



**Legal Principles Governing Arrest
and the Collection of Evidence by
Immigration Officers: The Fourth
Amendment, Immigration and Nationality
Act, and Other Provisions**

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1. GENERAL OVERVIEW

Federal agents are not entitled to make arrests of any person in whatever manner they desire. Instead, they must heed the limits on their authority imposed by various mechanisms, including the Constitution, statutes, and regulations. The Fourth Amendment, INA, and federal regulations all place limits on immigration officers' ability to search for individuals suspected of being unlawfully present, interrogate individuals about their immigration status, and arrest individuals for placement in removal proceedings. Overstepping these limits can make the resultant evidence suppressible in a removal proceeding.

Courts have recognized two provisions of the constitution that may serve as the basis for a motion to suppress: (1) the Fourth Amendment and (2) the Due Process Clause of the Fifth Amendment.

Immigration officers' authority is also constrained by various provisions of the Immigration and Nationality Act (INA). INA § 287 sets the conditions under which immigration officers may investigate, search for, and arrest individuals believed to be in the country without authorization. These provisions impose additional restraints not required by the Constitution and immigration officers may not violate these provisions while exercising their authority.

The conduct of immigration officers' is governed by federal regulations codified at 8 C.F.R. Part 287. These regulations impose additional limitations on federal agents beyond those mandated by the Constitution and the INA. Immigration officers may also be bound by "subregulations" contained in Operating Instructions and other internal guidance.

2. FOURTH AMENDMENT PRINCIPLES

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.

U.S. Const. amend. IV. (emphasis added)

Undergoing a "search" or a "seizure" is a prerequisite for a Fourth Amendment violation.

Determining the legality of a search or seizure always hinges on whether it was *reasonable*. *Michigan v. Fisher*, 130 S. Ct. 546 (2009).

Reasonableness

The *only* searches or seizures afforded a presumption of reasonableness are those carried out pursuant to a warrant issued by a neutral magistrate (e.g. judicial officer). See *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). Without such a warrant, a search or seizure must fall under an exception to the warrant requirement to be considered “reasonable.”

The misconduct is judged against how the officer acted in light of the objective facts available to him, not his subjective intentions with regard to the victim. See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). Would a reasonable officer have known he or she was violating the 4th Amendment?

a. Fourth Amendment Applicability to Non-Citizens

Courts have consistently held that non-citizens are afforded Fourth Amendment protections. See *Cotzoy v. Holder*, 725 F.3d 172, 181 (2d Cir. 2013) (“[I]t is uncontroversial that the Fourth Amendment applies to aliens and citizens alike.”); *Oliva-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259, 284-85 (3d Cir. 2012) (reaffirming that a civil immigration enforcement actions must be “consistent with the limitations imposed by the Fourth Amendment”); *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 2012) (applying Fourth Amendment to immigration arrests); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971) (“We agree with the Government that the [INA’s] arrest provision must be read in light of constitutional standards,” such that arrests must be supported by “probable cause”). In considering the issue of who Fourth Amendment protections applied to, the Supreme Court observed that, “‘the people’ protected by the Fourth Amendment... refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265, 110 S. Ct. 1056, 1061 (1990). In distinguishing *Verdugo-Urquidez* from another case, the Court inferred illegal aliens could be considered as members of “the people because they, “[are] [i]n the United States voluntarily and presumably [have] accepted some societal obligations...” *Verdugo-Urquidez*, 110 S. Ct. at 1065.

b. “Search” and “Seizure” Defined

Search

Katz v. United States, 389 U.S. 347 (1967), defined a “search” as any government action that violates an individual’s *reasonable expectation of privacy*. To meet this standard, a movant must establish (1) that he personally believed his privacy was violated, and (2) that this expectation of privacy was objectively reasonable. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

In the immigration context, the constitutionality of a “search” will generally arise only if government agents enter a home or non-public area of a commercial premises, or physically retrieve evidence from a person’s body or belongings.

Seizures

The Court has held that a “seizure” occurs whenever a government agent intentionally “terminates or restrains [a person’s] freedom of movement.” *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal citations omitted). A seizure clearly occurs any time law enforcement agents arrest someone or pull over a vehicle. A seizure also takes place when government agents act in such a manner that a “reasonable person” would not feel free to leave or end the encounter. *See United States v. Mendenhall*, 446 U. S. 544, 553 (1980) (Opinion of Stewart, J.); *Florida v. Bostick*, 501 U.S. 429, 534-35 (1991). In *Almeida-Amaral*, for example, the Second Circuit found a seizure occurred when a Border Patrol officer commanded an individual to stop, even though no physical contact took place. *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 232 (2d Cir. 2006). Note, however, that government agents are not required to inform individuals of their constitutional right to walk away or ignore questioning. *United States v. Drayton*, 536 U.S. 194, 206-07 (2002).

In determining whether a reasonable person would have felt free to end an encounter, courts presuppose an innocent person and employ a “totality of the circumstances” approach. *Bostick*, 501 U.S. at 438-39. Thus, a seizure may result from, among other things, “the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the [person], or the use of language or a tone of voice indicating that compliance with the officer’s request might be compelled.” *Benitez-Mendez v. INS*, 760 F.2d 907, 908-09 (9th Cir. 1985) (citation omitted); *see also Santos v. Frederick County Board of Commissioners*, 725 F.3d 451, 460-61 (4th Cir. 2013).

The Supreme Court requires seizures made in the absence of a warrant to be supported by “reasonable suspicion” that the particular person is engaged in unlawful activity, or “probable cause” to believe the particular person violated the law.

c. “Exceptions” to the Fourth Amendment’s warrant requirement

The absence of a warrant makes any resulting search or seizure presumptively *unreasonable*. To rebut the presumption, the government must demonstrate the existence of an exception to the warrant requirement. These exceptions are:

- “Terry” *stops and frisks*. When an officer possesses “reasonable suspicion” that an individual is or will soon be engaged in illegal activity, he may

briefly stop the person to ascertain his intentions and, if the officer further suspects the person to be armed and dangerous, frisk him for weapons.

- *Arrests in public places.* Officers may arrest individuals in public whom they have “probable cause” to believe have violated the law.
- *Searches based upon consent.* Any search made after receiving valid consent is considered “reasonable.”
- *“Exigent” circumstances.* Officers may enter a home without a warrant when the “exigencies of the situation” require immediate intervention, such as apprehending a fleeing felon, preventing the destruction of evidence, or assisting persons with serious injuries. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978)).
- *Searches incident to a lawful arrest.* When an individual is *lawfully* arrested, officers may search his person and the immediately surrounding area for weapons or evidence. *Chimel v. California*, 395 U.S. 752 (1969).
- *Automobile searches.* When an officer has “probable cause” to believe an automobile contains evidence of a crime, he may search the car. *Carroll v. United States*, 267 U.S. 132 (1925).
- *Plain view.* Officers may seize criminal contraband if it is in “plain view” in an area where they have a right to be. *Washington v. Chrisman*, 455 U.S. 1 (1982).
- *“Special needs” or administrative searches.* Officers may conduct warrantless searches in numerous contexts divorced from normal law enforcement needs, such as at the border.

d. The difference between “probable cause” and “reasonable suspicion”

The Supreme Court has established two points at which an officer may take action on his belief without obtaining a warrant. These points are known as “probable cause” and “reasonable suspicion.”

“Probable cause” requires that “the facts and circumstances within . . . the officers’ knowledge and of which they ha[ve] reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160,

175-76 (1949) (internal quotation marks, brackets, and citation omitted). *See also Wong Sun v. United States*, 371 U.S. 471, 480 (1963) (quoting *Carroll*, 267 U.S. at 162) (Probable cause generally requires a combination of facts sufficient to create a reasonable *belief* that a violation of law has occurred.). Probable cause is always required for a government officer to obtain a search warrant or arrest someone.

On review, courts examine the facts known to the officer at the time the search or arrest occurred. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

“Reasonable suspicion.” A middle ground where officers have reason to suspect illegal activity but lack sufficient evidence to establish probable cause.

Reasonable suspicion must be supported by objective “articulable” facts rather than a mere “hunch.” *Terry v. Ohio*, 392 U.S. 1, 21, 27 (1968). Reasonable suspicion is always required before a government agent conducts an investigative “*Terry*” stop. In the immigration context, courts permit such detentions where officers possess reasonable suspicion that an individual is illegally in the United States.

e. “Reasonable suspicion” of unlawful alienage

“Reasonable suspicion” can arise from virtually any set of circumstances creating plausible grounds to suspect that a person is in the country without authorization. Though they require more than a “hunch,” determinations of reasonable suspicion may “be based on commonsense judgments and inferences about human behavior.” *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

Race, ethnicity, or nationality

In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court held that apparent Mexican ancestry alone cannot provide “reasonable suspicion” of alienage, much less unlawful status. Subsequently, numerous circuit courts have concluded that reliance on race or ethnicity *alone* constitutes an “egregious” violation of the Fourth Amendment. *See Puc-Ruiz v. Holder*, 629 F.3d 771, 779 (8th Cir. 2010); *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 237 (2d Cir. 2006); *Orhorhaghe v. INS*, 38 F.3d 488, 492 (9th Cir. 1994). Moreover, the Ninth Circuit has given foreign appearance little weight as a factor supporting reasonable suspicion in areas with high concentrations of racial or ethnic minorities. *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 n.21-22 (9th Cir. 2000).

At the same time, the Court in *Brignoni-Ponce* credited the government’s assertion that “trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.” *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). As a consequence,

immigration officers may claim to have relied on ostensibly “neutral” factors in developing reasonable suspicion even if skin color was their primary motivation.

Nervousness

“Nervous, evasive behavior” may serve as a relevant factor in establishing reasonable suspicion, and immigration officers frequently cite it as a basis for suspecting that an individual is here without authorization. *Wardlow*, 528 U.S. at 124.

Flight from immigration officers

The Supreme Court has held that flight from law enforcement officers, standing alone, provides reasonable suspicion of illegal activity,¹¹⁹ and courts have long held that attempts to evade immigration officers provide justification to temporarily detain them for questioning. *Wardlow*, 528 U.S. at 124-125; *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630 (BIA 1974).

Failure to acknowledge immigration officers

Immigration officers may also cite an individual’s deliberate *failure* to acknowledge their presence as a factor justifying reasonable suspicion. While the Ninth Circuit categorically rejected such conduct as a factor to be considered in a reasonable suspicion analysis (*Gonzalez-Rivera*, 22 F.3d at 1446-1447.) the Supreme Court subsequently held its relevance depends on the context in which it arose. *See Arvizu*, 534 U.S. at 275-76 (a “failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)”).

f. Judicial approval of probable cause

Not only does the Fourth Amendment require probable cause; it also requires that at some point, the probable cause “determination must be made by a judicial officer” who can make a neutral and detached assessment. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975) (emphasis added). This judicial determination must occur “either before” the seizure in the form of a judicially issued warrant, or “promptly after” the seizure in the form of a probable cause hearing. *Id.* While *Gerstein* did not assign a specific time limit to “prompt[ness],” the Supreme Court subsequently clarified that, absent extraordinary circumstances, this determination must be made within 48 hours of the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991) (setting 48 hours as the outer presumptive limit, and holding that County’s policy of conducting probable cause hearings within “two days, exclusive of Saturdays, Sundays, or holidays[,]” was not reasonable).

Although *Gerstein* arose in the criminal context, the Supreme Court framed its ruling broadly as a Fourth Amendment rule that applies to “any significant pretrial restraint of liberty.” *Gerstein*, 420 U.S. at 125 (emphasis added). And it is well settled that immigration arrests must comply with the Fourth Amendment. In fact, the INS itself recognized twenty years ago that it was “clearly bound by . . . [judicial] interpretations [regarding arrest and post-arrest procedures], including those set forth in *Gerstein v. Pugh* [.]” Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406-01, 42411 (1994).

g. “Standing” to challenge Fourth Amendment Violations

Only individuals who have a *reasonable expectation of privacy over the area searched*, or who were *themselves seized*, can challenge the validity of a search or seizure.

One need not personally own a residence or commercial property to have a reasonable expectation of privacy. *Minnesota v. Olson*, 495 U.S. 91 (1990).

While employees have no expectation of privacy in public areas of their worksites, (*Marshall v. Barlow’s Inc.*, 436 U.S. 307, 315 (1978).) they can challenge searches in nonpublic areas. *Mancusi v. DeForte*, 392 U.S. 364 (1968).

While car passengers ordinarily lack standing to challenge *searches* of vehicles they neither own nor lease, (*Rakas v. Illinois*, 439 U.S. 128 (1978).) if law enforcement agents stop or obstruct a car, both the driver and passenger have been seized. *Brendlin v. California*, 551 U.S. 249 (2007).

3. ENCOUNTERS IN PUBLIC PLACES

a. “Consensual” questioning about immigration status

Fourth Amendment

Under the Fourth Amendment, law enforcement agents—including immigration officers—may *always* pose questions to persons they encounter in locations where the officers have a right to be. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185 (2003) (“[I]nterrogation relating to one’s identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.”); *Davis v. Mississippi*, 394 U. S. 721, 727 n. 6 (1969). However, persons approached for questioning have no corresponding obligation to answer and may simply walk away. See *Brown v. Texas*, 443 U.S. 47 (1979). As previously discussed

In *INS v. Delgado*, 466 U.S. 210, 218 (1983), immigration agents carried out a factory raid to search for undocumented workers. Some agents questioned

employees about their immigration status while others positioned themselves near the building exits. The Supreme Court found that no seizure had occurred because the agents neither prevented the workers from moving about the factory nor created an impression that they would be detained if they sought to leave.

INA

Most courts have held that the INA places independent limits on immigration officers' authority to ask questions about immigration status. Under INA § 287(a)(1), immigration officers may "interrogate any alien or *person believed to be an alien* as to his right to be or to remain in the United States." INA § 287(a)(1) (emphasis added). As one court has stated, "[a] plain reading of this statute requires the government to show that immigration officials *believed* a person was an alien before questioning him." *United States v. Flores-Sandoval*, 422 F.3d 711, 714 (8th Cir. 2005). See also *United States v. Garcia*, 942 F.2d 873, 877 (5th Cir. 1991); *United States v. Alvarez-Sanchez*, 774 F.2d 1036, 1041 (11th Cir. 1985); *Lee v. INS*, 590 F.2d 497, 501 (3d Cir. 1979); *Ill. Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977) (en banc); *Au Yi Lau*, 445 F.2d at 222; *Yam Sang Kwai v. INS*, 411 F.2d 683, 686-87 (D.C. Cir. 1969); *La Duke v. Nelson*, 762 F.2d 1318, 1327 (9th Cir. 1985).

Likewise, in *Matter of King and Yang*, 16 I&N Dec. 502, 504-05 (BIA 1978), the Board confirmed that INA § 287(a)(1) requires immigration officers to have a "reasonable suspicion of alienage" before questioning individuals about their immigration status, even where "no detention [i]s involved." Neither the INA nor federal regulations describe what factors may create a "reasonable suspicion of alienage." While an individual's ethnic appearance alone is not sufficient to create reasonable suspicion that a person is a noncitizen (*Matter of Toro*, 17 I&N Dec. 340 (BIA 1980).), it may, in combination with other factors, provide justification for an officer to question an individual about his immigration status. *Matter of King and Yang*, 16 I&N Dec. at 504-05.

b. Requesting documentation from an individual

Fourth Amendment

A request for identification does not, by itself, constitute a seizure. *Delgado*, 466 U.S. at 216. Again, however, such an encounter can *become* a seizure if the officer retains the identification in a manner that would make a reasonable person not feel free to request its return and depart the area. *Florida v. Royer*, 460 U.S. 491, 504 n.9 (Opinion of White, J.) (1983). For example, if an officer retains the identification while running the person's name through a government database, a seizure may have occurred because a reasonable person would not feel free to leave without his ID.

INA

Under INA § 264(e), it is a misdemeanor for any adult noncitizen “issued” an alien registration certificate or receipt card to fail to have it in his “personal possession” at all times. This requirement applies solely to “lawfully admitted aliens,” for the text of the law imposes no obligation on noncitizens never issued documents in the first place. *Katris v. INS*, 562 F.2d 866, 869 (1st Cir. 1977). However, courts have found that claiming to possess lawful immigration status, combined with a failure to produce documentary proof of such status, provides probable cause to arrest under § 264(e). *Benitez-Mendez v. INS*, 760 F.2d 907, 909 n.2 (9th Cir. 1985); *United States v. Wright*, 706 F.Supp. 1268, 1274 (N.D. Tex. 1989).

Because such requests concern an individual’s “right to be or remain in the United States,” it is arguable that § 287(a)(1) requires officers to have a “reasonable suspicion of alienage” before asking for documents.

c. Investigative (*Terry*) stops

Fourth Amendment

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that police under certain circumstances could forcibly (but temporarily) detain individuals for limited questioning. While a “*Terry* stop” qualifies as a seizure under the Fourth Amendment (*Terry*, 392 U.S. at 16.), it is less intrusive than a full-blown arrest and may thus be supported by “reasonable suspicion” rather than “probable cause.” *Brown v. Texas*, 443 U.S. 47, 51 (1979). As previously discussed, lower federal courts and the BIA have held that immigration officers may temporarily detain individuals whom they reasonably suspect are in the country without authorization. *Au Yi Lau v. INS*, 445 F.2d 217, 223 (D.C. Cir. 1971); *Matter of Yau*, 14 I&N Dec. 630, 632-33 (BIA 1974).

INA and CFR

Federal courts and the BIA have uniformly held that INA § 287(a)(1) authorizes immigration officers to make brief investigative stops of individuals reasonably suspected of being in the country without authorization. *Ojeda-Vinales v. INS*, 523 F.2d 286, 287 (2d Cir. 1975); *Au Yi Lau*, 445 F.2d at 223; *Yau*, 14 I&N Dec. at 632-33. Federal regulations likewise authorize immigration officers to briefly detain individuals for questioning whom they have reasonable suspicion to believe are unlawfully present in the country. 8 C.F.R. § 287.8(b)(2).

d. Length of detention during an investigative (*Terry*) stop

The Fourth Amendment limits the period of permissible detention during a valid *Terry* stop. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185-86 (2003). During such a stop, the seizing agents must diligently pursue a means of

investigation that is likely to quickly confirm or dispel their suspicions. *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

If an investigative detention is excessively lengthy, it will be considered a *de facto* arrest and found unconstitutional unless supported by probable cause. In the immigration context, the Second Circuit has recognized that an unfounded investigative stop may be considered egregious if it is “particularly lengthy.” *Almeida-Amaral v. Gonzales*, 461 F.3d 231, 236 (2d Cir. 2006).

The Supreme Court has not specified any rigid time limitations on investigative detentions but repeatedly has said they should be “temporary” or “brief.” *Hiibel*, 542 U.S. at 185-86; *Dunaway v. New York*, 442 U.S. 200, 212 (1979); *Brignoni-Ponce*, 422 U.S. at 881-82; *Adams v. Williams*, 407 U.S. 143, 146 (1972). In *Brignoni-Ponce*, the Court emphasized that inquiries into immigration status ordinarily last no longer than one minute. *Brignoni-Ponce*, 422 U.S. at 880; *cf. Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) (clarifying that the Fourth Amendment does not allow state and local police to detain a person, or prolong a detention, solely to verify immigration status). In a subsequent case, the Court noted that it had never approved a stop lasting ninety minutes. *United States v. Place*, 462 U.S. 696, 709-710 (1983).

e. “Frisking” during an investigative (*Terry*) stop

Officers conducting an investigative stop may frisk or pat down a suspect’s outer clothing only if they have independent “reasonable suspicion” that the person is armed and dangerous. *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

“The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue the investigation without fear of violence.” *Adams*, 407 U.S. at 146. Officers may seize other items encountered during a frisk, but *only* if the “plain feel” of the item makes it immediately recognizable as illegal contraband. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). If the frisking officer exceeds these limitations, any fruits of the search are obtained in violation of the Fourth Amendment. *Id.* at 373.

The only time an immigration officer may confiscate immigration documents—such as a foreign passport or other identification establishing alienage—without a warrant is if there is *probable cause* to believe the suspect is in the United States without authorization, in which case the officer may conduct a full search incident to arrest, one of the aforementioned exceptions to the warrant requirement. *Chimel v. California*, 395 U.S. 752 (1969).

f. Arrest

No bright-line test exists to determine when an individual is considered under “arrest.” However, the Supreme Court has made clear that a person need not be handcuffed, booked, or put in jail for an arrest to take place. For example, involuntarily transporting an individual to a police station for questioning has been found to be an arrest (*Dunaway v. New York*, 442 U.S. 200 (1979).), as has placing a person in a confined area, even for a limited period. *Florida v. Royer*, 460 U.S. 491 (1983). A *Terry* stop or brief detention—which is justified by reasonable suspicion—can become an arrest if the detention is sufficiently prolonged and officers do not develop the probable cause required to place a person under arrest.

g. Arrest in public places

Fourth Amendment

Under the Fourth Amendment, government agents may arrest individuals in public without a warrant if probable cause exists to believe the person has violated the law. *United States v. Watson*, 423 U.S. 411, 417 (1976). Thus, committing or confessing to a violation of law in an officer’s presence provides probable cause to arrest, no matter how minor the offense. *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).

INA and CFR

Under INA § 287(a)(2), immigration officers may make warrantless arrests only if they have “reason to believe” the person is (1) present in violation of law *and* (2) “likely to escape before a warrant can be obtained for his arrest.” Courts construe “reason to believe” as equivalent to probable cause (*United States v. Sanchez*, 635 F.2d 47, 63 n.13 (2d Cir. 1980); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971).), and regulations state that immigration officers must possess the requisite level of suspicion as to both the unlawfulness of a noncitizen’s presence *and* the likelihood of his escape. 8 C.F.R. § 287.8(c)(2)(i)-(ii); *see also Matter of Chen*, 12 I&N Dec. 603, 605-07 (BIA 1968).

Where either factor is absent, the admissibility of evidence obtained as a result of a warrantless arrest may be subject to challenge. *United States v. Quintana*, 623 F.3d 1237, 1241 (8th Cir. 2010); *Martinez-Angosto v. Mason*, 344 F.2d 673, 680 (2d Cir. 1965).

4. ENCOUNTERS ON PRIVATE PROPERTY

a. Entering a home to execute an administrative arrest warrant – the role of consent

Payton v. New York, 445 U.S. 573 (1980), held that government agents must,

in the absence of exigent circumstances, possess a judicially issued search or arrest warrant before entering a private residence without the consent of the occupant(s). However, immigration warrants are issued by DHS rather than judicial officers. INA § 236(a); *see also* Letter from former DHS Secretary Michael Chertoff to Sen. Christopher J. Dodd at 2 (June 14, 2007), *available at* <http://www.yaledailynews.com/documents/2009/sep/28/letter-from-former-secretary-of-homeland-security/> (acknowledging that a “warrant of removal is administrative in nature and does not grant the same authority to enter dwellings as a judicially approved search or arrest warrant”). Thus, even if they possess an administrative immigration arrest warrant, federal immigration officers arguably may not enter a residence without receiving valid consent from the occupant(s). *See Cotzojay v. Holder*, 725 F.3d 172, 183-84 (2d Cir. 2013) (remanding for additional fact-finding to determine whether residents had consented to a nighttime warrantless home entry by government officials).

b. What constitutes valid consent?

Fourth Amendment

Without valid consent, any warrantless entry into a private residence (or other area in which a person possesses a reasonable expectation of privacy) is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). The government bears the burden of showing valid consent. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). A claim of valid consent may be defeated if consent was (a) not given, (b) given involuntarily, (c) not given by an authorized party, or (d) limited in scope.

Consent not given

In *Lopez-Rodriguez*, the Ninth Circuit cautioned that consent could be inferred in very few circumstances, and held that the government “may not show consent to enter from the defendant’s failure to object to the entry.” *Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th Cir. 2008) (quotations omitted). The court found that a warrantless search without consent constitutes an egregious Fourth Amendment violation.

Consent given involuntarily

Consent must be given “freely and voluntarily” and not be “the result of duress or coercion, express or implied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) (quotations omitted). Courts look to the totality of the circumstances in making this inquiry, considering such factors as the coerciveness of the questioning; the vulnerability of the person who consented; and whether the individual understood his or her right to refuse consent. *Id.* at 228, 232-33. Consent may be deemed involuntary where agents falsely claim to possess a warrant or authority to search. *Bumper*, 391 U.S. at 548.

Consent given by unauthorized party

Consent must be given by an authorized party. Generally, third parties may provide valid consent if police reasonably believe them to possess “common authority” over the property. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Matlock*, 415 U.S. 164, 169-170 (1974). Both landlords (*Chapman v. United States*, 365 U.S. 610 (1961).) and hotel clerks (*Stoner v. California*, 376 U.S. 483 (1964).) have been found to lack authority to consent. Importantly, if the movant was himself present and refused consent, the search generally would be found unreasonable, even if another party provided consent. *Georgia v. Randolph*, 547 U.S. 103 (2006).

Consent limited in scope

Suspects may limit the scope of a search to which they consent, and it is unreasonable for officers to exceed such scope. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). Courts have similarly found that suspects may withdraw consent after a search has begun, and the Ninth Circuit explained that preventing suspects from withdrawing consent—by, for example, prohibiting them from witnessing the search—could violate the Fourth Amendment. *United States v. McWeeney*, 454 F.3d 1030, 1034-37 (9th Cir. 2006).

INA and CFR

The INA and federal regulations impose more specific limits on consensual searches than the Fourth Amendment. Under INA § 287(e), immigration officers cannot enter farms or other outdoor agricultural operations to interrogate an individual about his immigration status without “the consent of the owner (or agent thereof).” Likewise, 8 C.F.R. § 287.8(f)(2) requires officers to obtain consent from “the owner or other person *in control*” of a site. Under 8 C.F.R. § 287.8(f)(4), immigration officers may enter “open fields” or areas of a business accessible to the public without a warrant or consent, a provision consistent with the Fourth Amendment.

c. The detention of occupants for questioning when on private property

Permitting officers to enter a home does not authorize them to “round up” the occupants and/or detain them for questioning. To restrict a person’s freedom of movement, immigration officers must, at a minimum, possess reasonable suspicion that the individual is in the United States without authorization.

Absent reasonable suspicion, the only instance in which the Supreme Court has allowed officers to automatically detain the occupants of a home is during the execution of a search warrant for *criminal contraband*. *Michigan v. Summers*, 452 U.S. 692, 701 (1981).

5. ICE DETAINER REQUESTS

By its terms, an ICE detainer asks a federal, state, or local law enforcement agency (LEA) to “[m]aintain custody” of a person for an additional 48 hours, plus weekends and holidays, “beyond the time when the subject would have otherwise been released” from the LEA’s custody. DHS Form I-247 (rev. Dec. 2012); see also 8 C.F.R. §287.7(d). This new period of detention—which begins when the person’s criminal custody has ended, and which may last up to five days over a holiday weekend—is effectively a new arrest for Fourth Amendment purposes. This conclusion is supported by decades of Fourth Amendment case law. See *Dunaway v. New York*, 442 U.S. 200, 215-16 (1979); *Brown v. Illinois*, 422 U.S. 590, 605 (1975); *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (noting that “[d]etaining individuals solely to verify their immigration status would raise constitutional concerns,” and citing Fourth Amendment cases *Cotzojay v. Holder*, 725 F.3d 172, 181 (2d Cir. 2013) (“[I]t is uncontroversial that the Fourth Amendment applies to aliens and citizens alike.”); *Oliva-Ramos v. Attorney Gen. of U.S.*, 694 F.3d 259, 284-85 (3d Cir. 2012) (reaffirming that a civil immigration enforcement actions must be “consistent with the limitations imposed by the Fourth Amendment”); *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 2012) (applying Fourth Amendment to immigration arrests); *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir. 1971) (“We agree with the Government that the [INA’s] arrest provision must be read in light of constitutional standards,” such that arrests must be supported by “probable cause”).

Vohra v. United States, No. 04-0972, 2010 U.S. Dist. LEXIS 34363, *25 (C.D. Cal. Feb. 4, 2010) (magistrate’s report and recommendation) (“Plaintiff was kept in formal detention for at least several hours longer due to the ICE detainer. In plain terms, he was subjected to the functional equivalent of a warrantless arrest” to which the “‘probable cause’ standard . . . applies”), adopted, 2010 U.S. Dist. LEXIS 34088 (C.D. Cal. Mar. 29, 2010) (unpub.)

ICE detainers must be supported by probable cause. At a minimum, this means probable cause to believe that the subject is both a non-citizen and subject to removal from the United States. See, e.g., *Mendoza*, 2014 WL 3784141, at *6 (ICE detainer must be supported by “probable cause to believe that the subject . . . is (1) an alien who (2) . . . is not lawfully present in the United States”) (internal quotation marks and citation omitted); *Galarza*, 2012 WL 1080020, at *13 (same).

Thus, it is not enough for ICE to have probable cause to believe an individual is a non-citizen; ICE must also have probable cause to believe he or she is a non-citizen who is subject to removal. *Douglas v. United States*, 796 F. Supp. 2d 1354, 1366-67 (M.D. Fla. 2011)

(holding that ICE lacked probable cause to detain plaintiff once he told agents he was a derivative U.S. citizen, and rejecting the government’s “argument[] that . . . foreign birth creates a presumption of alienage” for purposes of establishing probable cause); Galarza, 2012 WL 1080020, at *14 (“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.”). In the case of a Lawful Permanent Resident, for example, that generally means that he or she must have been convicted, not just charged, with a removable criminal offense.

Drawing on this principle, several courts have concluded that the Fourth Amendment does not permit state or local officers (who generally lack civil immigration enforcement authority) to imprison people based on ICE detainers alone. See, e.g., Villars, 2014 WL 1795631, at *10 (holding that plaintiff stated a Fourth Amendment claim where defendants “lacked probable cause” to believe that he had “violated federal criminal law”) (emphasis added); *People ex rel Swanson v. Ponte*, No. 14652, --- N.Y.S.2d ----, 2014 WL 5285250, at *3 (N.Y. Sup. 2014) (slip op.) (granting habeas petition because “there is . . . no authority for a local correction commissioner to detain someone based upon a civil determination” of removability); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 918 (S.D. Ind. 2011) (preliminarily enjoining section of state law that “authorize[d] state and local law enforcement officers to effect warrantless arrests” based on ICE detainers, because permitting arrests “for matters that are not crimes” would contravene the Fourth Amendment), permanent injunction granted, 2013 WL 1332158, at*8, *10 (S.D. Ind. Mar. 28, 2013) (unpub.) (concluding that an ICE detainer, “without more, does not provide the usual predicate for an arrest,” and that “authoriz[ing] state and local law enforcement officers to effect warrantless arrests for matters that are not crimes . . . runs afoul of the Fourth Amendment”).

ICE’s current detainer practices do not comply with *Gerstein*. Unlike warrants, which are issued by judges and are based on evidence “supported by oath or affirmation,” U.S. Const., amend. IV, ICE detainers are unsworn documents that “[a]ny authorized immigration officer” may issue “at any time” on their own initiative. 8 C.F.R. § 287.7(a). Under *Gerstein*, then, a seizure based on an ICE detainer must be analyzed as a warrantless seizure. See *Morales*, 996 F. Supp. 2d at 39 (“Warrants are very different from detainers”); *Buquer*, 797 F. Supp. 2d at 911 (“A detainer is not a criminal warrant”); *Vohra*, 2010 U.S. Dist. LEXIS 34363, *25 (plaintiff “was subjected to the functional equivalent of a warrantless arrest”). Such detention would be constitutional only if ICE provided detainees with

probable cause determinations by a neutral judicial official within 48 hours after detention begins.

As Gerstein emphasized, it necessary but not sufficient for an arresting officer to have probable cause before making a warrantless arrest. The Fourth Amendment also requires that the officer's assessment of probable cause be reviewed and approved by a neutral judicial official. This is because "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." Gerstein, 420 U.S. at 114. Nor does it matter that some people may be held on ICE detainers for fewer than 48 hours. In *Riverside*, the Supreme Court cautioned that even delays shorter than 48 hours will violate the Fourth Amendment if they are "unreasonable," such as "delays for the purpose of gathering additional evidence to justify the arrest" and "delay for delay's sake." *Riverside*, 500 U.S. at 56. ICE routinely uses detainers for precisely these impermissible purposes. See, e.g., Brief of Federal Defendants at 27, *Morales v. Chadbourne*, No. 14-1425 (1st Cir. filed Aug. 15, 2014) (arguing that ICE detainers are used to give ICE "time to investigate the status of the person in the State's custody, including arranging for an interview of that person during which important information may be gathered"); Brief of Federal Defendants at 11, *Ortega v. ICE*, No. 12-6608 (6th Cir. filed Apr. 10, 2013) (arguing that "the purpose of issuing the detainer was to allow [ICE] time to conduct an investigation that could have discovered whether Plaintiff-Appellant was removable or was, in fact, a U.S. citizen.") (emphasis in original).