



## PRACTICE ADVISORY

# **Terminating Removal Proceedings for Activists Targeted for Political Speech**

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Practice Advisories published by the National Immigration Project of the National Lawyers Guild address select substantive and procedural immigration law issues faced by attorneys, legal representatives, and noncitizens.

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# Terminating Removal Proceedings for Activists Targeted for Political Speech

## Practice Advisory<sup>1</sup>

### I. Overview

The United States has historically targeted noncitizens who were politically active. Attorney General Mitchell Palmer conducted raids that led to the deportation of hundreds, including Emma Goldman.<sup>2</sup> In the 1940's and 50's, Attorneys General Biddle and Jackson targeted activists for deportation, including Harry Bridges, President of International Longshore and Warehouse Union.<sup>3</sup> More recently, the United States deported Dennis Brutus, a South African poet and anti-apartheid activist,<sup>4</sup> and attempted to deport the Los Angeles 8, activists who had supported the Popular Front for the Liberation of Palestine.<sup>5</sup> In two extreme crim/imm examples, Utah and Massachusetts executed Joe Hill<sup>6</sup> and Bartolomeo Vanzetti,<sup>7</sup> both foreign-born activists. These few

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<sup>1</sup> This practice advisory was written by Elizabeth Simpson with valuable comments from Sejal Zota and Dan Kesselbrenner. The attached model Motion to Terminate borrows gratefully from the Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction filed in *Ragbir v. Homan*, No. 18-cv-1159 (S.D.N.Y.). It is written with law from the Ninth Circuit. Questions about this advisory can be directed to Elizabeth Simpson at [elizabeth@nipnlg.org](mailto:elizabeth@nipnlg.org).

<sup>2</sup> Jewish Women's Archive, *Deportation of Emma Goldman as a Radical 'Alien'* (viewed on June 7, 2018), <https://jwa.org/thisweek/dec/21/1919/emma-goldman>.

<sup>3</sup> Chip Gibbons, *The Trial(s) of Harry Bridges*, Jacobin (viewed on June 7, 2018), <https://www.jacobinmag.com/2016/09/harry-bridges-longshore-strike-deportation-communist-party>.

<sup>4</sup> Dudley Clendinen, *Black Poet, an Exile for 10 Years, Battles U.S. Deportation to Africa*, NY Times (Jan. 14, 1982), <https://www.nytimes.com/1982/01/14/us/black-poet-an-exile-for-10-years-battles-us-deportation-to-africa.html>.

<sup>5</sup> John Catalinotto, *Victory at Last for Los Angeles 8*, Workers World (Feb. 1, 2007), <https://www.workers.org/2007/us/la-8-0208/>.

<sup>6</sup> AFL-CIO, *Joe Hill*, (viewed on June 7, 2018), <https://aflcio.org/about/history/labor-history-people/joe-hill>

<sup>7</sup> Felix Frankfurter, *The Case of Sacco and Vanzetti*, The Atlantic (Mar. 1927), <https://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/>.

examples—and there are scores more—illustrate that Attorney General Sessions and Donald Trump are following in some notorious footsteps.

This practice advisory provides information and background on Motions to Terminate removal proceedings based on the Department of Homeland Security’s (DHS) violation of agency regulations. It also provides a model Motion to Terminate for advocates to use in challenging removal proceedings that DHS initiates in retaliation for immigrant activists’ political speech. *See* Appendix A. It also attaches a decision from the Seattle Immigration Court on this issue. *See* Appendix B.

## II. Political Context

Donald Trump campaigned for President on an explicitly racist and anti-immigrant platform. In June 2015, he started his presidential bid by disparaging Latino immigrants, stating: “When Mexico sends its people, they’re not sending their best . . . They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>8</sup> Then-candidate Trump repeated that sentiment in August 2015, when he stated: “The Mexican government . . . send[s] the bad ones over because they don’t want to pay for them. They don’t want to take care of them.”<sup>9</sup>

In October 2016, then-candidate Trump responded to a presidential debate question about immigration by stating: “We have some bad hombres here, and we’re going to get them out.”<sup>10</sup> In December 2016, referring to an article about a crime wave on Long Island, President-Elect Trump said, “They come from Central America. They’re tougher than any people you’ve ever met. They’re killing and raping everybody out there. They’re illegal. And they are finished.”<sup>11</sup> On January 11, 2018, during a White House meeting

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<sup>8</sup> *Full Text: Trump announces a presidential bid*, Wash. Post (June 16, 2015), [https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm\\_term=.6fa0170ce812](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.6fa0170ce812).

<sup>9</sup> Andrew O’Reilly, *At GOP debate, Trump says ‘stupid’ U.S. leaders are being duped by Mexico*, Fox News (Aug. 6, 2015), <http://www.foxnews.com/politics/2015/08/06/at-republican-debate-trump-says-mexico-is-sending-criminals-because-us.html>.

<sup>10</sup> Katie Zezima, *Trump on immigration: There are ‘bad hombres’ in the United States*, Wash. Post (Oct. 19, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/10/19/trump-on-immigration-there-are-bad-hombres-in-the-united-states/?utm\\_term=.546dcc77b96b](https://www.washingtonpost.com/news/post-politics/wp/2016/10/19/trump-on-immigration-there-are-bad-hombres-in-the-united-states/?utm_term=.546dcc77b96b).

<sup>11</sup> Michael Scherer, *2016 Person of the Year: Donald Trump*, TIME (Dec. 2016), <http://time.com/time-person-of-the-year-2016-donald-trump/>.

with several U.S. Senators, the President disparaged a draft immigration plan that protected people from Haiti, El Salvador, and some African countries, asking “Why are we having all these people from shithole countries come here?”<sup>12</sup> President Trump further denigrated Haitians, asking “Why do we need more Haitians?” and ordered the bill’s drafters to “take them out.”<sup>13</sup> In this meeting, the President further expressed his preference for more immigrants from places like Norway,<sup>14</sup> where the population is more than 90 percent white. Haiti’s population, by contrast, is over 95 percent Black. Both during his campaign and after taking office, President Trump has repeatedly compared immigrants and refugees to snakes who will bite and kill anyone foolish enough to take them in.<sup>15</sup> He has also referred to immigrants as “animals.”<sup>16</sup>

Immigrant rights organizers were already active under Obama’s presidency, with prominent activist figures labeling him the “deporter-in-chief.”<sup>17</sup> The climate has only intensified, however, in the context of Trump’s overt animus toward non-white immigrants.<sup>18</sup> In retaliation for activists’ political speech, ICE has targeted immigrant rights figures for surveillance, arrest, and deportation.

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<sup>12</sup> Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Wash. Post (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-inoval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html?utm\\_term=.b56f11cc896f](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-inoval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.b56f11cc896f). Other senators have suggested the word used might have been “shithouse.” Julie Hirschfeld Davis, *Trump’s Harsh Words, Not His Plan for Wall, Dominate Hearing*, N.Y. Times (Jan. 16, 2018), <https://www.nytimes.com/2018/01/16/us/politics/trump-shithole-shithouse-immigration.html>.

<sup>13</sup> Josh Dawsey, *Trump derides protections for immigrants from ‘shithole’ countries*, Wash. Post (Jan. 12, 2018), [https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-inoval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94\\_story.html?utm\\_term=.b56f11cc896f](https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-inoval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.b56f11cc896f).

<sup>14</sup> *Id.*

<sup>15</sup> Dara Lind, “*The Snake*”: Donald Trump brings back his favorite anti-immigrant fable at CPAC, Vox (Feb. 23, 2018), <https://www.vox.com/policy-and-politics/2018/2/23/17044744/trump-snake-speech-cpac>

<sup>16</sup> Julie Hirschfeld Davis, *Trump Calls Some Unauthorized Immigrants ‘Animals’ in Rant*, N.Y. Times (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/politics/trump-undocumented-immigrants-animals.html>.

<sup>17</sup> Amanda Sakuma, *Obama Leaves Behind a Mixed Legacy on Immigration*, NBC News (Jan. 15, 2017), <https://www.nbcnews.com/storyline/president-obama-the-legacy/obama-leaves-behind-mixed-legacy-immigration-n703656>

<sup>18</sup> Alina Tugend, *Leading the Way in the Fight for Human Rights*, N.Y. Times (May 24, 2018) (profiling Mijente co-founder Maris Franco), <https://www.nytimes.com/2018/05/24/us/leading-the-way-in-the-fight-for-human-rights.html>.

Ravi Ragbir is perhaps the most prominent organizer to be singled out by the Trump Administration. Ragbir is the founder and Executive Director of the New Sanctuary Coalition in New York City. The New Sanctuary Coalition is an interfaith network of congregations, organizations, and individuals, standing in solidarity with families and communities resisting detention and deportation. It mobilizes grassroots communities to act together to reform immigration policies at the local and national level, winning a campaign in New York City to de-couple local law enforcement from immigration enforcement. In January 2018, ICE abruptly took Ragbir into custody during a routine check-in, and sent him over 1000 miles away to Krome Detention Center in Florida.<sup>19</sup> Due to ongoing legal and organizing efforts, he was returned to New York City, and currently has a stay of deportation.

ICE has also targeted another national figure: Maru Mora-Villalpando. She is a community organizer, trainer, and the founder of Latino Advocacy, an immigrant rights group. She has organized local and statewide campaigns and protests in support of immigrants and immigrant detainees and against ICE and other federal and local authorities, including supporting hunger strikers inside the Northwest Detention Center, and organizing the Latino community in Lynwood, Washington to kick ICE out of the local police station. In December 2017, she was served with a Notice to Appear via certified mail—which stated on its face that she had been identified due to her admissions to a media outlet that she was “undocumented” and due to her “anti-ICE protests.”<sup>20</sup>

ICE has also arrested less well-known immigrants who have dared to speak out. In December 2017, ICE arrested Baltazar Aburto Gutierrez, a clam harvester in Washington State, after he was quoted in local papers talking about his girlfriend’s deportation. “You’re the one from the newspaper,” the ICE agent who detained him reportedly said. “My supervisor asked me to come find you because of what appeared in the newspaper.”<sup>21</sup> In January 2018, ICE agents in Colorado arrested Eliseo Jurado after his wife publicly took sanctuary in a church to avoid deportation to Peru.<sup>22</sup> In March 2017,

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<sup>19</sup> Nick Pinto, *ICE Is Targeting Political Opponents for Deportation, Ravi Ragbir and Rights Groups Say in Court*, The Intercept (Feb. 9, 2018), <https://theintercept.com/2018/02/09/ravi-ragbir-ice-immigration-deportation/>.

<sup>20</sup> Gene Johnson, *Deportation Document described immigrant activist’s protests*, AP News (Feb. 27, 2018), <https://apnews.com/ec59e1c1780146cb9d3b96b669bb0926>.

<sup>21</sup> *Id.*

<sup>22</sup> *U.S. Arrests Spouse of Peruvian in Refuge in Colorado Church*, Associated Press (Jan. 12, 2018), <https://www.usnews.com/news/best-states/colorado/articles/2018-01-12/husband-of-woman-taking-refuge-in-colorado-church-arrested>.

ICE detained Daniela Vargas, a 22-year-old activist who came from Argentina when she was seven, as she was leaving a news conference in Jackson, Mississippi, where she had spoken out in favor of DACA.<sup>23</sup>

In this political context, it is important to challenge DHS's initiation of removal proceedings in retaliation for political speech through Motions to Terminate.

### III. What Is a Motion to Terminate?

A Motion to Terminate is a basis to seek an end to proceedings. This practice advisory focuses on a termination remedy that is a vehicle to challenge deportation proceedings based on DHS's violation of an agency regulation. It is like a Motion to Suppress insofar as it contests removal based on DHS's misconduct. However, a Motion to Suppress requires a very high showing that ICE committed an "egregious" Fourth Amendment violation. *INS v. Lopez-Mendoza*, 486 U.S. 1032, 1050 (1984). Additionally, because a Motion to Suppress merely excludes tainted evidence of alienage, DHS can introduce independent evidence to meet its burden of proof. *Garcia-Aguilar v. Lynch*, 806 F.3d 671, 676 (1st Cir. 2015). In a Motion to Terminate, by contrast, it is irrelevant whether there is independent evidence of alienage. There is no requirement to choose between filing a motion to terminate and a motion to suppress—it is common to file both, where appropriate.

If the noncitizen prevails, the proceedings against him or her are terminated. It is unclear whether DHS may re-charge a noncitizen with removability after proceedings are terminated based on regulatory violation. *Compare Rajah v. Mukasey*, 544 F.3d 427, 444 (2d Cir. 2008) (describing remedy as termination with prejudice), *with Matter of Hernandez*, 21 I&N Dec. 224, 226 (BIA 1996) (INS permitted to re-serve noncitizen with order to show cause to cure original improper service that was in violation of regulation). As a practical matter, ICE may not go to the trouble of re-charging an individual after proceedings are terminated.

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<sup>23</sup> Christine Hauser, *A Young Immigrant Spoke Out About Her Deportation Fears. Then She Was Detained*, N.Y. Times (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/immigrant-daca-detained.html>.

## IV. Background on Law Applying to Motions to Terminate

The rule of law requires that agencies adhere to their own regulations and internal policies. The Supreme Court has stated: “Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.” *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). “This is so even where the internal procedures are possibly more rigorous than otherwise would be required.” *Id.* Courts have recognized this basic principle in a variety of contests. *See id.* (related to the Bureau of Indian Affairs); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1978) (recognizing the “unremarkable proposition that an agency must abide by its own regulations” in considering the Department of the Interior’s regulations); *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (“An executive agency must be rigorously held to the standards by which it processes its action to be judged. . . . even [if they are] generous beyond the requirements that bind such agency); *Church of Scientology of Cal. v. U.S.*, 920 F.2d 1481, 1487 (9th Cir. 1990) (noting that “an administrative agency is required to adhere to its own internal operating procedures”); *Nicholas v. INS*, 590 F.2d 802, 806-08 (9th Cir. 1979) (dealing with an INS operations instruction).

The termination of removal proceedings based on regulatory violations is rooted in the *Accardi* doctrine. *See U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). When an agency violates a DHS regulation, and where the regulation “provides a benefit” to the noncitizen, the agency’s action is invalidated—if the noncitizen is prejudiced. *Matter of Hernandez*, 21 I&N Dec. 224, 226 (BIA 1996); *see also Matter of Garcia-Flores*, 17 I&N Dec. 325, 239 (BIA 1989); *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979) (“Violation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the [noncitizen] which were protected by the regulation).

Prejudice can be presumed when the regulation implicates constitutional rights. *See Matter of Garcia-Flores*, 17 I&N Dec. at 226. For example, in *Leslie*, the Third Circuit held that a violation of the right to counsel is an instance where the factfinder must presume prejudice because that right is protected by the Constitution. “When an agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency must comply with that regulation. Failure to comply will merit invalidation of the challenged agency action without regard to whether the alleged violation has substantially prejudiced the complaining party.” *Leslie*, 611 F.3d at 180. This is because a “court’s duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.” *United States v. Caceres*, 440 U.S. 741, 749 (1979).

The Immigration Court has the power to determine whether an agency has violated internal regulations. *Matter of Hernandez-Puente*, 20 I&N Dec. 335, 339 (BIA 1991) (“[T]his Board is empowered to find that a violation of the statutes or regulations has infringed upon a [noncitizen’s] procedural rights, which may in turn affect determinations regarding deportability, exclusion, relief from deportation or exclusion, or other benefits under the immigration laws.”). The “[o]ne who raises the claim” bears the initial burden of “com[ing] forward with proof establishing a prima facie case.” *Matter of Tang*, 13 I&N Dec. 691, 692 (1971); *see also Oliva-Ramos v. AG of the United States*, 694 F.3d 259, 273 (3d Cir. 2012) (recognizing the burden shifting standard); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1998) (applying this standard to suppression).

Once the noncitizen has presented a prima facie case of a violation, the burden shifts to ICE to justify the way it acted. If the government cannot demonstrate compliance with its own rules (and if the regulation provided a benefit to the noncitizen or was mandated by the Constitution), the factfinder should end the case. Deterring governmental misconduct and protecting the rights of noncitizens are key considerations underlying the use of termination. *See Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008).

## V. Political Context

There are many examples of regulations that a noncitizen may invoke in a Motion to Terminate. A few of these include (but are not limited to):

- 8 C.F.R. § 242.16(a), the right to be advised of right to representation by counsel. *See Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (prejudice presumed, and noncitizen prevailed).
- 8 C.F.R. 287.3, the right of noncitizen to be represented by an attorney. *Matter of Garcia Flores*, 17 I&N Dec. 325, 329 (BIA 1980) (case remanded for determination of prejudice).
- 8 C.F.R. § 287.8b(2), the right to avoid detention where immigration officer lacks reasonable suspicion that noncitizen is illegally in the United States. *See Sanchez v. Sessions*, 870 F.3d 901, 913 (9<sup>th</sup> Cir. 2017) (prejudice found, and noncitizen prevailed).
- 8 C.F.R. § 242.2(g), the right of a noncitizen to consult with diplomatic or consular authorities. *See U.S. v. Rangel-Gonzalez*, 617 F.2d 529, 530 (9<sup>th</sup> Cir. 1980) (prejudice found, and noncitizen

prevailed); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994) (finding of no prejudice).

- 8 C.F.R. § 287.8(c)(2)(vii), the right to be free of the use of threats, coercion, or physical abuse by immigration officer. *See Rajah v. Mukasey*, 544 F.3d 427, 444 (2d Cir. 2008) (finding of no prejudice).
- 8 C.F.R. § 287.8(c)(2)(ii), the right to be free of warrantless arrest unless there is reason to believe that noncitizen is likely to escape. *See Rajah v. Mukasey*, 544 F.3d 427, 444 (2d Cir. 2008) (finding of no prejudice).
- 8 C.F.R. § 287.8(c)(2)(iii), the right to have immigration officer identify himself and state reasons for arrest. *See Rajah v. Mukasey*, 544 F.3d 427, 444 (2d Cir. 2008) (finding of no prejudice).

This practice advisory also suggests that advocates may challenge removal proceedings based on violations of Executive Orders. Courts are bound to enforce executive orders, which have the force of law. *Armstrong v. United States*, 80 U.S. 154, 156 (1871). They are codified in the Federal Register, and they may be treated as regulations.

On May 17, 2017, President Trump issued an Executive Order entitled “Promoting Free Speech and Religious Liberty.” 82 Fed. Reg. 21675. It stated: “All executive departments and agencies shall, to the greatest extent practicable and to the extent permitted by law, respect and promote the freedom of persons and organizations to engage in religious and political speech.” *Id.* This Executive Order, duly published in the Federal Register, binds all agencies—including ICE—to respect political speech.

## **VI. Results of a Motion to Terminate Based on Retaliation for Political Speech**

As far as we know, there is only one Immigration Court decision on a Motion to Terminate based on a violation of the Executive Order protecting political speech. In the case of Maru Mora-Villalpando, the Immigration Judge in Seattle, Washington ruled that the Executive Order does bind ICE and that it does stem from the First Amendment of the Constitution. However, he also ruled that Mora-Villalpando’s media statements admitting that she was “undocumented” do not constitute “political speech,” and that a noncitizen cannot insulate herself from deportation by publicly declaring her unlawful status.

The Immigration Judge impliedly stated that he would have come to a different conclusion if ICE arrested a noncitizen while engaging in activism, such as “[sitting] in the street, arms locked with others, blocking traffic, and protesting deportations at the Northwest Detention Center” or while “[holding] rallies on the sidewalk in front of the Seattle Immigration Court to protest the perceived injustices of American’s immigration court system.” Appendix B at 4. Thus, the decision provides a roadmap for advocates who represent noncitizens who have either not admitted their undocumented status publicly (such as Eliseo Jurado), or who are arrested while actively protesting immigration enforcement (such as Daniela Vargas).

## **VII. Conclusion**

We urge practitioners to challenge ICE’s systematic targeting of immigrant rights activists by filing a Motion to Terminate, like the one that is attached as a model. If you are representing a client facing deportation as retaliation for political speech, please contact Elizabeth Simpson at [elizabeth@nipnlg.org](mailto:elizabeth@nipnlg.org).