

Illegal Immigrants and the Fourth Amendment

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Yesterday, in [United States v. Portillo-Munoz](#), the Fifth Circuit held that illegal immigrants do not have Second Amendment rights. The defendant in the case was charged with being an illegal alien in possession of a firearm, in violation of 18 U.S.C. § 922(g)(5). He argued that the statute was unconstitutional, but the court concluded that "[w]hatever else the term means or includes, the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States." It reasoned that "[i]llegal aliens are not 'law-abiding citizens' or 'members of the political community,' [terms previously used by the Supreme Court in describing the Second Amendment's reach] and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood."

That holding is significant in its own right, but the court's discussion of the Fourth Amendment is potentially even more consequential. The defendant argued that the Fourth Amendment protects illegal immigrants, and that the Second Amendment should therefore extend to that group as well. The court responded in two ways. First, it stated that the scope of the Fourth Amendment, which it characterized as a "protective right against abuses by the government," may be broader than the scope of the Second Amendment, which it described as providing an "affirmative right to keep and bear arms." Second, and more importantly for present purposes, it expressed doubt about the premise, stating that "neither this court nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally."

I assume that the court is correct about its own precedents, though a quick look at *Martinez-Aguero v. Gonzalez*, 459 F.3d 618 (5th Cir. 2006), makes me wonder -- that case seems to say that illegal aliens are covered by the Fourth Amendment. It is certainly correct about the Supreme Court's rulings. The Court assumed, but did not decide, that the Fourth Amendment protects illegal aliens in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). And in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court emphasized the limited reach of *Lopez-Mendoza* and again declined to address the applicability of the Fourth Amendment to illegal aliens.

I could find surprisingly little law on this issue elsewhere. I don't believe that any other federal circuit courts have squarely addressed it, though in *United States v. Quintana*, 623 F.3d 1237 (8th Cir. 2010), the court stated, somewhat in passing, that "the Fourth Amendment applies to arrests of illegal aliens." I also don't think that any North Carolina appellate case is on point. There are a few federal district court opinions on the issue. A good collection of authority is contained in *United States v. Gutierrez-Casada*, 553 F.Supp.2d 1259 (D. Kan. 2008) (concluding that "a previously deported, aggravated felonious illegal alien" lacks Fourth Amendment rights, but reserving judgment on whether other illegal aliens are protected). There are also a number of secondary sources, such as law review articles, that address this issue. They're easy to find on Westlaw or Lexis.

With [approximately 10 million](#) illegal aliens in the United States, it amazes me that this issue isn't more frequently litigated, and hasn't been conclusively resolved. If you have insight into why this is so, please chime in.