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Immigration -- In Re Sandoval: Deportation and the Exclusionary Rule

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Immigration—*In re Sandoval*: Deportation and the Exclusionary Rule

For more than fifty years, courts have generally assumed that evidence seized by immigration officers pursuant to an illegal search is subject to suppression in a deportation proceeding.[1] During this period, the federal courts as well as immigration judges and the Board of Immigration Appeals have often made reference to the applicability of the exclusionary rule, but, with one exception,[2] they have never had occasion to order the exclusion of illegally seized evidence.[3] In *In re Sandoval*,[4] the Board of Immigration Appeals, faced with a prima facie showing of an illegal search, thoroughly analyzed the history and appropriateness of applying the exclusionary rule to deportation proceedings. For the first time, evidence seized pursuant to an illegal search of an alien's home was held to be admissible in a deportation hearing.[5]

In *Sandoval*, Immigration and Naturalization Service agents conducted an illegal search of respondent Sandoval's apartment.[6] While still in her apartment, respondent was questioned by the agents and admitted being a Mexican citizen unlawfully in the United States. Once in custody, she signed an affidavit again admitting her illegal status;[7] this admission was incorporated in a standardized form[8] that was later used as evidence in her deportation hearing.[9] Relying on respon-

1. *See* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE §§ 5.2(a)-(c), 9.41 (1959); Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases*, 14 SAN DIEGO L. REV. 151, 163, 188 & n.117 (1976).

2. Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977); *see* notes 43 & 44 and accompanying text *infra*.

3. *See, e.g.*, Hoonsilapa v. INS, 575 F.2d 735 (9th Cir. 1978); Cordon de Ruano v. INS, 554 F.2d 944 (9th Cir. 1977); Aguirre v. INS, 553 F.2d 501 (5th Cir. 1977); Ho Chong Tsao v. INS, 538 F.2d 667 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977); *In re* Tsang, 14 I. & N. Dec. 294 (1973); *In re* Wong, 13 I. & N. Dec. 820 (1971). There have been cases, however, in which the courts have ordered, or have said they would order, the exclusion of evidence obtained as a result of an unlawful arrest from a deportation hearing. *See, e.g.*, Vlissidis v. Anadell, 262 F.2d 398, 400 (7th Cir. 1959).

4. No. 2725 (Bd. Immigration App., Aug. 20, 1979).

5. *Id.*, slip op. at 17.

6. At 6 a.m. on August 6, 1975, Immigration and Naturalization agents arrived at respondent Sandoval's apartment house, opened the door to her third floor apartment area, knocked after they had already entered, and then proceeded to conduct a warrantless search. According to the record, no consent was given for the search. *Id.* at 5.

7. Although the Board found the 68-page record unclear on this point, *id.*, respondent apparently admitted her unlawful status prior to being taken into custody and again after her arrival at an Immigration Service office. *See id.*

8. INS Form I-213 (Record of Deportable Alien).

9. *In re* Sandoval, No. 2725, slip op. at 5.

dent's verbal admission and the information contained in the standardized form, the immigration judge ordered respondent deported for entering the United States illegally.[10]

On appeal to the Board of Immigration Appeals, respondent argued that her admission of illegal alienage and her affidavit of admission included in the standardized form should be suppressed as evidence obtained in violation of her fourth amendment right to be free from unreasonable searches and seizures.[11] The Board, affirming the immigration judge's ruling, held that "[n]either legal [n]or policy considerations dictate the exclusion of unlawfully seized evidence from these proceedings."[12]

In its decision the Board first reaffirmed the generally accepted principle that deportation is in its nature a civil proceeding not a criminal one,[13] and noted that the United States Supreme Court has " 'never. . . applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state.' "[14] In response to respondent's argument that the rule should be extended to deportation proceedings, the Board pointed out that the exclusionary rule is " 'a judicially created remedy designed to safeguard Fourth Amendment rights generally

10. *Id.* at 3; *see* 8 U.S.C. § 1251(a)(2) (1976). The statute provides in pertinent part that any alien shall be deported who "entered the United States without inspection or at any time or place other than as designated by the Attorney General." Respondent was also later charged with failing to establish the date, manner and place of her entry, in violation of *id.* § 1361 (1976). *In re* Sandoval, No. 2725, slip op. at 3.

11. *In re* Sandoval, No. 2725, slip op. at 5-6. *See also* Wong Sun v. United States, 371 U.S. 471 (1963).

Respondent also claimed that her admission of illegal alienage made at the deportation hearing was elicited from her in violation of her fifth amendment privilege against self-incrimination, and that the deportation judge was biased. She claimed the judge acted with "flagrantly injudicious conduct" resulting in a denial of her due process rights. Slip op. at 18 n.24. The Board agreed that respondent's fifth amendment privilege against self-incrimination had been denied, but failed to find any evidence in the record of judicial misconduct resulting in a denial of a fundamentally fair hearing. *See id.* at 4 & n.1, 18.

12. *In re* Sandoval, No. 2725, slip op. at 17. Dissenting Board Member Appleman took issue with this conclusion by pointing out that "8 C.F.R. 287.3 bears indigenous seeds for motions to suppress for failure to follow correct arrest procedures." *Id.* at 29 (citing 8 C.F.R. § 287.3 (1979)). Section 287.3 provides that within 24 hours of a warrantless arrest, an alien must be presented to a district INS director for a determination whether there is prima facie evidence that the arrested alien is in the United States unlawfully. He also argued that

> [t]he published decisions [of the Board] are replete with discussion of the admissibility of evidence challenged on the ground of illegal arrest and search—discussion which would be surplusage if the Board were not applying and following the exclusionary rule. It is totally irrelevant that the rule has been followed and applied, sometimes expressly, and sometimes by implication. The rule has been followed. There is no question whatsoever that this is the case.

Id. at 30.

13. *Id.* at 10 & n.12.

14. *Id.* at 9 (quoting United States v. Janis, 428 U.S. 433, 447 (1976)).

through its deterrent effect,' " and that the need for the rule is " 'strongest where the Government's unlawful conduct would result in imposition of a *criminal* sanction on the victim of the search.' "[15] The Board reasoned that, if the rule is to be extended to a particular civil proceeding, the "likelihood of deterring misconduct by government officials [must outweigh] the societal costs imposed by rendering unavailable clearly probative and reliable evidence."[16]

Pursuing this rationale, the Board further reasoned that because Immigration and Naturalization Service agents are empowered to enforce laws that often carry both civil and criminal penalities,[17] applying the exclusionary rule would not have additional deterrent value on agents already aware that illegally seized evidence could not be used in subsequent criminal proceedings.[18] While conceding that excluding illegal evidence at a deportation proceeding "at first appearance" would have the same deterrent effect on law enforcement officials as excluding such evidence from a criminal proceeding, the Board found that the civil nature of deportation made the need for the rule less compelling than in criminal prosecutions.[19]

In addition, the Board noted that deportation is often based on an alien's present illegal "status," not his past actions or misconduct. If the rule were applicable and evidence such as the admissions in *Sandoval* were suppressed in deportation cases based on an alien's status, the government would, in many cases, only need to establish the alien's identity and alienage, and then the burden would shift to the alien to prove the time, place and manner of entry.[20] Therefore, said the Board, "[i]t is not clear that the application of the exclusionary rule would significantly impact on [an] officer's judgment because what is often the most damaging evidence resulting from an illegal search (the alien's 'body') cannot be suppressed."[21] Further, the Board found that

15. *Id.* at 8 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

16. *Id.* at 9.

17. *Id.* at 11; *see, e.g.*, 8 U.S.C. §§ 1252(d)-(e), 1282(c), 1304(e), 1306, 1324-1328, 1357(a)(4) (1976).

18. Slip op. at 13-14; *see* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (evidence suppressed); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (evidence admitted); United States v. Karathanos, 531 F.2d 26, 34-35 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976).

19. Slip op. at 12.

20. *Id.* at 12-13; *see* 8 U.S.C. § 1361 (1976).

21. Slip op. at 13. The "person" of the alien and his identity, even if considered evidence seized pursuant to an illegal search, have almost never been held subject to suppression or sufficient to invalidate a deportation proceeding. *See* Hoonsilapa v. INS, 575 F.2d 735, 738, *modified*, 586 F.2d 755 (9th Cir. 1978) (identifying papers discovered pursuant to an illegal search); Katris v. INS, 562 F.2d 866, 869 (2d Cir. 1977) (admission, but noting that there was no evidence to sup-

there were more effective alternatives to deterring agents' illegal conduct that would not result in the exclusion of reliable evidence from deportation hearings.[22]

Focusing on society's interest in having the information available and the potential costs of excluding it, the Board reasoned that to exclude probative evidence, and thereby possibly avoid deportation of an alien unlawfully in the United States, could result in sanctioning a continuous violation of the immigration laws. This, the Board found, differs significantly from excluding evidence in a criminal proceeding in which the crime is a past event, not an ongoing violation.[23] Also, to divert attention from the issue of the alien's immigration "status" to complicated fourth amendment questions would exact a high societal cost. According to the Board, application of the rule would create numerous problems of delay and administrative inconvenience because administrative judges have little expertise in complex legal analysis, administrative procedures are inadequate to handle suppression motions, hearings would be prolonged, and records on appeal would be long and confusing.[24]

The Immigration and Naturalization Service has long asserted, and the federal courts have upheld, the government's absolute authority to deport aliens who, by virture of their status, are unlawfully in the United States, or who, while legally in the United States, act in violation of federal immigration laws.[25] In short, an alien's stay in the

press); Avila-Gallegos v. INS, 525 F.2d 666, 667 (2d Cir. 1975) (same); Huerta-Cabrera v. INS, 466 F.2d 759, 761 n.5 (7th Cir. 1972) (body). *But see* Wong Chung Che v. INS, 565 F.2d 166, 168-69 (1st Cir. 1977) (no authority to make Crewman's Landing permit admissible if obtained by an illegal search).

22. Slip op. at 15-17. The Board suggested three possible, and in its opinion more effective, alternatives to deterring Immigration agent misconduct: (1) the alien may lodge a formal complaint against the agent with the latter's superior—most likely the District Director, an officer authorized to direct administration and enforce laws within his operational area, as provided in 8 C.F.R. § 100.2(j) (1979); (2) if the violation is based on an Immigration Service policy, the alien may challenge the policy in federal court by seeking an injunction or writ of mandamus to deter future misconduct; or (3) as in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the alien may file a civil action directly against the individual officer.

23. Slip op. at 15.

24. *Id.* at 14-15.

25. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893). Although Congress has plenary power in this area, the executive branch also has wide discretion in administering Immigration Acts. This discretion is well illustrated by President Carter's recent order requiring the Attorney General to identify Iranian students in the United States who are not maintaining their status as students and to commence deportation steps against them. The Attorney General subsequently enacted regulations requiring all Iranian students to report their status to the federal immigration service and stated that deportation proceedings would be commenced against all those who were in the United States illegally or who failed to report. 94 Fed. Reg. 65,727 (1979)

United States is not a right, "but is a matter of permission and tolerance"[26] subject to revocation by the government.

An alien charged with violating an immigration law does, however, have the right to a full and fair administrative hearing to determine his deportability.[27] During this civil proceeding, the alien has been granted by statute and judicial decree certain procedural rights and safeguards[28]; in addition, the hearing is subject to review by the federal courts to ensure that these "elementary standards of fairness and reasonableness" are met and that the alien has been afforded due process of law.[29] The Supreme Court has consistently warned that aliens are entitled to the protection of the Constitution and laws of the United States with respect to their rights of person and property, and that aliens are generally entitled to this protection in both criminal and civil proceedings against them.[30]

(to be codified in 8 C.F.R. § 214.5). Although a federal district court judge ordered an immediate halt to the order on the ground that Iranian students were denied equal protection of the law by being singled out on the basis of nationality from among all other foreign students in the United States, Navrenji v. Civiletti, 481 F. Supp. 1132 (D.D.C. 1979), on appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, holding that the order was reasonably related to the Attorney General's duties under the Immigration and Nationalization Act, 8 U.S.C. § 1251 (1976), and that these distinctions on the basis of national origin by the executive branch met the rational basis test. 48 U.S.L.W. 2434 (D.C. Cir. Dec. 27, 1979).

26. Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952).

27. 8 U.S.C. § 1252 (1976).

28. *Id.* § 1252(b)(1)-(4). These rights are as follows:

> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
>
> (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;
>
> (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government; and
>
> (4) no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.

Id. See, e.g., *In re* Sandoval, slip op. at 4 & n.1 (alien afforded protection of fifth amendment privilege against self-incrimination); Bridges v. Wixon, 326 U.S. 135, 151 n.6 (1945) (recorded statement made by alien and taken by Immigration officers must be made under oath and signed by alien).

29. Lloyd Sabaudo Societa v. Elting, 287 U.S. 329, 336 (1932); *see* Bridges v. Wixon 326 U.S. 135, 152 (1945) ("The [procedural] rules are designed to protect the interest of the alien and to afford him due process of law."); Cuevas-Ortega v. INS, 588 F.2d 1274, 1277 (9th Cir. 1979)("deportation proceedings must conform to traditional standards of fairness encompassed in due process"); Sonnenreich & Pinco, *The Inspector Knocks: Admistrative Inspection Warrants under an Expanded Fourth Amendment*, 24 Sw. L.J. 418, 422 n.28 (1970) (listing cases holding that aliens are entitled to due process rights at deportation hearings).

30. Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893); *cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 598-99 (1952) (Douglas & Black, JJ., dissenting) (list of Supreme Court cases recognizing various protections afforded an alien under the United States Constitution).

While it has generally been clear that an alien facing deportation is entitled to some of the protections of the fifth and fourteenth amendments,[31] it is also well established that he is *not* entitled to the full panoply of criminal procedural safeguards.[32] The question whether the fourth amendment's protection from unreasonable searches and seizures and its judicially created remedy, the exclusionary rule, is applicable in a deportation hearing has never been fully settled.[33]

In *United States v. Wong Quong Wong*,[34] the earliest case squarely confronting the issue, a federal district court held that personal letters contradicting respondent's claim of citizenship were seized pursuant to an illegal search and, therefore, could not be used as evidence in a deportation proceeding.[35] In *Ex Parte Jackson*,[36] similar reasoning was applied by another district court to suppress pamphlets advocating the overthrow of the government that had been seized pursuant to an illegal search.[37]

The first word from the United States Supreme Court, and certainly the most cited of all alien-related search and seizure cases, came in the 1923 case of *Bilokumsky v. Tod*.[38] In *Bilokumsky*, appellant was ordered deported for distributing materials advocating the overthrow of the government in violation of a federal statute.[39] Although the Court upheld the deportation on the separate ground that appellant was an alien in the United States without lawful admittance, the court assumed, without analysis, that "evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a

31. *See* authorities cited notes 28-30 *supra*. For a good, but somewhat dated, general discussion, see *Developments in the Law: Immigration and Nationality*, 66 HARV. L. REV. 643 (1953). For a good historical development of the constitutional rights of resident aliens, see Comment, *The Alien and the Constitution*, 20 U. CHI. L. REV. 547 (1953).

32. Abel v. United States, 362 U.S. 217, 237 (1960); United States v. Castro-Tirado, 407 F. Supp. 210, 212 (E.D.N.Y. 1976).

33. Wasserman, *Grounds and Procedures Relating to Deportation*, 13 SAN DIEGO L. REV. 125, 139-40 (1975). *See generally* Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 SAN DIEGO L. REV. 82 (1975).

34. 94 F. 832 (D. Vt. 1899).

35. *Id.* at 834.

36. 263 F. 110 (D. Mont. 1920).

37. The court in *Jackson* held that "deportation proceedings are unfair and invalid, [if] they are based upon evidence and procedure that violate the search and seizure and due process clauses of the Constitution." *Id.* at 112-13.

38. 263 U.S. 149 (1923) (Supreme Court affirmed district court order denying alien's petition for habeas corpus relief).

39. *Id.* at 150; *see* Act of Oct. 16, 1918, Pub. L. No. 65-221, §§ 1-2, 40 Stat. 1012, *as amended by* Act of June 5, 1920, Pub. L. No. 66-262, 41 Stat. 1008 (current version at 8 U.S.C. § 1251 (a)(6)(G) (1976)).

finding in deportation proceedings."[40]

It is this assumption that led many jurists and immigration scholars to believe that the question was well settled.[41] Over the course of the next fifty years, the Immigration Board and federal courts often paid deference to the *Bilokumsky* assumption in search and seizure situations, but no alien was able to establish that his fourth amendment rights had been violated.[42] Finally, in 1977, the United States Court of Appeals for the First Circuit, in *Wong Chung Che v. INS*,[43] found that appellant had made out a prima facie case of illegal search and seizure. On the premise that "illegally searched and seized evidence cannot be used in a deportation proceeding," the court remanded the case to the Board for an evidentiary hearing on appellant's motion to suppress.[44]

Faced with this scant history of assumed applicability of the exclusionary rule, the Board in *Sandoval* made the first thorough analysis of past law and of the appropriateness of applying the rule in deportation proceedings. Although the Board's analysis may make sense in a hearing to determine the lawful or unlawful "status" of an alien found in the United States, its logic and constitutionality is drawn into question if it is also intended to be applied to aliens legally in the United States whose misconduct subjects them to deportation. In order to differentiate between application of the rule in criminal as opposed to civil proceedings, the Board mentioned the difference between deportation cases that involve "solely the question of a respondent's *present status*, as distinguished from criminal proceedings where the issues generally relate to a defendant's *past actions*."[45] The Board's recognition of this distinction could provide a basis for distinguishing between "status" and "misconduct" deportation as well. Other courts, prior to *Sandoval*, have hinted at this distinction.[46]

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40. 263 U.S. at 155.

41. *See* authorities cited note 1 *supra*; Fragomen, *supra*, note 33, at 89-90.

42. *See* cases cited note 3 *supra*.

43. 565 F.2d 166 (1st Cir. 1977). In *Wong Chung Che*, alien crewmen, who had been permitted to stay in the United States for 29 days after arrival, were taken in handcuffs from a Chinese restaurant to their apartment by Immigration agents. The agents entered the apartment without consent or warrants, searched it and seized certain entry forms and documents found therein. All documents used as evidence in their deportation hearing, however, came from Immigration Service files except one landing permit giving the date of arrival in the United States, which was seized in the search and showed that the crewmen had overstayed their permit time.

44. *Id.* at 169. The court said that illegally seized evidence should be suppressed in a deportation proceeding because "we can think of no justification by necessity for encouraging illegal searches of premises. There is no doubt that, if the landing permit was obtained through an illegal search, its admission into evidence infected the deportation proceeding." *Id.*

45. Slip op. at 12.

46. *See, e.g.*, Smith v. Morris, 442 F. Supp. 712 (E.D. Pa. 1977). Although refusing to apply

The Board relied heavily on its rationale that a deportation hearing is civil in nature and, therefore, that the exclusionary rule is not applicable.[47] If applied to lawfully admitted aliens, however, this rationale fails to consider fully the reasoning in numerous cases in which the rule has been held applicable to civil proceedings.[48] In these cases, the courts have reasoned that the rule does have a potential deterrent effect when the penalty under the civil proceeding is quasi-criminal in character,[49] the particular enforcement agency itself can use the evidence in either a criminal or civil proceeding[50] or the illegally seized evidence is the only evidence available to establish a violation of civil law.[51]

In situations in which the civil penalty may be characterized as a quasi-criminal punishment, the courts have been more willing to apply the exclusionary rule. In *One 1958 Plymouth Sedan v. Pennsylvania*,[52] for example, the Supreme Court applied the exclusionary rule to bar illegally seized evidence in a civil forfeiture proceeding involving the violation of a Pennsylvania liquor control statute.[53] The Court reasoned that the rule should apply because the forfeiture was essentially an alternative punishment to available criminal sanctions.[54] The

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the exclusionary rule to a deportation proceeding in which the issue was the lawfulness of the alien's status, the court indicated that the distinction between "status" and "misconduct" could make a difference in the applicability of the rule:

> [I]t would nevertheless seem that the exclusionary rule serves no useful purpose in any deportation proceeding in which the decision does not depend upon proof of specific events, but merely on proof of status. (The possible applicability of the exclusionary rule in cases where past conduct is crucial—*e.g.*, immoral conduct, criminal conviction, falsification—need not now be considered.)

Id. at 714.

47. Slip op. at 10, 12-13.

48. *See* cases cited United States v. Janis, 428 U.S. 433, 447 n.17, 455-56 n.30. In Pizzarello v. United States, 408 F.2d 579, 585 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969), the court noted:

> Widespread uncertainty is prevalent on the issue of whether evidence, inadmissible in a criminal case, can be used for other purposes, and the Supreme Court has yet to resolve the problem . . . . [But] [t]he number of [civil] cases where the exclusionary rule has been applied is far greater than those where it has not.

Pizzarello v. United States, 408 F.2d 579, 585 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).

49. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965) (forfeiture proceeding characterized as "quasi-criminal" and thus illegal evidence suppressed). *See also* Boyd v. United States, 116 U.S. 616, 634 (1886).

50. *See* United States v. Janis, 428 U.S. 433 (1976); Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969). The *Janis* Court referred to *Pizzarello* as one of "[t]he seminal cases that apply the exclusionary rule to a civil proceeding." 428 U.S. at 456 n.32.

51. Pizzarello v. United States, 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).

52. 380 U.S. 693 (1965).

53. *Id.* at 700-01; *see* PA. STAT. ANN. tit. 47, § 6-601 (Purdon Cum. Supp. 1964).

54. 380 U.S. at 701. The dissent in *Sandoval* made a similar argument:

"Where as here there is a correlative civil action open to the Government which imposes

Court found that "a forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against the law."[55] Likewise, when a lawfully admitted alien is ordered deported for misconduct, the object of the deportation is to penalize the alien for violating the law.

Many courts have noted the harsh and penal-like nature of a deportation order.[56] The Supreme Court has recognized its severe effect on lawfully admitted aliens, pointing out that "[i]t may result . . . in loss of both property and life; or of all that makes life worth living,"[57] and that it "is a drastic measure and at times the equivalent of banishment and exile."[58] Further, the Court has said that for the lawfully admitted alien "[a] deportation hearing involves issues basic to human liberty and happiness . . ., perhaps to life itself."[59] Underlying these statements by the Supreme Court seems to be the recognition that, for the alien unlawfully in the United States, deportation is often only a return to the home and family in the country from which he has but recently come, but for the resident alien who violates certain laws, deportation constitutes banishment from what often is, and in many cases has been for years, his home and all that he cares about.[60] Although

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a penalty . . . commensurate with the criminal sanctions to which an accused, victimized by an illegal search would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum."

In re Sandoval, slip op. at 31 (quoting United States v. Blank, 261 F. Supp. 180, 182 (N.D. Ohio 1966)).

55. 380 U.S. at 700. The Court went on to say:

It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludible, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible. . . . [T]he forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution.

Id. at 701.

56. One district court went so far as to hold that deportation in certain circumstances can be cruel and unusual punishment, but the decision was overruled without opinion by the United States Court of Appeals for the Seventh Circuit. Lieggi v. INS, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd*, 529 F.2d 530 (7th Cir.), *cert. denied*, 429 U.S. 839 (1976), *discussed in* Note, *Deportation of an Alien: Lieggi v. United States Immigration and Naturalization Service*, 13 SAN DIEGO L. REV. 454 (1975). *But see* Circella v. Sahli, 216 F.2d 33 (7th Cir. 1954), *cert. denied*, 348 U.S. 964 (1955)(deportation not cruel and unusual punishment).

57. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

58. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citing Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).

59. Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

60. Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 310 (1956). Maslow proposes a thorough and, in many ways, radical restructuring of United States immigration law and policy. Gordon and Rosenfield, in their treatise *Immigration Law and Procedure*, also make the point that

[t]he theory of the law is that this [deportation] is simply a protective measure to rid the

both aliens may be deported for violating immigration laws, their violations differ in kind as well as degree. Because deportation in misconduct situations has been viewed widely as at least as harsh as, and often more severe than, an available criminal punishment[61] and because, absent application of the exclusionary rule, immigration agents could violate a resident alien's fourth amendment rights and still effectively punish him by deportation, the Board's decision in *Sandoval* should be limited to status violations.

In *United States v. Janis*,[62] the Supreme Court's most recent discussion of the use of the exclusionary rule in civil proceedings, the Court implied that the application of the exclusionary rule in quasi-criminal situations had been narrowed to "cases in which the officer committing the unconstitutional search or seizure was an agent of the sovereign that sought to use the evidence . . . [as opposed to] cases . . . where the officer has no responsibility or duty to, or agreement with, the sovereign seeking to use the evidence."[63] In *Janis*, defendant was arrested by local police for bookmaking in violation of state law. The police were acting pursuant to a search warrant that was subsequently ruled invalid, resulting in the exclusion of all evidence seized pursuant to the search from the criminal proceeding. Shortly after defendant's arrest, however, the police contacted Internal Revenue Service agents, who used the illegally seized evidence to calculate back taxes owed by defendant on his gambling operation.[64] In denying a motion to suppress the evidence in a civil tax assessment hearing, the Supreme Court reasoned that because "[t]he admission of evidence in a federal civil proceeding is simply not important enough to state criminal law enforcement officers to encourage them to violate Fourth Amendment rights,"[65] the exclusion of the evidence would have no additional deterrent value and, therefore, should be admissible.

United States of aliens deemed undesirable, and that in any event the deportee is merely being sent back to his country of origin and allegiance.

This hypothesis is sound enough if the deportee has recently arrived in our midst, and is being ejected for violating the border or the conditions of his admission. But its force is weakened when the alien has established roots in this country for many years. . . . Although the deportee is not being imprisoned, the consequences to him sometimes can be far more devastating than criminal punishment.

C. GORDON & H. ROSENFIELD, *supra* note 1, § 4.1(c), at 397. The dissent in *Sandoval* makes this same point with equal force. Slip op. at 32 (Appleman, Board Member, dissenting in part and concurring in part).

61. *See* notes 56-59 and accompanying text *supra*.

62. 428 U.S. 433 (1976).

63. *Id.* at 455.

64. *Id.* at 437.

65. *Id.* at 458 n.35.

Because immigration laws often carry criminal as well as civil (deportation) sanctions for the same offense, Immigration and Naturalization Service agents are in a position to pursue actions in both proceedings.[66] By statute, an agent is empowered to "make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony."[67] Many of these felonies also subject the alien to deportation.[68] In addition, an alien can often be deported on proof of a criminal violation in a deportation proceeding even though he has not been or is not actually criminally prosecuted.[69] In a *Sandoval* status situation, immigration agents are generally only concerned with finding illegal aliens and seeing that they are deported, not with potential criminal prosecutions. In a misconduct situation, however, agents are interested in seeing that the alien is first criminally convicted so that, based on that conviction, the alien can also be deported in a companion civil proceeding.[70] The immigration agent, then, is not only empowered to enforce but also has a direct and primary interest in enforcing both criminal and civil violations of the immigration laws.[71] Thus, although the Board used *Janis* to help justify its holding in *Sandoval*, use of that precedent is proper only if the Board's decision is limited to status violations like the one in *Sandoval*.

The courts have also recognized the applicability of the exclusionary rule when proof of the civil violation depends solely on the illegally seized evidence.[72] In *Pizzarello v. United States*,[73] a federal district court applied the exclusionary rule in a tax assessment proceeding because evidence upon which the tax was assessed had been illegally seized by Internal Revenue Service agents. The evidence was "in substantial part, if not *in toto*"[74] the information used by the Service to discover the amount of taxes owed. Affirming the decision of the district court, the United States Court of Appeals for the Second Circuit held:

66. *See* text accompanying note 17 *supra*.
67. 8 U.S.C. § 1357(a)(4) (1976).
68. *See id.* § 1357.
69. *See, e.g., id.* § 1251(11)-(12).
70. *See id.* § 1251.
71. *See id.* § 1357; *id.* § 1251(a)(4), (11).
72. *See* text accompanying note 51 *supra*.
73. 408 F.2d 579 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969).
74. *Id.* at 585.

> The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation . . . it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment is invalid.[75]

By comparison, in a *Sandoval* status situation, all that need be shown is the identity and alienage of the alien, which can often be established at the deportation proceeding independently of the illegally seized evidence. Because an illegal arrest does not invalidate a deportation proceeding nor permit the suppression of an alien's "person," and because an alien may be compelled to divulge his identity and alienage, it follows that excluding evidence obtained in an illegal search would not affect the outcome of a hearing to determine whether the alien's presence in the United States is lawful.[76]

When based on misconduct of a lawfully admitted alien, however, the deportation proceeding falls more nearly into a *Pizzarello*-type situation in which the courts have applied the exclusionary rule to civil proceedings. The illegally obtained evidence often may be the only available evidence to support the deportation order, and, absent the evidence, a deportable violation could not be independently established. If, for example, an immigration agent illegally seized evidence of an alien's connection with prostitution[77] or of an alien's illegal use of addictive, narcotic drugs,[78] the evidence would be subject to suppression in a criminal proceeding, but, absent application of the exclusionary rule, would not be excluded in a deportation hearing for proof of the same offense. Because immigration officers are empowered to enforce both criminal and civil laws concurrently, this type of situation could frequently occur. Although agents know that evidence seized in violation of fourth amendment rights will be suppressed in criminal prosecutions, after *Sandoval* they may think that the evidence can still be used in the potentially more severe deportation proceeding. Unless

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75. *Id* at 586.

76. *See* text accompanying notes 20-21 *supra*. As the Board in *Sandoval* pointed out, "once an alien's identity is learned, the service can entirely avoid triggering the exclusionary rule in all cases where documents lawfully in the Service's possession evidence unlawful presence." Slip op. at 13.

77. 8 U.S.C. § 1251(a)(12) (1976).

78. *Id.* § 1251(a)(11).

Sandoval is limited to hearings to determine status violations and not applied to misconduct violations of lawfully admitted aliens, it will lessen, if not completely undermine, an agent's pre-*Sandoval* incentive not to violate fourth amendment rights.

The Board's decision in *Sandoval* can be viewed as consistent with case law permitting the admission of illegally obtained evidence in civil proceedings only if its application is limited to status violations like the one before the Board in that case. If this is not done, and the exclusionary rule is not applied in deportation proceedings generally, the conduct of immigration agents investigating the misconduct of aliens lawfully admitted to the United States will likely go unchecked. To sanction the use of illegally seized evidence in a deportation proceeding when the same evidence cannot be used in a criminal prosecution is "[t]o visit upon [the lawfully admitted alien] the additional [and more severe] penalty of deportation [which] is unworthy of a free and powerful country."[79]

PAUL BALDASARE, JR.

79. Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 323 (1956).