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The Exculsionary Rule in INS Deportation Hearings: A New Look at the Lopez- Mendoza Cost-Benefit Analysis after the 1986 Immigration Reform and Control Act

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INTRODUCTION

The fourth amendment of the United States Constitution protects all persons[1] against unreasonable searches and seizures.[2] The judicially created exclusionary rule suppresses illegally seized evidence in criminal cases[3] and, until 1979, in Immigration and Naturalization Service (INS) deportation hearings.[4] Originally based on judicial integrity and personal rights,[5] today the Court applies the rule to deter wrongful police conduct.

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1. Aliens are generally entitled to constitutional safeguards and legal protections as long as they remain in the United States. *See generally* Yick Wo v. Hopkins, 118 U.S. 369 (1886); Wong Wing v. United States, 163 U.S. 228 (1896).

2. The fourth amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, [which] shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV.

3. *See* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

4. *See* United States *ex. rel.* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923), *but also*, *In re* Sandoval, 17 I. & N. Dec. 70, 79-80 (BIA 1979).

5. The personal right theory advocated exclusion of illegally seized evidence as a remedy for personal constitutional (fourth amendment) violations. *See Weeks*, 232 U.S. at 393. *See generally* Dodge v. United States, 272 U.S. 530, 532 (1926); Gouled v. United States, 255 U.S. 298, 303-06 (1921). The judicial integrity rationale required judges to refrain from becoming accomplices to constitutional violations by refusing to admit tainted evidence. *See* Elkins v. United States, 364 U.S. 206, 217 (1960).

Courts assume that excluding illegally seized evidence from hearings will sanction and prevent improper search and seizure behavior,[6] while educating and shaping officer behavior towards lawful techniques.[7]

INS deportation hearings are not criminal but rather administrative proceedings which determine one's eligibility to remain in the United States.[8] The INS historically utilized the exclusionary rule in its deportation hearings.[9] In 1979, the Board of Immigration Appeals (BIA) held the rule inapplicable in deportation proceedings.[10] The United States Supreme Court confirmed the decision in *INS v. Lopez-Mendoza*,[11] thus opening the door for non-compliance with fourth amendment requirements by INS agents. In 1986, however, Congress passed the Immigration Reform and Control Act (IRCA).[12] The Act's language and legislative history provide support for reinstituting the exclusionary rule in INS proceedings.

This comment examines the exclusionary rule's history and development, particularly in INS proceedings. It then critically examines the Court's analysis in *INS v. Lopez-Mendoza*. Finally, in light of this evaluation and the new Immigration Reform and Control Act, the authors recommend reinstituting use of the exclusionary rule in deportation proceedings.

BACKGROUND

A. HISTORY AND SCOPE OF THE EXCLUSIONARY RULE

The exclusionary rule is an evidentiary doctrine that bars the admission in judicial proceedings of evidence obtained by unconstitutional searches and seizures.[13] The United States Supreme Court first adopted the exclusionary rule in *Weeks v. United States*.[14] Using its supervisory power, the Court excluded from a federal gambling trial evidence obtained by federal officials through an unlawful search and seizure of incriminating papers. According to the Court in *Weeks*, the purposes of exclusion were to discourage federal officials from violating the fourth amendment

6. While the Court generally assumes that use of the exclusionary rule deters unlawful police conduct (*see* United States v. Janis, 428 U.S. 433, 453 (1976)), there is controversy among scholars concerning the rule's true deterrent effect. The *Janis* case cites numerous studies, analyses, and commentaries on the topic (*see id.* at 449-54, nn.21-27). The Court maintains in *Janis*, as it did in *Elkins*, that there are no empirical studies positively demonstrating "that enforcement of the criminal law is either more or less effective under either rule." *Id.* at 453 (citing *Elkins* 364 P.2d at 218).

7. *See generally* Stone v. Powell, 428 U.S. 465, 492 (1976).

8. *See* Immigration and Nationality Act §§ 236, 242, 8 U.S.C. §§ 1226, 1252 (1982); Landon v. Plasencia, 459 U.S. 21, 25 (1982).

9. *See generally infra* notes 68-85 and accompanying text.

10. *In re* Sandoval, 17 I. & N. Dec. 70, 79-80 (BIA 1979).

11. 468 U.S. 1032 (1984).

12. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).

13. *See generally Weeks*, 232 U.S. at 383. The fourth amendment states that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated." U.S. CONST. amend. IV.

14. 232 U.S. 383, 393 (1914).

and to prevent the federal courts' "tacit complicity" with the unconstitutional conduct of federal agents.[15] These separate objectives of the exclusionary rule have been labeled the "deterrence"[16] and the "judicial integrity"[17] rationales, respectively.

Mapp v. Ohio extended the application of the exclusionary rule from federal to state court judicial proceedings.[18] In *Mapp*, city police officers seized obscene materials in violation of the defendant's fourth amendment right to be secure against warrantless searches and seizures. The Supreme Court held that the fourth amendment applies to the states through the due process clause of the fourteenth amendment.[19] In excluding the illegally seized evidence, the *Mapp* Court first relied on the deterrence rationale of the exclusionary rule.[20] Next, the Court focused on maintaining judicial integrity and preserving confidence in the legitimacy of state court proceedings.[21]

The *Mapp* Court recognized that "nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."[22] Under the judicial integrity rationale for the exclusionary rule, the courts' failure to insure constitutional protections by excluding from their proceedings evidence illegally seized by government officials derogates their integrity. In order to protect the fundamental liberties embodied in the fourth amendment, the courts must therefore restrain acts of government which impinge upon the amendment's privacy guarantees.[23]

Because respect for the law depends on adherence to the law, the courts can promote governmental compliance with constitutional standards by excluding government evidence seized in violation of an individual's fourth amendment rights.[24] Conversely, the courts' failure to exclude evidence tainted with illegality makes them "accomplices in willful disobedience of law"[25] and "accomplices in willful disobedience of a Constitution they are sworn to uphold."[26] For this reason, the *Mapp* Court readily accepted the fact that exclusion of evidence occasionally results in setting the criminal free.[27] *Mapp* maintains that "the criminal goes free, if he must, but it is the law that sets him free."[28]

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15. *Id.*
16. *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 447 (1974).
17. *See, e.g.*, United States v. Peltier, 422 U.S. 531, 537-38 (1975).
18. 367 U.S. 643 (1961).
19. *Id.* at 650. *Cf.*, Palko v. Connecticut, 302 U.S. 319, 324 (1937).
20. *Mapp*, 367 U.S. at 656.
21. *Id.* at 659.
22. *Id.*
23. *Id.* at 660.
24. *Elkins*, 364 U.S. at 222.
25. McNabb v. United States, 318 U.S. 332, 345 (1943).
26. *Elkins*, 364 U.S. at 223.
27. *Mapp*, 367 U.S. at 659.
28. *Id.*

Mapp also focused on a privacy right to justify the exclusionary rule.[29] Under this theory, the exclusion of illegally obtained evidence provides a remedy for the invasion of privacy rights guaranteed by the fourth amendment. The Court later rejected this theory in *Linkletter v. Walker*[30] by explicitly asserting that "[t]he ruptured privacy of the victim's homes and effects cannot be restored. Reparation comes too late."[31] *United States v. Calandra*,[32] a 6-3 decision written by Justice Powell, signaled the end of the personal privacy right remedial purpose of the exclusionary rule. "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . [I]nstead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the fourth amendment against unreasonable searches and seizures . . . ."[33] Post-*Mapp* cases focused on the exclusionary rule's function of deterring infractions against these rights.

The exclusionary rule's application is not limited to federal and state court criminal proceedings. Courts have also applied it in civil proceedings deemed "quasi-criminal," which serve as an "adjunct to the enforcement of the criminal law."[34] In addition to civil proceedings, the rule has been applied to exclude evidence introduced in administrative hearings.[35] In administrative cases, it is not always clear what standards apply to determine whether to exclude evidence of unlawful searches and seizures. This comment examines the application of the exclusionary rule in INS proceedings.

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29. *Id.* at 655-56:

> The right to privacy, when conceded operatively enforceable against the states, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent. . . . Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right. . . . In short, the admission of the new constitutional right . . . could not consistently tolerate the denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold it privilege and enjoyment.

See also *Elkins*, 364 U.S. at 217, where the Court stated that "[T]he [exclusionary] rule is calculated to prevent, not repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."

30. 381 U.S. 619 (1965).

31. *Id.* at 637.

32. 414 U.S. 338 (1973).

33. *Id.* at 347.

34. *Janis*, 428 U.S. at 463 (Stewart, J., dissenting) (IRS used evidence illegally seized by state law enforcement officers in a civil proceeding against the taxpayer); *see also* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (illegally-seized evidence held inadmissible in civil forfeiture proceeding where the value of the forfeited property exceeded the maximum penalty for the criminal offense).

35. *See* Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) (FTC hearing to uncover discriminatory pricing practices); NLRB v. Bell Oil and Gas, 98 F.2d 870 (5th Cir. 1938) (NLRB hearing concerning labor controversy); Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966) (Air Force Grievance Committee hearing to review termination of a public employee).

B. THE *JANIS-CALANDRA* TEST

The Supreme Court first used a balancing test to determine whether to apply the exclusionary rule in *United States v. Calandra*, a criminal case.[36] In *Calandra*, the Court held that a witness summoned to testify before a grand jury could not refuse to answer the panel's questions on the ground that they were based on illegally seized evidence.[37] The Court, in an opinion by Justice Powell, held that the deterrent effect of excluding the evidence from the grand jury's proceedings did not outweigh the substantial impediment of the grand jury's function.[38] This balancing test weighed the benefit of deterrence against the cost of excluding probative evidence from the grand jury and thereby frustrating its investigative purpose.[39]

The exclusionary rule balancing test introduced in *Calandra* was first applied to a civil case in *United States v. Janis*.[40] In *Janis*, the Internal Revenue Service (IRS) assessed wagering taxes against a criminal defendant accused of bookmaking activities based on evidence illegally seized by local police officers.[41] The IRS levied the seized cash, defending against Janis' refund suit by claiming that the exclusionary rule did not apply.[42]

In determining that the exclusionary rule was not applicable, the Court reaffirmed that the rule's primary purpose is to deter illegal police search and seizure.[43] The balancing test requires that in order to exclude illegally seized evidence the rule's benefits (i.e., the deterrence value) must outweigh the potential societal costs of losing relevant evidence.[44] In applying this test, the *Janis* Court noted that the seizing agents were from a different sovereign.[45] It reasoned that excluding evidence from a federal civil proceeding, in which state police have little or no interest, would have little deterrent effect (i.e., benefit) on their subsequent conduct.[46] Conversely, the exclusionary rule's application would yield a greater social cost by excluding "concededly relevant and reliable evidence."[47]

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36. 414 U.S. 338 (1974).
37. *Id.*
38. *Id.* at 349-51.
39. *Id.*
40. 428 U.S. 433 (1976). Note that the United States Supreme Court has not required application of the exclusionary rule to civil proceedings. *Id.* at 447. It applied the rule in a forfeiture case involving an article illegally seized in a criminal case, indicating that the rule was applicable because of the quasi-criminal nature of the proceeding, because "forfeiture is clearly a penalty for the criminal offense." *One 1958 Plymouth Sedan*, 380 U.S. at 701.
41. *Janis*, 428 U.S. at 437-38.
42. *Id.*
43. *Id.* at 446 (citing United States v. Calandra, 414 U.S. 338, 347 (1974)). The Court emphasizes that the judicially-created exclusionary rule is not available as a personal right or remedy for fourth amendment violation. *Id.* at 446 (citing *Calandra*, 414 U.S. at 348). An additional rationale sometimes cited for exclusionary rule application, preservation of judicial integrity, is mentioned and dismissed in a footnote as "the same as the inquiry into whether exclusion would serve a deterrent purpose." *Id.* at 458 n.35. *See* United States v. Peltier, 422 U.S. 531, 538 (1975). The Court indicates that if no deterrent purpose is served, then judicial integrity is not impinged by evidence admission. *Janis*, 428 U.S. at 458 n.35.
44. *See generally Janis*, 428 U.S. at 447-60; *Calandra*, 414 U.S. at 348-54.
45. *Janis*, 428 U.S. at 434 (the seizing agents were state police officials).
46. *See id.* at 447-48.
47. *Id.* at 447.

The *Janis* Court reaffirmed deterrence as the primary goal in exclusionary rule use, minimizing the judicial integrity theory and dismissing the personal constitutional remedy rationale.[48] It adopted the *Calandra* balancing test, particularly relying on the intersovereign deterrence factor in weighing the exclusionary rule's benefits.[49] Thus, the stage was set for the Court to consider use of the exclusionary rule in an alleged fourth amendment violation of an agency's own officials.

C. HISTORY OF THE INS LAW

1. *Overview of INS Deportation Proceedings*

Deportation proceedings are commenced by the issuance and service of an order to show cause why the alien should not be deported.[50] The order to show cause notifies the alien of pending charges, provides the INS with direct jurisdiction over the alien, and sets the deportation proceedings in motion.[51] In cases of low priority, the INS may defer the proceedings until a more convenient time, thus extending the alien's stay in the United States.[52]

An immigration judge conducts the deportation proceedings.[53] Under the Immigration and Nationality Act (INA) the agency's wide latitude in determining the nature of deportation proceedings is limited only by procedural due process concerns.[54] The hearing, usually conducted in the district of the alien's arrest or residence, is often held in the alien's home.[55] The alien is given a reasonable opportunity to be present at the hearing, which begins with notification to the alien of his rights.[56] The immigration judge, after accepting the alien's pleadings on federal allegations and deportability, may determine deportability on the basis of these pleadings[57] or after the receipt of evidence concerning unresolved issues.[58]

The government must show by "clear, unequivocal, and convincing evidence"[59] that the person is an alien deportable under the INA. After the government establishes a prima facie case, the alien then has the burden of showing nondeportability. Proof of birth in a foreign country creates a presumption of alienage, but this presumption does not by itself constitute "clear, unequivocal, and convincing evidence" of deportability.[60]

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48. *Id.* at 446.
49. *See id.* at 453-54 & n.27.
50. 8 C.F.R. § 242.1(a), (b) (1987).
51. IMM. L. SERVICE § 17:20 (1985). *See also Re* Chery, 15 I. & N. Dec. 380 (BIA 1975).
52. *See, e.g.*, Siverts v. Craig, 602 F. Supp. 50 (D. Haw. 1985).
53. 8 U.S.C. § 1252(b) (1982). This statute refers to the immigration judge as a "special inquiry officer." *Id.*
54. *Id.*
55. IMM. L. SERVICE § 17:148 (1985) (citing La Franca v. INS, 413 F.2d 686 (2nd Cir. 1969)).
56. 8 U.S.C. § 1252(b) (1982).
57. 8 C.F.R. § 242.16(b) (1987).
58. 8 C.F.R. § 242.16(c) (1987).
59. Wallaby v. INS, 385 U.S. 276, 285-86 (1966).
60. Stint v. INS, 500 F.2d 120, 122 (1st Cir. 1974).

Once the immigration judge determines deportability, the alien may seek, via application to the immigration judge, certain forms of relief from deportation.[61] The immigration judge's response to the application for relief from deportation becomes part of the judge's final decision. When the immigration judge orders deportation, he will also specify the country of the alien's destination.[62] The alien's final administrative remedy is an appeal to the Board of Immigration Appeals.[63] After exhausting the right of appeal to the BIA, the alien may appeal to the United States Court of Appeals under section 106 of the INA.[64]

When the alien has exhausted his administrative and judicial remedies, the INS has a period of six months to effect the alien's departure.[65] During this six-month period, the alien may, depending on the INS' discretion, be detained or released. In special circumstances, the INS may grant a stay of deportation for a period deemed necessary to clarify unresolved substantive claims or vitiate compelling humanitarian factors.[66]

2. *INS Case Law*

INS exclusionary rule use has experienced an unstable history, although a majority of lower courts applied the rule.[67] The United States Supreme Court first recognized the issue in the 1893 case of *Fong Yue Ting v. United States*.[68] The Court maintained that deportation is not a criminal punishment.[69] Thus, the Court's dicta suggested that the constitutional constraints prohibiting unreasonable searches and seizures were not required in deportation hearings.[70]

Apparently failing to take note of the Supreme Court's dicta in *Fong Yue Ting*, an 1899 Vermont federal district court held illegally seized letters inadmissible in a deportation proceeding, based on violations of the fourth and fifth amendments.[71] In 1920, the Montana Federal District Court in *Ex parte Jackson*[72] also noted that deportation proceedings

61. 8 C.F.R. § 242.17 (1987). Several forms of relief from deportation are suspension of deportation, withholding of deportation, voluntary departure in lieu of deportation, waiver of deportation, creation of a record of lawful admission on the basis of the alien's intention of marrying a citizen of the United States, and asylum. *See generally id.*

62. 8 C.F.R. § 242.18(c) (1987).

63. 8 C.F.R. §§ 3.1(b)(2), 242.21 (1987).

64. 8 U.S.C. § 1105(a)(2) (1982).

65. 8 U.S.C. § 1252(c) (1982).

66. 8 C.F.R. § 243.4 (1987).

67. *See infra* notes 81-82.

68. 149 U.S. 698 (1883).

69. *Id.* at 730.

70. *See generally id.*

71. United States v. Wong Quong Wong, 94 F. 832 (D.C. Vt. 1899).

72. 263 F. 110 (D.C. Mont. 1920), *appeal dismissed*, 267 F. 1022 (9th Cir. 1920). The court asserted that "[t]he inalienable rights of personal security and safety, orderly and due process of law, are the fundamentals of the social compact, the basis of organized society, the essence and justification of the government, the foundation, key and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place, or occasion, but belong to man, always, everywhere, and in all circumstances." *Id.* at 113.

The court's indignant flame was no doubt fired by the fact that "federal agents," without warrants or probable cause and at the urging of "employer's agent" had beaten, arrested, and seized papers of foreign workers attempting to unionize. *Id.* at 111.

"based upon evidence and procedure that violate the search and seizure and due process clauses of the Constitution" were "unfair and invalid."[73] By 1923, the United States Supreme Court seemed ready to agree. It *assumed*, in *United States ex rel. Bilokumsky v. Tod*, that illegally seized government evidence could not be the basis of findings in deportation proceedings.[74]

During the exclusionary rule's use and development in INS proceedings, courts tended to admit illegally seized evidence under certain circumstances.[75] Courts more readily admitted evidence when the illegal search and seizure was conducted against third parties, and the tainted evidence was proffered for use against a suspected illegal alien.[76] Courts also tended to admit evidence if the illegal search was conducted by local police, not federal officers.[77] Illegal arrests that resulted in simply producing or identifying an illegal alien for a deportation proceeding,[78] or arrests resulting from the alien's own statements without warnings against self-incrimination,[79] were not suppressed.

Despite these exceptions, later courts generally assumed that "evidence seized during the course of an illegal arrest"[80] or as a result of an illegal search and seizure would be inadmissible in deportation hearings.[81] In 1979, however, the BIA initiated the beginning of the end in *In Re Sandoval*.[82] It reversed its historical practice of applying the rule,[83] relying heavily on the deportation proceeding's civil nature to justify non-

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73. *Id.* at 112-13.

74. 263 U.S. 149, 155 (1923). In *Bilokumsky*, the Court assumed the exclusionary rule applied to INS proceedings by arguing that search and seizure laws had not been violated by the INS, and, therefore, no fourth amendment violation had occurred which would prevent his deportation. *Id.*

75. *See infra* notes 76-78 and accompanying text.

76. An early New York federal district court applied the exclusionary rule in a deportation proceeding, reasoning that unlawfully seized evidence should be no more available in a deportation than a criminal prosecution. *Ex parte* Caminta, 291 F. 913, 914 (S.D.N.Y. 1922). However, the court did admit evidence obtained in the illegal search of a person other than the alien, noting that the fourth and fifth amendments protect one from evidence obtained from himself but not from another. *Id.* at 914-15. *See* Annotation, *Admissibility, in Deportation Hearing, of Evidence Obtained by Illegal Search and Seizure*, 44 A.L.R. FED. 933, 937 (1979). *See also* Tsuie Shee v. Backers, 243 F. 551, 552-53 (9th Cir. 1917) (alien female attempting to land in the United States filed a writ of habeas corpus contending that immigration officials illegally searched her alleged husband's bag. The court rejected use of the exclusionary rule based on the fact that 1) the man was found not to be her husband, and 2) evidence was used against her, not him.).

77. *See, e.g., Ex parte* Vilarino, 50 F.2d 582 (9th Cir. 1931).

78. *See* Hoonsilapa v. INS, 575 F.2d 735 (9th Cir. 1978); Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977); Huerta-Cabrera v. INS, 466 F.2d 759 (7th Cir. 1972).

79. *See Wong Chung Che*, 565 F.2d at 168; Chavez-Raya v. INS, 519 F.2d 397, 400-01 (7th Cir. 1975).

80. *Wong Chung Che*, 565 F.2d at 169 (1st Cir. 1977) (quoting Huerta-Cabera v. INS, 466 F.2d 759, 761 n.5 (7th Cir. 1972)).

81. *Id. See also* Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983); United States v. Villella, 459 F.2d 1028 (9th Cir. 1972); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959). *See generally Lopez-Mendoza*, 468 U.S. at 1058.

82. 17 I. & N. Dec. 70 (BIA 1979).

83. *Id.* at 93 (Appleman, J., dissenting in part, concurring in part).

application.[84] The United States Court of Appeals for the Ninth Circuit overturned the BIA's decision denying exclusionary rule application in *Lopez-Mendoza*, setting the stage for the Supreme Court to squarely consider for the first time, the exclusionary rule's applicability in INS deportation proceedings.[85]

D. *INS v. LOPEZ-MENDOZA* BACKGROUND

In 1979, INS agents, alerted by a tip but acting without a warrant, arrested employee Lopez-Mendoza at a San Mateo, California, transmission repair shop. Over the owner's objections, one agent slipped into the shop to question Lopez-Mendoza, who admitted he was from Mexico and without family in this country. Lopez-Mendoza was arrested and questioned further at the INS office. Agents completed a deportation form, while Lopez-Mendoza executed an affidavit "admitting his Mexican nationality and his illegal entry" into the United States.[86] The INS and BIA courts found that Lopez-Mendoza's illegal arrest had no bearing on his deportation hearing, but the Ninth Circuit Court of Appeals disagreed, vacating the deportation order and remanding it to determine if a fourth amendment violation had occurred.[87]

The appeal of another alien, Sandoval-Sanchez, was consolidated along with Lopez-Mendoza's case. In June 1977, warrantless INS agents arrested Sandoval-Sanchez as he was entering his workplace, a potato processing plant in Pasco, Washington.[88] Agents, who were given employer permission to question workers about their citizenship, stationed themselves at the plant's entrances, stopping and questioning those who averted their eyes, walked away, or tried to hide in a group. An agent, later unable to positively identify Sandoval-Sanchez, testified that "the employee he thought he remembered as Sandoval-Sanchez"[89] was evasive, but that certainly no one was stopped without probable cause.[90] Sandoval-Sanchez moved to suppress his statements, which he contended were made without the knowledge that he was entitled to remain silent.[91] The INS proceeding and BIA courts rejected the exclusionary rule arguments and ordered deportation based on their previous decision in *In re Sandoval*.[92] The Court of Appeals for the Ninth Circuit, deciding the *Sandoval-Sanchez* case along with *Lopez-Mendoza*,[93] reversed, finding that the deportation

84. *Id.* at 76-77. *In re Sandoval* was the BIA's first specific analysis of the rule's application. *Id.* at 75.

85. *See* Note, *The Exclusionary Rule's Applicability in Deportation Hearings: INS v. Lopez-Mendoza*, 18 CORNELL INT'L L.J. 125 (1985).

86. *Lopez-Mendoza*, 468 U.S. at 1035.

87. *Id.* at 1035-36. *See also In re* Lopez-Mendoza, No. A22 452 208 (INS, Dec. 21, 1977); No. A22 452 208 (BIA, Sept. 19, 1979); *In re* Lopez-Mendoza, 705 F.2d 1059 (9th Cir. 1983).

88. *Lopez-Mendoza*, 468 U.S. at 1036-37 (Sandoval-Sanchez is not the individual in *In re* Sandoval, 17 I. & N. Dec. 70 (BIA 1979)).

89. *Id.* at 1037.

90. *Id.*

91. *Id.*

92. *Id.* at 1037-38. *See also In re* Sandoval-Sanchez, No. A22 346 925 (INS, Oct. 7, 1977); No. A22 346 925 (BIA, Feb. 21, 1980).

93. *See* Lopez-Mendoza v. INS, 705 F.2d 1059 (9th Cir. 1983).

orders were based on a detention which resulted from the INS agents' violation of the respondents' fourth amendment rights.[94]

In deciding that the exclusionary rule should not apply to deportation proceedings, the United States Supreme Court classified such proceedings as "purely civil."[95] It then applied the *Janis* test, which weighs the social benefits, such as deterrence,[96] against the potential social costs of the rule's application.[97]

The majority[98] began by admitting that the exclusionary rule is most effective when applied in "intrasovereign" violations such as those in *Lopez-Mendoza*.[99] The evidence gathered by INS agents is for specific use in INS proceedings;[100] thus, excluding evidence from INS hearings is likely to attract the attention of involved INS agents.

Justice O'Conner, writing for the majority, identified four factors that minimize the admitted deterrent value. First, deportation may be achieved regardless of the rule's application. The government need only prove a suspect's identity, which is simplified because "the person and identity of the respondent are not themselves suppressible,"[101] and his alienage.[102] The INS may be able to prove alienage with information gathered separately from the tainted arrest.[103] Once identity and alienage are established by "clear, unequivocal and convincing"[104] evidence, the burden of proof shifts to the suspect to prove that he is in the country legally.[105] If he stands silent, the court may draw a negative inference.[106] This can result in a deportation finding so that deportation is achieved regardless of rule application.

Second, there are very few formal deportation hearings conducted and even fewer evidentiary challenges which would be affected by exclusion-

94. *Id.* at 1075.

95. *Lopez-Mendoza*, 468 U.S. at 1038. Note that the Court flatly rejected Lopez-Mendoza's claim that the exclusionary rule should apply to *his* deportation proceeding because he had never objected to the evidence offered against him at the hearing. Instead, he objected only to being called to the deportation proceeding following his illegal arrest. *See In re* Lopez-Mendoza, No. A22 452 208 (BIA, Sept. 19, 1979, reprinted in App. to Pet. for Cert. at 102a). According to the Court, "the 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest . . . search or interrogation." *Lopez-Mendoza*, 468 U.S. at 1039. *See generally* Gerstein v. Pugh, 420 U.S. 103, 119 (1975). Therefore, the Court never reaches the exclusionary rule's application in Lopez-Mendoza's case by reasoning that no valid objection exists when the illegal arrest simply resulted in producing Lopez-Mendoza's person at the deportation hearing. *Lopez-Mendoza*, 468 U.S. at 1040.

96. *Lopez-Mendoza*, 468 U.S. at 1040-42.

97. *Id.* at 1041-50.

98. Justices White, Brennan, Marshall and Stevens dissented. *Id.* at 1051-61.

99. *Id.* at 1042-43.

100. *Id.* at 1043.

101. *Id.* at 1039-40, 1043.

102. *Id.* at 1043.

103. *Id. See also In re* Sandoval, 17 I. & N. Dec. 70, 79 (BIA 1979).

104. *Lopez-Mendoza*, 468 U.S. at 1039 (citing 8 C.F.R. § 242.14(a) (1984)).

105. *Lopez-Mendoza*, 468 U.S. at 1043. *See also* Iran v. INS, 656 F.2d 469, 471 (9th Cir. 1981).

106. *Lopez-Mendoza*, 468 U.S. at 1043. *See also Bilokumsky*, 263 U.S. at 153-54.

ary rule application.[107] Agents know that their arrests will rarely be examined. Interestingly, the Court also points out that even if an agent's work is challenged in a hearing, the consequences on his "overall arrest and deportation record will be trivial."[108] The Court doubts that an agent's behavior will be shaped based on rare exclusions or by INS personnel record entries.[109]

Third, the Court emphasized the independent deterrent effect of the INS's internal education and disciplinary scheme.[110] In order "to safeguard the rights of those who are lawfully present at inspected work places,"[111] the INS regulations require probable cause before interrogation. Agents receive fourth amendment education and refresher courses.[112] Justice Department policy dictates exclusion of evidence from proceedings if it was *intentionally* illegally seized.[113] Additionally, the INS reportedly investigates and disciplines "officers who commit fourth amendment violations."[114] While these measures do not guarantee lawful agent behavior, they presumably reduce the need for the exclusionary rule's deterrent effect.[115]

Fourth, alternative remedies (such as civil suits or injunctions) against the INS are available to challenge INS practices that purportedly violate fourth amendment rights.[116]

After finding minimal deterrence benefit in INS exclusionary rule applications, the Court identified three "unusual and significant"[117] socie-

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107. *Lopez-Mendoza*, 468 U.S. at 1044. The Court emphasizes how rarely the exclusionary rule plays a part in alien arrests or deportations by noting that each INS agent arrests approximately 500 aliens annually (*see id.* at 1044), totalling nearly one million apprehensions each year (*see Lopez-Mendoza*, 705 F.2d 1059, 1071 n.17 (9th Cir. 1983) (en banc) (citing IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1979)). Over 97.5% leave voluntarily without a formal hearing. *Lopez-Mendoza*, 468 U.S. at 1044. Approximately twelve suspects per year per officer demand deportation proceedings; however, the BIA found that since 1952, fewer than fifty potential deportees have raised a fourth amendment challenge. *Id.* at 1044 (citing *Lopez-Mendoza*, 705 F.2d at 1071).

108. *Lopez-Mendoza*, 468 U.S. at 1044.

109. *Id.*

110. *Id.*

111. *See id.* (citing INS v. Delgado, O.T. 1983, No. 82-1271, n.7, 32-40 at n.25). In terms of probable cause, the INS "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." *Id.* at 1045.

112. *Id.*

113. *Id.* (citing Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, Violations of Search and Seizure Law (Jan. 16, 1981)).

114. *Id.* at 1045 (citing OFFICE OF GENERAL COUNSEL, INS, U.S. DEPT. OF JUSTICE, THE LAW OF ARREST, SEARCH AND SEIZURE FOR IMMIGRATION OFFICERS 35 (Jan. 1983)). This booklet, which reportedly contains the INS search and seizure violation disciplinary procedure, is simply a listing of statutes and cases "under which an INS officer may be subject to consequences that are no different from those faced by any other federal officer." Note, *The Exclusionary Rule in Deportation Proceedings: Immigration and Naturalization Service v. Lopez-Mendoza*, 20 U.S.F. L. REV. 143, 159 (1985) (discussing SEARCH AND SEIZURE FOR IMMIGRATION OFFICERS at iv., and 33-37).

115. *Lopez-Mendoza*, 468 U.S. at 1045.

116. *Id.*

117. *Id.* at 1046.

tal costs.[118] Justice O'Conner asserted that use of the exclusionary rule in deportation proceedings would allow an ongoing criminal violation, since Sandoval-Sanchez had not only entered the United States illegally[119] but had also failed to register as an alien.[120] The exclusionary rule is not intended to allow one freedom so he can continue his crime; such a result would be contrary to public policy.[121]

The majority also notes that exclusionary rule application may slow or complicate the INS's "deliberately simple"[122] and streamlined deportation hearing system which processes numerous individuals daily.[123] Since INS hearing officers and attorneys are not proficient in fourth amendment law, invocation of the rule may confuse and complicate proceedings.[124] The Court cites with approval a BIA opinion noting that exclusionary rule issues "[divert] attention from the main issues which those proceedings were created to resolve,"[125] both in terms of the administrative decision maker's expertise and the forum's structure.[126] Additionally, officers arresting many individuals each day have insufficient time to compile more sophisticated information than is presently required.[127] Use of the exclusionary rule might demand in-court testimony or detailed arrest reports, increasing administrative costs and burdens.[128] To the Court, this cost is unacceptably high when weighed against potential exclusionary rule deterrent value.[129]

Finally, the Court maintained that much legally-seized evidence may be lost if the exclusionary rule is applied. Mass arrests are often confusing.[130] INS agents are taught fourth amendment procedures and will testify that they followed these.[131] However, agents may not be able to posi-

118. *Id.* at 1046-50.

119. Sandoval-Sanchez was never criminally prosecuted for illegal entry under 8 U.S.C. § 1325 (1976) or failure to register as an alien under 8 U.S.C. §§ 1302, 1306 (1976). *See Lopez-Mendoza*, 468 U.S. at 1046-47 & n.3. Justice O'Conner maintains, however, that he could have been prosecuted for at least the latter immediately if not deported; hence, he was performing an ongoing crime if he was unregistered. *Id.*

120. *See* 8 U.S.C. §§ 1302, 1306, 1325 (1976). In her ongoing crime theory, Justice O'Conner compares illegal aliens to leaking hazardous waste, explosives and illegal drugs. *Lopez-Mendoza*, 468 U.S. at 1046. She reasons "that no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering [correction of a leaking hazardous waste problem], or to compel police to return [illegally seized] contraband explosives or drugs." *Id.*

121. *Id.* at 1047.

122. *Id.* at 1048.

123. *Id.* According to the *Lopez-Mendoza* majority, "[t]he average immigration judge handles about six deportation hearings per day." *Id.* at 1032, 1048 (citing Brief for Petitioner at 27 n.16).

124. *Id.* at 1048.

125. *Id.*

126. *Id.* (quoting *In re* Sandoval, 17 I. & N. Dec. 70, 80 (BIA 1979)).

127. *Id.* at 1049. Under the present system, INS officers arrest a suspect and perform interrogations necessary to complete a "Record of Deportable Alien." INS counsel introduces this document at the deportation proceeding to prove their case; the officer rarely attends. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* See also *id.* at 1037, wherein the agent who arrested Sandoval-Sanchez could not identify him but claimed he had probable cause for stopping the suspect.

tively identify arrested individuals,[132] let alone provide specific accounts of what occurred during arrests.[133] The exclusionary rule's application could preclude mass arrests by thwarting valid measures used to control large illegal alien populations.[134]

Even if the Court's analysis were presumed correct, circumstances surrounding the enactment of IRCA and the Act itself suggest a shift in the balance between social costs and social benefits of the exclusionary rule.

E. IMMIGRATION REFORM AND CONTROL ACT OF 1986

In 1986, Congress enacted the Immigration Reform and Control Act[135] (IRCA) to amend the Immigration and Nationality Act.[136] The amendment's primary purpose is to control illegal immigration to the United States.[137] To effectuate this purpose, the Act makes it illegal for employers to hire unauthorized aliens and imposes fines and imprisonment on employers who violate its proscriptions.[138] "The purpose of employer sanctions is to deter employers from hiring undocumented aliens and thus cut off the magnet of employment."[139]

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132. *Id.* at 1037.
133. *Id.* at 1049.
134. *Id.* at 1049-50.
135. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.).
136. 8 U.S.C. §§ 1101-1503 (1982).
137. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 5, at 13-15 (1986).

> The major purpose of the Immigration Reform and Control Act is the control of illegal immigration to the United States. The major provisions of the Act all relate to this purpose. First, the Act makes it illegal for employers to hire aliens who are unauthorized to work in the United States, either because they entered illegally or because their immigration status does not permit employment (i.e. tourists) and establishes penalties for violation. This provision is generally referred to as employer sanctions. The purpose of employer sanctions is to deter employers from hiring undocumented aliens, and thus to cut off the magnet of employment.
>
> The second major provision follows logically from employer sanctions. A legalization program is established which provides legal temporary and subsequently permanent resident status to otherwise eligible aliens who entered the United States prior to January 1, 1982 and have resided here unlawfully and continuously since. This program was intended to provide a humane solution to the problem of what to do about the undocumented aliens who established roots here and became law-abiding, productive members of our society.
>
> Finally, the Act responds to the potential need for seasonal agricultural workers which might result from the control of illegal immigration. It does this in two ways. First, by streamlining the procedures for the admission of H-2 non-immigrant temporary agricultural workers (now H-2A workers), and second by a seven-year program permitting the adjustment to temporary and subsequently to permanent resident status of special agricultural workers who meet the employment, residence, and other eligibility requirements. The purpose of the second program is to insure a smooth transition from the use of illegal to legal labor in seasonal agriculture, while at the same time assuring that neither the domestic workers nor the aliens involved in this transition will be adversely affected.

Id.

138. *Id.* at 13.
139. *Id.*

To bolster the agency's enforcement efforts, Congress also appropriated 422 million dollars in fiscal 1987 and 419 million dollars in fiscal 1988.[140] Congress intended for a large portion of this appropriation to be allocated towards increasing the border patrol by at least 50 percent of the fiscal 1986 level.[141] Increased border patrol and employer sanctions for hiring illegal aliens reflect Congress' intent to deter and control illegal immigration. Preventing illegal immigration is not, however, the only purpose behind IRCA.

Another major goal of IRCA is to "provide a humane solution to the problem of what to do about the undocumented aliens who established roots here and became law-abiding, productive members of our society."[142] To further this goal, the Act creates several classes of formerly illegal aliens entitled to temporary or permanent residence. The House Judiciary Committee Report indicates an intention that the "legalization program should be implemented in a liberal and generous fashion, as has been the historical pattern with other forms of administrative relief granted by Congress."[143]

The first class of aliens legalized under the Act consists of those unlawfully and continuously present in the United States since January 1, 1982.[144] Included within this class are aliens whose presence has been interrupted by "brief causal and innocent" absences.[145] Once these aliens comply with the application procedures,[146] they become eligible for temporary,[147] then permanent residency.[148]

IRCA also allows temporary and permanent residency for up to 350,000 "seasonal agricultural workers" who can show that they have worked in agriculture for 90 days in each of three years preceding May 1, 1985.[149] The primary purposes of these provisions are "to respond to Western grower concerns regarding the availability of labor and at the same time to protect workers to the fullest extent of all applicable federal, state, and local laws."[150] As with the legalization provisions, the aliens applying for temporary or permanent residency under the "seasonal agricultural workers" program must comport with the pertinent application procedures.[151]

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140. 8 U.S.C. § 1101(b) (Supp. IV 1986).

141. J. CONF. REP. No. 100, 99th Cong., 2d Sess. 90-91 (1986). "The amendment also authorizes, for fiscal years 1987 through 1989, such sums as may be necessary to provide for an increase in border patrol personnel so that the average level of such personnel is 50% higher than such level in fiscal year 1986." *Id.*

142. H.R. REP. No. 782, 99th Cong., 2d Sess., pt. 5, at 13-15 (1986).

143. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 72 (1986).

144. 8 U.S.C. § 1255a (Supp. IV 1986).

145. 8 U.S.C. § 1255a(a)(3)(B) (1986). The purpose of this provision is to allow increased flexibility in proof of continuous residence. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 73 (1986).

146. 8 U.S.C. § 1255a(a)(1) (Supp. IV 1986).

147. *Id.*

148. 8 U.S.C. § 1255a(b)(1) (Supp. IV 1986).

149. 8 U.S.C. § 1160 (1986).

150. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 84 (1986).

151. 8 U.S.C. § 1160(b) (1986).

Within the general mandate of controlling illegal immigration, the Act incorporates several provisions ostensibly intended to protect the constitutional rights, particularly the fourth amendment rights, of employers and aliens. The most notable of these provisions is section 116, which unequivocally restricts warrantless entry by INS agents onto farms and other outdoor agricultural operations:[152]

> (d)[a]n officer or employer of the Service may not enter without the consent of the owner [or agent there of] or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.[153]

Section 116 was a by-product of a major compromise between liberal and conservative members from both houses.[154] Prior to this intense compromise session in October of 1986, the Immigration Bill was certain to face its third rejection since 1982.[155] The House Rules Committee finally revived the bill in a last-minute effort dubbed a "miraculous compromise"[156] which resurrected "a corpse going to the morgue whose toe began to twitch."[157]

In a statement by the provision's co-sponsor,[158] the "farm worker is entitled to the same protection as every other worker in our society against the disruption that occurs when there is unwarranted and sometimes warrantless — without a warrant — search of farm premises."[159] After noting that 50 percent of the undocumented aliens picked up by INS agents within the interior of United States borders are farm workers, the co-sponsor continues: "These figures show a distinct bias in INS enforcement activities and serve notice that farmers *and farm workers* are not receiving equal protection as envisioned in our Constitution." (emphasis added).[160] With section 116, argues the co-sponsor, "employees will be protected from the humiliation of impulsive interrogation by the INS."[161] The

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152. 8 U.S.C. § 1357(d) (Supp. IV 1987).

153. *Id.*

154. N. MONTWIELER, THE IMMIGRATION REFORM LAW OF 1986 14-15 (1987).

155. *Id.* at 13-14. The first version of the bill failed on the House floor after eight hours of debate in mid-December of 1982. A renewed immigration bill failed in a conference committee after conferees were unable to reach agreement on a bill that the President would approve. *Id.* at 6-10.

156. *Id.* at 14 (statement by House Judiciary Committee Chairman Peter Rodino).

157. *Id.* (statement by ranking minority member of the House Judiciary Committee, Rep. Dan Lungren).

158. 132 CONG. REC. S11,440 (daily ed. Sept. 13, 1985) (statement by Senator McClure, a co-sponsor of section 116).

159. *Id.*

160. *Id.*

161. *Id.* The following excerpt illustrates the co-sponsor's strong commitment to the enforcement of fourth amendment principles:

> This legislation is needed, it has been passed by this body before by a vote of 2 to 1. It continues to be needed. Our system has failed in an important civil obligation, and if we are to live under the guaranteed proposition of the fourth amendment we must now take steps to correct this blatant injustice.

Id.

co-sponsor's language and intent is explicit. The provision requiring a warrant or consent prior to open field searches by INS agents is designed to protect farmers *and their employees.*

ANALYSIS

By removing any potential exclusion of illegally obtained evidence from deportation proceedings, the *Lopez-Mendoza* Court opened the door to increasingly unchecked INS agent fourth amendment violations.[162] In the process, the Court firmly closed the door on the use of the exclusionary rule as a remedy for personal constitutional violations[163] or a structural support for insuring judicial integrity.[164] This analysis will discuss 1) the weaknesses inherent in the majority's assessment of costs and benefits, 2) the weaknesses in the underlying cost-benefit test of *Janis* and *Calandra*, and 3) the effect of the IRCA on the exclusionary rule's application in deportation proceedings.

A. *LOPEZ-MENDOZA'S* APPLICATION OF THE *CALANDRA-JANIS* TEST

1. *Exclusionary Rule Social Benefits*

In applying the *Janis* test, the Court readily admitted that the exclusionary rule's deterrent effect is greatest when used in proceedings by the same agency that conducted the investigation.[165] It then "neutralized" the acknowledged deterrent value by hastily dismissing or minimizing the rule's relevant social benefits.

The *Weeks* Court firmly established judicial integrity as a compelling rationale for exclusionary rule application. Despite this, the Court's current regard for this purpose is noticeably absent. In *Janis*, the Court insists that "the 'prime purpose' of the rule, if not the sole one, is to deter future unlawful police conduct."[166] Given the single benefit the *Janis* Court attributed to the exclusionary rule, it is not surprising that *Janis* held

162. For documented accounts of callous INS search and seizure behavior, *see infra* notes 203-13 and accompanying text.

163. *Lopez-Mendoza*, 468 U.S. at 1045-46. The majority brushes over use of the exclusionary rule as a remedy for personal constitutional violations so briefly that one must keep a sharp eye out to realize that the Court was there. Respondents raised the concern that Hispanic-Americans' fourth amendment rights are particularly vulnerable to INS abuses. The Court asserted that deterrence considerations were its only concern since *"[t]he 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." *Id.* at 1046.

164. The Court did not address the exclusionary rule's role in promoting judicial integrity.

165. *Lopez-Mendoza*, 468 U.S. at 1043. INS agents collect evidence for both criminal and civil deportation proceedings against aliens. However, in this agency, the civil deportation proceeding is not "collateral," but, as the majority points out, it is the "primary objective" of the INS agent "to use [the] evidence in the civil deportation proceeding." *Id.* at 1053 (White, J., dissenting, quoting the majority at 1043). These officials then bring the deportation action, and the INS's case is based primarily on the agent's "Record of Deportable Alien." *Id.* at 1049 (majority opinion). It is difficult to imagine a system which more directly invests an agent in the outcome or evidence used at the proceeding. *Id.* at 1053 (White, J., dissenting).

166. *Janis*, 428 U.S. at 446 (citing United States v. Calandra, 414 U.S. 338, 347 (1974)).

the administrative costs of excluding illegally-seized evidence from a federal tax proceeding outweighed its benefits.[167]

The flaw in *Janis'* judicial integrity refutation arises from an apparent misconception of the *Calandra* case, upon which the *Janis* Court relied. In *Calandra*, the Court emphatically asserts that the exclusionary rule is not a "personal constitutional right of the party aggrieved."[168] The *Janis* Court incorrectly uses this same assertion to negate the existence of a separate judicial integrity theory behind the exclusion of illegally-seized evidence.[169] Granted, as mentioned above, the personal constitutional remedy theory is not a viable justification for excluding evidence under the fourth amendment. The *Janis* Court went too far, however, in sounding the death knell for the separate judicial integrity rationale initially established in Weeks:

> The tendency of those who execute the . . . laws . . . by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights guaranteed by the Federal Constitution, *should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution*, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. (emphasis added).[170]

In incorrectly applying the *Calandra* decision to vitiate the judicial integrity rationale, the *Janis* Court disregarded one of the primary justifications for the exclusion of unlawfully seized evidence. Thus, the subsequent cost-benefit analysis employed in *Janis* is inherently flawed because it fails to reflect the "benefit" of judicial integrity. Likewise, the *Lopez-Mendoza* Court's failure to recognize the judicial integrity benefit skews Justice O'Conner's rationale from the opinion's outset.

Initially, the *Lopez-Mendoza* Court argued that deportation may be achieved regardless of the exclusionary rule's application because the suspect assumes the burden of proof after a minimal government showing of identity and alienage.[171] Further, the government can often prove their burden with legally gathered evidence.[172] In criminal trials, prosecutors are barred from admitting tainted evidence but allowed to use legally seized evidence which results in the suspect's conviction.[173] Despite the fact that criminals can be convicted when the exclusionary rule is used, courts still apply the rule in criminal cases, and the Court does not suggest criminal case exclusionary rule abandonment.[174] Additionally, if the

167. *Id.* at 453-54.
168. *Calandra*, 414 U.S. at 348.
169. *Janis*, 428 U.S. at 446.
170. *Weeks*, 232 U.S. at 392.
171. *Lopez-Mendoza*, 468 U.S. at 1043.
172. *Id.*
173. *Id.* at 1053-54 (White, J., dissenting).
174. See generally, United States v. Leon, 468 U.S. 897 (1984), issued the same day as the *Lopez-Mendoza* opinion. In *Leon*, the Court confirmed criminal case exclusionary rule use but recognized a limited good faith exception to exclusionary rule application when police officers reasonably rely on a warrant later invalidated. *Id.*

government's burden of proof is not particularly great, as the majority suggests,[175] every possible safeguard should be employed to assure that the evidence used is fairly obtained to prevent increasing procedural laxity on the part of government agents.

The Court points out that an exclusionary rule challenge is not commonly offered by the rare suspect who demands a formal hearing. Agents know their searches are rarely examined, and that the occasional illegal search will not markedly affect their personal record.[176] Factors suggest that an alien with a valid fourth amendment argument must be highly motivated to challenge his prosecution.[177] Therefore, although fewer fourth amendment violation questions reach INS proceedings, the cases that do are more likely to be valid, and their deterrent effect should not be underestimated. Note also that although many criminal defendants plead guilty, it does not prevent criminal court exclusionary rule application or the deterrent effect.[178]

Additionally, the exclusion of evidence from INS cases may prompt vigilance and better policy management by agency administrators. An agent's incentive to comply with procedural rules is greater if his motivation is reinforced from the top.[179] The exclusionary rule was enforced by the BIA[180] and lower federal courts[181] until *Lopez-Mendoza*. The lack of numerous fourth amendment challenges and search and seizure-related injunctions[182] may suggest that the exclusionary rule was, at least in part, working.[183]

The majority relies heavily on the fact that the INS has "its own comprehensive scheme for deterring fourth amendment violations by its

175. *See Lopez-Mendoza*, 468 U.S. at 1043.

176. *Id.* at 1044.

177. Statistics indicate that there may be factors which discourage a suspect's use of the formal proceeding, since 97.5% depart voluntarily. *Id.* In Perez-Funez v. District Director, INS, 619 F. Supp. 656, 661 n.10 (D.C. Cal. 1985), the Court acknowledged "that INS agents no doubt encourage the selection of voluntary departure. Use of voluntary departure lessens the [INS administrative burden] and thus is the optimum choice from an agency perspective." *Id.*

178. *Lopez-Mendoza*, 468 U.S. at 1054 (White, J., dissenting).

179. *See id.*

180. *See* Note, *The Exclusionary Rule's Applicability in Deportation Hearings: INS v. Lopez-Mendoza*, 18 CORNELL INT'L L.J. 125 (1985) (citing 1A. C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE § 5.2C, at 5-31 (rev. ed. 1977)).

181. Until the *Lopez-Mendoza* decision, the lower federal courts which occasionally heard INS fourth amendment violation questions generally applied the exclusionary rule. *See generally supra* notes 75-85 and accompanying text.

182. See generally, *infra* notes 188-97 and accompanying text which describe situations in which INS agent search and seizure abuses prompted requests for injunctive relief. The majority of the cases cited arose after the BIA discontinued exclusionary rule enforcement in 1979 (*see In re* Sandoval, 17 I. & N. Dec. 70 (BIA 1979)).

183. "In part" acknowledges the fact that many suspects probably depart "voluntarily" with INS encouragement after being informed of possible consequences of formal deportation. Suspects are often poor, illiterate, and non-English-speaking which makes securing counsel for representation at a hearing difficult. *See* Comment, *The Exclusionary Rule in Deportation Proceedings*, 14 U.C.D.C. REV. 955, 969 n.76 (1981). Also, clear indication by the Court that the exclusionary rule definitely applies in INS proceedings may cause an increased availment of the defense resulting in even greater effectiveness.

officers."[184] The Court apparently failed to closely examine INS cases which demonstrate a history of fourth amendment abuses or carefully review INS search and seizure policies, or critically evaluate past internal disciplinary measures.[185] The Court indicates that its "[c]onclusion concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[186]

When injunctive relief is required to control government agent abuses, it suggests that significant violations are presently occurring.[187] Courts have granted several injunctions against illegal INS search and seizure activities in recent years.

In 1982, an Illinois federal court enjoined INS agents from harassing persons with Spanish surnames or of Mexican descent without appropriate warrants or probable cause after agents conducted preplanned, unwarranted searches of private dormitories without consent or probable cause.[188] The same year a District of Columbia court granted a temporary restraining order and a preliminary injunction against six INS officers who raided a private dwelling, entering without warrant or consent.[189] The court, noting that the INS officials entered the residence without valid consent, engaged in a fight and refused to leave when asked to by the owner,[190] condemned the agent's "cavalier approach to [the] incident."[191]

In *Mendoza v. INS*,[192] INS officials in Texas were enjoined from conducting mass, unwarranted raids on establishments and questioning Mexican-descent patrons at random without probable cause or consent.[193] *LaDuke v. Nelson*[194] saw INS agents enjoined from conducting regular, unwarranted raids on farm labor dwellings.[195] The raids, in violation of the fourth amendment, again targeted Spanish-speaking individuals at a specific location because illegal aliens had been discovered at the farm in the past.[196] The list does not end here; INS agents have committed repeated fourth amendment violations by performing stops, searches, seizures, and arrests without probable cause or appropriate warrants.[197] These cases suggest that INS agents do not show great respect for individual fourth amendment rights.

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184. *Lopez-Mendoza*, 468 U.S. at 1044.

185. See Note, *supra* note 114, at 154-60, for an in-depth analysis of the Court's failure to consider past INS misconduct and detect major flaws in the "internal regulation" scheme.

186. *Lopez-Mendoza*, 468 U.S. at 1050.

187. *See generally* Note, *supra* note 114, at 155.

188. Illinois Migrant Council v. Pillrod, 531 F. Supp. 1011 (N.D. Ill. 1982).

189. Wong v. Nelson, 549 F. Supp. 895, 896 (D. Colo. 1982).

190. *Id.*

191. *Id.* at 896-97. The court refused to grant a permanent injunction because the plaintiffs "failed to demonstrate substantial risk that future violations would occur." *Id.*

192. 559 F. Supp. 842 (W.D. Tex. 1982).

193. *See id.* at 845-51.

194. 560 F. Supp. 159 (E.D. Wash. 1982).

195. *See generally id.* at 160.

196. *Id.* at 160-61.

197. *See generally* Note, *supra* note 114 at 158 nn.140-44. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 884-86 (1975); United States v. Ortiz, 422 U.S. 891, 896-97 (1975);

The INS internal regulatory scheme is based largely on *The Law of Arrest, Search and Seizure for Immigration Officers.*[198] This booklet provides a list of cases and statutory law outlining potential INS agent disciplinary situations, but it is "no different from those faced by any other federal officer."[199] It offers no special guidelines that would help abate INS agent search and seizure abuses. There is also an illegal search and seizure complaint procedure.[200] However, self-policing is frequently ineffective[201] and less likely to work in systems where individuals, such as aliens, are unsophisticated or easily intimidated by the agency itself.[202]

Indeed, the INS is unable to demonstrate that their internal regulation scheme has ever been successfully implemented. In a four-year period, the INS suspended or terminated twenty officers "for misconduct toward aliens."[203] At least eleven were terminated for rape or assault.[204] The INS claims that it

> does not compile identifiable statistics on Fourth Amendment violations. It instead includes those complaints among civil rights complaints and destroys its records after a specified time period. The INS was unable to show that any officer had been disciplined

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Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973); Benitze-Mendez v. INS, 707 F.2d 1107, 1109 (9th Cir. 1983); Carnejo v. Molina, 649 F.2d 1145, 1148 (5th Cir. 1981); Arias v. Rogers, 676 F.2d 1139, 1141 (7th Cir. 1981); United States v. Sanchez-Jaramillo, 637 F.2d 1094, 1098-99 (7th Cir. 1980) (INS agents searched dwellings and businesses without obtaining consent or search warrants); United States v. Lamas, 608 F.2d 547, 549-50 (5th Cir. 1979) (INS agents stopped vehicles without reasonable suspicion); Medina-Sandoval v. INS, 524 F.2d 658, 659 (9th Cir. 1975) (INS agents stopped individuals without reasonable suspicion); United States v. Cardona, 524 F. Supp. 45, 47-48 (W.D. Tex. 1981) (INS agents searched vehicles without probable cause or consent). There are numerous cases in which suspects raised INS fourth amendment violation questions, but the court refused to hear testimony, holding that it was irrelevant because of later suspect admissions or legally-obtained evidence. Note, *supra* note 114, at 159 n.145.

198. OFFICE OF THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE, THE LAW OF ARREST, SEARCH AND SEIZURE FOR IMMIGRATION OFFICERS (1983).

199. Note, *supra* note 114, at 159.

200. *See* IMMIGRATION AND NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, REGULATIONS, AND INTERPRETATIONS, § 287.10 (1979). The INS Office of Professional Integrity (OPI) receives and reviews serious and major administrative charges leaving the Regional Commissioner to address minor infractions. Prima facie misconduct is investigated in a preliminary inquiry. Sustained allegations are referred to the United States Attorney for disciplinary action by regional authorities. Comment, *The Exclusionary Rule in Deportation Proceedings*, 14 U.C.D.L. REV. 955, 967 n.65 (1981).

201. *See* Comment, *supra* note 200, at 967 (citing generally Batey, *Deterring Fourth Amendment Violations through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245, 248 (1976); Berger, *Law Enforcement Control: Checks and Balances for the Police System*, 4 CONN. L. REV. 467, 483 (1971-72)). *See also* Mapp v. Ohio, 367 U.S. 643, 670 (1961); People v. Cahan, 44 Cal. 2d 434, 447, 282 P.2d 905, 913 (1955) (cases discussing the efficacy and effectiveness of internal policing policies).

202. Aliens are generally unaware of their remedies and unsophisticated in dealing with the American legal system effectively. They may also be apprehensive about filing complaints or civil suits with or against the authorities. *See* Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U.L.Q. 621, 692; Comment, *supra* note 200, at 968 n.70.

203. *Lopez-Mendoza*, 468 U.S. at 1054 n.2.

204. *Id.*

for a Fourth Amendment violation since the BIA held the exclusionary rule inapplicable in 1979.[205]

The INS fails to articulate how it monitors, evaluates, and appropriately adjusts its "comprehensive"[206] fourth amendment violation deterrence program when it does not keep statistics or in-house reports, particularly after the 1979 BIA abolishment of the exclusionary rule.[207] The INS's apparent lack of concern about this information leads one to question how important it considers fourth amendment violation deterrence.[208]

Finally, the *Lopez-Mendoza* Court mentions that the INS has a fourth amendment agent education program,[209] which was instituted during the time that the BIA and courts were applying the exclusionary rule in deportation proceedings.[210] Even if the education programs remain, without the enforcement effect of the exclusionary rule to reinforce proper search and seizure techniques, agents may be less motivated to follow proper procedure. Furthermore, supervisory personnel may have little motivation to sanction errant agents since fourth amendment violations no longer threaten to interfere with agency deportation prosecutions or result in wasted investigations.

One of the agency's functions is to discover and deport illegal aliens by using search, seizure, and arrest methods. It is, at the same time, charged with educating agents about, and enforcing, fourth amendment limitations which would interfere with the agency's deportation activity. We have undoubtedly left the fox in charge of the hen house. The history of federal court injunctions against INS officers and the agency's failure to implement an effective internal education and disciplinary scheme indicate that the exclusionary rule should be revived and uniformly and rigorously applied in deportation proceedings to correct INS agent fourth amendment abuses.

The Court's benefit analysis indicates that alternative remedies such as civil or criminal suits against the INS are available to challenge systematic INS violations.[211] Although such cases are filed,[212] it is an expensive, time-consuming, and "unrealistic" remedy.[213] Those ordered deported are removed from the country rapidly, with little opportunity to arrange

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205. Note, *supra* note 180, at 138 n.95 (citing Brief for Respondent at 55, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)).

206. *Lopez-Mendoza*, 468 U.S. at 1044.

207. *In re* Sandoval, 17 I. & N. Dec. 70 (BIA 1979).

208. Interestingly, many of the cases enjoining INS agents from fourth amendment violations have occurred since 1979. *See supra*, notes 178-90 and accompanying text. Filing civil suits in order to control INS agent abuses seems judicially inefficient when the exclusionary rule provides an immediate, readily available, and less expensive deterrent method.

209. *Lopez-Mendoza*, 468 U.S. at 1045.

210. *Id.* at 1055 (White, J., dissenting) (citing INS v. Lopez-Mendoza, 705 F.2d 1059, 1071 (9th Cir. 1983)).

211. *Id.* at 1045 (majority opinion).

212. *See supra* notes 188-97 and accompanying text.

213. *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

for legal redress.[214] The usual alien is uneducated, poor, unfamiliar with the American legal system and speaks no English.[215] "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."[216]

Injunctive relief is available only against illegal INS policy,[217] so injunctions control INS procedure, but not an individual agent's behavior.[218] As one author points out, injunctive relief is of little use to the arrested alien, because evidence already illegally seized is not excluded from his deportation hearing. Other aliens lack standing to file for injunctive relief unless they have been personally injured.[219] Lastly, criminal charges,[220] which are available to prosecute government officials who perpetrate unwarranted or malicious search and seizures, are rarely filed against any government official despite frequent fourth amendment issues in criminal cases.[221] There is little to indicate that effective alternative means for deterring INS fourth amendment violations are available to illegal alien suspects.

2. *Social Costs of the Exclusionary Rule*

The *Lopez-Mendoza* majority identified three major costs society will incur if the exclusionary rule is utilized in deportation proceedings.[222] It

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214. *Id.* Although an alien may request a temporary deportation order stay from the district director so that he can file suit, the stay order is completely discretionary and nonappealable. Comment, *supra* note 200, at 968-69 (citing 8 C.F.R. § 243.4 (1980)). If denied, the alien may then lack federal court standing "since nonresident aliens may not have a right to sue in federal courts." Comment, *supra* note 200, at 969 (citing Silva v. Bill, 605 F.2d 978 (7th Cir. 1978)).

If he achieves a deportation stay and federal court standing, the alien may nonetheless have an uphill legal battle in order to prevent his eventual deportation. First, he must finance his legal action if pro bono representation is unavailable. Then, if a civil suit for damages is maintained (which is allowed; *see* Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)), he may face a jury which is likely to be unsympathetic to an alien's fourth amendment violation complaints. *See* Gilligan & Lederer, *Replacing the Exclusionary Rule With Administrative Rulemaking*, 28 ALA. L. REV. 533, 547 (1977); Spitto, *Search and Seizure: An Empirical Study of the Exclusionary Rule & Its Alternatives*, 2 J. LEGAL STUD. 243, 272 (1973). Additionally, there is no indication that punitive damages are allowed against government agents who violate an individual's fourth amendment rights while acting in an official capacity. Thus, damages, if awarded, may be minimal. Comment, *supra* note 200, at 967 n.64 and 968 n.71 (citing Spitto, *infra* this note, at 255.)

215. *See* Comment, *supra* note 200, at 969 n.76. *See also* 2 LEGAL SERVICES CORP., SPECIAL LEGAL PROBLEMS AND PROBLEMS OF ACCESS TO LEGAL SERVICES OF VETERANS, NATIVE AMERICANS, PEOPLE WITH LIMITED ENGLISH-SPEAKING ABILITIES, MIGRANT AND SEASONAL FARM WORKERS, INDIVIDUALS IN SPARSELY POPULATED AREAS 120, 136 (1979) (noting the lack of available legal services for these individuals).

216. *Lopez-Mendoza*, 468 U.S. at 1055 (White, J., dissenting).

217. Comment, *supra* note 200, at 969 (citing *In re* Sandoval, No. 2725 at 16 (BIA Aug. 20, 1979)).

218. Comment, *supra* note 200, at 969-70.

219. *Id.* (citing O'Shea v. Littleton, 414 U.S. 488 (1974)) (plaintiffs in a class action suit must have been personally injured or threatened with future harm in order to challenge practices).

220. 18 U.S.C. §§ 2234, 2236 (1982) (allows criminal charges to be filed against government officials who perform searches and seizures without probable cause or maliciously; the penalty is a fine or imprisonment).

221. *See* Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 260 (1961).

222. *Lopez-Mendoza*, 468 U.S. at 1046-50.

identified ongoing illegal alien presence as a crime.[223] Just as exclusionary rule application in criminal cases allows the occasional criminal to go free, deportation hearing exclusionary rule use is bound to free the occasional illegal alien. Justice O'Conner insists that while freeing a criminal is tolerable, since his crime is finished, freeing an illegal alien means the resumption of an ongoing crime.[224] She indicates that this would be against public policy[225] and that it constitutes a social cost. The social cost of having illegal aliens in this country is difficult to tally. Illegal aliens rarely present a criminal threat to organized society; they demonstrate "no evidence of rejecting fundamental American values and institutions."[226] They are well motivated to comply with the law in order to prevent arrest and detection,[227] apparently unlike many criminal defendants released by exclusionary rule application in criminal cases.[228]

Although illegal aliens may come to the United States for a variety of reasons, most immigrate seeking employment opportunities to better support themselves and their families.[229] Some argue that illegal aliens cost citizens jobs.[230] This rationale inspired the new IRCA requirements which are now successfully discouraging illegal alien employment by imposing strict penalties on employers.[231] Additionally, illegal aliens are not a drain on general societal benefits. They are not entitled to social welfare benefits[232] and generally "underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."[233] Nor are they an effective political body since non-citizens are not allowed to vote.[234] While illegal alien children may be entitled to public education,[235] evidence indicates that employment, not education, is the primary reason for undocumented alien entry into the United States.[236]

Given the fact implementation of IRCA employer requirements will decrease alien employment, and thus decrease illegal alien entry and num-

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223. *Id.* at 1046-47.
224. *Id.* at 1047.
225. *Id.*
226. INS v. Lopez-Mendoza, 705 F.2d at 1072 (citing CORNELIUS, CHAVEZ & CASTRO, MEXICAN IMMIGRANTS AND SOUTHERN CALIFORNIA: A SUMMARY OF CURRENT KNOWLEDGE 9 (1982)).
227. *Id.* at 1072-73.
228. *Id.* (citing NATIONAL COUNCIL ON CRIME AND DELINQUENCY, UNIFORM PAROLE REP. CHARACTERISTICS OF THE PAROLE POPULATION, 1973 at 3 (1980)). "[T]he tendency of persons who have once committed crimes to do so again is well documented." *Lopez-Mendoza*, 468 U.S. at 1073. Twenty-six percent of prisoners have served one or more prior prison terms. *Id.*
229. *See* Plyler v. Doe, 458 F. Supp. 569, 584-85 (E.D. Tex. 1978).
230. *See generally* The Laramie Daily Boomerang, Jan. 14, 1988, at 2, col. 1.
231. *Id.*
232. Plyler v. Doe, 457 U.S. 202, 251 (Burger, C.J., dissenting).
233. *Id.* at 228 (majority opinion).
234. *Id.* at 222 n.20.
235. *See generally id.* at 202.
236. *Id.* at 228 n.24.

bers,[237] allowing a tiny percentage[238] of illegals to go free because of exclusionary rule application would result in an insignificant social and economic cost. It seems a small price for enforcing our constitutional rights and integrity.

Second, the majority also insists that exclusionary rule use will significantly increase administrative costs, documentation and hearing officer burdens and appeals.[239] Concern about increased appeals does not justify denying enforcement of fourth amendment rights.[240] Note that the INS was applying the exclusionary rule prior to the 1979 BIA decision without undue hardship.[241] The agency supposedly monitors and sanctions fourth amendment violations by agents,[242] so arrest documentation adequate to show that officers are following proper search and seizure guidelines should already be available for hearings. Further, the Court is concerned that INS hearing officers and attorneys will be inconvenienced by their inexperience in exclusionary rule law.[243] This demonstrates a shocking lack of faith in the INS's ability to educate these individuals, which is odd, because the Court is fully confident that the INS competently educates its agents in fourth amendment law.[244]

Finally, the majority insists that mass arrests are too confusing, and arrests too numerous for agents to accurately recall or document search and seizure methods.[245] Thus, Justice O'Conner argues, much honestly seized evidence is lost if the exclusionary rule is applied.[246] Again, documentation should already be adequate for internal agency fourth amendment deterrence procedures. If documentation is inadequate and too difficult to meet deportation hearing standards, the INS will have difficulty defend-

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237. The Laramie Daily Boomerang, Jan. 14, 1988, at 2, col. 1. The article indicates that implementation of the IRCA has already resulted in a 36 percent decline in the number of illegal aliens apprehended at the United States-Mexico border, according to INS officials. INS Commissioner Alan C. Nelson attributed the decreasing apprehension rate directly to the new law: "The continuing decline is a clear indication that the law is working . . . with aliens discouraged from attempting illegal entry by the knowledge that it is more difficult to find work in this country." *Id.* at col. 2.

238. If application of the [exclusionary] rule results in aborted deportation proceedings in as many as one hundred cases a year—a number twice as great as the number of evidentiary challenges raised before the BIA since 1952—the result would be an increase of less than one one thousandth of one percent in the illegal alien population.

Lopez-Mendoza, 705 F.2d at 1072. The hope, of course, is that the number of *successful* evidentiary challenges would decrease as the deterrent effect improved INS agent fourth amendment compliance.

239. *Lopez-Mendoza*, 468 U.S. at 1048-49.

240. *See* United States v. Robinson, 414 U.S. 218, 259 n.7 (1973) (Marshall, J., dissenting): "Mere administrative inconvenience . . . cannot justify invasion of Fourth Amendment rights."

241. *Lopez-Mendoza*, 468 U.S. at 1058-59 (White, J., dissenting). The major treatise on immigration law informed practitioners that the exclusionary rule applied in deportation hearings. *See* 1A C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.2c at 5-31 (rev. ed. 1980) *cited in Lopez-Mendoza*, 468 U.S. at 1059 (White, J., dissenting).

242. *Lopez-Mendoza*, 468 U.S. at 1045.

243. *Id.* at 1048.

244. *See id.*, at 1044-45.

245. *Id.* at 1049-50.

246. *Id.*

ing against civil and injunctive relief actions which the majority recommends as alternative violation remedies. Too, the problems related to INS mass arrests are comparable to those experienced by police officers in large drug or gambling raids or chaotic mass demonstrations. Criminal courts do not "waive" fourth amendment rights because the procedures and documentation are inconvenient. INS agents, who are experienced at mass arrest procedures,[247] should not be overwhelmed by fourth amendment requirements or the documentation necessary to prove they were followed.

B. IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON THE *LOPEZ-MENDOZA* COST-BENEFIT ANALYSIS

The Immigration Reform and Control Act of 1986, a comprehensive legislative effort to control the influx of illegal aliens, significantly shifts the balance of costs and benefits identified in *Lopez-Mendoza.* The exclusionary rule would impede the IRCA's purpose in deportation hearings tainted by illegally seized evidence. It may therefore resemble the "social cost" of the *Lopez-Mendoza* analysis.[248] The flaw in this assessment is that it attributes to Congress an unconstitutional motive of implementing its immigration reform in a manner that violates the constitutional rights of aliens. This interpretation contradicts the express Congressional intent to safeguard, rather than undermine, the constitutional rights of aliens.[249]

The IRCA's primary purpose is to provide streamlined and effective control on illegal immigration. This purpose is frustrated when probative evidence is excluded from deportation proceedings. Since even an alien's unsuccessful litigation of fourth amendment violations would impede a proceeding's efficiency,[250] it seems likely that INS agents would conform their conduct to fourth amendment requirements in order to prevent lengthy deportation proceedings. Without the exclusionary rule, there is no longer any threat to the agency's efficient deportation process. Because a failure to effectuate IRCA's objectives is tantamount to agency ineffectiveness, the exclusionary rule in the "intrasovereign" setting of deportation hearings is a more effective deterrent.

Justice O'Conner points to the government's low burden of proof in deportation hearings as a factor which makes it unlikely that INS agents will be significantly deterred by the prospect of deterrence.[251] Prior to IRCA, deportation could be effected without the illegally seized evidence because the government only had to establish identity and alienage.[252] This is no longer the case. Due to the legalization provisions of IRCA, the alien may avoid deportation by showing that he entered the country prior to January 1, 1982, and has resided here unlawfully and continuously since.[253]

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247. *Id.*
248. *Id.* at 1046.
249. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384.
250. *Lopez-Mendoza,* 468 U.S. at 1047.
251. *Id.* at 1038-39.
252. *Id.* at 1043.
253. 8 U.S.C. § 1255a(a)(2) (Supp. IV 1986).

Despite the fact that these provisions are a temporary adjustment measure which apply to a limited class of individuals, deportation based on alienage and identity is no longer a legal certainty.

In cases where the alien is eligible for legalization status, the government's case may depend solely on the admissibility of illegally seized evidence. For example, if an illegal search by INS officials produces a confession of narcotics addiction, the alien is deportable notwithstanding IRCA's legalization provisions.[254] If evidence relating to addiction were suppressed, however, the alien would potentially be eligible for legalization status. Not only would the exclusionary rule frustrate the INS purpose of enforcing IRCA efficiently, it would defeat an otherwise probable deportation. Under these circumstances, the exclusionary rule is a more efficacious deterrent.

The Act also provides for temporary and permanent residence of seasonal agricultural workers. Again, the Act creates a class of legal aliens which formerly would have been subject to the agency's mass deportation operations. Prior to IRCA, warrantless searches and seizures of these individuals may have been "reasonable" in light of the good probability that they were deportable. Under IRCA, the presumption of deportability no longer applies to the aliens falling under the legalization and the seasonal agricultural worker provisions. To subject these aliens to warrantless searches and seizures would be to grant them the benefits of United States residency yet deny them the protection of the United States Constitution. Such a result, arguably justifiable when the Court decided *Lopez-Mendoza*, is blatantly unreasonable today.

The *Lopez-Mendoza* cost-benefit analysis also focuses on the small percentage of fourth amendment challenges to evidence introduced in deportation hearings.[255] In fact, 97.5 percent of aliens formerly opted for voluntary deportation.[256] When the Court decided *Lopez-Mendoza*, it may have been safe to assume that the small percentage of fourth amendment challenges would not deter fourth amendment violations by INS agents. This is no longer a safe assumption. It would seem likely that aliens who fall under the amnesty provisions of IRCA would now challenge deportation. With the increase in deportation challenges, the increase in fourth amendment challenges may well rise to a level sufficient to deter fourth amendment violations by INS agents.

In considering factors that allowed the Court to dismiss INS exclusionary rule application, Justice O'Conner placed great weight on the existence of an intra-agency scheme for deterring fourth amendment violations by INS officials.[257] Because most arrests of illegal aliens away from

254. 8 U.S.C. § 1251(a)(11) (1982). An alien who "at any time after entry has been, a narcotic drug addict, or ... has been convicted of ... possession of or traffic in narcotic drugs" shall be deported upon the order of the Attorney General. *Id.*

255. *Lopez-Mendoza*, 468 U.S. at 1044.

256. *Id.*

257. *Id.*

the border occur "during farm, factory, or other workplace surveys,"[258] the INS has developed its own internal procedures to safeguard the rights of lawfully present persons. Prior to section 116 of IRCA, the fourth amendment privacy rights of aliens did not extend to open agricultural fields.[259] The legislative history of IRCA, however, shows a clear design to extend the protection against unreasonable searches and seizures to agricultural employers and, as relevant here, to the agricultural *employees:*

> Since *Hester v. United States* (citation omitted) in which this ["open fields"] exception was recognized . . ., . . . there is now no requirement for service enforcement officials to obtain a warrant prior to entering farms or ranches. However, this policy is unlike the policy applied to other places of business. Also, under this policy, one of the basic rights provided by the Constitution, the right of the people to be secure against unreasonable searches and seizures, is being denied to an important segment of our society—farmers and ranchers.
>
> In addition, the surprise raids by the Service, in the Committee's view, have unduly harrassed agricultural employers and employees and, in a number of situations, have jeopardized the lives of *workers.* (emphasis added).[260]

The INS internal procedures for protecting the "basic" constitutional rights of aliens do not contemplate that section 116 extends this fourth amendment protection to alien farm workers. Therefore, the internal measures cannot be an effective safeguard. For this reason, Justice O'Conner's most important factor against the deterrent value of the exclusionary rule does not apply when the fourth amendment rights at stake are those of alien farm workers. In this class of cases, the exclusionary rule's deterrent effect is more likely to safeguard fourth amendment rights than are INS internal rules.

The legalization and seasonal agricultural worker provisions also mitigate one of the major social costs identified in *Lopez-Mendoza.* Justice O'Connor asserts that applying the exclusionary rule to deportation proceedings would require the courts to close their eyes to ongoing violations of the immigration laws.[261] Since IRCA, many of the same aliens formerly deportable under this reasoning would be entitled to legalization and residency under the seasonal agricultural worker program. Today, the exclusionary rule does not necessarily require the courts to "close their eyes to ongoing violations of the law."[262] Rather, it finally requires the INS to *open* its eyes to ongoing violations of the law established in the constitutional proscriptions of the fourth amendment.

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258. *Id.*

259. Hester v. United States, 265 U.S. 57 (1955) (fourth amendment protection against unreasonable searches and seizures does not apply to open fields).

260. H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 5, at 6 (1986) (statement by Mr. De La Garza from the Committee on Agriculture).

261. *Lopez-Mendoza,* 468 U.S. at 1046.

262. *Id.*

The other major cost identified in *Lopez-Mendoza* is the cost resulting from a disruption in the INS's streamlined deportation proceedings.[263] The impetus of this cost is also mitigated by IRCA. With a 50 percent increase in border patrol, there will undoubtedly be fewer illegal aliens crossing the United States borders.[264]

Furthermore, the imposition of employer sanctions removes the undocumented alien's primary incentive to enter the country illegally—employment.[265] The Subcommittee on Immigration, Refugees, and International Law observed that as long "as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or to violate status once admitted as a non-immigrant in order to obtain employment will continue."[266] IRCA's direct border patrol discouragement of illegal entry, combined with the indirect employer sanctions for hiring illegal aliens, will reduce the number of illegal or undocumented aliens subject to the INS's streamlined deportation proceedings. The smaller caseload created by IRCA reduces the "cost" of inefficiency while creating an opportunity for the INS to address fourth amendment violations by its agents.

In providing for fourth amendment protections against unreasonable searches and seizures, Congress considered the potential impact of compliance on the enforcement efforts of the INS.

> [I]t is the view of the Immigration and Naturalization Service that the requirement for a warrant would curtail the enforcement activities of that agency. However, the Committee has not received convincing evidence to support the view that search warrant requirements or consent of the owner for entry into open agricultural lands would unduly hamper enforcement efforts.[267]

It is clear that Congress was more concerned with preventing fourth amendment violations by INS agents than facilitating INS enforcement operations. Likewise, the exclusion of evidence from a single INS deportation proceeding would do more to deter similar violations by INS agents than it would hamper overall INS enforcement.

The tug-of-war that exists between INS enforcement and the fourth amendment guarantee against unreasonable searches and seizures is illus-

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263. *Id.* at 1048.

264. *See*, H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 63 (1986). The House Report identifies a lack of resources as the cause of the "overwhelming" undocumented alien problem:

> In the past, INS has been undermanned, ill-equipped, and generally overwhelmed by its responsibilities under the Immigration and Nationality Act (INA). The Committee has long been aware of these shortcomings and has consistently sought to raise the level of INS resources over the years. There has been no doubt that the undocumented alien problem facing the nation today, which this bill seeks to correct, is largely due to the lack of attention to and appreciation for the INS mission by the Department of Justice.

Id.

265. H.R. REP. No. 682, 99th Cong. 2d Sess., pt. 1, at 56 (1986).

266. *Id.*

267. H.R. REP. No. 682, 99th Cong., 2nd Sess., pt. 5, at 7 (1986).

trated by the enforcement provisions of the Immigration and Naturalization Act which remained intact after its amendment by the Immigration Reform and Control Act of 1986. INS agents are still allowed to conduct warrantless searches when they observe an alien crossing the border illegally, when the search takes place within a reasonable distance from a United States border, when agents have probable cause to believe an alien has committed a felony[268] or upon employer consent. In these situations, warrantless searches would seem reasonable in light of the agency's purposes of controlling illegal immigration and enforcing the law.

Lopez-Mendoza fails to acknowledge the social cost of *not* applying the exclusionary rule in INS deportation hearings.[269] One such cost would be derogation of the fourth amendment rights of newly-legalized alien farm workers. A typical INS raid would almost certainly lead to this undesirable result.

> Anyone who has ever witnessed an INS raid can attest to the tremendous human tragedy involved.
>
> When those agents enter a field, people fly in all directions like scared animals. Many flee because they face deportation and the loss of income to support their families. But many who flee are not illegal aliens; rather, they . . . simply panic at the sight of so many agents moving toward them.[270]

The IRCA's drafters expressed a marked concern over the fourth amendment rights of alien farm workers.[271] The legalization of certain classes of aliens exacerbates this valid concern.

Additionally, INS agents sometimes conduct raids of agricultural fields based on the physical appearance or foreign accent of the workers.[272] Because the new class of aliens looks and sounds like deportable aliens,

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268. *See also* H.R. REP. NO. 682, 99th Cong., 2nd Sess., pt. 5, at 6-7 (1986).

269. *See, e.g., Lopez-Mendoza*, 468 U.S. at 1046-49.

270. 131 CONG. REC. S11,441-42 (daily ed. Sept. 13, 1985) (statement of Senator Symms, co-sponsor of section 116).

271. *See, e.g.*, 131 CONG. REC. S11,440 (daily ed. Sept. 13, 1985) (statement of Senator DiConcini, co-sponsor of section 116):

> Before INS . . . agents enter a business . . . they must comply with the fourth amendment to the U.S. Constitution and obtain a search warrant . . . . It is estimated that only 15 percent of employed illegal aliens are employed in agriculture. . . . It is obvious that [the] INS . . . singled out agriculture for a much higher proportion of their attention because it is simply easier to apprehend people if you do not have to have to [sic] search warrant to enter the property on which they work.
>
> This singling out of agriculture for special treatment is unfair to both the employees and the owners. In my opinion, it is also a violation of their constitutional rights.

See also id. at S11,441 (statement of Senator Symms, co-sponsor of section 116): "The constitutionally guaranteed protection against unreasonable searches and seizures should not be applied selectively."

272. 131 CONG. REC. S11,443 (daily ed. Sept. 13, 1985) (statement of Senator McClure, co-sponsor of section 116):

> INS agents have used some of the most heavy-handed tactics in pursuit of what they believed to be undocumented workers.
>
> . . . [W]orkers, sometimes legal and sometimes illegal, have been handcuffed

they are likely to suffer undue harassment under current INS practices. This social cost can be reduced by excluding illegally obtained evidence from INS deportation proceedings.

CONCLUSION

The turbulent history of the exclusionary rule indicates that its applicability was not resolved by *Lopez-Mendoza.* In order to curb abuses by INS agents which infringe on the fourth amendment rights of aliens, the rule must apply in INS deportation proceedings. To be sure, its applicability depends on its efficacy as a deterrent. As in the criminal setting, this benefit offsets many of the social and administrative costs of excluding probative evidence. The cost-benefit analysis must look beyond deterrence, however, and examine the maintenance of judicial integrity which the rule provides. This is what the *Lopez-Mendoza* Court failed to do.

Even if *Lopez-Mendoza* was correctly decided, the Immigration Reform and Contol Act of 1986 substantially altered the Court's cost-benefit analysis. The legalization provisions and the seasonal agricultural worker provisions of IRCA entitle a class of otherwise deportable aliens to remain in the United States. To exclude illegally seized evidence from their deportation hearings would no longer result in the continuance of an ongoing violation.

The Act also bolsters INS resources through increased border patrol. This addition, combined with sanctions to deter employers from hiring illegal aliens, will significantly reduce the INS deportation caseload. The lighter caseload reduces the "cost" of handling fourth amendment issues in a streamlined deportation proceeding. Finally, violating the fourth amendment rights of the new class of aliens may impose a substantial social cost under the *Lopez-Mendoza* analysis. This social cost, unlike the others identified by Justice O'Conner, tips the balance *in favor* of applying the exclusionary rule.

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together and chained to trees. Why? Not because there is any presumption of guilt based upon anything other than the color of their skin and, upon occasion, because the worker does not speak English well.

. . .

. . . Most of those [aliens] who did speak English spoke with a heavy accent and spoke the English language poorly. Any INS agent would have perhaps been justified in asking whether or not they were illegal aliens. But just the color of their skin alone would make them suspect and, therefore, subject to the harassment that comes from a warrantless search.