

**PRACTICE ADVISORY<sup>1</sup>**

**December 21, 2012**

**RETURN TO THE UNITED STATES AFTER PREVAILING ON A  
PETITION FOR REVIEW OR MOTION TO REOPEN OR RECONSIDER**

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This advisory is not a substitute for individual legal advice and decision-making supplied by a lawyer familiar with a client’s case. Readers are cautioned to check for cases and legal developments.

## I. INTRODUCTION

This practice advisory contains practical and legal suggestions for individuals seeking to return to the United States after they have prevailed on a petition for review or an administrative motion to reopen or reconsider to the immigration court or Board of Immigration Appeals (“BIA”). This advisory begins with an overview of relevant developments over the past few years, including the government’s issuance of a return directive in February 2012. It then covers administrative steps to try to obtain return under the directive. Finally, it summarizes potential litigation options if the government refuses to facilitate or unreasonably delays return, and strategies for avoiding in absentia orders in administrative proceedings while pursuing return. The end of the advisory includes a sample email to initiate return and a list of links to the documents referenced herein.

Notwithstanding the return directive, arranging return continues to be a haphazard process—even for individuals who fit squarely within the categories of noncitizens that the Department of Homeland Security (“DHS”) acknowledges may return.<sup>2</sup> Attorneys regularly report demoralizing combinations of intransigence, confusion, and lack of coordination on the part of the agencies involved in facilitating returns. Given the significant impediments attorneys report with this process, successful post-departure pro se litigants stand little to no chance of navigating the legal and bureaucratic obstacles to returning to the United States.

## II. BACKGROUND

Practitioners long have reported that there appeared to be no policy for bringing their clients back to the United States after they prevailed in the courts. It thus came as a surprise in 2008, when the Office of the Solicitor General (“OSG”) represented to the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009), that the government had a “policy and practice” of providing “effective relief” to noncitizens who prevail in their cases after being removed, by facilitating their return.<sup>3</sup> In its opinion, the Court relied on this representation in concluding that, for a stay of removal, “the burden of removal alone cannot constitute the requisite irreparable injury.”<sup>4</sup> Immigration advocates’ surprise morphed into suspicion. This led them to file Freedom of Information Act (“FOIA”) requests for the alleged policy, and when the agencies failed to turn over records, they filed a lawsuit against DHS, the Department of Justice (“DOJ”), and the

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<sup>2</sup> See [ICE Policy Directive Number 11061.1](#) (Feb. 24, 2012).

<sup>3</sup> Brief for Respondent at 44, *Nken v. Holder*, 556 U.S. 418 (2009) (No. 08-681).

<sup>4</sup> See *Nken*, 556 U.S. at 435 (citing Brief for Respondent at 44).

Department of State (“DOS”).<sup>5</sup> The FOIA lawsuit revealed that the OSG had misrepresented the existence of a return policy to the Supreme Court.<sup>6</sup>

In the wake of these revelations, DHS rushed to demonstrate to the Supreme Court and lower courts that they subsequently had put an effective return policy in place. On February 24, 2012, Immigration and Customs Enforcement (“ICE”) issued a [directive](#) purporting to “describe[] existing ICE policy”—although notably the directive does not reference any pre-existing policies. Then in April 2012, ICE issued guidance in the form of [Frequently Asked Questions](#) (“FAQ”) regarding implementation of the February 2012 “policy.”<sup>7</sup> At the same time, Secretary of State Clinton sent a hurried cable to embassies and consular offices, instructing them to refer return inquiries to ICE and process parole notifications for individuals whom DHS determines merit return.<sup>8</sup>

With the purported “policy” barely in place, on April 24, 2012, the OSG sent a letter to the Supreme Court, acknowledging its incorrect representations in *Nken*. In the letter, the OSG urged the Court not to revisit the portion of its opinion that relied on those representations, averring that “[t]he government does not believe that any action by this Court is required,” given its client-agency’s recent announcements.<sup>9</sup> Since the OSG submitted its letter, attorneys in DOJ’s Office of Immigration Litigation have been submitting the return directive to courts considering requests for stays of removal orders, in support of the position that deportation does not result in irreparable harm.

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<sup>5</sup> Complaint at 1, *Nat’l Immigration Project of the Nat’l Lawyers Guild v. U.S. Dep’t. of Homeland Sec.*, No. 11-CV-3235 (S.D.N.Y. filed May 12, 2011). The plaintiffs are the National Immigration Project of the National Lawyers Guild (NIPNLG), the American Civil Liberties Union, the Immigrant Defense Project, the Boston College Post- Deportation Human Rights Project, and Professor Rachel Rosenbloom. The New York University School of Law Immigrant Rights Clinic represents plaintiffs.

<sup>6</sup> See [Nat’l Immigration Project of the Nat’l. Lawyers Guild v. U.S. Dep’t. of Homeland Sec.](#), 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012). Case documents, case updates, and the documents the government disclosed through the litigation and to the Supreme Court in *Nken* are available on the [NIPNLG website](#).

<sup>7</sup> [U.S. Immigration and Customs Enforcement, Frequently Asked Questions about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens \(2012\)](#).

<sup>8</sup> The cable is attached as appendix E to the OSG’s letter to the Supreme Court in *Nken* and is available on the NIPNLG website.

<sup>9</sup> [Letter](#) from Michael R. Dreeben, Deputy Solicitor General, to Hon. William K. Suter, Clerk of the Supreme Court (Apr. 24, 2012). Several immigration groups that had appeared as *amici curiae* in *Nken* responded with a letter asking the Court to “withdraw[] the parts of its *Nken* opinion that relied on representations that the government now acknowledges were inaccurate.” [Letter](#) from Paul R.Q. Wolfson and Adam Raviv to Hon. William K. Suter, Clerk of the Supreme Court (May 4, 2012). As of this writing, only the OSG’s letter—not the letter from *Nken*’s amici—was acknowledged as received by the Court. See [Nken v. Holder, No. 08-681](#).

In May 2012, the NYU Immigrant Rights Clinic, the National Immigration Project/NLG, Boston College Post Deportation Human Rights Project, and the American Immigration Council issued a practice advisory that identifies some of the major flaws in the ICE return policy and provides arguments for satisfying the “irreparable harm” component of the stay-of-removal analysis.<sup>10</sup>

### III. ICE’S POLICY DIRECTIVE

ICE’s policy [directive](#), announced in the wake of the FOIA litigation and implemented haphazardly, falls far short of providing fairness to prevailing litigants who have overcome the difficulties of litigating from abroad—challenges often created by DHS’ decision to pursue removal before the case has run its course. As discussed in further detail below, the directive addresses the return only of certain individuals who prevail on a petition for review (“PFR”), in particular, lawful permanent residents (“LPRs”) and others whose presence ICE considers “necessary.” By its terms, the directive is extremely narrow in scope and provides little guidance to individuals seeking return. It is important to understand the many aspects in which it falls short:

- **Non-Binding and Lacks the Force of Law.** DHS has indicated that it does not intend this policy to bind agency employees or carry the force of law. The directive explicitly states that it “does not apply to bargaining unit employees” and “is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party.”<sup>11</sup>
- **Subject to Change or Revocation at Any Time.** By issuing a mere statement of policy, DHS may change its position on returns at any time.<sup>12</sup> DHS did not publish the directive

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<sup>10</sup> See [Seeking a Judicial Stay of Removal in the Court of Appeals: Standard, Implications of ICE’s Return Policy and the OSG’s Misrepresentation to the Supreme Court, and Sample Stay Motion \(May 25, 2012\)](#).

<sup>11</sup> Moreover, DHS should have satisfied notice-and-comment requirements under the APA, 5 U.S.C. § 553, because the directive substantively affects the people it regulates. While policy statements are exempt from notice-and-comment requirements, § 553(b)(A), legislative rules carrying the force of law are not. See *General Electric Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (“If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA’s legislative rulemaking procedures.”). In any event, the directive would likely fall short of notice-and-comment requirements of the APA, because it fails to provide “sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking.” *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997) (“It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal interpretations.”).

<sup>12</sup> See, e.g., *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) (“By issuing a policy statement, an agency simply lets the public know its current enforcement or adjudicatory approach. The agency retains the discretion and the authority to change its position—even abruptly—in any specific case because a change in its policy does not affect the legal norm. We

in the Federal Register, as required by the APA, 5 U.S.C. § 552(a)(1)(D), and the agency retains full discretion to revoke the policy directive at any time.

- **Limited coverage.** The directive only covers noncitizens who prevail on PFRs. It does not cover noncitizens who prevail on administrative motions to reopen or reconsider before an immigration judge (“IJ”) or the BIA.
- **Subject to ICE’s Unfettered Discretion.** The directive states that ICE will facilitate return only where:
  - i. *The court, by vacating or reversing the removal order, restores the noncitizen to LPR status.* Practitioners continue to report that, despite the fact that the policy is clear on this point, ICE nevertheless has refused to facilitate return in this situation. Some practitioners have had to file a federal court lawsuit to obtain a proper response.
  - ii. *ICE deems, in its sole, unfettered discretion, that a non-LPR’s “presence is necessary for continued administrative removal proceedings.”* There is little guidance on when ICE will deem a person’s presence necessary at her or his hearing. ICE routinely takes the position that it need not consider returning someone whose case is remanded to the BIA for further action by the court of appeals unless and until the BIA rules on the pending matter. Furthermore, ICE often takes the position that return is unnecessary when an immigration court hearing may take place by video or by phone.
  - iii. *On remand, the person ultimately obtains relief, allowing her or him to reside in the U.S. lawfully.* This describes a very limited set of people—essentially, those who have overcome all of the obstacles and won their case while abroad.<sup>13</sup>
- **“Extraordinary Circumstances” Exception Undefined.** The directive states that ICE will facilitate return, in the limited instances described above, “[a]bsent extraordinary

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thus have said that policy statements are binding on neither the public, nor the agency. The primary distinction between a substantive rule—really any rule—and a general statement of policy, then, turns on whether an agency intends to bind itself to a particular legal position.”) (internal citations omitted).

<sup>13</sup> Respondents forced to proceed from abroad often face problems such as limited communication with their counsel, difficulty presenting and reviewing evidence, and technological malfunctions or failures. Although the FAQ states that a person may participate in immigration hearings from abroad, there is no indication that a system is in place to facilitate videoconferencing from abroad; Secretary Clinton’s cable to consular offices, *see supra* n.8, does not contain any instruction on facilitating videoconferencing.

Worse still, practitioners have reported that, where clients were unable to appear in person, IJs have closed cases or considered issuing in absentia orders. *See* Part VI, *infra*, for further discussion of removal proceeding strategies where the respondent is stranded abroad.

circumstances.” The FAQ states that these circumstances “include, but are *not limited to*, situations where the return of an alien presents serious national security considerations or serious adverse foreign policy considerations.” (emphasis added). This nebulous definition delegates wide discretion to ICE and opens the door to manipulation.

- **Lack of Pre-Return Detention Determination.** The directive notes only that it “may detain” a noncitizen upon return. ICE’s refusal to make a custody determination prior to return, even for noncitizens who were not previously detained or who complied with a voluntary departure order, is unsettling. Knowing whether one will be detained is crucial to an individual weighing the risks and rewards of return and considering the timing of her or his return.
- **Failure to Provide Proof of Pre-Removal Status.** The directive states that ICE regards a returned noncitizen as having the immigration status that she or he had, if any, prior to the entry of the removal order. The FAQ states that ICE will not treat a returning noncitizen as an “arriving alien” unless she or he was charged as an “arriving alien” prior to removal. Nonetheless, ICE continues to fail to provide returning noncitizens with proof that they are returning with their pre-removal status. For example, ICE has refused to return LPRs their LPR cards so that they may use them to travel back to the United States. And once an LPR has returned, practitioners report that United States Citizenship and Immigration Services (“USCIS”) has denied the person’s I-90 application to replace her or his LPR card. Practitioners have had to resort to federal court actions to spur the agencies to act properly in regard to these issues.
- **Facilitation of Return through Parole.** The directive states that ICE will, “if warranted, parole the alien into the United States.” To the extent that ICE is paroling in returning noncitizens who were *not* deemed “arriving aliens” prior to their removal order, this statement seems to be at odds with the FAQ’s promise that ICE will not treat returning individuals as “arriving aliens.” Parolees are subject to grounds of inadmissibility under § 212(a) and detention without a bond hearing, *see* 8 C.F.R. § 1003.19(h)(2)(i)(B). Issues associated with the manner of entry are discussed below in Part IV.C.
- **Cost-Prohibitive.** The directive states that “[f]acilitating an alien’s return does not necessarily include funding the alien’s travel via commercial carrier to the United States or making flight arrangements for the alien.” In practice, ICE generally refuses to pay for return transportation and returning noncitizens must pay their own way.<sup>14</sup> Moreover, since the transportation document that ICE or DOS issues (*see* Part IV.C) may be valid for only a week or less, the cost of a flight on such short notice can be exorbitant. Additionally, in most cases, it is necessary to retain a lawyer to navigate the return

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<sup>14</sup> ICE has paid for travel, however, in instances where a court has ordered that the agency produce the person on a short timeframe, or where the person was unlawfully removed in violation of a stay order. It is advisable to make a written request for payment of travel costs to the ICE Public Advocate. In addition, consider requesting that ICE cover travel as alternative relief when seeking a stay of removal.

process and, if necessary, file a federal court action to compel return. This additional expense also may prevent a noncitizen from returning to the United States.

- **Dependent on Documentation.** The directive states that individuals returning by air or sea must have “a valid passport or equivalent documentation” and that persons returning by land must have “appropriate identity documentation, which could include a passport or other government-issued documents.” For lower income and indigent individuals and those who fear persecution in their countries of origin, this requirement may prohibit return altogether.

In sum, the lack of an adequate return policy in the PFR context, the lack of any policy in the administrative-motions context, the problems associated with parole, and the myriad practical obstacles to return all present significant challenges to prevailing litigants.

#### **IV. NAVIGATING THE EXISTING RETURN PROCESS**

The return process needs an overhaul, both in terms of policy and practice. In the meantime, the advice in this section of the practice advisory may help individuals navigate the vagaries of the current limited, ad hoc process. Although the process of return continues to be cumbersome and disorganized, some common occurrences and best practices have emerged.

The ICE directive only covers noncitizens who prevail on PFRs, but individuals whose administrative motions have been granted can follow the steps outlined below. Indeed, some practitioners have succeeded in obtaining return for clients in this situation.

##### **A. Contact Client and Collect Relevant Information**

The first step for attorneys in arranging return is communicating with the client abroad to inform her or him of the court’s decision and verify that she or he wishes to return to the United States. Timing and detention issues are important factors to consider in making this decision.

##### ***Timing***

An individual who prevails on a PFR need not wait for the mandate to issue for the court’s order to take effect.<sup>15</sup> Unless and until the court of appeals reverses, amends, or vacates its decision, the government is bound by, and must follow, the court’s existing decision.<sup>16</sup>

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<sup>15</sup> Unless the government files a petition for rehearing or receives an extension of time for seeking rehearing, or the court stays the mandate, typically pending a petition for a writ of certiorari, the mandate will issue fifty-two days after the issuance of a decision entering judgment. Fed. R. App. P. 40(a)(1), 41(b).

<sup>16</sup> See *Wedbush, Noble, Cooke, Inc. v. Securities and Exchange Commission*, 714 F.2d 923, 924 (9th Cir. 1983) (“even though the mandate has not yet issued . . . the judgment filed by the panel in that case . . . is nevertheless final for such purposes as stare decisis . . . unless it is withdrawn by the court”); *Vo Van Chau et al. v. Department of State*, 891 F. Supp. 650, 654 (D.D.C. 1995) (“the District Court is bound by the principle of stare decisis to ‘abide by a recent decision of one panel of [the Court of Appeals] unless the panel has withdrawn the opinion or the

An individual who prevails on an administrative motion for reopening or reconsideration also can initiate return immediately. If an immigration judge granted the motion and DHS appealed the grant, DHS may refuse to return the person while the BIA appeal is pending.

Although one can initiate the process of return immediately, the possibility of detention upon return may affect when one decides to initiate the process.

### ***Detention***

The FAQ states that “[y]ou may be detained for further immigration proceedings upon your return depending on the circumstances of your case and ICE’s assessment of whether you are subject to mandatory detention under the immigration laws or should otherwise be detained.”<sup>17</sup> ICE generally has detained returning noncitizens who were detained prior to their removal.<sup>18</sup> They have refused, however, to promise that noncitizens who were *not* detained prior to their removal will be afforded the same custody status upon their return. If feasible, a noncitizen facing a likelihood of detention upon return might consider pursuing her or his case from abroad to the extent possible, and only return once she or he is required to be present (e.g., for an individual hearing before an IJ). If ICE detains a noncitizen upon her or his return, INA § 236 should continue to govern the detention, unless another detention provision governed the person’s custody status prior to removal or departure. Importantly, DHS should not treat returning noncitizens as arriving aliens—whether for custody purposes or any other purpose—unless they were arriving aliens prior to their departure or deportation from the United States.

### ***Collecting relevant information and documentation***

In order to arrange return, the existing policy requires individuals to provide certain documentation and information, which is specified in the sample letter at the end of this advisory, and includes the following: passport number and expiration date; the address and telephone number for the place where the person intends to live upon return; the closest U.S. consulate where the person can obtain necessary paperwork; and the anticipated port of entry (airport or border entry point).<sup>19</sup> The individual returning to the United States must have a valid passport or equivalent travel document to return to the United States.

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court en banc has overruled it”) (quoting *Association of Civilian Technicians, Montana Air Chapter v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985)).

<sup>17</sup> See *supra* n.7.

<sup>18</sup> If the Court of Appeals orders proceedings terminated, then ICE should not detain the noncitizen at all.

<sup>19</sup> To determine the nearest land border, consult this [list](http://cbp.gov/xp/cgov/toolbox/ports/) of U.S. ports of entry: <http://cbp.gov/xp/cgov/toolbox/ports/>, last visited: December 21, 2012.



## **B. Contact and Follow Up with the ICE Public Advocate**

The FAQ directs attorneys or litigants to contact the ICE Public Advocate, who is tasked with finding out internally whether ICE (presumably, the Office of Chief Counsel) believes that Enforcement and Removal Operations (“ERO”) should facilitate a person’s return.<sup>20</sup> In the case of a successful PFR, it makes sense also to copy the Office of Immigration Litigation attorney who litigated the PFR on this communication, as that person has a particular interest in the prompt resolution of the case. Practitioners report that the ICE Public Advocate’s responses often are nonresponsive or delayed, and in some instances, there is no response at all. One should persist with follow-up communications to obtain an adequate response.

The Public Advocate may refer a return inquiry to a regional point of contact, who will perform the same function. That person is likely to be an ERO officer in the office that was responsible for the individual’s initial deportation. If ICE agrees that a person can return, the regional point of contact is tasked with coordinating the return.

## **C. Mechanics of ICE-Facilitated Return**

If ICE agrees a noncitizen may return, the next step is for the regional point of contact to coordinate the person’s ability to do so. There are additional bureaucratic and logistical hurdles at this stage. Even in situations where ICE agrees to facilitate return, practitioners report a significant lack of coordination within and among ICE, DOS, and Customs and Border Protection (“CBP”). As discussed above, ICE generally has refused to return LPRs their LPR cards so that they may use them to travel back to the United States. And once an LPR has returned, USCIS has denied the person’s I-90 application to replace her or his LPR card. If USCIS refuses to issue the card, consider asking the ICE Public Advocate to communicate with her sister agency to ensure that USCIS issues the card. If this effort fails, consider evaluating federal court options.

According to the directive, ICE is supposed to engage in activities that would allow the person to travel to the United States. The directive specifically mentions issuance of a Boarding Letter (also known as a “transportation letter”) to permit commercial air travel and parole upon arrival at a U.S. port of entry.

### ***Transportation Letters***

In nearly all cases it is advisable to request issuance of a transportation letter, which generally is obtained from the nearest U.S. embassy or consulate. This document allows a returning noncitizen to board a commercial airplane or boat to come to the United States. Airlines will not permit passengers to board international flights without proper travel documents. Transportation letters are addressed to passenger transportation companies and supervisory immigration inspectors at the intending port of entry. The letters generally state that the letter holder is considered properly documented to travel to the United States and assure the carrier that it will not be subject to liability for transporting the person.

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<sup>20</sup> The Public Advocate may be contacted at [EROPublicAdvocate@ice.dhs.gov](mailto:EROPublicAdvocate@ice.dhs.gov) and (202) 732-3100. A sample email is provided at the end of this advisory.

An individual must present a valid passport or equivalent documentation to obtain the transportation letter. The person who issues the transportation letter may be a consular employee, an ICE attaché, or a USCIS officer stationed overseas. Practitioners have reported confusion and delay among consular officials and miscommunication between them and ICE. Persistence with ICE is the best approach to overcome this problem, in the absence of a more systemic change to the current process.

### *Parole*

The directive states returning noncitizens will have the immigration status that they had, if any, prior to the entry of the removal order, and the FAQ provides that “[b]ecause ICE regards you as returning to your prior status, ICE will not treat you as an arriving alien unless you had been charged as an arriving alien prior to removal.” Nonetheless, the ICE directive refers to parole as a mechanism for return, without specifying that parole would only be appropriate for those who DHS deemed arriving aliens prior to their removal order. To the extent that both the FAQ and directive suggest that parole would be a proper mechanism for return for individuals who were not arriving aliens when they were deported, such a policy has serious, negative consequences.

First, there is no guarantee that CBP will allow the person back into the United States. CBP instructions on parole clearly provide that border officials can override a prior decision to grant parole.<sup>21</sup>

Second, parole does not constitute an admission, *see* INA § 212(d)(5), and parolees remain subject to grounds of inadmissibility under § 212(a) after passing into the United States.

Third, parolees are subject to detention without a bond hearing. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (“[A]n immigration judge may not redetermine conditions of custody imposed by the Service with respect to . . . [a]rriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act.”).

Fourth, parole is temporary, lasting only as long ICE authorizes. In some cases, the grant of parole has been for less than a month, despite the fact that the individual’s remanded proceedings may last much longer. Parolees in this situation must request that ICE renew their parole, and may have to make further renewal requests as parole expiration dates approach.

In addition, there may be unpredictable adverse consequences of entering on parole. For example, if the return policy is rescinded or substantially revised in the future, it may be difficult to convince an immigration officer 10 years from now that the person returned under the policy with her or his pre-removal status.<sup>22</sup> Given these consequences, we strongly encourage individuals to request a transportation letter or use a valid LPR card (if possible).

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<sup>21</sup> [CBP Directive No. 3340-043, at 5 \(The Exercise of Discretionary Authority\) \(Sept. 3, 2008\)](#).

<sup>22</sup> Note also that immigration forms often will ask for the applicant’s “manner of last entry” into the United States. Immigration forms may ask for an applicant’s “manner of last entry,” *see, e.g.*, Application for Employment Authorization, *available at* <http://www.uscis.gov/files/form/i-765.pdf>, and thus the agency would likely assume that a person who entered on parole was an arriving alien.

If ICE insists on facilitating return via parole and the individual agrees to return in that manner, one can attempt to minimize the potential consequences by requesting that ICE or CBP annotate the parole document, I-94, and/or the person's passport to reflect entry in pre-removal status. Keep in mind that when a person is being paroled in, ICE generally instructs CBP to parole the client in at a specific port of entry during a specific window of time under INA § 212(d)(5). ICE may assign a parole reference number to an individual. Again, all returning noncitizens must also possess a valid passport or equivalent documentation.

## V. FEDERAL COURT OPTIONS

### A. Overview

#### 1. Litigation Challenges to Address ICE's Refusal to Respect a Federal or Administrative Court Order

Even in the wake of its policy directive, ICE still routinely fails to facilitate the return of individuals after they prevail in federal and administrative courts. Such failures underscore a fundamental lack of respect for administrative and court orders. If ICE expressly refuses to facilitate return or constructively refuses (e.g., is non-responsive), litigation options may be considered.

Any ICE refusal to return someone who has prevailed on a petition for review arguably constitutes a refusal to comply with the circuit court's order granting the petition for review. In cases where the court's order restores LPR status, ICE's refusal to facilitate return also violates its own policy directive. Likewise, ICE's refusal to return someone who prevails on an administrative motion constitutes a refusal to comply with an immigration judge or BIA order granting reopening or reconsideration.

There is no meaningful distinction between prevailing on a petition for review and prevailing on an administrative motion. The statutory right to judicial review, 8 U.S.C. § 1252(a), would be meaningless if a petitioner could not benefit from a favorable Article III court decision. Similarly, the statutory rights to reconsideration and reopening, 8 U.S.C. §§ 1229a(c)(6)&(7),<sup>23</sup>

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<sup>23</sup> In *Dada v. Mukasey*, the Supreme Court held that “[t]he purpose of a motion to reopen is to ensure a proper and lawful disposition.” 554 U.S. 1, 18 (2008). Further, the Court admonished any interpretation that would “nullify a procedure so intrinsic a part of the legislative scheme.” *Dada*, 554 U.S. at 18-19. See also *Kucana v. Holder*, 130 S. Ct. 827, 834, 838-39 (2010) (protecting judicial review of motions to reopen in light of the importance of such motions).

Of particular relevance here, despite the agency's attempts to bar motions filed or adjudicated after a noncitizen is removed or departs from the United States, see 8 C.F.R. §§ 1003.2(d) and 1003.23(b)(1), the nine courts to consider the issue have rejected the validity of the so-called “departure bar” with respect to motions filed pursuant to statutory authority. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Lari v. Holder*, 697 F.3d 273 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011);

and regulatory rights to reopening sua sponte, 8 C.F.R. §§ 1003.23 and 1003.2(a), would be meaningless if a respondent could not benefit from a favorable immigration court or BIA decision. Moreover, the effect on the removal order is the same regardless whether a circuit court grants a PFR or the immigration court or BIA grants reopening: the final removal order is vacated and the person is restored to pre-removal status.<sup>24</sup>

The various avenues for bringing litigation challenges in these contexts are discussed below.

## 2. Create a Paper Trail!

Even if merely contemplating filing litigation to compel return, we strongly advise keeping detailed notes of all conversations and written correspondence related to return. If the only evidence of ICE's refusal to return the client is oral, such notes may form the basis of a sworn declaration from a person with personal knowledge, attesting to the conversation.<sup>25</sup> While attorneys generally should avoid becoming witnesses for their clients, alternative evidence of ICE's refusal to facilitate return may not be available.

### B. Where and What to File

Deciding to litigate leads to the questions “where and what do I file?” These questions do not have definitive answers, but in most cases, a complaint in the district court having jurisdiction over the ICE office responsible for facilitating return is the most appropriate action. Motions and mandamus actions in the courts of appeals also may provide opportunities for redress in some cases.

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*Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012).

<sup>24</sup> When the BIA reopens a case, the removal order is vacated. *Nken*, 556 U.S. at 430 n.1. See also *Contreras-Bocanegra v. Holder*, 678 F.3d 811, 818-19 (10th Cir. 2012) (en banc). Furthermore, the removal proceedings are reinstated. *Bronisz v. Ashcroft*, 378 F.3d 632, 637 (7th Cir. 2004) (holding that “the grant of a motion to reopen vacates the previous order of deportation or removal and reinstates the previously terminated immigration proceedings”). Thus, the person is restored to pre-removal status. See *Nken*, 556 U.S. at 435 (stating that persons who prevail on their petition for review “can be afforded effective relief by facilitation of their return, along with *restoration of the immigration status they had upon removal*”) (emphasis added); Return Policy, at 1 (“ICE will regard the returned alien as having reverted to the immigration status she or he held, if any, prior to the entry of the removal order . . .”). See also *Matter of Lok*, 18 I&N Dec. 101, 105-06 (BIA 1981) *aff'd*, 681 F.2d 107 (2d Cir. 1982).

<sup>25</sup> Declarations attesting to return efforts or ICE's position should be scrupulously accurate. The tone of such declarations should be detached and written to provide the court with information supporting the facts on which the motion is based. Declarations should not overstate the facts or give personal opinions about actions of government actors or opposing counsel. An unprofessional declaration could undermine the motion.

## 1. Complaint for Declaratory and Injunctive Relief (District Court)

District courts regularly review declaratory judgment and injunctive relief actions and, therefore, are arguably the most suitable forum for filing an action to compel return.<sup>26</sup>

A district court action can name several defendants, in their official capacities, including, but not limited to, the Secretary of DHS, the Director of ICE, the Field Office Director of the local ICE office, the Chief Counsel of the local ICE office, and the ICE Public Advocate. *See generally* 5 U.S.C. §§ 702-703 (Administrative Procedure Act). At a minimum, we suggest naming the DHS Secretary.

A district court complaint may allege jurisdiction to review ICE's refusal to facilitate return under to 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (Administrative Procedure Act);<sup>27</sup> 28 U.S.C. §§ 2201 and 2202 (declaratory relief); 28 U.S.C. § 1361 (mandamus); and 28 U.S.C. § 1651 (All Writs Act).

The federal venue statute, 28 U.S.C. § 1391, governs where the complaint may be filed. Generally, venue will lie in the district where ICE "resides," *see* 28 U.S.C. § 1391(b)(1), and/or where a substantial part of the events giving rise to ICE's refusal to facilitate return occurred, *see* 28 U.S.C. § 1391(b)(2).

There are at least three claims a district court action seeking to compel return may raise.

### *Administrative Procedure Act Claims*

First, ICE's refusal to return the person arguably violates the APA. As an initial matter, it satisfies the APA's judicial review requirement that there be a "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Under the APA, a person may ask the court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1). A person may also challenge ICE's refusal to return her or him as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "contrary to constitutional right," and "in excess of statutory . . . authority, or limitations or short of statutory right," 5 U.S.C. § 706(2)(A)-(C). Further, to the extent ICE defies subpoenas or procedures required by the immigration court, a person may challenge ICE as acting "without observance of procedure required by law," 5 U.S.C. § 706(2)(D).

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<sup>26</sup> For sample district court complaints, please contact Trina Realmuto at trina@nipnlg.org

<sup>27</sup> The APA, 5 U.S.C. §§ 701 et seq., does not independently grant subject matter jurisdiction to the federal courts, *see Califano v. Sanders*, 430 U.S. 99 (1977), but final agency action is available through federal question jurisdiction. Moreover, the APA does waive sovereign immunity in actions against the government for injunctive relief, which is necessary for the court to exercise its jurisdiction. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Thus, the APA can be listed in the jurisdictional section of a complaint.

### *Constitutional and Statutory Due Process Claims*

Second, ICE's refusal to facilitate return arguably violates the Fifth Amendment's Due Process Clause and a person's statutory rights in removal proceedings, including his right to be present at one's own removal proceeding under INA § 240(b)(2). *See also* INA § 240(b)(4)(B) ("the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's behalf, and to cross-examine witnesses presented by the Government . . ."). An individual outside of the United States is substantially hindered in his ability to testify, present witnesses and evidence, consult with his attorneys, and cross-examine the government's witnesses and examine its evidence.

### *Mandamus*

Finally, the complaint might include a claim that ICE's refusal to facilitate return warrants injunctive relief in the form of a writ of mandamus compelling ICE to perform its ministerial duty of returning the person. In order for a court to grant mandamus relief, the person must show that: (a) she or he has a clear right to the relief requested; (b) the defendant has a clear duty to perform the act in question; and (c) no other adequate remedy is available. *See, e.g., Iddir v. INS*, 301 F.3d 492, 499 (7th Cir. 2002).

The end of the complaint should request the relief sought from the district court. We suggest asking the district court to: (a) accept jurisdiction over the action; (b) declare defendants' refusal to facilitate the plaintiff's return to the United States to violate the Immigration and Nationality Act, the Fifth Amendment's Due Process Clause, and the Administrative Procedure Act; (c) order defendants to immediately facilitate plaintiff's prompt return to the United States – either pursuant to Federal Rule of Civil Procedure 65, pursuant to a writ of mandamus or pursuant to the court's inherent powers under 28 U.S.C. § 1651 and Article III; (d) grant attorneys' fees and costs under 28 U.S.C. § 2412, 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d), and any other relevant authority; and (e) grant such other and further relief as the court deems just and proper under the circumstances.

## **2. Motions Requesting Return (Circuit Court)**

In cases where the court of appeals already has exercised its jurisdiction over the case, for example, in a petition for review or district court appeal, the circuit court should continue to have jurisdiction to entertain motions related to the main case, e.g., a motion asking the court to order the person's return. *See* Federal Rule of Appellate Procedure 27(a)(1) ("An application for an order or other relief is made by motion unless otherwise provided by these rules"). There is no particular name for such a motion, but some ideas include: motion to enforce court's order, motion to order respondent to cause petitioner's return to the United States, and motion for ancillary relief to enforce court's order. In extreme situations, some attorneys also have filed contempt motions for refusal to comply with the court's order.

### 3. Mandamus (Circuit Court)

Mandamus is appropriate to maintain the integrity of an earlier court decision.<sup>28</sup> If ICE flouts a circuit court (or district court) decision by refusing to return a petitioner to the United States for execution of that decision, the circuit court arguably has the authority and the duty to preserve the effectiveness of its earlier decision by exercising mandamus jurisdiction.

The Ninth Circuit decision in *Ramon-Sepulveda v. Immigration & Naturalization Service* is an example of a successful circuit court mandamus action. 824 F.2d 749 (9th Cir. 1987). In that case, the Ninth Circuit issued a writ of mandamus to preserve the effect of its prior decision to grant a noncitizen's petition for review. In the prior decision, the court held that an immigration judge cannot reopen deportation proceedings where the evidence of alienage (a birth certificate) on which reopening was based was not "newly discovered." *Id.* at 750. Following that decision, the Immigration and Naturalization Service ("INS") initiated new deportation proceedings based solely on the *same* birth certificate the Ninth Circuit found could not be used to reopen proceedings. *Id.* Petitioner then filed a mandamus action directly with the court of appeals, arguing that INS' initiation of new proceedings violated the Ninth Circuit's earlier decision. The court agreed and issued a writ of mandamus, stating "[i]t is our mandate that the INS flouts. We have the authority and the duty to preserve the effectiveness of our earlier judgment." *Id.* at 751.

## VI. SUGGESTED STRATEGIES FOR AVOIDING IN ABSENTIA ORDERS IN REMOVAL PROCEEDINGS FOR RESPONDENTS STRANDED ABROAD

In many cases, practitioners find themselves facing an upcoming immigration court hearing for a respondent whom ICE has refused to return. This is especially trying in cases where the BIA or an immigration judge has granted a motion to reopen or reconsider. ICE takes the position that the return policy does not apply to this situation.

In these situations, practitioners should consider the following immigration court strategies, all of which are intended to avoid an in absentia order pursuant to INA § 240(b)(5) while they pursue administrative and federal court options to secure the client's return.

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<sup>28</sup> *Iowa Utils. Bd. v. FCC*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999) ("[Federal courts] have not only the power, but also a duty to enforce our prior mandate to prevent evasion") (citation omitted); *Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties"); *American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982) ("[W]e hold that we have jurisdiction to enforce our prior mandate. Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus"); *City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (mandamus appropriate to correct violations of "the letter or spirit" of previous judicial mandate) (internal citations omitted); *see also Miguel v. McCarl*, 291 U.S. 442, 451-52 (1934) (holding that an act involving some discretion can still be compelled by mandamus to conform to applicable governing statutes).

- Seek a continuance of the hearing pursuant to 8 C.F.R. § 1003.29. An immigration judge must assess whether a respondent demonstrates “good cause” for requesting a continuance. Where ICE has refused to return the client, arguably good cause is shown.
- Ask the immigration judge for a subpoena pursuant to INA § 240(b)(1), 8 C.F.R. § 1003.35. Immigration judges have the authority to issue subpoenas for the “attendance of witnesses and presentation of evidence.” INA § 240(b)(1). Thus, the judge may issue a subpoena against DHS to produce respondent to be a witness and to present evidence at his or her hearing.
- Obtain the client’s consent to proceed in her or his absence pursuant to INA § 240(b)(2)(A)(iii). In limited situations, the client’s presence may not be necessary for a master calendar hearing to take place if, for example, the judge is simply setting the date for an application to be filed and/or setting a hearing date.
- Move for administrative closure pursuant to *Matter of Avetisyan*, 25 I&N Dec. 688 (BIA 2012). In *Matter of Avetisyan*, the BIA held that immigration judges may administratively close removal proceedings, even if one of the parties objects. Administrative closure may not be a suitable option as ICE may be even less inclined to return respondents whose cases have been administratively closed. Moreover, if simultaneously pursuing federal court litigation to compel return, having a forthcoming hearing date by which the person must return is strategically helpful.
- Build the record! If the immigration judge seems inclined to issue a ruling that is not in the respondent’s best interest (e.g., in absentia order or administrative closure) because ICE refuses to bring the client back, it is imperative that counsel object to the immigration judge’s ruling to preserve any and all appeal issues on the record. As noted above, ICE’s refusal to facilitate return arguably also violates the Fifth Amendment’s Due Process Clause and a person’s statutory rights in removal proceedings, including the right to be present at one’s own removal proceeding under INA § 240(b)(2). *See also* INA § 240(b)(4)(B) (“the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien’s behalf, and to cross-examine witnesses presented by the Government . . .”). An individual outside of the United States is substantially hindered in his ability to testify, present witnesses and evidence, consult with his attorneys, and cross-examine the government’s witnesses and examine its evidence.

## VII. CONCLUSION

ICE’s current return “policy”—a product of the embarrassing revelation that, contrary to the OSG’s representations to the Supreme Court, the government lacked a “policy and practice” of providing “effective relief” to individuals who prevail in their cases—fails on several accounts. The return policy is incomplete and vests unfettered discretion in the party responsible for removal in the first place. The directive does not cover noncitizens who prevail on administrative motions before an IJ or the BIA. Moreover, ICE refuses return to noncitizens who prevail on PFRs whenever it deems their presence unnecessary.



Even in the respects that it may seem complete on paper, the process repeatedly breaks down. An incredible lack of coordination within and among the relevant agencies plagues the process. Frustrated practitioners have found that their only hope for obtaining an appropriate response is by filing a complaint in federal district court. The policy needs a dramatic expansion and overhaul and better agreement and coordination among the various immigration agencies involved.

Nonetheless, practitioners whose clients are considering seeking return to the United States should contact the ICE Public Advocate, to see if the agency will agree to facilitate return and to begin making arrangements. If that process fails to yield return, practitioners are advised to consider litigation options.

### ***Contact us***

Practitioners are constantly confronting new and complicated obstacles in seeking the return of their clients. Please contact the National Immigration Project at [trina@nipnlg.org](mailto:trina@nipnlg.org) or the American Immigration Council at [clearinghouse@immcouncil.org](mailto:clearinghouse@immcouncil.org) if you would like help strategizing around these situations.

## Sample Email to ICE ERO Public Advocate

To: [EROPublicAdvocate@ice.dhs.gov](mailto:EROPublicAdvocate@ice.dhs.gov)

Dear Public Advocate:

I am an attorney in [CITY, STATE], and my firm represents an individual ([NAME], A# \_\_\_\_\_) who is currently in [CITY, COUNTRY]. [If applicable: [NAME] has a hearing before the [LOCATION] Immigration Court on [DATE]]. I am writing to seek your assistance in returning [NAME] to the United States [in advance of that hearing / in an expeditious manner]. I understand that one of your responsibilities is to facilitate the return of individuals such as [NAME], who have prevailed in their immigration cases after having been removed.

On [DATE], [NAME] was removed based on [DESCRIBE BASIS FOR ORDER OF REMOVAL]. Subsequently, [DESCRIBE NATURE OF PROCEEDINGS SINCE THEN]. On [DATE], [COURT/BIA/IJ] granted [NAME]'s [motion for reopening/rehearing or Petition for Review]. A copy of the decision is attached to this email. [If applicable: In addition to rescinding the prior, defective removal order, the decision specifically orders that [NAME] be permitted to enter the U.S. to attend her/his hearing on DATE].

[For cases involving returning LPRs who prevail on PFRs, consider adding: As your agency acknowledged in its Feb. 24, 2012 directive, when a PFR is granted, the "alien will once again, in contemplation of law, be an LPR even though removal proceedings may still be pending before EOIR on remand." *See also Matter of Lok*, 18 I&N Dec. 101, 106 (BIA 1981).]

OR

[For cases involving returning LPRs who prevail on motions to reopen, consider adding: When a case is reopened, the removal order is vacated. *Nken v. Holder*, 556 U.S. 418 (2009). Reopening restores the person to her/his status prior to the removal order, i.e., lawful permanent resident. *See Matter of Lok*, 18 I&N Dec. 101, 106 (BIA 1981) (holding that LPR status terminates when there is a final order, but that "reversal on the merits of that deportability finding by an appellate court or administratively upon a motion for reopening or reconsideration" can restore lawful permanent resident status").]

Accordingly, [NAME] must be [if applicable: restored to her/his pre-removal status] and allowed to pursue [RELIEF]. I respectfully request your assistance in facilitating her/his return to the United States so that s/he may be restored to this status.

[If applicable: Furthermore, I note that the Court/BIA/IJ specifically ordered that [NAME] be permitted to enter the United States for her/his calendar hearing on [DATE]. Therefore, if [NAME] is not permitted to enter the United States for this purpose, your agency will have failed to comply with the Judge's/IJ's order. Although I hope this does not occur, such a failure will force my office to consider other actions, including whether to file an action in federal court seeking to compel compliance with the order.]

I am also hereby supplying the follow information: [If applicable: the federal court case #]; [NAME]'s passport # and expiration date; the address and telephone # at the place where [NAME] intends to live upon her/his return; the closest U.S. consulate where s/he can go to obtain necessary paperwork; and her/his anticipated port of entry.

I appreciate your prompt assistance with this matter. If you have any questions, or require any further documentation, please contact me immediately.

Sincerely,

[Attorney Name]

## APPENDIX

### Web Addresses for Documents Referenced in this Advisory (in order of reference)

- ICE Policy Directive Number 11061.1 (Feb. 24, 2012), *available at* [http://nationalimmigrationproject.org/legalresources/ICE\\_Return\\_Policy\\_Memo\\_Feb\\_2012.pdf](http://nationalimmigrationproject.org/legalresources/ICE_Return_Policy_Memo_Feb_2012.pdf).
- National Immigration Project of the National Lawyers Guild, et al., *Seeking a Judicial Stay of Removal in the Court Of Appeals: Standard, Implications Of Ice's Return Policy and the OSG's Misrepresentation to the Supreme Court, and Sample Stay Motion* (May 2012), *available at* [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/pa\\_Seeking\\_a\\_Judicial\\_Stay\\_of\\_Removal\\_May2012.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_a_Judicial_Stay_of_Removal_May2012.pdf).
- *Nat'l Immigration Project of the Nat'l. Lawyers Guild v. U.S. Dep't. of Homeland Sec.*, 842 F. Supp. 2d 720, 722 (S.D.N.Y. 2012), *available at* <http://nationalimmigrationproject.org/legalresources/8-SJ-memo-order-final.pdf>.
- Letter from Michael R. Dreeben, Deputy Solicitor General, to Hon. William K. Suter, Clerk of the Supreme Court (Apr. 24, 2012), *available at* [nationalimmigrationproject.org/legalresources/NIPNLG\\_v\\_DHS/OSG Letter to Supreme Court, Including Attachments - April 24 2012.pdf](http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/OSG_Letter_to_Supreme_Court_Including_Attachments_-_April_24_2012.pdf)
- Letter from Paul R.Q. Wolfson and Adam Raviv to Hon. William K. Suter, Clerk of the Supreme Court (May 4, 2012), *available at* [nationalimmigrationproject.org/legalresources/NIPNLG\\_v\\_DHS/Amici Letter to the Supreme Court in Nken - May 4 2012.pdf](http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/Amici_Letter_to_the_Supreme_Court_in_Nken_-_May_4_2012.pdf).
- U.S. Immigration and Customs Enforcement, *Frequently Asked Questions about ICE Policy Directive Number 11061.1, Facilitating the Return to the United States of Certain Lawfully Removed Aliens* (2012), *available at* <http://www.ice.gov/about/offices/enforcement-removal-operations/publicadvocate/faq.htm>.
- *Nken v. Holder*, No. 08-681, *available at* <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/08-681.htm>.
- CBP Directive No. 3340-043, at 5 (The Exercise of Discretionary Authority) (Sept. 3, 2008), *available at* [http://nationalimmigrationproject.org/legalresources/NIPNLG\\_v\\_DHS/CBP%20Parole%20Directive%20%28Partially%20Redacted%29%20-%20Sept%203%202008.pdf](http://nationalimmigrationproject.org/legalresources/NIPNLG_v_DHS/CBP%20Parole%20Directive%20%28Partially%20Redacted%29%20-%20Sept%203%202008.pdf).

Case documents, case updates, and the documents the government disclosed through the FOIA litigation and to the Supreme Court in *Nken* are available on the NIPNLG website at <http://nationalimmigrationproject.org/legalresources.htm#nipnlg>.