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ARTICLES

ON THE BORDER PATROL AND ITS USE OF ILLEGAL ROVING PATROL STOPS

DAVID ANTÓN ARMENDÁRIZ*

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I. INTRODUCTION

Our partitioned constitutional system is intended to make each branch of government serve as “the means of keeping each other in their proper places.”¹ This system of checks and balances reflects humanity’s imperfect nature² as the strong and the powerful, where unrestrained, will tend towards abuse of the weak and the powerless. “If men were angels, no government would be necessary.”³ The purpose of this paper is to expose

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1. THE FEDERALIST NO. 51 (Alexander Hamilton) (E.H. Scott ed. 1898); *see also* U.S. CONST. arts. I, II, III (authorizing executive, legislative and judicial powers).

2. In *Federalist 51*, Alexander Hamilton rhetorically asked “what is government itself, but the greatest of all reflections on human nature?” THE FEDERALIST NO. 51, *supra* note 1.

3. *Id.*

an area of unrestrained governmental authority Border Patrol's use of illegal roving patrols; to succinctly explain the factual and procedural circumstances that enable the Border Patrol to abuse its power to conduct roving patrols with relative impunity; and to suggest a modest judicial ameliorative measure to help keep the Border Patrol in its place or, at a minimum, to mitigate some of the resulting damage. The suggested measure is the adoption of an evidentiary rule in immigration removal proceedings whereby any testimony proffered by a respondent⁴ to demonstrate that the government illegally obtained its evidence of alienage in the case-in-chief would be inadmissible as evidence against the respondent on the issue of removability.

The Border Patrol is a federal law enforcement agency created by regulation⁵ to execute the border enforcement powers authorized by the Immigration and Nationality Act (INA).⁶ The Border Patrol, whose functions were previously performed by the Immigration and Naturalization Service (INS), is now part of U.S. Customs and Border Protection (CBP), an agency within the Department of Homeland Security (DHS).⁷ The Border Patrol is assigned enforcement duties *between* ports of entry, and the CBP inspectors are assigned duties *at* ports of entry.⁸ Immigration and Customs Enforcement (ICE), another agency within DHS, is tasked with immigration enforcement in the U.S. interior.⁹

The Border Patrol is flush with money and manpower. Due to a sharp rise in federal funding for border enforcement, the federal government has greatly increased the number of Border Patrol agents.¹⁰ For fiscal year 2011, CBP had a projected goal of more than 21,000 Border Patrol

4. A person in removal proceedings is generally referred to as a "respondent."

5. 8 C.F.R. § 287.5(b)(1) (2010).

6. Immigration and Nationality Act of 1952 (INA) § 287, 8 U.S.C. § 1357(a) (2006). The INA was enacted in 1952, Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified in scattered sections of the U.S.C.), and has been amended many times over the years. The INA is also contained in, and therefore has parallel but differently numbered cites in, the United States Code (U.S.C.). For present purposes, an effort will be made to include both cites for ease of reference.

7. OFFICE OF BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION, NATIONAL BORDER PATROL STRATEGY 4 (Sept. 2004), available at http://www.au.af.mil/au/awc/awcgate/dhs/national_bp_strategy.pdf [hereinafter NATIONAL BORDER PATROL STRATEGY].

8. *Id.*; CHAD C. HADDAL, CONG. RESEARCH SERV., BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 7 (Aug. 2010), available at <http://www.fas.org/sgp/crs/homsec/RL32562.pdf>.

9. NATIONAL BORDER PATROL STRATEGY, *supra* note 7, at 13.

10. HADDAL, *supra* note 8, at 2.

agents.¹¹ This more than doubles the number of agents employed in 2004.¹² The vast majority of its agents are assigned to the Border Patrol sectors¹³ along the southern border of the United States abutting Mexico.¹⁴ This tremendous increase in manpower has allowed the Border Patrol to increase its roving patrols,¹⁵ which are one part of the Border Patrol's overall strategy for immigration enforcement. The Border Patrol says it has a "three-tiered, defense-in-depth strategy" to secure the border between ports of entry involving "the use of line-watch operations on the border, roving patrol operations near the border, and traffic checkpoints on highways leading away from the border."¹⁶ At the border. Near the border. Leading away from the border. As it does here, the eponymous agency generally defends its sphere of activities as involving or being in relation to the actual border.¹⁷ The problem is that the Border Patrol is actually engaged in roving patrol operations at a greater distance from the border than its own regulations appear to contemplate. More to the point, its modus operandi often appears to be to conduct these operations in a manner that clearly violates not only its own operating regulations but also applicable statutory law and constitutional limita-

11. U.S. DEP'T OF HOMELAND SEC., CONGRESSIONAL BUDGET JUSTIFICATION FY 2012, at CBP S&E-60 (2012), available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>.

12. Press Release, U.S. Dep't Homeland Sec., Fact Sheet: Southwest Border Next Steps (June 23, 2010) (available at http://www.dhs.gov/ynews/releases/pr_1277310093825.shtm).

13. The Border Patrol allocates its resources to areas of the country termed "sectors." U.S. CUSTOMS AND BORDER PROTECTION, CBP ANNUAL FINANCIAL REPORT FISCAL YEAR 2010, at 6 (Jan. 2011), available at http://www.cbp.gov/linkhandler/cgov/newsroom/publications/admin/fy2010_report.ctt/fy2010_report.pdf [hereinafter CBP ANNUAL FINANCIAL REPORT FISCAL YEAR 2010]; *Border Patrol Sectors*, CBP.GOV, http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_sectors/ (last visited Feb. 26, 2012). Each sector is led by a Chief Patrol Agent and each sector is "divided into stations, led by a Patrol Agent in Charge," responsible for operations within his or her sector area. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-824, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 5 n.7 (2009), available at <http://www.gao.gov/new.items/d09824.pdf> [hereinafter GAO-09-824].

14. See GAO-09-824, *supra* note 13 ("As of June 2009, the Border Patrol had 19,354 agents nationwide, an increase of [fifty-seven] percent since September 2006. Of these agents, about [eighty-eight] percent (17,011) were located in the nine Border Patrol sectors along the southwest border.").

15. Leslie Berestein, *Border Patrol's Stops Are Criticized*, U-T SAN DIEGO, Mar. 1, 2009, <http://www.utsandiego.com/news/2009/mar/01/1m1enforce22436-border-patrols-stops-are-criticize/>.

16. CBP ANNUAL FINANCIAL REPORT FISCAL YEAR 2010, *supra* note 13, at 17.

17. NATIONAL BORDER PATROL STRATEGY, *supra* note 7, at 2 ("The National Border Patrol Strategy has an ambitious goal: operational control of our nation's border, and particularly our borders with Mexico and Canada.").

tions. The predictable result is a degraded agency, racial profiling, and unlawful seizures of the undocumented,¹⁸ of non-citizens with legal status, and of U.S. citizens. The principle underlying reason for this abuse of power (beyond our imperfect human nature) is uncomplicated—the Border Patrol is insufficiently restrained. There are neither adequate internal nor sufficient external restraints on the exercise of its powers. It has been left to self-regulate and this experiment has been a failure, but a failure that largely goes unnoticed because of the legal and factual context in which the Border Patrol operates.

The issue here addressed is particularly timely given the present cacophony of calls for the greater participation of state and local police authorities in immigration enforcement, calls which have been rightly criticized as exhortations to invidious racial profiling. A look at how even the Border Patrol—the purported expert agency at lawful immigration enforcement—is unable to conduct roving patrols without racial profiling reveals that any person committed to the rule of law should not be adverse to asking the state and local police authorities to do the same.

II. THE PROBLEM: RAMPANT UNLAWFUL ROVING BORDER PATROL STOPS

On January 5, 2010, Javier Z.¹⁹ was driving to work on Interstate Highway 35 North in Schertz, Texas, which is just north of San Antonio and approximately 167 miles from Piedras Negras, Mexico, the nearest border crossing. He was in a red double-cab truck with two other Latino co-workers.²⁰ He was driving in accordance with the traffic law and there was nothing visually unusual or indicative of illegal activity about Javier, his passengers, or his truck. Nevertheless, Border Patrol agents in two separate Border Patrol vehicles acting in concert pulled him over, questioned him and his companions about their immigration status, and arrested them.²¹ The agents involved were Rolando S., Francisco D., and

18. The term “undocumented” is used here to refer generally to all non-citizens without current governmental permission to be in the United States, without regard to immigration history or manner of entry. The use of the term “illegal” is avoided throughout this article for several reasons, not least of which because it is ungrammatical and ontologically nonsensical.

19. Javier and most of the other persons mentioned in this article who were arrested by Border Patrol were clients of the author. The names of clients referenced in this article will be redacted although some of their names are a matter of public record due to federal court litigation.

20. Affidavit of Javier Z. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). This account is taken from Javier's sworn statement made in litigation.

21. *Id.*

Ernest L.²² On the return trip to the office, the agents stopped and arrested other persons in the same fashion.²³ In documents later produced during litigation, the agents claimed that they stopped Javier because they could see him and two of his companions as they drove past the agents' stationary vehicle. They noticed Javier's unspecified "body posture"; Javier and his companions "appeared to be startled"; Javier and the others were "looking straight ahead" and "never acknowledged" the agents;²⁴ Javier's vehicle "slowed down abrupt[ly]" after the Border Patrol agents pulled their vehicle in behind them; and, finally, an unspecified passenger "made a sudden move to take off his seatbelt."²⁵

In the early evening of March 19, 2007, Jose O. was driving by himself in an Isuzu Rodeo sport utility vehicle on Loop 410 West in San Antonio when he was stopped by Border Patrol agents, Rolando S. and Ernest B.²⁶ San Antonio is approximately 146 miles from the nearest border port of entry. According to the government's account, the Border Patrol agents stopped him because he was "always looking straight ahead," he looked "nervous," and he was "switching lanes quickly."²⁷ The Border Patrol agents questioned him about his immigration status and arrested him.²⁸ Under oath, Agent Rolando S. testified that he stopped people based on their facial expressions and how they reacted to the Border Pa-

22. Throughout this Article, names of law enforcement agents will be redacted although many of their names are a matter of public record on account of federal court proceedings.

23. Affidavit of Javier Z., *supra* note 20.

24. Form I-213: Record of Deportable/Inadmissible Alien of Javier Z. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). This leads one to question: Did the agents expect them to wave?

25. Javier was ultimately deported, but not because his arrest was legal; rather, the government was able to convince the immigration judge that it had evidence of alienage untainted by the arrest. On account of his illegal arrest, Javier filed suit pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. Sections 1346(b) and 2671, against the U.S. government and the agents involved in his illegal arrest. The documents referenced here consist of a government Form I-213, also known as a Record of Deportable/Inadmissible Alien, and accompanying addendums. Form I-213: Record of Deportable/Inadmissible Alien of Javier Z., *supra* note 24. The Form I-213 is denominated the "Record of Deportable Alien." *Id.* It is the form that an immigration agent fills out after an alien is arrested. *Id.* Its purpose, besides identifying the basis of the government's encounter with the person arrested, is to record identifying and biographical information as well as other facts such as manner of entry into the United States, along with criminal history. *Id.*

26. Affidavit of Jose O. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*). This account is taken from a sworn statement taken during removal proceedings.

27. Form I-213: Record of Deportable/Inadmissible Alien of Jose O. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

28. Written Decision of the Immigration Judge, case of Jose O. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

trol vehicle.²⁹ The agent claimed to be able to tell that Jose was nervous because of the way Jose, *while driving*, was “clenching” the steering wheel.³⁰ The agent could not explain how he could distinguish one Hispanic person from an “illegal alien” given the high Hispanic population in San Antonio.³¹ The immigration judge found the agent’s testimony lacking in credibility. The judge concluded “that the only basis for the agent’s stop was that [Jose] ‘looked like an alien’” and that, in arresting Jose in an act of racial profiling, Agent Rolando S. “deliberately violated the law or acted in conscious disregard of the Constitution.”³² The judge threw out the resulting evidence and terminated the removal proceeding against Jose because there was no other evidence of alienage.³³

On November 25, 2008, Melchor R. was with three other Latino men in a double-cab Ford F-250 truck on Interstate Highway 10 just outside San Antonio when he was stopped and arrested by Border Patrol Agents Francisco D. and Rolando S.³⁴ In documentation arising from the arrest, the officers claim to have arrested Melchor and the other men in the truck because they appeared to be “stoic and extremely nervous.”³⁵ Agent Rolando S. was apparently undeterred by the immigration judge’s prior decision in the case of Jose O. wherein the judge had ruled his conduct to be in deliberate violation or conscious disregard of the law.³⁶ The removal proceedings of Melchor R. are currently on-going.

One month after the arrest of Melchor R, on December 31, 2008, Border Patrol Agents Francisco D. and Ernest L. struck again. Juan S. was traveling in a four-door 1999 Ford 350 truck on Highway 151 in San Antonio, Texas, with two other Latino men.³⁷ The Border Patrol agents pulled them off the freeway, questioned them as to their immigration sta-

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Written Decision of the Immigration Judge, *supra* note 28. The procedural mechanics of removal proceedings in this context are explained in greater detail in Part III below.

34. Affidavit of Melchor R. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

35. Form I-213: Record of Deportable/Inadmissible Alien of Melchor R. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

36. The immigration judge’s decision in the case of Jose O. was issued on February 14, 2008, nine months prior to the arrest of Melchor R. *Compare* Written Decision of the Immigration Judge, *supra* note 28, *with* Form I-213: Record of Deportable/Inadmissible Alien of Melchor R., *supra* note 35.

37. Affidavit of Juan S. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

tus, and arrested Juan.³⁸ In documenting the arrest,³⁹ the agents rehashed the “stoic and nervous” excuse used in the case of Melchor R.:

On [December 31, 2008] at approximately [9:30 am] subject Juan [S.] was apprehended by the San Antonio Border Patrol pursuant to a vehicle stop. Agents [Francisco D. and Ernest L.] were in their assigned area when they noticed a brown pickup carrying three passengers pass them in their marked unit. The passenger and driver seemed stoic and nervous in their mannerisms when Agents [Francisco D. and Ernest L.] drove alongside them. Agents [Francisco D. and Ernest L.] decided to conduct a vehicle stop in order to conduct a further review.⁴⁰

The agents’ pretext for the arrest—appearing stoic and nervous—is inherently nonsensical. It also is not original as it appears to be in widespread use by Border Patrol agents.⁴¹ The removal proceedings of Juan S. are currently on-going.

On January 15, 2009, Damian C. was in a double-cab truck with four other Latino men when they were stopped by a Border Patrol agent on Highway 87 outside San Angelo, Texas, which is northwest of San Antonio.⁴² San Angelo is approximately 156 miles from the nearest border port of entry at Del Rio, Texas. When Damian asked the arresting agent why he was stopped, the agent told him that it was because of the construction equipment that he had in his truck and because he looked “Mexican.”⁴³ The government arrest form gave no stated reason whatsoever for the stop.⁴⁴ Subsequent to the taking of all evidence, the judge found no other reason for the stop beyond “[Damian’s] Hispanic appearance.”⁴⁵ The judge threw out the resulting evidence and terminated the removal proceeding against Damian.⁴⁶

38. *Id.*

39. Form I-213: Record of Deportable/Inadmissible Alien of Juan S. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*).

40. *Id.*

41. *United States v. Alvarado*, 635 F. Supp. 2d 586, 587 (W.D. Tex. 2009) (finding illegal arrest where Border Patrol agent testified that he stopped a vehicle north of New Braunfels, Texas because the driver appeared stoic and nervous).

42. Affidavit of Damian C. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*).

43. *Id.*

44. Form I-213: Record of Deportable/Inadmissible Alien of Damian C. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*).

45. Written Decision of the Immigration Judge, case of Damian C. (on file with *The Scholar: St. Mary’s Law Review on Minority Issues*).

46. *Id.*

On May 15, 2009, Israel H. and his friend Cesar ate breakfast at a restaurant near downtown San Antonio.⁴⁷ Afterwards, they got into their double-cab Dodge truck and drove onto Interstate Highway 10 East in the direction of Seguin, Texas.⁴⁸ They did not get very far before being stopped by Border Patrol agents, including Agent Rolando S.⁴⁹ He questioned Israel and his friend as to their immigration status and arrested Israel.⁵⁰ On the resulting arrest form, Agent Rolando claimed that Israel was stopped because he and his companion had an “uncomfortable looking forward stare” and because they “appeared very nervous.”⁵¹ Subsequent to the taking of all evidence, the judge found no other explanation other than “[Israel’s] Hispanic appearance as the cause for the stop,” warranting suppression of the evidence and termination of proceedings.⁵²

On December 04, 2009, Luis Pablo P. was on Highway 87 leaving San Angelo heading towards San Antonio.⁵³ He was in a four-door flat-bed truck with six others, all but one of whom were Latino, when they were stopped by a border patrol agent for no apparent lawful reason.⁵⁴ The agent approached the vehicle and, without explaining the reason for the stop, began asking each of them whether they had “papers.”⁵⁵ Luis Pablo remains in removal proceedings and no government documentation identifying the purported reasons for the stop has yet been produced.⁵⁶

What do these arrested persons and factual scenarios have in common? All the arrestees were Hispanic men. All but one were stopped in the greater San Antonio metropolitan area, the population of which is just over 2.1 million, over fifty percent of which are “Hispanic or Latino,” according to the latest census.⁵⁷ All were stopped well over 100 miles from the nearest port of entry on the U.S.–Mexico border. All but one was arrested while driving in a double cab or four-door truck; and accord-

47. Affidavit of Israel H. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

48. *Id.*

49. *Id.*

50. Written Decision of the Immigration Judge, case of Israel H. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

51. Form I-213: Record of Deportable/Inadmissible Alien of Israel H. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

52. Written Decision of the Immigration Judge, *supra* note 50.

53. Affidavit of Luis P. (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Census 2010 P.L. 94-171 Profile — San Antonio-New Braunfels, TX Metro Area (U50002360)*, PROXIMITYONE, <http://proximityone.com/cen2010/pl/plUS0002360.htm> (last visited Feb. 25, 2012).

ing to their own accounts, they were driving in accordance with the traffic law and there was nothing visually indicative of illegal activity that was not also perfectly consistent with lawful activity. The government documentation pertaining to the arrests includes statements by Border Patrol agents claiming the vehicles were stopped because the occupants purportedly looked nervous, or stoic and nervous, or for other highly subjective reasons. Finally, as argued below, all of these arrests were illegal and violated clearly established law.

In *INS v. Lopez-Mendoza*,⁵⁸ the Supreme Court explained one reason why the type of Border Patrol misconduct previously described happens so frequently and with such impudence:

Every INS agent knows . . . that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding. When an occasional challenge is brought, the consequences from the point of view of the officer's overall arrest and deportation record will be trivial.⁵⁹

In other words, Border Patrol agents stop a lot of people, some of whom they arrest; however, very few of those arrested persons challenge their arrests and defend their constitutional rights, and even when the arrest is challenged as unlawful, it will have no impact on the agent's record. Amazingly, the Court found this to be an argument *against* uniform application of an exclusionary rule for constitutional violations in administrative removal proceedings.⁶⁰

The Court gave additional reasons for not extending a bright line exclusionary rule to immigration proceedings, stating:

These regulations require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof. New immigration officers receive instruction and examination in Fourth Amendment law, and others receive periodic refresher courses in law. Evidence seized through intentionally unlawful conduct is excluded by Department of Justice policy from the proceeding for which it was obtained.⁶¹

This means that the Border Patrol is self-regulating and can be trusted to police itself.⁶² The aforementioned examples of Border Patrol misconduct indicate that whatever policy may have been in place to restrain the

58. 468 U.S. 1032, 1044 (1984).

59. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

60. *Id.* at 1034.

61. *Id.* at 1044-45 (internal citations omitted).

62. Hamilton would disagree. See *supra* notes 1-2 and accompanying text.

government from using evidence obtained from an agent's unlawful conduct has long been abandoned. For the Border Patrol it is, and has long been, open season.

III. THE LAW AS IT RELATES TO ROVING BORDER PATROL STOPS

Whether they are respected or not, there exist constitutional, statutory, and regulatory limits on the legal authority of Border Patrol agents to detain and arrest persons. On U.S. soil, the Fourth Amendment's prohibition against unreasonable searches and seizures and its warrant requirement upon probable cause arguably will generally apply equally to both citizens and noncitizens.⁶³ The statutory and regulatory provisions that outline the limited authority of immigration agents to stop, detain, question, and arrest certain persons are located at INA Section 236(a) (8 U.S.C. Section 1226(a)), providing for the arrest with warrant of any alien subject to removal;⁶⁴ INA Section 287(a) (8 U.S.C. Section 1357(a)), providing for warrantless arrests under certain circumstances;⁶⁵ and 8 C.F.R. Section 287.8(b), allowing "[i]nterrogation and detention not amounting to arrest" and (c), detailing the "[c]onduct of arrests."⁶⁶ The Border Patrol has no authority to stop people for actual or perceived violations of the state traffic code.⁶⁷ INA Section 287(a) and 8 C.F.R. Section 287.8

63. See *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006) (extending generally the protection of the Fourth Amendment against unlawful arrest and the excessive use of force to non-citizens).

64. Immigration and Nationality Act of 1952 (INA) § 236(a), 8 U.S.C. § 1226(a) (2006).

65. INA § 287(a), 8 U.S.C. § 1357(a) (2006). This section, entitled, "Powers without warrant," reads in pertinent part:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . .

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle . . .

Id.

66. 8 C.F.R. §§ 287.8(b), (c) (2010).

67. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 n.8 (1975) ("Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways.").

are the non-constitutional provisions of law most relevant to our topic. Section 287(a)(1) purports to allow Border Patrol agents to “interrogate” any person believed to be an alien about his or her immigration status.⁶⁸ To the extent the Border Patrol uses this provision as authority for conducting *Terry*-stop type vehicular seizures,⁶⁹ the Supreme Court requires “reasonable suspicion” of alienage⁷⁰ on the part of the agent beyond the actual border or its functional equivalent.⁷¹ This “reasonable suspicion” requirement is codified in 8 C.F.R. Section 287.8(b)(2):

If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning.⁷²

Moving beyond questioning in the context of *Terry* stops, Section 287(a)(2) empowers a Border Patrol agent to make warrantless arrests of two classes of aliens: (1) those actually in the act of entering illegally, and (2) those other aliens who the agent has “reason to believe” are in the United States in violation of immigration law and are likely to escape before arrest warrants can be obtained.⁷³ Finally, Section 287(a)(3) authorizes warrantless vehicle searches “within a reasonable distance” from the nation’s borders, which is defined by regulation as 100 miles from the border.⁷⁴ Although Congress did not intend to incorporate into Section 287(a)(3) a requirement of probable cause,⁷⁵ the Supreme Court has read into it a reasonable suspicion requirement as it did with Section 287(a)(1):

68. INA § 287(a)(1), 8 U.S.C. § 1357(a)(1).

69. *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (explaining that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person”). Vehicular traffic stops, like pedestrian stops, are seizures within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

70. *Terry*, 392 U.S. at 37. The case law is not perfectly fully clear on whether the “reasonable suspicion” solely goes to alienage (i.e., any person reasonably suspected of being an alien may be stopped) or whether the agent must also have some rational basis to think the person is an alien out of status. *Id.*

71. *Brignoni-Ponce*, 422 U.S. at 884. To the extent the Border Patrol is questioning someone under circumstances that do not constitute even a *Terry*-stop type seizure, no particular level of suspicion is required. See *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (reaffirming prior precedent holding that mere police questioning does not constitute a seizure).

72. 8 C.F.R. § 287.8(b)(2) (2010).

73. *Id.* § 287.8(a)(3).

74. *Id.* § 287.1(a)(2).

75. *Brignoni-Ponce*, 422 U.S. at 877 n.3.

The effect of our decision is to limit exercise of the authority granted by both §287(a)(1) and §287(a)(3). Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.⁷⁶

Note that a careful reading of the Court's decision makes clear that the words "the border" as used in this passage do not mean "the border area"; rather they reference the actual border.⁷⁷ The whole point of the *Brignoni-Ponce*⁷⁸ decision is that even in border areas, reasonable suspicion is required. The net effect of the *Brignoni-Ponce* decision and its progeny is the rule that, even in border areas, the Border Patrol must always have objectively reasonable suspicion of criminal activity⁷⁹ prior to making a *Terry*-stop type seizure of a suspected alien, whether by vehicle or on foot, regardless of the purported source of the government's authority.⁸⁰

In making a reasonable suspicion inquiry, a court "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."⁸¹ The *Brignoni-Ponce* "reasonable suspicion" factors include: (1) known characteristics of a particular area, (2) previous experience of the arresting agents with criminal activity, (3) proximity of the area to the border, (4) usual traffic patterns of that road, (5) information about recent illegal trafficking in aliens or narcotics in the area, (6) behavior of the vehicle's driver, (7) appearance of the vehicle, and (8) num-

76. *Id.* at 884; *see also* *United States v. Lopez-Moreno*, 420 F.3d 420, 430 (5th Cir. 2005) ("For a traffic stop to be justified at its inception, an officer must have an objectively reasonable suspicion that some sort of illegal activity . . . occurred, or is about to occur, before stopping the vehicle."). This is the same analysis as applies to *Terry* stops. *See Terry v. Ohio*, 392 U.S. 1, 38 (1968) (holding that in order to briefly detain a person for questioning, an officer needs a reasonable suspicion based on specific articulable facts).

77. *Brignoni-Ponce*, 422 U.S. at 884.

78. 422 U.S. 873 (1975).

79. Case law seems to indicate that, although the focus of the aforementioned statutes and regulations is on the Border Patrol's immigration enforcement authority, the necessary "reasonable suspicion" may be of any criminal activity. *See, e.g., United States v. Rubio-Hernandez*, 39 F. Supp. 2d 808 (W.D. Tex. 1999) (citing *United States v. Cortez*, 449 U.S. 411, 421–22 (1981), as support for the claim that the *Brignoni-Ponce* "reasonable suspicion" test was extended to include "criminal activity").

80. *Brignoni-Ponce*, 422 U.S. at 884.

81. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *Cortez*, 449 U.S. at 417).

ber, appearance, and behavior of the passengers.⁸² Race and ethnic appearance, standing alone, do not constitute reasonable suspicion.⁸³

Proximity to the border is a decisive, even indispensable, factor in the *Brignoni-Ponce* analysis under Fifth Circuit precedent. “[I]f there is no reason to believe that the vehicle has come from the border, the remaining factors must be examined charily.”⁸⁴ Additionally, “[w]hen the stop occurs a substantial distance from the border, th[e] element [of proximity to the border] is missing.”⁸⁵ Vehicles traveling more than fifty miles from the border will generally be considered a “substantial distance” from the border.⁸⁶ A concomitant principle to the border proximity rule is that there should be some evidence that the vehicle recently crossed the border:

When a person is traveling within our country . . . we are more hesitant to allow interference, even if the vehicle is close to the border. For this reason, this Court has repeatedly emphasized that one of the vital elements in the *Brignoni-Ponce* reasonable suspicion test is whether the agents had reason to believe that the vehicle in question recently crossed the border.⁸⁷

And “[i]f a vehicle is already past towns in this country, the mere fact that it is proceeding on a public highway leading from the border is not sufficient cause to believe the vehicle came from the border.”⁸⁸ Of course, having crossed the border and having come from the border area are not the same thing. As between the two concepts, the emphasis appears to focus on an analysis of whether the vehicle has recently crossed the border, which makes sense given the Border Patrol’s limited powers to enforce immigration laws.⁸⁹

82. *Brignoni-Ponce*, 422 U.S. at 884–85.

83. *Id.* at 886–87 (noting that “[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor,” but rejecting the officer’s singular reliance on the “apparent Mexican ancestry of the occupants”). It is highly doubtful that this proposition still stands thirty-five years after *Brignoni-Ponce*, given the number of Hispanic U.S. citizens. Given the current immigrant population does one even know what it means to look like a Mexican?

84. *United States v. Rodriguez-Rivas*, 151 F.3d 377, 380 (5th Cir. 1998); *see also* *United States v. Jacquinot*, 258 F.3d 423, 428 (5th Cir. 2001) (“One of the vital elements in the reasonable suspicion test is whether the agents had reason to believe that the vehicle in question recently crossed the border.”).

85. *Rodriguez-Rivas*, 151 F.3d at 380 (citing *United States v. Melendez-Gonzalez*, 727 F.2d 407, 411 (5th Cir. 1984)).

86. *Id.* (citing *United States v. Inocencio*, 40 F.3d 716, 722 n.7 (5th Cir. 1994)).

87. *United States v. Melendez-Gonzalez*, 727 F.2d 407, 411 (5th Cir. 1984).

88. *Id.*

89. *See, e.g.*, *United States v. Moreno-Chaparro*, 180 F.3d 629, 632 (5th Cir. 1998) (“A vital element of the *Brignoni-Ponce* test is whether the agent had reason to believe that the

Decades of case law make clear that the roving patrol stops described at the beginning of this article do not pass constitutional muster. In *United States v. Rodriguez-Rivas*,⁹⁰ the Fifth Circuit found a Fourth Amendment violation where the agent stopped the vehicle over fifty miles from the border just because a five-foot seven-inch-tall defendant was slouching in his seat.⁹¹ In *United States v. Ortega-Serrano*,⁹² a vehicle stop 300 to 400 miles north of the border was deemed improper where it was based on an uneven paint job and the fact that the vehicle occupants were Hispanic and appeared “dirty” and “nervous.”⁹³ In *United States v. Lamas*,⁹⁴ the Court held that an agent was not constitutionally justified in stopping a vehicle 190 miles from the border even though the car was heavily loaded, had out-of-state plates yet did not appear to be a “typical tourist’s car,” and the passengers appeared to avoid eye contact with the agents.⁹⁵ In *United States v. Lopez-Valdez*,⁹⁶ “a midsize sedan traveling on a road near the U.S.–Mexican border with as many as eight visible passengers does not give rise to reasonable suspicion of unlawful activity.”⁹⁷ And in a more recent decision, *United States v. Rangel-Portillo*,⁹⁸ the Fifth Circuit reviewed a stop by Border Patrol agents a mere 500 yards from the border and overturned a wrongful denial of a suppression motion:

[T]he district court noted that all of the passengers in the vehicle wore seatbelts, sat rigidly, refrained from talking to one another, and had no shopping bags [although exiting a Wal-Mart]. This Court, however, cannot infer reasonable suspicion from these factors since there is no rational reason to conclude that law-abiding citizens are less likely to wear their seatbelts or exit a Wal-Mart parking lot sans shopping bags Thus, it is logical to conclude that none of these factors carry any weight since law-abiding individuals are just as likely, if not more likely, to wear their seatbelts, sit rigidly, and re-

vehicle in question had come from the border. It appears manifest that Agent Hollenbeck did not have reasonable grounds to believe that Moreno had crossed the border. Moreno was [sixty] miles north of the Mexican border, driving a pickup truck with valid Texas license plates, and could have been coming from nearby communities.”); *Rodriguez-Rivas*, 151 F.3d at 380 (“A stop [sixty] miles from the Mexican border, we have found, was not near enough to the border to justify a belief that the vehicle originated from the border.”).

90. 151 F.3d 377 (5th Cir. 1998).

91. *Rodriguez-Rivas*, 151 F.3d at 382, 382 n.3.

92. 788 F.2d 299 (5th Cir. 1986).

93. *United States v. Ortega-Serrano*, 788 F.2d 299 (5th Cir. 1986).

94. 608 F.2d 547 (5th Cir. 1979).

95. *United States v. Lamas*, 608 F.2d 547, 548 (5th Cir. 1979).

96. 178 F.3d 282, 288 (5th Cir. 1999).

97. *United States v. Lopez-Valdez*, 178 F.3d 282, 288 (5th Cir. 1999).

98. 586 F.3d 376 (5th Cir. 2009).

frain from conversing with one another as they exit a Wal-Mart parking lot.⁹⁹

Of course, there are many reasons why a roving investigatory patrol stop can quickly escalate to a simple arrest—which would require probable cause and possibly an arrest warrant—including when a stop is extended in duration or the person in question is handcuffed. However, no analysis of the requirements of probable cause will here be provided because, in the context of a Border Patrol roving patrol stop, if the agent does not have an objective “reasonable suspicion” of illegal activity, he will by definition also not have enough evidence to show probable cause to make an arrest.

IV. THE PROCEDURAL AND FACTUAL CIRCUMSTANCES THAT ENABLE THE BORDER PATROL TO ACT WITH IMPUNITY

The problem and the applicable Fourth Amendment law have been explained, but to understand the real-world dynamics that enable the Border Patrol to abuse its power to conduct roving patrols with relative impunity, we have to understand the surrounding factual and procedural circumstances. There are only three kinds of persons that may be seized in a Border Patrol roving patrol stop: U.S. citizens, non-citizens with legal status, and undocumented individuals. In general, the average person, regardless of citizenship or immigration status, will not have the adequate means and incentives to assert and defend his or her legal rights after being unlawfully stopped by the Border Patrol. This is due to a number of issues—ignorance of the law, cultural acceptance, fear of the government, inadequate legal protections both in removal proceedings and in civil tort litigation and, of course, financial considerations. For U.S. citizens or non-citizens with legal status, the only available recourse is an administrative complaint or a civil lawsuit.¹⁰⁰ Good data is lacking on the number of administrative complaints that have been made arising from unlawful Border Patrol roving patrol stops or any resulting agency action,¹⁰¹ but given the pervasiveness of the tactic, there is no reason to believe that the Supreme Court was wrong when it stated, as previously

99. *United States v. Rangel-Portillo*, 586 F.3d 376, 381 (5th Cir. 2009).

100. As with Javier Z. and Luis Pablo P., previously mentioned, most lawsuits in this context will be brought against the individual agents pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and against the federal government pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. Sections 1346(b) and 2671.

101. However, in the lawsuit brought by Javier Z., the government claimed in discovery responses that no such complaints had been made against any of the three agents involved in that arrest.

quoted, that a complaint will have no effect on an individual agent's record.

Civil lawsuits are available to all persons regardless of immigration status. However, there are serious hurdles that effectively discourage such actions. Lawyers are expensive, especially lawyers who practice law in federal court. The average person does not have the money to hire a lawyer on an hourly basis and the overwhelming majority of lawyers who litigate tort claims in federal court will not agree to represent a client in a civil tort suit on a contingency basis where there is no prospect of collecting meaningful monetary damages. U.S. citizens and non-citizens with legal status will generally be released by the Border Patrol within a very short time subsequent to the initial stop, perhaps mere minutes, so federal courts will likely view their monetary damages as limited, or nominal at best. As for non-citizens without status, assuming that there is no outstanding order of removal¹⁰² or other basis for expedited removal,¹⁰³ the Border Patrol will either place them in removal proceedings subsequent to a roving patrol stop or persuade them to depart "voluntarily."¹⁰⁴ If they accept voluntary departure, the person will be outside the country within a very short period of time and unable logistically to bring suit as a practical matter even if inclined to do so.¹⁰⁵ If the person is placed in removal proceedings but later brings a federal civil lawsuit, the government will argue that any detention subsequent to the initial patrol stop was not tortious at all; it was rather a necessary consequence of the person being removable as a non-citizen based on status, regardless of whether the initial stop was completely legal. The point is that even in the best of situations, assuming no other egregious conduct on the part of the Border Patrol agents, the likelihood of recovering serious monetary damages will be extremely minimal, thus erasing the financial conditions necessary to vindicate one's rights through federal court litigation. If this were not enough, to reduce the financial incentive for federal litigation even more, Congress has codified the rule that a lawyer accepting any FTCA claim is limited to twenty-five percent of any award.¹⁰⁶ The end

102. If the person has an outstanding order of removal, the Border Patrol may "reinstate" the removal order and remove the person from the United States quickly and without much further due process. 8 C.F.R. § 1241.8 (2010).

103. *See, e.g.*, Immigration and Nationality Act of 1952 (INA) § 235, 8 U.S.C. § 1225 (2006) (providing for expedited removal of arriving aliens); INA § 238, 8 U.S.C. § 1228 (providing for expedited removal of aliens convicted of committing aggravated felonies).

104. *See* 8 C.F.R. § 240.25 (providing voluntary departure authority).

105. *See id.* § 1241.33(b) (allowing a seventy-two-hour window from when a final order is issued and when an alien may be physically deported).

106. *See* 28 U.S.C. § 2678 (2006) (explaining that any person who "charge[s], demand[s], receive[s], or collect[s]" more than twenty-five percent may be subject to a \$2,000 fine or be imprisoned for up to one year).

result here, given minimal damages and a statutory cap on attorneys' fees, is that these lawsuits are few and far between.

For non-citizens, and even those with legal status, there are other powerful reasons, entirely distinct from financial considerations that discourage lawsuits. Non-citizens with legal status are extremely reluctant to bring legal challenges to redress governmental misconduct. Ignorance of their rights is pervasive as is obedience to, and fear of, the government, all of which often stems from their deep cultural roots. They intuitively, but rightly, understand the precarious nature of their legal status and the extent to which their continued maintenance of that status depends on the deferential exercise of the discretion of the federal government—suing the government in the eyes of most non-citizens is an absurd and suicidal act.

The dynamics with regard to undocumented individuals change somewhat with the introduction of removal proceedings and the prospect of the person's physical removal from the country, but the end result is the same. When the border patrol arrests someone subsequent to a roving patrol stop, but is unsuccessful in getting the person to accept voluntary departure, the person will be put in removal proceedings if eligible. There are a number of legal ways in which a person in removal proceedings may avoid deportation if he or she meets the oftentimes onerous legal requirements, but this Article is not concerned with those situations because such persons are not attempting to vindicate their rights to be free from an unlawful seizure by government agents. Rather, they are simply pursuing other available relief in an attempt to avoid their removal. As a practical matter, given the difficulty of vindicating their rights to be free from an unlawful seizure by government agents within the context of a removal proceeding, as explained below, if the person has any other means of avoiding removal, that other means is usually a better course of action, though this also depends on various other factors such as one's venue. Whether he¹⁰⁷ can avoid deportation on account of the illegality of the initial arrest (as happened in the cases of Jose O., Damian C., and Israel H., referenced above) is highly doubtful. Applicable law and procedural rules see to that. Although this Article is not meant to be a primer on motions to suppress in removal proceedings, a brief overview of the process and some of its applicable law and procedural rules is necessary in order to understand how this Kafka-esque process helps make it possible for the Border Patrol to act with relative impunity.

107. This pronoun is used for the sake of simplicity and because, as the aforementioned cases make clear, the Border Patrol appears to target men more so than women with its roving patrols.

An alien has a right to be represented in removal proceedings, but not at the expense of the government.¹⁰⁸ So right from the start, there is a huge financial hurdle to jump—hiring a lawyer. This is at most times beyond the reach of your average non-citizen without status in removal proceedings. It is safe to say that a non-citizen in removal proceedings who cannot retain competent counsel will be unaware of the possibility of litigating the illegality of government conduct as a means of removal defense and, in any case, for reasons that will be clear shortly, they would certainly be utterly incapable of defending themselves in this manner *pro se*.¹⁰⁹ Even amongst removal defense lawyers, litigating the illegality of government conduct as a means of removal defense is a relatively niche practice. Pursuing this line of defense has its personal costs: it can be a highly litigious process; it requires reference to, and application of, ordinarily inapplicable criminal and constitutional law; and it can disrupt otherwise congenial relations between a defense lawyer and opposing counsel and judges because it disrupts the ordinary deportation of people who are otherwise presumably deportable.¹¹⁰ If the person has the luck and the means to hire a lawyer capable of properly defending the case, the entire proceeding will be an evidentiary contest in which, at most, two issues will be litigated: alienage and the legality of the underlying arrest. The problem with this contest, however, is that it is overwhelmingly handicapped in favor of the government.

In removal proceedings, the government has the initial burden of demonstrating alienage by “clear, convincing and unequivocal” evidence when denied by a respondent.¹¹¹ In this context, as an evidentiary and practical matter, “alienage” can be summarized as the fact of having been

108. See INA § 292, 8 U.S.C. § 1362 (explaining that in removal proceedings, the person of interest has the privilege to be represented by choosing any attorney they wish as long as it is at their own expense).

109. There is some authority for the idea that immigration judges have a duty to inform respondents as to forms of relief for which they are apparently eligible. See *In re Cordova*, 22 I&N Dec. 966, 970–71 (B.I.A. 1999) (citing 8 C.F.R. § 240.11(a)(2) (1998)) (explaining that those who are eligible for voluntary departure must be informed). However, immigration judges are under considerable pressure to move their cases along. See Daniel Gonzalez, *Immigration Cases Flooding U.S. Courts, Experts Say Judges Pressured*, ARIZ. REPUBLIC, Jan. 16, 2012, <http://www.azcentral.com/arizonarepublic/news/articles/2010/02/14/20100214immigrationcourts.html> (explaining that even a brief pause in each case involving a person charged with entry without inspection to inquire into the circumstances of the respondent’s arrest may be considered untenable).

110. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1048–49 (1984) (explaining that “[t]he ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws”) (quoting *In re Sandoval*, 17 I&N Dec. 70, 80 (B.I.A. 1979)).

111. *Woodby v. INS*, 385 U.S. 276, 281, 285 (1966).

born abroad¹¹² because any evidence of foreign birth gives rise to a rebuttable presumption of alienage.¹¹³ This means that once the government succeeds in proving up the respondent's foreign birth by admissible evidence, whether connected to the underlying arrest or not, the burden then shifts to the respondent to prove he is not an alien or that he is an alien here in lawful status.¹¹⁴ At that point, if the respondent has no other relief from removal, the case is lost (assuming no successful appeal) and the legality of the underlying arrest ceases to be an issue of continuing relevance to the immigration court. One more illegal border patrol stop will have gone unremedied.

The government can demonstrate alienage in any number of ways. The common forms of evidence used are the Form I-213, testimony from the respondent himself, and preexisting immigration records relating to the respondent. Government counsel often attempts to introduce the Form I-213 as evidence of alienage because, if not contradicted, an immigration judge will have to consider it inherently trustworthy and admissible as evidence to prove alienage.¹¹⁵ Recall that the Form I-213 is the form that an immigration agent fills out after an alien is arrested and is supposed to identify, *inter alia*, the basis of the government's encounter with the person arrested. It also usually contains statements made by the examining officer attesting to the respondent having said that he or she was born in Mexico. The downside from the government's perspective of using the I-213 is that it opens the door to questions about the legality of the underlying arrest. That is a door that government counsel works vigorously to keep shut.

The easiest way for the government to prevent any inquiry into the underlying arrest is to avoid using the I-213 altogether and to rely instead on other evidence of alienage, such as the respondent's own testimony, prior immigration records, or other documentation of alienage.¹¹⁶ Any

112. While one can certainly be born abroad and still be a U.S. citizen, whether, for example, derivatively or by naturalization, a person who is a U.S. citizen but was not born in the United States would not be litigating the illegality of government conduct as a means of removal defense. He or she would just prove his or her citizenship.

113. See *In re Benitez*, 19 I&N Dec. 173, 177 (B.I.A. 1984) (explaining that "in deportation proceedings there is no presumption of citizenship similar to the presumption of innocence which exists in criminal cases"); *In re Leyva*, 16 I&N Dec. 118, 119 (B.I.A. 1977) (allowing a 1964 visa to serve as evidence of birth in Mexico, because it contained a picture that bared a resemblance to the respondent, which sufficiently created a presumption of alienage).

114. Immigration and Nationality Act of 1952 (INA) § 291, 8 U.S.C. § 1361 (2006).

115. *In re Ponce-Hernandez*, 22 I&N Dec. 784, 785 (B.I.A. 1999).

116. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043 (1984). ("[R]egardless of how the arrest is effected, deportation will still be possible when evidence not derived directly from the arrest is sufficient to support deportation."); *In re Cervantes-Torres*, 21 I&N Dec.

voluntary statement made by the respondent in removal proceedings implicating alienage will suffice to carry the government's initial burden of proof, making the illegality of the underlying arrest irrelevant.¹¹⁷ However, an illegal entry is a criminal act,¹¹⁸ and any person that entered illegally has the right to refuse to answer any questions that would implicate him or herself in that act. The privilege against self-incrimination "not only extends to answers that would in themselves support a conviction under a federal criminal statute, but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."¹¹⁹ Although removal proceedings are administrative and the respondent is not being criminally charged, the Fifth Amendment right against self-incrimination extends to administrative proceedings.¹²⁰ If the government succeeds in getting the respondent to admit alienage or to say something that implicates alienage, the case is over and the Border Patrol's illegal conduct becomes irrelevant.

If the government is unsuccessful in eliciting testimony from the respondent implicating alienage, they can use any admissible and preexisting immigration records relating to the respondent to prove alienage. In *United States v. Herrera-Ochoa*,¹²¹ the Fifth Circuit Court of Appeals held that an immigration file need not be suppressed even if there was an illegal arrest because the person does not have a legitimate expectation of privacy in the file and therefore has no standing to challenge its introduction into evidence.¹²² This means that if the respondent has any prior immigration history, regardless of the nature of that history,¹²³ the government will be able to introduce the records without complaint from the respondent as evidence of alienage, the case will be lost, the legality of the underlying arrest will no longer be of any relevance to the immigra-

351, 353 (B.I.A.1996) (holding that independently obtained evidence of alienage will suffice to prove alienage regardless of an alien's illegal arrest).

117. See *In re Carrillo*, 17 I&N Dec. 30, 32-33 (B.I.A. 1979) (finding that the voluntary statement given at the hearing rendered unnecessary the inadmissible testimony obtained in violation of Fifth Amendment right to remain silent).

118. INA §§ 8 U.S.C. §§ 1302, 1306, 1325 (2006) (outlining procedures for alien registration, penalties for failure to register, and penalties for improper entry).

119. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

120. See *Kastigar v. United States*, 406 U.S. 441, 444 (1972) ([T]he Fifth Amendment privilege against compulsory self-incrimination . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"); see also *In re Carrillo*, 17 I&N Dec. at 33 (affirming the privilege against self-incrimination in removal proceedings).

121. 245 F.3d 495 (5th Cir. 2001).

122. *United States v. Herrera-Ochoa*, 245 F.3d 495, 498 (5th Cir. 2001).

123. For example, the respondent may have been the beneficiary of a visa petition that was filed by a parent years past.

tion court, and one more illegal border patrol stop will have gone unremedied.

If the government has no preexisting immigration records relating to the respondent, they will often use the information taken by the Border Patrol to obtain the respondent's foreign birth certificate or other such evidence of identity.¹²⁴ Then, in court, the government will argue that, regardless of whether the arrest was illegal and regardless of whether they obtained the identity documents by means of biographical data taken as a result of the arrest, biographical data is part of that person's "identity" and "identity" cannot be suppressed. Government counsel repeats ad nauseam the mantra that the "identity" of an alien is never itself suppressible as if this suffices to satisfy any and all concerns about the origin of the documents and whether they relate to the respondent. It seems to this author that this position misrepresents the case law and confuses the relevant issues, but it is nevertheless highly persuasive to immigration judges.¹²⁵ If the government is successful with this tactic

124. For Mexicans, the government will often obtain the Clave Única de Registro de Población, or Unique Population Registry Code, a unique alphanumeric identity code assigned by the Mexican government to all citizens and residents of Mexico. The code is readily available on the internet. See *Orientación para trámite de la Curp*, CURP MEXICO, <http://curp.troyaestrategias.com/index.html> (last visited Feb. 25, 2012). For a detailed discussion of the difficulty of proving citizenship through the use of foreign birth certificates see Lee J. Terán, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 SCHOLAR __ (2012).

125. In *Lopez-Mendoza*, the Supreme Court, considered two consolidated cases involving two unrelated but similarly situated aliens—Respondents Lopez-Mendoza and Sandoval-Sanchez. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1034 (1984). The Court, affirming prior law, held that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as the fruit of an unlawful arrest, even if it is conceded that an unlawful arrest . . . occurred." *Id.* at 1039. The problem was that "[a]t his deportation hearing, [Respondent] Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him." *Id.* at 1040. Just as a criminal defendant cannot escape a criminal court's jurisdiction on account of an illegal arrest (although such a person could avail himself of the exclusionary rule), an alien's arrest, which may have been illegal, nonetheless has no bearing on whether a subsequent deportation hearing can be brought against that person. *Id.* In other words, the illegal arrest does not affect the immigration court's in personam jurisdiction over the respondent. See, e.g., *Huerta-Cabrera v. INS*, 466 F.2d 759, 761 n.5 (7th Cir. 1972) ("Even if the arrest were illegal, the mere fact that the authorities got the 'body' of Huerta-Cabrera illegally does not make the proceeding prosecuting him or deporting him the fruit of the poisoned tree."). By contrast, Respondent Sandoval-Sanchez had "a more substantial claim [because h]e objected not to his compelled presence at a deportation proceeding, but to evidence offered at that proceeding." *Lopez-Mendoza*, 468 U.S. at 1040. When government counsel argues that a respondent cannot refuse to identify his date or place of birth or that a respondent cannot object to the government using biographical data taken at the time of the illegal arrest to obtain other evidence of alienage because "identity cannot be sup-

then, once again, the illegality of the government's conduct becomes irrelevant, the case is lost, and the Border Patrol succeeds in parlaying its violation of the law into one more person deported.

If the government has to rely on the Form I-213 because it is unable to use the respondent's own testimony, prior immigration records, other documentation, or some other means to prove alienage, then and only then, will the illegality of the Border Patrol's arrest become relevant. Where the government seeks to introduce into evidence the I-213, the burden falls to the respondent and his lawyer to object to its admission and to make a prima facie case that the evidence contained in the I-213—namely the respondent's statements implicating himself as a non-citizen to the Border Patrol agent—was obtained by the government in an egregiously illegal manner and therefore should be excluded from the record. A person in removal proceedings “who raises the claim questioning the legality of the evidence must come forward with proof establishing a prima facie case before the [government] will be called on to assume the burden of justifying the manner in which it obtained the evidence.”¹²⁶ Putting it in other terms, this rule basically means that it falls to the respondent to lay a foundation for the government's evidence rather than the other way around.

One basis for the exclusion of evidence obtained by law enforcement misconduct is an egregious violation of the Fourth Amendment. Nevertheless, despite the fact that we previously described at some length how Border Patrol roving stops often violate the Fourth Amendment, neither the Fourth Amendment (and its applicable judicial exclusionary rule), nor strict evidentiary rules ordinarily apply in removal proceedings.¹²⁷

pressed,” they are conflating and confusing a challenge to the court's in personam jurisdiction, which the Supreme Court in *Lopez-Mendoza* stated in not permissible, with a challenge to illegally obtained evidence, which the *Lopez-Mendoza* Court did not foreclose, even in removal proceedings. A respondent in proceedings bringing a motion to suppress and exclude illegally obtained evidence is not objecting to his being compelled to come forth and defend himself against the government's charge of alienage; he is simply objecting to the government's use of illegally obtained evidence. They are two separate objections entirely. One is proper; one is not. The Eighth and Tenth Circuit Courts have affirmed this reading of *Lopez-Mendoza* on this issue; “the ‘identity’ language in *Lopez-Mendoza* refers only to jurisdiction over a defendant and it does not apply to evidentiary issues pertaining to the admissibility of evidence obtained as a result of an illegal arrest and challenged in a criminal proceeding.” *United States v. Olivares-Rangel*, 458 F.3d 1104, 1112 (10th Cir. 2006). “[T]he [*Lopez-Mendoza*] Court's reference to the suppression of identity appears to be tied only to a jurisdictional issue, not to an evidentiary issue.” *United States v. Guevara-Martinez*, 262 F.3d 751, 753 (8th Cir. 2001).

126. *In re Barcenas*, 19 I&N Dec. 609, 611-12 (B.I.A. 1988).

127. *See Lopez-Mendoza*, 468 U.S. at 1050-51 (holding by a five to four margin that the exclusionary rule generally does not apply in removal proceedings to evidence obtained in violation of the Fourth Amendment).

Fortunately, and for the time being, all persons in the United States are entitled to due process of law under the Fifth Amendment.¹²⁸ For evidence to be admissible in removal proceedings it must be probative and “its use fundamentally fair so as to not deprive respondents of due process of law as mandated by the [F]ifth [A]mendment.”¹²⁹ As explained by the Board of Immigration Appeals (BIA):

Every [F]ourth [A]mendment violation will not of necessity result in a finding that the admission of resulting evidence is fundamentally unfair. The circumstances surrounding an arrest and interrogation, however, may in some cases render evidence inadmissible under the due process clause of the [F]ifth [A]mendment. [Thus,] . . . cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the [F]ifth [A]mendment’s due process requirement of fundamental fairness.¹³⁰

The “egregious” misconduct sufficient to warrant suppression of resulting evidence need not entail grotesque or criminal behavior or excessive force or other such self-evidently offensive misconduct by officers. Searches and arrests by immigration agents that violate clearly established Fourth Amendment principles should constitute egregious misconduct under the due process standard.¹³¹ This explains why now, when

128. See *Reno v. Flores*, 507 U.S. 292, 306 (1993) (agreeing that the INS policy violated petitioner’s equal protection rights).

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

130. *Id.*; see *In re Garcia-Flores*, 17 I&N Dec. 325, 327 (B.I.A. 1980) (“[S]uch a violation [of regulatory requirements] may lead to a finding of inadmissibility under certain circumstances.”); *In re Garcia*, 17 I&N Dec. 319, 321 (B.I.A. 1980) (“[T]he respondent’s admissions which underlie the finding of deportability were involuntarily made and that the requirements of due process warrant their exclusion from the record.”). Although to date only the Second, Eighth, and Ninth Circuits have expressly affirmed that the exclusionary rule applies in immigration proceedings for egregious Fourth Amendment violations, see *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (employing the *Lopez-Mendoza* analysis in determining whether to exclude evidence); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006) (finding the exclusionary rule applies if it is established “either (a) that an egregious violation that was fundamentally unfair had occurred, or (b) that the violation . . . undermined the reliability of the evidence . . .”); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449 (9th Cir. 1994) (discussing the level of “egregiousness” of conduct necessary for the exclusionary rule to apply). No other circuit court has rejected it.

131. See *In re Toro*, 17 I&N Dec. at 342–43 (finding that “persons may not be stopped and questioned on the street by immigration officers absent a reasonable suspicion that they are aliens”). In *In re Toro*, it was precisely because the officers acted in good faith, in conformity with government policy, and without the guidance of established law (which came later with the Supreme Court decision in *Brignoni-Ponce*, 422 U.S. 873, 884 (1975)), that their violation of the Fourth Amendment was excused and the evidence obtained thereby was deemed admissible. *Id.* at 343–44.

immigration officers stop a vehicle based solely on the racial appearance of the passengers, the stop will be deemed an egregious violation of the Fourth Amendment and, thus, provide grounds to apply the exclusionary rule in immigration proceedings.¹³² Another basis for the exclusion of evidence obtained by law enforcement misconduct is that the evidence was obtained in violation of the agency's governing regulations. It is well settled that regulations promulgated by a federal agency, which affect the rights and interests of others, are controlling upon the agency.¹³³ Because constitutional violations will also in many instances necessarily be acts taken in violation of the applicable statutes and regulations mentioned previously, suppression may also be appropriate, therefore, under the administrative exclusionary rule as applied by the Board of Immigration Appeals where the Border Patrol violates regulations promulgated for a noncitizen's benefit and the non-citizen suffers prejudice.¹³⁴

The initial prima facie case establishing a basis for exclusion of the evidence is usually satisfied with a sworn affidavit outlining the illegal arrest in conjunction with the respondent's testimony to the same subject.¹³⁵ This is where things get tricky. The respondent has to testify about the illegal arrest but he has to do it without implicating alienage. Of course, one huge and essential aspect of the illegal arrest was the conversation between the Border Patrol agent and the respondent just after being pulled over in which the respondent invariably answered the Border Patrol agent's questions about immigration status. And, once the respondent takes the stand, government counsel is going to ask the respondent pointedly about what he said to the Border Patrol agent. The respondent can of course plead his constitutional right against self-incrimination if he knows when and how to do so, but the entire process promises to be extremely unnerving and confusing. Predictably, government counsel is going to ask him all kinds of questions having nothing whatsoever to do with his arrest but having every potential to implicate alienage. The respondent's position is untenable; he must vindicate his Fourth Amend-

132. *Gonzalez-Rivera*, 22 F.3d at 1452; see *Almeida-Amaral*, 461 F.3d at 237 (“[W]ere there evidence that the stop was based on race, the violation would be egregious, and the exclusionary rule would apply.”).

133. See e.g., *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 265 (1954) (holding that regulations have the force of law when dealing with deportation proceedings).

134. See *In re Garcia-Flores*, 17 I&N Dec. at 327 (noting that a rigid rule has yet to emerge “under which every violation of an agency regulatory requirement results in the invalidation of all subsequent agency action or the exclusion of evidence from administrative proceedings”).

135. See *In re Barcnas*, 19 I&N Dec. 609, 611 (B.I.A. 1988) (holding that an affidavit standing alone is insufficient to prosecute a motion to suppress; testimony is absolutely necessary to defend the motion).

ment right to be free from unreasonable warrantless seizures by fully explaining what happened without giving up his Fifth Amendment right against self-incrimination by fully explaining what happened. Criminal courts long ago realized the absurdity of this situation¹³⁶—being forced to sacrifice one constitutional right in order to vindicate another—but, in immigration court, the respondent is not entitled to a suppression hearing that is separate and apart from removal proceedings.¹³⁷ So anything the respondent says at any time can and will be used against him.

There is one final obstacle to the vindication of a respondent's Fourth Amendment rights in removal proceedings worth mentioning before moving on: the "detention" of the respondent subsequent to his arrest. A non-citizen arrested for immigration violations has no constitutional right to release on bond.¹³⁸ However, he may be released on bond or on his own recognizance¹³⁹ if not subject to mandatory detention due to criminal or terrorist grounds.¹⁴⁰ If the respondent is not given a bond subsequent to his arrest or is given a bond that he cannot afford to post, then the respondent, if statutorily eligible, will have to seek a bond order from an immigration judge.¹⁴¹ Immigration courts have wide discretion to determine whether a respondent should be released on bond¹⁴² but, in general, the judge will base the bond decision on whether the respondent has demonstrated that he is not a threat to national security or a risk of flight.¹⁴³ There is no exhaustive list of relevant factors but the factors commonly considered by immigration judges in making bond decisions

136. See *Simmons v. United States*, 390 U.S. 377, 394, (1968) ("[W]hen a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issues of guilt unless he makes no objection.").

137. See *In re Benitez*, 19 I&N Dec. 173, 175 (B.I.A. 1984) (stating that there is no statutory or regulatory right to a separate suppression hearing in deportation proceedings); *In re Bulos*, 15 I&N Dec. 645, 646–47 (B.I.A. 1976) (raising but not ruling on whether evidence in connection with a suppression motion may be considered in determining the issue of the respondent's removability).

138. See *Carlson v. Landon*, 342 U.S. 524, 542 (1952) ("The refusal of bail in [deportation] cases is not arbitrary or capricious or an abuse of power.").

139. Immigration and Naturalization Act of 1952 (INA) § 236(a)(2), 8 U.S.C. § 1226(a)(2) (2006).

140. INA § 236(c)(1), 8 U.S.C. § 1226(c)(1).

141. See 8 C.F.R. § 1003.19 (2010) (providing for bond redeterminations and appeals from immigration judge determinations).

142. See *Carlson*, 342 U.S. at 540–41 (deciding that the standard for determining an abuse of the Attorney General's discretion will be "where it is clearly shown that it 'was without a reasonable foundation'"); *United States ex rel. Barbour v. District Director of INS*, 491 F.2d 573, 577–78 (5th Cir. 1974) ("[A]n alien has a heavy burden to establish that the Attorney General abused his discretion.").

143. *In re Adeniji*, 22 I&N Dec. 1102, 1103 (B.I.A. 1999); *In re Patel*, 15 I&N Dec. 666, 666 (B.I.A. 1976).

include whether the person has a fixed address in the United States, length of residence in the United States, family ties in the United States, employment history, criminal record, history of immigration violations, and manner of entry to the United States.¹⁴⁴

Most immigration courts use a form bond application which requires the respondent to provide supporting documentation including proof of identification if such proof is not already in the hands of the government. Although bond proceedings are separate from removal proceedings,¹⁴⁵ if the respondent denies alienage in the removal proceeding, government counsel will use in the removal case whatever identification or bond documents the respondent provides in the bond case that implicates alienage.¹⁴⁶ Government counsel will also use whatever information the respondent provides in his bond package to go out and get other evidence of alienage. If he provides a date of birth, for example, government counsel may use it to obtain the client's birth certificate from the home country or other forms of documentation of birth abroad.¹⁴⁷ The bottom line is that it is difficult for a respondent to seek a bond order and obtain his liberty from an immigration judge without prejudicing his ability to defend the removal case on the basis of the illegality of the underlying arrest. And as any practitioner, whether of removal defense or criminal defense, can attest; it is exponentially more difficult to defend a case when the client is incarcerated. All the ordinary pressures, financial and otherwise, are magnified and the average person, who has no relief other than to litigate the illegality of the underlying arrest, will not defend his case if it means prolonged incarceration. He will simply give up the fight and yet another illegal Border Patrol stop will go unnoticed.

144. *In re Saelee*, 22 I&N Dec. 1258, 1262 (B.I.A. 2000); *In re Andrade*, 19 I&N Dec. 488, 490 (B.I.A. 1987).

145. 8 C.F.R. § 1003.19(d) reads, in pertinent part: "Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding."

146. See *In re Cervantes-Torres*, 21 I&N Dec. 351, 353 (B.I.A. 1996) (holding that the exclusionary rule does not apply to documents voluntarily submitted by respondent to the government).

147. See the discussion of Unique Population Registry Code for Mexicans, *supra* note 124. Of course, the government will already have respondent's date of birth because it will be part of the information taken upon arrest. Nevertheless, if the respondent submits that information in his bond packet, then he will be giving the government an independent source of that information untainted by the illegal arrest.

V. ONE SUGGESTED MODEST JUDICIAL MODIFICATION TO MITIGATE THE DAMAGE

There is no panacea to this problem. But there is one judicial measure that has not been tried that might help keep the Border Patrol in its place or, at a minimum, mitigate some of the resulting damage. The time has come for separate suppression hearings. In *In re Benitez*,¹⁴⁸ issued shortly after *Lopez-Mendoza*, the B.I.A. issued an opinion that was hostile to, if not derisive of, the idea of excluding evidence due to the illegality of the government's conduct by which it was obtained.¹⁴⁹ Mr. Benitez, through counsel, had sought from the immigration court a separate hearing in which to litigate his motion to suppress.¹⁵⁰ This request was denied and, during his hearings, he admitted alienage.¹⁵¹ In upholding the denial of a separate suppression hearing, the Board stated that “[n]either the Immigration and Nationality Act, the regulations, nor case law gives a respondent the right to a separate hearing on a motion to suppress evidence,” as if that were the end of the analysis.¹⁵² This statement is mostly accurate, but certainly not dispositive, as the Board did not consider the obvious question of whether constitutional due process requires a separate hearing.

As mentioned, immigration removal proceedings must comport with constitutional due process standards of fundamental fairness.¹⁵³ “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”¹⁵⁴ This fundamental due process requirement is reflected in the immigration judge's explicit duty to dispassionately consider all relevant evidence¹⁵⁵ and in the re-

148. 19 I&N Dec. 173 (B.I.A. 1984).

149. *In re Benitez*, 19 I&N Dec. 173, 174–75 (B.I.A. 1984) (upholding the immigration judge's decision to deny Benitez's request to suppress the evidence).

150. *Id.* at 174.

151. *Id.*

152. *Id.* at 175.

153. *See Reno v. Flores*, 507 U.S. 292, 306 (1993) (“[T]he Fifth Amendment entitles aliens to due process of law in deportation proceedings.”); *Bridges v. Wixon*, 326 U.S. 135, 152 (1945) (stating that the Fifth Amendment does not designate between citizens and non-citizens).

154. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see Yamataya v. Fisher*, 189 U.S. 86, 101 (1903) (explaining that the due process clause forbids the state from “deport[ing an alien] without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States”).

155. *See Immigration and Naturalization Act of 1952 (INA) § 240(b)(1)*, 8 U.S.C. § 1229a(b)(1) (2006) (“The immigration judge shall administer oaths . . . [and] receive evidence”); 8 C.F.R. § 1240.1(c) (2010) (“The immigration judge shall receive and consider material and relevant evidence”).

spondent's right to present evidence on his own behalf and to examine the evidence against him.¹⁵⁶ While the Board and immigration courts will generally not rule on constitutional issues,¹⁵⁷ they may entertain due process and fundamental fairness challenges to procedures as applied,¹⁵⁸ and can entertain due process challenges that can be corrected administratively.¹⁵⁹ There is nothing in the INA, the regulations, or case law that prohibits a separate suppression hearing. Even *Benitez* stopped short of prohibiting immigration courts from holding separate suppression hearing. And "immigration judges . . . may take any action consistent with their authorities under the [INA] and regulations that is appropriate and necessary for the disposition of [removal] cases."¹⁶⁰

Given this backdrop of due process rights designed to ensure a fair hearing, it is no major mental leap to conclude that it is necessary and appropriate to hold separate suppression hearings. As explained above, the respondent has the burden of making a prima facie case that his arrest was an egregious violation of the Fourth Amendment or violated the Border Patrol's governing statutes and regulations and he has the burden of testifying to the same. And yet, under current law, as applied, he must do so while simultaneously withholding vital information about what transpired between him and the Border Patrol agent where necessary to avoid self-incrimination, information that is clearly relevant, even necessary, to a determination on the ultimate question of law. "Constitutional protections are meaningless if a respondent cannot present evidence of their violation except at his or her own peril."¹⁶¹ This is why for over forty years the law has been that testimony given by a defendant in a criminal proceeding in support of a motion to suppress evidence on Fourth Amendment grounds cannot thereafter be admitted against him at trial on the issue of guilt or innocence.¹⁶² If the law were otherwise, the defendant would have to choose between enforcing his Fourth Amendment right to be free from unreasonable and warrantless seizures and

156. INA § 240(b)(4)(B), 8 U.S.C. § 1229a(b)(4)(b) ("[T]he alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government . . .").

157. See *In re Fuentes-Campos*, 21 I&N Dec. 905, 912 (B.I.A. 1997) ("It is well settled that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer."); *In re U.M.*, 20 I&N Dec. 327, 334 (B.I.A. 1991) ("It is not within the province of the Board to pass upon the constitutionality of the statutes it administers.").

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

159. See *Alleyne v. INS*, 879 F.2d 1177, 1183 n.10 (3rd Cir. 1989) (noting that the court could not consider the due process claim because it "[was] not properly raised.").

160. 8 C.F.R. § 1003.10(b).

161. *Simmons v. United States*, 390 U.S. 377, 393-94 (1968).

162. See *id.* at 393-94 (discussing the tension between the right to not self-incriminate and the need to establish standing under the Fourth Amendment).

preserving his Fifth Amendment right against self-incrimination; seeking to preserve one constitutional right at the expense of another. This is an “intolerable” situation.¹⁶³ The rationale of *Simmons*¹⁶⁴ applies with equal force with regard to removal proceedings. A respondent in removal proceedings either has a right to fundamental fairness or he does not. The law as currently applied is untenable but slow to change. The very reasons previously identified for why respondents so rarely successfully litigate the illegality of government conduct as a means of removal defense are the same reasons why the issue so rarely comes up for judicial review. It is time for removal defense lawyers to push the issue, to press the case, and to push back against government misconduct. It is time to insist upon separate suppression hearings.

163. *Id.* at 394.

164. 390 U.S. 377 (1968).