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## The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it Is, Where it May be Going

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# The Exclusionary Rule in Immigration Proceedings: Where it Was, Where it Is, Where it May be Going

IRENE SCHARF\*

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## I. INTRODUCTION—THE HARTFORD IMMIGRATION COURT

A startling conclusion arose from a case decided last summer in the United States Immigration Court at Hartford, Connecticut. In an opinion issued June 1, 2009, after characterizing the respondent's testimony as candid, forthright, both internally consistent and consistent with his written declaration and with other testimony and declarations made in the case, Immigration Judge Michael W. Straus dismissed the case. The Judge found that, while the respondent was sleeping in his room with his wife and children in the early morning hours, he was awakened by a knocking on the front door and then on the back door. When he asked the identity of the knocker, he was informed it was the police. After asking them who they were looking for, they said they were looking for someone named "Chavez." The respondent opened the door a few inches, and without asking his permission to enter, an officer forcibly pushed open the door. While his son translated, the respondent was asked about his immigration status; he was later arrested.<sup>1</sup>

At the conclusion of the case, the Judge ruled that the agents' entry violated the respondent's Fourth Amendment rights.<sup>2</sup> The court specifically addressed the "aggressive nature of the forced entry, which required a resident to move back out of fear of being struck by the door into a private residence at dawn."<sup>3</sup> Finding that the subsequent conduct of the immigration officers "lends further support to our conclusion that respondent has displayed the necessary aggravating circumstances" confirming a flagrant violation of the respondent's Fourth Amendment rights,<sup>4</sup> the Judge excluded the testimony and dismissed the case, a rare result among evidentiary challenges brought in immigration courts, where when successful, generally only remands result.

The case alerted me to the continuing issue concerning the treatment of alleged violations of Fourth Amendment rights in immigration court, with this article the result of research conducted relating thereto. Beyond reviewing the relevant views of the federal courts of appeals; the administrative tribunal that handles appeals of immigration court cases, the Board of Immigration Appeals (BIA); and even local immigration courts; I consider whether the jurisprudence has remained static since the

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1. In Removal Proceedings, at 23 (Hartford Immigr. Ct., June 1, 2009) (Straus, I.J.).

2. *Id.* at 24.

3. *Id.*

4. *Id.*

Supreme Court's watershed opinion on the issue about twenty-five years ago. I also offer suggestions as to how to effectively, fairly, and efficiently resolve the issues raised in the immigration context by these Fourth Amendment cases.

Part II presents an overview of the jurisprudence governing application of the exclusionary rule in immigration proceedings. Part III visits judicial responses to violations of regulatory authority governing detention and deportation procedures. Part IV surveys recent BIA and immigration court interpretations of the exclusionary rule and illustrates the difficulty of maintaining the divergent jurisprudence that currently exists among the courts of appeals. Part V identifies issues on which recent opinions hint at a possible turn in favor of enhanced civil rights' protections in these cases, where "cracks"<sup>5</sup> could be developing in the long-standing rule disadvantaging respondents in immigration hearings. This section then moves to suggest a unifying jurisprudence on this issue that is more likely to result in fair and just results.

I must thank Michael J. Wishnie, Supervising Attorney at the Jerome N. Frank Legal Services Organization at Yale Law School, and his law student representatives, for inspiring me through their efforts, for providing me with redacted copies of the decisions and briefs in the New Haven case, and for convincing Judge Straus that when the government gathers evidence against an immigrant in an unconstitutional manner, the case must be dismissed.

## II. HISTORICAL VIEW OF THE APPLICATION OF THE FOURTH AMENDMENT IN IMMIGRATION HEARINGS, THE SUPREME COURT, AND THE CIRCUIT COURTS' RESPONSES

### *A. Traditional Inapplicability of Constitutional Protections Lifted by a 1984 Supreme Court Case*

The jurisprudential history of immigration law has caused any discussion of the civil rights of immigrants to follow a non-traditional

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5. Reference to "cracks" is borrowed from Steve Legomsky & Christina Rodriguez, *IMMIGRATION AND REFUGEE LAW AND POLICY 195-97* (Thomson Reuters/Foundation Press, 5th ed. 2009). Reference to "cracks" is borrowed from Steve Legomsky & Christina Rodriguez's book, *IMMIGRATION AND REFUGEE LAW AND POLICY* (5th ed. 2009) at 195 et. seq.

path. While academic discussions of constitutional issues generally begin with a review of the relevant constitutional provisions, and then move on to a study of relevant statutory and regulatory authority followed by discussion of applicable case law, immigration law is different in the historically limited application of constitutional protections to immigrants.<sup>6</sup>

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6. Beginning with the case of *Chae Chang Ping v. United States* (“Chinese Exclusion Case”) in 1889, the Supreme Court has established substantial jurisprudence holding consistently, for about a century, the plenary power doctrine limited the Court’s ability to review federal immigration legislation and that the federal government has an inherent power to exclude non-citizens. *Chae Chan Ping v. United States (The Chinese Exclusion Case)* 130 U.S. 581, 610-11 (1889). *Nishimura Ekiu v. United States* held that the Due Process Clause does not limit this power to exclude. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). The theory of these cases was applied to deportation in *Fong Yue Ting v. United States*, 149 U.S. 698, 705 (1893) (requiring a white witness to attest to a Chinese immigrant’s presence), in which the Court held that the power to exclude is inherent in sovereignty, and that only those in the country legally are entitled to constitutional protections.

This lack of judicial authority over immigration laws continued to be extended to procedural due process, at least as far as those entering the country were concerned. In *United States ex rel. Knauff v. Shaughnessey*, 338 U.S. 537, 543-44 (1950), an exclusion was upheld in spite of it having been carried out without a hearing, based on confidential government information. The chilling phrase from this case, “[w]hatever procedure authorized by Congress . . . is due process as far as an alien denied entry is concerned,” is an infamous reminder of *Knauff* to this day.

Affirming the power of exclusion as a “fundamental sovereign attribute exercised by the Government’s political departments” that is “largely immune from judicial control,” the Court affirmed exclusion in *Shaughnessy v. Mezei*, 345 U.S. 206, 213 (1953) that could have resulted in the indefinite detention on Ellis Island of a non-citizen who had no country to return to.

In *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), the Court expanded the plenary power theory by rejecting a challenge to exclusion on the basis of substantive due process rights, in this case those guaranteed by the First Amendment. In the case, the Court permitted exclusion based on either advocacy or publishing pro-communist doctrine. In *Fiallo v. Bell*, 430 U.S. 787, 797 (1977), this power was extended to those who were illegitimate.

Clearly this doctrine appears inconsistent with *Marbury v. Madison*, 5 U.S. 137, 178 (1803), wherein the Supreme Court asserted its power to review the constitutionality of federal legislation. In addition, some of the Court’s earlier proclamations have been adjusted over the years. For example, it is now clear that while *Fong Yue Ting* still holds that the federal government has the constitutional power to decide upon the deportation of even lawful immigrants, procedural due process does apply in deportation cases. As to whether that is also true in exclusion cases, the answer is less clear.

Some rights have been acknowledged by the Supreme Court. Procedural due process rights in deportation hearings to those already here were acknowledged in 1903 in *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903) (see discussion in Judy C. Wong, *Egregious Fourth Amendment Violations and the Use of the Exclusionary Rule in Deportation Hearings: The Need for Substantive Equal Protection Rights for Undocumented Immigrants*, 38 COLUM. HUM. RTS. L. REV. 431, 437-38 (1997)).

More recently, with cases including *Francis v. Immigration & Naturalization Serv.*, 532 F.2d 268, 272 (2d Cir. 1976) (ruling on a constitutional basis in a case involving

On the issue of the Fourth Amendment's application in removal<sup>7</sup> hearings, though, the tables have turned; there actually is jurisprudence surrounding this important issue that arises commonly in immigration hearings. This is the result of a United States Supreme Court ruling in a 1984 case, *Immigration and Naturalization Service v. Lopez-Mendoza*,<sup>8</sup> in which it issued an important decree on the role of the Fourth Amendment's<sup>9</sup> exclusionary rule in immigration hearings.

Prior to *Lopez-Mendoza*, even though no case had explicitly denied application of the Fourth Amendment in deportation proceedings, this was long assumed to be the case by several federal courts of appeals.<sup>10</sup> In *Lopez-Mendoza*, the Court held that the traditional remedy for a Fourth Amendment violation, suppression of both illegally-seized evidence<sup>11</sup> and evidence that is the indirect product of illegal police activity as "fruit of the poisonous tree,"<sup>12</sup> was generally unavailable in immigration court hearings, so long as the case was supported by

relief from deportation); *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (striking a federal statutory provision that it decided violated the principle of separation of powers); and *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (striking a provision that violated due process by permitting the government to unconditionally and indefinitely detain a non-citizen); it has become evident by inference that the Court does believe it has at least some authority to review certain principles of immigration law. These cases have given rise to the notion among scholars that "cracks" have developed in the plenary power doctrine. See LEGOMSKY & RODRIGUEZ, *supra* note 5.

7. This term refers to what is commonly referred to as "deportation;" the term was replaced by "removal" in a 1996 statute (8 U.S.C. § 1229) making substantial changes to the Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified in scattered sections of 8 U.S.C.).

8. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1033 (1984).

9. The Fourth Amendment provides the following: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Violations of the Fourth Amendment generally lead to the exclusion of evidence obtained as a result, hence the term "Exclusionary Rule."

10. *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923); *In re Sandoval*, 17 I. & N. Dec. 70, 82 (B.I.A. 1979).

11. See *Weeks v. United States*, 232 U.S. 383, 398 (1914) (barring use in federal courts of evidence seized by federal officers in violation of 4th Amendment); see also, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (barring use in state courts of evidence seized in violation of Fourth Amendment); *Elkins v. United States*, 364 U.S. 206, 223 (1960) (barring use in federal courts of evidence seized by state officers in violation of Fourth Amendment).

12. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

“credible evidence derived from a peaceful arrest.”<sup>13</sup> One of the bases

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13. *Lopez-Mendoza*, 468 U.S. at 1051. Subsequent courts have understood *Lopez-Mendoza* to stand for that proposition. *See, e.g., Mendoza-Solis v. Immigration & Naturalization Serv.*, 36 F.3d 12, 14 (5th Cir. 1994). The notion that the Constitution does not mandate the exclusionary rule to apply in civil proceedings was affirmed that same year in *Adamson v. Comm’r of Internal Revenue*, 745 F.2d 541, 545 (9th Cir. 1984), which cited *Lopez-Mendoza*. While the distinction between “civil” deportation hearings and criminal cases may have had some rational support in the past, as a result of changes in the law that began in the late-1980s and continued through 2001, criminal and immigration law have become dramatically and, many say, inappropriately intertwined. *See* Diana R. Podgomy, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the “Aggravated Felony” Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287, 290 (2009); Juliet Stumpf, *The CrimmigrationCrisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (discussing the reasons behind this merger); Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 617-18 (2003) (noting that immigration scholars see this intersection as the importation of crimes into immigration law, while criminal scholars view it as the imposition of the administrative and regulatory characteristics of immigration control into the criminal justice system); Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 122 (2005) (existence of the merger itself); Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1131(2002) (describing the parallels between deportation and punishment, and the constitutional consequences of criminalizing immigration law); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000) (describing the way in which deportation acts as does punishment, incapacitating the deportee, deterring other potential offenders, and achieving retribution; suggesting that the deportation of lawful residents, if understood to be punishment, necessitates substantive constitutional protections, especially when applied retroactively or without counsel); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 656 (2004).

“More immigration violations now constitute crimes.” *See* 8 U.S.C. § 1324a(f) (2006), criminalizing a pattern or practice of knowingly hiring, recruiting, or referring for a fee an unauthorized alien for employment (§ 1324a(a)(1)(A)), or knowingly continuing to employ an unauthorized alien (§ 1324a(a)(2); § 1325(c) (criminalizing persons to marry for purpose of evading immigration laws); § 1325(d) (outlining criminal penalties imposed on those who establish commercial enterprises for purpose of evading immigration laws); § 1326(b)(1) (criminalizing noncitizens with misdemeanors who attempt to unlawfully re-enter the United States); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546-3009-724 (codified as amended in scattered sections of 8 U.S.C and 18 U.S.C.) (criminalizing exceeding the speed limit while fleeing an immigration checkpoint, knowingly failing to disclose role as preparer of false immigration application, knowingly making a false claim of U.S. citizenship, and failing to cooperate in the execution of one’s removal order); Juliet Stumpf, *Fitting Punishment*, 66 WASH. AND LEE L. REV. 1683, 1685 (2009); *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 477-80 (2007) (hereafter “New Path”) (noting that “[s]ince 1986, Congress has liberally expanded the list of immigration offenses”); in addition, since the 1980s, prosecution of immigration-related crimes has increased greatly, Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 639 (2003) (detailing the increase in the number of noncitizens who face criminal punishment for crimes that were

once only civil violations)]; *see also* Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, *supra* at 388 (noting that immigration prosecutions outnumber all other types of federal criminal prosecutions). “Immigration law has become so tightly interwoven with criminal justice norms as to constitute a distinct legal category.” Stumpf, *Fitting Punishment*, *supra* at 1686; Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1061-73 (2002) (describing how immigration law has become a tool of the criminal justice system); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000) (noting the convergence between immigration law and criminal justice); Legomsky, *The New Path*, *supra* at 471-73 (detailing the intersection of criminal justice and immigration control); Miller, *Citizenship and Severity*, *supra* at 613 (describing the intimacy between the criminal justice system and immigration law as the “criminalization of immigration law”); Miller, *Blurring the Boundaries*, *supra* at 82 (noting that commentators have alternately described the changing relationship between criminal justice and immigration law as the “‘criminalization’ of immigration law” and as a “convergence between the criminal justice and deportation systems”); and Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, *supra* at 376, 384 (describing civil immigration violations that have been elevated to criminal offenses).

Another issue addressed in *Lopez-Mendoza* but beyond the scope of this article is when, if at all, evidence of a non-citizen’s identity could be suppressed. One short sentence in the case has led to much confusion: “The ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest.” *Lopez-Mendoza*, 468 U.S. at 1039. Despite the apparent clarity of that statement, many cases have taken up the issue, with some finding ambiguities that have resulted in both suppression of evidence and admission of it. Several federal circuit courts have ruled that, despite alleged egregiousness of constitutional violations, the identity of a defendant (emphasis supplied) is never suppressible. *See, e.g.*, *United States v. Del Toro Gudino*, 376 F.3d 997, 1001 (9th Cir. 2004), *United States v. Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005) (denying suppression of a defendant’s name and date of birth when disclosed as a result of an allegedly unconstitutional detention), *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 23 (1st Cir. 2004). *Cf.*, *United States v. Oscar-Torres*, 507 F.3d 224, 230 (4th Cir. 2007) (“Despite the illegality of his detention or arrest, he cannot suppress his person or the fact of his identity.”) (ruling that when fingerprints are obtained by officers motivated by an investigative purpose, they are obtained by “exploitation of police illegality” and must be suppressed, but that if this evidence was obtained for and motivated by an administrative purpose, the evidence is admissible; the court recognized that if a court concludes that both investigative and administrative purposes motivated the illegal arrest and fingerprinting, the fingerprints and attendant record evidence must be suppressed).

The Eighth Circuit, however, in *United States v. Guevara-Martinez*, distinguishing criminal from deportation cases, held that *Lopez-Mendoza* was irrelevant to suppression of unlawfully obtained identity-related evidence in a criminal case. *United States v. Guevara-Martinez*, 262 F.3d 751, 754 (8th Cir. 2001). *Guevara-Martinez* has been narrowed more recently, in *United States v. Rodriguez-Arreola*, 270 F.3d 611, 618 (8th Cir. 2001) and *United States v. Perez-Perez*, 337 F.3d 990, 994 (8th Cir. 2003). In *Guevara-Martinez*, the suppressed evidence was not actually identity evidence, but fingerprints obtained as the result of unlawful arrests. *Guevara-Martinez*, 262 F.3d at 754. Since then, the Eighth Circuit has indicated that, if faced with a defendant seeking



for the ruling was the Court's assumption that "the I.N.S. has its own comprehensive scheme for deterring Fourth Amendment violations by its officers."<sup>14</sup> In addition, the Court indicated that the deterrent effect of applying the exclusionary rule in civil cases, including deportation hearings, would be minimal compared with the significant costs of enforcing the rule.<sup>15</sup>

Regardless of both the plenary power and the Court's conclusion on the constitutional question in *Lopez-Mendoza*, the Court did leave open the possibility for suppression of evidence in certain immigration cases. First, the Court noted that its "conclusions concerning the exclusionary rule's value might change, [sic] if there developed good reason to believe that Fourth Amendment violations by I.N.S. officers were widespread."<sup>16</sup> Most important, it added that it had not dealt "with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."<sup>17</sup> Clearly, the Court "implicitly recognized that the 'imperative' of safe-guarding judicial integrity,

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to suppress only his identity (and not fingerprints), it would not invoke the exclusionary rule. *Perez-Perez*, 337 F.3d at 994.

14. *Lopez-Mendoza*, 468 U.S. at 1044. "I.N.S." refers to the Immigration and Naturalization Service, the legacy executive department responsible for administering immigration laws before it was replaced, in 2003, by the Department of Homeland Security and, within that, the newly-created Citizenship and Information Service ("CIS").

15. *Id.* at 1046. Since 1923, the Court has held that deportation is a civil remedy, thus the rights afforded criminal defendants in court need not be granted those in deportation proceedings. *Bilokumsky*, 263 U.S. at 154. In 1979, the Board of Immigration Appeals ruled as well in *Matter of Sandoval*, that the Fourth Amendment did not apply in deportation proceedings. *In re Sandoval*, 17 I. & N. Dec. 70, 82 (B.I.A. 1979).

16. For a creative approach to the *Lopez-Mendoza* limitation developed recently, see Stella Burch Elias, "Good Reason to Believe": *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, WIS. L. REV. 1109, 1155 (2008) (arguing that because constitutional violations are so widespread today compared with 1984, and because immigration enforcement has changed fundamentally since then, the assumptions that underlay the opinion in *Lopez-Mendoza* have been eroded, and that, to remain faithful to the case, the exclusionary rule should be reintroduced in immigration proceedings).

17. Earlier in the opinion the Justices discussed the array of justifications for the exclusionary rule offered over the years, one being to deter future unlawful police conduct; it eventually concluded that the burdens versus benefits militated against its application in deportation hearings. See *Lopez-Mendoza*, 468 U.S. at 1041-50. The Court pointed out that even the BIA had agreed with this proscription. *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980) (holding, though, that evidence obtained by coercion or other activity that violates the Due Process Clause of the Fifth Amendment may be excluded) available at [http://www.justice.gov/eoir/vll/intdec/lib\\_indecitnet.html](http://www.justice.gov/eoir/vll/intdec/lib_indecitnet.html); *Lopez-Mendoza*, 468 U.S. at 1050-51.

another core function of the exclusionary rule, would sometimes require application of the rule even in the civil context.”<sup>18</sup>

It is axiomatic in constitutional law that, in a criminal case, evidence may be suppressed if seized in contravention of a defendant’s rights under the Fourth Amendment.<sup>19</sup> The word “defendant” here is key, and is behind an important impasse for many immigration scholars: the distinction made between criminal defendants and immigration respondents. Because of the long-held view that deportation hearings are civil in nature,<sup>20</sup> application of the rights granted to criminal defendants have generally not been afforded to respondents in deportation hearings, even though several of the guarantees of the Bill of Rights, among them both procedural<sup>21</sup> and substantive due process (Fifth Amendment),<sup>22</sup> the rights to free speech and association (First Amendment),<sup>23</sup> and the

18. *Gonzalez-Rivera v. Immigration & Naturalization Serv.*, 22 F.3d 1441, 1448 (9th Cir. 1994) (citing *Adamson v. Comm’r of Internal Revenue*, 745 F.2d 541, 545-546 (9th Cir. 1984)).

19. *Wong Sun v. United States*, 371 U.S. at 488 (1963).

20. *Bilokumsky*, 263 U.S. at 154; *Trias-Hernandez v. Immigration & Naturalization Serv.*, 528 F.2d 366, 368 (9th Cir. 1975). In spite of this well-established principle, several courts have objected: The Court in *Bridges v. Wixon*, for example, said that deportation “may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” 326 U.S. 135, 147, 146 (1945) (citations omitted). “Here the liberty of an individual is at stake . . . We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.” *Id.* at 154. And Justice Brandeis, speaking in *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922), reminded us that “deportation may result in the loss ‘of all that makes life worth living.’”

21. *Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86 (1903); *Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008).

22. While this has been interpreted as a constitutional mandate since the mid-1950s, see *Shaughnessy v. Mezei*, 345 U.S. at 212 (1953), claims of self-incrimination in immigration proceedings are limited to admissions concerning actions that constitute a crime, see *Laqui v. Immigration & Naturalization Serv.*, 422 F.2d 807 (7th Cir. 1970). In addition, in 1960, the Ninth Circuit Court held that “[a] coerced confession was inadmissible a deportation hearing.” *Bong Youn Choy v. Varber*, 279 F.2d 642, 646 (9th Cir. 1960).

23. See *Harisiades v. Shaughnessey*, 342 U.S. 580, 581 (1952); *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *rev’d on other grounds*, 940 F.2d 445 (9th Cir. 1991).

right to counsel (Sixth Amendment),<sup>24</sup> are generally provided to immigrants.

It may not be surprising, then, that the Fifth Amendment's Due Process Clause, rather than the Fourth Amendment's exclusionary rule is more frequently the successful theory upon which evidence offered at removal hearings is excluded.<sup>25</sup> The test applied in these cases is the same as that used in other due process cases—whether the evidence is both probative and fundamentally fair.<sup>26</sup>

#### *B. Interpretations of Fourth Amendment Depend on Circuit in Which an Immigration Court Sits*

While the Supreme Court's rule in *Lopez-Mendoza* still governs removal proceedings, and has resulted in the general unavailability of the exclusionary rule in these hearings,<sup>27</sup> over the years since several federal courts of appeals have tackled the question as to what the Court meant by the phrase "egregious violations." Accordingly, for cases involving egregious violations of these rights as defined by the various federal courts of appeals, these courts have begun to employ what appears to be an "exception" to the general principle of Fourth Amendment non-applicability outlined in *Lopez-Mendoza*.<sup>28</sup> The problem

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24. This right has been granted through regulation, not an interpretation based on the Sixth Amendment, and only so long as the non-citizen pays for the attorney. In addition, grounded in the Due Process Clause, it has been recognized as applicable to removal cases. *Waldron v. Immigration & Naturalization Serv.*, 17 F.3d 511, 517 (2d Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994).

25. See *Bustos-Torres v. Immigration & Naturalization Serv.*, 898 F.2d 1053, 1058 (5th Cir. 1990) (shifting burden to respondent to prove non-deportability once the government has met its burden of proving deportability does not abridge Fifth Amendment rights supports an inference that respondents do have Fifth Amendment rights in deportation proceedings); *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131 (2d Cir. 2008); *Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008) (affirming use of video testimony); *Navia-Duran v. Immigration & Naturalization Serv.*, 568 F.2d 803, 810 (1st Cir. 1977); *In re Garcia*, 17 I. & N. Dec. 319, 321 (B.I.A. 1980); *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980). A search for precedent relying exclusively on the Fifth Amendment produced limited results beyond the two Second Circuit and the two BIA cases mentioned herein.

26. *Aslam*, 537 F.3d at 114.

27. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

28. Others, such as the First Circuit, seem wedded to the more stringent rule. For example, in 2006, in the case of *Kandamar v. Gonzales*, the Court seemed to attempt to go further than *Lopez-Mendoza* when it refused to suppress the respondent's passport alleged to have been improperly seized by DHS in violation of the Fourth Amendment. *Kandamar v. Gonzalez*, 464 F.3d 65, 74 (1st Cir. 2006). While the Court acknowledged that "the seizure is troubling," it nonetheless required, for suppression, that the respondent

that has been caused by, first, the vague Supreme Court language, and second, that vague language now being interpreted differently by different courts, is apparent—a lack of uniformity in the interpretation and implementation of an important civil right and principle of federal law. For, depending on the location of an immigration court, immigration judges will apply principles deriving from the circuit court in their district. A survey of recent opinions from various courts of appeals demonstrates this problem.

In 2006, the First Circuit Court of Appeals, in *Kandamar v. Gonzales*, acknowledged and adopted an egregiousness exception to the non-applicability of the exclusionary rule even though it denied suppression in concluding that the gathering of evidence against the respondent did not involve misconduct through threats, coercion, or physical abuse.<sup>29</sup>

There is more jurisprudence in the Second Circuit. In 2006, the Court in *Almeida-Amaral v. Gonzales* denied suppression even though the Department of Homeland Security (DHS) officer had no valid reason for the stop or the request for identification. Nonetheless, the Court outlined a sliding scale test to apply to the proffered evidence: a seizure suffered for no reason would be considered an egregious violation *only if* it was sufficiently severe, or if the stop was based on race or another “grossly improper consideration.”<sup>30</sup> In offering guidance as to what might render a seizure gross or unreasonable, the Court mentioned both a “particularly lengthy” initial illegal stop and the show or use of force.<sup>31</sup>

But when the Second Circuit spoke again on this issue two years later, in a case not involving race, the Court permitted use of challenged evidence. In *Melnitsenko v. Mukasey*,<sup>32</sup> an Estonian woman who overstayed her non-immigrant visa was questioned by U.S. Immigration

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demonstrate prejudice and harmful error resulting from the seizure. Without this, the Court refused to find that the respondent was a victim of egregious government misconduct. *Id.*

29. *Id.* at 71-72.

30. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006). There was no evidence in this case that race played a part in the stop. Victims of racial discrimination in removal should also benefit by an equal protection argument in which the exclusionary rule would apply unless the government could demonstrate at least an important state interest for using the evidence. *See Wong, supra* note 6.

31. *Almeida-Amaral v. Gonzales*, 461 F.3d at 236. In this case, although the respondent stated in his affidavit that he was stopped based solely on his race, he offered no evidence besides his affidavit to support his claim. When there was no evidence of either a lengthy stop or a show of force, the court found a lack of egregious violation of the Fourth Amendment, and did not suppress the evidence in question.

32. *Melnitsenko v. Mukasey*, 517 F.3d 42, 44 (2d Cir. 2008).

and Customs Enforcement (ICE) for several hours during a traffic stop near the Vermont border. The Court held the facts to be insufficiently “severe” to constitute an egregious violation of the Fourth Amendment. Nonetheless, it emphasized that Melnitsenko was “neither arrested nor taken to jail,”<sup>33</sup> perhaps supporting an inference that had she been, the case may have been decided differently. In the same year, in *Pinto-Montoya v. Mukasey*, the Second Circuit determined that while it generally did not favor suppression, it would employ it when it found that “an egregious violation that was fundamentally unfair had occurred, or that the violation . . . undermined the reliability of the evidence,”<sup>34</sup>

Finally, in 2009, the Second Circuit came upon a case whose facts induced it to suppress a statement it found to be unreliable.<sup>35</sup> In *Singh v. Mukasey*,<sup>36</sup> the Court ruled that the immigration judge’s adverse credibility determination of Singh was undermined and improper when Mr. Singh, a permanent resident in removal proceedings on charges of attempted smuggling after he and a friend attempted to re-enter the United States at Buffalo from Canada following their visit to a strip club, had not been advised of his rights until near the interview’s completion, several hours into the detention; he was not informed of his rights until after the statement was taken.<sup>37</sup> The Court reiterated the applicability of the Fifth Amendment’s due process protections in deportation proceedings,<sup>38</sup> and mentioned *Lopez-Mendoza’s* reluctance to sanction a general application of the exclusionary rule in these cases. But it then invoked *Lopez-Mendoza’s* failure to specify the occasions in which exclusion is warranted because of “egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”<sup>39</sup> The Court took on that issue in ruling that Mr. Singh’s statement, being unreliable, should have been suppressed.<sup>40</sup> The Court reiterated that

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33. *Id.* at 48. Further, the Court would not necessarily require either physical abuse or threats of violence in order to find “severe” and therefore “egregious” violation of the Fourth Amendment. *Id.* at 47. The acronym “ICE” in the prior sentence refers to the Department of Homeland Security’s division of Immigration and Customs Enforcement.

34. *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131 (2d Cir. 2008) (quoting *Almeida-Amaral*, 461 F.3d at 235).

35. *Singh v. Mukasey*, 553 F.3d 207 (2d Cir. 2009).

36. *Id.* at 209-11, 213.

37. *Id.* at 213.

38. *Id.* at 214-15 (citing, among others, *Bridges v. Wixon*, 326 U.S. 135, 147, 154 (1945)).

39. *Id.* at 215 (citing *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984)).

40. *Id.*

“exclusion of evidence is appropriate” “if . . . evidence established either (a) that an egregious violation that was fundamentally unfair had occurred or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute.”<sup>41</sup> In addition, it recited, from *Almedia-Amaral*, that “[e]ven assuming that the conduct here was not ‘egregious,’ it nonetheless ‘undermined the reliability of the evidence in dispute.’”<sup>42</sup>

As is usually the case, in the end, the decision turned on its facts: Mr. Singh had been held for four to five hours in the early morning, while armed uniformed officers were circulating; he was repeatedly told he was going to jail, had not slept for about twenty-four hours by the time of his release, testified that he had not read the statement he was asked to sign, that it contained admissions he never made, that he was in custody during this time while both his permanent resident card and his car had been taken from him by the officers,<sup>43</sup> “that it was unclear when he was informed of his right to speak with an attorney or of his other rights, and that the officer testified that she did not see Mr. Singh sign the statement and did not witness any officer informing him of his rights until “at least a few hours had gone by.”<sup>44</sup> At its conclusion, the Court distinguished this case from others in which it had affirmed denials of suppression, noting that in those cases, the evidence was reliable, as it related to simple objective facts, such as whether a person was a foreign citizen or had a passport or valid visa.<sup>45</sup> “These facts are not altered by coercive interrogation—a person either is or is not a citizen.”<sup>46</sup> But “[i]n this case, the underlying issue—whether Mr. Singh knew that Mr. Bedi, although a Canadian citizen with permission to enter the United States, was entering the country in violation of law by virtue of his intent to continue working in the United States without authorization—is more nuanced and susceptible to corruption during the course of an improper interview.”<sup>47</sup> Given that “in this extraordinary case . . . the government

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41. *Id.* (citing *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131 (2d Cir. 2008)).

42. *Id.* (citing *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006)).

43. *Id.*

44. *Id.* at 215-16.

45. *Id.* at 216.

46. *Id.*

47. *Id.*

has failed to demonstrate by the requisite level of proof,” it vacated the BIA’s order of removal and remanded the case for further proceedings.<sup>48</sup>

Did the Second Circuit alter its concept of the Fourth Amendment between 2008 and 2009, or was it simply that the facts in the *Singh* case appeared to be more egregious than were those in *Melnitsenko*? No one can know.

In 2005, the Sixth Circuit failed to suppress evidence in *United States v. Navarro-Diaz*,<sup>49</sup> when questions were raised concerning the admissibility of a defendant’s name and date of birth garnered during an allegedly unconstitutional detention. Though denying relief, the Court did give a nod to the egregious violation theory of *Lopez-Mendoza* but, like that Court, the Sixth Circuit indicated that Navarro-Diaz was not a victim of an egregious violation of the Fourth Amendment<sup>50</sup> given his situation: Navarro-Diaz encountered the police not in a random attempt to determine whether he was in the country illegally, but as the result of his being in a hotel room in the middle of the day with four other local men, at least one of whom was smoking marijuana. All were asked to identify themselves, not just those who appeared Hispanic.<sup>51</sup>

Other circuits appear to be changing their approach to the issue. While in 2001, the Eighth Circuit applied the exclusionary rule to exclude from a removal hearing fingerprint evidence gathered as a result of an unlawful arrest, citing Supreme Court precedent to support its conclusion,<sup>52</sup> the same Court, in 2005, applied the rule, this time in a criminal case, to determine that ICE could not “take custody of a person and fingerprint him without any admissible reason to believe the person is an illegal alien.”<sup>53</sup> In excluding the fingerprint evidence, the Court stated that “such a custodial detention without justification offends the Fourth Amendment, and therefore, the fingerprints and statements obtained as a result of the detention must be suppressed.”<sup>54</sup> The case involved detention of respondent following questioning by local law enforcement officers for undetermined reasons. When it became evident that he primarily spoke Spanish, the officers called an agent of the U.S. Border Patrol to interpret. During that period, the respondent allegedly admitted that he was in the U.S. without authorization, even though there was no

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48. *Id.* at 217.

49. *United States v. Navarro-Diaz*, 540 F.3d 581, 585 (6th Cir. 2005).

50. *Id.* at 587.

51. *Id.*

52. *United States v. Guevara-Martinez*, 262 F.3d 751, 754-57 (8th Cir. 2001).

53. *United States v. Flores-Sandoval*, 422 F.3d 711, 712 (8th Cir. 2005).

54. *Id.* at 712.

indication that he had received Miranda warnings prior to his statement. After spending the night in the local jail, he was transported to the ICE office, still in custody. When his fingerprints were scanned and it was learned that he had previously been deported, he was indicted for re-entry following deportation.<sup>55</sup> The Court ruled that the detention had been unconstitutional, thus finding that the evidence should be excluded, as it was “obtained by exploitation of [an unlawful detention] instead of by means sufficiently distinguishable to be purged of the primary taint.”<sup>56</sup> To the government’s assertion that the detention was constitutional because the respondent admitted to being in the U.S. illegally, thereby providing ICE a basis for detention, the Court disagreed,<sup>57</sup> as there was no indication that the respondent had been given Miranda warnings before making the inculpatory statements and the government offered nothing to support its claim that ICE had reason to believe he was in the U.S. illegally based on anything other than his own statement to the Border Patrol. “Because the government was able to demonstrate no constitutional justification for detaining Flores-Sandoval,” the Court said, “the District Court did not err in granting his motion to suppress his fingerprint evidence and statements.”<sup>58</sup> Holding that “statements that result from an illegal detention are not admissible,”<sup>59</sup> the Court noted that the government failed to show that respondent’s statement was made in circumstances that make its use permissible, as the government, here acting through the Border Patrol, offered no evidence to justify detaining respondent in the first place.<sup>60</sup> While the Court was well

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55. *Id.* at 713.

56. *Id.* at 714 (citing *Guevara-Martinez*, 262 F.3d at 755).

57. *Id.* (quoting *United States v. Hernandez-Hernandez*, 384 F.3d 562, 565 (8th Cir. 2004)).

58. *Id.* at 715. The Court noted that after disposition of this appeal, ICE could issue a detainer on respondent to retake custody because as a jurisdictional rather than an evidentiary matter, his body and identity could not be suppressed as fruit of the poisonous tree (citing *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984)). The Court opined that this would happen as a result of civil deportation proceedings, so while their decision was of limited value to Flores-Sandoval, the Court applied well-established Supreme Court and Eighth Circuit precedent and reached “a result that has a somewhat academic feel to it. Yet we believe there is value in reminding the government that it must do things ‘the right way.’ Our holding today serves that important interest.” *Id.* (citing *Guevara-Martinez*, 262 F.3d at 753, 756).

59. *Id.* at 714 (citing *United States v. Hernandez-Hernandez*, 384 F.3d 562, 565 (8th Cir. 2004)).

60. *Id.* at 714-15. The court also held that its outcome should be the same as it was in *United States v. Guevara-Martinez*, which held that fingerprint evidence is subject to the



aware of the fact that, subsequent to the disposition of the appeal, ICE would likely issue a detainer to retake the respondent's custody,<sup>61</sup> "[a]s a practical matter, our decision is of very limited value to Flores-Sandoval. The decision simply applies well-established Supreme Court and Eighth Circuit precedent and admittedly reaches a result that has a somewhat academic feel to it. Yet we believe there is value in reminding the government that it must do things 'the right way.' Our holding today serves that important interest."<sup>62</sup>

In the Ninth Circuit, as in the others, while the Court has been more likely to find the egregiousness to which it believed *Lopez-Mendoza* referred in cases involving immigration-related stops made based on the respondent's race, its views of egregiousness in other scenarios were generally limited until recently. In 1985, a year following *Lopez-Mendoza*, in a case that did not involve race, the Court reflected the Supreme Court's view of the Fourth Amendment and deportation proceedings when it stated that "the exclusionary rule is inapplicable in *civil* deportation proceedings in the absence of any showing that the officer's conduct would undermine the credibility of the challenged evidence."<sup>63</sup> Here was evident the Court's view that excluding evidence would be the exception to the rule. Further, as to egregiousness, the Court offered a particularly limited view, requiring evidence that officers' actions "undermined the probative value of petitioner's statements" by causing the statements to have been made involuntarily or as the result of duress or coercion.<sup>64</sup> By 1994, when the Court suppressed evidence gathered as a result of a stop it determined had been based solely on the respondent's Hispanic appearance,<sup>65</sup> it held that egregiousness was proved, as the stop was made in bad faith and constituted an egregious violation of the Fourth Amendment.

As the years progressed, the Ninth Circuit developed a broader view of excludability. For example, by 2008, the Court began ordering the

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exclusionary rule and thus, given that evidence did not support an assumption that the respondent consented to the taking of his fingerprints. *Id.* at 715 (citing *Guevara-Martinez*, 262 F.3d at 755-57). Also, the fingerprints were taken during a custodial detention by ICE that has not been constitutionally justified. *Id.* at 715.

61. This is because, "as a jurisdictional rather than an evidentiary matter, his body and identity cannot be suppressed as fruit of the poisonous tree." *Id.* (citing *Guevara-Martinez*, 262 F.3d at 756).

62. *Id.* (quoting *Guevara-Martinez*, 262 F.3d at 756).

63. *Cervantes-Cuevas v. Immigration & Naturalization Serv.*, 797 F.2d 707, 711 (9th Cir. 1985) (emphasis supplied).

64. *Id.*

65. *Gonzalez-Rivera v. Immigration & Naturalization Serv.*, 22 F.3d 1441 (9th Cir. 1994).

exclusion of *any* evidence obtained either as the result of a deliberate violation of the Fourth Amendment or as the result of conduct that a reasonable officer should have known violated the Constitution.<sup>66</sup> The Board of Immigration Appeals understands that the Ninth Circuit's view of the exclusionary rule is broader than the standard adopted by both the BIA<sup>67</sup> and the First and Second Circuits.<sup>68</sup>

To summarize, while it is difficult to identify a unified test that is applied to determine whether evidence being offered against a non-citizen at a removal hearing should be excluded, to date, there is no case law that helps determine either the precise *quantum or quality* of evidence the government must proffer to justify evidentiary admission in a removal case.<sup>69</sup> Nonetheless, based on the assumption that the evidence should at least meet the level required of respondents to meet their *prima facie* case, *Matter of Barcnas* instructs us that the government must make reasonable attempts to produce supporting testimony from agents with knowledge of the events.<sup>70</sup> While this requirement furthers the general principles of fundamental fairness and reflects that due process is afforded to those in removal proceedings,<sup>71</sup> the relevant regulations, requiring an immigration judge to receive into evidence “any oral or written statement that is material and relevant to any issue in the case,”<sup>72</sup> arguably imply a lower standard of proof for admissibility. Nonetheless, the regulation is tempered by the Immigration and Nationality Act (INA), which mandates

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66. *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1019 (9th Cir. 2008), *reh'g en banc denied sub nom.* *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1099 (9th Cir. 2009) (citing *Adamson v. Comm'r of Internal Revenue*, 745 F.2d 541, 545 (9th Cir. 1984)); *see Orhorhaghe v. Immigration & Naturalization Serv.*, 38 F.3d 488, 504 (9th Cir. 1994) (affirming the Immigration Judge's suppression of a passport and Form I-94 seized in an egregious violation of constitutional rights involving both a race-based stop and invasive search techniques).

67. This rule was adopted in *In re Cervantes-Torres*, 21 I. & N. Dec. 351, 353 (B.I.A. 1996).

68. The First Circuit's test was described in *Kandamar v. Gonzales*, 464 F.3d 65, 71-72 (2006) (denying a motion to suppress and concluding that “egregious” misconduct by government agents was that which involves threats, coercion, or physical abuse); the Second Circuit's test was explained in *Almeida-Amaral v. Gonzales*, 461 F.3d at 236 (denying motion to suppress fruits of illegal stop during which respondent was asked for identification; a seizure was egregious if it is grossly unreasonable or “sufficiently severe”).

69. *See In Removal Proceedings*, *supra* note 1, at \*12.

70. *In re Barcnas*, 19 I. & N. Dec. 609, 611 (B.I.A. 1988).

71. *See United States v. Barraza-Leon*, 575 F.2d 218, 220 (9th Cir. 1978); *Singh v. Mukasey*, 553 F.3d 207, 214 (2d Cir. 2009).

72. 8 C.F.R. § 1240.7(a) (2010).

that a non-citizen in removal proceedings “shall have a reasonable opportunity to examine the evidence against [him/her] . . . and to cross-examine witnesses presented by the Government.”<sup>73</sup> Thus, an immigration judge’s admission of unsupported evidence may constitute a due process violation if its inclusion prejudices the respondent.<sup>74</sup>

### III. JUDICIAL RESPONSES TO REGULATORY VIOLATIONS GOVERNING DETENTION AND DEPORTATION PROCEDURES

Given that courts have hesitated to invoke the Constitution to regulate evidence introduced at immigration hearings, relying instead, as did the Court in *Lopez-Mendoza*, on the assumption that the regulations pertinent to collecting evidence will be honored, it should be instructive to review the value of that reliance. Various regulations promulgated pursuant to the Immigration and Nationality Act (INA) govern the role of arresting officers, warrants, and other details concerning apprehension and detention of suspected immigration law violators. For example, while INA § 287(a)(2) allows authorized officers to arrest without warrant “any alien in the United States, if he has reason to believe that the alien, so arrested is in the United States, in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest;” 8 C.F.R. § 287.8(c)(1) specifies that “[o]nly designated immigration officers are authorized to make an arrest.” Further, 8 C.F.R. § 287.8(c)(2)(i) requires that “[a]n arrest shall only be made when the designated immigration officer has reason to believe that the person arrested has committed an offense against the United States or is an alien illegally in the United States.” 8 C.F.R. § 287.8(c)(2)(ii) sets out details as to when a warrant is required: “A warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.” Finally, 8 C.F.R. § 287.8(c)(2)(iii) requires an officer to identify himself or herself as an immigration officer authorized to make an arrest, and to state that the person is under arrest and the reason for the arrest.

While it is true that not all regulatory violations in the immigration arena are held to be grounds to dismiss related removal charges,<sup>75</sup> some

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73. Immigration and Nationality Act of 1952 § 240(b)(4), 8 U.S.C. § 1229a(b)(4)(B) (2006).

74. *See* Farrokhi v. Immigration & Naturalization Serv., 900 F. 2d 697, 702 (4th Cir. 1990) (finding a due process violation based on lack of counsel); *see also* Marku v. Board of Immigration Appeals, No. 03-40871, 2005 WL 1162978, at \*1 (2d Cir. May 16, 2005).

75. *See* Lin v. United States Dep’t of Justice, 459 F.3d 255, 267-72 (2d Cir. 2006).

courts have considered such violations, especially when occasioned by arresting officers, to warrant dismissal.<sup>76</sup> An early and poignant statement on this question worth recalling here was issued by the Supreme Court in 1945, when it held in *Bridges v. Wixon* that a violation of an immigration regulation intended to protect noncitizens from unfair procedures in deportation proceedings should result in a dismissal in a case involving improperly introduced hearsay on the key issue in the case. The Court emphasized the crucial importance of making correct deportation decisions when it said:

Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulation are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.<sup>77</sup>

Nearly ten years later, in *United States ex rel. Accardi v. Shaughnessy*,<sup>78</sup> the Supreme Court held more broadly that an administrative agency must adhere to its own regulations. This principle neither died with *Bridges* nor was limited to the particular procedural objections of that case. Rather, it remains alive today, and is evident in the 1977 First Circuit case of *Navia-Duran v. Immigration and Naturalization Service*,<sup>79</sup> which vacated a deportation order because of noncompliance with a regulation requiring that statements used as evidence must be in writing and under oath, and that the respondent's signature be requested. That Court indicated that the case reminded us that the I.N.S.-established procedures should be followed at deportation hearings,<sup>80</sup> and that these procedures are supported by regulations found in the Code of Federal

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In *Lin*, the court did reverse the BIA's order of removal in a Chinese asylum case after a violation of a regulation that prohibited disclosure of confidential information that put the petitioner at risk of persecution if returned to China.

76. See *Bridges v. Wixon*, 326 U.S. 135 (1945) (deportation based on union organizer's alleged membership in the Communist Party).

77. *Id.* at 154.

78. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

79. *Navia-Duran v. Immigration & Naturalization Serv.*, 568 F.2d 803, 808 (1st Cir. 1977).

80. This can be found at 8 U.S.C. § 1252 (1970).

Regulations.<sup>81</sup> The Court quoted the statement from *Bridges v. Wixon* cited above, and reiterated its belief that compliance with regulations is an essential safeguard of a non-citizen's right to due process,<sup>82</sup> a rule that "evolved in the context of civil, not criminal, proceedings."<sup>83</sup>

The analogies to both *Bridges* and *Accardi* were evident to the court ruling on *Navia-Duran*, particularly when it highlighted the principle, affirmed by the regulation,<sup>84</sup> that one "arrested without a warrant . . . must be advised of his right to legal representation at a deportation hearing and of the possible use of his statement in a subsequent proceeding."<sup>85</sup> "Expulsion," the Court said, "cannot turn upon utterances cudged from the alien by governmental authorities; statements made by the alien and used to achieve his deportation must be voluntarily given."<sup>86</sup>

Finally, the court indicated its agreement that the "old Supreme Court dictum [from *Bilokumsky to Tod*, that the rule against involuntary confessions should not apply in deportation proceedings] has been undercut by later cases which recognize that the rule against involuntary confessions is an essential element of due process."<sup>87</sup>

Other circuits have been equally deferential to the axiom that enacted regulations must be followed, especially in removal hearings where respondents do not benefit by the full panoply of rights accorded criminal defendants. Nearly forty years after *Accardi*, in 1991, the Second Circuit adopted its doctrine in *Montilla v. Immigration and Naturalization Service*, when it held that "[t]he failure of the [BIA] and of the Department of Justice to follow their own established procedures [constituted] reversible error."<sup>88</sup> So, while the respondent in the 1993 Second Circuit case of *Waldron v. Immigration and Naturalization Service* was unsuccessful in challenging the refusal to allow him to contact his own consulate, the court nonetheless established that Waldron would have succeeded had he proved either that the applicable regulation been "promulgated to protect a fundamental right derived

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81. In this case, the regulations are found at 8 C.F.R. § 242 (1977).

82. *Navia-Duran*, 568 F.2d at 809.

83. *Id.* (citing *Smith v. Resor*, 406 F.2 141, 145 (2d Cir. 1969)).

84. 8 C.F.R. § 287.3 (2010).

85. *Navia-Duran*, 568 F.2d at 809.

86. *Id.* at 810. It is true that in *United States ex rel. Bilokumsky v. Tod*, the Supreme Court stated that an essential element of due process must be absent in order to render a deportation hearing unfair. 263 U.S. 149, 157 (1923).

87. *Navia-Duran*, 568 F.2d at 811. The Court also cited *Chambers v. Florida*, 309 U.S. 227, 240-41 (1940).

88. *Montilla v. Immigration & Naturalization Serv.*, 926 F.2d 162, 167 (2d Cir. 1991).

from the Constitution or federal statute,” or that he had suffered prejudice to the rights sought to be protected by the regulation.<sup>89</sup>

#### IV. THE BOARD OF IMMIGRATION APPEALS AND THE FOURTH AMENDMENT

##### *A. Analysis of Past Board of Immigration Appeals Decisions*

At the outset, a little background should be helpful for those unfamiliar with the administrative review tribunal for immigration cases. The Board of Immigration Appeals, commonly known as the BIA, has a heavy caseload; in fiscal year 2003, for example, it decided over 44,000 appeals.<sup>90</sup> Of those cases, more than 12,000 reached the federal circuit courts of appeals.<sup>91</sup> Unfortunately, the BIA publishes only a few of its decisions, selected by a majority of the Board members to have precedential value.<sup>92</sup> Most of its decisions remain unpublished and while they used to be accompanied by short explanations, since 1999, they have also included “affirmances without opinion,” known commonly as “AWOs,” terse decisions without any reasoning.<sup>93</sup> Thus, it is difficult to view these cases as an entity in order to ascertain the BIA’s views on particular issues.

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89. *Waldron v. Immigration & Naturalization Serv.*, 17 F.3d 511, 518 (2d Cir. 1993), *cert. denied*, 513 U.S. 1014 (1994).

90. Edward R. Grant, *Laws of Intended Consequences: IIRAIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 925 (2006).

91. *Id.*

92. 8 C.F.R. § 1003.1(g) (2010); *see also* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 251-55 (West, 5th ed. 2003); 1 Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, *IMMIGRATION LAW AND PROCEDURE* § 3.24[2][c] (Matthew Bender, rev. ed. 2010).

93. *See* John R.B. Palmer, Stephen W. Yale-Loehr, & Elizabeth Cronin, *Why are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 18-19 (2005); *see also* Katie R. Eyer *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 676-77 (Summer 2008) (“[T]he number of precedential decisions issued by the Board . . . decreased dramatically in the years following 1999. In FY 1999, just prior to the issuance of the first set of streamlining regulations, the BIA issued forty five precedential decisions, a number fairly consistent with its historical practice. During the following three years, the number of precedential decisions issued each year fell to the mid-twenties. In FY 2003, 2004, and 2005, following the issuance of the 2002 streamlining regulations, the number of precedential decisions fell even further, with an all-time low number . . . five—being issued in 2004 . . . considered as a proportion of the total number of cases decided by the BIA . . . [Prior to the streamlining,] approximately 0.256% of BIA appeals resulted in published precedential decisions[,] . . . [while] following the

Having said that, for the past nearly thirty years, the Board has, at least in its precedent cases,<sup>94</sup> followed the federal courts of appeals' rulings on the Fourth Amendment and the issue of egregiousness and has held that evidence obtained as a result of violations of the Fourth Amendment may constitute violations of the Fifth Amendment's Due Process Clause, and is thus suppressible if that evidence would adversely affect the fundamental fairness of an immigration proceeding.<sup>95</sup> In spite of that holding, the occasions on which the BIA has ruled that evidence should be suppressed have been notably few in number. For example, the Index to BIA Precedent Decisions Volume 22 categorizes decisions involving the exclusionary rule under the general topic "Evidence." While this volume includes Interim Decisions 2526-3540, covering BIA precedent cases from 1976-2009, only six of these cases concerned the applicability of the exclusionary rule. Of those six cases, in only two, *Matter of Garcia* and *Matter of Toro*,<sup>96</sup> do we find the BIA discussing the exclusionary rule in light of either the Fourth or Fifth Amendment considerations.<sup>97</sup>

Historically, the BIA has been even less concerned with regulatory violations, adopting the restrictive "prejudice" test in 1980 when deciding whether deportation proceedings should be invalidated following a regulatory violation.<sup>98</sup> In that year, it found substantial compliance with

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1999 and 2002 streamlining regulations, . . . 0.066% of BIA appeals result[ed] in published precedential decisions in 2001 and a mere 0.010% [in 2004].").

94. Three-member panels decide precedential cases. See BOARD OF IMMIGRATION PRACTICE MANUAL, ch. 1.3(a)(i) (rev. Apr. 1, 2008), available at <http://www.usdoj.gov/eoir/bia/qapracmanual/apptmnt4.htm> ("[A] single Board Member decides cases unless the case falls into one of six categories that require a decision by a panel of three Board Members [such as] the need to establish a precedent construing the meaning of laws, regulations or procedures."). Moreover, only "selected decisions of the Board rendered by a three-member panel or by the Board *en banc* may be designated to serve as precedents." 8 C.F.R. § 1003.1(g) (2010). Further, "[u]npublished decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases." BOARD OF IMMIGRATION PRACTICE MANUAL, ch. 1.4(d)(ii) (rev. Apr. 1, 2008). Because unpublished decisions lack precedential value, courts have declined to give them deferential treatment under *Chevron*. See *Chan v. Reno*, 113 F.3d 1068, 1073 (9th Cir. 1997) (refusing to defer to an unpublished disposition that, "by the INS's own regulations . . . carr[ies] no precedential weight"). However, there is disagreement on this issue. See *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1011-14 (9th Cir. 2006) (denying *Chevron* deference to a non-precedential BIA decision but emphasizing that *Chevron* deference may apply where the non-precedential decision relied on and was "compelled by" an earlier precedential decision).

95. *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

96. *Id.*; *In re Garcia*, 17 I. & N. Dec. 319 (B.I.A. 1980).

97. *In re Garcia*, 17 I. & N. Dec. at 319; *In re Toro*, 17 I. & N. Dec. at 343.

98. *In re Garcia-Flores*, 17 I. & N. Dec. 325, 329 (B.I.A. 1980) ("[W]here agency action has been invalidated by the Supreme Court there has either been an expressed or clearly apparent prejudice to the individual as a result of a violation of a rule or regulation promulgated at least in part to bestow a procedural or substantive benefit on the individual in

a regulation requiring that respondents be informed that statements made could be used in subsequent proceedings, where the record did not reflect that the respondent was so advised, but where the forms respondent signed advised him, “in both English and Spanish, of his right to consult a lawyer and his right to ask for a hearing to determine his right to remain in the United States.”<sup>99</sup> In 1991 the prejudice standard was disavowed after the Second Circuit held that relief for a non-citizen claiming the I.N.S. had failed to adhere to its own regulations in a deportation hearing was not predicated on proof of prejudice; rather, all that need be shown was that the I.N.S. violated regulations intended for the applicant’s benefit.<sup>100</sup>

The paucity of precedential BIA cases undoubtedly hampers research into the suppression issue.<sup>101</sup> Further, the federal courts of appeals’ continuing divergence as to what constitutes egregious conduct by government agents vis-à-vis immigration detainees has seemingly proved a challenge for the BIA as well, which finds itself applying different tests in different cases, depending on the law of the circuit in which the case originated. For example, in the recent case of *Matter of Sanchez-Lopez* arising in the Ninth Circuit (though an unpublished case), the BIA applied that Circuit’s egregious violation rule, which is broader than that of the First or Second Circuit.<sup>102</sup>

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question. Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed. Similarly, where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial (citations omitted). As a general rule, however, prejudice will have to be specifically demonstrated.”)

99. *In re Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (B.I.A. 1980).

100. *Montilla v. Immigration & Naturalization Serv.*, 926 F.2d 162, 169 (2d Cir. 1991). It could be argued that *Montilla* only meant to disavow the ‘prejudice’ in cases involving alleged violations of regulations regarding the right to counsel in immigration hearings. *See, e.g., id.*

101. A conversation with the BIA Library staff in Falls Church, Virginia confirmed that statistics are not generated by the BIA comparing the number of published cases with the total number decided. A staff member indicated that the current volume of the BIA’s indexed decisions, volume 24, includes decisions from 2009 through the present (mid-March 2010), during which time only 32 decisions have been deemed to carry precedential value. Some scholarly works attempt to get at these baseline figures. *See, e.g.,* John R.B. Palmer, Stephen W. Yale-Loehr, & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005).

102. *In re Sanchez-Lopez*, No. A094-810-418, (B.I.A. May 7, 2009), available at [www.bibdaily.com](http://www.bibdaily.com) (search Sanchez-Lopez).



In a manner similar to the federal courts of appeals, in the years since *Lopez-Mendoza*, the BIA has relied not upon the Fourth Amendment, but upon the Fifth Amendment's Due Process Clause when it encountered challenged evidence that lacked both probative value and fundamental fairness.<sup>103</sup> In fact, in 1979, it terminated proceedings after finding that a respondent's admissions, which formed the basis for the government's case, were based on coerced and involuntary statements, thereby violating due process.<sup>104</sup> In light of that decision, when a different respondent lost an appeal on the grounds of allegedly tainted evidence the following year, the BIA did reaffirm that "circumstances surrounding an arrest and interrogation . . . may in some cases render evidence inadmissible under the Due Process Clause of the Fifth Amendment."<sup>105</sup>

As to the Fourth Amendment, the 1979 case of *Matter of Sandoval* confirmed the BIA's canon that the exclusionary rule did not apply in deportation proceedings.<sup>106</sup> A year later it reaffirmed this conclusion, in a statement eerily akin to *Lopez-Mendoza* in its first blush denial of the Fourth Amendment, when the BIA iterated that "evidence resulting from a search and seizure in violation of Fourth Amendment rights is not . . . excludable from civil deportation proceedings."<sup>107</sup> In *Matter of Toro*, the BIA actually found that the officers' conduct during the arrest and interrogation breached the respondent's Fourth Amendment rights; in affirming the deportation, the Tribunal reasoned that the procedures employed were not prohibited at the time in which they were engaged, as the incident had taken place nearly a year before the Supreme Court ruled them to be unconstitutional.<sup>108</sup>

It was not until 1996 that the BIA specifically acknowledged the *Lopez-Mendoza* mandate that evidence produced at deportation hearings

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103. *Trias Trias-Hernandez v. Immigration & Naturalization Serv.*, 528 F.2d 366, 369 (9th Cir. 1975); *In re Toro*, 17 I. & N. Dec. 340, 343 (B.I.A. 1980).

104. *In re Garcia*, 17 I. & N. Dec. 319, 320-21 (B.I.A. 1980) (finding that admission of alienage was made only after officers led respondent to believe he was going to be deported, that he had no rights, including none to speak with counsel, and that he could be detained without explanation).

105. *In re Toro*, 17 I. & N. Dec. at 343 (citing *In re Garcia*, 17 I. & N. Dec. at 319).

106. *In re Sandoval*, 17 I. & N. Dec. 70, 77 (B.I.A. 1979). There is an odd statement appearing as *dictum* in *Sandoval* to the effect that respondent's admission at the hearing concerning her alienage was elicited from her after she was improperly not informed of her Fifth Amendment privilege against self-incrimination. As a result, the admission was disregarded. *Id.* at 72. The appropriate inference drawn here is that the court assumed this privilege to be applicable in deportation proceedings, regardless of whether the statement would have subjected the respondent to criminal liability.

107. *In re Toro*, 17 I. & N. Dec., at 343 (citing *In re Sandoval*, 17 I. & N. Dec. 70 (B.I.A. 1979)).

108. *Id.* at 343-44 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

which derived from egregious violations of Fourth Amendment rights must be excluded.<sup>109</sup>

Because it is difficult to draw supportable conclusions as to the BIA's jurisprudence from so few cases, I conducted additional research into the BIA's opinions on this topic, which led to cases the BIA chose not to assign precedential value. At the risk of discipline for citing and discussing unpublished cases,<sup>110</sup> I will do just that; otherwise, my attempt to draw conclusions about the BIA's views on this issue would be fruitless.<sup>111</sup>

In one non-precedential case from May 2009, the BIA affirmed the termination of removal proceedings where, following an illegal search and seizure, detention, and interrogation by immigration agents, the respondent admitted alienage.<sup>112</sup> In that case, originating in California and thus controlled by the Ninth Circuit's jurisprudence on the issues of egregiousness,<sup>113</sup> there was first an illegal stop; next when the respondent was subjected to a pat search, agents found respondent's wallet, which produced evidence of alienage; subsequently, during respondent's detention and interrogation, he admitted his alienage. The court reasoned that, under the Ninth Circuit's rule (being broader than that of the BIA), the evidence recovered during the pat search needed to be excluded because "a reasonable officer should have known that a pat search of the respondent and the act of reaching into the respondent's pocket and removing his identification card from his wallet, [sic] would be a violation of the respondent's Fourth Amendment rights."<sup>114</sup>

More recently, in October 2009, operating on the theory that "egregious violations of Fourth Amendment rights that transgress notions of

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109. *In re Cervantes-Torres*, 21 I. & N. Dec. 351, 353 (B.I.A. 1996) (denying relief, as the voluntary admissions were not the result of the illegal arrest).

110. In one case the court actually raised the possibility of discipline for a lawyer who cited to an unpublished case. *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001).

111. This lack of a stock of precedential cases discourages effective client counseling and almost assures a level of law practice far below that which ethical, diligent attorneys strive for and are expected to attain.

112. *In re Sanchez-Lopez*, No. A094-810-418, (B.I.A. May 7, 2009), available at [www.bibdaily.com](http://www.bibdaily.com) (search Sanchez-Lopez).

113. Requiring exclusion of any evidence obtained as the result of a deliberate violation of the Fourth Amendment or as the result of conduct that a reasonable officer should have known violates the Constitution. In this case the BIA agreed with the IJ that a reasonable officer should have known that a pat search of the respondent and reaching into the respondent's pocket and removing his identification card from his wallet would be a violation of the respondent's Fourth Amendment rights. *Id.* at 2.

114. *Id.*

fundamental fairness” warrant application of the exclusionary rule in immigration proceedings, the BIA issued another unpublished opinion in the removal case of Roberto Cervantes-Valerio.<sup>115</sup> Though not dismissing, the BIA did remand when the respondents challenged the judge’s refusal to hold a hearing on their Motion to Suppress the Form I-213,<sup>116</sup> where respondents alleged that the information contained therein regarding identity and alienage was improperly obtained by officials who lacked a “reasonable suspicion” sufficient to support a lawful apprehension.<sup>117</sup> The BIA noted that the judge’s ruling denying the motion failed to address whether the admission of the documents was fundamentally fair, whether the respondents had been lawfully stopped, or whether respondents had established the existence of an egregious violation of the Fourth Amendment. In its ruling, the BIA, citing *Lopez-Mendoza, Matter of Sandoval*, and more recent decisions such as *Navarro-Diaz*<sup>118</sup> and *Almeida-Amaral v. Gonzales*,<sup>119</sup> reiterated that a seizure is egregious if it is “gross or unreasonable” or “sufficiently severe,” the standard of the Second Circuit.

Further, the BIA seemed determined to remind the immigration judges that procedural requirements applicable in removal hearings should not be ignored: first, removal hearings must be conducted in accordance with requirements specified in the relevant Code of Federal Regulations, requiring that when there are contested issues of removability, the IJ “shall receive evidence as to any unresolved issues”;<sup>120</sup> and second, the INA<sup>121</sup> mandates that respondents have a reasonable opportunity to examine the evidence against them, to present evidence on their own behalf, and to cross-examine witnesses presented by the DHS.<sup>122</sup> The

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115. *In re Cervantes-Valerio*, at \*2 (B.I.A. Oct. 2, 2009), available at [www.bibdaily.com](http://www.bibdaily.com) (search Cervantes-Valerio).

116. Record of Deportable Alien. The I-213 is the form created by the legacy I.N.S. officer or the ICE officer with biographical information about a noncitizen as well as information obtained through undercover investigations, other law enforcement agencies, the USCIS, U.S. Customs and Border Protection (CBP), and other agencies. It is generally created during the questioning of a noncitizen to obtain information to place him in removal proceedings. See 1 NAT’L LAWYERS GUILD, IMMIGRATION LAW & DEFENSE § 7.5 (West, 3d ed. 2009).

117. *In re Cervantes-Valerio*, *supra* note 115, at \*1.

118. *United States v. Navarro-Diaz*, 420 F.3d 581, 587 (6th Cir. 2005).

119. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235-36 (2d Cir. 2006).

120. The Court here cited 8 C.F.R. § 1240.10(d) (2010).

121. Immigration and Nationality Act, 36 I.N.A. § 240(b)(4)(B) (2010).

122. For recent commentary on the critiques leveled against the fairness of hearings before both the BIA and the immigration courts, see Lindsey R. Vaala, *Bias on the Bench: Raising the Bar for U.S. Immigration Judges to Ensure Equality for Asylum Seekers*, 49 WM. & MARY L. REV. 1011 (2007); Grant, *supra* note 90, at 954.

BIA specified in *Cervantes-Valerio*'s remanded hearing that these requirements were to be followed.<sup>123</sup>

As a way to further discern the BIA's position on the Fourth and Fifth Amendments and suppression of tainted evidence, I reviewed all published BIA cases from 2006–2009 and studied the six in which Motions to Suppress were filed. The BIA affirmed the judges' denials of Motions to Suppress in four cases, and in only two of the six did the BIA alter the judges' decisions. One resulted in a remand, the other in a dismissal of the removal proceedings. One surely turned on a race-based stop, and the other probably did as well.

In the case involving the remand, it appears that the facts may have made out a case for an egregious violation of Fourth Amendment rights based on unlawful race discrimination, an inference impossible to confirm, as the immigration judge failed to specify sufficient details to make the inference.<sup>124</sup> In the case, the respondent claimed he was arrested solely because he was speaking Spanish and because he was Hispanic.<sup>125</sup> The BIA appeared to agree with the respondent that the Form I-213 indicated that the stop was solely based on the respondent's Hispanic appearance and thus could be found to have been egregious. In addition, there was apparently no independent evidence offered to establish the respondent's removability other than the fruit of the unlawful arrest.

In the case involving dismissal, the DHS had appealed the immigration judge's ruling terminating proceedings; the BIA dismissed the appeal and affirmed the termination.<sup>126</sup> At the removal hearing, because the judge found that respondent's arrest had been egregious and a violation of the Fourth Amendment, he suppressed the evidence obtained as a result thereof. The BIA agreed with the immigration judge that the respondent was neither asked about his immigration status before he was arrested nor arrested for safety concerns; rather, his arrest was based solely on his Hispanic appearance and his limited English, constituting an egregious violation of the Fourth Amendment that warranted suppression of the evidence gathered as a result of the unlawful activity.<sup>127</sup>

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123. *In re Cervantes-Valerio*, *supra* note 115, at \*3.

124. *In re Guerrero-Renovato*, 2009 WL 2171592 (B.I.A. July 8, 2009).

125. *Id.* at \*2.

126. *In re Avalos-Casillas*, 2008 WL 4722664 (B.I.A. Oct. 7, 2008).

127. *Id.* at \*2 (citing *Gonzalez-Rivera v. Immigration & Naturalization Serv.*, 22 F.3d 1441, 1449-52 (9th Cir. 1994)).

*B. Coming Full Circle: Immigration Courts on the Front Line—  
The Boston Immigration Court*

In the fact that the BIA speaks through the local immigration court judges as well as with its own voice, it is instructive to revisit how immigration judges are handling Fourth Amendment issues. While I have been unable to identify all of the Fourth Amendment-related opinions of the sitting immigration judges around the nation, there is at least one other case besides that of the Hartford Immigration Court Judge described earlier in this article in which objections to evidence offered by the government resulted in a dismissal of the removal charges. In this 2009 case decided by the Boston Immigration Court, Immigration Judge Leonard A. Shapiro found violations of 8 C.F.R. § 287 and of both the Fourth and Fifth Amendments, excluded the evidence garnered from an illegal search and, ultimately, dismissal of the case because of a dearth of evidence.<sup>128</sup>

In fact, in that case, the judge actually found that the government agents' activity to have been unconstitutional.<sup>129</sup> Procedurally, the judge initially found that the respondent had met her burden of establishing a *prima facie* case for suppression,<sup>130</sup> in that documentary evidence was not shown to have been obtained "independent of, and prior to "a warrantless search and arrest."<sup>131</sup> In his finding, Judge Shapiro, while acknowledging that "the exclusionary rule does not generally apply in removal proceedings,<sup>132</sup> nonetheless noted the appropriateness of applying it to suppress evidence acquired in violation of the Fourth Amendment where the violation was egregious.<sup>133</sup> In this particular case, that is precisely what he found.

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128. In Removal Proceedings (Bos. Immigr. Ct., Aug. 25, 2009) (Shapiro, I.J.).

129. More than one regulation was violated. First, 8 C.F.R. § 287.8(f)(2), which requires consent of owners or occupants of a residence before immigration officers enter without a warrant. The next regulation required that that unless one is likely to escape before a warrant can be issued, immigration officers must obtain an arrest warrant. 8 C.F.R. § 287.8(c)(2)(ii). The Judge noted that "[t]hese regulations are mandated by the Constitution, and a violation implicates constitutional rights." *Id.* at \*10.

130. *In re Barcenas*, 19 I. & N. Dec. 609, 611 (B.I.A 1988).

131. *In Removal Proceedings*, *supra* note 128, at \*8, (citing *Murray v. United States*, 487 U.S. 533, 537 (1988)).

132. *Id.* at \*5 (citing *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984)).

133. *Id.* at \*5 (citing *Lopez-Mendoza*, 468 U.S. at 1050-51 & *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22-23 (1st Cir. 2004) (noting that *Lopez-Mendoza* "left the door open [for application of the exclusionary rule] in cases of egregious violations of Fourth Amendment or other liberties.")).

The facts of the case are instructive. It began with a warrantless search of a third floor apartment in Newburyport, Massachusetts at 4:10 a.m. on August 23, 2007.<sup>134</sup> Testimony showed that respondent, who shared the apartment with her fiancé and four others, “awoke suddenly to someone pounding on her bedroom door.” They became “confused and did not understand who it could be or why someone would punch their bedroom door in the middle of the night. They thought it might be the fire department.” Respondent “turned the key to unlock the door.” As she did this, “two men pushed the door open and entered the bedroom. The lights were off, and everything was dark. The men shined a flashlight in their faces and told them [both of whom were naked] not to speak.” One “tried to grab a towel to give to [respondent], but the men said, ‘don’t get anything’ and get out of here.” Respondent’s fiancé “grabbed his shorts and [respondent] had to get out of bed, completely naked, in front of the men. She grabbed her pajamas at the end of the bed and put them on.” The men took respondent and her fiancé “to the living room and told them to sit on the couch. The officers did not indicate who they were, did not show [respondent] . . . any documents or papers, and did not tell them where they were going, and [respondent] did not know who they were or that they were immigration officers. Their uniforms had “ICE” printed on them. A female officer asked [respondent] for her passport, and [respondent] told her that it was in their bedroom, but she could not recall where. As soon as she said where her passport was, another officer went to [respondent’s] room to look for it . . . She did not feel that she could get up and leave because they were intimidating her and making her scared. [Respondent] requested to use the restroom, and the female officer went with her and stayed with her in the bathroom until she was finished.” Before respondent and her fiancé “were taken to Boston, the officers placed them in handcuffs. From Boston to the detention facility, restraints were also placed on [respondent’s] ankles. Once in Boston, the officers locked [respondent] in one of the cells, separated from the others. No one told her what was going on. After a while, someone came with papers for [respondent] to sign. [Respondent] did not know what the papers meant, and she was afraid. She did not sign the papers . . . After [respondent] was released after paying bond, [respondent] returned to her apartment and, once there, took pictures of

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134. *Id.* at \*2.

the apartment, which was “messy and disorganized, . . . different than its condition before the incident occurred.”<sup>135</sup> “[Respondent] testified that one of the photographs was of her bedroom. The picture showed a dresser with various drawers missing. [Respondent] testified that she did not take the drawers out, and they had not been like that before she left the apartment on August 23 . . . The officers seized her passport and have not returned it.”<sup>136</sup>

In his opinion following this description, Judge Shapiro stated that even though regulations governing immigration arrests had been violated in this case, these violations alone would not have warranted suppression of the evidence obtained therefrom.<sup>137</sup> Nonetheless, he dismissed the case upon finding, in addition, that the regulatory violations implicated constitutional rights, maintaining that “to admit any evidence derived from those violations would compromise the fundamental fairness of the removal proceedings.”<sup>138</sup>

Therefore, there is consistency in the BIA’s approach to Fourth Amendment claims: it applies the law of the federal courts of appeals from which cases arise, encountering little trouble identifying cases brought solely on account of the race of the respondent, and dismisses those cases. The immigration judges—or at least the two surveyed in this piece—apply the Fourth Amendment and seem to extend their inquiries to the Fifth Amendment as well because, as Judge Shapiro noted, “[t]he circumstances surrounding an arrest or seizure of evidence may in some instances render evidence inadmissible because it would violate the Fifth Amendment’s requirement of fundamental fairness.”<sup>139</sup>

#### V. IS THE STRICT INTERPRETATION OF THE EXCLUSIONARY RULE IN IMMIGRATION HEARINGS “CRACKED”<sup>140</sup> BEYOND REPAIR?

Predictability and uniformity in judicial decisions are fundamental to due process.<sup>141</sup> The Fourth Amendment’s proscription against introducing

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135. *Id.* at \*3.

136. *Id.* at \*4.

137. *Id.* (citing 8 C.F.R. § 287.12 & *Navarro-Chalan*, 359 F.3d at 23 (requiring regulations to have a purpose to benefit respondents in order for violations to require dismissal)).

138. *Id.* at \*10 (citing *Navia-Duran v. Immigration & Naturalization Serv.*, 568 F.2d 808-09 (1st Cir. 1977)).

139. *Id.* at \*5.

140. See LEGOMSKY & RODRIGUEZ, *supra* note 5 (reference to the term “cracks”).

141. See, e.g., *Francis v. Immigration and Naturalization Serv.*, 532 F.2d 268, 273 (2nd Cir. 1976) (“Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.”).

evidence gathered owing to breaches of fundamental rights is a touchstone of our constitutional society. Yet on this issue, the federal circuit courts of appeals, courts so central to the successful functioning of our judiciary, not only suffer conceptual differences, but also tolerate among them statistically-significant discrepancies in reversal or remand rates of BIA cases.<sup>142</sup> These disparities demonstrate a broken system, and mandate that the jurisprudence surrounding the Fourth Amendment in immigration cases be repaired.

A recent study of the federal circuit courts on a different issue—whether they have jurisdiction to stay a grant of voluntary departure<sup>143</sup> pending judicial review<sup>144</sup>—found significant discrepancies. The authors concluded that distinctions among the circuits,<sup>145</sup> and the unpredictability resulting therefrom, run counter to the “longstanding goal of uniformity within national immigration policy.”<sup>146</sup> The need for uniformity in this arena was even stressed by Alexander Hamilton when he argued in *The Federalist Papers* that “the power over naturalization must ‘necessarily be exclusive;

142. See Grant, *supra* note 90, at 956–57 n.198 (surveying reversal and affirmance rates for nine circuits, from information available in December 2009 and based on the last 136 court decision on the merits involving petitions for rev of BIA decisions of both published and unpublished cases. The average affirmance rate for the eight circuits reviewed is 89%, yet the discrepancy in rates of affirmance and accordingly in rates of remand or reversal among the circuits surveyed varied from 63% to 99%, a significant difference. The breakdown by circuits reveals the following affirmance rates: 1st Circuit, 90%; 2nd Circuit, an 84%; in the 3rd Circuit, 84%; 4th Circuit, 97%; 5th Circuit, 93%; 6th Circuit, 82%; 7th Circuit, 63%; 9th Circuit, 80%; and in the 11th Circuit, 99%).

143. Voluntary departure allows a respondent in a removal hearing to pay his/her own way back home, avoiding many of the adverse effects of removal.

144. See Grant, *supra* note 90.

145. This question of circuit splits has become a more significant issue since the 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, or “IIRAIRA.” Since this enactment, there has been considerable confusion among the circuit courts when interpreting various vague sections of the law. One such example arises in the effect of differing states’ classification of crimes; under IIRAIRA convictions of certain crimes prevent a grant of voluntary departure. Many of the crimes in question are defined at the state level. The circuit courts have had difficulty setting uniform parameters as to which state crimes, under IIRAIRA, forestall voluntary departure grants and, accordingly, as to the precise extent of their jurisdiction to review such grants. See Nicole Abruzzo, *Voluntary Departure Post-Iiraira: A Struggle Between Equitable Considerations Promoting Clemency Measures, and Statutory Considerations Tending Towards Oppression*, 21 ST. JOHN’S J. LEGAL COMMENT. 881, 883 (2007).

146. *Gerbier v. Holmes*, 280 F.3d 297, 311-12 (3rd Cir. 2002) (noting that the Constitution and notions of “fundamental fairness” support the policy of uniformity in the immigration context); see also *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 913 (9th Cir. 2004).



because if each State had power to prescribe a Distinct Rule there could be no Uniform Rule.”<sup>147</sup>

Courts have expressed concern about this type of disparate treatment, particularly as it relates to “similarly situated aliens under the immigration laws.”<sup>148</sup> In *Gerbier v. Holmes*, the Third Circuit Court of Appeals emphasized the need for uniformity in immigration law, noting its concern that those “convicted of drug offenses in different states . . . would be treated differently with respect to deportation and cancellation of removal . . . This cannot be what Congress intended in establishing a “uniform” immigration law.”<sup>149</sup>

The Supreme Court is also inclined to favor uniformity in instances in which varying state definitions of what constitutes criminal conduct have federal sentencing consequences,<sup>150</sup> in one case rejecting, on this basis, the Eighth Circuit’s approach to the issue and mentioning its concern about the possibility of unequal punishments for identical criminal conduct.<sup>151</sup>

The adverse consequences of these discrepant federal circuit court decisions, in the Fourth Amendment cases as well as in other issues, extend beyond the theoretical: they adversely affect attorney–client relationships, interfering with the immigration attorney’s ability to provide effective legal representation. For example, clients can feel pressure to move from one jurisdiction to another in an effort to find a circuit court forum that will enhance their chances of success in immigration court.<sup>152</sup>

“[I]nterpretations of the federal immigration statute vary greatly from district to district and from circuit to circuit. These days, to effectively represent his or her client, the successful immigration practitioner must be well-versed not only in the law that applies in his or her backyard, but also the law as applied across the country from sea to shining sea.”<sup>153</sup> For example, a client applying for naturalization needs to establish good moral character, but a conviction for certain crimes in *some* circuits

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147. *Gerbier v. Holmes*, 280 F.3d at 311 (quoting THE FEDERALIST NO. 32 at 181, 182 (Alexander Hamilton)); See Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 904-05 (2005).

148. *Aguirre v. United States*, 79 F.3d 315, 317 (2d Cir. 1996).

149. *Gerbier v. Holmes*, 280 F.3d at 312.

150. Yates et al., *supra* note 147, at 905-06.

151. *Taylor v. United States*, 495 U.S. 575, 590-91 (1990); see also Yates et al., *supra* note 148, at 906.

152. Jeff Joseph, Mary Holper & Gerald Seipp, *The Importance of Finding the “Right” Circuit for Your Immigration Case*, 09-04 IMMIGR. BRIEFINGS 1 (Apr. 2009).

153. *Id.*

would prevent such a finding while in others it would not; thus, in some cases, clients would be well-served by moving to a different circuit.<sup>154</sup> That lawyers must advise clients to actually engage in a physical move to a different jurisdiction underscores the grim situation in which we find ourselves, whereby it is claimed that we operate within a federal system, yet, in an area of such national importance as the enforcement of our immigration laws, we hardly do.

## VI. CONCLUSION

Of the four federal circuit courts of appeals that have spoken recently concerning the exclusion issue in immigration courts—the First, Second, Eighth, and Ninth—only one, the First Circuit, imposes a standard that truly reflects adherence to *Lopez-Mendoza's* requirement for egregious behavior—misconduct by threats, coercion, or physical abuse—to exclude evidence.<sup>155</sup> The remaining circuits have essentially ignored, or perhaps discarded, the Supreme Court's prescription as they ruled, serially, that, for evidence offered in removal hearings to be excluded as violating the Fourth Amendment,

it must be established either that (a) “an egregious violation that was fundamentally unfair had occurred or (b) that the violation—regardless of its egregiousness or unfairness—undermined the reliability of the evidence in dispute.”<sup>156</sup> In addition, this Circuit reiterated that where the reliability of evidence is in dispute, even if the conduct was not egregious, exclusion is warranted.<sup>157</sup> (Second Circuit)<sup>158</sup>

it must be established that there was a custodial detention without justification that “offends” the Fourth Amendment<sup>159</sup> (Eighth Circuit); and, finally, that

it was obtained either as the result of a deliberate violation of the Fourth Amendment or as the result of conduct that a reasonable officer should have known violated the Constitution.<sup>160</sup> (Ninth Circuit)

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154. *Id.*

155. *Kandamar v. Gonzales*, 464 F.3d 65, 71-72 (1st Cir. 2006).

156. *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009) (citing *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131 (2d Cir. 2008) (quoting *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006))).

157. *Id.* (citing *Almeida-Amaral*, 461 F.3d at 235).

158. *See Singh*, 553 F.3d at 207.

159. *United States v. Flores-Sandoval*, 422 F.3d 711, 712 (8th Cir. 2005).

160. *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008) (citing *Adamson v. Comm'r of Internal Revenue*, 745 F.2d 541, 545 (9th Cir. 1984)); *see Orhorhaghe v. Immigration & Naturalization Serv.*, 38 F.3d 488 (9th Cir. 1994) (affirming the Immigration

None of these statements reflects *Lopez-Mendoza's* ruling on the Fourth Amendment. Rather, each seems to ignore that rule and to be applying, actually, traditional Fourth Amendment principles. In fact, these rulings essentially reflect the exclusionary rule long in place in non-immigration or criminal cases.

While there appears, then, to be some consistency, at least among three of the eleven federal circuits, this consistency does not address the lack of uniformity among the rest of the courts. Nor does it establish reliability at the BIA, which generally applies the law of the circuit in which the case arose. "Thus, the law applied by the BIA differs by federal circuit, where there is a split between the circuits, or where a particular issue has been decided in one circuit but not another."<sup>161</sup> Different rules should not apply when such a vital right is at stake, where the protection accorded is based on the fortuity of the location in which an immigration case is heard. If immigration rules are so central to protecting the sovereignty of our nation,<sup>162</sup> as the Supreme Court has been professing for over one hundred years, interpretation of those rules should not depend on the fortuitousness of the jurisdiction in which a case is heard.<sup>163</sup>

The Supreme Court is unlikely to accept *certiorari* on this issue, given its low rate of acceptance and the limited scope of the cases it does hear, particularly in the area of immigration.<sup>164</sup> Hence, resolution of this unsettling issue, though important, seems left to the federal circuit courts; otherwise, if the distinctions would persist, lack of both respect for and deference to the courts is the likely outcome.<sup>165</sup>

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Judge's suppression of passport and Form I-94 seized in an egregious violation of constitutional rights involving both a race-based stop and invasive search techniques).

161. Paul O'Dwyer, *A Well-Founded Fear Of Having My Sexual Orientation Asylum Claim Heard In The Wrong Court*, 52 N.Y.L. SCH. L. REV. 185, 193 (2007-2008).

162. *Chae Chan Ping v. United States (The Chinese Exclusion Case)* 130 U.S. 581, 610-11 (1889); *see also* *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

163. While it is true that discrepancies among the circuit courts of appeals are tolerated on other issues, in this situation, because it is fundamental to the provision of due process, it should not be. An expansive study of the reasons why this issue is some much more fundamental than are others involving circuit differences and therefore should not be permitted is beyond the scope of this article.

164. The immigration cases it has accepted in the past decade dealt with issues so different from this one, which can be characterized as a micro-issue of how to conduct immigration hearings, it is doubtful the Court would accept *certiorari* on this issue. The cases they accepted concerned indefinite detention, *Zadvydas v. Davis*, 533 U.S. 678 (2001), and pre-trial detention, *Demore v. Kim*, 538 U.S. 510 (2003).

165. *See* Michele Benedetto, *Crisis on The Immigration Bench*, 73 BROOK L. REV. 467 (2008) (arguing that inconsistencies in grant rates for decisions among immigration courts reflects a lack of judicial ethics).

The recent blending of criminal and immigration law<sup>166</sup> resulting from IIRAIRA and its progeny<sup>167</sup> enhances the argument that the exclusionary rule's application in the criminal and immigration courts must be unified. It is wrong, unjust, and I suggest unconstitutional for the same evidence to be inadmissible in one court of the United States and not in another. The old adage that immigration matters are simply civil ones because removal is a civil remedy no longer stands. This is true not only because deportation is truly punishment and is essentially a criminal remedy,<sup>168</sup> but also because of the numerous immigration law violations that had been just but are now crimes;<sup>169</sup> the criminalization of immigration law violators is well under way.<sup>170</sup>

The need to unify treatment of the Fourth Amendment between the criminal and immigration courts raises the question as to what should replace the *Lopez-Mendoza* test.<sup>171</sup> Abandoning the *Lopez-Mendoza* proscription against Fourth Amendment application in removal hearings is insufficient. It is not acceptable to say that the rule is both morally wrong and also unconstitutional without offering a workable alternative that is likely to be effective and to avoid causing novel problems. In searching for a remedy, one can find solutions by studying adjustments made in other fields of law as their jurisprudence has developed. For example, illustrations from the field of Tort law can shed light on

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166. One might more accurately characterize it as “confusion between” the two areas of law.

167. See *supra* discussion accompanying note 13.

168. I do consider it to be that; in fact it has been established that the consequences are often worse for one removed than for one convicted of a crime. One convicted spends some time in a United States prison, with all the protections that go along with that—law libraries, exercise, medical care, even education. However, deportation is banishment. This proposition was set out by Justice Brewer in his dissent in *Fong Yue Ting*. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (“[i]f a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”). For other relevant cases discussing the punitive nature of deportation, see *Ng Fung Ho v. White*, 259 U.S. 176 (1923) and *Bridges v. Wixon*, 326 U.S. 135 (1945). For further discussion, see Robert Pauw, *A New Look At Deportation as Punishment: Why At Least Some of The Constitution's Criminal Procedure Must Apply*, 52 ADMIN. L. REV. 305 (2000).

169. One such example is illegal reentry following deportation. 8 U.S.C. § 1182(a)(9)(A) (2006).

170. See Stumpf, *The Crimmigration Crisis: Immigrants, Crime, And Sovereign Power*, *supra* note 13.

171. With the turmoil of tests that have been documented in this article, it is difficult to say seriously that there really is not any *Lopez-Mendoza* test in any event.

possible solutions. In recent years, many states have eliminated parent-child immunity as well as the distinctions in the degree of care owed to those injured on private land. States eliminating parent-child immunity have generally replaced long-standing special rules with a general duty to avoid being negligent. States eliminating the distinctions in the degree of care owed to those injured on one's land, which had been based on rigid classifications of trespasser, licensee, or invitee, have also substituted a negligence standard of care in its stead.

In like manner, we should replace *Lopez-Mendoza's* archaic principle of non-applicability of the Fourth Amendment in removal hearings with a general, well-settled constitutional principle—that evidence gathered as a result of violations of the Fourth Amendment must be suppressed. The Second, Eighth, and Ninth Circuit Courts of Appeals have already demonstrated to the remainder of the circuits, and to the BIA, how they have dealt with the question and have offered their own sensible solution; they have essentially interposed their own “general negligence standard,” the standard of traditional Fourth Amendment jurisprudence.

It should suffice when an immigration respondent proves that government agents violated constitutional rights in the gathering of evidence to support the case. One should not have to prove that these rights were violated egregiously, by misconduct, by threats, by coercion, by physical abuse, by a deliberate violation of the Constitution, or as the result of conduct that a government agent should have known violated the Constitution. A violation of constitutional rights is a violation of constitutional rights, and when it comes to violations generating evidence to be introduced in the all-important removal hearing, that evidence is tainted, *ab initio*, should be treated as such, and should be excluded.

*Author's Note: Immigration law, being progressive in nature, it is not surprising that the argument made herein is taking hold. Since this article was drafted, additional Immigration Courts have ruled that Fourth Amendment rights were violated during unreasonable searches, and judges have suppressed the evidence gathered as a result (see the mid-Atlantic region). Readers can look forward to further progress on this issue in the near future, including rulings from the BIA.*