AMERICAN IMMIGRATION COUNCIL

PRACTICE ADVISORY[1]
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MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW

By the American Immigration Council[2]

> "*Every INS agent knows, therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding.*"
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> *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984)

This practice advisory discusses issues, strategies, and procedures relating to the filing of motions to suppress in removal proceedings. Long used in criminal trials, motions to suppress seek to exclude evidence obtained in violation of an individual's constitutional or other legal rights. Though federal immigration officers often disregard the rights of noncitizens, legal and practical obstacles prevent many respondents in removal proceedings from challenging the manner in which they were arrested. More frequent use of motions to suppress will help protect the rights of noncitizens, promote greater accountability by law enforcement officers, and result in the termination of proceedings in some cases.

Part I of this practice advisory discusses basic principles underlying motions to suppress. Part II addresses motions to suppress evidence obtained in violation of the Fourth Amendment and related provisions of federal law. Part III discusses motions to suppress evidence obtained in violation of the Due Process Clause of the Fifth Amendment and related provisions of federal law. Finally, Part IV discusses the procedures for filing motions to suppress.

This practice advisory focuses on misconduct by federal immigration officers. It does not discuss unique issues relating to misconduct committed by, or resulting from cooperation with,

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state and local law enforcement officers.[3] Nor does it discuss misconduct by U.S. Customs and Border Protection (CBP) officers.[4]

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[3] See American Immigration Council, *Motions to Suppress in Removal Proceedings: Cracking Down on Fourth Amendment Violations by State and Local Law Enforcement Officers*.

[4] See American Immigration Council, *Motions to Suppress in Removal Proceedings: Fighting Back Against Unlawful Conduct by U.S. Customs and Border Protection*.

Part I: Basic Principles of a Motion to Suppress

1. What is a motion to suppress?

A motion to suppress seeks to prohibit the use of evidence unlawfully obtained by the government, a remedy available under a principle known as the "exclusionary rule." Motions to suppress attack the methods the government uses to *obtain* evidence. They are distinct from objections to the manner in which a party *presents* evidence, such as asking a leading question on direct examination. The purpose of a motion to suppress is to prevent the government from meeting its burden of proof. If successful, it may result in the termination of removal proceedings.

Because removal proceedings are civil in nature, motions to suppress are not always available to the same extent as in criminal proceedings. However, the Supreme Court, Board of Immigration Appeals, and numerous federal circuit courts have recognized many contexts in which the "exclusionary rule" applies in immigration court.

2. What legal provisions govern the collection of evidence by immigration officers?

Federal agents do not have *carte blanche* to make arrests however they wish. Instead, they must heed limits on their authority imposed by the Constitution, statutes, and regulations. Overstepping these limits can make the resultant evidence a valid target of a motion to suppress.

Courts have recognized two constitutional provisions that may serve as the basis for a motion to suppress: (1) the Fourth Amendment and (2) the Due Process Clause of the Fifth Amendment. Both limit the authority granted to immigration officers under the Immigration and Nationality Act (INA) to investigate and arrest noncitizens for purposes of initiating removal proceedings. They are discussed in detail in Parts II and III of this Practice Advisory.

Immigration officers' authority is also constrained by various provisions of the Immigration and Nationality Act (INA). INA § 287 sets the conditions under which immigration officers may investigate, search for, and arrest individuals believed to be in the country without authorization. Immigration officers may not violate these provisions while exercising their authority, even where the statute imposes additional restraints not required by the Constitution. For example, INA § 287(a)(2) provides that immigration officers cannot make a warrantless arrest of a person believed to be unlawfully present, if time exists to obtain an arrest warrant,[5] a requirement that the Constitution does not impose.[6]

Finally, immigration officers' conduct is governed by federal regulations codified at 8 C.F.R. Part 287. These regulations impose additional limitations on federal agents beyond those mandated by the Constitution and the INA. Immigration officers may also be bound by "subregulations" contained in Operating Instructions and other internal guidance.

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[5] The only exception to this requirement is for noncitizens who attempt to unlawfully enter the United States in the "presence or view" of an immigration officer. INA § 287(a)(2).

[6] *See, e.g., United States v. Watson*, 423 U.S. 411, 417 (1976) (finding that the Fourth Amendment requires only probable cause); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (permitting warrantless arrests under Fourth Amendment for misdemeanors and other minor crimes committed in an officer's presence).

3. What type of evidence can be the subject of a motion to suppress?

A motion to suppress may target any evidence the government attempts to introduce, whether physical, documentary, or testimonial. By filing a motion to suppress, respondents charged with being in the United States without being admitted or paroled can seek to exclude the government's evidence of *alienage* on the basis that it was illegally obtained. Because the government has the burden of proof with regard to this threshold issue,[7] a removal proceeding cannot go forward without such evidence. In most cases, the government establishes alienage through the introduction of Form I-213, in which the examining officer summarizes the respondent's arrest and interview. In other cases, the government seeks to establish alienage through the testimony of an immigration officer, documents obtained from the respondent's country of origin, or other information provided by the respondent.

A motion to suppress must seek to exclude actual pieces of evidence. It cannot contest a court's jurisdiction over the respondent or prevent a hearing from going forward, even if the individual was discovered as a result of unlawful conduct. This rule was confirmed in ***INS v. Lopez-Mendoza***, 468 U.S. 1032, 1039-40 (1984). The case involved two individuals, one of whom "objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him."[8] The Court summarily denied his suppression motion because "the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest."[9] By contrast, the Court found that the other individual filed a proper motion to suppress because he objected "to evidence offered at that proceeding."[10]

> **Tip**: If your client may have grounds to file a motion to suppress, it is crucial that you deny the charges and the relevant allegations in the Notice to Appear (NTA) and that neither you, your client, nor any other witness concedes alienage at any point in the case. If you file a Freedom of Information Act (FOIA) request or an application for an Employment Authorization Document (EAD), be careful not to include any information bearing on alienage. If the agency requires your client's country of origin to process the application, note that the country provided is that alleged in the NTA.

4. Can identity-related evidence be the subject of a motion to suppress?

The government sometimes argues that respondents cannot suppress "identity-related" evidence, such as a passport, fingerprints, birth certificate, or other documents establishing who they are. In making this argument, the government relies on the Supreme Court's statement that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest. . . ." *Lopez-Mendoza*, 468 U.S. at 1039.

Courts are divided on how to understand this statement from *Lopez-Mendoza*. Four circuits have interpreted the phrase to mean that an unconstitutional search or seizure cannot deprive a court

[7] 8 C.F.R. § 1240.8(c).
[8] *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984).
[9] *Id*. at 1039.
[10] *Id*. at 1040.

of the ability to exercise personal jurisdiction over the body of a defendant.[11] Four other circuits have interpreted *Lopez-Mendoza* as holding that evidence establishing the identity of a defendant or respondent, such as evidence concerning the defendant or respondent's name, cannot be suppressed under any circumstances.[12] The Eleventh Circuit has independently reached the latter conclusion, without relying on the statement from *Lopez-Mendoza*.[13] Several courts, including the Ninth Circuit, have distinguished between evidence procured for the purpose of a investigating a crime such as unlawful reentry, which is suppressible, and evidence obtained solely for identification purposes, which is not.[14]

For cases arising in circuits where this issue is undecided, there are several reasons why the Supreme Court's statement in *Lopez-Mendoza* should be read narrowly to concern a court's personal jurisdiction over a defendant, and not to preclude the suppression of evidence related to identity. First, *Lopez-Mendoza* concerned two separate deportation cases – Mr. Lopez-Mendoza's case and Mr. Sandoval-Sanchez's case – each of which followed an unlawful arrest. Mr. Lopez-Mendoza objected to his deportation on the ground that, because of the unlawful arrest, the court lacked personal jurisdiction over him. Mr. Sandoval-Sanchez, by contrast, "objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." 468 U.S. at 1040. The Supreme Court considered each objection separately, and made its statement concerning the identity of the defendant in the portion of the opinion addressing Mr. Lopez-Mendoza's jurisdictional argument. Second, the Supreme Court supported its statement with citations to cases involving what is known as the *"Ker-Frisbie"* doctrine – the rule that illegal police activity affects only the admissibility of evidence and not the jurisdiction of the court over the defendant.[15] The Supreme Court also cited cases concerning the rule in forfeiture proceedings that the mere fact of an illegal seizure does not immunize the goods from forfeiture. This rule, too, is jurisdictional. Third, Mr. Sandoval-Sanchez objected to the admissibility of statements memorialized in an I-213 Form, which certainly included identity-related statements. Yet, in

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[11] *See Pretzantzin v. Holder*, 725 F.3d 161, 166 (2d Cir. 2013); *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007); *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111 (10th Cir. 2006); *see also* W. LaFave, 1 Search & Seizure § 1.9(b) (4th ed. 2011). However, even these courts may refuse to suppress "jurisdictional identity evidence"—the information required to identify an individual in proceedings, *see Pretzantzin*, 725 F.3d at 170, or fingerprints obtained for administrative, rather than investigatory, purposes following an illegal arrest, *see infra* n.14.

[12] *See United States v. Navarro-Diaz*, 420 F.3d 581, 584-85 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999); *United States v. Bowley*, 435 F.3d 426, 430-31 (3rd Cir. 2006). Note, however, that *Navarro-Diaz* and *Bowley* were both careful to state that they did not involve an "egregious" Fourth Amendment violation. The concept of "egregiousness" is discussed below. Furthermore, one judge in the Fifth Circuit recently noted that that court's precedent on identity evidence was based on an "erroneous interpretation" of *Lopez-Mendoza*. *See United States v. Hernandez-Mandujano*, 721 F.3d 345, 351-56 (5th Cir. 2013) (Jolly, J., concurring).

[13] *United States v. Farias-Gonzalez*, 556 F.3d 1181 (11th Cir. 2009).

[14] *See, e.g.*, *United States v. Garcia-Beltran*, 389 F.3d 864, 867-68 (9th Cir. 2004); *United States v. del Toro Gudino*, 376 F.3d 997, 1000-01 (9th Cir. 2004); *Guevara-Martinez*, 262 F.3d at 756; *Olivares-Rangel*, 458 F.3d at 1114-16; *Oscar-Torres*, 507 F.3d at 230-31 (indicating that fingerprints "intended for use in an *administrative* process—like deportation—may escape suppression"). However, this distinction may have little practical significance. *See United States v. Ortiz-Hernandez*, 427 F.3d 567, 577-78 (9th Cir. 2005) (affirming suppression of a criminal defendant's fingerprints based on a prior unlawful arrest, but reversing denial of government's motion to compel a second set of fingerprints based on identity and other information obtained through initial fingerprints).

[15] For example, the Court cited *Frisbie v. Collins*, 342 U.S. 519 (1952); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); and *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923).

addressing Mr. Sandoval-Sanchez's objection, the Supreme Court did not distinguish between identity-related statements and other statements. Instead, it merely recited the "general rule" concerning the exclusion of "statements and other evidence" in criminal proceedings. *Lopez-Mendoza*, 468 U.S. at 1040-41. Finally, the Supreme Court has specifically held that the exclusionary rule requires the suppression of illegally obtained fingerprint evidence, which is a kind of identity evidence, in criminal proceedings.[16] Although the Court reaffirmed that holding a year after *Lopez-Mendoza*, it made no reference to any kind of general rule precluding suppression of identity evidence.

5. When is evidence considered the "fruit of the poisonous tree"?

Even where federal immigration officers engage in unlawful behavior, not all subsequently discovered evidence will be considered the "fruit of the poisonous tree." If the evidence was discovered by "exploitation" of the underlying misconduct, it is subject to possible suppression; by contrast, where the evidence came to the authorities' attention by means "sufficiently distinguishable to be purged of the primary taint," it will not be excludable.[17]

In some cases, the causal nexus between the unlawful conduct and the resulting evidence is clear. For example, if immigration agents illegally entered a home without a warrant and questioned a resident about his immigration status, a concession of unlawful alienage might be subject to suppression.[18] However, intervening events could destroy the causal link. If the same resident refused to answer questions in her home but voluntarily accompanied the agents to an immigration office, the government could argue that a resulting confession was sufficiently distinguishable from the initial warrantless entry to permit its introduction as evidence.[19]

The government sometimes argues that the fruit-of-the-poisonous-tree rule does not apply to any evidence obtained through knowledge of a noncitizen's name or certain other types identity evidence – even when such evidence was obtained through a constitutional violation. For example, the government has argued that, having learned the name of a noncitizen in an illegal raid, it could then use that name to procure a birth certificate from the noncitizen's home country to establish alienage. Or, to take another example, the government has argued that, having learned the name of a noncitizen and her child in an illegal raid, the government may obtain the birth certificate for the U.S. citizen child, which lists the parent's foreign place of birth, and use that birth certificate as evidence of alienage.

Some courts have accepted arguments such as these.[20] In circuits where this issue is undecided, a strong argument can be advanced against the government's position. The purpose of the fruit-of-

[16] *See Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811, 814-16 (1985).
[17] *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).
[18] *Id*. at 485-86; *but see Carcamo v. Holder*, 713 F.2d 916, 923 (8th Cir. 2013) (noting that an unreasonable home search is not necessarily "egregious").
[19] *Wong Sun*, 371 U.S. at 491.
[20] *See, e.g.*, *Pretzantzin v. Holder*, 725 F.3d 161, 170-71 (2d Cir. 2013) (suggesting that independent evidence obtained using only an individual's name would be admissible); *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1186 (11th Cir. 2009); *United States v. Guzman-Bruno*, 27 F.3d 420, 422 (9th Cir. 1994); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999). However, where an individual has made a prima facie case for suppression, the government should bear the burden of proving that it obtained such evidence using only non-suppressible information. *Pretzantzin*, 725 F.3d at 170.

the-poisonous-tree doctrine is to deter illegal police conduct by preventing the government from benefiting from the constitutional violation. Thus, the rule requires the exclusion of evidence obtained as a direct consequence of the constitutional violation. Even if a noncitizen's name cannot be suppressed, there is no justification for allowing the admission of *other* evidence (for example, evidence of alienage) that is obtained as a consequence of the constitutional violation.

6. Is it possible to suppress evidence that the government had in its possession prior to the illegal misconduct?

Courts are divided on this important question, which can arise in challenges to the introduction of fingerprint samples, records of prior admissions, or other pre-existing information in government databases that might establish a respondent's alienage.[21] As previously noted, some courts have taken the position, primarily in criminal cases, that government records can be excluded like any other object or statement introduced for an evidentiary purpose.[22] Other courts take the position that pre-existing governmental records are not suppressible, either because they are "identity-related";[23] because they were obtained by the government independently of any constitutional violation;[24] or because a noncitizen lacks a reasonable expectation of privacy in his or her immigration file and thus lacks standing to challenge its admissibility.[25]

For cases arising in circuits in which this issue is undecided, there are strong arguments why courts should exclude pre-existing government files when the government is led to search those files only after committing a constitutional violation that enabled it to learn a noncitizen's identity. As the Tenth Circuit has explained, even though an immigration file is "not developed as the result of any illegal activity, but rather was compiled prior to, and independently of, the illegal seizure [of a noncitizen], the [government officials] did not effectively have [the noncitizen's] A-file in their grasp. Instead, the practicality of the situation is that they obtained [the alien's] A-file only by first" obtaining the noncitizen's identity through a constitutional violation. *Olivares-Rangel*, 458 F.3d at 1119-21. Suppressing the immigration file as "fruit of the poisonous tree" makes sense in those circumstances. Suppression prevents the government from benefiting from the illegal conduct and deters investigative techniques prohibited under the Fourth Amendment, such as custodial questioning without consent or probable cause, random identity checks and vehicle stops, and pretextual arrests.

As for the argument that a noncitizen lacks standing to challenge the admission of his or her immigration file, that position misunderstands the rules governing Fourth Amendment standing. So long as an individual experiences a Fourth Amendment violation, he or she has standing to

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[21] In 2010, the Supreme Court agreed to resolve the split in a non-immigration related criminal case, but ultimately dismissed the petition without rendering a decision. *Tolentino v. New* York, 131 S. Ct. 1387 (2011) (dismissing writ of certiorari as improvidently granted).

[22] *United States v. Oscar-Torres*, 507 F.3d 224, 227-30 (4th Cir. 2007); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1111-1112 (10th Cir. 2006); *United States v. Guevara-Martinez*, 262 F.3d 751, 753-55 (8th Cir. 2001); *United States v. Garcia-Beltran*, 389 F.3d 864, 865 (9th Cir. 2004); *see also Pretzantzin*, 725 F.3d at 171 (suggesting that such evidence may be suppressible when it was previously in the possession of a police department, rather than immigration officials).

[23] *Farias-Gonzalez*, 556 F.3d at 1189; *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006); *Roque-Villanueva*, 175 F.3d at 346; *United States v. Navarro-Diaz*, 420 F.3d 581, 584-85 (6th Cir. 2005); *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004).

[24] *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9th Cir. 1978); *Reyes-Basurto v. Holder*, 477 Fed. Appx. 788 (2d Cir. 2012).

[25] *U.S. v. Pineda-Chinchilla*, 712 F.2d 942, 944 (5th Cir. 1983); *Bowley*, 435 F.3d at 430-31.

challenge the admission of any evidence obtained through that violation – even evidence in which he or she has no reasonable expectation of privacy. Thus, if the government was led to search the immigration file as a direct result of a Fourth Amendment violation, the noncitizen would have standing to challenge the admission of that immigration file as the fruit of the illegal conduct.

Part II: Motions to Suppress For Violations of the Fourth Amendment and Related Violations of Federal Law

The Fourth Amendment prohibits government agents from making "unreasonable searches and seizures." For suppression purposes, it applies to all conduct by law enforcement officials prior to an individual's *lawful* arrest for immigration purposes.[26] The Fourth Amendment, INA, and federal regulations place limits upon immigration officers' ability to search for individuals suspected to be unlawfully present, interrogate individuals about their immigration status, and arrest individuals for placement in removal proceedings. Before addressing the substantive bases for filing a motion to suppress, Section A, below, will explain the obstacles attorneys face when seeking to exclude evidence on Fourth Amendment grounds in removal proceedings.

A. Limits on the Exclusionary Rule in Removal Proceedings

1. Why is the exclusionary rule not always available for Fourth Amendment violations?

The "exclusionary rule" is a judicially created remedy to prevent the introduction of evidence obtained as a result of a Fourth Amendment violation. Its purpose is not to provide relief to the victim but to deter government officers from engaging in similar misconduct in the future.[27] Consequently, for the exclusionary rule to apply, a court must weigh the cost of excluding evidence against the benefit of deterring future government misconduct.[28]

In ***INS v. Lopez-Mendoza***, 468 U.S. 1032 (1984), the Supreme Court held that the exclusionary rule generally does not apply in removal proceedings to evidence obtained in violation of the Fourth Amendment. In a 5-4 decision, the Justices found that application of the exclusionary rule was unlikely to deter future misconduct by immigration officers and that the costs of suppressing evidence outweighed its benefits.

With regard to the exclusionary rule's potential deterrent effect, the Court cited (now outdated) statistics showing that nearly 98 percent of individuals arrested by immigration officers agreed to "voluntary deportation without a formal hearing," and therefore lacked any opportunity to suppress evidence related to their apprehension.[29] The Court also noted that legacy INS developed a comprehensive scheme of federal regulations meant to deter constitutional violations, and implied that recourse to the exclusionary rule was unnecessary because immigration officers would presumably comply with the existing regulatory framework.[30] Finally, the Court cited the existence

[26] See Part III for a discussion of suppression motions challenging post-arrest conduct under the Fifth Amendment.
[27] *Elkins v. United States*, 364 U.S. 206, 217 (1960).
[28] *Illinois v. Krull*, 480 U.S. 340, 352-353 (1987) (internal quotation marks omitted).
[29] *Lopez-Mendoza*, 468 U.S. at 1044.
[30] *Id*. at 1044-45.

of alternative remedies for redressing constitutional violations, such as seeking declaratory relief against unlawful agency practices.[31]

The Court also found the costs of applying the rule to be "unusual and significant."[32] Citing ***Matter of Sandoval***, 17 I&N Dec. 70 (BIA 1979), the Justices noted that failing to remove otherwise unlawfully present respondents would effectively sanction ongoing violations of federal immigration law; could "complicate" the streamlined nature of removal hearings; and would require immigration officers to document the precise circumstances of each arrest, which could preclude the use of large scale operations to detect undocumented immigrants.[33]

However, as discussed below, the Justices recognized an important exception for "egregious" Fourth Amendment violations and the need for reevaluation of their holding if widespread constitutional violations became evident. Today, the egregiousness exception provides the basis for many motions to suppress in immigration cases.

2. Did the Supreme Court's opinion in *Lopez-Mendoza* contain any exceptions?

Yes. In the final section of Justice O'Connor's majority opinion, she and three other Justices noted that no violation of legacy INS's internal regulations had been alleged, and stated that their conclusions about the value of the exclusionary rule might change if confronted with evidence that Fourth Amendment violations by immigration officers were "widespread."[34] Additionally, Justice O'Connor wrote:

> "[W]e do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."[35]

Meanwhile, four dissenting Justices argued that the exclusionary rule *always* should be available in removal proceedings for Fourth Amendment violations,[36] thus endorsing the view of Justice O'Connor that the rule may apply for egregious violations or where there is evidence of widespread violations. Lower courts and the BIA have applied the "egregious violation" exception in removal proceedings to suppress evidence obtained in violation of the Fourth Amendment, and at least one federal court of appeals has remanded a suppression case to allow the petitioner to submit additional evidence of widespread constitutional violations.[37]

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[31] *Id*. at 1045.
[32] *Id*. at 1046.
[33] *Id*. at 1048-50. Note that the Court incorrectly stated that unlawful presence "without more, constitutes a crime," and that granting the Petitioner's motion would immediately "subject him to criminal penalties." *Id*. at 1047. *See Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States."); *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976) ("Remaining in this country longer than permitted does not constitute a criminal offense.").
[34] *Lopez-Mendoza*, 468 U.S. at 1050 (Opinion of O'Connor, J.).
[35] *Id*. at 1050-51 (Opinion of O'Connor, J.).
[36] *Id*. at 1051-1061 (Brennan, J., dissenting) (White, J., dissenting) (Stevens, J., dissenting) (Marshall, J. dissenting).
[37] *See infra* at 9-11, 13-14.

3. Are the exceptions from *Lopez-Mendoza* binding on immigration judges?

As numerous circuit courts have recognized, eight of nine Justices believed that the exclusionary rule should remain available for "egregious" violations at a minimum, which arguably makes the exception binding.[38] Four circuits have adopted the exception as the law within their jurisdiction, and four additional circuits have acknowledged the possibility that it may exist. By contrast, no circuit has explicitly rejected the exception. However, in a troubling departure from its own precedent, which acknowledges the egregious exception under *Lopez-Mendoza*,[39] at least one panel of the BIA declined to review a claim for exclusion of evidence based on egregious and widespread violations of the Fourth Amendment. Though the unpublished decision was reversed on appeal to the Third Circuit, the BIA's assertion that the exceptions in *Lopez-Mendoza* constitute non-binding dicta[40] is concerning. However, in other unpublished decisions, the BIA has recognized evidence may be suppressed based on egregious violations, even within the jurisdiction of courts of appeals which have not yet issued a published decision on the issue.[41]

4. Which federal appellate courts have adopted the "egregious" exception?

The Second, Third, Eighth, and Ninth Circuits have adopted the exception for egregious Fourth Amendment violations as the law of the circuit. However, only the Ninth Circuit has found facts sufficiently egregious to require suppression without remanding a case for further proceedings.

In ***Almeida-Amaral v. Gonzales***, 461 F.3d 231, 236 (2d Cir. 2006), the **Second Circuit** suggested that a Fourth Amendment violation generally must be accompanied by an additional aggravating factor to result in suppression. As a result, the court upheld the denial of an individual's suppression motion despite finding that an immigration officer ascertained his alienage during an unconstitutional investigatory stop. The court stated that a seizure for no reason might merit suppression if it were "sufficiently severe," for example if it were "particularly lengthy" or involved a "show or use of force." A seizure which is "not especially severe" could still merit suppression if based upon race or "some other grossly improper consideration."[42] Applying this standard in subsequent cases, the Second Circuit found no egregious violation where the Border Patrol detained a noncitizen at a checkpoint for several hours[43] and where immigration officers and local police targeted individuals for arrest on the basis of national origin and work as day laborers.[44] However, in ***Cotzojay v. Holder***, 725 F.3d 172 (2d Cir. 2013), the Second Circuit held that a nighttime, warrantless home entry by government officials, without consent and in the absence of exigent circumstances, would constitute an egregious Fourth Amendment violation regardless of whether

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[38] *See, e.g., Puc-Ruiz v. Holder*, 629 F.3d 771, 778 n.2 (8th Cir. 2010); *Orhorhaghe v. INS*, 38 F.3d 488, 493 n.2 (9th Cir. 1994); *Oliva-Ramos v. Att'y Gen.*, 694 F.3d 259, 271-72 (3d Cir. 2012).

[39] *See Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996).

[40] *See Oliva-Ramos*, 694 F.3d at 266.

[41] *See, e.g., David Antonio Lara-Torres*, A094-218-294, 2014 WL 1120165 (BIA Jan. 28, 2014) (unpublished) (affirming decision from the Baltimore Immigration Court); *Manuel de Jesus Chavarria-Lopez*, A089-823-873, 2011 Immig. Rptr. LEXIS 7257 (BIA Dec. 15, 2011) (unpublished) (remanding a case for further proceedings before the Denver Immigration Court).

[42] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-37 (2d Cir. 2006). In an unpublished case, the Court recognized a prima facie case for suppression where an individual provided "specific factual allegations . . . and evidence" to support his belief that he was stopped due to his race. *See Camargos Santos v. Holder*, 486 Fed. Appx. 918, 920-21 (2d Cir. 2012).

[43] *Melnitsenko v. Mukasey*, 517 F.3d 42, 48 (2d Cir. 2008).

[44] *Maldonado v. Holder*, 763 F.3d 155 (2d Cir. 2014).

government agents physically threatened or harmed residents.[45] The court remanded the case to give the government an opportunity to prove that its officers had obtained consent.[46]

In ***Oliva-Ramos v. Attorney General,*** 694 F.3d 259 (3d Cir. 2012), the **Third Circuit** adopted the exception in *Lopez-Mendoza.*[47] The court remanded the case for a determination of whether ICE agents had violated Oliva-Ramos's Fourth Amendment rights, and whether those violations were widespread or egregious.[48] The Third Circuit laid out its standard for egregiousness, concluding that "evidence will be the result of an egregious violation within the meaning of *Lopez-Mendoza*, if the record evidence establishe[s] either (a) that a constitutional violation that was fundamentally unfair had occurred, or (b) that the violation—regardless of its unfairness—undermined the reliability of the evidence in dispute."[49] The court provided an illustrative list of factors bearing on egregiousness, including whether the violation was intentional; whether the seizure was "gross or unreasonable" and without a plausible legal ground; whether the encounter involved "threats, coercion[,], physical abuse" or "unreasonable shows of force"; and whether the seizure or arrest was based on race or ethnicity.[50]

In ***Puc-Ruiz v. Holder***, 629 F.3d 771 (8th Cir. 2010), the **Eighth Circuit** provided valuable guidance about the egregious violation exception, although it denied the petitioner's suppression motion. The court stated that egregious violations were "not limited to those of physical brutality," and listed a number of factors that could make a Fourth Amendment violation egregious: (1) if law enforcement officers "employ[] an unreasonable show or use of force in arresting and detaining" an individual; (2) if the decision to detain or arrest was "based on … race or appearance"; or (3) if government officers "invade[] private property and detain[] individuals with *no* articulable suspicion whatsoever."[51] The court emphasized this list was *not* exhaustive, but stressed that technical Fourth Amendment violations would not merit suppression. More recently, in ***Carcamo v. Holder***, 713 F.3d 916 (8th Cir. 2013), the Eighth Circuit denied a petition for review on the basis that the ICE officers' warrantless home entry without the residents' consent was not sufficiently egregious to warrant the exclusion of evidence.[52]

The **Ninth Circuit** holds that the exclusionary rule should remain available in removal proceedings for—at a minimum—all evidence obtained from "bad faith" constitutional violations.[53] It defines "bad faith" violations as those involving (1) "deliberate" violations of the Fourth Amendment or (2) "conduct a *reasonable officer should have known* is in violation of the Constitution."[54] The first test—for deliberate violations—is a subjective one, dependent on the officer's intent. The second test is an objective one, dependent on the state of the law at the time the alleged violation took place.[55] Notably, numerous Ninth Circuit opinions have relied upon the

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[45] *Cotzojay*,725 F.3d at 183.
[46] *Id.* at 184.
[47] *Oliva-Ramos*, 694 F.3d at 272, 275.
[48] *Id.* at 275.
[49] *Id.* at 278.
[50] *Id.* at 279.
[51] *Puc-Ruiz*, 629 F.3d at 778-779.
[52] *Carcamo*, 713 F.3d at 922-24; *see also Lopez-Fernandez v. Holder*, 725 F.3d 172 (8th Cir. 2013).
[53] *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 n.5 (9th Cir.1994) ("We emphasize that [we do not] hold that *only* bad faith violations are egregious, but rather that *all* bad faith constitutional violations are egregious.") (emphasis in original).
[54] *Id.* at 1449 (emphasis in original).
[55] *See, e.g., Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018-1019 (9th Cir. 2008).

extensive Fourth Amendment training that immigration officers receive to conclude that the offending agent should have known his conduct violated the Constitution.[56]

The Ninth Circuit is the only federal appellate court to order the suppression of evidence for a Fourth Amendment violation. In ***Arguelles-Vasquez v. INS***, 786 F.2d 1433 (9th Cir. 1986) (subsequently vacated as moot) and ***Gonzalez-Rivera v. INS***, 22 F.3d 1441 (9th Cir. 1994), the court ordered evidence excluded where Border Patrol officers pulled over a vehicle solely on account of the occupants' ethnic appearance. In ***Orhorhaghe v. INS***, 38 F.3d 488 (9th Cir. 1994), the court ordered exclusion where immigration officers initiated an investigation based upon the petitioner's presumed national origin. And in ***Lopez-Rodriguez v. Mukasey***, 536 F.3d 1012 (9th Cir. 2008), the court found an egregious violation where immigration officers entered the petitioner's home without consent or a judicially issued warrant.[57] In an unpublished decision, the court also has found that suppression may be warranted where an immigration officer issues a detainer for an individual in criminal custody without seeking to determine the individual's citizenship or immigration status in the United States.[58]

Generally speaking, the Ninth Circuit's "bad faith" test for egregiousness is more favorable than the standard employed by the Second, Third and Eighth Circuits,[59] insofar as it does not require the individual seeking suppression to demonstrate "aggravating" factors beyond the constitutional violation. However, attorneys should be aware of a Ninth Circuit opinion that could make it more difficult to satisfy the standard in cases where the law may be subject to some ambiguity. In ***Martinez-Medina v. Holder***, 673 F.3d 1029 (9th Cir. 2011), the court declined even to consider whether a sheriff's deputy violated the Fourth Amendment by detaining individuals who conceded unlawful presence because of the "lack of clarity" in the law over state officers' authority to make arrests for civil violations of the INA.[60] The court reasoned that it need not determine whether a Fourth Amendment violation had occurred because a reasonable officer could not have been expected to know that his conduct was unconstitutional. This approach departed from, but did not overrule, the court's longstanding practice of determining whether the Fourth Amendment was violated *before* determining whether the violation was egregious.[61]

5. How have other federal appellate courts treated the exception for "egregious" violations?

While no other circuit court has rejected the egregious violation exception, few have provided meaningful guidance as to its scope. The First Circuit[62] has acknowledged the exception but has not expounded upon its meaning. The Fifth Circuit has acknowledged in an unpublished opinion that the Supreme Court left open the possibility of an exception for egregious violations.[63] The Sixth Circuit has acknowledged the exception and stated in *dicta* it might apply where a noncitizen is

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[56] *See, e.g., Id*. at 1018-19.
[57] *See also Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996) (recognizing the validity of the egregious violation exception in cases arising in the Ninth Circuit).
[58] *Armas-Barranzuela v. Holder*, 566 Fed. Appx. 603 (9th Cir. 2014).
[59] The Eighth Circuit has explicitly rejected the Ninth Circuit's "bad faith" standard. *Carcamo v. Holder*, 713 F.3d 916, 923 (8th Cir. 2013).
[60] *Id.* at 1035.
[61] *Orhorhaghe*, 38 F.3d 448, 493 n.5 (9th Cir. 1994) (citing *Gonzalez-Rivera*, 22 F.3d at 1445-52).
[62] *Westover v. Reno*, 202 F.3d 475, 479 (1st Cir. 2000); *Navarro-Chalan* v. *Ashcroft*, 359 F.3d 19, 22-23 (1st Cir. 2004); *Kandamar v. Gonzales*, 464 F.3d 65, 66 (1st Cir. 2006).
[63] *Santos v. Holder*, 506 Fed. Appx. 263, 264 (5th Cir. 2013) (unpublished per curiam decision).

"accosted by the police in a random attempt to determine whether he was an illegal alien."[64] The Seventh Circuit, while not officially adopting the exception, has repeatedly noted that the Supreme Court left open the question.[65] The Tenth Circuit has not decided a case involving an individual seeking to invoke the exception, but referred to it with approval in a criminal reentry case.[66] The validity of the exception remains an open question in the Fourth and Eleventh Circuits. [67]

6. To be egregious, must a violation "transgress notions of fundamental fairness" *and* "undermine the probative value of the evidenced obtained"?

Citing language from the final phrase of the exception in *Lopez-Mendoza*, the government may argue that a Fourth Amendment violation cannot be considered "egregious" unless it both (a) transgresses notions of fundamental fairness, *and* (b) undermines the probative value of the evidence obtained. However, every circuit that has considered this argument has rejected it. For example, in *Gonzalez-Rivera*, the Ninth Circuit held that "a fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained."[68]

This is true regardless of even if the evidence in question is a Form I-213. The government may seek to argue, based on *Matter of Barcenas,* 19 I&N Dec. 609 (BIA 1988), that "[a]bsent any indication that a Form I–213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability."[69] This argument, which is based upon a misreading of both suppression case law generally and *Barcenas* in particular, has not been adopted by any court. The probative value of evidence has long been irrelevant to the application of the Fourth Amendment exclusionary rule in general[70] and in immigration cases.[71] Indeed, to hold otherwise would undermine the goal of deterring unlawful conduct by law enforcement officers, who would know that trustworthy evidence ultimately would be admitted even if obtained unlawfully.

Barcenas itself applied a "fundamental fairness" standard for the admission of evidence set forth in *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980). *Toro* acknowledged that evidence obtained through egregious constitutional violations could be inadmissible, and specifically rejected a coercion or

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[64] *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005).

[65] *Wroblewska v. Holder*, 656 F.3d 473, 478 (7th Cir. 2011). *Gutierrez-Berdin v. Holder*, 618 F.3d 647, 652 (7th Cir. 2010); *Krasilych v. Holder*, 583 F.3d 962, 967 (7th Cir. 2009); *Martinez-Camargo v. INS*, 282 F.3d 487, 492 (7th Cir. 2002); *but see United States v. Sanders*, 743 F.3d 471, 471-75 (7th Cir. 2014) (expressing doubt about the value of suppression based on egregious violations in a non-immigration context and noting that while *Lopez-Mendoza* reserved the egregiousness issue, "reserving a question does not equal a holding").

[66] *United States v. Olivares-Rangel*, 458 F.3d 1104, 1116 n. 9 (10th Cir. 2006).

[67] *United States v. Oscar-Torres*, 507 F.3d 224, 227-28 n.1 (4th Cir. 2007); *Ghysels-Reals v Att'y Gen.*, 418 Fed. Appx. 894, 895 (11th Cir. 2011).

[68] *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451 (9th Cir. 1994); *see also Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010); *Singh v. Mukasey*, 553 F.3d 207, 217 (2d Cir. 2009); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234 (3d Cir. 2006); *Oliva-Ramos v. Att'y Gen.*, 694 F.3d 259, 277-78 (3d Cir. 2012).

[69] *Barcenas*, 19 I&N Dec. at 611.

[70] *See, e.g., Byars v. United States*, 273 U.S. 28, 29-30 (1927) ("Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light….").

[71] *See supra* n.67; *see also Aguilar-Linares v. Holder*, 577 Fed. Appx. 687 (9th Cir. 2014) (remanding where the BIA "applied the test for the admissibility of evidence in removal proceedings" rather than "analyz[ing] whether [law enforcement officers] committed an egregious Fourth Amendment violation").

duress requirement for the exclusion of evidence.[72] *Barcenas* applies the broader *Toro* standard, but focuses on coercion, duress, and error due to the respondent's particular claims.[73] It may be helpful to emphasize errors in the I-213 and any indication that information on the form was obtained through coercion or duress whenever possible, but *Barcenas* should not limit the suppression of I-213s in other situations.

7. What is the relationship between "egregious" Fourth Amendment violations and the Due Process Clause of the Fifth Amendment?

Much confusion exists over the relevance of the Due Process Clause to an "egregious" Fourth Amendment violation. Some immigration judges have suggested that evidence discovered through an egregious Fourth Amendment violation is suppressible because its introduction would undermine the "fair" hearing requirement of the Due Process Clause.[74]

While this approach may have been analytically correct at one time, Supreme Court cases decided after *Lopez-Mendoza* indicate that claims cognizable under the Fourth Amendment should not be analyzed under the Due Process Clause.[75] Indeed, the Court has indicated that ***Rochin v. California***, 342 U.S. 165 (1952)—the principal case cited in *Lopez-Mendoza* in support of the "egregious" violation exception—would today be analyzed under the Fourth Amendment rather than the Due Process Clause.[76] Notably, no federal circuit court to consider the question has linked egregious Fourth Amendment violations to the Due Process Clause.

Note, however, that the Due Process Clause provides an independent basis for excluding evidence in some circumstances, including coerced confessions, which are discussed in Part III.

8. Can respondents exclude evidence due to "widespread" Fourth Amendment violations?

Justice O'Connor also stated in the final section of *Lopez-Mendoza* that the Court's conclusions about the value of the exclusionary rule might change if Fourth Amendment violations by immigration officers became "widespread."[77] Lamentably, but perhaps not surprisingly, much evidence exists that such violations have occurred with growing frequency, particularly within the last decade.[78] In *Oliva-Ramos*, the **Third Circuit** addressed the possibility of excluding evidence based on "widespread" violations, noting that this exception was "as much of a part of the *Lopez-*

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[72] *Toro*, 17 I&N Dec. at 343.
[73] *Barcenas*, 19 I&N Dec. at 610.
[74] *See, e.g.*, Matter of [Redacted], Order of Williams, J., Aug. 5, 2010, at 15, 17, *available at* www.law.umaryland.edu/programs/clinic/initiatives/immigration/documents/suppression-decision.pdf.
[75] *Graham v. Connor*, 490 U.S. 386, 395 and n.10 (1989); *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).
[76] *County of Sacramento*, 523 U.S. at 849 n.9.
[77] *Lopez-Mendoza*, 468 U.S. at 1050 (opinion of O'Connor, J.).
[78] See, e.g., Stella Burch Elias, *Good Reason to Believe: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 Wisc. L. J. 1109 (2009), *available at* http://hosted.law.wisc.edu/lawreview/issues/2008_6/2_-_elias.pdf; Jennifer Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010). *See also* Brief of *Amici Curiae* LatinoJustice PRLDEF, No. 10-1479, *Argueta, et al. v. ICE, et al.* (3rd Cir. Dec. 10, 2010), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Argueta-amicus-brief.pdf; Brief of *Amici Curiae* LatinoJustice PRLDEF, No. 10-3849, *Oliva-Ramos v. Att'y Gen*. (3d Cir. Mar 11, 2011), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Oliva-Ramos-amicus-brief-redacted.pdf; Cardozo Immigration Justice Clinic, *Constitution on ICE* (2009), *available at* http://cw.routledge.com/textbooks/9780415996945/human-rights/cardozo.pdf.

Mendoza discussion as 'egregious' violations."[79] The court remanded to enable the Petitioner to present additional evidence, but suggested that, if substantiated, the allegations of a "consistent pattern" of conducting home raids during "unreasonable hours" might warrant suppression of evidence based on Fourth Amendment violations that were both egregious and widespread.[80] To date, we are not aware of any court that has excluded evidence on this ground.[81] While we encourage attorneys to alert immigration judges to the nationwide prevalence of Fourth Amendment violations, and to develop a record in support of this contention when filing motions to suppress, we caution against relying solely on this argument.

9. Is the "egregious" violation test also applied to suppression motions based upon violations of the INA and federal regulations?

The Supreme Court's decision in *Lopez-Mendoza* only addressed the applicability of the exclusionary rule for violations of the Fourth Amendment. Justice O'Connor specifically noted that no challenge was raised under federal regulations,[82] and the Court's decision did not disturb prior Board precedent establishing a separate test for suppression for regulatory violations. In addition, while the Justices did not discuss the exclusionary rule in the context of statutory violations, circuit courts and the BIA regularly entertained motions to suppress stemming from violations of INA prior to the Supreme Court's decision in *Lopez-Mendoza*.[83]

Statutory violations

In the criminal context, the Supreme Court has suppressed evidence obtained in violation of statutes that "implicate important Fourth and Fifth Amendment interests" and are "connected to the gathering of evidence."[84] The Court also has suggested that suppression may be particularly warranted if, among other factors, the violation gives the police a "practical advantage" and suppression is the "only means" of vindicating the rights protected by the statute.[85] Section 287 of the INA contains numerous provisions relating to the collection of evidence that implicate important Fourth and Fifth Amendment interests. However, the extent to which the rule for suppression in the criminal context carries over to the civil immigration context remains unsettled.

As discussed, *Lopez-Mendoza*, which addressed a Fourth Amendment violation, arguably does not apply to statutory violations—meaning the heightened "egregious violation" requirement is inapplicable. Instead, attorneys may argue that the suppression standard for statutory violations is similar to that applied to regulatory violations. Attorneys with potential suppression cases arising

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[79] *Oliva-Ramos*, 694 F.3d at 279-80.

[80] *Id.* at 281. For a more comprehensive discussion of the implications of the Third Circuit's decision in *Oliva-Ramos*, see NYU Immigrant Rights Clinic, Practice Advisory: *Understanding Oliva-Ramos v. Attorney General and the Applicability of the Exclusionary Rule in Immigration Proceedings* (November 30, 2012), *available at* http://www.law.nyu.edu/sites/default/files/ECM_PRO_074309.pdf.

[81] In *Melnitsenko v. Mukasey*, 517 F.3d 42 (2d Cir. 2008), the Second Circuit declined to consider whether the nationwide prevalence of constitutional violations mandated reconsideration of *Lopez-Mendoza* because the petitioner had not raised the claim before the agency.

[82] *INS v. Lopez-Mendoza*, 468 U.S. at 1051 (Opinion of O'Connor, J.).

[83] *See, e.g., Ojeda-Vinales v. INS*, 523 F.2d 286 (2d Cir. 1975); *Lee v. INS*, 590 F.2d 497 (3d Cir. 1979); *Shu Fuk Cheung v. INS*, 476 F.2d 1180 (8th Cir. 1973); *Tejeda-Mata v. INS*, 626 F.2d 721 (9th Cir. 1980); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971); *Matter of Cachiguango & Torres*, 16 I&N Dec. 205 (BIA 1977).

[84] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348-49 (2006) (discussing cases).

[85] *Id*. at 348-350.

from statutory violations should contact the American Immigration Council at clearinghouse@immcouncil.org for guidance.

Regulatory violations

In ***Matter of Garcia-Flores***, 17 I&N Dec. 325, 327 (BIA 1980), the Board held that evidence obtained in violation of federal regulations could be suppressed if (1) the violated regulation was promulgated to serve "a purpose of benefit to the alien," and (2) the violation "prejudiced interests of the alien which were protected by the regulation."[86] Generally, the respondent has the burden of demonstrating prejudice as a result of a regulatory violation. Such prejudice should be presumed in two circumstances, however: (a) when compliance with the regulation is *mandated* by the Constitution or federal law, or (b) where "an entire procedural framework, designed to insure [sic] the fair processing of an action affecting an individual is created but then not followed by an agency."[87]

The government may argue that termination based on regulatory violations is barred by 8 C.F.R. § 287.12, which states that the § 287 regulations "do not, are not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal." While the First Circuit has accepted this argument in dicta, other courts of appeals and the BIA have not addressed the issue in published decisions.[88] Where the government raises the impact of § 287.12 on regulatory suppression claims, respondents can make several counterarguments. First, § 287.12 does not expressly address the use of § 287 regulations in administrative proceedings.[89] The history of the regulation also suggests that it was not intended to overrule preexisting agency and judicial precedent providing for regulatory suppression in immigration proceedings.[90] Finally, regardless of the intended purpose of § 287.12, an agency may not "sidestep" its binding obligations under a regulation while that regulation remains in effect.[91]

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[86] *Matter of Garcia-Flores*, 17 I&N Dec. at 328-29 (citing *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979)). *See also Martinez-Camargo v. INS*, 282 F.3d 487, 491 (7th Cir. 2002); *Puc-Ruiz v. Holder*, 629 F.3d 771, 780 (8th Cir. 2010).

[87] *Garcia-Flores*, 17 I&N Dec. at 329.

[88] *See Navarro-Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004). In cases outside of the First Circuit, the BIA has accepted and rejected this argument in various unpublished decisions. *Compare Thiago Assereui de Oliveira*, A088 190 201, 2010 Immig. Rptr. LEXIS 6292, *2-*3 (BIA Nov. 2, 2010) (unpublished) (noting, in response to government's argument against termination based on a violation of § 287.6, that "DHS has not cited any authority indicating that 8 C.F.R. § 287.12 was intended to overrule *Matter of Garcia-Flores*") and *Mirna Linares-Tlazola*, A095 748 797, 2012 Immig. Rptr. LEXIS 6501, *10 (BIA Jan. 30, 2012) (unpublished) (overturning an IJ decision, in part because § 287.8 is "not enforceable by the respondent to seek termination of proceedings or to suppress evidence," based on § 287.12).

[89] *Compare* 8 C.F.R. § 287.12 (discussing "criminal or civil" matters) *with* 8 C.F.R. § 204.6(j)(3)(iv) (referring to "civil or criminal actions" *and* "governmental administrative proceedings" separately).

[90] In response to public comment indicating concern that the regulation would prevent victims of regulatory violations from pursuing remedies, the agency stated that the regulation would not eliminate existing remedies and was "consistent with the holding in *United States v. Caceres*, 440 U.S. 741 (1979)." 59 Fed. Reg. 42406, 42414 (Aug. 17, 1994). *Caceres* held that evidence obtained in violation of an agency's regulations need not be suppressed in a *criminal* proceeding, but discussed agencies' obligation to follow their own regulations, especially where "compliance . . . is mandated by the Constitution or federal law" and also where individuals' rights are affected. 440 U.S. at 749, 751 n.14. *Caceres* and the cases it cites were relied upon by the BIA in establishing its own rule for termination based upon regulatory violations. *See Garcia-Flores*, 17 I&N Dec. at 328.

[91] *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

B. Fourth Amendment and Related Limitations on Immigration Officers

1. Basic Fourth Amendment Principles

a. What does the Fourth Amendment prohibit?

The full text of the Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A "search" or a "seizure" is a prerequisite for a Fourth Amendment violation. Assuming that a search or seizure transpired, its legality always hinges on whether it was *reasonable*.[92] The answer, in turn, will depend on the circumstances surrounding the particular conduct.

Two considerations should be kept in mind when thinking about the reasonableness of a search or seizure. First, the *only* searches or seizures afforded a presumption of reasonableness are those carried out pursuant to a warrant issued by a neutral magistrate (e.g. judicial officer).[93] Without such a warrant, a search or seizure must fall under an exception to the warrant requirement to be considered "reasonable." Second, the test for determining reasonableness is objective, not subjective.[94] That is, the misconduct is judged against how the officer acted in light of the objective facts available to him, not his subjective intentions with regard to the victim. Similarly, when asking whether an officer *should* have known his conduct was unconstitutional, the question is whether a *reasonable officer* would have known he was violating the Fourth Amendment.

b. What constitutes a "search" or "seizure"?

Searches

Katz v. United States, 389 U.S. 347 (1967), defined a "search" as any government action that violates an individual's *reasonable expectation of privacy*. To meet this standard, a movant must establish (1) that he personally believed his privacy was violated, and (2) that this expectation of privacy was objectively reasonable.[95] Thus, the Court has held that government agents conduct a "search" by entering a home or wiretapping a phone conversation, but not by rummaging through garbage left on the curb or conducting aerial surveillance of a backyard.

In the immigration context, the constitutionality of a "search" will generally arise only if government agents enter a home or non-public area of a commercial premises, or physically retrieve evidence from a person's body or belongings. The boarding of a train or bus by immigration agents does not constitute a search, since people have no reasonable expectation of privacy in a public conveyance.

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[92] *Michigan v. Fisher*, 130 S. Ct. 546 (2009).
[93] *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).
[94] *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).
[95] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

Seizures

The Court has held that a "seizure" occurs whenever a government agent intentionally "terminates or restrains [a person's] freedom of movement."[96] A seizure clearly occurs any time law enforcement agents arrest someone or pull over a vehicle. A seizure also takes place when government agents act in such a manner that a "reasonable person" would not feel free to leave or end the encounter.[97] In *Almeida-Amaral*, for example, the Second Circuit found a seizure occurred when a Border Patrol officer commanded an individual to stop, even though no physical contact took place.[98] Note, however, that government agents are not required to inform individuals of their constitutional right to walk away or ignore questioning.[99]

In determining whether a reasonable person would have felt free to end an encounter, courts presuppose an innocent person and employ a "totality of the circumstances" approach.[100] Thus, a seizure may result from, among other things, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the [person], or the use of language or a tone of voice indicating that compliance with the officer's request might be compelled."[101] In contrast to searches, the individual's personal view of whether a seizure occurred is not determinative; similarly, whether the officer intended to "seize" the individual is irrelevant.

> **Tip:** The Supreme Court requires seizures made in the absence of a warrant to be supported by "reasonable suspicion" that the particular person is engaged in unlawful activity, or "probable cause" to believe the particular person violated the law. An appendix to this practice advisory lists the relevant limits on seizures under the Constitution, INA, and federal regulations.

c. What are the "exceptions" to the Fourth Amendment's warrant requirement?

A: Searches and seizures are presumptively reasonable *only* if authorized by a warrant issued by a neutral judicial officer.[102] By the same token, the absence of a warrant makes any resulting search or seizure presumptively *unreasonable*. To rebut the presumption, the government must demonstrate the existence of an exception to the warrant requirement. These exceptions are:

- "Terry" *stops and frisks*. When an officer possesses "reasonable suspicion" that an individual is or will soon be engaged in illegal activity, he may briefly stop the person to ascertain his intentions and, if the officer further suspects the person to be armed and dangerous, frisk him for weapons. These exceptions are discussed on pages 19-20.
- *Arrests in public places*. Officers may arrest individuals in public whom they have "probable cause" to believe have violated the law. This exception is discussed on page 21.

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[96] *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations omitted).
[97] *United States v. Mendenhall*, 446 U. S. 544, 553 (1980) (Opinion of Stewart, J.); *Florida v. Bostick*, 501 U.S. 429, 534-35 (1991).
[98] *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 232 (2d Cir. 2006).
[99] *United States v. Drayton*, 536 U.S. 194, 206-07 (2002).
[100] *Bostick*, 501 U.S. at 438-39.
[101] *Benitez-Mendez v. INS*, 760 F.2d 907, 908-09 (9th Cir. 1985) (citation omitted); *see also Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 460-61 (4th Cir. 2013).
[102] *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

- *Searches based upon consent*. Any search made after receiving valid consent is considered "reasonable." This exception is discussed on pages 22-23.
- "*Exigent*" *circumstances*. Officers may enter a home without a warrant when the "exigencies of the situation" require immediate intervention, such as apprehending a fleeing felon, preventing the destruction of evidence, or assisting persons with serious injuries.[103]
- *Searches incident to a lawful arrest*. When an individual is *lawfully* arrested, officers may search his person and the immediately surrounding area for weapons or evidence.[104]
- *Automobile searches*. When an officer has "probable cause" to believe an automobile contains evidence of a crime, he may search the car.[105]
- *Plain view*. Officers may seize criminal contraband if it is in "plain view" in an area where they have a right to be.[106]
- *"Special needs" or administrative searches*. Officers may conduct warrantless searches in numerous contexts divorced from normal law enforcement needs, such as at the border.[107]

d. What is the difference between "probable cause" and "reasonable suspicion"?

When a government agent thinks a particular individual has broken the law, his suspicion can range from a mere hunch (perhaps based on a stereotype) to absolute certainty (based on witnessing the crime first hand). Along this spectrum, the Supreme Court has established two points at which an officer may take action on his belief without obtaining a warrant. These points are known as "probable cause" and "reasonable suspicion."

"Probable cause" is the more demanding requirement. It generally requires a combination of facts sufficient to create a reasonable *belief* that a violation of law has occurred.[108] Probable cause is always required for a government officer to obtain a search warrant or arrest someone. On review, courts examine the facts known to the officer at the time the search or arrest occurred.[109] As will be discussed on page 21, probable cause is also sometimes referred to as "reason to believe."

"Reasonable suspicion" is less demanding. It represents a middle ground where officers have reason to suspect illegal activity but lack sufficient evidence to establish probable cause. Reasonable suspicion must be supported by objective "articulable" facts rather than a mere "hunch."[110] However, courts need not weigh the sufficiency of each individual factor but instead consider the "totality of the circumstances."[111] Reasonable suspicion is always required before a government agent conducts an investigative "*Terry*" stop. In the immigration context, courts permit such detentions where officers possess reasonable suspicion that an individual is illegally in the United States. See pages 19-20.

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[103] *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978)).
[104] *Chimel v. California*, 395 U.S. 752 (1969).
[105] *Carroll v. United States*, 267 U.S. 132 (1925).
[106] *Washington v. Chrisman*, 455 U.S. 1 (1982).
[107] *United States v. Ramsey*, 431 U.S. 606 (1977).
[108] *Wong Sun v. United States*, 371 U.S. 471, 480 (1963) (quoting *Carroll*, 267 U.S. at 162).
[109] *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).
[110] *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968).
[111] *United States v. Arvizu*, 534 U.S. 266, 274 (2002); *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

e. What behavior can create "reasonable suspicion" of unlawful alienage?

"Reasonable suspicion" can arise from virtually any set of circumstances creating plausible grounds to suspect that a person is in the country without authorization. Though they require more than a "hunch," determinations of reasonable suspicion may "be based on commonsense judgments and inferences about human behavior."[112] Moreover, because courts look to the "totality of the circumstances," it may not matter that each factor taken into account is susceptible to innocent explanation.[113]

Race, ethnicity, or nationality

In ***United States v. Brignoni-Ponce***, 422 U.S. 873 (1975), the Supreme Court held that apparent Mexican ancestry alone cannot provide "reasonable suspicion" of alienage, much less unlawful status. Subsequently, numerous circuit courts have concluded that reliance on race or ethnicity *alone* constitutes an "egregious" violation of the Fourth Amendment.[114] Moreover, the Ninth Circuit has given foreign appearance little weight as a factor supporting reasonable suspicion in areas with high concentrations of racial or ethnic minorities.[115]

At the same time, the Court in *Brignoni-Ponce* credited the government's assertion that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[116] As a consequence, immigration officers may claim to have relied on ostensibly "neutral" factors in developing reasonable suspicion even if skin color was their primary motivation. Attorneys can try to undermine such claims by challenging officers' assumptions about physical appearance on cross-examination.

Nervousness

"Nervous, evasive behavior" may serve as a relevant factor in establishing reasonable suspicion,[117] and immigration officers frequently cite it as a basis for suspecting that an individual is here without authorization. Because perceived nervousness is so subjective, attorneys should insist that the officer testify about the respondent's allegedly nervous behavior and attempt to demonstrate on cross that the officer's conduct was based on a subjective hunch rather than an articulable "fact." For example, a court disregarded an agent's contention that the respondent appeared nervous because he had a "dry mouth," reasoning that the government had not introduced evidence linking the dryness of an individual's mouth to his or her level of nervousness.[118]

Flight from immigration officers

The Supreme Court has held that flight from law enforcement officers, standing alone, provides reasonable suspicion of illegal activity,[119] and courts have long held that attempts to evade immigration officers provide justification to temporarily detain them for questioning.[120]

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[112] *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).
[113] *Arvizu*, 534 U.S. at 274.
[114] *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).
[115] *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 n.21-22 (9th Cir. 2000).
[116] *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).
[117] *Wardlow*, 528 U.S. at 124.
[118] *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1447 (9th Cir. 1994).
[119] *Wardlow*, 528 U.S. at 124-125.

Failure to acknowledge immigration officers

Immigration officers may also cite an individual's deliberate *failure* to acknowledge their presence as a factor justifying reasonable suspicion. While the Ninth Circuit categorically rejected such conduct as a factor to be considered in a reasonable suspicion analysis,[121] the Supreme Court subsequently held its relevance depends on the context in which it arose.[122]

f. Who has "standing" to challenge Fourth Amendment violations?

Only individuals who have a reasonable expectation of privacy over the area searched, or who were themselves seized, can challenge the validity of a search or seizure. One need not personally own a residence or commercial property to have a reasonable expectation of privacy. For example, invited overnight guests always have a reasonable expectation of privacy in the home where they sleep.[123] While employees have no expectation of privacy in public areas of their worksites,[124] they can challenge searches in nonpublic areas.[125] And while car passengers ordinarily lack standing to challenge *searches* of vehicles they neither own nor lease,[126] if law enforcement agents stop or obstruct a car, both the driver and passenger have been seized.[127]

2. ENCOUNTERS IN PUBLIC PLACES

a. When can officers engage in "consensual" questioning about immigration status?

Fourth Amendment

Under the Fourth Amendment, law enforcement agents—including immigration officers—may *always* pose questions to persons they encounter in locations where the officers have a right to be.[128] However, persons approached for questioning have no corresponding obligation to answer and may simply walk away.[129] As previously discussed, a consensual encounter can become a "seizure" if an officer restrains an individual's freedom of movement in such a way that a reasonable person would *not* feel free to leave or otherwise end the encounter. In ***INS v. Delgado***, 466 U.S. 210, 218 (1983), immigration agents carried out a factory raid to search for undocumented workers. Some agents questioned employees about their immigration status while others positioned themselves near the building exits. The Supreme Court found that no seizure had occurred because the agents neither prevented the workers from moving about the factory nor created an impression that they would be detained if they sought to leave.

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[120] *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630 (BIA 1974).
[121] *Gonzalez-Rivera*, 22 F.3d at 1446-1447.
[122] *Arvizu*, 534 U.S. at 275-76 (a "failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)").
[123] *Minnesota v. Olson*, 495 U.S. 91 (1990).
[124] *Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978).
[125] *Mancusi v. DeForte*, 392 U.S. 364 (1968).
[126] *Rakas v. Illinois*, 439 U.S. 128 (1978).
[127] *Brendlin v. California*, 551 U.S. 249 (2007).
[128] *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185 (2003) ("[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."); *Davis v. Mississippi*, 394 U. S. 721, 727 n. 6 (1969).
[129] *Brown v. Texas*, 443 U.S. 47 (1979).

INA

Most courts have held that the INA places independent limits on immigration officers' authority to ask questions about immigration status. Under INA § 287(a)(1), immigration officers may "interrogate any alien or *person believed to be an alien* as to his right to be or to remain in the United States."[130] As one court has stated, "[a] plain reading of this statute requires the government to show that immigration officials *believed* a person was an alien before questioning him."[131] Likewise, in ***Matter of King and Yang***, 16 I&N Dec. 502, 504-05 (BIA 1978), the Board confirmed that INA § 287(a)(1) requires immigration officers to have a "reasonable suspicion of alienage" before questioning individuals about their immigration status, even where "no detention [i]s involved." Neither the INA nor federal regulations describe what factors may create a "reasonable suspicion of alienage." While an individual's ethnic appearance alone is not sufficient to create reasonable suspicion that a person is a noncitizen,[132] it may, in combination with other factors, provide justification for an officer to question an individual about his immigration status.[133]

Attorneys considering a motion to suppress under INA § 287(a)(1) are encouraged to contact the American Immigration Council at clearinghouse@immcouncil.org.

b. When can immigration officers ask an individual for documentation?

Fourth Amendment

A request for identification does not, by itself, constitute a seizure.[134] Nor does the voluntary production of identification transform the encounter into a seizure.[135] Again, however, such an encounter can *become* a seizure if the officer retains the identification in a manner that would make a reasonable person not feel free to request its return and depart the area.[136] For example, if an officer retains the identification while running the person's name through a government database, a seizure may have occurred because a reasonable person would not feel free to leave without his ID.

INA

Under INA § 264(e), it is a misdemeanor for any adult noncitizen "issued" an alien registration certificate or receipt card to fail to have it in his "personal possession" at all times. This requirement applies solely to "lawfully admitted aliens,"[137] for the text of the law imposes no obligation on noncitizens never issued documents in the first place. However, courts have found that claiming to

[130] INA § 287(a)(1) (emphasis added).
[131] *United States v. Flores-Sandoval*, 422 F.3d 711, 714 (8th Cir. 2005). *See also United States v. Garcia*, 942 F.2d 873, 877 (5th Cir. 1991); *United States v. Alvarez-Sanchez*, 774 F.2d 1036, 1041 (11th Cir. 1985); *Lee v. INS*, 590 F.2d 497, 501 (3d Cir. 1979); *Ill. Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Au Yi Lau*, 445 F.2d at 222; *Yam Sang Kwai v. INS*, 411 F.2d 683, 686-87 (D.C. Cir. 1969); *La Duke v. Nelson*, 762 F.2d 1318, 1327 (9th Cir. 1985).
[132] *Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).
[133] *Matter of King and Yang*, 16 I&N Dec. at 504-05.
[134] *Delgado*, 466 U.S. at 216.
[135] *Florida v. Royer*, 460 U.S. 491 (1983).
[136] *Id*. at 504 n.9 (Opinion of White, J.).
[137] *Katris v. INS*, 562 F.2d 866, 869 (1st Cir. 1977).

possess lawful immigration status, combined with a failure to produce documentary proof of such status, provides probable cause to arrest under § 264(e).[138]

To date, the law is less developed regarding what, if any, justification immigration officers must have to request immigration papers in the first place. Because such requests concern an individual's "right to be or remain in the United States," it is arguable that § 287(a)(1) requires officers to have a "reasonable suspicion of alienage" before asking for documents. *See* previous discussion on pages 15-16.

c. Under what circumstances may immigration officers make investigative (*Terry*) stops?

Fourth Amendment

In ***Terry v. Ohio***, 392 U.S. 1 (1968), the Supreme Court held that police under certain circumstances could forcibly (but temporarily) detain individuals for limited questioning. While a "*Terry* stop" qualifies as a seizure under the Fourth Amendment,[139] it is less intrusive than a full-blown arrest and may thus be supported by "reasonable suspicion" rather than "probable cause."[140] As previously discussed, lower federal courts and the BIA have held that immigration officers may temporarily detain individuals whom they reasonably suspect are in the country without authorization.[141] The Supreme Court has also extended this rationale to permit brief traffic stops near the border where officers have reasonable suspicion to believe a vehicle contains noncitizens who are in the country without authorization, or individuals who are otherwise engaged in unlawful activity.[142]

INA and CFR

Federal courts and the BIA have uniformly held that INA § 287(a)(1) authorizes immigration officers to make brief investigative stops of individuals reasonably suspected of being in the country without authorization.[143] Federal regulations likewise authorize immigration officers to briefly detain individuals for questioning whom they have reasonable suspicion to believe are unlawfully present in the country.[144]

d. For how long may an individual be detained during an investigative (*Terry*) stop?

The Fourth Amendment limits the period of permissible detention during a valid *Terry* stop.[145] During such a stop, the seizing agents must diligently pursue a means of investigation that is likely to quickly confirm or dispel their suspicions.[146] If an investigative detention is excessively lengthy,

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138 *Benitez-Mendez v. INS*, 760 F.2d 907, 909 n.2 (9th Cir. 1985); *United States v. Wright*, 706 F.Supp. 1268, 1274 (N.D. Tex. 1989). For a creative argument that arrests based on § 264(e) are no longer proper due to the lack of a comprehensive registration scheme, *see* Families for Freedom and New York University School of Law Immigrant Rights Clinic, *Uncovering USBP: Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals* (January 2013), at 24-26.

139 *Terry*, 392 U.S. at 16.

140 *Brown v. Texas*, 443 U.S. 47, 51 (1979).

141 *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630, 632-33 (BIA 1974).

142 *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Arvizu*, 534 U.S. 266 (2002).

143 *Ojeda-Vinales v. INS*, 523 F.2d 286, 287 (2d Cir. 1975); *Au Yi Lau*, 445 F.2d at 223; *Yau*, 14 I&N Dec. at 632-33.

144 8 C.F.R. § 287.8(b)(2).

145 *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185-86 (2003).

146 *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

it will be considered a *de facto* arrest and found unconstitutional unless supported by probable cause. In the immigration context, the Second Circuit has recognized that an unfounded investigative stop may be considered egregious if it is "particularly lengthy."[147]

The Supreme Court has not specified any rigid time limitations on investigative detentions but repeatedly has said they should be "temporary" or "brief."[148] In *Brignoni-Ponce*, the Court emphasized that inquiries into immigration status ordinarily last no longer than one minute.[149] In a subsequent case, the Court noted than it had never approved a stop lasting ninety minutes.[150]

e. May immigration officers "frisk" an individual during an investigative (*Terry*) stop?

Officers conducting an investigative stop may frisk or pat down a suspect's outer clothing only if they have independent "reasonable suspicion" that the person is armed and dangerous.[151] "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue the investigation without fear of violence."[152] Officers may seize other items encountered during a frisk, but *only* if the "plain feel" of the item makes it immediately recognizable as illegal contraband.[153] If the frisking officer exceeds these limitations, any fruits of the search are obtained in violation of the Fourth Amendment.[154]

Arguably, officers cannot seize immigration documents—such as a foreign passport or other identification establishing alienage—during a pat down under this test because such documents are neither weapons nor illegal contraband. The only time an immigration officer may confiscate such documents without a warrant is if there is *probable cause* to believe the suspect is in the United States without authorization, in which case the officer may conduct a full search incident to arrest, one of the aforementioned exceptions to the warrant requirement.[155]

f. When is an individual considered under "arrest"?

No bright-line test exists to determine when an individual is considered under "arrest." However, the Supreme Court has made clear that a person need not be handcuffed, booked, or put in jail for an arrest to take place. For example, involuntarily transporting an individual to a police station for questioning has been found to be an arrest,[156] as has placing a person in a confined area, even for a limited period.[157] A *Terry* stop or brief detention—which is justified by reasonable suspicion—can become an arrest if the detention is sufficiently prolonged and officers do not develop the probable cause required to place a person under arrest.

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147 *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006).
148 *Hiibel*, 542 U.S. at 185-86; *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *Brignoni-Ponce*, 422 U.S. at 881-82; *Adams v. Williams*, 407 U.S. 143, 146 (1972).
149 *Brignoni-Ponce*, 422 U.S. at 880; *cf. Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (clarifying that the Fourth Amendment does not allow state and local police to detain a person, or prolong a detention, solely to verify immigration status).
150 *United States v. Place*, 462 U.S. 696, 709-710 (1983).
151 *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).
152 *Adams*, 407 U.S. at 146.
153 *Minnesota v. Dickerson*, 508 U.S. 366 (1993).
154 *Id*. at 373.
155 *Chimel v. California*, 395 U.S. 752 (1969).
156 *Dunaway v. New York*, 442 U.S. 200 (1979).
157 *Florida v. Royer*, 460 U.S. 491 (1983).

g. Do immigration agents need a warrant to make an arrest in public?

Fourth Amendment

Under the Fourth Amendment, government agents may arrest individuals in public without a warrant if probable cause exists to believe the person has violated the law.[158] Thus, committing or confessing to a violation of law in an officer's presence provides probable cause to arrest, no matter how minor the offense.[159]

INA and CFR

Under INA § 287(a)(2), immigration officers may make warrantless arrests only if they have "reason to believe" the person is (1) present in violation of law *and* (2) "likely to escape before a warrant can be obtained for his arrest." Courts construe "reason to believe" as equivalent to probable cause,[160] and regulations state that immigration officers must possess the requisite level of suspicion as to both the unlawfulness of a noncitizen's presence *and* the likelihood of his escape.[161]

Where either factor is absent, the admissibility of evidence obtained as a result of a warrantless arrest may be subject to challenge.[162] While the Sixth Circuit has found that suppression is not an appropriate remedy for violations of INA § 287(a)(2),[163] the court did not consider the Fourth Amendment interests protected by the statute, which the Supreme Court has indicated is an important consideration. *See* page 12. Attorneys considering motions to suppress under INA § 287(a)(2) are encouraged to contact us at clearinghouse@immcouncil.org.

3. ENCOUNTERS ON PRIVATE PROPERTY

a. May immigration agents enter a home to execute an administrative arrest warrant without the consent of the occupants?

Payton v. New York, 445 U.S. 573 (1980), held that government agents must, in the absence of exigent circumstances, possess a judicially issued search or arrest warrant before entering a private residence without the consent of the occupant(s). However, immigration warrants are issued by DHS[164] rather than judicial officers. Thus, even if they possess an administrative immigration arrest warrant, federal immigration officers arguably may not enter a residence without receiving valid consent from the occupant(s).[165]

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158 *United States v. Watson*, 423 U.S. 411, 417 (1976).

159 *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).

160 *United States v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971).

161 8 C.F.R. § 287.8(c)(2)(i)-(ii); *see also Matter of Chen*, 12 I&N Dec. 603, 605-07 (BIA 1968).

162 *United States v. Quintana*, 623 F.3d 1237, 1241 (8th Cir. 2010); *Martinez-Angosto v. Mason*, 344 F.2d 673, 680 (2d Cir. 1965).

163 *United States v. Abdi*, 463 F.3d 547, 550 (6th Cir. 2006).

164 INA § 236(a); *see also* Letter from former DHS Secretary Michael Chertoff to Sen. Christopher J. Dodd at 2 (June 14, 2007), *available at* http://www.yaledailynews.com/documents/2009/sep/28/letter-from-former-secretary-of-homeland-security-/ (acknowledging that a "warrant of removal is administrative in nature and does not grant the same authority to enter dwellings as a judicially approved search or arrest warrant").

165 *See Cotzojay v. Holder*, 725 F.3d 172, 183-84 (2d Cir. 2013) (remanding for additional fact-finding to determine whether residents had consented to a nighttime warrantless home entry by government officials).

b. When is consent considered valid?

Fourth Amendment

Without valid consent, any warrantless entry into a private residence (or other area in which a person possesses a reasonable expectation of privacy) is presumptively unreasonable.[166] The government bears the burden of showing valid consent.[167] A claim of valid consent may be defeated if consent was (a) not given, (b) given involuntarily, (c) not given by an authorized party, or (d) limited in scope.

Consent not given

The most obvious defense to a consent search is that consent was not given. In *Lopez-Rodriguez*, the Ninth Circuit cautioned that consent could be inferred in very few circumstances, and held that the government "may not show consent to enter from the defendant's failure to object to the entry."[168] The court found that a warrantless search without consent constitutes an egregious Fourth Amendment violation.

Consent given involuntarily

Consent must be given "freely and voluntarily" and not be "the result of duress or coercion, express or implied."[169] Courts look to the totality of the circumstances in making this inquiry, considering such factors as the coerciveness of the questioning; the vulnerability of the person who consented; and whether the individual understood his or her right to refuse consent.[170] Consent may be deemed involuntary where agents falsely claim to possess a warrant or authority to search.[171]

Consent given by unauthorized party

Consent must be given by an authorized party. Generally, third parties may provide valid consent if police reasonably believe them to possess "common authority" over the property.[172] Both landlords[173] and hotel clerks[174] have been found to lack authority to consent. In all cases, the government bears the burden of establishing the third party's common authority over the property.[175] Importantly, if the movant was himself present and refused consent, the search generally would be found unreasonable, even if another party provided consent.[176]

Consent limited in scope

Suspects may limit the scope of a search to which they consent, and it is unreasonable for officers to exceed such scope.[177] When the scope of consent is ambiguous, courts ask what a

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166 *Payton v. New York*, 445 U.S. 573, 586 (1980).
167 *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).
168 *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir. 2008) (quotations omitted).
169 *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (quotations omitted).
170 *Id.* at 228, 232-33.
171 *Bumper*, 391 U.S. at 548.
172 *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Matlock*, 415 U.S. 164, 169-170 (1974).
173 *Chapman v. United States*, 365 U.S. 610 (1961).
174 *Stoner v. California*, 376 U.S. 483 (1964).
175 *Rodriguez*, 497 U.S. at 181.
176 *Georgia v. Randolph*, 547 U.S. 103 (2006).
177 *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

"typical reasonable person would have understood by the exchange between the officer and the suspect."[178] Courts have similarly found that suspects may withdraw consent after a search has begun, and the Ninth Circuit explained that preventing suspects from withdrawing consent—by, for example, prohibiting them from witnessing the search—could violate the Fourth Amendment.[179]

INA and CFR

The INA and federal regulations impose more specific limits on consensual searches than the Fourth Amendment. Under INA § 287(e), immigration officers cannot enter farms or other outdoor agricultural operations to interrogate an individual about his immigration status without "the consent of the owner (or agent thereof)." Likewise, 8 C.F.R. § 287.8(f)(2) requires officers to obtain consent from "the owner or other person *in control*" of a site. The regulation further states that the immigration officer must note on his or her report that consent was given and, if possible, by whom consent was given. Under 8 C.F.R. § 287.8(f)(4), immigration officers may enter "open fields" or areas of a business accessible to the public without a warrant or consent, a provision consistent with the Fourth Amendment.

c. If officers receive consent to enter a home, may they automatically detain the occupants for questioning?

No. Generally, the same standards for a seizure on the street also apply inside a home. Permitting officers to enter a home does not authorize them to "round up" the occupants and/or detain them for questioning. To restrict a person's freedom of movement, immigration officers must, at a minimum, possess reasonable suspicion that the individual is in the United States without authorization.

Absent reasonable suspicion, the only instance in which the Supreme Court has allowed officers to automatically detain the occupants of a home is during the execution of a search warrant for *criminal contraband*. However, even then, the Court stated that temporary detentions may *not* be "exploited … to gain more information,"[180] and that any questioning which prolongs the period of detention must have independent support under the Fourth Amendment.[181]

Part III: Motions to Suppress for Due Process and Related Violations

Unlike the Fourth Amendment, which ceases to apply for suppression purposes after a lawful arrest, the Due Process Clause of the Fifth Amendment can form the basis of a suppression motion for misconduct occurring before *or* after an arrest. However, because violations of the Due Process Clause are difficult to establish, attorneys are encouraged to also make suppression arguments based on regulatory violations when the allegations permit.

1. What does the Due Process Clause prohibit?

The Due Process Clause of the Fifth Amendment states, in relevant part:

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178 *Id.* at 251.
179 *United States v. McWeeney*, 454 F.3d 1030, 1034-37 (9th Cir. 2006).
180 *Michigan v. Summers*, 452 U.S. 692, 701 (1981).
181 *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

> "No person shall be … deprived of life, liberty, or property, without due process of law."

Unlike the Fourth Amendment, which hinges upon reasonableness, the Due Process Clause requires *fairness*. Specifically, it entitles noncitizens to "fair" removal proceedings[182] and mandates that evidence be used in a "fundamentally fair" manner.[183] Among other limitations, the Due Process Clause prohibits the government from introducing statements made by individuals under coercion or duress. The Supreme Court requires "exclusion of coerced confessions both because we disapprove of such coercion and because such confessions tend to be unreliable."[184] In numerous cases, the Board and federal circuit courts have ordered the exclusion of statements obtained in violation of the Due Process Clause.[185]

2. What makes a statement "involuntary" or "coerced"?

Fifth Amendment

To establish a statement was made involuntarily, a movant must demonstrate that it was the product of affirmative duress or coercion by government agents. The seminal immigration case for the suppression of involuntarily obtained statements is ***Matter of Garcia***, 17 I&N Dec. 319, 320 (BIA 1980), in which the respondent conceded alienage after arresting officers physically prevented him from giving his attorney's phone number to his employer; failed to advise him of his rights under 8 C.F.R. § 287.3(c); and refused his requests to contact counsel. The Board reversed the deportation order, finding that the respondent's admission was involuntary. In a subsequent case, the Board identified other factors that would demonstrate coercion: physical abuse, lengthy interrogation, denial of food or drink, threats or promises, or interference with a respondent's attempts to exercise his rights.[186] More recently, in ***Singh v. Mukasey***, 553 F.3d 207 (2d Cir. 2009), the Second Circuit excluded the confession of a noncitizen who was interrogated for four hours in the middle of the night; repeatedly threatened him with imprisonment; and denied the opportunity to read the statement before signing it.[187]

CFR

Federal regulations prohibit immigration officers from using threats, coercion, or physical abuse to induce a suspect to waive his or her rights or to make a statement.[188] Arguably, this regulation imposes the same limitations on immigration officers as the Due Process Clause. Thus, attorneys may also cite this regulation when filing motions to suppress on due process grounds.

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182 *Bridges v. Wixon*, 326 U.S. 135, 154 (1945); *United States ex rel. Vajtauer v. Comm'r*, 273 U.S. 103, 106 (1927) ("Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process.").

183 *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980).

184 *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 349 (2006).

185 *Matter of Sandoval*, 17 I&N Dec. 70, 83 n.23 (BIA 1979) (citing *Tashnizi v. INS*, 585 F.2d 781 (5th Cir. 1978)); *Valeros v. INS*, 387 F.2d 921 (7th Cir. 1967); *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir. 1977); *Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960)).

186 *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

187 *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009); *see also Bong Youn Choy*, 279 F.2d 642; *Navia-Duran*, 568 F.2d 803.

188 8 C.F.R. § 287.8(c)(2)(vii).

3. What warnings must immigration officers provide to noncitizens following arrest?

Fifth Amendment

In contrast to criminal cases, the failure to provide *Miranda* warnings prior to interrogating a suspect in custody does not necessarily render subsequent statements inadmissible in removal proceedings.[189] However, an immigration officer's failure to provide similar advisals listed under 8 C.F.R. § 287.3(c) may be considered in determining whether, under the Due Process Clause, a statement is voluntary.[190]

INA

The INA states that all persons arrested without a warrant be taken for "examination" before a qualified immigration officer,[191] but does not require the provision of any warnings prior to examination.

CFR

Under 8 C.F.R. § 287.3(c), noncitizens arrested without a warrant are entitled to receive certain *Miranda*-like advisals following their arrest. The regulation currently reads in relevant part:

> (c) *Notifications and information.* … [A]n alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services … The examining officer shall note on [the Notice To Appear] that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

In ***Matter of E-R-M-F & A-S-M-*, 25 I&N Dec. 580 (BIA 2011)**, the Board held that noncitizens arrested without a warrant need not receive these advisals until *after* removal proceedings have been initiated by the filing of a Notice To Appear (NTA). The Board therefore concluded that "any statements made prior to the initiation of formal proceedings are not obtained in violation of 8 C.F.R. § 287.3(c), and the fact that no advisals were given at that time does not render the documents containing those statements inadmissible in removal proceedings."[192] The Board reasoned that the phrases "arrested without warrant" and "placed in formal proceedings" describe the subset of arrestees to whom the advisals must be given, making the filing of a NTA "a necessary precondition to the mandatory issuance of the advisals."[193] The Board also noted that the Ninth Circuit previously reached the same conclusion in *Samayoa-Martinez v. Holder*, 558 F.3d 897 (9th Cir. 2009).[194]

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189 *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975); *Matter of Rojas*, 15 I&N Dec. 722, 724 (BIA 1976).

190 *Matter of Garcia-Flores*, 17 I&N Dec. 325, 327 (BIA 1980).

191 INA § 287(a)(2).

192 *Matter of E-R-M-F*, 25 I&N Dec. at 588.

193 *Id*. at 583.

194 Unlike the Ninth Circuit, the Second and Eighth Circuits have assumed, without directly deciding, that the advisals must be provided *prior* to examination. *Puc-Ruiz v. Holder*, 629 F.3d 771, 780-81 (8th Cir. 2010); *Singh v. Mukasey*, 553 F.3d 207, 215-16 (2d Cir. 2009).

Notwithstanding the Board's decision, a strong argument exists that the advisals in 8 C.F.R. § 287.3(c) must be given *prior to* questioning suspects arrested without a warrant, and attorneys may therefore wish to preserve this objection for future appellate challenges. First, it would be illogical to wait until after noncitizens are placed in removal proceedings to inform them of the reason(s) for their arrest, because the charges in the NTA may ultimately differ from the reason(s) for which they were initially arrested. Second, if arrestees do not receive the list of free legal service providers until *after* the NTA is filed, examining officers cannot honestly attest on the NTA that such a list was provided to the arrestee, as the regulation requires. And third, the Board's opinion renders the advisal regarding the use of statements in subsequent proceedings both inaccurate, because the initiation of removal proceedings renders them no longer "subsequent,"[195] and virtually meaningless, because the government typically has no need to obtain further statements from an arrestee after the NTA has been filed.

From a policy standpoint, in cases where the advisals are not provided prior to interrogation, it will be more difficult for immigration judges to evaluate claims under the Due Process Clause that statements were obtained involuntarily. In addition, waiting to provide the advisals may mislead immigration officers into believing that arrestees do not, in fact, have the right to remain silent or to have counsel present during interrogation. Finally, the Board's construction of the regulation creates no guarantee that the advisals will, in fact, be provided—particularly in cases where arrestees are transferred far from the location of their initial interrogation.

Attorneys considering filing a motion to suppress for violations of 8 C.F.R. § 287.3(c) are encouraged to contact the American Immigration Council at clearinghouse@immcouncil.org.

4. May noncitizens have an attorney present during post-arrest examination?

Fifth Amendment

In ***Matter of Garcia***, 17 I&N Dec. 319 (BIA 1980), the Board suppressed evidence obtained from a respondent who was repeatedly prevented from contacting his attorney following his arrest. The Board concluded that preventing the respondent from contacting his attorney rendered his subsequent statements involuntary and therefore subject to suppression under the Due Process Clause.[196]

INA and CFR

INA § 292 gives persons the privilege of being represented by counsel (at no expense to the government) during all proceedings before immigration judges and the BIA. Importantly, 8 C.F.R. § 292.5(b) expands this right by entitling noncitizens to the presence of counsel during any "examination" by immigration officers. Both the INA and federal regulations characterize questioning that follows a warrantless arrest as an "examination."[197] If a noncitizen is precluded from having counsel present during such an examination, any resulting statements could therefore

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[195] See, e.g., 8 C.F.R. § 1239.1(a) ("Every removal proceeding conducted under section 240 of the Act (8 U.S.C. § 1229a) to determine the deportability or inadmissibility of an alien is commenced by the filing of a notice to appear with the immigration court.").

[196] *Matter of Garcia*, 17 I&N Dec. at 321 (citing *Navia-Duran v. INS*, 568 F.2d 803 (1st Cir.1977); *Bong Youn Choy v. Barber*, 279 F.2d 642 (9th Cir. 1960)).

[197] INA § 287(a)(2); 8 C.F.R. § 287.3(c).

merit suppression under 8 C.F.R. § 292.5(b).[198] Attorneys considering motions to suppress under 8 C.F.R. § 292.5(b) are encouraged to contact the American Immigration Council at clearinghouse@immcouncil.org.

Part IV: How to File a Motion to Suppress

1. What facts do I need to determine whether to file a motion to suppress?

Establishing the circumstances of your client's interactions with immigration officers (and, in some cases, other law enforcement officials) encountered prior to the initiation of removal proceedings is critical to assessing the viability of a motion to suppress. During your initial interview, you should question your client about his or her encounter(s) with ICE, CBP and/or other law enforcement officials, the nature of any questioning, your client's responses, any documents provided or received by your client, any restraints imposed on your client, whether your client received any warnings, whether there was a warrant for your client's arrest, and the sequence of developments that led to the issuance of a Notice to Appear. If possible, you should try to elicit this information while the facts are still fresh in your client's mind.

2. Who bears the burden of proof of removability?

When a respondent is charged with being present in the United States without being admitted or paroled, the government need only prove the respondent's identity and alienage, at which point the burden shifts to the respondent to establish the time, place, and manner of entry.[199] A motion to suppress must seek to prevent the government from establishing alienage.

3. Who bears the burden of establishing that evidence was unlawfully obtained?

When a motion to suppress is filed, the respondent bears the burden of showing that evidence used to establish removability was unlawfully obtained.[200] First, a respondent must make a *prima facie* case that the evidence in question was obtained unlawfully.[201] In the context of a motion to suppress in immigration court, a *prima facie* case is one that, on the facts alleged, is sufficient to create a rebuttable presumption that an egregious or widespread violation occurred. To establish a *prima facie* case, the motion must (a) be specific and detailed, (b) contain allegations based on the respondent's personal knowledge, and (c) list the evidence to be suppressed.[202] Where the written evidence submitted "could support a basis for excluding the evidence in question," then the individual seeking suppression "must" support the evidence with testimony.[203] If the individual then makes a *prima facie* case, the government will be called upon to justify how it obtained the evidence at issue.[204] Where an immigration judge finds that a respondent has not made a *prima facie*

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198 *See, e.g.*, *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006) (stating that 8 C.F.R. § 292.5(b) protects the "right to be represented by counsel at examinations by immigration officers").

199 8 C.F.R. § 1240.8(c); *Matter of Cervantes-Torres*, 21 I&N 351, 354 (BIA 1996).

200 *Matter of Tsang*, 14 I&N Dec. 294, 295 (BIA 1973).

201 *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971).

202 *Id.* at 822.

203 *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988).

204 *Id.*; *see also Cotzojay v. Holder*, 725 F.3d 172, 178 (2d Cir. 2013).

case, the decision may be subject to challenge before the BIA if the judge does not provide sufficient factual findings and reasoning to support the determination.[205]

4. At what point in proceedings should attorneys file a motion to suppress?

Before filing a motion to suppress, attorneys should deny the allegations (including alienage) in the NTA at the first master calendar hearing. Subsequently, after the government offers a Form I-213 or other evidence of the respondent's alienage, attorneys should disclose their intention to file a motion to suppress and, if needed, request time to file the motion.

5. What should be filed with a motion to suppress?

Affidavit(s)

Respondents must submit evidence in support of their suppression claims. Typically, though not exclusively, attorneys submit affidavits from the respondent and any witnesses detailing the factual basis for the motion.[206] Though couched in non-legal language, supporting affidavits should address all legal elements of the suppression motion—for example, that valid consent for a search was not obtained, or that the respondent was engaged in no activity that could create a reasonable suspicion of unlawful presence. Where necessary, include a certificate of interpretation as required under Chapter 3.3(a) of the Immigration Court Practice Manual.

Motion to terminate

Attorneys should also file a motion to terminate proceedings along with a motion to suppress. If suppression is granted and the government presents no untainted evidence of alienage, the immigration judge can grant the motion to terminate and dismiss the charges against the respondent.[207]

6. Are respondents entitled to a separate hearing on a motion to suppress?

Matter of Benitez, 19 I&N Dec. 173 (BIA 1984), held that respondents are not entitled to a separate hearing on a motion to suppress. However, ***Matter of Barcenas***, 19 I&N Dec. 609, 611 (BIA 1988), held that when a movant submits evidence that "could" provide a basis for excluding the evidence in question, the claims "must" be supported by testimony. Arguably, immigration judges must therefore allow respondents to testify in support of a motion to suppress which makes a *prima facie* case that the evidence in question was unlawfully obtained, even if a separate suppression hearing is not required.

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[205] *See, e.g.*, *Jose Fonseca Velasquez*, A200-586-281, 2014 WL 1278449 (BIA Mar. 10, 2014).

[206] *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). Note that such evidence may not need to be presented in a sworn statement. *Id.* at 821 n.1.

[207] *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

Tip: Before a client testifies, attorneys may wish to file a motion in limine seeking to prohibit questioning regarding alienage or removability, or the use of such testimony as part of the government's case-in-chief.[208] If such a motion is denied, attorneys should prepare their clients to exercise the privilege against self-incrimination guaranteed by the Fifth Amendment.

7. Do respondents have a right to remain silent in removal proceedings?

Yes. Even in civil removal proceedings, respondents cannot be required to answer questions that could subject them to criminal liability.[209] Thus, a respondent charged with being present without being admitted or paroled cannot be required to respond to questions that might establish alienage, because the answer could result in prosecution for criminal violations of the INA, such as illegal entry.[210] By contrast, the privilege against self-incrimination may not be invoked against questions relating to a visa overstay, because only civil consequences attach to such a violation.[211]

In general, the respondent must assert the privilege against self-incrimination on a question-by-question basis.[212] However, some immigration judges allow attorneys to assert the privilege on the client's behalf. The privilege may be asserted for both questions directly related to the respondent's alienage and for questions that could elicit a "link in the chain of evidence" needed to convict the individual of a crime.[213] Importantly, a witness cannot be compelled to state why an answer might tend to incriminate him;[214] nor can an immigration judge or trial attorney validly offer immunity to respondents to prevent them from invoking the privilege.[215] If asked a question to which the answer could help prove citizenship of a foreign country, clients should say, "I decline to answer under the Fifth Amendment."

8. Can immigration judges draw an adverse inference from a respondent's refusal to testify?

Yes. A respondent's silence may lead to adverse inferences regarding alienage.[216] However, until the government presents evidence of alienage, such silence is not alone sufficient to establish removability.[217] Thus, if the government's only evidence of alienage is excluded pursuant to a motion to suppress, and if the respondent does not concede alienage, the government will have failed to meet its burden and a motion to terminate proceedings should be granted.

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208 For an example of a decision granting such a motion, visit http://www.legalactioncenter.org/sites/default/files/docs/lac/IJ-Marks-order-8-25-11.pdf.

209 *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (holding that the privilege against self-incrimination may be "asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.").

210 See, e.g., INA § 275; *Matter of Velasquez*, 19 I&N Dec. 377, 379 (BIA 1986) ("Since it is a crime to enter the United States without inspection, the immigration judge found the respondent had properly invoked the privilege.").

211 *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976); *Matter of Santos*, 19 I&N Dec. 105, 109-110 n.2 (BIA 1984).

212 *Matter of R-*, 4 I&N Dec. 720, 721 (BIA 1952).

213 *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 191 (2003).

214 *Matter of R-*, 4 I&N Dec. at 721.

215 *Matter of Carrillo*, 17 I&N Dec. 30 (BIA 1979).

216 *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043-44 (1984).

217 *Matter of Guevara*, 20 I&N Dec. 238, 244 (1991).

9. What happens if the respondent concedes alienage?

Such an admission would constitute untainted evidence on which the government can base a finding of removability.[218] Absent highly unusual circumstances, a formal admission by a respondent's attorney—such as during the pleading stage or in a motion to change venue—is binding upon the respondent in removal proceedings.[219] If your client is considering a motion to suppress, it is crucial that you deny the charges and the relevant allegations in the NTA and that neither you nor your client concede alienage at any point of the case.

10. Can the government use a respondent's application for relief to establish alienage?

No. Federal regulations state that an application for relief made during a hearing "shall not be held to constitute a concession of alienage or deportability in any case in which the respondent does not admit his or her alienage or deportability."[220] Similarly, regulations state that bond hearings "shall be separate and apart from, and shall form no part of" an individual's removal hearing.[221] However, the regulations do not bar the government from relying on applications submitted prior to the initiation of proceedings, or other filings submitted to the court.[222]

11. Can respondents compel arresting or examining officers to testify?

Generally not. However, if the government offers a Form I-213 to establish alienage, attorneys may ask the immigration judge to subpoena or order a deposition of the agent who prepared the form so that he may be cross-examined.[223] A party applying for a subpoena must state what he or she expects to prove and show "diligent" but unsuccessful efforts to produce the same.[224]

Respondents generally are not entitled to cross-examine the preparers of Form I-213, because the form is considered "inherently trustworthy."[225] However, an exception exists if information on the form "is manifestly incorrect or was obtained by duress,"[226] or if other circumstances indicate lack of trustworthiness.[227] In many suppression cases, the alleged misconduct itself may provide a basis to question the reliability of the Form I-213—for example, whether or not immigration officers obtained consent before entering a home.

Furthermore, the reasons for considering I-213s inherently reliable are not necessarily sound. BIA cases which initially found I-213s reliable tied their reasoning to the public records hearsay

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218 *Matter of Carrillo*, 17 I&N Dec. at 32.

219 *Matter of Velasquez*, 19 I&N 377, 382 (BIA 1986). However, in unpublished cases, the BIA has reopened or remanded based on ineffective assistance of counsel where a previous attorney sought to suppress evidence but nonetheless conceded removability. *See Olga Mercedes Solano-Vargas*, A099-577-390, 2010 Immig. Rptr. LEXIS 7380 (BIA Oct. 12, 2010) (unpublished); *In re Jose Ramirez-Guadalupe*, A072-723-388, 2008 Immig. Rptr. LEXIS 9036 (BIA Sep. 18, 2008) (unpublished).

220 8 C.F.R. § 1240.11(e).

221 8 C.F.R. § 1103.19(d).

222 *See, e.g.*, *Vanegas-Ramirez v. Holder*, 768 F.3d 226 (2d Cir. 2014) (finding admissions in a change of venue motion to be independent evidence of removability).

223 8 C.F.R. § 1003.35(a)-(b) (granting immigration judges power to order depositions and issue subpoenas).

224 8 C.F.R. § 1003.35(b)(2).

225 *Matter of Barcenas*, 19 I&N Dec 609, 610 (BIA 1988).

226 *Barradas v. Holder*, 582 F.3d 754, 763 (7th Cir. 2009).

227 *Espinoza v. INS*, 45 F.3d 308, 310-11 (9th Cir. 1995) (quoting Fed. R. Evid. 803(8)(C)).

exception in the Federal Rules of Evidence (FRE).[228] Although the immigration courts are not bound by the FRE, they can provide guidance in determining whether evidence submitted to the courts is reliable and comports with due process. Thus, it is noteworthy that the public records hearsay exception itself contains an exception—courts may not admit public records of matters observed by law-enforcement personnel unless they were prepared in a routine, objective manner in a non-adversarial context.[229] Many I-213s, like records compiled by law enforcement personnel that are inadmissible under the public records hearsay exception, may not be reliable due to "the adversarial nature of the confrontation between the police and the defendant" that led to their creation.[230] Practitioners may argue that an I-213, like a record prepared by a law enforcement officer in the criminal context, requires closer examination for trustworthiness. Challenges to an I-213 should also highlight other indicia of unreliability where applicable, such as the inclusion of double hearsay or paraphrased statements, lack of detailed information, or lack of authentication.

12. If removal proceedings are terminated following the suppression of unlawfully obtained evidence, may the government reinitiate proceedings based upon untainted evidence?

Yes. ***Matter of Perez-Lopez***, 14 I&N Dec. 79 (BIA 1972), held that the government may commence new removal proceedings following the termination of an earlier case if it has new, untainted evidence of removability. However, the government must establish "that it gained or could have gained the knowledge it relies upon from a source independent of its wrongful act."[231]

Part V: Strategic Considerations

1. Are there advantages to seeking damages or other relief in federal court while pursuing a motion to suppress?

The events that give rise to a motion to suppress also may provide the basis for your client to sue the government for damages in federal court. Such damages actions are typically brought against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), § 2671 *et seq.*, or against individual law enforcement officers under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Before filing an FTCA lawsuit, a claimant must exhaust administrative remedies by filing an administrative claim with the relevant agency.[232]

Although damages lawsuits do not generally result in large monetary awards, there may be other reasons to sue. Through federal court discovery, you may be able to obtain evidence—for example, information regarding the basis for an unlawful stop—that strengthens your motion to suppress. Moreover, filing a well-founded administrative claim or federal lawsuit may provide a basis for a respondent to seek prosecutorial discretion under existing ICE policy.[233] The government

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[228] *See, e.g.*, *Matter of Davila*, 15 I&N Dec. 781, 782 (BIA 1976).

[229] *See, e.g.*, *Felzcerek v. INS*, 75 F.3d 112, 115 (2d Cir. 1996).

[230] Fed. R. Evid. 803, Advisory Committee Note.

[231] *Matter of Perez-Lopez*, 14 I&N Dec. at 80 (citing *Wong Sun v. United States*, 371 U.S. 471, 485 (1963)).

[232] 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2. For general information about filing FTCA claims, see National Immigration Project of the National Lawyers Guild, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys* (January 24, 2013), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_FTCA_FAQ.pdf.

[233] See John Morton, Director, ICE, Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs (June 17, 2011). In addition, respondents should consider filing an administrative complaint with the DHS Office of Civil Rights and

may also have a greater incentive to terminate a removal case as part of a global settlement of pending federal court litigation.

2. What are the pros and cons of filing a motion to suppress before requesting prosecutorial discretion?

If you file a motion to suppress, you are indicating to the government that you intend to take a litigious approach that will require them to invest more resources than usual. This will not endear you to the Office of Chief Counsel and may adversely affect how DHS trial attorneys think of you and treat you, which in turn may make them less inclined to grant your client's request for prosecutorial discretion. If you intend to seek prosecutorial discretion on your client's behalf, we recommend that you consider filing your request before your motion to suppress. You should, of course, avoid submitting any supporting materials with your request that implicate alienage or could lead to the discovery of evidence of alienage. On the other hand, filing a motion to suppress may give DHS a greater incentive to grant prosecutorial discretion to avoid unnecessary litigation.

Before deciding whether to file either a motion to suppress or a request for prosecutorial discretion and how to sequence these tactics, you should consider a number of factors. For purposes of the motion to suppress, the most important variables are the egregiousness of the conduct at issue, the government's access to independent evidence of alienage, the applicable law in your circuit, and the resources available to undertake prolonged litigation. For purposes of prosecutorial discretion, you should determine whether your client fulfills the criteria set forth in DHS's guidance on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), and Exercising Prosecutorial Discretion With Respect to Individuals Who Came to the United States as Children (June 15, 2012) or the memorandum issued by former ICE Director John Morton, entitled Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs (June 17, 2011).[234] Your strategy ultimately should be determined based on the relative strength of each of these claims.

Civil Liberties (OCRCL), which may also provide a basis for seeking prosecutorial discretion. *Id.* More information about the OCRCL complaint process is available at http://www.dhs.gov/file-civil-rights-complaint.

[234] For further discussion of these memoranda, see American Immigration Council, *Prosecutorial Discretion: How to Advocate for Your Client* (updated June 2011, additional update forthcoming based on Nov. 20, 2014 guidance), American Immigration Council, National Immigration Project of the National Lawyers Guild, and American Immigration Lawyers Association, *Deferred Action for Childhood Arrivals* (updated Aug. 2014, additional update forthcoming based on Nov. 20, 2014 guidance), and American Immigration Council and National Immigration Project of the National Lawyers Guild, *Preventing the Removal of Individuals Eligible for DAPA or Expanded DACA* (Dec. 2014).

APPENDIX

Questioning, Stops, and Arrests: Three Types of Encounters with Law Enforcement Officers

	Fourth Amendment	**INA § 287**	**8 C.F.R. 287**
"Consensual" questioning	*Not a seizure*. No individual suspicion required. Officers may always pose questions to people in public places. However, for questioning to be "consensual," reasonable person must feel free to decline and/or leave.	INA 287(a)(1). Permits immigration officers to "interrogate" any "alien" or "person believed to be alien" as to "his right to be or remain in the United States." BIA and most courts construe statute to require "reasonable suspicion of alienage" to justify questioning about immigration status. Statute thus more protective of individuals than Fourth Amendment.	8 C.F.R. § 287.8(b)(1). Permits immigration officers, "like any other person," to ask questions of "anyone" as long as the officer "does not restrain the freedom of an individual, not under arrest, to walk away." Same standard as Fourth Amendment. Regulation arguably violates INA 287(a)(1) if construed to permit questioning about immigration status without reasonable suspicion of alienage.
Investigative (*Terry*) stop	*Seizure*. Individualized suspicion required. Brief forcible detention permitted if officer possesses "reasonable suspicion" based on articulable facts that illegal activity is afoot (including violation of civil immigration laws).	INA 287(a)(1). Has been construed to authorize investigative detentions upon reasonable suspicion of *unlawful* alienage. Same standard as Fourth Amendment.	8 C.F.R. § 287.8(b)(2). Permits immigration officers to "briefly detain [a] person for questioning" if officer has "reasonable suspicion" based on "specific articulable facts" that the suspect is, or is attempting to be "engaged in an offense against the United States" or is "an alien illegally in the United States." Same standard as Fourth Amendment.
Arrest	*Seizure*. Arrests permitted in dwellings if officer obtains warrant. Arrests permitted in public places if officer possesses "probable cause" to believe arrestee committed violation of law. Seriousness of crime not relevant. Whether time existed to get a warrant not relevant.	INA 287(a)(2). Warrantless arrests permitted if immigration officer has "reason to believe" (e.g. probable cause) arrestee is an "alien in the United States in violation of law"—but only if "likely to escape" before warrant can be obtained. More protective than Fourth Amendment.	8 C.F.R. § 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." Same standard as Fourth Amendment. 8 C.F.R. § 287.8(c)(2)(ii). Arrest warrant "shall" be obtained except if officer has "reason to believe" suspect is "likely to escape" before warrant issued. More protective than Fourth Amendment.