ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-491

TITLE IMMIGRATION AND NATURALIZATION SERVICE, Petitioner, v. ADAN LOPEZ-MENDOZA

PLACE Washington, D. C.

DATE April 18, 1984

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ALDERSON REPORTING

IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND NATURALIZATION :

SERVICE, :

Petitioner, :

v. : No. 83-491

ADAN LOPEZ-MENDOZA :

- -x

Washington, D.C.

Wednesday, April 18, 1984

The above-entitled matter came on for oral argument befcre the Supreme Court of the United States at 10:13 o'clock a.m.

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

MARY L. HEEN, ESQ., American Civil Liberties Union, New York, New York; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Immigration and Naturalization Service against Lopez-Mendoza.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Thank you, Mr. Chief Justice, and may it please the Court.

The issue before the Court today is whether it should extend the Fourth Amendment exclusionary rule heretofore applied by it only in the context of criminal prosecutions and quasi-criminal forfeiture proceedings to civil deportation hearings.

Respondents Lopez and Sandoval are Mexican nationals who entered the United States illegally nearly ten years ago. Each was apprehended within a few months after his illegal entry by an INS agent at his place of employment, and each made admissions of his illegal alien status following his apprehension.

These admissions were utilized at the deportation hearings to establish that respondents were not U.S. citizens, a fact that I might say is virtually impossible for the Immigration Service to prove by other

means in cases of persons who enter the United States without inspection, and these admissions formed the basis of the decision ordering their deportation.

They appealed to the Court of Appeals and an en banc panel of the Ninth Circuit held that Sandoval's admission of his alien status was the fruit of an unlawful arrest. As to respondent Lopez, it held that the record did not establish whether or not his arrest was unlawful.

It then turned to the question whether the exclusionary rule applies to deportation hearings, and concluding that it does, reversed the order of deportation with respect to Sandoval, and remanded for further proceedings with respect to Lopez.

Now, let me begin my discussion by saying --

QUESTION: Mr. Frey, may I ask --

MR. FREY: Certainly.

QUESTION: -- before you begin, respondent's brief has this statement. "Contrary to the government's characterization of the decision below as extending the exclusionary rule to an entirely new category of cases and creating a new barrier to enforcement of immigration laws, it merely marks a return to long-standing former practice. Until 1979, the INS performed its investigative and prosecutorial functions in a legal

regime in which the exclusionary rule was thought to apply."

It then goes on to say that really what you are asking is abandonment of the exclusionary rule after over 60 years of applicability. What do you say about that?

MR. FREY: Well, I guess I have two things to say about that. The first is that I am first addressing the question of this Court's jurisprudence and what it would mean in terms of this Court's jurisprudence to decide that the exclusionary rule is applicable to deportation proceedings, and as to that point, I think it is clear that it would be an extension in the sense that the Court has never applied the exclusionary rule to civil proceedings of any kind, and it has never applied the exclusionary rule to a non-punitive proceeding the purpose of which is to determine status.

So, from the standpoint of this Court's jurisprudence, while it is in a sense a question of semantics, I think it is fair for us to characterize a decision affirming as an extension.

Now, there is a second --

QUESTION: Well, has there been a practice for 60 years of recognizing the exclusionary rule?

MR. FREY: That is a point that I intend to

address. I do not think it has been a practice. It has not been in any way a significant feature of deportation --

QUESTION: Nc, but has it been a practice at all --

MR. FREY: Well, I am not sure --

QUESTION: -- in deportation proceedings?

MR. FREY: I am not sure how to answer that question. There is not a single decision of the Board of Immigration Appeals or a single decision of a federal court since 1920 in which it has been held that evidence should be suppressed in a deportation proceeding, sc there has never been a case before the -- there is only one case, and that is the case of respondent Sandoval, in which it was held that someone should not be deported because of the application of the Fourth Amendment exclusionary rule.

Now, it is true that there are cases in which the courts, the BIA, at least, had considered the question whether an arrest was lawful, whether certain evidence was lawfully obtained. In every one of those cases, and there are not very many over this 60-year period, it was either determined that there was no illegality or that there was enough other evidence cf deportability, so it never was necessary for the BIA

actually to hold yea or nay as to whether the exclusionary rule was applicable.

And when Matter of Sandoval, which is the 1979 decision of the Board of Immigration Appeals, came before the board, the board concluded four to one that this was effectively a question of first impression for them, and that they were free to make a decision on the merits and not bound by precedent. There was one dissenting member of the board who felt it had been the practice.

Now, I am not sure what to make of it from the standpoint of this Court, except I think it is quite important to understand that if this Court decides today that the exclusionary rule should apply to deportation proceedings, that will work a dramatic change in the nature of the deportation process from what it was before.

QUESTION: What about the situation of the egregious violation that might constitute in and of itself a violation of the due process clause? Now, the Board of Immigration Appeals has adopted a different view as to --

MR. FREY: As to that narrow class of cases, and I believe there are two instances where it has actually found that evidence should be suppressed under

a due process rationale. This is, I think --

QUESTION: Do you agree with that? Is that required in your view in a purely civil proceeding?

MR. FREY: I don't believe it has done it -- I don't believe it has done it because it thought it constitutionally required it. It has done it because the Attorney General determined on reviewing the decision in Matter of Sandoval that it should be done.

QUESTION: And what is your position? Is it constitutionally required under those circumstances?

MR. FREY: My position, I think, would be that it is not constitutionally required, but it is a very different thing to say that the Board of Immigration Appeals in its discretion should determine what kind of evidence it will receive in its proceedings for the courts to tell the Board of Immigration Appeals what kind of evidence it should receive.

QUESTION: How about the courts? Do you think as a matter of deterrence, although not constitutionally required, that in the egregious situation where there is a violation of due process that the rule should be applied?

MR. FREY: You are talking about in the context of Fourth Amendment, evidence obtained in violation of the Fourth Amendment --

QUESTION: Yes.

MR. FREY: -- but egregious violations?

QUESTION: Right.

MR. FREY: Well, in the context of the courts, we do have a judicially adopted exclusionary rule which does require the exclusion of illegally seized evidence, and we have not suggested in the cases that the Court has previously heard that it should modify the rule so far as to allow the admission of such evidence. So, in the context of criminal prosecutions, at least, it is not our position that this evidence should be deemed admissible, but I think it is quite a different question as to when the courts are reviewing the decisions of the agency.

I think it would be tenable perhaps to say that even that kind of evidence is admissible, but of course cases like Verochin against California suggested even before Mapp that there was a restriction on the use of such evidence in criminal prosections.

I don't know if I have fully answered your question, but I think that in terms of this Court's own jurisprudence, the only holding that really has any applicability is its decision in Janis, United States against Janis, and while that case clearly imposes substantial restrictions on the use of the exclusionary

rule in civil proceedings, we concede that its reasoning does not foreclose the possible extension of the exclusionary rule to certain types of civil cases.

Now, for those who already entertain substantial doubts about the wisdom of the exclusionary rule and its existing applications, they may prefer to simply draw the line, and to resist its extension to entirely new contexts such as non-punitive civil proceedings. But the Court does not have to go so far or adopt such a broad rule to decide this case. Rather, we think it can decide this case by employing the traditional cost-benefit analysis that it has used in deciding the application of the exclusionary rule in connection with various aspects of criminal proceedings, and it is to that analysis that I would like to turn.

But before I address the costs and benefits of applying the exclusionary rule in deportation proceedings, I think it is useful to take a little journey through the locking glass, as it were, to the imaginary world that respondents depict. Their argument here rests critically on the following series of assertions.

First, that there has long been and continues to be a widespread pattern of Fourth Amendment violations by INS agents. Second, that there has long

existed prior to the BIA's decision in Matter of Sandoval in 1979 a meaningful and substantial exclusionary rule remedy in deportation proceedings. Third, that this state of affairs imposed no serious burden on the deportation process because suppression claims were infrequently raised and even more rarely successful.

Fourth, that the decision in Matter of Sandoval created a situation in which open season was declared on the Fourth Amendment rights of Hispanic Americans. And fifth, that only a restoration of the exclusionary rule in deportation proceedings can restore those rights.

Now, if these various assertions were accurate, a case could be made for respondent's position, but they are fundamentally inaccurate. First, as the Court of Appeals itself noted, there is no evidence of serious or widespread Fourth Amendment violations by INS agents. Now, of course, there are bound to be some. They make over a million arrests a year. It would be inconceivable if they didn't make mistakes. It would be inconceivable if occasionally they didn't detain people without reasonable suspicion or arrest them without probable cause.

But what is so striking about this case is the

inability of anybody to point to any substantial evidence of a serious pattern of violations by immigration agents.

Secondly, and this is the point I made in responding to Justice Brennan's question before, it is clear that the exclusionary rule has never been a meaningful aspect of deportation proceedings. As I said, there is not a single case since 1920 in which a court or the Board of Immigration Appeals has suppressed evidence.

QUESTION: Doesn't that cut the other way? I am just not sure. If there has never been a problem, and if the rule has been routinely enforced, maybe there isn't just a big problem.

MR. FREY: Well, I don't think so at all. I think the dilemma is not ours in this respect, because the problem that we are concerned about is not so much that the occasional illegal alien will escape deportation as a result of the application of the exclusionary rule, but the systemic consequences. Now, what happened, I think, quite clearly prior to 1979 is that there was no general understanding that the exclusionary rule applied, that people would occasionally raise claims that dealt with the legality --

QUESTION: Didn't the standard text on

immigration law say it applied?

MR. FREY: Well, the standard text, I noticed that the Court of Appeals cites the 1980 edition of the standard text, which says it applies. Matter of Sandoval was decided in 1979, so I am not sure how much weight should be given to a text that says it applies.

QUESTION: If you were a brand new immigration lawyer and you went to that text, I suppose you would assume it applied, I guess, is all I am saying.

MR. FREY: Well, I cannot account for the fact that people never made suppression motions or hardly ever did. If it had been a feature of the deportation process, it is inconceivable that there would not have been, as there are in criminal cases --

QUESTION: There are no statistics as to how many cases that the Fourth Amendment was denied?

MR. FREY: You mean how many cases --

QUESTION: Where they held -- yes.

MR. FREY: There are not statistics about what happened --

QUESTION: Weren't most of them, didn't they hold that the Fourth Amendment didn't apply, so you didn't get to the exclusion.

MR. FREY: But that is not true, because what happens is that there is a right of appeal to the Board

of Immigration Appeals following which there is a right of judicial review. Now, you can't tell me, I don't think, that if the exclusionary rule was such a regular feature of the deportation process, there would be a handful of cases in the Board of Immigration Appeals and not a single case until 1970, between 1920 and 1975.

QUESTION: I didn't say exclusion. I said Fourth Amendment.

MR. FREY: Fourth Amendment exclusion.

QUESTION: Well, if you deny the Fourth Amendment was violated, you will never get to the exclusionary rule.

MR. FREY: No, but the alien who is seeking to resist deportation gets his appeal rights. I mean, don't you see cases that come up to this Court where people are claiming that their Fourth Amendment rights were violated in criminal cases, even though the District Court denied their suppression motion?

QUESTION: Not that many on immigration.

MR. FREY: No, I am talking about in criminal cases. If you look at what happened --

QUESTION: Well, in this case in particular, there is no positive evidence of what this man said.

MR. FREY: That goes to a quite different question as to whether --

QUESTION: Isn't that the normal proceeding?

MR. FREY: There is positive evidence that he admitted his alienage. What is lacking is detailed evidence about the circumstances leading up to his arrest.

QUESTION: Which is a Fourth Amendment point.

MR. FREY: Well --

QUESTION: There is no evidence in the record about his Fourth Amendment point.

MR. FREY: There is ample evidence, but it is not very clear as to the facts surrounding his arrest. I mean, I --

QUESTION: Well, I have difficulty in getting through the smoke.

MR. FREY: Well, I had a lot of difficulty, too, and I think that is, as I will get to in a minute, one of the reasons for not applying the exclusionary rule in deportation proceedings, but I just want to bring home this point, because I think it is quite essential. If you look at what happens in criminal cases, even people who don't have meritcrious Fourth Amendment claims still make suppression motions. When their motions are denied, they appeal to the Court of Appeals. When their convictions are affirmed by the

Court of Appeals, they petition for certiorari to the Supreme Court.

Aliens resisting deportation take advantage of every right they think they have to avoid an improper deportation. It is simply inconceivable if the exclusionary rule was a meaningful aspect of the deportation process before 1979 that there would be no cases. Where is the beef? Really.

QUESTION: You are talking about BIA cases?

MR. FREY: I am talking about court cases as well. Not -- There are no court cases in which people after they lost in the BIA appealed to the Court saying the exclusionary rule should be applied. There should be a large volume of those cases.

QUESTION: I can see how that would prove one aspect of what you are talking about, but are there BIA opinions, for instance, that discuss on the merits a claim of --

MR. FREY: There are some BIA opinions that discuss and reject on the merits claims that look like Fourth Amendment suppression claims, but very few.

QUESTION: How many opinions does the BIA write in an average year?

MR. FREY: I am told they write about 2,000, of which about 200 are published as precedents.

QUESTION: Do you have any idea what percentage of those opinions deal with Fourth Amendment issues?

MR. FREY: I would say less than 1 percent, and the point is that every single one of these people -- look at the class of cases we are talking about. Most aliens who are apprehended entered without inspection. They are arrested some place. The only evidence we have of their alienage is the admission that they have made after their arrest that they are in fact natives of Mexico or wherever they may be.

Each one of these people could raise a plausible Fourth Amendment claim.

QUESTION: Is that typically true, that the only evidence you have of alienage is their own admission?

MR. FREY: The way the procedure now works is that the burden is on the INS to establish by clear and convincing evidence alienage, and at that point the burden shifts to the alien. Now, if you could tell me how the INS can prove that somebody is not a citizen when all they have is his body --

QUESTION: By another alien.

MR. FREY: Hm?

QUESTION: By another alien.

MR. FREY: Well, I suppose that they might --

QUESTION: We have had several cases here on that.

MR. FREY: There are cases in which they may find other people who could testify that this person --

QUESTION: Didn't we have a case last year where they kept those that testified for the government and sent the other witnesses back?

MR. FREY: That was a criminal prosecution.

QUESTION: That's right.

MR. FREY: The question there was not the alienage of the person at deportation proceedings. There are 70,000 deportation proceedings a year. This whole system is workable only because there are these reliable admissions of alien status which are introduced, and deportability is not an issue in these deportation proceedings. They look to other things, such as discretionary relief.

QUESTION: There are 70,000? I thought there were a million a year.

MR. FREY: There are a million -- over a million arrests.

QUESTION: What happens to the 930,000?

MR. FREY: They mostly take voluntary departure at one stage or another. The number -- I

mean, the system would completely break down if they all asked for deportation hearings. But the point that I am making is that all of these people or a very large proportion of them would have some kind of Fourth Amendment claim. They have been arrested. The circumstances of their arrest are uncertain. The evidence against them is arguably a fruit of the arrest. But they don't appear in the jurisprudence, so I just think it cannot be said that the exclusionary rule was a meaningful feature.

But if you decide this case against us, I have no doubt that there will be a tremendous impact on deportation proceedings in the future. Now, that impact may be worthwhile, and I would like to turn to the question of whether the benefits from applying the exclusionary rule in terms of deterring illegal searches and seizures by immigration officers are worth the costs.

First of all, I'd like to make a general point about the perspective from which this issue should be approached. There has only been one time before that this Court has extended the exclusionary rule to a significant new class of cases and that was Mapp against Ohio. There it was confronted not only with the case in which there had been a particulary egregious Fourth

Amendment violation, but with a situation in which the exclusionary rule seemed to be the only way to curb a nationwide epidemic of police violations of the Fourth Amendment.

And the Court of Appeals itself recognized that there is nothin comparable to that that anybody is aware of in the immigration context. Nevertheless, it wholly ignored that factor. It simply began its analysis by pointing out that since INS agents' duties are to apprehend illegal aliens for purposes of deportation, the application of the exclusionary rule would be in an area within their zone of primary interest.

QUESTION: Mr. Frey, can I ask just one other question? I don't mean to take up too much of your time. It is the same problem I think may have troubled Justice O'Connor earlier. You talk about the exclusionary rule, and it seems to me that -- Mapp against Chio is what raised this question in my mind -- that one at least theoretically might say, say a coerced confession case might be different from the search of a home, which in turn might be different from just an arrest.

Are you just talking about arrest cases, or are you talking about no matter what the INS does to get

evidence, no exclusionary rule would ever apply?

MR. FREY: Well, I wouldn't be talking about confession cases. We are talking about a Fourth Amendment exclusionary rule.

QUESTION: What about, say, the search of a home without a warrant, in the middle of the night, and all that kind of stuff?

MR. FREY: Well, in those rare cases where that happens, and the INS has changed its procedure so that that happens much less often than it may have happened in the past --

QUESTION: Well, I am sure it doesn't happen very often. I am just trying to get to really what your are asking us to do.

MR. FREY: The INS has recognized this so-called discretionary due process right to suppression of evidence in the case of a middle of the night warrantless search of a home, but in terms of the Fourth Amendment exclusionary rule, we would say that it would not apply even to that kind of evidence. It would not apply -- you simply could not come in and say, this evidence was obtained in violation of the Fourth Amendment.

QUESTION: So your argument is to all Fourth Amendment, but you don't reach the Fifth Amendment.

MR. FREY: If the statement is an involuntary statement that would raise a separate question. It wouldn't raise the same question as it does in a criminal case, because, of course, they don't have a privilege against self-incrimination in a deportation hearing, but it would raise a due process question rather than a Fourth Amendment exclusionary rule question.

QUESTION: Why don't you have a privilege against self-incrimination at a deportation hearing?

MR. FREY: It is not a criminal prosecution.

QUESTION: But I thought -- didn't the -- the Brandeis opinion --

MR. FREY: No, no, let me explain.

QUESTION: -- held it was applicable to bankruptcy a long time ago.

MR. FREY: You don't have -- you don't have the right not to be compelled. Evidence can be compelled from you for use in a deportation proceeding. Of course you have -- and that is what Bilcomski against Todd said. You can put the alien on the stand and ask him about his nationality. Now, he may invoke his Fifth Amendment privilege, but that is because of the possibility of a criminal prosecution arising out of the same conduct. So you have the privilege in the sense

that a witness in a civil case has the privilege, but you don't have the privilege in the deportation proceeding.

QUESTION: It is a privilege against testifying, not against being called as a witness.

MR. FREY: It's the same privilege that a witness in a civil case would have, but it is not a privilege against use of compelled testimony in the deportation proceeding itself. Presumably these people could be immunized and compelled to testify in the deportation proceeding.

QUESTION: But your proposition doesn't affect the criminal deportation hearing?

MR. FREY: Well, there is not a criminal deportation hearing. It would not affect a criminal prosecution for immigration law violations.

QUESTION: It wouldn't go that far?

MR. FREY: It does not. No. That is not at all the question, and that is certainly not the question that is important to the administration of the immigration system, because that is a very small part, and the deportation hearings are a very major part.

Now, I would like to look first briefly -- let me just say that the point that I was making before about the Court of Appeals' analysis is that to say that

this -- these arrests are within the zone of primary interest because what they are looking toward is the deportation of the aliens is to raise an issue for this Court, because if you didn't at least get that far, there would be no issue under Janis. It would be quite clear that the exclusionary rule wouldn't apply.

But I agree that there is an issue for this Court to consider which requires balancing the potential benefits in terms of deterrence of misconduct from applying the exclusionary rule against the special costs that may exist in the deportation context.

Now, in terms of the benefits, it is not, we believe, accurate to equate the effect of the application of the exclusionary rule on immigration officers with the effect of the application of the exclusionary rule in criminal prosecutions on police officers. There are at least three significant differences between this case and Mapp that make it far less likely that application of the exclusionary rule will provide important incremental incentives to lawful conduct.

First is the difference between the countless local police forces scattered around the country in Mapp, and here a single federal agency, which has shown itself to be sensitive to Fourth Amendment issues, which

does follow judicial decisions, issue guidelines to its agents instructing them what they may or may not do, provide them with a substantial amount of training, have disciplinary procedures, and there is a lot of dispute about how effective --

QUESTION: Of course, you can argue that point just the opposite, too, and say that because it is a single federal agency, it has a good deal more power and ability to conform the conduct of its agents to Fourth Amendment decisions, whereas all the countless local and state jurisdictions simply that are too scattered and to poor --

MR. FREY: The question for this Court, Justice Rehnquist, is whether adding the exclusionary rule in deportation proceedings to the existing means that are available to obtain compliance with the Fourth Amendment will provide a substantial increment of deterrence of illegal conduct.

I want to make the point, and I will have to sit down in a moment, that there is a substantial difference in the activities and the incentives that operate on INS agents and police officers who are looking to solve crimes. INS -- where a police officer might make eight or ten or fifteen arrests in a year leading to criminal prosecutions, INS agents make

hundreds. In many, many of the cases, it does not go to a deportation hearing. There is voluntary departure.

So that the degree of probability that the exclusionary rule will actually be applied if the agent violates the Fourth Amendment is far less, far less in the immigration context than it is in the criminal context, and therefore the assumption of deterrence that the court is willing to make in the context of criminal prosecutions carries far less weight in the context of immigration operations.

I want to make one other point on the cost side. My time is running out, and I would like to save a little time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Frey, we will enlarge your time five minutes. We will enlarge your time five minutes.

MR. FREY: Thank you, Mr. Chief Justice.

Well, then let me make one more point on the benefit side. Another important question is the reliability of the determination that the Fourth Amendment has been violated in deciding to apply the exclusionary rule. The exclusionary rule can't accomplish its purporse if it is supplied to suppress evidence that was in fact lawfully seized.

So you only -- it is going to work only where

it is reasonably accurate in identifying the class of cases in which there has been an illegal obtaining of evidence, and only the suppression of that evidence.

Now, as the Sandoval case itself shows, the remedy cannot be applied with precision in the deportation context. What the Court of Appeals essentially said is, the officer couldn't remember the precise details of his encounter with Mr. Sandoval, so he hasn't carried his burden of proof, and so we are going to determine that the arrest was illegal, and so we are going to suppress the statement, all against a background in which it seems to me quite clear that in all probability there was no Fourth Amendment violation.

So, I think it is very important, and we made the same point in connection with the so-called good faith exception to the exclusionary rule, that when you are -- as to these cases where it is difficult to determine whether there has been a Fourth Amendment violation, applying the exclusionary rule won't work the way you want it to work.

QUESTION: Mr. Frey, how rigid is the burden of proof in this proceeding on the Fourth Amendment issue?

MR. FREY: Well, I am sure that we would argue

that the conventional rule in criminal cases it that if you have a warrantless search or seizure, the burden is on the government to show probable cause.

QUESTION: But surely the mere absence of a warrant in an arrest of this kind of case wouldn't put the burden on the agent to defend the arrest, would it?

MR. FREY: Well, the Court of Appeals -- what did the Court of Appeals say? The Court of Appeals said that Mr. Sandoval was down at the police station, the agent couldn't remember precisely why it was, precisely what his interaction with Mr. Sandoval was, and let me make the point that if you look at cases like Florida against Royer, and you are asking yourself the question, was there an illegal stop --

QUESTION: Well, I realize in the criminal. I am just wondering if maybe the solution to your problem is a rule that requires the movant to bear a fairly substantial burden of proof.

MR. FREY: Well, the movant in this case told a story, incredible as I think it is, and never credited by anybody.

QUESTION: Well, an incredible story shouldn't carry a burden of proof. I just don't --

MR. FREY: Well, there may be other means of dealing with this problem in terms of adjusting the

traditional burdens of proof which would make the problem less of a problem, but I have to emphasize that the problem on the cost side of the equation is not just that a few illegal aliens will escape deportation. The problem is, what does it do to the system?

And I wanted to point out what the Board of Immigration Appeals said in deciding Sandoval, because I think it is very important. They are the people who know what the immigration, the deportation process is like far better than the courts, and they said that absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof.

When Fourth Amendment issues are raised in deportation hearings, the result is a diversion of attention from the main issues. The result is asking people who don't at least currently have the expertise to decide these questions, and particularly pertinent here, the BIA said the result frequently seems to be a long, confused record in which the issues are not clearly defined, and in which there is voluminous testimony, but the underlying facts are not sufficiently developed. You have only to look at the record in this case to see that.

I am not sure what that signal was in terms of

time.

CHIEF JUSTICE BURGER: Five minutes for rebuttal is still available. You have five minutes more.

MR. FREY: All right. Let me just see if there is anything else I would like to --

QUESTION: Mr. Frey, what would happen if the exclusionary rule were applied and the only evidence that the government had on the deportation was the alien's own admission, so the deportation proceeding resulted in the release of the individual who had been questioned. Now, does that mean that the alien who has, of course, admitted he is not properly here can just remain indefinitely in this country? What, as a practical matter, does the government then do?

MR. FREY: Well, the government can't do anything directly. What it can do is continue its general enforcement operations, and perhaps it will catch him again in a situation where it has other evidence. It can do nothing. I mean, the alien is allowed to remain in the United States unless and until with new evidence that is not subject to suppression they can establish his deportability.

QUESTION: So you get a special class of illegal aliens.

MR. FREY: You have a special class of people who are here by virtue of a suppression motion. Of course, this is different from the criminal case or even other civil contexts where, for instance, an OSHA penalty proceeding, where you might apply the exclusionary rule even though it is a civil proceeding, because the purpose of the proceeding is to impose a penalty for some past misconduct that at least bears some resemblance tc the traditicnal criminal case.

QUESTION: Would you be faced with the application of an illegal fruits of the evidence doctrine in trying to follow up on the individual later?

MR. FREY: Certainly.

I think I will reserve the balance of my time.

CHIEF JUSTICE BURGER: Very well.

Ms. Heen.

ORAL ARGUMENT OF MARY L. HEEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MS. HEEN: Mr. Chief Justice, and may it please the Court, at the heart of this case is the question of whether the Fourth Amendment will remain enforceable in the immigration context. In the criminal law enforcement setting, the Court seven years ago in

Weeks and later in Matt versus Ohio adopted the exclusionary rule as the only way to give life and meaning to the Fourth Amendment.

Although deportation proceedings have been given a civil label, they are completely analogous in this regard to criminal proceedings. The rule in deportation proceedings functions in the same way, serves the same values, and provides the same effective safeguard against arbitrary intrusions by government officials.

I plan to address here four principal reasons why the government's arguments for a different treatment are invalid. First, the Fourth Amendment privacy rights to be protected are just as important in this context. The Fourth Amendment protects society generally, not just the rights of those accused of criminal violations.

Second, the degree of deterrence is the same. As in the criminal context, it is direct and substantial. Third, there are no other remedies which will effectively enforce Fourth Amendment rights. The alternatives urged by the INS in this context are no different than those which have been rejected as inadequate and insufficient in the criminal setting. And fourth, the social costs of applying the rule to deportation proceedings are no greater than the social

costs in the criminal setting.

Moreover, the immigration system itself has demonstrated in the past that it can function under the rule without excessive costs.

QUESTION: How widespread was that?

MS. HEEN: Well, as explained in greater detail in our brief, the --

QUESTION: Well, Mr. Frey takes very vigorous issue with what you said in your brief.

MS. HEEN: Well, the administrative practice and the judicial history both demonstrate that there was a substantial body of both administrative cases and judicial review cases looking at the Fourth Amendment violation.

QUESTION: Are they cited?

MS. HEEN: They are cited in our brief. And in addition, the Board of Immigration Appeals set up a procedure for examining motions for suppression, placed the burden on the alien to show that the conduct was illegal, and then once that prima facie showing of illegality was established, the burden then would shift to the government to show the lawfulness of the conduct in a particular situation. So it is clear that under the administrative practice --

QUESTION: When did the BIA do that, what you

just referred to?

MS. HEEN: The BIA did that in the early seventies. However, prior to that time, it had also looked at offers of proof in this setting. It set up the specific mechanism for review in the Matter of Tsang case, Matter of Wong, and Matter of Tong case.

Now, with regard to Mr. Frey's argument that there is a paucity of decisions in this area, let me just address the population that we are dealing with with regard to the suppression motions. First of all, the target population is in general a group that is poor. It is legally unsophisticated, and they are not in general represented by counsel.

Secondly, the nature of the bureaucracy itself tends to understate the amount of the problem here, because first of all immigration law judge decisions are not reported. A substantial number of Board of Immigration Appeals decisions are not reported. As we just heard, it is something like 10 percent per year. And finally, there are built-in incentives in the system so that people tend to opt for voluntary departure rather than to insist on their right to a deportation hearing. And all of these factors --

QUESTION: Well, is that bad?

MS. HEEN: I am not suggesting that --

QUESTION: If people opt for voluntary deportation when they admit that they have illegally entered the country?

MS. HEEN: There is a mechanism set up so that they can opt for voluntary departure, and in that way avoid some of the consequences with regard to being detained while waiting for a hearing, and --

QUESTION: Since you analogize this -- you seem to think a deportation proceeding equates to a criminal proceeding, is that voluntary deportation somewhat analogous to a guilty plea in a criminal case?

MS. HEEN: It is analogous to a plea bargaining situation. However, getting back to the issue of whether or not the reported decisions themselves indicate the amount of significance that an exclusionary rule could have in terms of applying it in this context, it is clear that the number of decisions themselves would not fully indicate the amount of impact the decision could have on the general training and supervision of officers in this context.

A good example in the criminal setting is the reaction to this Court's decision in Delaware versus Prouse, when the random traffic stop practice was invalidated. For example, in the District of Columbia the chief of police issued a telex to officers informing

them of this new practice with regard to traffic stops. The same sort of mechanism applies in the immigration context, so that when the Court of Appeals is reviewing the Board of Immigration Appeals' decisions with regard to the Fourth Amendment, the judicial review establishes the standards under which these officers will conduct their future investigations.

In Matter of Sandoval, the Board of Immigration Appeals really turned its back on its prior history, and decided in large part because of the civil nature of the proceeding that it would no longer apply the rule in deportation proceedings. That decision was erroneous. It was based in part on a misapplication of the Janis decision, and should not be followed here.

The Fourth Amendment privacy rights are just as important whether the government is enforcing civil immigration laws or criminal laws. The Fourth Amendment itself was adopted in response to abuses which arose in the enforcement of civil rather than criminal laws. The use of general warrants in enforcement of libel laws and writs of assistance in enforcement of British taxation and import regulations.

The privacy interest itself is the same. Here, the privacy interest to be protected and those interests most threatened by INS intrusions are the

targets of INS searches who look like or could be mistaken for illegal aliens. At the current time, that group is composed largely of persons of Hispanic or Asian ancestry. The interests to be protected are thus more important in this context.

For example, in area control operations, INS inevitably encounters numerous citizens of Hispanic ancestry. In California, for example, there are 4.5 million persons of Hispanic dissent, and 17 percent of that number are citizens. In Texas, 88 percent of the state's Hispanic population of nearly three million are citizens. Where those most threatened by INS intrusions are members of a racially defined minority group, they deserve the most resolute protection of Fourth Amendment rights.

Next, with regard to the deterrent effect in this context, as in the criminal setting, excluding illegally obtained evidence in deportation proceedings would exert a substantial deterrent effect on unconstitutional conduct. The government concedes that deportation of illegal aliens, not criminal prosecution, is the primary concern of immigration officers. Obtaining evidence of deportation is therefore in the officer's zone of primary interest.

In addition, there is no question here that

the offending INS officers work for the same federal agency which seeks to use the unlawfully obtained evidence in their case in chief. They share a common law enforcement goal and purpose, and the agency utilizes a large investigative force in which to perform this function. By the very nature of this process, therefore, INS agents are pushed by the pressures of their jobs to the very limits of the Fourth Amendment.

There are pressures on the agents to apprehend large numbers of deportable aliens rather than to concentrate on whether or not their apprehensions comply with constitutional standards. There is therefore in this case a demonstrable need for a deterrent sanction in immigration investigations.

Here, in addition, although the government maintains that in this case there is not a serious penalty with regard to civil deportation proceedings, this Court has recognized in the past that deportation can be a severe punishment. It can be the equivalent of banishment or exile, and in the words of the Court, it can mean the loss of all that makes life worth living.

In many cases, the civil consequence of a deportation proceeding can be of greater importance to the individual and also the law enforcement goals of the system than imposition of a corresponding criminal

sanction for exactly the same conduct. Therefore, under the rationale of One 1958 Plymouth Sedan versus Pennsylvania, the serious consequences of deportation proceedings provide another justification for applying the rule in this context.

All of these factors taken together sharply distinguish this case from Janis, Calandra, and the other cases in which the Court has declined to apply the exclusionary rule. Here the deterrent effect is not marginal. It is substantial and efficient.

QUESTION: May I ask a question? You are talking about deterrence. It seems to me just as I listen to you that given the large number of citizens who are perhaps going to be victimized if there are a lot of Fourth Amendment violations, this might be an area in which the civil damage remedy might actually be effective, because if you have an illegal arrest of a person just because he looked Hispanic or something like that would seem like one of the simplest cases to win from a damage point of view.

MS. HEEN: Well, as in the criminal setting, the Bivens actions or civil damage actions do not provide an effective substitute for the rule. It can be a helpful complement to the exclusionary rule.

QUESTION: But the reason -- the difference

that occurs to me as I listen to your argument is that you have a large number of potential plaintiffs out there in this particular area that you may not have in the other areas, because you are talking about arresting the wrong person basically.

MS. HEEN: Well, the problem with regard to the reliance on civil damage actions as a surrogate for the rule in this context is that first of all the nature of the population, which I already mentioned. The citizens who may be apprehended because they work alongside illegal aliens are probably a population which is very unlikely to have the resources and the access to legal representation in order to pursue civil damage actions, and as the government has conceded in its brief, Bivens actions are very rarely successful. There is the good faith immunity defense on the part of INS officers.

And with regard to the deterrent impact of a civil damage action, the real question is with regard to those instances which would not be tremendously flagrant or egregious. The civil damage actions do not provide the incentive for INS officers to err on the side of constitutional behavior, and therefore cannot provide an effective alternative to the exclusionary rule in this context.

The same is true with regard to the other alternatives which the government relies on. For example, declaratory and injunctive actions. Now, as outlined last term in City of Los Angeles versus Lyons, because of equitable and standing prerequisites, it is very difficult to obtain injunctive relief. Injunctive relief can be obtained only where the victims of the unlawful actions can establish that INS would subject them to another unlawful search or seizure.

Moreover, it must be shown under Rizzo versus Goode that the actions are a result of a policy adopted by INS. Therefore, the injunction can be obtained only in rare cases, and only after the deterrent mechanism has already failed with regard to the institution of an unconstitutional policy.

Reliance on internal rules, training, and discipline have not been effective as an accepted alternative in the -- acceptable alternative in the criminal setting, and in the case of INS, has been used in the past only to sanction the most flagrant and appalling misconduct.

There are three major failures of the INS disciplinary procedures. First of all, it is not applied to Fourth Amendment violations. Secondly, there has been no recordkeeping. And thirdly, the procedures

are themselves inadequate on their face.

With regard to the first point, that INS does not in fact discipline officers for Fourth Amendment violations, INS can point to no disciplinary sanctions applied to INS officers for Fourth Amendment violations since the Matter of Sandoval decision in 1979. In fact, the only examples of discipline that INS has produced for the last four fiscal years are truly criminal and flagrant misconduct.

Three officers were terminated or suspended because of rape of aliens, three for physical brutality of federal undercover agents posing as aliens, and in one case a supervisory agent abused and detained a United States citizen for 19 hours without food or water, and transported him to Mexico.

Therefore, it is obvious from the way that the internal procedures have been applied that INS is not applying high priority in terms of disciplining officers for Fourth Amendment violations.

Secondly, INS keeps no adequate records of Fourth Amendment violations, and does not and therefore cannot monitor the effectiveness of its training procedures. And third, as we mentioned in our brief, there are significant inadequacies with regard to the procedures themselves on their face.

Finally, I would like to address --

QUESTION: Ms. Heen, in your brief, at Footnote 9 on Page 30, you refer to the fact that patterns of INS conduct described and reported in cases evidence widespread Fourth Amendment violations by immigration officers. Then you cite INS versus Delgado, which of course was reversed by us yesterday; Immigration Council verus Pilict, which I don't believe can be the law any more after Delgado.

Are these the theme of all your citations? Are they pretty well overruled by our decision yesterday?

MS. HEEN: No. With regard to LaDue versus Nelson, Mendoza versus INS, and Marquez versus Kiley, these cases, although only the Mendoza versus INS case arouse subsequent to the Matter of Sandoval decision, are really used as examples of the kind of conduct which INS officers have overstepped the boundaries with regard to compliance with the Fourth Amendment in their investigations.

The government places great reliance with regard to the issue of whether or not there are widespread violations in this context, and I think that we would be closing our eyes to the problem which exists with regard to an area of law enforcement where there

are over a million apprehensions per year.

Matt versus Ohio, in which the Court applied the exclusionary rule to this case through the due process clause, does not require a showing of widespread violations prior to applying the rule. There, the Court held that there is really no Fourth Amendment in the criminal context without application of the exclusionary rule.

The government also relies on the fact that this is one single federal agency, and therefore is more manageable with regard to protection of Fourth Amendment rights. If that were the rationale, the FBI, also one single federal agency, with regard to the application of the exclusionary rule, which has always applied in the context of federal criminal enforcement since Weeks, would also apply in terms of the rationale.

In addition to the reported cases, with regard to the indication of the problem in this area, and also the nature of the population and the nature of the bureaucracy with regard to this, I may just point out that in terms of the record in this particular case, both of the issues arose during a time period when the exclusionary rule applied in deportation proceedings, and therefore there was no attempt to make this kind of record below with regard to the extent of the problem.

Finally, I would like to address with regard to alternatives the government's reliance on the due process exclusionary rule. The government maintains that this is a discretionary rule, and was not adopted as a constitutional requirement, but in terms of the actual language of the Board of Immigration Appeals' decision in Matter of Toro, and prior to that in its unpublished decision in In re Ramira-Cordova, it is clear that the Board of Immigration Appeals felt that it was compelled under the due process clause to apply the exclusionary rule for egregious Fourth Amendment violations, and therefore it is analogous in some respects to the rule which was adopted by the Court in Rochen versus California and later discussed in the Irvine versus California case.

The problem with regard to relying on this rule as an effective alternative is that basically it rewrites the Fourth Amendment in the immigration context. In other words, unreasonable but less severe violations would be permitted in this context. It also fails to provide clear standards for application of the exclusionary rule, and this is a problem which was addressed in the Irvine decision in the criminal context.

And finally, because it applies to intentional

misconduct, it may require inquiry into the subjective state of mind of the officer. Thus the due process exclusionary rule does not provide adequate protection of Fourth Amendment values.

I would like to next address the issue of the societal costs involved. The social costs of applying the rule in this context provide no basis for a distinction between deportation proceedings and criminal proceedings, yet the government argues that the cost to society of applying the rule in this context is greater than we can afford, even greater than the cost borne by the criminal justice system. That argument should be rejected for the following three reasons.

First, the immigration system has functioned under the rule in the past without excessive cost. And it presently functions under a due process exclusionary rule. For example, suppression motions are permitted for violation of INS regulations, and suppression motions are also ruled upon with regard to the voluntariness of statements and the voluntariness under the Fifth Amendment.

Applying the rule in deportation proceedings therefore will not mark a change in procedure, and will not require the system to adapt to something which has not already functioned quite adequately in the past.

The government's attempt to label the rule's application as a judicial licensing of unlawful conduct is simply a red herring in this case. No special class of aliens will result as a consequence of applying the rule in this context at any time independent, untainted evidence of alienage may support a deportation order. In fact, as the reported cases show, that is extremely common in this context.

In addition, the government fails to note that once the due process exclusionary rule is applied in this context, and a deportation proceeding is terminated as a result of that suppression motion, an alien also is released, and that same person can later be apprehended on the basis of independent tips and all the other enforcement mechanisms that the agency uses to apprehend illegal aliens. In the --

QUESTION: Such as?

MS. HEEN: Such as its area control operations. The factory raid situation, where the INS goes into a factory and surveys it to determine whether or not there are illegal aliens working there.

An example of a pre-Matter of Sandoval decision in which the Board of Immigration Appeals applied independent evidence in order to deport someone is the case of In the Matter of Perez-Lopez. And in

that case, which was decided in 1972, the immigration law judge had suppressed evidence of deportability at the original hearing. That hearing was terminated, and later on the hearing was reopened when the agency received from an informant information that the person was in this country illegally.

Therefore, on the basis of that independent source of information, the Board of Immigration Appeals upheld the deportation order. That provides an example of how the system has been able to work under the rule in the past, and that same sort of evidence can be used in the future in order to deport those who may be released as a result of application of the exclusionary rule.

QUESTION: May I ask you this question, Ms. Heen? One of their arguments is not just how it works in a particular case, but rather that if we decide the way you urge us to, that there will be an opinion on the books that will stimulate a large number of motions that have not been filed in the past, and both in the 70,000 contested cases and in the 900,000 uncontested cases there will be a very great practical change in the way these matters are handled.

Would you like to comment on that?

MS. HEEN: Well, there may be some slight

increase in the number of suppression motions, which may be tied to the increased enforcement activity of the INS at the present time, but in terms of looking at the past history of applying the rule in this context, as mentioned earlier, the leading treatise in the field, going back to its original editions, had stated that it was undisputed that evidence obtained illegally may be suppressed in deportation hearings.

Therefore, it was a part of the recognized administrative practice that such suppression motions could be filed. In addition, there are other types of suppression motions, not just Fourth Amendment suppression motions, which are filed in the context of a proceeding.

In terms of the actual mechanism established by the Board of Immigration Appeals to review suppression motions, as pointed out by board member Appleman in the dissent in Matter of Sandoval, the answer is really to require a prima facie showing of illegality in order to support the suppression motion itself, and under the mechanism which was established in the pre-Matter of Sandoval decisions, that showing of illegality had to be supported by affidavits and by a non-frivolous offer of proof.

Therefore, with regard to whether or not the

agency will be swamped by the filing of frivolous suppression motions can really be addressed in terms of the mechanisms for review of these motions, and the agency may also, in addition to its mechanism for subpoenas, require the alien to file such a suppression motion prior to the hearing. Therefore, the government will be able to respond in such a case to a non-frivolous assertion of illegality on the part of the government.

What the government is really asking for in this case is that the Fourth Amendment not be enforced as rigorously in this context because it would be more efficient for the government to enforce immigration laws without the Fourth Amendment. So the costs relied upon by the government in this context are really the costs imposed on the enforcement system by the Fourth Amendment itself.

There is a need for neutral procedures to be adopted by the agency, or a need for sufficient facts for the government to justify its intrusion, and that cost analysis has already been conducted by the framers of the Constitution in applying the Fourth Amendment to government intrusions.

It is really unacceptable for the government to say that it cannot enforce the immigration laws and

live effectively within the Fourth Amendment. That is a bad enough result when it affects the rights of undocumented aliens, and it is an even worse result when its primary impact is on corroding the rights of Hispanic Americans.

This Court must also consider the cost to society posed by an abandonment of the exclusionary rule in this context.

With regard to whether or not this case requires an extension of the exclusionary rule or a return to former long-standing practice, what is important with regard to that consideration is whether or not, first of all, the costs asserted by the government are as significant as they maintain, and if you look at the past history of applying the rule, and the way that the suppression motions have come up in this context, that cost is not going to be significant in terms of the system being able to adopt procedures to apply the exclusionary rule.

But the issue of extension is also important with regard to the signal that it would send to agents out in the field who are enforcing the immigration laws. If the signal is that the Fourth Amendment is not going to be taken as seriously in this context as it is in the criminal context, and abandonment of the rule

will indicate to officers in the field that their actions will not be reviewed with as much rigorousness, and they will have additional discretion in the field.

The real danger is that officers will confuse ethnicity with probable cause in this area. This Court has structured a careful balancing of Fourth Amendment protections and law enforcement needs in the roving border patrol cases and the fixed checkpoint cases. If freed from the exclusionary rule in this context, that balance would be lost.

Inevitably, given the pressures under which INS officers work, INS officers would increasingly confuse ethnicity with a reason for apprehending illegal aliens. Those who look like the targets of INS searches would be swept into an ever-growing net of suspicion and fear. In effect, the government asks that Hispanic Americans surrender the enjoyment of their Fourth Amendment rights to permit more efficient enforcement of immigration laws. That is a price that no American may be asked to pay.

In sum, the Fourth Amendment exclusionary rule should be applied in deportation proceedings just as it is applied in criminal proceedings. The privacy interests to be protected are just as important here. The rule's deterrent effect is substantial. It has long

been applied in deportation prcceedings without excessive cost, and no realistic or equally effective alternatives exist which will adequately safeguard against violation of Fourth Amendment rights.

The Court should therefore affirm the judgment below.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Frey?

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice --

QUESTION: Mr. Frey, before you commence, it may or may not be important, but I am not clear as tc what the answer is. Justice Brennan asked you at the outset of your argument a question whether or not the statement in the brief of respondents was correct that the rule had been enforced consistently for many years. I understood you to say that there was no evidence cf that in the decisions of the Board of Immigration Appeals. Counsel for respondents say, and they cite Pages 67-69 of their brief, that there have been any number of cases. I haven't looked at those cases. Maybe I misunderstood either or both of you. What is the situation?

MR. FREY: Well, I think the situation is that

it is difficult to know in the purely abstract sense whether the exclusionary rule in the air applied in deportation proceedings prior to 1979 or not. I don't think that was a matter that was ever quite clear.

There were a number of cases that reached the BIA with claims of Fourth Amendment violations. Some of them, they said there was no Fourth Amendment violation. This is not a large number of cases compared to the total case load that we are talking about. Some of them they -- a lot of the cases they cite are alien crewmen cases, where there was other evidence of alienage, and therefore the challenge to evidence was no necessary to reach a decision in the case, and therefore the BIA had no occasion to pass upon whether it should have been admitted or excluded.

I would not say to you that it was clear that the exclusionary rule did not apply.

QUESTION: They really wouldn't have wasted their time deciding Fourth Amendment issues in a case if the evidence was admissible anyway, would they?

MR. FREY: If it was inadmissible anyway?

QUESTION: You say they actually ruled on Fourth Amendment claims. Why would they waste their time doing that?

MR. FREY: I am not suggesting to the Court

that there was a settled principle that the exclusionary rule did not apply. What I am suggesting to the Court is that it was not a significant feature in any way of the deportation hearing process or the review process. And on those -- that handful of cases that reached the BIA where there were substantive Fourth Amendment questions raised, they either disposed of them or said it was unnecessary to consider them simply without deciding.

QUESTION: But isn't it correct that they cite some cases that say they set up a regular procedure for processing, who had the burden of proof and all that sort of thing.

MR. FREY: I am not aware of that. I am sorry. I will say that there is one case, this Perez-Lopez case, that is cited where deportation initially did not occur because of a Fourth Amendment violation. This was at the ALJ level. One case. Now, just ask yourself, all of these people are being arrested in these various kinds of encounters that are bound to raise Fourth Amendment issues.

I just -- I mean, I feel that something that is so clear to me is perhaps not as clear to the Court, but how could it have been a meaningful feature, and yet all these people who would have had at least

colorable Fourth Amendment claims to suppress vital evidence in the deportation proceeding never went to a Court of Appeals until the Wong Chung Che case in 1975 in the First Circuit.

QUESTION: Could it be they didn't have lawyers?

MR. FREY: Well, that is an interesting point that I wanted to get to. One of the arguments -- they had lawyers in the deportation process, I think, most of them, but one of the arguments that is made for why the costs are not unacceptable is that most of these people are poor, they won't have lawyers, they will be deported anyway, so it is all right to have the exclusionary rule because we can rely on the fact that they won't have lawyers to invoke these rights that we are giving them.

Now, this seems to be a very odd way to try to minimize the costs of the exclusionary rule. What it really shows -- it is true, most of them don't have lawyers. Most of them leave without asserting all the legal rights that they could assert, and it is for that very reason that the exclusionary sanction is not going to be an effective way of getting INS agents who are otherwise acting without regard to their responsibilities under the Fourth Amendment to change their behavior.

We are not talking here about rewriting the Fourth Amendment. My friend does not keep clearly in mind the distinction between the Fourth Amendment and the exclusionary rule. The framers didn't adopt the exclusionary rule. They adopted the Fourth Amendment. If applying the exclusionary rule substantially advances Fourth Amendment values, a case can be made for it. If it doesn't, I think no case can be made for it.

Now, with respect to Justice Rehnquist's question about their footnote, of course there are some violations that probably occur that are not -- do not involve the issues in the Delgado case that was decided yesterday, but I think the vast bulk of claims do involve that kind of claim, so that the history of violations against which the Court should decide whether it needs an exclusionary rule here is largely violations that have turned out upon this Court's inspection of the legal issue not to be violations.

This also alters the cost-benefit balance. These people can still raise the claim. If Sandoval's claim were to be believed, he was walking through the line with the mask on, minding his own business. He was grabbed by the seat of the pants, put into the restroom, no questions asked, without any reason whatsoever, taken down to the station house, and presumably all 37 of

these people, for all we know, the same thing happened to them, yet it happened just by a strcke of gcod fortune that all 37 of these people were illegal aliens. They were incredibly lucky in using these procedures that supposedly violated the Fourth Amendment to have such a good batting average.

The point in these cases is that it is gcing to be very hard when you get into this kind of nitty-gritty, what did the agent see, what did the agent know, what did the alien do, was there a seizure, was it supported by reasonable suspicion, at what point was the admission of illegal alienage made, these are exceedingly intricate questions.

If these 70,000 deportation hearings, which now have very few -- have had very few cases in which that kind of question is raised, if that kind of question has to be litigated in a substantial number of these cases, and then on appeal to the BIA, and then, don't kid yourselves, cn appeals to the Courts of Appeals, because if you say there is an exclusionary rule, you will see this in the courts as well as within the immigration system.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:24 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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ADAN LOPEZ-MENDOZA

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