not required at all, however, if the Respondent failed to provide a change of address. INA §239(a)(2)(B).
[15] INA §239(a)(1)(G)(ii).
[16] *See* INA §239(a)(1)(D).

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- Are the dates, charges, final dispositions, and sentences for any criminal charges correct?
- How was this information obtained? Was it obtained in violation of due process?[17]

Additionally, attorneys must carefully analyze the charges of inadmissibility or deportability in light of the Respondent's facts to determine if he or she was properly charged. A respondent in removal proceedings must be charged as either inadmissible under INA §212(a) or deportable under INA §237(a). The first step in this analysis is to determine whether the respondent has already been admitted to the United States or is an arriving alien. Where the respondent was improperly charged as deportable when he or she was actually inadmissible, or vice versa, the court should terminate the proceedings.[18]

Practice Pointers:

- In analyzing whether the respondent was properly charged as inadmissible under INA § 212(a), attorneys should look for allegations of valid admission to the United States coupled with allegations that the respondent is an "arriving alien." This will be an indication that the respondent may not have been charged correctly under INA §212(a).
- In analyzing whether the respondent was properly charged as deportable under INA §237(a), attorneys should look for allegations of a lack of valid admission. This will be an indication that the respondent may not have been charged correctly under INA §237(a).
- If the NTA alleges inadmissibility, but then lists deportability in the alternative, or if it does not list the specific charges against the respondent, attorneys should argue that there has not been proper notice of the charges against the respondent and that this violates due process.[19]

If the respondent was properly charged under INA §212(a) or INA §237(a), the next step in the analysis is to determine whether the specific charges against the respondent are accurate.[20] Attorneys should review each charge and analyze it in light of the respondent's specific facts. Any challenges to removability must be raised on the record of proceedings before the immigration court. It is possible that DHS has not established inadmissibility or deportability in the NTA, which may lead to termination of the proceedings.[21]

Practice Pointer: Beyond inaccuracy of the charges as discussed above, the following is a list of potential grounds for challenging the NTA:

- Due process violations;[22]
- Res judicata or collateral estoppel, where the issue or charge has already been considered and addressed or litigated;[23]

[17] For an explanation of the rationale for these questions, please see the I-213, Motions to Suppress, and due process discussions below.
[18] *Matter of R–D–*, 24 I&N Dec. 221 (BIA 2007).
[19] *Browne v. Zurbrick*, 45 F.2d 931 (6th Cir. 1930).
[20] *See* INA §§212(a), 237(a) (listing the various inadmissibility and deportability grounds).
[21] *See* Operating Instructions §239; *Bilokumsky v. Tod*, 263 U.S. 149 (1923).
[22] These are discussed below in the sections on Motions to Suppress and Due Process Challenges.

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- Notice of the proceedings or charge(s) against the respondent was insufficient;[24]
- The NTA was improvidently issued;[25]
- The NTA was not issued by the proper authorities;[26]
- The respondent is a U.S. citizen or national, whether by birth, naturalization, automatic acquisition, or derivation from a relative;[27]
- The respondent was a citizen at the time he or she was convicted of the charges forming the basis of the removability ground;[28]
- The respondent is deceased or is not in the United States;[29] and
- The respondent has refugee or asylee status and that status has not been revoked.

If the statutory and regulatory requirements of service and content are not met, or if the factual allegations and charges of inadmissibility or deportability against the respondent are deficient, inaccurate, or unconstitutional, it is essential for attorneys to raise these issues and challenge the NTA on the record. Not only does this secure the respondent's rights under the law and preserve these important issues for appeal, but it also may lead to termination of the removal proceedings altogether.[30]

Moreover, challenging the NTA is essential because inaccurate or overreaching factual allegations and charges may affect the respondent's eligibility for relief, as well as his or her eligibility for release from detention.[31] They may also affect who has the burden of proof during that stage of the proceedings.[32] If the respondent is present in the United States without having been admitted or paroled, it is DHS's burden of proof to establish the respondent's alienage.[33] If DHS is able to demonstrate alienage, the burden then shifts to the respondent to demonstrate that he or she is lawfully present or not inadmissible as charged.[34] On the other hand, if the respondent was lawfully admitted, but is now deportable, the burden is on DHS to prove that the respondent is removable as charged by "clear and convincing evidence."[35] If DHS meets this burden, the burden then shifts to the respondent to demonstrate eligibility for relief from removal. Challenging allegations of alienage, inadmissibility, or deportability as set forth in the NTA shifts the burden of proof to DHS and may force DHS to meet its burden in an evidentiary

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[23] *See U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966); *Oyeniran v. Holder*, 672 F.3d 800, 806-07 (9th Cir. 2012); *Al Mutarreb v. Holder*, 561 F.3d 1023, 1031 (9th Cir. 2009); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *Guevara v. Gonzales*, 450 F3d 173 (5th Cir. 2006); *Duvall v. Att'y Gen. of the U.S.*, 436 F.3d 382 (3d Cir. 2006); *Medina v. INS*, 993 F.2d 499 (5th Cir. 1993); *Ramon-Sepulveda v. INS*, 824 F.2d 749 (9th Cir. 1987).

[24] *Matter of Lopez-Barrios*, 20 I&N Dec. 203 (BIA 1990); *Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001); *Xiong v. INS*, 173 F.3d 601, 607-08 (7th Cir. 1999).

[25] *Matter of Vizcarra-Delgadillo*, 13 I&N Dec. 51 (BIA 1968). If the NTA was improvidently issued, DHS may cancel it. 8 CFR §§239.2(a), 1239.2(a). However, once the NTA has been filed with the immigration court, DHS cannot unilaterally terminate proceedings. DHS must instead move the immigration judge to terminate the proceedings. *See Matter of G–N–C–*, 22 I&N Dec. 281 (BIA 1998).

[26] 8 CFR §§239.1(a)(1) – (41).

[27] 8 CFR §§239.2(a)(1) – (2); *Matter of Cruz*, 15 I&N Dec. 236 (BIA 1974). *See also* INA §§301–09, 316–20.

[28] *Costello v. INS*, 376 U.S. 120 (1964).

[29] 8 CFR § 239.2(a)(3)–(4).

[30] *Matter of G–N–C–*, 22 I&N Dec. 281 (BIA 1998).

[31] *See* INA §236(c).

[32] 8 CFR §1240.8.

[33] *Id.*

[34] 8 CFR §1240.8(c).

[35] INA §240(c)(3)(A); 8 CFR §1240.8(a).

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hearing before the immigration court. This is essential to protect the respondent's rights and to preserve important issues for appeal. Furthermore, if DHS cannot meet its burden, proceedings against the Respondent must be terminated.

Practice Pointer: Please find below a checklist for review and consideration of the NTA. If any of these boxes remain unchecked, it is a sign that an objection or challenge to the NTA—perhaps even a motion to terminate proceedings—should be made:

- Was the NTA served on the respondent in person? If not, was it served on the respondent by mail? If not, was it served on the respondent's counsel by mail?
- Does the NTA state the nature of the proceedings?
- Does the NTA state the legal authority for the proceedings?
- Does the NTA state the acts or conduct alleged to be in violation of the law?
- Does the NTA state the charges against the respondent and the statutory provisions alleged to have been violated?
- Does the NTA notify the respondent that he or she may be represented by counsel and will be provided a list of counsel and a period of at least ten days to procure counsel?
- Does the NTA notify the respondent that he or she must immediately provide a written address and telephone number where he or she may be contacted?
- Does the NTA notify the respondent that he or she must immediately provide a written record of any change of address or telephone number?
- Does the NTA notify the respondent of the consequences of failure to provide address and telephone information?
- Does the NTA state the time and place of the proceedings?
- Does the NTA notify the respondent that a removal order will be entered *in absentia* if he or she fails to appear?
- Is the respondent even subject to removal proceedings? Is it possible the respondent might be a U.S. citizen, in valid nonimmigrant or immigrant status, in A or G status with diplomatic immunity, or an asylee or refugee who has not yet had his status terminated by DHS?[36]
- Is each and every one of the factual allegations listed in the NTA completely correct?
- Was the respondent correctly charged as inadmissible under INA §212(a)?
- Was the respondent correctly charged as removable under INA §237(a)?
- Are the charges of inadmissibility or deportability against the respondent correct?
- Has DHS provided enough information or submitted enough supporting evidence to make a *prima facie* case of inadmissibility or deportability in the NTA?[37]

Challenging the Form I-213

In addition to challenging the NTA, attorneys should consider whether to challenge the Form I-213, Record of Deportable/Inadmissible Alien. Evidence presented by the government to prove alienage often includes the Form I-213, which sets forth the respondent's biographic information; date, place, time, and manner of entry to the United States; immigration record and any history of apprehension and detention by immigration authorities; criminal record, if any;

[36] *See* 8 CFR §1208.24.
[37] *See* Operating Instructions § 239; *Bilokumsky v. Tod*, 263 U.S. 149 (1923).

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family data; any health or humanitarian aspects; and disposition (whether or not an NTA is to be issued).[38] A Form I-213 can contain damaging information about the respondent that can have far-reaching effects, even when DHS does not have substantial evidence to support its claims. Some examples include allegations of gang membership, reason to believe the respondent is a drug trafficker, role as a past persecutor, and material support to a terrorist organization. Moreover, the information contained in the Form I-213 may have been obtained unlawfully, and there may be grounds to move to suppress the evidence of alienage. Motions to suppress evidence are discussed below.

Source problems, inaccurate information, lack of detail, a gap in time between when the information was collected and when the I-213 was created, the inability to cross-examine the preparer of the I-213, and coercion or duress are all potential challenges to the I-213 and the information contained therein. For example, if the source of the information on a Form I-213 is neither the government nor the subject of the report, it cannot be presumed true.[39] Similarly, if the source is not identifiable or is a juvenile, it may not be reliable.[40]

If the respondent believes that information contained in the I-213 is false, attorneys should prepare documentation to demonstrate the falsity. In determining whether to admit the I-213 and whether to give it weight, the immigration judge will determine if the alleged false information is material, and if so, whether any probative evidence has been submitted to contradict that information.[41]

While respondents generally are not entitled to cross-examine the preparer of Form I-213, some courts have made an exception in cases where the information on the form "is manifestly incorrect or was obtained by duress,"[42] or if other circumstances indicate a lack of trustworthiness.[43] Alleged misconduct in preparing Form I-213 may also provide a basis to question its reliability. In such cases, you should ask the immigration judge to subpoena or order a deposition of the agent who prepared the form.[44]

Matter of Barcenas[45] is often erroneously cited for the proposition that, in the absence of an indication of coercion, duress, or factual error, an I-213 is inherently trustworthy and therefore admissible in removal proceedings.[46] However, this interpretation contradicts longstanding Board of Immigration Appeals (BIA) precedent recognizing the possibility of excluding evidence based solely on fundamental fairness concerns.[47] Indeed, the BIA explicitly reiterated

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[38] *See* Form I-213, Record of Deportable/Inadmissible Alien.

[39] *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995). *See also Hernandez-Guadarrama v. Ashcroft*, 394 F.3d 674, 680 (9th Cir. 2005); *Murphy v. ISN*, 54 F.3d 605, 610 (9th Cir. 1995).

[40] *See Matter of Rosa Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002); *Matter of Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999).

[41] *See Espinoza v. INS*, 45 F.3d 308, 310–11 (9th Cir. 1995). *See also Murphy v. INS*, 54 F.3d 605, 610-11 (9th Cir. 1995).

[42] *Barradas v. Holder*, 528 F.3d 754, 763 (7th Cir. 2009).

[43] *Espinoza v. INS*, 45 F.3d 308, 310–11 (9th Cir. 1995).

[44] 8 C.F.R. §1003.35(a)–(b).

[45] 19 I&N Dec. 609 (BIA 1988).

[46] *See, e.g., In re: Ingrid Dugue-Regalado*, 2013 WL 2610149 (BIA Apr. 30, 2013).

[47] *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).

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this principle in *Barcenas*, explaining that documentary evidence can be admitted in removal proceedings only if it is "probative" and its use would be "fundamentally fair."[48] Due process claims based on a lack of fundamental fairness are discussed below.

Practice Pointer

- A party seeking a subpoena must state what he or she expects to prove and show diligent but unsuccessful efforts to produce the witness or document. Prior to asking an immigration judge to issue a subpoena, attorneys should request that DHS allow the officer who prepared Form I-213 to testify. Ideally, such a request should be in writing so that it can later be presented to demonstrate that any efforts to produce the officer were unsuccessful.

Form I-213 can contain damaging information about the respondent that can have far-reaching effects. Thus, attorneys should preserve the respondent's rights by challenging the admissibility and reliability of the I-213.

MOTIONS TO SUPPRESS

Another important tool for protecting the respondent's rights is a motion to suppress evidence of alienage that has been unlawfully obtained or obtained in violation of DHS's own procedures. Many individuals in removal proceedings have been subject to warrantless home entries, unlawful vehicle stops by roving border patrols, wrongful arrests, coercive interrogations, and other unlawful activity by U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) officers. In some cases, such misconduct may be challenged through the use of motions to suppress, which seek to exclude evidence of alienage obtained by the government in violation of the respondent's constitutional or other legal rights. If successful, motions to suppress can result in the termination of removal proceedings and promote greater accountability by law enforcement officers.

Legal Standard

The U.S. Supreme Court held in *INS v. Lopez-Mendoza* that a Fourth Amendment violation, standing alone, does not justify the suppression of evidence in removal proceedings.[49] However, eight Justices indicated that the exclusionary rule might, at a minimum, apply in cases of "egregious" or "widespread" Fourth Amendment violations.[50] Over the past three decades, numerous federal circuit courts have either affirmed,[51] or at least acknowledged the possibility

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[48] *Barcenas*, 19 I&N Dec. at 611 (citing *Toro*).
[49] 468 U.S. 1032, 1050 (1984).
[50] A plurality of the Court recognized the possibility that the exclusionary rule might apply in the case of "egregious" or "widespread" Fourth Amendment violations. *Id.* at 1050–51 (Opinion of O'Connor, J.). In addition, four dissenting Justices found that the exclusionary rule should always be available in removal proceedings. *Id.* at 1051–61 (Brennan, J., dissenting) (White, J., dissenting) (Stevens, J., dissenting) (Marshall, J. dissenting).
[51] *See Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006); *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3d Cir. 2012); *Puc-Ruiz v. Holder*, 629 F.3d 771 (8th Cir. 2010); *Gonzalez-Rivera v. INS*, 22 F.3d 1441(9th Cir. 1994).

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of,[52] an "egregious" exception to the *Lopez-Mendoza* rule. More recently, the Third Circuit addressed the possibility of excluding evidence based on "widespread" Fourth Amendment violations.[53]

Courts have also suppressed evidence obtained through conduct that would render use of the evidence "fundamentally unfair" and in violation of an individual's due process rights under the Fifth Amendment.[54] Such challenges often focus on whether confessions or other evidence were involuntary or coerced.

In addition, evidence may be suppressed if it was obtained in violation of a federal regulation that "serves a purpose of benefit to the alien" and "the violation prejudiced interests of the alien which were protected by the regulation."[55] The law is unsettled regarding whether motions to suppress can be based solely on violations of the Immigration and Nationality Act (INA), but evidence of such violations can be used to bolster arguments that immigration officers have exceeded the scope of their enforcement authority.

Practice Pointers:

- Research applicable case law carefully because the definition of "egregious" varies from circuit to circuit.
- Arguments based on widespread Fourth Amendment violations should be thoroughly documented with reports, declarations from individuals other than your client who were subject to similar treatment, and other evidence. Ideally, such arguments should not be the sole basis for a motion to suppress.
- With respect to regulatory violations, prejudice may be presumed where compliance with a regulation is mandated by the Constitution or where an agency fails to comply with a procedural framework designed to ensure fair processing. Thus, the burden of proof is lower in such cases.
- Wherever possible, try to bolster your case by alleging constitutional, statutory, and regulatory violations in a motion to suppress.

Factual Basis

Establishing the circumstances of your client's interactions with immigration officers (and, in some cases, other law enforcement officers) encountered prior to the initiation of removal proceedings is critical when deciding whether to file a motion to suppress. Try to gather as much information as possible about your client's encounters with ICE, CBP or other law enforcement officers, any documents provided or received by your client, any restraints imposed during questioning, whether your client felt free to leave, whether there was a warrant for your client's

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[52] *See, e.g., Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000); *Santos v. Holder*, 2013 U.S. App. LEXIS 367, *3 (5th Cir. Jan. 4, 2013) (unpublished per curiam decision); *U.S. v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005); *Wroblewska v. Holder*, 656 F.3d 473, 478 (7th Cir. 2011); *U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1116 n. 9 (10th Cir. 2006).

[53] *Oliva-Ramos v. Attorney General*, 694 F.3d 259 (3d Cir. 2012); *see also Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (2d Cir. 2006).

[54] *Matter of Garcia*, 17 I&N Dec. 319, 320 (BIA 1980); *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009).

[55] *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980).

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arrest, and the sequence of developments that led to the issuance of the Notice to Appear. If you file a motion to suppress, these facts should be set forth in a supporting affidavit.

Fourth Amendment challenges often turn on whether an investigative stop of a vehicle or a pedestrian was supported by "reasonable suspicion" that an individual was unlawfully present in the United States. A reasonable suspicion inquiry is a highly fact-driven determination that is based on the "totality of the circumstances." An occupant's apparent race or ethnicity cannot provide reasonable suspicion of alienage and a stop based exclusively on such factors has been held to constitute an egregious Fourth Amendment violation.[56]

Practice Pointers:

- File a Freedom of Information Act (FOIA)[57] with USCIS for your client's A-file, as well as broader FOIA requests with ICE and/or CBP regarding their enforcement operations in the area where your client was stopped, detained and/or arrested. The documents produced may provide important insights into the reasons why your client ended up in removal proceedings. In drafting such requests, be careful not to disclose any information bearing on alienage.
- If state or local law enforcement officials played a role in immigration enforcement activities involving your client, consider filing a Public Records Act request for relevant documents, which should include any audio or video recordings of interactions with your client.

Timing

Before filing a motion to suppress, you should deny the allegations in the NTA at the first master calendar hearing. Subsequently, after the government proffers a Form I-213 or other evidence of the respondent's alienage, you should disclose your intention to file a motion to suppress and, if necessary, request additional time to do so.

If you plan to seek prosecutorial discretion in addition to filing a motion to suppress, you should sequence these tactics strategically. When you file a motion to suppress, you are signaling to the government that you intend to take a litigious approach that will require them to invest significant resources. This may make them less inclined to grant your client's request for prosecutorial discretion. On the other hand, filing a motion to suppress may give DHS a greater incentive to grant prosecutorial discretion to avoid unnecessary litigation. Your decision about timing should be based on the relative strength of the difference claims.

Practice Pointers

[56] *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-86 (1975); *see also Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006); *Orhorhaghe v. INS*, 38 F.3d 488, 492 (9th Cir. 1994).

[57] Freedom of Information Act, 5 USC §552, as amended by Pub. L. No. 104-231, 110 Stat. 3048.

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- When submitting a request for prosecutorial discretion, be careful not to submit any supporting materials that implicate alienage or could lead to the discovery of evidence of alienage.
- The events that give rise to a motion to suppress also may provide a basis for your client to sue the government for damages in federal court. Through discovery in such cases, you may obtain documents that bolster your motion to suppress. Moreover, filing a damages case may provide a basis for a respondent to seek prosecutorial discretion or prompt the government to terminate removal proceedings as part of a global settlement.

Pre-existing Government Records

In some cases where a respondent seeks to suppress evidence of alienage based on alleged misconduct by law enforcement officers, the government responds by proffering alternative evidence in its files that might establish a respondent's alienage. Some courts take the position that government records can be excluded like any other evidence.[58] Other courts take the position that pre-existing government records are not suppressible, either because they are "identity-related";[59] because they were obtained by the government independently of any constitutional violation;[60] or because a noncitizen lacks a reasonable expectation of privacy in his or her government file.[61]

In circuits where this issue remains undecided, there are strong arguments why pre-existing evidence in government files should be excluded when the government is led to search those files only after committing a constitutional violation that revealed a noncitizen's identity. Under those circumstances, suppressing the immigration file as "fruit of the poisonous tree" prevents the government from benefiting from the illegal conduct and deters investigative techniques prohibited under the Fourth Amendment.

Practice Pointers

- Determine what, if any, prior contacts your client has had with the U.S. government, including lawful admissions and previously filed benefit applications. If the government can establish your client's alienage from an independent source, a motion to suppress will be denied.
- Marshall any available arguments that the government would not have identified evidence of alienage in its files but for the underlying violation of your client's constitutional rights.

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[58] *U.S. v. Oscar-Torres*, 507 F.3d 224, 227039 (4th Cir. 2007); *U.S. v. Olivares-Rangel*, 458 F.3d 1104, 1111-12 (10th Cir. 2006); *U.S. v. Guevara-Martinez*, 262 F.3d 751, 753–55 (8th Cir. 2001); *U.S. v. Garcia-Beltran*, 389 F.3d 864-65 (9th Cir. 2004).
[59] *U.S. v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009); *U.S. v. Bowley*, 435 F.3d 426, 430–31 (3d Cir. 2006); *U.S. v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *U.S. v. Navarro-Diaz*, 420 F.3d 581, 584–85 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 33 (1st Cir. 2004).
[60] *Pretzantzin v. Holder*, 2013 WL 3927587, *23–*25 (2d Cir. 2013); *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978).
[61] *U.S. v. Pineda-Chinchilla*, 712 F.2d 942, 944 (5th Cir. 1983); *Bowley*, 435 F.3d at 430–31.

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DUE PROCESS CHALLENGES

The Supreme Court has held that noncitizens in removal proceedings have constitutional due process rights.[62] At the core of procedural due process is a person's right to notice and the opportunity to be heard.[63] The INA and implementing regulations governing removal proceedings help to define the scope of these due process protections.[64] Violations of the statute and regulations should be raised as separate challenges, as described above. Moreover, the BIA has recognized that respondents in removal proceedings before the U.S. immigration courts are entitled to full and fair hearings on their claims.[65] In arguing that certain procedures before the immigration courts are fundamentally unfair, attorneys should cite to due process as well as the requirement of fundamental fairness.[66]

Practice Pointer

- Although the BIA lacks jurisdiction over constitutional challenges, litigants should raise constitutional issues to the BIA to ensure that administrative remedies are exhausted. Because the statute and regulations governing removal proceedings require that a hearing be fundamentally fair, the BIA could remand a case based on a statutory or regulatory violation.

Prejudice

To prevail in a procedural due process claim, the respondent must not only establish that she or he was deprived of notice or the right to be heard, but also must demonstrate prejudice.[67] Prejudice has been defined as having the potential to affect the outcome.[68] The respondent need not establish that the outcome of the case would have been different. In some circumstances involving fundamental rights, such as the right to counsel, prejudice may be presumed and need not be separately established.[69]

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[62] *See Reno v. Flores*, 507 U.S. 292 (1993). The Fifth Amendment protects the "life, liberty, and property" of "all persons."
[63] *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).
[64] *See* INA §240(b) and 8 CFR §1240.
[65] *See Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002); *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Lam,* 14 I&N Dec. 168 (BIA 1972).
[66] *In re Rodriguez-Carrillo*, 22 I&N Dec. 1031 (BIA 1999) (recognizing that the regulations require that removal hearings be fundamentally fair and finding that hearing under review was fair).
[67] *See, e.g., Waldron v. INS*, 17 F.3d 511 (2d Cir. 1994).
[68] *Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005) (test is whether deficiency "may have affected the outcome of the proceedings") (internal citation omitted); *U.S. v. Perez*, 330 F.3d 97, 102 (2d Cir. 2003) (prejudice demonstrated where applicant "could have made a strong showing in support of his application") (internal citation omitted); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1389 (7th Cir. 1987) (person must "show some concrete evidence indicating that the violation of a procedural protection actually had the potential for affecting the outcome of . . . deportation proceedings.").
[69] *See, e.g., Leslie v. Att'y Gen*., 611 F.3d 171 (3d Cir. 2010); *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991); *Castaneda-Delgado v. INS*, 525 F.2d 1295 (7th Cir. 1975); *Yiu Fong Cheung v. INS*, 418 F.2d 460 (D.C. Cir. 1969). *See also Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (suggesting in dicta that denial of right to counsel may be prejudicial).

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Practice Pointer

- When arguing prejudice from a due process violation during removal proceedings, attorneys should seek to connect the violation of the Respondent's due process rights with the immigration judge's reasoning in the denial or with the inability to establish eligibility for relief based on the existing record.

Jurisdiction

The U.S. courts of appeals have jurisdiction over constitutional questions and questions of law, even if they lack jurisdiction over other claims (for example, certain discretionary adjudications and claims relating to noncitizens with certain criminal convictions).[70]

Practice Pointer

- In litigating before the BIA, attorneys should keep in mind what claims will be reviewable if the case reaches the U.S. court of appeals and should frame claims before the BIA appropriately (for example, as a question of law).

Case Examples

Courts have found due process violations in immigration proceedings based on a wide range of circumstances. The following list of due process challenges to deficiencies in removal proceedings is not comprehensive, but is intended to provide a sampling of the types of claims that have been successful.

- Failure to advise of eligibility for relief;[71]
- Denial of continuance;[72]
- Refusal to change venue;[73]
- Failure to permit testimony;[74]
- Reliance on unreliable hearsay;[75]

[70] *Kucana v. Holder*, 558 U.S. 233, 239 (2010) (observing that the REAL ID Act of 2005 restored jurisdiction over constitutional questions and questions of law).
[71] 8 CFR §1240.11(a)(2); *see U.S. v. Melendez-Castro*, 671 F.3d 950, 954 (9th Cir. 2012) (IJs failure to meaningfully advise petitioner of his right to voluntary departure violated due process); *U.S. v. Arias-Ordonez*, 597 F.3d 972 (9th Cir. 2010) (due process violation where IJ misled applicant by stating no relief was available).
[72] *See, e.g., Cruz Rendon v. Holder*, 603 F.3d 1104 (9th Cir. 2010); *Gjeci v. Gonzales*, 451 F.3d 416 (7th Cir. 2006); *Chlomos v. I.N.S.*, 516 F.2d 310 (3d Cir. 1975).
[73] *See, e.g., Campos v. Nail*, 43 F.3d 1285 (9th Cir. 1994).
[74] *See, e.g., Oshodi v. Holder*, 729 F.3d 883, 889 (9th Cir. 2003) (IJs refusal to hear oral testimony); *Agyeman v. INS*, 296 F.3d 871 (9th Cir. 2002) (pro se petitioner's wife was not allowed to testify in court, and petitioner was not told what evidence he could use to prove that he had a bona fide marriage to a U.S. citizen); *Podio v. INS*, 153 F.3d 506, 510–11 (7th Cir. 1998) (IJs refusal to allow petitioner to finish his testimony and refusal to allow siblings to testify).
[75] *See, e.g.*, *Pouhova v. Holder*, 726 F.3d 1007, 1012 (7th Cir. 2013) (admission of two unreliable hearsay documents against petitioner violated due process); *Anim v. Mukasey*, 535 F.3d 243, 256–57 (4th Cir. 2008) (admission of a State Department letter relating to an investigation violated due process because it contained "multiple hearsay statements"); *Alexandrov v. Gonzales*, 442 F.3d 395, 404–07 (6th Cir. 2006) (IJ improperly relied

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- Failure to consider evidence or give reasoned explanation;[76]
- Immigration judge bias;[77]
- Defective notice;[78] and
- Reliance on extra-record facts.[79]

CONCLUSION

Making effective challenges to DHS's Notice to Appear and Form I-213, moving to suppress unlawfully obtained evidence of alienage, and insisting that the respondent's right to due process be secured through fundamentally fair proceedings are essential responsibilities of any attorney practicing before the U.S. immigration courts. Utilizing these strategies beyond relief will secure the respondent's rights under the law, preserve important issues for appeal, and may even lead to termination of the removal proceedings.

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on two unreliable documents containing hearsay); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 405–08 (3d Cir. 2003) (reliance on double and triple hearsay relating to asylum claim violated due process).

[76] See, *e.g.*, *Bosede v. Mukasey*, 512 F.3d 946, 950–51 (7th Cir. 2008) (IJ failed to consider all of the evidence when determining particularly serious crime issue); *Hanan v. Mukasey*, 519 F.3d 760, 764 (8th Cir. 2008) ("wholesale failure to consider evidence implicates due process") (citing *Tun v. Gonzalez*, 485 F.3d 1014, 1025 (8th Cir. 2007)); *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (IJ must "actually consider the evidence and argument that a party presents") (citing *Rhoa-Zamora v. INS*, 971 F.2d 26, 34 (7th Cir. 1992)).

[77] See, *e.g.*, *Abulashvili v. U.S. Att'y Gen*., 663 F.3d 197, 207–08 (3d Cir. 2011) (IJ violated due process because when "stepping into the role of the attorney for the government, the IJ gave the strong impression that she was on the government's side"); *Floroiu v. Gonzales*, 481 F.3d 970, 973–76 (7th Cir. 2007) (IJ violated due process and "manifested a clear bias" when characterizing applicants as "religious zealots"); *Cham v. Att'y Gen*. of the U.S., 445 F.3d 683 (3d Cir. 2006) (IJ presumed application was false, sought out minor inconsistencies, blocked access to the record, and interrupted respondent); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1003 (9th Cir. 2003) (IJ expressed bias against respondent who had committed adultery).

[78] See, *e.g., Burger v. Gonzales*, 498 F.3d 131, 133 (2d Cir. 2007) (IJ failed to give asylum applicant notice or opportunity to respond to changed country condition findings); *Hossain v. Ashcroft,* 381 F.3d 29 (1st Cir. 2004) (transcript and briefing schedule mailed to erroneous address); *Chike v. INS*, 948 F.2d 961, 962 (5th Cir. 1991) (failure to provide briefing schedule to petitioner).

[79] See, *e.g.*, *Burger v. Gonzales*, 498 F.3d 131, 135 (2d Cir. 2007) (BIA "erred by failing to give Burger advance notice of its intention to consider this extra-record fact"); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1099 (10th Cir. 1994) ("[W]here the BIA noticed facts and made disputable inferences based on those facts which not only directly contradicted the findings of the immigration judge but were dispositive of Petitioners' appeal, we hold that due process requires the BIA to give Petitioners advance notice and an opportunity to be heard."); *Getachew v. I.N.S.*, 25 F.3d 841, 845 (9th Cir. 1994) ("immigrants in deportation proceedings [must] receive notice and an opportunity to respond to extra-record facts the Board intends to consider.").

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