



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2007

(Argued in Tandem: November 21, 2007 Decided: September 24, 2008)

Docket No. 06-3493-ag  
Docket No. 06-3811-ag  
Docket No. 06-4102-ag  
Docket No. 06-5390-ag

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MOHAMED RAJAH, SAID NAJIH, SAADE BENJELLOUN, SAMER EMILE EL ZAHR,  
Petitioners,

-v.-

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES,  
MICHAEL CHERTOFF, SECRETARY OF THE DEPARTMENT OF HOMELAND  
SECURITY, PETER SMITH, SPECIAL AGENT IN CHARGE OF THE NEW YORK  
DISTRICT OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,  
Respondents.

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B e f o r e: WINTER, WALKER, and CALABRESI, Circuit Judges.

Petitioners are aliens who responded to the Special Call-In  
Registration Program instituted after the terrorist attacks on  
September 11, 2001, and were subsequently placed in deportation

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\*Pursuant to Federal Rule of Appellate Procedure 43(c)(2),  
Attorney General Michael B. Mukasey is automatically substituted  
for former Attorney General Alberto R. Gonzales as a respondent  
in this case.

\*\*Pursuant to Federal Rule of Appellate Procedure 43(c)(2),  
Special Agent in Charge Peter Smith is substituted for former  
Special Agent in Charge Martin Ficke as a respondent in this  
case.



1 proceedings. They petition for review of deportation orders  
2 issued by the Board of Immigration Appeals. The petitioners make  
3 various regulatory, statutory, administrative, and constitutional  
4 arguments in support of their claims. For the reasons stated  
5 below, we reject these claims and hold that the petitioners are  
6 deportable, with the exception of Petitioner Rajah. Petitions  
7 denied in part, granted in part.

8  
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19 brief for Mr. El Zahr, Jesse M. Bless on the  
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21 Wright of counsel for Mr. Rajah and Mr.  
22 Najih, Linda S. Wernery of counsel for Mr. El  
23 Zahr, David V. Bernal of counsel for Mr.  
24 Benjelloun) for Respondents.

25  
26 Lynn M. Kelly, Executive Director, Justice  
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28 York, New York (Linda Marie Kenepaske, Alice  
29 Morey, and Myriam Jaidi on the brief) for  
30 Amicus Curiae New York City Bar Association.

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34 WINTER, Circuit Judge:

35 Mohamed Rajah, Said Najih, Saade Benjelloun, and Samer Emile  
36 El Zahr petition for review of deportation orders issued by the



1 Board of Immigration Appeals ("BIA").<sup>1</sup> Each petitioner responded  
2 to a Special Call-In Registration Program ("Program"), after the  
3 terrorist attacks of September 11, 2001. The Program required  
4 non-immigrant alien males over the age of 16 from designated  
5 countries to appear for registration and fingerprinting.  
6 Following their registration, each petitioner was placed in  
7 deportation proceedings and ordered deported. They challenge the  
8 deportation orders principally on the grounds that: (i) the  
9 Program lacks statutory authorization; (ii) the Program is  
10 invalid as a matter of administrative law; (iii) the Program  
11 violates equal protection; (iv) evidence obtained during the  
12 Program should be suppressed under the Fourth and Fifth  
13 Amendments; and (v) regulatory violations in the course of the  
14 Program require the vacating of their deportation orders. Two  
15 petitioners make other claims specific to their cases. With the  
16 exception of Rajah, we reject their arguments and deny the  
17 petitions for review for the reasons stated below. We remand  
18 Rajah's case to the BIA on the grounds discussed by Judge  
19 Calabresi, in an opinion filed concurrently with this. See Rajah  
20 v. Mukasey, \_\_\_ F.3d \_\_\_, No. 06-3493-ag (2d Cir. September 23,

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<sup>1</sup>Abdulraqueeb Alqaidaei also petitioned for review of a deportation order and his petition was heard in tandem with the other petitioners. After oral argument, Alqaidaei withdrew his petition for review. Alqaidaei v. Mukasey, No. 06-3494 (2d Cir. Filed July 26, 2006) (dismissed July 25, 2008).



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I. BACKGROUND

After the terrorist attacks of September 11, 2001, the Attorney General instituted the National Security Entry-Exit Registration System ("NSEERS"). NSEERS required the collection of data from aliens upon entry and periodic registration of certain aliens present in the United States. Its purpose was to enhance the monitoring of aliens and the enforcement of immigration laws.<sup>2</sup> The Special Call-In Registration Program was part of NSEERS. It required alien males from certain designated countries who were over the age of 16 and who had not qualified for permanent residence to appear for registration and fingerprinting and to present immigration related documents.<sup>3</sup>

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<sup>2</sup>For a description of the program's original aims, see John Ashcroft, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>.

<sup>3</sup>The outlines of the Program were set forth in an enabling regulation that read:

The Attorney General, by publication of a notice in the Federal Register, also may impose such special registration, fingerprinting, and photographing requirements upon nonimmigrant aliens who are nationals, citizens, or residents of specified countries or territories (or a designated subset of such nationals, citizens, or residents) who have already been admitted to the United States or who are



1 Individuals who did not appear for required registrations were  
2 threatened with possible arrest. The affected countries were  
3 Muslim majority states and North Korea. The Program did not  
4 include citizens of these countries who were women, were under  
5 the age of 16, or were qualified to be permanent residents in  
6 this country. For those individuals whose immigration status was  
7 in order, registration generally had no special consequences.  
8 But for those individuals, such as the petitioners, whose  
9 immigration status was not in order, registration led to

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otherwise in the United States.

8 C.F.R. 264.1(f)(4) (2003). See also Registration & Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584 (Dep't of Justice Aug. 12, 2002) (final rule) (promulgating the final enabling rule). The specific groups of aliens subject to registration were designated in a series of additional notices. See, e.g., Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766 (Dep't of Justice Nov. 6, 2002) (notice). In all, aliens from 25 countries were subject to registration. The first group included Iran, Iraq, Libya, Sudan and Syria. Id. The second group included Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526 (Dep't of Justice Nov. 22, 2002) (notice). The third group included Pakistan and Saudi Arabia. Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642 (Dep't of Justice Dec. 18, 2002) (notice). The fourth group included Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2,363 (Dep't of Justice Jan. 16, 2003) (notice).



1 deportation proceedings.<sup>4</sup>  
2 Although the experiences of the petitioners varied to some  
3 extent, they followed the same general pattern, deviations from  
4 which will be noted where relevant. Their experiences typically  
5 consisted of a registration day and an interrogation day.<sup>5</sup> On  
6 their registration days, petitioners appeared at the then-INS<sup>6</sup>  
7 facility at 26 Federal Plaza in New York City, filled out a few  
8 forms, and presented documentation or information, such as  
9 passports, immigration forms, or alien registration numbers. At  
10 the end of the registration day, they were instructed to return  
11 on a subsequent day on which they were interrogated. On their  
12 interrogation days, the petitioners were generally taken to the

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<sup>4</sup>See Department of Homeland Security, Fact Sheet; Changes to National Security Entry/Exit Registration System (NSEERS) (2003), [http://www.dhs.gov/xnews/releases/press\\_release\\_0305.shtm](http://www.dhs.gov/xnews/releases/press_release_0305.shtm) (last visited June 30, 2008).

<sup>5</sup>Benjelloun was registered on April 24, 2003, and interrogated on June 17, 2003. Najih was registered on April 24, 2003, and interrogated on June 4, 2003. Rajah was registered on January 9, 2003, and interrogated on April 22, 2003. The only exception to the two-day rule is El Zahr, who was both registered and interrogated on September 5, 2003.

<sup>6</sup>The Immigration and Naturalization Service became part of the Department of Homeland Security on March 1, 2003. Press Release, United States Department of Homeland Security, Department of Homeland Security Facts for March 1, 2003 (Feb. 28, 2003, available at [http://www.dhs.gov/xnews/releases/press\\_release\\_0100.shtm](http://www.dhs.gov/xnews/releases/press_release_0100.shtm)).



1 10th floor of 26 Federal Plaza and subjected to questioning.  
2 This questioning was frequently preceded by a pat-down search and  
3 often occurred in a closed room while the petitioners were seated  
4 on a chair that had shackles attached, although none of the  
5 petitioners were shackled. At some point, petitioners received a  
6 Notice to Appear for removal proceedings. Some were then placed  
7 in holding cells for a period of time.

8 In the removal proceedings, the petitioners argued, inter  
9 alia, that the Program was not authorized by statute and was  
10 unconstitutional. They also contended that their hearings should  
11 be terminated without prejudice to renewal due to various alleged  
12 regulatory violations committed by the then-INS, discussed in  
13 detail infra. Immigration Judges ("IJs") declined to rule on the  
14 ultra vires and constitutional claims as outside their  
15 adjudicatory powers. Although the IJs' opinions differed in some  
16 respects, they also held that any regulatory violations that may  
17 have occurred did not require termination of the proceedings or  
18 suppression of any crucial evidence. The IJs then found the  
19 petitioners removable based on the information presented in the  
20 course of their registration and interrogation. The BIA upheld  
21 the IJs' decisions in their essential respects.

22 These petitions for review followed.

23 II. DISCUSSION

24 Petitioners mount a variety of legal challenges to the



1 Program and the deportation proceedings brought against them.  
2 However, no claim is made that they were, or are, in the country  
3 legally or entitled to asylum or withholding of removal; it is  
4 therefore undisputed that they are deportable.

5 Their challenges, then, claim that their deportation  
6 proceedings were so tainted by the Program and associated events  
7 that we should, for prophylactic purposes, either prevent their  
8 deportation altogether, suppress evidence of their deportability  
9 collected in the course of the Program, or require that the  
10 deportation proceedings be rerun.

11 a) Legality of the Program

12 1) Statutory Authorization

13 Petitioners argue that the Attorney General had no statutory  
14 authority to enact the Program. If the Program was in fact  
15 simply rogue conduct by immigration authorities, some remedy, the  
16 dimensions of which we need not address, would be called for.  
17 Cf. Montilla v. INS, 926 F.2d 162, 169 (2d Cir. 1991) (noting  
18 that agencies that exhibit carelessness in complying with their  
19 own rules undermine public confidence). However, statutory  
20 authorization for the Program is abundant.

21 Title 8 U.S.C. § 1303(a)<sup>7</sup> grants the Attorney General broad

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<sup>7</sup>8 U.S.C. § 1303(a) reads, in its entirety:  
Notwithstanding the provisions of sections  
1301 and 1302 of this title, the Attorney  
General is authorized to prescribe special



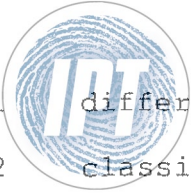


1 power to prescribe regulations for "registration and  
2 fingerprinting" of certain classes of aliens. Among the  
3 enumerated classes of aliens subject to such rules is a catch-all  
4 provision including "aliens of any other class not lawfully  
5 admitted to the United States for permanent residence." 8 U.S.C.  
6 § 1303(a). This language facially authorizes the Program, which  
7 prescribed registration for a class of aliens who had not  
8 qualified for permanent residency. See Kandamar v. Gonzales, 464  
9 F.3d 65, 73 (1st Cir. 2006) (noting that 8 U.S.C. §§ 1305 and  
10 1303(a) "give[] the Attorney General great latitude in setting  
11 special registration requirements")

12 Petitioners note that the Program classifies on the basis of  
13 nationality. They then argue that, because national-origin  
14 classifications are often disfavored, see, e.g., 42 U.S.C. §  
15 2000a(a) (forbidding discrimination in public accommodations  
16 based on national origin), Section 1303(a) should be construed to  
17 avoid such classifications. However, immigration regulation

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regulations and forms for the registration and fingerprinting of (1) alien crewmen, (2) holders of border-crossing identification cards, (3) aliens confined in institutions within the United States, (4) aliens under order of removal, (5) aliens who are or have been on criminal probation or criminal parole within the United States, and (6) aliens of any other class not lawfully admitted to the United States for permanent residence.



1 differs fundamentally from the legal contexts relied upon because  
2 classifications on the basis of nationality are frequently  
3 unavoidable in immigration matters. See, e.g., Romero v. INS,  
4 399 F.3d 109, 112 (2d Cir. 2005) (discussing and upholding  
5 NACARA, a statute granting preferential immigration treatment to  
6 Cubans and Nicaraguans); Narenji v. Civiletti, 617 F.2d 745 (D.C.  
7 Cir. 1979) (discussing and upholding registration requirements  
8 targeting Iranian nationals). Given the importance to  
9 immigration law of, inter alia, national citizenship, passports,  
10 treaties, and relations between nations, the use of such  
11 classifications is commonplace and almost inevitable. Indeed,  
12 the very concept of "alien" is a nationality-based  
13 classification.

14 In arguing for their proposed construction of the statute,  
15 petitioners rely upon the cannon of ejusdem generis. Ejusdem  
16 generis is "an aid to statutory construction problems suggesting  
17 that where general words follow a specific enumeration of persons  
18 or things, the general words should be limited to persons or  
19 things similar to those specifically enumerated." United States  
20 v. Turkette, 452 U.S. 576, 581 (1981). Petitioners assert that,  
21 because the other categories in Section 1303(a) are all  
22 immigration statuses or factors that could affect immigration  
23 status, see Note 6, supra, the catch-all provision should not be  
24 interpreted to authorize nationality-based distinctions.



1 Ejusdem generis has no relevance here. The list of specific  
2 classes contained in Section 1303(a) contains a motley assortment  
3 of groups, including alien crewmen and aliens on parole or  
4 probation, so diverse that it provides no aid in construing the  
5 “any other class” language. Therefore, we follow Section  
6 1303(a)’s clear language that allows nationality-based  
7 classifications. See Narenji, 617 F.2d at 747 (finding that 8  
8 U.S.C. § 1303(a) allows the Attorney General to draw immigration  
9 distinctions based on nationality).

10 Petitioners also assert that, because Congress has proposed  
11 enforcement methods specifically targeted at terrorism, Section  
12 1303(a) should not be interpreted to authorize the Program.  
13 However, there is no tension whatsoever between Congress passing  
14 specific laws targeting terrorism and the Attorney General using  
15 broad powers granted under existing statutes toward the same  
16 end.

17 A second statute authorizing the Program is Section 1305(b).<sup>8</sup>

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<sup>8</sup>The relevant portion of 8 U.S.C. § 1305 reads:

(b) Current address of natives of any  
one or more foreign states

The Attorney General may in his  
discretion, upon ten days notice,  
require the natives of any one or more  
foreign states, or any class or group  
thereof, who are within the United  
States and who are required to be  
registered under this subchapter, to  
notify the Attorney General of their



1 It empowers the Attorney General to require "the natives of any  
2 one or more foreign states, or any class or group thereof . . .  
3 to notify the Attorney General of their current addresses and  
4 furnish such additional information as the Attorney General may  
5 require." This reference to "additional information" is a broad  
6 grant of power and, on its face, authorizes the collection of  
7 information contemplated by the Program.<sup>9</sup> See Kandamar, 464 F.3d  
8 at 73. The petitioners attempt to restrict the reach of this  
9 statute to information about addresses, noting that the title of  
10 the subsection refers only to addresses. However, "the title of  
11 a statute . . . cannot limit the plain meaning of the text."  
12 Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1988)

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current addresses and furnish such  
additional information as the Attorney  
General may require.

The fact that the statute applies only to aliens "required to be registered under this subchapter" does not insulate the petitioners from its reach. Title 8 U.S.C. § 1302 is part of the same subchapter as the instant statute and requires all aliens over 14 years of age in the United States for more than 30 days to be registered and fingerprinted, absent a waiver from the Attorney General. 8 U.S.C. § 1302. The petitioners are therefore "required to be registered under this subchapter," as all those within the reach of the Program are over the age of 14.

<sup>9</sup>It is possible that the statute might be read not to authorize the gathering of information whose collection, in itself, might raise constitutional questions. But none of what was sought under the Program before us is of that sort. As a result, we express no view on such hypothetical fact gathering.



1 (internal quotation marks omitted). Accordingly, 8 U.S.C. §  
2 1305(b) also provides authority for the Program.

3 2) Administrative Law Challenges

4 Petitioners next claim that the Program was invalidly  
5 promulgated because the relevant regulations were not subject to  
6 the required public notice and comment. The Program was  
7 implemented in two stages. In the first stage, the Attorney  
8 General promulgated a general enabling regulation that set forth  
9 a framework for alien registration but did not designate specific  
10 groups to be registered ("Enabling Regulation"). See 8 C.F.R. §  
11 264.1(f)(4). The Enabling Regulation was subjected to notice and  
12 comment procedures. See Registration & Monitoring of Certain  
13 Nonimmigrants, 67 Fed. Reg. 40,581, 40,582 (Dep't of Justice June  
14 13, 2002) (proposed rule). In the second stage, the Attorney  
15 General issued notices specifying the groups to be registered  
16 ("Group Specifications"). See, e.g., Registration of Certain  
17 Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg.  
18 67,766 (Dep't of Justice Nov. 6, 2002) (notice). The Group  
19 Specifications designated, inter alia, the countries whose  
20 nationals were subject to the Program. Promulgation of the Group  
21 Specifications occurred without notice and comment, which in the  
22 petitioners' view, was required by the Administrative Procedure  
23 Act ("APA"). See 5 U.S.C. § 553 (describing the APA's notice and  
24 comment requirement). We disagree.



1 Although the Group Specifications would ordinarily be  
2 subject to notice and comment procedures, these procedures were  
3 not required here because the Group Specifications fell within  
4 the APA's foreign affairs exemption. The APA provides that  
5 notice and comment procedures do not apply to regulations  
6 involving "a military or foreign affairs function of the United  
7 States." 5 U.S.C. § 553(a)(1). "For the exception to apply, the  
8 public rulemaking provisions should provoke definitely  
9 undesirable international consequences." Zhang v. Slattery, 55  
10 F.3d 732, 744 (2d Cir. 1995) (citation omitted), superceded by  
11 statute on other grounds, by 8 U.S.C. § 1101(a)(42).

12 There are at least three definitely undesirable  
13 international consequences that would follow from notice and  
14 comment rulemaking. First, sensitive foreign intelligence might  
15 be revealed in the course of explaining why some of a particular  
16 nation's citizens are regarded as a threat. Second, relations  
17 with other countries might be impaired if the government were to  
18 conduct and resolve a public debate over why some citizens of  
19 particular countries were a potential danger to our security.  
20 Third, the process would be slow and cumbersome, diminishing our  
21 ability to collect intelligence regarding, and enhance defenses  
22 in anticipation of, a potential attack by foreign terrorists.

23 Petitioners advance two principal counter-arguments. First,  
24 they assert that the foreign affairs exception is inapplicable



1 because the regulation itself did not contain a statement of the  
2 undesirable international consequences flowing from the  
3 application of notice and comment review. There is, however, no  
4 requirement that the rule itself state the undesirable  
5 consequences. Cf. Jean v. Nelson, 711 F.2d 1455, 1478 (11th Cir.  
6 1983) (looking to the trial record to determine whether there  
7 were any definitively negative international consequences that  
8 would flow from notice and comment rulemaking), vacated and rev'd  
9 on other grounds, 727 F.2d 957 (1984) (en banc). This is  
10 particularly so when the consequences are seemingly as evident as  
11 they are in this case.

12         Petitioners also appear to assert that there is insufficient  
13 evidence that the group specification was tied to the President's  
14 foreign policy. Yassini v. Crosland, 618 F.2d 1356, 1361 (9th  
15 Cir. 1980) (upholding immigration restrictions on Iranian  
16 nationals during the hostage crisis after becoming satisfied that  
17 the then-INS Commissioner was acting to further policies  
18 expressed in a presidential directive and that the restrictions  
19 were enacted after consultation with the Attorney General -- who  
20 had in turn consulted the President about United States policy  
21 toward Iran). There is, however, no burden of proof to be  
22 carried with regard to a connection to the President's conduct of  
23 foreign affairs where the relevance to international relations is  
24 facially plain, and no presumption that a cabinet officer, such



1 as the Attorney General, is acting as a rogue until proven  
2 otherwise. See Malek-Marzban v. INS, 653 F.2d 113, 115-16 (4th  
3 Cir. 1981) (upholding a similar INS action, reasoning that the  
4 foreign relations link was "obvious" and quoting the INS's own  
5 explanation of its activities that was published in the Federal  
6 Register); see also Nademi v. INS, 679 F.2d 811, 814 (10th Cir.  
7 1982). Moreover, the notice announcing the enabling regulation  
8 stated that, in deciding which countries to designate for  
9 registration, the Attorney General would confer with the  
10 Secretary of State, an officer who is well placed to be aware of  
11 the President's policy and to ensure that other officers conform  
12 to it.<sup>10</sup> Registration & Monitoring of Certain Nonimmigrants, 67  
13 Fed. Reg. 52,584, at 52,589 (Dep't of Justice Aug. 12, 2002)  
14 (final rule).

### 15 3) Equal Protection

16 Petitioners also argue that their deportation orders violate  
17 their rights under the Equal Protection component of the Fifth  
18 Amendment's Due Process Clause because the immigration laws were

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<sup>10</sup>The notice stated, "The listing of countries from which nonimmigrant aliens will be subject to special registration is determined by the Attorney General in consultation with the Secretary of State, thereby ensuring that foreign policy implications will be considered when evaluating the possible designation of any specific country." Registration & Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, at 52,589 (Dep't of Justice Aug. 12, 2002) (final rule).





1 selectively enforced against them based on their religion,  
2 ethnicity, gender, and race. See United States v. Armstrong, 517  
3 U.S. 456, 464 (1996) (noting that selective prosecution claims  
4 are cognizable under the Equal Protection component of the Fifth  
5 Amendment's Due Process Clause); see also Bolling v. Sharpe, 347  
6 U.S. 497, 499 (1954) (noting that "discrimination may be so  
7 unjustifiable as to be violative of [the] due process [clause of  
8 the Fifth Amendment.]") We agree that a selective prosecution  
9 based on an animus of that kind would call for some remedy. Cf.  
10 Zahra v. Town of Southold, 48 F.3d 674, 683 (2d Cir. 1995)  
11 (stating the general grounds on which selective enforcement  
12 claims may be sustained). In that regard, the Supreme Court has  
13 "not rule[d] out the possibility of a rare case in which the  
14 alleged basis of discrimination is so outrageous" that a  
15 selective enforcement challenge can be allowed in a deportation  
16 hearing despite the jurisdiction-stripping provisions of 8 U.S.C.  
17 § 1252(g). Reno v. American-Arab Anti-Discrimination Comm., 525  
18 U.S. 471, 491 (1999); see also 8 U.S.C. § 1252(g) (providing that  
19 "no court shall have jurisdiction to hear any cause . . . on  
20 behalf of any alien arising from the decision . . . by the  
21 Attorney General to commence proceedings [or] adjudicate cases  
22 . . . against any alien under this chapter.").

23 Courts "have long recognized the power to expel or exclude  
24 aliens as a fundamental sovereign attribute exercised by the



1 Government's political departments largely immune from judicial  
2 control." Fiallo v. Bell, 430 U.S. 787, 792 (1977) (internal  
3 quotation marks omitted). Indeed, "[t]he most exacting level of  
4 scrutiny that we will impose on immigration legislation is  
5 rational basis review. Under this review, legislation will  
6 survive a constitutional challenge so long as there is a facially  
7 legitimate and bona fide reason for the law." Romero v. INS, 399  
8 F.3d 109, 111 (2d Cir. 2005) (internal quotation marks omitted).  
9 "Distinctions on the basis of nationality may be drawn in the  
10 immigration field by the Congress or the Executive. . . . [and  
11 must be upheld] [s]o long as [they] are not wholly irrational  
12 . . . ." Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir.  
13 1979) (citations omitted).

14 No circumstance calling for a remedy is present here. There  
15 was a rational national security basis for the Program. The  
16 terrorist attacks on September 11, 2001 were facilitated by the  
17 lax enforcement of immigration laws. See Nat'l Comm'n on  
18 Terrorist Attacks upon the U.S., 9/11 Commission Report 384  
19 (2004). The Program was designed to monitor more closely aliens  
20 from certain countries selected on the basis of national security  
21 criteria. See Registration & Monitoring of Certain  
22 Nonimmigrants, 67 Fed. Reg. 52,584 (Dep't of Justice Aug. 12,  
23 2002) (final rule). The individuals subject to special  
24 registration under the Program were neither citizens nor even



1 lawful permanent residents. They were asked to provide  
2 information regarding their immigration status and other matters  
3 relevant to national security. They were not held in custody for  
4 appreciable lengths of time. Those whose immigration status was  
5 not valid were subject to generally applicable legal proceedings  
6 to enforce pre-existing immigration laws. In sum, the Program  
7 was a plainly rational attempt to enhance national security. We  
8 therefore join every circuit that has considered the issue in  
9 concluding that the Program does not violate Equal Protection  
10 guarantees. See Kandamar v. Gonzales, 464 F.3d 65, 73-74 (1st  
11 Cir. 2006); Ali v. Gonzales, 440 F.3d 678, 681 n.4 (5th Cir.  
12 2006); Zafar v. U.S. Att'y Gen., 461 F.3d 1357, 1367 (11th Cir.  
13 2006); Shaybob v. Att'y Gen., 189 Fed. Appx. 127, 129-30 (3d Cir.  
14 2006); Hadayat v. Gonzales, 458 F.3d 659 (7th Cir. 2006) (finding  
15 that the court had no jurisdiction to review the claim); Malik v.  
16 Gonzales, 2007 WL 98115 (4th Cir. 2007).

17 To be sure, the Program did select countries that were, with  
18 the exception of North Korea, predominantly Muslim. Petitioners  
19 argue, without evidence other than that fact, that the Program  
20 was motivated by an improper animus toward Muslims. However, one  
21 major threat of terrorist attacks comes from radical Islamic  
22 groups. The September 11 attacks were facilitated by violations  
23 of immigration laws by aliens from predominantly Muslim nations.  
24 The Program was clearly tailored to those facts. It excluded



1 males under 16 and females on the ground that military age men  
2 are a greater security risk. Muslims from non-specified  
3 countries were not subject to registration. Aliens from the  
4 designated countries who were qualified to be permanent residents  
5 in the United States were exempted whether or not they were  
6 Muslims. The program did not target only Muslims: non-Muslims  
7 from the designated countries were subject to registration.  
8 There is therefore no basis for petitioners' claim.

9         Petitioners also challenge the Program based on their  
10 perception of its effectiveness and wisdom. They argue, among  
11 other things, that it has not succeeded in catching many  
12 terrorists. However, we have no way of knowing whether the  
13 Program's enhanced monitoring of aliens has disrupted or deterred  
14 attacks. In any event, such a consideration is irrelevant  
15 because an ex ante rather than ex post assessment of the Program  
16 is required under the rational basis test. Sammon v. New Jersey  
17 Bd. of Med. Exam'rs, 66 F.3d 639, 645 (3d Cir. 1995) ("If the  
18 legislature [predicts that a statute] will serve the desired  
19 goal, the court is not authorized to determine whether . . . the  
20 desired goal has been served. The sole permitted inquiry is  
21 whether the legislature rationally might have believed . . . that  
22 the desired end would be served.") (emphasis added). Because we  
23 find that there was no circumstance present in the design and  
24 implementation of the Program calling for a remedy, we conclude



1 that the petitioners' selective enforcement under 8 U.S.C. §  
2 1252(g) is unavailing. See American-Arab Anti-Discrimination  
3 Comm., 525 U.S. at 490.

4 4) Fourth and Fifth Amendments

5 Petitioners claim that any evidence of their deportability  
6 obtained during the Program must be suppressed because it was the  
7 product of violations of the Fourth and Fifth Amendments. There  
8 is no question that compliance with the Program was mandatory and  
9 that petitioners were required to produce documents and answer  
10 questions relevant to their immigration status. There is also no  
11 question that the documents produced and answers given provided  
12 the evidence on which their deportation was ordered.

13 "In order to prove that an alien is subject to removal for  
14 overstaying his visa, DHS need only show that the alien was  
15 admitted as a nonimmigrant for a temporary period, that the  
16 period has elapsed, and that the nonimmigrant has not departed."  
17 Zerrei v. Gonzales, 471 F.3d 342, 345 (2d Cir. 2006) (internal  
18 quotation marks and ellipsis omitted). In non-visa-overstay  
19 cases, "[t]he INS must show only identity and alienage; the  
20 burden then shifts to the respondent to prove the time, place and  
21 manner of his entry." INS v. Lopez-Mendoza, 468 U.S. 1032, 1039  
22 (1984); see also 8 U.S.C. § 1361. As noted, the information  
23 collected during the registration and interrogation phases showed



1 that each petitioner was subject to removal, and the suppression  
2 of that evidence would undermine the existing deportation orders.

3 Aliens are generally subject to registration requirements as  
4 a condition of obtaining a visa and entering the country and,  
5 therefore, of remaining in it. See 8 U.S.C. § 1201(b) (requiring  
6 registration as part of most visa applications); 8 U.S.C. §  
7 1304(d) (stating that all aliens who are required to register  
8 will be issued proof of registration). Aliens are also required  
9 to maintain and produce required documents regarding their  
10 status. See Kandamar, 464 F.3d at 74 (“Certainly, there can be  
11 little doubt about DHS’s authority to inspect and photograph  
12 . . . passport[s] and other documentation.”). Most non-immigrant  
13 aliens are issued I-94s<sup>11</sup> on their arrival in the United States,  
14 are required to keep their I-94s with them at all times, and are  
15 subject to criminal penalties for failing to do so. See 8 U.S.C.  
16 § 1304(e); United States v. Abrams, 427 F.2d 86, 91 (2d Cir.  
17 1970). The obvious purpose of these requirements is to ensure

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<sup>11</sup>The I-94 serves as proof that the alien has validly entered the country, see Department of Customs and Border Protection, FAQs on the Arrival-Departure Record (I-94 Form) & Crewman Landing Permit (I-95 Form) (Feb. 25, 2008), [http://www.cbp.gov/xp/cgov/travel/id\\_visa/i-94\\_instructions/arrival\\_departure\\_record.xml](http://www.cbp.gov/xp/cgov/travel/id_visa/i-94_instructions/arrival_departure_record.xml), has complied with certain registration requirements, see 8 C.F.R. § 264.1(a) (noting that the I-94 is proof of registration), and has a right to remain for a set time period.



1 that an alien's I-94 will be available for inspection by  
2 immigration enforcement officials under appropriate  
3 circumstances. The statutory framework also contemplates that  
4 aliens will possess valid passports while in the United States.  
5 As a condition of admission, entering non-immigrant aliens must  
6 have a passport valid for six months after the end date of their  
7 authorized stay. See 8 U.S.C. § 1182(a)(7)(B)(i)(I-II). As a  
8 result, each of the petitioners was obligated to provide just  
9 such evidence; none had the right to remain silent with regard to  
10 such matters; and none suffered a constitutional violation.

11 The Program was designed in large part to determine by an  
12 updated registration the status of the specified aliens and was  
13 clearly valid for reasons discussed above. The aliens in  
14 question had no right to remain in the country while not  
15 cooperating in the Program. They, therefore, had no right to  
16 remain silent or to decline to provide information relevant to  
17 immigration status.

18 In immigration proceedings, suppression of evidence is  
19 available only under limited circumstances under either the  
20 Fourth or Fifth Amendment. With regard to Fourth Amendment  
21 violations, suppression is warranted only when the evidence  
22 indicates "either (a) that an egregious violation that was  
23 fundamentally unfair has occurred, or (b) that the violation --  
24 regardless of its egregiousness or unfairness -- undermine[s] the



1 reliability of the evidence in dispute.” Almeida-Amaral v.  
2 Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).

3 In the present matter, there was no Fourth Amendment  
4 violation, much less one that was egregious or that undermined  
5 the probative value of evidence collected. The Fourth Amendment  
6 does provide protection against random or gratuitous questioning  
7 related to an individual’s immigration status. For example,  
8 government agents may not stop a person for questioning regarding  
9 his citizenship status without a reasonable suspicion of  
10 alienage. United States v. Brignoni-Ponce, 422 U.S. 873, 884  
11 (1975); see also id. at 884 n.9 (reserving decision on whether  
12 that suspicion must be of illegal alienage or may be of mere  
13 alienage). However, the government does not violate the Fourth  
14 Amendment by obtaining documents or statements in the course of  
15 an alien’s compliance with a statutorily authorized registration  
16 program.

17 An alien’s presence in the country is conditioned upon  
18 compliance with such requirements. Immigration laws, difficult  
19 to enforce by their very nature, would become completely  
20 unenforceable if an alien, once in the country, could then refuse  
21 all compliance with requests for information relevant to  
22 immigration status from immigration authorities. Moreover,  
23 petitioners make no claim that any alleged Fourth Amendment  
24 violation undermined the probative value of documents or





1 statements taken from them.

2 Nor does the Fifth Amendment provide any grounds to suppress  
3 evidence collected from the petitioners on their interview days.  
4 We have noted that the Fifth Amendment protects aliens in  
5 deportation proceedings from procedures that transgress the  
6 fundamental notions of "fair play" that animate the Fifth  
7 Amendment. Montilla v. INS, 926 F.2d 162, 164 (2d Cir. 1991).

8 However, the Fifth Amendment does not protect an alien from  
9 having to provide information relevant to the registration that  
10 is a condition of their presence in the country. This  
11 information includes passports, I-94s, or other documents or oral  
12 statements regarding their immigration status.

13 The Fifth Amendment protects not only statements that are  
14 themselves evidence of criminal violations, but also "those  
15 [statements] which would furnish a link in the chain of evidence  
16 needed to prosecute the claimant for a federal crime." United  
17 States v. Hubbell, 530 U.S. 27, 38 (2000). Moreover, in limited  
18 circumstances, the act of producing a document can be  
19 testimonial, as when the act of producing the document is  
20 evidence that the document exists. See In re Grand Jury Subpoena  
21 Duces Tecum Dated Oct. 29, 1992, 1 F.3d 87, 93 (2d Cir. 1993).  
22 Forcing an alien to perform the act of producing a foreign  
23 passport, I-94, or statement regarding immigration status at  
24 least arguably forces the alien to admit alienage and thus



1 provide possible evidence of one or more crimes involving  
2 immigration violations. See Lopez-Mendoza, 468 U.S. at 1038  
3 (collecting statutes); see also 8 U.S.C. § 1302 (failure to  
4 register unless exempted by the attorney general); 8 U.S.C. §  
5 1306 (willful failure to register); 8 U.S.C. § 1325 (evading  
6 inspection). Therefore, an alien who is not in legal status  
7 could be exposed to further investigation and subsequent  
8 prosecution by producing a foreign passport, I-94, or statements  
9 regarding immigration status.

10         However, the Fifth Amendment does not protect the  
11 petitioners either from being forced to turn over their passports  
12 and I-94s or to answer questions related to their immigration  
13 status. The Fifth Amendment is not an impediment to the  
14 enforcement of a valid civil regulatory regime. This is so for  
15 three specific reasons. First, the Fifth Amendment's act of  
16 production privilege does not cover records that are required to  
17 be kept pursuant to a civil regulatory regime. In re Two Grand  
18 Jury Subpoenae Duces Tecum Dated Aug. 21, 1985, 793 F.2d 69, 73  
19 (2d Cir. 1986). The documents at issue here are such "required  
20 records." A central rationale for the required records rule is  
21 that "if a person conducts an activity in which record-keeping is  
22 required[,] . . . he may be deemed to have waived his privilege  
23 with respect to the act of production -- at least in cases in  
24 which there is a nexus between the government's production



1 request and the purpose of the record-keeping requirement." Id.  
2 The petitioners in our case voluntarily entered this country on  
3 the condition of maintaining the required documentation and  
4 thereby waived any right they might otherwise have had to refuse  
5 to produce those documents in response to immigration inquiries  
6 such as the Program. Just as a taxpayer's W-2 forms are required  
7 records not subject to the Fifth Amendment because they are a  
8 mandatory part of a civil regulatory regime, so too are the  
9 passports and I-94s at issue in the current case. Cf. In re Doe,  
10 711 F.2d 1187, 1191 (2d Cir. 1983).

11 Second, the Program was a valid reporting requirement.  
12 Notwithstanding the protections of the Fifth Amendment, the  
13 government may require disclosure of information where the area  
14 of inquiry is regulatory rather than criminal, where the field  
15 subject to the disclosure obligation is not permeated with  
16 criminal statutes, and where there is a substantial non-  
17 prosecutorial interest served by the reporting regime. United  
18 States v. Dichne, 612 F.2d 632, 639-41 (2d Cir. 1979) (upholding  
19 the Bank Secrecy Act, which required reporting the transportation  
20 of more than \$5,000 into or out of the United States). All of  
21 these criteria are satisfied by the Program. Immigration law is  
22 generally regulatory rather than criminal. Indeed, deportation  
23 hearings are civil proceedings. INS v. Lopez-Mendoza, 468 U.S.  
24 1032, 1038 (1984). To be sure, there are some crimes related to



1 immigration violations. But the level of criminal regulation in  
2 immigration matters is far less, and almost of a different order  
3 from that which governs those areas where reporting requirements  
4 have been struck down. See Dichne, 612 F.2d at 640 (noting that  
5 reporting requirements invalidated by the Supreme Court generally  
6 required disclosure of "information which would almost  
7 necessarily provide the basis for criminal proceedings  
8 . . . for the very activity that [the subject of the reporting  
9 requirement] was required to disclose."). Finally, the  
10 regulatory -- in contrast to criminal law enforcement -- interest  
11 in the Program is evident because the Program was designed to  
12 further protect national security interests by enhancing  
13 immigration law enforcement. Accordingly, the Program was valid  
14 as a reporting requirement not subject to Fifth Amendment  
15 protections.

16 Third, because they were merely a condition on the continued  
17 receipt of an immigration benefit, the statements required by the  
18 program were not compelled for purposes of the Fifth Amendment.  
19 We have held that statements required as a condition of receiving  
20 a government benefit are not protected by the Fifth Amendment  
21 because they are not compelled. See Ciccone v. Sec'y of Dep't of  
22 Health & Human Serv., 861 F.2d 14, 18 (2d Cir. 1988) (holding  
23 that statements required on an application for Social Security  
24 benefits are not compelled and therefore not protected). The



1 statements required under the Program were merely a condition on  
2 the continued receipt of the government benefit of being allowed  
3 to remain in this country. Any alien who did not wish to  
4 register could avoid doing so because the notices requiring  
5 registration applied only to those who remained in the United  
6 States after a certain date. See, e.g., Registration of Certain  
7 Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg.  
8 67,766 (Dep't of Justice Nov. 6, 2002) (notice) (noting that the  
9 reporting requirement applies "only to certain nonimmigrant  
10 aliens from one of the countries designated in this Notice . . .  
11 who will remain until at least December 16, 2002."); Registration  
12 of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed.  
13 Reg. 70,526 (Dep't of Justice Nov. 22, 2002) (notice);  
14 Registration of Certain Nonimmigrant Aliens from Designated  
15 Countries, 67 Fed. Reg. 77,642 (Dep't of Justice Dec. 18, 2002)  
16 (notice); and Registration of Certain Nonimmigrant Aliens from  
17 Designated Countries, 68 Fed. Reg. 2,363 (Dep't of Justice Jan.  
18 16, 2003). Although those subject to the Program were threatened  
19 with arrest if they failed to register, this fact does not alter  
20 the analysis. Aliens faced arrest only if they enjoyed the  
21 benefit without complying with the condition -- just as someone  
22 illegally receiving Social Security benefits faces arrest.  
23 Although to be sure, the petitioners were illegally present in  
24 the country, they enjoyed the de facto immigration benefit of



1 residing in the United States while under the protection of many  
2 of our laws. For the foregoing reasons, there was therefore no  
3 Fifth Amendment privilege for the petitioners to refuse to  
4 produce immigration documents or to refuse to answer questions  
5 about their immigration status.

6 Of course, the foregoing discussion has no relevance to  
7 government inquiries that are focused on independent crimes only  
8 tangentially related to an alien's immigration status -- for  
9 example, questions about drug sales that might, if a conviction  
10 followed, constitute an aggravated felony requiring an alien's  
11 deportation. See 8 U.S.C. § 1227(a)(2)(A)(iii) (requiring  
12 deportation of aliens who commit aggravated felonies).

13 b) Regulatory Violations and Remedies

14 Petitioners argue that the INS violated a variety of its  
15 regulations in the course of registering, interrogating, and  
16 arresting them. They further argue that the existence and nature  
17 of the regulatory violations call for some remedy. In some  
18 instances, the petitioners did suffer regulatory violations. In  
19 other instances -- for example, where there were insufficient  
20 factual findings made to enable definitive review -- we assume  
21 for purposes of argument that their rights under the regulations  
22 were violated. In no instance, however, was a regulatory  
23 violation of a kind or a degree that would require suppression of  
24 evidence or termination of the proceedings with or without



1 prejudice to renewal. We first discuss the claimed violations.

2 1) Regulatory Violations

3 A) Arrest Without Warrant: 8 C.F.R. § 287.8(c)(2)(ii)

4 Benjelloun, Najih, and El Zahr were arrested without a  
5 warrant on their investigation day. That these arrests were in  
6 violation of 8 C.F.R. § 287.8(c)(2)(ii), which provides that "[a]  
7 warrant of arrest shall be obtained except when the designated  
8 immigration officer has reason to believe that the person is  
9 likely to escape before a warrant can be obtained," is not  
10 seriously disputed. Also, Rajah alleges facts that, if true,  
11 show that he was arrested without a warrant in violation of the  
12 regulations. Although we have no findings on the issue from the  
13 BIA, we may assume that such a violation occurred because it does  
14 not affect our disposition of this matter.

15 B) Failure of Arresting Officer to Identify Himself  
16 and Failure to State Reasons for Arrest: 8 C.F.R.  
17 § 287.8(c)(2)(iii)

18 Title 8 C.F.R. § 287.8(c)(2)(iii) provides:

19 (iii) At the time of the arrest, the  
20 designated immigration officer shall, as  
21 soon as it is practical and safe to do  
22 so:

23  
24 (A) Identify himself or herself as  
25 an immigration officer who is



1 authorized to execute an arrest;  
2 and

3  
4 (B) State that the person is under  
5 arrest and the reason for the  
6 arrest.  
7

8 Three of the petitioners -- Najih, El Zahr, and Benjelloun  
9 -- can either show, or allege facts that, if proven, would show,  
10 a violation of this Section. Najih and El Zahr were not informed  
11 of their arrest until after substantial questioning had occurred,  
12 and Benjelloun may not have been informed of his arrest at all.  
13 Rajah does not argue that his rights under this section were  
14 violated.

15 With respect to Najih, Benjelloun and El Zahr, the IJs found  
16 that this regulation was not violated because the petitioners  
17 received various forms from the INS indicating that they were  
18 being arrested and why they were being arrested at some point on  
19 their interrogation day. However, it may be that it was  
20 "practical and safe" to provide notice once the petitioners  
21 reached the 10th floor of 26 Federal Plaza. The agents were  
22 questioning aliens in the agency's own building in an environment  
23 it controlled. Before being admitted to the 10th floor -- or not  
24 long afterwards -- the petitioners were searched. Absent a  
25 compelling reason to the contrary in a particular case, notice of





1 arrest could easily have been provided shortly after each  
2 petitioner reached the 10th floor rather than after questioning  
3 had continued for some time. We therefore assume the regulation  
4 was violated.

5 C) Post Arrest Exam by Arresting Officer: 8 C.F.R.  
6 287.3(a)

7 Two of the petitioners -- Najih and Rajah -- challenge  
8 rulings by the IJs that their rights under 8 C.F.R. § 287.3(a)  
9 were not violated. Title 8 C.F.R. § 287.3(a) provides:

10 An alien arrested without a warrant of arrest  
11 . . . will be examined by an officer other  
12 than the arresting officer. If no other  
13 qualified officer is readily available and  
14 the taking of the alien before another  
15 officer would entail unnecessary delay, the  
16 arresting officer, if the conduct of such  
17 examination is a part of the duties assigned  
18 to him or her, may examine the alien.  
19

20 It is not clear which party bears the burden of showing  
21 whether there was an officer, other than the arresting officer,  
22 available to conduct the examination. Putting the burden on the  
23 agency seems unreasonable. Demonstrating that all officers were  
24 otherwise occupied would require that the agency record in great  
25 detail and contemporaneously the actions of every officer at a  
26 given location during every working period. Putting the burden  
27 on the alien also seems unreasonable. Arrested aliens cannot  
28 learn of the idleness of immigration officers. In any event, we



1 need not determine where the burden lies because we may assume,  
2 for purposes of argument, that this regulation was violated with  
3 respect to all of the petitioners.

4 D) Right to Counsel at Examination: 8 C.F.R. §  
5 292.5(b)

6 Title 8 C.F.R. § 292.5(b) provides that: “[w]henver an  
7 examination is provided for in this chapter, the person involved  
8 shall have the right to be represented by an attorney or  
9 representative . . . .” Although the petitioners allege that  
10 attorneys were not permitted on the 10th floor, none of the  
11 petitioners claims to have brought an attorney to his  
12 examination. El Zahr claims that his Salvation Army caseworker  
13 was not permitted to accompany him to the 10th floor. Even if  
14 true, this is not a violation, because she was neither an  
15 attorney nor a “representative” as specified in the regulations.  
16 See 8 C.F.R. 292.1(a).

17 E) Coercion: 8 C.F.R. § 287.8(c)(2)(vii)

18 Title 8 C.F.R. § 287.8(c)(2)(vii) provides that “[t]he use  
19 of threats, coercion, or physical abuse by the designated  
20 immigration officer to induce a suspect to waive his or her  
21 rights or to make a statement is prohibited.”

22 Determining when coercion has occurred is a fact-specific



1 inquiry. In re Garcia, 17 I. & N. Dec. 319, 320 (BIA 1980)  
2 (confession was involuntary when an alien was misinformed about  
3 his rights, his attempts to contact his lawyer were interfered  
4 with, and he spent substantial time in custody). Navia-Duran v.  
5 INS, 568 F.2d 803, 810 (1st Cir. 1977) (statements given by an  
6 alien arrested in the middle of the night, actively misinformed  
7 about her rights, and threatened with imminent deportation were  
8 involuntary). Bong Youn Choy v. Barber, 279 F.2d 642, 647 (9th  
9 Cir. 1960) (an alien's statements were involuntary when he was  
10 interrogated for seven hours, lasting into the early morning  
11 hours, and threatened with prosecution for perjury).

12 No petitioner claims to have either waived a right or made a  
13 statement as a result of such coercion. However, the regulatory  
14 language prohibits coercive conduct undertaken with a motive of  
15 seeking to elicit such a waiver or statement whether or not the  
16 conduct succeeds. Because we may assume that unproductive  
17 coercive conduct with the prohibited intent violates the  
18 regulation, it does not affect our disposition of this matter.

19 Each petitioner claims that the entire Program was coercive  
20 -- including both the registration and interrogation days. The  
21 petitioners' experiences during their registration days entailed  
22 nothing coercive for purposes of the regulation. They were asked

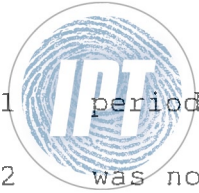


1 questions relevant to the Program by government officers and gave  
2 relevant statements or documents in response to those questions.

3 As discussed infra, they had no right to remain silent or  
4 otherwise be uncooperative. Although the petitioners often may  
5 have endured long waits before their interviews, been interviewed  
6 under threat of criminal sanctions, and sometimes may have been  
7 subject to impolite treatment, none of these conditions rises to  
8 the level of coercion. Impoliteness and slow service are  
9 unfortunate, but not uncommon, characteristics of many ordinary  
10 interactions with government agencies, such as, for example,  
11 registering a motor vehicle. Moreover, the threat of criminal  
12 sanctions for willfully failing to provide required regulatory  
13 information does not make providing the information coercive in  
14 the sense of the regulation any more than laws prohibiting  
15 willful failure to file a tax return make the filing of a return  
16 a product of impermissible coercion.

17 Turning to the interrogation days, neither Benjelloun,  
18 Najih, nor Rajah were coerced. Their questioning did not involve  
19 the kind of circumstances that prior courts have found coercive,  
20 such as marathon questioning or misinformation as to their  
21 rights.

22 El Zahr's interrogation lasted seven hours but was  
23 interrupted twice when he was put in a cell, each time for short



1 periods of time. For much of the time he was interrogated, he  
2 was not told why the interrogation was taking place. He was not  
3 explicitly threatened or given misinformation about his rights.  
4 The IJ found the length of the interrogation to be coercive.

## 5 2. Remedies

6 We may, therefore, assume that significant regulatory  
7 violations took place with regard to each of the petitioners  
8 during the interrogation/arrest phase. We turn now to the  
9 possible remedies for such violations: (i) invalidation of the  
10 deportation orders with prejudice; (ii) suppression of all  
11 evidence obtained during the registration and interrogation  
12 phases; and (iii) terminating the deportation proceedings without  
13 prejudice to the starting of new deportation proceedings.

### 14 A) Invalidation of the Deportation Orders with 15 Prejudice

16 We may assume, without deciding, that a regulatory violation  
17 or violations so egregious as to shock the conscience would call  
18 for invalidation of the deportation orders with prejudice to the  
19 renewal of deportation proceedings against a petitioner whose  
20 rights were violated. Cf. Almeida-Amaral v. Gonzales, 461 F.3d  
21 231, 234 (2d Cir. 2006) (authorizing exclusion of evidence for,  
22 inter alia, egregious Fourth Amendment violations). By way of



1 contrast, conduct of a less culpable nature would not suffice to  
2 justify the draconian remedy of permanently preventing the  
3 deportation of an otherwise deportable alien.

4 None of the violations here approached such a level of  
5 egregiousness. Warrantless arrests were made, but, when made,  
6 there was a powerful showing of probable cause -- in fact,  
7 conclusive evidence of deportability. The failure to inform some  
8 petitioners of their arrest and reasons for it was entirely  
9 harmless, and the interrogation of El Zahr, while undoubtedly  
10 unpleasant, did not rise beyond the level of being long and  
11 tiresome.

12 B) Suppression of Evidence

13 As noted earlier, we have held that suppression of evidence  
14 in immigration proceedings is warranted when an egregious or  
15 fundamentally unfair violation of applicable law occurred or when  
16 a violation of applicable law undermines the reliability of the  
17 evidence in question. See Almeida-Amaral, 461 F.3d at 234.  
18 Again, none of the regulatory violations here were egregious or  
19 fundamentally unfair or impaired the reliability of the evidence  
20 of petitioners' deportability.

21 The BIA's jurisprudence may differ somewhat. Under its  
22 caselaw, for regulatory violations not impacting fundamental  
23 rights, suppression is generally only available when (i) the



1 regulation was for the benefit of the alien, and (ii) the  
2 violation prejudiced the alien. In re Garcia-Flores, 17 I. & N.  
3 Dec. 325, 327-28 (BIA 1980). On the record before us, there is  
4 no reason to believe that the BIA failed to properly apply its  
5 own standards.

6 C) Termination Without Prejudice

7 Petitioners argue that their deportation proceedings should  
8 be terminated without prejudice to renewal as a result of the  
9 pre-hearing regulatory violations described above.

10 We have held that regulatory violations occurring *during a*  
11 *deportation hearing* that affect fundamental rights derived from  
12 the Constitution or federal statutes require such termination,  
13 even without a showing of prejudice. Montilla, 926 F.2d at 170  
14 (requiring termination even when the regulatory violation caused  
15 no prejudice); Waldron v. United States, 17 F.3d 511, 518 (2d  
16 Cir. 1993) (clarifying that Montilla applies only to cases  
17 implicating fundamental rights derived from federal statutes or  
18 the Constitution). However, we have never decided whether a non-  
19 egregious, harmless regulatory violation occurring *prior to a*  
20 *hearing* requires termination.

21 We hold that pre-hearing regulatory violations are not  
22 grounds for termination, absent prejudice that may have affected  
23 the outcome of the proceeding, conscience-shocking conduct, or a  
24 deprivation of fundamental rights. With regard to termination,



1 we have sought to strike a balance between protecting the rights  
2 of aliens, deterring government misconduct, and enabling  
3 reasonably efficient law enforcement. See Montilla, 926 F.2d  
4 168-69; Waldron, 17 F.3d at 518. In the case of harmless, non-  
5 egregious, pre-hearing violations, termination would provide no  
6 benefit other than a windfall delay to the deportable alien.  
7 Unlike a violation occurring during a hearing, the alien's second  
8 deportation hearing would be no more fair than, or even different  
9 from, the first. Similarly, there are no societal benefits from  
10 entitling deportable aliens to extend their time in the United  
11 States because of harmless technical violations of regulations in  
12 the pre-hearing phase.

13 With regard to deterrence and efficiency, termination for  
14 pre-hearing regulatory violations would have little deterrent  
15 effect, and the resulting burden on enforcement operations would  
16 be substantial. The enforcement of immigration laws is subject  
17 to significant resource constraints. Forcing the system to  
18 litigate every regulatory dispute, no matter how harmless or  
19 technical, as a routine part of deportation proceedings would  
20 impose a burden of far greater magnitude than any benefit to be  
21 gained.

22 In INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), the Court  
23 denied suppression for routine Fourth Amendment violations in  
24 deportation proceedings because, inter alia, an exclusionary rule





1 would provide little deterrent effect at a great administrative  
2 cost. The Court reasoned, in part, that because only a small  
3 fraction of deportation cases actually resulted in hearings  
4 rather than voluntary departures, any violation would so rarely  
5 harm a case that an exclusionary rule would be unlikely to shape  
6 agents' behavior. Id. at 1044. The Court also noted that  
7 litigating the conduct surrounding an arrest would impose an  
8 intolerable administrative burden on the immigration enforcement  
9 system. Given that officers may arrest several aliens per day,  
10 they "cannot be expected to compile elaborate, contemporaneous,  
11 written reports detailing the circumstances of every arrest."  
12 Id. at 1049. Moreover, deportation hearings, which depend on  
13 simplicity and efficiency, would become immensely complicated if  
14 testimony had to be heard on the detailed circumstances of each  
15 arrest. Id. at 1049.

16 The tradeoffs in our case are similar. Given the dimensions  
17 of the problems in immigration enforcement, arresting officers  
18 cannot be expected even to remember each arrest, much less the  
19 precise details of what happened and what was said. It would  
20 enormously decrease the productivity of such officers to require  
21 them to compile extensive contemporaneous documentation regarding  
22 the details of each investigation and arrest of an alien solely  
23 to rebut allegations of technical, non-prejudicial regulatory  
24 violations made well after their memory of events had faded. Nor



1 would the deterrent effect of a termination-without-prejudice  
2 remedy be potent given the rarity of formal hearings where such  
3 violations would affect an immigration officer's enforcement  
4 record and the prospect that such hearings could simply be re-  
5 run. In short, using termination as a remedy for pre-hearing  
6 violations promises a substantial drain on agency resources with  
7 little gain in immigrants' significant rights under the  
8 regulations.

9         It may be that the Montilla/Waldron rule grants remands  
10 somewhat more liberally for regulatory violations than the rule  
11 that we adopt. But it makes sense to grant remands more  
12 frequently for regulatory violations occurring during a hearing  
13 because such remands impose a far smaller burden on the agency.  
14 For regulatory violations during hearings, there is a trial  
15 transcript documenting the proceedings and little need for  
16 witnesses or additional documentation. Even there, however, we  
17 have limited relief to violations of fundamental rights.

18         Accordingly, we hold that aliens are not entitled to  
19 termination of their proceedings for harmless, non-egregious pre-  
20 hearing regulatory violations. Those are the circumstances  
21 before us, and we, therefore, reject the petitioners' claims for  
22 termination without prejudice.

23 c) Individual Claims

24         Najih and Rajah raise additional claims specific to the



1 facts of their cases. Najih's claims are treated here while  
2 Rajah's claim is discussed in Judge Calabresi's opinion also  
3 issued today.

4 Najih claims that there was insufficient evidence to find  
5 him removable because the IJ relied on documents attached to the  
6 government's brief that were not formally admitted into evidence,  
7 never made him plead to the charge, and never held a formal  
8 evidentiary hearing on his removability. Najih does not argue  
9 that the evidence relied on by the IJ and the BIA was actually  
10 flawed; rather he claims that because of these procedural  
11 defects, no evidence of his removability was ever properly  
12 presented.

13 Though informal, the procedure followed below was not so  
14 erroneous as to merit a remand. With regard to the documents on  
15 which the IJ relied to establish deportability, the BIA found  
16 that the IJ effectively admitted them when he accepted the  
17 government's brief. Najih points to no specific authority  
18 indicating that this procedure is improper. Nor does it appear  
19 to have prejudiced him in any way. The authenticity of the  
20 documents is not challenged, and he had notice that the IJ  
21 believed they were sufficient to "establish a prima facie case of  
22 removability and sustain the charge in the [notice to appear]"  
23 when the IJ ruled on his termination motion. Najih was therefore  
24 on notice that he should raise any issues regarding the documents



1 and failed to do so.

2 With regard to the IJ's failure to make Najih plead, the  
3 regulations provide that "[t]he immigration judge shall require  
4 the respondent to plead to the notice to appear by stating  
5 whether he or she admits or denies the factual allegations and  
6 his or her removability . . . ." 8 C.F.R. § 1240.10(c).  
7 However, no remand is warranted. Najih twice refused to plead,  
8 preferring to press only his motion for termination. This claim  
9 is therefore forfeited.

10 With regard to the holding of an evidentiary hearing, the  
11 regulations state that the IJ "shall receive evidence as to any  
12 unresolved issues, except that no further evidence need be  
13 received as to any facts admitted during the pleading." 8 C.F.R.  
14 § 1240.10(d). Given the presence of the documents attached to  
15 the government's brief, the lack of any dispute about their  
16 authenticity and reliability, and the conclusiveness of the  
17 documents as to Najih's immigration status, there were no  
18 unresolved issues regarding Najih's removability and hence no  
19 need for a hearing. For these reasons, none of Najih's  
20 procedural claims merit a remand.

21 III. CONCLUSION

22 For the foregoing reasons, the petitions for review are  
23 denied with the exception of petitioner Rajah whose case is  
24 remanded according to the opinion by Judge Calabresi.