

Trump Administration Says Deportable Immigrants Can't Go to the Courts — Even if Their First Amendment Rights Are Violated

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IF U.S. IMMIGRATION and Customs Enforcement is trying to silence its most vocal critics by singling them out for deportation among the nearly 1 million people in the United States with final orders of removal, is there any check or remedy for that abuse of power? Is there any court, or indeed, any authority at all outside the executive branch, with the power to protect those activists' First Amendment rights?

No.

That was the position articulated by Justice Department lawyers on Tuesday before a panel of judges on the 2nd Circuit Court of Appeals in New York City. The hearing was meant to determine whether the court should issue a stay preventing ICE from deporting just such a figure, Ravi Ragbir, executive director of the New Sanctuary Coalition of New York City, before he has a chance to assert his constitutional claim in federal court.

Tuesday's hearing in New York was only a small part of an already complex court battle: As The Intercept [reported at the time](#), Ragbir is one of the plaintiffs — along with the New Sanctuary Coalition, four other immigrant rights groups, and some 79 friend-of-the-court supporters at last count — in a First Amendment lawsuit filed in February accusing ICE officials of targeting activists around the country for deportation, effectively prioritizing the expulsion of its political enemies.

The stakes of the argument are high, and not only for undocumented people, said Alina Das, a professor at New York University Law School and one of Ragbir's attorneys. "Saying there's a group of people who can be literally banished from this country for any reason, even if it violates their constitutional rights, creates a vulnerable class, and when their rights aren't respected, it hurts both them and society as a whole," she said. "If ICE is given free reign to silence their critics, we are creating an agency that is unaccountable and is permitted to disappear those who are in the best position to educate the public about what this agency is actually doing. That should be a scary prospect for anyone living in this country."

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In May, Judge Kevin Castel ruled against Ragbir in a motion seeking preliminary injunction to prevent ICE from deporting him before the First Amendment lawsuit can be resolved. While the rest of the lawsuit is still pending in district court, Ragbir

has appealed that ruling. The 2nd Circuit won't get to the substance of that appeal for another month or more, but Tuesday's hearing concerned Ragbir's motion for an order preventing ICE from deporting him while the appeal is in process.

If all that makes it sound like Ragbir's legal team is particularly preoccupied with getting some sort of guarantee that their client won't be deported before he even has a chance to argue his case, it's an anxiety that appears to have some foundation. For one thing, there's the fact that when he presented himself for a regularly scheduled check-in with ICE officials in January, [Ragbir was taken into custody](#) and put on a plane in anticipation of deportation in a matter of hours, despite the fact that he had an open legal challenge still pending at the time. Government lawyers have explained that ICE assessed that Ragbir had a low chance of prevailing in his legal proceedings and cleared the way for him to be deported before they could be resolved.

THE GOVERNMENT'S OWN statements in court on Tuesday did nothing to quiet the fears of Ragbir's lawyers. Early in the day's arguments, the three-judge panel appeared interested in resolving the issue without having to decide the question of a stay. Ragbir is already protected by a stay of deportation ordered by a district court in New Jersey in a separate legal matter, they noted, and William Perdue, one of Ragbir's lawyers, conceded that he was seeking this additional stay as a form of further "insurance."

"You're worried that if those stays are lifted, the government's going to swoop in before you have a chance to come back here?" Judge Dennis Jacobs asked.

"Absolutely," Perdue answered.

Jacobs was skeptical, noting that in a [scorching opinion](#) in January, Judge Katherine Forrest ruled that ICE had acted unconstitutionally and been "unnecessarily cruel" in subjecting Ragbir to "treatment we associate with regimes that are unjust." ICE had raced to deport Ragbir in January, speeding him out of town [with a New York Police Department escort](#) and onto a plane bound for Florida in the few hours it took his lawyers to secure a restraining order from Forrest.

ICE "may not be quite so abrupt in view of the Judge Forrest's ruling already cautioning them about abruptness," Jacobs said. Perhaps, he suggested, the court needn't issue a stay if the government simply promised that if the other stay in New Jersey were to be lifted, they'd give Ragbir and the 2nd Circuit a few days' notice before deporting him, so that a stay could be considered then.

To the judges' evident surprise, though, the government flatly refused to make such a commitment. Steven Kochevar, the U.S. Attorney's Office lawyer arguing the motion, informed the judges that the government did not agree with Forrest's ruling and is in the process of appealing it.

“You don’t accept her ruling that you can’t come in after someone has been here 11 years, you can’t change your mind and instantly remove him?” Jacobs asked, surprised.

“That’s correct,” Kochevar replied.

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“I need to know,” Newman asked, “if the New Jersey stay is dissolved, number one, are you going to take him immediately into custody?”

“Subject to the applicable regulations, yes, I believe ICE intends to enforce this,” Kochevar answered.

Newman tried again: “I’d be much more sympathetic to your side if you would say to the court, ‘Don’t worry, we’re not going to take him in the dead of night.’” Kochevar again demurred.

“I’ll try one other time,” Newman pressed. “If the New Jersey stay is dissolved ... and we for whatever reasons don’t grant one, can the government assure us you will not take him into custody and remove him for at least, let’s say, seven days?”

“We can’t,” Kochevar said.

“Can you even give him one day?”

“I am not in a position to make any representation as to the specific amount of time,” Kochevar said.

“You realize that doesn’t make your opposition to this stay more appealing?”

“Certainly, your honor,” Kochevar said. “But our position is that as a matter of law this court doesn’t have jurisdiction.”

THE QUESTION OF jurisdiction turns on a reading of a section of federal immigration law, Title 8, Section 1252 of the U.S. Code, designed to streamline and clarify when and which federal courts can provide judicial oversight over the deportation process, which is otherwise the purview of the executive branch.

The immigration courts of the Executive Office of Immigration Review, in which people press their claims for asylum or challenge their removal, are part of the Justice Department, not the judicial branch, and immigration judges there answer not to the Supreme Court, but to the attorney general. ICE, which is under the Department of Homeland Security, handles enforcement of those courts’ decisions.

“No court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter,” reads Title 8, Section 1252 (g) of the U.S. Code.

As the Trump administration’s escalating war on immigrants generates an increasing number of court challenges, the government is trying to head them off by asserting an expansive reading of executive authority on immigration that is exempted from judicial review. Immigrant advocates contend these cases aren’t so much about final orders of removal as they are about challenging other unlawful actions by ICE — improperly targeting immigrants or blocking their access to courts.

On Thursday, the appeals panel appeared to dodge the question of its authority, issuing an order that did not include a ruling on the stay request, but rather directing the parties to notify it if Ragbir’s existing stay in New Jersey is lifted.

By the time the court receives such a notice, if ICE’s past actions and the Justice Department lawyer’s reluctance to promise otherwise are any indication, Ragbir might already be in handcuffs on a southbound plane, leaving his court case challenging ICE’s alleged practice of political-suppression-by-deportation behind him, unresolved.

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