

# MOTIONS TO SUPPRESS AND TERMINATE IN IMMIGRATION COURT TO HELP CHILDREN

Rex Chen, Safe Passage Project

Homero Lopez, Jr., Catholic Charities-  
Archdiocese of New Orleans

November 2015

# Welcome!

- 
- Write questions down and pass them up.

# Hypo #1



A 15 year old girl came in 2014. Kept four days in a small room with adults. No bed, lights on 24 hours, and extremely cold. No medical care for her fever.

# Welcome: Mini-mock



## Challenging proper service of the NTA

- IJ
- The child's lawyer

What could the child's lawyer have done better?

# Motivational Quote

- Each generation must, out of relative obscurity, discover its mission, fulfill it, or betray it --  
Frantz Fanon.



Photograph by CAFOD Photo Library, used under a Creative Commons license

# Termination/suppression

<b>Tactic</b>	<b>Work</b>	<b>LPR path</b>
SIJS	Yes	Yes
Asylum	Yes	Yes
Withholding of removal	Yes	No
U non-immigrant status	Yes	Yes
T non-immigrant status	Yes	Yes
Prosecutorial discretion	Usu. no	No

# Termination/suppression

<b>Tactic</b>	<b>Work</b>	<b>LPR path</b>
SIJS	Yes	Yes
Asylum	Yes	Yes
Withholding of removal	Yes	No
U non-immigrant status	Yes	Yes
T non-immigrant status	Yes	Yes
Prosecutorial discretion	Usu. no	No
<b>Terminate/suppress</b>	<b>No</b>	<b>No</b>

# Termination/suppression

<b>Tactic</b>	<b>Work</b>	<b>LPR path</b>
SIJS	Yes	Yes
Asylum	Yes	Yes
Withholding of removal	Yes	No
U non-immigrant status	Yes	Yes
T non-immigrant status	Yes	Yes
Prosecutorial discretion	Usu. no	No
<b>Terminate/suppress</b>	<b>No</b>	<b>No</b>
Deportation order ☹️	No	No

# There are two ways to win:



- **Termination motions:** Throw the case out because of something stinky (doesn't matter whether ICE meets its burden of proof).
- **Suppression motions:** Keep certain evidence out and hope ICE cannot meet its burden of proof (usually to prove alienage)

# Practical steps



- I. Ask the IJ to set a deadline for ICE's evidence.

# Practical steps



II. If ICE submits material late, ask the IJ to terminate. (ICE's unusually heavy workload is no excuse). **IJ Khan knows this.**

# Practical steps

III. To fight this or not? Consider:

- Want to fight for relief (seek a conditional order)
- Good chance for other relief (100%??)
- Specific IJ's preferences
- Fear that the IJ/ICE will improperly punish you just because you file the motion
  - ▣ Continuances? Iffy PD requests?

# Practical steps



III. To fight this or not? Consider:

□ Ethics?

- Save the lawyer's time/effort
- Reputation/victory percentage
- Save the client's time/fees
- Lawyer's personal feelings about these cases
- Pursuit of the child's parents in the US
- Establish case law/precedent in your jurisdiction

# Termination: regulatory violations

Throw the case out because the government violated a regulation and that regulation was intended to benefit the non-citizen. *Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980). Possible even if ICE has proof of alienage.

# Termination: regulatory violations

## **Prejudice – the BIA**

Either:

- ❑ mandated by Constitution/federal law,
- ❑ creates a procedural framework, or
- ❑ benefits non-citizen plus proof of actual prejudice

# Termination: regulatory violations

**The Second Circuit:** for years, a better rule. But a three-judge panel in *Rajah v. Mukasey*, (2d Cir. 2008) is illogically muddying the waters. Is the rule for pre-hearing regulatory violations that we either show: (see next slide)

# Termination: regulatory violations

**The Second Circuit: ideas = either**

- ❑ Egregious conduct,
- ❑ Arrests without clear probable cause,
- ❑ Deprivation of fundamental rights,
- ❑ Might have affected the outcome, or
- ❑ Balancing protections and deterrence in our specific case [frequent MTTs help]
- ❑ Q: Other ideas?

# Termination: regulatory violations



**The Third Circuit:** presume prejudice if it affects fundamental rights derived from the Constitution or a federal statute. *Leslie v. Holder* (3d Cir. 2010)

# I-770 Termination



What is an I-770 form?



# I-770 termination

**Lectura de este Aviso:**

- He leído este aviso.
- Este aviso me ha sido leído.

**Derecho de Usar el Teléfono:**

- Me he comunicado con mis padres o guardián legal.
- Me he comunicado con un amigo o pariente adulto.
- No deseo hablar con nadie por teléfono.

**Derecho a Ser Representado por un Abogado:**

- He hablado con un abogado.
- No deseo hablar con un abogado.

**Derecho a una Audiencia:**

- Entiendo mi derecho a una audiencia ante el Juez de Inmigración.

- Deseo una audiencia ante el juez.

Firma: 

- No deseo una audiencia ante el juez.

Estoy en los Estados Unidos ilegalmente y deseo regresar a mi país.

Firma: 

# I-770 termination

## Lectura de este Aviso:

- He leído este aviso.
- Este aviso me ha sido leído.

## Derecho de Usar el Teléfono:

- Me he comunicado con mis padres o guardián legal.
- Me he comunicado con un amigo o pariente adulto.
- No deseo hablar con nadie por teléfono.

## Derecho a Ser Representado por un Abogado:

- He hablado con un abogado.
- No deseo hablar con un abogado.

C
Pa
N

# I-770 termination



- The government must give it to all <18, even those with parents. 8 CFR 236.3(h).
- If <14 or doesn't understand it, DHS must read and explain it in a language the child understands.

# I-770 termination



- Providing another similar form does not cure the violation according to a NYC IJ but then the BIA in an unpublished decision said the opposite (case litigated by Jason Cade then at The Door).
- **Victories in NYC, NJ, MA** (MTT or settled)

# I-770 termination



## **Check for:**

- Gave I-770 but kids didn't understand it
- Gave in wrong language (winner!)
- Forced to sign without reading it (good if we can prove it)
- Did not offer a copy (unclear)
- Analyze whether CBP wrote they gave it to the kid but in fact never did so (liars!)

# I-770 termination



**Warning:** some IJs may illogically say the I-770 does not implicate fundamental rights where the child in question by chance was eventually able to get a lawyer. Hey, that is not a principled way to analyze if a right is fundamental. **Be prepared with IJ Nelson!**

# I-770 termination



**Warning:** some IJs try to say the I-770 is focused on when those  $<18$  are pushed to accept voluntary departure and will not grant our motions where voluntary departure not involved. **Be prepared with IJ Nelson!**

# I-770 termination



## **CBP only gave the I-770 to a conservator**

- 8 CFR 1236.2 only lets them serve the NTA and arrest warrant like that if the kid is under 14.
- 8 CFR 103.8(c)(2)(i) says can do that where a completely incompetent person is in an institution.
- Also: due process trumps regulations.

# Termination – NTA service



**What is the NTA?**

# Termination – NTA service



**NTA:** the Notice to Appear. It includes the allegations and charges. The second page includes a space to describe the way it was served. If served personally, there is a space for a signature.

# Termination – NTA service

**NTA service:** Must give the NTA for those <14 to parents and a person where kid resides, not just the kid. 8 CFR 103.5a(c)(2)(ii); *In re Mejia-Andino*, 23 I&N Dec. 533 (BIA 2002).

- Ninth Circuit requires it for kids 14-17 and after release. *Flores-Chavez* (9th Cir. 2004).
- *But see Nolasco v. Holder* (2d Cir. 2011) (no remedy if no prejudice where fully litigated).

# Termination – NTA service



## **Other NTA service issues:**

- ❑ Incomplete certificate of service
- ❑ Merely told the child to give a copy to the sponsor
- ❑ Watch out for IJs who say child's appearance at MCH means child received/understood NTA

# Termination – NTA service

---

## **Other NTA service issues:**

□ Unknown signature supposedly by a child personally served who was only 6 years old.

**IJ in Bmore agrees**

□ Says given to a conservator but no signature or name **IJ in Bmore agrees but an**

**IJ in Nebraska disagrees**

# Termination – NTA service

## Other NTA service issues:

- Says given to a conservator but illegible signature and no name **IJ in PA agrees**
- Given to conservator before child was in that shelter. **IJ in Nebraska disagrees**
- CBP in McAllen, TX lies about supposedly giving the NTA but the child refused to sign **Talk to Jodi Zeisemer of CCCS in NYC!**

# Termination – NTA service



## **Other NTA service issues:**

- Says personally served but nothing on the line for a signature when personal service is done. **IJ Khan now in NYC agrees**

# Termination – NTA service



## **ICE's lame attempt to cure: mini-mock**

- IJ
- The child's lawyer
- ICE counsel

**Q: What could the child's lawyer do better?**

# Termination – NTA service



## **ICE's lame attempt to cure:**

- ICE belatedly tries to serve in court. Should be invalid under 8 CFR 1003.14(a) (complete service before filing the NTA).
- Also, due process concerns to deny our chance to challenge it.
- **Many IJs agree but not an IJ in Bmore**

# Termination – NTA service

---

## **ICE's lame attempt to cure:**

□ ICE claims IJ should give time to serve the NTA under Matter of E-S-I- (BIA 2013). **IJ**

**Tsankov when in Denver:** only where indicia of incompetency arose after serving the NTA. (Victory by Jennifer Smith and Erin Richards).

# Termination – NTA service



## **ICE's lame attempt to cure:**

- ❑ Service on the child's immigration lawyer is not service on the custodian.
- ❑ Service on a family court lawyer is not service on the child.
- ❑ Audience: case stories? Ideas?

# Termination – NTA service



## **Re-serve and re-file the NTA:**

- ICE calling the mother in to ERO and trying to serve her there – any potential risk to the mother? Any legal basis for summoning her to ERO?
- Audience: case stories of ICE filing a new NTA or re-filing the NTA?

# Flores settlement



**What is the Flores settlement?**

# Flores settlement



Applies to all minors in detention

- Access to temperature control and ventilation
- Unless an emergency/influx,
  - Placed within 72 hours,
  - Held in licensed child-care facilities, and
  - Held in safe and sanitary conditions
- If an emergency, then DHS must place children expeditiously.

# Flores settlement – IJ rulings



- Feb 2015: NYC IJ Cheng held influx exists, ignored the “expeditious” requirement.
- May 2015: NYC IJ Wright ruled (a) not a regulation, (b) no prejudice, and (c) not factually proven
- July 2015: NYC IJ Nelson ruled you can only file a lawsuit, not a MTT

# Flores settlement – litigation



Litigation in a real court (C.D. Cal.) to enforce the Flores settlement

- Aug 2015: Judge Gee ruled that DHS has been violating Flores and must enact certain remedies by 10/23/2015
- Oct 2015: DHS doesn't comply

# Orantes injunction rules



If from El Salvador, see *Orantes-Hernandez* rules. (This applies to adults too)

- In writing and verbally give advisals.
- Cannot coerce them to drop asylum claims.
- Must make legal materials about relief available in Spanish and have accessible law libraries.

# CBP Hold Rooms Memo



**Hold Rooms Memo:** CCAN and the National Immigration Forum stitched pieces of it.

- Food (e.g. snacks every 4 hours)
- Bedding: all required will get clean bedding. Detained >24 hours must get a blanket and mattress.
- I-770 advisals
- Adequate temperature control/ventilation

# Other regulations or policies



Regulations, rules, and policies are everywhere! Some discuss arrests, coercion, and warnings. Work together to find out more policies and consider demanding document production in immigration court of DHS policies.

- E.g. CBP issued some standards in Oct  
<http://www.cbp.gov/sites/default/files/documents/cbp-teds-policy-20151005.pdf>

# Suppression



## Three Well-Established Grounds

- **Egregious** violations of the Fourth Amendment
- **Widespread** Fourth Amendment violations
- Fifth Amendment violations

# Egregious 4th Amendment (part 1)



Two steps: a 4th Amendment violation plus egregious in nature.

- First: was there a 4th Amendment violation of any kind? Hard if at a border checkpoint.

# Egregious 4th Amendment (part 2)

---

Second: egregious in nature:

- ❑ Racial profiling.
- ❑ Bad faith violations.
- ❑ Severe seizure. *Almeida-Amaral v. Gonzales*, 461 F.3d 231 (2d Cir. 2006).  
Offensive sexual touching. Cold cells?
- ❑ Even if local police did it.

# Widespread 4th Amendment



- Factors listed in *Oliva-Ramos v. Holder*, 694 F.3d 259 (3d Cir. 2012).
- Wild guess is any violation you see will be widespread against kids.
- Home raids: ask Rex for lots of research.

# 5th Amendment



- Coercion. Such as late-night intimidation.
- How about cold room treatment?

# Suppression grounds



- Certain conduct violates both regulations and can be grounds for a suppression motion
- Feel free to file both a termination motion and a suppression motion for the same conduct (e.g. coercion)

## Miami Herald Article on Cold Rooms



- Immigrants tell consistent stories about the hieleras.
- “It was super cold in the room,” “And there were 60 people in a room, packed, and it was still cold, like the air-conditioning going on all the time, never pausing.”

# Miami Herald Article on Cold Rooms



“Immigrant-rights activists believe the holding cells are deliberately kept cold and immigrants purposely made uncomfortable as **tactics to pressure them into signing documents** that enable immigration authorities to kick them out of the country quickly.”

# Mayeli Hernandez's 2014 Testimony



12 year old girl living on Long Island, lives with 9 year old sister.

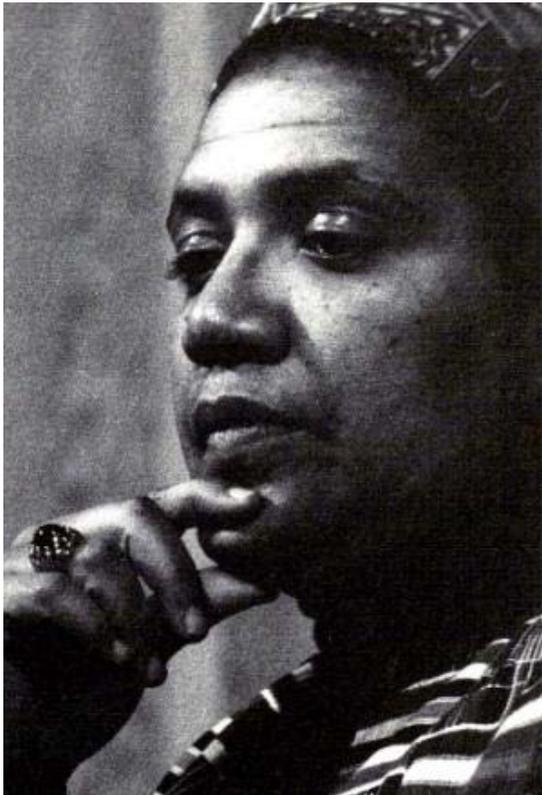
<http://www.c-span.org/video/?c4505324/mayeli-hernandezs-testimony-members-congressional-progressive-caucus>

**Excerpt at 3:17 to 4:56**

<http://www.c-span.org/video/?c4559666/mayeli>

# Ambitious Grounds

The Master's Tools will never dismantle the  
Master's House. -- Audre Lorde



Picture by K. Kendall, used under a Creative Commons license,  
<https://creativecommons.org/licenses/by/2.0/>

# Ambitious Grounds



- Fourth Amendment violations even if not egregious nor widespread
- State Constitutional rights
- Vienna Convention on Consular Relations
- Outrageous trickery
- Ask Rex for research and to coordinate!
- \* Civil rights lawsuits are another tactic

# Motions to suppress and terminate

---

## □ Near-Final Points

- Make the stories vivid! Boldly evoke pain caused, not a dry legal recitation!
- Waves of shameful practices? Stay in touch with each other through Rex.
- Discussions: groups such as the National Immigration Project (**just \$40** for law students!)

# Motions to suppress and terminate

- ▣ Vera 3/2015 MTT advisory
- ▣ ACLU-AZ 11/2015 advisory on CBP
- ▣ Advocacy



Rally to end family detention: March 2015 in NYC

# Motions to suppress and terminate



- ▣ Civil litigation for damages
- ▣ Collaboration!

# Thanks



- Special thanks to Amanda Hurt, Emily Bzdega, and Brooke Rickett of HB & Co.
- Thanks also to Kris Jackson, Helen Lawrence, Katie Glynn, Jason Cade, Heather Yvonne Axford, and Michael Wishnie
- Also to Michelle Mendez and Elizabeth Badger, speaking at this week's conference!

# Hypo #1



A 15 year old girl came in 2014. Kept four days in a small room with adults. No bed, lights on 24 hours, and extremely cold. No medical care for her fever. How would you argue a termination motion? If you have time, please outline how would you argue a suppression motion.

# Hypo #1 - continued

- Note, Bryan Johnson's motion is available on his web site



## Hypo #2



A girl was held in very cold conditions with lights kept on around the clock. On the second day in detention, DHS advised her of her rights then got the child to admit she was born outside the US. IJ Cheng asks you (a) what was violated, (b) why should prejudice be presumed, and (c) what facts in this hypo or that you'd hope to gather would prove that actual prejudice exists?

## Hypo #3



A 13 year old boy was given an NTA but DHS would not let him keep a copy until 3 weeks later. DHS did not serve the parents. The child is released with the NTA, joins his parents in NYC, and brings a lawyer to the first court date. IJ Wright wants to understand how you are contesting NTA service and how come there isn't merely a technical violation.

## Hypo #4



A 14 year old girl was caught at the border and put in an ORR shelter. At that point, ICE created an NTA. The NTA has a stamp saying “served on conservator” with an illegible scribble for a signature and no typed name. What is the argument that the NTA was not properly served? If DHS gives you a copy at the MCH, how do you respond?

## Hypo #5



A 17 year old boy from Honduras was caught at the border, lost his birth certificate during the trip, told CBP he was 17 but they treated him as  $>18$  and put him with adults for 8 days, traumatizing him. ICE could not get an answer from the consulate about the boy's true age. After realizing the mistake, ICE put him in solitary for 24 hours then moved him to a shelter. What's the termination motion?

## Hypo #6



A 15 year old boy from El Salvador was caught at McAllen, TX, put in a frigid room, and wasn't shown or given an NTA, an I-770 form, or an Orantes notice. CBP created an NTA and I-770 that say the child supposedly refused to sign them – he says that didn't happen. IJ Tsankov wants to know (a) why terminate and (b) whether ICE can cure any problem by serving an NTA in court. If IJ Tsankov allows ICE to cure in court, what's your next move?

## Hypo #7



A 13 year old boy from Honduras was caught at the border during the “surge,” is held in the “hieleras” for 10 days without being allowed to shower and then sent to an ORR shelter without getting an I-770 or NTA from CBP. At court, ICE argues that DHS and EOIR entered an “agreement” to not provide the I-770 or NTA at the time of capture because it was impossible to do during the “surge.” What’s your response?

# Fuller mock script



- Depending on the time and the audience's preference, we could do a longer mock hearing now, later, or not at all.

# IJs



□ Opinions?

# Discovery



- So much to say! Ask Rex if you want more information afterward.

# Discovery



- Ask if ICE will get it and give it
- Demand that the IJ compel production of the A-file and documents about admission/presence. INA 240(c)(2)(B)
- Track 3 FOIA request (limited to the A-file)
- Broad FOIA requests
- Brady, subpoenas (8 CFR 1003.35(b)(3)), interrogatories, depositions

# Discovery



- What if an IJ says a DHS officer can never be compelled? Ideas from the audience?

# Discovery



Advanced ideas:

- Call the agency/police for documents
- State law equivalent to FOIA
- File complaints about misconduct
- Jencks Act

# Discovery



What kinds of documents?

- The A-file
- Policies and memos (for the date/place)
- Records about how our client was treated
- Evidence of widespread violations
- Pictures of officers? Disciplinary records?
- Meta-data

# Closing

You cannot understand or know what revolution is simply by reading about it or talking about it. You must take action and do it. Don't think, do.

– Su Beng, Taiwanese activist  
(1918- )

Photo by Felicia Lin



# Feedback



# Evaluation

# Thanks!

- 
- Amanda Hurt
  - Emily Bzdega
  - Brooke Rickett
  - Kris Jackson
  - Helen Lawrence
  - Katie Glynn
  - Jason Cade
  - Heather Yvonne Axford
  - Michael Wishnie