

HOLDING THE LINE: CUSTOMS AND BORDER
PROTECTION’S EXPANSION OF THE BORDER SEARCH
EXCEPTION AND THE ENSUING DESTRUCTION OF
INTERIOR FOURTH AMENDMENT RIGHTS

Hannah Robbins[†]

TABLE OF CONTENTS

INTRODUCTION 2248

I. BACKGROUND: FOURTH AMENDMENT PROTECTIONS AT THE BORDER..... 2251

 A. *Diminished Constitutional Protections at the Border Under the
 Border Search Exception* 2251

 B. *The Border Search Exception Recognizes a Narrow, Limited
 Conception of the Border*..... 2253

 1. *Almeida-Sanchez v. United States: Searches Conducted by
 Border Agents Away from the Border or Its Functional
 Equivalent Require Individualized Suspicion or Consent* 2255

 2. *United States v. Martinez-Fuerte: Border Agents May
 Briefly Stop and Question Drivers at Reasonably Located
 Fixed Checkpoints* 2257

 C. *The Border Search Exception and the Court’s Interpretation of CBP
 Regulations Before September 11* 2259

II. CBP’S PUSH INTO THE INTERIOR OF THE COUNTRY..... 2264

 A. *CBP Interior Enforcement Near the Northern Border* 2265

 B. *CBP Interior Enforcement Near the Southern Border* 2268

 C. *Possible Explanations for CBP’s Push into the Interior* 2270

III. PROPOSAL: REGULATORY AND AGENCY FIX 2271

[†] Associate Editor, *Cardozo Law Review*. J.D., Benjamin N. Cardozo School of Law, 2015. I would like to thank my Note advisor, Professor Peter Markowitz, for his unwavering support and critical guidance. Thank you also to my public interest peers and former colleagues whose passion for and belief in social justice keep me going. To the editors of the *Cardozo Law Review*, thank you for your thoughtfulness and diligence. A tremendous thank you to my family for taking an interest in my interests, reading drafts on a minute’s notice, and doing it all with a smile. And lastly, a special note of gratitude to Matthew Beyrouty, without whose love and support I would not have reached page 2.

A. <i>CBP's Interior Enforcement Is an Attempt to Unconstitutionally Expand the Border Search Exception and Must Be Curtailed</i>	2271
B. <i>8 C.F.R. § 287.1(a)(2) Must Be Amended to Keep the Border Search Exception at the Border and to Protect Interior Fourth Amendment Rights</i>	2272
1. <i>DHS Should Amend 8 C.F.R. § 287.1(a)(2) to Incorporate the Limits of the Border Search Exception and the Logic of the Extended Border Search Test</i>	2277
C. <i>The Roles of CBP and ICE Must Be Clarified and Appropriate Training Must Be Conducted so Each Agent Knows the Scope of His Authority</i>	2278
CONCLUSION	2281

INTRODUCTION

After the September 11 attacks, prevention of terrorism and border security replaced prevention of drug trafficking and unauthorized immigration as the priority mission of the U.S. Border Patrol.¹ Having already been reassigned from the Treasury Department to the Department of Labor, and then to the Department of Justice,² in 2003 the Border Patrol was shuffled for a third time into the newly created Department of Homeland Security (DHS).³ Within the DHS structure, the Border Patrol became a component of the Customs and Border Protection (CBP) agency.⁴ Since its establishment in 2003,⁵ CBP has become the federal government's largest law-enforcement agency.⁶

Whatever its title or bureaucratic position, the agency patrolling the United States' border has historically had a mixed mission—to protect the country from dangerous persons and instrumentalities crossing its boundaries, and to prevent the entry of unauthorized

¹ See, e.g., STEPHEN R. VIÑA, CONG. RESEARCH SERV., RL31826, PROTECTING OUR PERIMETER: "BORDER SEARCHES" UNDER THE FOURTH AMENDMENT 18 (2006), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31826.pdf>; PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 153–54 (Peter J. Katzenstein ed., 2009); see also Eric Blum, *Shock of Attacks Reinvents U.S. Border Security*, 3 FRONTLINE: U.S. CUSTOMS AND BORDER PROT. 46 (2011), available at http://nemo.cbp.gov/opa/frontline/911_frontline2011.pdf ("The traditional Border Patrol mission had been to 'secure and protect the external boundaries of the United States to prevent, detect, apprehend and interdict illegal aliens, smugglers, contraband and violators of other laws.' Within hours of 9/11, the priority focus shifted to terrorism and the Border Patrol was ramped up to meet all its challenges.").

² *Timeline*, U.S. CUSTOMS & BORDER PROTECTION, http://nemo.cbp.gov/opa/timeLine_04212011.swf (last visited May 31, 2015) [hereinafter *Timeline*].

³ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

⁴ See *Timeline*, *supra* note 2.

⁵ *Id.*

⁶ See, e.g., Todd Miller, *War on the Border*, N.Y. TIMES, Aug. 18, 2013, at SR1.

migrants.⁷ However, as the agency's mission shifted toward terrorism prevention after September 11,⁸ so too has CBP expanded its reach into the interior of the country and relied on questionable authority to conduct suspicionless searches in an attempt to achieve its newly prioritized mission.⁹ This interior enforcement has not resulted in increased apprehensions of potential terrorists, but in increased apprehensions and arrests of both citizens and immigrants, many of whom entered the country more than ten years prior to their arrest.¹⁰ Notably, in 2012, the majority of the more than 364,000 people arrested by CBP agents nationwide were migrant workers crossing the border.¹¹ CBP border agents did not arrest a single international terrorist that year.¹²

While the Fourth Amendment applies to every search conducted by government agents within the United States,¹³ the Supreme Court has sanctioned diminished Fourth Amendment protections at the border by holding warrantless and suspicionless routine border searches constitutional due to the "special need" of the government to protect its people.¹⁴ However, in permitting this "Border Search Exception" to the Fourth Amendment, the Supreme Court has done so with a conception of the border in mind that does not bear resemblance to the "100-mile buffer zone" described in CBP's regulations,¹⁵ and under which CBP

⁷ See *Timeline*, *supra* note 2. Currently, CBP's mission is stated as follows:

We are the guardians of our Nation's borders. We are America's frontline. We safeguard the American homeland at and beyond our borders. We protect the American public against terrorists and the instruments of terror. We steadfastly enforce the laws of the United States while fostering our Nation's economic security through lawful international trade and travel. We serve the American public with vigilance, integrity and professionalism.

CBP Mission Statement and Core Values, U.S. CUSTOMS & BORDER PROTECTION, <https://www.behance.net/gallery/17322397/CBP-Mission-Statement-and-Core-Values> (last visited May 31, 2015).

⁸ See *supra* note 1.

⁹ See *infra* Part II.

¹⁰ N.Y.U. SCH. OF LAW IMMIGRANT RIGHTS CLINIC & NEW YORK CIVIL LIBERTIES UNION, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK'S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL'S INTERIOR ENFORCEMENT PRACTICES 9 (Nov. 2011) [hereinafter JUSTICE DERAILED].

¹¹ Miller, *supra* note 6.

¹² *Id.* As evidenced by CBP's own statistics, those apprehended by the agency in 2012 were largely undocumented immigrants or drug smugglers. U.S. BORDER PATROL, APPREHENSIONS/SEIZURE STATISTICS—FISCAL YEAR 2012 (2013), available at [http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/appr_seiz_stats.pdf](http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbp_statistics/usbp_fy12_stats/appr_seiz_stats.ctt/appr_seiz_stats.pdf).

¹³ U.S. CONST. amend. IV.; *Mapp v. Ohio*, 367 U.S. 643, 646–48 (1961).

¹⁴ See, e.g., *United States v. Ramsey*, 431 U.S. 606, 619 (1977) ("This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless 'reasonable' has a history as old as the Fourth Amendment itself.").

¹⁵ Immigration and Nationality Act (INA) § 287(a)(3); 8 C.F.R. § 287.1 (2014); see also *infra* Parts I.B–D.

now rests its authority for its push into the interior.¹⁶ Rather, in sanctioning reduced Fourth Amendment protections at the border, the Court has employed a commonplace understanding of what the country's border means—the narrow barrier zone between the United States and its international neighbors.¹⁷

This Note argues that the reduced Fourth Amendment protections at the physical border, sanctioned by the Supreme Court under the Border Search Exception doctrine, do not authorize CBP's post-September 11 expansion of suspicionless searches into the interior, to the outermost limits of the agency's jurisdictional authority under INA § 287(a)(3) and 8 C.F.R. § 287.1(a)(2). In other words, CBP has usurped the investigative tools provided to it for border protection work to achieve internal immigration enforcement under the guise of terrorism prevention.¹⁸ This expansion of diminished Fourth Amendment protections has resulted in constitutional violations that must be reigned in by the Supreme Court, if it is given the opportunity to do so, or by DHS itself, by amending 8 C.F.R. § 287.1(a)(2) to reflect CBP's more limited authority away from the border.

Part I of this Note provides an overview of the Supreme Court jurisprudence regarding Fourth Amendment protections at the border and of the statutory and regulatory sections that govern CBP's authority away from border. Part II discusses CBP's push into the interior of the country after September 11 to perform internal immigration enforcement—a job that belongs to CBP's sister agency, Immigration and Customs Enforcement (ICE).¹⁹ Part III argues that the "100-mile border zone" promoted in CBP's regulations under 8 C.F.R. § 287.1(a)(2) has enabled CBP to assert authority to perform interior suspicionless searches, and that such action is in direct conflict with the limitations of the Border Search Exception. Part III also suggests a regulatory and internal agency fix to this Fourth Amendment problem.

¹⁶ INA § 287(a)(3); 8 C.F.R. § 287.1; *see also infra* Part II.

¹⁷ *See infra* Part II.

¹⁸ ANDREAS, *supra* note 1, at 156.

¹⁹ U.S. DEPT. OF HOMELAND SEC. PRESS OFFICE, BORDER REORGANIZATION FACT SHEET (2003), *available at* http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Juvenile_factsheet.pdf.

I. BACKGROUND: FOURTH AMENDMENT PROTECTIONS AT THE BORDER

A. *Diminished Constitutional Protections at the Border Under the Border Search Exception*

The Fourth Amendment to the Constitution protects those on American soil²⁰ from “unreasonable” searches and seizures.²¹ What is reasonable under the Fourth Amendment depends on a context-specific analysis of where, when, how, who or what, and why the search or seizure has taken place.²² To test whether a government search or seizure is reasonable within the meaning of the Fourth Amendment, the Supreme Court developed a balancing test that weighs the government’s need to perform the search or seizure against the invasion of privacy the search or seizure causes an individual.²³

The Court has held the default norm that satisfies the reasonableness element of a Fourth Amendment search is a judicially granted search warrant.²⁴ Because a warrant must be approved by a neutral, detached judge, the procedure provides a reliably objective assessment of the reasonableness of a requested search.²⁵ The Court has also recognized specific situations in which an officer may perform a search or seizure without first obtaining a warrant, and such action may still be considered reasonable under the Fourth Amendment.²⁶ For

²⁰ The Constitution has repeatedly been found to apply to citizens and non-citizens alike within the country’s borders. Specifically, the wording of the Fourth Amendment, to protect “the people,” has led the Court to assume that the Amendment protects the interests of both citizens and non-citizens. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044–46 (1984) (analyzing whether undocumented Respondent’s Fourth Amendment rights were violated and recognizing importance of “protect[ing] the Fourth Amendment rights of all persons”); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (holding that Border Patrol search of Mexican citizen’s automobile away from border made without probable cause or consent violated Petitioner’s Fourth Amendment rights). *But cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (plurality opinion) (holding Fourth Amendment did not apply to search by American authorities of Mexican residence of Mexican citizen who had no voluntary attachment to United States).

²¹ The Fourth Amendment states:

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 [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

²² *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

²³ *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967).

²⁴ *See Katz v. United States*, 389 U.S. 347, 357 (1967).

²⁵ *United States v. Leon*, 468 U.S. 897, 913–14 (1984).

²⁶ *See, e.g.*, *Carroll v. United States*, 267 U.S. 132, 283–84 (1925) (“[T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer . . . the search and seizure are valid.”).

example, a search performed without a warrant, but based on probable cause²⁷ or individualized suspicion may be constitutional.²⁸ However, when the Court permits warrantless searches, it purports to do so only when the surrounding circumstances of the search act as a guarantee of the reasonableness of the search.²⁹ Such conditions may include the fact that a neutral and detached decision maker has directed that the search take place, which, in essence, replaces the need for a neutral and detached judicial officer to issue a warrant.³⁰

In addition to context-specific exceptions, the Supreme Court has approved of certain blanket exceptions to the Fourth Amendment warrant requirement.³¹ One such exception is for routine searches conducted at the U.S. border, which in addition to not requiring a warrant, do not require probable cause or individualized suspicion of wrongdoing.³² This Fourth Amendment exception for routine border searches³³ is founded upon the right of the United States to protect its sovereignty from those trying to enter to do the country harm—essentially, that the government’s need to search entrants is unquestionably reasonable, regardless of what privacy interest this

²⁷ *Id.*

²⁸ *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (“[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. . . . And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” (footnote and citations omitted)).

²⁹ *See United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976) (“Another purpose for a warrant requirement is to substitute the judgment of the magistrate for that of the searching or seizing officer. But the need for this is reduced when the decision to seize[] is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials.” (citations omitted)).

³⁰ *Id.*

³¹ *See Katz v. United States*, 389 U.S. 347, 357 n.19 (1967).

³² *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (“That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.”); *see also United States v. Flores-Montano*, 541 U.S. 149, 152–53 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Carroll v. United States*, 267 U.S. 132, 153–54 (1925).

³³ The Supreme Court has not excluded *all* border searches from the protective elements of the Fourth Amendment. The Court has drawn a line between “routine” and “non-routine” border searches, and requires a minimum of reasonable suspicion for government agents to conduct a non-routine search at the border. Examples of routine border searches include questioning and pat downs, while examples of non-routine border searches are strip searches, body cavity searches, and involuntary x-ray searches. *Montoya de Hernandez*, 473 U.S. at 551 (Brennan, J., dissenting); *id.* at 541 n.4 (majority opinion); *United States v. Braks*, 842 F.2d 509, 512–13 (1st Cir. 1988). For a more in-depth discussion about routine and non-routine border searches and accompanying contemporary Fourth Amendment concerns see, for example, Erick Lucadamo, Note, *Reading Your Mind at the Border: Searching Memorialized Thoughts and Memories on Your Laptop and United States v. Arnold*, 54 VILL. L. REV. 541 (2009).

government interest in self-protection is being weighed against.³⁴ This is the basis of the Border Search Exception doctrine: controlling what passes through the nation's borders is categorically a reasonable government need, such that any routine search based on that need outweighs Fourth Amendment considerations of individual privacy.³⁵

B. *The Border Search Exception Recognizes a Narrow, Limited Conception of the Border*

As demonstrated by the historical development of the Border Search Exception doctrine, the legal rationale underlying the doctrine, and, of course, its name, the Border Search Exception is only applicable to searches that occur *at* the actual or functional equivalent³⁶ of the international *border* of the United States.³⁷ While the Supreme Court has only explicitly discussed the Border Search Exception doctrine twice by name—first by Justice Douglas in a dissent from the Court's denial of a petition for certiorari³⁸ and second in its opinion in *United States v. Ramsey*³⁹—it has spoken on the issue repeatedly in form if not in precise title.⁴⁰ In doing so, the Court has narrowly defined what constitutes “the

³⁴ *Ramsey*, 431 U.S. at 619 (“Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be ‘reasonable’ by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself.” (footnote omitted)); *see also Carroll*, 267 U.S. at 132, 154 (“Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”). While the foundations of the Border Search Exception doctrine rely on this formulation—that the government’s need to search entrants is unquestionably reasonable—this notion has been challenged in modern cases and academic arguments dealing with arguably “non-routine” searches. Such arguments suggest the government must have a heightened degree of individualized suspicion if they are to preform intrusive, non-routine border searches. *See, e.g.*, Ari B. Fontecchio, Note, *Suspicionless Laptop Searches Under the Border Search Doctrine: The Fourth Amendment Exception that Swallows Your Laptop*, 31 CARDOZO L. REV. 231 (2009).

³⁵ *Id.*; *see also Ramsey*, 431 U.S. at 623 n.17.

³⁶ *See infra* notes 60–64 and accompanying text for a discussion of the meaning of the functional equivalent of the border.

³⁷ *See, e.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

³⁸ *Mason v. United States*, 414 U.S. 941, 942 (1973) (Douglas, J., dissenting) (requesting petition for certiorari be granted due to “necessity for a delineation by th[e] Court of the exact parameters of the border search exception” after Ninth Circuit held search warrant was not needed for border agents to conduct body cavity search at border).

³⁹ 431 U.S. 606, 621–22 (1977).

⁴⁰ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez*, 413 U.S. at 266; *Carroll v. United States*, 267 U.S. 132 (1925); *Boyd v. United States*, 116 U.S. 616 (1886). The dearth of explicit discussion of the Border Search Exception doctrine may be due to the fact that throughout the country’s history, many different

border” for the purpose of analyzing whether a search falls under the Fourth Amendment Border Search Exception.⁴¹

The concept underlying the Border Search Exception was first discussed in the late 19th century in the context of customs duties. In *Boyd v. United States*, the Court sanctioned diminished Fourth Amendment rights at the border by approving of customs officers boarding vessels to perform warrantless searches for goods entering the country in breach of revenue laws.⁴² Since then, the Court has found the principle of reduced Fourth Amendment rights at the border applicable to the modern criminal and immigration contexts.⁴³ Starting with *Carroll v. United States* in 1925, the limits of the Border Search Exception have been solidified via cases analyzing the constitutionality of vehicle searches conducted away from the immediate border.⁴⁴

In *Carroll*, the Court evaluated whether the warrantless search of the defendants’ vehicle and subsequent discovery of alcohol, then illegal under the National Prohibition Act, violated the defendants’ Fourth Amendment rights.⁴⁵ The search was made by two prohibition agents assigned to patrol the highways leading to and from Detroit, a known international border city from where illegal alcohol entered the United States at the time.⁴⁶ Reviewing *Boyd* and other Fourth Amendment precedent, *Carroll* highlighted the ideology underlying the Border Search Exception, noting that travelers “crossing an international boundary” may be searched without a warrant because of the reasonable requirement of “national self-protection.”⁴⁷ However, since the agents had stopped the defendants on an interior highway and *not* at the border, the Court applied a “reasonable cause” standard to determine the constitutionality of the search.⁴⁸

government actors have been stationed at the border and each has been responsible for different tasks, thus confusing the constitutional analysis applicable to various government actors protecting varied government interests. As what justified the government’s interest in patrolling the border changed, so too did the responsibilities of the border agencies and their accompanying scopes of authority. For example, in 1853, the Treasury Secretary authorized “Customs Mounted Inspectors” to patrol U.S. borders; in 1913, Congress allowed the Bureau of Immigration to deploy mounted *guards* along the Southwest border; and in 2003 CBP was created to incorporate not only the customs service and border patrol, but also the Department of Agriculture. *Timeline*, *supra* note 2. For a criticism of the Court’s lack of development of this important doctrine, see Janet C. Hoefel & Stephen Singer, *Fear and Loathing at the U.S. Border*, 82 *MISS. L.J.* 833 (2013).

⁴¹ Hoefel & Singer, *supra* note 40.

⁴² *Boyd*, 116 U.S. at 623–24; *see also* Hoefel & Singer, *supra* note 40, at 837 n.21–22 (explaining that statute approved of in *Boyd* remains in effect today under 19 U.S.C. § 482 (2012)).

⁴³ *See, e.g., Brignoni-Ponce*, 422 U.S. 873; *Almeida-Sanchez*, 413 U.S. 266.

⁴⁴ 267 U.S. 132 (1925).

⁴⁵ *Id.*

⁴⁶ *Id.* at 160.

⁴⁷ *Id.* at 153–54.

⁴⁸ *Id.* at 160.

The Court's analysis in *Carroll* makes clear that if a search occurs at a location physically removed from the border, the reasonableness requirement of the Fourth Amendment, which is satisfied under the Border Search Exception, is revitalized, and an officer must make a proper showing of reasonableness prior to conducting a search.⁴⁹ Furthermore, the Court emphasized its disapproval of any attempt to broaden the geographic reach of the Border Search Exception in stating, "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."⁵⁰ Thus, the Court firmly established that people traveling within the country have a right to travel without being stopped, and may be stopped only if an officer has reasonable cause to believe that the vehicle in question is being used to further illegal conduct.⁵¹

1. *Almeida-Sanchez v. United States*: Searches Conducted by Border Agents Away from the Border or Its Functional Equivalent Require Individualized Suspicion or Consent

The next significant case in the Court's line of Border Search Exception jurisprudence, *Almeida-Sanchez v. United States*,⁵² again recognized that the Border Search Exception to the Fourth Amendment warrant and individualized suspicion requirements incorporates only a narrow characterization of the border.⁵³ In *Almeida-Sanchez*, Border Patrol stopped petitioner Almeida-Sanchez on Highway 78 in southern California and searched his car.⁵⁴ Highway 78 does not reach or cross the U.S.-Mexico border and the stop occurred approximately twenty-five air miles north of the border.⁵⁵ Border Patrol had no search warrant, no probable cause, no reasonable suspicion of wrongdoing, nor consent to search Almeida-Sanchez or his car.⁵⁶ The officers alleged they were looking for "the illegal importation of aliens,"⁵⁷ but as the lower court's opinion makes clear, the officers put forth no specific reason for

⁴⁹ *Id.*

⁵⁰ *Id.* at 153–54.

⁵¹ *Id.* at 155–56.

⁵² 413 U.S. 266 (1973).

⁵³ *Id.* at 274–75.

⁵⁴ *Id.* at 267–68.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 268.

stopping Almeida-Sanchez.⁵⁸ The officers found marijuana in the car and Almeida-Sanchez was charged with a violation of the federal Controlled Substances Act.⁵⁹

In its analysis of the search in *Almeida-Sanchez*, the Court recognized that in certain situations when a search at the actual physical international borderline is impracticable, a routine search might still fall within the Border Search Exception if it occurs at the “functional equivalent” of the border.⁶⁰ To clarify this standard, the Court gave the prime example of searching passengers who have landed at an airport after an international flight.⁶¹ Though the airport itself may not be located near the national boundary line, for example the Louisville International Airport,⁶² it is the functional equivalent of the border when passengers are returning from an international destination.⁶³ This “functional equivalent” language has been limited to international airports, the convergence of two or more roads that extend from the border, and permanent border checkpoints near the physical border.⁶⁴

In *Almeida-Sanchez*, the Court concluded that the search at issue, conducted by a roving patrol⁶⁵ away from the border, was *not* a search at the “functional equivalent” of the border, and Almeida-Sanchez was entitled to the full protections of the Fourth Amendment.⁶⁶ *Almeida-Sanchez* thus held that a warrantless search conducted twenty-five miles from the international borderline by Border Patrol still required probable cause or consent to be constitutional, because a search at such a distance did not take place at the actual border or its functional equivalent.⁶⁷ Furthermore, all circuits that have analyzed functional

⁵⁸ The Ninth Circuit opinion notes that the officers claim Almeida-Sanchez’s “car was selected at random from those moving north on Highway 78.” *United States v. Almeida-Sanchez*, 452 F.2d 459, 467 (9th Cir. 1971) (Browning, J., dissenting), *rev’d*, 413 U.S. 266 (1973).

⁵⁹ *Id.* at 460. Almeida-Sanchez was found to be in violation of 21 U.S.C. § 176(a) (repealed 1970). *Id.*

⁶⁰ *Almeida-Sanchez*, 413 U.S. at 272–73.

⁶¹ *Id.* at 273.

⁶² Located at 600 Terminal Drive, Louisville, Kentucky 40209—over 300 miles from the nearest international border.

⁶³ *Almeida-Sanchez*, 413 U.S. at 273.

⁶⁴ *Id.*

⁶⁵ CBP interior searches can occur in three different ways: (1) at permanent checkpoints, (2) at temporary or tactical checkpoints, and (3) by roving patrols. Permanent checkpoints consist of permanent structures often located at or near the intersection of roads leading away from the border. Temporary checkpoints are often set up with less permanent structures, like tents and traffic cones, and are located on secondary roads. Roving patrols consist of CBP agents driving in patrol cars to conduct stops of drivers or pedestrians anywhere within the 100-mile “border zone.” *Id.* at 268; *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-824, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL’S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 6–13 (2009).

⁶⁶ *Almeida-Sanchez*, 413 U.S. at 272–74.

⁶⁷ *Id.*

equivalency of the border since *Almeida-Sanchez* have held that only when there is reason to believe the person or item being searched has recently *crossed* the border can the location of a search be considered the functional equivalent of the border.⁶⁸

While the Border Search Exception obviates the need for CBP agents to support a search *at* the border or its functional equivalent with a warrant or individualized suspicion, it is important to emphasize that at the border or its functional equivalent the “reasonableness” factor of the Fourth Amendment analysis does not drop out of the equation entirely. Rather, the reasonableness of a border search is satisfied by the known fact that the person or item being searched has recently *crossed* the border.⁶⁹ In cases in which the Court has acknowledged that border searches do not require a warrant or individualized suspicion, yet found the search at issue occurred away from the actual borderline, the Court has reverted to a straightforward Fourth Amendment balancing test and explicitly analyzed the reasonableness of the search in the context-specific situation.⁷⁰

2. *United States v. Martinez-Fuerte*: Border Agents May Briefly Stop and Question Drivers at Reasonably Located Fixed Checkpoints

Between 1886 and 1976, the Supreme Court was consistent in its narrow conception of the border in its Border Search Exception jurisprudence.⁷¹ In 1976, in *United States v. Martinez-Fuerte*,⁷² the Court strayed from its Border Search Exception logic, yet did not overrule it. In *Martinez-Fuerte*, the Court evaluated Fourth Amendment claims made by multiple petitioners stopped at different fixed Border Patrol checkpoints removed from the international border.⁷³ The Court sought

⁶⁸ See *United States v. Jackson*, 825 F.2d 853, 859 (5th Cir. 1987) (“Therefore, only searches of persons or effects that have crossed the border may be deemed functionally equivalent to border searches and hence be excepted from the Fourth Amendment’s compass.”); *United States v. Garcia*, 672 F.2d 1349, 1365 (11th Cir. 1982) (“We view the ‘functional equivalent of the border’ language as peculiarly appropriate to describe those searches that . . . take place after a border crossing at the first practicable detention point. Such searches are truly border searches because their sole justification is the fact that the border has been crossed.”); see also *United States v. Mayer*, 818 F.2d 725, 727 (10th Cir. 1987); *United States v. Gaviria*, 805 F.2d 1108, 1112 (2d Cir. 1986); *United States v. One (1) 1966 Beechcraft Baron, No. N242BS*, 788 F.2d 384, 388 (6th Cir. 1986); *United States v. Whiting*, 781 F.2d 692, 695–96 (9th Cir. 1986); *United States v. Caminos*, 770 F.2d 361, 364 (3d Cir. 1985); *United States v. Udofot*, 711 F.2d 831, 839–40 (8th Cir. 1983); *United States v. Carter*, 592 F.2d 402, 404 (7th Cir. 1979); *United States v. Bilir*, 592 F.2d 735, 742 n. 11 (4th Cir. 1979).

⁶⁹ See *infra* notes 85–88 and accompanying text.

⁷⁰ *Almeida-Sanchez v. United States*, 413 U.S. 266, 271–72 (1973); *Carroll v. United States*, 267 U.S. 132, 160 (1925).

⁷¹ See *supra* note 40 and accompanying text.

⁷² 428 U.S. 543 (1976).

⁷³ *Id.*

to determine whether, in the absence of any reason to believe that a vehicle contained “illegal aliens,” officers at a fixed checkpoint had the authority to stop a vehicle for brief questioning of its occupants.⁷⁴ The first checkpoint at issue, the permanent checkpoint near San Clemente, California, was located sixty-six miles north of the border.⁷⁵ The second checkpoint at issue, the permanent checkpoint near Sarita, Texas, was located sixty-five miles north of the border.⁷⁶ The petitioners stopped at the San Clemente checkpoint were all referred to a secondary inspection and questioned about their immigration status.⁷⁷ The petitioner stopped at the Sarita checkpoint was stopped and asked about his immigration status, though not referred to secondary inspection like the San Clemente petitioners.⁷⁸

The Court held that vehicle stops for the purpose of brief questioning at reasonably located fixed checkpoints away from the physical border, in the absence of probable cause or reasonable suspicion, did not violate the Fourth Amendment.⁷⁹ In *Martinez-Fuerte*, the Court did not explicitly address the Border Search Exception doctrine or the Court’s previous understanding of the test for functional equivalency of the border.⁸⁰ However, as explained below, *Martinez-Fuerte* is consistent with the test for functional equivalency adopted by all circuits,⁸¹ and consequently with a narrow conception of the border with regard to permissible warrantless border searches.

By specifically holding that immigration-related stops and questioning “may be made in the absence of any individualized suspicion at *reasonably located checkpoints*,” the court limits its opinion to those permanent checkpoints that are established with the intent of stopping and searching those whom CBP has reason to believe have recently crossed the border.⁸² *Martinez-Fuerte* elaborates the “reasonableness” of a fixed checkpoint location by suggesting the obvious: that the location of a fixed checkpoint is selected by CBP administrators based on where border-crossers would likely travel.⁸³ In

⁷⁴ *Id.* at 545.

⁷⁵ *Id.*

⁷⁶ *Id.* at 549–50.

⁷⁷ *Id.* at 547.

⁷⁸ *Id.* at 549–50.

⁷⁹ *Id.* at 566–67.

⁸⁰ *Id.*

⁸¹ *See supra* note 68.

⁸² *Martinez-Fuerte*, 428 U.S. at 562 (emphasis added). The Court takes care to show that its opinion is limited to the factual scenario encountered in the case. *Id.* at 567 (“[O]ur holding today is limited to the type of stops described in this opinion.”).

⁸³ *Id.* at 559 (“The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.”).

fact, the Court leans on this language of “reasonably located checkpoints” to justify its assertion that the need for a warrant under the Fourth Amendment is reduced when the decision to seize a motorist is not entirely at the discretion of field officers, but has already been made by “higher ranking officials.”⁸⁴ Thus, though *Martinez-Fuerte* does not couch its analysis in the Border Search Exception doctrine and does not explicitly conclude whether the search took place at the border or its functional equivalent, the opinion is consistent with the Court’s prior decisions on the issue.

Furthermore, the Court confirmed its unwillingness to stray from Border Search Exception precedent in its opinion in *United States v. Ramsey*, which it published eleven months after *Martinez-Fuerte*.⁸⁵ At issue in *Ramsey* was whether international mail crossing the border is properly within the scope of the Border Search Exception, and, thus, may be searched without a warrant.⁸⁶ Holding that such a search was within the scope of the Border Search Exception, the Court explicitly reaffirmed the rationale underlying the doctrine.⁸⁷ In speaking directly about the “reasonableness” of border searches, *Ramsey* held that such warrantless searches are justified by “the single fact that the person or item in question has entered into our country from outside.”⁸⁸ Again, the Court held true to its narrow conception of the “border” in the Border Search Exception doctrine.

C. *The Border Search Exception and the Court’s Interpretation of CBP Regulations Before September 11*

In addition to the constitutionally-based Border Search Exception doctrine, statutory and regulatory provisions govern CBP’s search authority. Under INA § 287(a)(3), the agency is granted license to search without a warrant any vessel, railway car, aircraft, or vehicle *within a reasonable distance from any external boundary of the United States*, for the purpose of “patrolling the border to prevent the illegal

⁸⁴ See *supra* note 30.

⁸⁵ *United States v. Ramsey*, 431 U.S. 606 (1977).

⁸⁶ *Id.*

⁸⁷ *Id.* at 619 (“Border searches, then, from before the adoption of the Fourth Amendment, have been considered to be ‘reasonable’ by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended on the existence of probable cause. This longstanding recognition that searches at our borders without probable cause and without a warrant are nonetheless ‘reasonable’ has a history as old as the Fourth Amendment itself. We reaffirm it now.” (footnote omitted)).

⁸⁸ *Id.*

entry of aliens into the United States.”⁸⁹ Notably, while the statute explicitly states that these searches may be conducted without a warrant, it does *not* state that these searches may be conducted without individualized suspicion. The corresponding regulation, 8 C.F.R. § 287.1(a)(2), defines “reasonable distance” as “within 100 air miles from any external boundary of the United States.”⁹⁰ When the Border Patrol tested the power of this regulatory definition as an independent agency before 2003⁹¹—specifically, whether searches within 100 miles of the border could be conducted *without* individualized suspicion—the Supreme Court limited the reach of the regulation.⁹²

Recall *Almeida-Sanchez*, in which Border Patrol officers stopped petitioner Almeida-Sanchez twenty-five air miles north of the border and searched his car.⁹³ The officers offered no specific reason for the stop.⁹⁴ Instead, when confronted with Almeida-Sanchez’s challenge to the constitutionality of the stop, the government argued its actions were in compliance with its statutory and regulatory guidance under INA § 287(a)(3) and 8 C.F.R. § 287.1,⁹⁵ which allowed the officers to search, without a warrant, a vehicle within 100 miles of the international border.

⁸⁹ INA § 287(a)(3) (emphasis added). The full sub-section of the statute states:

(a) Powers Without Warrant. Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—(3) 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

INA § 287(a)(3). Ultimately, although INA § 287(a)(3) refers to agents’ ability to investigate illegal entry violations, CBP’s warrantless search authority has been extended to apply to investigations of other criminal activity. *United States v. Cortez*, 449 U.S. 411, 421–22 (1981). The focus of this Note, however, is on the stated purpose of the statutory grant of powers: “to prevent the illegal entry of aliens into the United States.” INA § 287(a)(3).

⁹⁰ 8 C.F.R. § 287.1(a)(2) (2014). The full sub-section of the regulation states:

(2) Reasonable distance. The term reasonable distance, as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the chief patrol agent for CBP, or the special agent in charge for ICE, or, so far as the power to board and search aircraft is concerned any distance fixed pursuant to paragraph (b) of this section.

Id.

⁹¹ In 2003, the Independent Border Patrol Agency was consumed by and now exists within DHS. *See supra* notes 2–3 and accompanying text.

⁹² *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

⁹³ *See supra* notes 52–70 and accompanying text.

⁹⁴ The Ninth Circuit opinion notes that the officers claim Almeida-Sanchez’s “car was selected at random from those moving north on Highway 78.” *United States v. Almeida-Sanchez*, 452 F.2d 459, 467 (1971) (Browning, J., dissenting).

⁹⁵ *Almeida-Sanchez*, 413 U.S. at 268.

Recognizing its “duty” to engage in the judicial exercise of constitutional avoidance,⁹⁶ the Court was unable to find that INA § 287(a)(3) provided the blanket justification the agents sought under the “100 mile” regulation.⁹⁷ Remaining true to its Border Search Exception precedent, the Court instead held that the suspicionless search of Almeida-Sanchez’s car away from the border was unconstitutional, and concluded that the Border Patrol agents could not fall back on their regulations to justify the legality of the search.⁹⁸ However, even though the Court began its opinion with the refrain, “no Act of Congress can violate the Constitution,”⁹⁹ and found that the Constitution prevented the agents from relying on their regulations to justify the search at issue, *Almeida-Sanchez* fell short of voiding INA § 287(a)(3) or its accompanying regulation C.F.R. § 287.1(a)(2).¹⁰⁰ The Court’s clear confidence in its position and conviction in the Fourth Amendment imperative to prevent the type of unwarranted government intrusion that occurred in this case makes it unclear why, at a minimum, the regulation was not struck.¹⁰¹

Two years after *Almeida-Sanchez*, the Court had a second opportunity to strike the regulation that Border Patrol officers were relying upon to conduct unconstitutional searches removed from the physical border. In *United States v. Brignoni-Ponce*,¹⁰² the Court again addressed the authority of Border Patrol in areas near, but not at, the

⁹⁶ *Id.* at 272 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). The canon of constitutional avoidance counsels the Court to construe ambiguous statutory language a way that “avoid[s] serious constitutional doubts,” thus allowing the Court to avoid deciding constitutional questions. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *Clark v. Martinez*, 543 U.S. 371, 381–82 (2005).

⁹⁷ *Almeida-Sanchez*, 413 U.S. at 272–75.

⁹⁸ *Id.* at 272–75.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ The opinion closes with the following profound statement:

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution’s protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

“These (Fourth Amendment rights), I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.”

Id. at 273–74 (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

¹⁰² 422 U.S. 873 (1975).

border.¹⁰³ Whereas the question in *Almeida-Sanchez* addressed agents' authority to stop and search people and their vehicles, the issue in *Brignoni-Ponce* was limited to the authority of agents to stop vehicles to *inquire* about the immigration status of drivers and passengers.¹⁰⁴

In *Brignoni-Ponce*, the respondent was stopped by a roving patrol of Border Patrol officers on Highway 5 south of San Clemente, California.¹⁰⁵ Admitting that their only reason for stopping and questioning the respondent and his passengers was because they "appeared to be of Mexican descent,"¹⁰⁶ the government agents attempted to justify the validity of their search with the same authority proffered in *Almeida-Sanchez*: INA § 287(a)(3) and 8 C.F.R. § 287.1.¹⁰⁷ In addition to these two sources of authority, the government added to its arsenal INA § 287(a)(1), a provision that allows an officer, without a warrant and without geographic limitations, to interrogate any person the officer believes is undocumented about his or her right to be in the country.¹⁰⁸ Once again refusing to allow the proffered regulatory authority to displace the reasonableness inquiry required in a Fourth Amendment search performed outside the narrow area defined by the Border Search Exception,¹⁰⁹ the Court engaged in context-specific Fourth Amendment reasonableness balancing.¹¹⁰ Ultimately determining that the government's interest in deterring illegal immigration was of great importance as compared to the "modest" intrusion such questioning imposes on individuals seized by officers during a traffic stop,¹¹¹ the Court held that such stops and questioning *can* be made by roving patrols without a warrant, but still require reasonable suspicion that a vehicle contains undocumented immigrants.¹¹²

¹⁰³ *Id.* at 873.

¹⁰⁴ *Id.* at 876.

¹⁰⁵ *Id.* at 874–75. Although the opinion does not say how far the Respondent was from the border when the Border Patrol stopped him, San Clemente is roughly seventy miles from the border.

¹⁰⁶ *Id.* at 875.

¹⁰⁷ *Id.* at 876–78.

¹⁰⁸ *United States v. Brignoni-Ponce*, 422 U.S. 873, 876–77. INA § 287(a)(1) states: "(a) Powers Without Warrant. Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States"

¹⁰⁹ *Brignoni-Ponce*, 422 U.S. at 882 ("We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government." (footnote omitted)).

¹¹⁰ *Id.* at 878–85.

¹¹¹ *Id.* at 880.

¹¹² *Id.* at 881. While the Court held that the officers' reliance on the respondent's apparent Mexican ancestry was a relevant factor in the Fourth Amendment analysis, the Court required additional evidence of alienage to meet the level of reasonable suspicion needed to justify the stop.

As it did in *Carroll*, *Ramsey*, and *Almeida-Sanchez*, once the Court noted that the search in *Brignoni-Ponce* occurred away from the border or the functional equivalent of the border, the presumption of reasonableness disappeared and the Court reverted to a straightforward Fourth Amendment reasonableness analysis.¹¹³ Unlike in the predecessor cases, however, the Court finally made a statement as to the effect of its analysis on INA § 287(a)(3) and 8 C.F.R. § 287.1.¹¹⁴ Recognizing not only the Fourth Amendment violations in the case at hand, but also the untenable outcome that would ensue if the Court approved of the authority suggested by the government,¹¹⁵ the Court expressly limited the authority granted in the statute and accompanying regulation.¹¹⁶ In limiting the reach of the statute and regulation by requiring that roving patrol officers possess reasonable suspicion when performing inquisitive traffic stops away from the border, the Court aligned the relevant Immigration and Nationality Act (INA) and Code of Federal Regulations (CFR) sections with its previously conceived Border Search Exception doctrine. Additionally, the Court confirmed that while INA § 287(a)(3) excuses the warrant requirement for searches conducted away from the actual border,¹¹⁷ it does not excuse the requirement that agents must possess individualized suspicion of wrongdoing to conduct a search.¹¹⁸ However, as this Note argues, the Court's limitation of the relevant INA and CFR sections has done little to stop CBP from expanding the geographic reach of its suspicionless stop and search powers.

Id. at 886–87 (“The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”).

¹¹³ *Id.* at 882–85.

¹¹⁴ *Id.* at 844.

¹¹⁵ *Id.* at 882–83 (“To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. . . . Thus, if we approved the Government’s position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.”).

¹¹⁶ *Id.* at 884 (“The effect of our decision is to limit exercise of the authority granted by both § 287(a)(1) and § 287(a)(3). Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.”).

¹¹⁷ See, e.g., *Carroll v. United States*, 267 U.S. 132, 153–54 (1925). Whether, in the first place, Congress is authorized to create statutes that explicitly grant warrantless search powers is beyond the scope of this Note.

¹¹⁸ *Brignoni-Ponce*, 422 U.S. at 884.

II. CBP'S PUSH INTO THE INTERIOR OF THE COUNTRY

After decades of existence,¹¹⁹ Border Patrol had developed the ability to prevent the entry of many unauthorized migrants and drug traffickers.¹²⁰ However, the newly charged antiterrorism mission of CBP resulted in a troubling standard: a greater demand for success with a bigger consequence of failure.¹²¹ Unequipped to ensure that one hundred percent of all potential terrorists would be prevented from crossing the border—a task already proved improbable by the fact that the September 11 hijackers boarded their international flights with valid U.S. visas¹²²—CBP has had to find a way to use its augmented resources to achieve its new homeland-security-driven mission.¹²³ The result: immigration enforcement conducted through the prism of antiterrorism.¹²⁴ In addition to the militarization of the border via drones,¹²⁵ military-trained border agents,¹²⁶ and military contractor-

¹¹⁹ The border patrol was officially established in 1924, but Texas state police agents were documented as patrolling the border as early as 1904. *Border Patrol History*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/history> (last visited May 31, 2015).

¹²⁰ LESLIE SAPP, DHS OFFICE OF IMMIGRATION STATISTICS, APPREHENSIONS BY THE U.S. BORDER PATROL: 2005–2010, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf> (noting that apprehension of foreign nationals peaked in 2000); see also William Booth, *Full Circle on the Smuggling Beat; After 25 Years, Customs Official Is Back at the Busiest U.S. Border*, WASH. POST, July 30, 2001, at A13; Stephanie Condon, *Napolitano: Border security better than ever*, CBS NEWS (Mar. 25, 2011), <http://www.cbsnews.com/news/napolitano-border-security-better-than-ever/>; cf. UNITED STATES GENERAL ACCOUNTING OFFICE, BORDER CONTROL: REVISED STRATEGY IS SHOWING SOME POSITIVE RESULTS, GAO/GGD-95-30 (1994) (discussing Border Patrol's "encouraging" results from new prevention-based strategies).

¹²¹ See, e.g., Press Release, U.S. Customs and Border Prot., DHS Begins Second Phase of Arizona Border Effort (Mar. 30, 2005), available at http://cbp.gov/archived/xp/cgov/newsroom/news_releases/archives/2005_press_releases/032005/03302005_dpr.xml.html (CBP Commissioner Bonner notes heightened importance of gaining control of borders because, "[I]n a post 9/11 era, securing our borders is a national security issue").

¹²² ANDREAS, *supra* note 1, at 153; Martha Raddatz, *State Dept. Lapses Aided 9/11 Hijackers*, ABC NEWS (Oct. 23, 2001), <http://abcnews.go.com/WNT/story?id=130051>. USCIS officers at consular offices oversee the visa approval process, not CBP.

¹²³ JUSTICE DERAILED, *supra* note 10, at 18. Reflecting on the events of September 11, 2001, CBP Commissioner Alan D. Bersin said, "The attacks of 9/11 fundamentally changed how America looks at its borders. . . . The attacks created the notion of an American homeland that had to be secured from individuals intent on doing it harm." Blum, *supra* note 1; see also Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. The terrorism-focused mission of CBP continues today. See U.S. CUSTOMS AND BORDER PROT., SECURE BORDERS, SAFE TRAVEL, LEGAL TRADE 13 (2009), available at <https://www.hsdl.org/?view&did=29986> ("CBP's first priority is to prevent terrorists and terrorist weapons from entering the country.").

¹²⁴ ANDREAS, *supra* note 1, at 156; see also Blum, *supra* note 1, at 42 ("Almost immediately, conventional wisdom called for U.S. borders to be reinvented through coordinated and unified management that prioritized its anti-terrorism mission. In March 2003 CBP was born and became the entity that merged all border administrative and enforcement functions.").

¹²⁵ ANDREAS, *supra* note 1, at 157–58; see also Miller, *supra* note 6 (noting it is now normal to see Blackhawk helicopters and hear drones overhead at Arizona border zone).

developed strategies,¹²⁷ CBP has amped up its enforcement efforts by creeping into the interior of the United States to expand the scope of its “border” work and to infringe on the work of the internal immigration enforcement agency, ICE.¹²⁸

A. *CBP Interior Enforcement Near the Northern Border*

The post September 11 trend toward interior immigration enforcement and policing by CBP has been most clearly documented by the agency’s increased transportation raids near the northern border, often conducted on routes that do not even cross the border with Canada.¹²⁹ While CBP’s own statements attempt to show that its enforcement miles from the border is done to achieve its mission of apprehending potential terrorists and recent border crossers,¹³⁰ the facts

¹²⁶ For example, in 2005, a “Stryker unit” (designed to operate armored vehicles in reconnaissance missions) spent sixty days training New Mexico CBP officers before being sent to Iraq. Additionally, while past military units stationed at the border were limited to assisting with the “War on Drugs,” after September 11, military units at the border have been instructed to support the mission of Homeland Security, which can include “targeting illegal immigration.” ANDREAS, *supra* note 1, at 157–58.

¹²⁷ *Id.* at 157–58.

¹²⁸ ICE is the internal enforcement arm of DHS, responsible for the two principal operating groups Homeland Security Investigations and Enforcement and Removal Operations. *See generally, Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/overview> (last visited May 31, 2015).

¹²⁹ *See generally* JUSTICE DERAILED, *supra* note 10. “The transportation raids also serve as a window into the practices of an agency that, although charged with policing the border, abuses its authority through its unprecedented reach into the interior of the United States and the use of aggressive search and seizure procedures that do not comport with standards and expectations for domestic policing or interior immigration enforcement.” *Id.* at 1; *see also* Dina Kleyman, Note, *Protecting the Border, One Passenger Interrogation at a Time*, 77 BROOK. L. REV. 1557 (2012).

¹³⁰ Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 29, 2010, at A1 (“The checks are ‘a vital component to our overall border security efforts’ to prevent terrorism and illegal entry, said Rafael Lemaitre, a spokesman for United States Customs and Border Protection.”); Alan Wirzbicki, *Border Stops Snag Drugs, No Terrorists*, BOS. GLOBE, Dec. 19, 2006, at 1A (“In a written response . . . Homeland Security Secretary Michael Chertoff said that the road stops are a ‘critical component’ of border security measures and that they ‘increase the certainty of arrest of anyone attempting to illegally enter the United States.’”); Colin Woodard, *Far From Border, U.S. Detains Foreign Students*, CHRON. HIGHER EDUC. (Jan. 9, 2011), available at <http://chronicle.com/article/Far-From-Canada-Agressive/125880> (“CBP Border Patrol agents conduct these types of operations periodically in key locations that serve as conduits for human and narcotics smuggling. . . . These operations serve as a vital component to our overall border security efforts and help sustain security efforts implemented in recent years.”); *see also* Andrew Burton, *Caught in Transit: The Rochester Border Patrol Station*, NEWS HOUSE (Apr. 18, 2008), available at <https://vimeo.com/912940> (Adrian Codsworth, the head border patrol agent of the Rochester CBP station in 2008, notes: “The priority of the Border Patrol is operational control of the borders. The main objective of that is preventing the entry of terrorists and terrorist weapons into the U.S. in between ports of entry. Everything we do is based on that one thing.”); *cf.* Press Release, Nat’l Border Patrol Council, *Border Patrol Curtails Transportation Checks with Increased Bureaucracy* (Oct. 27, 2011), available at http://www.nbpc.net/index.php?option=com_content&task=view&id=367&Itemid=1.

paint a different picture. For example, in Rochester, New York, between the years 2006–2009, 76% of those arrested during CBP bus and train raids had been living in the United States for longer than one year, and 12% of those arrested had been present in the country for more than ten years.¹³¹ Of the 2743 people arrested during CBP transportation raids in Rochester in that four-year span, only seven were arrested at entry and fifteen were arrested within seventy-two hours of crossing the border.¹³²

Transportation raids performed by CBP near the northern border occur when officers board trains and buses without reasonable suspicion of unlawful activity¹³³ and ask questions about travelers' citizenship status or, at times, when officers block travelers' entrance to a bus or train unless the traveler answers the officers' questions.¹³⁴ CBP officers have been repeatedly documented boarding Amtrak trains traveling on fixed routes that do not cross the international border and inquiring into passengers' citizenship status.¹³⁵ Officers have also been documented boarding Greyhound buses to do the same in places like Elyria and Toledo, Ohio,¹³⁶ and on buses and at ferry ports in Washington State on routes that do not carry passengers across international boundaries.¹³⁷

¹³¹ JUSTICE DERAILED, *supra* note 10, at 2.

¹³² *Id.* at 10.

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 7.

¹³⁵ See Ken Dilanian & Anna Gorman, *Students Face Deportation to Countries They Don't Remember*, L.A. TIMES, June 28, 2010, <http://articles.latimes.com/2010/jun/28/nation/la-na-deport-student-20100628-1>; Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA TODAY (Oct. 2, 2008, 1:08 AM), http://usatoday30.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm; Jennifer 8. Lee, *A Protest Over Bus and Train Citizenship Checks*, N.Y. TIMES CITY ROOM BLOG (Apr. 2, 2008, 5:01 PM), <http://cityroom.blogs.nytimes.com/2008/04/02/a-protest-over-bus-and-train-citizenship-checks>; see also Scott Kuhagen, *Controversy over Border Patrol Arrests on Amtrak near the U.S.-Canada Border*, THOUGHTS ON LAW & POLICY, IMMIGRATION-RELATED & OTHERWISE (Mar. 2, 2012), <http://scottkuhagen.wordpress.com/2012/03/02/controversy-over-border-patrol-arrests-on-amtrak-near-the-u-s-canada-border> (depicting video representations of the type of stop CBP conducts on Amtrak trains and Greyhound buses in upstate New York.); see also Niels Gerson Lohman, *Why I will Never, Ever, Go Back to the United States*, HUFFINGTON POST (last updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/niels-gerson-lohman/us-border-crossing_b_4098130.html (demonstrating the intrusive tactics used by CBP agents inspecting passengers on trains at the border).

¹³⁶ Brad Dicken, *Sandusky Border Patrol Removes Passengers from Elyria Bus*, CHRON. ONLINE (Oct. 31, 2009), <http://chronicle.northcoastnow.com/2009/10/31/sandusky-border-patrol-removes-passengers-from-elyria-bus>; Letter from Betsy Ginsburg, Cardozo Immigration Justice Clinic, to Office of the General Counsel, U.S. Department of Homeland Security (Mar. 12, 2013), available at http://www.legalactioncenter.org/sites/default/files/docs/lac/final_redacted_ijc_ftca_complaint_-_client_2_oh.pdf; see also detroitjones, *Border Patrol on Greyhound*, YOUTUBE (Aug. 11, 2011), <http://www.youtube.com/watch?v=wTwpISJ1WiI> (visual representation of CBP agents boarding Greyhound buses in Ohio).

¹³⁷ See, e.g., *Keep the Border Patrol on the Border*, BORDER PATROL FREE (Feb. 14, 2009), <http://www.bpfree.org/film.html>.

Additionally, CBP conducts individual vehicle checks on interior roads near the northern border.¹³⁸ In Washington State, between February and November 2008, CBP stopped 24,524 vehicles at a total of fifty-three roadblocks or “tactical checkpoints.”¹³⁹ Of the 41,912 passengers who were stopped, eighty-one undocumented immigrants were taken into custody, nineteen people were turned over to other agencies, and zero terrorists were apprehended.¹⁴⁰ In fact, of the forty-three prosecutions for terrorism that took place between 2001 and 2012 in Washington State, none of the defendants were apprehended by CBP.¹⁴¹ Similarly, in Vermont, while no terrorist suspects have been apprehended by CBP, the increasing presence of officers and resulting increase in marijuana seizures has caused Vermont residents to complain that driving in their state feels like “being in Eastern Europe under communism.”¹⁴² Such CBP enforcement tactics in Vermont led Senator Leahy, former chairman of the Senate Judiciary Committee, to propose an amendment to the Senate’s 2013 Immigration Reform Bill to reduce the expanse of CBP’s enforcement jurisdiction.¹⁴³ Citing concerns about federal checkpoints stationed far from the Northern border, the amendment would have limited the distance from the northern border within which CBP agents could conduct stops from 100 miles down to 25.¹⁴⁴

¹³⁸ *Id.*

¹³⁹ *Id.*; Paul Shukovsky, *Border Patrol Roadblocks may Be Working, but at What Cost?*, SEATTLE POST-INTELLIGENCER (Nov. 9, 2008), <http://www.seattlepi.com/local/article/Border-Patrol-roadblocks-may-be-working-but-at-1290964.php>. For an explanation of “tactical checkpoints,” see *supra* note 65.

¹⁴⁰ *Id.* Represented as a percentage, 0.19% of the total people stopped were undocumented immigrants.

¹⁴¹ SARAH CURRY ET AL., *THE GROWING HUMAN RIGHTS CRISIS ALONG WASHINGTON’S NORTHERN BORDER 2* (2012), available at https://www.weareoneamerica.org/sites/weareoneamerica.org/files/REPORT_northernborder-FINAL.pdf.

¹⁴² Wirzbicki, *supra* note 130.

¹⁴³ S. Amdt. 1183 (Leahy) to S. 744, 113th Cong. (2013). Although Senator Leahy’s amendment was incorporated into the 2013 Senate Immigration Bill, the Bill itself was never passed by the House.

¹⁴⁴ Press Release, Patrick Leahy, Leahy Amendment to Limit Border Zone Vehicle Stops And Searches of Private Land Is Included In New Bipartisan Border Agreement (June 21, 2013), available at <http://www.leahy.senate.gov/press/leahy-amendment-to-limit-border-zone-vehicle-stops-and-searches-of-private-land-is-included-in-new-bipartisan-border-agreement>. Senator Leahy’s amendment is also informed by personal experience. While questioning the efficacy of internal CBP checkpoints during the 2008 DHS appropriations hearings, Leahy reflected that he had been stopped by border patrol 125 miles south of the border, in New York. When Senator Leahy asked the agent what authority he was acting under, the agent pointed to his gun and said, “That’s all the authority I need.” *Dep’t of Homeland Sec. Appropriations for Fiscal Year 2009: Hearing before the Subcomm. of the S. Comm. on Appropriations*, 110th Cong. 6–7 (2008) (statement of Sen. Patrick J. Leahy).

Expanding its search tactics even further, CBP has been documented waiting in church parking lots in the states of New York,¹⁴⁵ Washington,¹⁴⁶ and Michigan¹⁴⁷ to search for undocumented immigrants. In the Olympic Peninsula, CBP has also interrogated workers in a purported effort to verify harvesting permits, pulled over a uniformed correctional officer on his way to work, approached a man helping his parents load a truck at a local farmer's market, and stopped a Native American woman setting out in her canoe on her way home.¹⁴⁸

B. *CBP Interior Enforcement Near the Southern Border*

While historically CBP operations removed from the border have been more commonplace and, thus, more expected near the border with Mexico than the border with Canada,¹⁴⁹ there is rising agitation among southern border-area residents at the persistence and expansion of CBP's interior enforcement.¹⁵⁰ Frustration with CBP's enforcement practices has grown to the point that people have organized civil disobedience protests in which they test CBP's knowledge and use of its own authority,¹⁵¹ created websites to expose the misdoings of the

¹⁴⁵ Todd Miller, *Post-9/11 Sodus: The U.S.-Canadian Border on Display*, NACLA (July 25, 2012), <https://nacla.org/blog/2012/7/25/post-911-sodus-us-canadian-border-display>.

¹⁴⁶ See *supra* note 137.

¹⁴⁷ Lornet Turnbull, *Border Patrol Oversteps Its Bounds, Coalition Says*, SEATTLE TIMES (Feb. 29, 2012), <http://www.seattletimes.com/seattle-news/border-patrol-oversteps-its-bounds-coalition-says>; Letter from Northern Borders Coalition to Janet Napolitano, Sec'y of the U.S. Department of Homeland Security, available at http://www.nyclu.org/files/releases/NorthernBordersSignOnLetter_Final.pdf.

¹⁴⁸ FORKS HUMAN RIGHTS GROUP & FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, *TERROR IN TWILIGHT: THE REAL-LIFE LEGACY OF U.S. BORDER PATROL ON THE OLYMPIC PENINSULA OF WASHINGTON STATE 11* (2013), available at <http://www.law.seattleu.edu/Documents/Terror-in-Twilight.pdf>.

¹⁴⁹ For example, drivers in Arizona can pass through up to eleven CBP checkpoints, most of which are stationed more than twenty-five miles north of the border. Residents are, thus, often forced to pass through checkpoints many times per day if they want to perform basic tasks like running errands or taking their children to school. Curt Prendergast, *Hearing Puts Border in New Perspective*, NOGALES INT'L (Sept. 17, 2013, 8:54 AM), http://www.nogalesinternational.com/news/hearing-puts-border-in-new-perspective/article_73c33e5c-1fb1-11e3-a092-001a4bcf887a.html.

¹⁵⁰ See, e.g., Cindy Casares, *Border Patrol Takes "No" for an Answer at Internal Checkpoints*, TEX. OBSERVER (Mar. 7, 2013, 2:49 PM), <http://www.texasobserver.org/border-patrol-takes-no-for-an-answer-at-internal-checkpoints>.

¹⁵¹ *Id.*; Angela Kocherga, *Drivers Challenge Border Patrol Highway Checkpoints*, KVUE NEWS (Dec. 1, 2013), <http://www.kvia.com/news/drivers-challenge-border-patrol-highway-checkpoints/23170410>; see also detroitjones, *Border Patrol on Amtrak Part 2*, YOUTUBE (Aug. 11, 2011), <http://www.youtube.com/watch?v=A9KS9mbT5u0> (showing such civil disobedience has also taken place on the northern border).

agency,¹⁵² and formed organizations to ensure continued documentation of CBP abuses of its constitutional authority.¹⁵³

CBP has been documented traveling on roads far removed from the southern border and away from established checkpoints,¹⁵⁴ as well as performing interior enforcement in places like church parking lots¹⁵⁵ and hospitals.¹⁵⁶ Moreover, the character of CBP's interior enforcement near the southern border has been abusive in many instances.¹⁵⁷ In October 2013, the American Civil Liberties Union (ACLU) submitted a complaint to the Inspector General and Officer for Civil Rights and Civil Liberties of DHS documenting the severity of the enforcement abuses carried out by CBP.¹⁵⁸ The agency's abusive tactics and assertion of authority to perform suspicionless searches in the 100-mile border zone defined in its regulations, and in which almost two-thirds of the

¹⁵² See, e.g., DEPORT THE BORDER PATROL, <http://deporttheborderpatrol.com> (last visited May 31, 2015); CROSSING THE LINE: CORRUPTION AT THE BORDER, <http://bordercorruption.apps.cironline.org> (last visited May 31, 2015).

¹⁵³ See, e.g., THE 4409, <http://www.youtube.com/user/RP4409> (last visited May 31, 2015); see also Amy Lieberman, *Arizona's Checkpoint Rebellion*, SLATE (updated July 21, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/07/arizona_immigration_checkpoint_criticism_border_patrol_harasses_people_and.html.

¹⁵⁴ For example, CBP has been documented conducting roving patrols in Three-Points, Arizona (forty miles from the border); in the Tohono O'odham Reservation (fifty miles north of the border); and near Benson, Arizona (sixty miles north of the border). See Letter from James Lyall, Staff Attorney, ACLU of Arizona, to Charles K. Edwards, Deputy Inspector Gen., Department of Homeland Security and Tamara Kessler, Officer for Civil Rights and Civil Liberties, Department of Homeland Security (Oct. 9, 2013), available at <http://www.acluaz.org/sites/default/files/documents/ACLU%20AZ%20Complaint%20re%20CBP%20Roving%20Patrols%20Oct%209%202013.pdf> [hereinafter ACLU Complaint]; see also Jeremy Schwartz, *Border Patrol Arrests Reach Deep into Texas*, AUSTIN AM. STATESMAN, Nov. 2, 2014, at A1; Maria Hinojosa & A.C. Valdez, *What is "Reasonable Distance"?*, LATINO USA (Apr. 25, 2014), <http://latinousa.org/2014/04/25/reasonable-distance>.

¹⁵⁵ Jesus Campo, *Letter to the Editor: Border Patrol Tactics Raise Concern*, BROWNSVILLE HERALD (Apr. 18, 2009), http://www.brownsvilleherald.com/opinion/letters_to_editor/article_f108b768-dfd3-5711-afbc-ca4cd4550599.html.

¹⁵⁶ ACLU Complaint, *supra* note 154, at 2.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* Included in the ACLU complaint is the story of a mother driving home with her seven-year-old daughter and five-year-old son, all U.S. citizens, who was pulled over by border patrol agents for no given reason. When the mother requested an explanation for the stop, she was not given an answer, yet was confronted with threats that she exit the vehicle or be cut out of her seatbelt by the knife the officer wielded. Another documented story in the complaint involves a Tohono O'odham Native American woman who was stopped by Border Patrol without cause, forcibly removed from her car, and subjected to an unlawful search and seizure. A third story documents an Arizona farmer's father being pulled over by two border patrol agents on the farmer's own property for no apparent reason, while his five-year-old grandson was in the backseat. The agents approached the truck with their automatic weapons in hand and questioned the farmer's father for over one hour. *Id.* at 2–8.

United States population lives,¹⁵⁹ has led critics to refer to this area as “the Constitution-free zone.”¹⁶⁰

C. *Possible Explanations for CBP’s Push into the Interior*

While CBP has invaded the private lives of many border-area residents by stopping them while driving from one area of their state to another¹⁶¹ or even on foot while, for example, trying to irrigate their own farm,¹⁶² the agency does not deny its presence in the zone and believes internal enforcement is important to the agency’s mission.¹⁶³ However, CBP’s attempt to justify its reach into the interior on the needs of antiterrorism enforcement does not seem sincere when the former Director of Homeland Security herself declared the border secure¹⁶⁴ and when such enforcement tactics do not clearly further an antiterrorism mission.¹⁶⁵

The increased rate of post-September 11 CBP stops far removed from the border instead suggests that the agency has pushed its presence into the interior as a result of increased resources.¹⁶⁶ Analysts point to the possibility that CBP agents engage in internal enforcement in order

¹⁵⁹ *Constitution Free Zone*, AM. CIVIL LIBERTIES UNION (Oct. 21, 2008), <https://www.aclu.org/technology-and-liberty/constitution-free-zone>.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Stewart Loew was born and raised on his family’s Amado, Arizona farm. One night, while irrigating his farm in his pajamas, he found himself surrounded by border patrol agents who asked him what he was doing and demanded his identification. See Miller, *supra* note 6.

¹⁶³ See *supra* note 130.

¹⁶⁴ Jim Avila & Serena Marshall, *Napolitano on Immigration: Border Is Secure So “Fix the Entire System,”* ABC NEWS (Mar. 1, 2013), <http://abcnews.go.com/Politics/OTUS/napolitano-immigration-border-secure-fix-entire-system/story?id=18630676>.

¹⁶⁵ While one must take into account the potential deterrent effect of increased internal presence of Border Patrol officers on potential terrorists seeking to illegally enter the country, it is notable that in 2012, “a majority of the more than 364,000 people arrested by Border Patrol agents nationwide were migrant workers crossing the border” and that “[a]gents did not capture or arrest a single international terrorist.” Miller, *supra* note 6.

¹⁶⁶ *Id.* at 11–15; JUSTICE DERAILED, *supra* note 10, at 18; Colin Woodard, *Far From Border, U.S. Detains Foreign Students*, CHRON. HIGHER EDUC. (Jan. 9, 2011), <http://chronicle.com/article/Far-From-Canada-Aggressive/125880>. The change in CBP resources is perhaps most salient when considering the northern border with Canada. In 2011, CBP had more than 2200 agents on the northern border, which the Department of Homeland Security asserts is a 500% increase in agents since September 11. DEP’T OF HOMELAND SEC., IMPLEMENTING 9/11 COMMISSION RECOMMENDATIONS 61 (2011), available at <http://www.dhs.gov/xlibrary/assets/implementing-9-11-commission-report-progress-2011.pdf>. This surge in resources allowed for a serious lack of hiring oversight, the result of which is that over 1700 allegations of excessive force have been lodged against CBP agents and many individual criminal prosecutions have been brought against agents for drug smuggling and human trafficking. For an investigative report detailing “how the Border Patrol became America’s most out-of-control law enforcement agency,” see Garrett M. Graff, *The Green Monster*, POLITICO (Nov./Dec. 2014), <http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220.html>.

to meet political pressure to perform antiterrorism measures and that the agency engages in such arrest-based performance measures as the only way to justify prior and future funding increases.¹⁶⁷ However, despite a lack of demonstrated success in apprehending terrorists at the border,¹⁶⁸ CBP's funding for its work on the border continues to rise.¹⁶⁹

III. PROPOSAL: REGULATORY AND AGENCY FIX

A. *CBP's Interior Enforcement Is an Attempt to Unconstitutionally Expand the Border Search Exception and Must Be Curtailed*

At a time when those patrolling the U.S. border have attempted to expand the theoretical conception of the "border" inward toward the interior of the country,¹⁷⁰ and, consequently, grow their power to operate under reduced constitutional restrictions within a larger area, such confirmation that "the border" means "the border" is vital.¹⁷¹ In spite of the Supreme Court's clear instruction that CBP's sweeping authority under the Border Search Exception disappears when CBP conducts stops removed from the border or its functional equivalent,¹⁷² since September 11 CBP has ignored this limitation and conducted stops and searches in the interior without any purported "reasonableness" underlying the encounters.¹⁷³

As any realistic possibility of immigration reform in Congress hinges on a compromise that entails the continued amplification of border security,¹⁷⁴ before more funds are funneled into the border

¹⁶⁷ JUSTICE DERAILED, *supra* note 10, at 18; FORKS HUMAN RIGHTS GROUP & FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, *supra* note 148, at 11–15; *see also* Christian Sanchez, Border Patrol Agent, U.S. Customs and Border Patrol, Testimony Before the Congressional Transparency Caucus 3–7 (July 29, 2011), *available at* <http://www.skagitirc.org/IRC%20Materials/Sanchez%20Testimony%20-%20BorderPatrol.pdf>.

¹⁶⁸ *See supra* notes 10–12 and accompanying text; *see also supra* notes 138–142 and accompanying text.

¹⁶⁹ CHAD C. HADDAL, CONG. RESEARCH SERV., RL32562, BORDER SECURITY: THE ROLE OF THE U.S. BORDER PATROL 21 (2010); Graff, *supra* note 166.

¹⁷⁰ *See supra* Part II.

¹⁷¹ Such a clarification is vital as CBP not only pushes its authority inward into the interior of the country, but also outward onto the international stage. *See* Todd Miller, *Wait—What are US Border Patrol Agents Doing in the Dominican Republic?*, THE NATION (Nov. 19, 2013), <http://www.thenation.com/article/177253/wait-what-are-us-border-patrol-agents-doing-dominican-republic> ("By 2009, the new [Dominican Republic Border] force had already received training, funding, and resources from a number of US agencies, including the Border Patrol itself. Somehow, it seems that what the US consulate calls "strong borders" between the Dominican Republic and the hemisphere's poorest country has become an integral part of a terror-obsessed world.").

¹⁷² *See supra* note 70.

¹⁷³ *See supra* Part II.

¹⁷⁴ *See, e.g.*, S. 744, 113th Cong. § 1102 (2013).

agency, it is imperative that the appropriate scope of CBP's authority be clarified via a regulatory amendment and solidified via agency training. Amending 8 C.F.R. § 287.1(a)(2) by replacing the regulation's arbitrary "100-mile" notion of reasonableness with a constitutional-based standard of reasonableness will better reflect the intent of the regulation's statutory counterpart, INA § 287(a)(3), and will force CBP to stop defying past judicial constraints upon its authority.¹⁷⁵ Such changes are necessary to prevent CBP from continuing to use the liberties provided to it at the border under the Border Search Exception to search people in the interior without cause, and to finally stem CBP's erosion of interior Fourth Amendment rights.

B. *8 C.F.R. § 287.1(a)(2) Must Be Amended to Keep the Border Search Exception at the Border and to Protect Interior Fourth Amendment Rights*

Before September 11, the Supreme Court tried to limit Border Patrol's authority under INA § 287(a)(3) and 8 C.F.R. § 287.1,¹⁷⁶ but the shift to CBP's antiterrorism mission and accompanying swollen budget pushed its agents to ignore the Court's earlier decisions and expand the agency's geographic reach.¹⁷⁷ However, in spite of the realignment of agency priorities,¹⁷⁸ increase in budget and manpower,¹⁷⁹ and general national climate of fear¹⁸⁰ that have led to CBP's defiance of the high Court's law, the tenets of the Constitution must not be permitted to give way to the contemporary challenges we face.

The Fourth Amendment rests upon an ideological tension between the rights of individuals and the government's need to protect the people.¹⁸¹ In determining the constitutionality of a warrantless search, courts engage in a balancing inquiry to weigh whether the intrusion upon an individual's privacy is outweighed by the government's

¹⁷⁵ While CBP's suspicionless searches in the interior are unconstitutional, INA § 287(a)(3) and 8 C.F.R. § 287.1(a)(2) as limited by *Brignoni-Ponce* are not themselves unconstitutional. See *supra* notes 113–118 and accompanying text. Rather, as a matter of practice, CBP has essentially bootstrapped the expansive authority granted to it at the border under the Border Search Exception and applied it to the 100-mile area defined in its regulations.

¹⁷⁶ See *supra* notes 115–116 and accompanying text.

¹⁷⁷ See *supra* Part II; see also JUSTICE DERAILED, *supra* note 129.

¹⁷⁸ See *supra* note 1.

¹⁷⁹ See, e.g., *Spending on Border and Immigration Enforcement Continues to Skyrocket in Obama Administration*, AM.'S VOICE (May 25, 2010), http://americasvoice.org/research/charts_enforcement_spending_and_deportation_levels_continue_to_skyrock.

¹⁸⁰ DANIEL GARDNER, THE SCIENCE OF FEAR: HOW THE CULTURE OF FEAR MANIPULATES YOUR BRAIN 248–49 (2009).

¹⁸¹ See *supra* note 101; see also Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974).

purported need to conduct the search at issue.¹⁸² Recognizing this tension, the Border Search Exception provides that at the border, the “reasonableness” of a Fourth Amendment search weighs in the government’s favor. The outcome: a bright-line rule that CBP agents may conduct stops and searches in the absence of a warrant or individualized suspicion when conducted *at* the border or its functional equivalent.¹⁸³ By taking this investigative tool to the interior of the country to perform immigration enforcement under the guise of terrorism prevention, CBP has seemingly justified its defiance of Court precedent by autonomously engaging in a Fourth Amendment analysis away from the border and finding the “reasonableness balance” in favor of government intrusion on individual liberties.¹⁸⁴ However, that decision is not for CBP to make. Moreover, as the Court has repeatedly recognized, the Border Search Exception doctrine is not a doctrine of “exigent circumstances” and does not change with the changing political tides.¹⁸⁵

The purpose underlying the statute that gives CBP the power to stop and search vehicles away from the border is clear. Section 287(a) of the Immigration and Nationality Act demarcates the “powers without warrant” of federal immigration agents.¹⁸⁶ As elucidated by *Brignoni-Ponce*, the statute does *not* state that agents may conduct searches without probable cause or individualized suspicion away from the border.¹⁸⁷ Specifically, INA § 287(a)(3) allows agents to conduct vehicle searches within a “reasonable” distance of the border “*for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.*”¹⁸⁸ This objective is not denied by CBP—rather, it is emphasized

¹⁸² *Camara v. Mun. Court*, 387 U.S. 523, 536–37 (1967).

¹⁸³ *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–85 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266, 272–74 (1973).

¹⁸⁴ *See, e.g., United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1194 (D.N.M. 2010) (the U.S. argues burden to prove that stop was based on reasonable suspicion is diminished because stop occurred within 100 miles of border).

¹⁸⁵ *United States v. Ramsey*, 431 U.S. 606, 621 (1977) (“[T]he ‘border search’ exception is not based on the doctrine of ‘exigent circumstances’ at all. It is a longstanding, historically recognized exception to the Fourth Amendment’s general principle that a warrant be obtained . . .”) *see also Almeida-Sanchez*, 413 U.S. at 274 (“The Court that decided *Carroll v. United States* . . . sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Mr. Chief Justice Taft’s opinion for the Court distinguished between searches at the border and in the interior, and clearly controls the case at bar . . .”).

¹⁸⁶ INA § 287(a).

¹⁸⁷ *See supra* note 118 and accompanying text.

¹⁸⁸ INA § 287(a)(3) (emphasis added). For evidence of the congressional intent behind INA § 287(a)(3), *see* Memo from the Department of Justice Office of Legal Counsel to the Attorney General, *Immigration Consequences of Undocumented Aliens’ Arrival in United States Territorial Waters* (Oct. 13, 1993), at III.B, available at <http://www.justice.gov/olc/nautical.htm>; *see also United States v. Santa Maria*, 15 F.3d 879, 881 (9th Cir. 1994). As the intent of INA § 287(a)(3) is

in CBP's own statements, reports, videos, and strategic plans.¹⁸⁹ However, when agents have been accused of unconstitutional stops and searches in the interior, CBP has not always asserted a resolute effort to pursue its statutory purpose—to prevent “illegal entry”—as justification for its actions, but has instead relied on the claim that its regulations *permit* its actions.¹⁹⁰

To ensure that CBP agents do not continue to take advantage of expansive regulatory language to justify actions that do not serve the underlying purpose of INA § 287(a)(3), DHS must change the language of 8 C.F.R. § 287.1(a)(2) to incorporate the limits of the Border Search Exception doctrine.¹⁹¹ If the arbitrary numerical limitation that has unduly expanded the “border” to 100 miles is not replaced with a constitutional-based limitation, agents will continue to be tempted to achieve their antiterrorism mission by pushing the authority given to them at the border into the interior.¹⁹²

At the border, CBP's extraordinary power to perform suspicionless routine searches¹⁹³ is ceded to the agency because of the give and take of the Fourth Amendment allowed by its “reasonableness” factor.¹⁹⁴

clear, the regulation must not go beyond the clear purpose of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

¹⁸⁹ U.S. CUSTOMS & BORDER PROT., 2012–2016 BORDER PATROL STRATEGIC PLAN, *available at* http://nemo.cbp.gov/obp/bp_strategic_plan.pdf; U.S. CUSTOMS & BORDER PROT., PERFORMANCE AND ACCOUNTABILITY REPORT: FISCAL YEAR 2011, at 8, *available at* http://nemo.cbp.gov/opa/fy2011_par.pdf; *Border Patrol Overview*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/overview> (last visited May 31, 2015).

¹⁹⁰ *See, e.g., United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172, 1194–96 (D.N.M. 2010) (noting government's argument for constitutionality of stop ninety-two miles from border is that stop occurred within 100-mile border area).

¹⁹¹ In *United States v. Juarez-Torres*, the District of New Mexico court noted the troublesome actions of CBP:

This Court is also struck by the fact that, as a matter of border patrol policy, the further from the border a border patrol stop occurs, the less effort that border patrol agents make to determine whether the vehicle originated from the border. As Agent Duenez testified, if this stop had happened on the border, the license plate number would have been called in to dispatch to obtain the border crossing history for the vehicle. However, where border patrol stops occur over 100 air miles from the border, border patrol agents assume that the case will be handled administratively and not prosecuted and, therefore, border patrol does not bother to obtain the border crossing history for that vehicle. Specifically, Agent Duenez testified that when border patrol stops are made beyond the 100-mile limit “rarely do we prosecute the drivers only because the distance of the border applies to this. And our AUSA will say, ‘no, you can’t prosecute this.’” Clearly, the government understands that border patrol stops beyond the 100 mile limit are less likely to withstand judicial scrutiny. In order to avoid this scrutiny, the government’s policy is to forgo criminal prosecution in these cases and to pursue them in an administrative proceeding, where details such as a vehicle’s border crossing history are presumably less likely to be questioned.

441 F. Supp. 2d 1108, 1114–15 (D.N.M. 2006) (internal citations omitted).

¹⁹² *See supra* Part II.

¹⁹³ *See supra* note 33 and accompanying text.

¹⁹⁴ *See supra* notes 34–35 and accompanying text.

However, the limits of this Fourth Amendment search exception must correspondingly be determined by Fourth Amendment notions of reasonableness, rather than be defined by an arbitrary number of miles.¹⁹⁵ To avoid agency reliance on the 100-mile definition of “reasonable distance” as a license to stop those in the interior without cause, and to prevent further destruction of Fourth Amendment principles by lower courts wrongfully equating regulatory-defined “reasonableness” with Fourth Amendment reasonableness,¹⁹⁶ this regulation must be amended.

Analyzing how the circuit courts have addressed CBP’s push into the interior can help inform a restructuring of 8 C.F.R. § 287.1(a)(3). After *Almeida-Sanchez* was decided, the circuit courts whose own geographic jurisdiction overlapped with CBP’s expansive border jurisdiction developed a way to evaluate the constitutionality of CBP enforcement removed from the border: the Extended Border Search doctrine.¹⁹⁷ Seemingly uncomfortable with the idea of federal agents conducting suspicionless searches away from the border, yet understanding the valid foundation for these searches *at* the border, eight circuit courts have adopted the Extended Border Search test for Fourth Amendment reasonableness.¹⁹⁸ An Extended Border Search takes place when the person or item being searched has “cleared the border and thus regained an expectation of privacy.”¹⁹⁹ Logically, as the person or item moves away from the border, the reasonableness of the government’s interest in conducting a search based on preventing illegal *entry* decreases and the individual’s expectation of privacy increases.²⁰⁰ Rather than take CBP’s regulation at face-value to understand the 100-mile border zone as a 100-mile national perimeter where an individual’s rights under the Fourth Amendment forever yield to government interests,²⁰¹ the Extended Border Search doctrine recognizes that Fourth

¹⁹⁵ While this Note takes the position that 8 C.F.R. § 287.1(a)(3)’s determination that 100-miles is an appropriate measure of “reasonable distance” from the border is an arbitrary determination, the details of the argument that the regulation should be struck based on arbitrary and capricious grounds are beyond the scope of this Note. See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

¹⁹⁶ See, e.g., *Habeeb v. Castloo*, 434 F. Supp. 2d 899, 905–06 (D. Mont. 2006), *vacated*, No. CV 05–24 GFSEH, 2007 WL 2122452 (D. Mont. 2007).

¹⁹⁷ *United States v. Stewart*, 729 F.3d 517, 525 (6th Cir. 2013); *United States v. Yang*, 286 F.3d 940, 949 (7th Cir. 2002); *United States v. Cardenas*, 9 F.3d 1139, 1153 (5th Cir. 1993); *United States v. Caminos*, 770 F.2d 361, 364–65 (3d Cir. 1985); *United States v. Caicedo–Guarnizo*, 723 F.2d 1420, 1422–23 (9th Cir. 1984); *United States v. Garcia*, 672 F.2d 1349, 1366–67 (11th Cir. 1982); *United States v. Bilir*, 592 F.2d 735, 739–40 (4th Cir. 1979); *United States v. Glaziou*, 402 F.2d 8, 13 n.3 (2d Cir. 1968).

¹⁹⁸ See *supra* note 197.

¹⁹⁹ *United States v. Cotterman*, 709 F.3d 952, 961 (2013).

²⁰⁰ See, e.g., *United States v. Caicedo–Guarnizo*, 723 F.2d 1420, 1422–23 (1984); cf. *United States v. Glaziou*, 402 F.2d 8, 13 n.3 (1968) (pre-*Almeida-Sanchez*).

²⁰¹ See *supra* note 159.

Amendment reasonableness is a spectrum, dependent on a fact-specific inquiry in which numerical distance from the border is but one relevant factor.²⁰²

While *Almeida-Sanchez* and *Brignoni-Ponce* held that roving patrol stops removed from the border and conducted without reasonable suspicion or consent violate the Fourth Amendment, the cases did not make clear what *would* constitute reasonable suspicion for a border agent to stop a vehicle in the interior.²⁰³ Left to fill in this gap, the circuit courts have enlisted the Extended Border Search doctrine as a judicial tool to determine whether reasonable suspicion existed during CBP searches conducted away from the border.²⁰⁴ The development of the doctrine has been most pronounced in the Fifth and Ninth Circuits,²⁰⁵ the two circuits where most illegal crossings and smuggling into the United States occur.²⁰⁶ Both circuits have determined the key requirement that makes a CBP Extended Border Search reasonable, and thus the Fourth Amendment unharmed, is that at the time an agent conducts a search he must be able to articulate with “reasonable certainty” that the person or item searched has *recently crossed the border*.²⁰⁷ Furthermore, the circuits require that at the time of the search, the agent must have reasonable suspicion that the person or vehicle searched is involved in some illegality and that the condition of that illegality has not materially changed since clearing the border area.²⁰⁸

As the Extended Border Search analysis has made its way into circuit jurisprudence, the 100-mile regulatory standard has lost much of its potency in the courts.²⁰⁹ By using the Extended Border Search

²⁰² See *supra* note 197.

²⁰³ *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

²⁰⁴ See *supra* note 197.

²⁰⁵ As of February 2014, according to this Author’s research, the Ninth Circuit referenced the Extended Border Search test in fifty-six cases and the Fifth Circuit referenced the test in thirty-nine cases. The next circuit court that most frequently referenced the Extended Border Search was the Second Circuit, with six relevant opinions.

²⁰⁶ Eric Lipton & Julia Preston, *As U.S. Plugs Border in Arizona, Crossings Shift to South Texas*, N.Y. TIMES, June 17, 2013, at A1.

²⁰⁷ Compare *United States v. Villasenor*, 608 F.3d 467, 471–72 (9th Cir. 2010) (“Because extended border searches ‘intrude more on an individual’s normal expectation of privacy,’ their reasonableness depends on two factors: (1) ‘whether the totality of the surrounding circumstances . . . convince the fact finder with reasonable certainty that any contraband . . . at the time of search was aboard the vehicle at the time of entry into the . . . United States[]’; and (2) whether government agents conducting the search have ‘reasonable suspicion that the search may uncover contraband or evidence of criminal activity.’” (second and third alterations in original) (internal citations omitted)), with *United States v. Niver*, 689 F.2d 520, 526 (5th Cir. 1982) (“The extended border search still requires a showing beyond reasonable certainty both that the border has been crossed and that conditions have remained unchanged since the time of the border crossing.”).

²⁰⁸ See, e.g., *United States v. Guzman-Padilla*, 638 F.2d 765, 779–80 (9th Cir. 2009).

²⁰⁹ See, e.g., *United States v. Pacheco-Espinosa*, 354 F. Supp. 2d 1219, 1224 (D.N.M. 2003).

doctrine's constitutionally-based reasonableness analysis, courts have found certain CBP stops within 100 miles of the border to be unreasonable and certain CBP stops more than 100 miles from the border to be reasonable.²¹⁰ This result makes sense: so long as an agent can articulate that (1) he is reasonably certain the vehicle being stopped has recently crossed the border, (2) he has reasonable suspicion that the vehicle contains "illegal aliens" or contraband, and (3) the condition that is the basis of the illegality existed when the border was crossed and has not materially changed, then the agent has formed a constitutionally reasonable basis to carry out his statutory authority.

1. DHS Should Amend 8 C.F.R. § 287.1(a)(2) to Incorporate the Limits of the Border Search Exception and the Logic of the Extended Border Search Test

Incorporating the ideology of the Extended Border Search into 8 C.F.R. § 287.1(a)(2) is straightforward: remove all mention of mileage and replace the definition of "reasonable distance" with "the distance necessary to apprehend those who have *recently entered* the United States without authorization." Furthermore, the regulation should specify that all stops and searches under INA § 287(a)(2) must be based on *reasonable certainty* that the railway car, aircraft, conveyance, or vehicle being stopped and searched has recently entered the United States.²¹¹ While a clear criticism of replacing the 100-mile language with a regulation based on "reasonableness" is that "reasonableness" is too abstract of a standard to be practically implemented, such is the basis underlying most, if not all, search authority standards of U.S. federal and state law enforcement officials operating within the country.²¹²

²¹⁰ Compare, e.g., *United States v. Hernandez-Lopez*, 761 F. Supp. 2d 1172 (D.N.M. 2010) (Border Patrol stop of vehicle 92 miles from border found to violate driver's Fourth Amendment rights), with *Pacheco-Espinosa*, 354 F. Supp. 2d 1219 (Border Patrol stop of vehicle 120 miles from border found not to violate driver's Fourth Amendment rights).

²¹¹ The regulation may be drafted as: "Reasonable distance. The term reasonable distance, as used in section 287(a)(3) of the Act, means the distance necessary for an agent to achieve the statutory purpose of preventing illegal *entry* of aliens. An agent may only stop and search a railway car, aircraft, conveyance, or vehicle in the interior of the United States if that agent is reasonably certain that the individual or object of the search has recently entered the United States from a foreign country or territory without authorization." See also H.R. 0070, 97th Leg., Reg. Sess. (Mich. 2013) (a resolution to urge Congress to enact legislation that prohibits CBP from conducting interior stops and searches without probable cause outside the immediate vicinity of the border or its functional equivalent).

²¹² For example, the Due Process Clause of the Fourteenth Amendment applies the Fourth Amendment reasonableness standard for searches and seizures to police in all fifty states. See *Mapp v. Ohio*, 367 U.S. 643 (1961); see also *Terry v. Ohio*, 392 U.S. 1 (1968); cf. *People v. Carrasquillo*, 54 N.Y.2d 248 (1981). Federal police agents, such as FBI agents, are of course also bound by the Fourth Amendment and its reasonableness requirement for searches and seizures. See, e.g., *United States v. Jones*, 132 S. Ct. 945 (2013).

Furthermore, with adequate agency training, a regulation based on constitutional standards of reasonableness rather than arbitrary geographic lines has the potential to better protect Fourth Amendment rights against agent over-reach and constitutional contempt.

The historic foundation for the Border Search Exception, the congressional intent of INA § 287(a)(3),²¹³ and the judicial approval of CBP's use of the Border Search Exception in narrow circumstances make clear that CBP is only authorized to conduct suspicionless searches at the actual border or its functional equivalent. While this standard seems clear from a statutory and case law perspective, it is important to ensure that the regulation accompanying this extraordinary grant of authority does not create an ambiguity that allows officers to base their actions on an arbitrary geographic line.²¹⁴ By incorporating the logic underlying the Extended Border Search doctrine into 8 C.F.R. § 287.1(a)(2), the regulation would be restructured to reflect the proper constitutional limit of CBP authority and safeguard Fourth Amendment rights in the interior.

C. The Roles of CBP and ICE Must Be Clarified and Appropriate Training Must Be Conducted so Each Agent Knows the Scope of His Authority

The creation of DHS in 2003 involved the acquisition of old federal agencies and subsequent redistribution of these agencies into branches of a new, unified federal department.²¹⁵ The two immigration enforcement agencies created by DHS in 2003 were CBP and ICE. In addition to protecting the country's borders from breach by terrorists and terrorist weapons, CBP was tasked with conducting immigration enforcement at and between ports of entry.²¹⁶ ICE, on the other hand, became responsible for interior immigration enforcement.²¹⁷ To oversee the coordination of the two agencies, DHS created the Border and Transportation Security Directorate (BTS).²¹⁸

²¹³ See *supra* note 188.

²¹⁴ See *supra* note 195.

²¹⁵ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

²¹⁶ BORDER REORGANIZATION FACT SHEET, *supra* note 19; *CBP and ICE: Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests? Part II and III: Hearing Before the Subcomm. on Mgmt., Integration, and Oversight of the Comm. on Homeland Sec. 1, 109th Cong. (2005-2006)* [hereinafter *Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests?*]; see also JOHN SIMANSKI & LESLEY M. SAPP, IMMIGRATION ENFORCEMENT ACTIONS: 2011, DEP'T OF HOMELAND SEC. OFFICE OF IMMIGRATION STATISTICS (2012).

²¹⁷ *Does the Current Organizational Structure Best Serve U.S. Homeland Security Interests?*, *supra* note 216, at 1.

²¹⁸ *Id.* at 1.

In 2005, Congress's Homeland Security Subcommittee on Management, Integration, and Oversight held a hearing to evaluate the possibility of combining the two agencies.²¹⁹ Ultimately, the Secretary of Homeland Security determined the agencies should remain separate and BTS should be dissolved.²²⁰ Reflected in the Secretary's decision was the desire to strengthen the individual identities and unique missions of CBP and ICE, and to increase successful coordination between the agencies by eliminating BTS as a bureaucratic barrier to direct communication with the Secretary's Office.²²¹

To this day CBP and ICE remain separate, yet as CBP extends its authority into the interior of the country, it has begun to infringe on the mission of ICE.²²² If CBP continues to encroach on the mission and work of ICE—to enforce immigration laws in the interior—then the same organizational confusion and mission drift that led to the 2005 congressional evaluation will soon reoccur. Not only is preventing unintended inter-agency overlap desirable from an organizational management perspective, it is also imperative that CBP be restricted to its mission because of the constitutional violations that will otherwise continue to occur. There is a reason why within DHS, only CBP agents and Special ICE Agents stationed at the border are permitted to perform warrantless stops and searches²²³—the Border Search Exception. Because the assigned jurisdiction of most ICE agents does not include the border, but instead the interior of the country, most ICE agents are bound by the full force of the Fourth Amendment.²²⁴ For this reason, ICE is not found stopping individuals or drivers on the streets or in public places in the interior, but conducts its operations via its own carefully planned investigations²²⁵ or in partnership with state and local

²¹⁹ *Id.*

²²⁰ *Id.* at 11–12 (statement of Stewart Baker, DHS Assistant Secretary for Policy).

²²¹ *Id.*

²²² See *supra* Part II; see also BORDER REORGANIZATION FACT SHEET, *supra* note 19.

²²³ See U.S. CUSTOMS & BORDER PROT., BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION, CBP Directive No. 3340–049, at 5.1.2 (Aug. 20, 2009) (noting CBP officers may make searches at border without individualized suspicion); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, BORDER SEARCHES OF ELECTRONIC DEVICES, ICE Directive No. 7–6.1, at 6.1 (Aug. 18, 2009) (noting Special ICE agents acting under border search authority may make searches at border without individualized suspicion). DHS has enlisted Special ICE agents to join BEST teams, or Border Enforcement Security Task Forces, to assist CBP in its border enforcement duties. See Janet Napolitano, Dep't of Homeland Sec. Sec'y, "Securing the Border: Progress at the Federal Level," testimony before the Sen. Comm. on Homeland Sec. and Governmental Affairs (May 4, 2011). However, the majority of ICE agents are not stationed at the border, but in the interior. See JOHN SIMANSKI & LESLEY M. SAPP, IMMIGRATION ENFORCEMENT ACTIONS: 2011, OFFICE OF IMMIGRATION STATISTICS 1 (Sept. 2012).

²²⁴ See, e.g., *Cotzojay v. Holder*, 725 F.3d 172 (2d Cir. 2013).

²²⁵ See, e.g., Joseph Tanfani, *U.S. Immigration Officials Announce 2,000 Arrests in Nationwide Raids*, L.A. TIMES (Mar. 9, 2015, 3:50 PM), <http://www.latimes.com/nation/la-na-immigration-arrests-deportations-20150309-story.html>; *Fugitive Operations*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/fugitive-operations> (last visited May 31, 2015).

law enforcement agencies.²²⁶ Essentially, by extending the authority granted to it under the Border Search Exception into the interior, CBP has attempted to do ICE's job, but without the clear constitutional limits that accompany ICE's work.

To ensure that CBP adheres to its mission—to prevent the *entry* of undocumented immigrants, contraband, and terrorists *at the border*—and does not infringe on the mission of its sister agency ICE, the Office of the Inspector General and the Secretary of Homeland Security should conduct studies similar to those conducted for the 2005 congressional hearings. The studies should determine the degree of agency jurisdictional overlap in practice and propose solutions to make clear to agents the scope of their authority within their respective agencies.

Furthermore, it is imperative that all CBP agents undergo Fourth Amendment training that makes clear the extent of their regulatory authority under the Constitution and that stresses the limits of the Border Search Exception. Any Fourth Amendment training must include an emphasis that the Supreme Court's instruction in *Almeida-Sanchez* is still the law, and should include guidance on how the Extended Border Search doctrine has clarified the proper application of *Almeida-Sanchez* after September 11 and the creation of CBP.

Such training is not impracticable, and in fact has related precedent in a 2013 settlement agreement from a case in the Western District of Washington State.²²⁷ In *Sanchez v. U.S. Border Patrol*, plaintiffs complained of unconstitutional stops by agents of the Blaine, Washington sector of CBP.²²⁸ As a result of the settlement, the Blaine CBP office was required to conduct training on the applicability of Fourth Amendment principles to the agents' work and to highlight in this training that all vehicle stops conducted away from the physical border must be based on at least reasonable suspicion.²²⁹ While CBP acknowledges in the settlement agreement that a vehicle's location near an international border is not sufficient to establish reasonable suspicion to justify a stop,²³⁰ it is vital that any Fourth Amendment training emphasize that "reasonable suspicion" to justify a stop by

²²⁶ See, e.g., *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/secure-communities> (last visited May 31, 2015); *ICE announces standardized 287(g) Agreements with 67 State and Local Law Enforcement Partners*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/news/releases/ice-announces-standardized-287g-agreements-67-state-and-local-law-enforcement-partners> (last visited May 31, 2015).

²²⁷ Settlement Agreement, *Sanchez v. U.S. Border Patrol*, No. CV12-5378-RJB (W.D. Wash. Sept. 20, 2013); see also Kleyman, *supra* note 129, at 1588–89 (noting that Fourth Amendment training of CBP officers can be modeled on USCIS training, in which "officers are required to attend periodic trainings both in national offices and in their regional offices that educate them on the relevant . . . law").

²²⁸ Complaint, *Sanchez*, No. 12-cv-00735, 2012 WL 1448214 (W.D. Wash. Apr. 26, 2012).

²²⁹ Settlement Agreement, *supra* note 227.

²³⁰ Settlement Agreement, *supra* note 227, at 8.

agents must involve “reasonable certainty” that the object of the search has recently crossed the border.²³¹

The *Sanchez* settlement is a first step toward solving the problem of CBP’s over-extension of its authority, but it is not enough. The agreement is applicable only to the Blaine sector of CBP and demands that only a single Fourth Amendment training be held.²³² While the *Sanchez* complaint lamented that CBP both lacks a national policy to ensure its agents are sufficiently trained and that the agency does not require documentation of the basis for an agent’s reasonable suspicion to justify a stop, the settlement agreement does not address these larger concerns.²³³

To ensure that all CBP agents in each operating sector abide by the dictates of the Fourth Amendment, CBP’s Office of Chief Counsel should develop a comprehensive Fourth Amendment training required for all agents that includes: (1) an emphasis on the distinct missions and roles of ICE and CBP, (2) instruction that all searches that lack individualized suspicion may only take place *at* the border or its functional equivalent, and (3) instruction that any stop or search that occurs away from the border or its functional equivalent must be based on the agent’s reasonable suspicion of illegal activity, which includes the agent’s reasonable certainty that the object of the search has recently crossed the border. Without such training to ensure agents are adequately informed of the scope of their authority, CBP agents will continue to test the limits of their power and Fourth Amendment rights in the interior will remain at risk.

CONCLUSION

The statutory and regulatory sections that govern the breadth of CBP’s jurisdiction away from the border—INA § 287(a)(1),²³⁴ INA § 287(a)(3),²³⁵ and 8 C.F.R. § 287.1(a)(2)²³⁶—make clear that CBP agents

²³¹ See *supra* note 207 and accompanying text (recognizing that key requirement for reasonableness of CBP “Extended Border Search” is agent’s ability to articulate with “reasonable certainty” that person or item searched had recently crossed border). Whether the Fourth Amendment training conducted at the CBP Blaine Sector included this specific instruction is unknown, as the exact details of the training are not public.

²³² See Settlement Agreement, *supra* note 227, at 3.

²³³ Compare Complaint, *supra* note 228, at ¶¶ 62–64, with Settlement Agreement, *supra* note 227. The lack of CBP statistics regarding interior roving patrol stops has frustrated efforts to fully expose the practice. Additionally, advocates say the number of legal decisions regarding questionable interior stops does not reflect the reality of the practice because immigrants rarely challenge the stops. Schwartz, *supra* note 154.

²³⁴ See *supra* note 108.

²³⁵ See *supra* note 89.

²³⁶ See *supra* note 90.

may perform their job at locations removed from the actual border. However, such enforcement action, as made clear by the Supreme Court, is not unlimited. While on its face the relevant statutory language permits CBP to search vehicles within a “reasonable” distance from the border and the pertinent regulation defines “reasonable” as within 100 air miles of the border,²³⁷ the idea of “reasonableness” underlying this regulatory grant of power is mere lip service to the Fourth Amendment. The constitutionality of a warrantless CBP search away from the border cannot be based upon an arbitrary geographic “safe zone” determined by the agency’s own regulations. Rather, any such search conducted by CBP must still pass constitutional muster under the rigorous analysis of reasonableness, which Fourth Amendment jurisprudence requires.

Despite past judicial limiting of CBP’s “100-mile regulation,” after September 11 and the formation of DHS, CBP has pushed the bounds of its authority to the maximum regulatory distance in defiance of Supreme Court precedent. Now, more than ever, with immigration reform likely to soon pass and with it bring increased CBP appropriations, the DHS Secretary must amend 8 C.F.R. § 287.1(a)(2) to incorporate a constitutional-based limitation on CBP’s warrantless search powers and require mandatory Fourth Amendment training for all CBP agents. If not, CBP agents will continue to be tempted by the permissive authority of 8 C.F.R. § 287.1(a)(2), conduct enforcement actions in disregard of Supreme Court precedent, and continue to erode the protections of the Fourth Amendment in the interior of the United States.

²³⁷ See *supra* notes 89–90.