



**ICE**

**OPEN!**

**VIDEO AS  
EVIDENCE  
GUIDE:  
IMMIGRATION**

**PRESENTED BY:  
WITNESS**

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This resource is solely for educational purposes, and it does not serve to substitute for any expert, professional, and/or legal representation and advice.

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# INTRODUCTION & GOAL OF THIS GUIDE

Filming U.S. immigration enforcement actions can be a dangerous practice. Attorneys, it can put the individuals you represent and their communities at risk. It is important to consider the ethical and security issues around sharing your client's video for advocacy or evidentiary purposes. It could result in making your client or their families a potential target for U.S. Immigration and Customs Enforcement (ICE). See Part II of this material for points to consider in using film taken by and of immigrant communities in your case strategy.



With U.S. immigration enforcement raids and arrests of immigrants showing no signs of abating, immigration practitioners are looking for creative strategies to protect the rights of individuals who are unlawfully placed into removal proceedings.<sup>1</sup>

**Video evidence is one such tool. And yet it remains a largely untapped tool in the U.S. immigration context.**

**This is a guide to begin thinking about ways in which video can be obtained, preserved, and prepared for trial to help strengthen an individual's immigration case.**

## GOAL



The goal of this guide is to introduce basic practices to help ensure that the video in your hands can be used not only for advocacy efforts, but also to protect the rights of individuals in a legal context.

This guide has two audiences: attorneys and community members.

## PART I:

- Is for **attorneys** who have come across footage that they believe could support a client's case but do not know how best to present the evidence and submit it such that it will be given full or substantial weight by the immigration court.
- Consult Part I of this guide for more information about how video can be used in legal proceedings, and how activists who capture footage can successfully work with immigration lawyers to help create accountability.



## PART II:

- Is for **community members** and **advocates** who find themselves in situations where they can and choose to record immigration enforcement violations as they happen, or in their immediate aftermath, and want to share footage with investigators and lawyers who could use it in investigations.



**We hope that after reviewing the practices here, you will begin to feel prepared to introduce video evidence as a part of your case strategy.**

<sup>1</sup> Removal was formerly called deportation and is often colloquially still referred to as such. Please see *Glossary* for detailed definitions.

# THE POWER OF VIDEO ADVOCACY IN SUPPORT OF IMMIGRATION CASES

The case of Romulo Avelica-Gonzalez illustrates the power of video for storytelling purposes in the advocacy context.



As bystander video becomes more available, we are beginning to see lawyers interested in video use for evidentiary purposes as well.<sup>2</sup>

In 2017, Fatima Avelica watched as immigration agents detained her father, Romulo Avelica-Gonzalez. She pulled out her phone and started recording the incident. With the help of a journalist, Romulo's family publicly released Fatima's footage of her father's arrest. The video went viral,

garnering national support for Romulo's case. After six months of Romulo's family, community, and lawyers tirelessly advocating, organizing, rallying and speaking to media, Romulo was finally released from immigration detention. For more information on advocacy in this case, read our case study.

2 A screenshot from a video about Romulo Avelica-Gonzalez, *A Viral Video Saved Her Father From Deportation*, National Geographic (posted: Jun. 24, 2018), <https://wit.to/3btzWXJ>; WITNESS Media Lab, *Case Study – Romulo's Story: Using Video to Advocate for Immigrant Rights* (last visited Apr. 2020), <https://lab.witness.org/romulos-story-using-video-to-advocate-for-immigrant-rights/>.

# ACRONYMS

**BIA**

Board of Immigration Appeals

**CBP**

Customs and Border Protection

**DHS**

Department of Homeland Security

**EOIR**

Executive Office for Immigration Review

**ICE**

Immigration and Customs Enforcement

**INA**

Immigration and Nationality Act

**INS**

Immigration and Naturalization Service

**LPR**

Lawful Permanent Resident

**USC**

United States Citizen

**USCIS**

United States Citizenship and Immigration Services

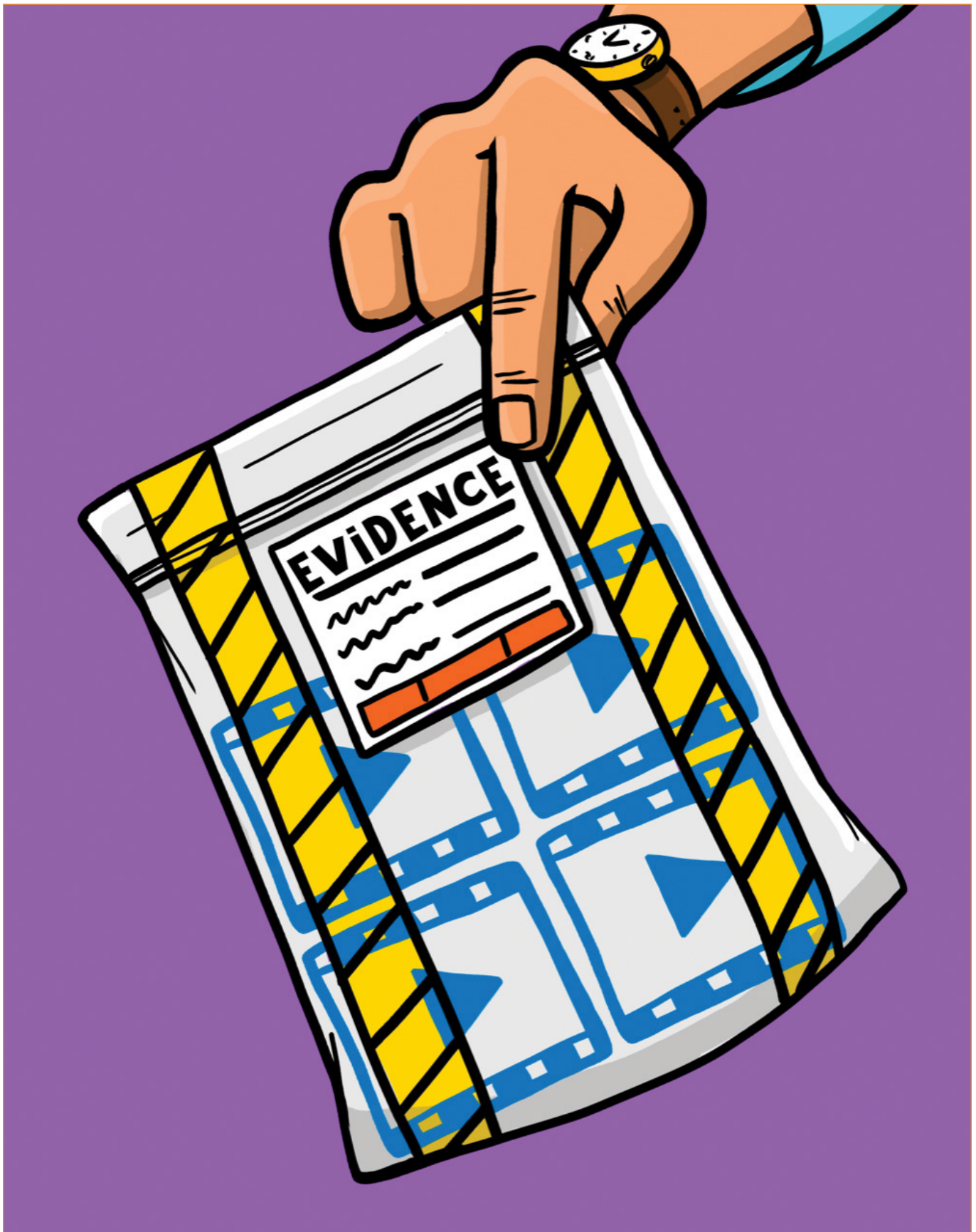


Illustration credit: Gregory Buissereth

# **PART I:**

## **Using Video Evidence in U.S. Immigration Legal Proceedings and in Immigration-Related Civil Rights Cases in Federal Court**



# INTRODUCTION

Witnesses to raids, including family members, friends, and bystanders are well placed to document an incident with their cell phone cameras as it unravels. Such footage has the power to corroborate an individual's view of how an apprehension unfolded. It may turn out to be crucial evidence in support of a strategy to prevent removal, suppress evidence of deportability, or to ensure that individuals are compensated for any damage to their property or to themselves that occurred during a search or seizure. This footage also sends the message that people are ready to document raids, which can influence changes in enforcement going forward.

Ultimately, video exposing *how* an enforcement action is carried out can help provide critical evidence as part of a community and legal defense strategy in an individual's removal hearing. Additionally, a well-shot piece of footage in this context has the potential to publicly expose any abuses committed by immigration agents and create greater officer accountability.

However, while eyewitness video often provides useful clues about what took place and who might be responsible, the quality may not always pass muster as evidence before a court of law. The good news is this: with slight modifications in practices, the footage eyewitnesses risk their safety to capture may serve as evidence in immigration and federal court proceedings.



VIDEO IN  
THE STREET

TO EVIDENCE  
IN THE COURTROOM



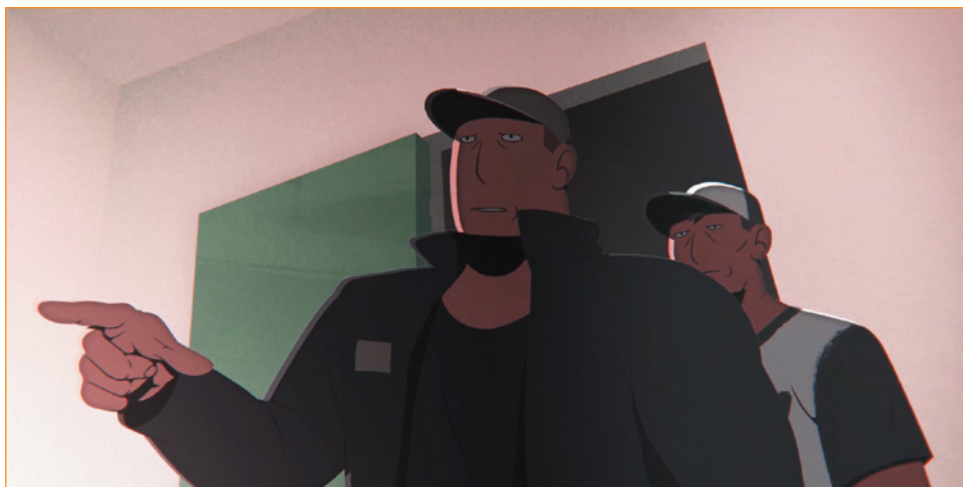
## Picture This



Start by reading the two scenarios below and think about what you would do. Throughout the rest of this guide you will find tips and recommendations for how to respond to these situations.

### SCENARIO #1

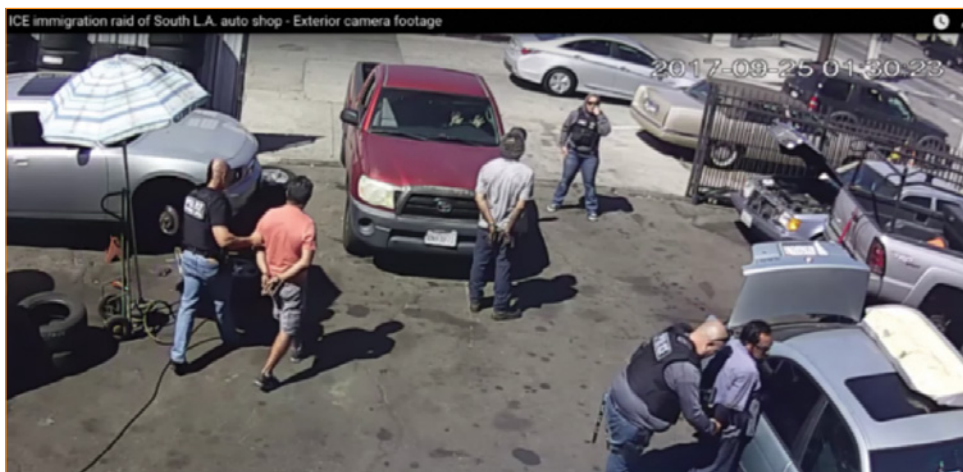
An ICE officer testifies that he had consent to enter an individual's premises when in fact he knocked on the door then pushed his way in after the resident opened to check who was there. Footage of the incident is captured by a neighbor on her cell phone, corroborating key aspects of the warrantless entry and lack of consent needed to enter. The lawyer for the client knows the footage could be extremely valuable to the client's motion to terminate, but has doubts about how to export the footage while preserving its authenticity, and how to submit the evidence in immigration court. What would you do in this situation?



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

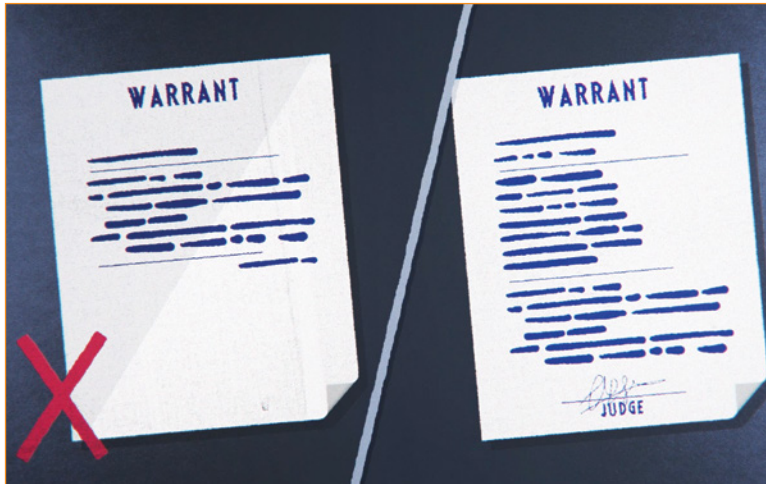
### SCENARIO #2

When performing a workplace sweep for an individual named in a warrant, immigration agents single out other Latinx-appearing individuals for arrest - without probable cause, a judicial warrant, or a determination that any of those people would be a flight risk. The scene is captured on surveillance video in the workplace. As an immigration attorney for one of those detained in the sweep but not named in the warrant, what is your next step for your client?



A still of the surveillance video released by the ACLU shows ICE officers disguised in police vests detaining several noncitizens in the Juan Hernandez Cuevas case, Los Angeles.

## Judicial vs. Administrative Warrants



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

The Fourth Amendment of the U.S. Constitution protects against search, seizure, and arrest without probable cause. ICE agents are not permitted to enter a person's home without a **judicial warrant** or **consent**. ICE is seldom able to obtain a judicial warrant prior to performing a search or arrest. Agents sometimes present a document that says "warrant" when in reality, it is not a judicial warrant.

A **judicial warrant** is an official court document, signed by a judge, allowing ICE to enter the premises.

In contrast, an **administrative or ICE warrant** is a form issued by immigration officers that designates a noncitizen as allegedly deportable and directs immigration agents to arrest that person. ICE warrants are not signed by a judge and *do not* give authority to enter private spaces to execute an arrest or search.<sup>3</sup> Federal courts have repeatedly found administrative warrants do not satisfy Fourth Amendment constitutional requirements. Therefore, an "ICE warrant" is not a real warrant.



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

### ✓ JUDICIAL WARRANT

- Allows ICE to enter the home
- Signed by a Judge
- Will have name of a state or federal court at the top such as Supreme Court of the State of New York

### ✗ ADMINISTRATIVE WARRANT

- Does not allow ICE entry
- Signed by an ICE supervisor and not by a judge
- May have "U.S. Department of Homeland Security" at top

Source: *Deportation Defense Manual*, Make the Road New York 14-15, <https://wit.to/2ldEhRM>

<sup>3</sup> Immigrant Legal Res. Ctr., *Summary: The Basics on ICE Warrants and ICE Detainers*, at 1 (May 2017), <https://wit.to/38q6Dmm>.



## VIDEO EVIDENCE IN OTHER U.S. LEGAL PROCEEDINGS

Lawyers are familiar with the use of video in civil rights litigation to expose police misconduct. Bystander video in the Walter Scott case was used to hold a police officer accountable for violating Scott's civil rights after the officer shot and killed him.<sup>4</sup> Video is also used to challenge police accounts of arrests in the criminal context: see the case of Christopher Parham in Brooklyn.<sup>5</sup> Criminal defense lawyers in Parham's case argued that police were not telling the truth about their confrontation with Parham, a delivery man buying groceries for his employer at a Brooklyn bodega. While officers claim they did not use force when they took Parham into custody for reckless driving and resisting arrest, among other charges, the video obtained

by his lawyers showed a different story. The charges against Parham were eventually dropped after the district attorney reviewed the video. These are but a few examples of how widely available eyewitness and surveillance videos are and how regularly they are used as evidence in various legal contexts in the U.S.

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Our investigation for this resource has involved interviews with immigration, constitutional, and criminal defense lawyers across the United States about their knowledge around, and in some cases, firsthand experience with the use of video evidence for immigration cases. Interviews with the immigration



A screenshot of the surveillance footage [released](#) by Brooklyn Defender Services showing three police officers on top of Christopher Parham.

4 WITNESS Media Lab, *Walter Scott* (updated Dec. 7, 2017), [https://lab.witness.org/portfolio\\_page/walter-scott/](https://lab.witness.org/portfolio_page/walter-scott/).

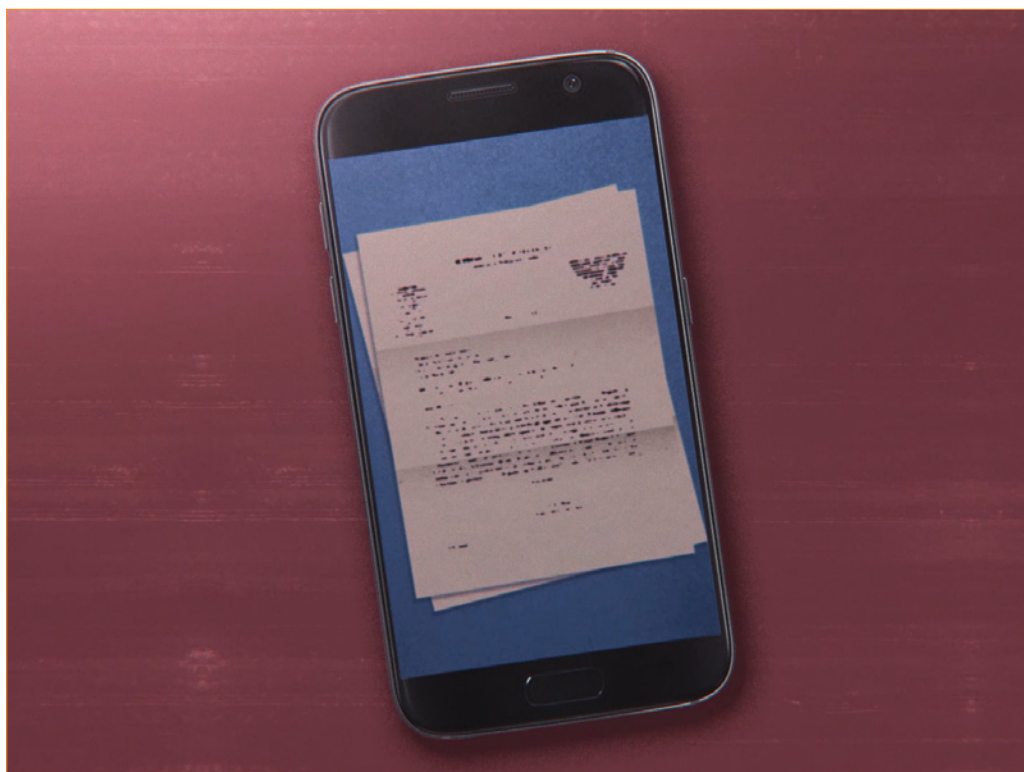
5 Leonard Greene, *Video contradicts police account of violent Brooklyn arrest: lawyers*, N.Y. Daily News (Mar. 20, 2019), <https://wit.to/2VAJ1ZD>.

attorneys have made clear there is an interest in introducing video evidence before immigration courts and, in some cases, federal court, yet questions and concerns remain around how to:

- Apply rules of evidence in immigration court—including, what the practices are around submitting video evidence;
- Prove the video footage is authentic, verifiable, and has a proven chain of custody;
- Manage chain of custody when the evidence is digital in nature;
- Provide copies of footage to the immigration judge and to government attorneys;
- Physically screen video in courtrooms; and
- Address videos showing only part of an incident.

This is a newly developing area in immigration defense. We do not have all the answers. But we are beginning to see video used in several cases,<sup>6</sup> giving us better clues as to its impacts and obstacles. While some questions remain, we are seeking answers. An evolving resource, **this material will change and grow based on input received from immigration attorneys like yourselves.** This guide offers a way to start thinking about introducing video into the immigration courtroom and in immigration-related cases in U.S. federal district courts.

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



6 To name a few: **(1)** A Fall 2019 Cancellation of Removal case for a non-LPR out of New York City where a witness' cell phone footage was successfully admitted into evidence (*see below*); **(2)** A 2018 case from Los Angeles, where workplace surveillance video captured an entire ICE raid and resulted in the termination of one individual's removal based on immigration enforcement practices being unconstitutional and violating regulations (*see below*); **(3)** An asylum case out of New York in which a documentary film was screened in court to support the testimony of an individual from Argentina who claimed he faced persecution for being transgender (*see below*); and **(4)** a 2014 unpublished Board of Immigration Appeals (BIA) decision, a remand from the 4th Circuit. The BIA remanded the record and instructed the immigration judge to consider video evidence submitted on a flash drive that may support allegations that the police had a pattern of pretextual traffic stops and illegal arrests based on Latinx appearance in a specific county in North Carolina. The video evidence was offered in support of a motion to suppress. The attorney for the client in that case, Rob Heroy, confirmed that the case, however, was administratively closed on remand without the court ever deciding the issue. *Jose Neftan Fuentes* (BIA, Oct. 28, 2014); the decision was issued by Vice Chairman Charles Adkins-Blanch. These are questions the immigration courts will be deciding with greater frequency.



## CASE AT A GLANCE: BYSTANDER VIDEO IN WALTER SCOTT KILLING



In April 2015, what was supposed to be a routine traffic stop for a broken brake light turned deadly for Walter Scott. The incident involving South Carolina police officer Michael Slager shooting, and ultimately killing, Walter Scott was caught on cell phone video by a bystander. His 3-minute video captures the officer firing at Scott eight times, five of which hit Scott from behind as he was attempting to run away. Before the bystander started filming, a struggle broke out between the two, and the officer reported that Scott was trying to take his stun gun, a fact which prosecutors disputed.

When the bystander's video emerged three days after the shooting, it contradicted the police narrative about the incident and its aftermath. The video went viral, bringing national attention to the case which ultimately resulted in Slager being charged with second degree murder and obstruction of justice. Officer Slager was ultimately sentenced to 20 years in prison in a federal civil rights case. The video of Scott's killing made an impact not only because of what it exposed, but because of when and how it was released. The bystander did not release the video until after Officer Slager filed his report, showing a clear contradiction in the official account of events. See more about the Walter Scott case: [https://wit.to/CaseStudy\\_WalterScott](https://wit.to/CaseStudy_WalterScott) contexts in the U.S.



“WHAT IF THERE WAS  
NO VIDEO?”

– ATTORNEY FOR FAMILY  
OF WALTER SCOTT

WITNESS  
MEDIA  
LAB

A screenshot taken from video of the police shooting of Walter Scott. New York Times<sup>7</sup>

<sup>7</sup> Michael Schmidt and Matt Apuzzo, *South Carolina Officer Is Charged With Murder of Walter Scott*, New York Times (Apr. 7, 2015), <https://wit.to/3fkOpqM>.

# USAGE OF VIDEO FOOTAGE AS EVIDENCE BY ATTORNEYS BEFORE THE U.S. IMMIGRATION COURTS AND FEDERAL DISTRICT COURTS



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

## INTRODUCTION TO VIDEO EVIDENCE IN U.S. IMMIGRATION COURT PROCEEDINGS & FOR IMMIGRATION-RELATED CIVIL RIGHTS CLAIMS IN FEDERAL COURT

For individuals appearing in U.S. immigration court, the stakes are usually very high. If their case is unsuccessful, not only is the life they know in the U.S. upended, but they run the risk of being deported to a country to which they have no ties or where they fear for their lives. They may also be separated from their families and communities. Referring to the high stakes in immigration courts (and the current backlog of cases), San Francisco Immigration Judge Dana Leigh, cautions that “[i]n essence, we’re doing death penalty cases in a traffic court setting.”<sup>8</sup>

For this reason, it is key to draw on all available tools to ensure the strongest legal arguments are made in court, including the introduction of

evidence that can help bolster clients’ cases. Removal defense lawyers are well aware that Department of Homeland Security (DHS) trial attorneys may introduce evidence to try to get a denial of immigration relief or bond. That liberal interpretation of the evidentiary rules can be applied in your client’s favor. Perhaps the most important of these rules for removal defense lawyers is not whether evidence is admissible, but instead the *weight the judge should* give the evidence.

The following topics will be covered:

- Key evidentiary rules in U.S. immigration court and in federal civil rights claims
- Strategic opportunities to introduce video evidence in a case
- Case Study/Collection Plans that help you connect video footage and legal arguments
- Practical guide on how to introduce video evidence

8 Hon. Mark A. Drummond, “Death Penalty Cases in a Traffic Court Setting”: Lessons from the Front Lines of Today’s Immigration Courts, American Bar Association (Jan. 15, 2019), <https://wit.to/JudgeDanaLeighMarks> (quoting Judge Dana Leigh Marks).

## KEY EVIDENTIARY RULES IN IMMIGRATION COURT

Evidentiary rules in immigration court can be unclear to even the most seasoned immigration lawyers; in part because traditional rules that apply in criminal court or in civil court *do not strictly apply* in removal proceedings.<sup>9</sup> In fact, judges in immigration court have broad discretion to determine what evidence is admissible,<sup>10</sup> and how much weight to give the evidence they do admit.<sup>11</sup>

Several key evidentiary rules are summarized in the chart below.



9 *Matter of D-R*, 25 I. & N. Dec. 445, 458 (BIA 2011); *Matter of Y-S-L-C*, 26 I. & N. Dec. 688, 690 (BIA 2015); *Jianli Chen v. Holder*, 703 F.3d 17, 23 (1st Cir. 2012) ("Strict rules of evidence do not apply in immigration proceedings."); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir.1996) ("The traditional rules of evidence do not apply in immigration hearings..."); *Espinoza v. INS*, 45 F.3d 308, 310 (9th Cir.1995) ("[a] deportation hearing is an administrative proceeding not bound by strict rules of evidence.").

10 See Exec. Off. For Immig. Rev., *Immigration Judge Benchbook*, at 2 [hereinafter *Immigration Judge Benchbook*], download: [https://wit.to/EOIR\\_EvidenceGuide](https://wit.to/EOIR_EvidenceGuide), (undated; last visited Apr. 2020).

11 Simon Azar-Farr, *A Synopsis of the Rules of Evidence in Immigration Removal Proceedings*, Bender's Immigr. Bull. 3, 14 (Jan. 2014) [hereinafter *Synopsis of the Rules*], <https://wit.to/3cxWffy>.

Immigration courts are operated by the Department of Justice's Executive Office for Immigration Review (EOIR) in the United States. They are civil administrative courts under the executive branch of the government; they do not fall within the scope of the government's judicial branch.

**Where do immigration laws and rules reside, then?** In immigration court, the Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Administrative Procedures Act do not strictly apply. Instead, the Immigration and Nationality Act or INA provides the statutory authority for immigration laws, and agencies that administer the immigration laws have promulgated regulations to implement the statute.<sup>12</sup> These regulations are published in the Federal Register and are incorporated into the Code of Federal Regulations or CFR.<sup>13</sup>

## THE STANDARD FOR THE ADMISSION OF EVIDENCE IN IMMIGRATION COURT

Immigration proceedings generally favor the admissibility of evidence and immigration judges, "tend to admit almost all of the evidence introduced."<sup>14</sup> When determining whether to admit evidence in immigration court, a judge will consider whether the evidence is **probative** and admitting it is **fundamentally fair**.<sup>15</sup> Evidence is **probative** if it makes a relevant disputed point more or less true.<sup>16</sup> **Fairness** can be understood to be closely related to the **reliability** and the **trustworthiness** of the evidence according to case law.<sup>17</sup>

While the Federal Rules of Evidence are not binding, they offer helpful guidance. If a specific piece of evidence would be admissible under the Federal Rules, it "lends strong support to the conclusion that admission of the evidence comports with due process."<sup>18</sup>

## ADMISSION & WEIGHT

Immigration judges are authorized by statute to assess the credibility and significance of the evidence before them and decide what weight to apply to it.<sup>19</sup>

There is a two-step legal framework for the analysis of evidence in immigration court (see slides below), where judges will:

- 1) Determine whether evidence should be admitted (is it probative and is its admission fundamentally fair?); then
- 2) Assess the weight that the evidence should be accorded, recognizing that reasonable fact-finders could differ on this.<sup>20</sup> The weight of the evidence is the degree to which a piece of evidence persuades the judge to either accept or reject a factual assertion.<sup>21</sup>

<sup>12</sup> INA, codified at 8 U.S.C. §1101 et seq.

<sup>13</sup> See USCIS, *Primary Research Sources*, <https://wit.to/2vxsUBq> (last visited Apr. 2020).

<sup>14</sup> Maya Leszczynski, Katherine Dennis, Nermeen Arastu, & Talia Peleg, *Evidentiary Objections to Challenge Commonly Introduced Evidence Used in Support of Gang Allegations*, at 4 (July 2019), <https://wit.to/2TIAic4>; see 8 C.F.R. §§ 1240.7(a), ("The immigration judge may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial").

<sup>15</sup> *Matter of Velasquez*, 25 I. & N. Dec. 680, 683 (BIA 2012) citing *Matter of D-R*, 25 I. & N. Dec. at 458.

<sup>16</sup> Black's Law Dictionary 502 (9th ed. 2010).


<sup>17</sup> *Felzcerek v. I.N.S.*, 75 F.3d 112, 115 (2d Cir. 1996); see *Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008).

<sup>18</sup> *Matter of D-R*, 25 I. & N. Dec. at 458, n.9 (quoting *Felzcerek v. INS*, 75 F.3d at 116).

<sup>19</sup> 8 U.S.C. § 1229a(c)(4)(C).

<sup>20</sup> See *Hernandez-Lima v. Lynch*, 836 F.3d 109, 114 (1st Cir. 2016).


<sup>21</sup> *Weight of the evidence*, Wex Legal Dictionary, LII – Legal Information Institute, [https://www.law.cornell.edu/wex/weight\\_of\\_the\\_evidence](https://www.law.cornell.edu/wex/weight_of_the_evidence), (last visited Apr. 2020).

 Evidence  
2018 Executive Office for Immigration Review  
Legal Training Program

Two step process:

- 1) Determine whether evidence admitted
  - probative
  - admission fundamentally fair
- 2) Assess weight that evidence should be accorded, recognizing that reasonable fact-finders could differ on this

**Part 1 – Assessing Weight**

 Evidence  
2018 Executive Office for Immigration Review  
Legal Training Program

Takeaways:

- discuss each document and all relevant testimony
- ask parties to offer “weight” arguments in closing
- if documents or testimony contradict, review both and give appropriate weight based on reliability factors


**Part 1 – Assessing Weight**

EOIR Legal Training Program slides (2018)<sup>22</sup>

## EOIR LEGAL TRAINING SLIDES – ASSESSING WEIGHT




The slides provide examples of evidentiary weight assessments by immigration court judges. Check the resource for additional examples.

 Evidence  
2018 Executive Office for Immigration Review  
Legal Training Program

Asylum

Musa v. Lynch, 813 F.3d 1019 (7th Cir. 2016):  
**IJ erred by placing too much weight on the absence of general documentary evidence regarding FGM in Botswana; credible testimony was sufficient**

**Part 1 – Assessing Weight**


 Evidence  
2018 Executive Office for Immigration Review  
Legal Training Program

A/W/H/CAT Cases – Motions to Reopen –  
Change in Country Conditions –  
**Expert Reports**

Marsadu v. Holder, 748 F.3d 55 (1st Cir. 2014) – upheld the Board’s finding that there was no “intensification or deterioration of country conditions”

Simarmata v. Holder, 752 F.3d 79 (1st Cir. 2014) – afforded **diminished weight** to an expert opinion for **failure to provide an assessment of particular or individualized risk** of harm to alien

**Part 1 – Assessing Weight**


 Evidence  
2018 Executive Office for Immigration Review  
Legal Training Program

Asylum Cases

Respondent threatened based on family relationship, or political opinion, and no cognizable social group, but IJ and Board failed to appreciate or address critical evidence -- remanded for **wholesale failure to discuss the evidence**

Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017)

**Part 1 – Assessing Weight**

 Evidence  
2018 Executive Office for Immigration Review  
Legal Training Program

Motion to Reopen – Change in Country  
Conditions - Unauthenticated “Village  
Committee Notice”

Le Bin Zhu v. Holder 622 F.3d 87 (1st Cir. 2010): **Lack of authentication undermines document’s evidentiary weight**

**Part 1 – Assessing Weight**

EOIR Legal Training Program slides (2018)<sup>23</sup>

<sup>22</sup> *Evidentiary Challenges: Admissibility, Weight, Reliability, and Impeachment v. Rebuttal Evidence*, EOIR Legal Training Program slides, posted by AILA, at 4, 9 (Aug. 22, 2018) [hereinafter: *EOIR Evidentiary Challenges Slides*], download: [https://wit.to/EOIR\\_EvidentiaryChallenges](https://wit.to/EOIR_EvidentiaryChallenges).

<sup>23</sup> *EOIR Evidentiary Challenges Slides*, *supra* note 22.



## KEY TAKEAWAY



The lack of strict evidentiary rules in immigration court means that rather than excluding evidence in a given case, immigration judges generally will admit evidence and designate it an exhibit, then determine the appropriate weight to give it. The issue then becomes how to persuade the court that the evidence an attorney offers, if it is in fact material to their case, should be given full weight as opposed to being admitted but being given partial or no weight. **Given the important role that weight plays, lawyers should be prepared to offer weight arguments.**

## KEY TAKEAWAY



Government attorneys may try to raise objections to your evidence based on authentication, relevance, hearsay, or undue repetitiveness. By referring to the liberal evidentiary standard in immigration court, you can argue that objections by the trial attorney should go to the weight of the evidence and not its admissibility.<sup>24</sup>

## HEARSAY

Since immigration proceedings are administrative, formal rules of evidence including hearsay do not apply. Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. Hearsay evidence is admissible in immigration court if it is probative and its admission is fundamentally fair.<sup>25</sup> An immigration judge may admit the evidence but may choose to give the hearsay evidence less weight than other evidence. An affidavit containing information that appears to be hearsay will not necessarily be excluded; “that fact merely affects the weight to be afforded such evidence, not its admissibility.”<sup>26</sup> Some research suggests the broad admission of hearsay evidence in immigration court has traditionally benefited the government against noncitizens, given the government’s greater access to resources.<sup>27</sup> However, removal defense lawyers can argue that the court should apply the same analysis around hearsay and evidentiary weight to benefit their clients as well.

## AUTHENTICATION

As a general rule, proper authentication requires some proof that a document “is what it purports to be.”<sup>28</sup> Identifying where the evidence originated, whether it is complete, and showing the unbroken chain of custody are some of the steps used to help authenticate evidence. Some relevant points around the flexible rules of authentication in the immigration court context are listed below.<sup>29</sup> The main idea to remember is that “if a party fails to properly authenticate a document, this does not necessarily render the document inadmissible. Rather, the [immigration judge], in her broad discretion, may simply afford less weight to unattributed or uncertified documents.”<sup>30</sup>

24 KIND, *The Immigration Court System*, at 8, <https://wit.to/38tbljy>, (last visited Apr. 2020).

25 *Kim v. Holder*, 560 F.3d 833, 836 (8th Cir. 2009); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003); *Espinoza v. INS*, 45 F.3d at 310; C.F.R. § 1240.7(a) (allows the immigration judge to “receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial.”); see EOIR, *IJ Benchbook—SF JLC Outline*, download: [https://wit.to/EOIR\\_Hearsay](https://wit.to/EOIR_Hearsay), (last visited Apr. 2020).

26 *Matter of Kwan*, 14 I. & N. Dec. 175, 177 (BIA 1972).

27 Meagan Kelleher & Michael J. Dal, *Coping with Hearsay Evidence in Immigration Proceedings*, NITA Blog (Jan. 2019) <https://wit.to/2ljc107>.

28 *Matter of J.R. Velasquez*, 25 I. & N. Dec. at 684 (quoting *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1196 (9th Cir. 2006)).

29 For more about authentication in the immigration court context, see *Synopsis of the Rules*, *supra* note 11, at 12.

30 *Synopsis of the Rules*, *supra* note 11, at 14; see also *id.* at 13-14 (while immigration regulations lay out authentication procedures under 8 C.F.R. §1287.6, they are not exclusive. The Federal Rules of Evidence & Federal Rules of Civil Procedure also provide alternatives to authentication).

## AUTHENTICATION BEFORE THE U.S. IMMIGRATION COURTS

"Documents may be authenticated in immigration proceedings through any recognized procedure."

*Khan v. INS*, 237 F.3d  
1143, 1144  
(9th Cir.2001)

A document that is not properly authenticated, does not necessarily mean it is inadmissible. Rather, the [immigration judge] may afford less weight to "unattributed or uncertificated documents".

*Azar-Farr, Synopsis of the Rules*

"The Bureau of Immigration Appeals has held that "issues regarding authentication and chain of custody generally go to the weight of the evidence, not its admissibility."

*Matter of D-R*, 25 I. & N.  
Dec. at 459

"Immigration judges retain broad discretion to accept a document as authentic or not based on the particular factual showing presented!"

*Vatyan v. Mukasey*, 508 F.3d 1179,  
1185 (9th Cir. 2007)

## A NOTE ON EVIDENTIARY RULES IN IMMIGRATION-RELATED CIVIL RIGHTS CASES IN FEDERAL COURT

In immigration court, the Federal Rules of Evidence and Federal Rules of Civil Procedure do not strictly apply though are, at times, influential or persuasive. Meanwhile both the Federal Rules of Evidence and of Civil Procedure *do apply* in most of the immigration-related civil rights cases in federal court that are discussed in this material (e.g. Federal Tort Claims Act cases and *Bivens* claims as we will see further below).<sup>31</sup>








<sup>31</sup> While there are certain rare exceptions, this is generally the rule.

## STRATEGIC OPPORTUNITIES TO INTRODUCE VIDEO EVIDENCE IN IMMIGRATION CASES

Visual submissions, whether photos or videos, can play a crucial role in corroborating key aspects of a client's testimony at various stages in the immigration context. From challenging abusive practices by immigration enforcement agents to providing proof of past persecution in an asylum claim, visuals can be powerful and persuasive tools to have at your disposal.

While photo evidence is used in various stages of immigration hearings (bond hearings, asylum hearings, discretionary determinations in relief applications), video is not frequently used – at least not yet. Keeping in mind how photo evidence has been used can help you better understand the stages at which video might be offered and admitted into evidence in immigration proceedings.

The following chart offers an overview of different strategic opportunities to use video evidence as part of your case strategy. These areas will be further developed below.

Where is video valuable in immigration court?			
	Strategic Uses of Video Evidence in Support of:	Examples of Claims	Video Examples
	Procedural challenges to proceedings	Motion to terminate	Video showing client is the target of racial profiling in an unlawful search and seizure by ICE
	Procedural challenges to proceedings	Motion to suppress	Video showing non-U.S. citizenship status ('alienage') info obtained without probable cause
	Bond determinations	Immigration bond hearing before the immigration judge	Video demonstrating family ties
	Relief applications, discretionary	Cancellation of removal in non-lawful permanent resident (LPR) case	U.S. citizen parent undergoing treatment for serious medical issue is dependent on your client; corroborated by video
	Relief applications, fear-based discretionary (Asylum, withholding of removal, protection under the Convention Against Torture (CAT))	Asylum	Video of client participating in anti-government political protests in their country of origin
Where is video valuable in immigration-related cases in federal court?			
	Federal Court	FTCA, Assault claim	Video showing ICE agents kicking down a door, brandishing weapons
	Civil Rights actions	<i>Bivens</i> claim	Video showing an unlawful entry & search of a person's home without judicial warrant or consent

## HOW COULD VIDEO EVIDENCE BE VALUABLE TO MY CLIENT IN IMMIGRATION LEGAL PROCEEDINGS AND IN IMMIGRATION-RELATED CIVIL RIGHTS CASES IN FEDERAL COURT?

To help you navigate the section below, you will find examples of video and photo evidence highlighted in **orange**.



### PROCEDURAL CHALLENGES TO PROCEEDINGS: MOTIONS TO SUPPRESS AND MOTIONS TO TERMINATE

*"Every [Immigration and Naturalization Service] agent knows, therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding."*  
*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984)

As ICE arrests intensify at homes, outside courthouses, and at the workplace, the utility of video evidence has great potential to challenge unlawful conduct during immigration enforcement situations. Two tools to challenge such conduct are motions to suppress and motions to terminate.

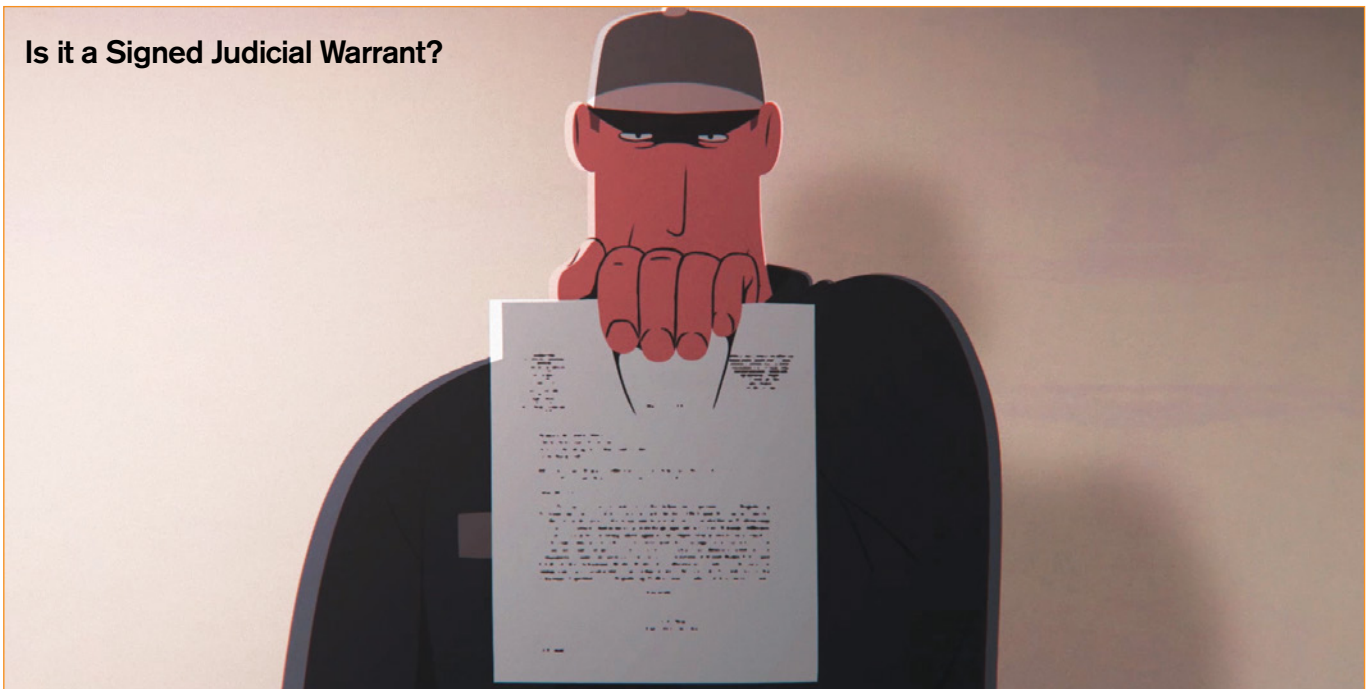
#### Video in support of a motion to terminate.

A motion to terminate asks an immigration court to terminate or conclude a removal proceeding against a person under various grounds, including that the government has violated certain regulations, policies, or procedures. For example, conduct of an ICE agent during an arrest may violate a governing statute, such as one which forbids the use of threats, coercion, or physical abuse by an immigration officer to induce an individual to waive their rights or make a statement.<sup>32</sup>

The standard for termination (i.e. dismissal of charges) differs based on the circuit in which the case is filed. The Ninth Circuit standard following a recent change in case law is: "[A] petitioner is entitled to termination of their proceedings without prejudice as long as the following requirements are satisfied: (1) the agency violated a regulation; (2) the regulation was promulgated for the benefit of petitioners; and (3) the violation was egregious, meaning

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

#### Is it a Signed Judicial Warrant?



32 8 C.F.R. §287.8(c)(2)(vii).

that it involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the petitioner.”<sup>33</sup>

**Video** can be introduced to help corroborate **prongs one** and **three** of the above rule.<sup>34</sup> For instance, under **Prong (1)**, video evidence can be used to show that an ICE agent (and therefore, a government agency) violated ICE’s own regulations. This may be done by using portions of eyewitness video or surveillance footage showing that DHS did not have probable cause or reasonable suspicion to

detain a noncitizen;<sup>35</sup> it can also serve to show that officers did not have a warrant or make a flight risk determination prior to detaining someone.<sup>36</sup> Video footage can also be used to satisfy **Prong (3)**; in other words to show egregiousness, and help meet the standard for a motion to terminate in the Ninth Circuit. Video that helps establish that a person was detained solely on the basis of their seemingly Latinx appearance could help show that ICE’s violation of a regulation was based on racial profiling and was therefore conscience shocking and egregious.<sup>37</sup>



Disguised ICE officer arresting Juan Hernandez as seen in surveillance video captured at his place of employment & released by the ACLU, 2017.

33 *Sanchez v. Sessions*, 904 F.3d 643, 655 (9th Cir. 2018); *Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008).

34 See WITNESS Media Lab, *Juan Hernandez Case Study Part 2: Legal* [hereinafter *Juan Hernandez Legal Case Study*], <https://lab.witness.org/juans-story-evidence/>, (last visited Apr. 2020).

35 See 8 C.F.R. § 287.8(b)(1), (2) and 287.8(c)(2)(i).

36 See 8 C.F.R. § 287.8(c)(2)(ii).

37 See *Sanchez v. Barr*, 919 F.3d 1193, 1195 n.3 (9th Cir. 2019), <https://wit.to/SanchezVBarr> (“*Rajah* therefore expressly allows for termination in *Sanchez*’s case because racial profiling is “conscience-shocking” and egregious.”).



## CASE AT A GLANCE:

### SURVEILLANCE VIDEO SUBMITTED IN SUPPORT OF A MOTION TO TERMINATE, LOS ANGELES IMMIGRATION COURT (2018)



A notable example of the power of video is the case of Juan Hernandez Cuevas, previously featured on the WITNESS Media Lab website.<sup>38</sup> Juan was working at an L.A. car repair shop when six unidentified ICE agents in vests marked "Police" stormed in bearing semi-automatic weapons, and arrested several workers, despite only holding a warrant for the shop owner. Surveillance video was strategically used by the American Civil Liberties Union (ACLU) of Southern California and co-counsel as corroborating evidence to support Juan's motion to terminate and clearly show that:

- ICE did not have probable cause or reasonable suspicion to arrest Juan;
- The situation did not give rise to a possible finding that Juan was a flight risk; and
- Agents never identified themselves as ICE.

The arguments supported by video helped persuade the DHS trial attorneys to voluntarily dismiss the charges against Juan, and no hearing was necessary. His ACLU attorney has been vocal about the fact that without the video evidence, it is unlikely the government attorneys would have backed down on Juan's removal so early in the case.

In a situation where ICE is arresting or detaining a noncitizen and you believe they may have violated the individual's Fourth Amendment rights against search and seizure, testimony of factual details is key. An eyewitness-recorded film or surveillance video may corroborate the noncitizens' account.

As explained above, the Juan Hernandez Cuevas Case Study provides a detailed account of how Juan's immigration attorneys anticipated and addressed concerns around authentication and chain of custody of the video evidence in their motions and declarations to the court. While the legal standard for a motion to terminate has changed in the Ninth Circuit since Juan's case, similar techniques can be used to surmount potential objections to the use of video evidence. Check the latest requirements for motions to terminate in your circuit.

Find key filings from Juan's case below under **Annotated Sample Filings**, including an authenticating declaration, a motion to submit video evidence, and a Statement of Facts in a motion to terminate (Files 1-3).

Finally, Juan's case also shows how the same piece of surveillance video used as evidence in a legal context was also used as an advocacy tool to fundraise for bond.<sup>39</sup>

See Juan's video used for advocacy [here](#) and find an example of a video for public campaigning [here](#).

<sup>38</sup> *Juan Hernandez Legal Case Study*, *supra* note 34.

<sup>39</sup> WITNESS Media Lab, *Juan Hernandez Case Study Part 1: Juan's Story*, [http://bit.ly/EyesonICE\\_Juan](http://bit.ly/EyesonICE_Juan), (last visited Apr. 2020).

**See the Collection Plan below for an example of how to begin connecting video footage to the legal standard for a motion to terminate.**

**Video as corroborating evidence to support a motion to suppress.** A motion to suppress involves a request to the immigration court to exclude unlawfully obtained information from the legal procedure. Motions to suppress can help create greater law enforcement accountability, and in certain cases, result in the termination of removal proceedings.

Motions to suppress are based on the idea of the “exclusionary rule,” which says that objects or statements obtained in violation of the U.S. Constitution generally may not be used in court.<sup>40</sup> Since the main objective for removal defense lawyers in immigration hearings is to stop the government from meeting its burden of proving “alienage” (in other words, that a person is not a U.S. Citizen), it follows that keeping out any unlawfully obtained evidence -including about alienage- is vital.

Attorneys may choose to advance the argument that evidence obtained through unlawful government action should be suppressed on the basis that ICE violated Fourth Amendment rights against unlawful search or seizure.<sup>41</sup> In cases where the excluded evidence of alienage is the only

evidence available, the proceedings will be terminated as the government could not meet its burden that the individual is not a citizen.<sup>42</sup>

**Videos** – like in the above examples for motions to terminate -- which corroborate your client’s account that there was a lack of probable cause or flight risk determination can also be invaluable in cases where information about noncitizen status was unlawfully obtained and may potentially be excludable.

In Part II, you can find a checklist of considerations for sharing videos of immigration enforcement.<sup>43</sup>



## **BOND DETERMINATIONS BEFORE THE IMMIGRATION JUDGE**

### **Video in support of bond hearings.**

Bond determinations are hearings for detained noncitizens that are in removal proceedings.<sup>44</sup>

The court determines whether detained noncitizens pose a danger to the community or are a flight risk; and therefore, whether they can or cannot be released from detention.<sup>45</sup>

The court will also make a determination about whether the individual poses a threat to national security.<sup>46</sup>

40 See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

41 See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

42 Note that the impact of a motion to suppress may differ on a documented vs. an undocumented immigrant; attorneys should also consider whether a motion to suppress is the best option for their client as opposed to other forms of relief.

43 WITNESS, *Checklist: Sharing Videos of Immigration Enforcement*, <https://wit.to/2Qw9pPW> (last visited Apr. 2020).

44 See Immigrant Legal Res. Ctr., *Introductory Practice Guide: Representing Clients in Bond Hearings*, at 3 (Sept. 2017), <https://wit.to/39zHHdq>. When an individual is first arrested by ICE, they are taken to a processing office where, in theory, ICE makes an initial custody determination on whether the person should be released or remain in custody. However, this initial custody determination is often not favorable to the noncitizen or these initial custody determinations by ICE do not always take place. Thus, the noncitizen can request a custody redetermination (or bond) hearing to take place before an immigration judge. This Video as Evidence guide delves into **discretionary bond hearings** and not the more complex bond issues of mandatory or prolonged detentions (e.g. some noncitizens will not be eligible for bond: for instance, “arriving aliens” and immigrants with certain criminal convictions or terrorism concerns can be subject to mandatory detention); the legal standards change in those situations. **In this resource, we focus on bond hearings before the immigration judge and how video evidence can help in those hearings.**

45 *Matter of Urena*, 25 I. & N. Dec. 140, 141 (B.I.A. 2009); see also 8 CFR § 236.1(c)(8).

46 *Matter of D-J-*, 23 I. & N. Dec. 572 (AG 2003).

**Photos and video** showing the detained individual with their spouse, child (or other relative), especially U.S. citizens or lawful permanent residents, can help demonstrate the strength of an immigrant's family ties; this can potentially count as a bond equity in the judge's flight risk assessment of your client. Video of family ties may also play a pivotal role where family members cannot appear for a bond hearing. For instance, in some cases, judges prefer not to have children in court; in other cases, undocumented family members may choose not to appear in court out of fear of putting their own immigration status at risk.

Being released on bond can improve access to a lawyer, increase the chance of successful case outcomes, and allow the individual to continue with employment and family responsibilities as they wait months – or sometimes, years - for a hearing. Described by the EOIR as “briefer and less formal than hearings in removal proceedings,”<sup>47</sup> any

evidence that is probative and specific may be admitted in a bond hearing to help the court make a determination.<sup>48</sup>

Additionally, you can consider using the same video and photo footage submitted in court to support your client's case for bond as part of a bond fundraising campaign or parallel public campaign to gain community support for your client's release from detention. See the use of video for bond fundraising and advocacy purposes [here](#) in the case of Juan Hernandez and the use of video in a public campaign [here](#) in the case of Julio Acosta.<sup>49</sup> See [Make the Road New York's](#) media plan, bond fundraising campaigns, and sample campaign messaging for more resources.<sup>50</sup>

**Check the Collection Plan further below for examples of how to begin connecting video footage to the legal requirements your client will have to meet in proving their bond case.**



Juan Hernandez, Crystal and Sofia reunite outside the detention center

Photo Credit: Nick Castle

### A NOTE ON VIDEO TELECONFERENCING (VTC)

Submitting strong supporting evidence is especially important with the recent use of Video Teleconferencing or VTC appearances in certain courts for individual immigration hearings. In VTC cases, an individual does not appear in person in a courtroom before a judge; rather, they appear for their hearing from a detention center. This makes the arguing of noncitizens' cases and the establishment of their credibility more difficult.<sup>51</sup> In VTC cases, it is particularly helpful to have evidence that can help humanize the noncitizen and allow the judge to make a determination on their release after viewing how detention can affect the lives of noncitizens and their families. Video evidence can also help corroborate a client's testimony in key ways when they appear through VTC.

47 Exec. Off. Immigr. Rev., *Immigration Court Practice Manual*, at 149 (Aug. 2018), <https://www.justice.gov/eoir/page/file/1084851/download>.

48 Clinic Legal, *Guide to Obtaining Release from Immigration*, at 34 (updated May 24, 2018), download: <https://wit.to/2wsTdJ4>.

49 *Juan Hernandez Legal Case Study*, *supra* note 34, <https://wit.to/Juans-Story-Evidence>; Jeremy Robins, Video: *Who is Julio Acosta?* (upload date: Jan. 28, 2016), <https://wit.to/2XWkOxY>.

50 *Deportation Defense Manual*, *Make the Road New York*, at 7, 25, 33-34, <https://wit.to/2ldEhRM> (last visited Apr. 2020).

51 Lorelai Laird, *Videoconferencing's promise of increased access to justice has a disconnect in immigration courts*, *ABA Journal* (Jul. 2019), <https://wit.to/2VFm9bs>.



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



## RELIEF APPLICATIONS: DISCRETIONARY DETERMINATIONS AND FEAR-BASED APPLICATIONS

**Video in support of certain discretionary relief applications.** Many applications for relief from removal rely on showing positive equities, such as showing community ties, family ties, and how these ties would be impacted if an individual were removed.

One type of application for relief where judges have room to make certain determinations is the following: if a person is in removal proceedings but has been in the U.S. continuously for at least 10 years; has had good moral character for 10 years; has not been convicted of certain crimes; and deportation would result in “exceptional and extremely unusual hardship” to a qualifying relative (such as a U.S. Citizen or Lawful Permanent Resident parent, spouse or unmarried child under 21),<sup>52</sup> then the person’s lawyer can bring a case seeking “cancellation of removal for a non-lawful permanent resident (non-LPR).” What this

means in non-legal terms is that the lawyer can ask the immigration court to grant this person a green card allowing them to reside permanently in the U.S. Most grants are based on a qualifying relative’s significant physical or mental health diagnosis; however, factors such as a qualifying relative’s age, special needs in school, and family/community ties in the U.S. are among those that have been considered in key case law.<sup>53</sup>

Helpful **video** could be footage of a lawful permanent resident father who is undergoing chemotherapy and who relies on his son, the individual seeking relief from removal, for transportation to treatment and for daily care.<sup>54</sup> Such footage could be beneficial to show exceptional and extremely unusual hardship in a cancellation of removal case for a non-LPR.

A range of evidence may go toward good moral character – i.e. letters of support, certificates and awards, photos, and of course, video.<sup>55</sup> “Because the judge has the authority to grant or deny a non-LPR cancellation application in his or her discretion, the best practice is to try to use all the evidence you have to show that your client is an upstanding, productive, and likeable person.”<sup>56</sup>

<sup>52</sup> See 8 USC § 1229b(b)(1), INA § 240A(b)(1).

<sup>53</sup> See Immigrant Legal Res. Ctr., *Practice Advisory: Non-LPR Cancellation of Removal*, at 10-11 (Jun. 2018), <https://wit.to/2PLUim6>.

<sup>54</sup> *Id.* at 11.

<sup>55</sup> See *id.* at 12.

<sup>56</sup> *Id.* at 12.



## CASE AT A GLANCE:

### CELL PHONE VIDEO ADMITTED AT MERITS HEARING IN A SUCCESSFUL CANCELLATION OF REMOVAL CASE, NEW YORK IMMIGRATION COURT (2019)



In a Fall 2019 case out of New York City, an immigration lawyer working at a non-profit received a text message containing a video clip of an incident involving her client. She used the video to persuade the court to cancel a removal order against her client. The case was a non-LPR cancellation of removal case based on the Violence Against Women Act (VAWA) – and the video evidenced a centrally relevant point in the case: her client was a victim of domestic violence as corroborated by a violent incident captured on video. The challenge was that the attorney received the video from a witness to the incident a day before the hearing; meanwhile her client was in immigration detention in another state and would only be appearing in court via Video Teleconference (VTC).

The immigration attorney quickly had a technician at her organization save a copy of the video on two DVDs and on her laptop which she brought with her to court. She intended to submit the clip in a format the court would accept and watch. She prepared a motion to accept late-filed documents, though she ultimately ended up orally summarizing what was shown in the video evidence and why it was relevant to the case. **See the motion further below [File 4].** In order to qualify for non-LPR cancellation of removal based on VAWA, the non-LPR must have been subjected to battery or extreme cruelty by a U.S. citizen or lawful permanent resident spouse (or by certain other family members). The video was relevant, the lawyer argued, as her client was continuously subject to verbal threats and physical menacing by their USC spouse; the incident captured on video was an example of this abuse.<sup>57</sup>

While the New York immigration court had not received the video evidence until the day of the hearing, they were open to viewing it. The court, however, was not able to play the DVD on any court computers as their devices did not have DVD reading capabilities; eventually, the judge and the DHS attorney watched the video multiple times on the removal defense attorney's laptop. The DHS lawyer objected as to the fact that the government had not received the video evidence any earlier. The immigration lawyer, however, argued that her client being in detention made it difficult for her to receive the video any sooner. The lawyer elaborated on the challenges of preparing a removal case while a client is detained, and as such, argued that she should be afforded latitude in presenting late evidence.

Prior to the hearing, the lawyer reviewed the video with her client via a private VTC conversation. She intended to try to have her client that appeared via VTC authenticate the video by watching it on her laptop from the detention center. This approach was technically difficult and ultimately did not work. Thinking quickly, the attorney instead asked the client several questions about the circumstances leading up to the incident. The client attested to what happened during and after the situation captured in the roughly 10-second video; fortunately, the attorney had already raised questions regarding the incident during direct examination.

The attorney asked the court to give the video evidence the **highest weight** as it was highly probative and directly relevant to a material issue in the case (that her client was battered at the hands of a U.S. citizen); and the video was reliable, as it did not appear to have been tampered with. She reminded the court that her client had already testified to the circumstances leading up to the incident and was able to authenticate by describing who took the video, who appeared in the video, and the events that took place that day. The attorney also explained step-by-step to the court how the short

<sup>57</sup> The video cannot be shared due to the privacy and security of the client involved.



clip went from the cell phone of the witness who filmed it to her own laptop. The court ultimately granted her client's application for cancellation and the judge relied upon the video during his oral decision. *[See tips for authentication and proving chain of custody further below].*

The attorney attributed the case's success in large part to the video footage. As a former criminal defense attorney, she was also comfortable with how to lay a foundation for the evidence. She pointed out that the judge was also familiar with evidentiary practices from his experience in the criminal court context and was not taken by surprise by her video submission.

### **Fear-based applications for relief: Asylum, Withholding of Removal, Protection Under the Convention Against Torture (CAT)**

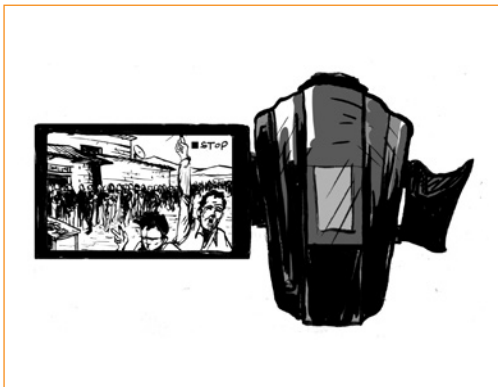
Video could potentially provide important support to a case when judges make other types of discretionary determinations, for instance in fear-based applications for relief like asylum, which we will see below.

### **Video as corroborative evidence in fear-based applications for relief, including asylum,<sup>58</sup> withholding of removal,<sup>59</sup> protection under the Convention Against Torture (CAT),<sup>60</sup> as well as in support of credible and reasonable fear interviews<sup>61</sup>**

An application for asylum is also an application for relief that involves a discretionary determination, though one that is fear-based. An asylum case requires a person to meet

the burden that they have suffered past persecution, or have a well-founded fear of future persecution, in their country of origin based on race, religion, nationality, political opinion, or membership to a particular social group.<sup>62</sup> While an asylum seeker's testimony and affidavit are always critical to their asylum determination, courts are increasingly demanding corroborating evidence of persecution. An adjudicator may grant asylum on testimony of the applicant alone but only where the testimony "is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee [meets the definition of refugee but is already in the United States]"<sup>63</sup>

An adjudicator may require other evidence to corroborate "otherwise credible testimony" [...] "unless the applicant does not have the evidence and cannot reasonably obtain the evidence."<sup>64</sup>



58 See INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

59 See 8 C.F.R. § 1208.16, INA §241(b)(3).

60 See 8 C.F.R. §§ 208.16–208.18.

61 While this sub-section is dedicated to fear-based applications for relief, here we focus on asylum claims, specifically before the immigration court.

62 INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

63 See INA §208(b)(1)(B)(ii); 8 USC §1158(b)(1)(B)(ii); see USCIS, *Refugees and Asylum* (last updated Nov. 12, 2015), <https://www.uscis.gov/humanitarian/refugees-and-asylum>.

64 INA §208(b)(1)(B)(ii); 8 USC §1158(b)(1)(B)(ii).

## CASE AT A GLANCE:

### VIDEO SCREENED IN ASYLUM HEARING TO CORROBORATE CLIENT'S FEAR OF FUTURE PERSECUTION, NEW YORK IMMIGRATION COURT (2011)



An attorney successfully screened a video in New York immigration court in connection with an asylum claim for her client, who had fled Argentina due to persecution on account of being transgender.

The country conditions in Argentina did not indicate on the surface that any persecution existed for transgender people. The lawyer sought to submit a documentary film to the court that showed police in that country arresting transgender people on the street, as well as showing the physical violence and degrading language used against them.

The immigration judge was willing to find a solution to have the video screen in the courtroom; she advised the attorney to prepare a **motion to present video evidence** and to include in it a **request to make video equipment available** to be able to arrange for equipment on which to play the video in the courtroom. The attorney prepared the motion, stating that her client wished to show selected portions of a video (transcripts of which were attached to the motion) in which transgender activists and transgender women from Argentina discussed their experiences. She added that her client requested a standard DVD player be provided for her hearing or that she, the attorney, be allowed to show the video from a laptop. The motion worked, and after some back and forth with the clerk and immigration court's information technology department, the attorney was able to get a television monitor and DVD player wheeled into the courtroom. She was able to screen the roughly four-minute video of the Argentinian police harassing, arresting, and beating a transgender woman.

The judge also asked the attorney to **submit a written transcript of the video clip to be included with her motion to present video evidence**. The attorney worked together with a team of interns from her organization to transcribe several 2-3-minute segments of the documentary film from its original Spanish; they then translated the transcript into English. Not only were the spoken dialogue and slurs used by police translated then transcribed, but the transcription included descriptions of the physical interaction that occurred between the police and the transgender women.

The client was ultimately successful in winning her asylum claim. In her decision, the judge referred to the video clip's written transcription. The attorney acknowledges that transcribing the video was a time-consuming process, however, she believes the video's content was critical and visceral evidence helping support her client's fear of future persecution claim. **See the motion and supplement to present video evidence (File 5)** further below.

One of the tasks in an asylum case is to make the immigration judge “**feel, see, smell and hear what [you] saw, smelled, and heard**”<sup>65</sup>; video and photo can play a pivotal role as supporting evidence in accomplishing this. Ultimately, you want to be able to show a judge that what your client is asserting in their asylum application is true. **Photos or videos** that help prove a person’s story can include, for example:



- Video footage of someone participating in political protests in their home country;
- Footage of a person at a church gathering in a country that prohibits religious conversion to Christianity;
- Video footage of a person with a same-sex partner in a country with anti-LGBT laws.

While there may be challenges transporting footage in physical form across the border into the United States,<sup>66</sup> evidence corroborating a person’s story of why they fled could be key when collecting supporting evidence for an asylum hearing.<sup>67</sup>

A second strategy is to try to submit video or photographic evidence of a similarly situated person from your client’s country of origin who is being persecuted, for instance for their political opinion, to illustrate the conditions that exist in the country. Consider the ethical and security risks of sharing such footage and discuss them with your client before doing so.

## FEDERAL CIVIL RIGHTS CASES: FEDERAL TORT CLAIMS ACT & BIVENS ACTIONS

Aside from immigration court strategies, immigration-related civil rights suits can be brought in federal court to obtain monetary damages and/or injunctive relief for the individual. Recall that the Federal Rules of Evidence and Federal Rules of Civil Procedure generally apply in these types of cases in contrast with litigation in the immigration court context.

### FEDERAL TORT CLAIMS ACT SUIT

**Video in support of a Federal Tort Claims Act (FTCA) suit.**<sup>68</sup> The FTCA authorizes an individual who has been harmed as a result of certain negligent or wrongful acts, omissions, or intentional misconduct of federal employees (while acting within the scope of employment or office) to sue the United States for monetary damages.<sup>69</sup> If your noncitizen client or family member has been injured by a federal government agency – for instance, if they were subject to abusive enforcement practices by an officer working for ICE – they may be able to sue under the FTCA. FTCA claims in the immigration context often include unlawful arrest, physical abuse, wrongful death,

65 Florence Immigrant & Refugee Rights Project, *I’m Afraid to Go Back: A Guide to Asylum, Withholding of Removal, and the Convention Against Torture*, at 8 (last updated May 2013), <https://wit.to/2TvbeOJ>.

66 See Sara Harrison, *To Help Migrants at the Border, Aid Groups Deploy Tech*, WIRED (Aug. 11, 2019), <https://wit.to/3bDXIG5> (a group at the U.S.- Mexico border has been helping migrants upload their documents to a cloud-based locker in case their belongings are taken away by Border Patrol while they are in custody).

67 See, e.g., Emily Schmall, *Asylum seekers bring evidence to show the dangers of home*, AP, (Jul. 11, 2018), <https://wit.to/3bpY1yE>.

68 See 28 U.S.C. §§ 2671 et seq.; 28 C.F.R. §§ 14.1-14.11.

69 Priya Patel, *Federal Tort Claims Act: Frequently Asked Questions for Immigration Attorneys*, National Immigration Project, at 1 (Jan. 24, 2013), <https://wit.to/2TDy3A0>.

unlawful search, and medical neglect, among others.<sup>70</sup> The FTCA not only authorizes money damages, but litigating a claim can also expose government misconduct and create greater accountability among immigration officials for their own bad actions.<sup>71</sup>

These claims are brought in federal court based on the tort laws of the state where the misconduct occurred. Make sure to check whether the state tort you would invoke as the basis for your FTCA lawsuit is indeed cognizable under the FTCA. It is important to note that you cannot bring an FTCA claim to federal court without first having exhausted administrative remedies.

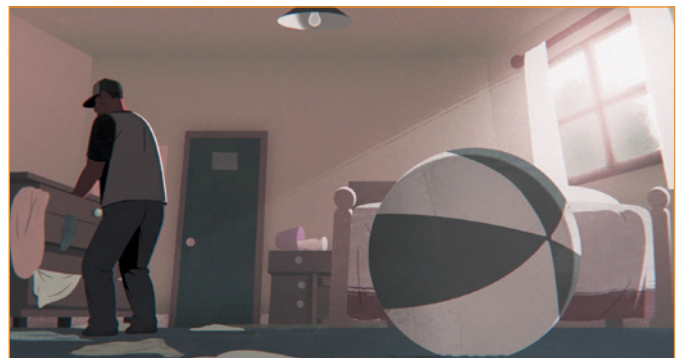
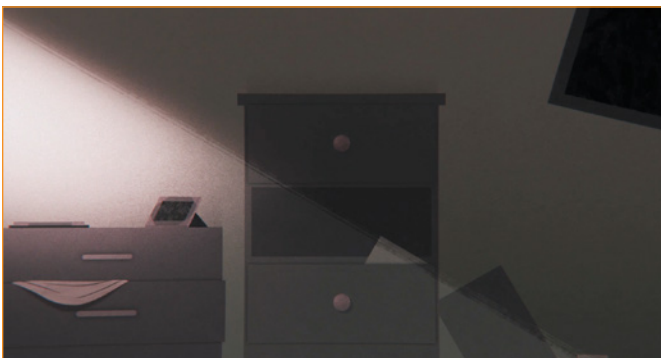
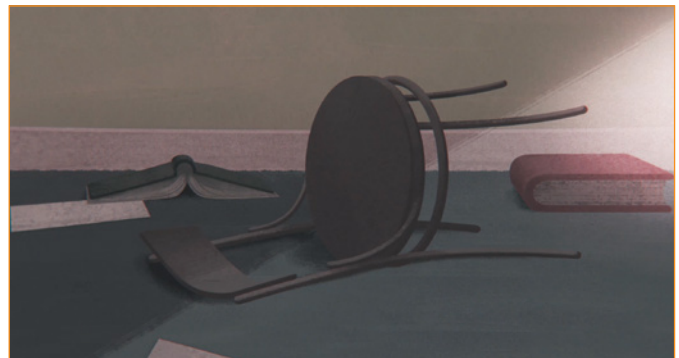
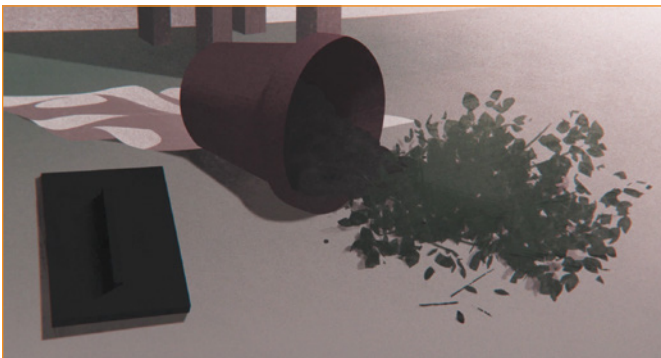
**Video** can be a powerful tool to document torts committed by federal agents against a noncitizen. Picture:

- A walkthrough of a home capturing the scene after a raid has occurred;
- Film of damage to a door that was kicked in by ICE;
- Footage of an individual being handled aggressively by an agent or being placed in a locked room.

Submitting the footage on the above could potentially support an FTCA claim for property damage, trespass, false imprisonment, intentional infliction of emotional distress (IIED), assault, and other claims. The claim you will bring will depend on the factual circumstances of the case.

**See the Collection Plan below for an example of how to begin connecting video footage to elements that need to be proven in an FTCA claim.**

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.* at 2.

## Bivens Actions

### Video in support of a Bivens action.

Both citizens and noncitizens may have access to a remedy for violations of the U.S. Constitution by individual federal agents under the U.S. Supreme Court decision *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.<sup>72</sup> In *Bivens*, the Court held that a federal agent who commits an unconstitutional search and seizure can be held liable for damages under the Fourth Amendment.<sup>73</sup>

*Bivens* suits serve multiple purposes in the immigration context: in addition to allowing an individual to obtain compensatory and punitive damages for constitutional violations by an individual federal officer, they allow for injunctive relief in certain cases. They are also seen to have a deterrence effect so that the same officer does not commit the unconstitutional act again. It is important to note that in recent years there have been greater challenges in litigating *Bivens* claims and a review of the most recent case law is necessary.<sup>74</sup>

Video can expose the unconstitutional way that the detention of a noncitizen occurred and may be a point you can leverage in your suit against the government. Examples may include footage that shows a violation of:

- The right to be free from unlawful entries into and searches of an individual's home without a judicial warrant or voluntary consent, and without probable cause and exigent circumstances;
- The right to be free from detention without a lawful, reasonable and articulable suspicion of unlawful activity or probable cause; and
- The right to be free from discriminatory application of the law and the right to equal protection under the law.<sup>75</sup>

<sup>72</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>73</sup> One high-profile immigration-related case currently being litigated in federal court under a *Bivens* cause of action is that of Erick Diaz Cruz, a tourist from Mexico, who was shot in the face by an ICE agent during an enforcement action in Brooklyn, New York on February 6, 2020. Diaz Cruz's legal team at New York's Legal Aid Society is suing the federal government; the complaint has been filed in the Eastern District of New York seeking punitive damages. See Complaint, *Erick Diaz Cruz v John Doe 1*, 1:20-cv-00891 (E.D.N.Y.) (Feb.19, 2020), <https://wit.to/2VlzJeb>.

<sup>74</sup> American Immigration Council, *Practice Advisory: Bivens Basics: An Introductory Guide for Immigration Attorneys*, at 1 (Aug. 21, 2018), <https://wit.to/Bivens>.

<sup>75</sup> The violations listed in the bullet points are actual claims brought under a *Bivens* cause of action in a noteworthy class-action lawsuit: see Fourth Amended Complaint at 122-123, *Aguilar, et al. v. ICE, et al.*, 1:07-cv-08224-KBF-FM (S.D.N.Y.) (filed Dec. 21, 2009) [hereinafter *Aguilar*], <https://wit.to/38p237Q>, (federal class action lawsuit brought by Latino Justice PRLDEF & co-counsel on behalf of 22 plaintiffs who had their homes raided by ICE in the early morning hours without judicial warrants or other legal justifications); while plaintiffs did raise *Bivens* claims in their suit against the federal government, they would ultimately voluntarily dismiss them. A settlement was reached in 2013 requiring new national policies around the conduct of immigration agents during raids; immigration benefits for certain plaintiffs; and \$1 million in damages.




## ALSO CONSIDER

### ICE Ruses and Consent in Home Raids

While ICE must have a judicial warrant to enter a home without consent, that is often not the case. ICE agents also use “ruses” to gain entry into residences. Ruses are a strategy used by ICE to get access to a person they have pre-identified as a target for arrest. They have used ruses to draw a person outside to a public space or to gain access and enter a home. Many courts have found that ruses are a tactic that violate the Fourth Amendment.<sup>76</sup>

Internally, ICE permits ruses. However, there are constitutional limitations to their use. In an ICE Academy training on the Fourth Amendment, ICE indicated that certain ruses like pretending there is a gas leak to gain consent to enter the premises are “not ok” due to certain “adverse decisions” at the time of the training; whereas acting as a delivery person, a hit-and-run investigator, or restaurant customer were all ok. These ICE training materials were released following a Freedom of Information Act (FOIA) request in 2013, and the date of the training is unknown. Consequently, these policies and practices may have changed.

See “Consent” slide below and ICE’s original 2006 Memo [here](#).<sup>77</sup>



### Consent

- Be aware of factors that may result in coercion – number of officers at door; weapons displayed; tone of voice; language that is demanding/commanding
- Ruses – permissible as long as not coercive
  - Deliveryman, hit and run investigator, restaurant customer – OK
  - Intruder, gas leak – not OK [recent adverse decisions]
- Consent-giver need not know of right to refuse – just one factor
- Always obtain a verbal expression of consent
- Scope of consent – objective standard (Florida v. Jimeno (1991))
- The burden is always on the government to prove that consent was given voluntarily

Source: ICE ACADEMY, ICE Fourth Amendment and Policy Refresher, undated<sup>78</sup>

### KEY TAKEAWAY

Generally, to hold ICE accountable for a ruse, an attorney can argue that the nature of the ruse vitiated (in other words invalidated) consensual entry into a home or building. Rather than focusing on the ruse itself being the problem, it is the fact that the ruse was used in a manner that was so misleading that the person inside the home or building was not able to meaningfully consent to entry or to search.




<sup>76</sup> ICE’s “Ruse Memo,” Center for Constitutional Rights (updated May 22, 2019) (see explanatory paragraph on “ruses”), <https://ccrjustice.org/search/site/ruses>.

<sup>77</sup> ICE’s “Ruse Memo,” Center for Constitutional Rights (March 6, 2006) (see actual ICE Memo obtained by CCR & IDP through FOIA request), <https://ccrjustice.org/search/site/ruses>.


<sup>78</sup> ICE Academy, *ICE Fourth Amendment and Policy Refresher* (available on Immigrant Defense Project website under see “Why does ICE use ruses?”), <https://wit.to/3eLmel9>, (undated; last visited Apr.2020). Verify the most recent policies and practices.

**To illustrate:** ICE agents conducting a warrantless search pressed a Texas woman to let them into her apartment. The agents' entry then led to the arrest of a man on the grounds of his unlawful presence in the country. The ICE agents had identified themselves as police to the woman and showed her a photo of a man (though not of the man they were searching for). The woman said that the man was not in her apartment, but the agents allegedly pressured her to allow them to enter. The woman and agents gave different accounts in court as to whether she consented to agents entering. The judge ultimately found that **even if the woman did consent to permitting the agents to enter, they had "misled her so thoroughly it rendered her consent meaningless and violated the Constitution's protections against warrantless searches and seizures."** Consequently, "[t]he judge did not allow any statements or other evidence the agents gathered in the house to be used against the man in his trial."<sup>79</sup>


**ICE**

### Ruses

- Allowed:
  - Van altered so not obviously Government transport van, i.e. equipped with ladders, tubing, etc.
  - Carrying box and clipboard
  - Fake business emblem and card
- Not allowed:
  - Must not represent self as employee of a real business, i.e. FedEx, UPS
  - Must not represent self as employee of Government agency such as OSHA, child welfare
  - Must not use license plates, Government identification that is not properly issued
  - Must not fabricate life threatening emergency, e.g. gas leak, fire


U.S. Department of Homeland Security  
U.S. Immigration and Customs Enforcement

ICE 2014 FOIA 01070 00047  
Attorneys: Weekly Produced For Review Only/Not For Distribution 26



## Consent & Translation:

**2013 ICE Training and Policy Statement**  
Consent to enter or search a private residence must be sought in a language understood by the resident of the residence granting consent whenever feasible, and one or more Spanish-speaking officers must be available to seek such consent where the target is thought to be from a Spanish-speaking country. Additionally, for consent-based home operations, the ICE statement claims that ICE makes reasonable efforts to make available an agent or officer proficient in the language spoken by the target.<sup>80</sup>

## KEY TAKEAWAY



When challenging the conduct of ICE in a case that involves the use of a ruse, framing legal arguments around the lack of meaningful consent to entry or search may be an effective approach.

Source: ICE, 4th Amendment Training (July 2011)<sup>81</sup>

- 79 Joel Rubin, "It's legal for an immigration agent to pretend to be a police officer outside someone's door. But should it be?" L.A. Times (Feb. 20, 2017), <https://wit.to/38dp8up>.
- 80 ICE Training and Policy Statement (Apr. 10, 2013), (last visited Apr. 2020), <https://www.immigrantdefenseproject.org/raids-foia/> (statement of Peter T. Edge, Deputy Executive Associate Director). Verify the most recent policies and practices, if applicable to your case.
- 81 ICE Office of the Principal Legal Advisor, 4th Amendment Training (Refresher for Enforcement & Removal Operations Fugitive Operations), (July 2011) (available on Immigrant Defense Project website under see "Does ICE teach its officers to use ruses?"), <https://wit.to/3btlFKq>, (last visited Apr. 2020). Verify the most recent policies and practices.

# PREPARING TO USE VIDEO FOOTAGE BEFORE U.S. IMMIGRATION AND FEDERAL COURTS: TIPS ON HOW TO CONNECT VIDEO FOOTAGE TO YOUR LEGAL ARGUMENTS

## COLLECTION PLANS

Go to developing  
a shot list

A Collection Plan is a list or grid created by lawyers, investigators, and in some cases, immigrant rights activists, to detail:

- Legal requirements, which are the specific elements or factors that a lawyer must prove. This may include, but is not limited to, any of the abovenamed legal actions. To name a few:
  1. A federal tort action alleging false imprisonment of a noncitizen during a raid;
  2. A motion to terminate removal proceedings against an individual on the basis that ICE violated a governing regulation or violated their constitutional right;
  3. A *Bivens* action based on an individual's constitutional rights being violated during a search and seizure;
  4. An asylum claim alleging fear of persecution on account of religious beliefs.
- Evidence already collected to prove each element, otherwise known as the “Completed List” (i.e. video, photos, audio, testimony), if applicable; and
- “To Do” list: Any type of evidence the lawyer still needs to collect to prove each element. This list may include specific types of video shots, photos, audio recordings, or witness accounts that can help your case.

Collection Plans can also be a tool that activists and lawyers use to facilitate their work together.



### FOR MORE INFORMATION



See “Collection  
Planning” at: [bit.ly/  
WITNESSLibrary\\_VaE](https://bit.ly/WITNESSLibrary_VaE)



## FICTIONAL CASE STUDY

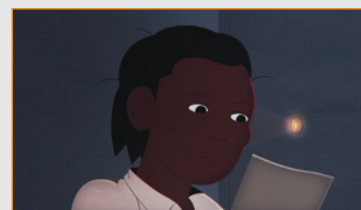
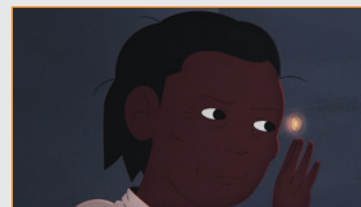
### LUISA'S HOUSE: THE STORY OF A HOME RAID

The below fact pattern is followed by some exercises and three sample Collection Plans. It is offered as an example of how you might approach completing a Collection Plan while you develop different legal strategies out of a single piece of video evidence.

It is predawn on a Sunday at 4:00 a.m. in California, and an extended family of six are at home asleep in three rooms: a woman named Luisa, her three children, her brother-in-law, and his son. There is a knock at the front door. It takes Luisa several minutes to wake from her sleep. She walks to the door and looks through the door's glass peephole. Her thirteen-year-old daughter follows behind her. Luisa notices some 6-8 people, mostly men, behind the door. Some are wearing plain clothes; most are wearing vests with "Police" on them. She thinks they must be mistaken and are at the wrong address. Something tells her not to open the door. Having seen several "Know Your Rights" posts online, she realizes these unexpected visitors might be ICE agents. With her limited English, Luisa asks who they are and why they came.

An officer wearing a police vest says they are the local police and are there to conduct a criminal investigation. She does not understand his response in English, and using both Spanish and English, she asks them again to explain why they are there. One of the men in a police vest begins to speak louder and more insistently, while other unidentified people are shining their flashlights through the window of her house. None of the agents offer to interpret. Luisa tries to piece the words together to ask if the group has paperwork authorizing them to enter her home. The officers do not respond to the question and slide a photo under the door of someone they claim to be looking for. Luisa doesn't recognize the person. She is relieved the officers are not there for her or her family. As the officers start to speak more aggressively, Luisa feels a wave of panic as she wonders what will happen if she does not cooperate. She opens the door to try and better understand the officers' reason for being at her home. Before she can stop them, and without getting her consent, the officers push their way in. Luisa notices several of them are armed, and they damage the door frame with their guns on the way in.

The officers storm in. There are seven of them, several carrying shotguns and submachine guns. They race into various rooms before Luisa can stop them, waking up the young children. One of the bedroom doors is locked, and the officers kick down the door. They pull her brother-in-law out of bed and ask him to put his hands behind his back, alleging that he is removable. They point a gun at his chest, then proceed to handcuff him and throw him onto a couch. Meanwhile, Luisa is watching in shock and fear. She asks in Spanish where their warrant is to enter her home. They answer in English that they do not need a warrant, as her brother-in-law is present in the country unlawfully. One officer pulls out a document with Department of Homeland Security and "Warrant for Arrest of Alien" typed at the top; on the signature line is the signature of an ICE officer, and Luisa's brother-in-law's name appears on the document. Another officer then swiftly turns his attention to Luisa. Shotgun in hand, without asking her any questions, he sifts through her belongings then proceeds to handcuff and detain her. She is terrified for her children who are being exposed to violence in their own home in the middle of the night. That day, ICE takes Luisa and her brother-in-law into custody while the shocked and distraught children stay at home with a friend. ICE issues them both a Notice to Appear charging them each as removable.



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

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## COLLECTION PLANNING EXERCISE

### Luisa's House: The Story of a Home Raid



Video footage filmed by an eyewitness (family member, neighbor, community advocate) or surveillance video can create an opportunity for creative lawyering.

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Luisa is your client. Are there ways you could visualize video being helpful in this scenario? Jot down a few ideas:

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As Luisa's lawyer, which legal processes could you bring? Check all that apply:

- ☐ Bond Hearing
- ☐ Motion to terminate
- ☐ Motion to suppress
- ☐ Cancellation of removal
- ☐ Fear-based application for relief
- ☐ FTCA Claim
- ☐ *Bivens* Claim
- ☐ Other: \_\_\_\_\_

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## Instructions

Look back above at the legal standard section to remind yourself what you need to prove. Then, consider how you would use video to help meet the legal standard.

Below are three examples of ways in which video footage captured from the scene described above could potentially be used to pursue multiple legal strategies for your client, Luisa. Try to think creatively about the material you collect. This may include, but is not limited to, photos, videos, or audio recordings.

Three example plans have been provided below. Fill out your own Collection Plan in the blank template.



## SAMPLE COLLECTION PLANS

### Luisa's House: The Story of a Home Raid

#### MOTION TO TERMINATE COLLECTION PLAN

Standards differ between circuits.

Below is a breakdown of requirements in the Ninth Circuit.<sup>82</sup>



Legal elements to prove	Sub-elements	TO DO: List of evidence to collect
The agency violated a regulation:	E.g. No Probable Cause or Reasonable Suspicion (for detention & arrest) <sup>83</sup>  Showing arrest & detention were done without having reason to believe a particular person was a noncitizen subject to removal	<ul style="list-style-type: none"><li>• Surveillance camera video showing ICE officers approaching the home and standing in front of the door without a judicially signed warrant</li><li>• Video from Luisa's teenage daughter's cell phone showing that officers first arrested Luisa, then asked her questions and searched her room – not asking her name or immigration status before the arrest</li></ul>
	E.g. Arrest without Warrant and No Flight Risk Determination <sup>84</sup>	<ul style="list-style-type: none"><li>• Surveillance video from the front door showing the ICE officers did not show Luisa any judicially signed warrant for her before arresting her</li><li>• Continuous video showing ICE arresting Luisa without providing a judicial warrant even though they had no reason to believe that she was likely to escape the home</li><li>• Both the surveillance video outside and the video taken inside showing the conduct of the officers and the coordinated manner in which they entered the home strongly suggest that the raid was planned. Accordingly, it would be within ICE's responsibility to secure a judicial warrant (one officer showed her an admin. warrant with her brother-in-law named)</li><li>• Cell phone footage taken by Luisa's daughter from the inside of the house showing Luisa was cooperating and not exhibiting any intent to flee</li><li>• Re no intention to flee: While not on film -- any points that indicate that Luisa had been attending work regularly for years and she was the sole provider for her young children, one of whom is a U.S. citizen</li></ul>
	E.g. ICE officers did not identify themselves as immigration agents or officers at the time of arrest <sup>85</sup>	<ul style="list-style-type: none"><li>• Surveillance camera footage showing the officers outside Luisa's door in either plain clothes or police vests</li><li>• Cell phone footage continuously rolling showing officials not identifying themselves during the entire raid (they did not until Luisa was in handcuffs and transferred into a van to be transported to an ICE processing facility)</li></ul>


<sup>82</sup> These are the requirements under *Sanchez v. Sessions*, 904 F.3d 643, 655 (9th Cir. 2018) which changed the standard for motions to terminate in the Ninth Circuit. Check the requirements in your own circuit.

<sup>83</sup> See 8 C.F.R. § 287.8(b)(1), (2) and 287.8(c)(2)(i); probable cause cannot arise from generalized suspicion of a group of people but must be particularized with regard to a specific person.

<sup>84</sup> See 8 C.F.R. §287.8(c)(2)(ii).

<sup>85</sup> See: 8 C.F.R. §287.8(c)(2)(iii)(A).

## MOTION TO TERMINATE COLLECTION PLAN (continued)

Legal elements to prove	Sub-elements	TO DO: List of evidence to collect
	<p>E.g. ICE officers are prohibited from entering a residence without a judicial warrant in the absence of consent<sup>86</sup></p> <ul style="list-style-type: none"> <li>Any proof that entrance into home was without consent (such as forced entry, lack of actual or meaningful consent, no interpreters offered)</li> </ul>	<ul style="list-style-type: none"> <li>Surveillance footage showing the ICE officers outside Luisa's door, not sliding any judicial warrant under the door or lifting it to the peephole for her to see</li> <li>Cell phone photo or video of the ICE warrant (not a judicially signed warrant &amp; not for her arrest) for Luisa's brother-in-law that the officer showed Luisa once inside &amp; just before arresting her</li> <li>Lack of Consent: check if Luisa's daughter's video taken inside showed that Luisa never consented to the officers entering</li> <li>Lack of Consent: does video taken on cell phone pick up the voices of the ICE officers speaking and responding only in English to Luisa?</li> <li>Lack of Consent: a shot of the photo ICE slid under the door of the person they claimed to be looking for (ruse)</li> <li>Lack of Consent: Take photo of the front door frame to help show entry into home was forceful</li> </ul>  <p>Source: <i>We Have Rights</i> by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.</p>
Regulation was promulgated for the benefit of petitioners	Not proven by film	Not proven by film
Violation was egregious, meaning that it involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the petitioner:	Egregious conduct: Racial Profiling <sup>87</sup>	<ul style="list-style-type: none"> <li>Footage showing no questioning took place</li> <li>Footage showing no other criminal act was occurring</li> <li>Audio of officers hearing Luisa speaking a mix of Spanish &amp; English and then hearing her asking for the warrant in Spanish</li> </ul>
	Egregious conduct: Coercion	<ul style="list-style-type: none"> <li>Video from surveillance camera showing 7 officers, some holding guns, all men except one person</li> <li>Video or audio of the officers' loud voices outside the door in the middle of the night; their insistence to enter the home; them pushing past her when the door opened</li> </ul>
	Egregious conduct: Use of Force: Level of unjustified physical force used	<ul style="list-style-type: none"> <li>Outside video showing force to enter inside her home</li> <li>Photo of the damaged front door frame</li> <li>Photo of damage to the locked bedroom door that was kicked down</li> <li>Physical violence towards her brother-in-law which Luisa and the family members had to observe</li> </ul>
	Egregious conduct: Children being present	<ul style="list-style-type: none"> <li>Video showing children present &amp; distressed after being woken in the middle of the night by violence and many unknown people in their home</li> </ul>

<sup>86</sup> See: 8 C.F.R. 287.8(f)(2).

<sup>87</sup> See *Sanchez v. Sessions*, 904 F.3d at 655; see *Maldonado v. Holder*, 763 F.3d 155, 159 (2d Cir. 2014), e.g. detaining or interrogating a suspected noncitizen based on racial or ethnic stereotyping is the type of egregious regulatory violation that warrants terminating without a separate showing of how the violation prejudiced the respondent; see *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1451 (9th Cir. 1994).

## FEDERAL TORT CLAIMS ACT COLLECTION PLAN

Cause of Action: Assault



In an FTCA claim, it is the substantive law of the state where the tort occurred that determines the liability of the U.S. The example below is based on California state tort law. Check the laws within your own jurisdiction.

Legal elements to prove	TO DO: List of evidence to collect
At all relevant times to the action, the agents, officials, or other personnel were acting in their official capacity under the authority of DHS and ICE, and, therefore, under the authority of the U.S. <sup>88</sup>	<ul style="list-style-type: none"><li>• Medium shot of ICE officers in full uniform, if there were any</li><li>• Close-up shot of officers' badge number, nameplate, and face if available</li><li>• A variety of shots placing the officer at the scene of the apprehension</li><li>• A variety of shots of the officer giving orders on scene</li><li>• Check for surveillance camera footage from outside the home and any possible interior surveillance cameras</li><li>• Ask neighbors if they saw the vehicle the ICE officers were driving</li><li>• Close-up of the license plate and any identifying marks on the vehicle the officer was driving/riding in</li><li>• Close-up video or photos of any documentation showing the officer was on duty that day – timecards, signed and dated reports, etc.</li></ul>
An intentional act that creates in another person a reasonable apprehension or fear of immediate harmful or offensive contact	<p>Video or photo showing ICE officers:</p> <ul style="list-style-type: none"><li>• Forcibly entering Luisa's home</li><li>• Kicking down the bedroom door</li><li>• Brandishing weapons –shotguns and semi-automatic weapons</li><li>• Behaving in a threatening and aggressive manner:<ul style="list-style-type: none"><li>– If available, video of officer pointing a gun at brother-in-law's chest, handcuffing, then throwing him onto the couch. Another officer, with gun in hand, coming to handcuff Luisa directly after.</li></ul></li><li>• In case of injury, images showing the severity of the injuries to illustrate the force used</li><li>• Damage to property due to forcible conduct:<ul style="list-style-type: none"><li>– Find out if family members took photographs of damage to the door frame (entrance of home &amp; kicked bedroom door)</li></ul></li></ul>



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

88 Aguilar, *supra* note 75, at 130.

## DISCRETIONARY BOND HEARING COLLECTION PLAN



This Collection Plan is filled in based on individuals in detention requesting release from an immigration judge in a discretionary bond hearing.<sup>89</sup> Video evidence gathered to use before a court for a bond hearing can also be used for the additional purpose of advocacy vis-à-vis the public as well. A well-planned advocacy campaign can garner public support for your client's release from detention. See examples [here](#)<sup>90</sup> and [here](#).<sup>91</sup>

Legal requirements you wish to prove	TO DO: List of evidence to collect
Client is not a danger to the community	<ul style="list-style-type: none"> <li>• Non-video: client's history of being charged with crimes</li> <li>• Video that shows either innocence or reduced responsibility for a crime</li> <li>• Mitigate any bad facts with equities. Video that goes to a showing of rehabilitation or remorse, distancing from any history of charged crimes, and good moral character</li> </ul>
Client is not a flight risk <ul style="list-style-type: none"> <li>• Consider the various bond equities in your client's case</li> </ul>	<ul style="list-style-type: none"> <li>• Videos or photos showing that detained person has USC or LPR family ties, especially if family has been in area for a long time or are able to confer immigration benefits               <ul style="list-style-type: none"> <li>– Video or photo of USC/LPR children                   <ul style="list-style-type: none"> <li>• Video of Luisa's USC children visibly shaken and traumatized during and following the raid</li> <li>• More generally, video or photos of Luisa's USC children prior to the raid to show the strength of family ties and the difficulty the family is experiencing now that Luisa is detained</li> </ul> </li> <li>– Video or photo of USC/LPR spouse if any</li> </ul> </li> <li>• Show immigration relief is available to client in immigration court. E.g. An application for Non-LPR cancellation of removal, then you could show hardship to USC/LPR family member               <ul style="list-style-type: none"> <li>– Video or photo showing USC/LPR family member that would face exceptional and extremely unusual hardship if your client is deported, e.g. they physically rely on your client – e.g. Luisa's children being physically reliant on her for care due to a medical condition</li> </ul> </li> <li>• Videos or photos showing that detained individual is involved in local community               <ul style="list-style-type: none"> <li>– Video clips or photos of involvement in children's school activities</li> <li>– Video clips or photos of membership in organizations or sports clubs</li> </ul> </li> </ul>
Client does not pose a danger to national security	Not proven by film

<sup>89</sup> Note: in this resource we focus on discretionary bond hearings (not the more complex bond issues of mandatory or prolonged detentions) as the legal standards change in those situations; Immigrant Legal Res. Ctr., *Bond Practice Guide*, at 5 (Sept. 19, 2017), <https://wit.to/39zHHdq>.

<sup>90</sup> Juan Pablo Garnham, *Salvadoran Father Targeted by ICE is released*, *Voices of New York* (Feb. 26, 2016), <https://wit.to/2RYI2kn>

<sup>91</sup> Video of Romulo Avelica-Gonzalez, *A Viral Video Saved Her Father From Deportation*, *National Geographic* (posted: Jun. 24, 2018), <https://wit.to/3btzWXJ>.

## BLANK COLLECTION PLAN



**Legal Claim to be Presented:** \_\_\_\_\_

Legal elements to prove	Sub-elements	List of evidence collected	TO DO: List of evidence still needed to collect

### FOR MORE INFORMATION



See “Developing a Collection Plan” to learn how to strategically capture higher value footage at: [https://wit.to/VAE\\_CollectionPlanning](https://wit.to/VAE_CollectionPlanning)



# PRACTICAL GUIDE: HOW TO INTRODUCE VIDEO EVIDENCE IN U.S. IMMIGRATION COURT PROCEEDINGS

In the digital age, the availability of video footage corroborating a client's story is not as rare as it used to be. If there was ever a time to use video as part of your case strategy, it is now. On the flip side, video can be manipulated to show events happening out of context, or to change the chronology of events, among other alterations. The key is to ensure that you obtain footage as quickly and as carefully as possible to surmount any potential challenges to its credibility. **Certain practices will help ensure that when you obtain footage it will be usable in a court context.**

That video clip of a particularly forceful ICE apprehension sitting idle on a hard drive in an immigration lawyer's desk can go from being an important, but unused, piece of evidence to one whose authenticity and chain of custody has been verified.

The following section will focus specifically on immigration court and will not cover federal court.

Refer to the "After You Film" Section of the Filming Guide in Part II of this resource for more details around the storing and sharing of footage.

## I. ACQUISITION OF FOOTAGE

Acquisition refers to the process of receiving video and metadata<sup>92</sup> from a source and adding it to your collection. Your aim at this stage is to acquire your materials in a complete<sup>93</sup> and intact form. Actions you take at this stage are critical to the later usability and preservation of your video.

### WHAT IS VIDEO METADATA?

Video metadata is data or information about the video. [Watch this video explainer.](#)

### TO EDIT OR NOT TO EDIT?

Editing embedded video metadata is not recommended unless you have specific reasons, like security concerns, as this may strip the authenticity of a video.

92 Metadata is any information about a video: from technical information embedded in the file that allows the video to function, such as format and duration, to descriptive information about the content to help you understand or find it—such as keywords, security restrictions, geographic locations, and so on. Metadata is critical to any future use, and is important throughout the archiving process. Despite what is sometimes said, images almost never speak for themselves. They require context and description to make sense, to corroborate their factuality, and to be accessible beyond one person's memory or desktop. Metadata can be automatically generated and embedded in the file, such as with technical metadata, or it can be manually recorded on an external medium, such as with descriptions, security flags, and keywords in a database. Metadata capture sometimes needs to be manually enabled on your device, such as with GPS or location services.

93 Completeness is the quality of having all of the information a record contained when it was created, and that its original context is maintained. Incomplete records are not as reliable as complete ones, since one might not know what information is missing and why. Transcoding a video to another format can reduce the image quality and discard metadata, making the video less complete and therefore less reliable. Keeping original video files, documenting context, and organizing videos in a way that maintains the original order of video files contributes to the completeness of the video records.

**In cases of unlawful immigration enforcement, track down and collect footage from an eyewitness bystander, a surveillance camera at a nearby business, a traffic/street camera, or request bodycam/dashcam footage from law enforcement.**

Send an investigator, if your organization has one, or a community member to obtain this footage. Try to pursue it without delay as surveillance camera footage is often automatically recorded over within a few days. If no bystanders were present or there were no surveillance cameras you know of, consider asking local shopkeepers in the vicinity to verify if anyone saw the incident. With increased use of bodycams and dashcams by law enforcement, you may choose to pursue such footage in support of your client's case. In case a client has a criminal trial related to the same incident, you can request the footage from their criminal defense attorney.

Where a person with access to potentially relevant evidence does not cooperate with your request, you may wish to request a subpoena from the immigration judge.<sup>94</sup> In case the immigration judge is not accustomed to issuing a judicial subpoena and does not agree to do so, it is helpful to consider alternatives such as requesting the same footage from the criminal defense attorney working with your client on their criminal case, if applicable. Judicial subpoenas in immigration court do not have contempt power as they do in criminal or federal court.<sup>95</sup> Therefore, bear in mind that even if you are granted a subpoena to serve against a private person or a state agency, for example, it may not effectively lead them to cooperate. Nevertheless, a subpoena is encouraged if need be, as it may increase the likelihood of obtaining crucial footage.<sup>96</sup>

Illustration credit:  
Gregory Buissereth



94 8 C.F.R. § 1003.35.

95 See Andrea Saenz, *Subpoenas in Immigration Court*, Immigration Law Advisor at 16, Vol. 5 No. 7, (Aug. 2011), <https://wit.to/2Tknlzo>.

96 For more information on obtaining a subpoena in immigration court, see Exec. Off. *Immigr. Rev.*, *Immigration Court Practice Manual*, at 93 (Aug. 2018), <https://www.justice.gov/eoir/page/file/1084851/download>.

In certain cases, and **only after reviewing ethical and strategic considerations**, you may want to publicly share video footage you already have in an effort to find any other eyewitnesses who can corroborate a different angle of the scene. The lawyers in the Christopher Parham (criminal) case, for example, publicized the video of his arrest in an effort to obtain witness accounts to help verify what happened to him when he was arrested.<sup>97</sup>

For fear-based applications for relief, or for bond hearings, obtain the video footage from your client or their family members directly.

You can learn more about acquiring original files and metadata, maintaining chain of custody, and more, here: Acquiring Raw Video and Metadata.<sup>98</sup>

## II. EXTRACTION OF FOOTAGE

Extraction is when the video is downloaded or copied. During this stage, it is important to ensure the reliability of the video as evidence for purposes of authentication. See “Steps for Preserving Your Video” in Part II’s Filming Guide for more details. In case you plan to alter the file in any way, it is crucial to maintain an unedited exact duplicate copy of the original – this includes not modifying the file name. If safe and possible, store exact copies of the footage in at least two locations on two types of storage devices (e.g. external hard drive, laptop, cloud, DVD). Refer to the “After You Film” section of the Filming Guide in Part II of this resource.

### KEY TAKEAWAY



#### DO NOT ALTER YOUR VIDEO IF AT ALL POSSIBLE.

If you do make any changes, for instance for security purposes (such as cropping or blurring), keep an original unmodified source copy and, if necessary, the modified copy so that the judge can see what you have done and hear you explain why you did it. This may prevent an objection from the government attorney.

## III. AUTHENTICATION OF VIDEO FOOTAGE

Authentication is the process of proving that evidence is genuine, not forged, and is what it purports to be. What is authenticity when it comes to video footage? Authenticity means that an object was actually created by the person represented as its creator, and that it was actually created at the time and place that is represented as its time and place of creation. Video footage that has been manipulated or altered but is represented as if it had not been, for example, is not authentic. To authenticate a video means to verify the relationship between it and its creator and point of creation. **Documentation about who created something, when and where it was created, and the chain of custody can provide a starting point for this authentication process.**

While we are not aware of strict rules around authentication of video in the immigration court context, **reliability** is key in terms of the weight a court may grant to the video evidence. We know that evidence should be probative in order to be admitted. Another way to think about probative value is the **ability of evidence to prove an issue, and that ability increases when the evidence can be shown to be authentic and reliable. The actions you take to ensure the authenticity of your video therefore strengthen its probative value.**

97 Dean Meminger, *Scooter Rider Says NYPD Slammed Him to the Ground Despite Committing No Serious Crime*, NY1 (Mar. 20, 2019), <https://wit.to/38kA0GK>.

98 WITNESS, *Acquiring Raw Video and Metadata*, <https://wit.to/2wwjupL>, (last visited Apr. 2020).

To this end, try to address the following points, where possible:<sup>99</sup>

- Who captured the footage and when?
- Who had access to the footage between the time it was captured and the time it was introduced into court?
- Has the original footage been altered in any way since it was taken?
- Has the original *file* name been altered in any way, when and why?
- Who enhanced the image, when and why?
- What was done to enhance the image?<sup>100</sup>
- Has the enhanced image been altered in any way since it was first enhanced?
- Was the file format altered at all? Why? Make sure to explain why it was necessary. Was it required as a step to make the video playable on regular devices?

In addition, cases in the *criminal* and *civil* contexts in the U.S. lay out certain steps that may help satisfy the authentication of a video (certain points may overlap with the above):<sup>101</sup>

1. the nature of the recording device to understand how the video was recorded;
2. whether the camera was working correctly, its mode of operation, and its usual reliability;
3. how the footage was downloaded or copied;
4. how the extracted footage was copied and whether exporting the video evidence compromised the reliability of the images;
5. the absence of any alteration/enhancement of the video;<sup>102</sup> or
6. if enhanced, the manner in which that enhancement was performed and why;
7. testimony that the copy fairly and accurately depicts what was visible on the monitor during the extraction; and
8. chain of custody proof.

**While not necessary or possible in every case, consider hiring a video forensics specialist to review the footage and attest to its contents for authentication purposes.**



99 James Careless, *Video Evidence*, Canadian Bar Association (Apr. 21, 2011) [hereinafter *Video Evidence*], <https://wit.to/32la9HH>.

100 The general types of manipulation you may want to look out for involve basic editing (e.g. removing periods of time or placing shots out of sequence). Applications exist to help with video verification such as TruePic (a for-profit service that verifies content). You can also find WITNESS' *Verifying Eyewitness Video Tip Sheet* (last visited Apr. 2020), <https://wit.to/39osFHE>.

101 See Carmen Giardano, *Silent Witness Authentication of Video Evidence*, at 3-4 (Nov. 16, 2015), <https://www.law.com/newyorklawjournal/almID/1202742399696/silent-witness-authentication-of-video-evidence/>.

102 For good measure, you can verify with an IT consultant at your organization about how to preserve the file as close to its original state as possible.

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



## VIDEO & AUTHENTICATION TIPS FROM OTHER LEGAL CONTEXTS **OUTSIDE** IMMIGRATION COURT

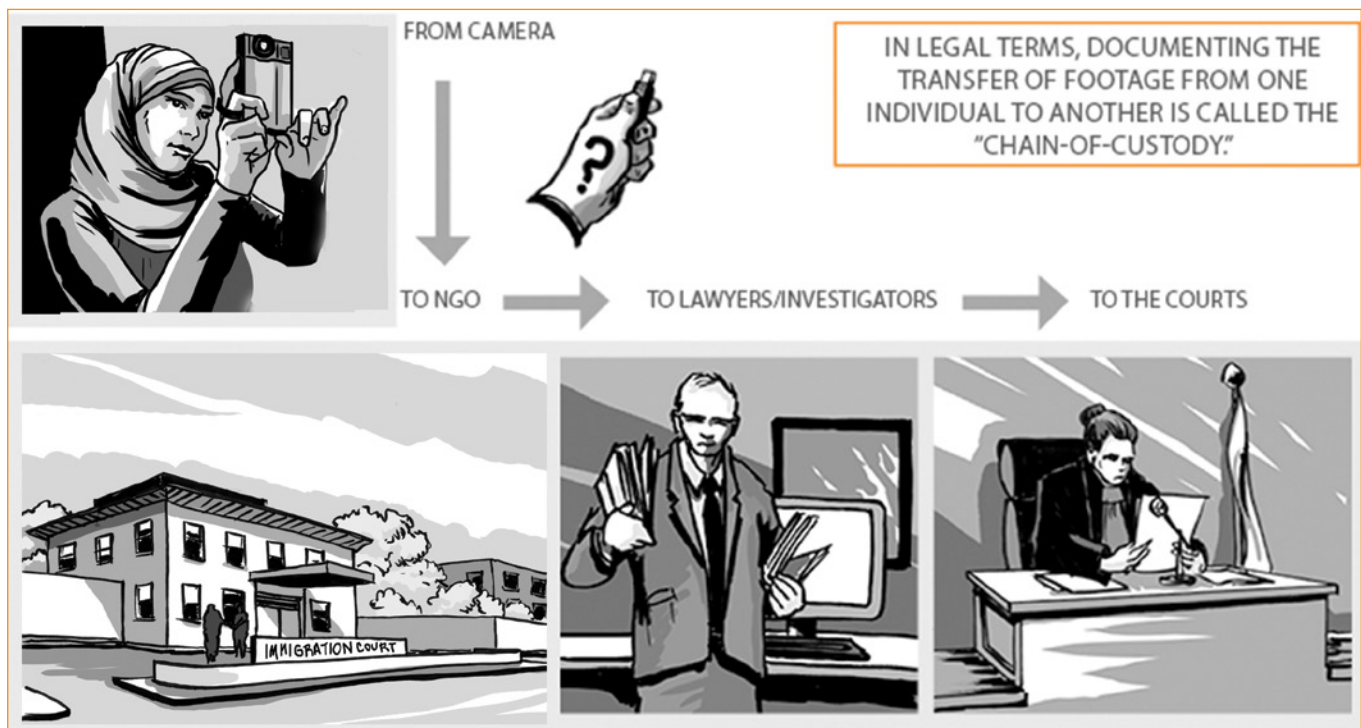
Videotape “may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted.”<sup>103</sup>

“Evidence establishing the **chain of custody** of the videotape may additionally **buttress its authenticity** and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering.”<sup>104</sup>

## IV. INTERVIEWING HANDLERS OF FOOTAGE

Interview whomever was involved in filming the relevant video or handling the footage. Take very detailed notes, asking the questions below. Ask each person involved in the filming or handling of the video if they would complete a sworn statement (a declaration) explaining how they obtained it and what they did with it, and possibly, if they would be willing to testify.

**Chain of custody** is the chronological documentation that shows who has held or controlled a video file from the moment it was created. **The ability to show an unbroken chain of custody is one important indicator of the authenticity of a video** and therefore a factor in how much weight may be accorded to the video as evidence.<sup>105</sup>



103 *Brady v. Koby*, 106532/08 (N.Y. Misc. 2009) citing *People v. Patterson*, 93 NY2d 80, 84 (N.Y. 1999).

104 *People v. Patterson* 93 N.Y.2d 80, 84 (N.Y. 1999).

105 WITNESS, *Archiving and Video as Evidence*, <https://wit.to/2RTFZx2>, (last visited Apr. 2020).



Not documenting chain of custody could hurt your chances of authenticating a video, possibly impacting the weight the evidence is given in court. Keep clear records of the video's chain of custody with detailed notes that document:<sup>106</sup>

- Who initially captured the footage and when;
- When the video file was first collected and by whom;
- Where the video file was stored;
- Who else had access to the video file and when between the time it was captured and the time it was introduced into court; and
- What alterations if any (e.g. editing or converting to a different file format) were performed on the file and by whom.

Once again, there may be some overlap with the points raised above in Section III on authentication.

## V. OBTAINING DECLARATIONS TO PROVIDE CHAIN OF CUSTODY DETAILS

After interviewing them, have the person who originally obtained the footage sign a declaration under oath stating how they acquired the footage and how they handled the footage from the moment they received it. Determine what information to include in the declaration based on the answers they provided in their interviews in Part IV.

Follow the same steps with anyone else who handled the footage following the original person, and ensure each person signs a declaration under oath explaining the details. You may want to ask them if they would be willing to testify if called as a witness.

### Chain of Custody and File Conversions of Video



Having Clear Documentation of Chain of Custody Can Affect The Weight That Evidence Has In Your Case

<sup>106</sup> See *id.*

## VI. PREPARING A MOTION TO SUBMIT VIDEO EVIDENCE OR OTHER MOTION ON BEHALF OF YOUR CLIENT IN REMOVAL PROCEEDINGS IN WHICH YOU REFERENCE VIDEO EVIDENCE

The motion you choose to submit can explain how many video files you are submitting, in what format, and when the footage was captured and transferred to you. It should also include why the evidence is relevant. You may wish to include language from prior case law to establish the rule for admission of evidence in the immigration context: “the sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.”<sup>107</sup> **See the sample of an actual motion to submit video evidence below (File 2).**

**The video must be deemed relevant for the court to give it any weight. Make sure to connect how the video you are showing links to the legal argument you are trying to prove.**

**In case the footage does not capture the entire scene of an immigration apprehension from start to finish, you can explain why the footage is not complete in your motion to submit video evidence.** For instance, if you have eyewitness video footage of a scene that starts with a noncitizen face down on the pavement surrounded by three officers arresting him, you can supplement that video with reliable supporting evidence such as eyewitness testimony through declarations, as well as your client's own sworn declaration about the incident. In these declarations, try to have the individuals describe – based on their personal knowledge – the facts that led up to the time when the video starts.

A motion to submit video evidence is one example of the type of motion in which you can reference video evidence; for another example, see the language in the sample motion to accept late-filed documents **(File 4)** or the motion to present video evidence below **(File 5)**.

## VII. ESTABLISHING THE BEST APPROACH FOR SUBMITTING & REFERENCING VIDEO EVIDENCE

The contents of the video evidence should in some way be transcribed, summarized, or otherwise memorialized.

- For instance, if you are filing a motion to terminate, indicate in your Statement of Facts that the incident/raid was captured on video; that this footage corroborates your client's account of how the incident occurred (if that is the case), and make sure to include a declaration by the person who either captured the footage and/or who handled the footage.
  - In your Statement of Facts refer to the exhibits at the end of your document and include timestamps to pertinent sections of the video (e.g. one agent approached Mr. X., Exh. 3 at 2:42-2:58 [the video during that timestamp interval will show ICE agent approaching, searching and handcuffing Mr. X, who was wearing a blue shirt]). See pp.1-4 of the [motion to terminate](#) in the Juan Hernandez Cuevas case.<sup>108</sup> The motion to submit video evidence in Juan's case included a footnote underscoring that the video files were submitted in two different formats to the court and to DHS, and *that the respondent could provide the videos in another format at the court's request.*

<sup>107</sup> *Matter of D-R-*, 25 I. & N. Dec. at 458 quoting *Espinoza v. INS*, 45 F.3d at 310.

<sup>108</sup> Mot. to Terminate, 1-4, *In re Juan Hernandez Cuevas*, No. [REDACTED] (Imm. Court. L.A.) [hereinafter Motion to Terminate], download: [https://wit.to/Hernandez\\_MotionToTerminate](https://wit.to/Hernandez_MotionToTerminate).

- Another option to try to reference the video is to submit to the court a certified written transcription of dialogue in the video clip. This would be an option if in fact audio is recorded and there is dialogue. Consider printing out and including screengrabs of key moments in the video you are referring to in your court filings.
- In case there is no dialogue (e.g. CCTV or closed-circuit television surveillance footage with no audio), you may wish to have someone watch the video and make a declaration under penalty of perjury attesting to what they see in the video, and submit this document to the court. This could be in the form of a sworn affidavit by an individual who has watched the video and verbalized what the video shows frame-by-frame. Consider asking a person not connected with the case or a specialist to undertake this task to minimize the likelihood of having their credibility assailed. It will be a time-consuming process to transcribe a lengthier video, in which case you might decide to transcribe shorter segments of the video that are directly relevant to the arguments you are making.<sup>109</sup> Consider printing out and including screengrabs of key moments in the video you are referring to in your court filings.

See **File 5(A)** in the Annotated Sample Filings section below: it is a motion to present video evidence in New York immigration court, in which the attorney transcribed portions of a documentary about persecution against transgender women in Argentina that was relevant to her client's asylum case and included the transcription with her motion prior to screening the video in the courtroom.

## VIII. SUBMITTING A DECLARATION FROM YOUR CLIENT

Video evidence can corroborate key statements made by your client about the incident at issue in their sworn declaration.<sup>110</sup>

### LEARN MORE



Transcription services and platforms to simplify your transcription work:

[Rev.com](https://www.rev.com)  
[Descript.com](https://www.descript.com)  
[Temi.com](https://www.temi.com)  
[Trint.com](https://www.trint.com)  
[Otter.ai](https://www.otter.ai)  
[Sonix.ai](https://www.sonix.ai)  
[Inqscribe.com](https://www.inqscribe.com)

<sup>109</sup> See e.g. a USCIS field manual for adjudicators of affirmative asylum applications outside immigration court provides a valuable suggestion for making video submissions to immigration court. The manual suggests **producing some form of a certified transcription of any video submitted as evidence to the immigration court**. More specifically, the guide defines the procedure for USCIS interviews as follows: "in many instances the adjudicator may audio or **video tape** an interview with an applicant or petitioner. The purpose of such a recording is to preserve evidence for possible use in later proceedings [... ] Such recordings may be used as evidence for denying a benefit. However, if such a decision is subsequently appealed, it may be necessary to transcribe the text of the interview in order to introduce it before the immigration court or Board of Immigration Appeals. The Executive Office for Immigration Review has declined to accept either video or audio taped interviews as evidence unless they are so transcribed." See *Video and Audio Taping: USCIS Adjudicator's Field Manual*, <https://wit.to/38mYGyr>, (last visited Mar. 2020).

<sup>110</sup> See *Motion to Terminate*, *supra* note 108, at 18-21 (page numbers here refer to the screen numbers rather than numbers appearing on the document itself for purposes of clarity in this document only) (Juan Hernandez's sworn personal declaration describes the facts as he recalled them the day of the workplace raid when ICE agents detained him. In some instances, details he includes in his declaration are corroborated in the Statement of Facts of his motion to terminate and are backed by timestamps to the surveillance video that captured the events of that day; *Motion to Terminate*, *supra* note 108, at 1-5).

## IX. CONSIDERING HIRING AN EXPERT VIDEO WITNESS

While it may not be required by the immigration court, to ensure the court understands the technical concerns involved with the use of video as evidence in a particularly technically challenging case, you may want to have the video explained by a qualified expert. Expert analysis of video evidence can help the court understand certain technical issues around multiple camera views, frame rates, aspect ratios, compression, and alignment of audio to video images. An expert can assist the court in understanding any technical concerns that might otherwise be misunderstood and can ultimately maximize the value of the evidence.<sup>111</sup> It is important to underscore, however, that a video expert is not necessary in every case and in fact, none of the actual cases we came across using video evidence in immigration court required the use of an expert.

## X. PREPARING FOR POSSIBLE OBJECTIONS

Be prepared for the objections of the government attorney who may try to characterize the video evidence as unauthenticated, unfair, or irrelevant, and that may ultimately minimize the weight given to the evidence.<sup>112</sup>



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

<sup>111</sup> *Video Evidence*, *supra* note 99.

<sup>112</sup> *Video Evidence*, *supra* note 99.

# PREPARING TO ADDRESS CHALLENGES TO YOUR SUBMISSION OF VIDEO EVIDENCE

As seen above, U.S. civil and criminal courts are governed by stricter evidentiary rules than immigration courts, yet the use of video evidence is more prolific in those courts than in immigration court. What can you do if you have a powerful piece of footage but are faced with challenges in having it admitted or having its weight underestimated by the immigration court?

## IN CASE THE IMMIGRATION COURT HAS NOT RECEIVED A SUBMISSION OF VIDEO EVIDENCE BEFORE:

- It is possible and even likely that neither the immigration judge you are appearing before nor the government attorney has ever experienced a video submission in an immigration proceeding. **Your task is to convince them that, as long as the video evidence is relevant and its admission is fundamentally fair, it should be admissible.**<sup>113</sup> If admitted, the judge will then determine how much weight your video evidence should receive. You can follow certain best practices listed above to prepare for any objections or challenges around authenticity or chain of custody.

## IF YOU ARE CHALLENGED BY GOVERNMENT COUNSEL OR THE COURT AS TO YOUR SUBMISSION OF VIDEO EVIDENCE:



- Reiterate that the rules of evidence in immigration court are far more relaxed than the FRE.
- Point to the fact that photo submissions are already made in asylum cases, in bond hearings, and in relief applications, and that video provides a moving image to corroborate facts.
- Explain how video is regularly used by attorneys in criminal court and civil court in the U.S. and is starting to appear in immigration court; utilize the examples in this resource.
- Remind the court the ways in which you have helped satisfy chain of custody and authentication concerns in the case.
- If the court claims that the format in which you have submitted the video is unsuitable to *play in the courtroom*, try an alternate method:<sup>114</sup>
  - Come prepared with the video uploaded to a private password-protected website, as well as copies on two DVDs and/or on two flash drives (one for the judge and one for the government attorney).

<sup>113</sup> *Immigration Judge Benchbook*, at 3 (last visited Apr. 2020), download: [https://wit.to/EOIR\\_EvidenceGuide](https://wit.to/EOIR_EvidenceGuide)

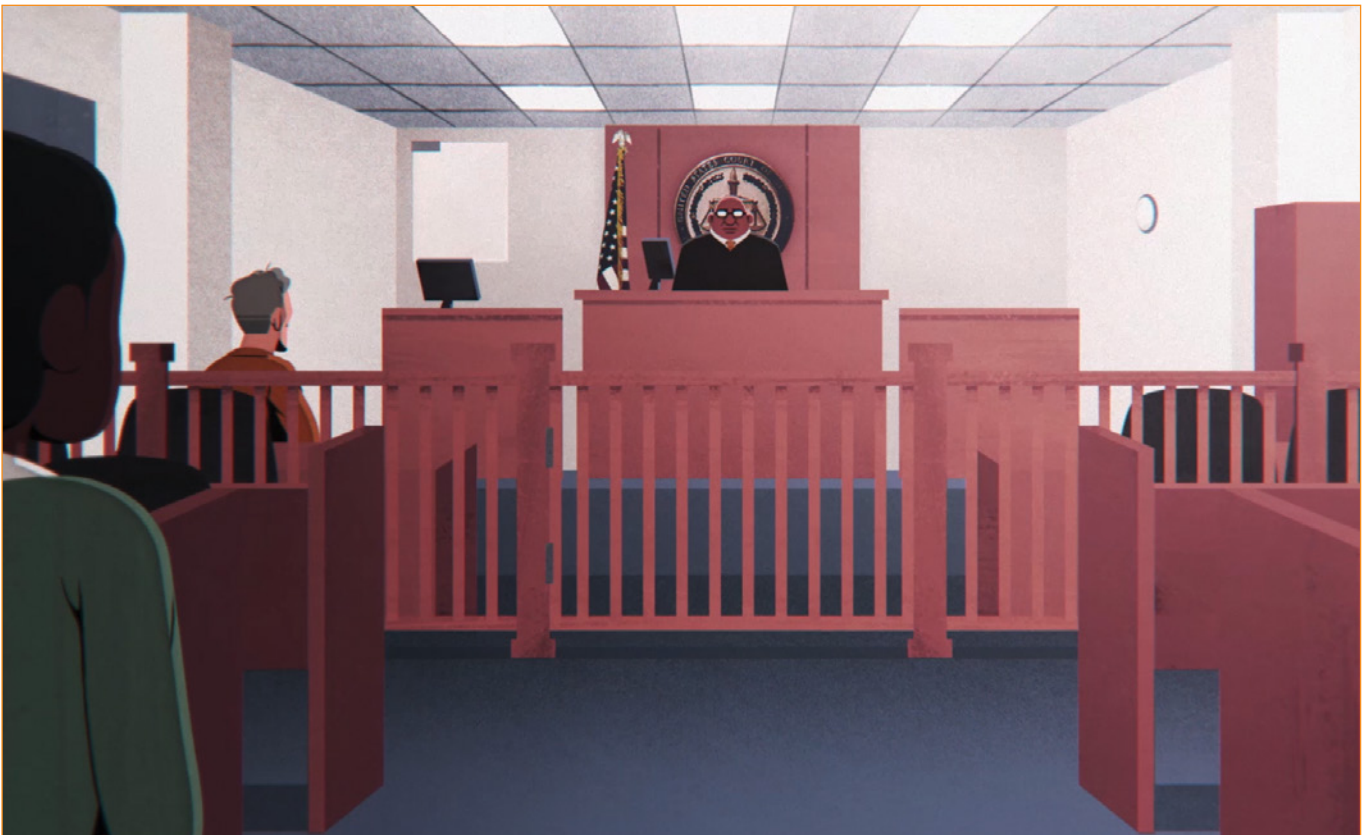
<sup>114</sup> Note: the scope of this section is limited to the EOIR courtroom context; if you are submitting video to a USCIS asylum office, the procedures for the submission of video evidence will be different. For instance, asylum officers conducting credible fear interviews may not be able to watch a video saved on a flash drive as they may not be permitted to use them on government computers. They may be able to access videos uploaded to YouTube but not to certain other websites. The manner in which you submit your video footage should be consistent with how the government wishes to receive it at the specific stage of the asylum process your client is in.



- Try to request video equipment be brought into the courtroom by filing a motion to make video equipment available.
- In case the court does not have dedicated video equipment on which to play the video, which is likely, try to play the video on a court computer if permitted.
- If the court computers do not have a DVD reader or a USB port, or if there are concerns that the file may not be safely accessible on government property, you can try to **play the video on your own laptop**. Immigration attorneys have reported successfully using this approach. It is important to be prepared to play the video on your own device, while still providing two DVDs/flash drives as well as reference to a link to a private password-protected website where the video has been uploaded.

Following the steps in this section can help prevent challenges to the admission of your video evidence in immigration court, and more likely, will help in the weight accorded to your evidence.

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



# CONCLUSION

Over the past decade, we have seen continuous growth in the use of cell phones that allow for video and photo capture. Everywhere you look, someone is sharing video they gathered: of a churros seller hauled off by the New York Police Department in a subway station; of ICE arresting a man working at a residence in Portland; or of a student participating in political protests in the Syrian streets before fleeing his country to seek protection from persecution. Meanwhile, more and more law enforcement personnel are being outfitted with bodycams and dashcams, and CCTV cameras seem to crop up at our local street corner bodegas, endlessly capturing our movements. Now more than ever, it is important that we make a shift and create space for the great potential of video evidence to strengthen immigration cases. And yet, powerful video content is not enough; the court system must also be ready to absorb and handle video evidence when it gets there.<sup>115</sup>

The use of video evidence in immigration court may still be in its early stages, but its capacity to support a noncitizen's case – from bond, to asylum, to cancellation, to motions to suppress and terminate, and to federal civil rights claims – is tremendous. The hope is that at this point, you have greater awareness of the various methods that can help you verify and present a submission for video evidence in immigration court. Many strategies were outlined, and only some may relate to your specific case. It is natural to still have questions as this is a practice that continues to develop. Building off existing examples in immigration court will give you the basic tools you need to get started.

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



<sup>115</sup> See Alexa Koenig, Sam Dubberly, and Daragh Murray, *Digital Witness*, 46, Oxford University Press (2020) (quoting from an interview with Kelly Matheson of WITNESS: “No matter how damning your video is, it’s not going to make a difference if the systems aren’t designed to deal with [digital visual content].”).

# ANNOTATED SAMPLE FILINGS FROM IMMIGRATION CASES EFFECTIVELY USING VIDEO EVIDENCE IN IMMIGRATION COURT

## FILE 1: AUTHENTICATING DECLARATION FROM HANDLER OF VIDEO EVIDENCE: SAMPLE FROM THE JUAN HERNANDEZ CUEVAS CASE

As detailed above, whenever possible, it is important to include an authenticating declaration by individuals involved in the handling of the video footage. This will bolster the chain of custody of the evidence and therefore the authenticity as well. The person or persons who obtained the footage will sign the declaration under oath stating how they obtained the footage, and how they handled the footage from the moment they acquired it.

The below declaration was signed by a community member who obtained video from a surveillance camera that was filming the day ICE apprehended Juan Hernandez Cuevas. It was included at the end of the motion to terminate:

Stacy Tolchin  
Megan Brewer  
Law Offices of Stacy Tolchin  
634 S. Spring St., Suite 500A  
Los Angeles, CA 90014  
Telephone: (213) 622-7450  
Facsimile: (213) 622-7233

**NON-DETAINED**

Jennifer Pasquarella  
Eva Bitran  
ACLU Foundation of Southern California  
1313 W. 8th Street  
Los Angeles, CA 90017  
Telephone: (909) 380-7505  
Facsimile: (213) 977-5299

Attorneys for Respondent  
Juan HERNANDEZ CUEVAS

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE  
LOS ANGELES, CALIFORNIA

In the Matter of:  
  
Juan HERNANDEZ CUEVAS,  
  
Respondent,  
  
In Removal Proceedings.

No. [REDACTED]  
  
Hearing date: September 13, 2018  
Hearing time: 1:00 P.M.  
Before: Hon. Judge Stancill

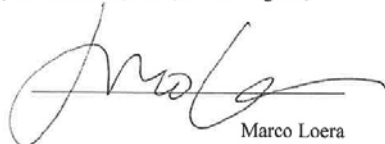
MOTION TO TERMINATE PROCEEDINGS

**Go back to Juan's  
Case at a Glance**

I, MARCO LOERA, declare as follows:

1. I make this declaration based on personal knowledge. If called as a witness, I could and would testify competently to the following:
2. On October 13, 2017, I went to View Park Automotive at 4301 Crenshaw Boulevard in Los Angeles to review and recover footage from the garage's surveillance cameras.
3. The surveillance recording equipment is in the management office of the mechanic shop. The video cameras are set to record constantly. Every few days, the footage is deleted to make room for new video.
4. On the day I went to the shop, I searched for footage from the afternoon of September 25, 2017 on the shop's surveillance system. I did this along with Alex Espinoza, the son of the shop's owner. The footage had already been automatically deleted by the surveillance system. However, Alex had a downloaded copy of the surveillance footage from that afternoon on his laptop.
5. I copied the files from the afternoon of September 25, 2017 to a USB drive from Alex's computer. Then I copied those same files to my computer.
6. On October 16, 2017 I converted the files I had recovered from Alex's computer from a .dav format (which the recording equipment produces) to a .mp4 format, to make the video easier to play. Then I shared these files with the legal team in this case.
7. Aside from this conversion, I did nothing to the files. I have not edited, modified, altered, or manipulated the footage in any way.
8. These files are the same ones submitted as evidence in these proceedings.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 12th day of December, 2017, in Los Angeles, California.



Marco Loera

Community member who retrieved the surveillance footage explains that he changed file format & why.

## FILE 2: MOTION TO SUBMIT VIDEO EVIDENCE: SAMPLE FROM THE JUAN HERNANDEZ CUEVAS CASE

Consider filing a motion to submit video evidence if helpful in your client's case. The motion can include the number of video files being submitted and their format; when the footage was captured and when it was transferred; and why the evidence is relevant to the case.

The example below is the motion to submit video evidence that was filed in the Juan Hernandez Cuevas case **mentioned above**. The motion indicates where the footage was obtained and why it is relevant. It also indicates that an authenticating declaration is included in the motion to terminate concurrently filed in the case:

Respondent, Juan Hernandez Cuevas ("Mr. Hernandez"), by and through counsel, hereby respectfully moves to submit video as evidence in his removal proceedings.

The evidence comprises two video files obtained from the surveillance cameras at Mr. Hernandez's place of business, View Park Automotive, in Los Angeles, California. As the attached authenticating declaration states, these videos capture the afternoon hours of September 25, 2017. Exh. 2 to Respondent's Motion to Terminate (concurrently filed) (Declaration of Marco Loera). They were transferred from Marco Loera to Mr. Hernandez's attorneys on October 16, 2017. *Id.*<sup>1</sup>

This video evidence is **relevant** because it captures the Immigration and Customs Enforcement raid on Mr. Hernandez's workplace that resulted in his arrest and placement in removal proceedings. Mr. Hernandez has moved to terminate these proceedings based on ICE's violations of governing regulatory and constitutional law in the course of his arrest. Therefore, these videos, which show how ICE conducted the raid, including ICE's interactions with and arrest of Mr. Hernandez, corroborate key portions of Mr. Hernandez's account and are probative evidence of the raid and ICE's arrest of Mr. Hernandez. *Espinoza v. I.N.S.*, 45 F.3d 308, 310 (9th Cir. 1995), *as amended on denial of reh'g* (Jan. 12, 1995) ("The sole test for admission of evidence is whether the evidence is probative and its admission is fundamentally fair.").

Mr. Hernandez respectfully requests that this Court admit video evidence in this matter.

Dated: December 14, 2017

Respectfully submitted,

Megan Brewer  
Jennifer Pasquarella  
Eva Bitran  
Attorneys for Mr. Hernandez

<sup>1</sup> The video files have been submitted in two forms: as links to a URL where the videos can be viewed and on CDs in .mp4 format. See Exhs. 3 and 4 to Respondent's Motion to Terminate (concurrently filed). Respondent is willing to provide these videos in another format at the Court's request.

The attorney includes a reason for why the evidence is relevant to her client's case in the motion to submit video evidence.

The motion to submit video evidence points out the two different forms in which the video files have been submitted to the court and to DHS. Also: that the respondent can provide the videos in another format at the court's request.

**Go back to VI.  
Preparing a Motion**



### FILE 3: INTEGRATING VIDEO TIMESTAMPS AND EXHIBITS INTO A STATEMENT OF FACTS: SAMPLE FROM THE MOTION TO TERMINATE IN THE JUAN HERNANDEZ CUEVAS CASE

A Statement of Facts is a party's written presentation of the facts leading up to or surrounding a legal dispute. If you are submitting video evidence, you can identify specific key moments that are relevant to your arguments in your Statement of Facts (see A below) and reference video timestamps that represent each of those moments. You can include a link to the online location where your video is uploaded as an exhibit (see B below).

**A. Statement of Facts in the motion to terminate for Juan Hernandez, access the motion [here](#).**

#### **Introduction**

Respondent, Juan Hernandez Cuevas, by and through counsel hereby moves to terminate these proceedings because ICE officials arrested him in violation of controlling regulations.

Mr. Hernandez files this motion in response to the egregious regulatory and constitutional violations that took place during a raid at Mr. Hernandez's workplace on September 25, 2017 in Los Angeles, California. ICE officials implemented a plan to enter the mechanic shop where Mr. Hernandez works—carrying semi-automatic weapons and disguised as peace officers—in order to detain and arrest every employee at the garage. Instead of procuring a warrant for Mr. Hernandez's arrest, ICE officials decided to enter the worksite in a brazen display of force and arrest and handcuff every worker on the premises, *without* making any individualized determinations of probable cause or even reasonable suspicion that Mr. Hernandez or his co-workers were noncitizens subject to removal.

The integrity of the administrative and judicial process requires that proceedings arising out of these regulatory violations be terminated. *See Sessions v. Sanchez*, 870 F.3d 901, 910 (9th Cir. 2017); *Gonzalez-Rivera v. I.N.S.*, 22 F.3d 1441, 1448 (9th Cir. 1994).

#### **Statement of Facts**

On September 25, 2017, Juan Hernandez Cuevas was at work at View Park Automotive, a garage in South Los Angeles where he worked as a car mechanic, when ICE agents violently raided his workplace, arresting Mr. Hernandez, the two other mechanics employed at the garage, and the garage's owner. *See generally* Exh. 1 (Declaration of Respondent Hernandez).

The entire raid was captured on the garage's surveillance cameras. This footage corroborates Mr. Hernandez's account of how the raid occurred. Exhs. 3 and 4 (Video Footage); *see also* Exh. 2 (Declaration of Marco Loera describing the garage's surveillance cameras).

Just before 1:30 p.m., at least six ICE agents bearing semi-automatic weapons and wearing jackets or vests that read POLICE stormed the shop, entering through the front gate carrying their weapons. *See* Exh. 1 at ¶ 4; Exh. 3 at 1:11–1:45;<sup>1</sup> Exh. 6 at ¶¶ 3–4, 7 (Declaration of Vanessa Alba). Without identifying themselves, two agents with their guns drawn immediately ordered everyone in the garage—the shop owner, the three mechanics, a customer and a vendor who had just delivered parts and was in his truck about to pull out of the garage—to freeze and put up their hands. Exh. 1 at ¶ 4; Exh. 3 at 1:11–2:00; Exh. 4 at 2:17–2:30. Everyone complied, including Mr. Hernandez. *See id.* One agent stood near the entrance gate, preventing anyone from leaving or entering. *E.g.* Exh. 3 at 2:25. Mr. Hernandez did not feel he was free to leave, and, neither he, nor the other men, were in fact free to leave. Exh. 1 at ¶ 6; *see also* Exh. 6 at ¶ 5.

The agents then ordered Mr. Hernandez and the other garage employees to stand against the nearest car with their hands on its roof. Exh. 1 at ¶ 7; Exh. 3 at 2:20–2:30. Without informing any of the men who they were or why they were arresting them, the agents proceeded to handcuff all of the employees. Exh. 1 at ¶ 8.

Specifically, at 1:30 pm, one agent approached Mr. Hernandez. Exh. 3 at 2:42–2:58 (showing ICE agent approaching, searching and handcuffing Mr. Hernandez, who was wearing a blue shirt). Without asking him any questions, not even for his name, the agent took Mr. Hernandez's hands, pulled them behind his back and handcuffed him. *Id.*; Exh. 1 at ¶ 8. After

<sup>1</sup> The pinpoint citations for Exhibits 3 and 4 are timestamps that denote the minutes and seconds elapsed on the video files submitted as evidence.

Exhibit number referring  
to surveillance video  
(Exh. 3)

Timestamp  
(at 1:11-2:00)



B. Example of an exhibit attached to the motion to terminate in the case of Juan Hernandez Cuevas indicating where the video evidence is accessible (in addition to the hard copy provided):

Exhibit 3: Surveillance Video, Outdoor Camera

Available at <https://youtu.be/CbMkC68omro>

**FILE 4: USING ANOTHER APPROACH TO REFERENCING VIDEO EVIDENCE  
IN YOUR FILINGS: SAMPLE FROM THE MOTION TO ACCEPT LATE-FILED  
DOCUMENTS IN A NON-LPR CANCELLATION OF REMOVAL CASE**

The motion here was prepared by the immigration attorney after receiving last-minute video evidence that proved a centrally relevant point in her client's case: that her client was a victim of domestic violence at the hands of their USC spouse.

Meghan McCarthy  
Brooklyn Defender Services  
180 Livingston Street, 3rd Floor  
Brooklyn, NY 11201

**DETAINED**

**U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
NEW YORK IMMIGRATION COURT  
201 VARICK STREET  
NEW YORK, NEW YORK 10014**

In the Matter of

██████████  
Respondent

File No.: A# ██████████

**In Removal Proceedings**

Immigration Judge Cortes  
Hearing Date: September 12, 2019, 1:00pm

**RESPONDENT'S MOTION TO ACCEPT LATE-FILED DOCUMENTS**

**Go back to Cancellation  
Case at a Glance**

**Go back to VI.  
Preparing a motion**

U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
NEW YORK IMMIGRATION COURT  
201 VARICK STREET  
NEW YORK, NEW YORK 10014

In the Matter of

Respondent

**In Removal Proceedings**

File No.: A#

**RESPONDENT'S MOTION TO ACCEPT LATE-FILED EVIDENCE**

Respondent, , through undersigned Counsel, respectfully moves the Court to accept additional evidence in support of his application for VAWA cancellation of removal pursuant to Immigration Court Practice Manual 3.1(d)(ii):

1. Respondent was last before your honor on September 9, 2019, during which time the court held the individual hearing on ' applications for relief. At the conclusion of testimony, the court indicated that it would permit the submission of additional evidence including testimony of Dr. Forman and an update as to the disposition of criminal case which was set for hearing on September 10, 2019.
2. Counsel has attached a letter from Navarro Gray, ' criminal defense attorney indicating that the charge will very likely be dismissed at the next court date within the next two weeks. Exhibit A.



3. Additionally, during the evening of September 10, 2019 counsel for respondent received a video recording of an incident that transpired between [REDACTED] and [REDACTED], an incident which had been testified to during proceedings on September 9, 2019. The video is a recording of an event depicting [REDACTED] yelling very loudly at [REDACTED] while waving a very long white stick and banging it on the ground very violently.
4. Counsel for respondent only just received this video from [REDACTED] family members when she was in New Jersey visiting other detained clients and had absolutely no ability to submit it prior to this date, September 12, 2019.
5. Additionally, the video was only just discovered by respondent's family member in his social media account and was not available prior to this date.
6. The video is directly relevant to the issue at hand in these proceedings and is a credible presentation of the violence perpetrated by [REDACTED] against [REDACTED].
7. Wherefore, it is respectfully requested that the Court excuse Counsel's delay and permit counsel to present the video evidence as it only just became available and is credible and directly relevant to the proceedings.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

September 12, 2019  
New York, New York

---

Meghan McCarthy  
Brooklyn Defender Services  
180 Livingston Street, 3rd Floor  
Brooklyn, NY 11201  
(646) 787-3322

Description of relevant events contained in the video

Pointing to relevance and trustworthiness of the evidence

**FILE 5: REQUESTING VIDEO EQUIPMENT IN THE IMMIGRATION COURTROOM IN YOUR MOTION: SAMPLE MOTIONS IN AN ASYLUM CASE**

An attorney in New York successfully requested that video equipment be brought into the courtroom in a 2011 asylum case. After filing a motion to present video evidence (see A below) and supplement to present video evidence (see B below), she was able to screen a documentary that was relevant to her client's asylum case on a court-provided television and DVD player:

**A. Motion to present video evidence in a New York asylum case, which also states that relevant segments of the video have been transcribed and are attached to the motion:**

Jodi Ziesemer  
BIA Accredited Representative  
Catholic Charities  
1011 First Avenue, 12<sup>th</sup> Floor  
New York, NY 10002  
212-419-3708  
Fax: 212-751-3197  
[Jodi.Ziesemer@archny.org](mailto:Jodi.Ziesemer@archny.org)

U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE  
NEW YORK, NEW YORK

In the Matter of:

ACJ,

Respondent

## In Removal Proceedings

**AXXX-XXX-XXX**

**Immigration Judge: xxx**

**Next Hearing Date: xx**

**MOTION TO PRESENT VIDEO EVIDENCE**

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Proposed Order of the Immigration Judge.....	8
Certificate of Service.....	9

Includes transcription of relevant segments of the video with the motion (Exh. A)

**Go back to Video  
Screened in Asylum  
Case at a Glance**

Go back to  
VI. Preparing a motion

**Go Back to VII.  
Referencing Video**

### LEGAL ARGUMENT

The Respondent has filed an application for asylum and withholding of removal based on past persecution on account of her membership in the social group of transgender women in Argentina. The Department of Homeland Security has expressed doubt that persecution, abuse, social exclusion, and arbitrary arrests of transgender women still occurs in Argentina despite the advancement of rights of homosexuals and certain legal protections provided to homosexuals in Argentina.

The Respondent and her counsel would like to present evidence in the form of a DVD of a video entitled “Translatina.” This video is a documentary released in 2010 which illustrates the persecution of transgender persons in Argentina and throughout Latin America. The Respondent would like to show selected portions of the video (transcripts of which are attached to this Motion), in which transgender activist and transgender women from Argentina discuss their experiences. Additionally, the Respondent would like to present a portion of the video in which police officers and the head of police in Peru are interviewed and discuss, in graphic detail, their abuse and torture of transgender women. Although the Respondent is applying for asylum from Argentina, she feels that this testimony of the police in the largest city in Latin America, and from a neighboring country, illustrates the attitude of police officers and officials throughout Latin America. The police discuss treatment of transgender women which closely mirrors mistreatment and abuse which the Respondent has testified that she has also suffered at the hands of the police in Argentina.

The Respondent request a standard DVD player be provided for her xxx hearing or that her counsel be allowed to show the video from a laptop.

The Respondent through her representative,

\_\_\_\_\_  
Jodi Ziesemer  
BIA Accredited Representative  
Catholic Charities Archdiocese of New York  
Department of Immigrant & Refugee Services  
1011 First Avenue, 12<sup>th</sup> Floor  
New York, NY 10022  
(212) 419-3708  
[jodi.ziesemer@archny.org](mailto:jodi.ziesemer@archny.org)

Indicates portions of the documentary video that have been transcribed & are attached to the motion

Request to have equipment supplied by the court on which to play video or alternatively to play video on attorney's laptop

B. Supplement to motion to present video evidence in a New York asylum case:

Jodi Ziesemer  
BIA Accredited Representative  
Catholic Charities  
1011 First Avenue, 12<sup>th</sup> Floor  
New York, NY 100022  
212-419-3708  
Fax: 212-751-3197  
[Jodi.Ziesemer@archny.org](mailto:Jodi.Ziesemer@archny.org)

U.S. DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE OF IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE  
NEW YORK, NEW YORK

	)	
In the Matter of:	)	
	)	
ACJ	)	Axxx-xxx-xxx
	)	
Respondent	)	
	)	
In Removal Proceedings	)	
	)	

Immigration Judge: xx                      Next Hearing Date: xxx

**SUPPLEMENT TO MOTION TO PRESENT VIDEO EVIDENCE**

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[DVD of Translatina film, 93 minutes]

Exhibit B—Transcription of Video Evidence in original Spanish.....	10-11
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Exhibit D—Article by Yusef Najafi about Translatina film, dated June 4, 2010.....	13-14
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Supplement provides transcription of video evidence in original Spanish (Exh. B) & a full description of the video (Exh.C)

#### DESCRIPTION OF FILM AND FILM-MAKERS

“Translatina” is a 93-minute documentary film directed by the award-winning Felipe Degregori and produced in Peru by the Pan-American Health Organization with funds from the Red LACTrans (Network of Latin American Transgendered), United Nations Development Program, United Nations AIDS program, Agencia Española de Cooperación Internacional para el Desarrollo (Spanish Agency for International Cooperation for Development). The film is produced in Spanish with English subtitles. The documentary exposes the reality of transgender women in Latin America through the testimonies of activists, health professionals, experts and transgender people. Combining more than three years of production and more than one hundred hours of footage and interviews with people of fifteen nationalities, “Translatina” is a thought-provoking depiction of the realities confronted by transgender people in Latin America. Aimed at showing a more complete view, the documentary takes testimonies from different Latin American trans organizations, as well as from the State actors and civil organizations. Diverse testimonies narrate the fight for survival in a society where the stigma of being trans brings along indifference and physical and psychological violence.

The Respondent through her representative,

---

Jodi Ziesemer  
BIA Accredited Representative  
Catholic Charities Archdiocese of New York  
Department of Immigrant & Refugee Services  
1011 First Avenue, 12<sup>th</sup> Floor  
New York, NY 10022  
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<sup>1</sup> Felipe Degregori won best film at the Bogota Film Festival in 1993, Special Mention at the Havana Film festival, and Best Latin Film at the Peníscola Film Festival. See the Internet Movie Database, <http://www.imdb.com/name/nm0214833/>, last accessed on September 26, 2011.



# ADDITIONAL RESOURCES

## WITNESS Video as Evidence Guide Part II: Filming, Storing & Sharing Video Evidence For Immigration Legal Proceedings

WITNESS Media Lab, *Juan Hernandez Case Study Part 2: Legal* (visited Apr. 2020): <https://wit.to/Juans-Story-Evidence>

Immigrant Defense Project, ICE Raids Tactics Map (Jul. 2018): <https://wit.to/39kkOL4>

EOIR *Immigration Judge Benchbook Evidence Guide* (visited Apr. 2020) –(While an outdated resource, it offers a useful overview of the types of rules of evidence that have been acknowledged and accepted in immigration court): <https://wit.to/2TnyGP9>

Simon Azar-Farr, *A Synopsis of the Rules of Evidence in Immigration Removal Proceedings*, Bender's Immigr. Bull. (Jan. 2014): <https://wit.to/3cxWffy>

*Evidentiary Issues: Assessing Evidentiary Weight Circuit Court Case Law Summaries*, 2018 Executive Office for Immigration Review Legal Training Program. Download (visited Apr. 2020): <http://www.aila.org/File/DownloadEmbeddedFile/77145>

# GLOSSARY OF TERMS

For a more extensive list, see Immigration Equality's Glossary of Terms.<sup>116</sup>

**Alienage:** the official legal status of being an "alien," which is a person who is not a U.S. Citizen but who is physically present in the U.S.

**Alien:** anyone who is not a U.S. citizen but who is physically present in the U.S. This may include a range of people including visitors, undocumented individuals, permanent residents. Given the term has a negative connotation, the term "noncitizen" is used throughout this material instead.

**Asylum seeker:** a person who flees their country of origin, enters the U.S., and applies for protection due to their well-founded fear of persecution based on certain protected criteria (race, religion, membership to a particular social group, nationality, or political opinion).

**Board of Immigration Appeals (BIA):** an administrative body that hears appeals from immigration judges' decisions.

**Cancellation of Removal (Non-LPR & LPR):** there are two types of cancellation of removal that ultimately lead to a noncitizen adjusting status to that of a lawful permanent resident. **Non-LPR cancellation:** a noncitizen may be eligible if they have resided in the U.S. continuously for 10 years; have good moral character; have not been convicted of certain crimes; and can prove that removal would cause extreme and exceptionally unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. **LPR cancellation:** a permanent resident who is inadmissible or deportable may be eligible for LPR cancellation if they have resided continuously in the U.S. for at least seven years; have been in permanent residence status for five years; and have not been convicted of any aggravated felony.

**Customs and Border Protection (CBP):** a division of the Department of Homeland Security which patrols U.S. borders.

**Department of Homeland Security (DHS):** the Executive branch department which is comprised of many immigration-related agencies including: Customs and Border Protection, Immigration and Customs Enforcement, and U.S. Citizenship and Immigration Services.

**DHS Attorney:** the attorney representing the Department of Homeland Security in Immigration Court proceedings. Though their official title is "Assistant Chief Counsel," they are sometimes referred to as "DHS attorney," the "government attorney," or the "trial attorney."

**Deportation/Removal:** removal was formerly known as deportation. Removal is an immigration process in which immigration officials seek to remove a foreign national from the U.S. for having violated an immigration law or other U.S. law. These proceedings generally occur in immigration court before an immigration judge; however, removal may also occur at the border.

**Executive Office for Immigration Review (EOIR):** a department within the U.S. Department of Justice which oversees immigration judges and immigration courts.

**Immigrant:** in this resource, "immigrant" is used in the broad sense of the term and its application here will be interchangeable with noncitizen to refer to any person who is not a U.S. citizen. In technical legal terms, "immigrant" is a person who has been granted the right to remain in the U.S. on a permanent basis, in contrast to a "non-immigrant" who comes to the U.S. on a temporary basis. As mentioned, however, the broader application of the term is used here.

<sup>116</sup> Immigration Equality, *Glossary of Terms*, <https://immigrationequality.org/asylum/asylum-manual/glossary/> (last visited Aug. 2020).

**Immigration and Customs Enforcement (ICE):** a branch of the Department of Homeland Security which handles enforcement actions and includes such officials as deportation officers and immigration court trial attorneys.

**Immigration and Nationality Act (INA):** the INA was enacted in 1952 and contains many of the most important provisions of U.S. immigration law. It has been amended many times over the years.

**Immigration and Naturalization Service (INS):** the federal government restructured the INS in 2013 and separated its functions under certain newly created agencies within the Department of Homeland Security. These new agencies are Customs and Border Protection, U.S. Citizenship and Immigration Services, and Immigration and Customs Enforcement.

**Lawful Permanent Residents (LPRs):** are noncitizens who are lawfully authorized to live permanently in the U.S. Also known as “green card” holders.

**Noncitizen:** the term noncitizen and **immigrant** are used interchangeably in this resource to refer to any person who is not a U.S. citizen.

**Refugee:** a person who applies for refugee status outside the U.S. and who must meet the same standard for persecution as an applicant for asylum.

**Removal/Deportation:** removal was formerly known as deportation. Removal is an immigration process in which immigration officials seek to remove a foreign national from the U.S. for having violated an immigration law or other U.S. law. These proceedings generally occur in immigration court before an immigration judge; however, removal may also occur at the border.

**Removal/Deportation defense:** representing and advocating for immigrants facing removal from the U.S.

**United States Citizenship and Immigration Services (USCIS):** a sub-division of the Department of Homeland Security which handles various services including naturalization, lawful permanent residency, and visa applications.

**Warrants (judicial vs. administrative):**

The Fourth Amendment of the U.S. Constitution protects against search, seizure, and arrest without probable cause, and ICE agents are not permitted to enter a person's home without a judicial warrant or consent. A judicial warrant is an official court document, signed by a judge, allowing ICE to enter a private home. In contrast, an administrative or ICE warrant is a form issued by immigration officers that designates a noncitizen as allegedly deportable and directs immigration agents to arrest that person. ICE warrants are not signed by a judge and do not give authority to enter private spaces to execute an arrest or search.

**Withholding of Removal:** is a very limited benefit that allows a noncitizen to remain in the U.S. to avoid persecution in their country of origin. There are similarities and differences with asylum; one difference is that withholding of removal does not lead to lawful permanent residency in the U.S.

This resource is solely for educational purposes, and it does not serve to substitute for any expert, professional, and/or legal representation and advice.

## **PART II:**

# **Filming, Storing & Sharing Video Evidence for Immigration Legal Proceedings**



This guide was researched and written by the WITNESS U.S. Program Team

This resource is solely for educational purposes, and it does not serve to substitute for any expert, professional, and/or legal representation and advice.



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# INTRODUCTION & GOAL OF THIS GUIDE

Filming an abusive immigration enforcement action can help expose enforcement violations, deter violence, substantiate reports, and serve as evidence. But if the footage isn't captured, preserved, and shared safely and ethically, there can be unintended harm to both the person being filmed and the person filming.



With U.S. immigration enforcement actions showing no signs of abating and greater numbers of people swept up in U.S. Immigration and Customs Enforcement (ICE) sweeps, immigration practitioners are looking for creative strategies to protect the rights of individuals who are unlawfully placed into removal proceedings.

**Video evidence is one such tool. And yet it remains a largely untapped tool in the U.S. immigration context.**

**This is a guide to begin thinking about ways in which video can be obtained, preserved, and prepared for trial to help strengthen an individual's immigration case.**

This guide has two audiences: attorneys and community members.

## PART I:

- Is for **attorneys** who have come across footage that they believe could support a client's case but do not know how best to present the evidence and submit it such that it will be given full or substantial weight by the immigration court.
- Consult Part I of this guide for more information about how video can be used in legal proceedings, and how activists who capture footage can successfully work with immigration lawyers to help create accountability.



## GOAL



The goal of this guide is to introduce basic practices to help ensure that the video in your hands can be used not only for advocacy efforts, but also to protect the rights of individuals in a legal context.

## PART II:

- Is for **community members** and **advocates** who find themselves in situations where they can and choose to record immigration enforcement violations as they happen, or in their immediate aftermath, and want to share footage with investigators and lawyers who could use it in investigations.



We hope that after reviewing the practices here, you will begin to feel prepared to introduce video evidence as a part of your case strategy.

# PREPARING TO FILM

Though immigration enforcement often occurs without warning, planning ahead can help you prepare to better document any unlawful activity when it happens.

## SAFETY FIRST

Your first priority should be to do no harm. Filming could escalate the situation or expose someone's identity and put them at greater risk. Always assess the risks to yourself and others before you hit "record." Consider other ways to respond, such as reaching out to an advocacy organization or rapid response group, bearing witness, or taking notes. Whether or not it's safe to film will rarely be a black-and-white decision, but being better prepared can help you make the right judgement in the moment. Trust your gut and your instincts.

## KNOW YOUR RIGHTS

Generally, it is legal under the First Amendment of the U.S. Constitution to film immigration and law enforcement in public spaces in the U.S., regardless of your immigration status,<sup>1</sup> as long as you don't interfere. Keep in mind that your rights on federal property, ports of entry, and borders may look different<sup>2</sup>. Check local laws before filming as they can vary for private property, businesses, and federal buildings. For instance, in New York City, while you generally cannot film inside a courthouse, you can film outside of one. Read more about your right to film immigration enforcement in the U.S. here.<sup>3</sup> Also, be aware of "wiretapping" laws that vary from state to state and govern when a private conversation can be audio recorded.

These laws were originally created to protect people's privacy from wiretaps on phones, but in some cases they have been used to challenge the right to record law enforcement. However, when it comes to filming law enforcement, most states have upheld that it is legal to openly film and record audio of police in public **without** their consent.

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



## LEARN MORE



See our [blog post](#) and [interactive map](#) for more information related to audio recording.

<sup>1</sup> <https://www.nyclu.org/en/know-your-rights/you-have-right-film-ice>

<sup>2</sup> [https://www.aclutx.org/sites/default/files/field\\_documents/KYRBORDERfinalprint.pdf](https://www.aclutx.org/sites/default/files/field_documents/KYRBORDERfinalprint.pdf)

<sup>3</sup> <https://www.nyclu.org/en/know-your-rights/you-have-right-film-ice>

# DO



## **DO ASSERT YOUR RIGHT TO FILM IN A CALM MANNER, IF YOU FEEL COMFORTABLE DOING SO.**

You must, however, comply with orders like “back up,” or you could face arrest. You can film your feet backing up to keep a record of your cooperation.



## **DO HAVE A LEGAL SUPPORT NUMBER AND/OR A TRUSTED CONTACT'S INFO HANDY.**

Call United We Dream's MigraWatch Hotline to report Border Patrol or ICE activity or to be connected with resources: 1-844-363-1423

## **DO SET YOUR PHONE TO BACK UP.**

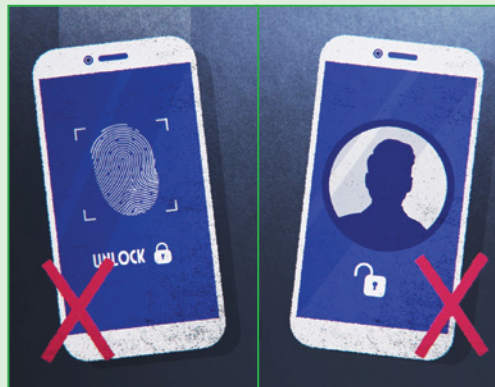
There are only limited situations where authorities can seize your phone for evidence, and they are never allowed to delete footage from your phone, but be aware that they may do it anyway. Backing up to a cloud-like service can help protect your footage in case your phone is taken, broken, or lost.

**DO** protect your contacts. If you plan to be in a situation where your phone could be confiscated, then delete or encrypt names of contacts, call logs, text messages, photographs, videos and audio files in advance. Consider using a different device to film that does not have personal information on it.

**DO BRING A NOTEPAD AND PEN** in order to write down the date and time or a recollection of the events after filming is over or has been impeded. It's helpful to write down information while it's still fresh in your mind. [See our Written Documentation section for more information on effective note taking.](#)

## **DO AVOID LOCKING YOUR PHONE WITH FINGERPRINT, FACE, AND PATTERN ID.**

You generally have a 5th Amendment constitutional right to not give up your cell phone password during a search by government officials (however some courts have ruled that you are required to under certain circumstances). That right does not currently extend to fingerprint, face, or pattern ID, so it is best to have at least a 6 digit passcode on your phone. Law enforcement generally can't force you to give up your passcode without a warrant or court order, but they can ask or coerce you to unlock your phone with your fingerprint or Face ID. These laws are being interpreted differently as technology evolves. Check with a local legal organization or groups like the Electronic Frontier Foundation for the most up to date information.



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

**DON'T MAKE SUDDEN MOVEMENTS.** Be aware that immigration agents and police care mainly about their safety, not yours. Moving quickly or suddenly to grab your phone or reach into your pocket could escalate the situation.

**DON'T LIE.** Be truthful. Immigration agents might falsely identify themselves as police officers or lie in the course of enforcement, **but you should not.**

**DON'T INTERFERE.** “Interference” is subjective to the law enforcement officer, so it's best to keep at least an arm's length distance between yourself and the incident while you film. Make sure you are not trying to hide the fact that you are filming.

# DON'T



## CASE AT A GLANCE



Kianga Mwamba<sup>4</sup> was driving home late at night in Baltimore in March 2014, when she saw police beating a handcuffed man. While stopped at a red light, she began to record the scene out her window. The scene quickly escalated, with officers yelling at Mwamba to get out of the car, then forcing her to the ground and arresting her. Mwamba's phone was still recording and audio captures the chaos that ensued: officers demanding she get out of the car, yelling profanities at her, and the clicking of a taser. Mwamba spent the night in jail, charged with assault and resisting arrest.

The video, she knew, would prove her innocence. However, when she was released on bail and given back her belongings, the video was gone. But later, Mwamba's teenage daughter pointed out that her smartphone automatically backed up photos and videos. And though the video of her arrest had been removed from her gallery, it was saved to her google account.

Mwamba's attorneys took the video to Baltimore police's internal affairs department, and the Maryland State Attorney's Office opened an investigation. Six months later, the charges against Mwamba were dropped on December 2015, Mwamba settled a civil suit against the Baltimore Police Department. The city will be ordered to pay Mwamba \$60,000. Read more and watch the video [here](#).



4 [https://lab.witness.org/portfolio\\_page/kianga-mwamba/](https://lab.witness.org/portfolio_page/kianga-mwamba/)



# DETERMINING WHAT TO FILM

After assessing that it is safe to film, the single most important principle to keep in mind is to **start filming as soon as you feel it is safe to do so and to film continuously**. Your footage will be more valuable to lawyers if you start filming from the outset of the apprehension and continue filming until the incident is over.

In a moment of heightened tension, it might not be possible to capture everything on the list below. The most important thing to keep in mind is trying to tell a story with your footage. Ask yourself: What would someone who isn't here need to see in order to understand what is happening and where it is happening? It can also be helpful to work with a partner in order to get more angles and vary your shots. When possible it can be helpful to prepare and work with a partner.

The type of immigration legal relief an individual can obtain depends on the court in which the lawyer files the claim. Different visuals will assist different legal approaches for relief. But if possible, try to include the following:



## VARY YOUR SHOTS:

- **Wide** establishing shots to provide an easily understandable layout of the scene. This can also help assist in verifying time, date, and location.
- **Medium shots** to establish the location of the evidence (e.g. a damaged door or window) in the scene of apprehension and the relationship of one piece of evidence to another.

## LEARN MORE



See our [Verifying Eyewitness Video Guide](#) for more ideas on how to make your content easier to trust.<sup>7</sup>

## ABOUT METADATA



There is no single legal definition of metadata. Loosely defined, metadata is simply “data about data.” For our purposes here, we are defining digital metadata as information about a file, created by an electronic device, that is automatically stored and is often not visible to the user. Another way to think about it is as the digital footprint that is left behind. This invisible footprint includes such information as date, time, location, what device was used and even a record of changes made to the file. WATCH: [What is Metadata?](#)<sup>5</sup>

## WHY IT'S IMPORTANT

Metadata can make it easier for lawyers, judges, researchers, reporters, or investigators to verify that your video footage was filmed when and where you say it was. For more information, see [“How to Capture Metadata and Documentation”](#).<sup>6</sup>

5 <https://youtu.be/A0g8JnuwX8>

6 <https://archiving.witness.org/archive-guide/create/how-capture-metadata/>

7 <https://library.witness.org/product/video-as-evidence-verifying-eyewitness-video/>



## PROVE YOUR FOOTAGE IS REAL

Where and when did the enforcement happen? Record time, date, and location. If you need to film anonymously, write the time, date, and location on a piece of paper and hold it up in front of the camera for 10 seconds. You can also film a clock, the front page of a newspaper, street signs, buildings, and landmarks. Capture wide shots so that lawyers can get a full picture of the scene. If filming inside or outside someone's home, don't expose any identifying details of their living situation (i.e. an address) without consent. Doing so could put other members of their family at risk.



## CAPTURE KEY DETAILS

The shots below are examples of footage that can be helpful to capture during or after an immigration enforcement action. In the moment, it's not always possible to know how these shots can or will be used by a lawyer, but it's always helpful to safely capture as much clear and thorough documentation as possible.

### Additionally, film:

- Any other eyewitnesses filming or observing the officers (this may be helpful to corroborate your footage with their angle in the future)
- Security cameras in the vicinity
- Bodycams

## LEARN MORE



If you plan to film witnesses on camera, see [this template](#)<sup>8</sup> or [short video](#)<sup>9</sup> for collecting informed consent.

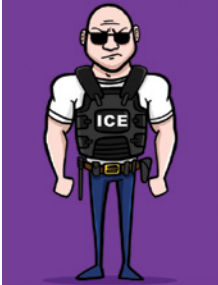

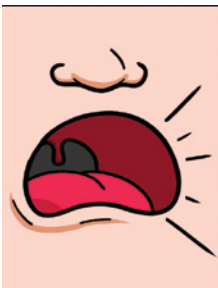

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



<sup>8</sup> <https://library.witness.org/product/informed-consent-template/>

<sup>9</sup> <https://library.witness.org/product/interviewing-techniques-obtaining-informed-consent/>

## CAPTURE KEY DETAILS

<p><b>Who</b> conducted the enforcement action (e.g. ICE, police)?</p>	<ul style="list-style-type: none"> <li>ICE agents or police officers present</li> <li>Number of agents or officers present</li> <li>Any communication between agencies (e.g. ICE agents and police officers talking to each other)</li> <li>Supervisors giving orders</li> <li>Badges or IDs</li> <li>Vests/uniforms or lack thereof</li> <li>Vehicles and license plates or any permits posted on the front of vehicles</li> </ul>	
<p><b>What</b> type of incident did you observe (e.g. car stop, home raid) ?</p>	<ul style="list-style-type: none"> <li>Home raid, work raid, or car stop in progress, etc.</li> <li>Detention or questioning in progress</li> <li>Damage to property or personal belongings</li> <li>Injuries</li> <li>Use of weapons</li> </ul>	
<p><b>How</b> did the agents carry out the enforcement? Did agents use violence or were they dishonest? Did they have a warrant?</p>	<ul style="list-style-type: none"> <li>Warrant or lack thereof</li> <li>Stories or "<u>ruses</u>" used to get consent to enter a target's home</li> <li>Aggressive behavior, yelling, intimidation - can help show egregiousness of arrest</li> <li>Threatening or coercive words, racial slurs</li> <li>Agents breaking down a door to get inside and the damage caused to the door after the agents leave</li> </ul>	
<p><b>When/Where</b> did the enforcement happen?</p>	<ul style="list-style-type: none"> <li>A clock</li> <li>The home screen of a cell phone</li> <li>A newspaper</li> <li>Wide shots that establish the location</li> <li>Landmarks</li> <li>Street signs</li> </ul>	



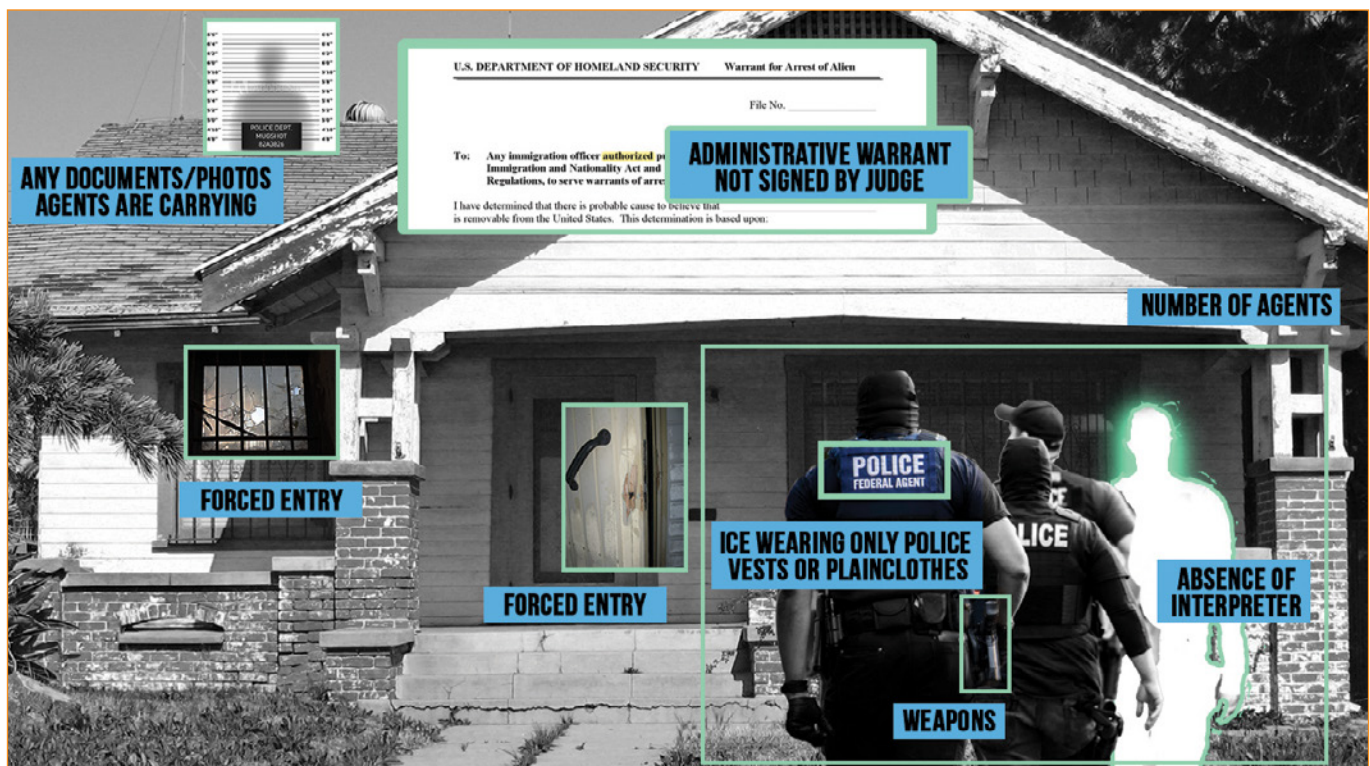
## DEVELOPING A SHOT LIST

Activists often capture the “What” but not always the “Who” “How” and “When/Where”. Consider coming up with a “Shot List” to help you strategically determine what footage you will need to capture to give viewers a clear sense of the events that took place.

Picture yourself returning to your home in the early hours of the morning when you notice a group of people wearing vests that read “police” come out of a car. What are some of the shots you would gather after reading about the types of information (who, what, where, when, how) that would be helpful for legal proceedings?

Some violations on their own aren’t strong enough to support a case but, in conjunction with other violations, they can help show a person’s rights were violated. **And remember, if you’re unable to film or it’s not safe, taking notes of these details during or directly after the incident is still valuable. No footage is worth anyone’s safety.**

To see how this footage may be used in a legal case by an attorney, see **collection plans** in Part I of this guide.





# BEST PRACTICES FOR FILMING

## From an expert

*"If witnesses gather shots from the beginning of an encounter with ICE (the moment someone is approached by ICE) until ICE leaves, the video could be useful in immigration proceedings and could potentially carry more weight than a video or photograph that only captures part of the interaction."*

Genia Blaser, Senior Staff Attorney Immigrant Defense Project



## LEARN MORE



See our handy tip sheet on [Filming Immigration Enforcement](#), available in multiple languages!<sup>10</sup>

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

## BASIC GUIDANCE:

- **Film the details. Tell a story with your footage.** Think: If I weren't here, what would I need to see to understand what happened?
- **Stay focused on law enforcement activity instead of civilians.** Make the people being targeted harder to identify by filming very wide shots and/or filming people's feet or backs. There are also tools you can use later to blur people's faces.
- **Film continuously without stopping and starting.** This will help verify that your footage was not edited. If you have to start and stop, try recording each new clip by pointing the camera at the same location you were filming when you stopped. In other words, overlap the shots.
- **Hold all your shots for 10 seconds or more.** Use slow, smooth pans whenever possible.
- **Let the video speak for itself.** If violence occurs, stay calm and quiet. Lawyers and investigators will need to hear what's happening. If adding narration won't interfere, or if filming from a distance, add context through **factual and unbiased commentary** such as location, number of agents/officers, etc. Anything said or learned during the arrest may be admissible in court against the person targeted. Be careful to not allege anything about the person's country of origin, immigration status, criminal history etc

<sup>10</sup> <https://library.witness.org/product/filming-immigration-enforcement/>



## LIVESTREAMING

Livestreaming can be an effective way to garner public support and create awareness. But, it can also expose people's identities and other sensitive information far more easily than regularly recorded video. If you do decide to livestream, here are some basic considerations to ensure you do so safely and effectively:

- Be aware of what location details you are sharing when you livestream - phones can default to sharing your location. You can turn off your location settings in your phone if this is a concern.
- Consider streaming to a trusted set of viewers, such as an attorney, trained legal observers, or fellow organizers and community members on a private channel. Most social media platforms give you the option to choose who can and cannot view a livestream.
- Some advocacy organizations also invest in organizational smartphones that don't contain anyone's personal information and are only used for organizational purposes, such as livestreaming protests or direct actions.
- Describe what is happening through factual commentary. If possible, work with a partner to keep an eye on what's happening in the periphery and to check viewers' comments and questions.
- Only some sites let you save the video on their platform. If you think your video contains evidentiary content, it's good to download and preserve a copy. **Learn how:** <http://bit.ly/PreservingLiveVideo>

## WRITTEN DOCUMENTATION

If you were unable to add certain basic information to the video recording itself, then you should create a separate document that summarizes the key information about your footage (see below). **Be sure to do this while the details are fresh in your mind.** Even though this can be time consuming, providing thorough written documentation can significantly increase the chances that your video will be used as evidence. The summary information can be handwritten, or done on a computer and saved in a folder with the video. If possible and safe, include:

- Date and time you wrote the summary
- Date, time, and location of the filming
- Names and contact information for the:
  - Person filming
  - People being filmed
  - Other people on scene who may have information about the events that took place
- A short, factual summary of what is shown in the video. Leave out unsupported opinions, misinformation, and exaggerations
- Any details about what happened before/after the video was recording, in case the footage only shows part of the incident
- Any safety information or security restrictions with using the video
- Make sure to add if you observed any other eyewitnesses present that were either filming or observing, as well as their names and contact information (if obtained)
- List the location of any surveillance video or traffic cameras you noticed in the vicinity

### KEY POINT: WHY WRITTEN DOCUMENTATION MATTERS

Even if you include basic information in the video recording, a separate written summary can be helpful. This additional documentation will make your video stand out among the thousands of videos captured and shared every day by citizens and activists, and it will help immigration lawyers, constitutional lawyers and journalists as they review the content and determine whether or not your footage will help them. In short, the easier you make it for the reviewers, the more likely they are to watch and use your video.



Source: *We Have Rights* by Brooklyn Defender Services and ACLU.  
Produced by MediaTank and Variant Strategies.

# STORING YOUR FOOTAGE



Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.

## Preserve Your Footage

Preserving your footage is essential if you want it to be used as a part of the judicial process. In order to use a video in court, **an attorney must prove that the video file was not edited or manipulated.**

If you do need to make any edits (i.e. blurring faces), make sure to do so from a copy and save the original version unedited. In some cases, the attorney will also need to show how the video got from the person who filmed it to an investigator, then to a lawyer, then to a court. In legal terms this is called the **“Chain of Custody”**.

**When you give the footage to another person or organization, they may ask you to sign a form that documents the hand off of the footage.** The information requested will vary, but you will most likely need to verify that you recorded the video and that you have not altered the video file. [See further below for an example of a real authenticating declaration].

## Steps for Preserving Your Video

If your video is not properly protected, the trustworthiness of your footage may be called into question. The guidance below will help you protect the integrity of your footage:

- If you are filming regularly or working with a group, make sure you have a plan for offloading footage. Make it a routine to always copy your footage off your camera at the end of each incident or at the end of each day. Set everything up (e.g. storage location, folder organization, backup system, etc.) so that you can just “drop” your footage off in an easy and consistent way.
- Save the original file by transferring it from your phone/device to your computer/hard drive without altering or processing the video in any way. Drag and drop or copy-paste works, as well as Image Capture (Mac) or Photos (PC). Keep files intact<sup>11</sup>. Do not run it through special software or change the file format, file name, or file structure.
- It's recommended to offload **all of the files from the incident**, not just the ones you think might be useful. Only offloading a select few can appear manipulative or hurt your credibility in court.

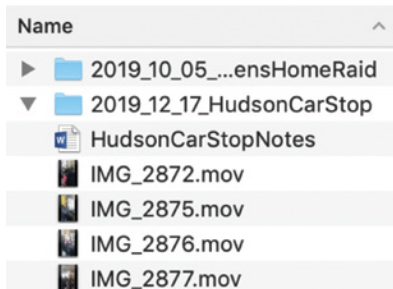
<sup>11</sup> <https://archiving.witness.org/archive-guide/transfer/keeping-files-intact/>

- Use the 3-2-1 rule to protect valuable footage.



- Make **3** copies.
- Save on **2** different types of storage – like an offline hard drive and a computer, or Google Drive and iCloud. The idea is to prevent one type of failure (e.g. faulty manufacturer, lost password, unpaid account) from affecting all your copies.
- Keep **1** offsite copy so that all your copies don't live in the same physical location (e.g. keep one on your home computer and one on your hard drive at your office).
- If you edit, do so from a copy.

- Limit physical and digital access to only those who need it.
- Organize your footage by creating folders with the date/location/filmer. You can also drop text documents into those folders with more information about the video. Name your folders in a standardized way so that you can easily sort and identify them. For example: yyyy-mm-dd\_CreatorName\_IncidentName. Keep the "Incident Name" a short description.



- Use a spreadsheet or database to keep track of where you preserve the footage and who you share it with. In order for your video to be used as part of an investigation, you will need to give it to a trusted immigration attorney.



In legal terms, documenting the transfer of footage from one individual to another is called the "Chain of Custody."

- You may also need to prepare a declaration to provide chain of custody details. For a declaration, the person who originally obtained the footage signs a statement under oath stating how they handled the footage from the moment they obtained it. While the individual, who signed the declaration, did not film the incident himself, the declaration gives you an idea of the type of step-by-step details you would include in your own declaration about your experience filming an enforcement incident. Such a declaration would be prepared with the help of a lawyer for the person whose case it is.<sup>12</sup>

## LEARN MORE



Learn more and see an example of a real authenticating declaration signed under oath by someone who acquired video footage from a surveillance camera and provided it to a team of lawyers on the next page.

Source: *We Have Rights* by Brooklyn Defender Services and ACLU. Produced by MediaTank and Variant Strategies.



<sup>12</sup> Motion to Terminate: *Juan Hernandez Cuevas* case (Dec. 2017, EOIR L.A.), download: [https://wit.to/Hernandez\\_MotionToTerminate](https://wit.to/Hernandez_MotionToTerminate).

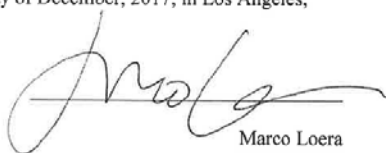


## Authenticating Declaration from Handler of Video Evidence: Sample from the Juan Hernandez Cuevas Case

I, MARCO LOERA, declare as follows:

1. I make this declaration based on personal knowledge. If called as a witness, I could and would testify competently to the following:
2. On October 13, 2017, I went to View Park Automotive at 4301 Crenshaw Boulevard in Los Angeles to review and recover footage from the garage's surveillance cameras.
3. The surveillance recording equipment is in the management office of the mechanic shop. The video cameras are set to record constantly. Every few days, the footage is deleted to make room for new video.
4. On the day I went to the shop, I searched for footage from the afternoon of September 25, 2017 on the shop's surveillance system. I did this along with Alex Espinoza, the son of the shop's owner. The footage had already been automatically deleted by the surveillance system. However, Alex had a downloaded copy of the surveillance footage from that afternoon on his laptop.
5. I copied the files from the afternoon of September 25, 2017 to a USB drive from Alex's computer. Then I copied those same files to my computer.
6. On October 16, 2017 I converted the files I had recovered from Alex's computer from a .dav format (which the recording equipment produces) to a .mp4 format, to make the video easier to play. Then I shared these files with the legal team in this case.
7. Aside from this conversion, I did nothing to the files. I have not edited, modified, altered, or manipulated the footage in any way.
8. These files are the same ones submitted as evidence in these proceedings.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed this 12th day of December, 2017, in Los Angeles, California.



Marco Loera

### LEARN MORE



See our [Activists Guide to Archiving Video](#) for more information about organizing, storing, preserving, and sharing your footage.



# SHARING YOUR FOOTAGE

Assessing safety risks should happen both before and after filming an immigration enforcement. After filming, review the footage to determine whether or not anyone depicted in the video could be endangered if certain people saw the video.

Should you share publicly or privately? If there are risks involved in sharing the video, consider only sharing privately with trusted individuals or organizations. Consult the checklist on the next page<sup>13</sup> before sharing your footage:



Illustration credit: Gregory Buissereth

13 <https://library.witness.org/product/checklist-sharing-videos-of-immigration-enforcement/>

## CHECKLIST: SHARING VIDEOS OF IMMIGRATION ENFORCEMENT

BE SAFE. BE ETHICAL. BE EFFECTIVE.

Think through the following questions before uploading or publicly sharing footage of someone being questioned or detained by an immigration enforcement agent. Whether you filmed, received or found a video online, it's important to understand that sharing it publicly could put you, the filmer, the victim and/or others at further risk of harm or retraumatization by exposing identity, location, immigration status, etc. Seek advice from a trusted advocacy group or lawyer about how you can protect your community.

**\*If possible, first share your footage with the person or the family of the person who was arrested or harassed by an immigration agent. They should decide how it's used.\***

### WHY AM I SHARING THIS VIDEO?

Be clear about what you want to achieve: Do you want to expose an abuse, counter a problematic narrative, rally support for an individual, etc.? Your intentions will help determine your strategy.

### WHEN SHOULD I SHARE THIS VIDEO?

Waiting to share footage until after an immigration agent makes an official statement or releases a report can be a powerful way to expose lies and discrepancies. It can also be more impactful to wait and tie the video to specific policy demands, or release the video in collaboration with other organizing efforts.

### ARE THERE ANY IDENTITIES I NEED TO PROTECT INCLUDING MY OWN?

Identities can include someone's face, voice, dialect, tattoos, home or business address, license plates, etc. Use Youtube's free blur tool to obscure identifying features from footage before you share. Check out our tutorial for more info: <https://youtu.be/vBFrVIGB9L0>

### DO I WANT MY NAME ASSOCIATED WITH THE FOOTAGE?

Connecting your name or social media handles publicly to the video can make you vulnerable to online and offline aggressions. It could also result in long periods of time in the media spotlight or legal proceedings.

If you or those you know have vulnerable immigration status, being on immigration enforcement's radar could be detrimental. Work with a trusted journalist or advocacy organization to release footage anonymously, but beware that metadata associated with your video could still tie the footage back to you.

If you release footage with a journalist or media outlet, make sure you have a contract in place that discusses ownership, usage, rights to the footage, etc.

### HOW CAN I MAKE MY VIDEO EASIER TO FIND & VERIFY?

Adding visual and written context can help make your footage easier to verify. You can do this by filming landmarks, street signs, stating the time and day, etc. and by providing detailed descriptions after you upload footage.

Keep titles brief and descriptive. Only use factual information to describe the events. Write a description of what happened before, during and after the recording. Always include date, time, city, specific location. Add keywords or "tags" so your video is easier to find.

### SHOULD I LIVESTREAM?

Livestreaming can expose people's identities and other sensitive information far more easily than recorded video. It's important to understand the risks before you go live.

Phones can default to sharing your location, be aware of what location details you're sharing.

Describe what is happening and recap what has happened through factual commentary. Work with a partner to keep an eye on what's happening in the periphery and check on viewers' comments and questions

Consider streaming to a trusted set of viewers, such as an attorney or trained legal observers on a private channel instead of publicly to anyone.

### HOW DO I PREVENT MY CONTENT FROM BEING TAKEN DOWN?

Familiarize yourself with social media community standards and takedown policies. These are updated regularly.

Adding factual details and descriptions to your video can help ensure its intended use. Don't include personal opinions or perceptions, and NEVER use slurs or discriminatory language. If your footage is graphic, write "GRAPHIC IMAGERY" in the video's title and description to alert viewers.

Remember, online platforms are not archives. Keep at least one copy of the video file in a secure location.

### HOW DO I PROTECT MY FOOTAGE?

Backup your footage in at least one separate, secure location. If you edit, do so from a copy and save the original unedited file.

Some sites let you save livestreams on their platform, but others delete the video after a set time period. If you think your video contains evidentiary content, download and preserve a copy. Learn how: <http://bit.ly/PreservingLiveVideo>

## PROVIDE ADDITIONAL DETAILS



If sharing your footage with someone else or when posting online, and only when possible, try to include the following supplementary information so your video is easier to verify and less likely to be taken out of context:

- Time, date, and specific location the video was captured;
- A concise factual summary of what is shown in the video;
- The names and contact information for the videographer, persons filmed, and others who may have valuable information about the incident and are willing to speak to an NGO or an investigator;
- Any security information letting your allies know what information is confidential and what can be shared with others

## SHARING FOOTAGE FROM OTHERS



When working with footage you didn't film yourself, consider these questions before you share with media outlets, with lawyers, or post on social media:

- Who is identifiable in the video and how are they portrayed?
- Are those individuals aware they are being filmed? How might their appearance in the footage, if seen by a wide audience, impact them or their community?
- What was the intent of the filmer?
- Was this filmed to document abuse? Was it filmed to promote hate or fear, or to glamorize violence?
- Who is the intended audience?
- Was it intended to be seen widely or was it filmed for a specific, limited audience?
- Does the video contain shocking or graphic imagery?

- Is the graphic footage gratuitous or is it critical for documenting a particular event? How can you warn your audience before they view it?
- Are you certain the video is authentic?
- Is it possible the video has been manipulated or misinterpreted to mislead viewers?
- What is the intended purpose and audience for sharing this video?
- Do the potential benefits of sharing this video outweigh the potential risks of doing so?

## REAL OR RUMOR? HOW TO VERIFY ONLINE REPORTS OF ICE RAIDS



Misinformation about immigration enforcement and ICE raids can spread quickly on social media, escalating feelings of fear and uncertainty in immigrant communities. We can help fight against misinformation by verifying the information we share online, so that communities can be better informed and organized.

Together with United We Dream, we created a guide to help make your content more verifiable, as well as verify online posts of raids and immigration enforcement activity before you share. Download the resource here: <https://wit.to/Verify-ICE-Raids>

# ADDITIONAL RESOURCES

The more you know about filming techniques and safe-guarding, organizing, managing, and sharing your footage, the easier it will be to film safely, effectively, and ethically. For more information, visit <https://lab.witness.org/projects/eyes-on-ice/>

## **TIPSHEET (WITNESS)**

Filming Immigration Enforcement:  
<https://library.witness.org/product/filming-immigration-enforcement/>

## **VIDEO (WITNESS)**

Filming Immigration Enforcement:  
<https://library.witness.org/product/filming-immigration-enforcement-2/>

## **TIPSHEET (WITNESS)**

Livestreaming Protests:  
<https://library.witness.org/product/livestreaming-protests-usa/>

## **RESOURCE (WITNESS + NYCLU + Immigrant Defense Project)**

Eyes on Courts: Documenting ICE Arrests:  
<https://lab.witness.org/eyes-on-courts-documenting-ice-arrests/>

## **GUIDE (WITNESS)**

Video as Evidence for Human Rights Lawyers and International Justice Organizations:  
<https://library.witness.org/product/video-as-evidence-mini-guide-compilation/>

# WITNESS

SEE IT

FILM IT

CHANGE IT

**ACTIVISTS** | **LAWYERS**  
**SUPPORTING** | **SUPPORTING**  
**LAWYERS** | **ACTIVISTS**

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