2018

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Recommended Citation
THE UNREASONABLE SEIZURES OF SHADOW DEPORTATIONS

Mary Holper*

President Trump, during his campaign, promised a “deportation task force” to swiftly deport the eleven million undocumented noncitizens in the United States.1 Within his first week in office, he issued two Executive Orders calling for stricter immigration enforcement and a stronger border.2 The Department of Homeland Security (“DHS”) Memos implementing his interior and border enforcement executive orders indicate that DHS will use every tool to enforce the immigration laws, expanding the use of procedural tools that bypass immigration courts and ensuring that noncitizens remain detained3 during these “shadow” deportations. Two of these procedural tools—administrative removal and expedited removal—allow an Immigration and Customs Enforcement (“ICE”) officer or Customs and Border Protection (“CBP”) officer—the immigration police—to sign off on arrest and detention without involvement of an immigration judge.4 Such a seizure without a probable cause finding by a neutral, detached magistrate, if occurring within the criminal justice system, would clearly violate the Fourth Amendment.6

* Associate Clinical Professor, Boston College Law School. I would like to thank Daniel Kanstroom, César Cuauhtémoc García Hernández, Kari Hong, Robert Bloom, Sharon Beckman, Patricia McCoy, Mary Bilder, Christopher Robertson, Shu-Yi Oei, Daniel Farbman, and Ray Madoff for their comments, and Kit Johnson, Jason Cade, Carolina Núñez, Jennifer Koh, and Geoffrey Heeren for their comments to an earlier draft of this article at the Emerging Immigration Scholars’ Workshop in Dallas. Thanks also to Mary Kate Sexton for her research assistance, and Dean Vincent Rougeau for his research support.


5. See 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1; 8 U.S.C. § 1225(b); 8 C.F.R. § 235.3(b).

In this article, I build off of prior scholarship and litigation examining Fourth Amendment violations in immigration law to argue that the arrest and detention pursuant to administrative and expedited removal is an unreasonable seizure. I propose a framework for thinking about the Fourth Amendment violations at issue in these shadow deportation procedures. This framework focuses on the reasonableness of the seizure, not the status of the person harmed by the seizure, and not whether the proceedings that follow are punishment. In doing so, this article examines how the Fourth Amendment’s core concerns are present in the immigration law enforcement context notwithstanding immigration law’s plenary power. The article contributes to the scholarship that has both challenged immigration law’s historical exceptionalism and mapped where the plenary power has not trumped.

The rise of “removal in the shadows of immigration court,” also dubbed “speed deportations” or “diversions from the system,” is a

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8. See, e.g., Jennifer Chacón, Border Exceptionalism in the Era of Moving Borders, 38 FORDHAM URB. L.J. 129, 129 (2010) (arguing that Supreme Court jurisprudence that has endorsed exceptionally broad policing authority at the border has transformed the nature of immigration policing into the interior and that existing law is insufficient to guard against racial profiling and unreasonable police arrests and detentions of noncitizens); Kevin Johnson, How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering, 98 GEO. L.J. 1005, 1024-25 (2010) (arguing that Supreme Court cases interpreting the Fourth Amendment in immigration enforcement has authorized racial profiling and that the Court should revisit the authorization of such profiling and the vast discretion afforded law enforcement); David Cole, In Aid of Removal: Due Process Limits on Immigration Detention, 51 EMORY L. J. 1003, 1011-1021 (2002) (arguing that, notwithstanding the plenary power, the Supreme Court always has treated immigration detention like other civil detention, requiring the government to justify detention because of dangerousness or flight risk); Daniel Kanstroom, St. Cyr or Insincere: The Strange Quality of Supreme Court Victory, 16 GEO. IMMIGR. L.J. 413, 416 (2002) (noting that the Supreme Court in INS v. St. Cyr is noteworthy in its approach to judicial review because “[n]ot once does the so-called plenary power raise its hoary head”); Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625, 1627-28 (1992) (arguing that courts have created an important exception to the plenary power doctrine by hearing constitutional claims sounding in “procedural due process” and that “this ‘exception’ has grown to the point that we need to rethink what the ‘rule’ is?”).


topic that has begun to receive some scholarly attention. These types of
removals include administrative and expedited removal, but also
reinstatement of removal and stipulated orders of removal. Jill Family
has critiqued such “diversions” from the typical removal procedures
through an administrative law institutional design lens. Shoba
Sivaprasad Wadhia has critiqued such “speed deportations” by focusing
on the enlarged role of prosecutorial discretion when noncitizens face
these procedures. Jennifer Lee Koh has identified several concerns
that apply to mainstream immigration court proceedings, and asserts that
those critiques are amplified in such shadow proceedings. Amanda
Frost has suggested that some of the errors that occur in immigration
removal happen because low-level officials are asked to administer
complex and ambiguous immigration laws quickly and with little
training or oversight; she has called for more empirical research of
wrongful deportations in the model of the Innocence Project, which has
used data from DNA exonerations to raise public awareness of wrongful
convictions and to advocate for additional procedural protections in the
criminal justice system.

In this article, I examine two of these procedures, administrative
removal and expedited removal, through the lens of the Fourth
Amendment. I focus on the absence of a finding of probable cause by
a neutral detached magistrate in order to detain a person. In the criminal
procedure world, this right stems from Supreme Court cases interpreting
the Fourth Amendment; namely, the 1975 case Gerstein v. Pugh and
the 1991 case County of Riverside v. McLaughlin. In stark contrast to
the rights guaranteed in the criminal justice context, the statutes and
regulations authorizing administrative and expedited removal contemplate an ICE or CBP officer making the critical decision to seize
a person and detain him or her for the duration of these procedures
without any review by an immigration judge. I focus on the Fourth
Amendment concerns at issue with these types of shadow deportations,

12. Id. at 635.
13. See Wadhia, Speed Deportations, supra note 10.
16. See U.S. CONST. AMEND. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).
17. 420 U.S. at 14.
18. 500 U.S. 44 at 55-56.
19. See infra Parts IIb, c.
as opposed to the others, which at least have some involvement by an immigration judge. By identifying the arrest and detention that occurs within administrative and expedited removal as immigration law’s next Fourth Amendment problem, I build on the work of other immigration law scholars who have recognized serious Fourth Amendment violations within immigration procedures. Christopher Lasch has exposed the Fourth Amendment violations inherent in ICE detainer practices, which has led to successful damages claims for Fourth Amendment violations when state or local officials hold a person, pursuant to an ICE request, once criminal custody has ended. Following the successful detainer litigation, Michael Kagan described the practice of warrantless arrests for deportation without a prompt probable cause hearing by a neutral decisionmaker as “immigration law’s looming Fourth Amendment problem.” As Kagan has identified, in regular removal proceedings, the lack of a prompt review of custody by a neutral judge presents a Fourth Amendment violation. He proposes that courts read the Immigration and Nationality Act (“INA”) to require that immigration arrests automatically be reviewed by a neutral immigration judge within a seventy-two hour period, unless the person is released from custody. As opposed to focusing on why substantive Due Process allows these Fourth Amendment principles to apply when an immigration officer arrests a noncitizen for removal, as Kagan has

20. With reinstatement of removal, there at least has been some involvement of a judge somewhere in the process (albeit during a prior removal order). But see Koh, Removal in the Shadows, supra note 4, at 206 (“The removal order serving as the basis for reinstatement might be the product of a shadow removal proceeding.”). Stipulated removal orders and in absentia removal orders, although carrying their own procedural complications, at the very least involve an immigration judge signing off on the order of removal. See Koh, Removal in the Shadows, supra note 4, at 218; see also generally Jennifer Lee Koh, Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication, 91 N.C. L. REV. 475 (2013).

21. See, e.g., Lasch, The Faulty Arguments Behind Immigration Detainers, supra note 7; Lasch, Litigating Immigration Detainer Issues, supra note 7; Lasch, Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers, supra note 7.

22. Id.; see also ACLU, ICE Detainers, supra note 7.


25. Id. at 130; see also id. at 166 (describing how many states limit emergency civil commitment without a hearing or neutral review to 72 hours or less).
argued, I make the case that the Fourth Amendment itself provides noncitizens the right to have their detention reviewed by a neutral judge when immigration officers arrest them for removal. Kagan also discusses why prompt probable cause hearings are necessary in the context of regular removal proceedings, which at least have some involvement of an immigration judge, even if not as prompt as in the criminal justice context. In administrative and expedited removal, however, the statute and regulations contemplate no role by a neutral judge, except in very limited circumstances.

The Fourth Amendment is not only applicable when a criminal justice actor holds a noncitizen for deportation, as was the case in the detainer litigation. The Supreme Court has repeatedly applied the Fourth Amendment to immigration officers’ actions enforcing immigration laws. That the Fourth Amendment applies when an ICE officer arrests a noncitizen for deportation is one of the few positive outcomes of the 1984 decision in *INS v. Lopez-Mendoza*, where the Court refused to apply the exclusionary rule, except when immigration officers committed egregious violations of the noncitizen’s Fourth Amendment rights. Because the *Lopez-Mendoza* decision dealt only with the remedy of evidentiary exclusion, it implicitly recognized that the Fourth Amendment applies to such an arrest, as subsequent courts have clarified. More recently, in 2012, the Supreme Court in *Arizona v. U.S.*, reiterated that the Fourth Amendment applies to arrests for immigration enforcement purposes. These cases have left the door

26. See id. at 129 (“[T]he Fourth Amendment and due process overlap because the requirement of the Fourth Amendment is, in effect, a requirement for a certain kind of process.”).

27. See Kagan, supra note 7.

28. The circumstances in which a judge may review an expedited or administrative removal case are the “escape valves” for those who fear persecution and, in the context of expedited removal, for those who claim to be U.S. citizens, lawful permanent residents, refugees, or asylees. See infra Part IIb, c.


31. Id. at 1050-51.

32. See Kagan, supra note 7, at 147-48; M. Isabel Medina, *Ruminations on the Fourth Amendment: Case Law, Commentary, and the Word “Citizen,”* 11 HARV. LATINO L. REV. 189, 196 (2008); see also id. (“The Lopez-Mendoza opinion accepted without question the principle that the Fourth Amendment applied to undocumented persons in a criminal proceeding.”).

33. See, e.g., Yanez-Marquez v. Lynch, 789 F.3d 434, 450 (4th Cir. 2015) (“To hold otherwise would give no effect to the language used by the Supreme Court in *Lopez-Mendoza* expressing concern over fundamentally unfair methods of obtaining evidence and would ignore the fact that eight justices in *Lopez-Mendoza* seem to have agreed that the exclusionary rule applies in removal proceedings in some form.”); Oliva-Ramos v. USAG, 694 F.3d 259, 271-72 (3d Cir. 2012); Kandamar v. Gonzales, 464 F.3d 65, 71 (1st Cir. 2006); Almeida-Amaral v. Gonzales, 461 F.3d 231, 235 (2d Cir. 2006).


35. The Court considered section 2(B) of the law, which required Arizona officers to make a
open to the application of a different Fourth Amendment right; namely, the right to prompt review of detention by an immigration judge for probable cause, and release should that review not occur.

The remedy proposed by this article would partially dismantle the shadow deportation regime created through expedited and administrative removal because it would require the prompt involvement of a “neutral” immigration judge; within 48 hours the judge would have to find probable cause to detain or the noncitizen should be freed from detention. Thus, detention decisions occurring within the context of expedited and administrative removal would start to more closely resemble regular removal proceedings, in which there is at least some review by a neutral immigration judge of the decision to detain.

The need for independent review of the decisions made by ICE and CBP officers is even more critical in a Trump administration. Former press secretary Sean Spicer described how the DHS Border Security Implementation Memo and Enforcement Memo “took the shackles off” CBP and ICE officers, suggesting that these officers are clamoring to detain and deport more noncitizens. The memos recommend that DHS hire thousands of additional ICE and CBP officers, with little vetting.

36. I put “neutral” in quotes because I recognize that immigration judges have been critiqued as not being truly neutral, since they work as employees for the Department of Justice, and their decisions can be overruled by the Attorney General. See infra Part IVa.

37. See 8 U.S.C. § 1226(a) (providing for immigration judge review of ICE’s decision to detain); 8 C.F.R. § 1003.19(h)(1)(ii) (immigration judge may review whether someone is properly classified as a mandatory detainee); In re Joseph, 22 I & N. Dec. 799 (BIA 1999) (same). I leave aside any critique of why a more prompt probable hearing should happen during regular removal proceedings. See Kagan, supra note 7 (advocating for probable cause hearing by immigration judge within 72 hours of immigration custody); see also Mary Holper, Promptly Proving the Need to Detain for Post-Entry Social Control Deportation (forthcoming VAL. U. L. REV. 2017) (arguing that prompt probable cause hearings should only occur for cases where ICE alleges deportation for post-entry conduct).


39. Id.

40. See Kelly, Border Security Implementation Memo, supra note 3; Kelly, Enforcement Memo, supra note 3.
History tells us that this can lead to serious abuses, due to the lack of adequate supervision, which leads officers to abuse their authority with impunity. The Border Security Implementation Memo plans to expand expedited removal to apply to entrants without inspection who have been in the U.S. for up to two years, which David Martin, former General Counsel for the Immigration and Naturalization Service (“INS”) (the precursor to ICE and CBP), warned against in 2000. A leaked ICE memo instructs its officers to “prioritize[e] detention resources on aliens subject to expedited removal and aliens removable on any criminal ground” and calls for the expansion of detention space. Immigration arrests increased by more than forty percent in the Trump administration. In sum, there has never been more of a need for oversight of these detention decisions by the judiciary.

This article proceeds in four parts. In Part I, I describe the protections available in the criminal justice system; namely, the Fourth Amendment right to have one’s detention expeditiously reviewed by a neutral and detached adjudicator. In Part II, I first describe the procedures used in regular removal proceedings and discuss past litigation advocating for the Fourth Amendment right to a probable cause hearing by a neutral judge. I then describe the procedures used in expedited and administrative removal; noticeably missing from these proceedings is a neutral and detached judge who signs off on the detention. Part II also examines some of the legal challenges to these summary removal procedures, none of which have included considerations of the Fourth Amendment right to review of detention by a neutral judge. Part II concludes with a discussion of the ICE detainer litigation and lessons learned from these cases about Fourth Amendment rights in the immigration enforcement context. In Part III, I propose a framework for thinking about the Fourth Amendment violations at issue in administrative and expedited removal, which should focus on the reasonableness of the seizure, not the status of the person harmed by the seizure, and not whether the proceedings that follow are punishment.

41. Josiah Heyman, Why Caution is Needed Before Hiring Additional Border Patrol Agents and ICE Officers (April 24, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/why_caution_is_needed_before_hiring_additional_border_patrol_agents_and_ice_officers_final.pdf (“Now the Trump administration wants to repeat history by hiring thousands of additional [ICE and CBP] officers, without introducing the reforms and safeguards needed to avoid the abuses and scandals of the past.”).
43. David Martin, Two Cheers for Expedited Removal in the New Immigration Laws, 40 Va. J. INT’L L. 673, 700 (2000). He wrote, “[t]he risks are simply too great that persons who are not EWIs [entrants without inspection] (or who are longer-resident EWIs) could get caught up in the sweep.” Id.
44. Albence, supra note 3, at 1-2.
By framing the issues this way, one can see that Fourth Amendment rights should not diminish because it is an immigration officer conducting the seizure, or because it is a noncitizen (or alleged noncitizen) whose is unreasonable seized. Because my proposal seeks prompt immigration judge review of the detention that occurs in administrative and expedited removal, in Part IV, I discuss policy concerns with this proposal. I also propose what I believe is the most appropriate remedy: a habeas corpus petition filed once detention reaches 48 hours without review by a judge. I conclude by recommending that courts recognize administrative and expedited removal as immigration law’s next Fourth Amendment problem, and vindicate these rights by ordering that anyone facing expedited and administrative removal promptly be brought before an immigration judge for a probable cause hearing to justify detention.

I. THE FOURTH AMENDMENT RIGHT TO A PROBABLE CAUSE HEARING

In the criminal justice system, a probable cause hearing before a neutral magistrate within forty-eight hours of arrest is necessary to ensure that an arrestee’s Fourth Amendment rights are not violated.\(^\text{46}\) This hearing promotes a central purpose of the Fourth Amendment, which is to interject a neutral magistrate between a private citizen and the government that wants to deprive him of his liberty. The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”\(^\text{47}\) In 1948, in Johnson v. U.S.,\(^\text{48}\) the Supreme Court decided that to implement the Fourth Amendment’s protection against unfounded invasions of liberty and privacy, whenever possible, the existence of probable cause must be decided by a neutral and detached magistrate.\(^\text{49}\) The Court wrote,

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out

\(^{46}\) See Riverside, 500 U.S. at 55-56; Gerstein, 420 U.S. at 114-117.
\(^{47}\) U.S. CONST. AMEND. IV.
\(^{48}\) 333 U.S. 10 (1948).
\(^{49}\) Id. at 13-14.
crime.\textsuperscript{50}

In 1975, in \textit{Gerstein v. Pugh}, the Supreme Court reversed a Florida criminal procedure which, according to Florida courts’ interpretation, foreclosed the suspect’s right to a preliminary hearing on probable cause when a prosecutor filed an information.\textsuperscript{51} In describing the state court’s interpretations of its criminal procedures laws, the Court found troubling that “[a]s a result, a person charged by information could be detained for a substantial period solely on the decision of a prosecutor.”\textsuperscript{52} The Court wrote, “[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”\textsuperscript{53} The detached judgment of a magistrate judge is necessary to continue detention after initial arrest; the prosecutor’s finding of probable cause is insufficient to protect the important Fourth Amendment rights to be free of an unreasonable seizure.\textsuperscript{54} This Fourth Amendment rule applies to “\textit{any} significant pretrial restraint of liberty.”\textsuperscript{55}

In 1991, in \textit{County of Riverside v. McLaughlin}, the Court defined “bringing someone promptly before a magistrate” as forty-eight hours.\textsuperscript{56} The Court wrote that “the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system. But flexibility has its limits; \textit{Gerstein} is not a blank check.”\textsuperscript{57}

Thus, in the criminal justice system, a probable cause hearing before a magistrate within forty-eight hours of arrest\textsuperscript{58} is necessary to place a neutral, detached judge between the government and a person whose

\textsuperscript{50} Id.
\textsuperscript{51} See Gerstein, 420 U.S. at 105-06.
\textsuperscript{52} Id. at 106.
\textsuperscript{53} Id. at 114.
\textsuperscript{54} See id. at 114-17.
\textsuperscript{55} Id. at 125 (emphasis added). The \textit{Gerstein} Court also allowed few procedural rights in this probable cause hearing, reasoning that the “sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing.” \textit{Id}. at 120.
\textsuperscript{56} Riverside, 500 U.S. at 55-56.
\textsuperscript{57} Id. at 55. The Court reasoned that even if probable cause hearings are provided within 48 hours, there may still be “unreasonable delays” – for example, “delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay’s sake.” \textit{Id}. at 56.
\textsuperscript{58} This probable cause hearing is different from the later arraignment. \textit{See Gerstein}, 420 U.S. at 106 (holding that arraignment, which happens often 30 days after arrest, is insufficient to satisfy an arrestee’s Fourth Amendment rights); \textit{but see Riverside}, 500 U.S. at 58 (reasoning that probable cause hearing and arraignment could be combined so long as the proceedings occurred within forty-eight hours).
II. EXPEDITED, ADMINISTRATIVE, AND REGULAR REMOVALS, AND THEIR FOURTH AMENDMENT CHALLENGES (OR LACK THEREOF)

This section explains the scarce procedural rights that are available in the context of administrative and expedited removals, thus presenting a contrast from the relatively rigid requirements of a prompt probable cause hearing by a neutral detached magistrate in the criminal justice process. Before discussing the administrative and expedited removal procedures, it is helpful to describe the procedures available in regular removal proceedings.

A. Regular Removal Proceedings

ICE and CBP have statutory authority to arrest a noncitizen without a warrant in three situations. First, such warrantless arrest may occur if the noncitizen is entering or attempting to enter the United States illegally in the officer’s presence. ICE or CBP also may conduct a warrantless arrest if the agent has “reason to believe that the alien so arrested is in the United States in violation of [the immigration laws] and is likely to escape before a warrant can be obtained.” Courts have held that this “reason to believe” language is the equivalent of probable cause. Finally, ICE or CBP may make arrests for immigration law-related felonies or other felonies cognizable under the laws of the U.S. if there is a likelihood of escape before a warrant can be obtained.

Following a warrantless arrest, the ICE or CBP officer must bring the

59. Besides the aforementioned Supreme Court cases interpreting the Fourth Amendment, Federal Rule of Criminal Procedure 5(a) also reflects this requirement. FED. R. CRIM. P 5(a)(1)(A) (“A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.”).

60. See Kagan, supra note 7, at 162.

61. 8 U.S.C. § 1357(a); 8 C.F.R. § 287.5.

62. Id.

63. Id. ICE and CBP may, without a warrant, interrogate a noncitizen “believed to be an alien” about his or her right to remain in the U.S. and board vessels or vehicles near the border for the purpose of patrolling the border. Id.

64. See, e.g., Morales v. Chadbourne, 793 F.3d 208, 216 (1st Cir. 2015) (collecting cases); see also U.S. v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010) (“Because the Fourth Amendment applies to arrests of illegal aliens, the term “reason to believe” in § 1357(a)(2) means constitutionally required probable cause.”).

noncitizen “without unnecessary delay” for examination before a different ICE or CBP officer.\textsuperscript{66} That officer decides, within forty-eight hours, whether to issue a Notice to Appear and whether to detain that person.\textsuperscript{67} The Notice to Appear is the document that commences removal proceedings.\textsuperscript{68} It is issued once an ICE or CBP officer has confirmed the existence of prima facie evidence for removal.\textsuperscript{69} The regulation requires that it be a different ICE or CBP officer (not the arresting officer) who makes the prima facie evidence determination, although “[i]f no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is part of the duties assigned to him or her, may examine the alien.”\textsuperscript{70}

Upon issuance of a Notice to Appear, the noncitizen is brought to an immigration judge, who works for the Executive Office for Immigration Review, an agency within the Department of Justice.\textsuperscript{71} This judge presides over removal proceedings,\textsuperscript{72} where the judge determines whether to sustain the charges of removability.\textsuperscript{73} If the charges are sustained, then the noncitizen has the right to apply for various forms of relief from removal, such as asylum, withholding of removal, adjustment of status, cancellation of removal, or voluntary departure.\textsuperscript{74} In these regular removal proceedings, the noncitizen has the right to counsel (at no cost to the government);\textsuperscript{75} the noncitizen also may inspect the government’s evidence,\textsuperscript{76} present evidence or witnesses,\textsuperscript{77} and

\begin{itemize}
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} 8 C.F.R. § 287.3(d). Following the September 11, 2011 attacks, the regulation was amended, without comment, to expand the time frame from 24 hours to 48 hours, but to include a provision allowing for this timeline to be extended “in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time.” See 66 Fed. Reg. 48335 (2001); see also Wadhia, \textit{Under Arrest}, supra note 23, at 874 (critiquing regulation for failing to define “emergency,” “extraordinary circumstance,” or “additional reasonable period of time”).
  \item \textsuperscript{68} 8 C.F.R. § 239.1(a).
  \item \textsuperscript{69} 8 C.F.R. § 287.3(a).
  \item \textsuperscript{70} Id.; see also Jason Cade, \textit{The Challenge of Seeing Justice Done in Removal Proceedings}, 89 \textit{TULANE L. REV.} 1, 70 (2014) (“[N]o rule or agency practice requires or even regularly facilitates the review of a [charging document] by any attorney before it is filed with the immigration court.”).
  \item \textsuperscript{71} See 8 U.S.C. § 1229; see also Executive Office for Immigration Review, \textit{About the Office}, https://www.justice.gov/eoir/about-office (last visited May 12, 2017).
  \item \textsuperscript{72} Prior to 1996, noncitizens who had been admitted to the United States were in “deportation” proceedings, whereas those who were stopped attempting to enter the United States were in “exclusion” proceedings. The 1996 reforms to the INA combined these into “removal” proceedings. \textsc{Charles Gordon, Stanley Mailman & Stephen Yale-Loehr}, \textit{Immigration Law and Procedure} § 64.01 (rev. ed. 2010).
  \item \textsuperscript{73} 8 U.S.C. § 1229a(a)(1).
  \item \textsuperscript{74} See \textit{generally} id.
  \item \textsuperscript{75} 8 U.S.C. § 1229a(b)(4)(A).
  \item \textsuperscript{76} 8 U.S.C. § 1229a(b)(4)(B).
\end{itemize}
appeal any negative decisions to the Board of Immigration Appeals (also situated within the Executive Office for Immigration Review). The noncitizen may appeal certain types of decisions to the circuit court of appeals.

While in removal proceedings, the noncitizen’s custody is first reviewed by an ICE or CBP officer who, by regulation, requires the noncitizen to prove that he or she is not a danger or flight risk. The noncitizen may appeal this custody determination to an immigration judge, who also requires the detainee to disprove dangerousness or flight risk. There is a further appeal of custody to the Board of Immigration Appeals, and a district court, in habeas corpus proceedings, may review the legality of the detention.

Although some courts have examined the right to have a noncitizen’s detention for deportation promptly reviewed by a neutral judge, the Supreme Court has never squarely decided the issue. In 1960, in *Abel v. U.S.*, the Court considered whether an arrest pursuant to an administrative warrant by immigration authorities, which did not require judicial involvement, should lead to suppression of the evidence under the Fourth Amendment. Declining to suppress the evidence, the Court stated, “[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time” (although

77. *Id.*
78. 8 U.S.C. § 1229a(c)(5).
79. 8 C.F.R. § 1003.1(a)(1).
81. See 8 C.F.R. 236.1(c)(8). In a separate article, I have critiqued the reasoning behind this regulation, as it violates the presumption of freedom. See Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 90-91 (2016).
82. See 8 C.F.R. § 1003.19(b); 236.1(d)(1); Matter of Hussam Fatahi, 26 I. & N. Dec. 791, 794-95 (BIA 2016); Holper, *Beast of Burden*, supra note 81 (critiquing the Board’s burden allocation in bond proceedings). Not all detainees in removal proceedings have a right to an immigration judge’s review of custody. For example, if the detainee is described as an “arriving alien,” a judge may not review his custody. See 8 C.F.R. § 1003.19(h)(2)(I)(B). Also, for those who are properly included in a mandatory detention category (due to deportability for certain crimes), there is no immigration judge review of his custody. See 8 U.S.C. § 1226(c); In Re Joseph, 22 I. & N. Dec. 799 (BIA 1999) (judge may review whether a detainee is properly included in mandatory detention category). The Supreme Court upheld the mandatory detention statute against a Due Process challenge in 2003. See Demore v. Kim, 538 U.S. 510, 524-25 (2003).
83. 8 C.F.R. § 1003.19(t), 1003.38.
86. *Id.* at 230. The Court was writing prior to its express holdings that the Fourth Amendment applied when immigration officers arrested noncitizens for deportation. See *infra* notes 180-190.
87. *Id.*
it does not appear that anyone had ever raised that challenge to arrest for deportation. The Court’s statement about administrative arrests was dicta, however, since the Court repeatedly stated that the petitioner had waived the issue by not raising it in prior stages of the litigation.

The question of whether noncitizen juveniles who were in INS custody had the right to a prompt probable cause hearing before a neutral judge was an issue in litigation that began in the Ninth Circuit in the 1980s. In *Flores by Galvez-Maldonado v. Meese*, a panel of the Ninth Circuit reversed a district court judge’s order granting such hearings. The panel concluded that *Gerstein* did not apply to deportation proceedings, and that the *Gerstein* Court itself stressed that its holding was not readily transferrable to civil proceedings. The panel also followed the dicta in *Abel*, writing that although “professing not to reach the issue of whether an INS arrest warrant was invalid because it failed to comply with the fourth amendment’s requirements for warrants, the Court nonetheless devoted five pages to rejecting petitioner’s claim.” An en banc panel of the Ninth Circuit disagreed, finding that the children’s fundamental liberty interest required that “the decision to detain be made only in conjunction with a neutral and detached determination of necessity.”

The Supreme Court reversed the Ninth Circuit in 1993, in the case entitled *Reno v. Flores*. The Court found that there was no
fundamental liberty interest at stake, since the case dealt with INS custody of children, who are “always in some form of custody.”96 Thus, “shackles, chains, or barred cells” were not at issue, as would be the case in adult immigration detention.97 The Court dedicated very little of its decision to the procedural due process claim that the children should have their detention promptly reviewed for probable cause by a neutral judge. Rather, the Court found that the juveniles were given ample procedures under the regulations.98 Nowhere in the majority opinion is Gerstein even mentioned.99 Because the Flores Court took great pains to ensure that it was not deciding about “shackles, chains, or barred cells,” the issue of whether adults in immigration detention can seek a Gerstein-style hearing was not resolved.100 Also, because the Court was ruling on a facial challenge to the regulation, it did not have to consider what would amount to “excessive delay” in holding a hearing.101

Other courts have not recognized a Fourth Amendment right to a neutral detached magistrate to review detention for probable cause in the immigration context.102 Some have followed the dicta in Abel.103

96. Id. at 301-02.
97. Id. at 302.
98. Id. at 307-08.
99. This is unlike the panel decision and the en banc decisions, which, between the majority opinions and the concurring and dissenting opinions, yielded much discussion about the applicability of Gerstein or whether a prompt probable cause hearing should be afforded to the juveniles under the Mathews v. Eldridge test. See, e.g., Flores, 913 F.2d at 1335-37 (panel opinion discussion of applicability of Gerstein); id. at 1348-49 (Fletcher, J., dissenting) (“[T]he [Gerstein] Court reasoned that when ‘the stakes are this high,’ a determination by a neutral magistrate is required. Prosecutorial judgment standing alone is not enough.”); see also Flores, 942 F.2d at 1364-65 (en banc opinion addressing Gerstein issue); id. at 1367-69 (Tang. J., concurring) (discussing that under Mathews, not Gerstein, plaintiffs should have probable cause hearing with neutral judge and stating, “[t]he Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decision making.”); see also id. at 1374-75 (Rymer, J., concurring in part and dissenting in part) (finding that Gerstein does not apply to civil deportation hearings, but that “[t]ime limits and impartiality . . . are basic safeguards against arbitrary action”).
100. See Kagan, supra note 7, at 151-52.
101. See id. In Flores, the INS regulation challenged had been in effect only one week when the district court issued its judgment; prior to that, the INS had relied on a 1984 policy that was codified in the regulation. See Flores, 507 U.S. at 295-97, 300. The Court reasoned that to prevail in such a facial challenge, the children “must establish that no set of circumstances exists under which the [regulation] would be valid.” Id. at 301 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).
102. See, e.g., Salgado v. Scannel, 561 F.2d 1211, 1212 (5th Cir. 1977) (finding warrantless arrest legal pursuant to statute and thus subsequent statement taken following arrest should not be suppressed); cf. U.S. v. Encarnacion, 239 F.3d 395, 399-400 (1st Cir. 2001) (holding that Federal Rule of Criminal Procedure 5(a), which requires a prompt probable cause hearing, does not protect detainees arrested for deportation under 8 U.S.C. § 1357(a)(2)).
103. See, e.g., Spinella v. Esperdy, 188 F. Supp. 535, 540-41 (S.D.N.Y. 1960) (“While the Supreme Court declined to pass upon a similar argument in Abel, . . . some pertinent observations there were nonetheless made . . . the court did refer to its frequent upholding of administrative deportation proceedings shown to have commenced by arrests made pursuant to such warrants.”).
Others have assumed, without much analysis, that an immigration officer’s review of the charges is the equivalent to prompt review of detention by a magistrate judge. Of interest is Judge Posner’s opinion in the 1982 case Arias v. Rogers. Considering a challenge to the INS’ arrest without warrant procedures, Judge Posner observed that the INA requires “that an alien arrested without a warrant ‘be taken without unnecessary delay before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.’” He wrote that “the reference is to a special inquiry officer, also called an immigration judge. Special inquiry officers have judicial authority . . . and therefore correspond to the committing magistrate in a criminal proceeding.” Judge Posner was mistaken about the involvement of the immigration judge in such arrest authorization, as the Ninth Circuit later pointed out. The charging document was in fact written by the then-INS (now ICE), not the immigration judge. The confusion is understandable, given the history of today’s immigration judges, who were once officers of the INS. However, it demonstrates how at least one circuit court believed that more process actually existed within regular removal procedures, and thus was unable to see a Fourth Amendment violation.

104. See, e.g., Tejeda-Mata v. Immig & Naturalization Serv., 626 F.2d 721, 725 (9th Cir. 1980) (“The phrase ‘has reason to believe’ has been equated with the constitutional requirement of probable cause.”); Min-Shey Hung v. U.S., 617 F.2d 201, 202 (10th Cir. 1980); U.S. v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975), cert. denied, Cantu v. U.S. 423 U.S. 1035; Au Yi Lau v. U.S. Immig and Naturalization Service, 445 F.2d 217, 222 (D.C. Cir. 1970).
105. 676 F.2d 1139 (7th Cir. 1982).
106. Id. at 1142 (quoting 8 U.S.C. § 1357(a)(2)).
107. Id. (citing 8 C.F.R. § 242.8(a)).
108. In the panel opinion in Flores, the Ninth Circuit cited Arias as erroneously concluding that examining officer mentioned in 8 U.S.C. § 1357(a)(2) was an immigration judge rather than INS official, and analogizing immigration judge to “committing magistrate in criminal proceeding.” Flores by Galvez-Maldonado, 913 F.2d at 1337 (citing Arias, 676 F.2d at 1142).
109. Judge Posner wrote Arias one year before the Executive Office for Immigration Review (“EOIR”) was created. With EOIR’s creation, the former INS and immigration judges were finally divorced in 1983, although both agencies remained within the Department of Justice. Sidney B. Rawitz, From Wong Yang Sung to Black Robes, 65 INTERP. REL. 453-59 (1988), reprinted in Stephen E. Legomsky and Cristina M. Rodriguez, IMMIGRATION AND REFUGEE LAW AND POLICY, Sixth Ed. 686 (2015) (chronicling the history of the separation of functions between the INS and what ultimately became immigration judges under the newly-created EOIR in 1983). While “special inquiry officers” were, in 1982, the precursor to what today is an immigration judge, at the time, they were part of the INS. There were procedures in place to ensure that special inquiry officers were separate from prosecuting officers. Id. at 690. With the changes that created EOIR, immigration judges were never given the authority to review INS’ charging documents for probable cause. Today, EOIR remains within the Department of Justice, whereas ICE, CBP, and the Citizenship and Immigration Services are within the Department of Homeland Security. See Department of Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).
B. Expedited Removal

Expedited removal is the removal, without a hearing, of those who are caught without a proper visa or legal status. Noncitizens subject to expedited removal are detained during the process and generally do not see an impartial judge; an ICE or CBP officer signs off on their detention and deportation, with only a supervisor’s review. The only way for a noncitizen to see a judge is if he expresses a fear of return or swears to be a U.S. citizen, lawful permanent resident, refugee, or asylee. However, the noncitizen remains detained during this process. Expedited removal was created in 1996 to address what was perceived as an abuse of the asylum system, wherein noncitizens could arrive from another country, claim asylum, and spend years in the U.S. while this claim made its way through the clogged immigration courts.

When Congress wrote the expedited removal statute, it authorized the

110. 8 U.S.C. § 1225(b); 8 C.F.R. § 235.3(b).
111. Id.
112. Should a noncitizen express a fear of return, the case is referred to an asylum office for a credible fear interview; should the noncitizen satisfy an officer of his or her fear of return, the case will be referred to an immigration judge for an asylum hearing. See 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.1(b)(4).
113. See 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(5)(i). If the DHS officer confirms that the noncitizen was admitted as a lawful permanent resident, refugee, or asylee, the DHS officer shall not issue an expedited removal order against the noncitizen. See 8 C.F.R. § 235.3(b)(5)(i-iv). In the case of a verified U.S. citizen, the DHS officer may not place the person in removal proceedings. Id.
114. See, e.g., 8 C.F.R. § 235.3(b)(5)(i) (stating that a DHS officer must issue an expedited removal order against a claimed U.S. citizen, LPR, refugee, or asylee for whom DHS cannot verify that status and “[t]he person shall be detained pending review of the expedited removal order [by the immigration judge]”; 8 U.S.C. § 1225(b)(1)(B)(iv); 8 C.F.R. § 235.3 (“Pending the credible fear determination by an asylum officer and any review of that determination by an immigration judge, the alien shall be detained.”). Although parole is an option, that parole is highly discretionary and unreviewable by any neutral judge. See id. (“Parole of such alien in accordance with section [1182](d)(5) of the Act may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.”). Once the noncitizen has passed a credible fear interview, if he or she is not an “arriving alien,” an immigration judge may review custody in a bond hearing. See In re X.K., 23 I. & N. Dec. 731 (BIA 2005) (a noncitizen in expedited removal but who is not an “arriving alien” may request a bond hearing once she passes her credible fear interview); see also 8 C.F.R. § 1.2 (defining “arriving alien” as “an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means” and clarifying that “[a]n arriving alien remains an arriving alien even if paroled pursuant to section [1182](d)(5) of the Act, and even after any such parole is terminated or revoked”).
INS to apply the summary procedures to any noncitizen who has been in the U.S. for fewer than two years. The INS, however, initially only applied expedited removal to those who were stopped at the border seeking admission to the U.S. The immigration authorities then incrementally expanded its application. In 2002, expedited removal grew to apply to those who had arrived by sea and had been in the U.S. for fewer than two years. Expedited removal again grew in 2004 to apply to noncitizens who had been in the U.S. fewer than fourteen days and were found within 100 miles of a land border. In the February 2017 Border Security Implementation Memo, former DHS Secretary Kelly directed the agency to engage in new rulemaking on the issue of expedited removal, indicating the agency’s intent for expedited removal to expand to those who cannot prove they have been in the U.S. continuously for more than two years.

Court cases challenging expedited removal have largely failed, due to statutory limitations on the right to judicial review in such proceedings, in addition to the lack of Due Process protections available to the persons to whom it has traditionally applied, those who are stopped at the border and thus seeking entry. Because of the “entry fiction,” courts have found that these individuals have no right

118. Ayelet Shachar describes how expedited removal has allowed the border to become “detached from its traditional location at the perimeter of the country’s edges [by] relying on the legal fiction of removing unwanted migrants ‘at the border’ when they are already firmly within its perimeter.” Ayelet Schachar, The Shifting Border of Immigration Regulation, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 165, 174 (2007).
122. See infra Part IVb; see also Li v. Eddy, 259 F.3d 1132, 1134–35 (9th Cir. 2001), opinion vacated on reh'g as moot, 324 F.3d 1109 (9th Cir. 2003) (“With respect to review of expedited removal orders,...the statute could not be much clearer in its intent to restrict habeas review.”).
123. See Am. Immigration Lawyers Ass’n v. Reno, 18 F. Supp. 2d 38, 59 (D.D.C. 1998) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)) (“Because such aliens are not considered to be within the United States, but rather at the border, courts have long recognized that such aliens have ‘no constitutional right[s]’ with respect to their applications for admission.”); Li, 259 F.3d at 1136 (finding that noncitizen seeking entry and subjected to expedited removal procedures may not raise Due Process arguments because she has no constitutional right to Due Process to challenge her immigration status or petition for entry into the U.S.). There is a pending petition for rehearing en banc in the case of U.S. v. Peralta, 847 F.3d 1124 (9th Cir. 2017), in which the Ninth Circuit held that a noncitizen who was arrested not long after surreptitiously who was placed in expedited removal after entering the U.S. had no Due Process right to counsel. Id. at 1136.
124. See Shaughnessy v. U.S. ex rel. Mezei, 345 U.S. 206, 214-15 (1953) (permitting the indefinite detention of a noncitizen who was assimilated to the status of one seeking admission to the U.S., which meant that he had no constitutional rights to assert); Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien
to judicial review of their cases.\textsuperscript{125}

\section*{C. Administrative Removal}

Administrative removal is the deportation, without a hearing, of certain noncitizens whom the government accuses of having been convicted of an “aggravated felony.”\textsuperscript{126} Created in 1996, administrative removal is another summary removal procedures that, especially for the scapegoated “aggravated felons,”\textsuperscript{127} became a way to cut off access to immigration courts.\textsuperscript{128} The noncitizen is necessarily subject to mandatory detention throughout this procedure.\textsuperscript{129} The regulation also states that there is no administrative review of detention for a noncitizen in administrative removal proceedings.\textsuperscript{130}

The noncitizen never sees a neutral judge during his detention for administrative removal, even though there exist immigration judges who work for the Executive Office for Immigration Review.\textsuperscript{131} Rather, it is
denied entry is concerned.”); see also infra note 303 (discussing critiques of entry fiction).

\textsuperscript{125} See, e.g., Castro v. US DHS, 835 F.3d 422, 445-46 (3d Cir. 2016).

\textsuperscript{126} See 8 U.S.C. § 1182(a)(9)(A)(i). If the noncitizen does reenter, he or she can be prosecuted for federal reentry and faces up to a 20-year sentence if the underlying removal was for an aggravated felony. See 8 U.S.C. § 1326(a)(b)(2).

\textsuperscript{129} The only review of the charges happens by an ICE supervisor, unless the noncitizen contests the charges within fourteen days. See 8 C.F.R. § 238.1(a), (d), (f). The noncitizen also may file a petition for review within 30 days of when an administrative removal order becomes final. 8 U.S.C. §
an ICE officer who writes the charging document, finds that detention is justifiable based on that charge, and issues an order of deportation.\textsuperscript{132} The statute and regulations only require that the ICE officer be different than the officer who initially placed the noncitizen in the administrative removal proceedings.\textsuperscript{133} If ICE finds that the case is not amenable to administrative removal, the officer \textit{may} refer the case to an immigration judge; no provision requires such referral.\textsuperscript{134} In the February 2017 Enforcement Memo, former DHS Secretary Kelly referred to administrative removal as “effective tool to facilitate the removal of criminal aliens from the United States” and stated that it “shall be used in all eligible cases.”\textsuperscript{135}

In court cases examining administrative removal, there has been no real focus on the lack of a neutral, detached magistrate. Several of the cases involved questions about whether the noncitizen had adequately exhausted the legal issues raised, if he or she never challenged the “Notice of Intent to Issue Final Administrative Order” (the document that ICE uses to notify the noncitizen of administrative removal proceedings).\textsuperscript{136} In at least one case, the noncitizen argued, unsuccessfully, that the statute requires all removal proceedings to occur before an immigration judge.\textsuperscript{137}

\begin{footnotesize}
\begin{enumerate}
\item[132.] See 8 C.F.R. § 238.1.
\item[133.] See 8 U.S.C. 1228(b)(4)(F); 8 C.F.R. § 238.1(a).
\item[134.] See 8 C.F.R. § 238.1(d)(2)(i)(A) (an officer \textit{may} place the noncitizen in regular removal proceedings); \textit{id. at} (d)(2)(i)(B) (“If the deciding Service officer finds that the alien is not amenable to removal under section 238 of the Act, the deciding Service officer shall terminate the expedited proceedings under section 238 of the Act and shall, where appropriate, place noncitizen in regular removal proceedings.”); \textit{id. at} (d)(3) (“Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.”).
\item[135.] Kelly, Enforcement Memo, \textit{supra} note 3, at 3.
\item[136.] See, e.g., Malu, 764 F.3d at 1289 (finding that the noncitizen could have, but failed to, exhaust argument that she was not an aggravated felony because she did not respond to the Notice of Intent and that because of the conceded aggravated felony, court lacks jurisdiction to review errors of fact that she alleges); Aguilar-Aguilar v. Napolitano, 700 F.3d 1238 (10th Cir. 2012) (finding that noncitizen’s failure to challenge Notice of Intent “sound[ed] the death knell of his [petition for review] of the [Final Administrative Removal Order] because only a lack of that enumerated proof limited DHS’ discretion to remove Petitioner pursuant to 1228(b); but see Eke v. Mukasey, 512 F.3d 372, 378 (7th Cir. 2008) (court could consider whether DHS correctly classified noncitizen’s conviction as an aggravated felony).
\item[137.] Osuna-Gutierrez v. Johnson, 838 F.3d 1030, 1034 (10th Cir. 2016) (“Nothing in § 1228 requires that an IJ preside over the expedited removal process—in fact, the words ‘immigration judge’
Only in one case, *Etienne v. Lynch*, did the Fourth Circuit in 2015 examine the administrative removal procedures in any great depth. In a few places within the decision, the court appears troubled by the fact that an ICE officer is unilaterally making these critical decisions. For example, when comparing the administrative removal procedures to those that occur in typical removal proceedings, the court wrote: “for aliens like Etienne who have not been lawfully admitted to the United States for permanent residence, the INA authorizes an expedited removal process, without a hearing before an IJ. Instead, a DHS officer, who need not be an attorney, presides over this expedited removal process.” In *Etienne*, the court held that DHS had properly classified his conviction as an aggravated felony and therefore denied his petition for review.

It does not appear that any judge has seriously considered a Fourth Amendment challenge to the statute and regulations authorizing administrative removal. This is unsurprising, as the INA does not provide for court-appointed counsel in standard removal proceedings, much less administrative removal proceedings. Even in a jurisdiction like New York that has a fund to provide public defenders for indigent noncitizens in detention, counsel is provided only for those who are in regular removal proceedings and appear before the immigration court. Effectively raising a Fourth Amendment challenge to administrative removal would be a difficult task for an unrepresented, detained

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138. 813 F.3d 135 (4th Cir. 2015).
139. *Id.* at 138-42. This was because the court got past the jurisdictional issue, holding that because the noncitizen has no opportunity to challenge the legal basis of his removal in administrative removal proceedings, the INA’s administrative exhaustion requirement does not deprive the court of jurisdiction. *Id.* at 138. The court held that because the procedures give no notice to the noncitizens that they must raise all legal issues in response to Notice of Intent, but rather only allows the noncitizen to contest issues of fact, the noncitizen had not failed to exhaust administrative remedies. *Id.* at 141-42.
140. *Id.* at 138-40.
141. *Id.* at 138-39; *see also id.* at 140 (describing procedures available to challenge an administrative removal order and stating “[o]f course, all of these potential challenges are to be raised to the presiding DHS officer, who, significantly, is not required to be an attorney or have any specialized legal training.”).
142. *Id.* at 145.
144. 8 U.S.C. § 1228(b)(4)(B) (no right to court-appointed counsel in administrative removal proceedings).
noncitizen. If the noncitizen secures counsel, the relatively quick nature of the proceedings and deadlines for judicial review of the administrative removal order itself would likely cause counsel to focus all efforts on a petition for review in a circuit court of appeals. This would leave little time for litigating a Fourth Amendment challenge to the detention.

D. A Renewed Interest in the Fourth Amendment’s Guarantee of a Probable Cause Hearing: the ICE Detainer Litigation

Although thus far there has been a dismal legal landscape for challenges to expedited and administrative removal, it is entirely possible that a court will take a fresh look at these procedures through the lens of the Fourth Amendment. When one looks at the recent successful litigation around ICE detainers, it appears that courts have found a renewed interest in the Fourth Amendment right to a probable cause finding when immigration agents authorize detention for the purposes of deportation.

The ICE detainer is a request to state or local authorities to “[m]aintain custody” of a person for an additional forty-eight hours, plus weekends and holidays, “beyond the time when the subject would have otherwise been released” from the state or local custody. When local jails honored ICE’s request and refused to release a noncitizen until ICE came to detain them, the noncitizens sued the state authorities for

146. See Wadhia, Speed Deportations, supra note 10, at 9 (noting “the practical impediments faced by those in administrative removal,” such as a “lack [of] information about judicial review” and that because “the timeline for administrative removal is a short one (14 days), the likelihood is very high that people are wrongfully removed before a court of law can conclude that a particular crime is not, in fact, an aggravated felony”).

147. See 8 U.S.C. § 1252(b)(1) (deadline for petition for review of thirty days after the final order of removal); 1252(a)(5) (providing that this statutory section is the sole means of judicial review of any order of removal issued under the chapter, except for review of expedited removal, which is at 8 U.S.C. § 1252(c)).

148. See, e.g., Parada v. Anoka County, 2018 U.S. Dist. LEXIS 128176, *19 (D. Minn. July 30, 2018) (finding local county honoring ICE detainer violated detainee’s Fourth Amendment rights); Orellana v. Nobles Cty., 230 F.Supp. 3d 934, 944 (D. Minn. 2017) (immigration detainee’s continued confinement after he would have been released on state charges of driving under the influence, pursuant to ICE detainer, violated his rights under the Fourth Amendment); Moreno v. Napolitano, 213 F.Supp. 3d 999, 1009 (N.D. Ill. 2016) (granting summary judgment to class of individuals targeted by ICE detainers on their claim that ICE’s practice of issuing detainers without obtaining an arrest warrant was prohibited by the INA and finding that that the warrantless arrest power of § 1357(a)(2) did not defeat their claim because “immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained.”); Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317, 2014 WL 1414305, *10 (D. Or. Ap. 11, 2014); see also ACLU, ICE Detainers, supra note 7, at 3-4 (collecting cases where holding a noncitizen under ICE detainer was found to be a new arrest for Fourth Amendment purposes).

149. 8 C.F.R. § 287.7(d).
damages, arguing that this continued custody was a new “seizure” for Fourth Amendment purposes, yet it lacked probable cause.\textsuperscript{150} Because noncitizens enjoy the same rights as citizens when charged or held for a crime,\textsuperscript{151} courts have responded to the unlawful seizure of a noncitizen by the criminal justice system’s actors by analyzing their cases under traditional Fourth Amendment principles.

In the detainer cases, one sees that it is not only criminal justice actors, but also ICE agents, who violate the Fourth Amendment by briefly detaining without probable cause persons they are investigating for civil immigration violations.\textsuperscript{152} For example, in \textit{Morales v. Chadbourne},\textsuperscript{153} the First Circuit in 2015 considered the case of a naturalized U.S. citizen held pursuant to an ICE detainer for forty-eight hours beyond her release from criminal custody.\textsuperscript{154} She sued both the state officials who detained her and the ICE officials who issued the detainer, seeking money damages pursuant to 42 U.S.C. § 1983 against the state officials and pursuant to the Supreme Court’s decision in \textit{Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics}\textsuperscript{155} against the federal officials.\textsuperscript{156} ICE officials filed an interlocutory appeal to the First Circuit, arguing that they had qualified immunity because the law was not clear on whether an issuance of a detainer violated her Fourth Amendment rights.\textsuperscript{157} Holding that her Fourth Amendment rights clearly had been violated by the ICE officers, the court unequivocally stated that the Fourth Amendment applied when ICE officers authorized detention to verify whether someone was present in violation of the immigration laws.\textsuperscript{158} In fact, the court found (as was necessary to overcome a qualified immunity defense) the applicability of the Fourth Amendment to this context was so obvious that “the existing precedent . . . placed the statutory or constitutional

\footnotesize{\textsuperscript{150} See supra note 148 (summarizing ICE detainer litigation).\
\textsuperscript{151} See D. Carolina Núñez, \textit{Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment}, 85 S. CAL. L. REV. 85, 89-90 (2011) (discussing cases and briefs in which courts and litigants assumed Fourth Amendment’s application to noncitizens); Dunaway v. New York, 442 U.S. 200, 216 (1979) (“[D]etention for custodial interrogation – regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrests.”).\
\textsuperscript{152} See ACLU, \textit{ICE Detainers}, supra note 7.\
\textsuperscript{153} 793 F.3d 208 (1st Cir. 2015).\
\textsuperscript{154} Id. at 211.\
\textsuperscript{155} 403 U.S. 388 (1971).\
\textsuperscript{156} Morales, 793 F.3d at 213 (citing Bivens, 403 U.S. 388 (1971)); see also Morales, 996 F.Supp.2d at 26.\
\textsuperscript{157} Morales, 793 F.3d at 211-13.\
\textsuperscript{158} Id. at 215-18. The court held that even though the state officials physically detained Morales, the ICE officer who issued the detainer should have known that the natural consequences of the act of issuing the detainer to state officials would cause her to be detained up to forty-eight hours. Id. at 218.}
question beyond debate.”

Morales also refreshingly separated out detention from deportation by reasoning that ICE officials can go about their work determining whether someone has violated the immigration laws; they must, however, let the person out of jail while they undertake such investigation. In Morales, the court stated, “we do not understand why it would be more difficult to obtain the facts necessary to establish probable cause for an individual who was detained in criminal custody than for an individual who was walking freely in the community.”

In this way, courts deciding detainer cases have done a little work to undo a central critique about the U.S. detention system, that during the early debates on the U.S. government’s right to exclude and expel noncitizens, “detention had never been separately considered from the issue of expulsion,” which “proved to be a crucial omission” because of the “distinct legal and moral concerns” raised by detention.

Cases where detainers were lodged against U.S. citizens also demonstrate the critical need for Fourth Amendments protections when ICE agents detain those they believe are not citizens. Clearly ICE can be mistaken, and Fourth Amendment rights should guard against such erroneous detention. As the late Justice Scalia wrote, “[t]he common-
law rule of prompt hearing [which became the precursor to the Fourth Amendment right] had as its primary beneficiaries the innocent—not those whose fully justified convictions must be overturned to scold the police . . . but those so blameless that there was not even good reason to arrest them. The detainer cases have verified that the seizure of a person being investigated for civil immigration violations without probable cause is an obvious Fourth Amendment violation. Do these cases mark a turning point, where the Fourth Amendment suddenly applies in this context, or have the Fourth Amendment rights always existed? How have noncitizens’ Fourth Amendment rights fared when faced with immigration law’s exceptionalism? In the next section, I seek to answer these questions and provide a framework for seeing the Fourth Amendment violations in immigration enforcement practices such as expedited and administrative removal.

III. A FRAMEWORK TO SEE IMMIGRATION LAW’S NEXT FOURTH AMENDMENT PROBLEM

The core concerns of the Fourth Amendment – the right not to be unreasonably seized by a government actor – exist in the immigration enforcement context. Why should Fourth Amendment rights apply when deportation is civil, not punishment, and therefore the procedural protections of a criminal trial do not apply? The Fourth Amendment question is not whether what occurs after the seizure is

The fact that Mr. Galarza is Hispanic and was working at a construction site with three other Hispanic men—two of whom are citizens of foreign countries and another who claimed to have been born in Puerto Rico but is a citizen of the Dominican Republic—does not amount to probable cause to believe that Mr. Galarza is an alien not lawfully present in the United States. Galarza v. Szalczyk, 2012 WL 1080020, at *14 (E.D. Pa. Mar. 30, 2012). ICE officers later reached a settlement, so the appeal of the case to the Third Circuit involved only claims against the county officials. See Galarza v. Szalczyk, 745 F.3d 634, 638 (3d Cir. 2014).

166. County of Riverside v. McLaughlin, 500 U.S. 44, 71 (Scalia, J., dissenting).
168. See Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (holding that deportation is not punishment). In the facetious words of Dan Kanstroom, “they are not being punished, they are simply being regulated.” Daniel Kanstroom, Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases, 113 Harv. L. Rev. 1889, 1895 (2000).
punishment. These are the questions that should be asked: Has there has been a seizure? Is this a person who can claim Fourth Amendment protections? Was the seizure unreasonable? If the answer to the first three questions are yes, then what should the remedy be?

When discussing an appropriate remedy, questions regarding the purpose of such proceeding become relevant, especially when that remedy is sought within the context of a civil proceeding. For this reason, in U.S. v. Lopez-Mendoza, the Supreme in 1984 decided that the Fourth Amendment’s exclusionary rule did not extend to illegal arrests by the immigration authorities. Because the Court held that a deportation proceeding is civil, it balanced the social benefits against the costs of applying the exclusionary rule, finding that the costs outweighed the benefits of applying the rule. The Court held that it would rule differently, however, if the Fourth Amendment violations by INS officers were widespread, or if there was an egregious Fourth Amendment violation that “might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.”

There has been significant scholarly critique of this case for its watered-down application of an important remedy to Fourth Amendment violations by immigration officers. Yet Lopez-Mendoza dealt with only one possible remedy for an illegal arrest, and created one

170. Cf. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (quoting Calandra, 414 U.S at 354) (discussing how Fourth Amendment violation is “‘fully accomplished’ at the time of an unreasonable governmental intrusion,” regardless of whether the evidence gained from the Fourth Amendment violation is later introduced at trial).


173. Id. applying test from United States v. Janis, 428 U.S. 433 (1976)). The Court also decided that if it applied the exclusionary rule to release a person from custody, that person would immediately resume the “commission of a crime through their continuing, unlawful presence in this country.” Id. at 1050. The Court stated, “The constable’s blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime.” Id. at 1047.

174. See, e.g., David Gray et. al., The Supreme Court’s Contemporary Silver Platter Doctrine, 91 TEX. L. REV. 7, 25 (2012) (criticizing Lopez-Mendoza Court’s reasoning that law enforcement officers are primarily interested in criminal law enforcement, not immigration enforcement, and that imposing the exclusionary rule in immigration proceedings therefore offers little or no additional deterrence benefit beyond that provided by the threat of suppression in criminal trials); Jennifer Chacón, A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Protections, 59 DUKE L. J. 1563, 1624–27 (2010) (proposing the application of the Fourth Amendment exclusionary rule 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, 1115 (2008) (arguing for an application of the Fourth Amendment exclusionary rule due to widespread constitutional violations by immigration officers and a fundamental change in immigration court practice since Lopez-Mendoza was decided).

The Lopez-Mendoza Court said little about other remedies for Fourth Amendment violations by immigration officers, leaving the door open to the exploration of other possible remedies.

When framing the Fourth Amendment questions in the manner that I have set forth, one can see that the core concerns of the Fourth Amendment are applicable in the immigration enforcement context notwithstanding immigration law’s plenary power. The plenary power of the political branches over immigration law has long sounded the death knell for many constitutional challenges to immigration agents’ actions. Yet, in 1973, in *Almeida-Sanchez v. U.S.*, the Supreme Court applied the Fourth Amendment when a Mexican citizen challenged the warrantless search of his car by Border Patrol. While the Court recognized that the plenary power of the political branches over decisions regarding the admission of noncitizens permitted such routine searches at the border, such a search violated the noncitizen’s Fourth Amendment rights when it did not occur at the border or the “functional equivalent of the border”—which the Court refused to extend twenty miles beyond the border. In the 1975 decision *United States v. Brignoni-Ponce*, the Court suppressed statements admitting illegal presence made by passengers in a car that was subjected to a warrantless random stop by Border Patrol. The Court found that the single factor—“the apparent Mexican ancestry of the occupants”—was

177. See Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 568 (2016) (quoting Ronald Jay Allen, William J. Stuntz, et al, CRIMINAL PROCEDURE: INVESTIGATION AND THE RIGHT TO COUNSEL, 2d ed. 449 (2011)) (“The exclusionary rule itself is subject to so many exceptions that in fact, ‘cumulatively, the exceptions may be the rule.’”).
178. See Lopez-Mendoza, 468 U.S. at 1045 (discussing the possibility of declaratory relief for Fourth Amendment violations by INS officers).
179. Hiroshi Motomura, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 27 (Oxford Univ. Press 2006) (“Courts, citing the plenary power doctrine, have been reluctant to ask seriously if immigration law decisions by Congress and the executive are unconstitutional. With some exceptions, courts have ceded decision making to Congress and the executive branch of government.”).
181. Id. at 267. The Border Patrol agents did not assert that they had probable cause or even reasonable suspicion that would have justified the stop. Id. at 268. The government defended the search by claiming authority under 8 U.S.C. § 1357(a)(3), which permitted warrantless searches of automobiles “within a reasonable distance from any external boundary of the United States,” which the regulations described as 100 miles from the border. Id. (citing 8 U.S.C. § 287(a)(3 and 8 C.F.R. § 287.1).
182. Id. at 272.
183. Id. at 272-73.
184. Id. at 273. The Court suggested that “searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches.” Id.
185. 422 U.S. 873 (1975).
186. Id.
not enough to furnish reasonable suspicion that the occupants of the car were not citizens.\textsuperscript{187} The Court wrote that the plenary power “cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens.”\textsuperscript{188} Although \textit{Brignoni-Ponce} is known to many scholars as the decision that authorized racial profiling in immigration enforcement,\textsuperscript{189} it is also frequently cited for the principle that the Fourth Amendment applies to immigration enforcement actions.\textsuperscript{190}

There is no doubt that the detention that occurs within the context of administrative and expedited removals is a “seizure” within the meaning of the Fourth Amendment. The bars, shackles, and cells that immigration detainees endure are significantly more intrusive than the brief stops by law enforcement that may occur, for example, at a fixed border checkpoint,\textsuperscript{191} or when the police stop motorists at a checkpoint.

\textsuperscript{187} Id. at 876, 885-86. The Court made suggestions of what would serve as reasonable suspicion: a driver’s erratic driving or obvious attempts to evade officers; characteristics of the vehicle, such as certain station wagons or vehicles that are heavily loaded with passengers, or vehicles where persons appear to be trying to hide; and “the characteristic appearance of people who live in Mexico, relying on such factors as the mode of dress or haircut.” Id. Subsequent courts have discussed whether such use of apparent Latino heritage could factor into the reasonableness determination. \textit{See, e.g.}, U.S. \textit{v.} Montero-Camargo, 208 F.3d 1122, (9th Cir. 2000) (“At this point in our nation’s history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required.”); \textit{but see} U.S. \textit{v.} Manzo-Jurado, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (reasoning that the court’s decision in \textit{Montero-Camargo} did not apply because unlike the location of the arrest in \textit{Montero-Camargo}, where Latinos were the majority, in the case at hand, “Havre, Montana, is sparsely populated with Hispanics”).\textsuperscript{188}

\textsuperscript{188} \textit{Brignoni-Ponce}, 422 U.S. at 884. Although this passage about the plenary power suggests that the Court was only concerned about citizens who were mistaken for noncitizens, the Court then stated, “[f]or the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.” \textit{Id.}\textsuperscript{189} See Devon W. Carbado and Cheryl I. Harris, \textit{Undocumented Criminal Procedure}, 58 UCLA L. REV. 1543, 1549 (2011); Johnson, \textit{Racial Profiling}, supra note 8, at 1027 (2010) (“Today, race dominates immigration enforcement, in no small part due to the Court’s sanctioning of the reliance on ‘Mexican appearance’ in \textit{Brignoni-Ponce.”); \textit{see also id.} at 1036-37 (“Many Latino/as in the United States today firmly believe that race is determinative to immigration officers investigating alleged violations of the U.S. immigration laws. Evidence supports this assertion.”).\textsuperscript{190}

\textsuperscript{189} See U.S. \textit{v.} Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010) (collecting cases). There was no suggestion that the Fourth Amendment did not apply because it was Border Patrol made the search, because it was a noncitizen or suspected noncitizen whose rights were violated, or because the search was made for the purpose of enforcing civil immigration law. \textit{But cf.} U.S. \textit{v.} Zapata-Ibarra, 223 F.3d 281, 282 (5th Cir. 2000) (Weiner, J., dissenting) (discussing \textit{Brignoni-Ponce} as “the judiciary’s evisceration of the Fourth Amendment in the vicinity of the Mexican border”); Carbado and Harris, \textit{supra} note 189, at 1570-73 (noting that the “undocumented cases” such as \textit{Brignoni-Ponce} operated to expand courts’ willingness to authorize racial profiling in criminal procedure cases outside of the immigration context). I also recognize that, while appearing to be a win, \textit{Brignoni-Ponce} could be described as a “defeat in disguise” for giving broad discretion to border patrol in making stops and lowering the standard from probable cause to reasonable suspicion for this type of stop. \textit{See} Johnson, \textit{Racial Profiling}, supra note 8, at 1024-25.\textsuperscript{191}

\textsuperscript{190} See U.S. \textit{v.} Martinez-Fuerte, 428 U.S. 543, 563 (1976) (finding no Fourth Amendment
to ask about a recent crime.\textsuperscript{192} Traffic stops are annoying and inconvenient;\textsuperscript{193} immigration detention is a euphemism for imprisonment.\textsuperscript{194} As David Cole has written, “few state actions are more serious than locking up a human being.”\textsuperscript{195}

A question that has gained increasing relevance since 1990, when the Court decided \textit{United States v. Verdugo-Urquidez},\textsuperscript{196} is whether undocumented noncitizens are part of “the people” protected by the Fourth Amendment. In \textit{Verdugo-Urquidez}, the Court held that a Mexican citizen could not claim suppression as a remedy for a Fourth Amendment violation when U.S. federal agents searched his properties in Mexico after he had been arrested in Mexico and extradited to the United States for prosecution.\textsuperscript{197} The Court examined the history of the Fourth Amendment’s reference to “the people” and found that unlike other amendments (such as the Fifth Amendment that applies to “persons” and the Sixth Amendment that applies to the “accused”), the Fourth Amendment only applies to citizens of the U.S. or those with voluntary substantial connections to the political community of the U.S.\textsuperscript{198} Because he had not established “voluntary substantial connections” to the U.S., Mr. Verdugo-Urquidez could not claim Fourth Amendment rights.\textsuperscript{199} The Court suggested, however, that the Fourth Amendment should apply to noncitizens who are illegally in the U.S.\textsuperscript{200}

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\item \textsuperscript{193} See id. at 425-26; Martinez-Fuerte, 428 U.S. at 558 (quoting U.S. v. Ortiz, 422 U.S. 891, 894-95 (1975) (“The circumstances surrounding a checkpoint stop and search are far less intrusive than those attending roving-patrol stop.”).
\item \textsuperscript{194} See generally César Cuauhtémoc García Hernández, Abolishing Immigration Prisons, 97 B.U. L. REV. 245 (2017); Malik Ndaula with Debbie Satyal, Rafiu’s Story: An American Immigrant Nightmare, in KEEPING OUT THE OTHER: A CRITICAL INTRODUCTION TO IMMIGRATION ENFORCEMENT TODAY 241, 250 (David C. Brotherton & Philip Kretsedemas eds., 2008) (“They call immigration detention civil confinement, but prison is prison no matter what label you use, and prison breaks people’s souls, hearts, and even minds.”).
\item \textsuperscript{195} Cole, \textit{In Aid of Removal}, supra note 8, at 1008.
\item \textsuperscript{196} 494 U.S. 259 (1990).
\item \textsuperscript{197} Id. at 274-75.
\item \textsuperscript{198} Id. at 265-67.
\item \textsuperscript{199} Id. at 271, 274-75.
\item \textsuperscript{200} Id. at 272-73 (reasoning that “the illegal aliens in Lopez-Mendoza were in the United States voluntarily and presumably had accepted some societal obligations,” which distinguished their cases from that of Mr. Verdugo-Urquidez, who “had no voluntary connections with this country that might place him among ‘the people’ of the United States.”). Courts have disagreed about whether the plurality opinion’s discussion with respect to whether the Fourth Amendment applies to “illegal aliens” is dicta or binding precedent, since Justice Kennedy, in a concurring opinion, wrote “[i]f the search had occurred in a residence within the United States, I would have little doubt that the full protections of the Fourth Amendment would apply.” \textit{Verdugo-Urquidez}, 494 U.S. at 278 (Kennedy, J., concurring); see also Martinez-Aguero v. Gonzalez, No. EP-03-CA-411(KC), 2005 WL 388589 (W.D. Tex. Feb. 2, 2005), aff’d and remanded, 459 F.3d 618 (5th Cir. 2006) (finding that a border crossing-card holder had Fourth
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Carolina Núñez discusses how the Court’s Verdugo-Urquidez opinion marked a key moment in the Court’s emerging “post-territorial” approach to membership that rejects territorial presence as an accurate measure of membership for noncitizens. Rather, she writes, “the post-territorial approach looks to more substantive indicators of membership, including community ties and mutuality of obligation, to afford rights.” Of particular concern should be the voluntariness with which someone came to the U.S.; the status that one holds should be less relevant to one’s membership and ensuing rights because a status-based approach “values the state’s consent above all else [territorial presence, community ties, or any other factors].” She writes that courts should be evaluating membership and the ensuing Fourth Amendment rights guaranteed to members of the U.S. community by looking not at proxies such as status, but at a more complex theory of membership, such as community ties and mutuality of obligation.

Following Núñez’ reasoning, noncitizens in administrative and expedited removal have voluntary connections to the U.S. that have ensured a mutuality of obligation. They have every intent to join the U.S. community, and many have lived here for up to two years or more,

Amendment rights and stating that “[t]he definition of ‘the people’ advanced in Verdugo-Urquidez is therefore considered as persuasive authority to the extent it applies to resolution of the present motion for summary judgment.”); United States v. Gutierrez, 983 F.Supp. 905, 915 (N.D.Cal.1998) (“It is also noteworthy that a majority of the justices did not subscribe to Chief Justice Rehnquist's [Verdugo-Urquidez] opinion, particularly with respect to his discussion and analysis regarding the scope of the Fourth Amendment as it applies to illegal aliens,” rev’d on other grounds by United States v. Gutierrez, 203 F.3d 833 (9th Cir.1999); but see United States v. Esparza-Mendoza, 265 F.Supp.2d 1254, 1261 (D. Utah 2003) (“This court is not at liberty to second-guess Justice Kennedy's direct statement that he was joining the Court's opinion.”).

201. Núñez, supra note 151, at 85-86. Núñez was writing in response to some district courts that interpreted Verdugo-Urquidez’s “substantial connections” test as a reason to deny Fourth Amendment rights to those who were deported from the U.S. and reentered illegally. See, e.g., United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1272 (D. Kan. 2008) (reasoning that because the defendant had been “justifiably expelled” from the United States by virtue of his deportation, “his very presence in this country is ‘wrongful,’ and his expectation of freedom from governmental intrusion is not ‘one that society is prepared to recognize as ‘reasonable’’”); United States v. Ullah, No. 04-CR-30A(F), 2005 WL 629487, at *99 (W.D.N.Y. Mar. 17, 2005), aff’d in part, adopted in part, No. 04-CR-030A, 2006 WL 1994678 (W.D.N.Y. July 14, 2006); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1271 (D. Utah 2003), aff’d, 386 F.3d 953 (10th Cir. 2004) (“it appears that all previously deported alien felons stand outside “the People” covered by the Fourth Amendment.”); but see Gutierrez, 983 F.Supp. at 915 (finding that a noncitizen who is illegally present in the U.S. need not first establish “voluntary connections” to the U.S. before asserting a Fourth Amendment violation).

202. Núñez, supra note 151, at 86; see also id. 129 (“Verdugo could just as easily have ended up Canada or Honduras—his location was completely involuntary. He clearly had no ties—nor wanted any—to the United States and had no sense of obligation to U.S. law.”).

203. Id. at 112 (“Clearly, Verdugo's lack of sufficient connections cannot be attributable to unauthorized status. Rather, the Court specifically noted that Verdugo's presence in the United States was involuntary; Verdugo did not manifest any willing submission to U.S. law.”).

204. Id. at 122.

205. Id. at 137.
forming the substantive indicators of membership that would afford Fourth Amendment rights. That the U.S. has not consented to their presence by affording them an immigration status should matter less.

Victor Romero writes that the Fourth Amendment “should be about creating a floor of rights, beneath which the United States government may not fall.” He looks at immigrants’ rights to public benefits as an entirely different issue, one that is about establishing a “ceiling of immigrant benefits.” Yet, immigration law’s “adherence to immigration classifications” may have led courts, following *Verdugo-Urquidez*, to engage in such analysis of a noncitizen’s classification within immigration law prior to allowing him to assert Fourth Amendment rights.

Romero examines changes in tort law that govern a landowner’s liability for injuries to entrants upon her land to draw an analogy to the Fourth Amendment question. Just like a landowner, who under the tort reforms now owes the same duty of care regardless of whether the person injured is an invitee, a licensee, or a trespasser, the U.S. government owes a duty to not unreasonably seize a lawful permanent resident, visa holder, or undocumented noncitizen.

The adherence to immigration classification finds its place more commonly in a Due Process analysis under the Fifth Amendment. There, lawful permanent residents stand above all other noncitizens to claim the strongest Due Process protections. Fourth Amendment questions are different, though. When considering the Fourth Amendment, the question should not be whether the person, by coming

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208. Id. at 59-62.

209. Id. at 63; see also supra note 201 (describing cases).

210. Romero, Domestic Fourth Amendment Rights, supra note 207, at 64, 79-89.

211. Id. at 79-82. Romero acknowledges that the purposes of private tort law differ substantially from those of constitutional or immigration law. Id. at 88. However, he writes, “both types of law seek to deter undesirable conduct.” Id. In Fourth Amendment law, the threat of excluding evidence because of police misconduct and the threat of a *Bivens* suit both act as deterrents to unreasonable governmental conduct. Id. at 88-89.

212. See Kevin R. Johnson, An Immigration Gideon for Lawful Permanent Residents, 122 YALE L. J. 2394, 2397 (2013) (“[C]lassic due process analysis...requires guaranteed counsel for lawful permanent residents, the group of noncitizens most likely to have the strongest legal entitlement to remain in, as well as the likelihood of having the deepest community ties to, the United States.”); Peter Markowitz, Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Removal Proceedings, 43 HARV. C.R-C.L. L. REV. 289, 292 (2008) (“Permanent residents, as a class, have the greatest economic and familial connections and political allegiance to the United States.”).
to the U.S. illegally or committing a crime, deserves to be unreasonably seized. Shouldn’t the right to be free from unreasonable seizure by governmental authorities involve questions of human dignity that are the same regardless of status? Scholars have answered this question affirmatively. Or, the focal point should be deterring the government from unreasonably seizing a person, not the status of the person who was seized. Suggesting that some people in the U.S. deserve to be illegally seized by the U.S. government is a slippery slope. Can they also be subjected to a year at hard labor? The Supreme Court, writing at the “very height of deference to plenary immigration power,” answered this question in the negative.

The next question is whether the seizure is reasonable. Is the seizure at issue reasonable because its purpose is not primarily to investigate crime, but to enforce a civil regulatory scheme?

213. Cf. Demore, 538 U.S. at 518-21, 524-26 (detention without bond pending deportation did not violate Due Process because statute authorizing detention applied to a narrow group of those Congress deemed most dangerous, those deportable for certain types of crimes, including aggravated felonies, and detention was brief).

214. Romero, supra note 206, at 1016 (“The focus of the Fourth Amendment is on what the government can and cannot do, not on against whom its actions may be taken.”).

215. See generally Jonathan Simon, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA ch. 6 (New Press 2014); see also Medina, supra note 32, at 193 (“Substitution of the word ‘citizen’ for the word ‘person’ or ‘individual’ [when referencing Fourth Amendment rights] erects a barrier between classes of persons that negates the basic humanity common to all.”); Romero, supra note 206, at 1018 (“The characterization of the Fourth Amendment as embodying an inherent human right would be consistent with American’s traditional commitment to the international human rights movement. The international human rights movement purports the existence of a minimum cluster of rights that should be enjoyed by all.”).

216. See William C. Heffernan, The Fourth Amendment Exclusionary Rule as a Constitutional Remedy, 88 GEO. L. J. 799, 800-01, 825-827 (2000) (discussing how modern Court has come to view exclusion as a remedy instead of a constitutional requirement, and that the aim of exclusion is to deter police illegality in the context of evidence-gathering for criminal trials); Romero, supra note 207, at 88-89 (discussing Bivens and exclusion as remedies that have as their primary purpose deterrence).

217. See Romero, supra note 207, at 88-89.

218. See id. at 62 (discussing erosion of Fourth Amendment rights for both undocumented noncitizens but also legal noncitizens should Verdugo-Urquidez be read to make Fourth Amendment rights turn on the status of the person asserting them); see also Carbado and Harris, supra note 189, at 1016 (discussing how cases involving Fourth Amendment issues for undocumented noncitizens have operated to erode Fourth Amendment rights in cases involving citizens).

219. Cole, supra note 8, at 1016 (citing Wong Wing v. U.S., 163 U.S. 228 (1896)).

220. See Wong Wing, 163 U.S. at 235-37 (holding that Congress may authorize temporary detention in order to facilitate deportation but may not subject Chinese citizens to a year at hard labor prior to deportation without the protections of a criminal trial).


1967 case that introduced an “administrative search doctrine,”\(^\text{223}\) *Camara v. Municipal Court*,\(^\text{224}\) the Supreme Court permitted health inspectors to search houses without individualized suspicion of a violation.\(^\text{225}\) The Court, however, still required an “area warrant” issued by a judge so as to limit the discretion of each inspector.\(^\text{226}\) In the seizures at issue in administrative and expedited removals, there is no judicial warrant whatsoever to limit the DHS officer’s discretion, and yet the intrusion is significantly more – the taking away of physical liberty, not the search of one’s house. Nor does it seem plausible that the noncitizen, by coming illegally to the U.S. or committing a crime, has a reduced expectation of privacy that would justify his detention, as would the owner of a “closely regulated” industry whose business property may be subject to warrantless inspection.\(^\text{227}\)

Are there “special needs”\(^\text{228}\) that would justify seizures of all persons subject to expedited and administrative removal (which may number close to 500,000 for expedited removal and 10,000 for administrative removal)?\(^\text{229}\) Border control has been justified as a special need;\(^\text{230}\) for this reason, briefly detaining noncitizens who present themselves at the border or port-of-entry in order to issue an expedited removal order would likely pass a reasonableness test under the Fourth Amendment.\(^\text{231}\) However, seizing and jailing thousands of people suspected of

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  \item \textit{223}. See Bloom, supra note 221, at 303.
  \item \textit{224}. 387 U.S. 523 (1967).
  \item \textit{225}. \textit{Id.} at 536-37.
  \item \textit{226}. \textit{Id}.
  \item \textit{228}. See New Jersey v. TLO, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (setting forth three-part test for reasonableness of warrantless inspections of commercial properties); see also Ferguson v. City of Charleston, 532 U.S. 67, 79-81 (2001) (hospital’s sharing of diagnostic tests for pregnant women with police not justified by special need even if ultimate purpose is to protect the health of the mother and child); Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoint is special law enforcement concern that justifies highway stop without individualized suspicion).
  \item \textit{229}. See Jose Magaña-Salgado, \textit{Fair Treatment Denied: The Trump Administration’s Troubling Attempt to Expand “Fast-Track” Deportations}, at 4, Immigrant Legal Resource Center (June 2017), available at: https://www.irlc.org/report-expedited-removal-expansion (predicting that if expedited removal begins to apply to those who have been in the U.S. for up to two years, the procedures will be used in an additional 328,440 cases); Koh, \textit{supra} note 4, at 194 (reporting number of expedited removals in fiscal year 2015 as 165,935); Wadhia, \textit{supra} note 10, at 3 (reporting number of administrative removals in fiscal year 2013 as 9,217).
  \item \textit{230}. See Martínez-Fuerte, 428 U.S. at 552-53, 556-557 (finding that stops of motorists at permanent checkpoints near the border are justified by the important law enforcement concern of policing a southern border that is 2,000 miles long); see also Lidster, 540 U.S. at 424 (describing border patrol checkpoint at issue in Martínez-Fuerte as justified by special law enforcement concerns).
  \item \textit{231}. See U.S. v. Montoya de Hernandez, 473 U.S. 531, 541-43 (1985) (permitting detention for sixteen hours at an international border based on reasonable suspicion by customs agents that she was smuggling contraband in her alimentary canal).
\end{itemize}
immigration violations who are found anywhere within the interior of the U.S. is a far cry from the brief stops of vehicles or persons, which are justified when they occur at a border checkpoint or port-of-entry.  

Thus, the reasonableness of the seizures and subsequent detentions involved in administrative and expedited removal should be made on a case-by-case basis. I argue that the reasonableness of each detainee’s seizure should be answered by a neutral immigration judge, not a DHS supervisor.

There are undoubtedly critiques about a proposal that uses immigration judges to provide such hearings, especially given Congress’ intent to create streamlined proceedings with administrative and expedited removal. In the next section, I seek to answer these policy concerns and propose a remedy for this Fourth Amendment violation.

IV. A PROPOSED REMEDY

The remedy of immigration judge review of detention for administrative and expedited removal would alleviate some of the critiques of these “shadow” deportations, since an immigration judge would review the justification ICE or CBP presents for the noncitizen’s detention. This remedy could have the effect of adding an additional layer of review in what were intended to be streamlined, “fast-track” removal procedures, because the involvement of an immigration judge would necessarily slow down the procedures. This is not a bad outcome, given the critique of these procedures for their poor institutional design and likelihood of error, among others. The fast-track procedures would remain in place, however, with respect to the removal order, since the lack of a probable cause hearing would not automatically cause the expedited or administrative removal order to be invalid. Just like in Gerstein, where the Court reasoned that an illegal

232. See Martinez-Fuerte, 428 U.S. at 557; United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”); Montoya de Hernandez, 473 U.S. at 533, 538 (viewing airport as “international border” for purposes of applying Fourth Amendment’s reasonableness inquiry for detention by customs officers); United States v. Ramsey, 431 U.S. 606, 616 (1977) (“That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.”).


234. See generally Koh, supra note 4.

235. See id. at 200.

236. See Family, supra note 11, at 646.

237. See Frost, supra note 15.
arrest does not void a subsequent conviction, the lack of a probable cause hearing would merely render the illegal detention invalid, not the removal order that followed the illegal detention.

A. Why Have a Probable Cause Hearing Before an Immigration Judge?

There certainly will be critics who respond that this proposal gives DHS inadequate time to prepare their case. Without detention, someone could easily abscond. However, this proposal requires that ICE or CBP justify detention to a judge by proving probable cause to detain. In the case of administrative removal, ICE would prove probable cause that the person is not a lawful permanent resident and has been convicted of an aggravated felony. Criminal records should not be difficult for ICE to obtain, given their regular cooperation with state authorities and relatively easy access to such records for bond hearings before immigration judges. If the person detained is actually a lawful permanent resident and therefore not subject to such streamlined procedures, the probable cause hearing provides an opportunity to correct this error.

For expedited removal cases, there is less information available to the government about someone who has just crossed the border or has been living illegally in the U.S. However, because a noncitizen stopped at the border or port-of-entry must prove that he or she is entitled to be admitted, the burden lies with the noncitizen to present a valid visa. For those who entered without inspection, the government must first prove alienage; then the burden then shifts to the noncitizen to prove presence in the U.S. prior to a lawful admission or that he or she is clearly and beyond doubt entitled to be admitted. In many cases, it may be relatively simple for the government to prove to the judge that the person is not a citizen, and any disputes about the validity of the person’s visa can be addressed at the probable cause hearing. And, it is important to note that “probable cause” is not an incredibly high

238. See Gerstein, 420 U.S. at 119 (citing Frisbie v. Collins, 342 U.S. 519 (1952)).
239. See Martin, supra note 43, at 702-03.
240. See generally Part IIc.
242. See Holper, supra note 81, at 117-18.
243. See Peter H. Schuck, INS Detention and Removal: A “White Paper,” 11 GEO. IMMIGR. L. J. 667, 672 (1997) (“When an alien comes into INS custody . . . the agency probably knows little or nothing about him. Moreover, the agency cannot readily obtain reliable information about him unless he has previously been criminal convicted or was otherwise in the custody of some government agency.”).
244. 8 U.S.C. § 1229a(c)(2)(A) (noncitizen seeking admission must prove that he or she is “clearly and beyond doubt entitled to be admitted”).
245. 8 C.F.R. § 1240.8(c).
standard of proof; certainly it is lower than the “clear and convincing evidence” standard that is required for deportability.\textsuperscript{246} If it is too difficult for the government to promptly prove alienage, one might query whether the government should be detaining someone at all under the immigration laws, given that there is a possibility that the person could be a citizen.\textsuperscript{247} If immigration law’s presumption of citizenship is to mean anything,\textsuperscript{248} it should mean DHS has to prove its detention decisions to a neutral judge.

Do the “escape valves” to both administrative removal and expedited removal resolve the concerns presented in this article? There are “fear-based” escape valves, which allow for a noncitizen who would otherwise be subject to administrative or expedited removal to express a fear of return and see an asylum officer, who may refer that person’s case to an immigration judge.\textsuperscript{249} These fear based-escape valves to a procedure that would otherwise not involve a judge ensure U.S. compliance with its obligations under the Refugee Convention to not return a person to a country where it is likely he would fear persecution.\textsuperscript{250} Also, there is an escape valve that provides automatic referral to an immigration judge for someone in expedited removal who swears to be a U.S. citizen, lawful permanent resident, refugee, or asylee, and for whom the DHS officer does not confirm such status.\textsuperscript{251} No such automatic review by an immigration judge exists in administrative removal; rather, the DHS officer can make a discretionary referral to an immigration judge if the officer finds that

\textsuperscript{246} See Woodby v. INS, 385 U.S. 276, 285-86 (1966) (standard for deportation is clear, convincing, and unequivocal evidence); see also California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 93 n.6 (1981) (defining “clear, unequivocal, and convincing” as “a higher probability than is required by the preponderance-of-the-evidence standard”); Gerstein, 420 U.S. at 111-112 (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964) (defining “probable cause” as “facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense”); id. at 121 (reasoning that probable cause “does not require the file resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands”).

\textsuperscript{247} See Morales, 793 F.3d at 215-18 (in Bivens action against ICE officials for issuing a detainer against a U.S. citizen, reasoning that ICE can conduct its investigation into the immigration status of a person without detaining her).

\textsuperscript{248} See Holper, supra note 81, at 113-14 (discussing presumption of citizenship in immigration law).

\textsuperscript{249} 8 U.S.C. § 1225(b)(1)(A)(ii); 8 C.F.R. § 235.1(b)(4); 235.3(b)(4); 238.1(f)(3).

\textsuperscript{250} Refugee protections were codified in the 1951 Refugee Convention and 1967 Refugee Protocol, to which the U.S. acceded in 1968. By signing the Protocol, the United States became bound by articles 2 through 34 of the Refugee Convention. 189 U.N.T.S. 150, 176 (1954), 19 U.S.T. 6259, 6278, T.I.A.S. No. 6577 (1968). The concept of nonrefoulement, or nonreturn, appears in Article 33.1 of the Refugee Convention, which states that “no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion.” Refugee Convention Art. 33.1.

\textsuperscript{251} See 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(5)(i).
administrative removal is not appropriate.  

While these procedures to protect those with a valid claim to refugee protection or lawful status will catch some otherwise faulty expedited and administrative removals (so long as officers ask the mandated questions), these protections do not ensure freedom from detention during such review. Indeed, as Jennifer Koh has written, while awaiting a reasonable fear determination for those in reinstatement of removal (the same procedures that would apply to those in administrative removal with fear-based claims), individuals have been held in immigration detention for over a year. Thus, assuming for a moment that these escape valves work properly and screen out the cases where there is the greatest likelihood of error, they provide no redress for the Fourth Amendment concern about being free from an unlawful seizure.

Some may argue that a noncitizen can simply give up and agree to deportation; he or she thus holds the ticket out of jail. However, the statute and regulations contemplate that persons subject to these procedures have claims that may entitle them to an immigration judge hearing; hence, the escape valves. Asking a person to give up a valid claim in order to be free from detention proved to be an unsatisfactory solution when it was presented to courts as an option for long-term mandatory detainees whose detention became prolonged because they continued to fight meritorious claims for relief.

Is asking an immigration judge to conduct this task the equivalent of asking a truly neutral magistrate judge to review detention for probable cause? As immigration judge Dana Leigh Marks has noted,

252. See 8 C.F.R. § 238.1(d).
254. See 8 C.F.R. § 238.1(g).
255. See 8 C.F.R. § 208.31 (for reinstatement of removal and administrative removal, outlining same procedures for requesting reasonable fear interview with an asylum officer).
256. Koh, supra note 4, at 205 (citing Complaint, Alfaro Garcia v. Johnson, No. 14-cv-01775 (N.D. Cal. Apr. 17, 2014)).
257. See supra notes 249-252.
258. See, e.g., Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 476 (3d Cir. 2015), abrogated in part and on other grounds by Jennings v. Rodriguez, 138 S.Ct. 830, 847 (2018) (“We cannot ‘effectively punish’ these aliens for choosing to exercise their legal right to challenge the Government’s case against them.”); Ly v. Hansen, 351 F.3d 263, 272 (3d Cir. 2003) (“An alien who would not normally be subject to indefinite detention cannot be so detained merely because he seeks to explore avenues of relief that the law makes available to him.”).
The immigration court system is housed in a law enforcement agency, the Department of Justice, which is closely aligned with those who are the prosecutors in our courts (Department of Homeland Security (DHS) trial counsel). This structural arrangement has caused many members of the public we serve, and the attorneys who represent them, to doubt our decisional independence.

This lack of neutrality is made worse when there are allegations of politics playing into the hiring of immigration judges, as happened during the George W. Bush administration. Stephen Legomsky has proposed reforming the Executive Office for Immigration Review, converting immigration judges into administrative law judges. Others have called for the creation of an Article I immigration court, akin to the Tax Court. Should these proposals occur, we can expect immigration judges to move in the direction of a truly neutral judge. Even under the current structure, immigration judges are bound by regulation to exercise their discretion independently. And, at the very least, detentions pursuant to expedited and administrative removal procedures that currently are made entirely in the “shadows” will be examined by a judge for validity. Furthermore, from a practical standpoint, because the probable cause decision involves a judge’s evaluation of whether a noncitizen is actually removable as DHS has alleged, it makes sense that it be an immigration judge, who makes these decisions on a daily basis, who presides over these hearings.


263. See 8 C.F.R. § 1003.10.

264. Jennifer Koh has warned that emphasizing the shortcomings of summary removal proceedings “may have the unintended effect of making immigration court seem like a relatively favorable venue.” Koh, supra note 4, at 232. However, as she notes, “where deficiencies in immigration courts exist, their shadows are likely even worse.” Id.

265. Even the Court in Riverside recognized that there should be some flexibility in the provision...
There of course is the added problem of cost; immigration judges have a crushing caseload, with half a million cases pending as of February 2017. Judges already will have an increased caseload, given that DHS has changed its enforcement priorities in the Trump administration, which means that fewer noncitizen’s cases will be taken off judges’ dockets through the use of prosecutorial discretion mechanisms such as administrative closure. Although the hiring of more immigration judges has been a priority of the Trump administration, filling a vacancy can take up to two years, so judges’ dockets will not be cleared up anytime soon.

Cost, however, should not guide courts in their Fourth Amendment analysis; this is unlike the consideration that courts may give to cost when litigants demand more procedures under the Fifth Amendment Due Process clause, invoking *Mathews v. Eldridge*. In the criminal justice context, probable cause hearings come with a financial cost, yet the Court in *Gerstein* and *Riverside* did not weigh that cost in determining the value or necessity of such hearings. Indeed, in the ICE detainer litigation, cost was not a consideration, given that courts

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267. See id.


269. 424 U.S. 319 (1976). When considering whether a new procedure is necessary under the Due Process clause, Courts must consider:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

270. The Court in *Gerstein* arguably engaged in an implicit cost analysis because the Court determined that the formal procedures of a trial were not required to meet the Constitution’s demand for a neutral magistrate to find probable cause to continue detention. *See* Gerstein, 420 U.S. at 121-23. In *Riverside*, the Court allowed for a “reasonable postponement” (of no more than forty-eight hours) “while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.” *Riverside*, 500 U.S. at 55. The Court thus overruled the Ninth Circuit, which interpreted *Gerstein*’s prompt probable cause requirement to mandate that the hearing be held as soon as the administrative steps incident to arrest were completed. *Id.* at 54.
were awarding damages for the unlawful detention against government actors. Because this article proposes that courts find a Fourth, not Fifth, Amendment violation in the use of expedited and administrative removal procedures, cost should not be factored into the calculus. Also, as Stephen Legomsky has noted in his article proposing a conversion of immigration judges into administrative law judges, “[p]erhaps most important, ‘efficient’ does not mean ‘cheap.’” He writes, “[t]he ideal adjudication system would churn out a high number of accurate decisions at a low cost. In algebraic terms, adjudicatory efficiency might therefore be thought of as productivity times accuracy, divided by cost.”

Would requiring immigration judges to review the detention for probable cause be no more than a “rubber stamp” on the ICE officer’s decision? Such a solution could suffer similar critiques as stipulated orders of removal, which require an immigration judge to sign off on a noncitizen’s waiver of his right to a hearing. Scholars and courts alike have critiqued the problematic aspects of the stipulated removal order – that a non-lawyer, low-level immigration officer advises noncitizens about the law, noncitizens frequently waive the right to counsel, and the judge never independently verifies whether the waiver of hearing was truly “voluntary, knowing, and intelligent.” To avoid such pitfalls, a probable cause hearing would have to involve a detainee personally appearing before a judge, who would review the evidence to determine whether DHS could justify detention.

The risk of an immigration judge “rubber stamping” a DHS officer’s decision also finds support in the criminal justice context, where magistrate judges’ speedy review of warrant applications has led to rubber stamping, a practice that scholars have exposed and critiqued.

271. See supra Part IId.
272. Legomsky, supra note 261, at 1647.
273. Id.
274. See, e.g., Johnson, supra note 8, at 1029 (citing Edwin Harwood, Arrests Without Warrants: The Legal and Organizational Environment of Immigration Law Enforcement, 17 U.C. DAVIS L. REV. 505, 531 (1984)) (discussing study of immigration enforcement that found the ease with which border patrol agents could come up with reasonable suspicion, a practice referred to as “canned p.c.” [probable cause]).
275. See 8 U.S.C. § 1229a(d) (allowing for removal orders that are stipulated to by the noncitizen or his representative); 8 C.F.R. § 1003.25(b) (detailing contents of a stipulated removal order, which, if the noncitizen is unrepresented, requires an immigration judge to determine that the waiver of the hearing is “voluntary, knowing, and intelligent”); see generally Koh, supra note 20, at 497.
276. See id. Following a 2010 Ninth Circuit decision critiquing several aspects of the stipulated removal order program as violating detainees’ due process rights, DHS appears to have decreased its use of the stipulated removal order program. See Koh, supra note 4, at 217 (citing United States v. Ramos, 623 F.3d 672, 678 (9th Cir. 2010)).
277. See, e.g., Oren Bar-Gill, Barry Friedman, Taking Warrants Seriously, 106 NW. U. L. REV. 1609, 1613-14 (2012) (“There are perennial concerns that magistrates are ‘rubber stamps,’ granting
That the criminal justice system’s response to the Fourth Amendment’s warrant requirement has been weak does not undermine the importance of such a requirement. The Court’s language in *Gerstein* and *Riverside* of a “neutral, detached magistrate” should mean something. Perhaps the immigration system could learn from the mistakes made in the criminal justice system in setting forth its own probable cause hearing requirements.

**B. Habeas Corpus as a Remedy**

The last remaining question is what remedy should apply in light of the Fourth Amendment violations outlined here. The remedy that I propose is immediate release if an immigration judge does not find probable cause to detain within forty-eight hours of arrest. This would take the form of a habeas corpus petition, since the noncitizen would be challenging unlawful detention, in violation of the Fourth Amendment right to a probable cause finding by a neutral judge. Habeas petitioners also could seek declaratory and injunctive relief, requesting that the court order a probable cause hearing by an immigration judge before someone can be detained pursuant to the expedited or administrative removal procedures. A full discussion of the statutory bars to declaratory and injunctive relief is beyond the scope of this article, however.

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279. See Heffernan, supra note 216, at 804 (“Remedies vindicate rights. They can offer ex ante protection of rights; they can also offer ex post relief for rights violations.”).

280. See 28 U.S.C. § 2241; Arias, 676 F.2d at 1144 (reasoning that habeas corpus is available if deportation proceedings are not “begun with reasonable promptness after the alien’s arrest”); see also *Indefinite Detention Without Probable Cause: A Comment on Inz Interim Rule 8 C.F.R. S 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 427 (2001) (discussing how persons detained pursuant to new interim rule allowing DHS to delay issuance of Notice to Appear in exigent circumstances can pursue a habeas corpus petition to challenge their detention).

281. See *Gerstein*, 420 U.S. at 106-07, n5, n6 (class of plaintiffs who complained that their Fourth Amendment rights were violated if deportation proceedings are not “begun with reasonable promptness after the alien’s arrest”); see also *Riverside*, 500 U.S. at 48 -49 (pursuing both declaratory and injunctive relief, seeking court to order that all persons arrested without a warrant be afforded a judicial determination of probable cause within thirty-six hours of arrest).

282. See 8 U.S.C. § 1252(f)(1) (“No court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. §§ 1221—1231], other than with respect to . . . an individual alien against whom proceedings under such part have been initiated.”); Rodriguez v. Hayes, 591 F.3d 1105, 1119 (9th Cir. 2010) (considering declaratory and injunctive relief warrants without serious scrutiny.”); Paul Sutton, *The Fourth Amendment in Action: An Empirical Review of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 421 (1986); Richard Van Duizend, et al., *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* (1985) (describing results of study of warrant practices in in multiple jurisdictions).
Habeas corpus is in many ways an ideal remedy because it offers the victim of the Fourth Amendment violation what he lost: physical freedom. Habeas is specifically reparative, giving back what was taken away; in this sense, it is very different from a remedy such as monetary damages, which serve as a substitute for specific reparation. Money damages also may be difficult to obtain for noncitizens in administrative and expedited removal, given that the noncitizen would have to sue ICE using a *Bivens* action (as opposed to the detainer litigation, where noncitizens could sue state officials using 42 U.S.C. § 1983). Court have found that the *Bivens* remedy is inappropriate in the context of regular removal proceedings because of the availability of other relief; additionally, the Supreme Court recently has cautioned courts against extending the *Bivens* remedy to new situations.

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283. See Heffernan, supra note 216, at 806.
284. Id. at 806.
285. See ACLU, supra note 7, at 6-9.
286. See, e.g., De La Paz v. Coy, 786 F.3d 367 (5th Cir. 2015), cert. denied, (U.S. June 26, 2017) (holding that when noncitizens filed a *Bivens* claim against border patrol agents for violating their Fourth Amendment rights by arresting them based solely on their race, they could not pursue a *Bivens* claim because deportation proceedings could adequately address the wrongs); Mirmehdi v. U.S., 689 F.3d 975, 979-83 (9th Cir. 2012) (in case of Iranian nationals suing FBI and INS for unlawful immigration detention, holding that a *Bivens* remedy was not available because the petitioners had availed themselves to two different remedial procedures – habeas corpus and deportation proceedings – and thus *Bivens* was inappropriate); but see Mendia v. Garcia, 165 F.Supp.3d 861, 882-85 (N.D.Ca. 2016) (citing Wilkie v. Robbins, 551 U.S. 550 (2007)) (applying Wilkie test for whether to extend *Bivens* to a new context – when ICE put a detainer hold on someone who was a U.S. citizens – and deciding that the INA did not provide an adequate procedural remedy, so *Bivens* remedy was appropriate, and that because the person was no longer in custody, habeas was not an appropriate remedy); Lyttle v. United States, 867 F.Supp.2d 1256, 1277-1278 (M.D.Ga.2012) (finding the INA did not preclude a *Bivens* remedy because although the INA provided some procedural protections for U.S. citizens mistaken for noncitizens, those procedures were not constitutionally adequate). It would be an open question whether the fairly paltry procedures available through expedited and administrative removal, in addition to the habeas bars for expedited removal, would suffice to provide a substitute remedy. *See supra* Part IIb, c; *infra* notes 293-309 (discussing jurisdictional bars to habeas claims in expedited removal).
287. In *Ziglar v. Abbasi* the Court in 2017 dismissed a *Bivens* claims against the FBI Director, Former Attorney General John Ashcroft, and former INS Commissioner James Ziglar, for harsh
The application of the exclusionary rule may not provide the specific reparation that a noncitizen seeks, although another possible remedy. Scholars have debated whether the exclusionary rule is specifically reparative, since an officer’s violation of the defendant’s right to privacy can never be restored; thus, the exclusionary rule benefits the greater society by deterring that future misconduct by the arresting officer. Moreover, the Supreme Court has held that the exclusionary rule does not apply in the context of regular removal proceedings except in certain circumstances. Even if one of Lopez-Mendoza’s exceptions applied, there would simply be no forum in which to raise the arguments because a noncitizen in expedited or administrative removal never sees an immigration judge. Thus, I propose a habeas petition as a remedy to the Fourth Amendment violations occurring within expedited and administrative removal that I have described.

For those detained pursuant to administrative removal, the statute contemplates judicial review in the same manner as with regular removal proceedings. In removal proceedings, however, the

detention conditions in the days immediately following the September 11, 2001, terrorist attacks. See No. 15-1358 (June 19, 2017). The Court determined that prisoner abuse was a new expansion of Bivens that could only be remedied by Congress, not the Court. See slip op. at 11-14, 22. The Court did not reach the issue of whether immigration law provided an adequate remedy for the noncitizen plaintiffs. See id.

288. See Heffernan, supra note 216, at 807-08; but see Jerry E. Norton, The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante, 33 WAKE FOREST L. REV. 261, 285, 292 (1998) (arguing that restoration of rights lost in the illegal search or seizure may be viewed as the central aim and benefit of the exclusionary rule, since it restores each party to the status quo ante, yet acknowledging that exclusion “will rarely completely restore the parties to the position they would have been in had the Fourth Amendment been honored”); William A. Schroeder, Restoring the Status Quo Ante: The Fourth Amendment Exclusionary Rule as a Compensatory Device, 51 GEO. WASH. L. REV. 633, 655-656 (1983).

289. See Lopez-Mendoza, 468 U.S. at 1050-51.

290. One could say that an exception to Lopez-Mendoza’s holding applies to expedited removal, because the Fourth Amendment violations are widespread. See supra note 229 (number of persons subject to administrative and expedited removal). Alternatively, the expedited and administrative removal procedures transgress notions of fundamental fairness, since the requirement of separation of functions – that the same person should not be prosecutor and judge – finds its roots in the Due Process concept of procedural fairness. See Flores, 942 F.2d at 1368 (Tang, J., concurring) (“Our Constitution has long recognized that combining the roles of prosecutor and adjudicator in a single entity is a recipe for fundamentally unfair and erroneous decisionmaking.”); Stephen H. Legomsky, Deportation and the War on Independence, 91 CORNELL L. REV. 369, 396 (2006) (outlining theories for decisional independence and stating, “[p]robably the most obvious, and certainly one of the most frequently asserted, theories of decisional independence is procedural fairness”). These two exceptions present alternative arguments for applying the exclusionary rule. See Yanez-Marquez, 789 F.3d 434, at 449 (citing Lopez-Mendoza, 486 U.S. at 1050) (finding that while the Lopez-Mendoza Court stated that one of the exceptions to its ruling is if the Fourth Amendment violation “transgress[es] notions of fundamental fairness and undermine[s] the probative evidence obtained,” on “closer inspection of the context of this statement reveals that the Supreme Court meant to use the disjunctive ‘or’ instead of the conjunctive ‘and’ to create two avenues of relief instead of one such avenue”).

291. See 8 U.S.C. § 1228(b)(4)(E) (“The Attorney General shall provide that . . . a record is
proscribed path to judicial review of a removal order is separate from a challenge to detention. 292 A challenge to the legality of detention within the context of administrative removal is through habeas corpus.293

A habeas challenge to expedited removal is up against the statutory preclusion of judicial review that Congress established in 1996 when it created expedited removal.294 The ability to systemically challenge the expedited removal procedures, for which Congress gave a sixty-day window after its implementation,295 already was unsuccessful in the D.C. Circuit in the case of AILA v. Reno296 in 2000. Because of the short window to raise such claims, only two people had standing; since they were not permanent residents or persons with substantial connections to the U.S., the court decided they had no due process rights to raise any of the challenges.297
More recently, in *Castro v. U.S. Department of Homeland Security*, the Third Circuit in 2016 considered the case of a class of asylum-seekers who were subjected to expedited removal after negative credible fear determinations by both an asylum officer and immigration judge. Deciding whether the statute precluding judicial review of expedited removal orders violated the Suspension Clause, the court held that because the noncitizens were apprehended within hours of their illegal entry into the United States, they were treated as seeking admission; thus they could not invoke any constitutional rights, including rights under the Suspension Clause. Under the Supreme Court’s decisions in *Knauff* and *Mezei*, “[w]hatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned.” The Supreme Court denied certiorari in the *Castro* case.

A year later, in *Osorio-Martinez v. Att’y Gen. of the United States*, the Third Circuit in 2018 reasoned that petitioners, who had entered the U.S. unlawfully, satisfied the eligibility criteria for special immigrant juvenile status, but were awaiting availability of visas, developed the “substantial connections with this country,” such that precluding their challenge to expedited removal via habeas corpus violated the Suspension Clause. The court reasoned, “This is not to suggest that aliens must be accorded a formal statutory designation and attendant benefits to lay claim to ‘substantial connections’ to invoke the Suspension Clause . . . We need not address here what minimum requirements aliens must meet to lay claim to constitutional protections.”

In 2018, the Supreme Court in *Jennings v. Rodriguez* also opined on this statute that supposedly precluded all habeas challenges to those in expedited removal. Here two justices (although not a majority)
opined that this statute could not be read to make prolonged detention claims “effectively unreviewable.”

Although the Jennings Court did not consider the Suspension Clause question, at least some justices sought to limit what could be a permissible, but constitutionally problematic, reading of the statute barring habeas review of expedited removal claims.

The Castro decision, although problematic, does not foreclose future habeas relief and Suspension Clause arguments for the wide variety of noncitizens subject to expedited removal who have been in the U.S. for longer than those few hours the Castro petitioners were in the U.S. – especially when, as is planned, expedited removal applies to those who are in the U.S. for up to two years. Using the level of membership, including ties to the U.S. community and length of residence in the U.S., as a gauge for how much process is due (as the Third Circuit in Castro and immigration scholars have recommended), more noncitizens subject to these procedures will

308. Id. at 840.
309. See id. at 839-41.
310. See Petition for Certiorari, Castro v. DHS, 2016 WL 7451290 (U.S.), 1-2 (Dec. 22, 2016) (quoting U.S. CONST, Art. I, § 9, cl. 2 and Zadvydas, 533 U.S. at 693) (arguing that the Castro court violated the Suspension Clause because the writ of habeas corpus may not be denied to individuals within the U.S. except in “in Cases of Rebellion or Invasion,” and that noncitizens are entitled to constitutional rights after they enter the country, regardless of whether their presence is “temporary” or “unlawful”). Many critics believe that no person should be beyond the reach of the Constitution. See, e.g., Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1393-94 (1953) (stating that “the Constitution always applies when a court is sitting with jurisdiction in habeas corpus” but that “the requirements of due process must vary with the circumstances”); see also T. Alexander Aleinikoff, Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 374 (2002) (characterizing as “wildly out of step with modern constitutional law” the Mezei Court’s affirmation of Knauff’s holding that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”). David Cole has argued that the Court’s decision in Knauff v. Shaughnessy, which is the foundational case for the entry fiction, “does not stand for the sweeping proposition that aliens beyond our borders have no rights, or even no due process rights, but establishes only the narrower claim that because non-citizens have no liberty or property interest in entry they have no right to object to the procedures used to exclude them.” See Cole, supra note 8, at 1031-33. He writes that the Mezei Court, “[v]irtually without analysis . . . extended the right-privilege distinction that governed in Knauff to the distinct issue of indefinite detention.” Id. at 1033; see also Zadvydas v. Davis, 533 U.S. 678, 690-92, 696, 699 (2001) (interpreting statute to avoid Due Process concerns for a detainee under a final order of removal and stating that the individual released from detention does not gain a right to reside in the U.S., but merely the right to be free of restraint on his liberty).
311. See Kelly, supra note 3, at 5-6.
312. See Castro, 835 F.3d at 446-48. David Martin has argued that what process is due, or “owed” to a noncitizen rightly depends not on the arbitrary line between whether the noncitizen is in exclusion or deportation proceedings, but that the noncitizen’s level of membership should govern how much process is due. David A. Martin, Due Process and Membership in the National Community: Political Asylum and Beyond, 44 U. PITT. L. REV. 165, 192, 214–15 (1983); see also Johnson, An Immigration Gideon, supra note 212, at 2404-12 (arguing that lawful permanent residents, because their Due Process rights are the strongest, should get court-appointed counsel in removal proceedings); but see Núñez, supra note 151, at 122-23 (discussing failures of status-based membership theory because

Published by University of Cincinnati College of Law Scholarship and Publications, 2018
have stronger ties to the U.S. because they will have been here longer—up to two years—and yet still be in expedited removal. Using the Third Circuit’s analysis in both Castro and Osorio-Martinez, they will have created a stake hold in the United States via their presence, connections to the U.S. community, and eligibility for immigration relief, which in turn allows future courts to entertain whether stripping them of habeas corpus rights violates the Suspension Clause.\(^{313}\) They will be far beyond the “very recent surreptitious entry,” which allowed the Castro court to assimilate their status to those of “aliens seeking initial admission to the country” and thus outside of the Constitution’s protections.\(^{314}\) Gerald Neuman, who has critiqued the jurisdiction-stripping functions of expedited removal, has written that the statute closing the window for systemic challenges to expedited removal likely violates the Suspension Clause, especially if expedited removal expands beyond those at the border.\(^{315}\) Even one of expedited removal’s defenders, David Martin, wrote in 2000 (when expedited removal was only applied to those seeking admission at the border), “If [expedited removal] is applied beyond today’s scope, as the statute allows, to entrants without inspection who have been present for less than two years, then we can expect a significant court test of the full reach of the Knauff/Mezei doctrine – or, conceivably, an occasion to rethink it more comprehensively.”\(^{316}\)


\(^{314}\) See Osorio-Martinez, 2018 U.S. App. LEXIS 16265, at *23; Castro, 835 F.3d at 449.

\(^{315}\) Gerald Neuman, Federal Court Issues in Immigration Law, 78 TEX. L. REV. 1661, 1676-79 (2000) (arguing that 8 U.S.C. § 1252(e)(3)’s confining all constitutional challenges to a long-closed statutory window is unconstitutional with regard to subsequent victims); id. at 1678 (describing “[t]his largely illusory scheme of judicial review” as one that “might be reconciled with the Constitution to the extent that it would be applied to individuals who had no constitutional right to judicial inquiry into the lawfulness of the procedures applied against them, assuming arguendo that such individuals exist.”).

\(^{316}\) David Martin, supra note 43, at 689. Martin discusses how the Supreme Court has never squarely ruled on the procedural due process claims for those who entered the U.S. without inspection (known as “EWIs”). He notes, however, that there is a “certain anomaly . . . in giving greater rights to persons who completely evaded border screening, while those who presented themselves for inspection as the law required were rewarded with constitutional limbo.” Id. at 689-90. Yet, he believes that the ties EWIs create while in the U.S., even though illicitly obtained and thus “discounted somewhat in the due process calculus,” are not weightless, “and it would be unfortunate if the Court were to act as though EWIs have no greater interests than first-time applicants for admission at the border.” Id. at 691. He also notes that expanding expedited removal to those who are in the U.S. up to two years means that
A limitation on habeas as a remedy is that a successful habeas petition usually requires a lawyer. In expedited and administrative removal, there is no court-appointed counsel.\textsuperscript{317} Even if the detainee obtains counsel, deportation defense attorneys are not always versed in the intricacies of Fourth Amendment law or habeas corpus petitions. Statutory limitations on class-wide relief make it difficult for claims to be consolidated for the purposes of litigation with skilled counsel.\textsuperscript{318} That, however, is a problem with another remedy – better funding for deportation defense attorneys to handle individual cases and adequate training in habeas corpus litigation.\textsuperscript{319} And should Kevin Johnson’s call for “truly rebellious lawyering” be answered by immigration defense attorneys,\textsuperscript{320} immigration law’s next Fourth Amendment problem may come into focus.

V. CONCLUSION

The Supreme Court held over forty years ago that “[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”\textsuperscript{321} Gerstein’s promise has not extended to arrests by immigration officers for deportation, and now the current political climate finds us in a place where DHS officers—acting as the “prosecutor, judge, and jailor”\textsuperscript{322}—will increasingly make more decisions to detain for deportation with absolutely no review from any independent judge. The Court in Gerstein cautioned against such prosecutorial judgment “stand[ing]
alone” to meet the requirements of the Fourth Amendment.  

With the rise of procedures such as expedited and administrative removal, and the use of such procedures to detain more people, there is an even greater need for the decision of a detached judge to determine probable cause to arrest. The judiciary arguably has become emboldened in the Trump presidency, causing judges to question whether immigration law should be exempt from constitutional challenges. If courts take a closer look at administrative and expedited removals, they will begin to see the Fourth Amendment violations that lurk in the shadows of immigration law.

323. Gerstein, 420 U.S. at 117.
324. See International Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017); Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017).