



Immigration Law Advisor

September 2012 A Legal Publication of the Executive Office for Immigration Review Vol. 6 No. 8

In this issue...

Page 1: Feature Article:

What To Do When the Constable Blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings

Page 4: Federal Court Activity

Page 7: BIA Precedent Decisions

Page 10: Regulatory Update

The Immigration Law Advisor is a professional newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

What To Do When the Constable Blunders? Egregious Violations of the Fourth Amendment in Removal Proceedings

by Kate Mahoney

With increasing regularity, Immigration Judges are asked to decide whether evidence obtained in violation of the Fourth Amendment to the United States Constitution should be excluded from removal proceedings in their courtrooms. In motions to suppress, respondents challenge the nature and circumstances under which immigration officers obtained the evidence giving rise to their removal proceedings, usually urging that the Record of Inadmissible/Deportable Alien (Form I-213) be suppressed. For example, a respondent may allege that, while executing an arrest warrant at a suspect's home, Immigration and Customs Enforcement ("ICE") officers entered her apartment without consent and arrested her after she admitted alienage. Another may assert that ICE officers entered his workplace and questioned employees who could not speak English, arresting the respondent along with other undocumented workers. In another motion, a respondent may claim that she was arrested as a result of a stop predicated only on her "Hispanic appearance."

If these scenarios resulted in criminal proceedings, the result would be undisputed: under the "exclusionary rule," the criminal court would exclude any evidence obtained in violation of the Fourth Amendment's guarantee against warrantless search and seizure. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). However, in civil immigration proceedings, the consequences of officer actions that violate the Constitution are far less clear. The source of this confusion may lie in the fact that civil removal proceedings bear similarities to criminal cases which, according to some, justify heightened procedural protections like the exclusionary rule. For example, the penalties levied in immigration proceedings—deportation or removal from the United States—are arguably more akin to criminal sanctions than civil ones. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010). Additionally, as in the criminal context, immigration proceedings

are often initiated by an arrest, which inevitably carries with it the risk that the arresting officer's conduct will come under scrutiny.

In *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), the Supreme Court announced what appeared to be a clear rule: in general, Fourth Amendment violations would not result in exclusion of evidence from immigration proceedings.¹ However, circuit courts have since struggled to delimit that prohibition, attempting to give meaning to what is now known as the “egregiousness exception.” See *id.* For its part, the Board of Immigration Appeals has assumed that an exception exists, but it has declined to articulate the contours of the exception. In light of the compelling policy interests weighing in favor of and against application of the exclusionary rule in immigration proceedings, it is unsurprising that nearly three decades after *Lopez-Mendoza*, Immigration Judges still find themselves with little guidance when faced with requests for suppression. In an attempt to assist Immigration Judges facing increasingly frequent motions to suppress, this article examines the current state of the law against the backdrop of a protracted debate among the Board and reviewing courts. After a brief summary of early Board case law and *Lopez-Mendoza*, the article examines the development of case law in the circuit courts over the past three decades, in particular the controversial discord between the Ninth Circuit and the other courts of appeals.

Board Law Prior to *Lopez-Mendoza*

Beginning in the 1970s, the Board consistently denied requests for suppression based on the facts of each particular case. See, e.g., *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971) (denying a request for suppression but acknowledging that the remedy may be available in some cases); see also *Matter of Wong*, 13 I&N Dec. 820, 821-22 (BIA 1971) (same). By 1979, however, the Board changed gears. See *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979). In *Sandoval*, the respondent lived in a house that had been divided into several separate apartments. Immigration officers entered and searched her apartment without consent, and the respondent was taken into custody and held for 8 hours until she signed an affidavit admitting alienage and illegal entry. In her deportation proceeding, the Government conceded that the detention and arrest were the result of a warrantless search in violation of the Fourth Amendment. The Board assumed that if

the exclusionary rule applied in deportation proceedings, her illegally obtained admissions would be suppressed.

Rather than ordering the evidence suppressed, however, the Board embarked on a lengthy analysis of the costs and benefits of applying the exclusionary rule in deportation proceedings, tracking *United States v. Janis*, 428 U.S. 433, 448-53 (1976), a then-recent Supreme Court case that addressed a similar question in the context of tax proceedings. See *Sandoval*, 17 I&N Dec. at 76. The Board emphasized that the primary benefit of the rule in criminal proceedings is its deterrent value: officers are discouraged from engaging in unconstitutional misconduct by the knowledge that tainted evidence will be useless in criminal court. The Board noted that because deportation proceedings are often collateral to criminal investigations, the additional deterrent effect of applying the exclusionary rule twice—in both the criminal and the deportation proceeding—would be minimal. The Board then weighed this slight benefit against substantially greater societal costs: suppressing evidence from deportation proceedings would result in unnecessary delays and waste of resources; would distract from the real controversy, namely, the individual's illegal presence; and would encourage parties to forego more efficient challenges through existing bureaucratic channels, such as filing a complaint with the officer's supervisor. Perhaps most importantly, the Board highlighted the fundamental difference between the rule's operation in criminal and civil proceedings: while exclusion in a criminal case allows “immunity for past conduct,” exclusion in deportation proceedings would sanction “a continuing violation of this country's immigration laws.” *Id.* at 81. Concluding that the costs substantially outweighed the benefits, the Board held that neither “legal [nor] policy reasons dictate the exclusion of unlawfully seized evidence” from deportation proceedings. *Id.* at 83. For the moment, it seemed that the case for suppression in Immigration Courts was closed.

***Lopez-Mendoza* and the Egregiousness Exception**

For several years, the rule prescribed by *Sandoval* remained the last word on suppression. See, e.g., *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980). However, in *Lopez-Mendoza*, the Supreme Court took up the question in a case involving two petitioners arrested in workplace operations. 468 U.S. at 1035-37. During both

respondents' arrests, officers of the former Immigration and Naturalization Service ("INS") obtained evidence of alienage that the INS used to initiate deportation proceedings. In proceedings, both respondents sought suppression of their Forms I-213 and verbal admissions. Following *Sandoval*, the Board denied both motions, but the Ninth Circuit disagreed and found that the exclusionary rule should have applied in both cases. The INS appealed to the Supreme Court.

In an opinion by Justice Sandra Day O'Connor, the Court began by highlighting a critical distinction between criminal and civil proceedings: technically, a deportation proceeding is not designed to "punish an unlawful entry" but to determine an individual's "right to remain in this country in the future." *Lopez-Mendoza*, 468 U.S. at 1038. The Court also highlighted the procedural differences between deportation proceedings and criminal trials: deportation proceedings lack certain protections; the Government bears a lesser burden in proving its case; and traditional rules of evidence do not apply. In short, the Court stated, "[A] deportation hearing is intended to provide a streamlined determination of eligibility to remain in this country, nothing more." *Id.* at 1039.

Against this backdrop, the Court conducted its own *Janis* analysis, balancing the costs and benefits of excluding evidence from deportation proceedings, and it ultimately held that the benefits did not justify allowing suppression in Immigration Courts. *Id.* at 1042, 1050. While five justices signed the majority holding of *Lopez-Mendoza*, only four agreed with the final paragraph of Justice O'Connor's opinion, which stated, "[W]e do not deal here 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." *Id.* at 1050-51 (emphasis added). The remaining four justices dissented, arguing that the exclusionary rule should apply to all Fourth Amendment violations challenged in deportation proceedings. The effect of *Lopez-Mendoza*, in particular the weight and meaning of this final paragraph, remains a subject of dispute today.

Following this caveat, Justice O'Connor cited two cases, *Rochin v. California*, 342 U.S. 165 (1952), and *Matter of Garcia*, 17 I&N Dec. 319, the import of which remains a topic of speculation among courts today. In *Rochin*, the Supreme Court ordered the exclusion

of evidence obtained after police forcibly pumped the defendant's stomach to yield evidence of possession of an illicit substance. 342 U.S. at 166. The Court ruled that this conduct "shock[ed] the conscience" and warranted exclusion despite the evidence's reliability. *Id.* at 172. In contrast, in *Garcia*, the respondent had admitted alienage under conditions so coercive that the Board found his statements involuntary and excluded them as unreliable. See 17 I&N Dec. at 321. Since *Lopez-Mendoza*, the circuits have looked to *Rochin* and *Garcia* for guidance, and some have held that the Court intended them to illustrate the types of violations that the Supreme Court considered to be "egregious." See *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 234-35 (2d Cir. 2006); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994).

In the years that followed *Lopez-Mendoza*, the Board, without explicitly acknowledging *Lopez-Mendoza*, established a process for Immigration Judges to evaluate motions to suppress. In *Matter of Barcenas*, 19 I&N Dec. 609, 610-11 (BIA 1988), the Board refined a framework for adjudicating motions to suppress previously laid out in *Tang*, 13 I&N Dec. at 692, and *Wong*, 13 I&N Dec. at 821—cases that it had not cited since *Sandoval*. First, if a respondent's affidavit establishes a *prima facie* case meriting suppression, he must then support his affidavit with oral testimony. *Barcenas*, 19 I&N Dec. at 611. Only if the respondent's written and oral statements support exclusion of the evidence does the burden shift to the Government to "justify[] the manner in which it obtained the evidence." *Id.* (quoting *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975)) (internal quotation mark omitted). Despite providing this procedural roadmap, however, the Board declined to interpret *Lopez-Mendoza* or state what might constitute an "egregious" violation. Thus, although circuit courts apply the *Barcenas* framework, the outcomes yielded by that framework diverge dramatically.

The Exception in the Circuits

Nearly 30 years after *Lopez-Mendoza*, two tests have emerged in the courts of appeals. The majority of circuits, led by the First and Second, apply a conduct-based analysis that focuses on whether the offending officers' actions were egregious. This test can also be termed an "aggravating-factors" test because it relies on the presence of certain factors that might render a violation egregious. Meanwhile, the Ninth Circuit applies a "bad-faith" test that turns on the reasonableness of the alleged

continued on page 10

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR AUGUST 2012

by John Guendelsberger

The United States courts of appeals issued 328 decisions in August 2012 in cases appealed from the Board. The courts affirmed the Board in 306 cases and reversed or remanded in 22, for an overall reversal rate of 6.7%, compared to last month's 13.0%. There were no reversals from the First, Third, Fifth Circuits.

The chart below shows the results from each circuit for August 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	5	0	0.0
Second	159	156	3	1.9
Third	22	22	0	0.0
Fourth	13	12	1	7.7
Fifth	15	15	0	0.0
Sixth	10	9	1	10.0
Seventh	9	8	1	11.1
Eighth	3	2	1	33.3
Ninth	70	58	12	17.1
Tenth	6	5	1	16.7
Eleventh	16	14	2	12.5
All	328	306	22	6.7

The 328 decisions included 142 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 54 direct appeals from denials of other forms of relief from removal or from findings of removal; and 132 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	142	135	7	4.9
Other Relief	54	43	11	20.4
Motions	132	128	4	3.0

The seven reversals or remands in asylum cases involved credibility (three cases); nexus; level of harm for past persecution; presumption of a well-founded fear after a finding of past persecution; well-founded fear; and the particularly serious crime bar.

The 11 reversals in the "other relief" category addressed application of the modified categorical approach (2 cases); *Vartelas* remands to apply *Fleuti* to a returning lawful permanent resident (3 cases); a *Judulang* remand for section 212(c) consideration; adjustment of status; waivers under sections 212(h) and 237(a)(1)(H); and DHS authority to terminate asylum status.

The four motions to reopen involved ineffective assistance of counsel (two cases); changed country conditions; and a motion to rescind an in absentia order for lack of notice of hearing.

The chart below shows the combined numbers for January through August 2012 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	688	574	114	16.6
First	34	30	4	11.8
Eighth	30	27	3	10.0
Tenth	24	22	2	8.3
Fifth	85	78	7	8.2
Eleventh	103	95	8	7.8
Seventh	28	26	2	7.1
Third	163	152	11	6.7
Sixth	75	70	5	6.7
Fourth	93	88	5	5.4
Second	615	587	28	4.6
All	1938	1749	189	9.8

Last year's reversal rate at this point (January through August 2011) was 13.0% with 2462 total decisions and 321 reversals.

The numbers by type of case on appeal for the first 8 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	955	861	94	9.8
Other Relief	356	293	63	17.7
Motions	627	595	32	5.1

RECENT COURT OPINIONS

First Circuit:

Rebenko v. Holder, No. 11-2171, 2012 WL 3793128 (1st Cir. Sept. 4, 2012): The First Circuit denied the petition for review of a decision of an Immigration Judge (affirmed by the Board) denying an application for asylum from Ukraine. The petitioner described several incidents of mistreatment in Ukraine based upon her Pentecostal faith. In May 1999, police interrupted a prayer meeting and detained the petitioner and other participants for several hours, during which time she was questioned and slapped by an investigator. She subsequently received five threatening phone calls from nationalists. In June 2000, the petitioner was heckled at her high school graduation on account of her faith, and then she was followed home by skinheads who beat her and threatened to rape her at knifepoint before a passersby intervened. The petitioner departed Ukraine the following year. She claimed that she feared future persecution in Ukraine because she would have to register with the police and would be identifiable as a Pentecostal based on her dress and behavior. The petitioner also presented an expert witness, who testified that if the petitioner returned to Ukraine, she would be at grave risk of persecution from nationalists. The court upheld the Immigration Judge's conclusions that (1) the petitioner's mistreatment did not rise to the level of persecution; and (2) the petitioner did not establish a well-founded fear of future persecution because her testimony and that of the expert were contradicted by the 2007 and 2008 DOS *International Religious Freedom Reports*, which stated that the constitution, laws, and Government of Ukraine allowed for the free practice of religion and that the number of Protestant churches and Pentecostal communities "had grown 'rapidly' since independence." The court also found support for the Immigration Judge's conclusion in the fact that although the petitioner had been a practicing Pentecostal her entire life, all of her mistreatment occurred within a 1-year period, with the petitioner experiencing no problems before or since. The court further noted that only the first incident occurred at the hands of the Government and that the evidence of record did not establish that the Government was unable or unwilling to respond to the other incidents described.

Second Circuit:

Ruqiang Yu v. Holder, No. 11-2546-ag, 2012 WL 3871371 (2d Cir. Sept. 7, 2012): The Second Circuit granted a petition for review of the Board's decision affirming the

Immigration Judge's denial of the petitioner's application for asylum from China. The petitioner's claim was based on his reporting of corruption by officials at a State-run airplane factory where he worked as a team leader. The petitioner took this action at the behest of workers on his team who were denied pay because of a supposed lack of funds. The petitioner stated that he knew the excuse to be false and that the reason his workers were not paid was because factory officials embezzled the money intended for the workers. As a result of a letter he sent to the Shanghai Anti-Corruption Bureau, the petitioner was arrested by police, interrogated and beaten, and detained for 2 weeks. After signing a confession, he was released on bail and was fired from his job soon thereafter. He was also subjected to visits and ongoing harassment by the police. Both the Immigration Judge and the Board found that the petitioner's mistreatment lacked a nexus to a protected ground. In the Board's words, the petitioner's objection to "aberrational" corruption by specific factory officials could not be viewed as actions constituting "a political challenge directed against a governing institution." In the absence of a showing of "endemic corruption" involving "the complicity of the State," the Board concluded that the dispute was personal in nature. The court disagreed. Citing its earlier decisions, the court observed that determining whether a dispute should be viewed as political involves a complex factual inquiry "in relation to the political context in which the dispute took place." The court stated that factors that might have caused the dispute to be viewed as political by the authorities include the fact that the petitioner (1) had no personal financial motive in protesting the corruption; (2) sought "to vindicate the rights" of others against a State-owned institution, and (3) "suffered retaliation by an organ of the state—the police." The court therefore remanded to the Board to conduct that analysis. It also directed the Board to consider in the first instance whether a political opinion was imputed to the petitioner by the police.

United States v. Beardsley, No. 11-2206-cr, 2012 WL3641933 (2d Cir. Aug. 27, 2011): The Second Circuit held that a *strict* divisibility requirement applies when the Government seeks a mandatory minimum sentence under 18 U.S.C. § 2252A(b)(1) based on a defendant's prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." According to the court, a district court may resort to the modified categorical approach in § 2252A(b)(1) cases only if the

statute defining the prior offense of conviction is “easily divisible into predicate and non-predicate offenses—i.e., divided into disjunctive subsections, or separately listed within a single provision.” In arriving at that conclusion, the court conducted an extensive survey of the various circuit approaches to divisibility, including that of the Ninth Circuit in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011). The court acknowledged that a more flexible approach would not be irrational and has some appeal as a matter of policy, but it ultimately decided that Supreme Court precedent precluded the adoption of such an approach. The court noted “that the issues present in this case recur in many other contexts, particularly INA and ACCA cases. We do not seek to create a generalized rule for all federal sentence-enhancement statutes, including those that are worded differently from 18 U.S.C. § 2252A(b)(1), the statute at issue here.”

Gjerjaj v. Holder, No. 11-445-ag, 2012 WL 3661425 (2d Cir. Aug. 28, 2012): The Second Circuit denied the petition for review of an order of removal issued by the DHS and the denial of the petitioner’s request for a removal hearing before an Immigration Judge. The petitioner, a native and citizen of Albania, entered the U.S. under the Visa Waiver Program (“VWP”) by using a false Italian passport. Under the terms of the VWP, the petitioner signed an I-94W, waiving her rights to contest any finding of removability other than a determination on an application for asylum. Shortly after admission, the petitioner applied for asylum. Her application was denied by an Immigration Judge in an “asylum only” proceeding, a determination that was affirmed by both the Board and the Eleventh Circuit (in an unpublished decision). After overstaying her authorized period of admission under the VWP by some 4 years, the petitioner married a U.S. citizen who petitioned on her behalf. However, she was found ineligible for adjustment of status based on her VWP admission, the signed I-94W waiver, and the “asylum only” hearing before an Immigration Judge. She was thus served with an order of removal issued by ICE. The petitioner argued (1) that she was not bound by the VWP because she is not a citizen of a country eligible for such status; (2) that regardless, she did not waive her right to contest removability knowingly; and (3) that she is entitled to a hearing and decision based on her adjustment application. The court held that in spite of her use of a false nationality, the petitioner remained bound by the terms of the VWP under the court’s prior holding in *Shabaj v. Holder*, 602 F.3d 103 (2d Cir. 2010). The court further

found no evidence of record to support the petitioner’s contention that her waiver was not a knowing one. The court noted that she signed the waiver and, assuming arguendo that the waiver was only valid if entered into knowingly and voluntarily, concluded that the petitioner “was presumed to know the law and her rights when she read and signed the waiver.” The petitioner offered no evidence to rebut that presumption. Identifying the petitioner’s third argument as one invoking due process and equal protection grounds, the court found that she had waived the right to raise such defenses under the terms of the VWP, because to hold otherwise would contradict the plain language of the statute and would frustrate the congressional goal “of allowing VWP participants expeditious entry into the country but streamlining their removal.”

Third Circuit:

Roy v. Att’y Gen. of U.S., No. 11-1849, 2012 WL 3892963 (3d Cir. Sept. 10, 2012): The Third Circuit granted the petition for review of a decision of the Board denying the petitioner’s application for deferral of removal under the U.N. Convention Against Torture (“CAT”). In 2006, the petitioner was placed into removal proceedings and was charged with removability as an aggravated felon based on his 1992 conviction for aggravated assault and endangering the welfare of a child. The petitioner filed applications for asylum, withholding of removal, and deferral of removal under the CAT. He claimed to fear “rape and death if returned to Jamaica,” because his mental illness would cause him to be targeted by police and prison inmates. The Immigration Judge found the petitioner removable but granted the application for CAT deferral. The Board reversed the CAT grant. The case was then remanded for the Board to reconsider its decision in light of *Kaplan v. Attorney General of the U.S.*, 602 F.3d 260 (3d Cir. 2010). Applying *Kaplan*’s “mixed” standard of review, the Board found no clear error in the Immigration Judge’s factual determination of what the petitioner was likely to face if returned to Jamaica. However, the Board reaffirmed its prior legal conclusion that such facts would not satisfy the legal definition of “torture” necessary for CAT protection. The court concluded that the Board erred in requiring the petitioner to demonstrate that the Jamaican authorities would imprison him for the specific purpose of torturing him. According to the court, such mens rea is not necessary to establish government acquiescence, which it had previously found could be satisfied through a showing of willful blindness.

Ninth Circuit:

Cheema v. Holder, No. 08-72451, 2012 WL 3857163 (9th Cir. Sept. 6, 2012): The Ninth Circuit denied the petition for review of an Immigration Judge's decision (affirmed by the Board) finding the petitioner's asylum application to be frivolous pursuant to section 208(d)(6) of the Act. The petitioner admitted that he had fabricated the contents of his asylum application. However, he argued that the Board erred in upholding the frivolousness finding because he had not been adequately warned of the consequences of filing a frivolous application, as is required by section 208(d)(4)(A) of the Act. The court disagreed. Noting that it was an issue of first impression for the circuit, the court agreed with the Tenth Circuit (the only other circuit to have ruled on the issue) that the written warnings contained on the Form I-589 constitute sufficient warning to satisfy the statutory requirement. The court concurred with the Tenth Circuit's observation that since the statute is silent as to the type of warning required, the printed warning is adequate. The court also added that the warnings are printed in "clear, conspicuous, bold lettering on the signature page" and that the petitioner signed below those bold warnings.

Eleventh Circuit:

Poveda v. U.S. Att'y Gen., No. 11-14512, 2012 WL 3655293 (11th Cir. Aug. 27, 2012): The Eleventh Circuit (in a split panel decision) denied the petition for review of a decision of the Board finding the petitioner ineligible to apply for a stand-alone waiver under section 212(h) of the Act. The petitioner had adjusted his status to that of a lawful permanent resident ("LPR") in 2002. In 2007, he was convicted of battery of a child by bodily fluids under section 784.085(1) of the Florida Statutes Annotated. Soon thereafter, the petitioner was placed into removal proceedings and charged with removability under sections 237(a)(2)(A)(i), (iii), and (E)(i) of the Act. The Immigration Judge granted the petitioner's section 212(h) waiver, holding that his application did not need to be filed concurrently with an application for adjustment of status under the Eleventh Circuit's decision in *Lanier v. U.S. Attorney General*, 631 F.3d 1363 (11th Cir. 2011). The Board reversed, relying on the holdings of the Fifth and Seventh Circuits that a section 212(h) waiver must be filed concurrently with an application for a visa, for admission, or for adjustment of status. The Board also read the Eleventh Circuit's holding in *Lanier* as intending to explain that a section 212(h) waiver is available in removal proceedings, and not only to individuals seeking physical entry into the country.

The court recounted the case law's history relating to the availability of a section 212(h) waiver. The court noted that the Board had once held the view that such a waiver could only be applied for in removal proceedings by an LPR who had departed and returned to the U.S. In *Yeung v. INS*, 76 F.3d 337 (11th Cir. 1995), the court had reversed that holding and remanded to the Board to reconsider. The court observed that in *Matter of Abosi*, 24 I&N Dec. 204 (BIA 2007), the Board expressed its new position that a section 212(h) waiver is available to those outside the country seeking readmission and those in the U.S. applying for adjustment of status. The court found this latter view to be "more consistent with the plain language of section 212(h) than the earlier interpretation by the Board" addressed in *Yeung*. The court thus found the Board's present holding to be reasonable and, following the lead of the Fifth and Seventh Circuits, accorded it *Chevron* deference.

BIA PRECEDENT DECISIONS

In *Matter of A-S-J*, 25 I&N Dec. 893 (BIA 2012), the Board considered whether an Immigration Judge has jurisdiction to review the termination of a respondent's asylum status by the Department of Homeland Security ("DHS"). After examining the statutory and regulatory authority, it concluded that an Immigration Judge lacks such jurisdiction.

The respondent had been granted asylum by the Immigration and Naturalization Service, and after he applied to adjust his status, the DHS served him with notice of its intent to terminate his asylum status under 8 C.F.R. § 208.24(a)(1) based on fraud related to his asylum application. Following the respondent's interview regarding the notice of intent to terminate, the DHS terminated his asylum status and initiated removal proceedings, charging the respondent as removable under section 237(a)(1)(A) of the Act. The Immigration Judge determined that he had jurisdiction to review the DHS's termination of the respondent's asylum status because 8 C.F.R. § 1208.24(f) allows an Immigration Judge to terminate a grant of asylum at any time after a respondent has been provided notice of an intent to terminate the status, and so, by inference, Immigration Judges also have authority to restore asylum status that DHS has terminated.

On appeal, the Board looked to the relevant statutory and regulatory authority, observing that pursuant to section 208(c)(1)(A) of the Act, an alien who has been granted

asylum may not be removed unless his or her asylum status has been terminated. Reasons for termination of asylum or withholding of removal are provided in sections 208(c)(2)(A)–(E) of the Act, as implemented through 8 C.F.R. §§ 208.24 and 1208.24. Under 8 C.F.R. § 208.24(a)(1), a DHS asylum officer may terminate asylum granted under DHS authority if there is a showing of fraud in the asylum application such that the applicant was ineligible for asylum when it was granted. If the status is terminated, the DHS will initiate removal proceedings if appropriate. The respondent may reapply for asylum before the Immigration Judge, who is not bound by the DHS’s determination of fraud and who determines the respondent’s eligibility for asylum *de novo*.

Aliens who are in removal proceedings or who were granted asylum by an Immigration Judge or the Board are under the jurisdiction of EOIR, in accordance with 8 C.F.R. § 1208.24. The DHS may serve a respondent with a notice of intent to terminate asylum status in removal proceedings, at which point the Immigration Judge has jurisdiction to decide the issue in the first instance. When an Immigration Judge or the Board granted asylum, the DHS may seek reopening to request that asylum be terminated. In that circumstance, the DHS is not bound by the numerical or time limitations on motions to reopen when the basis for the motion is “fraud in the original proceeding or a crime that would support termination of asylum.”

If the DHS determines in the case of an arriving alien that a grant of asylum should be terminated, the DHS must issue a notice of intent to terminate and initiate removal proceedings. The alien will then have the opportunity to respond to the notice of intent during proceedings before the Immigration Judge.

Examining the regulatory scheme governing the termination of asylum, the Board pointed out that jurisdiction is conferred on the DHS to terminate asylum under 8 C.F.R. § 208.24(a), while 8 C.F.R. §§ 1208.24(f) and (g) provide for Immigration Judges to adjudicate a DHS request to terminate asylum during removal proceedings, to reopen proceedings to determine whether an asylum grant made in removal proceedings should be terminated, and to terminate asylum for arriving aliens. The Board noted that other sections of the Act and implementing regulations also provided for dual adjudication tracks depending on whether the alien is or has been subject to removal proceedings.

As an example, the Board pointed out that aliens seeking removal of the conditional basis of lawful permanent resident status must first apply to the DHS; if the DHS denies the petition to remove the conditional basis or an application to waive the joint petition requirement, the alien may obtain review of the denial in removal proceedings before an Immigration Judge. The Board observed that the implementing regulations expressly provide for the Immigration Judge’s jurisdiction to review a DHS action, and there is no provision for a respondent to file the joint petition or waiver application with an Immigration Judge in the first instance. Similarly, an alien whose application for temporary protected status (“TPS”) is denied by the United States Citizenship and Immigration Services (“USCIS”) may seek *de novo* review of the application before an Immigration Judge, and an applicant can apply for TPS in removal proceedings in the first instance. Additionally, the regulations provide that an alien whose application for adjustment of status was denied by the USCIS may, if not subject to the arriving alien restrictions, “renew” the adjustment application in proceedings before an Immigration Judge, and an alien in removal proceedings may apply for adjustment of status in the first instance before an Immigration Judge.

The Board observed that the regulations expressly provided for Immigration Judges to evaluate USCIS denials of joint petitions and waiver applications to terminate conditional permanent resident status, USCIS denials of TPS, and USCIS denials of adjustment of status applications, either through direct review of the denial or by allowing the alien to “renew” the application. Additionally, the regulations confer initial jurisdiction with an Immigration Judge as specified once removal proceedings have begun. Since the regulations governing termination of asylum status provide for either (1) USCIS adjudication, with the possibility of the alien asserting a subsequent claim for asylum before the Immigration Judge in removal proceedings, or (2) Immigration Judge jurisdiction to conduct an asylum termination hearing or to reopen the proceedings for the DHS to pursue termination of asylum status, the Board concluded that the regulations do not confer jurisdiction on an Immigration Judge to review a DHS termination of an asylum grant under 8 C.F.R. § 208.24(a). Finding that the Immigration Judge lacked jurisdiction to review the DHS’s revocation of the respondent’s asylum status, the Board sustained the DHS’s appeal and remanded the record for further proceedings as to the respondent’s removability and eligibility for relief.

In *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012), the Board considered how to assess whether there are serious reasons for believing that an alien seeking asylum or withholding of removal has committed a serious nonpolitical crime that would bar him or her from relief pursuant to sections 208(b)(2)(A)(iii) and 241(b)(3)(B)(iii) of the Act. After setting forth the framework for the assessment, the Board concluded that the applicant had committed a serious nonpolitical crime.

The applicant was a member of the youth arm of the Democratic Party of Cote d'Ivoire ("PDCI"), whose objective was to discredit the opposition party. He dressed as an opposition party member and participated in burning passenger buses and cars, throwing stones, pushing baskets off the heads of merchants walking in the streets, and throwing merchandise off merchants' tables in the market. The applicant asserted that no one was harmed by his actions and that he felt compelled to participate so that he would not lose his job as a driver for the PDCI. The Immigration Judge found that the applicant's actions constituted a serious nonpolitical crime, which made him ineligible for asylum and withholding of removal.

On appeal, the Board noted that evaluating the political nature of a crime involved a determination whether the political aspect of the offense outweighed its common law character. To illustrate, the Board explained that the political aspect of an offense would be subordinate to the criminal nature of the conduct if the crime was grossly disproportionate to the political objective of the conduct or if it involved acts of an "atrocious nature." Analyzing the political nature of a crime includes assessing whether (1) the act or acts were directed at a government entity or political organization, as opposed to a private or civilian entity; (2) they were directed toward modification of the political organization of the State; and (3) there is a close and direct causal link between the crime and its political purpose. A serious nonpolitical crime is evaluated on a case-by-case basis considering the individualized facts and circumstances.

Explaining that it interprets the term "serious reason for believing" as equivalent to probable cause, the Board concluded that the applicant's testimony about his actions was sufficient to establish probable cause to believe that he was involved in the criminal conduct at issue.

Applying this framework to the applicant's case, the Board found that his actions of stone-throwing, burning buses and cars, pushing merchant's baskets off their heads, and throwing goods off merchant's tables were crimes generally recognized as assault, aggravated assault, reckless endangerment, terroristic threats, arson, and criminal mischief. In addition, the Board recognized that the conduct had some political character and motive, because it was intended to create an impediment to the opposition obtaining power. While concluding that the applicant's conduct did not involve acts of an "atrocious nature," the Board nonetheless found that the criminal nature of the conduct, considered in the aggregate, was disproportionate to its political character and thus the conduct was a serious nonpolitical crime. In particular, despite the applicant's testimony that his group ensured that no passengers remained on the buses they set afire, the Board reasoned that serious physical harm was not required to find a serious nonpolitical crime. Further, the Board observed that burning buses and cars on public streets was highly dangerous conduct that placed innocent people at substantial risk of death or serious injury, a fact meriting significant consideration in its analysis. Also deemed significant was the impact the applicant's disruptive activities likely imposed on the daily life and economy of the affected Cote d'Ivoire residents.

The Board recognized that the PDCI's conduct had an overall political objective of damaging the opposition party's reputation. However the Board found that the PDCI's actions were not directed at deterring oppressive action of a ruling governmental entity and that its method was not a typical form of political activity that would likely have a clear, direct impact.

The Board addressed the applicant's argument that he was responsible only for pushing baskets off merchant's heads, a minor act that did not constitute a serious crime and found no error in the Immigration Judge's factual finding that the applicant participated in acts of arson, stone-throwing, assault, and criminal mischief, observing that he was not a mere bystander during these activities. The Board also was unpersuaded by the applicant's argument that he was compelled to assist in the PDCI's activities, concluding that his asserted fear of losing his job or being imprisoned was speculative and unsubstantiated. Finally, it explained that the applicant's claim of a well-founded fear of persecution is not a factor in determining whether he has committed a serious nonpolitical crime. The

Board concluded that although there was some political character to the applicant's conduct, the circumstances and cumulative effect of his multiple violent, destructive, and destabilizing acts were sufficient to trigger the serious nonpolitical crime bar. The appeal was dismissed.

REGULATORY UPDATE

77 Fed. Reg. 58,203 (Sept. 19, 2012)
DEPARTMENT OF STATE

[Public Notice 8032]

In the Matter of the Designation of the Haqqani Network Also Known as HQN as a Foreign Terrorist Organization Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled in this matter and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that there is a sufficient factual basis to find that the relevant circumstances described in section 219 of the Immigration and Nationality Act, as amended (hereinafter "INA") (8 U.S.C. 1189), exist with respect to the Haqqani Network, also known as HQN. Therefore, I hereby designate the aforementioned organization and its aliases as a Foreign Terrorist Organization pursuant to section 219 of the INA. This determination shall be published in the **Federal Register**.

Dated: September 7, 2012.

Hillary Rodham Clinton,
Secretary of State.

What To Do When the Constable Blunders? *continued*

violation. Not all circuits have had occasion to weigh in on the question, but at least one has declined to find any exception at all.

The Conduct-Based Approach

In *Almeida-Amaral*, a case arising in the Second Circuit, the petitioner was walking in a public parking lot at night when he was stopped by a border patrol agent, questioned, and placed in removal proceedings. 461 F.3d at 232-33. The petitioner moved to suppress the resulting evidence, arguing that because no other justification was apparent, the sole suspicion for the stop was his ethnicity.

Noting Justice O'Connor's reference to *Rochin* and *Garcia*, the Second Circuit posited that *Lopez-Mendoza* carved out two types of egregious violations: those that "transgress notions of fundamental fairness" and those that "undermine the probative value of the evidence." *Id.* at 234 (quoting *Lopez-Mendoza*, 468 U.S. at 1050-51) (internal quotation marks omitted). Whether a violation is fundamentally unfair, the court reasoned, turns on the "characteristics and severity of the offending conduct," and not just whether the stop violated the Constitution as a technical matter. *Id.* at 235. The court stated that a stop based purely on ethnicity or race is always egregious, but it implied that a respondent must provide facts or evidence beyond his own speculation that the stop was race based. *Id.* at 237. The court also listed other aggravating factors that might be egregious, such as an unreasonable use of force or a particularly lengthy illegal stop. *Id.* at 236; see also *Pinto-Montoya v. Mukasey*, 540 F.3d 126, 131-33 (2d Cir. 2008) (approving the conduct-based test but denying the petition for review in the absence of any Fourth Amendment violation). The Second Circuit found no evidence that the stop was based on race, and in the absence of other aggravating factors rendering the arrest egregious, it denied the petition for review. *Almeida-Amaral*, 461 F.3d at 236-37.

In *Kandamar v. Gonzales*, the First Circuit applied a similar conduct-based test in a case challenging the National Security Entry-Exit Registration System. 464 F.3d 65, 71-72 (1st Cir. 2006). Noting that the petitioner had failed to proffer evidence of "any government misconduct by threats, coercion or physical abuse . . . that would constitute egregious government conduct," the court found that the petitioner had not adequately justified suppression of evidence. *Id.* at 72. Perhaps reading *Lopez-Mendoza* more narrowly than the Second Circuit, the *Kandamar* court stated that the Supreme Court left open only a "glimmer of hope of suppression" in removal proceedings. *Id.* at 70 (quoting *Navarro-Chalan v. Ashcroft*, 359 F.3d 19, 22 (1st Cir. 2004) (internal quotation marks omitted). Still, the court's characterization of the egregiousness question as a conduct-based inquiry was clear. *Id.* at 74 (noting the "lack of egregious government misconduct" when denying the petition for review). Interestingly, in *Kandamar* the court noted that *Lopez-Mendoza* viewed favorably the Board's holding that evidence may be excluded if its admission would violate the due process requirements of the Fifth Amendment. *Id.* at 70. Thus, in the First Circuit, it may be that only Fourth Amendment violations that are so

egregious as to violate due process are “egregious” enough to merit suppression. *Id.*

More recently, the Eighth Circuit has joined the First and Second Circuits in applying the conduct-based approach. First, in *Puc-Ruiz v. Holder*, police arrested the petitioner during a warrantless operation at the restaurant where he worked. 629 F.3d 771, 775 (8th Cir. 2010). Citing *Almeida-Amaral*, the Eighth Circuit noted that while egregious violations need not involve physical brutality, a mere violation alone will not suffice. *Id.* at 778. Comparing the facts of its own case to those of *Rochin*, the court focused on the absence of evidence showing that the officers’ conduct shocked the conscience or offended the “community’s sense of fair play and decency.” *Id.* at 778 (citing *Rochin*, 342 U.S. at 172-73). The court noted that the arrest in question involved no unreasonable use of force, no race-based stop, and no other severe police misconduct. *Id.* The following year, the court narrowed the window for suppression even further when it noted that violations by State law enforcement officers will rarely justify suppression of evidence in an immigration proceeding, even when characterized by egregious conduct. See *Lopez-Gabriel v. Holder*, 653 F.3d 683, 686 (8th Cir. 2011). This sentiment finds support in other circuits as well, and the issue may arise more frequently as States attempt to implement their own immigration enforcement statutes. See *United States v. Guijon-Ortiz*, 660 F.3d 757, 769-70 (4th Cir. 2012) (finding that no Fourth Amendment violation occurred where a local law enforcement officer prolonged a routine traffic stop to call ICE to verify a suspect’s immigration status); see also *Arizona v. United States*, 132 S. Ct. 2492, 2510-11 (2012) (invalidating some provisions of Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act, Ariz. Senate Bill 1070, but allowing enforcement of a provision that requires state police to confirm the immigration status of certain detainees and arrestees).

The Ninth Circuit’s Bad-Faith Approach

In contrast to the First, Second, and Eighth Circuits, the Ninth Circuit has consistently applied a test that turns on whether the offending officers acted in bad faith, either by deliberately or unreasonably violating the Fourth Amendment. See generally *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012 (9th Cir. 2008), petition for reh’g en banc denied, 560 F.3d 1098 (9th Cir. 2009); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994);

Gonzalez-Rivera, 22 F.3d at 1449. The Ninth Circuit’s test has also been characterized, both by supporters and critics, as an “objective test,” because it focuses on what reasonable officers would have done rather than the subjective reprehensibility of the officers’ conduct.² In *Orhorhaghe*, INS officers, acting on a tip from a private financial investigator, went to the petitioner’s home without a warrant, but they obtained the respondent’s consent to enter his apartment. 38 F.3d at 491. After questioning, an officer opened the petitioner’s briefcase without permission and found evidence of alienage and illegal presence. *Id.* at 492. The petitioner was placed in deportation proceedings, where Government witnesses testified that their tip was based on the petitioner’s “Nigerian-sounding” name. *Id.* at 491.

The Ninth Circuit began by noting that in *Lopez-Mendoza*, while only four Justices had signed onto the “egregiousness” language, the four dissenters stated that they would have applied the rule to all Fourth Amendment violations, regardless of their severity. *Orhorhaghe*, 38 F.3d at 493 n.2. Thus, in theory, eight Justices supported “leaving open the possibility that the exclusionary rule might apply to egregious violations” at the very least. *Id.* The court interpreted this as evidence of the Supreme Court’s clear intent to allow suppression in some cases. *Id.* The court set forth a two-part test for determining when a violation is egregious. *Id.* at 493. First, Immigration Judges should inquire whether the Fourth Amendment was violated. If so, the violation is egregious if it was committed “deliberately or by conduct a reasonable officer should have known would violate the Constitution.” *Id.* The *Orhorhaghe* court concluded not only that the officers violated the Fourth Amendment by entering the apartment and seizing the petitioner without a warrant, but that their actions were egregious because they were “based on the unfounded and unwarranted assumption that people with certain foreign-sounding names are likely to be illegal aliens.” *Id.* at 501. The same year, the court applied this rule to a second case involving a seizure based on ethnicity, again finding that the violation ran afoul of well-settled constitutional law and thus constituted an egregious violation. See *Gonzalez-Rivera*, 22 F.3d at 1452. The Ninth Circuit has continued to apply the bad-faith test since *Orhorhaghe* and *Gonzalez-Rivera*, even in cases not involving race-based stops. See *Lopez-Rodriguez*, 536 F.3d at 1016-19 (finding that a warrantless entry without consent constituted an egregious violation of the Fourth Amendment).

The majority of remaining circuits have not addressed the question whether suppression may apply to egregious Fourth Amendment violations in immigration proceedings. For example, the Fifth Circuit, citing *Lopez-Mendoza*, has held that the “Supreme Court has specifically refused to extend the exclusionary rule to immigration proceedings.” *Ali v. Gonzales*, 440 F.3d 678, 681 (5th Cir. 2006). *But see Aziz v. Gonzales*, 185 F. App’x 349, 350 (5th Cir. 2006) (holding that the exclusionary rule does not apply in immigration proceedings, but noting that an “egregious” violation may be found where the respondent can demonstrate “substantial prejudice”). The Tenth Circuit has also suggested that *Lopez-Mendoza* never requires suppression following a breach of the Fourth Amendment. *See Luevano v. Holder*, 660 F.3d 1207, 1212 (10th Cir. 2011) (“In *INS v. Lopez-Mendoza*, the Supreme Court decided the exclusionary rule does not apply in civil deportation proceedings.”). Instead, the Tenth Circuit, like the First Circuit in *Kandamar*, suggested that evidence may be excluded only where admission would be “fundamentally unfair,” limiting so-called “egregious” Fourth Amendment violations to those that offend due process. *Id.* The Seventh Circuit has also offered this limited interpretation of *Lopez-Mendoza*. *See Kairys v. INS*, 981 F.2d 937, 941 (7th Cir. 1992) (holding that *Lopez-Mendoza* requires admission of evidence obtained contrary to the Fourth Amendment unless the evidence is unreliable). The remaining circuit courts have not squarely addressed *Lopez-Mendoza*’s effect on admissibility of evidence in removal proceedings.

Criticism of the Bad-Faith Approach

Despite its consistent application of the bad-faith approach in a comparatively large docket of immigration cases, the Ninth Circuit has come under scrutiny from sister circuits, as well as internally. The Eighth Circuit recently criticized the objective approach in *Garcia-Torres v. Holder*, 660 F.3d 333, 337 n.4 (8th Cir. 2011). The court first noted that *Lopez-Mendoza* did not address an “egregious” violation; indeed, Justice O’Connor found that the violations at issue were not so severe as to require suppression. *See id.* at 336; *see also Lopez-Mendoza*, 468 U.S. at 1050-51. Thus, the court reasoned, any exception that exists today is arguably based on dicta, rather than binding precedent. *See Garcia-Torres*, 660 F.3d at 336. Next, the court argued that the Ninth Circuit’s bad-faith test functionally allows for suppression any time

the Fourth Amendment is violated because the Fourth Amendment prohibits only “unreasonable” searches and seizures. *Id.* at 337 n.4. According to the Eighth Circuit, the Ninth Circuit’s test would “eviscerate” *Lopez-Mendoza* by allowing the exception to swallow the rule. *See id.*

At least some judges in the Ninth Circuit are also troubled by their court’s refusal to align with the First and Second Circuits. *See Lopez-Rodriguez*, 536 F.3d at 1018. In *Lopez-Rodriguez*, the Ninth Circuit found a bad-faith violation where officers entered the petitioner’s residence without a warrant or consent. Although the petitioner made no allegations of racial motivation, the court still applied the bad-faith test from *Orhorhaghe* and *Gonzalez-Rivera*, and it found that the violation was egregious because “reasonable officers would not have thought it lawful to push open the door to petitioners’ home simply because [another resident] did not ‘tell them to leave.’” *Id.* at 1018. Reciting the well-settled precedent prohibiting warrantless entry without consent, the court held that the tainted evidence should have been excluded from the record. *Id.* at 1016-19. In a concurrence, Judge Bybee compared the bad-faith standard to the test for “qualified immunity” from civil liability for constitutional violations by Government officials. *See id.* at 1019-20 (Bybee, J., concurring); *see also Pearson v. Callahan*, 555 U.S. 223, 243-44 (2009) (holding that an officer is only liable for a constitutional violation when “clearly established law” rendered the conduct unconstitutional at the time the violation occurred). Like the Eighth Circuit, Judge Bybee criticized the court for diluting the limited scope of the egregiousness exception by extending it to all unreasonable or deliberate violations. *Lopez-Rodriguez*, 536 F.3d at 1019-20 (Bybee, J., concurring).

The Ninth Circuit subsequently denied a petition to rehear *Lopez-Rodriguez*. *Lopez-Rodriguez v. Holder*, 560 F.3d 1098, 1099 (9th Cir. 2009). In a fiery dissent, Judge Bea also compared his colleagues’ interpretation of *Lopez-Mendoza* to the test for qualified immunity, and he criticized the court for veering off track in its early applications of *Lopez-Mendoza*. *Id.* at 1101 (Bea, J., dissenting). Judge Bea characterized *Lopez-Rodriguez* as flatly in conflict with Supreme Court precedent and every other circuit, and he applauded the First and Second Circuits’ conduct-based approach. *Id.* at 1101-05. However, despite Judge Bea’s admonitions, the majority of the Ninth Circuit appears unwilling to depart from its interpretation absent a mandate to the contrary.

Conclusion

Despite being the first court of appeals to interpret *Lopez-Mendoza*'s purported egregiousness exception, the Ninth Circuit has not found support for its bad-faith test in any other circuit. Nevertheless, the court's recent refusal to rehear *Lopez-Rodriguez* suggests that it will continue to apply the bad-faith test until instructed to do otherwise, a stance that creates a dramatic circuit split in the outcomes of motions to suppress. Meanwhile, since the Supreme Court spoke nearly three decades ago, the Board has remained silent on the question.

The Supreme Court and the Ninth Circuit have each acknowledged that at the heart of the debate is the importance of preventing racial profiling in law enforcement and protecting the rights of ethnic minorities in the United States. See *Lopez-Mendoza*, 468 U.S. at 1045-46; *Gonzalez-Rivera*, 22 F.3d at 1449. Additionally, the Ninth Circuit has emphasized that excluding illegally obtained evidence protects judicial integrity by sending a message that "Federal courts cannot countenance deliberate violations of basic constitutional rights." *Gonzalez-Rivera*, 22 F.3d at 1448 (quoting *Adamson v. Comm'r*, 745 F.2d 541, 546 (9th Cir. 1984)) (internal quotation marks omitted). Finally, courts continue to grapple with the rule's deterrent effect, or lack thereof, particularly where the actions of nonimmigration officers are at issue. See *Garcia-Torres*, 660 F.3d at 336; *Pinto-Montoya*, 540 F.3d at 130. To the extent that the exclusionary rule deters officers from engaging in racially motivated immigration-enforcement actions, courts seem to agree that extension of the rule to immigration proceedings is practical. See *Almeida-Amaral*, 461 F.3d at 237. However, the realities of an already overburdened system suggest that the deterrent effect of suppression is minimal: Given that only a small percentage of regulatory arrests result in court proceedings, the likelihood that exclusion would influence officers' conduct in the field is perhaps slim. See, e.g., *Lopez-Gabriel*, 653 F.3d at 686.

Courts have also identified some clear costs that weigh against allowing exclusion of evidence from immigration proceedings. See *Lopez-Rodriguez*, 560 F.3d at 1103 (Bea, J., dissenting). Today, as in 1984, excluding evidence from immigration proceedings effectively sanctions an ongoing violation of U.S. immigration laws, while the rule in the criminal context offers immunity for past conduct. As Justice O'Connor stated, "The constable's blunder may allow the criminal to go free,

but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime." *Lopez-Mendoza*, 468 U.S. at 1047. That concern continues to trouble critics of the exclusionary rule, especially as the immigration debate becomes increasingly politicized.

Amidst this policy crossfire, Immigration Judges are left to decide ever more common motions to suppress without clear guidance. The regulations and the Fifth Amendment's guarantee of due process ensure that certain types of severe violations do not unfairly prejudice respondents in removal proceedings, but even these protections leave unaddressed certain Fourth Amendment violations that may challenge the legitimacy of immigration enforcement. See *Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980); *Garcia*, 17 I&N Dec. at 321. Until the Board or the Supreme Court provides greater clarification, however, Immigration Judges must continue to apply the law of the circuit in which they sit.

Kate Mahoney is an attorney advisor at the San Francisco Immigration Court.

1. It is undisputed that evidence obtained in violation of certain regulations or the Fifth Amendment's guarantee of due process cannot be considered in removal proceedings. See, e.g., *Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (announcing a three-part test for exclusion of evidence obtained as a result of certain regulatory violations that prejudiced the respondent); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980) (excluding the respondent's admissions of alienage because they were made involuntarily under coercive conditions). This article does not address the law on these types of violations.

2. Interestingly, the Ninth Circuit drew on Board language to justify its objective test, noting, "It appears that the BIA has also adopted a reasonableness standard to determine whether an officer has engaged in a bad faith constitutional violation." *Gonzalez-Rivera*, 22 F.3d at 1449 (citing *Toro*, 17 I&N Dec. at 343).

EOIR Immigration Law Advisor

David L. Neal, Chairman
Board of Immigration Appeals

Brian M. O'Leary, Chief Immigration Judge
Office of the Chief Immigration Judge

Jack H. Weil, Assistant Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Librarian
EOIR Law Library and Immigration Research Center

Carolyn A. Elliot, Senior Legal Advisor
Board of Immigration Appeals

Sarah A. Byrd, Attorney Advisor
Office of the Chief Immigration Judge

Layout: EOIR Law Library