

NOTES

ADAPTING TO 287(G) ENFORCEMENT: RETHINKING SUPPRESSION AND TERMINATION DOCTRINES IN REMOVAL PROCEEDINGS IN LIGHT OF STATE AND LOCAL ENFORCEMENT OF IMMIGRATION LAW

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Two legal doctrines govern the suppression of evidence and termination of removal proceedings following constitutional or regulatory violations in immigration enforcement. The Lopez-Mendoza doctrine governs suppression of evidence obtained in violation of constitutional rights. The Accardi doctrine governs suppression of evidence and termination of removal proceedings following violations of regulatory rights. However, the expanding involvement of state and local law enforcement agencies in immigration enforcement, particularly through 287(g) agreements, calls into question the applicability of these two doctrines. This Note analyzes the Lopez-Mendoza and Accardi doctrines in light of the new enforcement context presented by 287(g) agreements; it concludes that reexamination of the Lopez-Mendoza doctrine is required and that full application of the Accardi doctrine is warranted in the 287(g) context.

INTRODUCTION

Section 287(g) of the Immigration and Nationality Act (INA) authorizes the Secretary of Homeland Security, through Immigration and Customs Enforcement, to enter into agreements with state and local law enforcement agencies delegating authority to state and local officers to enforce federal immigration laws.¹ The first Memorandum

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¹ Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

of Agreement (MOA) pursuant to section 287(g) was entered into in 2002.² Today there are about seventy-two active MOAs, more than 1190 state and local officers trained and certified under the program, and more than 173,000 aliens identified through 287(g) enforcement efforts.³ Despite controversies surrounding the 287(g) program, the Obama administration announced plans in 2009 to further expand the use of 287(g) agreements.⁴

The 287(g) program has received attention from lawmakers,⁵ commentators,⁶ and advocacy groups.⁷ Much of this attention has focused on the debate regarding the appropriate role for states and localities in immigration enforcement and on reporting progress and problems with program implementation. Little attention has focused on the ways in which the expanded use of 287(g) enforcement affects immigration doctrine. Given the increased number of reports of constitutional and MOA violations by 287(g) officers,⁸ challenges to 287(g) enforcement practices are likely to begin emerging in immigration litigation, bringing this neglected area of analysis to the forefront. This Note begins to fill that void by examining whether and how 287(g) enforcement modifies two immigration law doctrines: the *Lopez-Mendoza* doctrine, which governs suppression of illegally obtained evidence, and the *Accardi* doctrine, which governs sup-

² See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/news/library/factsheets/287g.htm> (last visited Feb. 19, 2011) [hereinafter *ICE 287(g) Website*] (describing 287(g) program).

³ *Id.*

⁴ See Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (July 10, 2009), http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm [hereinafter *Napolitano Press Release*] (announcing eleven new MOAs and stating that “[t]he 287(g) program is an essential component of [the department]’s comprehensive immigration enforcement strategy”) (quoting Immigration and Customs Enforcement (ICE) Assistant Secretary John Morton); see also Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy Under Obama*, N.Y. TIMES, Aug. 4, 2009, at A14.

⁵ See, e.g., *Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law: Hearing Before the H. Comm. on Homeland Sec.*, 111th Cong. (2009) [hereinafter *287(g) Congressional Hearing*].

⁶ See, e.g., Evelyn H. Cruz & Robert J. McWhirter, *G-Men Run Amuck: The 287(g) Men and Immigration Law*, ARIZ. ATT'Y, July–Aug. 2009, at 34, 34–36; Jason G. Idilbi, *Local Enforcement of Federal Immigration Law: Should North Carolina Communities Implement 287(g) Authority?*, 86 N.C. L. REV. 1710 (2008).

⁷ See, e.g., DEBORAH M. WEISSMAN ET AL., AM. CIVIL LIBERTIES UNION, UNIV. OF N.C. AT CHAPEL HILL IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, *THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA* (2009), available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf> [hereinafter *ACLU/UNC REPORT*].

⁸ See *infra* notes 73–74.

pression of evidence and termination of removal proceedings following violations of regulatory rights.

These doctrines constitute two primary avenues for suppression and termination relief in immigration proceedings.⁹ First, a respondent¹⁰ can argue that a constitutional violation has occurred, and therefore application of the exclusionary rule should result in suppression of the evidence. This first avenue of relief is governed by the *Lopez-Mendoza* doctrine.¹¹ As a second avenue to suppression and termination, a respondent can argue that regulatory violations have occurred, thus triggering suppression or termination remedies. This second avenue of relief is governed by the *Accardi* doctrine.¹² These two doctrines, which are commonly litigated together in an immigration case and are thus analyzed together in this Note, have become key areas of litigation in immigration proceedings. With the expansion of grounds for removal and the simultaneous narrowing of grounds for relief, suppression and termination have become the only avenues of relief left for many immigration respondents.¹³ In addition to their importance to immigration proceedings generally, the *Lopez-Mendoza* and *Accardi* doctrines are the most relevant immigration doctrines in the 287(g) context; 287(g) programs authorize state and local enforcement of immigration laws, and both of these doctrines focus on policing enforcement practices and remedying violations occurring in the course of immigration enforcement. This Note will examine these two doctrines in light of 287(g) agreements, concluding that a reexamination of the *Lopez-Mendoza* doctrine is required and

⁹ See ANNA MARIE GALLAGHER & THOMAS HUTCHINS, IMMIGRATION PLEADING AND PRACTICE MANUAL § 2:19 (2009) (stating motion to suppress is available for constitutional and regulatory violations by immigration officers); NAT'L IMMIGRATION PROJECT, NAT'L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 7:6 (3d ed. 2010) [hereinafter IMMIGRATION LAW AND DEFENSE] (same); IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 362 (11th ed. 2008) [hereinafter KURZBAN'S SOURCEBOOK] (same); Maria T. Baldini-Potermin, Rex Chen & Erich C. Straub, *Motions to Suppress: Breathing New Life into the Exclusionary Rule in Removal Proceedings*, in IMMIGRATION & NATIONALITY LAW HANDBOOK (Richard J. Link et al. ed., 2008) (listing suppression for constitutional and regulatory violations as motion in removal proceedings); Stella Burch Elias, "Good Reason to Believe": *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109 (describing motions to suppress and terminate as "single determinative factor" in whether individual is permitted to stay in United States).

¹⁰ The term "respondent" refers to an alien placed in removal proceedings in immigration court. See EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 56 (2008), available at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm [hereinafter IMMIGRATION COURT MANUAL].

¹¹ See *infra* Part II (analyzing *Lopez-Mendoza* doctrine).

¹² See *infra* Part III (analyzing *Accardi* doctrine).

¹³ See *infra* notes 30–38.

that full application of the *Accardi* doctrine is warranted in the 287(g) context.

Part I will begin by explaining the basic structure of immigration enforcement and removal proceedings, and the importance of suppression and termination remedies in the system. Part I will also present a brief overview of the debate regarding the appropriate role of state and local governments in the enforcement of immigration laws, as well as provide a description of the 287(g) program and MOAs. Part II will then focus on the *Lopez-Mendoza* doctrine, which governs the applicability of the exclusionary rule in removal proceedings to remedy constitutional violations. In this Part, I argue that 287(g) agreements present a novel enforcement context that requires reevaluation of the *Lopez-Mendoza* doctrine. Part III will then focus on the *Accardi* doctrine, which governs suppression and termination following violations of immigration regulations. In this Part, I argue for full application of *Accardi* in the 287(g) context.

I

IMMIGRATION ENFORCEMENT AND THE FEDERAL-STATE LINE

A. *Immigration Enforcement and Removal Proceedings*

Immigration and Customs Enforcement (ICE) is the investigative agency within the Department of Homeland Security (DHS)¹⁴ charged with enforcing immigration laws.¹⁵ ICE officers are empowered to stop, interrogate, arrest, and detain persons suspected to be removable aliens.¹⁶ After arrest, cases are referred to an immigration judge (IJ) for an administrative hearing to determine whether a respondent is removable under the relevant immigration laws.¹⁷ This

¹⁴ In 2002, the Homeland Security Act abolished the Immigration and Naturalization Service (INS) and transferred immigration services and enforcement responsibilities to the newly created DHS. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.). ICE was created within DHS. *See* 6 U.S.C. § 542 (2006); Name Change from the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection, 72 Fed. Reg. 20,131 (Apr. 23, 2007).

¹⁵ *See* 6 U.S.C. §§ 251–252; *see also* *ICE Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/index.htm> (last visited Feb. 19, 2011).

¹⁶ *See* Immigration and Nationality Act § 236, 8 U.S.C. § 1226 (2006) (describing apprehension and detention of aliens); *id.* § 287, 8 U.S.C. § 1357 (enumerating powers of immigration officers); 8 C.F.R. § 287 (2010) (setting forth regulations governing powers and duties of immigration field officers).

¹⁷ Immigration and Nationality Act § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A) (“At the conclusion of the proceeding the [IJ] shall decide whether an alien is removable.”); 8 C.F.R. § 1240.12(a) (noting that IJ decision must contain finding as to inadmissibility or

referral is done through a charging document—the notice to appear—which officially commences the removal proceeding.¹⁸ The respondent must appear in immigration court¹⁹ and will have the opportunity to file motions, including motions to suppress evidence or terminate proceedings.²⁰ DHS bears the initial burden to establish alienage²¹ and the burden to show deportability upon a showing by the respondent of prior admission into the country (e.g., as a legal permanent resident).²² The IJ determination of removability must be based only on the evidence presented at the proceeding.²³ Either DHS or the respondent can appeal an IJ determination to the Board of Immigration Appeals (BIA), the highest administrative body with the power to interpret and apply immigration laws.²⁴ The Attorney

deportability); *see also* CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 64.02 (2010) [hereinafter IMMIGRATION LAW AND PROCEDURE] (noting that removal hearing determines whether respondent is inadmissible or deportable). IJs are part of the Executive Office for Immigration Review, an office within the Department of Justice. *See* Immigration and Nationality Act § 103, 8 U.S.C. § 1103(g) (authorizing Attorney General to oversee Executive Office for Immigration Review and issue regulations pursuant to that authority); 8 C.F.R. § 1003.0(a)–(b) (requiring Director of Executive Office for Immigration Review to oversee IJs via examinations and performance reviews).

¹⁸ Immigration and Nationality Act § 239, 8 U.S.C. § 1229; 8 C.F.R. § 1003.14 (2010); IMMIGRATION COURT MANUAL, *supra* note 10, at 55–56.

¹⁹ Immigration and Nationality Act § 240, 8 U.S.C. § 1229a; IMMIGRATION COURT MANUAL, *supra* note 10, at 59, 78.

²⁰ *See supra* note 9 (listing motions to suppress and terminate proceedings as motions available to immigration respondents in removal proceedings); IMMIGRATION COURT MANUAL, *supra* note 10, at 65–66, 99 (indicating ability of respondent to file motions after initial appearance).

²¹ 8 C.F.R. § 1240.8(c) (stating that DHS has burden of showing alienage for aliens present in U.S. without prior admission or parole); IMMIGRATION LAW AND PROCEDURE, *supra* note 17, § 64.03 (same); KURZBAN'S SOURCEBOOK, *supra* note 9, at 153, 376 (same). This burden applies in all cases, except when the respondent is seeking admission at a point of entry or after parole. *Id.*

²² Immigration and Nationality Act § 240(c)(2)(B), (c)(3)(A), 8 U.S.C. § 1229a(c)(2)(B), (c)(3)(A) (2006); 8 C.F.R. § 1240.8(a) (burden of proof on DHS in cases of deportability); IMMIGRATION LAW AND PROCEDURE, *supra* note 17, § 64.03 (same); KURZBAN'S SOURCEBOOK, *supra* note 9, at 376 (same).

²³ Immigration and Nationality Act § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A) (“The determination of the immigration judge shall be based only on the evidence produced at the hearing.”); *see also* IMMIGRATION LAW AND DEFENSE, *supra* note 9, § 7:6 (same); IMMIGRATION LAW AND PROCEDURE, *supra* note 17, § 64.03 (same).

²⁴ 8 C.F.R. §§ 1003.1, 1003.38 (granting BIA appellate jurisdiction over IJ decisions); 8 C.F.R. § 1240.15 (indicating availability of appeal to BIA); IMMIGRATION COURT MANUAL, *supra* note 10, at 101 (same); IMMIGRATION LAW AND PROCEDURE, *supra* note 17, § 3.05 (same). The BIA is also part of the Executive Office for Immigration Review within the Department of Justice. *See* 8 C.F.R. § 1003.0.

General retains the ability to review BIA decisions,²⁵ but such review is infrequent.²⁶ Some judicial review of final orders of removal is available in the U.S. courts of appeals.²⁷

Given this structure of immigration enforcement and proceedings, suppression and termination remedies for constitutional and regulatory violations are important for at least two reasons. First, suppressing evidence and terminating proceedings can serve as deterrent tools to ensure agents' compliance with constitutional and regulatory mandates. In fact, courts have identified deterrence as the primary goal of suppression and termination remedies,²⁸ and these tools become particularly important given the expansion of ICE and the national focus on strengthening immigration enforcement.²⁹ Second, suppression and termination have become important remedies for many respondents. Over the last several decades, Congress has greatly increased the grounds of deportability while simultaneously limiting the availability of relief from removal.³⁰ Thus, an increasingly large

²⁵ 8 C.F.R. § 1003.1(h) (setting out referral process for Attorney General review of BIA decisions); see also KURZBAN'S SOURCEBOOK, *supra* note 9, at 1023 (explaining review of BIA decisions by Attorney General).

²⁶ See, e.g., Margaret H. Taylor, *Behind the Scenes of St. Cyr and Zadvydas: Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR. L.J. 271, 284 (2002) (describing Attorney General review as "rarely exercised").

²⁷ Immigration and Nationality Act § 242, 8 U.S.C. § 1252 (2006) (providing for judicial review of orders of removal); see also KURZBAN'S SOURCEBOOK, *supra* note 9, at ch.10 (describing judicial review available in depth); IMMIGRATION LAW AND DEFENSE, *supra* note 9, § 10:4 (same); IMMIGRATION LAW AND PROCEDURE, *supra* note 17, § 104.13 (same).

²⁸ See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) ("[T]he prime purpose of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct." (internal quotations and citation omitted)); *Rajah v. Mukasey*, 544 F.3d 427, 447 (2d Cir. 2008) ("With regard to termination, we have sought to strike a balance between protecting the rights of aliens, deterring government misconduct, and enabling reasonably efficient law enforcement.").

²⁹ See, e.g., Julia Preston, *Democrats Reframe the Debate on Immigration*, N.Y. TIMES, May 1, 2010, at A1 ("The outline for an immigration overhaul unveiled by Democratic senators this week lays down a new starting point for any national debate: tough immigration enforcement."); Preston, *supra* note 4 (outlining growth of immigration-enforcement efforts under Obama administration); Press Release, Dep't of Homeland Sec., DHS Announces \$12.14 Billion for Border Security & Immigration Enforcement Efforts (Jan. 31, 2008), http://www.dhs.gov/xnews/releases/pr_1201803940204.shtm (describing allocation of additional resources to immigration enforcement).

³⁰ See IMMIGRATION LAW AND PROCEDURE, *supra* note 17, § 2.04 (outlining history and development of immigration law and illustrating expansion of grounds of inadmissibility and deportability while simultaneously limiting availability of relief for many immigration respondents); KURZBAN'S SOURCEBOOK, *supra* note 9, at ch. 1 (same); Ira J. Kurzban, *Criminalizing Immigration Law*, in PRACTICING LAW INST., 42ND ANNUAL IMMIGRATION & NATURALIZATION INSTITUTE 321 (2009) [hereinafter Kurzban, *Criminalizing Immigration Law*] (outlining expansion of criminal grounds of deportation and simultaneous reduction in avenues of relief).

number of noncitizens, including legal permanent residents, are finding themselves in removal proceedings without any statutory avenue for relief.³¹ Facing very low odds of obtaining statutory relief from an IJ,³² the ability to suppress evidence or to terminate proceedings becomes important as potentially the only means of avoiding removal.³³ If a respondent can suppress evidence of alienage—e.g., a statement admitting foreign birth³⁴—or of deportability—e.g., a statement admitting to helping others enter the United States without inspection³⁵—then the outcome of the proceeding could change drastically. Unless the DHS can produce other untainted evidence, it will be unable to meet its burden, and the IJ will be without authority to order removal.³⁶ While this will not win the respondent legal status, she will not be removed from the country either. Similarly, a respondent who argues successfully for termination may remain in the country for a longer period of time, even if removal proceedings are recommenced.³⁷ In both scenarios, longer presence in the United States might affect eligibility for certain kinds of relief requiring continuous presence³⁸ or the ability to benefit from future immigration reform. Thus, suppression of evidence and termination of proceedings are important remedial options, both to keep immigration enforcement officers and agencies accountable to constitutional and regula-

³¹ See, e.g., Kurzban, *Criminalizing Immigration Law*, *supra* note 30, at 325 (explaining how expansion of criminal grounds of deportation has left many legal permanent residents facing removal without any relief).

³² See EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK, at D2 (2010), available at <http://www.justice.gov/eoir/statpub/fy09syb.pdf> (summarizing IJ dispositions and showing that 79.8% of cases resulted in removal of respondent, relief was granted in 12.3% of cases, and termination was granted in additional 7.3% in 2009 fiscal year).

³³ See Elias, *supra* note 9, at 1112–13 (“A motion to suppress evidence and terminate proceedings is . . . not merely a procedural step, but rather the single determinative factor deciding whether an individual is removed from the United States or allowed to remain in the country.”).

³⁴ See KURZBAN'S SOURCEBOOK, *supra* note 9, at 376 (noting that admission of foreign birth is sufficient to establish alienage in removal proceeding).

³⁵ See Immigration and Nationality Act § 237(a)(1)(E), 8 U.S.C. § 1227(a)(1)(E) (2006) (listing aiding others to enter illegally as grounds for deportation).

³⁶ See *supra* notes 21–23 (showing DHS has burden to prove alienage and deportability, and IJ must decide case based on evidence at hearing).

³⁷ Double jeopardy is inapplicable in removal proceedings, so unless terminated with prejudice, a removal proceeding can be recommenced after termination. See *Rajah v. Mukasey*, 544 F.3d 427, 446–47 (2d Cir. 2008) (discussing termination with and without prejudice); KURZBAN'S SOURCEBOOK, *supra* note 9, at 275 (noting inapplicability of double jeopardy). Double jeopardy is “[t]he fact of being prosecuted or sentenced twice for substantially the same offense.” BLACK'S LAW DICTIONARY 564 (9th ed. 2009).

³⁸ See, e.g., Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b (requiring continuous presence in United States for seven years for legal permanent residents and ten years for nonpermanent residents in order to qualify for cancellation of removal).

tory requirements and also as potential relief from removal for immigration respondents.

B. State and Local Enforcement of Immigration Laws

The proper role of states and localities in the enforcement of federal immigration law is a contested matter. For many years, the Department of Justice held the view that states and localities lacked inherent authority to enforce civil immigration law.³⁹ In 2002, the Attorney General announced a reversal of this position, stating that the Office of Legal Counsel found no preemption of states or localities in the enforcement of immigration law, including civil enforcement.⁴⁰ Legal commentators have come out on both sides of the issue, some arguing that states possess inherent authority to enforce all immigration laws,⁴¹ while others argue that such enforcement is pre-

³⁹ See Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. O.L.C. 26, 26 (1996) (“State and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws . . .”); Memorandum from Douglas W. Kmiec, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Joseph R. Davis, Assistant Dir., Legal Counsel, FBI, Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File, 4 n.11 (Apr. 11, 1989), available at http://www.aclu.org/pdfs/immigrants/1989_olc_opinion.pdf (“[W]e do not believe the Supremacy Clause of the Constitution can be interpreted to generally confer authority upon state and local municipalities to execute federal law.”). Certain immigration-related actions constitute criminal violations, such as reentry without inspection after removal. Immigration and Nationality Act § 276, 8 U.S.C. § 1326. Other actions are only civil violations of immigration laws, such as remaining in the country after expiration of a visa. See, e.g., Immigration and Nationality Act §§ 239–240, 8 U.S.C. §§ 1229–1229a.

⁴⁰ Att’y Gen. John Ashcroft, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), available at <http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (“[A]rresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable . . . is within the inherent authority of the states.”); Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John D. Ashcroft, Att’y Gen., U.S. Dep’t of Justice, Non-preemption of the Authority of State and Local Law Enforcement Officials To Arrest Aliens for Immigration Violations 8 (Apr. 3, 2002), available at <http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf> (“We . . . withdraw the 1996 OLC Opinion’s advice that federal law precludes state police from arresting aliens on the basis of civil deportability.”).

⁴¹ See, e.g., Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. REV. 83 (2004) (defending inherent authority position); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008) (arguing that state and federal governments share immigration authority under Constitution); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179, 182–83 (2005) (finding law “quite clear [that] arresting aliens who have violated either criminal provisions of the INA or civil provisions that render an alien deportable is within the inherent authority of the states” and “has never been preempted”).

empted.⁴² The few circuit courts to address this question have provided little guidance.⁴³

From a practical perspective, one of the main arguments in support of state and local participation in the enforcement of immigration laws is the need to increase effectiveness and enhance national security.⁴⁴ Not only is enrollment of state and local officers a “force multiplier”—adding hundreds of thousands of state and local officers to assist the few thousand federal field agents—but these officers also encounter the targets of immigration enforcement every day through their regular tasks and are thus uniquely positioned to detect and apprehend aliens. Many see state and local assistance, therefore, as not only valuable but also necessary for the effective enforcement of immigration laws and the apprehension of dangerous aliens.

Other commentators worry that, given the complexities of the immigration laws and system, state and local officers’ lack of knowl-

⁴² See, e.g., Maria Fernanda Parra-Chico, *An Up-Close Perspective: The Enforcement of Federal Immigration Laws by State and Local Police*, 7 SEATTLE J. SOC. JUST. 321 (2008) (arguing against state and local enforcement as preempted); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (arguing that local enforcement of immigration laws violates Constitution); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–95 (2004) (arguing that INA grants states only limited authority to enforce some criminal provisions).

⁴³ See *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295, 1300 (10th Cir. 1999) (finding that while federal statute in question did not authorize defendant’s arrest by municipal police officer, it nevertheless did not displace “preexisting state or local authority to arrest individuals violating federal immigration laws,” though failing to specify whether “federal immigration laws” included only criminal provision, at issue in the case, or also civil provisions); *Gonzalez v. Peoria*, 722 F.2d 468, 474–75, 477 (9th Cir. 1983) (concluding that “nothing in federal law precluded Peoria police from enforcing the *criminal provisions* of the Immigration and Naturalization Act” and mentioning only in dicta assumption that civil provisions of INA implicitly preempted state and local enforcement (emphasis added)). The United States District Court for the District of Arizona and the Ninth Circuit are currently considering a challenge to an Arizona immigration law, S.B. 1070, on federal preemption grounds. See *United States v. Arizona et al.*, No. 10-cv-01413 (D. Ariz. filed July 6, 2010). While the challenge is to a state immigration law, rather than specifically to state enforcement of federal immigration law, the outcome of the case and the future of S.B. 1070 is likely to shed light on the appropriate place for state enforcement of federal immigration law. For more information regarding litigation surrounding S.B. 1070, see *Arizona SB 1070, Legal Challenges and Economic Realities*, LEGAL ACTION CTR., AM. IMMIGRATION COUNCIL, <http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/arizona-sb-1070%E2%80%8E-legal-challenges-and-economic-realities> (last visited Feb. 19, 2011).

⁴⁴ Kobach, *supra* note 41, at 180–96 (describing value of state and local enforcement as “force multiplier” and explaining importance of state and local police in capturing suspected terrorists, criminals, and absconders); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323, 327–29 (2005) (arguing that state and local participation is needed given small number of federal agents).

edge and training will result in racial profiling and other constitutional and civil rights violations.⁴⁵ Members of the law enforcement community, including the Major Cities Chiefs Association,⁴⁶ the Police Foundation,⁴⁷ and the International Association of Chiefs of Police,⁴⁸ have issued reports identifying areas of concern surrounding state and local police involvement in immigration enforcement.⁴⁹ First, it could diminish immigrant communities' trust in local police and reduce cooperation and community policing, decreasing public safety.⁵⁰ The reports also raise concerns about diversion of already scarce resources from traditional police work.⁵¹ Additionally, these law enforcement agencies worry about the complexity of immigration laws and the potential for confusion and misapplication by state and local officers. One agency stated that "local police agencies are ill equipped in terms of training, experience and resources to delve into the complicated

⁴⁵ See Wishnie, *supra* note 42, at 1102–15 (describing risk "of expanded, and unlawful, profiling" if states participate in immigration enforcement); Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 114 (2007) (describing concern that "state and local officers lack the knowledge, training, and experience needed to approach immigration enforcement in a way that prevents civil rights violations").

⁴⁶ The Major Cities Chiefs Association "is comprised of the Chiefs of the sixty-three largest police departments in the United States and Canada" and their membership represent "fifty-six U.S. cities" and serve "roughly forty per-cent of America's population." MAJOR CITIES CHIEFS ASS'N, <http://www.majorcitieschiefs.org/> (last visited Feb. 19, 2011).

⁴⁷ The Police Foundation is an "[i]ndependent, nonpartisan, and nonprofit" organization that works "to improve American policing and enhance the capacity of the criminal justice system to function effectively." POLICE FOUNDATION, <http://www.policefoundation.org/> (last visited Feb. 19, 2011). It works to "define, design, conduct, and evaluate controlled experiments testing ways to improve the delivery of police services." *Id.*

⁴⁸ "The International Association of Chiefs of Police is the world's oldest and largest nonprofit membership organization of police executives . . ." ABOUT IACP, INT'L ASS'N OF CHIEFS OF POLICE, <http://www.theiacp.org/About/tabid/57/Default.aspx> (last visited Feb. 19, 2011). It has "over 20,000 members in over 89 different countries" and includes "the operating chief executives of international, federal, state and local agencies of all sizes" as part of its membership. *Id.*

⁴⁹ ANITA KHASHU, POLICE FOUNDATION, THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES (2009), available at <http://www.policefoundation.org/strikingabalance/strikingabalance.html> [hereinafter POLICE FOUNDATION REPORT]; MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES (2006), available at http://www.houstontx.gov/police/pdfs/mcc_position.pdf [hereinafter MCC REPORT]; GENE VOEGTLIN, INT'L ASS'N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL AND LOCAL LAW ENFORCEMENT (2004), available at <http://www.theiacp.org/PublicationsGuides/ContentbyTopic/tabid/216/Default.aspx?id=553&v=1> [hereinafter CHIEFS OF POLICE REPORT].

⁵⁰ CHIEFS OF POLICE REPORT, *supra* note 49, at 5; MCC REPORT, *supra* note 49, at 5–6; POLICE FOUNDATION REPORT, *supra* note 49, at 23–24.

⁵¹ CHIEFS OF POLICE REPORT, *supra* note 49, at 3–4; MCC REPORT, *supra* note 49, at 6–7; POLICE FOUNDATION REPORT, *supra* note 49, at 26–27.

area of immigration enforcement.”⁵² The reports raise the risk of police misconduct going unreported due to community fear, explaining that “[t]he likelihood of error in the context of immigration enforcement is higher for poor and minority communities.”⁵³ Finally, they note the potential for racial profiling, since “[e]ven well-intentioned police officers risk racial profiling.”⁵⁴

C. Content and Operation of 287(g) MOAs

Section 287(g) of the INA authorizes DHS, through ICE, to enter into agreements with state and local enforcement agencies (LEAs) authorizing LEA officers to enforce federal immigration laws, both civil and criminal.⁵⁵ The statute sets limitations on LEA officers’ exercise of immigration power, providing for training, supervision, and qualification requirements.⁵⁶ The written agreements, in the form of MOAs, must outline the powers, duties, and duration of the conferral of authority.⁵⁷ The program has grown considerably in the last few years,⁵⁸ “emerg[ing] as one of the agency’s most successful and popular partnership initiatives,”⁵⁹ with seventy-two active MOAs and 1190 LEA officers trained.⁶⁰

The standardized 287(g) MOA⁶¹ “defines the scope and limitations of the authority to be designated” and sets out “the supervisory

⁵² MCC REPORT, *supra* note 49, at 7; accord POLICE FOUNDATION REPORT, *supra* note 49, at 27–28; CHIEFS OF POLICE REPORT, *supra* note 49, at 3.

⁵³ POLICE FOUNDATION REPORT, *supra* note 49, at 29.

⁵⁴ *Id.* at 28–30.

⁵⁵ Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

⁵⁶ *Id.* § 287(g)(1)–(3), 8 U.S.C. § 1357(g)(1)–(3).

⁵⁷ *Id.* § 287(g)(5), 8 U.S.C. § 1357(g)(5).

⁵⁸ See Idilbi, *supra* note 6, at 1716–17 (outlining growth of 287(g) program).

⁵⁹ ICE 287(g) Website, *supra* note 2.

⁶⁰ *Id.*

⁶¹ In July of 2009, DHS announced that it had standardized all 287(g) MOAs to increase uniformity in program requirements. See Napolitano Press Release, *supra* note 4. The standardized MOA defines the scope of authority for the two types of delegation of immigration authority: the Task Force Officer Model, which authorizes LEA officers to exercise immigration powers by questioning individuals encountered in the course of routine police activities; and the Jail Enforcement Office Model, which authorizes LEA officers to check the immigration status of any individual arrested and brought to the jail or detention facility where the officer works. See, e.g., Memorandum of Agreement Between United States Immigration and Customs Enforcement and the City of Mesa Police Dep’t, app. D (Nov. 19, 2009), available at http://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/r_287gmesapolicedept.pdf [hereinafter Sample MOA] (listing authority delegated under both models). Because all MOAs have now been standardized, the City of Mesa MOA will be referenced in this Note as a sample MOA representative of all active MOAs. For more examples of both types of MOAs, see ICE 287(g) Website, *supra* note 2, which lists all 287(g) agreements, and Emily Haverkamp et al., *Immigration and Nationality Law*, 43 INT’L LAW. 725, 732–33 (2009), which describes the 287(g) program and MOAs.

structure” and “complaint process governing officer conduct.”⁶² It sets out information on the purpose, authority, and policy of the agreement, allocation of costs and responsibilities, and policies for detention and transportation of detainees.⁶³ The MOA also provides guidance on the selection, training and certification of LEA personnel, ICE supervision, reporting requirements, and compliance with civil rights standards, as well as community and media relations policies.⁶⁴ Each MOA also contains a Complaint Procedure and a Standard Operating Procedure.⁶⁵ The Standard Operating Procedure sets out in detail the scope and limitations of delegated immigration authority, including a description of the conferral of authority and the governing statutory and regulatory provisions for each delegated power; it also contains guidance on prioritization of resources, data collection, and details the supervision and training requirements for LEA personnel, including training topics.⁶⁶

ICE has made all active MOAs available to the public by posting them on its website,⁶⁷ but very little official information is available about the operation of the 287(g) programs on the ground. For instance, while the MOAs contain a list of topics to be covered in 287(g) officer training,⁶⁸ the training materials and curricula are unavailable.⁶⁹ Furthermore, the absence of explicit recordkeeping requirements in the MOAs limits the scope of the public record, obfuscating evaluation of the 287(g) program’s functionality.⁷⁰ Also, even though the MOAs establish a complaint procedure, publicly available information regarding complaints filed, investigation procedures, or response efforts is difficult to obtain.⁷¹ Given this lack of

⁶² ICE 287(g) Website, *supra* note 2.

⁶³ Sample MOA, *supra* note 61, at 1–3, 5, 7–8.

⁶⁴ *Id.* at 3–10.

⁶⁵ *Id.* at app. B (Complaint Procedure); *id.* at app. D (Standard Operating Procedure (SOP) Template).

⁶⁶ *Id.* at app. D.

⁶⁷ See ICE 287(g) Website, *supra* note 2.

⁶⁸ Sample MOA, *supra* note 61, at app. D (listing terms and limitations of MOA, officer authority, immigration law, ICE Use of Force Policy, civil rights, racial profiling, liability, cross-cultural issues, public outreach and complaint procedure, and consular notifications as topics to be included in 287(g) training, as well as requiring additional training one year after certification plus any local training needed based on ICE determination).

⁶⁹ See ACLU/UNC REPORT, *supra* note 7, at 9, 11 (criticizing “lack of transparency as to the implementation of the [287(g)] program” in training programs and other contexts).

⁷⁰ See 287(g) Congressional Hearing, *supra* note 5, at 41 (statement of Muzaffar A. Chishti, Director, Migration Policy Institute Office at New York University) (detailing inadequacy of 287(g) accountability measures).

⁷¹ See *id.* (describing lack of information regarding 287(g) complaint procedure); ACLU/UNC REPORT, *supra* note 7, at 66–67 (indicating difficulty of obtaining such information).

transparency, it is difficult to assess fully the operation of MOAs and functioning of 287(g) enforcement in the various localities, or the progress of the 287(g) program as a whole. The assessments of 287(g) programs in this Note, therefore, rely mostly on information contained in various reports, including reports by the Government Accountability Office (GAO), the DHS Office of Inspector General (OIG), and various advocacy groups.⁷²

A review of available program information reveals concerns with 287(g) enforcement, including reports of constitutional and civil rights violations—such as racial profiling—by LEA officers.⁷³ Lack of compliance with MOA requirements has also been reported, such as unauthorized exercises of immigration power by questioning individuals about their immigration status without prior suspicion of a criminal offense.⁷⁴ Given these reports, legal challenges to LEA officers' constitutional and MOA violations are likely to emerge during litigation in removal proceedings. As such, the application of the two doctrines for suppression of evidence and termination of proceedings—the *Lopez-Mendoza* doctrine and the *Accardi* doctrine—should be reanalyzed in light of 287(g) enforcement.

II

CHALLENGING CONSTITUTIONAL VIOLATIONS

The first doctrine governing suppression of evidence in removal proceedings is the *Lopez-Mendoza* doctrine, which is applied in cases involving allegations of constitutional violations. This Part analyzes

⁷² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-109, IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS (2009) [hereinafter GAO REPORT]; DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., OIG-10-63, THE PERFORMANCE OF 287(G) AGREEMENTS (2010) [hereinafter OIG REPORT]; ACLU/UNC REPORT, *supra* note 7; IMMIGRATION POLICY CTR., LOCAL ENFORCEMENT OF IMMIGRATION LAWS THROUGH THE 287(G) PROGRAM: TIME, MONEY, AND RESOURCES DON'T ADD UP TO COMMUNITY SAFETY (2010) [hereinafter IPC REPORT]; MIGRATION POLICY INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011) [hereinafter MPI 287(G) REPORT].

⁷³ See, e.g., ACLU/UNC REPORT, *supra* note 7, at 43–47, 53–54 (reporting on racial profiling and other constitutional law violations); GAO REPORT, *supra* note 72, at 6 (noting community member concerns of racial profiling in 287(g) localities); IPC REPORT, *supra* note 72, at 3 (detailing threats to community safety deriving from racial profiling); OIG REPORT, *supra* note 72, at 22–24 (listing prior civil rights accusations in several 287(g) localities).

⁷⁴ See ACLU/UNC REPORT, *supra* note 7, at 46 (reporting anecdotal evidence of 287(g) officers stopping people without prior suspicion of criminal activity); GAO REPORT, *supra* note 72, at 13 (noting that signed MOAs laying out 287(g) requirements do not explicitly comply with stated ICE policy of limiting questioning authority of LEA officers to incidents of prior arrest).

the *Lopez-Mendoza* reasoning in the 287(g) context and shows that the main factor driving the holding in *Lopez-Mendoza*—the existence of an internal mechanism to deter Fourth Amendment violations—is significantly altered in 287(g) enforcement, thus requiring a reexamination of the doctrine.

A. *Exclusionary Rule in Removal Proceedings: Lopez-Mendoza*

In *INS v. Lopez-Mendoza*,⁷⁵ the Supreme Court established the applicability of the exclusionary rule in removal proceedings. The respondents alleged that the evidence introduced at their removal hearings was obtained as a result of unlawful arrests, in violation of their Fourth Amendment rights.⁷⁶ Applying the balancing test developed in *United States v. Janis*⁷⁷ for determining the applicability of the exclusionary rule in civil proceedings—“to weigh the likely social benefits of excluding . . . against the likely costs”⁷⁸—the Court concluded that the “balance . . . comes out against applying the exclusionary rule in civil deportation hearings.”⁷⁹

On the benefits side of the *Janis* analysis, the Court considered whether application of the exclusionary rule in removal hearings would deter Fourth Amendment violations by immigration officers,⁸⁰ and concluded that the deterrent value was small for a number of reasons. First, because the government need only prove identity and alienage to support a deportation order, “deportation will still be possible when evidence not derived directly from the arrest is sufficient” to meet this low burden.⁸¹ Second, the Court stated that, as a practical matter, immigration officers would be unlikely to shape their conduct in response to the exclusion of evidence in a few cases given their large caseloads.⁸² Third, the Court noted the availability of declaratory relief to challenge Fourth Amendment violations as an alternative method of ensuring agency compliance.⁸³ Finally, the Court found that the most important reason for believing that application of the exclusionary rule in removal proceedings would not deter (or only minimally deter) immigration officers was that “the INS has its own comprehensive scheme for deterring Fourth Amendment violations by

⁷⁵ 468 U.S. 1032 (1984).

⁷⁶ *Id.* at 1035–38.

⁷⁷ 428 U.S. 433 (1976).

⁷⁸ *Lopez-Mendoza*, 468 U.S. at 1041.

⁷⁹ *Id.* at 1050.

⁸⁰ *Id.* at 1042–43.

⁸¹ *Id.* at 1043.

⁸² *Id.* at 1044.

⁸³ *Id.* at 1045.

its officers.”⁸⁴ The existence of regulations governing officer conduct, training on Fourth Amendment law, and a system of supervision and accountability “reduce[d] the likely deterrent value of the exclusionary rule.”⁸⁵

On the other side of the *Janis* analysis, the Court found three costs to applying the exclusionary rule to removal cases. First, because removal proceedings are intended to prevent continuing or future violations of immigration law rather than punishing past transgressions, applying the exclusionary rule would mean that courts would “close their eyes to ongoing violations of the law,” i.e., continued unauthorized presence.⁸⁶ Second, application of the exclusionary rule would disrupt the “simple deportation hearing system, streamlined to permit the quick resolution of very large numbers of deportation actions.”⁸⁷ Lastly, the inability of officers to provide precise details for every single arrest in mass arrest operations would exclude otherwise lawfully obtained evidence from removal hearings.⁸⁸

The Court concluded that because “the INS has already taken sensible and reasonable steps to deter Fourth Amendment violations by its officers,” and because the costs of exclusion are high, the exclusionary rule is not generally applicable in removal proceedings.⁸⁹ A plurality of the Court recognized three exceptional circumstances that could alter this holding and tip the balance in favor of application of the exclusionary rule: widespread Fourth Amendment violations by immigration officers, egregious and fundamentally unfair constitutional violations, and egregious violations that undermine the reliability of the evidence.⁹⁰ Both the majority and plurality decisions in *Lopez-Mendoza* have shaped the development of immigration practice and procedure, thus “controlling the admission or suppression of evidence in all immigration proceedings,” including appeals.⁹¹

⁸⁴ *Id.* at 1044.

⁸⁵ *Id.* at 1044–45; *see also* Elias, *supra* note 33, at 1118 (describing internal deterrence scheme as most important reason why Court decided against application of exclusionary rule in *Lopez-Mendoza*).

⁸⁶ *Lopez-Mendoza*, 468 U.S. at 1046.

⁸⁷ *Id.* at 1048.

⁸⁸ *Id.* at 1049–50.

⁸⁹ *Id.* at 1050–51; *see also* Elias, *supra* note 33, at 1116–18 (discussing Court’s conclusions that costs of applying exclusionary rule in immigration proceedings outweigh benefits and that deterrent effect of exclusionary rule is unnecessary given INS internal enforcement mechanisms).

⁹⁰ *Lopez-Mendoza*, 468 U.S. at 1050–51.

⁹¹ Elias, *supra* note 33, 1112–13; *see also* KURZBAN’S SOURCEBOOK, *supra* note 9, at 278–79 (summarizing case law applying *Lopez-Mendoza* egregiousness exception); Jonathan L. Hafetz, *The Rule of Egregiousness: INS v. Lopez-Mendoza Reconsidered*, 19 WHITTIER L. REV. 843, 861 (1998) (describing *Lopez-Mendoza* requirement of egregious Fourth Amendment violation for exclusionary rule to apply as “the rule”); Joseph J. Migas,

In the twenty-five years following *Lopez-Mendoza*, commentators have criticized the conclusion that the balance of benefits and costs tips against application of the exclusionary rule in removal proceedings. In particular, they argue that the assumptions about immigration enforcement and procedure in *Lopez-Mendoza* were incorrect or have since become inaccurate.⁹² These commentators urge courts to reexamine the continuing validity of *Lopez-Mendoza* in modern immigration practice, arguing that the balance now tips in favor of application of the exclusionary rule even without widespread or egregious Fourth Amendment violations.⁹³ Despite these persistent attacks on the continued validity of *Lopez-Mendoza*, some courts have been reluctant to deviate from its holding.⁹⁴ For these courts, the changes in immigration practices over the last two decades are not sufficient to tip the balance in favor of exclusion. But neither courts nor commentators have analyzed whether or how the *Lopez-Mendoza* analysis changes in the 287(g) enforcement context. The following Section begins that discussion.

B. *Lopez-Mendoza and 287(g): Reevaluating the Doctrine*

Section 287(g) agreements introduce a new enforcement context into the *Lopez-Mendoza* analysis. Application of the exclusionary rule is no longer intended to deter immigration officers, but rather a whole new group of actors: LEA officers. The “comprehensive scheme for deterring Fourth Amendment violations” analyzed by the Court in *Lopez-Mendoza*—considered the “most important” factor in the balancing test⁹⁵—is no longer present, replaced instead by the scheme outlined under the MOAs. The analysis below contrasts each

Exclusionary Remedy Available in Civil Deportation Proceedings for Egregious Fourth Amendment Violations, 9 GEO. IMMIGR. L.J. 207 (1995) (discussing Ninth Circuit’s application of *Lopez-Mendoza* exception for egregious Fourth Amendment violations in civil deportation hearing).

⁹² See, e.g., Elias, *supra* note 33 (arguing that constitutional violations by immigration officers have now become widespread, requiring reexamination of *Lopez-Mendoza* holding); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000) (arguing that constitutional safeguards should apply to deportation proceedings to limit their excessively punitive nature); Michelle Rae Pinzon, *Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century*, 16 N.Y. INT’L L. REV. 29 (2003) (arguing that immigration law has become increasingly criminalized, and thus constitutional protections afforded in criminal system should apply).

⁹³ See *supra* note 92.

⁹⁴ See *supra* note 91 (discussing application of rule established in *Lopez-Mendoza* to subsequent cases).

⁹⁵ *Lopez-Mendoza*, 468 U.S. at 1044.

of these elements of the scheme at issue in *Lopez-Mendoza* with the features of the new 287(g) MOA system.⁹⁶

1. Regulations Governing Officer Conduct

The first factor of the comprehensive deterrence scheme identified in *Lopez-Mendoza* was the existence of “rules restricting stop, interrogation, and arrest practices.”⁹⁷ All immigration officers must abide by immigration regulations governing stops, arrests, interrogations, searches, and other practices whenever they engage in enforcement activity.⁹⁸ These rules delineate the levels of suspicion needed for stops, interrogations, and arrests and outline procedures for arrests, transportation of detainees, use of force, vehicle pursuits, and site inspections.⁹⁹

In contrast, MOAs do not specifically require compliance with these enforcement regulations in the 287(g) context.¹⁰⁰ The regulations are not explicitly mentioned anywhere in the MOAs, even though other provisions from the same section of the Code of Federal Regulations are cited to reference conferrals of authority.¹⁰¹ The MOAs do require LEA officers to use “DHS and ICE policies and procedures, including the ICE Use of Force Policy.”¹⁰² This language could be interpreted to require compliance with all immigration-related regulations, including the enforcement regulations referenced by the Court in *Lopez-Mendoza*. However, the lack of elaboration in the MOAs on the content of these policies and procedures, coupled with the absence of information from ICE on the operation of the MOAs, makes it impossible to determine definitively whether compliance with enforcement regulations is required. In its examination of a sample MOA, a nonprofit organization’s report on 287(g) found that it “does not specify what [DHS] policies and procedures [for LEA personnel] are or where they can be found.”¹⁰³

⁹⁶ This Note does not argue that the balancing test in *Lopez-Mendoza* necessarily would come out differently when analyzed in light of 287(g) enforcement. Nor does this Note analyze how the other factors on the benefits or costs side of the *Lopez-Mendoza* holding are changed in light of 287(g). My claim is simply that introduction of 287(g) enforcement introduces a novel enough context into the most important factor of the Court’s reasoning that reevaluation of its holding is warranted.

⁹⁷ *Lopez-Mendoza*, 468 U.S. at 1044–45.

⁹⁸ 8 C.F.R. § 287.5 (2010).

⁹⁹ *Id.* §§ 287.3, 287.8.

¹⁰⁰ See Sample MOA, *supra* note 61 (making no specific mention of federal enforcement regulations).

¹⁰¹ See *id.* at app. D (referencing other subsections of 8 C.F.R. § 287 in describing functions LEA personnel are authorized to perform but not mentioning § 287.3 or § 287.8).

¹⁰² *Id.* § X.

¹⁰³ ACLU/UNC REPORT, *supra* note 7, at 64.

A closer analysis of the text of the MOAs suggests that this language does not actually encompass enforcement regulations, and thus the MOAs do not require them. First, in the same paragraph referencing the “DHS and ICE policies and procedures,” those “policies and procedures” are contrasted with local “rules, standards, or policies” when addressing the resolution of conflicts between federal and state practice requirements.¹⁰⁴ The failure to refer to any DHS or ICE “rules” while explicitly referencing local “rules,” and distinguishing them from “standards[] or policies,” suggests that “DHS and ICE policies and procedures” do not include official federal rules governing officer enforcement conduct. Second, the MOA defines “policies and procedures” as including “the ICE Use of Force Policy,” which is not a federal regulation.¹⁰⁵ This implies that “policies and procedures” refer to ICE memoranda outlining internal enforcement requirements,¹⁰⁶ rather than binding enforcement regulations. Finally, a GAO report also noted the lack of guidance for LEA officers, finding that “ICE has not consistently communicated, through its MOAs with participating agencies, *how* and under what circumstances 287(g) authority is to be used.”¹⁰⁷ The ambiguity is such that some agreements do not even specify when officers can engage in questioning or processing individuals for immigration violations.¹⁰⁸ This lack of guidance for LEA officers under the 287(g) MOAs stands in sharp contrast to the carefully delineated limitations on the exercise of authority for immigration officers under federal regulations.

2. *Training on Fourth Amendment Law*

The second factor the Supreme Court noted in *Lopez-Mendoza* in finding a comprehensive scheme for deterring Fourth Amendment violations was the existence of immigration officer training and refresher courses.¹⁰⁹ New immigration officers are required to enroll in and successfully complete Immigration and Customs Enforcement Deportation Integrated (ICE D), a thirteen-week training program

¹⁰⁴ Sample MOA, *supra* note 61, § X (emphasis added).

¹⁰⁵ *Id.*

¹⁰⁶ In fact, ICE utilizes this same language, “policies and procedures,” on its website to refer to these types of internal memoranda, rather than to formal regulations. *FOIA Electronic Reading Room*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/foia/readingroom.htm> (last visited Feb. 19, 2011).

¹⁰⁷ GAO REPORT, *supra* note 72, at 13 (emphasis added).

¹⁰⁸ See *id.* at 13–14 (noting inconsistent and nonexistent implementation guidance for 287(g) program authority across initial 29 MOAs).

¹⁰⁹ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–45 (1984).

that includes training on Fourth Amendment law.¹¹⁰ In addition, immigration officers also participate in refresher trainings.¹¹¹

MOAs require LEA officers to complete a training program, the Immigration Authority Delegation Program (IADP), and ICE may provide a refresher course one year after certification.¹¹² It is unclear, however, whether these courses provide LEA officers with the same level of training and preparation provided to ICE officers. While ICE D is a thirteen-week training program, IADP is only four weeks long.¹¹³ Part of the difference in the length of training programs is undoubtedly attributable to the fact that LEA officers, who should possess at least one year of law enforcement experience prior to certification under a 287(g) program,¹¹⁴ are already trained in basic law enforcement, including Fourth Amendment law, whereas new ICE officers must complete this basic training for the first time. An OIG report notes that some 287(g) jurisdictions do in fact require their officers to attend courses on Fourth Amendment and civil rights laws separate from IADP training.¹¹⁵ Based on this, it could be argued that even if IADP does not provide LEA officers with the same level of training on Fourth Amendment law as ICE D, the existence of additional instruction through their respective jurisdictions dispenses with any concerns regarding the adequacy of training. However, without information about the content and scope of local Fourth Amendment training, such a conclusion is premature.

Moreover, given the complexity of immigration law and the nuances in the application of the Fourth Amendment in this area, the instruction that LEA officers receive as part of their basic law enforcement training provides inadequate preparation for immi-

¹¹⁰ See, e.g., OIG REPORT, *supra* note 72, at 28 (noting that immigration officers receive twenty hours of Fourth Amendment training); *Immigration & Customs Enforcement Deportation Integrated (ICE D)*, DEPT. HOMELAND SECURITY, <http://www.fletc.gov/training/training-management/training-management-division/center-integrated-branch/immigration-customs-enforcement-detention-integrated-iced/> (last visited Jan. 23, 2011).

¹¹¹ See OIG REPORT, *supra* note 72, at 32 (noting that ICE officers are required to complete refresher training).

¹¹² Sample MOA, *supra* note 61, at app. D.

¹¹³ See ICE 287(g) Website, *supra* note 2 (“ICE offers a four-week training program conducted by certified instructors at the Federal Law Enforcement Training Center (FLETC) ICE Academy (ICEA) in Charleston, S.C.”); see also 287(g) Congressional Hearing, *supra* note 5, at 39 (statement of Muzaffar A. Chishti, Director, Migration Policy Institute Office at New York University) (“Whereas regular ICE agents receive 5 months of training in the intricacies of immigration law, 287(g) officers receive 4 weeks of ICE training.”).

¹¹⁴ See Sample MOA, *supra* note 61, at app. D (stating that LEA personnel should have at least one year of experience in law enforcement).

¹¹⁵ See OIG REPORT, *supra* note 72, at 28–29 (describing LEA officer training on civil rights and Fourth Amendment law).

gration enforcement.¹¹⁶ The International Association of Chiefs of Police expressed the concern that even trained LEA officers would make mistakes since “[w]hat constitutes ‘probable cause’ in immigration matters may not be easy to discern” for these officers.¹¹⁷ Further, lack of national requirements for Fourth Amendment training programs means that the length and depth of these courses can vary considerably, ranging from four to twenty-four hours of instruction on these issues.¹¹⁸ Such variability makes it difficult to determine whether any one 287(g) jurisdiction provides adequate Fourth Amendment training, given that IADP training is not tailored to take these local variations into consideration.¹¹⁹ In fact, the OIG report concluded that “287(g) training does not fully prepare officers for immigration enforcement duties,” highlighting inadequate training on civil rights and Fourth Amendment law,¹²⁰ and noted that, while MOAs require participation in refresher courses, most LEA officers did not complete these refresher trainings.¹²¹ Another recent study noted that 287(g) training prepares officers for “perform[ing] most of the functions of entry-level ICE officers,” but that “287(g) officer training on civil-rights law, the terms and limitations of 287(g) agreements, and outreach and complaint procedures, is limited” and that “287(g) officers receive 20 fewer hours of instruction on civil-rights law, including concerns about racial profiling, than do ICE officers.”¹²²

This uncertainty regarding the content and adequacy of training for 287(g) officers, the potential for variability in jurisdiction-specific training programs, and the lack of compliance with refresher training requirements, all call into question whether LEA officers receive the same level of preparation on the Fourth Amendment as do immigration officers and whether the training offered adequately prepares LEA officers on immigration-specific Fourth Amendment law. Given the *Lopez-Mendoza* Court’s emphasis on immigration enforcement

¹¹⁶ See 287(g) *Congressional Hearing*, *supra* note 5, at 39 (statement of Muzaffar A. Chishti, Director, Migration Policy Institute Office at New York University) (stating concern that LEA agents “will violate the unique standards and constitutional requirements surrounding immigration enforcement”); CHIEFS OF POLICE REPORT, *supra* note 49, at 3–4 (expressing concern with complexity of immigration law for LEA officers); MCC REPORT, *supra* note 49, at 7 (same); POLICE FOUNDATION REPORT, *supra* note 49, at 27–28 (same).

¹¹⁷ 287(g) *Congressional Hearing*, *supra* note 5, at 39 (statement of Muzaffar A. Chishti, Director, Migration Policy Institute Office at New York University) (quoting INT’L ASS’N OF CHIEFS OF POLICE, POLICE CHIEFS GUIDE TO IMMIGRATION ISSUES 13 (2007)).

¹¹⁸ See OIG REPORT, *supra* note 72, at 28–29 (describing variability of training on civil rights and Fourth Amendment law in state and local law enforcement agencies).

¹¹⁹ See *id.* at 28 (describing general training provided to all 287(g) officers).

¹²⁰ *Id.* at 27–29 (capitalization omitted).

¹²¹ *Id.* at 32.

¹²² MPI 287(G) REPORT, *supra* note 72, at 13.

officers' training in Fourth Amendment compliance, the possibility of substantially diminished training calls into question the applicability of that doctrine in 287(g) cases.

3. *Accountability and Supervision*

The third factor identified in *Lopez-Mendoza* as part of the comprehensive deterrence scheme was the existence of “a procedure for investigating and punishing immigration officers who commit Fourth Amendment violations.”¹²³ Department of Justice rules provide that officers who engage in improper search and seizure practices under the Fourth Amendment “may be subject to agency disciplinary action with possible penalties ranging from an official letter of reprimand to removal from his job.”¹²⁴ Internal ICE guidelines require reporting of all complaints, whether made formally or informally, to supervising officers for investigation.¹²⁵ After investigation, ICE has the authority to punish the officer for engaging in improper conduct.¹²⁶

This system of supervision and accountability, allowing for investigation and punishment of immigration officers who violate Fourth Amendment law, appears to be absent in the 287(g) enforcement context. Both the INA and the MOAs require ICE to supervise LEA officers. However, the scope and character of such supervision is ambiguous. The MOAs provide that “actions of participating [LEA] personnel will be reviewed by ICE supervisory officers on an ongoing basis to ensure compliance with the requirements of the immigration laws and procedures.”¹²⁷ It is unclear what the “requirement[s] of the immigration laws and procedures” includes and whether Fourth Amendment law falls under that category. Further, as noted by the

¹²³ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1045 (1984).

¹²⁴ IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, *THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS*, M-69 at 35 (1983) [hereinafter *LAW OF ARREST*, M-69].

¹²⁵ OFFICE OF DETENTION AND REMOVAL OPERATIONS, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *DETENTION STANDARD: GRIEVANCE SYSTEM*, 8, available at www.ice.gov/doclib/dro/detention-standards/pdf/grievance_system.pdf (“All ICE/DRO staff are reminded of the requirement of Administrative Manual 5.5.201 . . . All ICE employees are responsible for immediately reporting either orally or in writing any allegation of misconduct to their supervisor or a higher-level ICE official in their chain of command or directly to the ICE Office of Professional Responsibility or the DHS Inspector General. This reporting requirement applies without exception to all detainee allegations of officer misconduct, whether formally or informally submitted.” (emphasis added)). While this document deals only with Detention and Removal officers, the text clearly indicates that the internal administrative regulation governing the reporting of complaints applies to “[a]ll ICE employees.” *Id.*

¹²⁶ See *LAW OF ARREST*, M-69, *supra* note 124, at 35 (noting possibility of disciplinary action against officers for engaging in improper conduct).

¹²⁷ Sample MOA, *supra* note 61, § X.

GAO report, “details regarding the nature and extent of supervision, such as whether supervision is to be provided remotely or directly, the frequency of interaction, and whether reviews are conducted as written assessments or through oral feedback, are not described in the MOAs.”¹²⁸ The Inspector General observed that the lack of guidance on supervision led to inconsistencies in ICE supervisory practices among jurisdictions.¹²⁹ Even the degree of supervision required under the MOAs often is not provided: The GAO report states that “ICE officials in headquarters noted that the level of ICE supervision provided to participating agencies has varied due to a shortage of supervisory resources”¹³⁰ and that the level of supervision reported by the agencies ranged from positive evaluations to “fair,” to “provided on an as-needed basis,” or even to “unresponsive or not available” in some situations.¹³¹

The MOAs provide for a complaint procedure that allows for ICE involvement in the processing of complaints against LEA officers.¹³² Complaints are accepted from “any source” and can be reported to either federal or state and local authorities.¹³³ Complaints reported directly to an LEA are reported to ICE’s Office of Professional Responsibility (ICE-OPR) when they “involve [LEA] personnel with ICE delegated authority.”¹³⁴ Upon receipt of these complaints, ICE-OPR “will undertake a complete review of each complaint in accordance with existing ICE allegation criteria and reporting requirements” and refer complaints, as it deems appropriate, to the LEA Internal Affairs Division for resolution.¹³⁵ This complaint procedure lacks several key features present in the supervision system described above for immigration officers. First, the language of the MOA suggests that only formally reported complaints are investigated, whereas ICE internal management regulations require reporting and investigation of all complaints, whether formally or informally made. In addition, the dual reporting mechanism—i.e., the ability to report to either federal or LEA authorities—and the lack of publicly available information regarding specific LEA procedures make this mechanism confusing and inaccessible to the

¹²⁸ GAO REPORT, *supra* note 72, at 14.

¹²⁹ OIG REPORT, *supra* note 72, at 12–13.

¹³⁰ GAO REPORT, *supra* note 72, at 15.

¹³¹ *Id.* at 16; *see also* MPI 287(G) REPORT, *supra* note 72, at 34 (noting that past studies found federal oversight of 287(g) programs to be “weak”).

¹³² Sample MOA, *supra* note 61, at app. B (setting out complaint procedure).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

public.¹³⁶ Second, complaints filed directly with an LEA are only reported to ICE-OPR when they involve immigration enforcement activities. A narrow reading of this reporting requirement could allow LEAs to underreport Fourth Amendment complaints against LEA officers by drawing arbitrary lines between criminal and immigration activities.¹³⁷ Third, and most importantly, the MOAs do not give ICE-OPR power to sanction LEA officers at the conclusion of an investigation beyond mere suspension or revocation of 287(g) authority. In fact, it is unclear whether resolution of all complaints is even guaranteed.¹³⁸ Further, ICE has failed to provide any guidance on how complaints are to be reported or maintained, and for what use.¹³⁹ Complaints are referred to the LEA for resolution, and the agency is then free to resolve the complaint applying whatever standards it finds appropriate.¹⁴⁰ Thus, not only do MOAs fail to give ICE-OPR the power to sanction LEA officers at the conclusion of an investigation, but the outcome of such investigations is subject to the review standards of each individual LEA.

Supervision of LEA officers is thus significantly different from the supervision of immigration officers analyzed by the Court in *Lopez-Mendoza*. The supervision required by the MOAs is ambiguous in character and scope, and reports reveal evidence of inadequate or inconsistent practices. Even assuming ICE supervisory power extends to compliance with the Fourth Amendment, such authority still does not encompass the ability to sanction officers for Fourth

¹³⁶ See ACLU/UNC REPORT, *supra* note 7, at 59–60 (noting lack of information on complaint procedures available to the public); OIG REPORT, *supra* note 72, at 38 (reporting that inadequate information is available on 287(g) complaint procedures).

¹³⁷ In fact, one report on the 287(g) program notes that, under one specific 287(g) agreement model, 287(g) trained officers participate only in screening potential noncitizens once they are booked in jail. See MPI 287(G) REPORT, *supra* note 72, at 14–15, 36–37 (noting problems with supervision and accountability with “jail enforcement model”). Non-287(g) officers are responsible for the arrests that bring potential noncitizens to the jails to be screened. *Id.* at 14. The study notes that this 287(g) model “raises concerns that law enforcement officers may misuse the 287(g) program” by making “pretextual stops or engag[ing] in racial profiling with the expectation that arrestees will be screened for immigration status and possibly placed in removal proceedings.” *Id.* at 37. The MOAs, however, do not require LEAs to report complaints against these non-287(g) officers, nor are these officers under the control or supervision of ICE. See *id.*

¹³⁸ See ACLU/UNC REPORT, *supra* note 7, at 63 (“[T]here is no check in place to ensure resolution of any given complaint.”).

¹³⁹ See OIG REPORT, *supra* note 72, at 18–19 (noting that ICE has failed to provide guidance on how complaints should be used to assess officer suitability); see also ACLU/UNC REPORT, *supra* note 7, at 60–63 (noting problems with MOA complaint procedure, including unclear guidance regarding forwarding and resolution of MOA complaints).

¹⁴⁰ See ACLU/UNC REPORT, *supra* note 7, at 62–63 (describing “lack of criteria” for complaint procedures).

Amendment violations. Given this, it is unclear whether the Supreme Court would find this amount of supervision and accountability sufficient to constitute a comprehensive deterrence scheme, as it did in *Lopez-Mendoza*.

In summary, the comprehensive deterrence scheme analyzed by the Court in *Lopez-Mendoza*—the “most important” factor driving the holding in that case¹⁴¹—is absent in the 287(g) enforcement context. Instead, there is a system lacking clear rules governing LEA officer conduct, with uncertain content and potential variability in the adequacy of training programs and an absence of strong supervision and accountability measures. As such, the *Lopez-Mendoza* doctrine should be reevaluated to analyze the proper application of the exclusionary rule in removal proceedings challenging 287(g) enforcement practices.

III

CHALLENGING REGULATORY VIOLATIONS

This Part will analyze the *Accardi* doctrine, which is applied in cases alleging regulatory—as opposed to constitutional—violations by immigration officers. This Part examines *Accardi* and the requirements for its application, analyzing them in light of 287(g) enforcement and MOA violations, and concluding that full application of the *Accardi* doctrine is warranted in these cases.

A. *Remedying Regulatory Violations: The Accardi Doctrine*

The requirement that agencies adhere to their regulations or risk judicial intervention is known as the *Accardi* doctrine, after the Supreme Court case *United States ex rel. Accardi v. Shaughnessy*.¹⁴² In *Accardi*, the Court found that the Attorney General violated immigration regulations having “the force and effect of law” by interfering with a deportation determination that the regulations required be left to the Bureau of Immigration Appeals’ (BIA’s) independent judgment.¹⁴³ The Court remanded with instructions that if the Attorney General’s judgment had prevented the BIA from coming to their own decision, then invalidation of the deportation order and a rehearing for the BIA to reconsider the case and “exercise its own independent discretion” were required.¹⁴⁴ For the two decades following *Accardi*, the Supreme Court applied and expanded on this doctrine when eval-

¹⁴¹ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044 (1984).

¹⁴² 347 U.S. 260 (1954).

¹⁴³ *Id.* at 265, 268.

¹⁴⁴ *Id.* at 268.

uating challenges to agency regulatory violations.¹⁴⁵ These subsequent developments of the law generally suggest that the *Accardi* doctrine will apply when two requirements are met: (1) the regulation that the agency is charged with violating must be binding, and (2) it must have been promulgated for the benefit of individuals interacting with the agency, rather than merely setting procedures for internal agency operations. The application of these requirements, however, as one commentator explains, “is laced with uncertainties.”¹⁴⁶ Specifically, whether a binding regulation is an independent requirement, and what it means for a regulation to be binding, are unsettled questions. While the *Accardi* doctrine has been held to apply in the immigration context to suppress evidence or terminate proceedings in order to remedy regulatory violations,¹⁴⁷ it is not completely clear from the case law how or whether the requirements apply in immigration cases.

¹⁴⁵ See, e.g., *Service v. Dulles*, 354 U.S. 363 (1957) (invalidating discharge of State Department employee because Secretary of State failed to comply with regulations setting procedures for termination); *Yellin v. United States*, 374 U.S. 109 (1963) (reversing conviction for contempt of Congress after House Committee failed to abide by procedural rules); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970) (stating that *Accardi* doctrine is applied only when regulation was designed “to confer important procedural benefits upon individuals” but not when it involves “procedural rules adopted for the orderly transaction of [agency] business” (internal citation omitted)); *Morton v. Ruiz*, 415 U.S. 199, 235–36 (1974) (invalidating agency action after violation of internal agency manual); *United States v. Nixon*, 418 U.S. 683, 696 (1974) (concluding that special prosecutor had to abide by regulations); *United States v. Caceres*, 440 U.S. 741 (1979) (finding no invalidation for violation of internal IRS manual in criminal fraud case).

¹⁴⁶ Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 570 (2006); see also Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 877 (2009) (noting that studies of *Accardi* doctrine since 1950s found “confusion in the doctrine”).

¹⁴⁷ See, e.g., *Leslie v. Att’y Gen. of the U.S.*, 611 F.3d 171 (3d Cir. 2010) (remanding alien’s deportation case after IJ violated regulation requiring informing respondent of availability of free legal services); *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991) (remanding alien’s deportation case after INS violated its own assistance of counsel rule); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979) (approving invalidation of agency adjudicatory action in violation of its own regulations); *In re Garcia-Flores*, 17 I. & N. Dec. 325, 329 (B.I.A. 1980); see also KURZBAN’S SOURCEBOOK, *supra* note 9, at 275–76 (listing immigration cases applying *Accardi* doctrine). In *Garcia-Flores* the BIA cited *Accardi* in the context of immigration proceedings, acknowledging that subsequent agency action could be invalidated or evidence excluded when immigration officers violate a rights-conferring regulation, but “only if the violation prejudiced interests of the alien which were protected by the regulation,” meaning the deprivation affected the outcome of the proceeding. *Garcia-Flores*, 17 I. & N. Dec. at 328 (citing *Calderon-Medina*, 591 F.2d at 531). “Where compliance . . . is mandated by the Constitution” or “where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency,” prejudice can be presumed. *Id.* at 329. Many circuits similarly have adopted a prejudice requirement prior to granting suppression or termination remedies for ICE regulatory violations. See KURZBAN’S SOURCEBOOK, *supra* note 9, at 275–76 (listing circuit cases). Some courts have waived this requirement in some cases. See, e.g., *Leslie*, 611 F.3d at 178–81 (waiving prejudice requirement when regulation concerned due process and right to counsel); *Montilla*, 926 F.2d at 168–69 (waiving

The first requirement—that the regulation in question be binding on the agency—finds support in the language of several Supreme Court decisions applying the doctrine, including *Accardi* itself. In those cases, the Court specifically found that the regulations at issue were binding on the respective agencies as part of its analysis of the doctrine.¹⁴⁸ Thus, the cases suggest that a binding regulation is required for application of *Accardi*. The D.C. Circuit, which hears the largest number of administrative law cases and therefore has the most experience with *Accardi* issues, has ruled that the *Accardi* doctrine will only apply when the regulation in question is binding.¹⁴⁹ While other Supreme Court cases could be interpreted to hold that non-binding regulations can trigger application of the doctrine,¹⁵⁰ this Note will assume that a binding regulation is required. This assumption, which is consistent with D.C. Circuit case law and academic commentary on the doctrine,¹⁵¹ places the highest burden on potential litigants by requiring proof of all possible factors before application of *Accardi*.

It is unclear, though, what constitutes a binding agency regulation. If a regulation is a formally promulgated legislative rule enacted by the agency pursuant to congressional delegation of authority, the cases appear to conclude unanimously that it is binding on the agency.¹⁵² Because of the legislative delegation of authority, these

prejudice requirement when regulation violated was for benefit of individual in question); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (clarifying that *Montilla* applies only to cases implicating fundamental rights derived from federal statutes or Constitution).

¹⁴⁸ See, e.g., *Accardi*, 347 U.S. at 266–67 (finding that immigration regulations had “force and effect of law” and thus Attorney General could not “sidestep” them); *Nixon*, 418 U.S. at 696–97 (holding that executive branch was bound by regulation with force of law); *Service v. Dulles*, 354 U.S. at 368 n.8 (stating that regulations were binding on Department of State). A BIA case also used similar language. See *In re L.*, 20 I. & N. Dec. 553, 556 (B.I.A. 1992) (citing Supreme Court and BIA case law to show “[i]t is well settled that the regulations which the [Immigration and Naturalization] Service promulgates have the force and effect of law and are binding on the Service”).

¹⁴⁹ See *Viet. Veterans of Am. v. Sec’y of the Navy*, 843 F.2d 528, 536–38 (D.C. Cir. 1988) (finding memorandum to be without binding effect and therefore dismissing plaintiff’s claim); see also Magill, *supra* note 146, at 877 (“The D.C. Circuit, which has decided a large number of *Accardi* cases, holds that a self-regulatory measure must be followed by the agency only if it is ‘binding.’”); Merrill, *supra* note 146, at 587–94 (reviewing D.C. Circuit cases applying *Accardi* doctrine).

¹⁵⁰ See, e.g., *Caceres*, 440 U.S. at 749–57 (considering application of doctrine to violation of IRS manual without initial determination of whether IRS manual was binding); *Ruiz*, 415 U.S. at 234–36 (applying *Accardi* to invalidate agency action in violation of rules appearing in internal manual).

¹⁵¹ See Magill, *supra* note 146, at 878 (noting that binding regulation is necessary under *Accardi*); Merrill, *supra* note 146, at 612 (summarizing *Accardi* as only applying to “legislative” rules).

¹⁵² See, e.g., *Accardi*, 347 U.S. at 266–67 (finding that immigration regulation enacted pursuant to congressional delegation of authority to Attorney General has force of law,

formal regulations acquire the same effect as statutes, thus requiring agency compliance.¹⁵³ The regulations, in other words, have “the force of law.”¹⁵⁴ But a formal legislative rule is not required; informal rules can also be considered binding, triggering application of *Accardi*.¹⁵⁵ It is in this latter type of case that the law becomes unclear. A review of the case law reveals “frustrating ambiguity about which measures a court will deem ‘binding.’”¹⁵⁶

Nonetheless, the case law does provide some guidance for this analysis. Two main factors appear from the case law as potential indicators of the binding nature of these rules. The first is that some cases suggest that informal rules will be considered binding when the agency adopts them pursuant to an exercise of delegated legislative power.¹⁵⁷ Beyond recognizing the presence or absence of a delegation of authority and concluding on the binding nature of a rule as a result, the cases do not provide a framework of analysis of this factor. The second factor is the agency’s intent to limit its discretion by being bound by an informal rule. As some courts have recognized this factor explicitly, there is a more developed framework in place.¹⁵⁸ The cases

binding agency); *Nixon*, 418 U.S. at 694–96 (same); see also Magill, *supra* note 146, at 878 (“If the self-regulation is embodied in a legislative rule, it will be subject to the *Accardi* principle.”); Merrill, *supra* note 146, at 596 (noting that case law and commentary agree that *Accardi* duty attaches when regulation is legislative rule).

¹⁵³ See Merrill, *supra* note 146, at 600 (explaining that formal agency regulations acquire same effect as congressional statutes due to delegation of congressional authority vested on agencies); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own Laws*, 64 TEX. L. REV. 1, 10–12 (1985) (same).

¹⁵⁴ See *Nixon*, 418 U.S. at 694–96 (stating that Attorney General regulation regarding powers of special prosecutor had “the force of law”); *Accardi*, 347 U.S. at 265 (stating that BIA regulation had “force and effect of law”); Raven-Hansen, *supra* note 153, at 12 (explaining that formal agency regulations acquire force of law).

¹⁵⁵ See, e.g., *Ruiz*, 415 U.S. 199 (applying *Accardi* doctrine to violation of internal agency manual); *Montilla v. INS*, 926 F.2d 162, 167 (2d Cir. 1991) (noting that *Accardi* doctrine “is not limited to rules attaining the status of formal regulations”); Magill, *supra* note 146, at 878 (stating that *Accardi* doctrine applies, even if not legislative rule).

¹⁵⁶ Magill, *supra* note 146, at 878. In addition, courts can manipulate this determination easily, making it more difficult to discern a clear rule. See Merrill, *supra* note 146, at 592–93.

¹⁵⁷ See *Fano v. O’Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987) (stating that internal immigration rules are nonbinding “because they are not an exercise of delegated legislative power”); *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711–12 (D.C. Cir. 1985) (concluding that provision in interagency MOA is binding in part because it was “statutorily-sanctioned”). The rationale is presumably similar to that noted above in discussing the binding nature of formal rules: When enacted pursuant to a legislative delegation of power, regulations acquire the same force as statutes, thus requiring agency compliance. See *supra* note 153.

¹⁵⁸ See, e.g., *Viet. Veterans of Am. v. Sec’y of the Navy*, 843 F.2d 528, 536–38 (D.C. Cir. 1988) (stating that “‘binding’ quality” of rule will depend on agency intent to be bound (internal citation omitted)); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 (D.C. Cir. 1986) (noting that agency pronouncement with some substantive impact is not

place particular emphasis on the agency's language in articulating the informal rule, finding a rule binding when it is expressed in mandatory, rather than precatory, terms.¹⁵⁹ The cases also look to the context and application of the informal rule to determine whether the agency intended to be bound.¹⁶⁰ In the end, the test is "whether the agency intended to establish a 'substantive' rule" that "creates or modifies rights that can be enforced against the agency."¹⁶¹ If so, even an informal rule will be considered binding, triggering application of *Accardi*.¹⁶²

The second requirement for application of *Accardi* to invalidate agency action following a regulatory violation is that the regulations in question confer a benefit on individuals interacting with the agency, i.e., that it be a rights-conferring regulation. This requirement, unlike the first, has been rather uncontroversial. The main inquiry is whether the rule affects individuals' rights and interests, or merely sets procedures for the orderly administration of agency operations.¹⁶³ For example, rules setting internal procedures for approval of agency

automatically binding regulation as long as it "leave[s] the administrator free to exercise his informed discretion" (internal quotation marks and citation omitted)); *Krasilych v. Holder*, 583 F.3d 962, 966 (7th Cir. 2009) (finding Attorney General guidelines nonbinding in immigration case because they did not limit Attorney General's discretion but merely informed staff on intent to exercise such discretion).

¹⁵⁹ See *Viet. Veterans of Am.*, 843 F.2d at 537–38 (noting importance of language in determining binding quality of rule and finding rule nonbinding because terms were precatory, not mandatory); *Brock*, 796 F.2d at 537–38 (noting "great[] importance [of] the language used in the statement itself" to determine whether rule in policy statement is binding); *Nicholas v. INS*, 590 F.2d 802, 806–07 (9th Cir. 1979) (noting importance of fact that informal rule was "directive in nature" in concluding that rule was binding).

¹⁶⁰ See *Viet. Veterans of Am.*, 843 F.2d at 538 (looking at function of rule and its past application by agency to determine whether rule was binding); *Brock*, 796 F.2d at 538 (noting context as enforcement rule in determining whether rule was binding); *Nicholas*, 590 F.2d at 807–08 (looking to context of informal rule and relation to legislative rule in determining its binding nature).

¹⁶¹ *Viet. Veterans of Am.*, 843 F.2d at 537 (quoting *Nat'l Latino Media Coal. v. FCC*, 816 F.2d 785, 788 n.2 (D.C. Cir. 1987)).

¹⁶² One commentator recently proposed that courts determine whether a rule is binding for purposes of *Accardi* by asking whether the rule in question is a "legislative rule." Merrill, *supra* note 146, at 612. According to Professor Merrill, a rule is legislative if "(a) Congress has delegated authority to the agency to make legislative rules and (b) the agency intended to exercise this authority by making such a rule." *Id.* Another commentator had previously advanced a similar understanding of the applicability of *Accardi*, i.e., that a legislative rule is required. See *Raven-Hansen*, *supra* note 153, at 15–16. The test, according to Professor Raven-Hansen, is the content of the rule and the agency's intent in its enactment. *Id.* These requirements for finding a legislative rule, and thus triggering *Accardi*, mirror the requirements found in the various cases applying *Accardi* to informal rules: delegation of authority and agency intent.

¹⁶³ See *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970) (finding *Accardi* doctrine inapplicable because regulation was not designed "to confer important procedural benefits upon individuals," but rather fell within category of "procedural rules

action¹⁶⁴ or outlining the information required to complete certain administrative transactions¹⁶⁵ are not promulgated to confer rights to individuals. Rather, they merely set procedures for orderly and efficient agency operation and do not affect the rights of individuals outside the agency. In contrast, rules providing notice of the right to counsel in adjudicative proceedings¹⁶⁶ or requiring an agency to publish guidelines for benefits determinations¹⁶⁷ are rights-conferring regulations. They affect the rights and interests of those interacting with the agency directly by either affecting representation of the individual or limiting agency discretion. In these cases, it is more clear that the *Accardi* doctrine could be applied—assuming a binding regulation—and that courts can intervene to invalidate the agency action or otherwise remedy the regulatory violation.

B. *The Accardi Doctrine and 287(g) MOAs*

In light of the two conditions for application of the *Accardi* doctrine, the next question is how this doctrine applies, if at all, in the 287(g) enforcement context. Specifically, this new enforcement context presents the issue of whether the 287(g) MOA provisions are binding and rights-conferring regulations, such that violations trigger application of *Accardi* remedies.

The first *Accardi* condition is that the regulation be binding on the agency. The provisions in a 287(g) MOA are not formal legislative rules. Nevertheless, the provisions could still be considered binding rules based on the *Accardi* factors discussed above. First, Congress delegated the power to enter into MOAs to DHS/ICE through INA § 287(g).¹⁶⁸ Just as a statute might require promulgation of a legislative rule as a prerequisite for agency action, § 287(g) requires that DHS/ICE enter into an MOA in order to exercise the power to delegate immigration enforcement authority to LEAs.¹⁶⁹ It specifies that

adopted for the orderly transaction of business” (quoting *NLRB v. Monsanto Chemical Co.*, 205 F.2d 763, 764 (8th Cir. 1953))).

¹⁶⁴ See *United States v. Caceres*, 440 U.S. 741 (1979) (finding agency rule regarding supervisory approvals did not create situation where individual relied on agency regulation promulgated for benefit or guidance of public).

¹⁶⁵ See *Am. Farm Lines*, 397 U.S. 532, 538–39 (finding agency rule defining information requirements for administrative transactions to be primarily for orderly operation of agency, not to confer procedural rights on individuals).

¹⁶⁶ *In re Garcia-Flores*, 17 I. & N. Dec. 325 (B.I.A. 1980) (finding rule requiring notice of right to counsel when alien is arrested without a warrant to be for benefit of alien).

¹⁶⁷ *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (finding agency must comply with internal manual requiring publication of eligibility requirements for certain benefits because “rights of individuals are affected”).

¹⁶⁸ Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2006).

¹⁶⁹ *Id.* § 287(g)(5), 8 U.S.C. § 1357(g)(5).

the MOAs must contain the particular powers and duties delegated, the duration of delegation, and supervision requirements.¹⁷⁰ Thus, the statute clearly requires DHS/ICE to enter into an MOA containing specific provisions whenever there is cross-designation of LEA officers under § 287(g).¹⁷¹ Because the MOA provisions are a reflection of the legislative delegation and mandates of INA § 287(g), they should be considered binding rules for purposes of *Accardi*.

Second, the language, context, and application of the 287(g) MOA provisions reflect the intent for DHS/ICE and LEAs to be bound by its terms. The obligations of the LEA officers outlined in the 287(g) MOA are phrased in mandatory language. For example, the MOA provides that LEA officers “*must* successfully complete IADP training,” “*are bound* by all Federal civil rights laws, regulations, [and] guidance relating to non-discrimination,” and “*shall* [utilize] DHS and ICE policies and procedures.”¹⁷² The language shows an intention to bind DHS/ICE and LEA officers to the provisions in the 287(g) MOA and clearly delineate the use of immigration power, rather than provide mere guidance on the way to exercise discretion. Furthermore, if the provisions of the 287(g) MOA were not binding, DHS/ICE would be able to delegate to LEAs immigration power without regard to the constraints and requirements intended by Congress to apply in immigration enforcement practices and in the delegation of immigration authority pursuant to INA § 287(g). It is thus more likely that Congress intended for the MOA provisions to be binding. Lastly, in its treatment of 287(g) MOAs in the past, DHS has demonstrated its intent for these agreements to be binding. After adoption of the new standardized MOA, DHS stated that only LEAs with signed standardized agreements would be allowed to continue enforcing immigration law.¹⁷³ This suggests that DHS saw the MOA provisions as binding on LEA officers such that without adoption and adherence to the new terms, LEA officers would be without power to enforce the immigration laws under INA § 287(g). Thus, the

¹⁷⁰ *Id.*

¹⁷¹ Such delegation is similar, if not more specific, than the legislative delegation of authority found in cases dealing with formal legislative rules triggering *Accardi*. For example, in *United States v. Nixon*, Congress had delegated to the Attorney General the authority to prosecute the U.S. government criminally and to appoint subordinate officers. Thus, regulations pursuant to this authority, giving the special prosecutor power to contest invocation of executive authority were binding on the executive branch. 418 U.S. 683, 695–96 (1974).

¹⁷² Sample MOA, *supra* note 61, §§ VIII, X, XIV (emphases added).

¹⁷³ Napolitano Press Release, *supra* note 4 (announcing new standardized 287(g) agreement template and indicating that “ultimately only those agencies with newly signed agreements will be permitted to continue enforcing immigration law”).

mandatory language, context, and application of the 287(g) MOA provisions show that DHS/ICE intended these provisions to be binding requirements, which would trigger application of *Accardi* remedies for violations of these provisions.¹⁷⁴

Despite the fact that 287(g) MOA provisions are adopted pursuant to a delegation of legislative power and show the intent to bind LEAs, agreement provisions are far from what the *Accardi* cases originally considered “rules” that could trigger application of the doctrine. There is no clear answer, either in Supreme Court cases or academic commentary on *Accardi*, as to whether agreement provisions, rather than generally applicable rules, can qualify as regulations for *Accardi* purposes. There is, however, one case from the D.C. Circuit that provides some guidance. In *Massachusetts Fair Share v. Law Enforcement Assistance Administration*, that court recognized, in a context different from immigration enforcement, that provisions in interagency MOAs can be considered binding rules under *Accardi*.¹⁷⁵ The court found that “[t]he highly-refined procedures [for implementation of the program in question]—procedures jointly formulated, publicized and instituted by [the agencies] in a statutorily-sanctioned cooperative endeavor—command the same respect” as traditional legislative rules.¹⁷⁶ Similarly, 287(g) MOA provisions set out the procedures for implementation of 287(g) programs, are publicized and publicly available, and were entered into “in a statutorily-sanctioned cooperative endeavor,” i.e., pursuant to INA section 287(g). Thus, there is at least one case supporting 287(g) MOA provisions qualifying as binding rules for *Accardi* purposes.¹⁷⁷

The second requirement for application of *Accardi* is that the regulation affects the rights of individuals, rather than merely guiding internal agency operation. Certain provisions of the MOAs seem clearly intended to aid in orderly administration of the 287(g) program. The “Costs and Expenditures” section, for example, concerns the allocation of costs and expenses between ICE and the LEA

¹⁷⁴ See *supra* notes 157–162 and accompanying text (describing framework that looks to language, context, and application of informal rule to determine whether rule should be binding and trigger *Accardi*).

¹⁷⁵ *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708 (D.C. Cir. 1985).

¹⁷⁶ *Id.* at 711–12.

¹⁷⁷ The D.C. Circuit did not address in *Massachusetts Fair Share* whether contract law affected the interpretation of the MOA in that case. Given how the *Accardi* doctrine essentially transforms regular agency action, including contracts, letters, or mere “practices,” into enforceable rules, see Merrill, *supra* note 146, at 593, the failure to address contract law is unsurprising. The court treated the MOA provision as a regulation, not a mere contract clause, and thus contract law was not necessary to interpret or apply it.

for personnel expenses, training, and installation and maintenance of technology, among others.¹⁷⁸ The section deals only with how the 287(g) program operates financially and does not confer any substantive or procedural rights on the public.¹⁷⁹

In contrast, other MOA provisions could be said to be rights-conferring and do not deal—at least not solely—with program administration. For example, the “Complaint Procedure” section delineates the procedures for filing, processing, investigating, and resolving complaints against LEA officers, including timeline and notification requirements.¹⁸⁰ While some of these provisions do deal with the orderly administration of the 287(g) program—e.g., the rules LEAs must follow in processing complaints—the section as a whole seems to confer a benefit on the public, namely the right to file grievances and receive notice of their resolution. Mixed provisions that both set internal guidance and confer a benefit on the public can trigger *Accardi* protection, as was the case in *Accardi* itself.¹⁸¹

A more complicated question is whether the “Standard Operating Procedure (SOP) Template,” which, among other provisions, sets out enforcement procedures, training requirements, limits to the scope of authority conferred on LEA officers, and requirements for ICE supervision,¹⁸² is a rights-conferring provision triggering *Accardi*. The SOP section facilitates ICE monitoring and uniformity and communicates program priorities and requirements to LEAs, thus ensuring proper administration of 287(g) programs. Yet many of the individual provisions within the SOP section could be interpreted as conferring procedural or substantive rights. By limiting the scope of authority and setting out enforcement procedures, the SOP section protects the rights of individuals and communities against arbitrary or abusive exercises of authority; LEA officers can only engage in a limited scope of immigration activities and must comply with the procedural and substantive requirements of the MOA. Further, by requiring LEA officer training, the SOP attempts to ensure that officers are prepared and qualified to engage in immigration enforcement activities, thereby reducing the likelihood of unlawful or abusive practices. The

¹⁷⁸ See Sample MOA, *supra* note 61, § IX.

¹⁷⁹ *Id.* Another example is the “Liability and Responsibility” section of the MOAs, which deals with procedures for determining liability of LEA officers only, without affecting individual rights. *Id.* § XII.

¹⁸⁰ *Id.* at app. B.

¹⁸¹ See *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (finding regulation prescribing procedure to be binding); Raven-Hansen, *supra* note 153, at 24 (explaining that mixed rules could trigger *Accardi* remedies, depending on whether “protection of the public was a substantial purpose”).

¹⁸² See Sample MOA, *supra* note 61, at app. D.

references throughout the SOP section to training in, supervision over, and compliance with several civil rights laws provide further support that the section confers substantive and procedural rights.

These SOP provisions are similar to the regulations the Supreme Court found to be rights-conferring and binding on the agency in *Morton v. Ruiz*.¹⁸³ There, the Court considered internal manual provisions requiring publication of eligibility rules and guidelines for determination of benefits, which limit agency discretion and thereby decrease the risk of arbitrary action.¹⁸⁴ Similarly, the SOP provisions serve, in part, to limit LEA discretion by restricting the scope of authority and setting requirements for performance, supervision, and training of LEA officers. Further, rules regulating enforcement practices, similar to provisions in the SOP, have been found by an immigration court to be rights-conferring, triggering *Accardi*.¹⁸⁵ Finally, in *Massachusetts Fair Share*, described above, the D.C. Circuit found that provisions of an interagency MOA setting procedures for processing grant applications under a federal program triggered *Accardi*.¹⁸⁶ These cases provide a strong argument that the provisions in the MOAs (including the SOP) that set the procedures for enforcement of immigration law under the federal 287(g) program should similarly trigger application of the *Accardi* doctrine.

However, even if certain provisions of the MOAs could be seen as rights-conferring, there is still a question of whether the fact that other provisions are clearly meant as administrative guidance alters the *Accardi* analysis. It is unclear whether the provisions within MOAs are severable, such that some are considered rules triggering *Accardi* remedies while others are simply internal administrative rules. In *Massachusetts Fair Share*, the court did not analyze how other administrative provisions in the MOA—e.g., a provision setting the strategy for program implementation—affected the *Accardi* analysis. While the question is not definitively answered, this decision by the D.C. Circuit, a court with vast experience in this area, to decline to mention any effect suggests that MOA provisions will be severable and violations of rights-conferring provisions will trigger *Accardi*.

This analysis of 287(g) MOAs demonstrates the applicability of the *Accardi* doctrine in the new 287(g) enforcement context. First,

¹⁸³ See 415 U.S. 199 (1974).

¹⁸⁴ *Id.*

¹⁸⁵ See *In re Perez-Cruz*, No. A95-748-837 (EOIR Immigr. Ct., Feb. 12, 2009), available at <http://www.aclu-sc.org/releases/view/102932>.

¹⁸⁶ See *Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708 (D.C. Cir. 1985).

287(g) MOA provisions are binding regulations under *Accardi*, in that they reflect the exercise of legislatively delegated authority under INA § 287(g). Second, certain provisions, by limiting agency discretion and requiring compliance with certain enforcement practices, also confer substantive and procedural rights on immigration respondents. Consequently, 287(g) MOAs satisfy the two requirements for application of the *Accardi* doctrine, and MOA violations should trigger *Accardi* suppression and termination remedies in removal proceedings.¹⁸⁷

CONCLUSION

The increasing delegation of 287(g) immigration authority to state and local law enforcement agencies has received the attention of legislators, commentators, and advocacy groups. Yet very little attention has been focused on the effects of 287(g) enforcement on immigration law.¹⁸⁸ This Note begins to fill that gap by evaluating the two doctrines for suppression of evidence and termination of proceedings in light of 287(g) enforcement. In short, 287(g) presents a novel enforcement context requiring reexamination of both the *Lopez-Mendoza* doctrine governing suppression of evidence for constitutional violations and full application of the *Accardi* doctrine to remedy violations of MOA provisions.

These conclusions regarding the proper applicability of the *Lopez-Mendoza* and *Accardi* doctrines to immigration removal proceedings involving 287(g) agreements are of tremendous importance given the current immigration enforcement landscape. The federal government continues to increase its reliance on state and local enforcement efforts, and 287(g) agreements and similar projects delegating immigration enforcement authority to localities will continue to grow. Absent proper reevaluation of the *Lopez-Mendoza* doctrine, 287(g) programs will operate without an adequate mechanism to deter constitutional violations by state and local officers. As a consequence, immigration respondents will be left without proper recourse for violations of their rights, and immigrant communities will be subjected to harassment and racial profiling by 287(g) officers acting with virtually complete impunity. Further, failure to apply the *Accardi* doctrine to

¹⁸⁷ That is, provided the respondent satisfies the prejudice requirement. *See supra* note 147 (noting requirement that violation affect outcome of proceeding).

¹⁸⁸ Recently, one commentator did bring attention to the way courts are reacting to 287(g) enforcement. Instead of analyzing changes to the doctrine, however, the article suggested policy responses to 287(g) enforcement problems. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010).

remedy violations of 287(g) MOAs will leave ICE and DHS unable to ensure compliance with and deter violations of MOAs. Because localities are not compensated for their participation in 287(g) programs and therefore cannot be controlled with the power of the purse, court intervention is an important tool for ensuring compliance with the terms and procedures set by the federal government for immigration enforcement.

As the federal government delegates more immigration power to states and localities through 287(g) agreements, litigation challenging 287(g) enforcement practices will begin to reach courts. Proper application of the *Accardi* doctrine and a *Lopez-Mendoza* doctrine updated to reflect the realities of 287(g) enforcement will be essential in protecting immigrants' constitutional and regulatory rights.