IMMIGRATION RAIDS: SEARCH AND SEIZURE

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I. INTRODUCTION

The increasing use of massive roundups of employees at their worksites by large squadrons of armed Immigration and Naturalization Service (INS) personnel in search of "illegal aliens" generates widespread concern as to the lawfulness of INS's conduct. Recent decisions that virtually exempt such raids from fourth amendment protections necessitate the identification and utilization of the remaining available means of protecting the rights of U.S. citizens, legal residents and undocumented individuals.

These roundups, classified as "area control operations" by INS, involve the concentration of INS personnel in areas thought to contain a high incidence of undocumented aliens.[1] One method is the "factory survey," in which INS personnel concentrate on a factory or other worksite believed to have a large proportion of undocumented aliens among its work force.[2] According to the INS assistant district director in Los Angeles, "surveys account for one-half to three-quarters of the illegal aliens identified each day in the Los Angeles area."[3] In that district alone, "over 20,000 illegal aliens were arrested during factory surveys in one year."[4] As these unprecedented practices increase, INS area control operations must be evaluated against the judicial standards applicable to interrogation of individuals that were established recently by the Supreme Court in *INS v. Delgado*.[5]

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* J.D., People's College of Law (1983).

1. 65 Interpreter Releases 15, 297 (Apr. 20, 1984) [hereinafter cited as Interpreter Releases].

2. *Id.*

3. INS v. Delgado, 104 S. Ct. 1758, 1766 n.2 (1984) (Powell, J., concurring in the result). "The Solicitor General informs us that the figure in text refers to 1977. For the country as a whole, the INS estimates from its internal records that factory surveys accounted in 1982 for approximately 60 percent of all illegal aliens apprehended by INS in nonborder locations."

4. *Id.* at 1766.

5. *Id.* at 1758.

II. PERMISSIBLE WORKPLACE INTRUSIONS

On April 19, 1984, the Supreme Court in *INS v. Delgado* held that factory surveys did not result in the seizure of the entire work force and that individual questioning of employees by INS agents concerning the employees' citizenship did not amount to a detention or seizure under the fourth amendment.[6] The ruling overturned *International Ladies' Garment Workers Union, AFL-CIO v. Sureck*,[7] which had prohibited INS agents from conducting factory raids or surveys unless INS agents had a reasonable, individualized suspicion that workers selected for questioning were undocumented aliens.[8]

Delgado stemmed from a series of raids on the Los Angeles garment industry in which INS attempted to most effectively use its investigative personnel in detecting and apprehending the greatest number of undocumented aliens in the United States and, more specifically, in the Los Angeles area.[9] Acting pursuant to two warrants issued in January and September of 1977, INS conducted a survey of the work force at Southern California Davis Pleating Company in search of undocumented aliens. The warrants were issued on an INS showing of probable cause that numerous undocumented aliens were employed at Davis Pleating, although neither of the search warrants identified any particular suspect by name. A third factor survey was conducted with the employer's consent in October 1977 at Mr. Pleat, another garment factory.[10]

At the beginning of each raid, INS agents surrounded the factory and several agents positioned themselves near the building's exits, thus sealing them off. Meanwhile, other agents were dispersed throughout the factory and questioned workers about their immigration status. The agents displayed badges, carried walkie-talkies, and bore arms, although at no point during any of the surveys was a weapon ever drawn.[11] Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked each employee from one to three questions relating to the employee's citizenship. If the employee gave a credible reply that he or she was a United States citizen, the questioning ended and the agent went to the next employee.[12] If the employee gave an unsatisfactory response or admitted that he or she was an alien, the employee was asked to produce immigration pa-

6. *Id.* at 1760.
7. International Ladies' Garment Workers Union, AFL-CIO v. Sureck, 681 F.2d 624 (9th Cir. 1982) [hereinafter cited as *ILGWU v. Sureck*].
8. *Delgado*, 104 S. Ct. at 1760.
9. Interpreter Releases, *supra* note 1, at 24.
10. *Delgado*, 104 S. Ct. at 1760.
11. *Id.*
12. *Id.*

pers.[13] This practice was challenged by four employees of Hispanic descent who were questioned during one of the raids. Two of the employees were U.S. citizens; the other two were lawful permanent residents.[14]

A. *Interrogation: No Unreasonable Seizure of Individual or Workplace*

In concluding that plaintiffs' fourth amendment rights had not been violated because there had been no detention or seizure of the entire work force or plaintiffs specifically, the Supreme Court applied the reasoning of *United States v. Martinez-Fuerte*.[15] In that case, the Supreme Court ruled that the stopping of automobiles at permanent checkpoints for brief questioning does not violate motorists' fourth amendment rights. No need for individualized suspicion was found because the stops were momentary and the intrusions minimal. The Court asserted that the challenged INS encounters were casual and brief, with the questioning and possible production of documents lasting no more than a minute or two.[16] The *Delgado* Court concluded that there was no seizure of individual employees when they were questioned about their citizenship status.

The Court concentrated its discussion on whether mere questioning of an individual by a police officer can amount to a seizure under the fourth amendment.[17] In its decision, the Court relied in part on *Florida v. Royer*,[18] which held that interrogation relating to one's identity or a request for identification by the police does not, in itself, constitute a fourth amendment seizure.[19] When agents found that the respondent in *Royer* matched a drug courier profile, they approached the suspect and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the *Royer* Court believed that the request for and examination of the documents was permissible. In applying the *Royer* decision to the facts of *Delgado*, the Court compared the questioning about citizenship status to the request to see a driver's license, in that the

13. *Id.* "During the course of the first survey at Davis Pleating, 78 illegal aliens were arrested out of a work force of approximately 300. The second survey nine months later resulted in the arrest of 39 illegal aliens out of about 200 employees. The survey at Mr. Pleat resulted in the arrest of 45 illegal aliens out of approximately 90 employees." *Id.* at 1766 n.3.

14. "Respondents Herman Delgado, Ramona Correa, and Francisca Labonte worked at Davis Pleating, while Marine Miramontes, the fourth respondent, was employed by Mr. Pleat. Both Delgado and Correa are United States citizens, while Lanbonte and Miramontes are permanent resident aliens." *Id.* at 1761 n.1.

15. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

16. *Delgado*, 104 S. Ct. at 1766.

17. *Id.* at 1762.

18. Florida v. Royer, 103 S. Ct. 1319 (1983).

19. *Delgado*, 104 S. Ct. at 1762.

encounters were brief and casual.[20] The Court held that the employees in *Delgado* had no reason to believe that they would be detained if they gave truthful answers to the agent's questions or if they "simply refused to answer." If mere questioning does not constitute a seizure when it occurs inside the factory it is no more a seizure when it occurs at the exits."[21]

It is apparent to those familiar with the realities of the actual practices of the officers engaged in "factory surveys" that the Supreme Court has made the erroneous assumption that factory raids are conducted in an orderly, methodical fashion in which INS agents approach each employee and question him or her without creating an intimidating psychological environment or causing any disruption of the work force.[22] In fact, testimony presented to the United States Commission on Civil Rights indicated that, "[d]uring factory surveys, INS officers enclose the area or building to be searched and ensure that the door—the exits are sealed off . . . . Agents will block off exits from surveyed factories to ensure that no employees leave the building . . . ."[23]

> Before the limited number of officers available to conduct a survey arrive, diagrams have been prepared indicating the various entrances and exits in order to guarantee that individuals will not escape. Under normal circumstances about 25 percent of those officers available to conduct the survey are stationed outside the plant.[24]

INS factory raids, then, are "carefully planned to ensure that all employees are forced to remain on the premises or are restrained from leaving."[25] Other testimony before the Civil Rights Commission indicated that "factory employees are indeed aware that their freedom to leave has been restricted."[26] One witness testified that, during these raids, employees become frightened and, in panic, attempt to escape.[27]

> I would also like to point out that the raids made of places of work, small factories, are a traumatic experience, and they are frequent, very frequent. The buses pull up and the agents sur-

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20. *Id.*

21. *Id.* at 1764.

22. Wong, Maldef Memorandum, U.S. Supreme Court Ruling on the Constitution of INS Factory Raids and Open Field Searches 2 (Apr. 25, 1984).

23. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR 83 n.30 (Sept. 1980) (quoting testimony of Glen Bertness, INS Assistant Commissioner for Investigations, before the U.S. Commission on Civil Rights, Washington, D.C., hearing transcript at 101 (Nov. 14-15, 1978)).

24. Affidavit of Philip Smith, INS Assistant District Director for Investigations in Los Angeles, in *ILGWU v. Sureck*, No. CV 78-0740-LEW (PX) (C.D. Cal. Feb. 7, 1980) (judgment and order entered).

25. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, *supra* note 23, at 83.

26. *Id.*

27. *Id.*

round the building and enter, and there is absolute pandemonium in the factory. People are screaming, running.[28]

Understandably, such intimidating tactics employed by armed agents and directed indiscriminately against the innocent and presumed lawbreakers without warning undermine due process notions. "Although individuals can refuse to answer questions when stopped and interrogated by INS officers and can, theoretically, even walk away," an INS official conceded that this could be difficult because INS officers block all of the exits.[29]

> Well, he may not be able to get out if the exits are blocked, but he can still refuse to answer, and actually, if he were smart, or if he had been coached properly by some organization, he would insist on his civil rights that he doesn't have to . . . answer. He can just turn away.[30]

Other testimony presented to the Commission charged, however, that employees who are trapped in factories in actuality have no choice but to respond to INS interrogation.[31]

> Once inside, INS blocks all exits. There is no way that a person is free to leave the workplace once INS enters, so you have a classic custodial situation in which freedom and liberty [are] removed from all persons, and the message is extremely clear to those who are involved, that they must comply with the questioning, they must answer the questions, and they must answer them generally in the way that INS wants. There is no freedom to refuse . . . . It is a clear custodial situation in which there is no liberty to respond to the questions.[32]

Thus, in almost all raids, no advance notice or warning is given. Employees are suddenly surprised by armed INS agents who swarm into the factory, presenting a show of authority that few people will challenge. When questioned about their immigration status, most people will answer because of the strong likelihood of reprisal[33] since, in past raids, employees have been threatened, intimidated and even physically abused.[34] In *Delgado*, Justice Bren-

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28. *Hearings Before the New York Advisory to the U.S. Comm'n on Civil Rights, New York City Open Meeting* 1-120 (Feb. 16-17, 1978) (testimony on Rev. Bryan Karvelis).

29. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, *supra* note 23, at 83.

30. *Hearings Before the California Advisory Comm. to the U.S. Comm'n on Civil Rights, Los Angeles Open Meeting* 566 (June 15-16, 1978) (testimony of Bernard Karmiol, INS Western Regional Counsel) [hereinafter cited as *California Hearings*].

31. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, *supra* note 23, at 83.

32. *California Hearings, supra* note 30, at 336 (testimony of Mark Rosenbaum, ACLU attorney).

33. *Wong, supra* note 22, at 2.

34. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED DOOR, *supra* note 23, at 79 n.4.

Another example of INS apprehension activities occurred in a clothing factory

nan, in his opinion concurring in part and dissenting in part, portrayed the scenario of factory raids realistically.

> The manner in which the INS conducted these surveys demonstrated a "show of authority" of sufficient size and force to overbear the will of any reasonable person. Faced with such tactics a reasonable person could not help but feel compelled to stop and provide answers to the INS agent's questions.[35]

B. *Detention to Elicit Identity: An Unreasonable Seizure*

In contrast, a much different situation prevailed in *Brown v. Texas,*[36] when two policeman physically detained defendant to determine his identity after defendant refused the officers' request to identify himself.[37] The Court held that, absent some reasonable suspicion of misconduct, detaining defendant to determine his identity violated defendant's fourth amendment right to be free from unreasonable seizure.[38] In applying the *Brown* decision to the facts of *Delgado*, the Supreme Court noted that

> [u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. *But if the person refused to answer and the police take additional steps*—such as those taken in *Brown*—to obtain an *answer, then the fourth amendment imposes some minimal level of objective justification to validate the detention or seizure.*[39]

"What is apparent from *Royer* and *Brown*," concluded the Court, "is that police questioning, by itself, is unlikely to result in a fourth amendment violation,"[40] unless additional steps are taken by police to obtain an answer.

The impact of the *Delgado* decision is clear. The Supreme Court has not only permitted INS to continue its practice of raiding

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> in Texas, where INS agents were refused permission to question employees by the plant manager because a previous interrogation of employees proved too disruptive. INS agents returned days later with a search warrant, sealed off the exits of the plant with armed Border Patrol agents, and interrogated employees at random, even subjecting one employee to a strip search during the raid, or "factory survey," as INS terms it.

Hearings Before the Texas Advisory Comm. to the U.S. Comm'n on Civil Rights, San Antonio Open Meeting III-7-33 (Sept. 12-14, 1978) (testimony of George Lundquist, plant manager, Edinburg Mfg. Co.).

35. *Delgado*, 104 S. Ct. at 1762.

36. Brown v. Texas, 443 U.S. 47 (1979).

37. *Delgado*, 104 S. Ct. at 1762.

38. *Brown*, 443 U.S. at 52; United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (Clearinghouse No. 15,851); Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977) (Clearinghouse No. 16,093); Marquez v. Kiley, 436 F. Supp. 100 (S.D.N.Y. 1977).

39. *Delgado*, 104 S. Ct. at 1762-63 (emphasis added) (citations omitted).

40. *Id.* at 1763.

worksites, but it has ruled that INS agents can also interrogate any employee they choose without an individualized suspicion that immigration laws have been violated.[41] This is tantamount to saying that police officers may approach anyone and ask if that person committed a crime without the benefit of a description of the suspect or other evidence justifying a reasonable suspicion.[42]

More importantly, the *Delgado* decision means that U.S. citizens and permanent legal residents of Hispanic descent will be subjected to increased harassment. Indeed, any person who appears foreign-born, as determined solely by complexion or racial appearances, will run a greater risk of being subject to these mass interrogations.[43] Justice Brennan, who was joined by Justice Marshall, stated that

> what is striking about today's decision is its studied air of unreality. Indeed, it is only through a considerable feat of legerdemain that the Court is able to arrive at the conclusion that the respondents were not seized. The success of the Court's sleight of hand turns on the proposition that the interrogations of respondents by the INS were merely brief, "consensual encounters," that posed no threat to respondents' personal security and freedom.[44]

Although *Delgado* has provoked grave concern among those who believe it undermines traditional fourth amendment guarantees, it does not foreclose the possibility of future legal challenges. The task facing public interest groups is great: extensive public education among the immigrant community must be undertaken before any major litigation can be considered.[45] Employees must be advised of their rights in this area, the most important of which is the right to remain silent.[46] If they refuse to answer any questions and are still taken into custody by INS, a strong case can be made that such action is a seizure proscribed by the fourth amendment.[47] As the plurality opinion in *Royer* noted:

> . . . [L]aw enforcement officers do not violate that fourth amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions . . . Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go his way. *He may not be detained even momentarily*

41. *Id.* at 1767-68.
42. Wong, *supra* note 22, at 4.
43. *Id.*
44. *Delgado*, 104 S. Ct. at 1767-68 (citation omitted).
45. Wong, *supra* note 22, at 4.
46. *Id.*
47. *Id.*

without reasonable objective grounds for doing so; and his refusal to listen or to answer does not, without more, furnish those grounds.[48]

Hence, application of these principles to future raids should adequately serve to distinguish the facts in *Delgado* and add vitality to the fourth amendment protection against unreasonable searches and seizures and the fifth amendment privilege against self-incrimination.[49]

III. FURTHER DILUTION OF THE EXCLUSIONARY RULE

The fourth amendment's exclusionary rule is a judicially created remedy to deter illegal searches and seizures.[50] Although the exclusionary rule did not make its initial appearance until 1914,[51] the principal and application of this rule in deportation proceedings can be traced to as early as 1899. In *United States v. Wong Quong Wong*,[52] the Supreme Court held that evidence contradicting respondent's claim of citizenship, which was seized during an illegal search, could not be used in a deportation hearing.[53] However, it was not until 1923, in *United States ex rel. Bilokumsky v. Tod*,[54] that the Court, in dictum, stated that "it may be assumed that evidence obtained by INS through an illegal search and seizure cannot be made on the basis of finding in deportation proceedings."[55] This assumption led many jurists and immigration scholars to believe that the question was well-settled."[56]

A. *Exclusionary Rule and INS Searches*

The question of whether the fourth amendment's exclusionary rule is applicable in deportation hearings has now been decided by

48. Florida v. Royer, 103 S. Ct. 1319, 1324 (1983), *quoted in Delgado*, 104 S. Ct. at 1769 (Brennan, J., concurring and dissenting) (citations omitted).

49. Involuntary statements are inadmissible in a deportation hearing. Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979); Nivia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977) (Clearinghouse No. 23,659); Choy v. Barber, 279 F.2d 642 (9th Cir. 1960); Matter of Toro, 17 I&N Dec. 340, 343 (Bd. of Immigration Appeals 1980); Matter of Garcia, 17 I&N Dec. 319 (Bd. of Immigration Appeals 1980).

50. Torres, *Misconduct by Immigration Officers: Excluding Evidence in Deportation Hearings*, HOUS. J. OF INT'L L. 243, 259 (1983); Weeks v. United States, 232 U.S. 383 (1914); United States v. Calandra, 414 U.S. 338, 348, 357 (1974).

51. *See also* Boyd v. United States, 116 U.S. 616 (1885). United States v. Wong Quong Hong, 94 F. 832 (D. Vt. 1899) was actually based on *Boyd*; both are consistent with *Weeks*.

52. *See Weeks*, 232 U.S. at 383.

53. *Wong Quong Hong*, 94 F. at 832.

54. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923).

55. *Id.* at 155.

56. *Id.* at 261; GORDON & ROSENFELD, IMMIGRATION LAW AND PROCEDURE 141, § 5.109(f) (1976); Fragomen, *Prodecural Aspects of Illegal Search & Seizure in Deportation Cases*, 14 SAN DIEGO L. REV. 151, 163 (1976).

the Supreme Court in *INS v. Lopez-Mendoza*,[57] the Supreme Court held that the exclusionary rule does not apply to deportation proceedings because they are civil in nature. In so ruling, the Court reversed an earlier decision in which the Ninth Circuit, sitting en banc, had determined that the exclusionary rule applied to deportation proceedings.[58]

Lopez-Mendoza involved two Mexican nationals, Adam Lopez-Mendoza and Elias Sandoval-Sanchez, who were summoned to separate deportation proceedings in California and Washington after each was found deportable. They challenged the regularity of those proceedings, questioning the lawfulness of their respective arrests by INS officials.[59] The Board of Immigration Appeals, in separate opinions, dismissed their appeals. Both filed separate petitions for review before the Court of Appeals, which consolidated the cases for argument and which decided the cases in a joint opinion.

Respondent Lopez-Mendoza was arrested in 1976 by INS agents at his place of employment in San Mateo, California. INS agents had no warrant, nor were they granted permission by the proprietor to enter or interview his employees during working hours. Nevertheless, while one agent engaged the proprietor in conversation, another entered the shop and approached Lopez-Mendoza.[60] The INS agent questioned Lopez-Mendoza, who admitted he was a Mexican citizen and had entered the United States without inspection. Based on this information, Lopez-Mendoza was arrested and deportation proceedings commenced. Respondent Sandoval-Sanchez was arrested in 1977 at his place of employment in Pasco, Washington. INS agents had conducted a factory survey of his workplace with the permission of the employer's personnel manager.[61] As in *Delgado*,[62] agents conducted a survey that created an intimidating psychological environment and disruption of the work force.

> Many people in the room rose and headed for the exits or milled around; others in the plant left their equipment and started running; still others who were entering the plant turned around and started walking back out. The two officers eventually stationed themselves at the main entrance to the plant. . . .[63]

Sandoval-Sanchez was among the workers entering the plant who was "very evasive"; he averted his head, turned around and walked away when he saw the INS agent, according to one of the arresting

57. INS v. Lopez-Mendoza, 104 S. Ct. 3479 (1984).
58. Lopez-Mendoza v. INS, 705 F.2d 1059 (1983).
59. *Lopez-Mendoza*, 104 S. Ct. at 3482.
60. *Id.*
61. *Id.* at 3483.
62. *Delgado*, 104 S. Ct. at 1758.
63. *Lopez-Mendoza*, 104 S. Ct. at 3483.

agents.[64] He was detained at the plant, along with 38 other employees, and then transferred to the county jail where he was further interrogated and where he admitted his unlawful entry into this country.[65]

The Ninth Circuit Court of Appeals agreed with respondents' arguments challenging their unlawful arrests. Lopez-Mendoza had moved to terminate the proceedings on the ground that he had been arrested illegally. Sandoval-Sanchez took the position that the detention by the immigration officers violated the fourth amendment, that the statements he made were a product of that detention, and that the exclusionary rule barred their use in a deportation hearing.[66]

In reversing the Ninth Circuit, the Supreme Court stated that "[a] deportation proceeding is a purely civil action to determine a person's eligibility to remain in this country. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."[67] Responding directly to Lopez-Mendoza's claim that the search was illegal, the Court held that "[t]he '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, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[68] The Court concluded that "credible evidence gathered in connection with peacful arrests by INS officers . . . need not be suppressed in an INS civil deportation hearing."[69]

It is important to note, however, that the exclusionary rule rests on the premise that the conduct of overzealous government officials who, on occasion, may overreach and violate constitutionally protected rights in obtaining evidence must be deterred.[70] Although the Court has recently deviated in its interpretation of this premise, it has not totally abandoned or replaced the sole purpose of the rule.[71]

B. *Exclusionary Rule and Deportation Proceedings*

"Although courts have traditionally considered deportation a civil proceeding, it is more accurate to characterize it as a quasi-

64. *Id.*
65. *Id.*
66. *Id.* at 3484.
67. *Id.* at 3484-85.
68. *Id.* at 3485 (citing Gerstein v. Pugh, 420 U.S. 103, 119 (1975)); Frisbie v. Collins, 342 U.S. 519, 522 (1952); *Bilokumsky*, 263 U.S. at 158.
69. *Lopez-Mendoza*, 104 S. Ct. at 3491.
70. *Id.* at 3486.
71. *Id.* at 3486, 3492; United States v. Janis, 428 U.S. 433 (1976); United States v. Leon, 104 S. Ct. 230 (1984).

criminal proceeding."[72] The premise that deportation is civil in nature is "based on the notion that deportation is not punishment for a crime since the government is merely exercising a sovereign power to expel those who fail to comply with its immigration laws."[73] This focus on the source of the government's power, rather than on the abuse of that power and the effect that deportation has on aliens,[74] has significant implications for our traditional "concept[s] of ordered liberty" and fairness.[75] Furthermore, deportation proceedings "while civil in nature [are] not between private parties"[76] but involve the government. As the court stated in *Pizarello v. United States*,[77] "[a]bsent an exclusionary rule, the government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences."

This argument is further reinforced by the fact that "INS officers enforce both the civil and criminal provisions of the Immigration Act." In many cases, aliens are subject to criminal prosecution and deportation for the same act.[78] As Justice White pointed out in the dissenting opinion in *Delgado*, "INS agents are law enforcement officials whose mission is closely analogous to that of police officers and civil deportation proceedings are to INS agents what criminal trials are to police officers.'. . ."[79] Thus, deportations based on either entry without inspection or commission of criminal offenses by unauthorized reentry are civil actions open to the government in lieu of criminal prosecution.[80] It is incongruous to vary the constitutional protections accorded on the basis of the distinction between civil and criminal proceedings in the immigration context.

In reaching its decision in *Lopez-Mendoza*, the Court noted that, under the balancing test applied in *United States v. Janis*,[81] if the likely social benefits of excluding unlawfully obtained evidence are weighted against the likely cost, the exclusionary rule should not be applied in civil deportation proceedings. The Court stated that

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72. Torres, *supra* note 50, at 264 n.167; Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893).

73. Torres, *supra* note 50, at 264 n.168; Pizzarello v. United States, 408 F.2d 579, 585 (2d Cir. 1966), *cert. denied*, 396 U.S. 986 (1969).

74. Torres, *supra* note 50, at 264 n.169: Cumming v. Missouri, 71 U.S. (4 Wall.) 277, 286 (1866); U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, *supra* note 23, at 97; *Fong Yue Ting*, 149 U.S. at 713; Wong Wing v. United States, 163 U.S. 228 (1895); Bugajevity v. Adams, 228 U.S. 585 (1913); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

75. Palko v. Connecticut, 302 U.S. 319 (1937).

76. Torres, *supra* note 50, at 265 n.175; *Pizzarello*, 408 F.2d at 586.

77. *Pizzarello*, 408 F.2d at 585.

78. Torres, *supra* note 50, at n.175. *See, e.g.*, 8 U.S.C. § 1325; 8 C.F.R. § 287.2.

79. *Lopez-Mendoza*, 104 S. Ct. at 3492.

80. Torres, *supra* note 50, at 266; *Brignoni-Ponce*, 422 U.S. at 873; United States v. Cortez, 499 U.S. 411 (1981).

81. *Janis*, 428 U.S. at 433.

> The likely deterrence value of the exclusionary rule in deportation proceedings is difficult to assess. On the one hand, a civil deportation proceeding is a civil complement to a possible criminal prosecution, and to this extent it resembles the civil proceedings under review in *Janis*. As recognized in *Janis*, the exclusionary rule is likely to be most effective when applied to such "intrasovereign" violations.[82]

Despite the quasi-criminal characterization of deportation proceedings, the *Lopez-Mendoza* Court, in justifying its reasoning, reviewed four major factors:

(1) Regardless of how the arrest is effected, deportation will be possible when evidence not derived directly from the arrest is sufficient to support deportation.[83]

(2) [O]ver 97.5 percent [of those arrested] apparently agree to voluntary deportation without a formal hearing. Every INS agent knows therefore, that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding.[84]

(3) INS has its own comprehensive scheme for deterring Fourth Amendment violations by its officers. . . . The INS's attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, but it does reduce the likely deterrent value of the exclusionary rule. Deterrence must be measured at the margin.[85]

(4) Finally, the deterrent value of the exclusionary rule in deportation proceedings is undermined by the availability of alternative remedies for institutional practices by the INS that might violate Fourth Amendment rights.[86]

Justice White, in his dissent, not only disagreed with the majority's assessment of the exclusionary rule, but attacked each factor discussed by the Court. He noted that:

(1) This principal [sic] of law is no different from that of a criminal proceeding, where criminal defendants may succeed in suppressing certain evidence, but such suppression does no bar prosecution nor, in some cases, conviction.[87]

(2) This fact no more diminishes the importance of the exclusionary sanction than the fact that many criminal defendants plead guilty dilutes the rule's deterrent effect in criminal cases. The possibility of exclusion of evidence quite obviously plays a part in the decision whether to contest either civil deportation or criminal prosecution.[88]

(3) Since the deterrence function of the rule is furthered if it

82. *Lopez-Mendoza*, 104 S. Ct. at 3486.
83. *Id.* at 3487.
84. *Id.* at 3492.
85. *Id.* (citation omitted).
86. *Id.* at 3488.
87. *Id.* at 3492.
88. *Id.* at 3492.

alters either "the behavior of individual law enforcement of officers or the policies of their departments, it seems likely that it was the rule's deterrent effect that led to the programs to which the Court now points for its assertion that the rule would have no deterrent effect.[89]

(4) Contrary to the situation in criminal cases, once the government has improperly obtained evidence against an illegal alien, he is removed from the country and is therefore in no position to file civil action in federal courts. Moreover, those who are legally in the country but who are nonetheless subjected to illegal searches and seizures are likely not to have the access to counsel nor the sophistication to deal with these proceedings. "It is doubtful that the threat of civil suits by these persons will strike fear into the hearts of those who enforce the nation's immigration laws."[90]

Nonetheless, the majority of the Court rested its decision primarily on the rationale that *de facto* legalization would result from exclusion of tainted evidence since

> [t]he social costs of applying the exclusionary rule in deportation proceedings are both unusual and significant. The first cost is one that is unique to continuing violations of the law. Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law.[91]

This reasoning was challenged by Justice White in his dissenting opinion.

> Contrary to the view of the majority, it is not the case that Sandoval's "unregistered presence in this county, without more, constitutes a crime." . . . Section 285 of the Immigration and Nationality Act makes it a crime to enter the United States illegally . . . . The first offense constitutes a misdemeanor, and subsequent offenses constitute felonies. . . . Those few cases that have construed this statute have held that a violation takes place at the time of entry and that the statute does not describe a continuing offense . . . .Although this Court has not construed the statute, it has suggested in dictum that this interpretation is correct . . . and it is relatively clear that such an interpretation is most consistent with the statutory language. Therefore, it is simply not the case that suppressing evidence in deportation proceedings will "allo[w] the criminal to continue in the commission of an ongoing crime."[92]

The Court rejected respondents' arguments that "[r]etention of the exclusionary rule is necessary to safeguard the Fourth Amend-

89. *Id.*
90. *Id.* at 3493.
91. *Id.*
92. *Id.* at 3488.

ment rights of ethnic American lawfully in this country."[93] The Court stated that

> Applications of the exclusionary rule to civil deportation proceedings can be justified only if the rule is likely to add significant protection to these Fourth Amendment rights. The exclusionary rule provides no remedy for completed wrongs; those lawfully in this country can be interested in its application only insofar as it may serve as an effective deterrent to future INS misconduct. Important as it is to protect the Fourth Amendment rights of all persons, there is no convincing indication that application of the exclusionary rule in civil deportation proceedings will contribute materially to that end.[94]

Hence, unreasonable encroachment into the privacy rights of citizens, legal permanent residents and undocumented persons by INS agents in the agents' quest for evidence now has the sanction of law. The Supreme Court was persuaded by INS's contentions that

> INS currently operates a deliberately simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions. The prospect of even occasional invocation of the exclusionary rule might significantly change and complicate the character of these proceedings. Fourth Amendment suppression hearings would undoubtedly require considerably more, and the likely burden on the administration of the immigration laws would be correspondingly severe.[95]

In the final analysis, Justice White best summarized the assessment of the exclusionary rule as decided by the majority:

> The costs and benefits of applying the exclusionary rule in civil deportation proceedings do not differ in any significant way from the costs and benefits in applying the rule in ordinary criminal proceedings. Unless the exclusionary rule is to be wholly done away with and the Court's belief that it has deterrent effects abandoned, it should be applied for deportation proceedings when evidence has been obtained by deliberate violations of the Fourth Amendment or by conduct that a reasonably competent officer would know is contrary to the Constitution.[96]

IV. CONCLUSION

INS area control operations will have an adverse effect on U.S. citizens and legal permanent residents of Hispanic descent because such operations will subject them to unconstitutional searches and seizures.[97] INS interrogations of persons should be based only upon

93. *Id.* at 3489.
94. *Id.* at 3488.
95. *Id.* at 3489.
96. *Id.* at 3495 (White, J., dissenting).
97. U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR, *supra* note 23, at 90.

specific, articulable facts that create a reasonable suspicion that the individual is unlawfully present in the United States in violation of the immigration laws.[98] Because of the Supreme Court's retrenchment in protecting individual rights and liberties in the context of immigration law enforcement, increased resort to assertion of the privilege against self-incrimination until counsel can be consulted appears to be one of the few avenues left to ensure self-protection.

Advocates should embark on a campaign to educate those persons most likley to be affected about this privilege and should also continue seeking alternative means to challenge these newly sanctioned INS intrusions into the workplace and the lives of U.S. citizens and legal residents.

98. *Id.* at 94; *Brignoni-Ponce*, 422 U.S. at 873; Illinois Migrant Legal Council v. Pilliod, 548 F.2d at 715; *Marquez*, 436 F. Supp at 100.