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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”⁴ 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 with no involvement of an immigration judge.⁵ 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

In this article, I build off of prior scholarship and litigation examining Fourth Amendment violations in immigration law⁷ to argue that the arrest and detention pursuant to

* 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 Farberman, 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.

¹ *Donald Trump Wants to Use a “Deportation Force” to Remove 11 Million Immigrants From the U.S.*, The Atlantic, Nov. 11, 2015, available at: <http://www.theatlantic.com/politics/archive/2015/11/donald-trump-wants-to-use-a-deportation-force-to-remove-11-million-immigrants-from-the-us/445917/>.

² *Executive Order: Enhancing Public Safety Within the Interior of the United States* (Jan. 25, 2017), available at: <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>; *Executive Order: Border Security and Immigration Enforcement Improvements* (Jan. 25, 2017), available at: <https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements>.

³ Matthew T. Albence, *Implementing the President’s Border Security and Interior Enforcement Policies*, (Feb. 21, 2017), available at: <https://www.documentcloud.org/documents/3889695-doc00801320170630123624.html>; John Kelly, *Implementing President’s Border Security and Immigration Enforcement Improvements Policies* (Feb. 20, 2017), available at: <https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies> (herein after “Border Security Implementation Memo”); John Kelly, *Enforcement of Immigration Laws to Serve the National Interest* (Feb. 20, 2017), available at: <https://www.dhs.gov/publication/enforcement-immigration-laws-serve-national-interest> (hereinafter “Enforcement Memo”).

⁴ See Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181 (2017).

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

⁶ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

⁷ See, e.g., Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L. J. 125 (2015); American Civil Liberties Union, *ICE Detainers and the Fourth Amendment: What Do Recent Federal Court Decisions Mean?* (Nov. 13, 2014), available at: https://www.aclu.org/sites/default/files/assets/2014_11_13_-_ice_detainers_4th_am_limits.pdf; Christopher N. Lasch, *The Faulty Arguments Behind Immigration Detainers* (December 18, 2013), AMERICAN IMMIGRATION COUNCIL, IMMIGRATION POLICY CENTER, “PERSPECTIVES” SERIES, 2013; U Denver Legal Studies Research Paper No. 14-34, available at: SSRN: <https://ssrn.com/abstract=2432011> or <http://dx.doi.org/10.2139/ssrn.2432011>; Christopher N. Lasch, *Litigating Immigration Detainer Issues* (2011), Chapter 34 in Colorado Bar Association, IMMIGRATION LAW FOR THE COLORADO PRACTITIONER (1st

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. As such, the article contributes to the scholarship that has both challenged immigration law's historical exceptionalism and mapped where the plenary power has not trumped.⁸

The rise of "removal in the shadows of immigration court,"⁹ also dubbed "speed deportations"¹⁰ or "diversions from the system,"¹¹ is a 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.¹² Shoba Sivaprasad Wadhia has critiqued such "speed deportations" by focusing on the enlarged role of prosecutorial discretion when noncitizens face these procedures.¹³ 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.¹⁴ 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

ed. November 2011), available at SSRN: <https://ssrn.com/abstract=2140031>; Christopher Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008).

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 in 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 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 a 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 Substitutes 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).

⁹ See Koh, *Removal in the Shadows*, *supra* note 4.

¹⁰ See Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2015).

¹¹ See Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595 (2009).

¹² See *id.* at 635.

¹³ See Wadhia, *Speed Deportations*, *supra* note 10.

¹⁴ See Koh, *Removal in the Shadows*, *supra* note 4.

exonerations to raise public awareness of wrongful convictions and to advocate for additional procedural protections in the criminal justice system.¹⁵

In this article, I examine two of these procedures, administrative removal and expedited removal, through the lens of the Fourth Amendment.¹⁶ In particular, 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*¹⁷ and the 1991 case *County of Riverside v. McLaughlin*.¹⁸ 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.¹⁹ I focus on the Fourth Amendment concerns at issue with these types of shadow deportations, as opposed to the others, which at least have *some* involvement by an immigration judge.²⁰

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,²¹ 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.²² Following the successful detainer litigation, Michael Kagan has 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."²³ As Kagan has identified, in regular removal proceedings, the lack of a prompt

¹⁵ See Amanda Frost, *Learning from Our Mistakes: Using Immigration Enforcement Errors to Guide Reform*, 92 DENV. U. L. REV. 769, 769 (2015).

¹⁶ See U.S. CONSTITUTION 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. 103, 114 (1975).

¹⁸ 500 U.S. 44, 55-56 (1991).

¹⁹ See *infra* Parts IIb, c.

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 106; 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*, *supra* note 7.

²² See *id.*; see also ACLU, *ICE Detainers*, *supra* note 7.

²³ Kagan, *supra* note 7. Other scholars have briefly critiqued immigration law's lack of prompt, independent review of detention. See, e.g., Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 888-91 (2008) (commenting on the lack of prompt review of detention as part of a larger set of recommendations to ICE to "inject humanity into its arrest, detention, and removal procedures"); see also César Cuauhtémoc García Hernández, *Invisible Spaces and Invisible Lives in Immigration Detention*, 57 HOW. L. J. 869, 882 (2014) (comparing criminal justice and immigration process, where the government "can merely lodge an accusation that a person has violated the law").

review of custody by a neutral judge presents a Fourth Amendment violation.²⁴ 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.²⁵ 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 argued,²⁶ 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.²⁷ In administrative and expedited removal, however, the statute and regulations contemplate *no* role by a neutral judge, except in very limited circumstances.²⁸

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.²⁹ 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*,³⁰ where the Court refused to apply the exclusionary rule, except when immigration officers committed egregious violations of the noncitizen’s Fourth Amendment rights.³¹ 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,³² as subsequent courts have clarified.³³ More recently, in 2012, the Supreme Court in *Arizona v. U.S.*,³⁴ reiterated that the Fourth Amendment applies to arrests for immigration enforcement purposes.³⁵ These cases have left the door open to the application of a different Fourth

²⁴ See Kagan, *supra* note 7, at 167.

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).

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.

²⁹ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 884 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

³⁰ 468 U.S. 1032 (1984).

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).

³⁴ 132 S. Ct. 2492 (2012).

³⁵ The Court considered section 2(B) of the law, which required Arizona officers to make a “reasonable attempt ... to determine the immigration status” of any person they stop, detain, or arrest on some other legitimate basis if

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 that was created through expedited and administrative removal because it would require the prompt involvement of a “neutral” immigration judge;³⁶ 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.³⁷

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,³⁸ suggesting that these officers are clamoring to detain and deport more noncitizens.³⁹ The memos recommend that DHS hire thousands of additional ICE and CBP officers, with little vetting.⁴⁰ 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.⁴¹ 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,⁴² which David Martin, former General Counsel for the Immigration and Naturalization Service (“INS”) (the precursor to ICE

“reasonable suspicion exists that the person is an alien and is unlawfully present in the United States.” *Id.* at 2507 (quoting ARIZ. REV. STAT. ANN. § 11–1051(B)). The law also provided that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released.” *Id.* While the Court found that other provisions of Arizona’s law were preempted by federal law, section 2(B) was not, because nothing in federal law prohibited states from sharing information with ICE. *Id.* at 2507-08. When challengers suggested that Arizona officials would delay the release of individuals pending information from ICE, the Court stated, citing Fourth Amendment cases, that such holds would be illegal. *Id.* at 2509 (citing *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)). The Court also stated, “it is not a crime for a removable alien to remain present in the United States...[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.” *Id.* at 2506.

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).

³⁸ See *Press Briefing by Press Secretary Sean Spicer*, 2/21/2017, #13, The White House Office of Press Secretary, available at: <https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13>.

³⁹ See *id.*

⁴⁰ See Kelly, *Border Security Implementation Memo*, *supra* note 3; Kelly, *Enforcement Memo*, *supra* note 3.

⁴¹ Josiah McC. Heyman, *Why Caution is Needed Before Hiring Additional Border Patrol Agents and ICE Officers* 1 (April 24, 2017), available at: 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.”).

⁴² Kelly, *Border Security Implementation Memo*, *supra* note 3, at 5-6.

and CBP), warned against in 2000.⁴³ A recently-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.⁴⁴ Immigration arrests have increased by forty percent than at this same time in 2016.⁴⁵ 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. 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 to be 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.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.

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.

⁴⁵ Federal immigration authorities have made forty percent more arrests than they did at the equivalent point in 2016. Jonathan Blitzer, *What Will Trump Do with Half a Million Backlogged Immigration Cases?* 3, NEW YORKER (June 20, 2017).

⁴⁶ See *Riverside*, 500 U.S. at 55-56; *Gerstein*, 420 U.S. at 114-117.

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.”⁴⁷ In 1948, in *Johnson v. U.S.*,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.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 crime.⁵⁰

In 1975, in *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.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.”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.”⁵³ To continue detention after initial arrest, the detached judgment of a magistrate judge is necessary; the prosecutor’s finding of probable cause is insufficient to protect the important Fourth Amendment rights to be free of an unreasonable seizure.⁵⁴ This Fourth Amendment rule applies to “any significant pretrial restraint on liberty.”⁵⁵

In 1991, in *County of Riverside v. McLaughlin*, the Court defined “bringing someone promptly before a magistrate” as forty-eight hours.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; *Gerstein* is not a blank check.”⁵⁷

Thus, in the criminal justice system, a probable cause hearing before a magistrate within forty-eight hours of arrest⁵⁸ is necessary to place a neutral, detached judge between the

⁴⁷ U.S. CONST. AMEND. IV.

⁴⁸ 333 U.S. 10 (1948).

⁴⁹ *Id.* at 13-14.

⁵⁰ *Id.*

⁵¹ See *Gerstein*, 420 U.S. at 105-06.

⁵² *Id.* at 106.

⁵³ *Id.* at 114.

⁵⁴ See *id.* at 114-117.

⁵⁵ *Id.* at 125 (emphasis added). The *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.” *Id.* at 120.

⁵⁶ *Riverside*, 500 U.S. at 55-56.

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 to gather additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay’s sake.” *Id.* at 56.

⁵⁸ This probable cause hearing is different from the later arraignment. See *Gerstein v. Pugh*, 420 U.S. 103, 106 (1975) (holding that arraignment, which happens often 30 days after arrest, is insufficient to satisfy an arrestee’s

government and a person whose liberty is taken by the government.⁵⁹ To summarize, “[t]he central issues [in a *Gerstein/Riverside* probable cause hearing] are neutrality, time, and automacity.”⁶⁰

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.⁶¹ First, such warrantless arrest may occur if the noncitizen is, in the officer’s presence, entering or attempting to enter the United States illegally.⁶² 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.”⁶³ Courts have held that this “reason to believe” language is the equivalent of probable cause.⁶⁴ 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.⁶⁵

Following a warrantless arrest, the ICE or CBP officer must bring the noncitizen “without unnecessary delay” for examination before a different ICE or CBP officer.⁶⁶ That officer decides, within forty-eight hours, whether to issue a Notice to Appear and whether to detain that

Fourth Amendment rights); 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).

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. PRO 5(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 *United States 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.”).

⁶⁵ 8 U.S.C. § 1357(a).

⁶⁶ *Id.*

person.⁶⁷ The Notice to Appear is the document that commences removal proceedings.⁶⁸ It is issued once an ICE or CBP officer has confirmed the existence of prima facie evidence for removal.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.”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.⁷¹ This judge presides over removal proceedings,⁷² where the judge determines whether to sustain the charges of removability.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.⁷⁴ In these regular removal proceedings, the noncitizen has the right to counsel (at no cost to the government);⁷⁵ the noncitizen also may inspect the government’s evidence,⁷⁶ present evidence or witnesses;⁷⁷ and appeal any negative decisions to the Board of Immigration Appeals⁷⁸ (also situated within the Executive Office for Immigration Review).⁷⁹ The noncitizen may appeal certain types of decisions to the circuit court of appeals.⁸⁰

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.⁸¹ The noncitizen may appeal this custody determination to an immigration judge,

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, *Under Arrest*, *supra* note 23, at 874 (critiquing regulation for failing to define “emergency,” “extraordinary circumstance,” or “additional reasonable period of time”).

⁶⁸ 8 C.F.R. § 239.1(a).

⁶⁹ 8 C.F.R. § 287.3(a).

⁷⁰ *Id.*; see also Jason Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 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.”).

⁷¹ See 8 U.S.C. § 1229; see also Executive Office for Immigration Review, *About the Office*, available at: <https://www.justice.gov/eoir/about-office> (last visited May 12, 2017).

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. 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 64.01 (rev. ed. 2010).

⁷³ 8 U.S.C. § 1229a(a)(1).

⁷⁴ See generally *id.*

⁷⁵ 8 U.S.C. § 1229a(b)(4)(A).

⁷⁶ 8 U.S.C. § 1229a(b)(4)(B).

⁷⁷ *Id.*

⁷⁸ 8 U.S.C. § 1229a(c)(5).

⁷⁹ 8 C.F.R. § 1003.1(a)(1).

⁸⁰ See 8 U.S.C. § 1252.

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, *Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 90-91 (2016).

who also requires the detainee to disprove dangerousness or flight risk.⁸² There is a further appeal of custody to the Board of Immigration Appeals,⁸³ and a district court, in habeas corpus proceedings, may review the legality of the detention.⁸⁴

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, however. In 1960, in *U. S. v. Abel*,⁸⁵ 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.⁸⁶ Declining to suppress the evidence, the Court stated, “[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time”⁸⁷ (although it does not appear that anyone had ever raised that challenge to arrest for deportation).⁸⁸ 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.⁸⁹

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 1980's. In *Flores by Galvez-Maldonado v. Meese*,⁹⁰ a panel of the Ninth

⁸² See 8 C.F.R. §§ 1003.19(b); 236.1(d)(1); *In re 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). 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(f), 1003.38.

⁸⁴ Federal district courts have jurisdiction to address “questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws.” *INS v. St. Cyr*, 533 U.S. 289, 306–07 (2001); see 28 U.S.C. § 2241. The habeas court does not have jurisdiction, however, over discretionary decisions. See 8 U.S.C. § 1226(e).

⁸⁵ 362 U.S. 217 (1960).

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.* at 230.

⁸⁸ See *id.* at 233 (“The constitutional validity of this long-standing administrative arrest procedure in deportation cases has never been directly challenged in reported litigation.”); *id.* (“This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative deportation warrants. It has frequently, however, upheld administrative deportation proceedings show by the Court's opinion to have begun by arrests pursuant to such warrants.”).

⁸⁹ See *id.* at 230 (“The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for ‘warrants’ under the Fourth Amendment, is not entitled to our consideration in the circumstances before us. It was not made below; indeed, it was expressly disavowed.”); *id.* (stating that the petition “did not challenge the exercise of [the warrant] authority below, but expressly acknowledged its validity”); *id.* at 231 (“At no time did petitioner question the legality of the administrative arrest procedure either as unauthorized or unconstitutional. Such challenges were, to repeat, disclaimed.”); *id.* at 232 (“Affirmative acceptance of what is now sought to be questioned could not be plainer.”). As dicta, these statements would not bind future courts deciding the issue. See *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

⁹⁰ 913 F.2d 1315 (9th Cir. 1990).

Circuit reversed a district court judge's order granting such hearings.⁹¹ 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.⁹² 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."⁹³ 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."⁹⁴

The Supreme Court reversed the Ninth Circuit in 1993, in the case entitled *Reno v. Flores*.⁹⁵ 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

⁹¹ Id. at 1335-37.

⁹² Id. at 1336 (citing *Gerstein*, 420 U.S. at 125 n.27). The Court remanded to the district court to determine whether such a hearing was appropriate under the *Mathews v. Eldridge* balancing test. See id. at 1337 (citing *Mathews*, 424 U.S. at 334-35).

⁹³ Id. at 1337 (citing *Abel*, 362 U.S. at 233).

⁹⁴ *Flores by Galvez-Maldonado v. Meese*, 942 F.2d 1352, 1364-65 (9th Cir. 1991) (en banc).

⁹⁵ 507 U.S. 292 (1993).

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 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, "[o]ur 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. at 151-52. 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)).

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 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.¹⁰⁴ Of interest is Judge Posner's opinion in the 1982 case *Arias v. Rogers*.¹⁰⁵ 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.'"¹⁰⁶ 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."¹⁰⁷ Judge Posner was mistaken about the involvement of the immigration judge in such arrest authorization, as the Ninth Circuit later pointed out.¹⁰⁸ 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.¹⁰⁹ 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.

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. *United States v. Encarnacion*, 239 F.3d 395, 399-400 (9th 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.").

¹⁰⁴ See, e.g., *Tejeda-Mata v. Immigration & 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 v. Hung v. U.S.*, 617 F.2d 201, 202 (10th Cir. 1980); *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir.), cert. denied, 423 U.S. 1035, 96 S.Ct. 569, 46 L.Ed.2d 409 (1975); *Au Yi Lau v. Immigration 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. Rodríguez, 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.¹¹⁰ 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.¹¹¹ The only way for a noncitizen to see a judge is if he expresses a fear of return¹¹² or swears to be a U.S. citizen, lawful permanent resident, refugee, or asylee.¹¹³ However, the noncitizen remains detained during this process.¹¹⁴ 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.¹¹⁵

When Congress wrote the expedited removal statute, it authorized the INS to apply the summary procedures to any noncitizen who has been in the U.S. for fewer than two years.¹¹⁶ The INS, however, initially only applied expedited removal to only those who were stopped at the border seeking admission to the U.S..¹¹⁷ The immigration authorities then incrementally expanded its application.¹¹⁸ In 2002, expedited removal grew to apply to those who had arrived

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”).

¹¹⁵ See *Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)*, Pub. L. No. 104–208, Div. C. § 321, 110 Stat. 3009 (Sept. 30, 1996); Department of Justice, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures; Final Rule*, 62 Fed. Reg. 10313 (March 6, 1997); American Civil Liberties Union, *American Exile: Rapid Deportations That Bypass the Courtroom* 4 (2014), available at: <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>.

¹¹⁶ 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

¹¹⁷ Koh, *Removal in the Shadows*, *supra* note 4, at 116.

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

by sea and had been in the U.S. for fewer than two years.¹¹⁹ 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.¹²⁰ 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.¹²¹

Court cases challenging expedited removal have largely failed, due to statutory limitations on the right to judicial review in such proceedings,¹²² 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.¹²³ Because of the "entry fiction,"¹²⁴ courts have found that these individuals have no right to judicial review of their cases.¹²⁵

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."¹²⁶ Created in 1996, administrative removal is another summary removal procedure that, especially for the scapegoated "aggravated felons,"¹²⁷ became a way to cut off their access to immigration

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).

¹¹⁹ Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002).

¹²⁰ Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004).

¹²¹ Kelly, *Border Security Implementation Memo*, *supra* note 3, at 5-6.

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 denied entry is concerned."); see also *infra* note 303 (discussing critiques of entry fiction).

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

¹²⁶ See 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1. Administrative removal was first introduced in 1996 with IIRIRA. See Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3009-__ (1996).

¹²⁷ Initially introduced in the 1988 Anti-Drug Abuse Act, the aggravated felony definition included murder, drug trafficking, and firearms trafficking (or attempts or conspiracies to commit those crimes). See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). Amendments since 1988 have added "crimes of violence," theft, receipt of stolen property, fraud, forgery, and obstruction of justice, to name a few offenses that now meet the twenty-one part definition. See e.g., Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(b)(5), 117 Stat. 2875, 2879 (2003) (adding peonage, slavery, involuntary servitude, and trafficking in persons); IIRIRA of 1996, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3009-546, 3009-627 (1996) (adding sexual

courts.¹²⁸ The noncitizen is necessarily subject to mandatory detention throughout this procedure.¹²⁹ The regulation also states that there is no administrative review of detention for a noncitizen in administrative removal proceedings.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.¹³¹ Rather, it is an ICE officer who writes the charging document, finds that detention is justifiable based on that charge, and issues an order of deportation.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.¹³³ If ICE finds that the case is not amenable to administrative removal, the officer *may* refer the case to an immigration judge; no provision requires such referral.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.”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

abuse of a minor and rape); AEDPA of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1277–78 (1996) (adding bribery, forgery, counterfeiting, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, and bribery of a witness); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4321–22 (1994) (adding theft, receipt of stolen property, burglary, trafficking in fraudulent documents, RICO, certain prostitution offenses, fraud or deceit, tax evasion, and human smuggling); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (1990) (adding “crimes of violence”). With IIRIRA in 1996, Congress also reduced the length of sentence necessary to trigger the aggravated felony definition from five years to one year, IIRIRA, § 321(a)(3)–(4), 110 Stat. at 3009–627, while at the same time redefining a sentence to include any suspended sentence. *Id.* at § 322(a)(1)(B), 110 Stat. at 3009–628.

¹²⁸ The charge, an aggravated felony, also carries a consequence of forever preventing the noncitizen from returning to the United States. 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).

¹²⁹ See, e.g., 8 U.S.C. § 1226(c) (proscribing mandatory detention for a noncitizen who is deportable for an aggravated felony, among other criminal grounds of deportability).

¹³⁰ C.F.R. § 238.1(g) (“The decision of the Service concerning custody or bond shall not be administratively appealable during proceedings initiated under section 238 of the Act and this part.”).

¹³¹ 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. § 1228(b)(4)(E). Courts have held, however, that if the noncitizen did not respond to the charges within the requisite time period, he has not exhausted administrative remedies and therefore may not seek such judicial review. See, e.g., *Malu v. USAG*, 764 F.3d 1282, 1289 (11th Cir. 2014); *Escoto-Castillo v. Napolitano*, 659 F.3d 864, 866 (8th Cir. 2011); *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 443–44 (7th Cir. 2007); but see *Etienne v. Lynch*, 813 F.3d 135, 141–42 (4th Cir. 2015) (finding jurisdiction to review administrative removal order because there is no notice to noncitizens that they must raise all legal issues in response to the Notice of Intent to Issue Administrative Removal order, since the form only allows noncitizens to contest issues of fact).

¹³² See 8 C.F.R. § 238.1

¹³³ See 8 U.S.C. 1228(b)(4)(F); 8 C.F.R. § 238.1(a).

¹³⁴ See 8 C.F.R. § 238.1(d)(2)(ii)(A) (an officer *may* place the noncitizen in regular removal proceedings); *id.* at (d)(2)(iii) (“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].”); *id.* at (d)(3) (“Only the deciding Service officer may terminate proceedings under section 238 of the Act, in accordance with this section.”).

¹³⁵ Kelly, Enforcement Memo, *supra* note 3, at 3.

“Notice of Intent to Issue Final Administrative Order” (the document that ICE uses to notify the noncitizen of administrative removal proceedings).¹³⁶ In at least one case, the noncitizen argued, unsuccessfully, that the statute requires all removal proceedings to occur before an immigration judge.¹³⁷

In only one case, *Etienne v. Lynch*,¹³⁸ the Fourth Circuit in 2015 examined the administrative removal procedures in any great depth.¹³⁹ In a few places within the decision, the court appears troubled by the fact that an ICE officer is the one making all of these critical decisions.¹⁴⁰ 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.”¹⁴¹ In *Etienne*, the court held that DHS had properly classified his conviction as an aggravated felony and therefore denied his petition for review.¹⁴²

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,¹⁴³ much less administrative removal proceedings.¹⁴⁴ 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.¹⁴⁵ Effectively raising a Fourth Amendment challenge to administrative removal would be a difficult task for an

¹³⁶ See, e.g., *Malu*, 764 F.3d at 1289 (finding that 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).

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’ do not appear anywhere in 1228”); see also *id.* (“Congress commanded only that someone other than the charging officer preside over expedited removal proceedings and did so in a way that implies that someone other than an IJ can hear the proceeding.”).

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.

¹⁴³ 8 U.S.C. § 1229a(b)(4)(A) (no right to court-appointed counsel in removal proceedings initiated under 8 U.S.C. § 1229).

¹⁴⁴ 8 U.S.C. § 1228(b)(4) (no right to court-appointed counsel in administrative removal proceedings).

¹⁴⁵ See *New York Family Unity Project*, Bronx Defenders, available at:

<http://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project/> (last visited May 1, 2017).

unrepresented, detained noncitizen.¹⁴⁶ 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.¹⁴⁷ 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,¹⁴⁸ 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.¹⁴⁹ 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 damages, arguing that this continued custody was a new “seizure” for Fourth Amendment purposes, yet it lacked probable cause.¹⁵⁰ Because noncitizens enjoy the same rights as citizens when charged or held for a crime,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.

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(e)).

¹⁴⁸ See, e.g., *Orellana v. Nobles Cty.*, No. 15–3852, ___ F.Supp.3d ___, 2017 WL 7239, *7-9 (D. Minn. Jan. 6, 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*, No. 11–5452, ___ F.Supp.3d ___, 2016 WL 5720465, at *1, *5, *8 (N.D. Ill. Sept. 30, 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, at *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).

¹⁵⁰ See *supra* note 148 (summarizing ICE detainer litigation).

¹⁵¹ See D. Carolina Núñez, *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.”).

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.¹⁵² For example, in *Morales v. Chadbourne*,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.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 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*¹⁵⁵ against the federal officials.¹⁵⁶ ICE officials filed an interlocutory appeal to the First Circuit, arguing that they had qualified immunity because the law was not clear about whether an issuance of a detainer violated her Fourth Amendment rights.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.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 question beyond debate.”¹⁵⁹

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.¹⁶⁰ 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.”¹⁶¹ 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.¹⁶²

¹⁵² See ACLU, *ICE Detainers*, *supra* note 7.

¹⁵³ 793 F.3d 208 (1st Cir. 2015).

¹⁵⁴ *Id.* at 211.

¹⁵⁵ 403 U.S. 388 (1971).

¹⁵⁶ *Id.* at 213 (citing *Bivens*, 403 U.S. 388 (1971)); see also *Morales*, 996 F.Supp.2d at 26.

¹⁵⁷ *Id.* at 211-13.

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.

¹⁵⁹ See *Morales*, 793 F.3d at 214 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011)). The *Morales* court cited what appears to be perfectly consistent Supreme Court precedent finding that the Fourth Amendment applies to arrests for deportation and not just arrests by the police for investigation of criminal conduct. *Id.* at 215 (citing *Brignoni-Ponce*, 422 U.S. at 878); see also *id.* at 215 (citing *Dunaway*, 442 U.S. at 216) (“[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 arrest.”).

¹⁶⁰ See, e.g., *Morales*, 793 F.3d at 218.

¹⁶¹ *Id.* at 218; see also *id.* (citing 8 C.F.R. § 287.8(b)(1)) (reasoning that “federal regulations permit an immigration officer ‘to ask any questions of anyone as long as the immigration officer does not restrain the freedom of an individual’”).

¹⁶² See Daniel Wilshire, *IMMIGRATION DETENTION: LAW, HISTORY, POLITICS* 6 (Cambridge Univ. Press 2012); see also *Flores by Galvez-Maldonado v. Meese*, 913 F.2d 1315, 1339 (9th Cir. 1990) (Fletcher, J.,

Cases where detainers were lodged against U.S. citizens also demonstrate the critical need for Fourth Amendment protections when ICE agents detain those they believe are not citizens.¹⁶³ Clearly ICE can be mistaken, and Fourth Amendment rights should guard against such erroneous detention.¹⁶⁴ As the late Justice Scalia wrote, “[t]he common-law rule of prompt hearing [which became the precursor to the Fourth Amendment right]¹⁶⁵ 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.”¹⁶⁶

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.¹⁶⁷ 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,¹⁶⁸ and therefore the procedural protections of a criminal trial do not apply?¹⁶⁹ The Fourth Amendment question is

dissenting). (“In effect, the majority is moving from the uncontroverted propositions that the political branches of plenary authority over deciding whom to admit into the country and that such political decisions are largely immune from judicial review, to the unsupportable conclusion that how it treats those whom it detains while the deportation is underway is likewise beyond judicial review. This is an unwarranted judicial leap.”)

¹⁶³ See, e.g., *Morales*, 793 F.3d at 214; see also *Mendia v. Garcia*, 165 F.Supp.3d 861, 869-71 (N.D.Ca. 2016) (extending *Bivens* money damages against ICE officers who issued a detainer against a U.S. citizen).

¹⁶⁴ One district court, finding that ICE officials could not claim qualified immunity due to the lack of clarity on Fourth Amendment law for wrongfully issuing a detainer, stated:

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).

¹⁶⁵ See *Gerstein*, 420 U.S. at 114.

¹⁶⁶ *Riverside*, 500 U.S. at 71 (Scalia, J., dissenting).

¹⁶⁷ See, e.g., *Morales*, 793 F.3d at 214; *Galarza*, 2012 WL 10080020, at *14.

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).

¹⁶⁹ See, e.g., Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461 (2011) (arguing for the right to court-appointed counsel in deportation proceedings); Mary Holper, *Confronting Cops in Immigration Court*, 23 WM & MARY BILL RTS. J. 675 (2015) (arguing for the right to confront witnesses in deportation proceedings).

not whether what occurs *after* the seizure is punishment.¹⁷⁰ The questions that should be asked are: Has there 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, what should the remedy be?

When discussing an appropriate remedy, especially when that remedy is sought within the context of a civil proceeding, questions regarding the purpose of such proceeding become relevant.¹⁷¹ 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.¹⁷² 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.¹⁷³ 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."¹⁷⁴ 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.¹⁷⁵ Yet *Lopez-Mendoza* dealt with only with one possible remedy for an illegal arrest,¹⁷⁶ and created one more exception to the exclusionary rule.¹⁷⁷ The *Lopez-Mendoza* Court said little about other remedies for Fourth Amendment violations by immigration officers,¹⁷⁸ leaving the door open to the exploration of other possible remedies.

¹⁷⁰ Cf. *Verdugo-Urquidez*, 494 U.S. at 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).

¹⁷¹ See *Lopez-Mendoza*, 468 U.S. at 1041-50; see also *infra* Part IVb (discussing remedies for Fourth Amendment violation).

¹⁷² *Lopez-Mendoza*, 468 U.S. at 1041-50.

¹⁷³ *Id.* at 1041-50 (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 *Id.* at 1050-51.

¹⁷⁵ 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).

¹⁷⁶ Kagan, *supra* note 7, at 147-48.

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)) ("[T]he 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).

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.¹⁷⁹ Yet, in 1973, in *Almeida-Sanchez v. U.S.*,¹⁸⁰ the Supreme Court applied the Fourth Amendment when a Mexican citizen challenged the warrantless search of his car by Border Patrol.¹⁸¹ 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,¹⁸² 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”¹⁸³ – which the Court refused to extend 20 miles beyond the border.¹⁸⁴ In the 1975 decision *United States v. Brignoni-Ponce*,¹⁸⁵ the Court suppressed statements admitting illegal presence made by passengers in a car that was subjected to a warrantless random stop by Border Patrol.¹⁸⁶ The Court found that the single factor, “the apparent Mexican ancestry of the occupants,” was not enough to furnish reasonable suspicion that the occupants of the car were not citizens.¹⁸⁷ The Court wrote that the plenary power “cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens.”¹⁸⁸ Although *Brignoni-Ponce* is known to

¹⁷⁹ Hiroshi Motomura, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 27 (Oxford Univ. Press 2006) (“[C]ourts, 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.”)

¹⁸⁰ 413 U.S. 266 (1973).

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.*

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. See, e.g., *U.S. v. Montero-Camargo*, 208 F.3d 1122, (9th Cir. 2000) (“[A]t 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.”); but see *U.S. Manzo-Jurado*, 457 F.3d 928, 935 n.6 (9th Cir. 2006) (reasoning that the court’s decision in *Montero-Camargo* did not apply because unlike the location of the arrest in *Montero-Camargo*, where Latinos were the majority, in the case at hand, “Havre, Montana, is sparsely populated with Hispanics”).

¹⁸⁸ *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.” *Id.*

many scholars as the decision that authorized racial profiling in immigration enforcement,¹⁸⁹ it is also frequently cited for principle that the Fourth Amendment applies to immigration enforcement actions.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,¹⁹¹ or when the police stop motorists at a checkpoint to ask about a recent crime.¹⁹² Traffic stops are annoying and inconvenient;¹⁹³ immigration detention is a euphemism for imprisonment.¹⁹⁴ As David Cole has written, “few state actions are more serious than locking up a human being.”¹⁹⁵

A question that has gained increasing relevance since 1990, when the Court decided *United States v. Verdugo-Urquidez*,¹⁹⁶ is whether undocumented noncitizens are part of “the people” protected by the Fourth Amendment. In *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.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

¹⁸⁹ See Devon W. Carbado and Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1549 (2011); Johnson, *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 *Brignoni-Ponce*.”); 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.”).

¹⁹⁰ See *U.S. 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. But cf. *U.S. v. Zapata-Ibarra*, 223 F.3d 281, 282 (5th Cir. 2000) (Weiner, J., dissenting) (discussing *Brignoni-Ponce* as “the judiciary’s evisceration of the Fourth Amendment in the vicinity of the Mexican border”); Carbado and Harris, *supra* note 189, at 1570-73 (noting that the “undocumented cases” such as *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, *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. See Johnson, *Racial Profiling*, *supra* note 8, at 1024-25.

¹⁹¹ See *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (finding no Fourth Amendment violation when officers refer motorists selectively, without reasonable suspicion, to secondary inspection at border checkpoint for questioning regarding immigration status).

¹⁹² See *Illinois v. Lidster*, 540 U.S. 419, 424-45 (2004).

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.”)).

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.”).

¹⁹⁵ Cole, *In Aid of Removal*, *supra* note 8, at 1008.

¹⁹⁶ 494 U.S. 259 (1990).

¹⁹⁷ *Id.* at 274-75.

substantial connections to the political community of the U.S.¹⁹⁸ Because he had not established “voluntary substantial connections” to the U.S., Mr. Verdugo-Urquidez could not claim Fourth Amendment rights.¹⁹⁹ The Court suggested, however, that the Fourth Amendment should apply to noncitizens who are illegally in the U.S.²⁰⁰

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.²⁰¹ Rather, she writes, “the post-territorial approach looks to more substantive indicators of membership, including community ties and mutuality of obligation, to afford rights.”²⁰² Of particular concern should be the voluntariness with which someone came to the U.S.;²⁰³ 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].”²⁰⁴ She writes that courts should be evaluating membership and the ensuing Fourth Amendment rights

¹⁹⁸ Id. at 265-67.

¹⁹⁹ Id. at 271, 274-75.

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”). *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, at *5 (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 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 *30 (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 Id. 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.

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.²⁰⁵

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, forming the substantive indicators of membership that would afford Fourth Amendment rights.²⁰⁶ 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."²⁰⁷ He looks at immigrants' rights to public benefits as an entirely different issue, one that is about establishing a "ceiling of immigrant benefits."²⁰⁸ 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.²⁰⁹ 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.²¹⁰ 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.²¹¹

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.²¹² Fourth Amendment questions are different, though. When considering the Fourth Amendment, the question should *not* be whether the person, by coming to the U.S. illegally or committing a crime,²¹³ deserves to

²⁰⁵ Id. at 137.

²⁰⁶ See id.; but see Victor Romero, *Whatever Happened to the Fourth Amendment? Undocumented Immigrants' Rights After INS v. Lopez-Mendoza and United States v. Verdugo-Urquidez*, 65 S. CAL. L. REV. 999, 1015 (1992) (discussing difficulty, under *Verdugo-Urquidez*, of drawing temporal line for substantial connections of an undocumented noncitizen who came to the U.S. and remained for a short period of time before being arrested).

²⁰⁷ Victor Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On Gutierrez and the Tort Law/Immigration Law Parallel*, 35 HARV. C.R.-C.L. L. REV. 57, 62 (2000).

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. REV. 289, 292 (2008) ("Permanent residents, as a class, have the greatest economic and familial connections and political allegiance to the United States.").

²¹³ Cf. *Demore*, 538 U.S. at 518-21, 524-25 (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).

be unreasonably seized.²¹⁴ 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.²¹⁵ Or, the focal point should be deterring the government from unreasonably seizing a person,²¹⁶ not the status of the person who was seized.²¹⁷ Suggesting that some people in the U.S. deserve to be illegally seized by the U.S. government is a slippery slope.²¹⁸ 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,"²¹⁹ answered this question in the negative.²²⁰

The next question is whether the seizure is reasonable.²²¹ Is the seizure at issue reasonable because its purpose is not primarily to investigate crime, but to enforce a civil regulatory scheme?²²² In the 1967 case that introduced an "administrative search doctrine,"²²³ *Camara v. Municipal Court*,²²⁴ the Supreme Court permitted health inspectors to search houses without individualized suspicion of a violation.²²⁵ The Court, however, still required an "area warrant" issued by a judge so as to limit the discretion of each inspector.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

²¹⁴ Romero, *Whatever Happened to the Fourth Amendment*, *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, *Whatever Happened to the Fourth Amendment*, *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 (2000) at 825-27 (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, *Domestic Fourth Amendment Rights*, *supra* note 207, at 88-89 (discussing *Bivens* and exclusion as remedies that have as their primary purpose deterrence).

²¹⁷ See Romero, *Domestic Fourth Amendment Rights*, *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 (discussing how cases involving Fourth Amendment issues for undocumented noncitizens have operated to erode Fourth Amendment rights in cases involving citizens).

²¹⁹ Cole, *In Aid of Removal*, *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).

²²¹ See Robert M. Bloom, *Border Searches in the Age of Terrorism*, 78 MISS. L. J. 295, 299 (2008) (describing reasonableness as "touchstone" for Fourth Amendment rights).

²²² Cf. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (declining to suspend usual requirement of individualized suspicion where the police set up a non-border checkpoint "primarily for the ordinary enterprise of investigating crimes").

²²³ See Bloom, *supra* note 221, at 303.

²²⁴ 387 U.S. 523 (1967).

²²⁵ *Id.* at 536-37.

²²⁶ *Id.*

would justify his detention, as would the owner of a “closely regulated” industry whose business property may be subject to warrantless inspection.²²⁷

Are there “special needs”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)?²²⁹ Border control has been justified as a special need;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.²³¹ However, seizing and jailing thousands of people suspected of 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.²³² Thus, the reasonableness of the seizures and subsequent detentions involved in administrative and expedited removal should be made on a case-by-case basis.²³³ 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.

²²⁷ See, e.g., *New York v. Burger*, 482 U.S. 691, 702-03 (1987).

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, 81-83 (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).

²²⁹ See Jose Magaña-Salgado, *Fair Treatment Denied: The Trump Administration’s Troubling Attempt to Expand “Fast-Track” Deportations* 4, Immigrant Legal Resource Center (June 2017), available at: <https://www.ilrc.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, *Removal in the Shadows*, *supra* note 4, at 194 (reporting number of expedited removals in fiscal year 2015 as 165,935); Wadhia, *Speed Deportations*, *supra* note 10, at 3 (reporting number of administrative removals in fiscal year 2013 as 9,217).

²³⁰ See *Martinez-Fuerte*, 428 U.S. at 552-53, 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 *Martinez-Fuerte* as justified by special law enforcement concerns).

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).

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.”).

²³³ Cf. *Martinez-Fuerte*, 428 U.S. at 564-66 (permitting border checkpoint without issuance of an “area” warrant by a judge).

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,²³⁴ 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.²³⁵ This is not a bad outcome, given the critique of these procedures for their poor institutional design²³⁶ and likelihood of error,²³⁷ 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 arrest does not void a subsequent conviction,²³⁸ 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.²³⁹ 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.²⁴⁰ Criminal records should not be difficult for ICE to obtain, given their regular cooperation with state authorities²⁴¹ and relatively easy access to such records for bond hearings before immigration judges.²⁴² 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.²⁴³ 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.²⁴⁴ For those who entered without inspection, the government must first prove alienage; then the burden shifts to the

²³⁴ See Koh, *Removal in the Shadows*, *supra* note 4.

²³⁵ See *id.* at 200.

²³⁶ See Family, *supra* note 11.

²³⁷ See Frost, *supra* note 15.

²³⁸ See *Gerstein*, 420 U.S. at 118-19 (citing *Frisbie v. Collins*, 342 U.S. 519 (1952)).

²³⁹ See Martin, *Two Cheers*, *supra* note 43, at 702-03.

²⁴⁰ See generally Part IIc.

²⁴¹ See 8 U.S.C. § 1357(g).

²⁴² See Holper, *Beast of Burden*, *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”).

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.²⁴⁵ 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 standard of proof; certainly it is lower than the "clear and convincing evidence" standard that is required for deportability.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.²⁴⁷ If immigration law's presumption of citizenship is to mean anything,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.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.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.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 administrative removal is not appropriate.²⁵²

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

²⁴⁵ 8 C.F.R. § 1240.8(c).

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 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").

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).

²⁴⁸ See *Holper, Beast of Burden*, *supra* note 81, at 113-14 (discussing presumption of citizenship in immigration law).

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).

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.

²⁵¹ See 8 U.S.C. § 1225(b)(1)(C); 8 C.F.R. § 235.3(b)(5)(i).

²⁵² See 8 C.F.R. § 238.1(d).

officers ask the mandated questions),²⁵³ these protections do not ensure freedom from detention during such review.²⁵⁴ 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),²⁵⁵ individuals have been held in immigration detention for over a year.²⁵⁶ 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.²⁵⁷ 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.²⁵⁸

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,

[T]he 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.²⁵⁹

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.²⁶⁰ Stephen

²⁵³ See U.S. Commission on International Religious Freedom, *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal 2* (2016), available at:

<http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf> (stating concerns about CBP officers' interviewing practices and the reliability of the records they create, including: flawed Border Patrol internal guidance that conflates CBP's role with that of USCIS; certain CBP officers' outright skepticism, if not hostility, toward asylum claims; and inadequate quality assurance procedures).

²⁵⁴ See 8 C.F.R. § 235.3(b)(5)(i); § 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, *Removal in the Shadows*, *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., *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.").

²⁵⁹ Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54:4 AMERICAN BAR ASSN. JUDGES' JOURNAL 120, 21-22 (Fall 2015).

²⁶⁰ See U.S. Department of Justice, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and other Staff in the Office of the Attorney General* (July 28, 2008), 69, available at <http://www.justice.gov/oig/special/s0807/final.pdf> (concluding that members of the Bush administration violated civil service laws and departmental policy in selecting candidates for immigration judge positions based on political ties and recommendations rather than professional qualifications).

Legomsky has proposed reforming the Executive Office for Immigration Review, converting immigration judges into administrative law judges.²⁶¹ 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.²⁶² 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.²⁶³ 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.²⁶⁴

There of course is the added problem of cost; immigration judges have a crushing caseload, with half a million cases pending as of February 2017.²⁶⁵ 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.²⁶⁶ Although Attorney General Jeff Sessions announced that he planned to hire more immigration judges, filling a vacancy can take up to two years, so judges’ dockets will not be cleared up anytime soon.²⁶⁷

Cost, however, is not what should 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*.²⁶⁸ In the criminal justice context, probable cause hearings come with a financial cost, yet the Court in

²⁶¹ See, e.g., Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L. J. 1635, 1640 (2010).

²⁶² See 8 C.F.R. § 1003.10.

²⁶³ 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, *Removal in the Shadows*, *supra* note 4, at 232. However, as she notes, “where deficiencies in immigration courts exist, their shadows are likely even worse.” *Id.*

²⁶⁴ Even the Court in *Riverside* recognized that there should be some flexibility in the provision of a prompt probable cause hearing. See *Riverside*, 500 U.S. at 57. There the flexibility involved more time; here the flexibility would involve using an immigration judge, not a truly neutral magistrate judge.

²⁶⁵ See Madison Park, *By the Numbers: Why Immigration Cases Take So Long*, CNN (Apr. 12, 2017), available at: <http://www.cnn.com/2017/04/12/politics/immigration-case-backlog-by-the-numbers/index.html>. (“542,411: This is the number of pending cases in immigration court as of February. The country’s 58 immigration courts are already dealing with a crush of more than a half a million backlogged cases...”); see also Sarah Sherman-Stokes, *Immigration Judges Will Always be Overworked. Now They Will Be Untrained, Too*, Washington Post (July 11, 2017), available at: https://www.washingtonpost.com/opinions/immigration-judges-were-always-overworked-now-theyll-be-untrained-too/2017/07/11/e71bb1fa-4c93-11e7-a186-60c031eab644_story.html?utm_term=.458a3476d09b (“On average, an immigration judge completes more than 1,500 cases per year, with a ratio of 1 law clerk for every 4 judges.”).

²⁶⁶ See *id.*

²⁶⁷ See Blitzer, *supra* note 45.

²⁶⁸ 424 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.

Gerstein and *Riverside* did not weigh that cost in determining the value or necessity of such hearings.²⁶⁹ Indeed, in the ICE detainer litigation, cost was not a consideration, given that courts were awarding damages for the unlawful detention against government actors.²⁷⁰ 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.’”²⁷¹ 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.”²⁷²

Would requiring immigration judges to review the detention for probable cause be no more than a “rubber stamp” on the ICE officer’s decision?²⁷³ 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.²⁷⁴ 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.”²⁷⁵ 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.²⁷⁶

²⁶⁹ 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.

²⁷⁰ See *supra* Part II.d.

²⁷¹ Legomsky, *Restructuring Immigration Adjudication*, *supra* note 261, at 1647.

²⁷² *Id.*

²⁷³ See, e.g., Johnson, *Racial Profiling*, *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]).

²⁷⁴ 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, *Waiving Due Process (Goodbye)*, *supra* note 20.

²⁷⁵ 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, *Removal in the Shadows*, *supra* note 4, at 217 (citing *United States v. Ramos*, 623 F.3d 672, 678 (9th Cir. 2010)).

²⁷⁶ 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 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:

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.²⁷⁷ 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 that I have outlined in this article.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰ A full discussion of the statutory bars to declaratory and injunctive relief is beyond the scope of this article, however.²⁸¹

PRECONCEPTIONS, PERCEPTIONS, PRACTICES (1985) (describing results of study of warrant practices in in multiple jurisdictions).

²⁷⁷ See David E. Steinberg, *Zealous Officers and Neutral Magistrates: The Rhetoric of the Fourth Amendment*, 43 CREIGHTON L. REV. 1019, 1020 (2010) (arguing that "the Court's distinction between 'neutral' magistrates and 'zealous' police officers is seriously misleading").

²⁷⁸ 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.").

²⁷⁹ 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 Ins 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).

²⁸⁰ See *Gerstein*, 420 U.S. at 106-07, n5, n6 (class of plaintiffs who complained that their Fourth Amendment rights were violated when they were not promptly brought before a neutral judge demanded not release, but declaratory and injunctive relief, asking that the court to order that a probable cause hearing be held); 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).

²⁸¹ 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, 1111 (9th Cir. 2010) (considering declaratory and injunctive relief for class of noncitizens subject to mandatory detention under 8 U.S.C. § 1226(c) whose detention had exceeded six months and stating that "the text...most clearly shows that Section 1252(f) was not meant to bar classwide declaratory relief."); *id.* at 1119, 1126 (citing 8 U.S.C. § 1252(e)(1)(A)) (Comparing the text of 1252(f)(1) to the statutory preclusion on courts entering "declaratory, injunctive, or equitable relief" in the context of expedited removal and writing that "Congress knew how to say 'declaratory relief' in enacting the IIRIRA, but it chose not to use it in Section 1252(f)."); see also *Reno v. AADC*, 525 U.S. 471, 481-82 (1999) ("By its plain terms, and even by its title, that provision [§ 1252(f)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases."); *RILR v. Johnson*, 80 F.Supp.3d 164, 184 (D.D.C. 2015) (citing *Rodriguez*, 591 F.3d at 1120) ("Section 1252(f)(1) 'prohibits only injunction of 'the operation of' the detention statutes, not injunction of a violation of the statutes...[p]ut another way, '[w]here ... a petitioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of [the statute], and § 1252(f)(1) therefore is not implicated.'").

Habeas corpus is in many ways an ideal remedy because it offers the victim of the Fourth Amendment violation what he lost: physical freedom.²⁸² It 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.²⁸³ 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).²⁸⁴ Courts have found that the *Bivens* remedy is inappropriate in the context of regular removal proceedings because of the availability of other relief;²⁸⁵ additionally, the Supreme Court recently has cautioned courts against extending the *Bivens* remedy to new situations.²⁸⁶

The application of the exclusionary rule, although another possible remedy, may not provide the specific reparation that a noncitizen seeks. 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.²⁸⁷ Moreover, the Supreme Court has held that the exclusionary rule does not apply in the context of regular removal proceedings except in certain

²⁸² See Heffernan, *supra* note 216, at 806.

²⁸³ *Id.* at 806-07.

²⁸⁴ See ACLU, *ICE Detainers*, *supra* note 7.

²⁸⁵ 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, 882-84 (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. citizen – 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 (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).

²⁸⁶ In *Ziglar v. Abbasi* the Court in 2017 dismissed a *Bivens* claim against the FBI Director, Former Attorney General John Ashcroft, and former INS Commissioner James Ziglar, for harsh 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.*

²⁸⁷ 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 (1983).

circumstances.²⁸⁸ Even if one of *Lopez-Mendoza*'s exceptions applied,²⁸⁹ 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.²⁹⁰ In removal proceedings, however, the proscribed path to judicial review of a removal order is separate from a challenge to detention.²⁹¹ A challenge to the legality of detention within the context of administrative removal is through habeas corpus.²⁹²

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.²⁹³ The ability to

²⁸⁸ See *Lopez-Mendoza*, 468 U.S. at 1050-51.

²⁸⁹ 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 (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).

²⁹⁰ See 8 U.S.C. § 1228(b)(4)(E) (“The Attorney General shall provide that... a record is maintained for judicial review.”); see also Koh, *Removal in the Shadows*, *supra* note 4, at 211; Gerald Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 572 (2010).

²⁹¹ See 8 U.S.C. § 1252(a)(5) (“[A] petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e).”); see *id.* at (e) (limitations on judicial review of expedited removal orders).

²⁹² See *Aguilar v. U.S. Immigration & Customs Enf’t Div. of Dep’t of Homeland Sec.*, 510 F.3d 1, 11 (1st Cir. 2007) (citing *Demore v. Kim*, 538 U.S. 510, 516 (2003)). Specifically, federal district courts have jurisdiction to address “questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws.” *INS v. St. Cyr*, 533 U.S. 289, 306–07 (2001); See 28 U.S.C. § 2241.

²⁹³ 8 U.S.C. § 1252(a)(2)(A) provides:

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review (i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited removal order]; (ii) except as provided in subsection (e), a decision by the Attorney General to invoke the [expedited removal procedures]; (iii) the application of [expedited removal] to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or; (iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the [expedited removal] provisions.

8 U.S.C. § 1252(a)(2)(A).

Judicial review of an expedited removal order is available in habeas corpus proceedings, but is

systemically challenge the expedited removal procedures, for which Congress gave a 60-day window after its implementation,²⁹⁴ already was unsuccessful in the D.C. Circuit in the case of *AILA v. Reno*²⁹⁵ 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.²⁹⁶

More recently, in *Castro v. U.S. Department of Homeland Security*,²⁹⁷ 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.²⁹⁸ Deciding whether the statute precluding judicial review of expedited removal orders violated the Suspension Clause,²⁹⁹ 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.³⁰⁰ 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."³⁰¹ The Supreme Court denied certiorari in the *Castro* case.³⁰²

The *Castro* decision, although problematic,³⁰³ does not foreclose future habeas relief and Suspension Clause arguments for the wide variety of noncitizens subject to expedited removal

limited to determinations of--(A) whether the petitioner is an alien; (B) whether the petitioner was ordered removed under such section, and (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee..., or has been granted asylum... , such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

8 U.S.C. § 1252(e)(1).

²⁹⁴ See 8 U.S.C. § 1252(e)(3)(A) (providing jurisdiction to the district court for the District of Columbia to review challenges to the validity of the expedited removal system, including constitutional challenges or other challenges that the procedures are invalid, which must be brought within sixty days after the implementation of the challenged statute or regulation).

²⁹⁵ 199 F.3d 1352 (D.C. Cir. 2000).

²⁹⁶ *AILA v. Reno*, 18 F.Supp.2d 38, 60 (D.D.C. 1998). With respect to the organizational plaintiffs, their only claim that survived a standing challenge was their First Amendment claim, which was rejected. *Id.* at 52, 61-62. The D.C. Circuit decided that the organizational plaintiffs did not have standing to raise claims, whether statutory or constitutional, on behalf of noncitizens subject to the expedited removal procedures. See *AILA*, 199 F.3d at 1364.

²⁹⁷ 835 F.3d 422 (3d Cir. 2016).

²⁹⁸ *Id.* at 427-28.

²⁹⁹ U.S. CONST., Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

³⁰⁰ *Castro*, 835 F.3d at 445-46.

³⁰¹ *Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

³⁰² *Castro v. DHS*, 137 S.Ct. 1581 (2017).

³⁰³ 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

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.³⁰⁴ 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),³⁰⁵ more noncitizens subject to these procedures will 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 *Castro*, they will have created a stake hold in the United States via their presence and connections to the U.S. community, which in turn allows future courts to entertain whether stripping them of habeas corpus rights violates the Suspension Clause.³⁰⁶ 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.³⁰⁷ 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.³⁰⁸ 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

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, *In Aid of Removal*, *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).

³⁰⁴ See Kelly, *Border Security Implementation Memo*, *supra* note 3, at 5-6.

³⁰⁵ 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 this approach values the state’s consent above all else); T. Alexander Aleinikoff, *Aliens, Due Process and “Community Ties:” A Response to Martin*, 44 U. PITT. L. REV. 237, 244-45 (1983) (arguing that due process should turn not on the person’s membership in the United States community—the United States’ relationship to her—but rather on her community ties—what the United States is taking from her).

³⁰⁶ See *Castro*, 835 F.3d at 446-48. For a discussion of why the statute stripping those in expedited removal proceedings of their habeas rights violates the Suspension Clause, see Neuman, *Habeas Corpus Suspension Clause*, *supra* note 290, at 571-77 (citing *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (arguing that after the Court’s *Boumediene v. Bush* decision, statutory preclusion on habeas review of expedited removal violates the Suspension Clause).

³⁰⁷ See *Castro*, 835 F.3d at 449.

³⁰⁸ 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.”).

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.”³⁰⁹

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.³¹⁰ 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.³¹¹ 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.³¹² And should Kevin Johnson’s call for “truly rebellious lawyering” be answered by immigration defense attorneys,³¹³ 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.”³¹⁴ *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”³¹⁵ – will increasingly make more decisions to detain for deportation with absolutely no review from any independent judge. The Court in *Gerstein*

³⁰⁹ David Martin, *Two Cheers*, *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 many others will get “caught up in the sweep, and have insufficient opportunity to show that they have developed more extensive ties to the United States.” *Id.* at 700. As compared to when expedited removal is only applied at the border, or to those caught in the act of clandestine entry, “the physical facts make it highly likely that the procedure covers persons whose stakes are traditionally judged to be low – persons applying for a new benefit rather than persons who might suffer the deprivation of certain liberties or true entitlements they have previously enjoyed.” *Id.* at 700-01.

³¹⁰ See *supra* Part IIb, c.

³¹¹ See Chacón, *A Diversion of Attention*, *supra* note 175, at 1631.

³¹² The funding for a public defender system for detainees has materialized in cities like New York and San Francisco, and is being considered in other cities such as Boston. See, e.g., San Francisco Public Defender, *SF Public Defender Immigration Unit Launches Today* (May 23, 2017), available at: <http://sfpublicdefender.org/news/2017/05/sf-public-defender-immigration-unit-launches-today/>; Tito Jackson *Pitches Fund for Immigrants*, BOSTON GLOBE (Feb. 8, 2017). Also, the New England Chapter of the American Immigration Lawyers Association recently created a Federal Litigation Project Fund to support immigration lawyers who wish to engage in impact litigation in federal court; this fund also provides for a seasoned federal court litigator to act as a mentor for such attorneys. The author is a trustee of this Fund.

³¹³ See generally Johnson, *Racial Profiling*, *supra* note 8.

³¹⁴ *Gerstein*, 420 U.S. at 114.

³¹⁵ See ACLU, *Rapid Deportations*, *supra* note 115, at 2.

cautioned against such prosecutorial judgment “stand[ing] alone” to meet the requirements of the Fourth Amendment.³¹⁶

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.³¹⁷ If courts take a closer look at administrative and expedited removals, they will begin to see the Fourth Amendment violations that lurk in immigration law’s shadows.

³¹⁶ Gerstein, 420 U.S. at 117.

³¹⁷ See *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).