



Immigration Arrests in the Interior of the United States: A Brief Primer

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[U.S. Immigration and Customs Enforcement \(ICE\)](#), a component of the Department of Homeland Security (DHS), is primarily responsible for immigration enforcement in the interior of the United States. ICE has substantial authority to arrest and detain non-U.S. nationals (aliens) identified for removal because of immigration violations. In recent years, there has been a marked [increase](#) in arrests and removals conducted by ICE. Sometimes these arrests have been conducted as part of large-scale “sweeps” or “raids” [involving the arrest of hundreds of individuals](#). These large-scale enforcement actions have [prompted complaints](#) by some that they [instill panic and fear](#) in immigrant communities, along with criticism that they may lead to [separation of U.S. citizen children from their unlawfully present alien parents](#). In response, ICE [asserts](#) that it does not conduct raids indiscriminately, but targets those who have criminal charges or shown “blatant disregard for U.S. immigration laws.” The agency also [argues](#) that these enforcement actions are safely executed and [deter](#) future immigration law violations. This Legal Sidebar provides an overview of ICE’s power to conduct arrests and other enforcement actions.

ICE’s General Authority to Arrest and Detain

ICE was established following the [creation of DHS](#) in 2003. The agency’s [stated mission](#) is “to protect America from the cross-border crime and illegal immigration that threaten national security and public safety.” ICE officers’ authority to arrest aliens believed to have committed immigration violations derives primarily from two federal statutes: Sections 236 and 287 of the Immigration and Nationality Act (INA).

[INA § 236\(a\)](#) provides that an immigration officer may arrest and detain an alien who is subject to removal upon issuance of a “[Warrant for Arrest of Alien](#).” This administrative arrest warrant (ICE Warrant) may be issued with a [Notice to Appear](#) (NTA), the charging document that initiates formal removal proceedings, or “at any time thereafter and up to the time removal proceedings are completed.” DHS [regulations](#) provide that the ICE warrant may be issued only by certain designated immigration officials (e.g., a supervisory officer). In addition, an ICE warrant is issued exclusively for use by immigration officers. Reviewing courts have recognized that this administrative warrant [may not serve as the basis for](#) state or local law enforcement officials to arrest and detain an alien, except when done under the terms of a cooperative agreement with federal authorities under [INA § 287\(g\)](#).

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While an immigration-related arrest generally requires an ICE warrant, [INA § 287\(a\)\(2\)](#) lists two circumstances when an ICE warrant is not required for an immigration officer to arrest an alien for a suspected immigration violation:

- (1) The alien, in the presence or view of the immigration officer, is entering or attempting to enter the United States unlawfully; or
- (2) The immigration officer has “reason to believe” that the alien is in the United States in violation of law and is likely to escape before a warrant can be obtained.

The immigration officer must also have completed immigration law enforcement training and be one of the designated immigration officers who have the warrantless arrest authority under [DHS regulations](#).

While this Sidebar focuses on ICE officers’ authority to arrest aliens for immigration violations that render them removable, it bears mentioning that ICE [frequently investigates and arrests persons](#) who may potentially be subject to both criminal prosecution and removal proceedings (e.g., [transnational criminal street gangs](#)). [INA § 287\(a\)](#) permits [designated immigration enforcement officers](#), during the course of their immigration enforcement duties, to make warrantless arrests of aliens and other persons for criminal offenses in specified circumstances (e.g., when the offense is committed in the officer’s presence, or the officer has reason to believe the suspect committed a felony and would likely escape before a warrant could be obtained). [DHS regulations](#) require the immigration officer to advise the person being arrested of his or her legal rights, and to arrange promptly for that person’s initial appearance before a federal magistrate or district court judge.

Limitations to ICE’s Arrest Authority for Civil Immigration Violations

Generally, upon issuance of an ICE warrant, or “reason to believe” that an alien is removable and likely to escape, an authorized immigration officer may arrest and detain an alien. But there are constitutional restrictions on this arrest authority. The Fourth Amendment’s protections against unreasonable searches and seizures [apply to](#) immigration-related arrests and detentions. Thus, [reviewing courts have interpreted](#) the “reason to believe” standard for warrantless immigration arrests to be the equivalent of [probable cause](#). Under this [standard](#), the immigration officer must have sufficient facts that would lead a reasonable person to believe, based on the circumstances, that the alien has violated federal immigration laws *and* is likely to escape before an ICE warrant can be obtained.

The Supreme Court also has held that the Fourth Amendment’s prohibition against unreasonable seizures precludes the use of [excessive force](#) during an arrest. Thus, [DHS regulations](#) provide that “non-deadly force” may be used only when the immigration officer reasonably believes that such force is warranted, and that a “minimum” level of non-deadly force should be employed unless circumstances warrant a greater degree of force. And the regulations instruct that “deadly force”—defined as “any use of force that is likely to cause death or serious physical injury”—may be used only when the officer reasonably believes that such force is necessary to protect the officer or others from death or serious harm. The [regulations](#) also prohibit the use of threats or physical abuse to compel an individual to make a statement or waive his or her legal rights.

The Supreme Court has also [long held](#) that the Fourth Amendment prohibits the government’s nonconsensual entry into a person’s *home* without a judicial warrant. This restriction may also extend to other areas where there is a [reasonable expectation of privacy](#), such as the [non-public part](#) of a [workplace or business](#). Unlike *judicial* warrants, ICE warrants are [purely administrative](#), as they are neither reviewed nor issued by a judge or magistrate, and therefore [do not confer the same authority](#) as judicially approved arrest warrants. Applying these principles, some courts [have ruled](#) that ICE agents violated the Fourth Amendment by forcibly entering homes without a judicial warrant, when no exigent circumstances or other exceptions to general Fourth Amendment requirements existed. Thus, immigration authorities

would generally be unable to enter homes and non-public parts of a business absent [exigent circumstances](#) (e.g., risk of harm to the public, potential destruction of evidence) [or the owner's consent](#).

ICE also has a [longstanding policy](#) of not taking enforcement actions (i.e., arrests, interviews, searches, and surveillance) at certain “sensitive locations,” which include schools (including postsecondary institutions), hospitals, places of worship, and the sites of funerals, weddings, or other public religious ceremonies. There are [exceptions](#) if the enforcement action implicates national security or terrorism, or if there is an imminent danger to public safety, an imminent risk of destroying evidence, or “prior approval” for entering the “sensitive location.” Although ICE has [not included](#) courthouses as a “sensitive location” where immigration enforcement actions are limited, a federal district court has [ruled](#) that the agency lacks authority to conduct arrests inside Massachusetts state courthouses. The court [reasoned](#) that there is a long-established common law privilege against civil courthouse arrests, and that Congress did not clearly abrogate this privilege when it gave DHS statutory authority to conduct civil immigration arrests. Additionally, the State of New York has [barred](#) ICE arrests inside courthouses without a judicial warrant, and the New Jersey Chief Justice has issued a [directive](#) discouraging such arrests.

Immigration-Related Arrest and Detention Process

DHS [regulations](#) provide that, upon an arrest (with or without an ICE warrant), the immigration officer must promptly identify himself if it is practical and safe to do so, and inform the alien of the reason for the arrest. If the arrested individual claims to be a U.S. citizen, [ICE guidelines](#) require the immigration officer to assess any evidence of citizenship before taking that individual into custody. Before transporting the alien to an ICE facility, the officer [may search](#) the alien “as thoroughly as circumstances permit.” The alien must be [transported](#) “in a manner that ensures the safety of the persons being transported,” and the alien “shall not be handcuffed to the frame or any part of the moving vehicle or an object in the moving vehicle,” or left unattended during transport.

Typically, an alien arrested under an ICE warrant is taken into custody pending removal proceedings. At any time during those proceedings, ICE [may decide](#) to release the alien (but in some cases, such as when aliens have committed specified crimes, detention is [mandatory](#)). If an alien is arrested *without an ICE warrant*, DHS [regulations](#) require the alien to first be “examined by an officer other than the arresting officer,” unless no other qualified immigration officer is “readily available.” If the examining officer determines there is sufficient evidence that the alien has committed an immigration violation, the alien will be [issued](#) an NTA and placed in removal proceedings. ICE must decide [within 48 hours](#) of a warrantless arrest whether to issue an NTA *and* whether to keep the alien detained. In “[an emergency or other extraordinary circumstance](#),” the regulations permit ICE [to exceed](#) the 48-hour time limitation and make its charging and custody determinations “within an additional reasonable period of time.”

If an alien is placed in [formal removal proceedings](#) and then issued a final order of removal, the alien is generally [subject to detention](#) pending efforts to secure removal (though aliens [usually must be released](#) from custody if removal is not effectuated within a certain period). If the alien is not in ICE’s physical custody, the agency will typically issue a “[Bag and Baggage](#)” letter directing the alien to report to ICE so removal may be effectuated. If the alien fails to surrender, ICE may arrest the alien under an administrative [Warrant of Removal](#). But as noted above, an administrative warrant [does not confer authority](#) to enter a home or private area. And the immigration officer’s ability to arrest the alien may also be restricted by ICE’s “[sensitive locations](#)” policy.

Routine Questioning and Brief Investigative Detentions

ICE also has authority to conduct interrogations and brief detentions as part of an investigation into possible immigration violations. INA § 287(a)(1) states that an immigration officer may, without a warrant, “interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.” But the exercise of this authority is subject to constraint under the Fourth Amendment. The Supreme Court has [declared](#) that law enforcement officers do not violate the Fourth Amendment by [merely questioning](#) individuals in public places. Therefore, in *INS v. Delgado*, the Court held that immigration officers [did not violate](#) the Fourth Amendment by entering factory buildings (which the Court treated as “public places” because the officers had acted on either a warrant or the employer’s consent) and questioning employees about their citizenship, even if there were armed officers stationed near the exit doors. The Court reasoned that the questioning was “nothing more than a brief encounter” that did not prevent the employees from going about their business.

The Supreme Court, however, has long [held](#) that certain, more intrusive encounters that do not rise to the level of an arrest, such as a brief detention or “stop and frisk,” may be justified only if there is reasonable suspicion that a crime is afoot. This standard, [lower](#) than the probable cause threshold for an arrest, requires specific, articulable facts—rather than a mere hunch—that reasonably warrant suspicion of unlawful activity. The Supreme Court [has applied](#) this standard to immigration-related detentions. For example, in *United States v. Brignoni-Ponce*, the Court [held](#) that random automobile stops near the border to question the occupants about their immigration status require reasonable suspicion that the occupants are aliens who may be unlawfully present in the United States. (Conversely, in *INS v. Delgado*, immigration authorities [did not require](#) any individualized suspicion to question factory employees because they were not being detained.)

The Supreme Court has not decided, more generally, whether immigration authorities may briefly detain individuals solely on a reasonable suspicion that they are aliens, absent reasonable suspicion of their unlawful presence. [Some lower courts](#), however, [have ruled that](#) an immigration officer may not detain an alien to investigate his or her immigration status (e.g., stopping a pedestrian on the street) absent reasonable suspicion of the alien’s unlawful presence. And some [courts have held that](#) the officer may not rely solely on “generalizations,” such as an individual’s appearance, ethnicity, or inability to speak English, to establish reasonable suspicion.

Reflecting some of these Fourth Amendment constraints, DHS [regulations](#) provide that an immigration officer may question an individual so long as the officer “does not restrain the freedom of an individual, not under arrest, to walk away.” But an immigration officer may “briefly detain” an individual for questioning only if there is reasonable suspicion that the person is “engaged in an offense against the United States or is an alien illegally in the United States.” The information obtained from the immigration officer’s questioning “may provide the basis for a subsequent arrest” (e.g., if the immigration officer forms probable cause that the alien is unlawfully present in the United States).

Worksite Inspections

ICE also has statutory authority to conduct worksite inspections to enforce federal immigration laws on the employment of aliens. Under INA § 274A, it is unlawful for “a person or other entity” knowingly to employ an “unauthorized alien,” defined as an alien who is not lawfully admitted for permanent residence or otherwise authorized to be employed in the United States. The statute requires an employer to complete a [Form I-9](#) attesting that a person hired for employment is not an unauthorized alien. The employer must also retain the I-9 form for inspection for three years after the hiring. DHS [regulations](#) allow ICE to conduct the inspection at the employer’s place of business with at least three business days’ notice. I-9 site inspections do not require an administrative or judicial warrant, or probable cause of an immigration violation. Under DHS [regulations](#), ICE may conduct a worksite inspection so long as there is reasonable

suspicion that there are aliens at the site who are “illegally in the United States” or “engaged in unauthorized employment.”

Mirroring the Fourth Amendment’s restrictions, DHS [regulations](#) provide that an immigration officer conducting an inspection may not enter the *non-public* areas of a business, a residence, a farm, or other outdoor agricultural operation (excluding private lands near the border) to question the occupants or employees about their immigration status in the absence of a judicial warrant or the property owner’s consent. But the immigration officer may enter publically accessible parts of a business without any warrant, consent, or reasonable suspicion of the unlawful presence of aliens. As noted above, the Supreme Court in *INS v. Delgado* [held](#) that immigration officers who had legally entered worksites could briefly question employees about their citizenship as long as the employees were not restrained. But some [lower courts have ruled](#) that *detaining* employees during such questioning, without permitting them to leave, is unconstitutional absent reasonable suspicion.

Congressional Activity

In recent years several legislative proposals have been introduced concerning ICE’s ability to conduct immigration enforcement actions. Some of these bills have sought to statutorily constrain certain types of immigration enforcement activities. For example, the [Protecting Sensitive Locations Act](#) would essentially codify ICE’s “sensitive locations” [policy](#) and expand the range of locations where the agency may not engage in enforcement actions (e.g., any medical treatment facility, law offices, domestic violence shelters, congressional district offices, courthouses, school bus stops). Other recent bills would [preclude ICE from entering into agreements](#) allowing state and local authorities to enforce federal immigration laws; require immigration officers [to advise detained aliens of their rights](#) to counsel and to remain silent; require the release from custody of aliens who are members of a “[vulnerable population](#)” (e.g., those with “nonfrivolous” claims to U.S. citizenship, pregnant women, and those over age 65); and prohibit immigration officers from [wearing any clothing or accessories](#) that bear the word “police” while performing their duties.

At the same time, there have been legislative proposals that would expand ICE’s immigration enforcement powers. For instance, recent bills would [increase the classes of aliens who would become subject to removal](#) (e.g., aliens associated with criminal gangs), [increase the scope of aliens subject to mandatory detention](#) (e.g., unlawfully present aliens arrested for, but not yet convicted of, certain criminal offenses), or [require ICE](#) to enter into written agreements with state and local authorities to enforce federal immigration laws. With additional large-scale enforcement activities [potentially on the horizon](#), Congress may consider these and other legislative proposals that would clarify the scope and limitations of ICE’s immigration enforcement power.

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