

## PRELIMINARY ISSUES

### A. Standing

Aliens generally have standing to raise constitutional issues. See *Chadha v. INS*, 634 F.2d 408, 418 (9th Cir. 1980) (citation omitted).

Note: Movants do not have standing to challenge another person's interrogation. See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

Note: Automobile passengers have standing to challenge unlawful traffic stops. See *United States v. Diaz-Castaneda*, 2007 WL 2044244, \*2 (9th Cir. 2007) (citing *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007), abrogating *People v. Jackson*, 39 P.3d 1174 (2002) and *State v. Mendez*, 970 P.2d 722 (1999)).

### B. Rules of Evidence Generally

Removal proceedings are civil in nature and therefore need not strictly follow conventional rules of evidence. See *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) (citation omitted). Evidence is admissible if it is probative and its use is fundamentally fair. See *id.* (citations omitted); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980) (citation omitted).

An Immigration Judge may receive into evidence "any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7. However, in removal proceedings, a respondent has the right to a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf, and to cross-examine witnesses presented by the Government. See 8 C.F.R. § 1240.10(a)(4).

### C. Burden of Proof

Statements in a motion to suppress must be specific and detailed and based on personal knowledge. See *Ramirez-Sanchez*, 17 I&N Dec. at 505. A motion to suppress evidence must enumerate the evidence to be suppressed. See *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971). Whenever an alien in removal proceedings questions the legality of evidence, he must provide proof establishing a prima facie case that the Government's evidence was unlawfully obtained before the burden will shift to the Government to justify the manner in which it obtained the evidence. See *Barcenas*, 19 I&N Dec. at 611; *Ramirez-Sanchez*, 17 I&N Dec. at 505. In meeting this burden, an affidavit alone is not sufficient, rather the testimony of the movant is required. See *Barcenas*, 19 I&N Dec. at 611-12.

If the respondent has not yet testified in support of his motion, the Court may limit its ruling to whether the respondent has made a prima facie case that the Government's evidence was unlawfully obtained, thus warranting a suppression hearing.

### D. Suppressible Evidence

#### 1. Identity Evidence

Motions pertaining solely to a respondent's identity cannot be granted because such information is never suppressible. See *INS v. Lopez Mendoza*, 468 U.S. 1032, 1039

(1984). In *Lopez Mendoza*, the U.S. Supreme Court stated that “the ‘body’ or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest . . . .” *Id.* at 1039 (citations omitted). The respondent there had “objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him.” *Id.* at 1040. Thus, the Court held that the “mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding.” *Id.* Therefore, to the extent that the respondent is objecting only to his being summoned to proceedings following an allegedly unlawful arrest, the Court cannot grant his motion to suppress. *See id.*

Similarly, if statements made during an illegal arrest serve only to lead the authorities to discover a person’s identity, then the statements cannot be suppressed. *See United States v. Guzman-Bruno*, 27 F.3d 420, 421 (9th Cir. 1994) (holding that statements by an alien that lead the authorities to discover his status as an illegal re-entrant cannot be suppressed as a matter of law); *see also United States v. Orozco-Rico*, 589 F.2d 433, 435 (9th Cir. 1978) (“[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man’s identity and that merely leads to the official file or other independent evidence.”).

## 2. Statements & Things

Statements made during an illegal arrest may be suppressed under certain circumstances. *See United States v. Garcia-Beltran*, 389 F.3d 864, 866-67 (9th Cir. 2004) (stating that while identity alone may not be suppressed, evidence tending to establish identity such as fingerprints, photographs, and oral statements are not precluded from suppression).

Example: The I-213 states that the respondent disclosed a date, place, and method of entry into the United States. Because these statements exceed identity and alienage information, the Court may suppress them. *See Garcia-Beltran*, 389 F.3d at 866-67.

The fruits of the poisonous tree doctrine will exclude all evidence obtained or derived from the exploitation of illegally obtained evidence. *See Wong Sun v. United States*, 371 U.S. 471 (1963) (“The exclusionary prohibition extends as well to the indirect as the direct products of illegally obtained evidence.”); *see also Matter of Yau*, 14 I&N Dec. 630, 639 (BIA 1974) (Chairman Roberts, concurring) (“Where Government agents obtain evidence thus illegally, not only is the use of the evidence itself forbidden, but also use of information or evidence deriving from the evidence thus illegally obtained, since they constitute ‘the fruit of the poisonous tree[.]’”) (*citing Wong Sun*, 371 U.S. 471).

### a. Exception: Non-Prejudicial Statements

The Court need not suppress non-prejudicial statements made by a respondent. *See Matter of Barcnas*, 19 I&N Dec. 609, 611 (BIA 1988) (holding that evidence is admissible if it is probative and its use is fundamentally fair).

Example: The I-213 notes that the respondent claimed that he has no fear of returning to Mexico, that he has no pending applications with DHS, and that he suffers from kidney problems. The Court finds that the admission of these statements, to the extent that they go beyond statements of identity, does not prejudice the respondent. *See Barcnas*, 19 I&N Dec. at 611.

### b. Exception: Independent Source Doctrine

Evidence will not be suppressed if the Government learned of the evidence from an independent source. See *Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996) (“[O]nce the respondent has been placed in deportation proceedings, any evidence which is independently obtained may be relied upon, regardless of the alleged illegal arrest.”). Independently obtained evidence may be obtained from other independent sources. See *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1141-42 (9th Cir. 1981) (“Ordinarily, admissions of fact by counsel in deportation proceedings are binding.”) and *Cervantes-Torres*, 21 I&N Dec. at 353 (“Irrespective of the applicability of the exclusionary rule, we do not agree that the respondent’s own voluntary submission of his Form I-688A is a product of his illegal arrest.”).

The Board of Immigration Appeals has not determined whether testimony given by a respondent in support of a motion to suppress evidence on Fourth Amendment grounds is admissible on the issue of alienage and removability. See *Matter of Benitez*, 19 I&N Dec. 173, 175 (BIA 1984) (stating that there is no statutory or regulatory right to a separate suppression hearing in deportation proceedings); *Matter of Bulos*, 15 I&N Dec. 645, 646-47 (BIA 1976) (raising but not ruling on the question of whether evidence in connection with a suppression motion may be considered in determining the issue of the respondent’s removability). However, constitutional protections are meaningless if a respondent presents evidence of their violation at his or her peril. See *Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (holding that testimony given by a defendant in criminal proceedings in support of a motion to suppress evidence on Fourth Amendment grounds could not thereafter be admitted against him at trial on the issue of guilt unless he made no objection).

Example (Unpublished Ninth Circuit): “Garcia-Recendiz’s admissions in her voluntary Affidavit of Fact [nb: attached to her motion to suppress] are enough to establish evidence of a foreign birth.” \*\*\* “Considering the Board’s well-supported finding that Garcia-Recendiz admitted her alienage independently of her arrest, any error by the Immigration Judge in failing to suppress the alleged fruits of that arrest was harmless.” *Garcia-Recendiz v. INS*, 68 Fed. Appx. 10, 12, 2003 WL 21321181 at \*2 (9th Cir. 2003) (unpublished) (citing *United States v. Salgado*, 292 F.3d 1169, 1174-75 (9th Cir.), cert. denied, 537 U.S. 1011 (2002)).

### 3. Hearsay

Hearsay evidence is admissible in immigration proceedings, as long as such evidence is probative and fundamentally fair. See *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823-24 (9th Cir. 2003). The Ninth Circuit has held that the Court may consider information provided in a hearsay affidavit, even if derogatory, so long as the affidavit was offered by the respondent. See *Johnson v. INS*, 971 F.2d 340, 343-44 (9th Cir. 2003).