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Administrative Arrest Warrants: Armed Encounters Outside the Judicial Process

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ARTICLE

ADMINISTRATIVE ARREST WARRANTS: ARMED ENCOUNTERS OUTSIDE THE JUDICIAL PROCESS

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Imagine it's daybreak. You're just getting up.[1] As you walk to the kitchen to start your coffee you hear commotion outside. You look out the front window and see several armed law enforcement officers pointing guns at your home. There is banging on the front door. "Come out!" "Come out with your hands up," the officer knocking screams. "Now!" "Come out!" The armed officers refuse to leave.

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[1] Katherine Evans, *The ICE Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 589 (2009). Evans notes that ICE home raids generally occur "early in the morning when most residents are sleeping, capitalizing on [their] confusion and disorientation." *Id.*

Many thoughts are likely racing through your mind. Do I have to comply? Am I safe? This Article addresses these questions through a legal lens. Can law enforcement surround a person's home, armed solely with an administrative arrest warrant issued outside the judicial process, and demand that person exit? The answer to this question may depend on the continuing viability of a 1960 case, *Abel v. United States*.[2]

This Article considers three related questions. First, is a person "seized" under the Fourth Amendment when law enforcement restricts a person's movements in their home and limits their ability to leave or go about their business?[3] Second, does the answer to this seizure inquiry turn on the person's citizenship status? And third, how do lawyers ensure that courts discard bad law? This last question is not a qualitative assessment—with good and bad law being tied to one's legal ideology. Rather, certain legal holdings, dating back over half a century, have been whittled away if not entirely eroded.[4] When this happens, how do lawyers ensure that judges do not rely on outdated law that has not been directly overruled? Worse still, how do lawyers ensure that judges avoid dicta from such cases when the entire case should be jettisoned for being at odds with current legal doctrine?

These questions are not abstract hypotheticals. Real people have faced the real consequences of being seized at their home by Immigration and Customs Enforcement ("ICE") officers relying on nothing more than an administrative immigration arrest warrant.[5] These warrants are issued

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[2] 362 U.S. 217 (1960).

[3] Fourth Amendment seizures are not identical to arrests. A person can be seized without being arrested. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 16 (1968). *See also* Florida v. Bostick, 501 U.S. 429, 437 (1991) (explaining that the "crucial test" for seizure is "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'").

[4] *See* Trump v. Hawaii, 585 U.S. 667, 710 (2018). Chief Justice Roberts, in response to the dissent's criticism of his majority opinion, addressed the legal legacy of the infamous Japanese internment case, *Korematsu v. United States*, 323 U.S. 214 (1944). Justice Roberts wrote: "The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Trump*, 585 U.S. at 710. And just like that, a regrettable decision that had been whittled away in case after case was finally cast aside.

[5] Following 9/11, Congress passed the Homeland Security Act of 2002. *See* 6 U.S.C. 1, et seq., Pub. L. No. 107-296, 116 Stat. 2135 (2002). This Act abolished INS, replacing INS with three separate immigration agencies placed under a newly created agency—the Department of Homeland Security ("DHS"). Sec. 471, 6 U.S.C. 291. The two agencies tasked with controlling illegal immigration and enforcing immigration laws are Customs and Border Protection ("CBP") and Immigration and Customs Enforcement ("ICE"). *See also* Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433 (2021).

outside the judicial process solely by law enforcement officers.[6] Yet real judges have relied on *Abel v. United States* to allow armed ICE officers to surround a non-citizen's home and demand that person exit without first securing a judicial warrant.[7] Most troubling, from a legal perspective, is that these individuals roused from their homes have not committed any crime. They are suspected, by ICE officers, of being visa overstays—a non-criminal violation.[8] Armed seizures conducted in and around the home are usually reserved for dangerous criminals that must be overpowered to keep our communities safe.[9] These particular arrests, however, are not targeting violent or dangerous criminals.

Judges need clarity. Law enforcement officers need clarity. The Fourth Amendment has historically been one area where there have been firm lines drawn, particularly at the entry to the home.[10] Cases dating back to 1960, or pre-*Katz v. United States*,[11] have been eroded to the point that judges should recognize their impotency.[12] Yet that does not always happen. Whether due to a judicial law clerk's location of a seemingly great quote, often taken out of context, or a desire to find a basis for upholding an arrest, some judges still rely on pre-*Katz* cases for Fourth Amendment guidance.[13] This reliance is fraught with constitutional peril as *Katz* and its

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6 Sorto-Vasquez Kidd, et al. v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx), 2024 WL 2190981, at *11 (C.D. Cal. May 15, 2024) (granting summary judgment to prevent ICE "knock and talk" encounters at individuals' homes).

7 United States v. Malagerio, 49 F.4th 911 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 1785 (2023) (upholding district court finding that relied on *Abel*). The Fifth Circuit provided an additional reason to affirm the District Court's decision. The Fifth Circuit noted that a person standing in the doorway of his home voluntarily appears in public negating the need for a warrant. *Id.* at 915. Malagerio appeared in his doorway as a result of an armed officer knocking on his door and demanding he exit. *Id.* at 913-14. The Fifth Circuit's secondary reasoning relied on a quote from *United States v. Santana*, 427 U.S. 38 (1976). *Malagerio*, 49 F.4th at 915. Importantly, *Santana* pre-dates the Supreme Court's decision in *Payton v. New York* that requires judicial arrest warrants to make a home arrest. *See* Payton v. New York, 445 U.S. 573, 576 (1980). Much like *Abel*, one might question *Santana*'s full viability following *Payton*.

8 Arizona v. United States, 567 U.S. 387, 396 (2012). Most immigration offenses for being unlawfully in the country are civil, not criminal, in nature. *See id.*

9 This Article does not address arrest issues relating to individuals that have committed crimes, including the crime of illegal re-entry into the United States. Instead, this Article's focus is the many individuals that are suspected of being visa overstays or are otherwise illegally in the country where the only available penalty is removal.

10 Silverman v. United States, 365 U.S. 505, 511 (1961). "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *See also* United States v. U.S. Dist. Ct. E. Dist. Mich., 407 U.S. 297, 313 (1972) (reminding that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

11 389 U.S. 347 (1967). *Katz* is the seminal Fourth Amendment case providing protection against government intrusions.

12 *See, e.g.*, Abel v. United States, 362 U.S. 217, 236-37 (1960).

13 *See, e.g.*, Motion to Suppress, United States v. Malagerio, 5:20-CR-154-H-BQ, 2021 WL 3030067 (N.D.Tex. 2021) (No. 26).

progeny dramatically reshaped the legal landscape.[14] In moving away from a strictly property-based regime, *Katz* considered reasonable expectations of privacy.[15] While *Katz* underscores that the "Fourth Amendment protects people, not places,"[16] case law confirms that the place involved matters. And the home matters the most.[17]

This Article proceeds in four parts. Part I restates the opening hypothetical by explaining how ICE officers are legally permitted to issue, without judicial oversight, administrative arrest warrants. This statutory authority should, nonetheless, be evaluated using Fourth Amendment doctrine that limits exceptions to judicial warrants when law enforcement acts in, or just outside, the home. Part II introduces *Abel v. United States* to explain how arrests for alleged immigration violations could occur prior to *Katz*. Part III provides an overview of how modern Fourth Amendment doctrine has eroded *Abel* and justifies its outright reversal. Part IV concludes by asserting that all law enforcement officers, including ICE, should be bound by traditional Fourth Amendment doctrine when conducting seizures in, or just outside, the home.[18] The Fourth Amendment protects all people, not just citizens.[19] And its text should be given the full effect the Framers drafted and intended. For this reason, the Supreme Court should take an opportunity to explicitly overrule *Abel*.

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[14] *Katz* expanded Fourth Amendment protections beyond strict property-based protections. The Court concluded that "the underpinnings of [prior cases] *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." 389 U.S. at 353.

[15] The *Katz* Court famously stated that "the Fourth Amendment protects people, not places." *Id.* at 351. *Katz* involved a Fourth Amendment challenge to telephone calls made from a public telephone booth. The Court found that the "Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the [public] telephone booth, and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353.

[16] *Id.* at 351. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.*

[17] *See, e.g.*, Payton v. New York, 445 U.S. 573, 589 (1980) (noting that in no place "is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home."); Lange v. California, 594 U.S. 295, 303 (2021) (reminding that "any [judicial] warrant exception permitting home entry [is] 'jealously and carefully drawn,' in keeping with the 'centuries-old-principle' that the 'home is entitled to special protection.'").

[18] The "area immediately surrounding the home," or curtilage, has long been protected under the Fourth Amendment. Oliver v. United States, 466 U.S. 170, 178 (1984). In 1987, the Supreme Court created a four-part test to assess whether a particular area constitutes the curtilage. United States v. Dunn, 480 U.S. 294, 301 (1987). *Dunn* considers:

> the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id.

[19] *See* United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975) (noting that the appearance of Mexican ancestry, standing alone, does not provide adequate legal cause to stop a vehicle).

I. ICE OFFICERS AND ADMINISTRATIVE ARREST WARRANTS

The Fourth Amendment's text assures that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[20] These words, like all constitutional amendments, require interpretation. What is a search? What is a seizure? What makes a search or seizure unreasonable? Years of common law and judicial pronouncements have clarified the Constitution's promise that people will be protected from unreasonable governmental intrusions. And yet uncertainty remains. Whether due to technology,[21] the expansion of law enforcement (including immigration law enforcement),[22] or modernization such as cars,[23] mobile homes,[24] public transportation,[25] cellular telephones,[26] and tracking devices,[27] the Fourth Amendment's meaning is perpetually refined. Rarely does a Supreme Court term pass without a significant Fourth Amendment decision.

This Article adds to the scholarly literature by addressing an overlooked area—the Fourth Amendment's application to administrative arrest warrants issued solely by immigration officers. Does the Fourth Amendment require judicial determination of probable cause when an immigration officer seeks to arrest an individual at or near her home?

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20 U.S. CONST. amend. IV.

21 Kyllo v. United States, 533 U.S. 27, 31-35 (2001) (involving a search conducted by a thermal imaging device to permit officers to analyze the amount of heat emanating from a home). The Court explained that the "question we confront today is what limits there are upon this power of technology to shrink the realm of [Fourth Amendment] guaranteed privacy." *Id.* at 34.

22 *See, e.g.*, Florida v. Jardines, 569 U.S. 1 (2013) (establishing that K-9 dogs are now considered part of law enforcement); Florida v. Harris, 568 U.S. 237 (2013) (involving K-9 dog sniff search of an automobile); Rodriguez v. United States, 575 U.S. 348 (2015) (involving prolonged car stop to allow a K-9 dog to sniff around the car).

23 Carroll v. United States, 267 U.S. 132 (1925) (establishing the "automobile exception" to permit warrantless car searches provided law enforcement has probable cause that contraband is in the car); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (determining what constitutes voluntary consent to search a vehicle); South Dakota v. Opperman, 428 U.S. 364 (1976) (permitting warrantless inventory searches of a car to protect the contents); California v. Acevedo, 500 U.S. 565 (1991) (expanding "automobile exception" to permit warrantless car searches, including containers within the car, if law enforcement have probable cause the car contains contraband or evidence of a crime).

24 California v. Carney, 471 U.S. 386 (1985).

25 Florida v. Bostick, 501 U.S. 429 (1991) (involving law enforcement boarding buses during travel to seek permission to search passengers and their belongings); United States v. Drayton, 536 U.S. 194 (2002) (involving law enforcement request to search bus passengers).

26 City of Ontario v. Quon, 560 U.S. 746 (2010) (involving public employer's search of employee's text messages sent on city-issued cell phone); Riley v. California, 573 U.S. 373 (2014) (finding that personal cell phones are protected from warrantless searches by law enforcement).

27 United States v. Jones, 565 U.S. 400 (2012) (striking down as a trespass—and, therefore, violative of the Fourth Amendment—law enforcement's act of attaching a tracking device to the bottom of a car); Carpenter v. United States, 585 U.S. 296 (2018) (the warrantless use of cellphone tower "pings" to track a person's movement implicates the Fourth Amendment).

A. No Warrants Shall Issue, But Upon Probable Cause . . .

The Fourth Amendment does not require that all arrests, or seizures, be made pursuant to a warrant.[28] From *Terry* stops[29] to border checkpoints,[30] countless individuals are "seized" within the meaning of the Fourth Amendment daily.[31] These stops occur without prior judicial assessment and often result in completely innocent individuals being seized by law enforcement. There are limits to these seizures—both as to scope[32] and location.[33] When either the scope or location exceeds existing doctrine, a warrant is required.

In those instances where a warrant is required, the Fourth Amendment textually mandates that such warrant be issued only upon a showing of probable cause with sufficiently clear particularity.[34] But administrative warrants, those issued by executive officials without judicial oversight, often allow a relaxed showing of probable cause. The Supreme Court, in cases involving both home and business searches, has permitted deviation from Fourth Amendment text relating to administrative warrants based on public danger.[35] Certain "administrative" search warrants can be issued

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[28] The Fourth Amendment's text contains two clauses: the reasonableness clause and the warrants clause. The reasonableness clause only requires that searches and seizures be reasonable. This clause does not speak to warrants. In contrast, the warrants clause specifically requires that in those cases where warrants are required: "[A]nd no Warrants shall issue, but upon probably 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.

[29] *Terry v. Ohio* permits law enforcement to briefly stop an individual (which the Supreme Court found to be a seizure) and conduct a limited outer-clothes pat down frisk (which the Supreme Court found to be a search) without first securing a warrant if the officer has reasonable articulable suspicion "that criminal activity may be afoot" and that the person or people the officer is dealing with may be armed and dangerous. Terry v. Ohio, 392 U.S. 1, 30 (1968).

[30] Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (defining what constitutes a border or its "functional equivalent" for Fourth Amendment purposes); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975) (discussing roving patrols beyond the border and its "functional equivalent"); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (finding border checkpoint stops to be reasonable seizures under the Fourth Amendment).

[31] Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) (finding that a seizure can occur regardless of whether the person is being detained for investigatory reasons or subject to formal arrest).

[32] *Terry* requires that an officer's actions must be both "justified at its inception, and . . . reasonably related in scope to the circumstances which justified the [seizure] in the first place." *Terry*, 392 U.S. at 20.

[33] Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000) (finding that law enforcement checkpoint stops to discover and interdict illegal drugs violate the Fourth Amendment's protection against unreasonable seizures).

[34] The precise language is that "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.

[35] Camara v. Municipal Court, 387 U.S. 523, 530 (1967) (requiring that a home search be prefaced by securing a warrant); See v. City of Seattle, 387 U.S. 541, 545-46 (1967) (decided the same day as *Camara*, the Court held that businesses, as well as homes, require warrants—or an exception to the warrant requirement—prior to searching without consent).

on a generalized probable cause that falls far short of that expected under a personalized determination.[36] This article challenges that there is—and should be—a distinction between allowing limited administrative searches for potential societal dangers and allowing administrative seizures where no such danger exists. The two issues are not the same.

Beginning in 1967 with the *Camara* and *See* cases, the Supreme Court held that administrative search warrants were required to allow law enforcement officials to access one's home or business.[37] As the *See* Court emphasized, "the decision to enter and inspect will not be the product of the unreviewed decision of the enforcement officer in the field."[38] While these administrative warrants do not meet the particularized determinations textually mandated by the Fourth Amendment, there is at least a judicial determination of probable cause that a particular danger exists in the area justifying the search.[39] This step of placing a neutral and detached magistrate between law enforcement and the citizen is consistent with the Framers' disdain for generalized warrants.[40] But even here, the Framers' concern regarding generalized warrants is not squarely met.[41]

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[36] *Camara* allows code enforcement officers to secure a broad-based "area warrant" covering neighborhoods rather than meeting the textual mandate of "particularly describing the place to be searched." *Camara*, 387 U.S. at 537-38. This approach dilutes the textual protection for individuals relating to code enforcement issues in the name of community safety. The *See* case elaborated on the need for a flexible standard:

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.

See, 387 U.S. at 545.

[37] *Camara*, 387 U.S. at 538-39 (requiring warrants to enter the home). "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable government interest." *Id.* at 539.

[38] *See id.* at 545.

[39] *Id.* at 538, 545 (dispensing with the warrant specificity requirement and permitting administrative warrants to be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling"). Thus, administrative searches permitted under *Camara* do not require individualized housing decisions. Instead, the question becomes whether a particular house falls within a particular area—for which there is probable cause to conduct an administrative search. This "area search" approach is at odds with Constitutional text which requires that any warrant issued be based "upon probable cause" and "particularly describe[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[40] *See* Payton v. New York, 445 U.S. 573, 583 (1980) "It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Id.*

[41] Boyd v. United States, 116 U.S. 616, 630 (1886). The Framers valued personal privacy and individual liberty as the very fabric of freedom.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the party of the government and its employees of the sanctity of a man's home and the privacies of his life. It is not the breaking of his doors and the

From an originalist perspective, the Supreme Court's interpretation utilized in *Camara* and *See* is at odds with both the Amendment's text and original intent.[42] The Framers loathed unfettered access to their homes due to numerous abuses inflicted by the British troops using general warrants.[43] Homes were ransacked. Privacy was violated. And the Fourth Amendment was ratified to guard against such law enforcement abuses.[44] To ignore the particularized requirement of probable cause violates its textual structure and original intent. It dilutes the protection afforded. It empowers law enforcement and disempowers the individual.[45] This is wrong. But one thing that both *Camara* and *See* got right is the importance of placing a judicial officer in the path of law enforcement seeking to enter private buildings, particularly the home.

The Fourth Amendment was enacted to protect against unreasonable searches and arbitrary arrests. It stands, somewhat generically, for the

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> rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefensible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offence—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Id.

[42] *Payton*, 445 U.S. at 585 ("It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant."). In requiring a judicial warrant to make an in-home felony arrest, the Court explained that it has "long adhered to the view that the warrant procedures minimize the danger of needless intrusions . . . ." *Id.* at 586. These "area" searches permit far broader home searches than the Framers would have likely allowed.

[43] *Boyd*, 116 U.S. at 624-27 (1886) (detailing the then contemporary history of the events leading to ratification of the Fourth Amendment).

[44] *Id.* at 626-27.

> As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it a true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered sufficiently explanatory of what was meant by unreasonable searches and seizures.

Id.

> The struggles against arbitrary power in which [the Framers] had been engaged for more than twenty years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

Id. at 630.

[45] In 1886, the Court reminded that:

> The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that was ever found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.'"

Id. at 625.

proposition that a person's home is their castle.[46] Properly interpreted, the Fourth Amendment entrusts the decision of whether to permit entry to one's home to the individual (first and foremost) and, where consent is not given, to a judicial official to determine whether law enforcement has met its particularized burden of probable cause.[47] Barring such proof, with narrowly limited exceptions, law enforcement may not cross the threshold of the home.[48]

So how did we arrive at an a-textual interpretation allowing for broad "area searches"? And, equally troubling, when did executive officials become empowered to issue administrative warrants based on their own assessment of probable cause?[49] The Supreme Court has reminded that the difficult business of gathering evidence shouldn't be entrusted to the same entity seeking to ferret out crime.[50] The overzealous officer may more quickly leap to conclusions based on little more than instinct. The Framers knew this.[51] They feared entrusting executive officials with unbridled discretion. Their solution was simple: place a discerning and disinterested magistrate between the individual and law enforcement.[52] This judicial

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[46] Silverman v. United States, 365 U.S. 505, 511 (1961). "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Id.*

[47] *Id.* at 511-12. "This Court has never held that a federal officer may, without warrant or without consent, physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard." *Id.*

[48] Florida v. Jardines, 569 U.S. 1, 4 (2013) ("At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'").

[49] Case law clearly requires a neutral decision maker when warrants are issued. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971); Shadwick v. Tampa, 407 U.S. 345, 348-350 (1972). *See also* Sorto-Vasquez Kidd, et al. v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx), 2024 WL 2190981, at *12 (C.D. Cal. May 15, 2024) (explaining that "because the administrative warrants at issue here lack the independent assurance guaranteed by the Fourth Amendment, they do not immunize the alleged conduct.").

[50] Boyd v. United States, 116 U.S. 616, 625 (1886); *see also Coolidge*, 403 U.S. at 453 (explaining that warrants may not be "issued by the state official who was the chief investigator and prosecutor in the case").

[51] *Boyd*, 116 U.S. at 625. "These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government." *Id.*

[52] Johnson v. United States, 333 U.S. 10, 13-14 (1948). The *Johnson* Court gave what remains one of the most helpful explanations of the warrant requirement:

> The point of the Fourth Amendment which often is not grasped by zealous officers is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity, and leave the people's homes secure only in the discretion of police officers.

Id.

official is best able to weigh the probabilities and more likely to guard against reverting back to generalized warrants.[53]

B. Immigration Officers Are Law Enforcement

Immigration law enforcement agents (previously known as INS, currently known as ICE) are statutorily empowered to issue administrative arrest warrants based on probable cause without judicial oversight.[54] But why? Would the Framers have allowed British officers the power to decide for themselves, without personal observation, that an individual had committed a wrong meriting physical custody? Imagine two British officers discussing and comparing evidence without interposing a neutral magistrate between them; does this sound like the Framers' design? The entire purpose of requiring both warrants and probable cause was to ensure that law enforcement didn't decide for themselves who (or what) should be searched and who should be seized.[55] The I-200 immigration warrant approach seems at odds with history, if not originalism.[56]

Yet modern immigration administrative arrest warrants are issued entirely by executive law enforcement officials.[57] If an ICE officer avers that she has probable cause that a named individual is an immigrant visa overstay, she can present her probable cause to a superior ICE officer and

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[53] *Id.* at 14. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.*

[54] 8 U.S.C. § 1226(a). Section 1226 states that:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.

Id.; *see also* C.F.R. § 287.5(e)(2). This statutory section lists numerous immigration officials that are empowered to issue these executive arrest warrants. The statutory language does not require any judicial participation.

[55] *See Johnson*, 333 U.S. at 14. *See also Coolidge*, 403 U.S. at 453.

[56] I-200 warrants are form warrants used by ICE. UNITED STATES IMMIGRATION AND CUSTOM ENFORCEMENT (2017), https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF. This warrant is issued by an "Authorized Immigration Officer," not a judge. *Id.* The I-200 warrant is addressed to "any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations." *Id.*

[57] 8 C.F.R. § 287.5(e)(2) (2023). *See also* 8 C.F.R. § 236.1(b) (2023) (describing "warrant of arrest" as an I-200 warrant). These non-judicial arrest warrants allow:

> At the time of issuance of the notice to appear, or at any time thereafter and up to the time removal proceedings are completed, [suspected individuals] may be arrested and taken into custody under the authority of Form I-200, Warrant of Arrest. A warrant of arrest may be issued only by those immigration officers listed in § 287.5(e)(2) of this chapter and may be served only by those immigration officers listed in § 287.5(e)(3) of this chapter.

Id. Thus, the I-200 warrant is evaluated, issued, and enforced entirely within the Executive Department. Judicial oversight is not required during any stage of the process. This approach is contrary to the Fourth Amendment's design.

an I-200 administrative arrest warrant will issue.[58] There is no requirement that a neutral and detached magistrate judge analyze the evidence or arrest warrant to confirm it meets the probable cause determination. Instead, two law enforcement officers (ICE agents) make an extra-judicial assessment of probable cause and the I-200 warrant is issued.[59]

This approach raises serious concerns about the potential for mistaken arrests, mistaken identity, flawed evidence, and numerous privacy considerations protected under the Framers' Fourth Amendment.[60] It is unthinkable that a citizen would be subjected to physical arrest based solely on two law enforcement officer's assessments without personal observation.[61] In fact, the Fourth Amendment was placed precisely in the path of law enforcement to prevent those tasked with ferreting out crime from evaluating the cause needed to make a warrant-based arrest.[62] And while non-citizens do not always have the full panoply of constitutional rights American citizens possess, the Fourth Amendment is not dependent on citizenship status.[63]

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58 8 C.F.R. § 287.5(e) (2023).

59 8 C.F.R. § 236.1(b) (2023).

60 *See Johnson*, 333 U.S. at 13-14. *See also* Gonzalez v. U.S. Immigration & Customs Enf't, 416 F. Supp. 3d 995, 1018 (C.D. Cal. 2019). The *Gonzalez* court found that ICE's databases are not consistently reliable. In fact, *Gonzalez* found that:

> While ICE relies on several different databases in an attempt to compile enough information on a subject and make an adequate probable cause determination, the databases used by ICE, which have their limitations detailed herein—standing alone without additional checks—do not sufficiently establish probable cause of removal.

Id. Gonzalez further found that "[n]one of the databases on which ICE depends necessarily reflect a person's immigration status at the time when a detainer is set to be issued. This is because those databases reflect a person's immigration status at a particular point in time, but fail to reliably show how or whether that status has changed over time." *Id.* The Ninth Circuit returned the case to the District Court for additional factual findings regarding the reliability of ICE's many databases. Gonzalez v. U.S. Immigration & Customs Enf't, 975 F.3d 788 (9th Cir. 2020). But even as the case was returned, the Ninth Circuit reminded:

> Unreliab[ility] here means that ICE routinely issues immigration detainers without reasonably trustworthy evidence of removability. As the experiences of Gonzalez and other individuals who are not removable but have been subject to an immigration detainer underscores, unreliability has tangible consequences.

Id. at 823.

61 *Gonzalez*, 416 F. Supp. 3d at 1018-19. *Gonzalez* provides detailed explanations of why reliance on ICE databases, which do not even interact with one another to enhance accuracy, provide an unreasonable basis for determining probable cause. The *Gonzalez* court found evidence that "the set of databases ICE checks, and the information stored therein, contain serious errors." *Id.* at 1019. Those databases "suffer from structural flaws, incompleteness, and pervasive errors that render the databases unreliable." *Id. See also* Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971) *See also* Shadwick v. Tampa, 407 U.S. 345, 348-50 (1972).

62 *Johnson*, 333 U.S. at 13-14.

63 Fourth Amendment text speaks of "people," not citizens: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend IV.

Another concerning element of these administrative arrest warrants is that many immigration-related issues are civil in nature. The example focused on in this Article (a visa overstay or first unlawful entry) is a civil offense.[64] It does not ordinarily result in criminal charges being levied against the individual. Removal may follow. But, standing alone, a visa overstay or initial unlawful entry will not result in a criminal conviction.[65] So why would a civil law matter result in a lowered expectation of privacy against law enforcement? This seems counterintuitive. And it seems at odds with existing jurisprudence that factors in the government's interest when determining whether to relax privacy standards, particularly relating to involuntary home entries.[66] In past cases, the Supreme Court has held in favor of the individual when the government's interest was minor or civil in nature.[67]

The I-200 process is antithetical to the Fourth Amendment's text and design. It allows law enforcement actors, without any external reliability assessments, to make a custodial arrest.[68] That arrest then allows further inconvenience, including search incident to arrest and—depending on the location of the arrest—further search that may include a portion of one's home or hotel room.[69] The "crimmigration" exception to arrest warrants raises primary and secondary legal issues. The primary issue is the inability to test ICE's probable cause determinations prior to arrest.[70] There is no external review mechanism for I-200 arrest warrants.[71] This clothes ICE

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64 Arizona v. United States, 567 U.S. 387 (2012) (noting that "[r]emoval is a civil, not criminal matter").

65 Allowing ICE officers to make home arrests or conduct home raids increases the possibility that individuals facing a civil offense for being a visa overstay will be subjected to unrelated criminal charges. ICE home raids, falling largely outside the traditional judicial warrant requirement, currently allow for invasive searches of vulnerable populations. Such searches can be used to locate evidence of criminal conduct, such as guns—ordinarily protected under the Second Amendment—which become illegal to possess for those unlawfully present in the United States. *See* 18 U.S.C. §§ 922(g)(5), 924(a)(2).

66 *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 530-39 (1967) (relaxing the probable cause standard to issue a warrant but still requiring a judicial warrant to breach the home). *Camara* further noted the incongruity of only providing full Fourth Amendment protection to individuals that are suspected of criminal conduct while lowering those protections when the matter at issue is civil or administrative in nature. *Id.* at 530-34.

67 *See e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 750-55 (1984).

68 *See* 8 C.F.R. §§ 236.1(b), 287.5(e).

69 *See* Chimel v. California, 395 U.S. 752, 762-63 (1969).

70 Recent litigation calls into question the reliability of ICE databases. *See* Gonzalez v. U.S. Immigration & Customs Enf't, 975 F.3d 788, 798, 819-23 (9th Cir. 2020). The Ninth Circuit remanded a previously issued injunction against ICE's reliance on its various databases. *Id.* The case was remanded for additional factual findings on the reliability of ICE's databases that are regularly used outside the judicial process. *Id.*

71 8 C.F.R. §§ 236.1(b), 287.5(e). The process entrusts Executive Department officials with evaluating the propriety of probable cause and the execution of each arrest. *Id.* The statutory design intentionally vests full power in the Executive Department with no provision for judicial oversight. *See id.* This approach presents an anomaly in Fourth Amendment seizure law. For civil immigration cases that can result in custodial incarceration, certain individuals can

officers with greater authority to circumvent the Fourth Amendment than other law enforcement agents.[72] It also puts both non-citizens and citizens at risk of improper searches and seizures due to ICE overreach.[73] This first shortcoming is tied to the secondary issue: allowing entry to the home without placing a neutral and detached magistrate judge between law enforcement and their desire to enter a home.[74] I-200 arrest warrants, though purportedly limited by federal policy, have not proven to be an adequate deterrent to home entries. Instead, ICE officers have strategic opportunities to broaden their arrest—and search—power without the traditional judicial warrant gatekeeping requirement for entering homes.[75]

The Supreme Court needs to address what appears to be an executive end-around of existing Fourth Amendment jurisprudence.[76] I-200 warrants should not suffice to permit entry into the home.[77] Rather, courts should remain committed to the unbroken line of cases that require law enforcement to secure a judicial warrant, or consent, before entering a

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be seized—pursuant to an administrative warrant issued solely by law enforcement—without any judicial decision regarding probable cause. *See id.*

[72] *See* 8 CFR § 287.8(g). Section 287.8(g) states that: "The criminal law enforcement authorities authorized under this part will be exercised in a manner consistent with all applicable guidelines and policies of the Department of Justice and the Department of Homeland Security." *Id.* There is no explicit Constitutional protection or requirement that Constitutional norms be followed. *See id.*; *see also* Camara v. Municipal Court, 387 U.S. 523, 530 (1967) ("It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.").

[73] *See* Johnson v. United States, 333 U.S. 10, 14 (1948). *Johnson* emphasized:

> The right of officers to thrust themselves into a home is also a grave concern, not only to the individual, but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or a government enforcement agent.

Id.

[74] Welsh v. Wisconsin, 466 U.S. 740, 748 (1984). The *Welsh* Court explained that the "principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest." *Id.*

[75] Legal arrests permit, consistent with the Fourth Amendment, search incident to arrest of the individual's person and items within their immediate control or lunging radius. *See* United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 762-63 (1969).

[76] *See Camara*, 387 U.S. at 530; *Johnson*, 333 U.S. at 14; Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971); Shadwick v. Tampa, 407 U.S. 345, 348-50 (1972); Payton v. New York, 445 U.S. 573, 585-87 (1980).

[77] In a different factual setting, a federal court in the Central District of California found that "[e]rrors in the databases ICE reviews to make its probable cause determination for removal have, on multiple occasions, led to arrests of U.S. citizens and lawfully-present non-citizens." Gonzalez v. U.S. Immigration & Customs Enf't, 416 F. Supp. 3d 995, 1011 (C.D. Cal. 2019). The evidence presented demonstrated that during a nine-month period spanning May 2015 through February 2016, 771 out of 12,797 detainers were lifted because the individual was either a U.S. citizen or not subject to removal. *Id.* The Ninth Circuit vacated the District Court opinion based on the need for additional factual findings. *See* Gonzalez v. U.S. Immigration & Customs Enf't, 975 F.3d 788, 798, 820-23 (9th Cir. 2020).

person's home.[78] The home is the epitome of American privacy.[79] It is sacred in law and sacred in our society.[80] ICE officers should not be permitted to enter any home without receiving judicial permission or consent to do so.[81] Granting executive department officers freedom from the warrant requirement violates the separation of powers doctrine and undermines the judiciary's gatekeeping function.[82] Judges, not law enforcement, should be entrusted with determining whether law enforcement officers have provided adequate justification to breach a person's home.[83] This Article calls on courts to uphold their gatekeeping function and to ensure that ICE officers are not granted greater authority than other law enforcement when it comes to home entries. The home is the first among equals.[84] No law enforcement officer should be able to decide for themselves whether they have probable cause to enter one's home without consent.[85] Courts,

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[78] *See, e.g.*, *Coolidge*, 403 U.S. at 474-75 (articulating the now common understanding that "a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.'").

[79] Kyllo v. United States, 533 U.S. 27, 37-38 (2001) (noting that even seemingly insignificant details about one's home are constitutionally significant). In describing past cases where slight police interferences in the home were deemed unconstitutional, Justice Scalia explained that all details relating to the home are "intimate details because they were details of the home." *Id.*

[80] *See id.* at 31. Justice Scalia articulated this unyielding protection afforded the American home by reminding that "[w]ith few exceptions, the question whether a warrant search of a home is reasonable and hence constitutional must be answered no." *Id.*

[81] *Johnson*, 333 U.S. at 13-14.

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

Id.

[82] *See Coolidge,* 403 U.S. at 449-50; *Shadwick*, 407 U.S. at 348-50.

[83] *Johnson*, 333 U.S. at 17.

> An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effect," and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law.

Id.

[84] *Id.*

[85] *Coolidge*, 403 U.S. at 453. The Supreme Court has made clear that warrants permitting search and seizure may not be "issued by the same official who was the chief investigator and prosecutor" in a case. *Id.* ICE officials are responsible for policing immigration violations. They decide what evidence will be presented to prosecutors if evidence arises beyond an immigration matter. The I-200 warrant process thus avoids true judicial oversight entrusting ICE officers to police their own actions without subjecting these officers to the traditional Fourth Amendment oversight process. *See also Johnson*, 333 U.S. at 17 (noting that interposing a judicial officer between individuals and law enforcement provides a "fundamental distinction" between the United States and police states).

not law enforcement, are entrusted with balancing the privacy rights of individuals against the law enforcement needs of the executive.[86]

II. A SPY, A HOTEL, AND AN INFAMOUS ARREST

A. The Story

At 7:00 a.m., a joint team of FBI and INS agents went to arrest Rudolph Abel at the Hotel Latham in New York City.[87] Able was a suspected Russian spy.[88] INS came armed with an administrative arrest warrant.[89] The plan was to have the FBI enter first to see if Abel would admit to being a spy.[90] The FBI did not have a judicial warrant.[91] While FBI agents approached Abel's hotel room, INS officers waited in the room next door.[92] If Abel failed to comply, INS would rely on the administrative arrest warrant to take Abel into custody.

Two FBI agents approached the door and knocked.[93] Once Abel answered, the team pushed their way inside.[94] Abel, who was not dressed, was told to dress as the FBI began an extensive search of the hotel room.[95] Abel refused to submit to the FBI's questioning.[96] INS was summoned from the adjoining room.[97] Abel was arrested and subjected to "a search of his person and all of his belongings in the room and the adjoining bathroom."[98] The search lasted between 15 and 20 minutes but the INS agents remained

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[86] Kyllo v. United States, 533 U.S. 27, 39-40 (2001).

> The people in their houses, as well as the police deserve more precision. We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S. at 590. That line, we think, must not only be firm but also bright which requires clear specification of those methods of surveillance that require a warrant.

Id.

[87] United States v. Abel, 258 F.2d 485, 488, 491 (2d Cir. 1958).

[88] *Id.* at 492.

[89] *Id.* at 491. "The decision to use an administrative warrant was, in effect, a decision that Abel should be held for a deportation hearing and not apprehended as one charged with a criminal offense . . . ." *Id.*

[90] *Id.* at 492. The U.S. Supreme Court's opinion is more detailed on this point. *See* Abel v. United States, 362 U.S. 217, 222 (1960). The Supreme Court explained that the "FBI officer in charge asked whether, before petitioner was arrested, the FBI might 'interview' him in an attempt to persuade him to 'cooperate' regarding his espionage." *Id.*

[91] *Id.* at 223 (noting that the FBI agents "had no warrant either to arrest or search").

[92] *Abel*, 258 F.2d at 491.

[93] *Abel*, 362 U.S. at 223.

[94] *Id.* "When petitioner released the [door] catch, [Agent] Gamber pushed open the door and walked into the room, followed by [Agent] Blasco. The door was left ajar, and a third FBI agent came into the room a few minutes later." *Id.*

[95] *Id.* "Petitioner, who was nude, was told to put on a pair of undershorts and to sit on the bed, which he did." *Id.*

[96] *Id.*

[97] *Id.*

[98] *Abel*, 362 U.S. at 223.

with him in the hotel room for "about an hour."[99] Abel was then told to get dressed and choose the items he wanted to take with him.[100] Before leaving the room, Abel left a few items on the windowsill and discarded a few items in the trash.[101] Once Abel left, the search continued as an FBI agent returned to the room to gather the discarded trash.[102] This latter search resulted in the discovery of critical espionage evidence—a hollow pencil with microfilm and a wooden block with a "cipher pad."[103]

Abel was transported to Texas for several weeks, remaining in immigration custody.[104] During this time, he was repeatedly questioned, and the recovered items were evaluated for evidence of espionage.[105] Once it was clear Abel would not admit to his being a spy, a grand jury was summoned, and he was indicted.[106] He would face trial in New York for the capital crime of espionage. All the evidence gathered during the search of his hotel room, and following his departure from the hotel room, was used to secure the indictment.[107] This same evidence would be relied on to prove his guilt.

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99 *Id.*

100 *Id.* at 224.

101 *Id.*

102 *Id.* at 225. The FBI agent asked for, and received, permission from the hotel management to return to the room and complete a thorough search. This search lasted three hours. *Id.*

103 *Id.*

104 *Id.* Abel remained in the Texas immigration facility until he was charged with conspiracy to commit espionage. *Id.* The federal Court of Appeals decision indicates that the New York grand jury returned the indictment on August 7, 1957, or forty-seven days after Abel's arrest. *Abel*, 258 F.2d at 487.

105 James B. Donovan, STRANGERS ON A BRIDGE: THE CASE OF COLONEL ABEL AND FRANCIS GARY POWERS 42, 44 (1964). Donovan, who served as Abel's primary defense lawyer believed this approach violated the Fourth Amendment. In his first-person book about the case, Donovan wrote the following:

> The fact that the government agents had seized in his home a person and all his property, without a criminal warrant of arrest or a public search warrant; secretly transported him to an alien detention camp in Texas and held him for forty-seven days, the first five incommunicado—these facts appeared to be a classic example of the kind of thing the Fourth Amendment to the Constitution was designed to end in America.

Id. at 58.

106 *Id.* at 21. The Abel indictment spanned twelve pages and included three charges: (1) conspiracy to transmit atomic and military information to Soviet Russia; (2) conspiracy to gather such information; and (3) conspiracy to reman in the United States without registering with the State Department as a foreign agent. *Id.* The maximum penalty on count 1 was death. *Id.* The maximum penalties on counts 2 and 3, respectively, were ten and five years. *Id.*

107 *Id.* at 84. Donovan recounted that the FBI had amassed an evidentiary "smorgasbord, filling twenty-five tables." Donovan believed the most incriminating evidence—most of it located in Abel's hotel room—included:

> hollowed-out screws, pencils, and other containers—including a shaving brush which could, of course, hold microfilm messages; (2) microfilm letters to Abel from his wife and daughter in Russia and a microfilm schedule of future radio broadcasts from Russia; (3) a hollowed-out ebony block . . . which contained a

For those few who have heard, or read, of Abel, chances are you watched the Tom Hanks' movie *Bridge of Spies*. The movie dramatizes Abel's arrest and the trial judge's decision to allow the evidence in. But little is made of the Supreme Court case and its continued viability. Instead, the movie emphasizes the relationship between Abel and his famed attorney, James Donovan, and Donovan's subsequent work to secure the release of two Americans in exchange for Abel on a bridge in Germany.[108] Donovan, who had been a prosecutor at Nuremberg, urged the sentencing judge in Abel's case to spare Abel lest there be a later opportunity to exchange Abel for a politically equally valuable American prisoner.[109] Donovan's foresight saved not one, but three, Americans.[110] Donovan's legal ingenuity also allowed one of the most infamous Russian spies to live. Abel's Fourth Amendment legacy has largely been overlooked. This Article seeks to fill that gap by sharing more about the case and its continued constitutional relevance.

B. The Case, the Law, and the Dicta

Abel v. United States, the case, has had limited staying power. Decided before *Katz v. United States*, much of the case has been eroded to the point that little more than a shell remains.[111] Both search and seizure doctrine have been dramatically altered since Abel's arrest.

Because the joint FBI and INS teams did not secure a judicial search warrant, the search—but not the arrest—was challenged on Fourth

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> complete set of cipher tables on extremely thin paper of a very unusual quality, like very think silver foil.

Id.

[108] *See generally, id.*

[109] *Id.* at 4. Donovan recounts that he asked the judge at sentencing on November 15, 1957 to spare Abel's life because:

> It is possible that in the foreseeable future an American of equivalent rank will be captured by Soviet Russia or an ally; at such time an exchange of prisoners through diplomatic channel could be considered to be in the best national interests of the United States.

Id. The trial judge did spare Abel's life, sentencing him to a term of 30 years imprisonment. United States v. Abel, 258 F.2d 485, 487 (2d Cir. 1958). And, amazingly, on February 10, 1962, that prescient thinking proved true. In the early morning on the Glienicke Bridge in West Berlin, Germany, Abel was exchanged for American U-2 pilot Francis Gary Powers. Donovan, *supra* note 105, at 4. In addition, Donovan was able to secure the additional release of an American student, Frederic L. Pryor, whom the East Germans had arrested for espionage in August 1961. *Id.*

[110] *See* Donovan, *supra* note 105, at 3-4. In addition to Power and Pryor, Donovan was able to secure the release of another American student, Marvin Makinen, who was serving an eight-year sentence for espionage in Kiev.

[111] *See e.g.*, Stoner v. California, 376 U.S. 483 (1964) (granting Fourth Amendment protection to hotel rooms); Chimel v. California, 395 U.S. 752 (1969) (limiting search incident to arrest to the lunging radius of an arrestee, thereby preventing a warrantless search incident to arrest justification for an adjoining room); Payton v. New York, 445 U.S. 573 (1980) (requiring a judicial warrant for an in-home felony arrest).

Amendment grounds.[112] Notably, the search occurred pre-*Katz* and pre-*Stoner v. California*.[113] It was June 21, 1957.[114] The Fourth Amendment was not as robust as it is now, nor as it became post *Katz*. While Abel challenged the search, he did so on grounds that the INS and FBI used an administrative warrant for an illegitimate purpose.[115] Abel conceded that the INS had authority for the arrest without first securing a judicial warrant.[116] Thus, his seizure, legally speaking, was not relevant to any judicial decision regarding the search.[117] Ultimately, the trial court upheld the search.[118] The Court of Appeals[119] and Supreme Court both affirmed that decision.[120]

Abel remains valid, and often cited, for the proposition that discarded evidence, or abandoned property—such as trash left behind in a vacated hotel room—is not protected under the Fourth Amendment. The decision makes sense even after *Katz* because one has no expectation of

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[112] *Abel*, 258 F.2d at 487 (framing the primary appellate issue as "whether the Fourth Amendment prohibition of 'unreasonable searches and seizures' was violated when government agents without a search warrant searched a hotel room occupied by Abel and seized certain articles which they found there"); s*ee also* Abel v. United States, 362 U.S. 217, 225-26 (1960) (indicating that Abel's legal challenge to the search and seizure centered on whether the Government misused the administrative arrest warrant as "subterfuge" and "a pretense and sham" for the true purpose of arresting Abel).

[113] *See Stoner*, 376 U.S. at 483.

[114] *Abel*, 362 U.S. at 221 (explaining that Abel was arrested "in a single room in the Hotel Latham in New York City, his then abode").

[115] *Id.* at 225-26.

[116] *Id.* at 231 (providing the colloquy between Abel's counsel and the trial judge during the motion to suppress):

> The Court: They [the Government] were not at liberty to arrest him [petitioner]?
> Mr. Fraiman: No, your Honor. They were perfectly proper in arresting him. We don't contend that at all. As a matter of fact, we content it was their duty to arrest this man as they did. I think it should show, or rather, it showed, admirable thinking on the part of the FBI and the Immigration Service. We don't find any fault with that.
> Our contention is that, although they were permitted to arrest this man, and in fact, had a duty to arrest this man in a manner in which they did, they did not have a right to search his premises for the material which related to espionage. . . . He was charged with no criminal offense in this [immigration] warrant.
> The Court: He was suspected of being illegally in this country, wasn't he?
> Mr. Fraiman: Yes, your Honor.
> The Court: He was properly arrested.
> Mr. Fraiman: He was properly arrested, we concede that, your Honor.

Id.

[117] *Id.* at 230-31 (The Supreme Court clearly indicated that the seizure issue was "expressly disavowed" before the trial court. The entire issue was conceded during the hearing on the motion to suppress. The Supreme Court's own characterization of the issue confirms that its entire section on the administrative arrest warrant is non-binding dicta: "At no time did petitioner question the legality of the administrative arrest procedure either as unauthorized or as unconstitutional. Such challenges were, to repeat, disclaimed.").

[118] United States v. Abel, 155 F. Supp. 8, 12 (E.D.N.Y. 1957).

[119] United States v. Abel, 258 F.2d 485, 494-97 (2d Cir. 1958).

[120] *Abel*, 362 U.S. at 240.

privacy in abandoned property.[121] This part of *Abel* has not been altered by modern Fourth Amendment jurisprudence. *Abel* also stands for the proposition that joint law enforcement and immigration arrests are valid, provided that the immigration arrest is not mere subterfuge for a criminal investigation.[122]

This Article neither challenges, nor addresses, these points. Rather, this Article challenges the continued mistaken citation to Abel's dicta regarding immigration administrative arrest warrants.[123] Because Abel did not challenge the basis of his arrest, the Court's discussion of this was irrelevant to the search issues.[124] The Supreme Court explicitly noted that it could not determine this point because it had been expressly disavowed below.[125] The Court's opening explanation bears repeating here to fully appreciate how this dicta has been errantly relied upon by other courts:

> The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for "warrants" under the Fourth Amendment, is not entitled to our consideration in the circumstances before us. It was not made below; indeed, it was expressly disavowed.[126]

But the Court did not stop there, as it should have. It confessed the matter could not be considered, as it was "expressly disavowed" below.[127] Yet, immediately thereafter, in the same paragraph in fact, the Court continued to comment on the very issue it noted was not properly before the Court:

> Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanc-

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121 *Cf.* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that there is no "reasonable expectation of privacy" in garbage left outside the home in an opaque bag for collection).

122 *Abel*, 362 U.S. at 240.

123 This author fully agrees with James Donovan that circumvention of the Fourth Amendment against anyone is a threat to everyone. Donovan, *supra* note 105, at 57-58. As Donovan recounts:

> When the story was put together in terse narrative, it became a Hemingway-like tale. Because the methods used by the Government trapped a suspected enemy agent, the average citizen would not become alarmed, nor be shocked. In such a case, he would feel, the ends justifies the means. But under our law, the constitutional guarantees apply to every one of us as well as to a suspect like Abel.

Id.

124 *Abel*, 362 U.S. at 230-34.

125 *Id.* at 230.

126 *Id.*

127 *Id.* Rules of appellate procedure preclude parties from raising issues on appeal—particularly before the United States Supreme Court in the first instance—that were not presented below. The Supreme Court, in discussing an issue the parties did not raise or brief, provides a mere advisory opinion that should have no binding, or even persuasive, authority.

> tion of time. It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical legitimacy, to bring into question for the first time such a long-sanctioned practice at government at the behest of a party who not only did not challenge the exercise of the authority below, but expressly acknowledged its validity.[128]

The Court's opinion dedicates nearly an entire page to confirming, through the lower court transcript, that Abel's counsel affirmatively conceded his client was properly arrested.[129] There was no need for further discussion. There was no live issue relating to the seizure. The matter should have been abandoned by the Court, just as it had been abandoned by the parties. Yet the Court was undeterred and provided several pages of unnecessary commentary based, one must presume, on its own research and assessment of the disclaimed matter. The Court even used language that appears to state an actual finding, writing that "[t]he arrest procedure followed in the present case fully complied with the statute and regulations."[130] The opinion then provides a historical analysis of "the propriety of administrative arrest [warrants] for deportable aliens such as petitioner."[131]

This entire section is non-binding dicta. In the closing paragraph of this lengthy section, the Court muses:

> The constitutional validity of this longstanding administrative arrest procedure in deportation cases has never been directly challenged in reported litigation. . . . This Court seems never expressly to have directed its attention to the constitutional validity of administrative deportation warrants. It has frequently, however, upheld administrative deportation proceedings shown by the Court's opinion to have been begun by arrests pursuant to such [administrative] warrants. . . . In the presence of this impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation, petitioner's disavowal of the issue below calls for no further consideration.[132]

Despite a four-page investment on the issue, *Abel* did not decide the constitutionality of immigration administrative arrest warrants. It

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128 *Id.*
129 *Id.* at 231.
130 *Id.* at 232.
131 *Id.* at 233.
132 *Id.* at 233-34.

unnecessarily discussed an issue not presented by the parties and provided a lengthy advisory assessment that is nothing more than obiter dictum. The issue was not briefed. The issue was not argued. The issue was not material to the legality of the search. The parties agreed the arrest was valid and only challenged the constitutionality of the search.[133] Yet, in contravention of the Court's usual reluctance to issue advisory opinions, the Court chose to provide a lengthy commentary about immigration administrative arrest warrants.

Subsequent scholarship has aptly called into question the Court's historical and legal analysis.[134] This scholarship suggests the Court's history was imprecise, if not incorrect.[135] For those courts that might rely on *Abel*'s dicta, two points merit cautious consideration: (1) is *Abel*'s historical account accurate and reliable, and, if so, (2) has *Abel*'s dicta survived the Fourth Amendment's post-*Katz* transformation? The next section asserts, regardless of *Abel*'s historical accuracy, that *Abel*'s dicta has not weathered *Katz* and its progeny.

III. *KATZ*, *TERRY*, *STONER* AND THE CASES THAT LEFT *ABEL* BEHIND

A. *The Fourth Amendment Law Regarding Searches*—Katz v. United States

Katz v. United States is the seminal modern Fourth Amendment case.[136] FBI agents, without a warrant, placed a listening device atop a public phone booth where the agents had repeatedly seen Katz place what the agents believed to be illegal bets.[137] Katz, while able to ensure that no one was watching him in the booth, wrongfully assumed no one could hear his illegal activity.[138] Following his indictment, Katz challenged the warrantless search under the Fourth Amendment. The Supreme Court, moving away from a purely property-based approach to searches, found the FBI's warrantless listening to be an unlawful search.[139]

Katz provided the now common "reasonable expectation of privacy" test used by courts to assess Fourth Amendment searches.[140] Following *Katz*, courts analyze two related questions: first, has the person's conduct indicated

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133 *Id.* at 230-31.

134 Nash, supra note 5, at 462.

135 *Id.*

136 Katz v. United States, 389 U.S. 347 (1967).

137 *Id.* at 348.

138 *Id.* at 352. What Katz "sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id.*

139 *Id.* at 353. The Court found that prior emphasis on the "trespass" doctrine had been so eroded by subsequent decisions that a purely property-based assessment could no longer be controlling. *Id.*

140 *Katz* is one of the rare instances where the governing test comes from the concurring opinion. *Id.* at 360 (Harlan, J., concurring). Justice Harlan's test, initially presented in his short concurrence, provides the template for modern searches. Distilling past cases, Justice Harlan indicated his understanding of a twofold requirement emanating from past decisions: "[F]irst

a subjective expectation of privacy, and, if so, second, is that expectation of privacy one that society, objectively speaking, is willing to recognize as reasonable.[141] If the answer to both questions is yes, a search has occurred. Whether a particular search is reasonable requires additional assessment.

Katz expanded what constitutes a search for Fourth Amendment purposes.[142] *Katz*, analyzing one's privacy in a public setting (a public telephone booth), disconnected searches from property rights.[143] It did not matter that Katz was using a telephone booth that he had no property interest in.[144] It did not matter that the telephone booth was open to all and shared by many.[145] What mattered was that Katz walked into the telephone booth and shut the door behind him. He intended his conversation to be private. And he took the necessary steps to ensure—at least from his vantage point and all he could see at the time—that his conversation remained private.[146] As the Supreme Court noted, what Katz intended to protect against was "not the intruding eye—it was the uninvited ear."[147] Seeing no one else near him, Katz reasonably assumed that his conversation was private.[148]

The move from property rights to privacy rights was transformational. Modern courts now analyze whether a person's conduct, usually connected to a particular location, is intended to preserve privacy.[149] In the 21st

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that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable." *Id.* at 361.

141 *Id.*

142 *Katz* overturned the Supreme Court's earlier approach in *Olmstead v. United States*, 277 U.S. 438 (1928). The *Olmstead* opinion, authored by Chief Justice Taft, found that wiretapping was not a search because there was no physical trespass. *Id.* at 466. The Court explained that:

> The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses. The gathering of evidence continued for many months.

Id. at 456-57.

143 *Katz*, 389 U.S. at 352-53.

144 *Id.* at 352. The Court emphasized that Katz "did not shed his right [to privacy] simply because he made his calls from a place where he might be seen. . . . To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.*

145 *Id.* "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.*

146 *Id.*

147 *Id.* at 352.

148 *Id.* The Court explained that when a person occupies a public telephone booth, "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.*

149 *Id.*

century, the use of a phone booth is nearly unheard of. Few such booths still even exist in the United States. Rather, the modern situation is the ubiquitous use of cellular telephones, often in public where all can, and unfortunately often do, hear one end of an entire conversation. But the privacy assessment here is easy. *Katz* placed the burden of protecting privacy on the individual. *Katz* explained that

> [w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected.[150]

Where one speaks loudly in public on a cellular telephone, there is no subjective expectation of privacy—she has knowingly exposed her conversation to others. A person using their cellphone in a public restaurant or on a public street rarely takes adequate steps to prevent passers-by from overhearing. Even were such a person to cup their hand or speak softly, it is unlikely that the Supreme Court would find that the use of a cellular telephone in a public setting is objectively protected private conduct. Unlike the telephone booth in *Katz*, modern cellphone communications are so common that many of us lament the advanced technology as preventing us, the unintended audience, from enjoying our peace and quiet in the shared space. Public use of a cellular telephone provides the opposite spectrum of *Katz*'s protection to those seeking privacy.

Katz marked a Fourth Amendment turning point by focusing on privacy expectations. A public telephone booth with a closed door is considered private for Fourth Amendment purposes, despite being a public place. Likewise, homes and office buildings often yield constitutional protection. The question will be: what steps did the person take to ensure that the questioned location—be it a phone booth or a friend's apartment—remains free from public access?

Katz suggested that hotel rooms would be protected under its framework. But it wasn't until 1969, in *Stoner v. California*, that the Court provided explicit protection to hotel rooms.[151] *Stoner*, as discussed below, further erodes *Abel*'s legacy.

Stoner found that transient lodging, like the Latham hotel room where Abel was arrested, is entitled to full Fourth Amendment protection.[152] This shift means that the formidable rights attendant to a home and its curtilage likewise attach to people staying (or residing) in a hotel.[153] The

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150 *Id.* at 351.

151 376 U.S. 483, 489-90 (1969).

152 *Id.* at 490.

153 The legal protection turns on whether a person was an overnight guest or merely a passing visitor. *See e.g.*, Minnesota v. Carter, 525 U.S. 83 (1998). Chief Justice Rehnquist,

FBI could not, in 2024, push open a hotel room without a judicial warrant or the occupant's consent.[154] Their actions would be measured against the unbroken line of cases drawing a clear Fourth Amendment line at the entry of the home.

While *Katz* placed the emphasis on reasonable expectations of privacy, *Stoner* broadened protection to individuals that may be temporarily housed in a hotel or rented lodging.[155] *Stoner* undercuts *Abel*'s legacy. The hotel room, just like the home, provides unparalleled protection to the occupants within.[156] Law enforcement must either secure the occupant's consent or a judicial warrant before entering the premises.[157] It is doubtful that an administrative immigration warrant, issued on the averments of law enforcement acting without judicial oversight, permits law enforcement to breach the home or its *Stoner* equivalence.

B. The Fourth Amendment Law Regarding Seizure—Terry v. Ohio

Seizures, though not directly impacted by *Katz*, have likewise been expanded to focus on the objective expectations of the reasonable person rather than the subjective expectations and actions of officers or criminal

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writing for the majority, reminded that "an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Id.* at 90. *See also* Minnesota v. Olson, 495 U.S. 91 (1990). "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share." *Id.* at 98. The *Olson* Court explained that the desire for privacy, even during travel, merits Fourth Amendment protection.

> From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but the host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth . . . .

Id. at 99.

154 *Stoner*, 376 U.S. at 490. "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Id.*

155 While the Supreme Court has not yet addressed the rights of individuals staying in an "Airbnb" or "Vrbo," there is little doubt that *Stoner* applies to these settings as well. Regardless of whether the "landlord" for the temporary resident is Hilton, Marriott, or a couple renting their house out on "Vrbo," the person legally residing in that lodging for the period they have paid should be protected from warrantless searches and seizures under *Stoner*.

156 *Stoner*, 376 U.S. at 490; Payton v. New York, 445 U.S. 573, 590 (1980) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house.").

157 *See Payton*, 445 U.S. at 590. In describing the firm line at the entrance to the house, the Court found that "[a]bsent exigent circumstances, that threshold may not reasonable be crossed without a warrant." *Id.*

defendants.[158] The Supreme Court, in a series of cases including those occurring on public transportation, analyzed whether a reasonable person would feel that he or she is either (1) unable to walk away, or (2) unable to terminate the encounter.[159] This approach, unlike *Katz* and the law governing searches, does not use any subjective test. The focus is entirely on what the legal chimera—the so-called "reasonable person"—would perceive.[160]

It is legally irrelevant whether you personally, perhaps being more sensitive to a show of law enforcement authority, believe that police have limited your movement.[161] Your particular sensitivities are beside the point, constitutionally speaking. Courts do not—or should not—focus on what *you* did or what *you* felt. Rather, following a string of seizure cases, reviewing courts assess the situation to determine whether a reasonable person would believe *she* was not free to walk away or terminate the encounter.[162]

Terry v. Ohio is the first notable example of the expanded seizure law.[163] All too often, individuals confuse seizure with arrest.[164] A Fourth Amendment seizure is not the same as a full custodial arrest.[165] A seizure can be a relatively brief interaction with law enforcement, such as an

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158 The test originated in United States v. Mendenhall, 446 U.S. 544, 554 (1980). In Justice Stewart's opinion, the modern definition appeared:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. This test was adopted and applied by subsequent courts. *See* Florida v. Royer, 460 U.S. 491, 502 (1983); INS v. Delgado, 466 U.S. 210, 215 (1984); California v. Hodari D., 499 U.S. 621, 627-28 (1991).

159 Florida v. Bostick, 501 U.S. 429, (1991); United States v. Drayton, 536 U.S. 194, 201-02 (2002).

160 Michigan v. Chesternut, 486 U.S. 567, 574 (1988). "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Id.* Further, "[t]his 'reasonable person' standard also ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Id.*

161 *Id.*

162 *Id.* at 569 (concluding that "the police conduct in this case did not amount to a seizure, for it would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business").

163 392 U.S. 1, 19 (1968).

164 *Id.* "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop shorts of something called a 'technical arrest' . . . ." *Id.*

165 *See* Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). *Davis* reminding that "[n]othing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Id.*

immigration or drunk driving roadblock that you must stop for even if you are eventually waved through without any questioning or law enforcement interaction.[166] The brief detention required to pass through a roadblock constitutes a Fourth Amendment seizure.[167]

In *Terry*, a police officer noticed unusual conduct in downtown Cleveland.[168] The officer had been patrolling this area for several years.[169] He noticed some individuals that were unfamiliar to him.[170] His suspicions grew as he watched two men take turns walking back and forth in front of a particular store and then returning to the corner to confer.[171] This happened over a dozen times.[172] Even the casual observer might have noticed that these men appeared to be "casing" the store for a potential robbery.[173] The officer, suspicion aroused, walked up to the men and asked for identification.[174] One of the men mumbled something in response so the officer turned him around to face the other man and conducted a quick outer clothes pat down.[175] This was the classic "stop and frisk."[176]

The brief detention, the "stop," was deemed to be a seizure under the Fourth Amendment.[177] The outer clothes pat down was similarly determined to be a "search" under the Fourth Amendment.[178] While the officer's suspicions were vindicated when he felt a gun in the man's outer clothing, the arrest became one of the enduring symbols of police conduct. Consistent with the Fourth Amendment, law enforcement can—in a public

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166 *See e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) ("It is agreed that [immigration] checkpoint stops are 'seizures' within the meaning of the Fourth Amendment."); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450 (1990) (finding a Fourth Amendment seizure occurs when police stop a vehicle at a police checkpoint).

167 Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.").

168 *Terry*, 392 U.S. at 5.

169 *Id.* Officer Martin McFadden testified he had been patrolling this particular downtown Cleveland area for 30 years. *Id.*

170 *Id.* Officer McFadden testified that he "had never seen the two men before, and he was unable to say precisely what first drew his eye to them." *Id.*

171 *Id.* at 6. "The two men repeated this ritual alternately between five and six times apiece—in all roughly a dozen trips." *Id.*

172 *Id.*

173 *Id*. Officer McFadden testified that "he suspected the two men of 'casing a job, a stick-up.'" *Id.*

174 *Id.* at 6-7.

175 *Id.* at 7. "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." *Id.*

176 *Id.* at 16 (rejecting the notion that a "stop and frisk" falls outside the Fourth Amendment).

177 *Id.* "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.*

178 *Id.* "[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'" *Id.*

setting—stop and frisk an individual if the officer has reasonable articulable suspicion that the person is armed and dangerous or crime is afoot.[179] *Terry* held that the brief detention constitutes a Fourth Amendment seizure.[180] But such brief, investigatory detention, is not a legal arrest.[181]

Not every public encounter with law enforcement constitutes a Fourth Amendment seizure. There is nothing that prevents law enforcement from engaging individuals in a consensual encounter.[182] But once that encounter transforms to a situation where the reasonable person would not feel free to either walk away or terminate the encounter, a Fourth Amendment seizure has occurred.[183] The objective nature of this test places law enforcement in the unenviable task of constantly analyzing what a reasonable person might believe under the circumstances.[184] Yet the test is not entirely unmoored from predictability.

In a series of public transportation cases, the Supreme Court provided guidance of certain elements that make a seizure more likely to occur.[185] Courts should assess "all the circumstances . . . to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests [for questioning] or otherwise terminate the encounter."[186] For example, the encounter location, the number and positioning of officers, and tone of voice are all relevant to what a reasonable person might believe impacts her ability to walk away and terminate the encounter.[187] The use of commands versus requests can be discerned by both the volume and tone of voice.[188] The displaying of weapons, versus the simple presence of weapons, is also

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179 *Id.* at 30.

180 *Id.* at 16.

181 *Id.* "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime—'arrests' in traditional terminology." *Id.*

182 Florida v. Bostick, 501 U.S. 429, 434-35 (1991). *See also* Florida v. Royer, 460 U.S. 491, 497 (1983). *Royer* noted that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen . . . ." *Id.*

183 *Royer*, 460 U.S. at 504-06.

184 Michigan v. Chesternut, 486 U.S. 567, 574 (1988). "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question— allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Id.*

185 *Bostick*, 501 U.S. at 439; United States v. Drayton, 536 U.S. 194, 204-05 (2002).

186 *Bostick*, 501 U.S. at 439.

187 *Id.* ("The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary."); *Drayton*, 536 U.S. at 204 ("The fact that an encounter takes place on a bus does not on its own transform standard police questioning [of citizens] into an illegal seizure.").

188 *Drayton*, 536 U.S. at 204 (noting that the presence—or lack—of threats, commands, or authoritative tone are relevant factors in assessing whether a seizure occurred).

relevant.[189] The objectively reasonable person would respond differently to law enforcement's brandishing of weapons as opposed to a uniformed officer, with a holstered gun, asking the person to stop. The brandishing of a gun, which is tantamount to a show of lethal force, carries a much higher chance of compliance than the uniformed officer simply stopping to ask a few questions.

Individuals in the U.S. are quite accustomed to law enforcement being armed.[190] This is where the objective test provides an advantage to law enforcement.[191] Were an international visitor (imagine an Icelander) whose police do not ordinarily carry guns to have a heightened reaction to the uniformed U.S. officer walking about with a holstered gun, that situation would not constitute a seizure even though the Icelandic visitor might *subjectively* feel compelled to stop. In the U.S., the sight of armed officers is common. In fact, most U.S. law enforcement officers are armed. Their armed presence—standing alone—would not suggest that if an officer talked to me, I (an American familiar with American police) would have to stop. In most instances, I could simply walk away. And the reasonably objective person would recognize that an armed officer is not inherently oppressive.[192]

In each setting, the seizure question is relatively simply: considering all the circumstances presented, would a reasonable person feel free to walk away or terminate the encounter?[193]

C. *The Fourth Amendment Law Regarding "Homes"*—Stoner v. California

While *Katz* provided the watershed moment for searches, *Stoner v. California* more directly impacts *Abel*'s continued viability. In 1969, the Supreme Court's expanded Fourth Amendment protection to include temporary abodes, such as a hotel room.[194] *Stoner* prohibits the broad search conducted in *Abel*'s hotel room. There is little doubt that *Abel* would come out differently following *Stoner*.

Law enforcement agents, with evidence suggesting Stoner had committed an armed robbery, sought warrantless entry into his Pomona,

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189 *Id.* at 205 (distinguishing between an armed officer and an officer brandishing her weapon); *see Bostick*, 501 U.S. at 432.

190 *Drayton*, 536 U.S. at 204. "That most [American] law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.*

191 *See Bostick*, 501 U.S. at 439. Justice O'Connor, writing for the Court, noted that the "Court is not empowered to forbid law enforcement practices simply because it considers them distasteful." *Id.*

192 *See id.*; *Drayton*, 536 U.S. at 204.

193 *Bostick*, 501 U.S. at 439; *Drayton*, 536 U.S. at 201.

194 Stoner v. California, 376 U.S. 483, 490 (1969).

California hotel room.[195] Officers asked the night clerk whether they could enter Stoner's room.[196] When questioned why, the officers responded that they were there to arrest Stoner, who they feared had a weapon.[197] The night clerk, unsurprisingly, then escorted the officers to Stoner's room and reportedly stated, "be my guest."[198] Officers found evidence of the robbery during the warrantless search.[199] Stoner objected to the warrantless search and sought exclusion of the evidence.[200] The Government argued the clerk's consent gave sufficient basis for the search.[201] The Supreme Court agreed with Stoner that the officer's reliance on the clerk's consent was not sufficient to provide entry into one's abode—even a temporary abode like a hotel room.[202]

The FBI's forced entry into a hotel room, post *Stoner*, would likely result in the evidence discovered during that warrantless search being excluded in a subsequent trial. *Stoner* does not affect law enforcement's ability to enter an abandoned room for remnants of trash or evidence left behind by a former guest. That slice of *Abel* remains good law. But modern law enforcement cannot enter a home or temporary abode without consent or a judicial warrant in search of criminal evidence.[203]

Katz and *Stoner* paved the way for a bright line drawn at the entry to the home.[204] While *Katz* noted that the Fourth Amendment protects people, not places, the place searched necessarily factors into the analysis. The home—temporary or permanent—stands apart as the first among equals under the Fourth Amendment.[205] Justice Scalia explained the sacred nature

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195 *Id.* at 484-85. A witness found Stoner's checkbook in a parking lot near the Budget Town Food Market that had been robbed. There were two stubs in the checkbook drawn for the Mayfair Hotel in Pomona, California. *Id.*

196 *Id.* at 485.

197 *Id.*

198 *Id.* An officer testified that once the night clerk realized that Stoner was wanted for robbery, and possibly armed, the clerk stated, "In this case, I will be more than happy to give you permission, and I will take you directly to the room." *Id.*

199 *Id.* at 485-86.

200 *Id.* at 484.

201 *Id.* at 487-88.

202 *Id.* at 489. The Court explained:

> It is important to bear in mind that it was petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room.

Id.

203 *Id.* at 490.

204 Payton v. New York, 445 U.S. 573, 590 (1980) (explicitly stating that "the Fourth Amendment has drawn a firm line at the entrance to the house.").

205 *See, e.g.*, *Stoner*, 376 U.S. at 490; Chimel v. California, 395 U.S. 752, 768 (1969); *Payton*, 445 U.S. at 590; Minnesota v. Olson, 495 U.S. 91, 98-99 (1990); Minnesota v. Carter, 525 U.S. 83, 89 (1998) ("The text of the [Fourth] Amendment suggests that its protections

of the home as follows: "We have said that the Fourth Amendment draws 'a firm line at the entrance to the house,' . . . . That line, we think, must be not only firm but also bright."[206]

Were *Abel* to have been arrested in 2024 versus 1960, a good deal of the evidence collected against him would be excluded. Officers, armed solely with an administrative arrest warrant, would be limited in their ability to push open the door to one's home (or hotel room) and conduct an extensive search.[207] It remains an open question whether law enforcement officers, absent a judicial warrant, could force their way inside one's home. Once properly inside, a warrantless search would be strictly limited to the person, and area immediately surrounding, following an individual's lawful arrest.[208] *Abel* would not turn out the same today.

So, what remains of *Abel*? Law enforcement is bound to obtain a judicial warrant before searching a home or hotel room. Under current federal policy, an immigration administrative arrest warrant does not empower immigration officers to enter a home or a residence to arrest individuals. Indeed, an administrative arrest warrant does not allow law enforcement to cross the threshold of the home. An administrative search warrant does—but there is no case post-*Abel* empowering officers to rely solely on an administrative arrest warrant to gain access to the home.[209] And

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extend only to people in 'their' houses. But we have held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else."); Kyllo v. United States, 533 U.S. 27, 40 (2001); Florida v. Jardines, 569 U.S. 1, 4 (2013).

206 *Kyllo*, 533 U.S. at 40 (internal citation omitted).

207 *See Stoner*, 376 U.S. at 490; *Chimel*, 395 U.S. at 768.

208 *See Chimel*, 395 U.S. at 768 (limiting the scope of a warrantless search incident to arrest to the arrestee's person "and the area from within which he might [obtain] either a weapon or something that could have been used as evidence against him"). This limits the range of the search to the area within a person's immediate control from which he might either access a weapon or seek to destroy evidence. *See also* Arizona v. Gant, 556 U.S. 332 (2009). In contrast to *Chimel*, Abel was subjected to a search of his entire hotel room and the adjoining bathroom. Such broad, warrantless, searches are no longer permitted without consent or a judicial warrant. *Chimel*'s lunging radius rule was well explained by the Court:

> [I]t is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a [warrantless] search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Chimel, 395 U.S. at 763.

209 Camara v. Municipal Court, 387 U.S. 523, 545 (1967).

Supreme Court jurisprudence, in case after case, suggests that an executive issued arrest warrant falls short of Fourth Amendment requirements.

D. The Home is the First Among Equals—Payton v. New York

The home is undoubtedly the first among Fourth Amendment equals.[210] In case after case, year after year, the home receives the fiercest Fourth Amendment protection.[211] This boundary line is consistent with the home's value in our lives and the Framers' lives.[212] The British officers showed complete disregard for individuals' homes and belongings—the place where modern individuals find refuge to engage in private ideas, express their private thoughts, and enjoy freedom from arbitrary governmental intrusions.[213] It is because the British abused general warrants and ransacked colonial homes that the Fourth Amendment draws a line at the entry to one's home.[214] Not only is the home protected, the area commonly associated with the home (the curtilage) is similarly protected.[215]

Law enforcement cannot enter a person's home without a warrant except in the most limited of circumstances.[216] This is true regardless of whether the purpose for entering is to search or effectuate a seizure.[217] The *Stoner* case discussed above reminds that even temporary homes receive Fourth Amendment protection. The government cannot cross the threshold of my hotel room without first securing *my* consent or possessing a judicial warrant. Absent either, or some narrow exception, police may not enter.

Recent cases only fortify the home's elevated status. In *Welsh v. Wisconsin*, the Supreme Court held that officers pursuing an individual suspected of drunk driving—a civil offense under Wisconsin law at the

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210 Florida v. Jardines, 569 U.S. 1, 4 (2013).

211 *Id. See also Camara*, 387 U.S. at 529; Bumper v. North Carolina, 391 U.S. 543, 549-50 (1968) (a warrantless home search violates the Fourth Amendment when consent was obtained by falsely claiming to have a warrant); Mincey v. Arizona, 437 U.S. 385 (1978); Payton v. New York, 445 U.S. 573 (1980) (prohibiting warrantless home arrests for violent felony even where officers have probable cause the suspect committed the crime); Collins v. Virginia, 584 U.S. 586 (2018); Caniglia v. Strom, 593 U.S. 194 (distinguishing car searches from home searches); Lange v. California, 594 U.S. 295, 308 (2021) (finding that a fleeing misdemeanant does not always provide "exigent circumstances" permitting entry into the home without consent or a warrant).

212 *Payton*, 445 U.S. at 583-84.

213 Boyd v. United States, 116 U.S. 616, 627-30 (1886) (providing detailed history of Fourth Amendment genesis).

214 *Id.* at 625 (noting John Adams famously decried that the British approach towards home invasions resulted in American Independence. "Then and there, the child Independence was born.").

215 Florida v. Jardines, 569 U.S. 1, 6 (2013). Justice Scalia, writing for the majority, noted that the curtilage—or the "area 'immediately surrounding and associated with the home'"—is part of the home itself. *Id.* at 6. "That principle has ancient and durable roots." *Id.*

216 *Payton*, 445 U.S. at 590. *See also Caniglia*, 593 U.S. at 198; Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Kentucky v. King, 563 U.S. 452, 460 (2011).

217 *Payton*, 445 U.S. at 585.

time—could not enter a person's home without a warrant.[218] The Court's reasoning is particularly relevant to administrative immigration arrest warrants. The Court found that the state's interest in enforcing a civil infraction (drunk driving) did not empower law enforcement to breach the home without a warrant.[219] Instead, the officers were required to present their evidence to a neutral and detached magistrate for an independent evaluation before entering the home to vindicate a civil offense.[220] The Court emphasized:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. Given this expression of the State's interest, a warrantless home arrest cannot be upheld . . . . To allow a warrantless home entry on these facts would be to approve unreasonable police behavior that the principles of the Fourth Amendment will not sanction.[221]

Welsh demands that reviewing courts consider the gravity of the alleged offense before permitting a warrantless home entry.[222] The Court focused on "the underlying offense as an important calculus" in determining whether officers could dispense with a judicial warrant before entering one's home.[223] In finding Welsh's arrest invalid, the Court cautioned: "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor."[224]

The home has also been protected against warrantless felony arrests, or those instances where the allegations involve a serious crime.[225] In *Payton v. New York*, the Supreme Court found that officers had violated the Fourth Amendment by making an early morning warrantless home entry to effectuate a felony arrest.[226] The officers had probable cause that Payton had committed murder.[227] But the officers' independent probable

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218 466 U.S. 740, 754 (1984).
219 *Id.* at 753-54.
220 *Id.* at 754.
221 *Id.* at 754 (internal citations omitted).
222 *Id.* at 753.
223 *Id.* at 751.
224 *Id.* at 753.
225 Payton v. New York, 445 U.S. 573, 590 (1980).
226 *Id.* at 576.
227 *Id*. *Payton* actually involved two separate warrantless in-home arrests. Payton, the case's namesake, challenged the fact that six officers went to his home to arrest him for alleged murder.

cause determination, untested by a judicial inquiry, provided insufficient justification to enter the home.[228] *Payton* underscored the importance of the home to the Framers. Law enforcement may not enter the home even to seize individuals wanted for the most heinous crimes unless they first secure a warrant.[229]

Payton marked the beginning, not the end, of fortifying the home's protection. It is rare that law enforcement officers are legally entitled to enter a person's home without first securing a judicial warrant.[230] Fourth Amendment exceptions to the judicial warrant requirement are jealously guarded—and none more so than when involving the home. The past several decades include an unbroken line of Supreme Court cases securing the home's sacred place in Fourth Amendment jurisprudence. Absent consent or exigent circumstances, a judicial warrant must be obtained to cross the threshold of the home or its curtilage.[231]

As recently as 2021, in *Lange v. California*, the Supreme Court held that law enforcement could not enter the curtilage (an attached garage) to arrest a fleeing misdemeanant who was seen by, and intentionally fled, law enforcement.[232] The Court, in requiring a judicial warrant under these circumstances, found that "[w]hen the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means they must get a [judicial] warrant."[233] Once again, the Court confirms that in cases involving the home, a fleeing criminal does not provide automatic exigent circumstances to circumvent the warrant requirement.[234] Instead, barring a serious crime or potential serious injury to an individual, law enforcement must present their probable cause to a neutral and detached magistrate to ensure that breaching the security of the home is required.[235] Simply put, "when the officer has time to get a warrant, he must do so—even though the misdemeanant has fled."[236]

Id. Law enforcement used crowbars to forcibly open the door to his apartment. *Id.* A second individual, Obie Riddick, was arrested without a warrant in his home around noon. *Id.* at 578. Riddick was suspected of committing two armed robberies. *Id.* Both defendants were suspected of committing violent felonies.

228 *Id.* at 603.

229 *Id.*

230 *See, e.g.,* Illinois v. McArthur, 531 U.S. 326 (2000) (where police officers waited to enter a man's home to search for marijuana until they were able to secure a judicial warrant).

231 *Payton*, 445 U.S. at 590. *See also* Caniglia v. Strom, 593 U.S. 194, 198 (2021); Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Kentucky v. King, 563 U.S. 452, 460 (2011).

232 Lange v. California, 594 U.S. 295, 308 (2021). The *Lange* Court refused to embrace a categorical rule that every fleeing misdemeanant provides "exigent circumstances" to permit a warrantless home entry. *Id.*

233 *Id.* at 309.

234 *Id.* at 313.

235 *Id.*

236 *Id.*

Lange follows a similar case, *Collins v. Virginia*, where an officer walked up a residential driveway to observe a motorcycle, mostly covered by a tarp, without first securing a judicial warrant.[237] Like Lange, the defendant had evaded police (twice) on his motorcycle.[238] Having confirmed that the motorcycle was likely stolen, officers traced the motorcycle to Collins.[239] An officer then found a picture of the motorcycle on Collins's social media page that was parked up at the top of a driveway.[240] The officer located the address, went to the home, and saw what appeared to be the same motorcycle that was profiled on Collins's social media.[241] The officer took a picture of the tarp-covered motorcycle from the sidewalk.[242] Then, rather than taking all this evidence to a neutral and detached magistrate, the officer walked up the driveway, lifted the tarp off the motorcycle, and went back to his car to wait for Collins.[243]

Collins was ultimately arrested and convicted of receiving stolen property.[244] He challenged the officer's search as a trespass—which included moving the tarp[245] while standing within the curtilage of the home.[246] Virginia raised several exceptions to the warrant requirement, most prominently the automobile exception.[247] But the Court was unmoved. The

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237 Collins v. Virginia, 584 U.S. 586, 589 (2018).

238 *Id.*

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.* at 589.

243 *Id.* at 590.

244 *Id*.

245 *See* Arizona v. Hicks, 480 U.S. 321 (1987). Justice Scalia, writing for the majority, explained that the act of moving an item (stereo equipment in *Hicks*) constituted a Fourth Amendment search. *Id.* at 324-25. Here, the officer lifted the tarp off the motorcycle to get additional information about the motorcycle. The old adage—"you see with your eyes, not your hands"—accurately describes Fourth Amendment searches. If you can see something while you are lawfully in a place, you can gather all the information from that visual surveillance you desire. *See* California v. Ciraolo, 476 U.S. 207, 212-13 (1986). *Ciraolo* provides an excellent explanation of permissible visual surveillance:

> That the area is within the curtilage of the home does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activity clearly visible. "What a person knowingly exposes to the public, even in his own home or office, is not the subject of Fourth Amendment protection."

Id. at 213 (internal citations omitted). The problem in *Collins* is not that the officer took a picture from the sidewalk. The Fourth Amendment violation occurred when the officer entered the property by walking up the driveway (which constitutes the curtilage of the home in this instance) and lifting off the tarp. There was a trespass onto the curtilage. There was a search of the motorcycle.

246 *Collins*, 584 U.S. at 589-90.

247 *Id.* (citing Carroll v. United States, 267 U.S. 132 (1925) (establishing the automobile exception to the warrant requirement)).

motorcycle was parked within the curtilage of the home.[248] And "[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred."[249] The Court suggested that this placement within the curtilage gave the same level of protection to the motorcycle as if it has been parked in the living room.[250] Once again, the Supreme Court gave preference to the home and required that officers secure a warrant before entering a home or its curtilage to conduct a search.[251] The Court found in Collins's favor by relying on "the centrality of the Fourth Amendment interest in the home and its curtilage."[252]

The Supreme Court's unabated protection of the home is consistent with the Framers' design.[253] The British officers' disregard of personal privacy from unwarranted governmental intrusion was most commonly revealed during general warrants abusing the home.[254] Thus, modern courts should ensure that they retain the home in its proper hierarchy of Fourth Amendment importance. *Katz*'s oft-quoted language that "the Fourth Amendment protects people, not places," has proven itself imprecise if not inaccurate.[255] Cars, items unknown to the Framers, are regularly noted as providing less objective privacy rights due to their transient nature and their heavy regulation.[256] Individuals traveling on public transportation and walking in public are also deemed to have lessened expectations of privacy as judicial warrants may be disregarded if officers have a reasonable

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248 *Collins*, 584 U.S. at 589.

249 *Id.* at 593.

250 *Id.* at 594.

> Applying the relevant legal principles to a slightly different factual scenario confirms that this is an easy case. Imagine a motorcycle parking inside the living room of a house, visible through the window to a passerby on the street. Imagine further that the officer has probable cause to believe that the motorcycle was involved in a traffic infraction. Can the officer, acting without a warrant, enter the house to search the motorcycle and confirm whether it is the right one? Surely not.

Id.

251 *Id.* at 598.

252 *Id.*

253 Lange v. California, 594 U.S. 295, 309 (2021). "Like our modern precedents, the common law afforded the home strong protection from government intrusion." *Id.*

254 David E. Steinberg, *The Uses and Misuses of Fourth Amendment History*, 10 J. CON. L. 581, 585 (2008) (noting that the framing era emphasis on warrants were focused on the home). *See also id.* at 596 ("[I]n framing-era discussions of unreasonable searches and seizures, scholars and statesmen consistently opposed house searches conducted pursuant to general warrants.").

255 Katz v. United States, 389 U.S. 347, 351 (1967). *But see* Cady v. Dombrowski, 413 U.S. 433, 442 (1973) (noting a "constitutional difference between searches of and seizures from houses and similar structures and from vehicles . . . .").

256 The most difficult assessment is the recreational vehicle (RV) scenario. One of the most common exceptions to the warrant requirement is the automobile exception. And when an RV or mobile home is actually mobile—meaning capable of being driven or quickly moved—that vehicle is enveloped in the automobile exception rather than seen as a residence. *See, e.g.*, California v. Carney, 471 U.S. 386 (1985).

suspicion that criminal activity is afoot.[257] Such lessened burden is not adequate when facing the sanctity of the home.[258]

Homes, without exception, provide the most rigorous test for law enforcement.[259] Before law enforcement can interfere with the homeowner's privacy rights, judicial intervention is required.[260] The few exceptions, and they have been very few, involved officers showing restraint while seeking a judicial warrant[261] or mistaken consent by what objectively appeared to be a co-resident.[262] But even these exceptions have proven quite limited—and they should entail judicial assessment of the failure to first obtain a judicial warrant. When faced with the risk of lost evidence or an invalid seizure, law enforcement knows that securing a judicial warrant is the better choice.

IV. THE RIGHT OF ALL PEOPLE

The home is—and should be—sacred against all law enforcement.[263] Civil immigration searches or arrests conducted at the home should require a judicial warrant, not an administrative immigration warrant. The threshold to the home should never be crossed without a neutral and

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257 *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Florida v. Bostick, 501 U.S. 429 (1991); United States v. Drayton, 536 U.S. 194 (2002).

258 Caniglia v. Strom, 593 U.S. 194, 199 ("What is reasonable for vehicles is different from what is reasonable for homes.").

259 *See, e.g.*, United States v. Karo, 468 U.S. 705, 714-15 (1984). The *Karo* Court gave a clear description of the Court's dedication to protecting the home against warrantless intrusions:

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances.

Id.

260 Steagald v. United States, 451 U.S. 204, 212 (1981).

> The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime," may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home.

Id. (internal citation omitted).

261 Illinois v. McArthur, 531 U.S. 326, 337 (2001) (finding officers' actions reasonable in preventing individual suspected of preparing to destroy evidence from entering his home without police observation for 2 hours while officers sought to secure a search warrant).

262 Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (explaining the "common authority" consent doctrine).

263 Steinberg, *supra* note 254, at 600. Professor Steinberg emphasized Sir Edward Coke's 1644 comments that violations of the home to search for felons or stolen goods "is against the Magna Carta." *Id.*

detached magistrate interposed between law enforcement and the home.[264] The Fourth Amendment may "protect people, not places," but the home holds a sacred place in our jurisprudence.[265] And it always should. Not a single case—outside of *Abel*—has diminished the resolute protections drawn at the entry to the home.

Abel v. United States is a legal relic possessing dicta that should be discarded if not explicitly overruled. *Abel* was decided when a hotel room was not as prominently regarded as it is today.[266] *Abel*'s outcome, even with an arrest taking place in a hotel (or temporary abode), would be different now. Following *Stoner* and *Payton*, FBI agents cannot push their way into a person's temporary abode to make a warrantless arrest. This jurisprudence casts doubt on the FBI's ability to rely on an I-200 administrative arrest warrant to enter a person's home.

At least one court has relied on *Abel*'s dictum regarding administrative immigration arrest warrants to uphold an arrest where armed state and federal officers surrounded an individual's home at daybreak and demand he exit.[267] In *United States v. Malagerio*, the arresting officer initially testified he was conducting a "knock and talk" directing the individual to exit his home.[268] But knock and talks are consensual.[269] An officer cannot demand compliance when doing what all people can do—approach a home, knock, and see if those residing inside want to visit. The delineating feature of a knock and talk is the person inside's ability to ignore the knock or, upon opening and recognizing the officers as such, close the door and go about her business. A forced interaction transforms a legal consensual engagement, the knock and talk, into a likely seizure.[270]

In this same case, where the trial court relied on *Abel* as binding authority, the immigration officer—upon realizing he didn't actually conduct a proper knock and talk—indicated that he was relying on an I-200 warrant.[271] Yet federal policy prohibits such reliance.[272] ICE officers

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264 Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971) (confirming the legal distinction "between searches that take place on a man's property—his home or office—and those carried out elsewhere").

265 *Id.* at 474-75. "It is accepted, as least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of expectations based on the presence of 'exigent circumstances.'" *Id.*

266 *See* Stoner v. California, 376 U.S. 483 (1969).

267 United States v. Malagerio, 49 F.4th 911 (5th Cir. 2022) (upholding District Court's denial of a Motion to Suppress where the District Court cited and relied on *Abel*), *cert. denied*, 143 S.Ct. 1785 (2023).

268 Transcript of Motion to Suppress Hearing at 34, United States v. Malagerio, 5:20-CR-154-H-BQ, 2021 WL 3030067 (N.D. Tex. 2021) (No. 68).

269 Jayme W. Holcomb, *Knock and Talks*, 75 FBI Law Enforcement Bulletin 8 (2006).

270 *Id.*

271 *Malagerio*, *supra* note 268. *See also* Sorto-Vasquez Kidd, et al. v. Mayorkas, No. 2:20-cv-03512-ODW (JPRx), 2024 WL 2190981 (C.D. Cal. May 15, 2024).

272 *Kidd*, No. 2:20-cv-03512-ODW (JPRx), 2024 WL 2190981, at *10-13.

are trained that immigration officers cannot enter a residence or make a home arrest without consent or a judicial warrant.[273] So, when officers have neither, they often employ alternate tactics. These tactics were challenged in a recent class action lawsuit.[274] Cases like this bear resemblance to *Abel* because the immigration officers suspect possible crime afoot. Yet the officers do not have sufficient probable cause to secure a judicial warrant.[275] Instead, one executive official avers to another executive official (both immigration officers) that there is probable cause the individual is a visa overstay.[276] That is the method for issuing I-200 arrest warrants.[277] Law enforcement serves as the gatekeeper for other law enforcement. It is precisely the type of system the Framers would have opposed, and precedent prohibits.[278] Our Framers' concern was consistently one involving the separation of powers.[279] If the Executive can assess which individuals should be arrested in their home, the Fourth Amendment text becomes meaningless because all probable cause decisions can be made by law enforcement.[280] But that is not how the Fourth Amendment was written or designed. Instead, the intended gatekeeper, ensuring a separation of powers to protect individuals, is a neutral and detached magistrate that can provide assurance that law enforcement's invasive activity is required.[281]

In addition to the Fourth Amendment's gatekeeping function for law enforcement, the Fourth Amendment also provides heightened protection to the home. Supreme Court precedent prohibits non-consensual home entries without a judicial warrant.[282] Beyond these truisms, visa overstays and unlawful entries are civil, not criminal offenses. Surely the unbroken line of Fourth Amendment cases drawing a firm line at the home do not allow two law enforcement officers to circumvent the judicial warrant requirement to breach the home on the strength of a civil wrong. Unlike

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273 *Id.* at *19 (citing 8 C.F.R. § 287.8(f)(2)).

274 *See generally id.*

275 *Id.* at *11-12.

276 *Id.*

277 C.F.R. § 287.5(e)(2); 8 C.F.R. § 236.1(b).

278 Johnson v. United States, 333 U.S. 10, 14 (1948) (reminding that "[a]ny assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity, and leave the people's homes secure only in the discretion of police officers"). *See also* Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) (noting that "the values were those of the authors of our fundamental constitutional concepts").

279 *See, e.g.,* U.S. CONST. art. 1 § 2-3, 7 art. 2 § 2, 4 (splitting impeachment powers between the House and Senate, providing the remedy of impeachment only against Article II and III officials, and splitting the power of judicial appointments between the legislature and the executive).

280 *Coolidge*, 403 U.S. at 450-53.

281 Shadwick v. Tampa, 407 U.S. 345, 352-353 (1972).

282 *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980); New York v. Harris, 495 U.S. 14 (1990); Georgia v. Randolph, 547 U.S. 103 (2006).

Abel, *Welsh v. Wisconsin* is binding precedent.[283] Unlike *Abel*, *Welsh* held that the purpose for entering a home matters.[284] Unlike *Abel*, *Welsh* remains good law.[285]

A. Abel*'s Dictum Does Not Bind Lower Courts*

Courts are not bound by *Abel*'s dictum. The Supreme Court explicitly acknowledge that the issue was waived below and could not be considered by the Court.[286] Rather than accept the parties' express disavowal of the issue, however, the Court proceeded to draft several confounding pages amounting to an advisory opinion of what—had the issue perhaps been fully briefed, argued, and litigated—it *might* have found.[287] But the issue wasn't briefed. It was not argued. And it most certainly wasn't litigated. This dictum is unpersuasive in its findings and does not bind lower courts.

The Supreme Court provided generic explanations about the historical pedigree of administrative warrants.[288] But historical pedigree is beside the point post-*Katz*. History has changed. Now, nearly all

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283 Welsh v. Wisconsin, 466 U.S. 740 (1984).

284 *Id.* at 753.

285 *See* Stoner v. California, 376 U.S. 483, 490 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.").

286 Abel v. United States, 362 U.S. 217, 230 (1960).

287 *Id.* at 230-34.

288 The Fourth Amendment was designed to avoid abuses endured by the Colonists. These same abuses were decried in English common law as early as 1765. Thus, Professor Nash correctly argues that *Abel* likely erred in its historical presentation. *See* Nash, *supra* note 5.

The Plaintiff's argument in *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 19 Howell's State Trials 1029, provides compelling evidence that the FBI and immigration officers' conduct in *Abel* violated the Framers' original understanding of searches and seizures:

> A power to issue such a warrant as this is contrary to the genius of the law of England; and even if they had found what they searched for, they could not have justified under it. But they did not find what they searched for, nor does it appear that the plaintiff was the author of any of the supposed seditious papers mentioned in the warrant; so that it now appears that this enormous trespass and violent proceeding has been done upon mere surmise. But the verdict says, such warrants have been granted by secretaries of state ever since the Revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publishing of a libel which is the crime, and not the having of it locked up in a private drawer in a man's study. But if having it in one's custody was the crime, no power can lawfully break into a man's house and study to search for evidence against him. This would be worse than the Spanish inquisition; for ransacking a man's secret drawers and boxes, to come at evidence against him, is like racking his body to come at his secret thoughts. The warrant is to seize all the plaintiff's books and papers without exception, and carry them before lord Halifax. What? Has a secretary of state a right to see all a man's private letters of correspondence, family concerns, trade and business? This would be monstrous indeed! And if it were lawful, no man could endure to live in this country.

Id.

in-home arrests require judicial warrants.[289] The home has been marked as the "first among equals."[290] It receives the highest possible level of Fourth Amendment protection. The historical pedigree of the sanctity of the home is far greater, and the historical account more accurate, than *Abel*'s generalized dictum.[291]

Courts relying on *Abel*'s dicta to uphold a home arrest based on an I-200 immigration administrative arrest warrant ignore decades of actual precedent. These courts misconstrue *Abel*'s holding and rule as if *Katz*, *Stoner*, *Payton* and *Chimel* had never been decided. It is as if the Fourth Amendment has been frozen in time such that FBI agents could still push their way into a person's hotel room and conduct a shake-down search of the entire room. They can't. Not today. This result cannot happen without courts turning a blind eye to the post-*Katz* line of cases that have transformed the Fourth Amendment.

It seems odd to read *Abel* through a pre-*Katz*, pre-*Stoner*, and pre-*Payton* lens placing civil immigration arrest warrants outside the unbroken line of Supreme Court opinions providing heightened Fourth Amendment protection of the home. Doing so requires a Fourth Amendment blind spot—or a belief that immigration arrests inside the home are distinct from every other kind of search or seizure occurring in or around the home. *Abel*'s dictum withers under modern scrutiny. It deserves a proper burial.

Further, *Abel*'s dictum is precisely the type of decision the Roberts Court has avoided by relying strictly on standing and justiciability issues to avoid unnecessary constitutional decisions. Rather than accept the limited posture of *Abel*'s case, the *Abel* Court expanded its discussion to issues waived below. The result is an advisory opinion on civil immigration administrative arrest warrants that courts, or judicial law clerks, have

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289 Payton v. New York, 445 U.S. 573, 590 (1980); Florida v. Jardines, 569 U.S. 1, 6, 11 (2013); *Caniglia*, 593 U.S. 194 (2021).

290 Florida v. Jardines, 569 U.S. 1, 6 (2013).

291 The Framers relied upon the English common law as set forth in *Entick*. *Entick* focused on a property-based approach to searches and seizures. The *Entick* Court declared:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.

Entick's history was embraced by the United States Supreme Court in *Boyd v. United States*, 116 U.S. 616 (1886).

carelessly relied on out of context.[292] Simply put, *Abel* is no longer good law. And it is time to acknowledge this.[293]

Abel's dictum is particularly troublesome because the Supreme Court openly acknowledged the issue was expressly disavowed below.[294] Judicial restraint would have resulted in the Court stopping there—no further commentary, no discussion. The issue did not present a live controversy about the arrest's validity. Thus, the Court should have refrained from providing any statement, much less pages of unabated dictum.[295] To decide an abstract issue (the viability of an administrative arrest warrant) within a specified context is perhaps the worst form of dicta. It suggests the Court has debated, considered, and resolved the issue as if the matter had been properly presented. But it hadn't.[296] The Court was providing generic thoughts in a specific setting.[297] Its dictum appears to present an impressive history when disconnected from the actual case facts.[298] Modern courts should not be lulled into believing the Court's dictum carries binding force.[299] It simply doesn't. It couldn't.

Abel's dictum is an advisory opinion dressed up to look like a meaningful discussion.[300] Courts should not be fooled. The issue discussed was never at issue.[301] The Court lacked the ability to render a binding decision on the previously waived issue.[302] The discussion was unnecessary and is untethered to the requisite adversarial positioning expected under the

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292 *See, e.g.*, City of El Cenizo, Texas v. Texas, 890 F.3d 164, 187 (5th Cir. 2018). The *El Cenizo* Court presents a good illustration of a court (or law clerk) misunderstanding *Abel*'s dicta. The Court cites *Abel* for the proposition that: "It is undisputed that *federal* immigration officers may seize aliens based on an administrative warrant attesting to probable cause of removability." *Id.* (emphasis in original). But *Abel* did not involve any claim regarding federal immigration officers' power to seize an individual relying solely on an administrative arrest warrant. That very issue was disclaimed and abandoned by the lawyers below. The issue was discussed only as an abstract proposition in what is tantamount to an advisory opinion. In fact, there is significant dispute that immigration officers have the unfettered ability to arrest individuals relying solely on I-200 administrative arrest warrants. That issue is neither undisputed nor settled law.

293 One federal court recently did so. *See Kidd*, No. 2:20-cv-03512-ODW (JPRx), 2024 WL 2190981, at *12 (explicitly noting that *Abel* did not consider "whether an administrative warrant satisfied the requirements for warrants under the Fourth Amendment")

294 Abel v. United States, 362 U.S. 217, 230 (1960).

295 *Id.* at 230-34.

296 *Id.*

297 *Id.* at 232-34.

298 *Id.* at 233.

299 Courts that erroneously rely on *Abel*'s dicta as a "holding" or to profess "undisputed" powers only compound *Abel*'s error. *See* City of El Cenizo, Texas v. Texas, 890 F.3d 164, 187 (5th Cir. 2018). *Abel* did not address the powers attributed to it in the *El Cenizo* case. In fact, in the pages cited by the *El Cenizo* Court, *Abel* appears to note that this issue has not been expressly considered. *See Abel*, 362 U.S. at 233-34 ("This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative deportation warrants.").

300 *Abel*, 362 U.S. at 230-34.

301 *Id.* at 230-31.

302 *Id.* at 231.

standing doctrine. Judicial asides, which is precisely what *Abel*'s dictum is, are confusing and dangerous. They sit about gathering dust until, years later, a hurried researcher construes the dicta out of context. *Abel* did not hold that administrative arrest warrants are constitutionally valid when executed at a hotel or in a home.[303] It did hold that the FBI and INS did not collaborate in bad faith to circumvent the arrest process.[304] And, yet the dictum hangs in the wind just waiting for the cursory reader to grab hold and run with it.

B. Abel*'s Dicta Has Been Eroded and Should Be Discarded*

Courts need to directly address *Abel*'s dictum and give it a proper burial. It is not good law, at least not considering modern Fourth Amendment jurisprudence.[305] When officers seek entry into a person's home or hotel, an independent judicial decision should be made as to whether officers have probable cause. Law enforcement cannot, and should not, be solely entrusted with evaluating the accuracy of their suspicions. Such approach defies the separation of powers and violates the Fourth Amendment's design.

This is particularly true in the immigration context where the United States lacks a reliable system to log and cross-reference immigration entries.[306] The Ninth Circuit recently returned a case back to the District Court to further assess the reliability of immigration databases used by ICE to issue I-200 and other administrative warrants.[307] The District Court had found notable database reliability issues.[308] If immigration officers are able to rely on an incomplete and imprecise system, their cause determinations will be equally unreliable. A judge would not issue a judicial warrant based on an unreliable system. She would require more. She would require proof of probable cause and be able to test the officers' assertions for reliability. Yet, under our current system, immigration officers can place their faith in markedly unreliable databases without any meaningful oversight. This should stop. Judges, not law enforcement, should be entrusted with probable cause determinations needed to issue arrest warrants—particularly in those instances where the alleged infraction is civil in nature.

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303 *Id.* at 230-34.

304 *Id.* at 229-30, 240.

305 Both the method of arrest—pushing open a hotel door—and the breadth of the search, allowing the search of Abel's entire hotel room and the adjoining bathroom, have been renounced. *Abel*, 362 U.S. at 237. *Stoner* precludes this type of arrest. *Chimel* precludes this type of search. In short, *Abel* would be decided differently today were a reviewing Court to apply settled Fourth Amendment precedent.

306 Gonzalez v. U.S. Immigration & Customs Enf't, 416 F. Supp. 3d 995, 1011-12, 1017-19 (C.D. Cal. 2019).

307 *See* Gonzalez v. U.S. Immigration & Customs Enf't, 975 F.3d 788, 798, 819-24 (9th Cir. 2020) (vacating District Court opinion for further factual findings).

308 *Gonzalez*, 416 F. Supp. 3d at 1011-12, 1017-19.

Until the United States has a reliable immigration database, administrative immigration arrest warrants should not be permitted at or near the home. The current system is sufficiently flawed, and officers should be required to testify before a neutral and detached magistrate to protect against unnecessary home invasions. This is not to say that the I-200 warrant is wholly unreliable or that it cannot ever be used. But for current purposes, a firm line should be drawn at the entry to the home for I-200 warrants.

Beyond the unreliability of the current database stands the sacred nature of one's home. The home is first among equals and stands apart from other locations where law enforcement can more readily engage with individuals. Street encounters are less invasive and more public. It is far less likely that a team of 8 armed officers will descend upon a person walking down the street suspected of committing the civil offense of a visa overstay or simply being unlawfully present in the United States. But place those same officers at the disadvantage of making a home arrest and, for officer safety, you could conceive of an encounter that justifies the show of lethal force.

Home arrests most often present dangerous situations for both individuals and law enforcement.[309] The person at home may not recognize that the encounter is legitimate. This may result in behavior that is seen as threatening by the officers. Likewise, officers may fear the person is armed and may overreact to a homeowner's behavior. Many home arrests are avoidable. They should be avoided to protect all of us. This is especially true when the triggering event is minor, such as a civil immigration allegation.

This Article does not address cases involving immigration encounters for criminal offenses. Individuals accused of criminal offenses present a different calculation. A visa overstay is easily distinguishable from a previously removed individual (and, thus, a person accused of illegal re-entry), or a person convicted of a removable *criminal* offense. This Article is limited to the narrow—yet common—occurrence of a civil immigration infraction. Such individuals will not yet have been permitted to prove their lawful presence in the United States. And, even where the presence is deemed unlawful, the consequence is civil removal, not a criminal conviction.[310]

Abel's reasoning, suggesting that an immigration arrest warrant executed at one's abode is lawful, has not aged well. Homes, and hotel rooms, are far more protected now than they were in 1960. And immigration has become a hotly contested political issue that pulses and wanes with each administration. Fourth Amendment protections should not vacillate

309 *See* Chimel v. California, 395 U.S. 752, 763 (1969).

310 *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012).

due to political changes. The Fourth Amendment should be a rock upon which all people can rely. Its text makes this exact promise.

The Framers' Fourth Amendment places an important obstacle in the path of law enforcement seeking to enter the home—a neutral and detached magistrate. The purpose of entering the home is, constitutionally speaking, irrelevant for Fourth Amendment purposes. But in the few instances where the purpose matters, those facing civil violations, as opposed to criminal violations, receive the highest level of protection.[311] The *Abel* Court did not have the benefit of nearly seven decades of superior constitutional protection afforded the home. We do. Modern courts realize that the trajectory has been one favoring privacy in the home and one requiring judicial intervention to breach that sacred threshold. The Roberts Court, were it to face this decision, would find itself in a much different position than the 1960 *Abel* Court. The law is established. The cases are clear. The home is the first among equals.

Abel should be explicitly disclaimed by any court evaluating I-200 administrative arrest warrants executed in the home. *Abel* did not decide the issue. Its four-page discussion is as much an advisory opinion—during a snapshot in time—as it is ponderous dictum written without the benefit of briefing or adversarial argument.[312] Modern citations to *Abel* show the mischief of relying on Supreme Court dicta.[313] *Abel* did not need to decide the administrative arrest warrant issue. And shortly after it provided commentary, the law about arrest locations changed dramatically. Even courts that find *Abel*'s dictum persuasive on the generic issue of administrative arrest warrants should carefully consider the Fourth Amendment's evolution since that time. *Abel* would come out differently today.

Consideration of the constitutionality of I-200 administrative arrest warrants requires context. Any arrest made in the home—particularly one seeking solely to vindicate a civil wrong—should require judicial intervention. Law enforcement should be required to justify their decision to breach the home by proving to a judge that their evidence satisfies the

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311 *See, e.g.*, Abel v. United States, 362 U.S. 217, 237 (1960) (taking the contrary approach and stating that "we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches made for the purpose of turning up proof to convict than we are to protect them from searches for matter bearing on deportability."). Modern doctrine actually requires heightened justification to enter the home and protects more fiercely against home entry to address minor, civil law matters. *See* Welsh v. Wisconsin, 466 U.S. 740, 753-54 (1984); Lange v. California, 594 U.S. 295, 298 (2021) ("The Fourth Amendment ordinarily requires that police officers get a warrant before entering a home without permission.").

312 *Abel,* 362 U.S. at 230-34.

313 *See, e.g.*, Motion to Suppress, United States v. Malagerio, 5:20-CR-154-H-BQ, 2021 WL 3030067 (N.D.Tex. 2021) (No. 26).

probable cause standard as determined by a disinterested observer.[314] Allowing law enforcement to evaluate one another's probable cause assessments without independent, usually judicial, oversight has proven insufficient in the criminal context.[315] A lesser standard for evaluating home entries to enforce civil violations seems counterintuitive. It gives officers more discretion to enter one's home when the stakes are lower. Modern Fourth Amendment jurisprudence would not take this path. Lower stakes yield greater home protection, not less.

The I-200 administrative immigration warrant process is poorly suited to permit home entry. In fact, federal policy recognizes this by prohibiting immigration officers to make home arrests without consent or a judicial warrant. Case law should align with this well considered policy. No law enforcement should be permitted, when vindicating civil offenses, to enter the home without consent or a judicial warrant. A person's home is a sacred space. The Framers believed this. They placed this protection squarely within the Fourth Amendment's text. Modern courts are obliged to uphold this carefully designed protection. To diminish plainly crafted textual protections, in aid of civil law enforcement, would undermine the Framers' purpose.

V. CONCLUDING THOUGHTS ON TEXT AND DESIGN

There is a high constitutional premium placed on "originalism" these days. What did the Framers mean when crafting our unparalleled and durable Constitution? The push is to seek the original meaning and not veer from that. This approach helps ensure that judges do not simply issue rulings based on personal preferences disconnected from Constitutional text and original meaning. Originalism protects us from judges that substitute personal policy for Constitutional meaning. In this vein, this Article relies on Fourth Amendment originalism set forth in an unbroken line of cases giving the highest level of Constitutional protection to the home. From civil DWI cases to felony arrests for violent criminals, the Court has long held that if consent is not given, a judicial warrant is required to enter a home.

Why, in this particular context, does this matter? The truth is that we cannot budge on our Constitutional rights. As presaged in the *Boyd* case

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314 Shadwick v. Tampa, 407 U.S. 345, 348-50 (1972) (emphasizing that persons issuing Fourth Amendment warrants must be "neutral and detached" and capable of assessing probable cause).

315 Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971). The *Coolidge* Court explained that "prosecutors and policeman simply cannot be asked to maintain the requisite neutrality with regard to their own investigations . . . ." *Id.* at 450. Thus, the Court held that warrants permitting search and seizure may not be "issued by the state official who was the chief investigator and prosecutor in this case." *Id.* at 453.

roughly 135 years ago, a right is only as strong for all of us as it is applied against the least among us. Or, as the Court itself stated:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property shall be liberally construed.
>
> A close and literal construction deprives them of half of their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against stealthy encroachments thereon. Their motto should be *obsta principiis*.[316]

Fourth Amendment text protects the rights of all people. It does not differentiate between citizens and (suspected) non-citizens. And its consistent interpretation has likewise been given broad application to all people. Absent proximity to U.S. borders, search and seizure doctrine retains its full force. The fact that the Supreme Court has long drawn a malleable line at the U.S. border and its equivalent is as predictable as the Supreme Court having drawn a nearly impenetrable line at the home and its curtilage. All people have lessened expectations of privacy near the border—citizens and non-citizens alike. All people should also have enhanced protections at and around their home regardless of citizenship. The Fourth Amendment protects people. But it also protects places. And the home receives—and *should* receive—the foremost protection.

The Fourth Amendment must protect all people as they enter the safe harbor of their homes. All law enforcement should be required to respect the "firm line" drawn at the entry of the home. Many things change in law. But the immense protection afforded people in their homes has not. I-200 warrants enforcing civil law wrongs, while important, do not justify breaking with tradition and precedent to reach a quick solution. The home is sacred. Law enforcement's suspicion of who sits inside—citizen versus non-citizen—does not displace judicial assessments from the home entry equation. I-200 warrants, effectuated at the home or within the curtilage, should not be considered one of the jealously guarded exceptions to the judicial warrant requirement.

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316 Boyd v. United States, 116 U.S. 616 (1886). *Obsta principiis* is defined by Black's Law Dictionary as a call to "resist the first approaches or encroachments." It is a reminder that sitting silently by while others' rights are compromised or eliminated could ultimately impact your own rights.

> Thus, the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to few specifically established and well-defined exceptions. . . .
>
> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts.
>
> In times not altogether unlike our own the won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary invasions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.[317]

The Framers were distrustful of British troops that entered their homes in search of evidence of wrongdoing. That skepticism should remain in the forefront of all judges evaluating home entries by law enforcement without first securing a judicial warrant. The use of general warrants helped spur on the American revolution. Its history merits strong consideration when allowing executive officials, enforcing civil wrongs, to serve as the gatekeepers for their own assessments. A neutral and detached magistrate is the hallmark of Fourth Amendment home entries.[318] It has been so since the founding. It remains so today. *Obsta Principiis*!

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317 *Coolidge*, 403 U.S. at 454-55.

318 *Shadwick*, 407 U.S. at 350.