Immigration and the Fourth Amendment

RESTORE *the* FOURTH

"The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."
Reid v. Covert, 354 U.S. 1, 5-6 (1957).

In the first hundred days of the second Trump administration, there have been significant shifts in immigration policy. This brief does not discuss those shifts. Instead, it sets out our understanding of what "restoring the Fourth" looks like in this policy space. It reviews existing practices and precedents and the kinds of government behavior found constitutional in the immigration space. This brief proposes an appropriate and more administrable rule to resolve future disputes involving the constitutionality of government actions toward non-citizens.

What Rights Do Immigrants Have?

In almost all places, and including in the Fourth Amendment, the Constitution uses the terms "people" or "person" rather than "citizen," to designate the set of individuals whose rights the United States is bound to honor. Though the history of making these rights real is a complex one, the current state of the law is that non-U.S. citizens, whether lawfully present in the U.S. or not, do have some Fourth Amendment rights, and also have rights to due process and equal protection.

Under the Supreme Court's ruling in *U.S. v. Verdugo-Urquidez*, any person with "substantial voluntary connections" to the United States is protected by the Fourth Amendment's prohibition of unreasonable searches and seizures, and the government needs a warrant based on probable cause before conducting a search or seizure. Non-U.S. persons entering the United States, legally or illegally, may or may not have such connections. Non-citizens who are lawfully or unlawfully present in the United States, other than those present on a valid 90-day tourist visa, are deemed more likely to have these connections. When outside the U.S., non-U.S. persons are generally presumed to lack these connections, as demonstrated by the fact that the National Security Agency (NSA) grants them no Fourth Amendment protections from foreign intelligence searches.

Unlawful entry to the United States is a misdemeanor under 8 U.S.C. § 1325. However, the U.S. has treaty obligations under the Refugee Convention that allow people present in the U.S. to claim asylum even if they entered the country unlawfully. Since the U.S. does not guarantee hearings to asylum-seekers at the border, many cross illegally in order to access asylum under the convention. This is because their only opportunity to get their claim heard is to physically be in the U.S. For most U. S. persons, legal entry to the country is straightforward, but it can be more challenging for this population. People with genuine asylum claims are being persecuted in some way in their home country and may not have been able to get their government to give them permission to leave. Or, their government may have declined to provide them the necessary documentation. They may have been unable to secure a visa to enter the United States.

Unlawful presence in the United States is not a crime, but a civil infraction, for similar reasons. So, if one enters legally on a tourist or student visa, and overstays, that in itself is not a crime. Consequently, there are many people unlawfully present in the United States, who entered lawfully.

By contrast, under U.S.C. 1324(a), encouraging someone to enter the country without authorization, harboring such a person, transporting such a person, or hiring ten or more people to work with actual knowledge that they are not legally present or legally able to enter the country, are all crimes.

Even if mass arrests and detention of all those who are unlawfully present, or all those who entered unlawfully, were feasible, the Fourth Amendment does not provide authority for their detainer-based detention, unless there is probable cause and evidence that the person poses a risk of flight. Most "ICE warrants" don't meet this standard.

Furthermore, the process of identifying all those unlawfully present, or who entered unlawfully, would necessitate a massive expansion of State surveillance, which would impact all persons in the U.S. Mass deportations require access by ICE to its own database of U.S. citizens or access to data held by other agencies, such as the database established to support the Affordable Care Act or the NUMIDENT system of the Social Security Administration, which cover almost all persons in the U.S. and include a field for citizenship. Additionally, border surveillance technologies, militarization, and lack of legal accountability for abuses by CBP agents, put the rights and

lives of everyone living within the 100-mile border zone at risk threatening the Fourth Amendment rights of residents in a densely settled two-thirds of the continental United States. ICE's access to cell-phone metadata to track people suspected of unlawful presence imperils everyone's privacy. We all have a stake in ensuring that government agencies adhere to Fourth Amendment law, irrespective of someone's citizenship or immigration status.

As a Constitutional organization, Restore The Fourth believes that our laws should comport with the Constitution. However, we also have opinions about how the Constitution ought to be interpreted. The current jurisprudence on who does and who does not have Fourth Amendment rights is neither administrable nor just. A more appropriate rule would diverge from the practices of ICE, immigration courts, and from the "substantial connections" test established in *Verdugo-Urquidez*; Justices Brennan and Marshall's standard expressed in their dissent in that case is suitable. They wrote, "If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them" (at 494). In other words, the U.S. government should adhere to the Constitution when it seizes someone or searches their papers, effects or communications. There should be no outgroup whom the law binds, but does not protect. The approach in *Verdugo-Urquidez*, that the government should assess the details of what "societal obligations" a person has accepted before awarding them rights, is neither practical or fair. If the U.S. government wants to seize or search someone within its jurisdiction, it must afford them their rights under the Fourth Amendment. There should be no spaces or circumstances where the U.S. government evades Constitutional protections of life, liberty or property. The U.S. government likewise ought not to award or withhold rights based on criteria that cannot be ascertained without violating the Constitution.

ICE Detainers and "Administrative Warrants"

Every time someone is booked into jail, their fingerprints are automatically sent to ICE to be checked against their databases under the "Secure Communities" program.[1] This is how ICE targets people for detainers. An immigration or ICE detainer is a request to a state, local, or tribal law enforcement agency to hold an individual in their custody for up to 48 additional hours after their scheduled release so that ICE may assume custody for immigration enforcement. ICE agents issue Form I-247A detainers, or an "Immigration detainer - Notice of Action." As of 2017, a Form I-247A must be accompanied by a Form I-200B (Warrant for Arrest of Alien) or Form I-205 (Warrant for Removal/Deportation).

A Form I-200/205 represents an attempt by ICE to address some of the concerns regarding the basis for a detention request by including an administrative warrant based on a determination of probable cause for removability. They are issued without a neutral review process or a determination of probable cause *by a judge*, as is typical in other law enforcement contexts under the Fourth Amendment. Instead, they are prepared and issued entirely by ICE agents. Many Form I-200/205's are based solely on checks of databases containing biometric and other forms of sensitive data. The databases are notoriously filled with errors and inaccurate information that have resulted in the wrongful detention of U.S. citizens. Without a determination of probable cause reviewed by a neutral magistrate, instances of wrongful detainment will persist.

By federal law, detainers are not mandatory orders - they are entirely voluntary and law enforcement agencies are not obligated to follow them.[2] The federal government cannot constitutionally require a law enforcement agency to participate in immigration enforcement and detention.[3] This is partially because I-200/205 warrants are for civil immigration violations, not a crime. The settlement agreement in *Gonzalez v. ICE* (2020) requires that a Form-I247A explicitly disclose that state and local agencies do not have the authority to keep an individual in custody for ICE's purposes. However, many state and local laws regulate compliance with ICE. Whereas several state

1 Secure Communities was briefly suspended under the Obama Administration in 2014 and replaced with the Priority Enforcement Program (PEP). Secretary Johnson issued a memorandum announcing the discontinuation of the program as a way "to address the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment." Secure Communities was reinstated in 2017 under the first Trump Administration. For more on the difference between the two programs, see https://immigrationforum.org/article/trouble-immigration-detainers/.

2 Miranda-Olivares v. Clackamas Cnty., Case No. 3:12-cv-02317-ST (D. Or. Apr. 11, 2014)

3 See U.S. v. New Jersey (No. 20-CV-1364-FLW-TJB, 2021), "§1357 [of the INA] does not compel state and local governments to 'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States. Rather, the statute speaks in voluntary terms"; Galarza v. Szalcyk (745 F.3d 642, 645 (3d Cir. 2014), ICE detainers issued under 8 C.F.R. §287.7 are merely requests.

statutes limit or outright ban compliance with an ICE detainer, other states have made compliance more or less mandatory. In some states, practices vary on a county by county basis. The diversity of state and/or county level statutes does not render Fourth Amendment protections and processes irrelevant.

Holding someone in response to an ICE detainer may constitute a separate arrest and is therefore subject to all of the protections and restrictions of the Fourth Amendment.[4] In a 2015 case, *Morales v. Chadbourne*, the First Circuit Court of Appeals affirmed a basic Fourth Amendment principle - investigative interest, including investigation into immigration status, does not justify warrantless imprisonment. When a law enforcement agency chooses to honor a detainer and hold an individual beyond their otherwise scheduled release, this detention is considered a new seizure for Fourth Amendment purposes.[5] The Minnesota Court of Appeals made this clear in *Esparza v. Nobles County* (2019), holding that if an individual is "kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes - one that must be supported by a new probable cause justification."[6] The U.S. District Court for the Northern District of Texas concurred in *Mercado v. Dallas County* (2017).

The distinction between an arrest and a seizure is important because one need not be formally arrested to invoke Fourth Amendment protections. Temporary detentions, like those requested via ICE detainers, are also seizures. In many places, like New York, local law enforcement do not have the legal authority to hold a person beyond their scheduled release.[7] If a law enforcement agency receives an ICE detainer request, it is their responsibility to "determine what authority or right they have to hold an individual" before complying.[8]

The requirement of probable cause means that ICE can only issue detainers against noncitizens who are already "removable." The U.S. government may establish removability if they are able to demonstrate that the non-citizen in question falls under one or more "classes of deportable aliens" as listed in 8 USC §1227 (e.g., document fraud, criminal offense).[9] Note that mere presence within the U.S. in violation of U.S. immigration law is not sufficient to establish flight risk.

For the above reasons, a Form I-247A should not replace a judicial warrant when law enforcement holds any individual beyond their scheduled release from custody. Individuals facing an ICE arrest in their home can request to see a warrant, and if it's not signed by a judge, they may refuse entry to the home; however, this right is limited in public spaces or workplaces, where ICE may not need a judicial warrant. Even if ICE is appropriately authorized to proceed in a search and/or seizure, bystanders are not required to share information with officials. This is important to note as ICE raids are more likely to occur in schools and workplaces.

Expedited Removal

The Refugee Act of 1980 intended to bring the United States in alignment with its international treaty obligations under the 1951 Refugee Convention. The Act requires that asylum seekers be granted a process allowing them to prove a well-founded fear of persecution in their home country. However, migrants who cannot obtain asylum status are not guaranteed a hearing under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. The IIRIRA established "expedited removal," a process whereby U.S. Customs and Border Protection (CBP) officials may detain and remove noncitizens without a hearing before a judge, and on their own authority, under certain conditions. At first, expedited removal applied solely at the border and was generally re-

4 See N.S. v. Hughes (D.D.C 2020); preliminary injunction limited to legal authority of U.S. Marshall Services to arrest and detain individuals suspected of civil immigration violations. "Seizures" of persons, in the sense of arresting and detaining, potentially constitute a Fourth Amendment violation in the context of civil immigration enforcement.

5 See Creedle v. Miami-Dade Cnty., 349 F. Supp. 3d 1276 (S.D. Fla. 2018): ICE's issuance of a detainer could constitute a seizure for Fourth Amendment purposes, plaintiff alleged that ICE lacked probable cause that he was removable or likely to escape. Localities that honor ICE detainer requests can be held liable for damages and rights violations.

6 See also Ochoa v. Campbell, 266 F. Supp. 3d 1237 (E.D. Wash. 2017): "Courts around the country have held that local law enforcement officials violate the Fourth Amendment when they temporarily detain individuals for immigration violations without probable cause."

7 See People ex. Rel. Wells on Behalf of Francis v. DeMarco: local law enforcement in NY does not have the power to detain individuals solely based on civil immigration violations without a judicial warrant.

8 Gonzalez v. Immigration & Customs Enf't, 416 F. Supp. 3d 995 (C.D. Cal. 2019)

9 For an example of a policy governing ICE warrantless arrests and traffic stops, see the Castañon-Nava settlement agreement, effective until May 13th, 2025 for the Chicago Field Office Area of Responsibility. In general, ICE agents must have probable cause that an individual is in the U.S. in violation of U.S. immigration laws, and that there is probable cause that the individual is likely to escape before a warrant can be obtained for the arrest. These determinations must be made at the time of arrest for all warrantless arrests.

served for immigrants who could not produce proper documentation. Expedited removal's criteria were expanded under President Trump's first term. It applied to any immigrant attempting to cross a land border who is arrested within two weeks of their arrival, and within 100 miles from the border. A recent Executive Order attempted to expand its applicability to detentions within two years of entry anywhere in the United States. Once detained or removed, it is difficult for an individual of any immigration status to request or produce the relevant evidence for further process from their family or other contacts.

Expanded expedited removal violates the Fourth Amendment. The government should obtain a warrant from a neutral magistrate within 48 hours, based on probable cause, to conduct any criminal pretrial detention. This applies to detained immigrants within U.S. jurisdiction in criminal contexts (see *Gerstein v. Pugh (1975)* and *County of Riverside v. McLaughlin* (1991)). Expanded expedited removal, extended beyond the border, applies a border-like process with minimal judicial oversight inland, raising Fourth Amendment concerns.

But it goes even deeper than that. Expedited removal bypasses even immigration judges, who, while not as independent as Article III judges, still provide some level of administrative review. Unlike Article III judges, nominated by the President and confirmed by Congress, immigration judges are Department of Justice employees appointed by the Attorney-General and therefore part of the Executive branch, raising concerns about their neutrality under Fifth Amendment due process. This leaves detentions without the neutral oversight the Fourth Amendment may require for prolonged seizures.

Surveillance Technologies and Immigration

RT4's position on immigration also arises out of a concern for the privacy of both U.S. citizens and non-citizens. DHS collects troves of sensitive data to identify, locate, and target migrants to facilitate "digital deportation." The Homeland Advanced Recognition Technology System (HART) aggregates facial recognition, DNA, iris scans, fingerprints, and voice prints (often gathered without a warrant) into one database which can identify people in public spaces, chilling our right to protest and assemble, and instilling fear into people as they live their daily lives. As of early 2025, local and state law enforcement are being coerced to fully cooperate with immigration officials with the threat of losing federal funds. We are concerned that this cooperation will force checks with DHS databases at all levels of law enforcement.

In addition to biometric surveillance, DHS conducts the following surveillance on both migrants and U.S. citizens:

- **Social Media Monitoring** which has been abused by DHS and its sub-agencies to monitor and suppress protests;
- **Data-Brokerage Dataset Purchases**, where ICE and DHS buy access to databases of location information, circumventing Fourth Amendment warrant requirements. In 2018, ICE bought $190,000 worth of Ventel licenses, or subscriptions for location data;
- **Artificial Intelligence** surveillance decision-making, such as LexisNexis's Accurint tool that "automates" decisions regarding vetting, screening, and targeting people for deportation;
- **Surveillance towers** at the border, which total 465 along the U.S.-Mexico border alone, and which were aggressively expanded under the Biden Administration. 152 people living in Rio Grande Valley told the ACLU that they felt harassed, constantly watched, and scared to live their daily lives, due to the physical and technological omnipresence of Border Patrol.
- **Automated License Plate Readers (ALPRs)**, which provide ICE with access to over 5 billion points of location information collected by private businesses and law enforcement agencies;
- **Internal Revenue Service (IRS) tax-payer data and records**, which DHS has recently acquired. This data includes highly personal and sensitive information about all U.S. taxpayers (including both citizens and non-citizens), such as income, home address, place of employment, and employment history.

In sum, the detention and expulsion of immigrants constitute a Fourth Amendment seizure of their persons, subject to a reasonableness standard under current law. Immigrants within U.S. jurisdiction, including those deemed deportable, are protected against unreasonable seizures, though these protections are narrower than those for U.S. citizens. Simultaneously, officers face limited civil liability for violations, and remedies like the exclusionary rule rarely apply in immigration proceedings, highlighting the civil nature of deportation. There should be broader accountability and remedies, such as civil liability or exclusion of evidence, but, woefully, these remain aspirational under existing precedent.[10]

Expanded immigration enforcement implicates an ever-growing surveillance dragnet that collects sensitive and revealing information on both migrants and U.S. citizens. The U.S. government has a responsibility to distinguish lawful from unlawful entries at the border; but the way it has chosen to do this, over the course of decades, has failed to preserve the rights of citizens and immigrants alike, or to adhere to the strict requirements of the Fourth Amendment to the United States Constitution.

For more issue briefs on the Fourth Amendment and government surveillance, visit Restorethe4th.com/issues.

10 In general, the exclusionary rule does not apply in removal proceedings (INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)). However, as found in Matter of Toro, 17 I&N Dec. 340, 343 (1980), the exclusionary rule applies where there are "egregious violations of the Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained" or if "there developed good reason to believe that Fourth Amendment violations by INS officers were widespread." The Trump Administration's mass deportation plan implicates widespread seizures of persons rapidly and at scale. Therefore, it is still possible that immigration courts will again permit the use of the exclusionary rule in their removal proceedings.

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Started in 2013, Restore The Fourth stands against mass government surveillance. We seek to strengthen the Fourth Amendment and fight back against all programs that encroach on it through educating the public, lobbying elected officials, and supporting grassroots organizers across the country.

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