

# Fourth Amendment Limitations on Nonborder Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution

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## I. INTRODUCTION

The entry of illegal aliens<sup>1</sup> into the United States is a significant national problem.<sup>2</sup> Although overlooked for years, illegal immigration has now reached levels at which considerable public interest has been evoked. Millions of illegal aliens work in the United States and, while it can only be roughly estimated, their number appears to be growing at an alarming rate.<sup>3</sup>

The Immigration and Naturalization Service (INS) is the agency in charge of enforcing federal regulation of aliens. Although INS is empowered to inspect all persons entering the United States to determine their citizenship,<sup>4</sup> it has not succeeded in eliminating the influx of illegal aliens whose transit is motivated by the increasing lack of economic opportunity at home.<sup>5</sup> The INS has referred to the illegal

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1. The term "illegal alien" is used here to denote those foreign nationals who entered the United States in violation of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1503 (1976). Any alien who enters the United States without examination or through misrepresentation or fraud violates 8 U.S.C. § 1325 (1976). Sections of the Immigration and Nationality Act will be referred to in this article under their Act designation rather than their United States Code designation.

2. See V. BRIGGS, *MEXICAN MIGRATION AND THE U.S. LABOR MARKET: A MOUNTING ISSUE FOR THE SEVENTIES* (Austin Center for the Study of Human Resources, Monograph No. 3, 1975); Catz, *Regulating the Employment of Illegal Aliens: DeCanas and Section 2805*, 17 SANTA CLARA L. REV. 751 (1977); Greene, *Immigration Law and Rural Poverty--The Problems of the Illegal Entrant*, 1969 DUKE L.J. 475, 478-79; Salinas & Torres, *The Undocumented Mexican Alien: A Legal Social and Economic Analysis*, 13 HOUS. L. REV. 863, 881-84 (1976).

3. More than 500,000 illegal aliens were apprehended in 1972. 1972 INS ANN. REP. 7. In 1973, the figure exceeded 650,000. 1973 INS ANN. REP. 8. In 1974-75, more than 750,000 were apprehended. 1974 INS ANN. REP. 9. Approximately 90% of those arrested during these years were Mexican nationals. 1975 INS ANN. REP. 13. In 1975-76 the figure exceeded 780,000. 1976 INS ANN. REP. 14.

4. 8 U.S.C. § 1357(a)(1970).

5. For a discussion of the illegal alien problem, see *United States v. Ortiz*, 422 U.S. 891, 900-14 (1975) (Appendix to opinion of Burger, C.J., concurring in the judgment); *United States v. Baca*, 368 F. Supp. 398, 402-03 (S.D. Cal. 1973). See also, *Present Scope of the Illegal Alien Problem*, 54 CONG. DIG. 8 (1975). The most recent and comprehensive account of the illegal alien problem is contained in the PRESIDENT'S INTER-AGENCY TASK FORCE STUDY, DOMESTIC COUNCIL COMMITTEE ON ILLEGAL ALIENS, PRELIMINARY REPORT (1976).

Some have suggested that national policy sanctions illegal entry as a surrogate farm labor program. E.g., J. SAMORO, *LOS MOJADOS: THE WETBACK STORY* 57 (1971). See Greene, *Public Agency Distortion of Congressional Will: Federal Policy Towards Non-Resident Alien Labor*, 40 GEO. WASH. L. REV. 440, 454 (1972), that suggests INS officials routinely ignore employers who contract for and use illegal labor. Even when business sites are raided by INS officials, the employers and their agents are rarely prosecuted.

entries across the southern border as a "continuing surge" and admits its inability to handle the situation effectively.<sup>6</sup> The vast majority of illegal aliens entering the United States escape detection at or near the border and find refuge in both urban and agricultural centers throughout the United States. In its frustration to control the massive influx of illegal aliens INS has resorted to enforcement techniques that run afoul of the fourth amendment. These techniques, all resorted to without warrant, include massive dragnet raids at factories or farm labor camps as part of an area-wide control operation and street encounters, in which individuals with latino characteristics are stopped and interrogated.

Most INS abuse, a result of freewheeling efforts to enforce the immigration laws against illegal aliens, is suffered by Mexican-Americans.<sup>7</sup> For example, INS agents randomly interrogate individuals on city streets and other public places about their citizenship. They also invoke their authority to conduct mass raids on employment centers. Such searches for illegal aliens are often directed against people who are non-white and speak a language other than English.<sup>8</sup> This results in police-state like confrontations between INS agents and citizens, lawfully-present aliens, as well as illegal aliens.<sup>9</sup> These

6. 1974 INS ANN. REP. iii. See also *Hearings on Oversight of the Immigration and Naturalization Service Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 3, 6-7 (1978) (Statement of Commissioner Leonard F. Chapman, Jr., Immigration and Naturalization Service).

7. Berman, *Harassing Aliens: Roundup in the Barrio*, A.C.L.U. NEWSLETTER (1973) (reporting the physical abuse and property damage suffered by legal and illegal aliens during INS "dragnet" raids). See also *Hearings on Bureau of Customs Border Inspection Procedures Before the Sumcomm. and the Treasury, Postal Service, and General Government Appropriations of the House Comm. on Appropriations for 1973*, 92d Cong., 2d Sess., pt. 5 (1972); *Hearings on Treasury Dep. Before the Subcomm. on the Treasury, Postal Service, and General Government Appropriations of the House Comm. on Appropriations for 1973*, 92d Cong., 2d Sess., pt. 1 (1972). Sess., pt. 1 (1972).

8. Since immigration to the United States is increasingly motivated by adverse economic and political conditions in the Third World, large numbers of illegal immigrants are non-white and do not speak English. For a discussion of this phenomenon see A. FRAGOMEN, *THE ILLEGAL ALIEN: CRIMINAL OR ECONOMIC REFUGEE* (1973). INS estimates that there are approximately 12 million illegal immigrants in the United States, the majority of whom are Mexican. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Former INS Commissioner Chapman articulates the restrictionist view on illegal immigration in Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 SAN DIEGO L. REV. 34 (1975).

9. The following statement describes INS enforcement activities in Los Angeles: Search operations are being conducted, without reasonable or probable cause to believe that individuals stopped and interrogated are in fact aliens, merely because such persons appear to an individual officer to be "foreign looking."

Reports come in almost daily of immigration officers stopping and interrogating individuals at bus stops, on public streets, in private businesses, and of knocking on doors at private residences and apartments and requiring individuals therein to produce proof of lawful status in the United States.

119 CONG. REC. 31686 (1973) (remark of Sen. Tunney, quoting correspondence from the Los Angeles Trial Lawyers' Association).

Since illegal presence in the United States is not a crime, an alien who is apprehended is subject only to deportation proceedings. It is questionable whether local law enforcement may enforce federal immigration law when the offense involved is handled by the administrative pro-

abuses continue because the Supreme Court has not directly addressed the question whether INS agents may, without warrant or probable cause, stop persons located beyond the border and believed to be aliens when there is no reason to believe they are in the country illegally.<sup>10</sup>

This question was recently addressed in *Illinois Migrant Council v. Pilliod*,<sup>11</sup> a case which indicates that one court is ready to redefine the limits of INS powers to stop and interrogate suspected illegal immigrants. In a decision that was affirmed and ultimately modified by the Seventh Circuit Court of Appeals, the United States District Court for the Northern District of Illinois held that INS agents lack authority to interrogate individuals unless they have reason to believe, based on specific articulable facts, that the person questioned is an alien unlawfully in the United States.<sup>12</sup> This article will analyze the decisions of the district court and court of appeals in *Illinois Migrant Council*. It will consider the United States Supreme Court pronouncements on the subject of INS searches, and it will attempt to clarify the level of suspicion required by the United States Constitution before an INS agent can stop a person on the street and inquire about his or her citizenship.

## II. REVIEW OF INS "AREA CONTROL" OPERATIONS IN THE SEVENTH CIRCUIT

The plaintiffs<sup>13</sup> in *Illinois Migrant Council* instituted a class action on behalf of "all persons of Mexican descent and all Spanish surnamed persons"<sup>14</sup> legally within the State of Illinois. They sought declaratory and injunctive relief from INS street interrogations and "area control" operations.<sup>15</sup> Plaintiffs alleged that INS officials in the Chi-

cess. In *Kurtz v. Moffitt*, 115 U.S. 487 (1885), local law enforcement officials arrested a military deserter. At that time desertion was not a federal crime. The Supreme Court held that local officials could not arrest or detain a deserter because the offense was not triable and punishable in the courts. This holding should apply to immigration law enforcement, prohibiting local officials from arresting or detaining an alien for illegal entry. See Comment, *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation*, 8 U.CAL.D. L. REV. 127 (1975).

10. This question was specifically reserved in *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 n.9 (1975), that held roving border patrol agents may not constitutionally stop an automobile near the border to question its occupants when the only ground for suspicion is that they appear to be of Mexican descent.

11. 398 F. Supp. 882 (N.D. Ill. 1975), *aff'd*, 540 F.2d 1062 (7th Cir. 1976), *modified upon rehearing en banc*, 548 F.2d 715 (7th Cir. 1977). INS did not seek review in the United States Supreme Court.

12. *Id.* at 899.

13. The plaintiffs were a nonprofit corporation serving migrant agricultural workers, predominately of Mexican descent, and six individuals who were either U.S. citizens or permanent resident aliens. *Id.* at 885.

14. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1065 (7th Cir. 1976), *modified upon rehearing en banc*, 548 F.2d 715 (7th Cir. 1977).

15. The term "area control operations" refers to the INS practice of conducting mass raids on a particular building, dwelling, or neighborhood because it is believed illegal immigrants will be found. Invariably, citizens and lawful resident aliens are interrogated or detained in

chicago district office conducted and would continue to conduct a "pattern and practice of harassment, including illegal searches and seizures, arrests, interrogations, detentions, and mass raids against the individual plaintiffs and their class in violation of the First, Fourth, and Fifth Amendments."<sup>16</sup>

Pursuant to the plaintiffs' motion for a preliminary injunction the district court held an evidentiary hearing, after which the district court made extensive findings of fact. The court divided the evidence into four broad and sometimes overlapping categories: street encounters, entries into dwellings, raids on employment centers, and documentary evidence consisting of operations manuals for INS agents.<sup>17</sup>

Three street encounters took place—one in Chicago and two in Rochelle, Illinois. The Chicago encounter occurred during the first week of October, 1974. Two INS agents approached plaintiff Lopez while he was walking to his office on Jackson Boulevard. They asked Lopez if he lived in the area and he replied that he did not, but that he worked around there. The agents then asked him where he was born. When Lopez asked why he was being questioned the agent said he was from INS and showed Lopez his identification. Lopez then told the agent that he was born in New Mexico and was of Mexican descent.<sup>18</sup> The agent left without further interrogation.

Two separate street encounters took place in Rochelle, Illinois. On the morning of September 18, 1974, plaintiffs Sandoval and Montanez drove to the office of the Illinois Migrant Council where they worked. As they parked the car, an INS car pulled up next to them. The agents asked Montanez where he was born and he replied, "Mexico." The agents demanded that he show them some identification and threatened to take him to jail in Chicago. Montanez produced a satisfactory permanent resident alien card. The agents then asked Sandoval, an American citizen of Mexican descent, to show them his identification. He refused and the agents forced him into their car presumably to take him to Chicago. He continued to refuse to show them any identification but because in his protests he implied he was a United States citizen, the agents let him go.<sup>19</sup> The other street encounter occurred when Jose Ortiz, walking with a friend, was stopped by two INS agents. They

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such operations. The Investigations Division of INS conducts area control operations, primarily in major urban and suburban areas. The Investigations Division only has 1,139 agents throughout the country responsible for conducting nonborder operations. *Hearings on Oversight of the Immigration and Naturalization Service Before the Subcomm. on Immigration, Citizenship, and Int'l Law of the House Comm. on the Judiciary, 95th Cong., 2d Sess. 443 (1978). See, Franco & Warren, The Illegal Alien Assault: The United States Retreats from the Border, 14 AM. CRIM. L. REV. 747, 762 (1977). See also 1976 INS ANN. REP. 15-16.*

16. 540 F.2d at 1065.

17. 398 F. Supp. at 887-91.

18. *Id.* at 887-88.

19. *Id.* at 887.

asked Ortiz for his papers. He was allowed to leave upon complying.<sup>20</sup> That same day the INS conducted "area control operations" in Rochelle that involved warrantless raids on dwellings and places of employment. At 4:30 a.m. defendant Theodore Giorgetti, an INS employee, and thirty-two armed agents began to enter dormitories and cottages where employees of the Del Monte Food Company lived. In the two dormitories where fifty-five female employees slept, the agents went from room to room demanding that the women produce their papers. They left the buildings without making any arrests.<sup>21</sup> A raid of the cottages where the male migrants lived followed the same pattern. One resident, unable to produce his green card evidencing legal residence, was forced to follow the INS agents around on their search. He was released only when another Del Monte employee assured the agents that the detained resident's papers were in order.<sup>22</sup> Some time between 4:00 and 5:00 a.m., an INS agent went to a nearby farmhouse that was occupied by Alonzo Solis, a migrant worker who was an American citizen. The agent kicked on the door until Solis answered. When the agent tried to force his way into the house the Solis' child began crying and Solis ordered the agent out. Solis then showed his "certificate" to the agent who, apparently satisfied, left.<sup>23</sup>

In addition to these searches of dwellings, a number of agents showed up at two Del Monte plants. The two Del Monte supervisors, believing they had to allow the agents in, allowed them to search the plant. While there the agents questioned everyone who appeared to be of Latin heritage. No arrests were made.<sup>24</sup>

On the morning of September 26, Giorgetti and thirty agents made a similar warrantless search of the Motor Wheel plant in Mendota, Illinois. Nineteen employees were interviewed by Giorgetti and a number of them were arrested. The agents then went to several other targets in Mendota—industrial plants, hotels, boarding houses, and private dwellings. Altogether 108 illegal aliens were arrested in Mendota.<sup>25</sup>

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20. *Id.* at 890.

21. *Id.* at 889.

22. *Id.* at 889-90. The plight of the alien who becomes a migrant farmworker has its own unique problems and characteristics, and is treated elsewhere. S. LAW, *THE RIGHTS OF THE POOR*, 155-76 (1973); C. MCWILLIAMS, *ILL FARES THE LAND: MIGRANTS AND MIGRATORY LABOR IN THE UNITED STATES* (1942); Rochin, *Illegal Aliens in Agriculture: Some Theoretical Considerations*, 29 LAB. L.J. 149 (1978); Scher, Catz & Mathews, *USDA: Agriculture at the Expense of Small Farmers and Farmworkers*, 7 U. TOL. L. REV. 837 (1976); Scher & Catz, *Farmworker Litigation Under the Fair Labor Standards Act: Establishing Joint Employer Liability and Related Problems*, 10 HARV. C.R.-C.L. L. REV. 575, 594-95 (1975); Note, *The Mexican Farm Labor Importation Program—Review and Reform*, 30 GEO. WASH. L. REV. 84 (1961); Note, *Statutory Provision for Admission of Mexican Agricultural Workers—An Exception to the Immigration and Nationality Act of 1952*, 24 GEO. WASH. L. REV. 464 (1956); Comment, *Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws*, 21 STAN. L. REV. 1750 (1969).

23. *Id.* at 890.

24. *Id.*

25. *Id.* at 890-91. The district court termed INS conduct during the Rochelle and Mendota

The district court also received into evidence an INS operation manual and two supplements furnished by INS to its agents. The manual was published in 1967, and the supplements in 1969 and 1971.<sup>26</sup> The court considered these administrative guidelines relevant for determining whether INS embraced an official policy authorizing conduct inconsistent with the fourth amendment.<sup>27</sup> Because these operation manuals contained conflicting guidelines,<sup>28</sup> the court stated that "no finding can be made other than agents are probably receiving misleading and conflicting documents from the Service regarding the scope of their authority."<sup>29</sup> The district court, however, concluded:

[T]he evidence shows that these guidelines are not being followed by the officers in the field and the plaintiffs have established a reasonable probability that the misconduct is widespread and not the result of isolated transgressions by a few agents. Thus, even if the written policy were constitutionally adequate, the course of conduct in the field has been impermissible.<sup>30</sup>

INS argued in district court that the random street stops and interrogations of the plaintiffs were authorized by Section 287(a)(1) of the Immigration and Nationality Act<sup>31</sup> which empowers INS investigators to question without warrant any person believed to be an alien concerning his right to be in the United States.<sup>32</sup> The district court found that plaintiffs "were singled out by the agents solely because they looked like Mexicans . . ."<sup>33</sup> and the court stated that no act of Congress can authorize constitutional violations.<sup>34</sup> Thus, the court concluded that applicable fourth amendment principles rendered the defendants' conduct illegal<sup>35</sup> and granted the plaintiffs' motion for a preliminary injunction.<sup>36</sup> The terms of the injunction restrained INS from:

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raids "the most egregious." *Id.* at 888. These extensive and costly operations were undertaken based on the following information: a list of addresses where the illegal immigrants "might" be found, furnished by the local police; a letter from the *Chicago Tribune's* "Action Express" regarding the employment of undocumented workers at the Motor Wheel Plant; and a list of Mexicans working at the Motor Wheel Plant. *Id.*

26. *Id.* at 891, 902-03.

27. *Id.* at 902.

28. *Id.*

29. *Id.* at 891. Defendant Georgetti testified that INS agents relied on the 1967 manual daily. *Id.* This manual was written before *Terry v. Ohio*, 392 U.S. 1 (1968) and *Katz v. United States*, 389 U.S. 347 (1967) and consequently gives the impression that INS agents may accost any individual believed to be an alien as well as enter commercial premises without a warrant.

30. *Id.* at 903.

31. 8 U.S.C. § 1357(a)(1) (1976).

32. 398 F. Supp. at 891.

33. *Id.* at 893.

34. *Id.* at 892 (*citing* *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)). For law review articles discussing this case, see note 54 *infra*.

35. *Id.* at 899.

36. *Id.* at 903-04. In concluding that the plaintiffs had satisfied the requirements for the issuance of a preliminary injunction the court noted that the evidence demonstrated plaintiffs had a substantial likelihood of success on the merits and that there was a substantial likelihood

(a) entering houses, dormitories, cottages or other dwellings situated in the Northern District of Illinois which are occupied by plaintiffs or any person of Mexican ancestry or of a Spanish surname who is, will be or has been lawfully present in the Northern District of Illinois, *unless they possess a valid warrant to search or arrest, have probable cause to enter without such warrant, or have received permission voluntarily given by one lawfully entitled to give permission to enter;*

(b) arresting, detaining, stopping and interrogating or otherwise interfering with plaintiffs or any person of Mexican ancestry or of a Spanish surname who is, will be or has been lawfully present in the Northern District of Illinois, unless they possess a valid warrant to search or arrest such person, have probable cause to search or arrest such person without such warrant, or have reasonable suspicion based on specific articulable facts that such person is an alien unlawfully in the United States.<sup>37</sup>

The United States Court of Appeals for the Seventh Circuit voted to affirm the order of the district court by a vote of two to one.<sup>38</sup> Upon rehearing en banc, however, the eight judges of the Seventh Circuit were seriously divided. Three voted to affirm the district court order and four voted to reverse and completely vacate the preliminary injunction. One judge, however, voted to modify the injunction to permit INS agents to question individuals concerning their right to be in the United States solely upon a reasonable belief that such persons are alien. This modification prevailed, and the remainder of the district court's order was affirmed by an equally divided court.<sup>39</sup> A determination of the constitutionality of the INS actions was dependent on several United States Supreme Court opinions dealing with analogous situations. For a full understanding of the decisions in *Illinois Migrant Council*, these Supreme Court decisions will be analyzed in the following section.

### III. INS AUTHORITY TO STOP AND INTERROGATE AND ITS CONSTITUTIONAL LIMITS

Section 287(a)(3) of the Immigration and Nationality Act, provides INS with authority to interrogate any person, whether an alien or a citizen, for the purpose of determining an individual's right to enter the United States.<sup>40</sup> This section of the Act contains no requirement that the

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future violations would occur, money damages were an inadequate remedy, the preliminary injunction would not adversely affect INS since they were "merely being ordered to conform their conduct to the requirements of the Fourth Amendment, and the public interest would be served by the injunction since the public interest requires "both enforcement of the immigration laws and adherence to the Fourth Amendment."

37. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062, 1067 (7th Cir. 1976) (emphasis added), *modified upon rehearing en banc*, 548 F.2d 715 (7th Cir. 1977).

38. 540 F.2d 1062 (7th Cir. 1976), *modified upon rehearing en banc*, 548 F.2d 715 (7th Cir. 1977).

39. *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7th Cir. 1977). Chief Judge Fairchild and Judges Swygert and Cummings voted to affirm. Judges Tone, Pell and Bauer voted to reverse. Judge Wood voted to vacate paragraph (b) of the preliminary injunction. There was a majority for modification in the manner favored by Judge Wood.

40. 8 U.S.C. § 1357(a)(1) (1976).

officer have a reasonable suspicion before a stop can be made since the act of entering the country itself is sufficient reason to inquire about the right to enter. This function may be performed either at a point along an international border or at a functional equivalent of such a point.<sup>41</sup> For example, St. Louis might be a port of entry for a flight originating in another country and going directly to St. Louis. Also, an entry checkpoint could be established several miles inland on a road that could not have any domestic traffic. Thus, the criterion is not that the checkpoint be directly on the border, but that those passing through that checkpoint have come from another country.<sup>42</sup> When a checkpoint is established where a person passing through that point may have been traveling solely within the United States, the authority of INS to stop and question persons passing through that point becomes subject to fourth amendment restrictions.<sup>43</sup>

The authority of the INS to stop indiscriminately everyone who enters the United States is the factor that distinguishes border operations from inland operations. A person who is entering the United States seeks a benefit, the right of entry, and therefore voluntarily consents to the requirements placed on receiving that benefit.<sup>44</sup> A person already within the United States makes no such consent and is protected by the fourth amendment from unreasonable searches and seizures. That person may or may not be an alien, and if an alien, may or may not be illegally present in the United States. Were it not for the protection from unreasonable searches and seizures provided by the fourth amendment, any person who looked to an INS officer as if he or she might be an alien would be subject to unlimited interrogations, without reasonable suspicion, simply because of the detainee's physical appearance. The provision of section 287(a)(1) of the Immigration and Nationality Act that permits INS officers to interrogate anyone without a warrant must therefore be exercised within fourth amendment bounds to prevent having citizens and lawful resident aliens repeatedly made subject to violations of their rights solely on the basis of racial characteristics.<sup>45</sup>

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41. C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PRACTICE 3-161 to 3-167 (1977). Designated ports of entry for inspection are found in 8 C.F.R. § 100.4(c)(1977).

42. 8 C.F.R. § 287.1(a)-(b) (1977).

43. *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975).

44. *See United States v. King*, 517 F.2d 350, 353 (5th Cir. 1975) (because travellers are aware they may be subject to search, no reasonable expectation of privacy at border); *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970) (universally understood that those crossing the border may be searched), *cert. denied* 401 U.S. 947 (1971). Similarly, courts permit routine searches at airports because the serious threat of skyjacking provides an exigent circumstance that makes it reasonable to suspend the warrant and probable cause requirements. *See United States v. Canada* 527 F.2d 1374, 1378 (9th Cir. 1975) (consent implied because airport search practices well known), *cert. denied*, 423 U.S. 895 (1975); *United States v. Williams*, 516 F.2d 11, 12 (2d Cir. 1975) (consent implied since defendant could have checked luggage rather than carry it on board).

45. A 1970 study of the United States Commission on Civil Rights stated:

The fourth amendment protects the right of the people to be secure against arbitrary governmental interference with their privacy.<sup>46</sup> The amendment accomplishes this result by prohibiting unreasonable searches and seizures and requiring that search warrants be based upon probable cause.<sup>47</sup> Although the amendment does not specifically prohibit warrantless searches, searches conducted without a warrant are generally presumed to be unreasonable.<sup>48</sup> INS inspections, like other searches, are limited by the fourth amendment's requirements as interpreted by the Supreme Court.

The power of government agents to interrogate persons concerning their right to be present in the country and to conduct searches beyond the border or its functional equivalent has long been recognized by the courts. In 1925 the United States Supreme Court recognized an exception to the probable cause requirement at the border:

Travellers may be so stopped [on the chance of finding something illegal in each automobile] in crossing an international boundary . . . . But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to be a competent official authorized to search, [and] probable cause for believing that their vehicles are carrying contraband or illegal merchandise.<sup>49</sup>

This statement clearly requires probable cause for the government to search once a person is within the United States, but several federal

In the five Southwestern States which were the subject of this study, the Commission heard frequent allegations that law enforcement officers discriminated against Mexican Americans. Such discrimination includes more frequent use of excessive force against Mexican Americans than against Anglos, discriminatory treatment of juveniles, and harassment and discourteous treatment toward Mexican Americans in general. Complaints also were heard that police protection in Mexican American neighborhoods was less adequate than in other areas. The Commission's investigations showed that belief in law enforcement prejudice is widespread and is indicative of a serious problem of police-community relations between the police and Mexican Americans in the Southwest.

U.S. COMM'N ON CIVIL RIGHTS, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 13 (1970). See also, Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 CALIF. L. REV. 662, 723-27 (1975). See generally Munoz, *The Right of an Illegal Alien to Maintain a Civil Action*, 63 CALIF. L. REV. 762 (1975); Scher & Catz, *Farmworker Litigation Under the Fair Labor Standards Act: Establishing Joint Employer Liability and Related Problems*, 10 HARV. C.R.-C.L. L. REV. 575 (1975).

Statements read at congressional hearings and debates relating to immigration have characterized Mexicans as bringing with them "ignorance, dirt, disease and vice, . . ." *Immigration from Countries of the Western Hemisphere: Hearings Before the Comm. on Immigration and Naturalization*, 70th Cong., 1st Sess. 28 (1928) (remarks of Rep. Box). See also 72 CONG. REC. 7126 (1930) (remarks of Sen. Johnson); *id.* at 7215 (remarks of Sen. Heflin); *id.* at 10844 (remarks of Rep. Almon).

46. U.S. CONST. amend. IV provides:

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 person or things to be seized.

47. *Id.*

48. *Camara v. Mun. Court*, 387 U.S. 523, 528-29 (1967).

49. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

courts have relied on it to uphold INS activities away from the border.<sup>50</sup>

Prior to 1973 the lower federal courts consistently upheld warrantless INS searches within 100 miles of the border.<sup>51</sup> The judicial attitude seemed to be that the statutory authorization in section 287(a)(1) provided a strong presumption of reasonableness under the fourth amendment.<sup>52</sup> The probable cause requirement for warrants was imposed stringently on conventional law enforcement officials to promote reasonableness. INS searches, however, were accorded special treatment because of the apparent statutory exception to the probable cause requirement.<sup>53</sup> This special treatment disappeared, however, when the Supreme Court began to require that INS agents have probable cause, or some level of suspicion below probable cause, before the agents could make near-border searches.

#### A. Almeida-Sanchez v. United States

The Supreme Court first considered the issue of the constitutionality of extended border searches in *Almeida-Sanchez v. United States*.<sup>54</sup> The petitioner in *Almeida-Sanchez* was a Mexican citizen who held a valid United States work permit. He was stopped by the U.S. Border Patrol twenty-five air miles north of the Mexican border on a road that did not cross the border and came no nearer to it than twenty miles at any point. Although it was conceded by the government that there was no probable cause to suspect that the petitioner had com-

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50. See *United States v. McDaniel*, 463 F.2d 129, 132 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973); *United States v. McGlone*, 394 F.2d 75, 78 (4th Cir. 1968); *Thomas v. United States*, 372 F.2d 252, 254 (5th Cir. 1967).

51. 8 C.F.R. § 287.1(a)(2) (1977) defines reasonable distance from the border to mean "within 100 air miles from any external boundary of the United States." See *United States v. Wright*, 476 F.2d 1027 (5th Cir. 1972) (search for aliens upon reasonable suspicion is constitutional within a reasonable distance of the border), cert. denied, 414 U.S. 821 (1973); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972) (held search 7 miles from border to be reasonable as authorized but withheld blanket approval of the 100-mile limit), cert. denied, 413 U.S. 919 (1973); *Mienke v. United States*, 452 F.2d 1076 (9th Cir. 1971) (immigration searches within 100 miles of border do not violate fourth amendment); *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963) (stop for questioning within 100 miles was constitutional); *United States v. Correia*, 207 F.2d 595 (3d Cir. 1953) (right to interrogate, 8 U.S.C. § 1357(a)(1) (1970), is constitutional); *Kelly v. United States*, 197 F.2d 162 (5th Cir. 1952) (search for aliens at checkpoint north of Florida Keys constitutional under the 1946 Act).

52. The general approach is best summarized by the Fifth Circuit's statement in *Kelly v. United States*, 197 F.2d 162, 164 (5th Cir. 1952): "Obviously there is a strong presumption of constitutionality due to an Act of Congress, especially when the Act turns on what is reasonable . . ." But see *United States v. Wright*, 476 F.2d 1027 (5th Cir. 1973) (requiring reasonable suspicion to search), cert. denied, 414 U.S. 821 (1973); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972) (withheld blanket approval of the 100-mile limit; some searches might not be reasonable), cert. denied, 413 U.S. 919 (1973); *Au Yi Lau v. United States Immigration & Nat. Serv.*, 445 F.2d 217 (D.C. Cir. 1971) (reasonable suspicion required for INS to forcibly stop and interrogate), cert. denied, 404 U.S. 864 (1971).

53. See Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U. J. INT'L L. & POL. 93 (1972).

54. 413 U.S. 266 (1973). See *Sutis, The Extent of the Border*, 1 HASTINGS CONST. L. Q. 235 (1974); Comment, *Extended Border Searches and Probable Cause: Almeida-Sanchez v. United States*, 1973 WASH. U. L. Q. 889.

mitted a crime, the border patrol conducted a thorough search of his car and discovered marihuana, possessed in violation of federal law, under the rear seat. In a five to four decision, the Supreme Court held that the warrantless search made without probable cause or consent violated the fourth amendment.<sup>55</sup>

Justice Stewart's opinion for the Court, which ordered the evidence suppressed and reversed the conviction, appeared to distinguish between "roving patrols" and established border stations. In the latter circumstance, the federal government was found to have the power to exclude aliens by routine searches of individuals or vehicles without probable cause or a search warrant "in certain circumstances . . . not only at the border itself, but at its functional equivalents as well."<sup>56</sup> Examples, given by the Court, of permissible warrantless searches away from the actual border were searches made "at an established station near the border, at a point marking the confluence of two or more roads that extend from the border . . ."<sup>57</sup> and a search of passengers and cargo arriving in the United States after a nonstop flight from a foreign country. The majority, however, held that a "roving patrol" could not stop an automobile and conduct a warrantless search unless there was probable cause to believe that a crime was being committed.<sup>58</sup>

Justice Powell, who joined with four other members of the Court to form the majority in *Almeida-Sanchez*, wrote a concurring opinion that increased the uncertainty surrounding the meaning of the Court's opinion. He suggested that under certain circumstances, not met in this case, roving patrols would be constitutional, thus negating the Court's emphasis on the need for established stations.<sup>59</sup> Justice Powell sought to reconcile law enforcement needs with constitutionally protected rights. He suggested that the probable cause requirement might be met by knowledge of an area rather than by information relating to specific vehicles or persons.<sup>60</sup> He compared the problem of enforcing the immigration laws to the problem of enforcing municipal housing codes and cited *Camara v. Municipal Court*,<sup>61</sup> in which the Court found

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55. 413 U.S. at 273.

56. 413 U.S. at 272.

57. *Id.* at 273.

58. *Id.*

59. *Id.* at 279 (Powell, J., concurring).

60. *Id.* at 283-84.

61. 387 U.S. 523 (1967). See Greenberg, *The Balance of Interest Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CAL. L. REV. 1011 (1973); LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1.

In *Camara*, the Court held the fourth amendment warrant requirement applicable to municipal housing inspections of private residences, finding that nonconsensual warrantless searches of private property were unreasonable except in carefully defined circumstances. 387 U.S., at 528-29. The Court explicitly rejected the contention that broad statutory limitations on inspections provide sufficient constitutional safeguards, concluding that such limitations are an inadequate substitute for the individualized review required by the fourth amendment. *Id.* at

that the probable cause requirement could be met for periodic housing inspections by basing the request for a search warrant on knowledge of an area rather than of specific buildings. Justice Powell argued from *Camara* that roving border searches could be sustained on the basis of the same knowledge of an area rather than of specific vehicles or persons. As justification for such searches, he noted the impossibility of patrolling the entire border with fixed stations and the high concentration of illegal aliens present in the area.<sup>62</sup> The search of an automobile was found to be "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or a building."<sup>63</sup> In a conclusion supported by the four dissenting Justices—Chief Justice Burger, and Justices White, Blackmun and Rehnquist—Justice Powell stated that "on appropriate facts the Government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles . . ."<sup>64</sup> Justice Powell suggested that the interests of protecting individual rights and yet serving law enforcement needs could best be met by giving the border patrol authority to obtain area search warrants similar to those available to the building inspectors in *Camara*. These search warrants would be "justified by experience with obviously non-mobile sections of a particular road or area embracing several roads."<sup>65</sup> He concluded:

Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time. According to the Government, the incidence of illegal

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533. If inspections were permitted without a warrant, the Court reasoned, citizens would have no way of knowing whether the inspections were required by the housing code or whether the inspector was acting within the scope of his authority. *Id.* at 532. The uncontrolled discretion to search was exactly the kind of action that the fourth amendment search warrant requirement was meant to circumscribe. Absent allegations that an inspection program could not achieve its goals within the framework of a reasonable warrant requirement, the Court concluded, the fourth amendment prohibits the warrantless inspections. *Id.* at 533.

In *See v. City of Seattle*, 387 U.S. 541 (1967), a companion case to *Camara*, the Court extended the fourth amendment's protection against warrantless municipal inspections to nonpublic businesses, *id.* at 545-46, enunciating a flexible standard of probable cause, that requires consideration of the public's interest in the effective enforcement of the particular regulation. *Id.* at 545. The Court pointed out, however, that a magistrate may reasonably permit inspection of business premises in more situations than he may approve inspection of private residences, *id.* at 545-46, because the element of surprise is more often the crucial factor in business inspections. *Id.* at 545 n.6.

Recently in *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816 (1978), the United States Supreme Court held, relying on *Camara* and *See*, that a warrantless inspection of business premises undertaken pursuant to section 8(a) of the Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 657(a) (1970), which empowers federal OSHA agents of the Secretary of Labor to search work areas of any employment facility within OSHA's jurisdiction for safety hazards and violations of OSHA regulations, violates the fourth amendment. Under this holding the dragnet-warrantless raids of the employment centers of the migrant farmworkers and factory workers in Rochelle and Mendota, Illinois would clearly violate the fourth amendment.

62. 413 U.S., at 276 (Powell, J., concurring).

63. *Id.* at 279.

64. *Id.* at 281.

65. *Id.* at 282.

transportation of aliens on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule. The use of area warrant procedure would surely not "frustrate the governmental purpose behind the search." . . . It would of course entail some inconvenience, but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement . . .<sup>66</sup>

While admitting that the standards in the majority opinion in *Almeida-Sanchez* for determining probable cause were "relatively unstructured," Justice Powell suggested the following factors be considered in determining whether sufficient cause exists for issuance of an area search warrant:

(i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use; and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.<sup>67</sup>

Justice Powell's concurring opinion stressed that the "novelty" of the type of search conducted by roving patrols does not lessen the importance of prior judicial determination as to the nature and scope of the search.<sup>68</sup>

The dissenting opinion by Justice White agreed with Justice Powell's observation that searches by roving patrols, if authorized by an area search warrant issued on less than probable cause, would satisfy fourth amendment requirements.<sup>69</sup> Justice White disagreed, however, with Justice Powell's and the majority's holding that either a warrant or probable cause were required in the circumstances of this case. He saw this holding as in conflict with the legislative judgment in section 287 of the Immigration and Nationality Act,

that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border itself.<sup>70</sup>

The decision left the status of roving patrol searches in border areas in doubt. While five members of the Court held such a warrantless search to be invalid without probable cause, one member of the major-

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66. *Id.* at 283 (footnote omitted).

67. *Id.* at 283-284 (footnote omitted).

68. *Id.* at 284.

69. *Id.* at 288 (White, J., dissenting).

70. *Id.* at 294 (White, J., dissenting).

ity, with the support of the four dissenters, would permit such searches if authorized by an area search warrant issued on a showing of less than traditional probable cause. The four-member minority would permit such searches without warrants or probable cause. Thus, a majority of the Court would appear to support the constitutionality of "roving" patrols if prior judicial approval is given to the nature and scope of the search by issuance of an area search warrant.

#### B. *United States v. Brignoni-Ponce* and *United States v. Ortiz*

The primary question raised by the *Almeida-Sanchez* decision was how far it would be applied. In *United States v. Brignoni-Ponce*,<sup>71</sup> the Court examined the issue whether the border patrol could use a roving patrol to stop cars and question occupants about their citizenship and immigration status in areas near the border. In *Brignoni-Ponce*, a fixed checkpoint south of San Clemente, California, had been closed because of inclement weather. In place of the checkpoint, the border patrol stationed an off-highway patrol car from which two officers observed traffic. The respondent was stopped because the car's occupants appeared to be of Mexican descent. Upon questioning, the officers learned that the occupants of the car were aliens who had entered the country illegally. The respondent was charged with and convicted of knowingly transporting illegal aliens.<sup>72</sup> On appeal, the Ninth Circuit Court of Appeals found that the stop resembled a roving patrol and applied the ruling of *Almeida-Sanchez*. The Ninth Circuit held that while Mexican ancestry could be considered with other factors in forming a degree of suspicion sufficient to make a stop, it alone did not amount to a "founded suspicion" necessary to support the warrantless stop of the automobile.<sup>73</sup>

The Supreme Court unanimously affirmed the court of appeals, but split on theories to support its decision.<sup>74</sup> Justice Powell's opinion for the Court, which was joined by Justices Brennan, Stewart, Marshall and Rehnquist, applied a balancing test to determine the reasonableness of the warrantless search. The majority stated that the fourth amendment applies to all seizures of persons including brief detentions short of arrest and requires such seizures to be reasonable. The Court then defined its balancing test: "As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interfer-

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71. 422 U.S., 873 (1975). See Note, *Almeida-Sanchez and its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975); Note, 13 Hous. L. REV. 200 (1975).

72. 422 U.S. at 874-75.

73. *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1111 (9th Cir. 1974).

74. *United States v. Brignoni-Ponce*, 422 U.S., 873 (1975).

75. *Id.* at 878.

ence by law officers."<sup>75</sup> After discussing the public interest in controlling the large-scale illegal entry of unauthorized aliens at the Mexican border, the difficulty of enforcing the law along a long border, and the use of illegal aliens as a source for cheap labor, and comparing these public concerns with the interference with individual liberty involved in stopping and questioning persons suspected of being illegal aliens, the Court concluded that the search involved constituted a "modest intrusion."<sup>76</sup> In view of the limited nature of the intrusion, the Court found that stops of this nature could be justified on a finding of less than probable cause and applied the standard set forth in *Terry v. Ohio*.<sup>77</sup>

In *Terry* the Supreme Court had utilized a balancing test to uphold a temporary police seizure—stop and frisk—of individuals for the purpose of questioning on less than probable cause to arrest, since the intrusion on personal privacy was less than that which accompanies an arrest.<sup>78</sup> The Court, however, emphatically condemned "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches."<sup>79</sup> In order to justify a seizure, a law enforcement agent "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."<sup>80</sup> General or class suspicion therefore was not sufficient.

Applying the *Terry* balancing test, the Court in *Brignoni-Ponce* said:

In this case . . . , because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation" . . . . The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.<sup>81</sup>

The Court held that brief border stops, like stop and frisk stops, could be made if the officer has reasonable suspicion, which requires less evidence than probable cause, to believe that he has apprehended an illegal alien or a person transporting illegal aliens.<sup>82</sup> The Court refused,

76. *Id.* at 880.

77. 392 U.S. 1 (1968). See LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters and Beyond*, 67 MICH. L. REV. 40 (1968). See also, Note, 47 TEX. L. REV. 138 (1968).

78. 392 U.S., at 21-27.

79. *Id.* at 22.

80. *Id.* at 21.

81. 422 U.S., at 881-82 (citations omitted).

82. *Id.* at 884.

however, to give the government the broad discretion it had sought. It found that current regulations permitting such random stops within an area 100 miles from the border would substantially interfere with legitimate traffic and would be an infringement of individual freedom not justified by the relatively small percentage of the population engaged in illegal entry or transportation of aliens.<sup>83</sup> In dictum, the Court seemed to reach beyond the automobile stops to place restraints on stopping and questioning individuals not in vehicles: "For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens."<sup>84</sup>

In further defining the limitations on roving border patrols originally set forth in *Almeida-Sanchez*, the Court held that, except for searches actually made at the border or its functional equivalent, roving patrols "may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."<sup>85</sup> The Court noted several factors that could be considered in determining whether there was enough suspicion to permit a border officer to stop a person for brief questioning. One is the nature of the area in which the vehicle has been encountered, taking into consideration its proximity to the border and past experience with alien traffic in the area. Other factors that could be considered are information about recent illegal crossings made in the area, the behavior of the driver, and whether the vehicle appears to be heavily loaded. While foreign appearance could be a factor to be considered, the Supreme Court held that foreign appearance alone is insufficient to create the reasonable belief necessary to stop a person away from the border and question him concerning his nationality.<sup>86</sup> In discussing the particular facts of *Brignoni-Ponce*, the Court attributed significance to the brief period of time that the officers had to observe the respondent and to the large number of Mexican-Americans and legally present Mexican aliens in the area. Even though the officers did apprehend illegal aliens, the stop was unlawful because the officers could cite no

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83. *Id.* at 882-83.

84. *Id.* at 884.

85. *Id.* One commentator has criticized the "reasonable suspicion" standard because the "probable cause" standard is the more appropriate standard to insure protection of citizens and lawful resident aliens from INS harassment:

*Brignoni-Ponce* authorized roving units of the Border Patrol to conduct interrogation stops based on "reasonable suspicion." It ignored the fact that approval of this low standard of certitude would increase the proportion of erroneous intrusions, and that Mexican-Americans, because their apparent Mexican ancestry is a relevant evidentiary factor, would bear the brunt of these errors.

Comment, *Minority Groups and the Fourth Amendment Standard of Certitude: United States v. Ortiz and United States v. Brignoni-Ponce*, 11 HARV. C.R.-C.L. L. REV. 732, 762-63 (1976).

86. 422 U.S. at 885-86.

reason other than the appearance of the occupants for initially stopping the vehicle.<sup>87</sup>

The Court offered a suggestion for corrective legislation that would allow the INS to perform its function consistent with the fourth amendment. The majority opinion suggested the possibility of area search warrants, a point first raised in *Almeida-Sanchez*. In a footnote, the Court seemed to go out of its way to indicate that, since there was no warrant involved in this case, the Court would not have to consider the issue of "whether a warrant could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens."<sup>88</sup>

Chief Justice Burger, joined by Justice Blackmun, concurred only in the result reached by the Court. His opinion complained that the Court's interpretation of the fourth amendment would leave the INS "powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000 mile southern boundary."<sup>89</sup> Commenting on the Court's balancing test, the Chief Justice expressed the fear that "history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country."<sup>90</sup> He warned that in the absence of legislative action, presumably to permit area search warrants, the United States border could be protected only by a massive force of guards. The opinion concluded with the view that the Court had not given adequate weight to the needs of the society in balancing its interest against the rights of individuals.<sup>91</sup> An appendix accompanying the Chief Justice's opinion provided a comprehensive report on the law enforcement problems created by illegal aliens.

Justice Douglas' concurring opinion reached a conclusion opposite to that of the Chief Justice. He recalled his dissent from the "suspicion test" when it was first articulated in *Terry* and called the adoption of a standard permitting less than probable cause "an unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police."<sup>92</sup> Justice Douglas would have either discontinued use of the "suspicion test" or limited its application to violent crimes. His opinion warned:

[B]y specifying factors to be considered [in applying the "suspicion test"] without attempting to explain what combination is necessary to satisfy

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87. *Id.*

88. *Id.* at 882 n.7.

89. *Id.* at 899 (Burger, C.J., concurring).

90. *Id.*

91. *Id.* at 900.

92. *Id.* at 888 (Douglas, J., concurring).

the test, the Court may actually induce the police to push its language beyond intended limits and to advance as a justification any of the enumerated factors even where its probative significance is negligible.<sup>93</sup>

In yet another concurring opinion, Justice White joined by Justice Blackmun followed the theme set by Chief Justice Burger. Justice White lamented what he saw as the Court's "dismantling" of machinery to intercept illegal aliens. He viewed this result, however, as possibly beneficial to law enforcement. The system of border patrols was seen as

notably unsuccessful in deterring or stemming this heavy flow [of illegal aliens]: and its costs, including added burdens on the courts have been substantial. Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.<sup>94</sup>

The opinion went on to state that the problem of illegal aliens was best left to the President and Congress to resolve.<sup>95</sup>

Justice Rehnquist, who was apparently also concerned by the adverse effect that the restrictive ruling might have on law enforcement, wrote a concurring opinion to stress that *Brignoni-Ponce* should be considered as a limited decision, concerned only with roving border patrol stops of immigrants. He stressed that it would not interfere with the long-established practice by highway patrolmen of stopping persons believed to be in violation of motor vehicle laws. In his view, agricultural inspections and highway roadblocks to apprehend known fugitives would also be unaffected.<sup>96</sup>

Also decided on the last day of the 1974-75 Term was *United States v. Ortiz*,<sup>97</sup> which presented the issue whether vehicle searches at traffic checkpoints away from the border, similar in nature to roving patrol searches, must be based on probable cause. In *Ortiz* the respondent's car had been stopped, although the officers had no reason to believe that it contained illegal aliens. The checkpoint, which screened all traffic when it was open, was sixty-two air miles from the Mexican border at a place that could not be considered to be the functional equivalent of a border. At the checkpoint, drivers and passengers were asked questions about their citizenship; if anything suspicious was observed, the officers might "inspect" areas of the vehicle in which aliens could hide. Similar operations had been conducted at other permanent traffic checkpoints, but where traffic was heavy, only random stops were made.

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93. *Id.* at 890.

94. *Id.* at 915 (White, J., concurring).

95. *Id.* at 915.

96. *Id.* at 887-88 (Rehnquist, J., concurring).

97. 422 U.S. 891 (1975).

The government argued that these checkpoints could be distinguished from the roving patrols that had been limited by *Almeida-Sanchez*. The checkpoint officers' discretion in deciding what vehicles would be searched was limited by the location of the checkpoints, a policy decision made by officials who considered factors such as the inconvenience to the public, safety, and the potential for apprehending illegal aliens. These checkpoints were said to be less intrusive than roving patrol searches because they were placed on well-traveled roads, were well-marked and lighted, and were less likely to frighten motorists.<sup>98</sup>

Justice Powell's opinion for the Court, which was joined by Justices Douglas, Brennan, Stewart, Marshall, and Rehnquist, found that there was no difference, so far as probable cause requirements were concerned, between a roving patrol and a traffic checkpoint removed from the border.<sup>99</sup> While the lighting and warning given might make a difference with regard to the propriety of the stop, it made no difference as to the search itself. The Court stated that search at such a checkpoint, despite the greater regularity of the stop itself, could result in the same degree of embarrassment to the persons searched as a roving search.<sup>100</sup> Furthermore, the Court found that the officers' discretion was not significantly limited beyond that of the roving patrol since only three percent of the passing cars were actually stopped and no more than ten or fifteen percent of those stopped were actually searched. This left the officer with substantial discretion to determine the cars he would search, a determination that would never have to be justified.<sup>101</sup> The Court concluded:

This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search . . . We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in *Almeida-Sanchez*. We therefore follow that decision.<sup>102</sup>

In a footnote, the Court once again specifically stated that it had not ruled on the possibility of area searches because there had been no warrant in the case and the government had not attempted to obtain one.<sup>103</sup> In the same footnote, the Court also indicated that the scope of its holding might be limited: "Not every aspect of a routine automobile

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98. *Id.* at 894-95.

99. *Id.* at 896-97.

100. *Id.* at 895.

101. *Id.* at 896.

102. *Id.* at 896 (citations omitted).

103. *Id.* at 897 n.3.

'inspection' . . . necessarily constitutes a 'search' for purposes of the Fourth Amendment. There is no occasion in this case to define the exact parameters of an automobile 'search'."<sup>104</sup>

Justice Rehnquist, in his concurring opinion, stated that the Court's analysis of the distinction between roving and fixed checkpoint searches was correct but questioned the soundness of the rule in *Almeida-Sanchez*. He stressed the limited nature of the Court's opinion by pointing to the fact that it applied only to full searches and not to mere stops that "involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the important national interest in controlling illegal entry."<sup>105</sup> He would have held such stops to be reasonable whether or not accompanied by "reasonable suspicion" and would have limited the Court's requirement for suspicion to instances where a search is actually made. He announced that his understanding of the decision was that such stops would not be prohibited if unaccompanied by a search.<sup>106</sup>

### C. United States v. Martinez-Fuerte

The Supreme Court's decision in *United States v. Martinez-Fuerte*,<sup>107</sup> in an apparent concession to the eroding power of INS enforcement, preserved the border patrol's right to conduct routine stops of vehicles at permanent checkpoints within 100 miles of the border without warrant, probable cause, or even individualized suspicion. The consolidated cases involved routine stops at immigration checkpoints to inquire about citizenship and illegal alienage. The stops resulted in several arrests for transporting illegal aliens.<sup>108</sup> Because of the large amount of traffic at INS checkpoints, INS officials screened vehicles through lanes and selected automobiles for referrals to a secondary area where an interrogation was conducted.<sup>109</sup> None of the challenged stops at the checkpoints involved suspicion based on any articulable facts; the illegal aliens were discovered during an interro-

104. *Id.*

105. *Id.* at 898-99 (Rehnquist, J., concurring).

106. *Id.*

107. 428 U.S. 543 (1976).

108. The respondent was charged, *inter alia*, with two counts of violating 8 U.S.C. § 1324 (a) (2). That section provides for the felony conviction of any person who: knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law [any alien not lawfully entitled to enter or reside within the United States].

109. According to the Court fewer than one percent of the vehicles passing through the San Clemente checkpoint were stopped and interrogated. 428 U.S. at 563 n.16.

gation of the passengers that resulted from the referral to the secondary checkpoint area.

In a seven to two decision upholding this INS enforcement technique, the Supreme Court held that properly limited vehicle stops for questioning, made at reasonably located permanent checkpoints, did not violate the fourth amendment.<sup>110</sup> The Court found the interest of INS in apprehending aliens great but the intrusion on fourth amendment rights minimal.<sup>111</sup> It held that no particularized ground was needed to conduct checkpoint stops.<sup>112</sup> The Court concluded that checkpoint stops need not be justified by warrant, probable cause, or individualized suspicion, and that referrals to the secondary area could be made on the basis of the occupant's apparent heritage because "the Fourth Amendment imposes no irreducible requirement of such [individualized] suspicion"<sup>113</sup> to conduct a search or seizure. The Court permitted latino appearance to justify referral to the secondary area, reasoning that INS must be permitted wide discretion in selecting vehicles for further inspection and that selective referrals may actually advance fourth amendment interests by minimizing interference with the rights of the general public.

In light of the prior decisions restricting INS enforcement powers in *Almeida-Sanchez*, *Brignoni-Ponce*, and *Ortiz*, the Court's apparent retreat in *Martinez-Fuerte* must be viewed as a surprise. The leap from a strict probable cause standard for checkpoint searches in *Ortiz* to the abandonment of any fourth amendment requirements in *Martinez-Fuerte* is an unprincipled result, motivated by the majority's effort to give some regard to the enforcement problems of the INS.<sup>114</sup>

#### IV. A CONSTITUTIONAL STANDARD FOR INS "AREA CONTROL" OPERATIONS

In *Illinois Migrant Council* the district court had to apply the principles of these search and seizure cases to street encounters and to raids on dwellings and places of employment in Illinois. Looking first at street encounters, the court applied the holding of *Brignoni-Ponce* that Mexican appearance alone was insufficient cause for an INS stop. The

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110. Factors to be considered in weighing the reasonableness of the location of a given checkpoint included the number of arrests made at the checkpoint and compliance with the border patrol's own criteria for an effective location (e.g., that it is near the confluence of significant roads leading away from the border, that it is beyond the twenty-five mile area in which temporary border passes are valid, that it is in a location minimizing interference with legitimate traffic, and that it is situated where the topography restricts vehicle circumvention of the checkpoint). *Id.* at 562 n.15.

111. *Id.* at 556-57.

112. *Id.* at 563.

113. *Id.* at 561.

114. See generally Comment, *Alien Checkpoints and the Troublesome Tetralogy: United States v. Martinez-Fuerte*, 14 SAN DIEGO L. REV. 257 (1976).

court announced the following standard for street interrogation by INS agents: "[A]n INS agent must reasonably suspect on the basis of *specific articulable facts* and reasonable inferences drawn therefrom that a person is an alien *illegally* in the country before the agent may stop and interrogate that person pursuant to the authority of Section 1357 (a)(1) [287(a)(1)]."<sup>115</sup>

The court reasoned that if INS agents cannot stop a vehicle near the border merely because it is occupied by persons of Mexican ancestry, then "[a] fortiori, INS agents cannot stop a vehicle in the Northern District of Illinois merely because its occupants appear to be of Mexican ancestry."<sup>116</sup> In both geographical areas "the agents must reasonably suspect that the vehicle contains illegal aliens."<sup>117</sup>

The district court concluded that the same rule applies when the INS target is a pedestrian. The court pointed out that while automobile travel has become an essential part of our freedom to travel, it would be anomalous to grant the automobile driver greater freedom of movement than afforded the pedestrian.

Indeed, to the extent that differing Fourth Amendment standards have developed among persons, places, and vehicles, the less stringent have been applied to vehicles because of the exigent circumstances inherent in their operation. . . . Therefore, if as *Brignoni-Ponce* holds, a vehicle cannot be stopped unless the agent reasonably suspects that it contains aliens illegally in the country, a person should not be stopped unless the agent reasonably suspects that he or she is an alien illegally in the country.<sup>118</sup>

The question of the raids on dwellings and places of employment was a relatively simple one. The district court noted that it was not difficult to resolve the question posed by the warrantless entries and searches of plants, dormitories and homes during the area control operations in Rochelle and Mendota.<sup>119</sup> When the government seeks to justify a search on the basis of consent, said the court, it has the burden of establishing that the consent was fully and voluntarily given.<sup>120</sup> The court went on to say that "[i]t would be hypocrisy of the lowest order to hold that the knocks on the doors of the Del Monte dormitories and cottages and the Solis residence produced consent 'voluntarily given and not the result of duress or coercion.'"<sup>121</sup>

Because fourth amendment rights cannot be asserted vicari-

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115. *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 899 (N.D. Ill. 1975) (emphasis added).

116. *Id.* at 898.

117. *Id.*

118. *Id.* (citations omitted).

119. *Id.* at 899.

120. *Id.* at 900 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) and *Schnecko v. Bustamonte*, 412 U.S., 218, 248-249 (1973)).

121. *Id.* at 900 (citing *Schnecko v. Bustamonte*, 412 U.S. 218, 248-249 (1973)).

ously,<sup>122</sup> however, the district court held that the individual plaintiffs did not have standing to challenge the unconsented entries of INS agents into the factories where they worked.<sup>123</sup> The court said, however, that the individual plaintiffs did have standing to complain of what happened to them and to members of their class once INS agents entered the factories.<sup>124</sup> The court then pointed out that the systematic interrogation of workers of apparent Mexican ancestry in a plant setting regarding their citizenship<sup>125</sup> is no different than stopping and questioning them on the street.<sup>126</sup> Here, too, the district court applied principles of *Brignoni-Ponce* holding INS interrogations justifiable only when an agent has a reasonable suspicion based on specific articulable facts that the individual questioned is *unlawfully* in the United States.<sup>127</sup>

The evidence before the district court plainly showed that it was INS policy to seize individuals solely because they were non-white and did not speak English. These facts made it clear to the court that *Brignoni-Ponce's* holding—that mere appearance of Mexican ancestry is insufficient to justify INS stops near the border<sup>128</sup>—should be extended to require a reasonable suspicion of illegal alienage for urban interrogations as well. To reach this conclusion, however, the district court needed to distinguish two decisions of the District of Columbia Circuit<sup>129</sup> construing the authority of INS agents to stop and interrogate persons of apparent Chinese descent.

The District of Columbia Circuit's interpretation of section 287 (a)(1) drew a distinction between "mere questioning" that proceeds on the basis of "the individual's cooperation"<sup>130</sup> and "forcible detentions of a temporary nature for the purposes of interrogation."<sup>131</sup> For "mere questioning" it was required that the INS agent have a reasonable suspicion that the subject of questioning is "of alien origin,"<sup>132</sup> while temporary "forcible detention," according to the court, required a reasonable suspicion that the detainee was "illegally in the country."<sup>133</sup>

After careful study, the Illinois district court found the formula

122. *Id.* (citing *Alderman v. United States*, 384 U.S. 165 (1969)).

123. *Id.*

124. *Id.*

125. *Id.*

126. See note 25 and accompanying text *supra*.

127. 398 F. Supp. at 900.

128. 422 U.S., at 882-84.

129. *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), *cert. denied*, 404 U.S. 864 (1971). See also *Shu Fuk Cheung v. INS*, 476 F.2d 1180 (8th Cir. 1973).

130. *Au Yi Lau v. INS*, 445 F.2d 217, 222 (D.C. Cir.), *cert. denied* 404 U.S., 864 (1971).

131. *Id.* at 223.

132. *Id.* at 222.

133. *Id.* at 223.

developed by the District of Columbia Circuit "not realistic or conducive to the preservation of fourth amendment rights."<sup>134</sup> The court explained:

The line between mere questioning and forcible detention is faint and too easily crossed. . . . Implicit in the introduction of the agent and the initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond. Few will feel that they can walk away or refuse to answer. And if they should, Larry Sandoval's experience teaches the consequences. He was grabbed and placed in the agents' car to be taken "to Chicago."<sup>135</sup>

There is strong support for the district court's rejection of the distinction between "mere questioning" and "forcible detention." Although the District of Columbia Circuit explicitly adopted the *Terry* reasonable suspicion standard, it apparently ignored what, according to *Terry*, constitutes a seizure. *Terry* held that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."<sup>136</sup> The evidence before the district court demonstrated that there is no such thing as an INS agent's "mere questioning" about national origin or documents. Once approached by INS there is no freedom to walk away; the person has been "seized," according to *Terry*. If a reasonable suspicion of illegal alienage was required by the District of Columbia Circuit for INS interrogations because there was a "seizure," then the same standard must be applied to stops that the District of Columbia court termed "mere questioning." Further, the reasonable suspicion of illegal alienage requirement of *Illinois Migrant Council* is more equitable than the District of Columbia Circuit's mere alienage standard. Mere suspicion of alienage can arise too easily from racial and cultural characteristics and from the impressions of INS agents trained to doubt the citizenship of certain people.

In sum, the district court held that in order to comply with the fourth amendment, INS stops and interrogations conducted pursuant to section 287(a)(1) must be based upon a reasonable suspicion that the individual is an alien illegally in the country.<sup>137</sup> The court's objection to the District of Columbia Circuit's "mere questioning" and "forcible detention" distinction is legally sound as it accurately reflects the definition of seizure articulated in *Terry*. It should also be noted that the district court's reasonable-suspicion-of-illegal-alienage standard offers more protection to the rights of millions of Mexican-Americans and Spanish-surnamed persons who are legally present in the United States.

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134. 398 F. Supp. at 898-99.

135. *Id.* at 899.

136. 392 U.S. at 16.

137. 398 F. Supp. at 899-900.

In a two to one decision the Seventh Circuit Court of Appeals voted to affirm the district court's requirement that all INS stops be based on a reasonable suspicion that the person stopped is unlawfully in the United States.<sup>138</sup> Upon rehearing en banc, however, the Seventh Circuit modified the district court standard so that suspicion of alienage alone would suffice to justify an INS stop for questioning.<sup>139</sup>

The first indication that the district court standard would eventually be modified came in a footnote to the original Seventh Circuit opinion.<sup>140</sup> The majority there noted that the district court specifically enjoined INS from "arresting, detaining, stopping, and interrogating persons of Mexican ancestry."<sup>141</sup> The majority explained that this was in accord with the District of Columbia Circuit rule that required a reasonable suspicion of illegal alienage for INS interrogation.<sup>142</sup> The court added that it did not understand the district court injunction to prohibit INS agents from engaging in "casual conversation" with an individual when the individual cooperates with the investigating officer.<sup>143</sup> Further, the footnote embraced the portion of the District of Columbia Circuit standard that required suspicion of illegal alienage without rejecting the standard's first tier that permits questioning solely upon a suspicion of alienage.

This footnote laid the foundation for the en banc modification that permitted INS to question an individual concerning his right to be in the United States solely upon a reasonable suspicion of alienage.<sup>144</sup> This modification is apparently based on the fact that the majority in the footnote permitted "casual conversation" when the individual was cooperating, but required—as did the district court—a reasonable suspicion of illegal alienage for further interrogation.<sup>145</sup>

The footnote was added in response to the dissent's full approval of the District of Columbia Circuit's two-tiered standard for questioning and interrogation.<sup>146</sup> The dissent argued, and the majority apparently agreed, that questioning does not amount to a constitutional deprivation because the minimal invasion of privacy for the individual is justified by the special needs of immigration officials to make such interrogations.<sup>147</sup>

The majority followed the district court's application and extension

138. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), *modified upon rehearing en banc*, 548 F.2d 715 (7th Cir. 1977).

139. 548 F.2d 715 (7th Cir. 1977). *See* note 39 *supra*.

140. 540 F.2d at 1070 n.10.

141. *Id.*

142. *Id.* (*citing Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir.), *cert. denied* 404 U.S. 864 (1971)).

143. *Id.*

144. *Id.*

145. *Id.* at 1063.

146. *Id.* at 1076 (Tone, J., dissenting).

147. *Id.*

of *Brignoni-Ponce*.<sup>148</sup> The majority referred to one commentator who agreed with the standard of justification for street stops adopted by the district court,<sup>149</sup> and added a few approving citations. On the whole, however, the majority followed the district court "without much discussion."<sup>150</sup> The cursory treatment given *Brignoni-Ponce* by the majority was surprising because its "reasonable suspicion" standard for alien searches had recently been drawn into question by the Supreme Court. While the appeal from the district court in *Illinois Migrant Council* was being considered by the Seventh Circuit, the Supreme Court announced its decision in *United States v. Martinez-Fuerte*.<sup>151</sup> As previously noted, the holding in *Martinez-Fuerte* appears to be inconsistent with previous rulings regarding searches and seizures by immigration authorities because no quantum of suspicion was required.<sup>152</sup>

As authority for the proposition that the fourth amendment does not impose an "irreducible requirement of such suspicion,"<sup>153</sup> the *Martinez-Fuerte* Court cited *Camara v. Municipal Court*.<sup>154</sup> Arguably, INS urban inquiries regarding citizenship involve factors analogous to those in *Camara*.<sup>155</sup> The dissent, however, failed to mention *Martinez-Fuerte* and the majority dealt with it swiftly: "[T]hat ruling is explicitly limited by the Court to those intrusions at permanent check points . . . because of the limited nature of the intrusion and the regularity of the exercise of authority. *Martinez-Fuerte* therefore does not apply either to searches of dwellings or street stops of individuals."<sup>156</sup>

148. *Id.* at 1070.

149. "While *Brignoni-Ponce* reserved the question of whether the suspicion must be of illegal alienage since the facts did not require such decision, the language used in the text continued to phrase the standard in terms of illegal alienage." *Id.* at 1070 n.8 (citing Note, *Reasonable Suspicion of Illegal Alienage as a Precondition to 'Stops' of Suspected Aliens*, 52 CHI.-KENT L. REV. 485, 497 (1975)).

150. 540 F.2d at 1076 (Tone, J., dissenting).

151. 428 U.S. 543 (1976). The Seventh Circuit heard oral arguments on April 29, 1976 and handed down its first decision on August 17, 1976. The Supreme Court announced its decision in *Martinez-Fuerte* on July 6, 1976.

152. *United States v. Martinez-Fuerte*, 428 U.S., at 569-70. (dissenting opinion of Mr. Justice Brennan in which Mr. Justice Marshall joined). The decisions to which the dissent referred are *Almeida-Sanchez*, *Ortiz*, and *Brignoni-Ponce*. For a detailed criticism of *Martinez-Fuertes*, see Comment, *supra* note 114.

153. 428 U.S., at 561.

154. 387 U.S. 523 (1967).

155. Concern that *Martinez-Fuerte* could be extended to INS street stops is based on the Court's acceptance of Justice Powell's notion of a "functional equivalent of probable cause." This concept first appeared in Powell's concurring opinion in *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973). There he said that in some limited circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicle searches in the vicinity of the border as some form of judicial warrant from *Camara*. It would seem that the Court might approve *Camara* warrants for area control operations if the political and economic needs of the moment demanded it. For the present, though, it appears that the reasonable suspicion standard for alien searches is on firm ground. For further discussion on this question see, Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L. J. 355 (1974).

156. 540 F.2d at 1070.

The standard developed by the Seventh Circuit's en banc review prohibits INS agents from detaining an alien "by force, threat of force, or a command based on the agent's official authority" unless they have reason to believe, based on specific articulable facts, that the alien is illegally in the country. Agents, however, are not prohibited from questioning any person they reasonably believe to be an alien.<sup>157</sup> This modification elevates the spirit of the footnote in the original affirmance into the text of the final decree. It is the explicit two-tiered standard of the District of Columbia Circuit Court that the district court specifically and rightfully rejected. The modification interpreted Section 287(a)(1) to authorize INS agents to question individuals upon a reasonable suspicion of alienage, while requiring suspicion of illegal alienage for interrogation. Furthermore, the en banc standard rejected the district court's observation that "initial questioning is a show of authority to which the average person encountered will feel obliged to stop and respond."<sup>158</sup>

The district court decision in *Illinois Migrant Council v. Pilliod* placed new limits on the authority of INS agents to question persons they perceive to be aliens about their right to be in the United States. Under the standard formulated by the district court, INS agents lacked authority to question individuals unless they had a reasonable belief that their target was an alien unlawfully in the country; and that belief had to be grounded in specific articulable facts of which race and language and dress can be part, but that alone are insufficient. In requiring a founded suspicion of unlawful alienage for all INS stops of individuals, the district court made it clear that the fourth amendment applied to all immigration interrogations within the country, whether conducted near the border or in the interior of the country.

The extensive evidence in the record demonstrating that one faces detention if he refuses to answer INS questions supports the district court's refusal to distinguish between an INS agent's authority to "question" and "interrogate" suspected illegal immigrants. The district court's single-tiered standard appears to be the more workable in practice because the attempt to differentiate between questioning and interrogation would involve a difficult after-the-fact determination of which standard was appropriate to the facts of the particular encounter and would also be subject to abuses.

The Seventh Circuit's original affirmance reflected judicial support for the district court's pathbreaking limits on INS interrogation powers. The majority, however, did not demonstrate the district court's grasp either of the need for these limits or the legal foundation upon which the district court standard rested. For this reason, the original

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157. 548 F.2d 715.

158. 398 F. Supp. at 899.

majority would have permitted INS agents to engage persons without even a reasonable suspicion, in "casual conversation," a digression from the district court standard that is constitutionally and statutorily inadequate as well as unworkable in practice.

The rationale for the Seventh Circuit's en banc modification of the more stringent district court standard is unknown because an opinion did not accompany the court's order. It does seem clear, however, that this modification improves upon the original affirmance in that it does away with the confusing concept of "casual conversation." Moreover, it will curb the harassment of innocent people by INS if properly enforced by the courts: an INS agent must reasonably suspect, based on specific articulable facts, that a person is unlawfully in the country before he can make a "command" based on his authority—for example, demand a green identity card—or threaten detention. Under the other tests, an INS agent may question someone on a reasonable suspicion of alienage alone.

Since most area control operations consist of agents threatening detention or demanding green cards, the en banc standard should control any INS street activity, including "visits" to places of employment.

## V. CONCLUSION

The recent Supreme Court cases which place limits on the power of immigration officials to search for illegal aliens are an important indication that many traditional INS enforcement practices will not be tolerated under the fourth amendment. There is a natural tension between the need to stem the flow of illegal immigration and the right of the individual to be free from unreasonable INS intrusions. The need to enforce this nation's immigration laws is undisputed. The courts, however, have put to rest the notion that enforcement problems alone justify intrusions on the fourth amendment. The restraints imposed on INS by the *Illinois Migrant Council* standard should not frustrate reasonable and lawful efforts by INS to seek out illegal aliens. The standard effectively promotes legitimate law enforcement needs, while recognizing that the fourth amendment will not tolerate abuses by immigration officials of the magnitude documented by the Seventh Circuit. To have done otherwise would have been completely to emasculate the fourth amendment and would have continued to subject countless individuals to undue deprivations of their rights to privacy and free passage. Yet despite law enforcement efforts, the illegal alien problem continues unabated. The rate of illegal immigration from Mexico is increasing.<sup>159</sup> Illegal aliens come to the United States for one

159. Mexicans accounted for 90% of the illegal aliens arrested in 1974, 1974 INS ANN. REP. 9; 89% of the illegal aliens arrested in 1975, 1975 INS ANN. REP. 13; and 99% of illegal aliens arrested in 1976, 1976 INS ANN. REP. 14.

reason—to search for work. Unemployment is high; half of Mexico's eight million workers are unemployed and wages are low.<sup>160</sup>

Since employment is the primary reason for illegal entry, alternative policies in addition to increasing law enforcement efforts need to be developed to reduce the incentives to come to the United States. One method suggested would be to impose criminal penalties on employers of illegal aliens. In *DeCanas v. Bica*,<sup>161</sup> the Supreme Court held that, in the absence of federal legislation, the states can constitutionally prohibit employers from hiring illegal aliens and impose criminal sanctions. The anticipated enactment of employer sanction statutes by the states<sup>162</sup> requires the passage of a uniform federal enforcement scheme to regulate illegal alien employment.<sup>163</sup> Federal legislation will not only have the inherent benefits of a uniform federal enforcement scheme, but it will also avoid the problem caused by the migration of job seeking aliens attracted to those states that lack employer sanction statutes.

Beyond legitimate law enforcement techniques and federal employer sanctions, the United States needs to develop a national foreign

160. See Catz, *supra* note 1, at 753-57. The outlook for the future appears bleak, as it is uncertain that the Mexican economy will be able to keep pace with the 3.5% rate of population growth. It appears that unemployment levels in Mexico will increase further since 45% of the population is under 15 years of age. It has been estimated that this will cause the unemployment figures in Mexico to rise to 15,000,000 in 10 years. As in the past, unrelieved immigration pressure will result in increased numbers of illegal entries. *Id.* at 775.

161. 424 U.S. 351 (1976) (rejecting a preemption challenge to CAL. LAB. CODE § 2805 (West Supp. 1978)). For a discussion of the constitutional issues in *DeCanas* see Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 295 (1977).

162. In the aftermath of the *DeCanas* decision several states have enacted employer sanction statutes similar to CAL. LAB. CODE § 2805 (West Supp. 1978). See CONN. GEN. STAT. ANN. § 31-51K (West Supp. 1978); DEL. CODE ANN. tit. 19, § 705 (Supp. 1978); KAN. STAT. ANN. § 21-4409 (Supp. 1976); ME. REV. STAT. ANN. tit. 26, § 871 (West Supp. 1978). MASS. GEN. LAWS ANN. ch. 149, § 19c (West Supp. 1978); N.H. REV. STAT. ANN. § 275-A:4-A:5 (1976); VT. STAT. ANN. tit. 21, § 444a (Supp. 1977); VA. CODE § 40.1-11.1 (Michie Supp. 1977).

163. The House of Representatives has twice approved legislation creating employer sanctions, the bills, died when the Senate failed to act on them, preferring its own. The House and Senate proposals, however, differ in scope. Briefly, H.R. 8713, the Rodino bill eliminates the proviso in 8 U.S.C. § 1324 (a) (4) (1970) that employment will not constitute harboring, and in effect makes unlawful the knowing employment of an "alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General." H.R. 8713, 94th Cong., 1st Sess., § 2 (1975). Enforcement is a three-tiered process. The first step is the issuance of a citation; second, the imposition of a civil penalty up to \$500 for each alien knowingly hired; and finally, the imposition of criminal sanctions. The bill permits the Attorney General to initiate a civil action if an employer discriminates against an individual on the basis of national origin. Finally, it provides for amnesty, allowing status adjustment for an alien continuously physically present in the United States since June 30, 1968 and whose deportation after June 30, 1975 would result in undue personal hardship. *Id.* at §§ 3, 4(a). The Eastland bill, S. 3074, provides for the importation of an alien worker whenever domestic workers are unavailable for the same work. S. 3074, 94th Cong., 2d Sess., § 2 (1976). Moreover, the bill imposes only civil sanctions against the knowing employment of undocumented aliens and bars liability if the employer makes a bona fide inquiry. A signed statement from the prospective employee attesting that he is not an alien constitutes prima facie proof that the bona fide inquiry has been made.

policy to assist Mexico with its complex social and economic problems. Rather than committing ourselves to expanded border surveillance and obtrusive inland operations, the United States should, along with Mexico, develop bilateral programs of economic development, technical assistance, expansion of trade, population control, agrarian development, and land reform. In the last analysis, the problem of illegal entry is the result of the "pull" of this country's unskilled labor demands, and the "pushes" in Mexico,<sup>164</sup> caused by high unemployment, low wages, population growth and other economic factors.<sup>165</sup> Illegal immigration must be given far greater attention in our conduct of foreign affairs. The development of a comprehensive national policy<sup>166</sup> must be directed at reducing the "push-pull" factors if the illegal alien flow is to be reduced. One thing is certain, INS reliance on "dragnet" approaches to law enforcement is impermissible, ineffective, discriminatory, and promotes public disrespect for law enforcement.

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164. For a discussion of the "push-pull" factors of illegal migration, see PRESIDENT'S INTER-AGENCY TASK FORCE STUDY, DOMESTIC COUNCIL ON ILLEGAL ALIENS, PRELIMINARY REPORT. See also, A. FRAGOMEN, *THE ILLEGAL ALIEN: CRIMINAL OR ECONOMIC REFUGEE?* (1973); J. KARKASION, *THE ILLEGAL ALIEN* (1976); Dagodag, *Source Regions and Composition of Illegal Mexican Immigration to California*, 9 INT'L. MIGRATION REV. 499 (1975).

165. A *Washington Post* editorial noted:

[T]he real problem is how the countries of the world are going to work out the problem of redistributing the wealth in general and of stabilizing the food supply in particular. . . . As long as there are hungry, jobless people in the world, they are bound to head across frontiers in search of better lives. There is no practical way of sealing the Mexican and Canadian borders against illegal entry. And it is hard to get the message back to the "teeming shore" that those who were once welcome are now an intolerable burden.

. . . The real solutions, to the extent that there are any, lie with the government of the United States and those nations in a position to help the less developed countries, with economic development and aid and with measures to improve the distribution of food and the means of producing food. That is where the problem of "illegal immigration" begins and is probably the only place it can be solved.

*Illegal Importation: A Global Problem*, *Washington Post*, Nov. 13, 1974, § A, at 24, col. 2.

166. See Manulkin & Maghame, *A Proposed Solution to the Problem of the Undocumented Mexican Alien Worker*, 13 SAN DIEGO L. REV. 42 (1975). See also Nafziger, *A Policy Framework for Regulating the Flow of Undocumented Mexican Aliens into the United States*, 56 ORE. L. REV. 63 (1977).