

2012

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### Recommended Citation

Dina Kleyman, *Protecting the Border, One Passenger Interrogation at a Time*, 78 Brook. L. Rev. (2012).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol78/iss1/9>

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# Protecting the Border, One Passenger Interrogation at a Time

## INTRODUCTION

The terrorist attacks that occurred on September 11, 2001, represented the ultimate intersection between criminal and immigration law. Because many of the terrorists had entered the United States legally with visas issued by the Immigration and Naturalization Service (INS),<sup>1</sup> the tragedy revealed the deficiencies in the administration of laws that provided for entry into the United States.<sup>2</sup> Thus, in the years following September 11, immigration policy has been transformed<sup>3</sup> to ensure that persons who have not been properly screened and verified are not allowed to remain in the country.<sup>4</sup> That transformation has included a greater criminalization of immigration violations<sup>5</sup> as “illegal immigrants have come to be seen as synonymous with terrorists.”<sup>6</sup> The new priorities of immigration agencies and authorities have become to restrict admission and increase deportations with the purported goal of rooting out terrorists and increasing the security of the nation.<sup>7</sup>

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<sup>1</sup> See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, ENTRY OF THE 9/11 HIJACKERS INTO THE UNITED STATES, STAFF STATEMENT NO. 1, at 4 (2004) [hereinafter STAFF STATEMENT NO. 1], available at [http://www.9-11commission.gov/staff\\_statements/staff\\_statement\\_1.pdf](http://www.9-11commission.gov/staff_statements/staff_statement_1.pdf) (“Beginning in 1997, the 19 hijackers submitted 24 applications and received 23 visas.”); see also NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 218, 226 (2004) [hereinafter 9/11 COMMISSION REPORT], available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

<sup>2</sup> See 9/11 COMMISSION REPORT, *supra* note 1, at 80-82.

<sup>3</sup> See STAFF STATEMENT NO. 1, *supra* note 1, at 3 (“Our immigration system before 9/11 focused primarily on keeping individuals intending to immigrate from improperly entering the United States.”); see also Nora V. Demleitner, *Misguided Prevention: The War on Terror as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL., no. 6, at 5 (2004) (noting that in mid-2001, fighting terrorism was not INS's main concern).

<sup>4</sup> See generally Demleitner, *supra* note 3.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> JULIE FARNAM, US IMMIGRATION LAWS UNDER THE THREAT OF TERRORISM 18 (2005).

<sup>7</sup> Demleitner, *supra* note 3, at 1. “Because of the focus on foreign terrorism, immigration law has become a major investigatory and enforcement tool on the frontline in the fight against terrorism.” *Id.*

Charged with fighting terrorism and increasing homeland security, immigration agencies and officials have seen their power strengthened and expanded. For years, immigration agents have been routinely boarding domestic trains and buses traveling within one hundred miles of the border and interrogating passengers about their citizenship status and requesting their immigration paperwork.<sup>8</sup> Agents have arrested and detained thousands of passengers that did not have their immigration paperwork.<sup>9</sup> Individuals who were detained were sent either to detention facilities or local prisons and county jails, and most were held there until they were able to post a bond.<sup>10</sup>

This purportedly legal practice—the Immigration and Nationality Act (INA) allows immigration officials to interrogate anyone they suspect of being an illegal alien<sup>11</sup>—actually goes far beyond what Congress intended. Congress gave officials the authority to interrogate individuals in this way at the border, or close to the border, because of the greater need to investigate entrants into the United States.<sup>12</sup> Instead, immigration officials have been using the authority of the INA to question and arrest passengers on domestic vessels that have not crossed a border and will not be crossing a border.<sup>13</sup> Further, the explanation of fighting terrorism and arresting recently entered illegal immigrants cannot be justified by this practice, as “the vast majority of those arrested . . . had been in

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<sup>8</sup> Nina Bernstein, *Border Sweeps in North Reach Miles into U.S.*, N.Y. TIMES, Aug. 29, 2010, at A1, available at <http://www.nytimes.com/2010/08/30/nyregion/30border.html>; Karen Branch-Brioso, *Border Patrol Checks Bus Boarders*, TAMPA TRIB. (May 4, 2008), <http://www2.tbo.com/content/2008/may/04/040011/na-border-patrol-checks-bus-boarders-bus-riders-hi/>; see also Kirk Semple, *Report Faults Border Patrol on Bus and Train Searches*, N.Y. TIMES, Nov. 8, 2011, at A27, available at [http://www.nytimes.com/2011/11/09/nyregion/border-patrol-searches-faulted-in-new-report.html?\\_r=1](http://www.nytimes.com/2011/11/09/nyregion/border-patrol-searches-faulted-in-new-report.html?_r=1).

<sup>9</sup> Bernstein, *supra* note 8; N.Y. CIVIL LIBERTIES UNION, FAMILIES FOR FREEDOM & NYU SCH. OF LAW IMMIGRANT RTS. CLINIC, JUSTICE DERAILED: WHAT RAIDS ON NEW YORK'S TRAINS AND BUSES REVEAL ABOUT BORDER PATROL'S INTERIOR ENFORCEMENT PRACTICES 1, 4 (2011) [hereinafter NYCLU REPORT], available at <http://www.nyclu.org/publications/report-justice-derailed-what-raids-trains-and-buses-reveal-about-border-patrols-interi>. “[N]early all individuals arrested during transportation raids are detained by CBP without being screened for risk of flight, threat to the community, or other considerations . . . regardless of whether they are recent entrants apprehended at the border or have resided in the United States for years.” *Id.* at 14.

<sup>10</sup> NYCLU REPORT, *supra* note 9, at 14-15.

<sup>11</sup> 8 U.S.C. § 1357(a) (2006).

<sup>12</sup> See *infra* Part II.A (discussing the “border-search exception,” which allows officials greater leeway in investigating individuals when they arrive from outside the U.S. specifically because they are coming from outside the country).

<sup>13</sup> Bernstein, *supra* note 8.

the country for more than one year,” and many had been in the country for more than three years.<sup>14</sup>

Immigration officials violate the Fourth Amendment when they interrogate random passengers in this way. In the seminal Fourth Amendment case *Terry v. Ohio*, the Supreme Court laid out the parameters of police officers’ authority.<sup>15</sup> The Court specifically stated that a seizure occurs when a police officer “restrains” an individual’s ability to “walk away.”<sup>16</sup> An officer who has seized an individual must have reasonable suspicion to justify the intrusion.<sup>17</sup> The practice at issue here is a coercive display of police authority that constitutes a seizure, because the passengers do not feel free to refuse to respond.<sup>18</sup> Under *Terry* and the Court’s subsequent cases further defining a “seizure,”<sup>19</sup> immigration officers must have reasonable suspicion or probable cause to carry out their investigations.

This practice directly results from the post-September 11 expansion in immigration officials’ powers, which gives agents unprecedented authority under the official purpose of fighting terrorism.<sup>20</sup> However, the post-September 11 policies have resulted in almost no arrests for the actual crime of terrorism.<sup>21</sup> On the other hand, the lives of individuals who have been in the United States for years have been unjustifiably disturbed; in many instances, the consequences for individuals questioned during these transportation checks are dire, since the INA permits mandatory detention for

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<sup>14</sup> NYCLU REPORT, *supra* note 9, at 8-9; *see also* Bernstein, *supra* note 8.

<sup>15</sup> 392 U.S. 1 (1968).

<sup>16</sup> *See id.* at 16.

<sup>17</sup> *See id.* at 20-21.

<sup>18</sup> *See infra* Part III.A; *see also* United States v. Mendenhall, 446 U.S. 544, 552 (1980) (“Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”).

<sup>19</sup> *See infra* Part III.A.

<sup>20</sup> *See infra* Part I.

<sup>21</sup> DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION 232-34 (3d ed. 2006) (The authors note that “the war on terrorism, at least at home, has netted almost no actual terrorists.” Specifically, the authors write that although “[t]he Justice Department boasts that its terrorism investigations have led to more than 300 criminal indictments [and] over 100 convictions,” the vast majority of those convictions have been “for minor charges, *not* terrorism.” Further, “few of the government’s indictments charge actual terrorism.”); *see also* Demleitner, *supra* note 3, at 1 (“[S]o far these special measures have yielded few tangible results.”); CONSTITUTION PROJECT, THE USE AND ABUSE OF IMMIGRATION AUTHORITY AS A COUNTERTERRORISM TOOL: CONSTITUTIONAL AND POLICY CONSIDERATIONS 1 (2008), available at [http://www.constitutionproject.org/pdf/Immigration\\_Authority\\_As\\_A\\_Counterterrorism\\_Tool.pdf](http://www.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf) (“As the bipartisan 9/11 Commission’s staff found, there is no evidence that the post-September 11 immigration initiatives targeted at Arabs and Muslims succeeded in identifying any actual terrorists.”).

individuals with questionable status<sup>22</sup> and possibly immediate deportation without judicial review.<sup>23</sup> These actions are troubling because the courts,<sup>24</sup> the INA,<sup>25</sup> and the current administration recognize that some immigrants, even those in the country illegally, deserve certain protections. Recently, the Obama administration has stated that it will focus on deporting convicted criminals and individuals who pose national security risks rather than illegal immigrants with no criminal records.<sup>26</sup> Additionally, Senator Richard J. Durbin has sponsored legislation called the Development, Relief, and Education for Alien Minors Act of 2010 (the DREAM Act) that would provide a path to citizenship for certain young illegal immigrants who came to the United States as children.<sup>27</sup> Thus, the Obama administration and even members of Congress have recognized that although individuals may be in the country illegally, their ties to the United States may afford them greater protection from intrusion and seizure than first-time entrants or suspected terrorists.

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<sup>22</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2006).

<sup>23</sup> See U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, ANNUAL REPORT 2007, at 58 (2007), available at [http://www.uscirf.gov/images/AR\\_2007/annualreport2007.pdf](http://www.uscirf.gov/images/AR_2007/annualreport2007.pdf).

<sup>24</sup> Historically, the Supreme Court has recognized that individuals who have resided in the United States for some time are entitled to more procedural protections than first-time entrants. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”); *Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903) (holding that an illegal alien, who “has become subject in all respects to” the jurisdiction of the United States and has become “a part of its population,” is entitled to some due process protections).

<sup>25</sup> The INA’s cancellation of removal procedures are arguably a recognition by Congress that individuals who have lived in the U.S. for many years and have established ties to the country may, in certain instances, gain permanent resident status and repose. *Cf.* 8 U.S.C. § 1229b.

<sup>26</sup> Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1, available at [http://www.nytimes.com/2011/11/17/us/deportation-cases-of-illegal-immigrants-to-be-reviewed.html?\\_r=1&hp](http://www.nytimes.com/2011/11/17/us/deportation-cases-of-illegal-immigrants-to-be-reviewed.html?_r=1&hp). In particular, this would indefinitely delay the deportation of individuals who entered the country illegally as children (and thus did not make the original choice to immigrate) and have since spent their lives in the United States. Robert Pear, *Fewer Youths to Be Deported in New Policy*, N.Y. TIMES, Aug. 18, 2011, at A1, available at <http://www.nytimes.com/2011/08/19/us/19immig.html?pagewanted=all>. For one immigrant’s personal account of coming to the United States as a child and living with no legal status, see Jose Antonio Vargas, *My Life as an Undocumented Immigrant*, N.Y. TIMES, June 22, 2011, (Magazine), at MM22, available at [http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?\\_r=1&src=ISMR\\_HP\\_LO\\_MST\\_FB](http://www.nytimes.com/2011/06/26/magazine/my-life-as-an-undocumented-immigrant.html?_r=1&src=ISMR_HP_LO_MST_FB).

<sup>27</sup> David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/politics/19immig.html?sq=DREAM%20act&st=cse&adxnnl=1&scp=1&adxnnlx=1293375627-zGDKC/ZXQgn3ztzRZoOO5g>. The Senate voted down the bill, in a vote by 55-41 in favor of the bill. *Id.*

In November 2011, three immigrant rights groups—the New York Civil Liberties Union, Families for Freedom, and the Immigrant Rights Clinic at New York University School of Law—released a report examining data of arrests that occurred during these “transportation raids” in upstate New York.<sup>28</sup> The report found that these document checks “do little to protect the border, but they threaten constitutional protections that apply to citizens and non-citizens alike.”<sup>29</sup> In particular, the authors concluded that the majority of those arrested and detained were not recent border-crossers, agents violated “established arrest procedures,” and anecdotal reports indicated that officers used racial profiling to pick out the individuals stopped and questioned.<sup>30</sup> The report advocated ending this practice and putting in place more constitutional and procedural protections.<sup>31</sup>

In fact, the Border Patrol has taken some action to scale back the amount of random transportation checks that occur. In October 2011, the agency ordered field offices that were not near the southwest border to conduct checks in train and bus stations and airports only when “they have specific ‘actionable intelligence’ that there is an illegal immigrant there who recently entered the country.”<sup>32</sup> However, this order “has not been made public,” and, as stated by a spokesman for the U.S. Customs and Border Protection, “does not amount to a change in policy.”<sup>33</sup> Additionally, Border Patrol Agents and their union, the National Border Patrol Council, have criticized the move.<sup>34</sup> The union stated that the reduction in the number of transportation checks has “handcuff[ed] the effectiveness of Border Patrol agents.”<sup>35</sup> The union also alluded ominously to the September 11 attacks and stated, “A decade ago nineteen illegal aliens overstayed visas . . . which resulted in nearly 3,000 Americans losing their lives. This lesson must be lost on

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<sup>28</sup> NYCLU REPORT, *supra* note 9.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* at 25.

<sup>32</sup> *U.S. Relaxes Canadian Border Checks as Agents Are Told to Stop Searching Buses, Trains and Planes for Illegal Immigrants*, MAIL ONLINE (Oct. 30, 2011, 2:25 PM), <http://www.dailymail.co.uk/news/article-2055204/US-relaxes-Canadian-border-checks-Routine-bus-train-plane-searches-stopped.html>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; Press Release, Nat'l Border Patrol Council, Border Patrol Curtails Transportation Checks with Increased Bureaucracy (Oct. 27, 2011) [hereinafter NBPC Press Release], *available at* [http://www.nbpc.net/index.php?option=com\\_content&task=view&id=367&Itemid=1](http://www.nbpc.net/index.php?option=com_content&task=view&id=367&Itemid=1).

<sup>35</sup> NBPC Press Release, *supra* note 34.

those running the Border Patrol in Washington.”<sup>36</sup> Thus, although there has been a shift away from using transportation checks on domestic bus and train routes, no formal or official order has ended the practice, and there has been backlash.

As evident from the National Border Patrol Council’s statement, illegal immigrants are still closely associated with terrorists, and until there is permanent action to curb the practice of transportation checks, they may continue to be used at any time. Therefore, Congress and the Department of Homeland Security (DHS), the agency responsible for border security and the training of Border Patrol agents, must take official action to curtail this practice. Congress should amend the INA to permit Border Patrol agents to question individuals only when they have reasonable, particularized suspicion that the passenger is either in the country illegally or may be a terrorist, and the DHS should provide ongoing training to its agents on administering this standard.

This note will analyze the Border Patrol’s interrogation of passengers on domestic vessels under the Fourth Amendment and border search jurisprudence, and it will argue that the practice is unconstitutional under the Fourth Amendment. Therefore, this practice must be curtailed. Part I will discuss the structure of immigration authority and immigration law in the United States, including the changes in that structure after the September 11 attacks. Part II will discuss the law that defines the parameters of searches at the border and analyze whether this practice is illegal under that framework. Part III will discuss the general search and seizure law after *Terry* and argue that random requests for immigration documents of passengers on domestic vessels is both unconstitutional and based on unsound policy. Part IV will propose an amendment to the INA to curb this practice and a refinement of DHS training policy that would permit officers to question passengers only when they have individualized, reasonable suspicion to believe that the passenger is either an illegal alien or a terrorist.

Although protecting the nation from terrorism is an imperative objective, the Border Patrol’s interrogation of domestic passengers does nothing to further that goal. On the other hand, this practice violates passengers’ personal liberties in contravention of the Fourth Amendment. Because it is

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<sup>36</sup> *Id.*

unconstitutional and ineffective, Congress and the DHS should limit Border Patrol agents' authority.

I. CHANGES IN IMMIGRATION LAW AND POLICY AS A RESPONSE TO TERRORISM

Even before the attacks on September 11, Congress made changes to immigration law to deter and penalize illegal immigration.<sup>37</sup> After September 11, however, the connection between immigration and terrorism became explicit and Congress acted to strengthen the police powers of immigration officials by increasing funds, personnel,<sup>38</sup> and the jurisdiction in which they could interrogate and detain individuals suspected of being illegal immigrants.<sup>39</sup> The changes in immigration law and policy after September 11 have led to the current policy of randomly stopping, interrogating, and detaining passengers on common carriers travelling on routes exclusively within the United States.

A. *Immigration Law Prior to September 11, 2001*

Before the massive changes wrought by the terrorist attacks on September 11, immigration officials were responsible for regulating “travel, entry, and immigration” into the United States.<sup>40</sup> Congress charged the INS, the primary agency overseeing immigration, principally with preventing individuals from entering the country illegally<sup>41</sup> and working in the United States without authorization.<sup>42</sup> Although the INS had a staff of about “9,000 Border patrol agents, 4,500 inspectors, and 2,000 immigration special agents,”<sup>43</sup> the job function of these individuals was not framed in the context of national security.<sup>44</sup> Instead, the INS had responsibility for the “controlled entry” of temporary visitors and the administration of programs that allowed non-citizens to become naturalized or to gain

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<sup>37</sup> See *infra* Part I.A.

<sup>38</sup> See *infra* Part I.B.

<sup>39</sup> See *infra* Part I.C.

<sup>40</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 383-84.

<sup>41</sup> Marian L. Smith, *Overview of INS History*, in A HISTORICAL GUIDE TO THE U.S. GOVERNMENT 305, 308 (George T. Kurian ed., 1998).

<sup>42</sup> *Id.* (The INS was charged with investigating and sanctioning corporate employers who hired illegal immigrants, as well as the deportation of those illegal immigrants); Donald Kerwin & Margaret D. Stock, *The Role of Immigration in a Coordinated National Security Policy*, 21 GEO. IMMIGR. L.J. 383, 386 (2007).

<sup>43</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 80.

<sup>44</sup> *Id.* at 383-84.

permanent resident status.<sup>45</sup> The INS's main enforcement function was to detect and remove aliens who had entered the country illegally or stayed past the expiration of their legal documents.<sup>46</sup> Therefore, searching for terrorists was not the priority of the INS or its employees.<sup>47</sup>

The powers of the INS were defined by the INA.<sup>48</sup> Since its enactment in 1952, Congress has amended the INA numerous times.<sup>49</sup> The history of the INA—specifically the amendments enacted in the last twenty years—demonstrates the role that the ideals of fighting terrorism and national security have played in transforming immigration law to expand the power of immigration officials to find and remove certain individuals.

For instance, in 1996, following the 1993 bombing of the World Trade Center and the 1995 Oklahoma City bombing, Congress passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA).<sup>50</sup> A reaction to the threat of terrorism,<sup>51</sup> the AEDPA broadened the law under which individuals could be denied entry based on their suspected connections to terrorism. Previously, the government had the burden of proving that the individual denied entry or facing deportation had “personally engaged” in terrorist activity.<sup>52</sup> Under the new Act, admissibility would be denied to any individual who was

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<sup>45</sup> Smith, *supra* note 41, at 308.

<sup>46</sup> *Id.* An “alien” is “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2006). A “nonimmigrant” is “[a]n alien who seeks temporary entry to the United States for a specific purpose.” *Definition of Terms*, DEP’T HOMELAND SEC. (Sept. 10, 2009), <http://www.dhs.gov/files/statistics/stdfdef.shtm#0>. This note will use the word “alien” interchangeably with “noncitizen.” See COMM’N ON IMMIGRATION, AM. BAR ASSOC., REFORMING THE IMMIGRATION SYSTEM 1-6 n.10 (2010) [hereinafter ABA REPORT], available at [http://new.abanet.org/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.pdf](http://new.abanet.org/Immigration/PublicDocuments/aba_complete_full_report.pdf).

<sup>47</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 81.

<sup>48</sup> See REGINA GERMAIN, AILA’S ASYLUM PRIMER 24 (6th ed. 2010).

<sup>49</sup> See Smith, *supra* note 41, at 305-08 (summarizing enactment of immigration legislation from the late 1800s to the present); *Public Laws Amending the INA*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=publaw> (last visited Jan. 24, 2012).

<sup>50</sup> FARNAM, *supra* note 6, at 22-23.

<sup>51</sup> Perhaps foreshadowing the legislative response to the September 11 attacks, AEDPA was enacted primarily in the shadow of the Oklahoma City Bombing. COLE & DEMPSEY, *supra* note 21, at 132. Immediately following the attack, “Members of Congress . . . felt tremendous pressure to pass antiterrorism legislation. It did not matter that the proposals in the president’s initial bill were directed largely against international terrorism, while the Oklahoma bombing was the work of homegrown criminals.” *Id.*

<sup>52</sup> *Id.* at 143.

found to be “a representative” or a “member” of a terrorist organization.<sup>53</sup> Thus, the new law took away the requirement of individual responsibility and instead denied entry to individuals based merely on their suspected associations with terrorist groups.<sup>54</sup>

Following the passage of the AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)<sup>55</sup> to more forcefully address the problem of illegal immigration into the United States,<sup>56</sup> which was linked to terrorism. “IIRIRA was a major overhaul of the entire INA”<sup>57</sup> that “drastically changed the landscape of immigration law.”<sup>58</sup> The IIRIRA made significant changes to immigration enforcement both at the borders and in the country’s interior. In particular, the Act authorized the Attorney General to

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<sup>53</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 411, 110 Stat. 1214 (1996) (codified at 8 U.S.C. § 1182(a)(3)(B)(i)(IV-V)).

<sup>54</sup> COLE & DEMPSEY, *supra* note 21, at 143 (arguing that AEDPA substituted the requirement of a “personal connection to terrorist activity” for “guilt by association,” which is otherwise prohibited by the First Amendment).

<sup>55</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered provisions of 8 U.S.C. § 1101) [hereinafter IIRIRA].

<sup>56</sup> See H.R. REP. NO. 104-879, at 95 (1997). In its report on the history of the enactment of the IIRIRA, the Judiciary Committee characterized the state of illegal immigration, at the time, as such:

[M]ore than 4 million illegal aliens resided in the United States at the start of the 104th Congress, with an average net increase each year of 300,000; approximately half of these illegal residents had arrived with legal temporary visas and had overstayed; each year, tens of thousands of illegal aliens were ordered deported but were not removed from the United States due to lack of resources and legal loopholes; and the legal immigration system failed to unite nuclear families promptly, encouraged the “chain migration” of extended families, and admitted the vast majority of immigrants without regard to their level of education, job skills, or language preparedness.

*Id.* The Committee further noted that the immigration laws prior to the IIRIRA,

[C]ontributed to the problems we now face by failing to set clear priorities for our immigration system, and failing to provide tough sanctions against those who violate our immigration laws. In addition, these laws failed to treat migration as a comprehensive phenomenon, and failed to make the tough choices on priorities that would restore credibility both to our systems of admitting legal immigrants and deterring, apprehending, and removing illegal immigrants. More fundamentally, the law failed to provide adequate resources and enforcement tools to the Immigration and Naturalization Service (INS) to carry out its critical functions.

*Id.*

<sup>57</sup> Scott Aldworth, Note, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159, 1167 (2010).

<sup>58</sup> FARNAM, *supra* note 6, at 30.

substantially increase the number of border patrol agents,<sup>59</sup> install additional physical barriers and roads in the vicinity of the U.S. border, and buy any additional equipment necessary to stop illegal immigration.<sup>60</sup> Further, the IIRIRA included changes to the procedures for inspecting, detaining, and removing aliens.<sup>61</sup> For example, the Act established “expedited removal,” under which an individual in certain circumstances could be deported without judicial review,<sup>62</sup> and mandated the detention of individuals facing expedited removal.<sup>63</sup>

Thus, even before September 11, Congress responded to the fear of terrorism by targeting illegal immigration—it expanded the money and resources given to the INS, broadened the definition of which individuals could be deported and denied entry, and removed judicial review for deportation proceedings in certain cases. After September 11, the perceived tie between immigration and terrorism became even stronger, and Congress and the President responded accordingly.

### B. *Immigration Law after September 11, 2001*

In 2005, “The 9/11 Commission Report” was released to the public.<sup>64</sup> The National Commission on Terrorist Attacks

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<sup>59</sup> IIRIRA § 101(a). Specifically, IIRIRA states that “[t]he Attorney General in each of fiscal years 1997 . . . [-] 2001 shall increase by not less than 1,000 the number of positions for full-time, active-duty border patrol agents within the Immigration and Naturalization Service.” *Id.*

<sup>60</sup> *Id.* § 102(a).

<sup>61</sup> *Id.* tit. III.; see also FARNAM, *supra* note 6, at 30-31 (“IIRIRA . . . implement[ed] changes in border control, document fraud dealings, admissibility procedures, removal processes, asylum and refugee law, with implications for international students, and visas and consular procedures in general. This law is perhaps the biggest overhaul of the U.S.’s immigration system since the INA . . .”).

<sup>62</sup> 8 U.S.C. § 1225(b)(1)(A)(i) (2006); see Ebba Gebisa, Comment, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 565-66; see also FARNAM, *supra* note 6, at 36 (“Much of the controversy surrounding IIRIRA had to do with its expanded grounds for removal.”); Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 30 MICH. J. INT’L L. 809, 816-19 (2009); Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 389-93 (2007).

<sup>63</sup> 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). The mandatory detention provision of the IIRIRA has proven to be one of its most controversial aspects. See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000); see also Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11, 12 (2010) (“We use immigration law and detention as a weapon in the law’s enforcement because we seek to control our border. . . . [O]ur ‘border control’ is person control and containment.”).

<sup>64</sup> Eric Lichtblau, *9/11 Report Cites Many Warnings About Hijackings*, N.Y. TIMES (Feb. 10, 2005), [http://www.nytimes.com/2005/02/10/politics/10terror.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2005/02/10/politics/10terror.html?pagewanted=1&_r=1).

upon the United States (the Commission), which had been created by Congress and the President to investigate the attacks,<sup>65</sup> was highly critical of the INS.<sup>66</sup> The Commission found that in the 1990s, the INS was “seriously hampered by outdated technology and insufficient human resources.”<sup>67</sup> As a result, the Commission concluded, the INS could barely handle its actual primary functions, much less be prepared to fight terrorism.<sup>68</sup>

In fact, before September 11, there was no U.S. government agency whose primary responsibility was analyzing the travel of foreign nationals to determine any potential terrorist threat.<sup>69</sup> The Commission found this particularly troubling and noted, “For terrorists, travel documents are as important as weapons.”<sup>70</sup> In his testimony before the House Committee on the Judiciary shortly after the attacks, Attorney General John Ashcroft emphasized this point and stated, “The ability of alien terrorists to move freely across our borders and operate within the United States is critical to their capacity to inflict damage on our citizens and facilities.”<sup>71</sup> His statement made clear that immigration law would soon become a tool for detecting criminal terrorist activity.<sup>72</sup>

The Commission proposed the establishment of a new agency—the Department of Homeland Security (DHS)—to address the deficiencies in the U.S. immigration system that September 11 made painfully clear.<sup>73</sup> The new department would be a consolidation of the multitude of government agencies that had previously been tasked, separately, with homeland security and immigration oversight.<sup>74</sup> The hope was

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<sup>65</sup> 9/11 COMMISSION REPORT, *supra* note 1, at xv.

<sup>66</sup> *See id.* at 383-84. The Commission pointedly noted that, “[T]he routine operations of our immigration laws—that is, aspects of those laws not specifically aimed at protecting against terrorism—inevitably shaped al Qaeda’s planning and opportunities.” *Id.* at 384.

<sup>67</sup> *Id.* at 80.

<sup>68</sup> *Id.* at 384.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> John D. Ashcroft, *A Clear and Present Danger*, in RIGHTS VS. PUBLIC SAFETY AFTER 9/11, at 3, 7 (Amitai Etzioni & Jason H. Marsh eds., 2003).

<sup>72</sup> *See id.* at 4. Ashcroft stated that a goal of the DOJ would be to increase the authority of the INS, as part of broader changes in “law enforcement.” He thus placed the changes to immigration policy within the larger context of improving criminal law enforcement. *See id.* at 4-7.

<sup>73</sup> *See generally* EXEC. OFFICE OF THE PRESIDENT, THE DEPARTMENT OF HOMELAND SECURITY (2002) [hereinafter DHS PROPOSAL], available at <http://www.dhs.gov/xlibrary/assets/book.pdf>.

<sup>74</sup> ELIZABETH C. BORJA, DEP’T OF HOMELAND SEC. HISTORY OFFICE, BRIEF DOCUMENTARY HISTORY OF THE DEPARTMENT OF HOMELAND SECURITY 3 (2008) [hereinafter DHS BRIEF HISTORY], available at [www.hsdl.org/?view&did=37027](http://www.hsdl.org/?view&did=37027)

that one department “that has no question about either its mission or its authority,”<sup>75</sup> along with one “comprehensive national strategy” for fighting terrorism, would be better able to secure the nation.<sup>76</sup>

Thus, in November of 2002, President George W. Bush signed into law the Homeland Security Act of 2002,<sup>77</sup> which established the DHS and directed that the Secretary of Homeland Security would run the department.<sup>78</sup> Unlike the INS, the DHS had the primary purpose of fighting terrorism.<sup>79</sup> The U.S. Government manual states that the DHS “leads the unified national effort to secure America. It will prevent and deter terrorist attacks and protect against and respond to threats and hazards to the Nation. The Department will ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce.”<sup>80</sup> By its own mandate, the goal of the country’s main immigration authority is to fight terrorism first and to welcome immigrants second.<sup>81</sup>

The DHS was created to unify the various immigration and homeland security functions that had previously been spread across different agencies.<sup>82</sup> Thus, the immigration departments of the DHS each have a specific function that combines immigration and law enforcement. These departments include the United States Citizenship and Immigration Services (USCIS), which establishes and administers immigration and

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(“Before the establishment of the Department of Homeland Security, homeland security activities were spread across more than 40 federal agencies and an estimated 2,000 separate Congressional appropriations accounts.”).

<sup>75</sup> DHS PROPOSAL, *supra* note 73, at 5.

<sup>76</sup> DHS BRIEF HISTORY, *supra* note 74, at 4.

<sup>77</sup> *Id.* at 7.

<sup>78</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 101-02, 116 Stat. 2135 (codified at 6 U.S.C. §§ 111-12 (2012)).

<sup>79</sup> DEPT OF HOMELAND SEC., U.S. GOVERNMENT MANUAL 228 (2009-10), available at <http://www.gpoaccess.gov/gmanual/browse-gm-09.html>; FARNAM, *supra* note 6, at 53 (“Since 9/11 . . . the priority of the United States government and the agencies that control immigration in this country . . . is protection.”).

<sup>80</sup> U.S. GOVERNMENT MANUAL, *supra* note 79, at 226.

<sup>81</sup> In the section defining the mission of DHS, the Homeland Security Act of 2002 lists first and foremost that “[t]he primary mission of the Department is to . . . prevent terrorist attacks within the United States.” Pub. L. No. 107-296, § 101(b)(1); see also ABA REPORT, *supra* note 46, at 1-5 (“DHS serves both an enforcement function . . . and a service function . . .”).

<sup>82</sup> DHS BRIEF HISTORY, *supra* note 74, at 3. For a list of the agencies that became part of DHS, see *History: Who Became Part of the Department?*, DEPT OF HOMELAND SEC., [http://www.dhs.gov/xabout/history/editorial\\_0133.shtm](http://www.dhs.gov/xabout/history/editorial_0133.shtm) (last visited Jan. 24, 2012).

naturalization policy;<sup>83</sup> the United States Customs and Border Protection (CBP), which is responsible for securing the borders;<sup>84</sup> and the United States Immigration and Customs Enforcement (ICE), which enforces immigration laws in the country's interior.<sup>85</sup> Specifically, the CBP conducts inspections of arriving people and goods at ports of entries and is charged with "deterrence or apprehension of illegal immigrations *between* ports of entry."<sup>86</sup> Further, the Border Patrol is responsible for securing both the country's international land borders with Canada and Mexico, as well as the United States's coastal borders.<sup>87</sup> The ICE, on the other hand, is charged with conducting investigations in the country's interior, as well as with the detention and removal of noncitizens.<sup>88</sup> The three agencies work together to conduct the removal proceedings for noncitizens: the CBP and the ICE initially determine which individuals should be subject to removal proceedings, while the USCIS conducts the proceedings to determine whether these individuals should be granted legal status to remain in the United States.<sup>89</sup>

Additionally, after the September 11 attacks, Congress significantly increased the number of personnel and funds available to immigration authorities in every state along the northern border.<sup>90</sup> In the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, Congress appropriated "such sums as may be necessary" to triple the number of Border Patrol personnel, Customs Service personnel, and INS inspectors.<sup>91</sup> Further, the PATRIOT Act appropriates an additional \$50,000,000 to both the INS and the U.S.

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<sup>83</sup> "USCIS is responsible for immigration benefit services . . ." ABA REPORT, *supra* note 46, at 1-8. However, like the other DHS organizations, it is still tasked primarily with security enforcement. *Id.* at 1-8 n.35.

<sup>84</sup> FARNAM, *supra* note 6, at 50.

<sup>85</sup> OFFICE OF IMMIGRATION STATISTICS, DEP'T HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 1 (2009), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement\\_ar\\_08.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf).

<sup>86</sup> *Id.* (emphasis added).

<sup>87</sup> *Id.* According to DHS, CBP secures over 9000 miles of land, including "approximately 7,000 miles of international land border with Canada and Mexico and 2,000 miles of coastal border." *Id.*

<sup>88</sup> ABA REPORT, *supra* note 46, at 1-9.

<sup>89</sup> *Id.*

<sup>90</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§ 401-02, 115 Stat. 272, 342-43 (2001) (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 49 U.S.C., 50 U.S.C.).

<sup>91</sup> *Id.* § 402(1)-(3).

Customs Service to improve and acquire any technology and equipment necessary to monitor the northern border.<sup>92</sup>

Since its creation in 2003,<sup>93</sup> the CBP has grown into a major government operation. It currently employs more than 20,000 Border Patrol agents and has officers at more than 330 ports of entry.<sup>94</sup> Further, the agency received \$10.1 billion in funding for fiscal year 2010.<sup>95</sup> More than \$2 billion has been appropriated to border security, including personnel, infrastructure, and technology.<sup>96</sup> These figures indicate that as the perceived link between immigration and terrorism has grown, Congress and the President have increased funds, personnel, and support to the DHS. That support has directly led to the expanded use of random document checks of passengers traveling domestically on public transportation.

### C. *Internal Document Checks*

Policing immigration has become one of the government's primary methods for fighting terrorism and providing national security.<sup>97</sup> Border Patrol agents have broad statutory authority to conduct investigations of individuals they suspect to be in violation of immigration laws. Currently, under the INA, immigration officials do not need a warrant to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States,"<sup>98</sup> arrest any alien they see illegally entering the United States or who they believe is in the country illegally and "is likely to escape before a warrant

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<sup>92</sup> *Id.* § 402(4).

<sup>93</sup> *Timeline*, U.S. CUSTOMS & BORDER PROTECTION, [http://nemo.cbp.gov/opa/timeline\\_04212011.swf](http://nemo.cbp.gov/opa/timeline_04212011.swf) (last visited Jan. 24, 2012).

<sup>94</sup> *Securing America's Borders: CBP Fiscal Year 2010 in Review Fact Sheet*, CBP.GOV (Mar. 15, 2011), [http://www.cbp.gov/xp/cgov/newsroom/fact\\_sheets/cbp\\_overview/fy2010\\_factsheet.xml](http://www.cbp.gov/xp/cgov/newsroom/fact_sheets/cbp_overview/fy2010_factsheet.xml).

<sup>95</sup> COMM. ON APPROPRIATIONS, U.S. HOUSE OF REPRESENTATIVES, FACT SHEET: FY 2010 SUPPLEMENTAL APPROPRIATIONS: BORDER SECURITY, *available at* [http://democrats.appropriations.house.gov/images/stories/pdf/dhs/Appropriations\\_Fact\\_Sheet\\_-\\_Border\\_Security\\_Supplemental.pdf](http://democrats.appropriations.house.gov/images/stories/pdf/dhs/Appropriations_Fact_Sheet_-_Border_Security_Supplemental.pdf).

<sup>96</sup> *Id.*

<sup>97</sup> See Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 509 (2007) ("Perhaps no single development better exemplifies the public association of immigration and terrorism than the transfer of immigration functions to a Department whose defining mission is counter-terrorism."); Demleitner, *supra* note 3, at 9-12 ("[I]mmigration-related activities have been prosecuted as criminal violations but justified as anti-terrorism measures... It was 9/11 that made immigration... a national security issue.").

<sup>98</sup> 8 U.S.C. § 1357(a)(1) (2006).

can be obtained for his arrest,”<sup>99</sup> and “to board and search for aliens any vessel . . . and any railway car, aircraft, conveyance, or vehicle” within a reasonable distance of a U.S. border.<sup>100</sup> Beyond the border or its “functional equivalent,” however, immigration officials must have at least reasonable suspicion to warrant an inquiry or a search.<sup>101</sup> Nonetheless, following the general expansion of authority after the September 11 attacks, CBP agents have utilized this statutory grant of power to conduct random interrogations of passengers traveling domestically within the United States—that is, not at the border or its functional equivalent.<sup>102</sup>

CBP agents conduct inspections by boarding domestic trains, buses, and ferries traveling along domestic routes (meaning the vessels never cross the border) and inquiring about passengers’ immigration status.<sup>103</sup> At any given time, at least six uniformed officers, all armed, may board the vessel and—with no preface and no outright indication that the passenger may refuse to give their consent—ask passengers whether they are U.S. citizens.<sup>104</sup> As one journalist observed, passengers “startled from sleep, simply stared, and the agents prompted them: ‘State your citizenship for me, please, sir. What country were you born in?’”<sup>105</sup> Border Patrol agents request the immigration documents of any passengers who are not U.S. citizens.<sup>106</sup> Passengers without their documents are removed from the train and detained for further investigation and questioning, in full view of the other passengers.<sup>107</sup>

Though this practice is not widely publicized,<sup>108</sup> it is actually quite large in scope. In August 2010, Nina Bernstein of

<sup>99</sup> *Id.* § 1357(a)(2).

<sup>100</sup> *Id.* § 1357(a)(3). *See infra* Part II.A (discussing how the INS has defined “reasonable distance”).

<sup>101</sup> *See infra* Part II.A (discussing the Supreme Court’s interpretation of this statute as it applies to roving patrols at the border and beyond).

<sup>102</sup> *See infra* Part II.B (arguing that the area where transportation checks occur does not fall under the definition of the “functional equivalent” of the border).

<sup>103</sup> Bernstein, *supra* note 8; Emily Bazar, *Some Travelers Criticize Border Patrol Inspection Methods*, USA TODAY (Oct. 2, 2008, 1:08 AM), [http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside\\_N.htm](http://www.usatoday.com/news/nation/2008-09-30-border-patrol-inside_N.htm); Branch-Brioso, *supra* note 8.

<sup>104</sup> Nina Bernstein, *When the Border Patrol Comes Aboard*, N.Y. TIMES CITY ROOM BLOG (Aug. 30, 2010, 10:04 AM), <http://cityroom.blogs.nytimes.com/2010/08/30/when-the-border-patrol-comes-aboard> [hereinafter Bernstein II].

<sup>105</sup> *Id.*; *see also* NYCLU REPORT, *supra* note 9, at 7.

<sup>106</sup> Bernstein, *supra* note 8.

<sup>107</sup> Bernstein II, *supra* note 104.

<sup>108</sup> NYCLU REPORT, *supra* note 9, at 7; *see also* Bernstein, *supra* note 8 (noting that “[d]omestic transportation checks are not mentioned in a report on” CBP’s “northern border strategy”).

the *New York Times* reported that each year, as a result of these transportation checks, hundreds of passengers on trains and buses traveling along the northern border are taken to detention—and placed in removal proceedings—because they do not have “satisfactory immigration papers” with them.<sup>109</sup> Bernstein further suggested that such stops account for about 3000 arrests based on immigration violations each year.<sup>110</sup> In 2008, in a similar report regarding transportation checks on domestic trains, buses, and ferries, *USA Today* reported that transportation checks in CBP’s Buffalo sector resulted in the arrest of 1786 illegal immigrants.<sup>111</sup> In the agency’s New Orleans sector, 1754 illegal aliens were arrested on bus checks.<sup>112</sup>

These internal transportation checks have been “fueled by . . . an expanding definition of border jurisdiction”<sup>113</sup> and justified primarily as a security measure to prevent terrorism.<sup>114</sup> Further, immigration officials argue such checks are necessary on transportation near the border, because illegal immigrants would flee deeper into the interior after entering.<sup>115</sup> The problem with this argument, however, is that CBP agents are boarding domestic carriers that have not crossed the border. The vast majority of those arrested and detained had resided in the United States for years—some had overstayed their visa status, were in the process of changing their status, or had actually been granted legal status already.<sup>116</sup> Nancy Morawetz, a leading immigration scholar who

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<sup>109</sup> Bernstein, *supra* note 8.

<sup>110</sup> *Id.*

<sup>111</sup> Emily Bazar, *Border Patrol Expands Transportation Checks*, USA TODAY (Oct. 1, 2008, 12:35 PM), [http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks\\_N.htm](http://www.usatoday.com/news/nation/2008-09-30-border-patrol-checks_N.htm). The Buffalo sector covers about 400 miles of border. *Id.*

<sup>112</sup> *Id.* The New Orleans sector covers seven states. *Id.*

<sup>113</sup> Bernstein, *supra* note 8; see also Shachar, *supra* note 62, at 811-19 (arguing that expedited removal is an example of how the definition of the “border” is changing—becoming “malleable and movable”—and “blurring the line between the perimeter and the interior”).

<sup>114</sup> “Our mission is to defend the homeland, primarily against terrorists and terrorist weapons,” said the immigration official in charge of the Border Patrol station in Rochester, NY, where 1040 people were arrested in 2008, “95% of them from buses and trains.” Bernstein, *supra* note 8.

<sup>115</sup> A supervisory agent in Washington, D.C. explained CBP’s policy by stating that, “If you have someone attempting to illegally enter the United States, it’s very unlikely that they’re going to stay 15 yards from the international border . . . . We want to take a layered approach.” Bazar, *supra* note 103 (internal quotation marks omitted). Similarly, an immigration official in Washington State argued that, “The first line of defense is on the immediate border . . . . We have to have a second line of defense.” Bazar, *supra* note 111 (internal quotation marks omitted).

<sup>116</sup> NYCLU REPORT, *supra* note 9, at 6-11. The report further states that “Less than 1 percent of those arrested had entered the United States within the last 72 hours.” *Id.* at 10; see also Nadja Drost, *Heightened Security at U.S.-Canada Border Catching Few Terror*

supervises the NYU Immigrant Rights Clinic and is one of the authors of the NYCLU report, argues that while the expansion of the CBP's authority was meant to deal with "border security," it has actually become "interior enforcement to sweep up farmworkers and students."<sup>117</sup>

Such document checks have questionable utility for fighting terrorism as well. As a CBP public affairs officer stated, "If you look at our apprehensions, a small percentage have anything to do with terrorism . . ." <sup>118</sup> Ninety percent of the CBP's prosecutions in 2008 were for immigration—not criminal—violations.<sup>119</sup> Thus, the government cannot justify transportation checks on domestic carriers either on the ground of detecting terrorism or finding illegal immigrants attempting to flee the border.

## II. SEARCHES OF INDIVIDUALS AT THE BORDER

Immigration officials have the power to conduct searches and seizures at the border through a long-standing exception to the Fourth Amendment known as the "border-search exception."<sup>120</sup> Under this doctrine, officials may search anyone crossing the border or its "functional equivalent" without a warrant, and in some cases without reasonable suspicion or probable cause, for the sole reason that those individuals have entered the country from elsewhere.<sup>121</sup> The Supreme Court has held that interrogations conducted by immigration officials beyond the border or its "functional equivalent" are subject to normal Fourth Amendment requirements: they must be supported by reasonable suspicion or probable cause, since the reasons for the "border-search exception" no longer apply.<sup>122</sup> In the INA, Congress granted much broader discretion to immigration officials to stop and inquire about individuals' immigration status.<sup>123</sup> However, as the Supreme Court noted in *Almeida-Sanchez v. United States*,

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*Suspects*, IMMIGR. WATCH CAN. (Apr. 19, 2009), <http://www.immigrationwatchcanada.org/2009/04/19/heightened-security-at-u-s-canada-border-catching-few-terror-suspects/> ("[A] Border Patrol agent in upstate New York who did not want his name used due to concern he could lose his job said most of the immigrants he apprehends haven't come over the border recently—they are traveling domestically and have lived here for years in many cases.").

<sup>117</sup> Bernstein, *supra* note 8.

<sup>118</sup> Drost, *supra* note 116.

<sup>119</sup> *Id.*

<sup>120</sup> See *United States v. Ramsey*, 431 U.S. 606, 619-20 (1977).

<sup>121</sup> See *United States v. Jackson*, 825 F.2d 853, 858-59 (5th Cir. 1987); see also *infra* Part II.A.

<sup>122</sup> See *infra* Part II.A.

<sup>123</sup> See *infra* Part II.A.

a case that addresses immigration officials' investigative power under the INA, "[N]o Act of Congress can authorize a violation of the Constitution."<sup>124</sup>

A. *The INA and Exceptions to the Fourth Amendment at the Border*

Since the First Act of Congress, legislators and the Supreme Court have granted broad leeway to officers searching people, cars, or objects that have just entered the country.<sup>125</sup> In 1789, Congress stated that nothing beyond "suspicion" was necessary to examine items crossing the border.<sup>126</sup> This leeway has been termed the "border-search exception" to the Fourth Amendment bar against "unreasonable searches and seizures."<sup>127</sup> As the Supreme Court explained while officially upholding the exception in *United States v. Ramsey*, a border search is "reasonable" within the meaning of the Fourth Amendment for "the single fact that the person or item in question had entered into our country from outside."<sup>128</sup> Thus, an individual entering the country from outside should expect to be searched and should therefore have a lesser expectation of privacy.<sup>129</sup> Further, vehicles may be searched without a warrant when they cross "an international boundary because of national self-protection reasonably requiring one entering the country to

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<sup>124</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

<sup>125</sup> Act of July 31, 1789, ch. 5, 1 Stat. 29, 43 (1789) ("[I]t shall be lawful for the . . . officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine . . . any package or packages thereof . . . [I]f any of the packages so examined be found to differ in their contents from the entry, and it shall appear that such difference hath been made with intention to defraud the revenue, then all the goods, wares or merchandise contained in such package or packages, shall be forfeited . . .").

<sup>126</sup> *Id.*

<sup>127</sup> U.S. CONST. amend. IV; *United States v. Ramsey*, 431 U.S. 606, 619-20 (1977).

<sup>128</sup> *Ramsey*, 431 U.S. at 619.

<sup>129</sup> *United States v. Montoya de Hernandez*, 473 U.S. 531, 539 (1985) (citations omitted) ("[T]he expectation of privacy [is] less at the border than in the interior . . ."); *see also Ramsey*, 431 U.S. at 618 (The Court affirmed that there is no warrant requirement for a border search because "a port of entry is not a traveler's home. . . . Customs officials characteristically inspect luggage and their power to do so is not questioned . . . ; it is an old practice and is intimately associated with excluding illegal articles from the country." (quoting *United States v. Thirty-seven Photographs*, 402 U.S. 363, 376 (1971) (internal quotation marks omitted))); *United States v. Espericueta-Reyes*, 631 F.2d 616, 622 (1980) (noting that "[t]he power to detain persons at the border while their possessions are searched derives from the nation's right to regulate who and what may enter the Country"); *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1012 (1968) (explaining that one of the justifications for the border search exception is that because "the individual crossing a border is on notice that certain types of searches are likely to be made, his privacy is arguably less invaded by those searches").

identify himself as entitled to come in.”<sup>130</sup> Probable cause (much less a warrant) is therefore not a requirement for a search conducted at the border.<sup>131</sup>

Searches that occur at the “functional equivalent” of the border also fall under the border-search exception.<sup>132</sup> The functional equivalent of the border is an area where most individuals have just crossed the border so the justifications for the exception still apply.<sup>133</sup> The functional equivalent could include, for example, “an established station near the border, at a point marking the confluence of two or more roads that extend from the border,” or an airplane arriving in the United States on a nonstop flight from Mexico.<sup>134</sup> The exception to the Fourth Amendment applies at the “functional equivalent” of the border for the same reason as it applies at the border: for the “single fact” that an individual has entered the country from outside.<sup>135</sup>

Additionally, at a traffic checkpoint located reasonably close to the border, police officers may conduct a “stop[] and questioning” without reasonable, individualized suspicion or probable cause.<sup>136</sup> Although this is looser than typical Fourth Amendment requirements, the rule is again based on the closeness of the search to the border; in upholding it, the Supreme Court argued that the government interest in preventing illegal aliens from using highways to quickly get away from the border outweighed the private interest in privacy.<sup>137</sup> Further, the Court reasoned that defendants have a decreased expectation of privacy at a traffic checkpoint as compared to their homes,<sup>138</sup> and government agents subject them to less fright or annoyance than when a roving patrol stops them, because the government agents ask individuals only a few questions, and they can see that other vehicles are also getting stopped and questioned.<sup>139</sup>

When searches are conducted beyond the border, however, the Supreme Court has held that more information is needed to stop, question, and search individuals. Officers in roving patrols beyond the border or its functional equivalent

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<sup>130</sup> *Carroll v. United States*, 267 U.S. 132, 154 (1925).

<sup>131</sup> *Ramsey*, 431 U.S. at 619.

<sup>132</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973).

<sup>133</sup> *See United States v. Bowen*, 500 F.2d 960, 965 (1974).

<sup>134</sup> *Almeida-Sanchez*, 413 U.S. at 273.

<sup>135</sup> *United States v. Jackson*, 825 F.2d 853, 858 (5th Cir. 1987) (citations omitted).

<sup>136</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976).

<sup>137</sup> *See id.* at 556-57.

<sup>138</sup> *Id.* at 558-62 (citations omitted).

<sup>139</sup> *Id.* at 557-58 (citations omitted).

can only stop and question vehicles when they have “specific articulable facts . . . that reasonably warrant suspicion that the vehicle[] contain[s] [illegal] aliens.”<sup>140</sup> Further, police officers in roving patrols or checkpoints beyond the border or its functional equivalent may not search a vehicle without probable cause or consent.<sup>141</sup>

The INA, however, does not have these same requirements of reasonable suspicion or probable cause. It eliminates the warrant requirement and authorizes immigration officials to “interrogate” anyone believed to be an alien about his or her immigration status.<sup>142</sup> Additionally, “within a reasonable distance from” a United States border, officials may board and search “any railway car, aircraft, conveyance, or vehicle” for illegal immigrants.<sup>143</sup> The INS had further defined reasonable distance as “within 100 air miles from any external boundary of the United States.”<sup>144</sup> Despite this language, the Supreme Court has held that when immigration officials conduct searches beyond the border or its functional equivalent, the investigation must be supported by reasonable suspicion, probable cause, or consent.<sup>145</sup>

For example, when a roving patrol stopped and questioned passengers in a car “on a California road that lies at all points at least 20 miles north of the Mexican border,” the Court held that this stop was of a “wholly different sort” than an investigation that occurs at the border or its functional equivalent.<sup>146</sup> Even though the government was backed by the

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<sup>140</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975). Reviewing courts, in determining whether there was reasonable suspicion, look at the “totality of the circumstances” of each case. *See United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citations omitted). Under this analysis, courts look at whether the officer had a “‘particularized and objective basis’ for suspecting legal wrongdoing,” *id.*, taking into account the officer’s experience and training, including an immigration official’s experience with particular routes used by illegal aliens and the official’s “experience as a border patrol agent.” *See id.* at 277 (citations omitted).

Further, an individual’s Mexican ancestry alone does not provide such facts and is therefore an illegal reason to stop and question an individual, although Mexican appearance is a “relevant factor.” *Brignoni-Ponce*, 422 U.S. at 886-87.

<sup>141</sup> *See United States v. Ortiz*, 422 U.S. 891, 896-97 (1975) (holding that, because of the significant invasion of privacy in searching private cars, “at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause”); *Brignoni-Ponce*, 422 U.S. at 881-82; *Almeida-Sanchez v. United States*, 413 U.S. 266, 267-68, 274-75 (1973) (holding that a warrantless search conducted by roving patrol on a road that never intersects the Mexican border, with no probable cause justification, violates the Fourth Amendment).

<sup>142</sup> 8 U.S.C. § 1357(a)(1) (2006).

<sup>143</sup> *Id.* § 1357(a)(3).

<sup>144</sup> 8 C.F.R. § 287.1(a)(2) (2010).

<sup>145</sup> *See Almeida-Sanchez*, 413 U.S. at 272-73; *Brignoni-Ponce*, 422 U.S. at 884.

<sup>146</sup> *Almeida-Sanchez*, 413 U.S. at 273.

INA, the Court stated, specifically in response to their use of the statute, “[N]o Act of Congress can authorize a violation of the Constitution.”<sup>147</sup> The Court held the search of passengers in a vehicle that never intersected the border unconstitutional without probable cause, even though the INA, on its face, authorized the stop.<sup>148</sup> Similarly, transportation checks conducted on domestic common carriers are unconstitutional because the vessels never cross the border and are therefore not subject to the “border-search exception.”

*B. Domestic Document Checks Do Not Fall Under the Border-Search Exception*

Like the Supreme Court, Congress and the DHS have argued that certain measures, inapplicable in the country’s interior, are necessary at the border. In passing the expedited removal and mandatory detention provisions of the IIRIRA, the House Judiciary Committee argued, “If not detained, the aliens would most often disappear and become long-term illegal residents.”<sup>149</sup> Further, in explaining the expansion of the expedited removal program, the DHS stated that its focus was on “unlawful entries that have a close spatial and temporal nexus to the border”—meaning that this expanded authority is necessary, “because many aliens will arrive in vehicles that speedily depart the border area, and because other recent arrivals will find their way to near-border locales seeking transportation to other locations within the interior of the U.S.”<sup>150</sup> These policies arose because of the belief that more stringent requirements are necessary at the border to prevent aliens who have just entered from fleeing. The government’s explanation of its actions reflects an understanding that there is something different about individuals who have just entered the country from outside.

The government has justified the document checks on public transportation on similar grounds.<sup>151</sup> However, the justification is incongruent with the actual practice. The passengers are questioned while traveling on trains and buses

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<sup>147</sup> *Id.* at 272.

<sup>148</sup> *Id.* at 272-73.

<sup>149</sup> H.R. REP. NO. 104-879, at 98 (1997).

<sup>150</sup> Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,879 (Aug. 11, 2004).

<sup>151</sup> *See supra* Part I.C.

that have only domestic routes.<sup>152</sup> Though they are traveling within one hundred miles of the border, they have not recently crossed the border. Moreover, they are not at the “functional equivalent” of the border, because they have not entered the country from outside—and there is no reason to suspect that they have, since a train or bus traveling domestically never intersects with another country. When the Court gave examples of what may constitute the “functional equivalent” of the border, it provided areas where the majority of the individuals have recently entered the country from elsewhere.<sup>153</sup> Thus, the individuals stopped during the transportation checks should have the same expectation of privacy as any individual in the interior of the United States. Moreover, the argument that these vessels may contain illegal aliens attempting to flee into the country’s interior is weak, again, because these vehicles have not come from across the border.

### III. POLICE QUESTIONING OF INDIVIDUALS

The random questioning has also been justified by the general Fourth Amendment principle that a police officer may approach an individual in a public place and ask that person questions—without any requirement of a warrant, probable cause, or reasonable suspicion—as long as “a reasonable person would understand that he or she could refuse to cooperate.”<sup>154</sup> The encounter becomes a “seizure” that implicates the Fourth Amendment if the individual questioned believes that he or she is not free to walk away.<sup>155</sup> The conduct of immigration officials on domestic carriers is coercive and therefore a “seizure” under the Fourth Amendment. As long as CBP agents continue their interrogations without reasonable suspicion or probable cause, they are conducting illegal seizures in violation of the Fourth Amendment.

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<sup>152</sup> See Bernstein, *supra* note 8.

<sup>153</sup> See *Almeida-Sanchez*, 413 U.S. at 273.

<sup>154</sup> *Florida v. Bostick*, 501 U.S. 429, 431 (1991); see also *INS v. Delgado*, 466 U.S. 210, 215 (1984) (citations omitted).

<sup>155</sup> *Delgado*, 466 U.S. at 215; see *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (stating that “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person”).

### A. *Defining a “Seizure”*

As the Supreme Court noted in *Florida v. Royer*,<sup>156</sup> no “litmus-paper test” determines whether a consensual encounter or a seizure has occurred.<sup>157</sup> Instead, courts look at the totality of the circumstances and decide whether, based on all the circumstances, a “reasonable person would have believed he was not free to leave.”<sup>158</sup> This is not a question of the subjective experience of the individual, but of the objective factors and what a reasonable person would have concluded from them.<sup>159</sup> If the encounter was “so intimidating,”<sup>160</sup> or the officer “by means of physical force or show of authority”<sup>161</sup> has indicated that the individual is not free to leave, then a “seizure” has occurred within the meaning of the Fourth Amendment.<sup>162</sup>

Courts have looked at a variety of factors in determining whether a “seizure” has occurred. In *United States v. Mendenhall*, the Supreme Court articulated several specific factors that may indicate officers’ behavior is coercive and constitutes a seizure.<sup>163</sup> These factors include “the threatening presence of several officers, the display of a weapon by an officer . . . or the use of language or tone of voice indicating that” an individual’s compliance is required.<sup>164</sup> Further, the Court has held that “[t]he cramped confines of a bus are one relevant factor that” could be used to determine whether the individual being questioned felt that he was free to leave.<sup>165</sup>

If, in fact, a seizure has occurred, the officers must have “reasonable, articulable suspicion” to justify it<sup>166</sup>—even if the

<sup>156</sup> 460 U.S. 491 (1983).

<sup>157</sup> *Royer*, 460 U.S. at 506-07; *see also* *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (noting that the Court has “consistently eschewed bright-line rules” in determining whether a search is reasonable under the Fourth Amendment, “instead emphasizing the fact-specific nature of the reasonableness inquiry”).

<sup>158</sup> *Delgado*, 466 U.S. at 216; *see also* *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

<sup>159</sup> *See Delgado*, 466 U.S. at 228 (Brennan, J., dissenting).

<sup>160</sup> *Id.* at 216 (majority opinion).

<sup>161</sup> *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

<sup>162</sup> *See id.*; *accord Mendenhall*, 446 U.S. at 554 (“As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.”).

<sup>163</sup> 446 U.S. 544 (1980).

<sup>164</sup> *Id.* at 554.

<sup>165</sup> *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (The Court noted, however, the fact that the questioning took place on a bus, by itself, is not dispositive.); *see also* *United States v. Drayton*, 536 U.S. 194, 204 (2002).

<sup>166</sup> *Florida v. Royer*, 460 U.S. 491, 502 (1983). In his concurrence to *Royer*, Justice Brennan argued that any time a uniformed police officer approaches an

seizure at issue is “only a brief detention.”<sup>167</sup> This reasonable suspicion standard requires the officer to show specific facts, “which, taken together with rational inferences,” would “reasonably warrant” the seizure.<sup>168</sup> Further, even if the officer has specific facts to justify the seizure, the officer’s conduct is still limited in scope: the officer’s actions must be “reasonably related in scope to the justification” for the seizure.<sup>169</sup> With these rules, the Court has tried to limit police intrusion into individual privacy in an effort to balance important government interests with the individual interests in privacy protected by the Fourth Amendment.<sup>170</sup>

In a few illustrative cases, the Court has applied this totality of the circumstances test to determine whether a “seizure” had occurred, with varying results that indicate changes in policy rather than a consistent application of the Court’s own principles. For example, in *INS v. Delgado*,<sup>171</sup> INS agents entered a workplace to look for illegal aliens.<sup>172</sup> Agents were positioned near all of the building’s exits and others moved throughout the factory asking employees questions.<sup>173</sup> If employees answered “unsatisfactor[ily]” or stated that they were aliens, the agents asked for their immigration documents.<sup>174</sup> The Court held that in this situation, a seizure had not occurred; even though agents were stationed at all the exits, the

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individual and requests to see his documents (in this case, the defendant’s airplane ticket), a seizure has occurred, because “[i]t is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver’s license.” *Id.* at 512 (Brennan, J., concurring).

<sup>167</sup> *Mendenhall*, 446 U.S. at 551 (citations omitted); see also *INS v. Delgado*, 466 U.S. 210, 227 (1984) (Brennan, J., dissenting) (“[T]he Fourth Amendment protects an individual’s personal security and privacy from unreasonable interference by the police, even when that interference amounts to no more than a brief stop and questioning concerning one’s identity.”).

<sup>168</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968); see also *Mendenhall*, 446 U.S. at 551.

<sup>169</sup> *Terry*, 392 U.S. at 29. For example, in *Terry*, the Supreme Court upheld the inclusion at trial of a gun that a police officer obtained by frisking the defendant on the street. The Court held that the personal intrusion was permissible because the officer’s justification for conducting the search—his and bystanders’ protection—was limited in scope to a search aimed at discovering instruments that could be used to assault an officer. *Id.* at 29-30.

<sup>170</sup> See *id.* at 20-21 (“In order to assess the reasonableness of [the police officer’s] conduct as a general proposition, it is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interest of the private citizen, for there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.” (citations omitted)).

<sup>171</sup> 466 U.S. 210 (1984).

<sup>172</sup> *Id.* at 212.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 212-13.

employees could have “simply refused to answer.”<sup>175</sup> The agents were only questioning the employees; this conduct “could hardly result in a reasonable fear that [employees] were not free to continue working or to move about the factory.”<sup>176</sup> Further, while employees may have believed they would be questioned if they tried to leave the building, they should not have reasonably believed “they would be seized or detained in any meaningful way” for doing so.<sup>177</sup> Therefore, looking at the totality of the circumstances, the Court concluded that at all times, a reasonable employee—in a building where INS agents were walking around and standing near all the exits—should have felt free to walk away or refuse to answer, and thus, a seizure had not occurred.<sup>178</sup> No reasonable, individualized suspicion was required to question the individual employees here.<sup>179</sup>

Justice Brennan, in his dissent, argued instead that, based on all the objective factors, a seizure had in fact occurred because “a reasonable person could not help but feel compelled to stop and provide answers to the INS agents’ questions.”<sup>180</sup> Contrary to the majority’s description, the encounter from the viewpoint of the employees was an intimidating show of authority that required individualized suspicion.<sup>181</sup> The inspection was a surprise one, carried out by fifteen to twenty-five agents “who moved systematically through the rows of workers” while showing their badges and asking questions.<sup>182</sup> Employees suspected of being illegal aliens were handcuffed and led away to vans waiting outside, while agents stationed at the exits could prevent others from escaping questioning.<sup>183</sup> Under these “tactics,” the employees could not possibly have felt they could refuse to answer the questions and leave.<sup>184</sup> The agents

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<sup>175</sup> *Id.* at 218. The fact that the inspection occurred at a workplace was also a factor in the Court’s decision: Justice Rehnquist argued that, at work, individuals have an obligation to their employers to remain at work—therefore, their freedom of movement is already somewhat restricted. *See id.* Additionally, Justice Powell in concurrence argued that an employee’s “expectation of privacy in the plant setting . . . certainly is far less than the traditional expectation of privacy in one’s residence.” *See id.* at 224 (Powell, J., concurring).

<sup>176</sup> *Id.* at 220-21 (majority opinion).

<sup>177</sup> *Id.* at 219.

<sup>178</sup> *Id.* at 212, 220-21.

<sup>179</sup> *See id.* at 221.

<sup>180</sup> *Id.* at 229 (Brennan, J., dissenting).

<sup>181</sup> *Id.* at 229-30.

<sup>182</sup> *Id.* at 230.

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

<sup>184</sup> *Id.* at 230-31.

therefore needed to have reasonable and particularized suspicion to question each individual.<sup>185</sup>

Finally, Justice Brennan articulated an important distinction for purposes of immigration law—the difference between a legal and an illegal alien.<sup>186</sup> He argued that “the mere fact that a person is believed to be an alien provides no immediate grounds for suspecting any illegal activity.”<sup>187</sup> In the context of a large-scale inspection like the one at issue, “it is virtually impossible to distinguish fairly between citizens and aliens,” and therefore, the INS needed particularized, reasonable factors to question individuals suspected of being in the country *illegally*, rather than just to question anyone who may be an alien.<sup>188</sup>

As hinted at by the dissent, the *INS v. Delgado* decision was motivated by the strong public interest in curbing illegal immigration.<sup>189</sup> The show of force was so strong that it is not reconcilable with the Court’s previously articulated factors in *Mendenhall*; no reasonable employee in the situation could have felt free to refuse the agents’ questions or to leave the building when officers entered and essentially blocked the exits. Thus, the public policy interest weighed more strongly than the individual interest in privacy. While such a balancing of factors is standard in the Court’s Fourth Amendment cases,<sup>190</sup> it also has a ratcheting effect in that the Court describes more police encounters as “consensual” rather than “seizures”—even if the individual feels they have been detained—as long as the policy interest is strong enough to justify them.

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<sup>185</sup> *Id.* at 232-34. Here, there was no individualized suspicion to question anyone—the INS agents were instructed to interrogate “virtually all persons” in the factory. *Id.* at 233. In response, Justice Brennan argued, “To say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the words of the Fourth Amendment.” *Id.* at 234.

<sup>186</sup> *Id.* at 235.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 235-36.

<sup>189</sup> See César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 167, 176-77 n.40 (2009) (“Since a person might not feel free to leave when the only avenue for leaving a location is blocked by law enforcement officials, the Supreme Court’s decision in *Delgado* that individuals caught in the midst of a workplace inspection by immigration officials were not seized for purposes of the Fourth Amendment suggests that the only distinguishing criterion is that the *Delgado* incident occurred in the immigration context rather than the traditional criminal law context.”).

<sup>190</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968). In *Terry*, the particular interest at issue was the necessity of the police officer to ensure that the individual he was questioning was not dangerous to himself or the surrounding public. *Id.* at 23.

Cases where individuals were stopped during drug searches illustrate the ratcheting effect. In *Florida v. Bostick*,<sup>191</sup> police officers conducting a drug search on a bus questioned the defendant without any articulable suspicion and then searched his belongings with his consent.<sup>192</sup> The defendant argued that in the “cramped confines” of the bus, where police officers essentially blocked the exits and displayed their badges and firearms, he did not feel free to refuse consent either to the questioning or the search of his belongings.<sup>193</sup> The Court held that the mere fact that the encounter took place on a bus did not constitute a seizure per se.<sup>194</sup>

This practice was again upheld in *United States v. Drayton*,<sup>195</sup> where the Court held that police officers conducting a drug search on a bus are not required to inform passengers of their right to refuse cooperation.<sup>196</sup> In *Drayton*, because the police officers did not “brandish” the weapons they were clearly carrying or “make any intimidating movements,” a reasonable passenger would have felt free not to cooperate with the police.<sup>197</sup> In particular, the Court held that because the public knows most law enforcement officers are armed, “[t]he presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.”<sup>198</sup>

As the dissent pointed out in *Bostick*, the practice at issue in these cases occurred within the broader context of the “War on Drugs.”<sup>199</sup> By placing the decision within this framework, Justice Marshall hinted that the public policy was an important factor in the majority’s decision and argued that based on the mere facts alone, a seizure had in fact occurred.<sup>200</sup> The dissent asserted that the practice was “intimidating” and coercive,<sup>201</sup> and the presence of the officers was “threatening.”<sup>202</sup> When armed and uniformed police officers question passengers

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<sup>191</sup> 501 U.S. 429 (1991).

<sup>192</sup> *Id.* at 431-32 (The defendant was carrying cocaine in his luggage and was therefore arrested.).

<sup>193</sup> *Id.* at 435.

<sup>194</sup> *Id.* at 438-39. The case was remanded to the lower court for a determination of whether the conduct of the officers in this particular case, based on all the factors (not just that the encounter occurred on a bus), “communicated to a reasonable person that” he was free not to consent. *Id.* at 439-40.

<sup>195</sup> 536 U.S. 194 (2002).

<sup>196</sup> *Id.* at 206-07.

<sup>197</sup> *Id.* at 203-04.

<sup>198</sup> *Id.* at 205.

<sup>199</sup> *Bostick*, 501 U.S. at 440-41 (Marshall, J., dissenting) (citations omitted).

<sup>200</sup> *See id.* at 440.

<sup>201</sup> *Id.* at 446-47.

<sup>202</sup> *Drayton*, 536 U.S. at 210 (Souter, J., dissenting).

on a bus, effectively blocking the exit, they create “an atmosphere of obligatory participation” in which a reasonable person would not feel free to refuse cooperation.<sup>203</sup> The dissent argued that such a seizure requires reasonable suspicion; without that, such bus sweeps “violate[] the core values of the Fourth Amendment.”<sup>204</sup> Based on the public interest in finding illegal drugs, the Court in these cases found that a seizure had not occurred—despite factors that, objectively, appeared to be exactly those that did require reasonable suspicion in the Court’s prior opinions.

*B. Internal Document Checks on Domestic Vessels Are an Illegal Seizure*

The internal document checks violate the “core values” of the Fourth Amendment, because they are conducted without any reasonable or particularized suspicion.<sup>205</sup> In *Terry*, the Supreme Court asserted that a seizure occurs when a police officer, “by means of physical force or *show of authority*,”<sup>206</sup> has restrained an individual’s freedom to “walk away.”<sup>207</sup> Under the factors articulated in *Mendenhall*,<sup>208</sup> immigration officials inspecting individual passengers on domestic train and bus routes display a coercive amount of power and thus, their actions constitute a seizure. This practice must include reasonable, particularized suspicion, and it must be limited in scope.

The factors here amount to a coercive practice, where ordinary individuals do not feel free to refuse to answer.<sup>209</sup> Fully uniformed and armed immigration officials board trains and buses and ask passengers at random whether they are U.S. citizens.<sup>210</sup> In full view of other passengers, they check

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<sup>203</sup> *Id.* at 212.

<sup>204</sup> *Bostick*, 501 U.S. at 440 (Marshall, J., dissenting).

<sup>205</sup> *See id.*

<sup>206</sup> *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added).

<sup>207</sup> *Id.* at 16.

<sup>208</sup> *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (citations omitted); *see supra* Part II.B.

<sup>209</sup> In researching this issue for the *New York Times*, journalist Nina Bernstein specifically tested whether she could refuse. *See Bernstein II, supra* note 104. When asked whether she was a citizen, she replied, “I don’t want to answer that question.” *Id.* The officers moved on. *Id.* Bernstein, however, was fully aware of the law which allows individuals to refuse consent, and, as she herself pointed out, was “a white woman in jeans who had spoken American English with no accent.” *Id.* She had no further evidence of other individuals refusing consent, because they all answered the officers’ questions. *Id.*

<sup>210</sup> *Id.* (“[H]alf a dozen men in green uniforms with pistols on their hips strode down the platform . . .”).

individuals' immigration documents and passports<sup>211</sup> and remove from the train for further questioning those that do not have their papers.<sup>212</sup> Several immigration officers essentially block the exits, by standing between the passenger and the doors.<sup>213</sup> Moreover, as the dissent pointed out in *Bostick*, "Because the bus is only temporarily stationed at a point short of its destination, the passengers are in no position to leave as a means of evading the officers' questioning."<sup>214</sup> The officers also create an "intimidating atmosphere," by walking among passengers and abruptly asking them questions while clearly armed.<sup>215</sup> Taking away passengers in clear sight of others adds to the officers' demonstration of authority and power, which would make it difficult for a reasonable person to believe they can refuse to answer the officers' inquiries.<sup>216</sup>

Further, to determine whether a police practice violates the Fourth Amendment, courts often balance the government interest at issue with the private interest in privacy.<sup>217</sup> In *INS v. Delgado* and the drug search cases, the public interest in favor of curbing illegal immigration or fighting the war on drugs, respectively, outweighed the private interest in privacy.<sup>218</sup> The random document checks conducted on domestic buses and trains are justified primarily by the aim of fighting terrorism. As demonstrated by changes in immigration law and congressional spending after the September 11 attacks, fighting terrorism has become a national priority.<sup>219</sup> The random passenger surveys conducted on domestic vessels are an outgrowth of those policy changes.

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<sup>211</sup> *Id.*

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

<sup>213</sup> See *United States v. Drayton*, 536 U.S. 194, 211 (2002) (Souter, J., dissenting) ("The officers took control of the entire passenger compartment . . . . The reasonable inference was that the 'interdiction' was not a consensual exercise . . . .").

<sup>214</sup> *Florida v. Bostick*, 501 U.S. 429, 442 (1991) (Marshall, J., dissenting).

<sup>215</sup> See *INS v. Delgado*, 466 U.S. 210, 230, 234 (1984) (Brennan, J., dissenting) ("To say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the words of the Fourth Amendment."); see also NYCLU REPORT, *supra* note 9, at 21 (arguing that "when an armed agent questions passengers on a train or bus, sometimes in the middle of the night with a flashlight glaring at the rider's face, few individuals would feel that they have the right to refuse to answer the agent's questions").

<sup>216</sup> See *Delgado*, 466 U.S. at 230 (Brennan, J., dissenting).

<sup>217</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976) ("In delineating the constitutional safeguards applicable in particular contexts, the Court has weighed the public interest against the Fourth Amendment interest of the individual . . . ." (citations omitted)); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968).

<sup>218</sup> See *supra* Part III.A.

<sup>219</sup> See *supra* Part I.B and C.

Although fighting terrorism is vital, it is questionable whether these types of tactics actually work towards that goal.<sup>220</sup> Most of the arrests that occur as a result of these document checks are for immigration, not criminal, violations; a minuscule percentage are at all related to terrorism.<sup>221</sup> Fighting terrorism is a critical goal—but it is not accomplished by these types of random searches.

On the other hand, the potential for private harm is huge. Individuals who cannot present proper immigration documents are removed from the train or bus and taken to detention facilities or local prisons for further questioning and investigation.<sup>222</sup> According to the NYCLU's Report, the majority of individuals who were arrested and detained could not be released without posting a bond, which could range from \$1500 to \$20,000.<sup>223</sup> The Report postulated that as those arrested had just been traveling, they likely did not have such large amounts of cash on them and probably had to wait several days before being released.<sup>224</sup> Because the Supreme Court has upheld the constitutionality of mandatory detention,<sup>225</sup> once these individuals have been detained, they likely have few legal options that would allow them to be released quickly. Further, under the INA's expedited removal provisions, once they are arrested, certain individuals may even face immediate deportation without judicial or administrative review of their case.<sup>226</sup> Finally, the "exclusionary rule," which holds that evidence found in violation of the Fourth Amendment must be excluded from actions by the government against an individual, does not apply to civil deportation hearings.<sup>227</sup> Even if

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<sup>220</sup> See *supra* note 21 and accompanying text.

<sup>221</sup> See Drost, *supra* note 116; see also *supra* Part I.C.

<sup>222</sup> NYCLU REPORT, *supra* note 9, at 14-15; see also Bernstein, *supra* note 8. In one case, a woman was detained for three weeks before seeing an immigration judge. *Id.*

<sup>223</sup> NYCLU REPORT, *supra* note 9, at 15.

<sup>224</sup> *Id.*

<sup>225</sup> See *Demore v. Kim*, 538 U.S. 510, 527-28, 531 (2003) (holding that Congress can require that individuals be detained during the pendency of their removal proceedings); *United States v. Montoya de Hernandez*, 473 U.S. 531, 543-44 (1985) (holding that the detention of a suspected alimentary canal smuggler for almost sixteen hours before inspectors sought a warrant was not unreasonably long).

<sup>226</sup> See 8 U.S.C. § 1225(c) (2006) for which categories of aliens are subject to expedited removal. Expedited removal may occur simply by an order issued by an immigration official. Because of the speed with which it occurs, and the lack of oversight in the procedure, expedited removal has been heavily criticized as a system that lacks necessary due process protections and subjects aliens who are legitimately seeking asylum to the caprice of "low-level immigration inspection officers," whose decisions are "unreviewable." See Gebisa, *supra* note 62, at 566; see also Wadhia, *supra* note 62, at 392.

<sup>227</sup> See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984).

immigration agents act unlawfully, unlike in an ordinary criminal trial, any illegal immigrant arrested as a result of an illegal search will still be subject to deportation.<sup>228</sup> Further, many commentators have raised concerns about whether this practice amounts to racial profiling.<sup>229</sup> Although immigration agents assert that they randomly question people and do not base suspects on race, at present no limitations ensure that racial profiling is not occurring.<sup>230</sup>

Therefore, although the justification for these transportation checks is, on its face, without fault, the actual results have not borne out this justification. Moreover, the risk of private harm far outweighs the public utility of this practice. Private individuals that are randomly questioned by this procedure, if they are noncitizens and not carrying proper documentation, may be subjected to detention and deportation—and the possible unlawfulness of the procedure will not protect them. This is unjust both because many of the individuals arrested do have lawful status to be in the United States,<sup>231</sup> and because many have been here for long periods of time and have established ties to the country and the right to more constitutional protection than someone entering for the first time.<sup>232</sup> Congress and the DHS should both institute procedures and amendments to ensure that immigration officials proceed carefully and are limited in their actions.

#### IV. PROPOSAL

Congress must act to restrict the practice of randomly questioning individuals traveling on domestic buses and trains

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<sup>228</sup> *Id.* at 1050-51. This is because an immigration violation is considered an ongoing violation, and the Court has argued that,

Applying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary rule.

*Id.* at 1046.

<sup>229</sup> See NYCLU REPORT, *supra* note 9, at 7, 16; Bazar, *supra* note 103.

<sup>230</sup> See NYCLU REPORT, *supra* note 9, at 26 (“While CBP has refused to release its training materials on racial and ethnic profiling, accounts of its operations raise serious concerns that Border Patrol agents resort to racial and ethnic profiling techniques to determine who to stop, question or arrest. Such accounts indicate that even if CBP policy expressly forbids racial and ethnic profiling, additional guidance and training of Border Patrol officers is necessary to ensure appropriate compliance.”)

<sup>231</sup> *Id.* at 6-7.

<sup>232</sup> See *supra* notes 24-27 and accompanying text.

about their immigration status by amending the INA to define the parameters of a permissible stop and inquiry more narrowly. The Supreme Court in *United States v. Brignoni-Ponce*<sup>233</sup> held that beyond the border or its functional equivalent, officers in roving patrols can only stop individuals if they have reasonable suspicion to believe they are illegal aliens.<sup>234</sup> This same standard should be applied to the transportation checks at issue here. Border Patrol agents must have reasonable suspicion to stop and question someone on the train or bus about their immigration status.<sup>235</sup>

Further, as in *Brignoni-Ponce* and *Terry*, the search must be limited in scope.<sup>236</sup> There is a difference between believing that someone is an alien, an illegal alien, or a terrorist.<sup>237</sup> If immigration agents believe that such transportation checks are necessary to stop terrorism and to curb illegal immigration, they must have reasonable suspicion—specifically, articulable facts—to believe that the individual they are questioning is either a terrorist or an illegal alien.

The INA itself provides a model for the framing of this amendment. The INA states that immigration officials have the authority to “conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have *reasonable cause* to suspect that grounds exist for denial of admission to the United States.”<sup>238</sup> The “reasonable cause” limitation should be added to the other parts of the statute as well, requiring that officers may interrogate individuals suspected of being illegal aliens, or board vessels to search for illegal aliens, only if they have “reasonable cause” to suspect that the individual is an illegal alien or a terrorist.

Finally, Congress should act pragmatically when enacting this amendment by requiring that the DHS train immigration officials on determining what constitutes reasonable suspicion and when they may question individuals on suspicion that they

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<sup>233</sup> 422 U.S. 873 (1975).

<sup>234</sup> *Id.* at 881-82. Specifically, officers must be “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.” *Id.* at 884.

<sup>235</sup> See NYCLU REPORT, *supra* note 9, at 25-26.

<sup>236</sup> See *Brignoni-Ponce*, 422 U.S. at 881; *Terry v. Ohio*, 392 U.S. 1, 29 (1968) (holding that a stop and search inquiry must be “reasonably related in scope to the justification for [the] initiation”).

<sup>237</sup> See *INS v. Delgado*, 466 U.S. 210, 235 (1984) (Brennan, J., dissenting).

<sup>238</sup> 8 U.S.C. § 1357(c) (2006) (emphasis added).

are in the country illegally or are involved in terrorism. In particular, this training should address the issue of racial profiling to ensure that the officers' determinations are based on more than race.<sup>239</sup> This training program can be modeled on the USCIS Asylum Division Training Section, a "national training course that is specific to asylum adjudicators."<sup>240</sup> Asylum officers are required to attend periodic trainings both in national offices and in their regional offices that educate them on the relevant asylum law, how to properly adjudicate applications, and interviewing and writing skills, among other topics.<sup>241</sup> Officers are also required to attend periodic trainings to update their skills and their knowledge of the field.<sup>242</sup>

A similar training program can be instituted for Border Patrol agents who investigate domestic trains and buses. Like the asylum officers, Border Patrol officers can be required to learn about Fourth Amendment case law and its proper application in the field. Further, officers can learn the proper evidentiary standards required to question passengers and the factors that may have more relevance to making a decision about investigating passengers. Officers can also receive training on questioning passengers in less obtrusive ways.

Although the Border Patrol has recently taken steps to curb the practice of searching domestic trains and buses for illegal immigrants, and has stated that it will conduct searches only when it has information regarding a threat,<sup>243</sup> these changes have not been codified in any formal agency policy, rule, or law.<sup>244</sup> To ensure that long-term changes are made to the practice, Congress should enact formal changes to the INA, and the DHS should put in place ongoing training courses for its Border Patrol agents.

The Fourth Amendment protects individuals from unreasonable searches and seizures. When immigration officials, with no articulable reason, question passengers traveling on domestic train and bus routes about their immigration status, they violate this fundamental mandate of the U.S. Constitution.

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<sup>239</sup> See *Brignoni-Ponce*, 422 U.S. at 885-87 (stating that an individual's Mexican ancestry, alone, does not provide such facts and is therefore an illegal reason to stop and question an individual, although Mexican appearance is a "relevant factor").

<sup>240</sup> *Asylum Division Training Programs*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2a1d1a877b4bc110VgnVCM1000004718190aRCRD&vgnnextchannel=3a82ef4c766fd010VgnVCM1000000ecd190aRCRD> (last updated Apr. 12, 2011).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> NBPC Press Release, *supra* note 34.

<sup>244</sup> *U.S. Relaxes Canadian Border Checks as Agents Are Told to Stop Searching Buses, Trains and Planes for Illegal Immigrants*, *supra* note 32.

Congress and the DHS must work together to set clearer limitations on the practice and to train immigration officials in the proper ways to conduct investigations.

#### CONCLUSION

In the years following the September 11 terrorist attacks, immigration became linked with terrorist activity in the public mind. Congress and the President responded by enacting policies to curb illegal immigration with the principal aim of fighting terrorism. In particular, they established one agency, the DHS, to oversee both immigration and national security and made explicit the administration's view that immigration and terrorism were intricately linked. Congress also increased funding to the newly-created government agencies whose purpose became to secure the national borders in order to fight terrorism.

As a result of these actions, the fear of terrorism and terrorists has become a fear of illegal immigration, and the overall climate of fighting illegal immigration has led to a policy whereby immigration agents board domestic trains and buses and freely question all passengers regarding their citizenship and immigration status. This practice has been justified as a terrorism-fighting measure, but it has not resulted in the capture of any terrorists. Instead, agents have arrested students and other individuals who have resided in the country for years.<sup>245</sup>

President Barack Obama has argued that individuals who have been in the United States since they were children should not be treated in the same way as other illegal immigrants.<sup>246</sup> He supported passage of the Dream Act, legislation that would have enabled individuals that had been in the country since childhood and had completed college or military service in the United States to become citizens.<sup>247</sup> Though the bill was defeated in the Senate,<sup>248</sup> the official sanction for such a law demonstrates that not all aliens, who may technically be illegal, should be treated alike.

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<sup>245</sup> Bernstein, *supra* note 8.

<sup>246</sup> Herszenhorn, *supra* note 27.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

The random interrogation of passengers traveling on domestic routes unjustifiably subjects them to an unconstitutional intrusion on their personal privacy. Legislative and administrative action must limit this practice in its scope.

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