PRACTICE ADVISORY[1]
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MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: CRACKING DOWN ON FOURTH AMENDMENT VIOLATIONS BY STATE AND LOCAL LAW ENFORCEMENT OFFICERS

By The Legal Action Center[2]

Introduction

Increasingly, state and local law enforcement officers are assisting the federal government in immigration enforcement, whether through formal agreements under Section 287(g) of the Immigration and Nationality Act; through participation in Secure Communities and the Criminal Alien Program; through state laws such as those enacted in Arizona, Alabama, and elsewhere; or through policies promoted by local mayors, sheriffs, and police chiefs.

This practice advisory, which supplements a prior LAC practice advisory on *Motions to Suppress in Removal Proceedings: A General Overview*, deals primarily with Fourth Amendment limitations on state and local immigration enforcement efforts and also briefly addresses Fifth Amendment violations that may arise from the same types of encounters with state or local officers. It also discusses some of the legal issues that may arise when noncitizens in removal proceedings move to suppress evidence obtained as a result of a constitutional violation by state or local law enforcement officers.

To briefly summarize the main themes of this practice advisory, the Supreme Court established in *Arizona v. United States* that state and local officers acting outside of a Section 287(g) agreement[3] cannot carry out stops or arrests based upon a suspicion of a civil immigration violation. At the same time, however, state and local officers may make inquiries concerning the

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[2] Matthew Price, Jenner and Block LLP, and Melissa Crow were the principal authors of this practice advisory. The authors thank Rex Chen, Kate Desormeau, Mary Kenney, Michelle Mendez, Robert Pauw, Maureen Sweeney, and Michael Wishnie for their valuable input, and Kristin Macleod-Ball for her assistance with cite-checking. Questions regarding this practice advisory should be directed to clearinghouse@immcouncil.org.

[3] Section 287(g) of the Immigration and Nationality Act authorizes the Attorney General to enter agreements with states and political subdivisions that permit specific state or local officers to perform functions of federal immigration officers. State or local officers acting under such an agreement must receive training concerning the immigration laws and are subject to federal supervision. *See* 8 U.S.C. § 1357(g)(1)-(8).

immigration status of individuals they stop for a lawful reason (for example, a traffic violation), so long as such inquiries do not prolong the stop. The precise boundaries of permissible conduct have not yet been defined in the case law; this area of law is very much still in flux.

When state and local law enforcement officers have violated the Fourth Amendment, a noncitizen may move to suppress evidence obtained through that violation. If successful, such a motion would prevent the evidence from being used in removal proceedings against the noncitizen and, in some cases, may result in the termination of proceedings. In *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), the Supreme Court limited the exclusion of evidence in immigration proceedings to "egregious" or "widespread" violations of the Fourth Amendment by federal immigration officers. *Id.* at 1050-51. However, as discussed herein, there are compelling arguments that evidence obtained through any constitutional violation by state or local officers should be suppressed in removal proceedings and that the limitations in *Lopez-Mendoza* should be reconsidered.

One significant issue that may arise in litigating a motion to suppress is known as the "silver platter" doctrine.[4] Under that doctrine, federal authorities, in federal proceedings, may use evidence obtained as a result of a constitutional violation by state or local officers – so long as federal officers had no involvement in the constitutional violation. In 1960, the Supreme Court overturned the silver platter doctrine as it applied to criminal cases; thus, the exclusionary rule – that is, the rule that evidence obtained through a constitutional violation must be excluded – now applies in federal criminal proceedings regardless of whether federal, state, or local officers committed the constitutional violation.[5] However, the Supreme Court has continued to apply the silver platter doctrine in the context of certain federal civil proceedings. Whether the silver platter doctrine applies in immigration removal proceedings has not yet been decided. This practice advisory outlines arguments in favor of applying the exclusionary rule in civil immigration proceedings in cases in which state or local officers were responsible for the Fourth Amendment violation.

State and local law enforcement officers operating under a Section 287(g) agreement arguably are subject to the same regulatory requirements as federal immigration officers, and a violation of those requirements should result in termination of the proceedings in some cases.[6] When state and local law enforcement officers are authorized by statute to carry out specific types of immigration enforcement, they are subject to statutory restrictions under federal law—including but not limited to INA § 287(g).[7] The authors are not aware of any case law supporting a motion

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[4] The doctrine concerns evidence obtained by state authorities through a constitutional violation and handed to federal authorities "on a silver platter."

[5] *Elkins v. United States*, 364 U.S. 206 (1960).

[6] *See Matter of Garcia-Flores*, 17 I&N Dec. 325, 328-29 (BIA 1980) (holding that evidence obtained in violation of federal regulations could be suppressed if the violated regulation was promulgated to serve "a purpose of benefit to the alien," and the violation "prejudiced interests of the alien which were protected by the regulation" (quoting *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979))). For a discussion of motions to suppress in removal proceedings based on regulatory violations, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 12-13.

[7] *See, e.g.*, 8 U.S.C. §§ 1103(a)(10), 1252c, 1324(c). For more information regarding motions to suppress based on statutory violations, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 12.

to suppress based exclusively upon such a statutory violation. Finally, state and local law enforcement officers may also be subject to restraints imposed by state constitutional law, state statutes, or departmental policies. In cases where the search and seizure protections offered by these state-law restrictions are more stringent than those under the Fourth Amendment, a violation ordinarily will not support a motion to suppress in removal proceedings.[8] However, if relevant state standards are consistent with the Fourth Amendment, evidence of violations can often be used to bolster arguments in favor of suppression.

Part I: Establishing a Fourth Amendment Violation by State or Local Officers

Q: May state or local law enforcement officers conduct a civil immigration arrest?

A: Generally, no. In *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court made clear that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent."[9] However, state or local law enforcement officers are permitted to conduct a civil immigration arrest when they are acting under a Section 287(g) agreement and in other "specific, limited circumstances" authorized by Congress.[10]

Q: May local law enforcement officers arrest an individual for violating a criminal immigration provision, such as illegal reentry?

A: In general, the authority of state officers to make arrests for federal crimes is an issue of state law.[11] Applying that principle, some courts have found state officers to be empowered to make arrests for at least some federal immigration crimes.[12] However, there is a good argument that state and local officials should not generally be permitted to make arrests for immigration crimes. In *Arizona*, the Supreme Court emphasized that "[f]ederal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders."[13] Assuming that federal immigration crimes should be viewed as part of that comprehensive scheme of federal regulation, only federal officers should be permitted to make arrests for those

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[8] The Supreme Court has held that "when States go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same." *Virginia v. Moore*, 553 U.S. 164, 173 (2008).

[9] 132 S. Ct. at 2505 (internal citation omitted); *see also Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012) (holding that suspicion of unlawful presence alone is an insufficient basis for a local police officer to prolong a stop); *Santos v. Frederick County Board of Commissioners*, __ F.3d __, 2013 U.S. App. LEXIS 16335, *26 (4th Cir. Aug. 17, 2013) (holding that "absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law").

[10] *Arizona*, 132 S.Ct. at 2507. *See also* 8 U.S.C. §§ 1357(g)(1); 1103(a)(10), 1252c, 1324(c). Under all of these arrangements, state and local law enforcement officers may perform civil immigration arrests only in accordance with a "request, approval or other instruction from the Federal Government." 132 S.Ct. at 2507.

[11] *United States v. Di Re*, 332 U.S. 581, 589 (1948).

[12] *See e.g.*, *Gonzales v. Peoria*, 722 F.2d 468, 475–476 (9th Cir. 1983), *overruled on other grounds*, *Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1298-1300 (10th Cir. 1999), *cert. denied*, 528 U.S. 913 (1999).

[13] *Arizona*, 132 S. Ct. at 2502.

crimes, except when Congress has expressly directed otherwise. For example, in 8 U.S.C. § 1252c, Congress specifically authorized state and local officers to arrest and detain noncitizens unlawfully present in the United States who had previously been convicted of a felony in the United States and had been deported from, or had left, the United States following that conviction. However, state and local officers may only arrest such an individual "*after* [they] obtain appropriate confirmation from [federal officials] of the status of such individual and only for such period of time as may be required for [federal officers] to take the individual into Federal custody for purposes of deporting or removing the alien from the United States."[14] Given that Congress has expressly authorized state and local arrest authority with respect to only certain types of immigration crimes, it is a fair inference that state and local officers are not permitted to make arrests or detentions for other federal immigration crimes.[15] That is particularly so, given that federal immigration crimes are themselves often dependent upon complex determinations under civil immigration law. In *Arizona*, the Supreme Court appeared to leave open the question of whether the comprehensive federal scheme for regulating immigration would preempt (that is, preclude) state or local enforcement of criminal immigration law, just as it does state or local enforcement of civil immigration law.[16]

Further, even if state or local law enforcement officers did have the power to make an arrest for a criminal immigration violation, unlawful presence alone would not justify such an arrest. The Supreme Court made clear in *Arizona* that "it is not a crime for a removable alien to remain present in the United States," and the Ninth Circuit has subsequently held that "because mere unauthorized presence is not a criminal matter, suspicion of unauthorized presence alone does not give rise to an inference" of any criminal activity, such as illegal reentry.[17]

Q: May local law enforcement officers rely on a "pretext" to pull over a vehicle in order to ascertain the immigration status of one or more of its occupants?

A: There have been reports from a number of cities of police pulling over vehicles that appear to contain Latino or foreign-born individuals in order to check their immigration status. Local police may identify a reason for the stop – for example, a violation of a traffic law – that appears to be merely a pretext. When an apparently pretextual stop results in removal proceedings, the question is whether the government can introduce evidence (for example, admissions of alienage recorded on an I-213 form) obtained as a direct result of the stop.

The Supreme Court held in *Whren v. United States*, 517 U.S. 806 (1996), that so long as the police have an objectively reasonable basis for conducting a stop or an arrest, the stop or arrest is permissible under the Fourth Amendment. The officer's subjective

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[14] 8 U.S.C. § 1252c(a).

[15] *See* Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1093 (2004) (discussing this argument and relevant legislative history); *but see Vasquez–Alvarez,* 176 F.3d at 1297-1300 (rejecting this argument).

[16] *Id*. at 2509.

[17] *Melendres v. Arpaio*, 695 F.3d 990, 1001 (9th Cir. 2012).

motivations are not relevant to the constitutional analysis.[18] Thus, so long as the police officer can identify a lawful basis for the stop, the stop is constitutionally permissible.

However, in the same year that the Court decided *Whren*, it also reaffirmed that the administration of a criminal law on the basis of race or other impermissible classification may violate the Constitution.[19] Additionally, to the extent that the police lack an objective basis for the stop, and therefore violate the Fourth Amendment in making the stop, the subjective motivations of the police in conducting the stop may be relevant in determining whether the Fourth Amendment violation is "egregious," warranting suppression under the standard of *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).[20] As several Circuits have held, an illegal stop carried out on the basis of race or ethnicity is an "egregious" constitutional violation.[21]

Q: When an individual is stopped for a lawful reason, may local law enforcement officers ask for identification or inquire as to the individual's immigration status?

A: Yes, so long as such questioning does not prolong the stop. Mere police questioning concerning identity or immigration status does not by itself constitute a seizure under the Fourth Amendment.[22] However, the law also provides that an officer may not *prolong the duration of a stop* in order to make inquiries into matters unrelated to the justification for the stop, unless there is probable cause of separate criminal activity.[23] Prolonging the stop in essence counts as an "extra seizure" that itself needs to be supported by probable cause or reasonable suspicion of criminal activity. Thus, when an officer prolongs a stop by questioning an individual concerning his or her immigration status, there may be a Fourth Amendment violation, since mere unlawful presence is not a crime and does not provide probable cause to justify prolonging a stop.[24]

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[18] *Whren*, at 813.

[19] *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

[20] For more information on "egregious" Fourth Amendment violations, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 8-10.

[21] *See, e.g.*, *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006); *Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010); *Gonzalez-Rivera v. INS,* 22 F.3d 1441, 1449-50 (9th Cir. 1994); *Ghysels-Reals v. U.S. Att'y Gen.*, 418 Fed. App'x 894, 895-96 (11th Cir. 2011).

[22] *INS v. Delgado*, 466 U.S. 210 (1984). For a general discussion of applicable Fourth Amendment law on searches and seizures, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 13-23.

[23] *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *see also United States v. Digiovanni*, 650 F.3d 498, 509 (4th Cir. 2011) (finding Fourth Amendment violation when, following ordinary traffic stop, officer "failed to diligently pursue the purposes of the stop and embarked on a sustained course of investigation into the presence of drugs in the car," which prolonged the stop); *United States v. Everett*, 601 F.3d 484, 495 (6th Cir. 2010) ("if the totality of the circumstances, viewed objectively, establishes that the officer, without reasonable suspicion, definitively abandoned the prosecution of the traffic stop and embarked on another sustained course of investigation, this would surely bespeak a lack of diligence"); *United States v. Peralez*, 526 F.3d 1115, 1121 (8th Cir. 2008) (finding Fourth Amendment violation when police officer engaged in a "blended process" of conducting a routine traffic stop and a drug investigation, where topics concerning the drug investigation more than doubled the length of the stop"); *United States v. Mendez*, 476 F.3d 1077, 1080 (9th Cir. 2007) (police may not prolong stop through questioning unrelated to purpose of stop); *United States v. Griffin*, 696 F.3d 1354, 1362 (11th Cir. 2012) (Fourth Amendment implicated when police questioning unrelated to the purpose of a stop measurably prolongs the stop).

[24] *Muehler v. Mena*, 544 U.S. 93, 101 (2005).

Q: When an individual is stopped for a lawful reason, may state or local law enforcement officers contact federal agents to determine the person's immigration status?

A: Yes, under the Fourth Amendment, so long as the inquiry does not prolong the detention. Under 8 U.S.C. § 1357(g)(10), state or local officers are authorized to communicate with federal immigration officials regarding a person's immigration status, even in the absence of any Section 287(g) agreement.[25] However, in *United States v. Arizona*, the Supreme Court also made clear that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns,"[26] and cited cases standing for the proposition that a stop may not be prolonged for reasons unrelated to suspicion of criminal activity.[27] For example, if local police continue to detain a vehicle's passengers in order to verify the passengers' immigration status with ICE, even when the traffic stop has otherwise been completed, the prolongation of the stop would violate the Fourth Amendment because it would not be justified by probable cause or reasonable suspicion of any criminal violation. Likewise, state or local officers may not unnecessarily prolong a traffic stop, thereby delaying its completion until after an immigration investigation can be conducted.

Q: May state or local law enforcement officers prolong what began as a lawful traffic stop pending the arrival of a federal immigration officer or at the request of a federal immigration officer?

A: The law on this issue is unsettled. On the one hand, it is clear that a state or local officer may not *unilaterally* detain an individual upon suspicion that the individual has committed a civil immigration violation. A state or local officer also may not unilaterally prolong a stop in order to investigate an individual's immigration status. On the other hand, however, Congress has stated that state officers may "cooperate" with federal officials in "the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[28] The precise scope of permissible cooperation has not yet been determined. Examples of clearly permissible cooperation "include situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities."[29]

Whether permissible cooperation extends beyond these situations to one, for example, in which federal authorities request state or local officers to detain an individual pending their arrival on the scene, has not been decided. Thus, in *Arizona*, the Supreme Court stated, "There may be some ambiguity as to what constitutes cooperation under the

[25] In some jurisdictions, state or local rules may limit communication with federal immigration officials. *See, e.g.*, New York City Executive Order No. 41 (2003); Los Angeles Police Dep't Special Order No. 40 (1979).
[26] 132 S. Ct. at 2509.
[27] *Id.*
[28] 8 U.S.C. § 1357(g)(10)(B).
[29] *Arizona*, 132 S. Ct. at 2507.

federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."[30] The Supreme Court did not address whether a request, approval, or other instruction from federal officials to detain a noncitizen could justify a state or local officer in doing so.[31]

Q: Under what circumstances may an encounter with state or local law enforcement officers give rise to a Fifth Amendment violation that might affect the admissibility of evidence in immigration proceedings?

A: Both federal courts and the Board of Immigration Appeals have held that involuntary admissions of alienage should be excluded on the basis that they violate the Due Process Clause of the Fifth Amendment.[32] To establish that an admission was made involuntarily, a respondent must demonstrate that it was obtained through duress, coercion or improper action, including but not limited to "physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference" with an individual's attempt to exercise his or her rights.[33] The authors are not aware of any decisions where an admission of alienage during an encounter with state or local officers was suppressed on Fifth Amendment grounds. However, numerous courts have analyzed the voluntariness of such admissions, implicitly confirming that that the exclusionary rule would apply in the event of duress, coercion or other improper action.[34]

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[30] *Id.*

[31] ICE routinely makes such requests when it issues a detainer to state or local authorities to hold an individual for up to 48 hours. 8 CFR § 287.7. The situations under which a detainer may raise Fourth Amendment and statutory questions, and whether a detainer can be distinguished as a constitutional matter from a detention by state or local officials at the instruction of ICE or CBP following a traffic stop, have not been fully litigated. *See Jimenez-Moreno v. Napolitano*, No. 11-5452 (N.D. Ill. *filed* Aug. 11, 2011), Amended Complaint *available at* http://legalactioncenter.org/sites/default/files/Jimenez%20Moreno%20v%20Napolitano--Amended%20Complaint.pdf; *see also Brizuela v. Feliciano*, No. 12-0226 (D. Conn., *Settlement Agreement and Stipulation of Dismissal approved* Mar. 1, 2013, Petition for Writ of Habeas Corpus and Complaint *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Brizuela%20v.%20Feliciano%20Complaint.pdf. *See also* Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States,* 46 LOYOLA L.A. L. REV. __ (forthcoming, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524.

[32] *See Navia-Duran v. INS*, 568 F.2d 803, 810-11 (1st Cir. 1977); *Kandamar v. Gonzales*, 464 F.3d 65, 71 (1st Cir. 2006); *Singh v. Mukasey*, 553 F.3d 207, 215 (2d Cir. 2009); *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990); *Choy v. Barber*, 279 F.2d 642, 646-47 (9th Cir. 1960); *Matter of Garcia*, 17 I&N Dec. 319, 321 (BIA 1980).

[33] *See Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For a more detailed discussion of the circumstances that might warrant suppression of evidence on Fifth Amendment grounds, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 24-27.

[34] *See, e.g., Ghysels-Reals v. U.S. Atty. Gen.* 418 Fed. Appx. 894, 896 (11th Cir. 2011) (unpublished) (noting that respondent, who was detained by the police during a routine traffic stop, had not presented evidence to show that information obtained "was false or had resulted from coercion or duress"); *Matter of Angel Oswaldo Sinchi-Barros*, A094-072-050, 2011 WL 6706339, *2 (BIA Nov. 29, 2011) (unpublished) (noting lack of evidence that Minneapolis police had extracted statements relating to alienage by "threats, violence, or express or implied promises sufficient to overbear [the respondent's] will and critically impair his capacity for self-determination" (internal citations and quotations omitted)); *Angel Israel Ibarra Uraga*, A200-021-409, 2012 WL 3911870 (BIA Aug. 30, 2012) (unpublished) (noting lack of evidence that the respondent's statement to a Pennsylvania State Trooper had resulted from duress, coercion, or intimidation); *cf. Elenilson Alexander Gutierrez-Landaverde*, A087-686-663, 2013 WL 2613046 (BIA May 30, 2013) (unpublished) (noting that the respondent, who was interrogated by a sheriff's office

In some cases, a Fourth Amendment violation by state or local officers may taint any statements made by the respondent following a subsequent transfer to ICE.[35] The critical issue is whether the statements resulted from "exploitation of th[e prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[36] Relevant factors include the length of time since the illegal seizure, the presence of intervening circumstances, and the nature and purpose of the underlying misconduct.[37] If an analysis of these factors reveals that the evidence could not have been obtained but for the illegal conduct, it may be subject to suppression as "fruit of the poisonous tree."[38]

Part II: Application of the Exclusionary Rule to Constitutional Violations by State or Local Law Enforcement Officers

Q: Does the exclusionary rule generally apply in immigration proceedings when state or local officers have obtained evidence in violation of a respondent's constitutional rights?

A: Historically, under the "silver platter" doctrine, a federal court could admit evidence that had been illegally obtained by state officers. In *Elkins v. United States*, 364 U.S. 206 (1960), the Supreme Court overturned that doctrine in criminal cases.[39] However, one Court of Appeals has suggested in dicta that the silver platter doctrine continues to apply in immigration removal proceedings – that is, evidence is admissible in such proceedings even when obtained by a state or local officer in violation of the Fourth Amendment.[40]

The court reached that conclusion based upon the Supreme Court's decision in *United States v. Janis*, 428 U.S. 433 (1976), a case involving a federal civil tax proceeding. In *Janis*, the Supreme Court refused to suppress evidence unlawfully obtained by a state law enforcement officer because it concluded that there would be a minimal deterrent effect from excluding such evidence in a federal civil tax proceeding. According to the Supreme Court, a state law enforcement officer had little interest in the outcome of a federal civil tax proceeding. The state officer therefore was not likely to be motivated to obtain evidence to be used in a federal civil tax proceeding, and consequently, the prospect that evidence might be excluded from a federal civil tax proceeding was unlikely to deter the state officer from unconstitutional conduct. In those circumstances,

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operating under a 287(g) agreement, had not established that assertions made in Form I-213 were untrue or obtained by coercion, duress or intimidation).

[35] For an example of a decision acknowledging the validity of this argument, see *Matter of* [Redacted], Order of Holt, J., Aug. 2011, at 8-9, *available at* http://legalactioncenter.org/sites/default/files/Elliott%20Decision.pdf**.**

[36] *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (internal quotation omitted).

[37] *United States v. Gross*, 662 F.3d 393, 401-02 (6th Cir. 2011).

[38] *Wong Sun*, 371 U.S. at 487-88; *see also Santos v. Frederick County Board of Commissioners*, __ F.3d __, 2013 U.S. App. LEXIS 16335, *28-*29 (4th Cir. Aug. 17, 2013) (noting that an ICE detainer does not "cleanse" an unlawful seizure by local law enforcement officials). For a discussion of the fruit-of-the-poisonous-tree doctrine, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 4.

[39] *Elkins*, 364 U.S. at 223 (holding that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection ....").

[40] *See Lopez-Gabriel v. Holder*, 653 F.3d 683, 686 (8th Cir. 2011).

the Supreme Court reasoned, the exclusionary rule was inappropriate: it would impose social costs (the exclusion of probative evidence from a civil proceeding) without bringing out appreciable deterrence benefits (because state officers were not likely to regulate their conduct based upon what might happen in a federal civil tax proceeding).

There are significant differences between the tax enforcement context and the immigration enforcement context that undercut the relevance of *Janis* to immigration removal proceedings. Specifically, *Janis* pointed to three reasons for applying the silver platter doctrine and refusing to suppress evidence that had been illegally obtained by state law enforcement officers.

First, in *Janis*, a state court had already suppressed the evidence from a state criminal tax proceeding. The Court reasoned that there would be limited additional deterrent benefit from suppressing the evidence in the federal civil proceeding as well. In the immigration context, however, states may not impose parallel penalties for federal immigration offenses, whether criminal or civil.[41] Thus, the only proceeding in which immigration-related evidence can be used is a federal proceeding.

Second, in *Janis*, the Court assumed that state officers did not care very much about the outcome of federal civil tax proceedings, and therefore would not be prone to committing constitutional violations in order to obtain evidence for those proceedings. While that may be true in the context of tax enforcement, it is not true of immigration enforcement. In recent years, numerous states, and even some localities, have taken a strong interest in assisting the federal government with immigration enforcement.[42] State and local officers – at least in those locales – are therefore likely to be motivated to obtain evidence that could be used in an immigration removal proceeding.[43] If so, then applying the exclusionary rule in civil immigration proceedings could have a significant deterrent effect on unconstitutional conduct.

Third, the Court stated that even if state officers did care about the outcome of federal proceedings, the suppression of evidence in a federal criminal trial would suffice to deter state officer misconduct. There would be limited additional deterrent benefit from suppressing evidence in federal civil proceedings. While that reasoning may make sense in the tax context, it does not make sense in the immigration context, where the number of federal criminal proceedings is far smaller than the number of civil removal proceedings. State officers understand that any immigration-related evidence they obtain is much more likely to be used in a civil proceeding than in a criminal proceeding. Limiting the exclusionary rule to criminal proceedings therefore significantly undercuts its deterrent impact.

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[41] *Arizona*, 132 S. Ct. at 2502-3.

[42] *See* David Gray *et. al.*, *The Supreme Court's Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 25-33 (2012).

[43] For additional factors warranting renewed deterrence of unconstitutional conduct in recent years, *see* pages 12-13, *infra.*

Both federal courts and the BIA have indicated that evidence unlawfully obtained by state and local law enforcement officers may be suppressed in removal proceedings. For example, in *Martinez-Medina v. Holder*, 673 F.3d 1029 (9th Cir. 2011), the Ninth Circuit presumed that a deputy sheriff's actions could trigger Fourth Amendment scrutiny for purposes of excluding evidence in immigration court. However, the court ultimately determined that the sheriff's behavior was not sufficiently egregious to warrant suppression.[44] In a number of unpublished cases, the BIA has either affirmed an immigration judge's decision to exclude evidence procured by state or local officers or remanded cases involving allegations of constitutional violations by such officers for additional fact-finding.[45]

Q: Even if the exclusionary rule does not generally apply in immigration proceedings when state or local officers engage in unconstitutional conduct, might there be an exception when such officers are engaged in a joint operation with federal immigration officers?

A: Yes – even if the silver platter doctrine generally precludes application of the exclusionary rule where an illegal search or seizure was carried out exclusively by state or local officers, it does not apply when federal officers participated in some way in the illegal course of conduct. For example, if state or local officers illegally entered a premises and detained the people found there, and then a federal immigration officer arrived on the scene to interview those people and determine whether they might be removable, there would be a strong argument that the silver platter doctrine would not preclude the application of the exclusionary rule. Thus, in *Lustig v. United States*, 338 U.S. 74 (1949), decided at a time when federal courts could still admit evidence unlawfully obtained by state officers in criminal cases, the Supreme Court held that the exclusionary rule should apply to evidence obtained by local police officers through an illegal entry into a hotel room, when a federal officer later joined the local police in the hotel room and applied his expertise to sifting through the various pieces of evidence with an eye toward federal prosecution. The Supreme Court held that "[t]he decisive factor in determining [whether the exclusionary rule applies or is precluded by the silver platter doctrine] is the actuality of a share by a federal official in the total enterprise of

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[44] 673 F.3d at 1034-37. *See also Ghysels-Reals v. U.S. Atty. Gen.* 418 Fed. Appx. 894 (11th Cir. 2011) (unpublished) (concluding that circumstances of traffic stop by police did not warrant exclusion of evidence in removal proceedings); *Santos v. Holder*, 486 Fed. Appx. 918, 920 (2d Cir. 2012) (unpublished) (holding that immigration judge erred in denying motion to suppress without a hearing when respondent had established a *prima facie* case that Massachusetts state trooper had stopped and arrested him because of his race).

[45] *See, e.g., Concepcion Vargas-Lopez, et al.,* A099-577-393, 2009 WL 4639868, *2 (BIA Nov. 2009) (unpublished) (upholding immigration judge's decision to hold an evidentiary hearing to determine whether an allegedly unlawful seizure and interrogation during a traffic stop by a state officer was an egregious Fourth Amendment violation that warranted suppression of Form I-213); *Francisco S.*, A094-810-418 (BIA May 7, 2009) (unpublished) (affirming immigration judge's decision to exclude evidence of alienage obtained during a traffic stop because a reasonable officer should have known that the tactics used violated the respondent's Fourth Amendment rights), *available at* http://legalactioncenter.org/sites/default/files/Francisco.pdf; *Quinteros*, A088-239-850 (BIA, Mar. 21, 2011) (unpublished) (remanding case to immigration judge to assess the validity of a traffic stop and arrest by local police that led to immigration questioning by a 287(g) officer and, ultimately, to the initiation of removal proceedings), *available at* http://legalactioncenter.org/sites/default/files/Quinteros.pdf.

securing and selecting evidence by other than sanctioned means."[46] Thus, "[t]he fact that state officers preceded [the federal officer] in breach of the rights of privacy does not negative the legal significance of this collaboration in the illegal enterprise before it had run its course."[47] Indeed, the Supreme Court held, "[i]t surely can make no difference whether a state officer turns up the evidence and hands it over to a federal agent for his critical inspection with the view to its use in a federal prosecution, or the federal agent himself takes the articles out of a bag. It would trivialize law to base legal significance on such a differentiation."[48] Thus, the silver platter doctrine should not preclude suppression in cases where state or local law enforcement agencies collaborate with federal immigration officers.

Q: Is an exception to the silver platter doctrine warranted when state or local officers are operating under a Section 287(g) agreement?

A: This issue has not yet been decided. However, the Immigration and Nationality Act makes clear that, under Section 287(g) agreements, state or local officers are subject to the direction of the Attorney General and "shall be considered to be acting under color of Federal authority," at least for purposes of civil rights actions.[49] There is a good argument that state and local officers acting under a Section 287(g) agreement should be treated as federal officers for purposes of the exclusion of evidence, in which case the silver platter doctrine would not apply. The logic of applying the silver platter doctrine to federal civil proceedings like the tax proceedings at issue in *Janis* is that officers charged with enforcing the criminal law of one sovereign have a limited interest in enforcing the civil law of a different sovereign. They are not likely to be motivated to commit constitutional violations in order to obtain evidence for another sovereign's civil proceedings. Thus, applying the exclusionary rule to suppress evidence in those civil proceedings is unlikely to have any significant deterrent impact on their conduct.

As discussed above, that argument is dubious in the immigration context even when state and local officers are operating independently of a Section 287(g) agreement, but carries even less force when such an agreement is in place. Under a Section 287(g) agreement, a state or local officer "perform[s] a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."[50] That is, by signing such an agreement, states or political subdivisions agree to have their officers take on the role of enforcing federal immigration law. Because the entire premise of Section 287(g) agreements is that state or local officers will take an interest in assisting in the enforcement of civil immigration enforcement, it is logical that officers acting under such agreements are motivated to obtain evidence to be used in civil immigration proceedings, and that they will be deterred from unconstitutional conduct if evidence obtained through a constitutional violation is excluded from such proceedings.

[46] *Id.* at 79.
[47] *Id.*
[48] *Id.* at 78.
[49] 8 U.S.C. § 1357(g)(3), (8).
[50] 8 U.S.C. § 1357(g)(1).

Accordingly, there is no justification for allowing the silver platter doctrine in the context of a Section 287(g) agreement.

Q: To the extent that the exclusionary rule applies to evidence obtained through illegal conduct by state or local officers, is it limited to cases involving egregious constitutional violations?

A: In addressing motions to suppress evidence seized by state or local officers in the immigration context, federal courts and the BIA have generally assumed that the noncitizen must establish an "egregious" constitutional violation.[51] But no court has expressly confronted the question.

There are good reasons to conclude that the exclusionary rule should apply with full force in immigration proceedings when a Fourth Amendment violation is committed by state or local officers. In *Lopez-Mendoza*, the Supreme Court limited the exclusionary rule's application in immigration proceedings to "egregious" violations based on factors that either no longer hold true, or do not apply to state and local police officers.

First, the Court emphasized the low rate of formal deportation hearings. In 1984 when *Lopez-Mendoza* was decided, over 97.5% of noncitizens charged with violating the civil immigration laws agreed to leave the United States voluntarily without a formal hearing.[52] The Court also noted that, even where a formal hearing took place, it was rare for noncitizens to challenge the circumstances of their arrests.[53] Relying on these figures, the Court reasoned that "the arresting officer is most unlikely to shape his conduct in anticipation of the exclusion of evidence at a formal deportation hearing."[54] Today, however, removal hearings are commonplace. Immigration courts decide more than 220,000 removal proceedings each year,[55] and the percentage of noncitizens choosing voluntary departure has dropped from 97.5% when *Lopez-Mendoza* was decided to 45% in 2011.[56] Because the higher percentage of contested hearings means that evidence is more likely to be needed to effectuate a removal, there is a stronger incentive today than there was when *Lopez-Mendoza* was decided for an officer to obtain evidence through illegal means.

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[51] *See, e.g.*, *Martins v. Att'y Gen. of United States*, 306 F. App'x 802, 804-05 (3d Cir. 2009) (no egregious violation); *Puc-Ruiz v. Holder*, 629 F.3d 771, 778 (8th Cir. 2010) (same); *Garcia-Torres v. Holder*, 660 F.3d 333, 336-37 (8th Cir. 2011) *cert. denied*, 133 S. Ct. 108 (2012) (same); *Martinez-Medina v. Holder*, 673 F.3d 1029, 1034-35 (9th Cir. 2011) (same); *Ghysels-Reals v. U.S. Att'y Gen.*, 418 Fed. App'x 894, 895-96 (11th Cir. 2011) (same); *Angel Oswaldo Sinchi-Barros*, A094-072-050, 2011 WL 6706339 (BIA Nov. 29, 2011) (unpublished) (same); *Angel Israel Ibarra Uraga*, A200-021-409, 2012 WL 3911870 (BIA Aug. 30, 2012) (unpublished) (same); *Reymundo Alvarez Araceli*, A094-217-297, 2013 WL 3899764 (BIA Jun. 28, 2013) (unpublished) (remanding to permit immigration judge to determine whether evidence of alienage was procured through an egregious violation of respondent's constitutional rights by a local law enforcement officer).

[52] 468 U.S. at 1044.

[53] *Id.*

[54] *Id.*

[55] U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2011 Statistical Yearbook*, at D1 (February 2012), *available at* http://www.justice.gov/eoir/statspub/fy11syb.pdf.

[56] *See* Dep't of Homeland Security, *Yearbook of Immigration Statistics: 2011*, Table 39, *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2011/ois_yb_2011.pdf.

Second, the Court cited as "perhaps the most important" factor guiding its decision the existence of the former Immigration and Naturalization Service's "comprehensive scheme" for deterring its officers from committing Fourth Amendment violations, including "rules restricting stop, interrogation, and arrest practices."[57] In light of these apparent administrative protections, the Court expected that the additional deterrent value of applying the Fourth Amendment exclusionary rule would be minimal. However, state and local law enforcement officers who are not operating under a Section 287(g) agreement do not receive federal immigration training. Nor are such state or local officers subject to federal regulations that limit the stop-and-arrest authority of federal immigration officers. There simply is no reason to believe that state and local officers will be any more scrupulous in observing constitutional constraints in the immigration context than in enforcing criminal law generally. Just as the exclusionary rule is needed in the criminal context to deter violations of the Fourth Amendment by state and local officers, it is needed in the immigration context as well.

Third, the Court emphasized "the availability of alternative remedies" like declaratory relief "for institutional practices by INS that might violate Fourth Amendment rights."[58] Such alternative remedies further reduced the deterrent value of the exclusionary rule. Where state and local officers detain or arrest an individual for suspected immigration violations, however, there is no "agency under central federal control,"[59] that can be held accountable. Without a single target for declaratory relief, few tools are available to deter constitutional violations other than the exclusionary rule.
Thus, the *Lopez-Mendoza* Court's rationale for limiting the application of the exclusionary rule in immigration proceedings should not apply when the constitutional violation is committed by state or local officers.

Finally, *Lopez-Mendoza* suggests that the Court's "conclusions concerning the exclusionary rule's value might change if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."[60] Even if *Lopez-Mendoza*'s limitations on the exclusionary rule were held to apply to state and local officers in general, that conclusion should change if Fourth Amendment violations by state and local officers are widespread. No court has yet ruled on what kind of record evidence might suffice to establish "widespread" violations under *Lopez-Mendoza*. But one court has remanded a case to the BIA to allow a noncitizen to attempt to establish such a record.[61]

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[57] 468 U.S. at 1044-45.
[58] *Id.* at 1045.
[59] *Id.*
[60] *Id.* at 1050.
[61] *See Oliva-Ramos v. Holder*, 694 F.3d 259, 280-82 (3d Cir. 2012). For more information on the "widespread" exception, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 11-12.

Q: When state and local officers arrest a noncitizen in violation of the Fourth Amendment, and federal officials thereafter learn of the noncitizen through Secure Communities and initiate removal proceedings, can removal proceedings be terminated on the ground that they are the direct result of the illegal arrest?

A: The fact that a noncitizen came to the attention of federal authorities through a Secure Communities database search following an illegal arrest will not, on its own, warrant the termination of removal proceedings. In *Lopez-Mendoza*, the Supreme Court held that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest. . . ."[62] However, courts are divided on how to interpret this statement.[63] To the extent that the government relies in removal proceedings upon evidence of alienage obtained as a direct result of the unlawful arrest, including evidence obtained from a Secure Communities database search, such evidence may potentially be subject to suppression as "fruit of the poisonous tree." Courts are divided on the viability of suppressing evidence that the government previously had in its possession but identified only through illegal conduct.[64]

[62] *See Lopez-Mendoza*, 468 U.S. at 1039.
[63] For more information on the way different courts have interpreted this provision, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 2-4.
[64] For more information on the "fruit of the poisonous tree" doctrine, see LAC Practice Advisory, *Motions to Suppress in Removal Proceedings: A General Overview*, at 4-5.