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Part I. Introduction

What the 100-mile border-zone means for people of color – especially indigenous and Latinx people – “is that they are doubly-policed, both by cops and immigration officers, regardless of their citizenship status.”¹ The 100-mile zone allows for searches and seizures of *any vehicle* within 100 miles of a U.S. border as well as basic or advanced searches of electronic devices.² This “quasi-constitutional zone”³ affects the everyday lives of individuals living closest to U.S. borders, from their commute to the grocery store, school, or work, it “often require[s] passing through militarized checkpoints with armed agents.”⁴ These types of searches and seizures fall within the bounds of the Fourth Amendment for permissibility. Thanks to carve-outs from the Supreme Court, via cases such as *Almeida-Sanchez v. United States*⁵, *United States v. Brignoni-Ponce*⁶, and *United States v. Martinez-Fuerte*⁷, some searches and seizures are permissible under the Fourth Amendment. For good reason, there has been significant scholarship regarding the unique constitutional implications of the 100-mile border zone and the racialized policing that it permits.

While immigration has been a deeply politicized issue for much of United States history, the Trump campaigns and presidency injected the contemporary debate around immigration with a new level of hate and fear-mongering and a subsequent policy fallout of increased legal

¹ Yvette Borja, *How the Supreme Court Enabled the Border Patrol's Insane 100-Mile Power Grab*, Balls and Strikes (July 19, 2022). Accessible at <https://ballsandstrikes.org/legal-culture/border-patrol-100-mile-zone-explainer/>

² *Id.* (emphasis added).

³ Miguel de Hoyos, Elissa Steglich & Michael Churgin, *Border Zones I: Due Process at the Border*, 25 Tex. Hisp. J. L. & Pol'y 115, 117 (2019).

⁴ *Id.*

⁵ *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). See e.g. Justice Powell's concurrence.

⁶ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

⁷ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

hurdles and policing. As the migration crisis has grown and been exacerbated by policies such as “stay in Mexico,” significant numbers of aid workers and immigrant advocates have found themselves on the frontlines offering direct assistance to asylum seekers at the U.S. southern border. Sadly, in an apparent ploy to further deprive asylum seekers of access to basic necessities and legal assistance, immigrant advocates have increasingly been the target of government surveillance and other law enforcement actions that would amount to textbook Fourth Amendment violations if they occurred beyond a port of entry and/or outside the 100-mile border zone. This article aims to shed light on that phenomenon.

The Law

8 U.S.C. § 1357, passed by Congress in 1952, grants certain powers to immigration officers and employees – commonly referred to as U.S. Customs and Border Patrol (CPD).⁸ The statute permits officers or employees the power:

“without warrant – within a *reasonable distance* from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.”⁹

However, as the authors will explore, this power given to the U.S. CPD affects quite literally almost every citizen in the United States, essentially nullifying the protections set in place by the Fourth Amendment.

Following the passage of 8 U.S.C. § 1357, the Department of Homeland Security defined what Congress meant by “reasonable distance” through a promulgation in the Code of Federal Regulations. In CFR § 287.1(a)(1): “the term *reasonable distance*, as used in section 287(a)(3) of the

⁸ 8 U.S.C. § 1357(a)(3).

⁹ *Id.* (emphasis added).

Act, means within 100 air miles from any external boundary of the United States or any shorter distance..."¹⁰ This is now known as the "100-mile zone."¹¹

The Fourth Amendment of the United States Constitution protects "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."¹² The Supreme Court has interpreted the Fourth Amendment in several different capacities since its creation. From searching homes¹³ to automobiles¹⁴ to persons,¹⁵ the Supreme Court has interpreted that the Fourth Amendment does not protect against an invasion of privacy by the government without a warrant in *all* circumstances, particularly within the 100-mile border zone. Instead, the Court has created exceptions for searches and seizures by the government.¹⁶

Despite the Supreme Court's requirement for immigration checkpoints to be "brief and limited," checkpoints have become increasingly intrusive in terms of their scope and frequency.¹⁷ However, the Supreme Court has specified that immigration checkpoints are permissible only if they involve a minimal and limited inquiry into immigration status.¹⁸ This rule is established in *Martinez-Fuerte*, where the Court stated that immigration checkpoints near the southern U.S. border are allowed if they entail a "brief detention of travelers" during which they are required

¹⁰ CFR § 287.1(a)(1) (original emphasis).

¹¹ Borja, *supra* note 1.

¹² U.S. Const. amend. XIV

¹³ *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642 (1981).

¹⁴ *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

¹⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁶ See e.g.: *Terry v. Ohio*, 392 U.S. 1 (1968); *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925); *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642 (1981).

¹⁷ Deborah Anthony, *The U.S. Border Patrol's Constitutional Erosion in the 100-Mile Zone*, 124 PENN St. L. REV. 391 (2020).

¹⁸ *Id.*

to respond to "a brief question or two" and potentially provide a document proving their right to be in the United States.¹⁹

Checkpoint detentions have been the subject of numerous reports of troubling experiences for individuals beyond brief questioning about their immigration status.²⁰ Detentions have reportedly lasted from mere minutes to several days, with reasons as flimsy as having a car that smells like a skunk or carrying prescription medications.²¹ Even "humanitarian aid workers" have been detained simply for carrying backpacks, deemed inherently suspicious by some agents.²²

In several instances, individuals have been threatened with weapons and had their property damaged, with no compensation provided.²³ According to some reports, even filing a lawsuit to obtain reimbursement for property damage caused by CBP employees is not always successful, with CBP stating that the law does not permit such compensation.²⁴ The most alarming incident occurred when a U.S. citizen was forcibly strip-searched, subjected to genital and cavity searches, and forced to have a bowel movement, along with X-rays and CT-scans, after a canine "alert," and despite all of these invasive measures, no illegal activity was found.²⁵ These reports highlight the questionable effectiveness and fairness of checkpoint detentions and raise serious concerns about the treatment of individuals by CBP agents.

According to the CBP's procedure, electronic device searches at the border involve examining only the accessible information stored on the device.²⁶ Such searches are categorized

¹⁹ *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ashley N. Gomez, *Over the Border, under What Law: The Circuit Split over Searches of*

as basic or advanced, depending on whether agents manually search the device or use forensic analysis software.²⁷ CBP has recently implemented a policy requiring reasonable suspicion or national security concerns for forensic searches.²⁸ Some courts interpret this policy as treating forensic searches as "nonroutine" border searches, which require individualized suspicion in order for the search to be constitutional.²⁹ However, it is uncertain whether the Supreme Court would consider electronic device searches as "nonroutine" searches that necessitate individualized suspicion.³⁰ The lack of a Supreme Court ruling has led to conflicting approaches among the circuits, with the Fourth and Ninth Circuits requiring reasonable suspicion while the Eleventh Circuit has no such requirement.³¹

Part II. Discussion

Why is this an issue?

As Yvette Borja notes, two-thirds of the entire U.S. population lives within 100 miles of a border.³² The 100-mile border zone "effectively allows CPD to disregard key Fourth Amendment protections within that area."³³ 8 U.S.C. § 1357 permits CPD agents to search *any vehicle* within 100 miles of a U.S. border without a warrant.³⁴ This explicitly goes against what has been historically required by the Supreme Court to search a vehicle – probable cause.³⁵ The Carroll Court, in 1925, ruled that police may only search a vehicle without a warrant when they have

Electronic Devices on the Border, 52 ARIZ. St. L.J. 279, 281 (2020).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* (citing: *U.S. v. Cotterman*, 709 F.3d 952 (9th Cir. 2013); *U.S. v. Tousey*, 890 F.3d 1227 (11th Cir. 2018)).

³² Borja, *supra* note 1.

³³ Borja, *supra* note 1.

³⁴ 8 U.S.C. § 1357(a)(3) (emphasis added).

³⁵ *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280 (1925).

probable cause that a crime is being committed and exigent circumstances that prohibit them from obtaining a warrant.³⁶ But, clearly, Congress did not intend for police to need probable cause for searching vehicles in the 100-mile border zone in 8 U.S.C. § 1357, nor did the Department of Justice in interpreting the statute in CFR § 287.1(a)(1).

One of the first arguments for this permission to search near the border was that immigration issues and deportation are civil, not criminal, proceedings. Therefore, these issues do not warrant the same protection for situations such as those arising to criminal prosecutions.³⁷ There are many assumptions necessary to reach this conclusion – including that the issues are not as pertinent, time and resource-consuming, imperative to the safety of individuals, and worthy of protection. However, as Bojra notes, “fifty-years later, that particular justification for weakening Fourth Amendment protections at the border has become completely irrelevant” because of Operation Streamline.³⁸

Operation Streamline

Operation Streamline was initiated by the Department of Justice and the Department of Homeland Security in 2005 under the George W. Bush administration. Operation Streamline “is a program under which federal criminal charges are brought against individuals apprehended crossing the border illegally... which fast-tracks resolution of these immigration offenses, providing for mass proceedings in which as many as 80 unlawful border crossers are tried together in a single hearing, typically pleading guilty *en masse*.”³⁹ According to the National

³⁶ *Id.*

³⁷ *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). See Justice Powell’s concurrence.

³⁸ Bojra, *supra* note 1.

³⁹ *Fact Sheet: Operation Streamline*. National Immigration Forum (September 1, 2020). Accessible at <https://immigrationforum.org/article/fact-sheet-operation-streamline>.

Immigration Forum, this has become a huge issue: criminal prosecutions for “entry-related offenses” rose by 500% between 1997 and 2013.⁴⁰ Among other concerns related to Operation Streamline (i.e. overcriminalization, financial strain, etc.) the authors agree with the National Immigration Forum’s concern about Operation Streamline undermining Due Process rights in criminal prosecutions for those entering into the United States.⁴¹ We do not see hearings and pleadings held in any other context in U.S. courtrooms *en masse* with 80 defendants. Defendants in these situations do not receive their Due Process rights as others in the criminal justice system do.

Operation Lonestar

In terms of state action, Governor Greg Abbott initiated “Operation Lone Star” in 2022 in order to “secure the border and stop cartels and criminals from smuggling deadly drugs, weapons, and people into Texas.”⁴² Operation Lone Star, already in its short tenure, has led to “more than 336,000 migrant apprehensions and more than 23,000 criminal arrests, with more than 20,000 felony charges reported.”⁴³ It may be no surprise that Operation Streamline is already being investigated by the Department of Justice for alleged Civil Rights violations. Kate Huddleton, a staff attorney for the American Civil Liberties Union, argues that Operation Lonestar is “targeting individuals for enhanced punishment and subjecting them to a separate state criminal system that is created specifically for this purpose that is riddled with civil rights

⁴⁰ *Id.* (citing Marc R. Rosenblum, et al., “The Deportation Dilemma: Reconciling Tough and Humane Enforcement,” Migration Policy Institute, April 2014, download available at <https://www.migrationpolicy.org/sites/default/files/publications/RemovalsOverview-WEBFINAL.pdf>, at 28-29.)

⁴¹ *Id.*

⁴² *Operation Lone Star Takes Historical Action Throughout 2022*, Office of the Texas Governor, Greg Abbott (December 29, 2022) Accessible at <https://gov.texas.gov/news/post/operation-lone-star-takes-historic-action-throughout-2022>.

⁴³ *Id.*

violations."⁴⁴ The next section discusses how attorneys like Huddleton and other non-profit workers are affected by these operations as well as the 100-mile border zone.

Part III. The 100-Mile Border Zone and Targeting Immigrant Advocates

Journalists have painted a disturbing picture of a concerted effort by federal and state governments to intimidate and harass those who work to protect the rights of migrants and asylum seekers. Articles describe tactics such as surveillance, targeted searches of electronic devices, watchlists, and even criminal charges against lawyers and aid workers.⁴⁵ These tactics may also have a significant chilling effect on others who want to provide assistance.⁴⁶ As Amnesty International notes, "[h]uman rights defenders should be able to carry out their work without fear of reprisals, and lawyers should be able to provide legal services without facing harassment or persecution."⁴⁷

The U.S. government, including agents from CBP, ICE, DHS, and the FBI, created a watchlist based on specific 'security-related' incidents, but the watchlist included persons with no connection to the purported security-related incidents.⁴⁸ This surveillance and other 4th Amendment violations have occurred largely under the pretext that the immigration advocates are assisting human smuggling operations, such as organizing migrant caravans.⁴⁹ However, U.S.

⁴⁴ Perla Trevizo, *Justice Department is Investigating Texas' Operation Lone Star for Alleged Civil Rights Violations*. Texas Tribune (July 6, 2022). Accessible at <https://www.texastribune.org/2022/07/06/operation-lone-star-doj-investigation-abbott/>. (citing: Kate Huddleton, staff Attorney for the American Civil Liberties Union).

⁴⁵ Amnesty International, *USA: Authorities are misusing justice system to harass migrant human rights defenders*, 2019.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Julia Ainsley, *U.S. Officials Made List of Reporters, Lawyers, Activists to Question at Border*, NBC News (March 6, 2019), <https://www.nbcnews.com/politics/immigration/u-s-officials-made-list-reporters-lawyers-activists-question-border-n980301>.

⁴⁹ *Id.*

Attorneys and the Department of Justice said they would not seriously consider prosecuting human smuggling under 8 U.S.C. §1324.⁵⁰ Many advocates have been detained for “secondary inspections”, lasting six hours or more, without any reasonable suspicion underwriting that detainment with the only explanation being that the advocates were targeted for their political beliefs.⁵¹ The CBP tried to frame secondary inspections as routine, but framed the questions as though they were part of an ongoing investigation.⁵² Some of these secondary inspections even include the detainees being handcuffed and shackled to benches for four hours.⁵³

These examples represent a troubling trend in which those who are working to protect the rights of asylum seekers are facing unprecedented levels of scrutiny and harassment from the government. This not only has a negative impact on the individuals who are being targeted, but also on the broader efforts to ensure that the rights of migrants and asylum seekers are protected and respected. Sadly, these constitutional violations would likely not be happening if the immigrant advocates were providing assistance outside of the “quasi-constitutional” 100-mile border zone.

⁵⁰ Amnesty International, *Saving Lives is Not a Crime: Politically Motivated Legal Harassment Against Migrant Human Rights Defenders by the USA*, 28, 2019.

⁵¹ *Id.* at 20.

⁵² *Id.*

⁵³ *Id.* at 22.