How to do a
Motion to Suppress

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Panelists

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Why file a motion to suppress?

**"It always seems impossible until it's done."
—Nelson Mandela**

Why file a motion to suppress?

- Hold the government to its burden in high stakes proceedings

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Why file a motion to suppress?

- Keep prejudicial and/or unreliable evidence out of court

- Identify and highlight abusive or illegal conduct by government officials enforcing immigration laws

Why file a motion to suppress?

- Aggressive defense against deportation

How to recognize a possible suppression case

- Clear 4th Amendment violation with "egregious" elements
  - o Home raids – the sphere most protected by the 4th Amendment
  - o Nighttime arrest
  - o Abusive behavior by law enforcement officer
  - o Indications of racial profiling or other abuses
  - o Unreasonably long detention
  - o No legal authority for the stop

No legal authority for the stop – 4th Am law

- No **reasonable suspicion** for a brief detention – a *Terry* stop

  - o Remember that an officer has the right to ask anyone anything – a "voluntary" encounter is not a 4th Amendment event
  - o **Detention = individual does not "feel free to walk away"**
    - Show of authority by the officer
    - Show of force
    - Can be actions or words

No legal authority for the stop – 4th Am law

- Must be reasonable **suspicion of a violation** of the law
  - o Not just that the individual is not a US citizen
  - o Facts known to the officer at the time
  - o Must be an offense the officer has authority to enforce – if state/local officer, must be a criminal or traffic offense

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No legal authority for the stop – officer authority

- Officer must have legal authority to make the stop
  - o **State/local officer** must have reasonable suspicion of a **criminal** or **traffic** offense
  - o *Arizona v. US* – state/ local officers do not have the legal authority to enforce federal civil immigration law
  - o But pretextual stops are permissible under *Whren v. US* – officer's subjective motivation is irrelevant to reasonable suspicion if there was some kind of violation
    - May still be relevant to egregiousness

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No legal authority for the stop - prolonging the detention

- Officers may ask unrelated questions in the course of a lawful stop – but may not prolong the encounter beyond the time necessary to fulfill its purpose
  - o Unless the officer develops reasonable suspicion of another violation
  - o Rodriguez v. US, 135 SCt 1609 (2015) – 7-8 minute delay unrelated to the purpose was a 4th Amendment violation

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Indications of racial profiling

- No other justification for the stop
- Comments by the officers
- Others in the area who were/ were not stopped – race as the operative factor
- Apparent nationality and language can be proxies for race
- Try to see the situation in the light most generous to the officer – the judge will.

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What is the evidence?

- Are there neutral, credible witnesses with detailed testimony?
- Is your client a credible witness?
- What objective facts or documents can you point to and rely on?
- What documents can you get by FOIA or state public information act?
  o Department policies, police reports, Form I-213 documents
- Was your client charged with a crime?

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Does the client have relief from removal?

- Successful application for relief may put the client in a stronger position – cancellation of removal for non-LPRs, asylum/withholding, adjustment of status, etc.
- Suppression cases are hard to win and are hard-fought by ICE

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Basic Legal Foundation for Suppression Motions

- **Reliability**
- **Fairness**

Reliability—Burden of Proof

◦ DHS has initial burden of proof, by clear and convincing evidence, to prove that the Respondent is foreign born.

◦ 8 CFR 1240.8; *Matter of Amaya*, 21 I&N Dec. 583, 588 (BIA 1996)

DHS "independent evidence" not clear and convincing evidence of immigration status:

INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984)

Suppressible if:

1) the evidence was obtained through an *egregious* violation of the Fourth Amendment or other liberties;

and/or

INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984)

Suppressible if:

2) If there is reason to believe that violations of law were widespread.

Matter of Barcenas, 19 I&N 609 (BIA 1988) (burden of proof in suppression cases)

- Non citizen must introduce evidence showing that government violated the law.

- If affidavit establishes prima-facie case of illegality, evidence must be supported through testimony.

Matter of Barcenas, 19 I&N 609 (BIA 1988) (burden of proof in suppression cases)

• If respondent establishes prima facie case through affidavit **and** testimony, burden shifts to government to prove that evidence of alienage was obtained legally, or that an exception to the Fourth Amendment applied.

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Cognizable Suppression Theories

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Egregious Fourth Amendment Violation (examples)

• Race-based illegal stop

• Violent seizure—excessive force used, pointing weapons, racial epithets, unwanted sexual contact

• Bad faith action (knew or should have known it was illegal)

• Warrantless home entry

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Widespread Fourth Amendment Violation

- *Oliva-Ramos v. AG,* 694 F.3d 259 (3d Cir. 2012)

  - Denial of subpoena for documents relating to ICE enforcement practices when Respondent claimed widespread abuse, is reversible error.

- (Fugitive Operation Teams and pattern of warrantless entries)

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Fifth Amendment Violation

- Voluntariness of statements

- (detention conditions, interference with access to counsel, length and time of interrogation)

- (*Miranda*—presumption that custodial interrogation is unduly coercive)

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Violation of Governing Regulations

- Regardless of proof of alienage, the government violated a regulation intended to benefit the non-citizen + prejudice

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

  - 8 C.F.R. 287 et. seq.

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Proving Prejudice

Three ways to prove prejudice:

(1) Compliance with regulation is mandated by Constitution or federal law = prejudice;

(1) Framework designed to ensure procedural fairness, but not followed = prejudice

(1) Prove actual prejudice to your client.

Detainers

Immigration detainers as Fourth Amendment violations

◦ *Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014)

◦ *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014)

Priority Enforcement Program (PEP)????

Nuts & Bolts: Fact-Gathering

- Encounters with ICE, CBP or other law enforcement officials
- Questions asked & responses given
- Documents provided or received by your client
- Restraints imposed on your client
- Whether your client received any warnings
- Whether there was a warrant for your client's arrest
- Sequence of developments that led to the issuance of a Notice to Appear

Getting Started:
Deny Allegations & Charges

- At the first master calendar hearing, deny the allegations in the NTA – including alienage.
- Initial burden of demonstrating alienage is on government, so trial attorney will submit evidence – often Form I-213, which is considered inherently trustworthy and admissible.
- Alternatively, the trial attorney may try to question your client about alienage.

When I-213 is Submitted, Object and File (or Indicate Intent to File) a Motion to Suppress

- Ideally, motion and affidavit are ready at the hearing when your client pleads to the allegations.
- Motion must be specific, detailed, and based on your client's personal knowledge.
- Motion must specifically identify evidence to be suppressed.
- Concurrent motion to terminate proceedings is also recommended.

Making a Prima Facie Case

- You must make a prima facie case that evidence used to establish removability was unlawfully obtained before the government will be required to justify its actions
- Your client must submit an affidavit detailing factual basis for suppression and testify in support.
- Affidavits from other witnesses may be helpful.
- FOIA/Public Records Requests

Making a Prima Facie Case

- Next, the IJ will set the case for an individual hearing on the issue of alienage.
- Although there is no right to a separate suppression hearing, immigration judges must arguably allow respondents to testify in support of a motion to suppress.
- The government will then have an opportunity to cross-examine your client.

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Does Your Client Have the Right to Remain Silent?

- Your client has the right to refuse to answer any question that would implicate him or her in criminal acts, including illegal entry.
- Your client's silence may give rise to adverse inferences regarding alienage, but cannot itself satisfy the government's burden of proof.
- Prepare your clients to exercise their Fifth Amendment right against self-incrimination.

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Responding to Additional Government Evidence

- The government may present testimony from the arresting agent(s) to justify how it obtained the evidence at issue.
- Consider:
  1) Is the evidence the fruit of an unlawful arrest?
     2) Is there an independent source?
- Be sure your client does not concede alienage at any point of the case.

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If removal proceedings are terminated, can the government reinitiate proceedings?

- Yes, but only if it has new, untainted evidence of removability.
- The government must establish "that it gained or could have gained the knowledge it relies upon from a source independent of its wrongful act."

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Practice Resources

American Immigration Council
Practice Advisories:

- *Motions to Suppress in Removal Proceedings: A General Overview*
- *Motions to Suppress in Removal Proceedings: Fighting Back Against Unlawful Conduct by CBP*
- *Motions to Suppress in Removal Proceedings: Cracking Down on Fourth Amendment Violations By State & Local Law Enforcement Officers*

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Call to Action

- File motions to suppress!
- Sign up with Immigrationjustice.us.
- Sign up with www.standwithimmigrants.org.

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QUESTIONS

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