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Law and Policy Analysis

In July, the Trump administration **announced** that immigration police could start detaining and deporting people anywhere without any involvement by any judge. Prior to subjecting a person to this **shadow** deportation process, the Department of Homeland Security officer need only determine that the person is without legal status and without two years of continuous presence in the United States. Immigration advocates have just **sued**, asking a federal court to block the policy.

The policy, called **"expedited removal,"** was first authorized in 1996 as part of a major congressional overhaul of immigration law. At its inception, immigration authorities used expedited removal only to turn back persons stopped at the border seeking to enter the United States without a valid visa. A court **upheld** the truncated procedures back then, holding that noncitizens seeking admission to the U.S. have no constitutional rights with respect to their applications for admission. Immigration law's **"entry fiction,"** a legal fiction that treats those seeking admission as though stopped at the border, even though they are physically here in the U.S., was the judiciary's answer to the Due Process claims of those litigants.

Over time, expedited removal expanded inward, so that it no longer applies solely at the border. This caused the **Third** and **Ninth** Circuits to grapple with Due Process claims of litigants caught near (not at) the border. As a threshold matter, courts had to decide whether Congress' attempts to block federal court review of expedited removal violated the **Suspension Clause** by restricting access to courts by persons challenging their unlawful executive detention. With the recent announcement, expedited removal has been expanded to its maximum reach. The border is everywhere.

Expanded expedited removal creates another constitutional problem: it violates the Fourth Amendment rights of those who are subject to the procedures. The **Fourth Amendment** protects persons against unreasonable searches and seizures, requiring for such government intrusion a warrant based on probable cause. The Supreme Court held in **1975** that to continue any pretrial detention in the criminal process, a neutral judge must promptly find probable cause; a prosecutor's charging decision was not enough. In **1991**, the Court clarified "prompt" to require that for any warrantless arrest, police must bring a detainee before a neutral judge within 48 hours.

Yet the expedited removal procedures exclude judges altogether from the process. The immigration police detain and deport, with no neutral judge ensuring that the decision passes some threshold level of accuracy. This matters a great deal, because immigration police can and have made mistakes about who should be deported. U.S. citizens, for example, have been caught in the **ICE dragnet**. Over a decade ago, the U.S. Commission on International Religious Freedom **reported** that border patrol officers were illegally turning people away using the expedited removal procedures, failing to refer persons who expressed a fear of persecution to an asylum officer. A follow-up **report** by this Commission found minimal improvements.

I have argued in a recent **article** that expanded expedited removal violates detainees' Fourth Amendment rights. The Fourth Amendment requirement of a prompt probable cause hearing before a neutral judge applies even when the person arrested is not a citizen, and even when the process that follows is not a criminal trial. The Fourth Amendment's requirement of a neutral judge prior to detention was the basis of successful **litigation**

challenging ICE's detainer practices. In 2012, the Supreme Court reiterated in dicta that the Fourth Amendment to immigration arrests. To be sure, the *remedies* available for Fourth Amendment violations are not always the same in the immigration context. The Court held in **1984** that the exclusionary rule did not apply in deportation proceedings, but confirmed that the Fourth Amendment **applied**. The Court also has recognized **"border exceptionalism"** in the Fourth Amendment context. Yet seizing and jailing thousands of people suspected of immigration violations who are found anywhere within the U.S. is a far cry from the brief stops of vehicles or persons, which the Court **upheld** when they occur near the border. The government's interest may be at its **"zenith"** at the border, but that border cannot be stretched to cover every inch of the United States.

To challenge expanded expedited removal through the Fourth Amendment is to free litigants from the highly individualized and flexible **Due Process** inquiry. As students of immigration law have learned, Due Process can **turn** on status, place, stake, or some combination thereof. The Fourth Amendment turns on the **reasonableness** of the seizure, which no doubt gives courts some wiggle room. Yet it should matter not whether the person ICE seizes turns out to be a U.S. citizen or an undocumented person, or whether the proceedings that follow are civil or criminal. The seizure is unreasonable, because no neutral judge provides a check on the immigration police. Detentions pursuant to expanded expedited removal most certainly will last more than the **48 hours** required to get a person before a judge. Hence, these detentions violate the Fourth Amendment because no judge reviews them.

To correct the Fourth Amendment violations, who should that judge be? I suggested that it be an immigration judge, although I spoke too soon, as even their true neutrality has been called into question. Immigration judges are Department of Justice employees, working for the nation's top prosecutor, the Attorney General. During the Trump administration, both Attorneys General Sessions and Barr have taken several **steps** to undermine immigration judges' independence. Just last month, the American Bar Association, American Immigration Lawyers Association, Federal Bar Association, and National Association of Immigration Judges sent a **letter** to Congress asking for an independent immigration court. In fact, in a forthcoming **article** I argue that our entire immigration system lacks a truly neutral judge and therefore all immigration pretrial detentions violate the Fourth Amendment. A federal **magistrate** judge would be the optimal judge to provide the requisite Fourth Amendment check on the immigration police as they seek to conduct **hundreds of thousands** of unreasonable seizures.

Detention and Access to Justice, Immigration, Immigration Detention and Access to Justice, Search and Seizure