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## **On the Fringes of the Fourth Amendment: Changing Reasonableness at the Border**

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# ON THE FRINGES OF THE FOURTH AMENDMENT: CHANGING REASONABLENESS AT THE BORDER

ISABELLE HUTCHINSON\*

*The protection of the U.S.-Mexico border has become a priority for politicians and government officials alike. However, the protection of people's rights near the border has been largely ignored. Due to the Fourth Amendment's border search exception, customs officials and border patrol agents may use lower standards for suspicion in conducting searches and seizures of people in the border region. In determining whether a search or seizure is reasonable, the Fourth Amendment requires balancing of the degree to which the government intrudes on a person's privacy against the government's interest in conducting the search. This Article analyzes the changes in enforcement at the U.S.-Mexico border and their effect on what constitutes reasonableness for searches and seizures in the border region. It concludes that the changes in border and immigration enforcement enhance governmental intrusions upon privacy while the government's interests in enforcement remain largely unchanged. Therefore, in reevaluating reasonableness at the border, courts would likely hold that the government's interests do not afford the degree to which the government is intruding on privacy. While the Fourth Amendment itself has not changed, what constitutes reasonableness at the U.S.-Mexico border has.*

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## I. INTRODUCTION

The Fourth Amendment protects people from unreasonable searches and seizures. The reasonableness of a search or seizure is determined by balancing the intrusion upon a person's privacy and the governmental interests in conducting the search or seizure.<sup>1</sup> Therefore, the Fourth Amendment protects against some government intrusions upon people's privacy.

Although the government's methods for intrusions are always evolving, the people's interest in privacy is constant.<sup>2</sup> In fact, courts have held that the Fourth Amendment must progress over time in the face of changing circumstances.<sup>3</sup>

While many cases refer solely to advances in technology affecting government intrusions, there may be other circumstances strengthening these intrusions. These changing circumstances may affect the Fourth Amendment's application across the U.S. Recently, however, changing circumstances have strengthened government intrusions particularly on the fringes, or the borders, of the nation.

The U.S. can geographically be divided into two parts: the interior and the fringes. The interior of the country includes the area within its

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<sup>1</sup> *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

<sup>2</sup> *See City of Ontario v. Quon*, 130 S. Ct. 2619, 2624 (2010); *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

<sup>3</sup> *See Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) (stating that its ruling that using heat sensing technology was unconstitutional assured the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."); *Katz v. United States*, 389 U.S. 347, 361 (1967) (considering the changed role of the public telephone in private communication to determine a person's expectation of privacy).

borders. The fringes, on the other hand, consist of the U.S. borders and the areas immediately surrounding them.

Most attention is given to the Fourth Amendment in the interior, covering searches and seizures across the nation. Thus, the interior Fourth Amendment provides the general rules followed by all state and local law enforcement in conducting searches and seizures of people in the U.S.

However, the Fourth Amendment at the fringes of the nation differs from the interior. The standards of suspicion required for conducting reasonable searches and seizures are lower at the fringes than in the interior. The fringes, unlike the interior, also experienced an unprecedented change in circumstances due to heightened border and immigration enforcement, particularly at the nation's Southwestern border.<sup>4</sup>

This Article discusses the changed circumstances strengthening the government's intrusion upon privacy at the border. This Article proposes that changes at the border have upset the Fourth Amendment's balance between privacy and government interests, demanding the reevaluation of the Fourth Amendment's reasonableness at the fringes of the nation.

Part II of the Article explores the current standards for the Fourth Amendment. This section describes the central standards for lawful searches and seizures according to the interior Fourth Amendment. It also describes the lowered standards required for searches and seizures on the fringes of the Fourth Amendment. Part III examines the changes caused by the increase in border and immigration enforcement at the Southwestern border. In light of the changes surrounding increased enforcement, this Article proposes that courts reexamine what constitutes reasonableness at the Southwestern border. Finally, Part IV argues that the Southwestern border's changes tilt the balancing test in favor of implementing higher standards for border searches and seizures.

## II. CURRENT FOURTH AMENDMENT STANDARDS

The current Fourth Amendment standards describe the requirements necessary for all officers to conduct a legal search or seizure. The interior Fourth Amendment describes the search and seizure standards at play across the nation. While these standards apply within the country, there are exception to these standards on the fringes of the nation. Accordingly, the fringes of the Fourth Amendment describe the lowered standards for suspicion required for border-region searches and seizures.

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<sup>4</sup> *Southwest Border Region*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 12, 2013), <https://www.cbp.gov/border-security/air-sea/operations/locations/southwest-border> (the Southwestern border is the term used by U.S. Customs and Border Protection to describe the border between the U.S. and Mexico).

### A. THE INTERIOR FOURTH AMENDMENT

The Fourth Amendment commands that searches and seizures must meet certain standards.<sup>5</sup> The Fourth Amendment provides:

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 affirmations, and particularly describing the place to be searched, and the person or things to be seized.<sup>6</sup>

The Fourth Amendment right against unreasonable search and seizure is triggered only by government actors—those people acting officially on behalf of the government—conducting government action.<sup>7</sup> Government actors are limited to agents employed by the U.S. or state government.<sup>8</sup> Therefore, a foreign official’s search of a person abroad does not require adherence to the Fourth Amendment. However, the Fourth Amendment still applies to searches and seizures of U.S. citizens conducted by U.S. government actors while the citizen is in a foreign country.

If the search and seizure is done by a government actor conducting government action, then “[t]he threshold question . . . is whether a search or seizure occurred.”<sup>9</sup> Not all actions by a government actor constitute a search or seizure.<sup>10</sup> Rather, searches occur “when an expectation of privacy that society is prepared to consider reasonable is infringed.”<sup>11</sup> These include strip searches,<sup>12</sup> visual body cavity searches,<sup>13</sup> and vehicle searches.<sup>14</sup>

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<sup>5</sup> U.S. CONST. amend. IV.

<sup>6</sup> U.S. CONST. amend. IV.

<sup>7</sup> *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting).

<sup>8</sup> Samuel Crececius, *Lichtenberger and the Three Bears: Getting the Private Search Exception and Modern Digital Storage “Just Right”*, 4 TEX. A&M L. REV. 209, 213 (2017); *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) (holding the Fourth Amendment applicable to the states through the Fourteenth Amendment’s Due Process Clause).

<sup>9</sup> *U.S. v. Stephens*, 764 F.3d 327, 331 (4th Cir. 2014), cert. denied, 136 S. Ct. 43 (internal quotations omitted); *U.S. v. Taylor*, 90 F.3d 903, 908 (4th Cir. 1996).

<sup>10</sup> *Stephens*, 764 F.3d at 331 (holding that not every observation made by an officer is a search); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (“[N]ot all personal intercourse between policemen and citizens involves ‘seizures’ of person.”)

<sup>11</sup> *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (citing *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984)).

<sup>12</sup> See *Doe v. Calument City, Ill.*, 754 F. Supp. 1211, 1219-20 (N.D. Ill. 1990).

<sup>13</sup> See *Bell v. Wolfish*, 441 U.S. 520, 560 (1979).

<sup>14</sup> *Carroll v. United States*, 267 U.S. 132, 155-56 (1925).

Seizures occur when a person is deprived dominion over his person or property.<sup>15</sup> Seizures of a person occur when an officer, by means of physical force or show of authority, restrains the person's liberty in some way.<sup>16</sup> A seizure occurs if a reasonable person does not "feel free to decline the officer's requests or otherwise terminate the encounter."<sup>17</sup> Therefore, seizures include both arrests and stops—brief detentions that are short of arrests.<sup>18</sup>

All searches and seizures must be reasonable under the Fourth Amendment. What makes a search and seizure reasonable "depends on the context within which a search takes place,"<sup>19</sup> leading to the analysis of "where, when, how, who or what, and why the search or seizure has taken place."<sup>20</sup>

In determining whether a search or seizure is reasonable, the court begins with history, looking to the "statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."<sup>21</sup> Then, the court must determine the reasonableness of the search or seizure by using a balancing test. The court must balance (1) the degree to which the search or seizure intrudes upon the person's privacy; and (2) the degree to which the search or seizure is needed for the promotion of legitimate governmental interests.<sup>22</sup>

A seizure may intrude on a person's privacy only if the person had a reasonable expectation of privacy.<sup>23</sup> A reasonable expectation of privacy exists if (1) an individual exhibited actual expectation of privacy; and (2) the expectation is one that society is prepared to recognize as reasonable.<sup>24</sup> The expectation in privacy may change based on a person's location. For example, courts have held that a person's expectation of privacy in one's residence is higher than in one's vehicle.<sup>25</sup> If a person has a reasonable expectation of privacy and the government violates that expectation without a warrant or the requisite suspicion, the government violated the Fourth Amendment.<sup>26</sup>

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<sup>15</sup> *Horton v. California*, 496 U.S. 128, 133 (1990).

<sup>16</sup> *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968).

<sup>17</sup> *Florida v. Bostick*, 501 U.S. 429, 444 (1991).

<sup>18</sup> *Davis v. Mississippi*, 394 U.S. 721, 726 (1969); *Terry*, 392 U.S. at 16–19.

<sup>19</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

<sup>20</sup> Hannah Robbins, *Holding the Line: Customs and Border Protection's Expansion of the Border Search Exception and the Ensuing Destruction of Interior Fourth Amendment Rights*, 36 CARDOZO L. REV. 2247, 2251 (2015).

<sup>21</sup> *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

<sup>22</sup> *Id.* at 171 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

<sup>23</sup> *Katz v. United States*, 389 U.S. 347, 361 (1967).

<sup>24</sup> *Id.*

<sup>25</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976)

<sup>26</sup> *Katz*, 389 U.S. at 361.

If the degree to which the search or seizure is needed for the promotion of legitimate government interests—the interest the government has in conducting the search—outweighs privacy, the search or seizure is justified as reasonable.<sup>27</sup> Conversely, when a person’s privacy outweighs the legitimate government interest, the search or seizure is unreasonable, and the Fourth Amendment is violated.

Subject to many exceptions, a search or seizure is generally unreasonable without a warrant.<sup>28</sup> To obtain a search or arrest warrant, an officer must show that there is probable cause that the search or seizure is justified.<sup>29</sup> The probable cause standard “protects ‘citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,’ while giving ‘fair leeway for enforcing the law in the community’s protection.’”<sup>30</sup> The determination of probable cause to issue a warrant must be reviewed by a neutral and detached member of the judiciary before the warrant issues.<sup>31</sup> Accordingly, the judge must be severed from and disengaged from the activities of law enforcement.<sup>32</sup>

To obtain an arrest warrant, probable cause exists where “the facts and circumstances within [an officer’s] knowledge and of which [he or she] had 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.”<sup>33</sup> In obtaining a search warrant, probable cause exists if, given all the circumstances set forth by the officer, there is a fair probability that contraband or evidence of a crime will be found in a particular place.<sup>34</sup> The judge must make a “common sense decision” about whether the officer demonstrated this probability.<sup>35</sup>

Probable cause is evaluated by the “totality-of-the-circumstances” approach, assessing the probabilities in “particular factual contexts.”<sup>36</sup> Probable cause requires “only a probability or substantial chance of criminal activity, not a showing of such activity.”<sup>37</sup> In determining probable cause, the question is “not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts.”<sup>38</sup>

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<sup>27</sup> *Martinez-Fuerte*, 428 U.S. at 555, 561.

<sup>28</sup> *Katz*, 389 U.S. at 357.

<sup>29</sup> See U.S. CONST. amend. IV (stating that “no [w]arrants shall issue, but upon probable cause”).

<sup>30</sup> *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

<sup>31</sup> *Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

<sup>32</sup> *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

<sup>33</sup> *Safford Unified School Dist. # 1 v. Redding*, 557 U.S. 364, 370 (citing *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)).

<sup>34</sup> *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 230-31.

<sup>37</sup> *Id.* at 243 n.13.

<sup>38</sup> *Id.*

Importantly, the totality of the circumstances excludes the race of the person being searched or seized.<sup>39</sup> Therefore, probable cause must not be established when the officer's suspicion is based on race.<sup>40</sup>

Probable cause instead requires individualized suspicion, which, according to the Supreme Court, is the most important component of the standard.<sup>41</sup> Individualized suspicion is the idea that the states should judge each citizen based upon his own unique actions, character, thoughts, and situation.<sup>42</sup>

Many exceptions permit warrantless searches and seizures, such as exigent circumstances search, search incident to arrest, and vehicle searches. Under the exigent circumstances exception, an officer may perform a warrantless search or seizure if both probable cause and exigent circumstances exist. Exigent circumstances are those "circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."<sup>43</sup>

Under the search incident to arrest exception, an officer may perform a warrantless search of an arrested person and the area within the person's immediate control.<sup>44</sup> A person may not be searched incident to arrest if they were only given a citation or summons instead of being arrested.<sup>45</sup> An officer may conduct a search incident to arrest even if the arrest was a "mere pretext" for a search.<sup>46</sup>

Under the vehicle exception, an officer may perform a warrantless search of a vehicle. The vehicle exception was created nearly 100 years ago in *Carroll v. United States*.<sup>47</sup> The vehicle exception allows the search of a motor vehicle without a search warrant as long as the officer has probable cause.<sup>48</sup> An officer may search every part of a vehicle and its contents that

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<sup>39</sup> Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1556 (2011).

<sup>40</sup> *Id.* at 1587.

<sup>41</sup> Andrew E. Taslitz, *What is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion*, 73 L. & CONTEMP. PROBS. 145 (2010).

<sup>42</sup> *Id.* at 146.

<sup>43</sup> *United States v. Howard*, 828 F.2d 552, 555 (9th Cir. 1987).

<sup>44</sup> *Riley v. California*, 134 S.Ct. 2473, 2485 (2014).

<sup>45</sup> *Knowles v. Iowa*, 525 U.S. 113 (1998).

<sup>46</sup> *Arkansas v. Sullivan*, 523 U.S. 769, 772 (2001).

<sup>47</sup> *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>48</sup> *Id.* at 155-56 ("The measure of legality of such seizure is . . . that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband . . . .")



may conceal the object of the search.<sup>49</sup> This includes the vehicle's trunk and any other containers found in the vehicle.<sup>50</sup>

Some exceptions allowing warrantless searches require only reasonable suspicion, a standard lower than probable cause.<sup>51</sup> Whether reasonable suspicion was met depends on "both the content of the information possessed by police and its degree of reliability."<sup>52</sup> In determining if an officer had reasonable suspicion, a court takes into account "the totality of the circumstances—the whole picture."<sup>53</sup> The court will not consider whether the officer had an "unparticularized suspicion or hunch," but whether "the specific reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience."<sup>54</sup>

Reasonable suspicion applies to traffic stops and searches such as a 'stop and frisk.' A 'stop and frisk' occurs when an officer stops a suspect and frisks, or pats down, the suspect to search for weapons. Under *Terry*, the officer must have reasonable suspicion to believe the person is armed and dangerous.<sup>55</sup> The officer does not need to be certain that the individual is armed.<sup>56</sup> Instead, the relevant inquiry is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.<sup>57</sup>

The overarching goal of the Fourth Amendment is to protect people's privacy from government intrusions. While government intrusions are allowed, the government must have a certain level of suspicion to make an intrusion. The required level of suspicion is directly influenced by the government's interest in conducting the search or seizure. While governmental interests may allow for reasonable intrusions, governmental interests along the nation's fringes afford officers minimal standards of suspicion in conducting reasonable searches and seizures.

#### B. THE FRINGES OF THE FOURTH AMENDMENT

While the interior Fourth Amendment determines the requirements for most searches and seizures conducted in the U.S., it is subject to many exceptions. One major exception to the interior Fourth Amendment is the

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<sup>49</sup> *Wyoming v. Houghton*, 526 U.S. 295, 301 (1999) (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)).

<sup>50</sup> *Id.* at 300.

<sup>51</sup> *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014).

<sup>52</sup> *Alabama v. White*, 496 U.S. 325, 330 (1990).

<sup>53</sup> *Navarette*, 134 S. Ct. at 1687 (citing *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

<sup>54</sup> *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (internal quotations omitted).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

border search exception. This exception lowers the standards required for a search or seizure on the nation's fringes.

U.S. Customs and Border Protection (CBP) is primarily responsible for implementing searches and seizures in these areas. CBP conducts searches and seizures at border ports of entry—where people may enter the U.S.<sup>58</sup> CBP operates 328 land, air, and sea ports of entry throughout the country.<sup>59</sup> CBP conducts border and immigration enforcement at the border, its functional equivalents, the 100-Mile border zone, and the sea.

### 1. *Crossing the Border*

The constraints on border patrol agents are “less stringent than would be the case in many other contexts.”<sup>60</sup> People entering the U.S. through the border are subject to the Border Search Exception.<sup>61</sup> This exception is based on a “long-standing historically recognized exception to the Fourth Amendment’s general principle that a warrant must be obtained.”<sup>62</sup> Like other Fourth Amendment exceptions, the Border Search Exception is determined by a “reasonableness” test, balancing the government’s interest against the individual’s right to privacy.<sup>63</sup> Here, the test turns in favor of the government’s interest in “national self-protection.”<sup>64</sup> Because border searches and seizures of persons and personal belongings in their possession are reasonable per se, no warrant, probable cause, or reasonable suspicion is necessary for a government official to conduct a search or seizure at the border.<sup>65</sup> Therefore, a person’s rights at the border are extremely limited.

While searches may be without a warrant, probable cause, or reasonable suspicion, the border search power is not unlimited.<sup>66</sup> The border

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<sup>58</sup> *At Ports of Entry*, U.S. CUSTOMS & BORDER PROTECTION (2018), <https://www.cbp.gov/border-security/ports-entry>.

<sup>59</sup> *Id.*

<sup>60</sup> Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L. J. 129, 134 (2010).

<sup>61</sup> *United States v. Ramsey*, 431 U.S. 606, 617 (1977).

<sup>62</sup> *Id.* at 621.

<sup>63</sup> Chacón, *supra* note 60; *Carroll v. United States*, 267 U.S. 132, 149 (1925); *Florida v. Royer*, 460 U.S. 491, 500 (1983).

<sup>64</sup> *Carroll*, 267 U.S. at 154 (“Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”)

<sup>65</sup> *Ramsey*, 431 U.S. at 619; INA § 287(c); 8 U.S.C. § 1357(c).

<sup>66</sup> *United States v. Arnold*, 523 F.3d 941, 945 (2005).

search exception applies only to routine searches,<sup>67</sup> including luggage<sup>68</sup> and vehicle<sup>69</sup> searches. Non-routine searches, however, require reasonable suspicion of illegal activity.<sup>70</sup> Nonroutine searches may include destructive searches of inanimate objects, prolonged detentions, strip searches, body cavity searches, and x-ray searches.<sup>71</sup> For non-routine searches, the Supreme Court recognized that “[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusion is required on the mere chance that desired evidence might be obtained.”<sup>72</sup>

Because the government has a high interest in national security at its borders, the border search exception provides the government with substantial power to intrude on personal privacy. With no warrant, probable cause, or reasonable suspicion requirement, there are few protections for personal privacy against routine searches.

## 2. *The Border’s Functional Equivalents*

The border search exception extends to searches conducted at the “functional equivalents” of a border.<sup>73</sup> The border’s functional equivalent is usually the “first practical detention point after a border crossing or the final port-of-entry.”<sup>74</sup> Examples of searches at functionally equivalent locations include searches at established checkpoints near the border, searches at a point marking the confluence of two or more roads that extend from the border, and searches of passengers of an airplane arriving in the U.S. after a non-stop flight departing from another country.<sup>75</sup>

A search at a functional equivalent of a border is valid when (1) a reasonable certainty exists that the person or thing crossed the border; (2) a reasonable certainty exists that there was no change in the object of the search since it crossed the border; and (3) the search was conducted as soon as practicable after the border crossing.<sup>76</sup> This makes the border exception apply to a geographically-fluid area because people can enter the country at different points.<sup>77</sup>

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<sup>67</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (“Routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . .”).

<sup>68</sup> *Ramsey*, 431 U.S. at 620.

<sup>69</sup> *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004).

<sup>70</sup> *Montoya de Hernandez*, 473 U.S. at 541.

<sup>71</sup> Yule Kim, CONG. RESEARCH SERV., RL31826, *Protecting Our Perimeter: “Border Searches” Under the Fourth Amendment* 10 (2009).

<sup>72</sup> *Montoya de Hernandez*, 473 U.S. at 540-41.

<sup>73</sup> *Almeida-Sanchez v. United States*, 93 S.Ct. 2535, 2539 (1973).

<sup>74</sup> Kim, *supra* note 71, at 7.

<sup>75</sup> *Almeida-Sanchez*, 93 S.Ct. at 2539.

<sup>76</sup> Kim, *supra* note 71, at 7; *United States v. Hill*, 939 F.2d 934, 937 (11th Cir. 1991).

<sup>77</sup> Kim, *supra* note 71, at 8; *Hill*, 939 F.2d at 936.

Prominent examples of the border's functional equivalents are interior checkpoints and airports. Because they are functionally equivalent of the border, searches at interior checkpoints and airports require no warrant, probable cause, or reasonable suspicion.<sup>78</sup>

#### a. Interior Checkpoints

In 2005, U.S. Customs and Border Protection operated thirty-three permanent traffic checkpoints at the Southwestern border.<sup>79</sup> Permanent checkpoints may operate twenty-four hours per day, seven days per week.<sup>80</sup> They may also operate even in the face of natural disasters.<sup>81</sup> Permanent checkpoints have infrastructure technology infrastructure, detention facilities, paved equipment used for under-vehicle inspections, and space for gamma-ray machines for vehicle inspections.

CBP also operates tactical checkpoints.<sup>82</sup> Tactical checkpoints are non-permanent and often set up with tents and traffic cones.<sup>83</sup> The number and location of tactical checkpoints change daily based on “available resources and intelligence about illegal entrants’ routes.”<sup>84</sup>

At checkpoints, CBP may stop a vehicle to briefly question its occupants.<sup>85</sup> Checkpoint stops are only “brief detention[s] of travelers” by CBP during which a person must “respon[d] to a brief question or two and possibly . . . produc[e] . . . a document evidencing a right to be in the [U.S.]”

Unlike stops under the interior Fourth Amendment, CBP may employ race to decide whether to stop motorists or refer them to a secondary inspection area.<sup>86</sup> The Supreme Court held that to the extent that CBP relies on apparent Mexican ancestry at checkpoints, that reliance is clearly relevant to the law enforcement need to be served.<sup>87</sup>

#### b. Airports

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<sup>78</sup> Kim, *supra* note 71, at 9; Hill, 939 F.2d at 936.

<sup>79</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-05-435, *Border Patrol: Available Data on Interior Checkpoints Suggest Differences in Sector Performance* 5 (2005) [hereinafter *Checkpoint Data*].

<sup>80</sup> *Id.*

<sup>81</sup> See Joel Rose, *Border Patrol Says Checkpoints Will Remain Open During Hurricane Harvey*, NAT'L PUB. RADIO (Aug. 25, 2017), <https://www.npr.org/2017/08/25/546109886/border-patrol-says-checkpoints-will-remain-open-during-hurricane-harvey>.

<sup>82</sup> *Checkpoint Data*, *supra* note 79.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67 (1976).

<sup>86</sup> Carbado & Harris, *supra* note 39, at 1582.

<sup>87</sup> *Martinez-Fuerte*, 428 U.S. at 564 n.17.

Because many airports provide both domestic and international flights, different search and seizure standards can exist at adjacent boarding gates.<sup>88</sup> Thus, the purchase of a plane ticket may subject a person to different Fourth Amendment rights at an airport.

Further, any airports receiving international flights are subject to the border search exception.<sup>89</sup> For example, “a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.”<sup>90</sup>

### 3. 100-Mile Border Zone

Government officials may arrest illegal immigrants or people committing felonies with no geographic limitation.<sup>91</sup> However, there is a geographic limit for searches conducted under the Immigration and Nationality Act. According to the INA, Government officials have the authority to search for, and eventually seize, illegal immigrants “within a reasonable distance from any external boundary of the United States.”<sup>92</sup> A reasonable distance is defined as 100 miles from the border.<sup>93</sup> This perimeter follows along land borders, ocean coasts, and Great Lake shores.<sup>94</sup>

This 100-mile border zone, also known as the extended border, encompasses nearly the entire states of Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island, and Vermont.<sup>95</sup> It also includes the most populated parts of California and Illinois. The border zone includes roughly 200 million people, constituting about two-thirds of Americans.<sup>96</sup>

A government official may conduct a warrantless search in the 100-mile border zone if (1) the government official has a reasonable certainty that a border was crossed or there exists a high degree of probability that a border was crossed; (2) the official has reasonable certainty that no change in the object of the search occurred between the time of the border crossing and the search; and (3) the official has reasonable suspicion that criminal activity was occurring.<sup>97</sup>

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<sup>88</sup> John Rogers, *Bombs, Borders, and Boarding: Combatting International Terrorism at United States Airports and the Fourth Amendment*, 20 SUFFOLK TRANSNAT'L L. REV. 501, 502 (1997).

<sup>89</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

<sup>90</sup> *Id.*

<sup>91</sup> INA § 287(a)(2), (4).

<sup>92</sup> INA § 287(a)(3).

<sup>93</sup> 8 C.F.R. § 287.1(a)(2).

<sup>94</sup> Laila Lalami, *The Border Is All Around Us, and It's Growing*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/magazine/the-border-is-all-around-us-and-its-growing.html>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; AM. C.L. UNION, *The Constitution in the 100-Mile Border Zone*, <https://www.aclu.org/other/constitution-100-mile-border-zone>.

<sup>97</sup> Kim, *supra* note 71, at 8.

The 100-mile border zone gives CBP a geographical limitation on its lowered-suspicion search powers. Within this zone, the CBP may search non-citizens on any “railway car, aircraft, conveyance, or vehicle” with only reasonable suspicion.<sup>98</sup> Within twenty-five miles of the border, CBP may also enter onto private land—although not dwellings—without a warrant.<sup>99</sup> This is a higher threshold level of suspicion than required at the border or its functional equivalents.

#### a. Roving Patrols

U.S. Customs and Border Protection officials may set up roving patrols to supplement checkpoints within the 100-mile border zone.<sup>100</sup> These patrols may be operated by foot, bicycle, or vehicle and may be utilized at bus terminals near the border. A roving patrol officer must have reasonable suspicion that the occupant of a vehicle is undocumented before the officer can detain and ask questions about immigration status.<sup>101</sup>

To stop a person by roving patrol, the requisite reasonable suspicion is based on the circumstances of the person being stopped. In *United States v. Brignoni-Ponce*, CBP agents stopped the defendant’s car based on the fact that he appeared to be Mexican.<sup>102</sup> After questioning the passengers, agents determined that they were illegal immigrants.<sup>103</sup> The defendant was then charged with two counts of knowingly transporting illegal immigrants.<sup>104</sup> The defendant moved to suppress the statements of the passengers regarding their status because he claimed that the statements came from an illegal seizure.<sup>105</sup> The Supreme Court held that approving roving-patrol stops of all vehicles in the border area with no suspicion of illegal immigrants would subject residents within 100 miles of the border to unlimited interference with their use of highways.<sup>106</sup> Therefore, the Court limited the exercise of authority granted by federal statute. The Court then held that officers on roving patrol at the border or its functional equivalent may stop vehicles if “they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”<sup>107</sup>

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<sup>98</sup> INA § 287(a)(3); 8 U.S.C. § 1357(a)(1).

<sup>99</sup> INA § 287(a)(3).

<sup>100</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 (1975) (citing 8 C.F.R. § 287.1(a)).

<sup>101</sup> *United States v. Singh*, 415 F.3d 288 (2d Cir. 2005).

<sup>102</sup> *Brignoni-Ponce*, 422 U.S. at 875.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 882-83.

<sup>107</sup> *Id.* at 884.

There are many factors that are relevant for determining reasonable suspicion for border and immigration enforcement's roving patrols. Officers may consider the vehicle's proximity to the border, a road's usual traffic patterns, and the officer's previous experience with immigrant traffic.<sup>108</sup> The vehicle's proximity to the border is a "paramount factor" in determining reasonable suspicion.<sup>109</sup>

Officers may also consider vehicle and area characteristics. Vehicles with large compartments that could be used to transport concealed immigrants may support reasonable suspicion.<sup>110</sup> The officer may consider the behavior of the driver or passenger.<sup>111</sup> Thus, there may be reasonable suspicion if a driver is driving erratically or evading officers.<sup>112</sup>

Unlike searches and seizures under the interior Fourth Amendment, race may be used as a basis for suspicion.<sup>113</sup> An officer may recognize a driver's or passenger's appearance, such as their dress and haircut that is the "characteristic appearance of persons who live in Mexico."<sup>114</sup> Officers may also consider the inability of the driver or passengers to speak English.<sup>115</sup> The *Brignoni-Ponce* Court held that the ancestry of the person may not be the single factor which an officer uses to justify his stop.<sup>116</sup> However, "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."<sup>117</sup>

#### 4. *Sea*

CBP works with the U.S. Coast Guard to enforce the border.<sup>118</sup> The U.S. Coast Guard is vested with virtually unlimited authority to stop, board, and search vessels on the high seas and within "customs waters" without any particularized suspicion of wrongdoing or a warrant.<sup>119</sup> Customs waters include the waters within four leagues of the coast of the U.S.<sup>120</sup> The high

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<sup>108</sup> *Id.* at 884-85.

<sup>109</sup> *See* *United States v. Villalobos*, 161 F.3d 285, 288 (5th Cir. 1998).

<sup>110</sup> *Brignoni-Ponce*, 422 U.S. at 885.

<sup>111</sup> *Id.* at 884.

<sup>112</sup> *Id.* at 885.

<sup>113</sup> *Carbado & Harris*, *supra* note 39, at 1578.

<sup>114</sup> *Id.*

<sup>115</sup> *United States v. Ortiz*, 422 U.S. 891, 897 (1975).

<sup>116</sup> *Brignoni-Ponce*, 422 U.S. at 885-86.

<sup>117</sup> *Id.* at 886.

<sup>118</sup> *See Customs and Border Protection, Coast Guard Seize 368 Rounds of Ammo Bound for Guatemala*, U.S. CUSTOMS & BORDER PROTECTION (Sept. 13, 2017), <https://www.cbp.gov/newsroom/local-media-release/customs-and-border-protection-coast-guard-seize-368-rounds-ammo-bound>.

<sup>119</sup> Megan Jaye Kight, *Constitutional Barriers to Smooth Sailing: 14 U.S.C. § 89(A) and the Fourth Amendment*, 72 IND. L. J. 571, 571-572 (1997); 14 U.S.C.A. § 89(a) (2010); 19 U.S.C. § 1581(a) (2017).

<sup>120</sup> 19 U.S.C.A. § 1401(j) (2017).

seas are the areas outside of customs waters.<sup>121</sup> The Coast Guard may stop and board vessels in customs waters and the high seas for the purposes of “prevention, detection, and suppression of violations of the laws of the U.S.”<sup>122</sup>

The Coast Guard may also conduct border stops. A seizure in high seas may be considered a border search if the seizure occurs at a United States port of entry.<sup>123</sup> A border search may also occur when an officer has ‘reasonable certainty’—articulable facts supporting a reasonably certain conclusion—that the vessel sailed from international waters into U.S. territory.<sup>124</sup>

The reasonable certainty requirement is not clearly defined.<sup>125</sup> However, the Supreme Court noted that “reasonable certainty . . . is clearly a higher standard than that of probable cause.”<sup>126</sup> This higher standard requires that “the totality of the circumstances [along] with the officers’ knowledge and of which they have reasonably trustworthy information be sufficient in the light of their experience to warrant a firm belief that a border crossing occurred.”

When an officer stops someone in territorial waters and bases his decision on ethnicity alone, he does not have reasonable certainty that the vessel came from international waters.<sup>127</sup> Because the reasonable certainty standard is not met, the agent’s search or seizure is not subject to the border exception, which implements lower Fourth Amendment standards.<sup>128</sup>

### III. CHANGING EXPECTATIONS OF PRIVACY IN THE BORDER REGION

U.S. Customs and Border Protection covers three border regions: the Coastal border, Northern border, and Southwestern border.<sup>129</sup> While the Fourth Amendment standards at each border are the same, the enforcement reality between them is very different. Because the overwhelming amount

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<sup>121</sup> 19 U.S.C. § 1701(a) (2017).

<sup>122</sup> 14 U.S.C.A. § 89(a) (2017).

<sup>123</sup> *United States v. Villamonte-Marquez*, 462 U.S. 579, 589-92 (1983); see *At Ports of Entry*, *supra* note 58.

<sup>124</sup> *United States v. Tilton*, 534 F.2d 1363, 1366 (9th Cir. 1976).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing *United States v. Kessler*, 497 F.2d 277, 279 (9th Cir. 1974)).

<sup>127</sup> *Sanchez v. Sessions*, 870 F.3d 901, 910 (9th Cir. 2017).

<sup>128</sup> *Id.*

<sup>129</sup> *Sector Profile - Fiscal Year 2017*, UNITED STATES BORDER PATROL (2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/USBP%20Stats%20FY2017%20sector%20profile.pdf>.



of CBP power and money is used near the Southwestern border, this article focuses primarily on the Southwestern border.

The Southwestern border spans more than 2,000 miles of international border with Mexico, encompassing Texas, Arizona, New Mexico, and southern California.<sup>130</sup> The Southwestern border operation is by far, the largest of the sectors. It accounts for over 85% of the total agents staffed and 97% of the total apprehensions of illegal aliens made.<sup>131</sup>

The Southwestern border uses multiple methods to prevent illegal immigration. CBP supports ICE and local law enforcement with its Air branches by using helicopters to interdict those illegally entering the country.<sup>132</sup> CBP also uses its Marine branches to combat illegal immigration by sea.<sup>133</sup>

The Southwestern border contains 705 miles of fencing between the U.S. and Mexico.<sup>134</sup> CBP conducts surveillance using sensors to “increase situational awareness of activity in areas that are difficult to persistently patrol.”<sup>135</sup> It also operates 33 permanent checkpoints and up to 182 non-permanent checkpoints on the Southwestern border.<sup>136</sup>

The Southwestern border demonstrates the transformation in border and immigration enforcement. Through increased militarization of the border, use of invasive technology, and increased cooperation with local law enforcement and ICE, CBP has increased its intrusion upon people’s privacy near the Southwestern border.

#### A. INCREASED MILITARIZATION OF THE BORDER

Militarization occurs when there is “enhanced border policing with the specific aim of highlighting the use of military rhetoric and ideology, as well as military tactics, strategy, technology, equipment and forces . . . .”<sup>137</sup>

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<sup>130</sup> *Fact Sheet: Southwest Border Region*, U.S. CUSTOMS & BORDER PROTECTION (2013), [https://nemo.cbp.gov/air\\_marine/FS\\_Southwest\\_Border\\_Region.pdf](https://nemo.cbp.gov/air_marine/FS_Southwest_Border_Region.pdf); *Southwest Border Region*, *supra* note 4.

<sup>131</sup> *Sector Profile - Fiscal Year 2017*, UNITED STATES BORDER PATROL (2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017->

<sup>132</sup> *Southwest Border Region*, *supra* note 4.

<sup>133</sup> *Id.*

<sup>134</sup> *Mileage of Pedestrian and Vehicle Fencing by State*, U.S. CUSTOMS & BORDER PROTECTION (2017), <https://www.cbp.gov/sites/default/files/assets/documents/2017-Sep/Border%20Patrol%20Fence%20Totals.pdf>.

<sup>135</sup> *CBP’s Border Security Efforts: An Analysis of Southwest Border Security Between the Ports of Entry* 5, DEP’T OF HOMELAND SECURITY (Feb. 27, 2017), <https://www.oversight.gov/sites/default/files/oig-reports/OIG-17-39-Feb17.pdf>.

<sup>136</sup> *Id.* at 6.

<sup>137</sup> Jeremy Slack et al., *The Geography of Border Militarization: Violence, Death and Health in Mexico and the United States*, 15 J. OF LATIN AM. GEOGRAPHY 7, 9 (2016) (internal quotations omitted).

This, in turn, conflicts with the human rights of border crossers and residents.<sup>138</sup> Recently, funding to enforce the Southwestern border has grown rapidly.<sup>139</sup> For example, funding for the Secure the Border Initiative—an effort to reduce illegal immigration—increased from \$38 million in 2005 to \$800 million in 2010.<sup>140</sup>

CBP also expanded its staff significantly in the past thirty years.<sup>141</sup> CBP increased its numbers from 5,000 agents in 1992 to almost 20,000 as of 2016.<sup>142</sup> The Trump administration hopes to continue CBP's expansion to increase the enforcement of immigration laws.<sup>143</sup> According to Former Attorney General Jeff Sessions, “This is a new era [for immigration enforcement]. This is the Trump Era.”<sup>144</sup>

Militarization is actually linked to the increase in deaths at the border.<sup>145</sup> Scholars have noted that border crossing was lethal prior to the 1990s.<sup>146</sup> However, due to drastic enforcement changes, most deaths were concentrated to the southern Arizona region.<sup>147</sup> Since the early 2000s, immigrant deaths have increased exponentially, especially in Arizona and Texas.<sup>148</sup> The trend of immigrant border deaths continues to move upwards despite the reduction in border apprehensions.<sup>149</sup>

Politicians and government officials alike have used military rhetoric and ideology to describe the border. Politicians have reinforced militarization at the border by recognizing the “War on Drugs,”<sup>150</sup> the “War

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 10.

<sup>140</sup> *Id.*; *The Rise and Fall of the Secure Border Initiative's High-Tech Solution to Unauthorized Immigration*, AM. IMMIGRATION COUNCIL (Apr. 15, 2010), <https://www.americanimmigrationcouncil.org/research/rise-and-fall-secure-border-initiative%E2%80%99s-high-tech-solution-unauthorized-immigration>.

<sup>141</sup> Christine Stenglein, *Struggling to hang on to 20K officers, Border Patrol looks to hire 5K more*, BROOKINGS INST. (July 7, 2017), <https://www.brookings.edu/blog/fixgov/2017/07/07/struggling-to-hang-on-to-20k-officers-border-patrol-looks-to-hire-5k-more/>.

<sup>142</sup> Ted Hesson, *Sessions signals immigration crackdown: 'This is the Trump era'*, POLITICO (Apr. 11, 2017), <https://www.politico.com/story/2017/04/jeff-sessions-immigration-crackdown-237109>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Slack et al., *supra* note 137, at 10.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 11.

<sup>150</sup> Tom LoBianco, *Report: Aide says Nixon's war on drugs targeted blacks, hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrichman-richard-nixon-drug-war-blacks-hippie/index.html>.

on Terror,”<sup>151</sup> and the “War on the Border.”<sup>152</sup> CBP officials frequently evoke images of terrorists and foreign threats materializing at the Southwestern Border.<sup>153</sup> In fact, CBP’s mission focuses on “protecting the public from dangerous people and materials . . . .”<sup>154</sup> The agency believes and aspires to “protect the American people against terrorists and the instruments of terror.”<sup>155</sup>

CBP has further militarized the Southwestern border by hiring former military members and employing military equipment.<sup>156</sup> As employees, former military members transformed the CBP’s organizational culture to that of the military branches.<sup>157</sup> While military forces are trained to engage enemy combatants, this approach fails on border because undocumented immigrants are not enemy combatants.<sup>158</sup>

Militarization was also enforced due to the rearrangement of CBP.<sup>159</sup> The dissolution of the Immigration and Naturalization Services, the organization which formerly encompassed CBP, led to a drastic change in border security strategy.<sup>160</sup> CBP implemented the Consequence Delivery System (CDS) in 2011.<sup>161</sup> CDS included practices which “escalate[d] punishments for undocumented migrants apprehended along the [Southwestern] border and play[ed] a key role in the ‘whole of government’ approach that involves all levels of law enforcement across several agencies in immigration enforcement.”<sup>162</sup>

In implementing CDS, U.S. Customs and Border Protection employed actions on apprehended immigrants, including (1) repatriation to Southwestern border locations far from where the immigrant was apprehended; (2) formal removal orders carrying bars on future admission to the U.S.; (3) notices to appear before immigration judges with the possibility of the immigrant’s removal from the U.S.; and (4) prosecution for federal immigration crimes carrying sentences of months and even years.<sup>163</sup> CDS led

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<sup>151</sup> Nicholas Schmidle, *Trump’s Pentagon Tries to Move on From the War on Terror*, NEW YORKER (Jan. 19, 2018), <https://www.newyorker.com/news/news-desk/trumps-pentagon-tries-to-move-on-from-the-war-on-terror>.

<sup>152</sup> Todd Miller, *War on the Border*, N.Y. TIMES (Aug. 17, 2013), <http://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html>.

<sup>153</sup> Slack et al., *supra* note 138, at 12.

<sup>154</sup> *About CBP*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 21, 2016), <https://www.cbp.gov/about>.

<sup>155</sup> *Id.*

<sup>156</sup> Slack et al., *supra* note 137, at 11.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 12.

<sup>160</sup> *Id.*

<sup>161</sup> Randy Capps et al., *Advances in U.S.-Mexico Border Enforcement: A Review of the Consequence Delivery System 1* (May 2017).

<sup>162</sup> Slack et al., *supra* note 137, at 12.

<sup>163</sup> Capps et al., *supra* note 161, at 1.

local law enforcement and other officials to act as immigration authorities, detaining people for alleged immigration offenses.<sup>164</sup> This also led to increased incarceration rates and lengths of sentences for immigration offenders.<sup>165</sup>

There also exists a decline in immigrants prevailing on their cases for legal status.<sup>166</sup> Only 16,058 people prevailed in their immigration cases from February 1 to July 31, 2017, allowing them to stay in the U.S.<sup>167</sup> This marks a 20.7 percent decline from the same time period in 2016.<sup>168</sup>

The increase in orders for removal and decrease in prevailing on immigration cases could be due to the changes in priority deportation. Under the Obama administration, only “13 percent of the estimated 11 million unauthorized immigrants were considered a priority for deportation because of a disqualifying criminal conviction, recent removal order, or recent illegal entry . . . .”<sup>169</sup> President Trump expanded the pool dramatically with his executive order on interior enforcement.<sup>170</sup> Trump’s Executive Order “Enhancing Public Safety in the Interior of the United States” defied enforcement priorities and placed all unauthorized individuals—and even some authorized individuals<sup>171</sup>—at risk of deportation, including families, long-time residents, and Dreamers, people brought to the U.S. as children.<sup>172</sup>

These trends have “fundamentally reshaped how migrants experience the border, as well as conveniently framed an ever-expanding majority as ‘criminal aliens’ due to the changes in prosecution [of migrants] . . . .”<sup>173</sup> The increase of enforcement tactics and addition of

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<sup>164</sup> Slack et al., *supra* note 137, at 12.

<sup>165</sup> *Id.*

<sup>166</sup> Maria Sacchetti, *Deportation orders increase under Trump; fewer migrants prevail in court*, CHICAGO TRIBUNE (Aug. 8, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-deportation-orders-trump-20170808-story.html>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Muzaffar Chishti & Jessica Bolter, *The Trump Administration at Six Months: A Sea Change in Immigration Enforcement*, MIGRATION POL’Y INST. (July 19, 2017), <https://www.migrationpolicy.org/article/trump-administration-six-months-sea-change-immigration-enforcement>.

<sup>170</sup> *Id.*

<sup>171</sup> See Masha Gessen, *In America, Naturalized Citizens No Longer Have an Assumption of Permanence*, NEW YORKER (June 18, 2018), <https://www.newyorker.com/news/our-columnists/in-america-naturalized-citizens-no-longer-have-an-assumption-of-permanence>.

<sup>172</sup> Exec. Order No. 13768, 82 Fed. Reg. 8799, 2017-02102 (2017). For a summary of the executive order, see *Summary of Executive Order “Enhancing Public Safety in the Interior of the United States”*, AM. IMMIGRATION COUNCIL (May 19, 2017), <https://www.americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order>.

<sup>173</sup> Slack et al., *supra* note 137, at 12.

military rhetoric enforce the militarization of the Southwestern border.<sup>174</sup> The fueling of CBP's budget by the government only adds fuel to this flame.

### B. *INVASIVE TECHNOLOGY*

U.S. Customs and Border Protection uses technology to supplement its forces and respond to the changing threat environment.<sup>175</sup> CBP's technological advances have changed the way it screens incoming people and cargo and secures the border.<sup>176</sup> Unsurprisingly, the Department of Homeland Security continued to increase its funding of border technology.<sup>177</sup> In fact, estimates say that spending on global border control and biometrics will double to \$16.5 billion in 2012 to \$32.5 billion by 2021.<sup>178</sup>

The agency is using technology to reduce wait times for travelers.<sup>179</sup> CBP incorporates biometrics into passports which makes inspections more efficient and accurate.<sup>180</sup> The agency also uses Automated Passport Control kiosks and the Mobile Passport Control smartphone app to quickly accept travelers.<sup>181</sup> CBP's automated cargo processing reduces wait times as well.<sup>182</sup>

CBP continues to use cameras to facilitate its operations, including officer body-worn cameras, fixed-tower cameras, and remote and mobile surveillance systems.<sup>183</sup> Its Remote Video Surveillance Systems are already in use in Texas and Arizona.<sup>184</sup> RVSS employs day and night cameras, loudspeakers, and floodlights.<sup>185</sup> They also have motion and seismic detectors which may trigger alerts to CBP.<sup>186</sup> Air and Marine Operations use

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<sup>174</sup> *Id.* at 11-12.

<sup>175</sup> R. Gil Kerlikowske, *Technology: Force Multiplier and Facilitation Tool*, U.S. Customs and Border Protection, U.S. CUSTOMS & BORDER PROTECTION (May 31, 2016), <https://www.cbp.gov/newsroom/blogs/technology-force-multiplier-and-facilitation-tool>.

<sup>176</sup> *Id.*

<sup>177</sup> See *Budget-in-Brief: Fiscal Year 2016* 38, DEP'T OF HOMELAND SECURITY, [https://www.dhs.gov/sites/default/files/publications/FY\\_2016\\_DHS\\_Budget\\_in\\_Brief.pdf](https://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf) (raising the budget from \$351 million in 2014 to \$373.5 million in 2016).

<sup>178</sup> *Exclusive – Q&A with Immigration, Border Management Expert on Security, Tech Market*, HOMELAND SECURITY TODAY (Jan. 30, 2015), <https://www.hstoday.us/channels/global/exclusive-q-a-with-immigration-border-management-expert-on-security-tech-market/>.

<sup>179</sup> Kerlikowske, *supra* note 175.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> Tobias Naegele, *Technology is Border Patrol's 'Highest Need'*, GOVTECHWORKS, <https://www.govtechworks.com/technology-is-border-patrols-highest-need/#gs.QtPiOZc>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

drones and aircrafts to capture full-motion video to detect issues at the border through video and audio.<sup>187</sup>

The future of CBP's border security technology is shown annually at the Border Security Expo where DHS officials can browse booths with the "latest inventions to survey and protect the United States' border."<sup>188</sup>

### C. INCREASED COOPERATION WITH LOCAL LAW ENFORCEMENT AND ICE

While the federal government is responsible for enforcing the civil provisions of immigration laws, state and local law enforcement support the federal government by enforcing the criminal provisions of immigration laws.<sup>189</sup> Most jurisdictions also permit police officers to question people about their immigration status during criminal matters, such as traffic stops.<sup>190</sup>

Additionally, local authorities may be permitted to take on the federal government's role in immigration enforcement.<sup>191</sup> Section 287(g) of the Immigration and Nationality Act permits DHS to enter into agreements with state and local law enforcement agencies to allow them to enforce federal immigration law in jails or in the course of their regular work.<sup>192</sup>

U.S. Immigration and Customs Enforcement (ICE), the "investigative arm of the Department of Homeland Security," also works with state and local law enforcement.<sup>193</sup> ICE offers state and local law enforcement technological access to multiple federal databases which includes criminal and civil immigration information.<sup>194</sup> ICE may also use state driver's license databases to locate immigrants for enforcement

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<sup>187</sup> Kerlikowske, *supra* note 175; *Border Patrol – High Tech Equipment*, U.S. CUSTOMS & BORDER PROTECTION (Mar. 20, 2017), <https://www.cbp.gov/newsroom/photo-gallery/photo-library/border-patrol-high-tech-equipment>.

<sup>188</sup> Meredith Hoffman, *The Future of Border Securing Technology is Here and It's Terrifying*, VICE (Apr. 20, 2016), <https://www.cbp.gov/newsroom/photo-gallery/photo-library/border-patrol-high-tech-equipment>.

<sup>189</sup> Christie Hobbs, *State-Federal Partnerships in Immigration Enforcement: Is the Trend Right for Texas?*, 8 TEX. TECH. ADMIN. L.J. 141, 146 (2007).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 147; INA of 1952 § 287(g) (1996).

<sup>192</sup> *Untangling The Immigration Enforcement Web* 28, NAT'L IMMIGRATION L. CTR. (Sep. 2017), <https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf> [hereinafter *Enforcement Web*].

<sup>193</sup> *Difference between U.S. Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE)*, U.S. CUSTOMS & BORDER PROTECTION (Nov. 13, 2015), [https://help.cbp.gov/app/answers/detail/a\\_id/1040/~/-/difference-between-u.s.-customs-and-border-protection-%28cbp%29%2C-u.s.-citizenship](https://help.cbp.gov/app/answers/detail/a_id/1040/~/-/difference-between-u.s.-customs-and-border-protection-%28cbp%29%2C-u.s.-citizenship).

<sup>194</sup> *Enforcement Web*, *supra* note 192, at 3.

purposes.<sup>195</sup> Additionally, “[j]ail authorities give ICE agents access to jails and lists of arrestees, enabling the agency to target individuals for deportation.”<sup>196</sup>

Some states have taken border patrol into their own hand. Texas, for example, formed its own police force to patrol the Southwestern border, supplementing CBP.<sup>197</sup> The Texas border police force deploys boats on the Rio Grande, helicopters in the air, and hundreds of black-and-white patrol cars on South Texas highways.<sup>198</sup> According to Rio Grande Valley residents, the additional troopers have turned the area into a police state.<sup>199</sup>

#### IV. RETHINKING THE FOURTH AMENDMENT STANDARDS IN THE BORDER REGION

Courts determine the reasonableness of a search or seizure by balancing the degree to which the search or seizure intrudes upon the person’s privacy and the degree to which the search is needed for the promotion of legitimate governmental interests.<sup>200</sup> While this test has determined reasonableness for years, the test should be reevaluated due to the changes presented by the breadth of border and immigration enforcement.

Although the government maintains its legitimate interest in border and immigration enforcement, changes at the Southwestern border have increased the government’s intrusion on privacy. While searches and seizures at the border are reasonable per se, searches and seizures within the border should be reevaluated. Therefore, the increase in border and immigration enforcement measures begs for a reevaluation of reasonableness at the Southwestern border.

The main source of change in the reasonableness balancing test comes from the increased government intrusion on privacy. The degree to which the search is needed for the promotion of legitimate government interests is largely unchanged at the border but should include the broader interest in reducing violations of the Fourth Amendment.

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<sup>195</sup> *Id.* at 16.

<sup>196</sup> *Id.* at 3.

<sup>197</sup> John Burnett, *Texas Created Its Own Border Patrol Police, But Is It Necessary?*, NAT’L PUB. RADIO (Sept. 4, 2015), <https://www.npr.org/2015/09/04/437596910/texas-created-its-own-border-patrol-police-but-is-it-necessary>.

<sup>198</sup> *Id.*

<sup>199</sup> John Burnett, *In Texas, Complaints Of Too Many Trooper With Too Little To Do*, NAT’L PUB. RADIO (Sept. 5, 2015), <https://www.npr.org/2015/09/05/437768153/in-texas-complaints-of-too-many-troopers-with-too-little-to-do>.

<sup>200</sup> *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

### A. REWEIGHING PRIVACY

In determining whether a search or seizure is reasonable, courts must consider the intrusion upon a person's privacy. Courts must consider the current state of the intrusion, including any changes affecting the scope of the intrusion. At the Southwestern border, three major changes created a greater intrusion upon privacy: the border's militarization, advancement of technology, and cooperation with state and local law enforcement. Additionally, CBP officers' use of force demonstrates the intrusion upon the privacy right for personal security.

#### 1. *Effects of Militarization*

The border's militarization increased the degree of the government's intrusion upon privacy. The government engages in an unjustifiable intrusion upon privacy "whenever the monitoring of its citizens results in the abuse of its power."<sup>201</sup> This abuse may come from the creation of feeling constantly monitored by the government.<sup>202</sup>

Residents of border towns face constant monitoring by CBP.<sup>203</sup> While these citizens do not fear undocumented immigrants, they do fear CBP.<sup>204</sup> They feel that CBP is threatening.<sup>205</sup> One border resident told the New York Times that "there is fear [of CBP] everywhere."<sup>206</sup> Reports of heavy-handedness by border agents have bred mistrust among border residents.<sup>207</sup> "The fears of the community are compounded by the fact that many families live in mixed-status households, where some members are living in the country legally and others aren't, creating a fear of separation."<sup>208</sup> This sense of paranoia due to being monitored was caused by the crushing presence of CBP and its militarization. CBP's paranoia-causing presence demonstrates its abuse of power. This abuse of power causes increased intrusions into border residents' privacy.

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<sup>201</sup> Kimberly D. Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1545 (2014).

<sup>202</sup> *Id.*

<sup>203</sup> Shikha Dalmia, *How America turned this Arizona town into a police state*, THE WEEK (Aug. 29, 2017), <http://theweek.com/articles/719688/how-america-turned-arizona-border-town-into-police-state>.

<sup>204</sup> *Id.*

<sup>205</sup> Mariano Castillo, *For those living on border, security is complicated subject*, CNN (July 21, 2013), <https://www.cnn.com/2013/07/21/us/immigration-border-security/index.html>.

<sup>206</sup> John M. Broder, *Immigration Raids, Far From Border, Draw Criticism*, N.Y. TIMES (June 15, 2004), <http://www.nytimes.com/2004/06/15/us/immigration-raids-far-from-border-draw-criticism.html>.

<sup>207</sup> Castillo, *supra* note 205.

<sup>208</sup> *Id.*



Furthermore, towns on the border are often isolated.<sup>209</sup> Some towns require travelers to go through permanent checkpoints to enter or exit the area.<sup>210</sup> Some border residents feel targeted and profiled by CBP.<sup>211</sup> They also feel like the national rhetoric was racially discriminatory.<sup>212</sup>

## 2. *Effects of Technology*

With the growth of U.S. Customs and Border Protection, there are more officers targeting immigrants. Because there is an exponential increase in the number of officers and checkpoints, there are more opportunities where the government may intrude upon a person's privacy with little to no suspicion of wrongdoing. CBP's technological advances exponentiate its ability to intrude on a person's privacy.

Improvements in CBP's video surveillance, for example, further its intrusion into privacy. CBP's drone surveillance may provide persistent examination.<sup>213</sup> There is not yet law regarding privacy against drones. However, technological advances will permit the government to push the boundaries of privacy. This assembling of data from surveillance of the border area reveals private aspects of personal identity and is susceptible to abuse.<sup>214</sup>

The CBP's technology and size is fueled by its increasing budget. Because its budget continues to expand causes a greater invasion of privacy, CBP's intrusion upon privacy continues to grow.

## 3. *Effects of Cooperation*

Additionally, due to its cooperation with state and local law enforcement, CBP increased its manpower and ability to detain and deport immigrants, sometimes wrongfully so.<sup>215</sup> While CBP's cooperation with state and local law enforcement makes targeting immigrants easier, the cooperation leads to confusion in applying Fourth Amendment rules.

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<sup>209</sup> Manny Fernandez, *Checkpoints Isolate Many Immigrants in Texas' Rio Grande Valley*, N.Y. TIMES (Nov. 22, 2015), <https://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html>.

<sup>210</sup> Dalmia, *supra* note 203.

<sup>211</sup> Leif Reigstad, *Crossing the Line in El Cenizo*, TEX. MONTHLY (Aug. 2017), <https://features.texasmonthly.com/editorial/crossing-line-el-cenizo/>.

<sup>212</sup> *Id.*

<sup>213</sup> *Drones and privacy: A looming threat*, ECONOMIST (Mar. 19, 2015), <https://www.economist.com/blogs/democracyinamerica/2015/03/drones-and-privacy>.

<sup>214</sup> See *United States v. Jones*, 565 U.S. 400, 416 (2012) (discussing the invasion of privacy caused by GPS tracking).

<sup>215</sup> See Joel Rubin & Paige St. John, *How a U.S. citizen was mistakenly targeted for deportation. He's not alone*, L.A. TIMES (Nov. 29, 2017, 7:15 PM), <http://www.latimes.com/local/lanow/la-me-citizen-arrest-20171129-story.html>.

For example, both CBP agents and police officers must have reasonable suspicion to stop a car. Officers may not selectively enforce the law based on the consideration of race.<sup>216</sup> However, CBP agents may rely on indicators of origin to conduct stops for border and immigration enforcement. Because CBP agents, unlike officers, may base their suspicion on indicators of origin, CBP's standards are easier to attain.

Using indicators of origin significantly increased CBP's intrusion into privacy. Because agents may use roving patrols to make stops essentially without suspicion, the privacy rights of immigrants near the border are minute. Although roving patrols legally require reasonable suspicion, the factors to achieve this standard are inconclusive. By achieving reasonable suspicion through stereotypical characteristics of immigrants, including a person's haircut, dress, or inability to speak English, CBP can get away with searches and seizures of immigrants without any suspicion.

These lower standards intrude upon privacy at particularly high rates in areas with large populations of minority groups. The Southwestern border, in particular, has the largest concentration of Hispanic population.<sup>217</sup> In Texas, for instance, 39.1% of people are of Hispanic or Latino descent, compared to 42.6% of people who are white.<sup>218</sup> Because the 100-mile border zone covers the most Hispanic-dense areas of the U.S. and includes several major metropolitan areas, the privacy of a vast number of people is intruded upon by CPB.

Although CBP is authorized to use racial identifiers in reaching its reasonable suspicion standard, this standard intensifies the government's intrusion upon the privacy of people, particularly non-citizens and citizens of foreign descent. Therefore, the government's intrusion upon privacy has increased at the Southwestern border.

#### 4. *Effects of Force*

People also have a privacy right in regard to their personal security.<sup>219</sup> The Fourth Amendment itself gives a person the right to

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<sup>216</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>217</sup> Anna Brown & Mark Hugo Lopez, *Mapping the Latino Population, By State, County and City*, PEW RES. CTR. (Aug. 29, 2013), <http://www.pewhispanic.org/2013/08/29/mapping-the-latino-population-by-state-county-and-city/>.

<sup>218</sup> *QuickFacts: Texas*, U.S. CENSUS BUREAU (2016), <https://www.census.gov/quickfacts/fact/table/TX/RHI825216#viewtop>.

<sup>219</sup> See Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 895-96 (2004) (stating that the Fourth Amendment recognizes the value of privacy in its guarding of security of houses, person, papers, and effects); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

privacy over his or her body.<sup>220</sup> However, an officer may use force against a person to conduct a search or seizure.<sup>221</sup>

An officer's use of force must be reasonable.<sup>222</sup> Whether an officer's use of force is reasonable requires the same Fourth Amendment balance of the intrusion of the individual against the countervailing government interests.<sup>223</sup> Anytime an officer conducts a search or seizure, there is risk of physical harm to the person being searched or seized. Additionally, an officer conducts a seizure when he intentionally shoots a person he is trying to arrest.<sup>224</sup>

U.S. Customs and Border Protection agents' use of force led to many deaths at the border. Between 2010 and 2016, at least fifty-three individuals died due to encounters with U.S. Customs and Border Protection.<sup>225</sup> At least 48 of these deaths resulted from the use of force or coercion.<sup>226</sup> At least nineteen of the individuals who died between 2010 and 2016 were U.S. citizens.<sup>227</sup> There were also six people killed by CBP while on Mexican soil.<sup>228</sup> Notably, CBP-caused deaths along the Southwestern border grossly outnumbered those in other border areas.<sup>229</sup> The Southwestern border experienced forty-four deaths, while the remaining areas experienced only seven deaths.<sup>230</sup> In addition, at least twenty-six individuals were seriously injured while encountering CBP.<sup>231</sup>

CBP's use of force, especially at the Southwestern border, provides the public with a higher degree of privacy interest. Because CBP uses force at the border regardless of whether the person is on U.S. soil or is a U.S. citizen, CBP's use of force, sometimes fatal, is unreasonable.

Although the government maintains its interest in protecting the border, it cannot logically say that this interest is maintained by murdering people who are outside of the country or who are citizens of this country. In fact, the Fourth Amendment protects those outside of the U.S. against an

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<sup>220</sup> U.S. CONST. amend. IV.

<sup>221</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Wayne C. Beyer, *Police Shootings Under the Fourth Amendment*, 8 RICH. J. L. & PUB. INT. 1, 2 (2005).

<sup>225</sup> *Deaths and Injuries in CBP encounters since January 2010* 24, AM. C.L. UNION (May 19, 2016), [https://www.aclu.org/sites/default/files/field\\_document/may\\_2016\\_dead\\_and\\_injured\\_by\\_cbp\\_of\\_ficials.pdf](https://www.aclu.org/sites/default/files/field_document/may_2016_dead_and_injured_by_cbp_of_ficials.pdf).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 25.

<sup>229</sup> *Id.* at 27.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 24.

officer's unreasonable use of deadly force.<sup>232</sup> Therefore, there is an increased privacy interest in the personal security in the border area.

Courts must consider changes in circumstances that affect intrusions upon a person's privacy. At the Southwestern border, the CBP's militarization, advancement of technology, use of excessive force, and cooperation with local, state and federal law enforcement further intrude upon privacy. The use of force by CBP officers additionally demonstrates the intrusion upon the privacy a person has in their security. Therefore, the courts must examine these intrusions when determining the reasonability of searches and seizures in the Southwestern border region.

### B. A BROADER VIEW OF GOVERNMENT INTEREST

The people's right to privacy is balanced with the legitimate governmental interests. While CBP's primary legitimate government interest is enforcing the border to deter illegal immigration and smuggling, the government has many legitimate interests – like cost effectively solving and prosecuting crime -- which affect the government's decision to conduct a search or seizure.<sup>233 234</sup>

Likewise, the government's interest in solving, and prosecuting crime and saving money should be considered in the border areas which require lowered suspicion standards for conducting lawful searches and seizures. Because these government interests could be served by the reduction in Fourth Amendment violations, the court should also consider the reduction of illegal searches and seizures as a broader government interest.

The government has an interest in solving and prosecuting crimes.<sup>235</sup> To prosecute a crime, the government must use evidence to establish the elements of the crime beyond a reasonable doubt.<sup>236</sup> However, not all evidence is admissible.<sup>237</sup> When a government actor illegally conducts a search and seizure, the exclusionary rule applies, and the evidence obtained as a result of the violation is inadmissible in court.<sup>238</sup> The exclusionary rule,

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<sup>232</sup> *Rodriguez v. Swartz*, 899 F.3d 719, 729-30 (9th Cir. 2018).

<sup>233</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 538-39 (1985) (balancing the sovereign's interest at the border against privacy of entrant).

<sup>234</sup> *Sell v. United States*, 539 U.S. 166, 180 (2003) (crime solving and prosecution); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (saving money).

<sup>235</sup> *Sell*, 539 U.S. at 180.

<sup>236</sup> *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

<sup>237</sup> See Denise Robinson, *Kaupp v. Texas: Breathing Life into the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 761, 763 (2004).

<sup>238</sup> *Id.*

thus, serves to preserve judicial integrity and to deter illegal police activity.<sup>239</sup>

Because CBP uses local and state police to conduct immigration enforcement, the risk of obtaining evidence illegally is higher. CBP's mix of federal, state, and local law enforcement creates confusion between the standards that are required to conduct a legal search or seizure. Additionally, the factors used to reach the requisite level of suspicion differ between the forces.

Because a state or local officer has a greater chance of confusing legal standards and conducting an illegal search, the chance for excluding evidence is higher. The government's interest in solving and prosecuting crime is, therefore, promoted by decreasing illegal searches.

The government also has an interest in saving money.<sup>240</sup> One way for the government to maintain this interest is to avoid liability for the illegal acts of its officers.

A person may sue an officer, police department, or jurisdiction "for injuries caused by an officer's wrongdoing."<sup>241</sup> Under 42 U.S.C. § 1983, a person may sue a city for constitutional violations committed by the police.<sup>242</sup> Damages awarded under § 1983 "compensate persons for injuries that are caused by the deprivation of constitutional rights."<sup>243</sup> Plaintiffs may receive damages reflecting the harm they endured due to the police misconduct, including compensatory and general damages.<sup>244</sup>

The Supreme Court has upheld awards of general damages for unlawful searches and seizures on multiple occasions.<sup>245</sup> General damages awarded have resulted from physical harm like pain, disability, and discomfort, and emotional and mental harm like fear, humiliation, and mental anguish.<sup>246</sup> General damages include loss of bodily integrity, loss of dignity, violation of personhood, loss of freedom, damage to reputation, and loss of privacy.<sup>247</sup> These costs vary depending on the person being searched.

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<sup>239</sup> *Id.*

<sup>240</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Milner v. Apfel*, 148 F.3d 812, 813-14 (7th Cir. 1998).

<sup>241</sup> Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 908 (2015).

<sup>242</sup> 42 U.S.C. § 1983 (1871); Harmon, *supra* note 241, at 907.

<sup>243</sup> Harmon, *supra* note 241, at 907 (citing *Carey v. Phipus*, 435 U.S. 247, 254 (1978)).

<sup>244</sup> *Id.* at 908.

<sup>245</sup> *Foley v. Connelie*, 435 U.S. 291, 298 (1978) ("An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained."); *Terry v. Ohio*, 392 U.S. 1, 25 (1968) (stating that police stops can be "annoying, frightening, and . . . humiliating").

<sup>246</sup> Harmon, *supra* note 241, at 907.

<sup>247</sup> L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L. J. 1517, 1527 (2011).

Historically persecuted groups, for instance, are likely to experience especially high costs.<sup>248</sup>

Compensatory damages awarded under § 1983 include loss of past earnings, impairment of future earnings, property damage expenses, and medical treatment expenses.<sup>249</sup> Plaintiffs who succeed in their § 1983 claims are “often awarded million-dollar compensation awards for physical injuries, pain and suffering, medical expenses, and lost wages.”<sup>250</sup>

Due to the windfall amounts awarded to plaintiffs under § 1983, the government has an interest in saving money by avoiding liability. The government risks liability by committing illegal searches and seizures. Thus, the government’s interest in saving money is served by abiding by the Fourth Amendment.

While CBP’s primary interest is in border and immigration enforcement, the government also has an interest in solving and prosecuting crime and saving money. Because the government’s interests in solving and prosecuting crime and saving money are served by the reduction of Fourth Amendment violations, the court should consider the government’s broader interests in reducing illegal searches or seizures. Therefore, when balancing the government’s interests with its intrusions upon privacy, the court should consider the government’s interests in both border and immigration enforcement and the reduction of illegal searches and seizures.

Border and immigration enforcement are CBP’s primary objectives behind its conduct at the Southwestern border. This interest remains relatively constant. Therefore, courts’ consideration of a broader view of governmental interests would not likely have an overwhelming impact on the weight of the government’s interest when balanced against the intrusion on privacy. However, the analysis could provide additional clarity into how the government could best serve its interests.

## V. CONCLUSION

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<sup>248</sup> *Id.* at 1527 n.41.

<sup>249</sup> Harmon, *supra* note 241, at 907.

<sup>250</sup> *Id.* (citing as examples *Whitfield v. Municipality of Fajardo*, 431 F.3d 1, 16-17 (1st Cir. 2014) (reducing compensatory damages for physical and mental pain and suffering arising from police shooting resulting in shattered femur from \$4 million to \$3 million); *McCollum v. Kline*, 32 Fed. App’x 49, 56-57 (4th Cir. 2002) (upholding a \$1.25 million noneconomic damages award for injuries, pain, and suffering in an excessive force claim involving the loss of an eye and other significant injuries); *id.* at 51-52 (noting awards of \$67,670 for past medical expenses and \$145,000 for past and future lost wages arising from an excessive force claim); *Park v. Shiflett*, 250 F.3d 843, 854 (4th Cir. 2001) (permitting compensatory damages of \$300,000 for past and future medical costs from injuries caused by excessive use of force during arrest); *Gutierrez-Rodriguez v. Soto*, 882 F.2d 553, 578-87 (upholding a jury award of \$4.5 million for a plaintiff rendered paraplegic when he was shot in the back by the police)).

The Fourth Amendment's reasonableness is determined by the balance between the intrusion upon a person's privacy and the governmental interests in conducting it. This balance may tilt one way when there are changes in circumstances regarding searches and seizures. Although the Fourth Amendment itself does not change, what constitutes reasonableness may be subject to reevaluation.

The Border Search Exception balanced the government's high interest in border regulation against high intrusions into personal privacy. While this balance may still exist at border crossings, the intrusion by U.S. Customs and Border Protection within the border has increased substantially. Therefore, courts should reconsider the balancing of the intrusion upon privacy versus the government's interest in light of the changes at the Southwestern border.

Due to the Southwestern border's increased militarization, technology, and cooperation with local and state law enforcement with ICE, the government's intrusion has raised within the region. First, U.S. Customs and Border Protection's militarization created an unjustifiable intrusion upon privacy by its heavy monitoring of the border region and its people. Second, the agency's increase in technology amplified surveillance, increasing the government's intrusion upon privacy. Third, the government's ability to use racial identifiers to target minorities, particularly Hispanics, increases its intrusion upon people's privacy. Additionally, government intrusions occurred at the Southwestern border as a result of numerous invasions of personal security.

The intrusion of privacy must be balanced with the government's interests in conducting the search or seizure. At the Southwestern border, the government has an interest in immigration and border enforcement. The government also has an interest in solving and prosecuting crime and saving money. Because these interests may be served by reducing illegal searches and seizures, preventing Fourth Amendment violations should also be included in the court's consideration of government's interests.

If courts balanced the Southwestern border's privacy intrusions against the government's interest, they would likely hold that the government's interests do not afford the degree to which CBP is intruding on privacy. While the Fourth Amendment, itself, has not changed, what constitutes reasonableness at the Southwestern border has.