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Constitution-Free Zones: How the Fourth Amendment Rights of Americans are Violated at and Near the Border



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[CONSTITUTION-FREE ZONES: HOW THE FOURTH AMENDMENT RIGHTS OF AMERICANS ARE VIOLATED AT AND NEAR THE BORDER](#)

[September 20, 2021](#) by [Camila Valdivieso](#) [comment \(1\)](#)

A NOT SO “WELCOME HOME” ON A SCORCHING SUMMER DRIVE ACROSS THE BORDER

Imagine driving through miles upon miles of dry, barren, flat roads into Laredo, a border town in southern Texas, on a scorching hot August day. You are returning home after a long trip to Mexico. The car is packed with your belongings. You—a United States citizen who works in the rail industry selling American goods—are with your spouse and your three children. Upon arrival at the port of entry in Laredo, despite everyone’s paperwork being in order, you are stopped for a secondary inspection. Border Patrol agents question you aggressively: who are you; why you are entering the United States; where you are going; what do you have

in your vehicle; are these children in the vehicle yours; are you bringing drugs into the United States?

You begin to respond to the agent's questions just as your two-year old begins to cry in the backseat. She needs a diaper change. Temperatures have now exceeded 100 degrees. The officer refuses to let you out of the car. The officer prohibits your family from exiting the car. Your baby is in incredible discomfort from sitting in her own waste.



[jplenio](#) from [Pixabay](#).

Your spouse, who was not born in the United States, but who does have legal status, is forced to enter the agent's office. The Border Patrol agents do not inform your spouse about the purpose of this detainment. He is surveilled. Watched. His long hair and accent surely catalogued in the agents' minds.

After receiving no explanation for your detainment, and amid your baby's continued cries, you demand answers. You invoke your [right to be free from such an intrusive and arbitrary procedure](#). You are livid that you have been prohibited from taking care of your baby. Without explanation, nor anything that resembles rhyme or reason, your spouse has apparently been taken into custody. You assert that you will file a complaint, or sue every single officer present, if

your baby gets so much as a diaper rash on account of their actions.

Finally, the agents' supervisor comes outside. He explains that they had caught a "fake family" attempting to traffic drugs into the United States two weeks prior. Now they were randomly conducting searches of families entering the country. You are finally allowed to exit the vehicle and change your baby. The officers search your vehicle. They rifle through all of your personal belongings, allegedly in search of drugs. They find nothing. The supervisor offers you an empty apology. You know they will do it again. You know they will do it again to someone else who will not have the agency—the audacity—to confront their behavior in the same way.

After nearly two hours, in the heat, you are finally free to go.

The protagonist in the above narrative was my mother. I was about seven years old at the time. I remember being uncomfortable, hot, and confused. But my mother, who understood the gravity of the situation, was both furious and afraid. However, she only showed her rage—not her fear—so as to not allow the agents, who so often act with impunity, to take advantage of any visible vulnerability.

THE FOURTH AMENDMENT AND CUSTOMS AND BORDER PROTECTION AUTHORITY



Nancy

Hill from Pixabay.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. XIV.

Border Patrol continues to abuse their authority to this day. In 2008, an engineer who crossed a checkpoint at least twice a week to attend class was asked by a Border Patrol agent whether she was a drug dealer. In response, she nervously produced her documentation including her student identification and even school materials. In retrospect, she worried about what would have happened if she had not had her documentation. Additionally, as a result of this encounter, she realized that Border Patrol had been tracking her movements because the agent who stopped her told her he suspected her of drug dealing because of the frequency with which she crossed the particular checkpoint.

In 2019 a group of international travelers, 11 U.S. Citizens and 1 permanent resident, sued U.S. Customs and Border Protection for

violating their constitutional right to be free from unreasonable searches and seizures. CBP searched their phones without a warrant, copied the information onto government computers, and some devices were seized for up to 56 days. Although a Massachusetts District Judge found CBP's conduct unreasonable, the order failed to require that the government have a warrant for future searches. The order also failed to require that the travelers' data be removed from government servers.

Government agencies like U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) routinely abuse their authority to violate people's constitutional rights. It happened to my family, and it continues to happen to countless people at or near the country's borders, primarily the Southern border.

The primary goal of the Fourth Amendment is to protect people's right to privacy and to be free from unreasonable, or arbitrary stops and searches. Law enforcement officers generally must have a warrant, probable cause, or reasonable suspicion, or an exception to the warrant requirement to conduct a search. Some exceptions to the warrant requirement include consent; emergencies such as safety, hot pursuit, and destruction of evidence; and if the search occurs incident to a lawful arrest. Fourth Amendment rights are violated when the government violates what is termed an individual's "reasonable expectation of privacy." This means that for government conduct to constitute a violation of the Fourth Amendment, one must first have an expectation of privacy in the place that is searched or in items that are seized. This expectation of privacy is also one that we as a society would consider to be normal. For example, private homes are typically regarded as intimate spaces, and as such, a place within which Americans have a reasonable expectation of privacy.

The Supreme Court has devised a [balancing test](#) for privacy rights where the border is concerned. Under this test, an entrant's privacy rights are weighed against the government's security interests at the border. Accordingly, the Supreme Court has [held](#) that individuals have a reduced expectation of privacy at the border because the government's interest in monitoring and controlling entrants outweighs an individual's privacy interests. The Court's finding renders routine searches without a warrant, probable cause, or reasonable suspicion at the border, inherently reasonable and thus justified. This Court-created principle is called the "border search exception" and applies only to the "[narrow purpose of enforcing immigration and customs laws, which entails ensuring that required duties are paid on imported goods and that harmful goods and people do not enter the country.](#)" Other government interests, such as general crime control, are not included within the scope of the exception. In other words, the government's interests in keeping the border safe have been found by the court to be more important than the rights of people crossing the border to be free from random searches.



[Zahra](#)

[Amiri](#) on [Unsplash](#).

Further, CBP are given statutory [authority](#) to "[any alien or person believed to be an alien . . . \[and\] to arrest any alien](#)" seen unlawfully entering or attempting to enter the United States, "to board and search for aliens" on any "aircraft, conveyance, or vehicle . . . within a reasonable distance from any external boundary of the United

States." That is, the statute authorizes CBP to question, inspect, and arrest anyone they suspect is not a citizen of the United States. Although "reasonable distance" is not defined within the statute, the government implemented a [federal regulation](#) in 1953, which established the distance as 100 miles from any external boundary, including all coasts and waterways. Additionally, the same regulation gives case-by-case discretion to the Commissioner of CBP and the Assistant Secretary for ICE, to determine that a larger distance may be reasonable. Usually, such discretion is applicable only under unusual circumstances. However, there is [evidence](#) that CBP officers frequently conduct searches [further than 100 miles](#) from the border without any overhead supervision and under routine circumstances.

The federal regulation gives CBP broad authority to conduct warrantless searches in the name of national security. As a result, areas within 100 miles of the country's northern and southern borders are rendered "[constitution-free](#)" zones. For reference, this is about the distance between [San Francisco and cities in the Central Valley](#) in California or between [New York City and Hartford, Connecticut](#) in the East Coast. Due to the inclusion of ocean and waterways, coastal regions, including the east coast cities of Washington D.C., New York City, Philadelphia, and Boston, as well as large sections of the states of California, Oregon, and Washington on the west coast are also subject to a diminished level of constitutional protection. [CBP also has virtually unchecked authority](#) in the entire states of Connecticut, Delaware, Florida, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Vermont because these states are all within 100 miles of the border. CBP Agents also have authority to use [race and ethnicity factors](#) to stop and search people in these zones.

These areas are called constitution-free zones because [CBP frequently disregards Fourth Amendment constitutional](#) protections while operating in these areas. However, while CBP considers warrantless searches at the border inherently

reasonable, federal circuit courts have determined that CBP cannot pull anyone over without reasonable suspicion of an immigration violation or crime in the interior. Further, courts have also determined that Border Patrol cannot search vehicles within the 100-mile zone without a warrant or probable cause outside of ports of entry. Yet, CBP interprets the statute and accompanying regulation as granting them the authority to “conduct operations far removed from the border and on roads with no immediate border access.” Thus, CBP conducts internal checkpoints that are arguably beyond their jurisdiction—since ICE is responsible for enforcement of immigration laws in the interior—resulting in frequent, even routine, encounters with U.S. citizens and legal permanent residents.

WHERE “THE PEOPLE” BECOME SECOND CLASS CITIZENS OR “THE PEOPLE*”



Lynn

Melchiori from Pixabay.

My family and I are not alone in this experience, unfortunately it is one that we share with many others across the country. Nor is it an example of the agency's most egregious conduct. CBP and Border Patrol agents regularly conduct intrusive stops of folks crossing the border at ports of entry, as well as at airports and interior checkpoints. People [who live on or within 100 miles of the border](#) in places like South Texas, Southern California, New Mexico, and Arizona, are subject to frequent contact with CBP agents through these internal checkpoints. Individuals who are not crossing the border, and others who have never crossed the border, are often subject to arbitrary stops and searches at these checkpoints.

[An anthropological article](#) focusing on life in these constitution-free zones outlined the varied experiences of residents living in South Texas, including a couple instances of CBP's most egregious conduct. The authors explore life in these constitution-free zones through the lens of the United States as a [carceral state](#), which is defined as a "spatially concentrated, more punitive, surveillance and punishment-oriented system of governance." The authors center the concept of "[carcelment](#)," which refers to modes of surveillance, discipline, and the "prisoning of non-prison spaces." From this lens, constitution-free zones are used by the government as a way to deprive people of their liberty without due process of law, while outside the physical strictures of a prison. Thus, those living in constitution-free zones are surveilled, monitored, and deprived of freedom of movement in a way similar to those in prison.

1,950-mile-long open wound,
dividing *a pueblo*, a culture,
running down the length of my
body,
staking fence rods in my flesh,
splits me splits me,
me raja me raja.

This is my home,
this thin edge of
barbwire.

But the skin of the earth is
seamless.
The sea cannot be fenced,
el mar does not stop at borders.
To show the white man what she
thought of his
arrogance,
Yemayá blew that wire fence down.

This land was Mexican once,
was Indian always
and is.
And will be again.

Gloria Anzaldua, [Borderlands/La](#)

[Frontera: The New Mestiza](#).

In this context, an [attorney in South Texas](#) explains that a checkpoint at Falfurrias, Texas is “the equivalent of the border.” He clarifies that, “whatever rights you had normally within the United States are not present within 100 miles of the border” because “the feds say . . . we can do whatever the heck we want all in the name of national security.”

Another one of the interviewees, who is a naturalized U.S. citizen, struggles with the irony that while he is willing to risk his life to defend the Constitution, he is treated as less than a full citizen by virtue of where he lives. He describes what this experience is like:

“we are the people [but] with an asterisk on the side.” The asterisk signifies that they have less rights than those who live outside constitution-free zones, which renders them second-class citizens because they are deprived of the protections that people farther removed from the border enjoy.

On one end of the spectrum, there are minor nuisances those living in constitution-free zones frequently experience. For example, in one instance, Border Patrol agents tore the wrapping of a couch in the back of the driver’s truck to check for drugs, without any basis for reasonable suspicion. The driver was just helping a friend move his furniture. Another interviewee, a college student, vented about Border Patrol’s use of intimidation, which he expressed made him feel like even being a U.S. citizen was not enough to be worthy of protection by the country’s constitution. Another U.S. citizen college student shared that Border Patrol agents aggressively questioned him when he drove to San Antonio to vote on Election Day in the city where he was registered to vote.

Even the authors of the article were asked whether their children belonged to them while crossing a checkpoint at the time of their study.

Women Bear the Brunt of CBP’s Conduct in Constitution-Free Zones

Unfortunately, encounters with CBP are not just cumbersome. Women are often subject to violent searches and seizures. In one instance, a woman returning from Ciudad Juarez, Mexico to the United States, was attacked by a drug-sniffing dog. The CBP agents frisked her, strip-searched her, and probed her genitals with their fingers. Though they found nothing, the agents handcuffed her, and transported her to a hospital in El Paso, Texas. There, the agents ordered doctors to observe her bowel movements, conduct vaginal probes, a specular exam, a CT scan, and other

examinations without a warrant, or even reasonable suspicion. Still, they found nothing. [She sued CBP and the hospital.](#)

In another instance, which took place in Brownsville, Texas, [a woman was violently apprehended by a CBP agent as she was leaving work in her car.](#) The CBP agent arrived with flashing lights and told her to exit the car. After the agent searched her car and purse and found no contraband. The agent threw her to the ground, pinned her down, and handcuffed her. When the fire department arrived, they had to cut the handcuffs off because of how tight the agent had fastened them. As a result of the agent's brute force, she could not walk and suffered a miscarriage the next day. [She sued CBP and the individual agent.](#)

Even if the agents had found contraband in either of the above instances, whether the agents' conduct would have been reasonable is at best arguable. Generally, [a stop and frisk](#) is limited to a pat down search of the outer clothing for the purpose of ensuring officer safety. The women, who were both unarmed, posed no such a threat to the agents and thus their conduct was unreasonable.

**PEOPLE WHO LIVE NEAR THE
BORDER SHOULD NOT BE
RENDERED SECOND CLASS
CITIZENS IN THE HOLLOW
INTEREST OF NATIONAL SECURITY**



John

Hain from Pixabay.

Since coastal towns in the United States are among the most populated, almost two-thirds of the U.S. population lives within constitution-free zones. This means that hundreds of thousands of people could be, and many are, subject to arbitrary stops and searches every day by virtue of where they live. More significantly, 75 percent of the country's Latinx population and 72 percent of the country's people of color population live within constitution-free zones. A study by the organization People Helping People in the Border Zone, found that Latinx folks were 26 times more likely to be asked for identification at checkpoints and 20 times more likely to be sent for secondary inspection than white folks. According to CBP's own data, only two percent of total CBP arrests of non-citizens in 2017 at internal checkpoints were of deportable individuals. Data shows that these internal checkpoints permitted by the creation of constitution-free zones do not support CBP's stated interest in curbing illegal immigration. Rather, they

serve to surveil, intimidate, and criminalize communities of color living near the border.

My family's experience was and continues to be far too commonplace. My mother has the privilege of light skin and speaks English without an accent. She has a college education and for a long time, she worked as an executive selling American goods abroad. In her travels, she learned to be assertive and entitled when she encountered customs officers at airports or at ports of entry at the U.S.-Mexico border. She learned this was the only way the agents would not take advantage of her. This is how we made it out of the border stop on that scorching hot August day in two hours instead of five or six, or at all. But not everyone has these same privileges. The Constitution applies to everyone in the United States regardless of the privileges they may or may not hold. No one should have to put on a brave face to avoid being abused by an inherently racist and xenophobic institution.

CBP should not have the plenary, nearly unchecked discretion that section 1357, the 1953 federal regulation, Supreme Court, and federal district courts grant it to essentially bypass individuals' Fourth Amendment right. People's individual rights should not be sacrificed in a hollow, uncorroborated, and contested interest in furthering national security. CBP and Border Patrol agents should not be allowed to use their discretion in border zones as carte blanche to arbitrarily question, detain, abuse, and criminalize communities.

We deserve better. Our Constitution demands better