



LITIGATION STRATEGIES

KATHLEEN KERSH

ADVOCATES FOR BASIC LEGAL EQUALITY, INC. (ABLE)

NAZLY MAMEDOVA

WANG LAW

ENID TRUCIOS-HAYNES

UNIVERSITY OF LOUISVILLE BRANDEIS SCHOOL OF LAW

KATE MELLOY GOETTEL

NATIONAL IMMIGRANT JUSTICE CENTER

AGENDA

- ▶ Why litigation?
- ▶ Overview of types of litigation
- ▶ Illustrative cases from 2017-2018
- ▶ Organizing strategies

Why Litigation?

- ▶ In this environment, may be one of the most effective (and only!) tools we have
- ▶ Courts are emboldened right now
- ▶ Class actions can effect systemic change
- ▶ Slows down the detention and deportation machine
- ▶ It can be another bite at the apple (or two or three)
- ▶ Litigation can work in concert with communications and policy strategies

Federal Litigation Defined

- ▶ Federal district court
 - ▶ Challenges to agency action in violation of the law and Constitution
 - ▶ Individual actions and class actions
- ▶ Federal court of appeals
 - ▶ Appeals from the district court
 - ▶ Petitions for review from the Board of Immigration Appeals

Types of Federal Litigation

- ▶ Mandamus – Compelling agency action that is delayed
- ▶ Administrative Procedure Act – Agency is acting contrary to law, agency's decision is arbitrary or capricious, or decision not supported by evidence
- ▶ Habeas – Challenging detention
- ▶ Petitions for Review – Appeal of a final removal order
- ▶ Freedom of Information Act (FOIA) – Lawsuit for agency's failure to provide documents



Mandamus & Unreasonable Delay

- ▶ A “writ of mandamus” is a court order to an agency directing it to perform a non-discretionary duty.
- ▶ Under the Administrative Procedure Act, a court can order an agency to act if their decision has been unreasonably delayed
- ▶ Examples:
 - ▶ U visa cases – unreasonable delays of now 4-5 years
 - ▶ Asylum application delayed 6 years

Administrative Procedure Act

- ▶ A court may undo actions of immigration agencies which are:
 - ▶ Arbitrary, capricious, abuse of discretion, unlawful
 - ▶ Violates the Constitution
 - ▶ Violates federal law

Habeas Corpus

- ▶ A type of lawsuit for detained clients, alleging their detention is unlawful.
- ▶ Habeas remedy available if –
 - ▶ (1) the person is in custody of the United States (in this case, ICE custody)
 - ▶ (2) the custody violates the Constitution or laws, or treaties of the United States

Habeas: What relief?

- ▶ Release from detention
- ▶ Provide a bond hearing

Does it stop removal?

- ▶ No; would need a Temporary Restraining Order from judge
- ▶ Recently courts have found removing noncitizens before given a chance to present their claims violates the Constitution

Petition for Review

- ▶ Immigration court → Board of Immigration Appeals → Court of Appeals via a petition for review
- ▶ Challenges that an individual final order of removal is violates the law
- ▶ Does not stop removal unless a motion to stay is filed and granted
- ▶ Most common types of cases:
 - ▶ Asylum / withholding of removal / Convention Against Torture
 - ▶ Criminal issues
- ▶ Can be the last line of defense before removal

Freedom of Information Act (FOIA)

- ▶ FOIA requests are a mechanism to obtain government documents and information from a federal agency
- ▶ Don't need to be a lawyer to request—advocacy organizations, media, private citizens can request
- ▶ Requests are free and must be returned within 20 working days
- ▶ If the agency doesn't respond in that time, federal lawsuit can be filed
- ▶ If the agency denies or responds insufficiently, appeal and then federal lawsuit
- ▶ ICE and CBP are VERY slow right now, so litigation pressure critical
- ▶ States have equivalent means to obtain information

Illustrative Cases: Federal/state law enforcement

- ▶ *Tomas-Pedro v. Holden* (N.D. OH 2018 – pending)
 - ▶ § 1983 case brought on behalf of nine plaintiffs stopped by Ohio State Highway Patrol troopers and referred to U.S. Border Patrol
 - ▶ Constitutional claims based on racially-motivated traffic stops and prolonged detentions
 - ▶ Alternative form of getting information when FOIAs and Public Records Act requests are ineffective
- ▶ Ohio Bureau of Motor Vehicles advocacy
 - ▶ Addresses anti-immigrant BMV policies: co-signer requirements and refugee I-94 “expirations”
 - ▶ Relies on *Arizona v. United States* (U.S. Supreme Court 2012) holding that local law enforcement may not implement its own federal immigration rules

Illustrative Cases: Sanctuary Cities

- ▶ ***City of Chicago v. Sessions*** (7th Cir. 2018)
 - City of Chicago sued Department of Justice (DOJ) regarding new conditions on criminal justice grants.
 - Conditions:
 - Honor immigration detainers;
 - Participate in immigration enforcement;
 - Communicate immigration status with DHS.
 - Seventh Circuit found that DOJ conditions are unlawful under the Administrative Procedure Act.

Illustrative Cases: Petitions for Review

- ▶ *Trujillo Diaz v. Sessions*, 880 F.3d 244 (6th Cir. 2018)
 - ▶ Maribel apprehended in 2007, denied asylum by immigration judge in 2012; Board of Immigration Appeals denied appeal in 2014
 - ▶ Prosecutorial discretion requests granted from 2014-2017
 - ▶ Motion to reopen asylum case based on changed country conditions with stay of removal filed at BIA in 2017; BIA denied in opinion with little analysis and impermissible, blanket rejection of evidence without explanation
 - ▶ Petition for Review filed at 6th Circuit. Court essentially holds that evidence on motions to reopen must be taken in the light most favorable to the plaintiff; BIA's summary denial of evidence was an abuse of discretion
 - ▶ 6th Circuit mentions ICE's methods of detention and deportation
 - ▶ Overall outcome: immigrants deserve their day in court!

Illustrative Cases: Detention/Habeas

- ▶ *Hamama v. Adduci* (E.D. Mich. 2017) (appeal pending).
 - ▶ Class action brought on behalf of approx. 115 Iraqi nationals who were arrested and detained last summer in Michigan
 - ▶ Lawsuit sought release from detention and the opportunity to file immigration applications before removal
 - ▶ Court granted injunction first as to 115 class members, but then expanded nationwide (more than 1,000 people)
 - ▶ Gave class members several months to file immigration applications

Illustrative Cases: DACA Litigation

- ***Regents of Univ. of Calif. v. DHS***, N.D. California; ***Batalla Vidal v. Nielsen***, E.D. New York
 - Two cases with substantially same reasoning and result: nationwide preliminary injunction granted; DHS must accept renewals but not new applications
 - Rescission decision violated the APA—the government gave bad reasons for rescission
 - Both courts vacated the rescission
- ***NAACP v. Trump***, District of Columbia
 - Again arbitrary and capricious; vacated rescission
 - Vacatur effective 90 days from order (July 23, 2018)
- Government has now issued new rescission decision

Organizing Strategies: Working with Law Enforcement

- ▶ Immigrant-friendly policing policies
 - ▶ Education on immigration laws and statuses, including information about *Arizona v. US*
 - ▶ U Visa and T Visa certification trainings
 - ▶ Language access policies



Organizing Strategies: Fighting Detainer Policies & Creating Sanctuary Cities

- ▶ Examples:
 - ▶ City of Cincinnati
 - ▶ City of Louisville

Organizing Strategies: Fighting Immigration Detention

- ▶ Bond hearing projects
 - ▶ Collaboration with local law school clinics
- ▶ Universal representation model

Organizing Strategies: Resisting New Detention Centers

- ▶ Example: Elkhart, IN
 - ▶ CoreCivic planned to build detention center in Elkhart, IN
 - ▶ Group of organizers resisted building the center; advocated publicly
 - ▶ CoreCivic withdrew plans