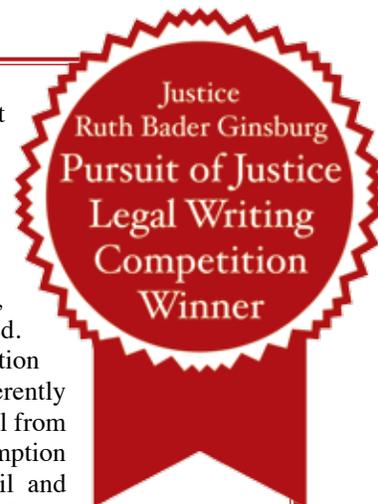


# Application of the Exclusionary Rule in Immigration Proceedings:

Not Just Egregious Violations, Recommendations for Meaningful Protection of Civil Rights

By Matthew G. Tom



Early on a cold January morning in a quiet Oklahoma town, Carlos Estrada, his wife, and teenage son and daughter were asleep in their home of 10 years when a team of ICE agents pounded on their front door. Hastily, Mr. Estrada answered the door, and agents entered the home. They handcuffed every member of the Estrada family and put them face down on the floor of their living room, guns drawn. Agents explained that Mr. Estrada had been under investigation for the last three years and showed Mr. Estrada surveillance pictures of himself at his workplace from three years earlier. However, after agents compared an electronic fingerprint of Mr. Estrada with the man they were actually seeking, the agents realized that they had raided the wrong home, and targeted the wrong person. Even still, Mr. Estrada was ordered to produce a green card. He could not because he was a United States citizen. The Estrada family remained in handcuffs for another forty minutes before being released.

Stories like the Estradas' are not rare; rather, tales of egregious violations of the civil rights of United States citizens and of noncitizens in the course of immigration enforcement are widespread. While the courts have applied the exclusionary rule in criminal law to deter the type of unlawful state action that traumatically affected the Estrada family, the Supreme Court has held that the rule will not generally apply to unlawful state action in the immigration enforcement context.

As an initial matter, it is important to note that legislative power and incident executive power is arguably at its height in the context of immigration law. Notwithstanding the general rule that the United States government is one of enumerated powers, the courts have resisted constitutional limitation of immigration laws basing this decision on the plenary power doctrine established in the case of *Chae Chan Ping v. United States*. There, the Supreme Court held that a federal law prohibiting immigration on the basis of race was permissible because the "power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution." This holding and its progeny has established a nearly unassailable deference for Congress in immigration matters that has come to be called the plenary power doctrine.

Given the existence of the plenary power it is not surprising that the constitutional protections afforded persons in criminal proceedings do not generally extend into related immigration proceedings, opening the door to unlawful government action. For instance, while criminal suspects are guaranteed the Fifth Amendment right against self-incrimination and the right to an attorney in criminal proceedings, such rights are not as a matter of constitutional law afforded that same suspect should she be subject to the removal for related immigration reasons.

This outcome has been justified, in part, on the theory that

removal from the country does not constitute a criminal punishment, but merely a civil one, the mere exercise of national sovereignty. This categorical approach, however, has lost legitimacy in an age where immigration law and criminal law, as a practical matter, have merged. The criminalization of immigration violations coupled with the inherently disruptive nature of physical removal from the country challenges the assumption that immigration sanctions are civil and therefore require lesser standards of due process, or exemption from constitutional limitation.

Despite the general reticence of the courts to acknowledge constitutionally mandated protections in immigration, the United States Supreme Court in *INS v. Lopez-Mendoza* recognized the possibility for limited application of the exclusionary rule in immigration proceedings despite their purported civil nature for violations of Fourth Amendment rights in 1984. Since then, several of the Circuit Courts have found occasion to interpret *Lopez-Mendoza* and articulate its import in immigration proceedings, including the application of the rule in at least one appellate case. However, the exclusionary rule remains sparingly and inconsistently applied and, therefore, ineffective deterrent of government violations of the Constitution in immigration law.

This Comment explores the application of the exclusionary rule in the immigration context. It sets forth the ways in which circumstances have changed since the Supreme Court's decision on the issue, circumstances that now require the Court's initial decision be reevaluated. Ultimately, this Comment asserts that the exclusionary rule should be fully adopted in criminal immigration enforcement without imposing the more stringent "egregious violations" standard because removal has effectively merged with the criminal punishment of individuals and, accordingly, can no longer be considered a mere civil penalty.

Even if immigration proceedings continue to be recognized as civil in nature, the changed circumstances of immigration enforcement have led to geographically and institutionally widespread violations of the Constitution such that the exclusionary rule must be adopted pursuant to the Supreme Court's own reasoning in *Lopez-Mendoza*. ■

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