Almeida-Sanchez and Its Progeny: The Developing Border Zone Search Law

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The problem of illegal alien entry has recently become one of increasing concern to both the American public and the government. Part of the difficulties surrounding the prevention of illegal alien and contraband smuggling arise from questions concerning the proper method of enforcing immigration and customs laws in areas surrounding the border. *Almeida-Sanchez v. United States*[1] was the Supreme Court's initial venture into the area of border zone search law. The question facing the Court was the right of immigration officials, while on roving patrol,[2] to stop and search without warrant or probable cause automobiles suspected of carrying illegal aliens.[3] The Court held that absent either probable cause or consent, the warrantless search of the automobile violated Almeida-Sanchez's fourth amendment rights.[4] However, the Court's initial attempt to deal with the problems of border zone searches created more confusion than clarity. Many new issues were raised by *Almeida-Sanchez,* and the lower federal courts reached conflicting conclusions as to the impact and proper interpretation of that case.[5]

In order to resolve these conflicts, and clarify the meaning and

1. 413 U.S. 266 (1973). For a further examination of *Almeida-Sanchez,* see Note, *Government Power to Search Vehicles in Border Areas,* 87 HARV. L. REV. 196 (1974).

2. 413 U.S. at 273. Roving patrols are one of three types of surveillance maintained to detect the illegal importation of aliens. Permanent checkpoints are maintained at certain key intersections, and temporary checkpoints are established from time to time along various routes near the border area. *Id.* at 268. *See* United States v. Baca, 368 F. Supp. 398, 403-08 (S.D. Cal. 1973). In contrast, agents of the Bureau of Customs generally conduct their inspections only at the international boundary.

3. 413 U.S. at 268.

4. *Id.* at 273.

5. *Compare* United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), *aff'd,* 43 U.S.L.W. 5028 (U.S. June 30, 1975), *with* United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973). This Note will concentrate on decisions in the Ninth Circuit with some footnote emphasis on the Fifth and Tenth Circuits. The three circuits will be referred to collectively as the border circuits.

scope of *Almeida-Sanchez*, the Supreme Court has recently decided two border zone search cases, *United States v. Brignoni-Ponce*[6] and *United States v. Ortiz*.[7] This Note will consider the scope and implications of *Almeida-Sanchez* and its progeny, *Ortiz* and *Brignoni-Ponce*. In *Ortiz*, the Supreme Court extended the principles of *Almeida-Sanchez* to searches at fixed checkpoints, while in *Brignoni-Ponce*, the Court indicated that the doctrine of reasonable suspicion, which permits investigatory stops by roving patrols, was a constitutionally acceptable method of border zone law enforcement. After consideration of these decisions, two tangential issues in the *Almeida-Sanchez* opinion, the definition of a functional equivalent of a border and the use of area search warrants, will be addressed.

I. BORDER ZONE SEARCH LAW AND THE *Almeida-Sanchez* DECISION

The Law Prior to Almeida-Sanchez

Much of the confusion surrounding *Almeida-Sanchez* and subsequent border search cases resulted from their mixed legal ancestry. Border zone search law is a combination of two conflicting lines of authority: automobile search cases and border-search standards. These two areas of law often suggest contrary results in the same case,[8] and a brief examination of the relevant cases is important to an understanding of border zone search law.

Although the Supreme Court has recognized the automobile as an area of privacy that is protected from unwarranted governmental intrusion,[9] automobile search cases have received different treatment under the fourth amendment than searches of houses and personal effects.[10] Earlier Supreme Court cases, with their emphasis on the auto-

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6. 43 U.S.L.W. 5028 (U.S. June 30, 1975).
7. 43 U.S.L.W. 5026 (U.S. June 30, 1975).
8. *Compare* Carroll v. United States, 267 U.S. 132 (1925), *with* United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir.), *rev'd*, 413 U.S. 266 (1973), [*and*] Fumgalli v. United States, 429 F.2d 1011 (9th Cir. 1970).
9. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971); *see* Chambers v. Maroney, 399 U.S. 42, 49 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting); LaFave, *Search and Seizure, The Course of True Law . . . Has Not . . . Run Smooth*, 1966 U. ILL. L.F. 255, 331-33; LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire"* 8 CRIM. L. BULL. 9, 17-20 (1972). *See generally* Comment, *Eavesdropping, Wiretapping, and the Law of Search and Seizure—Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428, 434 (1968); Comment, *The Concept of Privacy and the Fourth Amendment*, 6 U. MICH. J.L. REFORM 154, 170, 178 (1972).
10. *See* Chambers v. Maroney, 399 U.S. 42, 50 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968); Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 837-45 (1974).

mobile as simply a means of transportation, seemed to indicate that a person had a lesser expectation of privacy when in an automobile than in a home or office.[11] For example, in *Carroll v. United States*,[12] emphasizing the opportunity for escape inherent in the automobile's mobility,[13] the Supreme Court first permitted warrantless searches of automobiles on the highway. In *Carroll* and succeeding automobile search cases, however, the Court has continued to emphasize that probable cause remains an absolute prerequisite to any search, including authorized warrantless searches.[14]

Later, in *Chambers v. Maroney*,[15] the Supreme Court validated the warrantless search of an impounded automobile, where the police had probable cause to believe that it contained evidence and fruits of a crime.[16] Unable to rely on mobility as a factor, the Court reasoned that there was no difference between an immediate warrantless search and immobilization of the vehicle until a warrant could be obtained.[17] In *Coolidge v. New Hampshire*,[18] however, the Court indicated the outer limits of the *Carroll-Chambers* doctrine, holding that where a vehicle was regularly parked in the same spot and was under constant police surveillance, a warrantless search was impermissible. *Coolidge* established that a warrant was the prerequisite to an automobile search whenever it is practicable to secure one.[19] Thus, while the Court expanded—and then limited—the use of warrantless searches of automobiles, the probable cause requirement has not varied. Further, the Court never indicated that an automobile's geographic proximity to an international border lessened this probable cause standard.

The Supreme Court automobile search cases, however, have provided only one of the standards applicable to vehicle searches; a different standard has arisen where the search of an automobile is at or near a border. These border zone searches, which did not require a

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11. No problem of searching the home or any other place of privacy was presented either in *Carroll* or here. Both cases involve freedom to use public highways in swiftly moving vehicles for dealing in contraband, and to be unmolested by investigation and search in those movements. In such a case, the citizen who has given no good cause for believing he is engaged in that sort of activity is entitled to proceed on his way without interference.

Brinegar v. United States, 338 U.S. 160, 176-77 (1949). *See* Note, *supra* note 10, at 840.

12. 267 U.S. 132 (1925).

13. *Id.* at 153-54.

14. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 50-52 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968); Brinegar v. United States, 338 U.S. 160, 176-77 (1949).

15. 399 U.S. 42 (1970).

16. *Id.* at 52.

17. *Id.*

18. 403 U.S. 443 (1971).

19. *Id.* at 461-64.

showing of probable cause, were generally held to be statutorily authorized either as customs searches[20] or immigration searches.[21]

The *customs* search statute permits a border official to stop and search "any vehicle, beast, or person, on which . . . he . . . shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law."[22] This statutory suspicion requirement has been interpreted by the courts as embodying a standard that is less rigid than probable cause.[23] At the border, an agent needs only a hunch that a crime is being committed in order to stop and search an automobile.[24] Once a traveler has left the border, however, officials may conduct a customs search only if they have probable cause.[25]

Two major exceptions to the probable cause requirement for customs searches have been developed in the Court of Appeals for the Ninth Circuit. In *Alexander v. United States*,[26] the court held that a search conducted away from the border can be considered a border search when it can be reasonably ascertained from the totality of the circumstances that any contraband found in a vehicle at the time of the search was also in the vehicle when it entered the United States.[27] The requirement of reasonable certainty is usually established through surveillance of the suspect vehicle after it leaves the border.[28] Thus,

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20. 19 U.S.C. § 482 (1970).
21. 8 U.S.C. § 1357(a) (1970).
22. 19 U.S.C. § 482 (1970).
23. Valenzuela-Garcia v. United States, 425 F.2d 1170, 1172 (9th Cir. 1970); Blefare v. United States, 362 F.2d 870, 871 (9th Cir. 1966); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965); Blackford v. United States, 247 F.2d 745, 751-52 (9th Cir. 1957), *cert. denied*, 356 U.S. 914 (1958); Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329, 334-35 (1973); Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457, 459-60 (1968) [hereinafter cited as Comment, *Fourth Amendment*]; Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 54, 54-56 (1974); Comment, *Search and Seizure at the Border—The Border Search*, 21 RUTGERS L. REV. 513, 517-20 (1967) [hereinafter cited as Comment, *The Border Search*].
24. *See, e.g.*, United States v. Warner, 441 F.2d 821, 832 (9th Cir. 1971); King v. United States, 348 F.2d 814, 817 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965); Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); Ittig, *supra* note 23, at 334; Comment, *Fourth Amendment, supra* note 23, at 458 n.8; Note, *Border Searches and The Fourth Amendment*, 77 YALE L.J. 1007, 1007-08 (1968).
25. Carroll v. United States, 267 U.S. 132, 153-54 (1925) (dictum); Note, *supra* note 23, 54-56. *See generally* authorities cited notes 23-24 *supra*.
26. 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).
27. 362 F.2d at 382.
28. Surveillance, without more, can supply the reasonable certainty, since surveillance creates a presumption that conditions in the vehicle have not changed since it crossed the border. Gonzales-Alonso v. United States, 379 F.2d 347 (9th Cir. 1967) (search of automobile 11 miles from the border was valid since the vehicle had been kept under surveillance); Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967) (search conducted 20 miles from the border after 15 hours of constant surveillance and after a driver change was a lawful border search); Leeks v. United States, 356 F.2d 470 (9th Cir. 1966) (sufficient surveillance where the car was tailed by several officers who lost sight of the vehicle only momentarily). In Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966), and Castillo-Garcia v.

the *Alexander*-type search can be viewed as merely a deferred assertion of the custom official's right to search any vehicle crossing the border; it is a physical extension of the border search.[29]

A second exception was developed by the Ninth Circuit in *United States v. Weil*,[30] where the court held that customs agents may search a vehicle, whether or not it has actually crossed an international border, when they are reasonably certain that contraband has been smuggled across the border and secreted in the suspect vehicle.[31] *Weil* focuses on the suspected presence of contraband in the vehicle, and in contrast to *Alexander*, it is irrelevant whether the vehicle is known to have crossed the border under suspicious circumstances.[32]

United States, 424 F.2d 482 (9th Cir. 1970), an informer's tip provided additional reason for making the stop and search. The informer's tip was not necessary, however, since surveillance was sufficient. *See* Castillo-Garcia v. United States, *supra* at 485; Alexander v. United States, *supra* at 382.

29. The nearest Fifth Circuit equivalent of the *Alexander* rule applies a different test. The standard is a "reasonable suspicion that the customs laws are being violated." United States v. Martinez, 481 F.2d 214, 218 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). The requirement that border agents have some degree of knowledge or belief that the automobile to be searched has carried contraband across the border is implicit in the standard. In the Ninth Circuit, on the other hand, since suspicion must be accompanied by constant surveillance from the moment of entry, there must be proof that conditions within the vehicle have remained unchanged from the time it crossed the border. Surveillance is not a necessary prerequisite to Fifth Circuit extended border searches. In United States v. Reagor, 441 F.2d 252 (5th Cir. 1971), for example, the court held that the suspicion formed when the vehicle originally entered the United States was sufficient to justify a border search 60 miles from the border despite the fact that no surveillance occurred during the interim. *See* Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. INT'L L. & POLITICS 93, 102-03 (1972); Note, *supra* note 23, at 61.

30. 432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

31. 432 F.2d at 1323. Reasonable suspicion in *Weil* means more than mere suspicion, but less than probable cause. It may involve a combination of an informant's tip and observed suspicious activity. *Id.* at 1321-22. Suspicious activity alone may justify the search. In United States v. Markham, 440 F.2d 1119 (9th Cir. 1971), police observed a vehicle enter a sparsely populated dead-end street near the Mexican border during the early morning hours. Shortly thereafter, the car emerged, appearing quite heavily laden and carrying five additional passengers. The Ninth Circuit held that these facts were sufficient to meet the *Weil* reasonable certainty test. *Id.* at 1122.

The Ninth Circuit may have set a time limit on *Weil* searches. United States v. Vigil, 448 F.2d 1250 (9th Cir. 1971) (per curiam). "The car searched need not have recently crossed the border if it is 'reasonably certain' that it contains goods or persons which [have] just crossed the border illegally." *Id.* at 1251; *see* United States v. Majourau, 474 F.2d 766 (9th Cir. 1973) (interpreting *Weil-Vigil* as invalidating a search 90 miles inland and conducted approximately 3 hours after the border crossing).

32. *See* Note, *supra* note 23, at 64. The Fifth Circuit standard for *Weil*-type searches is that there must be a "reasonable suspicion of possession of unlawfully imported merchandise." United States v. Salinas, 439 F.2d 376, 379 (5th Cir. 1971). For example, in United States v. Valdez, 456 F.2d 1140 (5th Cir. 1972), an observer notified customs officials that a truck of Mexican registry had unloaded several suitcases in an area near Brownsville, Texas. Subsequently, the suitcases were placed in an automobile registered to an accused narcotics violator. The Fifth Circuit held that this was sufficient to establish that smuggling was taking place. *Id.* at 1142.

This criteria is virtually indistinguishable from the Fifth Circuit's standard for *Alexander*-type searches, established in United States v. Martinez, 481 F.2d 214, 218 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). *See* discussion note 29 *supra*. The only distinction between the *Martinez* standard of "reasonable belief that customs laws are being violated" and the *Salinas* requirement of "reasonable suspicion of possession of unlawfully imported merchandise" is that in the *Martinez* situation, the suspicion is

Generally, while customs searches were required to meet at least the extended border search standards developed in *Alexander* and *Weil, immigration* searches were not so limited. Courts upheld the statutory right of border patrol officers to stop and search vehicles at both fixed and temporary checkpoints without a warrant or a showing of probable cause.[33] The Ninth and Tenth Circuits also upheld the right of roving patrols of immigration officers to stop and search, without probable cause, automobiles suspected of containing illegal aliens.[34] Only two limitations had been placed upon immigration searches. First, all searches conducted without probable cause or warrant had to take place within the administratively established "reasonable distance" of 100 air miles of the border.[35] Additionally, immigration officials could only search those areas of the automobile where it was reasonably likely that *aliens* could be discovered.[36]

Thus, there were two distinct branches of border zone search law: (1) customs searches, which required probable cause away from the border, unless within the *Weil* or *Alexander* exceptions, and (2) immigration searches, which, while limited in their scope and intrusiveness, could be conducted without probable cause or suspicion anywhere within the 100-mile zone surrounding the border. These two distinctly different types of search law were applied in similar situations. While the law governing each type of search was distinct, all border officials were empowered to apply both customs search law and immigration search law in any given situation.[37] Since many fact situations appeared quite similar and lacked any distinct contraband or alien char-

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usually supported by an informant's tip acquired prior to the border crossing, while the *Salinas*-search requires that the suspicion be derived from customs officials observations of suspicious activity in the border zone. *Compare* United States v. Martinez, *supra*, *with* United States v. Salinas, *supra*.

33. United States v. Wright, 476 F.2d 1027 (5th Cir.), *cert. denied*, 414 U.S. 821 (1973); Fumgalli v. United States, 429 F.2d 1011 (9th Cir. 1970); Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967); Fernandez v. United States, 321 F.2d 383 (9th Cir. 1963); Ramirez v. United States, 263 F.2d 385 (5th Cir. 1963); Note, *supra* note 29, at 103-06.

34. *See* United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969).

35. Attorney General's Regulation, 8 C.F.R. § 287.1(a)(2) (1974).

36. Fumgalli v. United States, 429 F.2d 1011, 1013 (9th Cir. 1970); *see, e.g.*, United States v. Daly, 493 F.2d 395, 396-97 (5th Cir. 1974) (large crate); United States v. Barron, 472 F.2d 1215, 1218 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973) (trunk); United States v. Almeida-Sanchez, 452 F.2d 459, 461 (9th Cir. 1971), *rev'd*, 413 U.S. 266 (1973) (rear seat); United States v. Miranda, 426 F.2d 283, 284 (9th Cir. 1970) (hood).

37. Judge Goldberg referred to this as the two-hat theory in United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973):

> It appears that the Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer. The agents testified that they had planned to wear their immigration hats that night, but . . . nothing . . . would preclude them from donning their customs hats during a proper border search.

463 F.2d at 134; *see* Note, *supra* note 23, at 65 n.62.

acteristics, border agents had difficulty keeping the two search procedures separate.[38] Searches that began as immigration checks tended to turn into customs searches, often with resulting arrests and confiscations.[39] For example, in *United States v. Miranda*,[40] an alien search under the hood of an automobile revealed several bricks of marijuana. The search was upheld although there appeared to be only a few inches of space available for hiding any object under the hood.[41] Thus, on the eve of *Almeida-Sanchez*, the federal case law on border zone searches was contradictory and confusing. It remained unclear under what circumstances and to what extent border agents, acting under the auspices of either the immigration or the customs laws, might search an automobile.

The Decision: Almeida-Sanchez v. United States

Almeida-Sanchez was stopped by the United States Border Patrol approximately 25 miles north of the Mexican border on state highway 78 in California.[42] After asking for identification, one of the officers looked under the rear seat of the automobile for hidden aliens. Instead of illegal aliens, he discovered several packages of marijuana.[43] Almeida-Sanchez was arrested and convicted of knowingly receiving, concealing, and facilitating the transportation of illegally imported marujuana.[44]

In *Almeida-Sanchez*, the United States Supreme Court rejected the established border zone search law, holding that the search was governed by automobile search standards and required probable cause.[45] Justice Stewart, writing for the majority, noted that there had been no

38. *See, e.g.*, Fumgalli v. United States, 429 F.2d 1011 (9th Cir. 1970); Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963).

39. *See, e.g.*, United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971), *rev'd* 413 U.S. 266 (1973); Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969).

40. 426 F.2d 283 (9th Cir. 1970).

41. *Id.* at 285. In Contreras v. United States, 291 F.2d 63 (9th Cir. 1961), a Border Patrol officer stopped a vehicle 22 miles north of the border for the purpose of determining the driver's nationality. The officer saw a plain paper sack covered by a leather jacket and bedspread on the front seat of the automobile. Clearly, the sack could not contain an alien; nevertheless, it was seized and its contents found to be marijuana. *Id.* at 64. In Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970), the defendant was stopped by an immigration inspector who asked him for identification. Noting that the defendant appeared nervous, the inspector then asked the defendant to open his trunk for inspection. Finding that the trunk contained no aliens, the inspector then searched an 8-inch gap between the outer shell of the automobile and the trunk; he discovered marijuana. *Id.* at 1172.

42. Almeida-Sanchez v. United States, 413 U.S. 266, 267-68 (1973).

43. *Id.* at 267.

44. United States v. Almeida-Sanchez, 452 F.2d 459, 460 (9th Cir. 1971), *rev'd*, 413 U.S. 266 (1973).

45. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

consent, probable cause, or warrant to conduct the search.[46] The Court recognized that *Carroll* allowed warrantless automobile searches on an open road, but emphasized that probable cause was required even in these circumstances.[47] The government's contention that administrative searches, such as those authorized under *Camara v. Municipal Court*[48] and *See v. City of Seattle*,[49] validated the *Almeida-Sanchez* search was rejected.[50] Justice Stewart noted that the legality of the *Camara* and *See* searches was dependent on either consent or a warrant. In contrast, the search in *Almeida-Sanchez* was conducted in the unfettered discretion of the members of the Border Patrol who did not have a warrant, probable cause, or consent.[51] The Court also rejected the contention that the search could be validated by the warrantless search cases involving regulated businesses,[52] where business-

46. *Id.* at 269-70. Justice Stewart delivered the opinion of the Court, which Justices Douglas, Brennan, and Marshall joined. Justice Powell joined the opinion of the Court in a concurring opinion.

47. "[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search." *Id.* at 269.

Justice Stewart read dicta in *Carroll* as delineating the limitations of the *Carroll* doctrine and its relation to border searches:

> The Court that decided Carroll v. United States . . . sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Mr. Chief Justice Taft's opinion for the Court distinguished between searches at the border and in the interior, and clearly controls the case at bar:
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> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

Id. at 274-75.

48. 387 U.S. 523 (1967). *Camara* held that administrative inspections to enforce community health and welfare regulations could be made on less than probable cause. Warrants were required, however. *Id.* at 538.

49. 387 U.S. 541 (1967). In *See*, the Court held that where there is no consent, an administrative warrant must be obtained before private commercial premises could be inspected for fire hazards. The warrant, however, could be based on less than probable cause. *Id.* at 545.

50. 413 U.S. at 270.

51. *Id.*

52. *Id.* at 271-72. The two regulatory inspection cases relied upon by the government were Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), and United States v. Biswell, 406 U.S. 311 (1972). In both cases, the Court said it would uphold warrantless inspections of commercial enterprises engaged in businesses regulated and licensed by the government since a long history of governmental regulation and reporting was involved. United States v. Biswell, *supra* at 312 n.1, 315-16; Colonnade Catering Corp. v. United States, *supra* at 76-77. The regulated business cases provide that fourth amendment rights can be limited by conditions placed upon the receipt of certain privileges. But traveling along a road within the United States is not something that can be subjected to this type of condition—the individual is not receiving a conditioned

men were deemed to have consented to such searches, thus vitiating the need for either probable cause or warrant. *Almeida-Sanchez* did not fall within this category.[53] Finally, the Court found that the federal regulations authorizing alien immigration searches could not eliminate fourth amendment search and seizure requirements;[54] acts of Congress, the Court noted, were to be construed in a manner consistent with constitutional standards.[55] The Stewart opinion stated that neither a warrant nor probable cause would be necessary for routine searches at the border or its *functional equivalent*.[56] But the search of Almeida-Sanchez's automobile, 25 miles north of the international border, was wholly different from a border inspection and violated the fourth amendment.[57]

Justice Powell, joining the opinion of the Court in a separate concurring opinion,[58] recognized the conflict between fourth amendment rights and the government's need to enforce immigration laws.[59] In an attempt to reconcile that conflict, he argued that immigration inspections were primarily administrative and similar to the health and safety inspections at issue in *Camara* and *See* and suggested the development of area search warrants similar to those approved in *Camara*.[60] Under the system proposed by Justice Powell, the Border Patrol could obtain area warrants to conduct roving searches in a particular area for a reasonable period of time.[61]

The dissent argued that *Carroll* and the automobile search cases were irrelevant to *Almeida-Sanchez* and the case was to be governed by the border zone search doctrine.[62] The dissenters indicated that they would support Justice Powell's suggestion of area search warrants; however, they felt such warrants were clearly unnecessary.[63] They contended that reasonableness is the primary criteria by which a border search's legality is to be judged,[64] and that the *Almeida-Sanchez* search was reasonable since it was carried out under the authority of the immigration laws and occurred in the zone surrounding the border.[65]

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benefit. Almeida-Sanchez v. United States, 413 U.S. 266, 281 (1973) (Powell, J., concurring). *See generally* Andrews, *Screening Travelers at the Airport to Prevent Hijacking: A New Challenge to the Unconstitutional Conditions Doctrine*, 16 ARIZ. L. REV. 658, 674-84 (1975).

53. 413 U.S. at 271.
54. *Id.* at 272.
55. *Id.*
56. *Id.* at 272-73.
57. *Id.* at 273.
58. *Id.* at 275.
59. *Id.* at 276-77.
60. *Id.* at 282.
61. *Id.* at 283.
62. *Id.* at 287-91. Justice White wrote the dissenting opinion, in which Chief Justice Burger and Justices Blackmun and Rehnquist joined.
63. *Id.* at 288.
64. *Id.* at 291-94.
65. *Id.* at 294.

The decision in *Almeida-Sanchez* was narrowly limited to the facts of that case and left many issues unresolved. The Court did not indicate whether probable cause was required for both a stop and search by a roving patrol, or simply the search.[66] Additionally, as Justice Powell carefully pointed out in his concurring opinion, the decision did not reach the validity of searches at fixed and temporary checkpoints, and while the majority opinion indicated that a lesser standard than probable cause could be employed at the border or its functional equivalent, the Court did not define the latter term. Finally, the *Almeida-Sanchez* Court chose neither to endorse nor reject Justice Powell's area search warrant proposal.[67] Consideration will now be given to the recent efforts of the Supreme Court and the lower federal courts to resolve these areas of uncertainty.[68] Particular emphasis will be placed

66. The language of the Court was ambiguous on this point. Justice Stewart hinted that an automobile stop based on a suspicion standard equivalent to that found in Terry v. Ohio, 392 U.S. 1 (1968), might be permissible. "It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search—not even the "reasonable suspicion" found sufficient for a street detention and weapons search in Terry v. Ohio . . . and Adams v. Williams . . . ." 413 U.S. at 268. See text accompanying notes 71-99 *infra*.

67. A clear majority of the court, however, has indicated that they would support the validity of area search warrants, at least where executed by roving patrols. *See* discussion note 171 *infra*. *See also* United States v. Martinez-Fuerte, 314 F.2d 308, 322-25 (9th Cir. 1975) (Wright, J., dissenting).

68. A final unstated issue was the problem of the retroactivity of *Almeida-Sanchez*. In United States v. Peltier, 500 F.2d 985 (9th Cir. 1974), *rev'd*, 95 S. Ct. 2313 (1975), and United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975), the Ninth Circuit grappled with this problem. In *Peltier*, the Ninth Circuit held that *Almeida-Sanchez* was not a new rule as applied to roving patrol searches, but merely reaffirmed *Carroll* and thus should be retroactively applied. In *Bowen*, the Ninth Circuit determined that the principles of *Almeida-Sanchez* applied to searches at fixed checkpoints. In a separate section of the *Bowen* opinion, however, the court ruled that *Almeida-Sanchez* was a new rule for purposes of fixed checkpoint searches and need not be retroactively applied. Bowen, since his search took place before *Almeida-Sanchez* was decided, did not receive the benefit of the new rule. Relying on its holding in *Bowen*, the Ninth Circuit reversed the conviction of the defendant in United States v. Ortiz, an unreported decision. *See* No. 73-2050 (9th Cir. June 19, 1974), *aff'd*, 43 U.S.L.W. 5026 (U.S. June 30, 1975). In *Ortiz*, the fixed checkpoint search occurred after the *Almeida-Sanchez* decision. The court stated that *Almeida-Sanchez* required probable cause for all vehicle searches occurring after the date of that decision, whether conducted by roving patrols or at fixed checkpoints. United States v. Ortiz, *supra*. Taken together, the Ninth Circuit *Peltier, Bowen,* and *Ortiz* opinions indicated that while *Almeida-Sanchez* applied to all immigration search procedures when it was announced, retroactive-prospective application would be dependent on the type of search procedure involved.

The Supreme Court in United States v. Peltier, 95 S. Ct. 2313 (1975), reversed the Ninth Circuit in a 5 to 4 decision, and, despite a vigorous dissent by Justice Brennan, held that *Almeida-Sanchez* did not merely reaffirm traditional fourth amendment search principles but announced a new constitutional rule. *Id.* at 2318-20. The Court stated that since *Almeida-Sanchez* was a new rule, it need not be retroactively applied. The Supreme Court dealt with the two parts of the Ninth Circuit *Bowen* opinion in separate decisions. In United States v. Bowen, 43 U.S.L.W. 5024 (U.S. June 30, 1975), the Supreme Court affirmed the Circuit's decision not to apply *Almeida-Sanchez* retroactively to Bowen. The Court indicated, however, that the Ninth Circuit erred in determining the issue of *Almeida-Sanchez*'s application to fixed checkpoint searches. The Supreme Court reasoned that since *Almeida-Sanchez* was a new rule to be applied only prospectively and the *Bowen* search occurred before the *Almeida-Sanchez* decision, the determination that *Almeida-Sanchez* applied to fixed checkpoints was dictum. In *Ortiz*, the Court reached the issue of the application of the principles of *Almeida-San-*

upon *United States v. Brignoni-Ponce*,[69] where the Supreme Court held that border agents need only a reasonable suspicion—not probable cause—to stop and question occupants of vehicles suspected of carrying illegal aliens, and *United States v. Ortiz*,[70] which applied the principles of *Almeida-Sanchez* to checkpoint searches.

RECENT DEVELOPMENTS IN BORDER ZONE SEARCH LAW

The Doctrine of Reasonable Suspicion: United States v. Brignoni-Ponce

Almeida-Sanchez held only that a roving patrol could not search an automobile without probable cause,[71] and the Court did not decide whether probable cause was necessary for a mere stop of an automobile.[72] In response to this unresolved problem, the Ninth Circuit began applying the already established doctrine of reasonable or founded suspicion to investigatory stops by border agents.[73] Under this doctrine, law enforcement officials, with suspicion that did not amount to probable cause, could stop vehicles to interrogate the driver and passengers.[74] The actions or answers of those in the vehicle could either

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chez to fixed checkpoints and held that fixed checkpoint searches required probable cause, thus affirming the search and seizure analysis of *Bowen*. Since Ortiz was the party before the Court when the issue of *Almeida-Sanchez*'s application to fixed checkpoint searches was resolved, he received the benefit of the Court's determination. To do otherwise would have put the Court in the position of rendering advisory opinions, a violation of Article III. *See* Stovall v. Denno, 388 U.S. 293, 301 (1967); *cf.* United States v. Bowen, 43 U.S.L.W. 5024, 5026 (U.S. June 30, 1975). In *Ortiz*, the Court did not make clear whether it accepted the Ninth Circuit analysis—that *Almeida-Sanchez* determined the issue of probable cause for fixed checkpoint searches—or whether it was developing a new rule by applying the principles of *Almeida-Sanchez* to those searches. If the latter analysis is correct, then a determination of the retroactive-prospective application of the new *Ortiz* rule would be required. The Court's opinion in *Bowen*, however, may be read as holding that the probable cause requirement applies to all border zone searches conducted after *Almeida-Sanchez*.

69. 43 U.S.L.W. 5028 (U.S. June 30, 1975).

70. 43 U.S.L.W. 5026 (U.S. June 30, 1975).

71. 413 U.S. 266, 273 (1973).

72. Language in the opinion seemed to indicate that probable cause might not be necessary for the *stopping* of a vehicle. *See* discussion note 66 *supra*. But, there was also contradictory language in the case that could be read to the opposite effect. *See* text accompanying notes 84-85 *infra*.

73. *See, e.g.*, United States v. Mora-Chavez, 496 F.2d 1181 (9th Cir. 1974); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). The reasonable suspicion principle is not limited to border zone situations. Metropolitan police also have made use of the investigative stop principle. *See* Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). *See generally "Proper Grounds for Investigatory Stops: A Test,"* 15 ARIZ. L. REV. 593, 708 (1974) [hereinafter cited as *"Proper Grounds"*].

74. *See, e.g.*, United States v. Mallides, 473 F.2d 859 (9th Cir. 1973); United States v. Oswald, 441 F.2d 44 (9th Cir. 1971); Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). *See generally* United States v. Ward, 488 F.2d 162 (9th Cir. 1973); Weisgall, *Stop, Search and Seize: The Emerging Doctrine of Founded Suspicion*, 9 U. SAN FRANCISCO L. REV. 219 (1974). The Ninth Circuit used the term "founded suspicion" when referring to its investigatory stop rule. This term, however, has never been accepted by the other border circuits. Both the Fifth and Tenth Circuits preferred to apply a reasonable suspicion standard. *See, e.g.*, United States v. Wright, 476 F.2d 1027, 1030 (5th Cir.),

satisfy the agent's suspicions or provide probable cause, justifying a search of the vehicle.[75]

The reasonable or founded suspicion standard originated with the case of *Wilson v. Porter*,[76] where the Ninth Circuit upheld the stop and subsequent search of an automobile that was slowly cruising a deserted city street shortly before dawn. The court stated:

> [D]ue regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine the detention was not abitrary or harassing.[77]

United States v. Malides[78] refined the standard, requiring that the officer be able to point to specific and ascertainable facts that would lead a reasonable person to make the stop and investigation.

Considered in light of the stop and frisk rules enunciated by the Supreme Court in *Terry v. Ohio*,[79] the reasonable suspicion doctrine appeared to be constitutionally sound. The rationale supporting the stop and frisk—the protection of the public and the prevention and detection of crime—applied equally to investigatory stops.[80] Additional

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cert. denied, 414 U.S. 821 (1973); United States v. Saldana, 453 F.2d 352, 354 (10th Cir. 1972); United States v. Sanchez, 450 F.2d 525, 528 (10th Cir. 1971). The Supreme Court also used the term "reasonable suspicion" in ennunciating the *Brignoni-Ponce* investigatory stop standard. *See* text accompanying notes 92-96 *infra*. For the sake of clarity, this Note will use "reasonable suspicion" in describing all investigatory stop situations, regardless of the circuit where they occurred.

75. If the suspect's answers fail to alleviate suspicion, but there is no probable cause to search or arrest, the investigation must end. *See* United States v. Roberts, 470 F.2d 858, 859 (9th Cir. 1972). Unless the search takes place at the border or its functional equivalent, *Almeida-Sanchez* requires probable cause for an automobile search. 413 U.S. 266, 272-73 (1973). Questioning, however, can establish probable cause where it reveals that the vehicle's occupants are illegal aliens, United States v. Vital-Padilla, 500 F.2d 641 (9th Cir. 1974); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974), and failure to produce identification papers is also sufficient to change a reasonable suspicion into probable cause. *See* United States v. Ojeda-Rodriguez, 502 F.2d 560 (9th Cir. 1974).

76. 361 F.2d 412 (9th Cir. 1966).

77. *Id.* at 415; *see* Weisgall, *supra* note 74, at 222-26, 242-44; *"Proper Grounds," supra* note 73, at 714.

78. 473 F.2d 859 (9th Cir. 1973).

79. 392 U.S. 1 (1968). The Ninth Circuit in United States v. Mallides, 473 F.2d 859 (9th Cir. 1973), stated that immigration investigatory stops were analogous to *Terry*. *Id.* at 861.

80. Arguably, the rationale for the *Terry* decision was not simply crime prevention; rather, the need to protect the policeman and others from potential violence was the central justification for the decision. *See* United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5037 (U.S. June 30, 1975) (Douglas, J., concurring); LaFave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 65-67 (1969). There is some support for this position. Throughout *Terry* the Court refused to separate the stop and frisk. 392 U.S. at 21 n.16. *See* Note, *The Limits of Stop and Frisk—Questions Left Unanswered by Terry*, 10 ARIZ. L. REV. 419, 421 (1968).

support for vehicle stops was found in *Adams v. Williams*,[81] where the Supreme Court approved investigatory stops of individuals, without requiring an accompanying frisk.[82] Together these cases were read as approving investigatory stops of individuals based on specific ascertainable facts amounting to less than probable cause.

It was unclear, however whether the reasonable suspicion doctrine was consistent with *Almeida-Sanchez* and the automobile search cases. Arguably, automobile stops based simply on suspicion were not constitutionally acceptable.[83] For example, *Carroll* stated that those lawfully within the country have a right of free passage without interruption or search unless there is "known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband."[84] Similarly, the Court in *Almeida-Sanchez* said:

> It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop or* the subsequent search. . . . [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any sup-

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Rather, the Court seemed to insist that the procedure was allowable only where the person being investigated is both suspicious and considered to be armed and dangerous. *See* 392 U.S. at 30. Thus, the stop and frisk rule could be limited to situations where a crime of violence was involved. *See* LaFave, *supra*, at 65. However, the *Terry* Court also indicated in its decision that the general underlying public interest involved was the prevention of crime and its detection. 392 U.S. at 22. Further, there is dictum in *Terry* that can be read to indicate that a stop alone, if based on sufficient facts, would be acceptable. *See id.* at 21-22. Adams v. Williams, 407 U.S. 143 (1972), decided 4 years after *Terry*, clarified any doubts that may have existed as to whether the Court would permit a stop based on less than probable cause. The Court in *Adams* not only separated the stop from the frisk, but also indicated that the stop did not require that the suspect be armed and dangerous. *Id.* at 146. *See generally* Gaines v. Craven, 448 F.2d 1236 (9th Cir. 1971); United States v. Unverzagt, 424 F.2d 396 (8th Cir. 1970). The armed and dangerous rationale of *Terry* is really more relevant to the frisk procedure than the stop. *See* Note, *supra* at 428. A nonviolent crime may not require a frisk, but this does not negate the valid need of a law enforcement official to make a brief, investigatory stop under suspicious circumstances. *See id.* at 428-29.

81. 407 U.S. 143 (1972).

82. *Id.* at 146.

83. *See* United States v. Ojeda-Rodriguez, 502 F.2d 560, 561-62 (9th Cir. 1974) (Hufstedler, J., concurring); Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1973) (arguing from Henry v. United States, 361 U.S. 98 (1959), that every stop of an automobile is an arrest, and thus a moving automobile may only be stopped upon probable cause to arrest its occupants). In Henry v. United States, *supra*, agents stopped a car occupied by individuals suspected of being involved in an interstate liquor theft and spotted cartons, labelled with the missing brand name, within the automobile. After inquiry revealed that the cartons had been stolen, the agents formally arrested the suspects. The Supreme Court held that the arrest was unlawful since it was not based on probable cause. Thus, one possible interpretation of *Henry* would be that probable cause is needed for an investigatory stop. A careful reading of *Henry*, however, reveals that the question is whether probable cause existed at the time of the stop, rather than whether the stop in itself constituted an arrest. *Henry* simply reaffirms that probable cause is required for an arrest. Considering the limited nature of the *Henry* holding and that the case predates *Terry* by 9 years, it is not clear that the Supreme Court has actually held that the mere stopping of an automobile constitutes an arrest.

84. 267 U.S. 132, 153-54 (1925).

port for the constitutionality of the stop and search in the present case.[85]

Thus, it was not certain whether the Supreme Court would require probable cause for both the stop and search or if a lesser standard of suspicion would be permissible for an investigatory stop of an automobile.

In *United States v. Brignoni-Ponce*,[86] the Supreme Court addressed this issue. Defendant's automobile was stopped by a roving patrol on Interstate 5, south of San Clemente, California.[87] The officers' only justification for the stop was that the automobile's three occupants appeared to be of Mexican descent.[88] Questioning of Brignoni-Ponce and his passengers revealed that the latter were illegal aliens, and the petitioner was arrested and convicted of knowingly transporting illegal aliens.[89] On appeal, the Ninth Circuit held that the fourth amendment, as interpreted in *Almeida-Sanchez*, prohibits stopping a vehicle, even for the limited purpose of questioning its occupants, unless the officer had a reasonable suspicion that the occupants were aliens, illegally in the country.[90] The Court refused to find that Mexican ancestry alone was sufficient to support a reasonable suspicion and reversed the conviction.

In upholding the court of appeal's decision in *Brignoni-Ponce*, Justice Powell, writing for the Court, began by noting that although the stop in *Brignoni-Ponce* was undoubtedly a seizure under the fourth amendment, the reasonableness of such seizures depended upon a balance of the public interest involved and "the individual's right to personal security free from arbitrary interference by law officers."[91] The Court recognized the great difficulties faced by the government in preventing the entry of illegal aliens and the valid public interest in preventing that entry.[92] Justice Powell emphasized that the intrusion

85. 413 U.S. 266, 268 (1973) (emphasis added).
86. 43 U.S.L.W. 5028 (U.S. June 30, 1975).
87. *Id.* at 5029.
88. *Id.*
89. *Id.*
90. United States v. Brignoni-Ponce, 499 F.2d 1109, 1112 (9th Cir. 1974), *aff'd*, 43 U.S.L.W. 5028 (U.S. June 30, 1975). The *Brignoni-Ponce* stop, however, did not directly involve the reasonable suspicion principle, but centered around the government's claim that it could stop all vehicles without probable cause or suspicion pursuant to 8 U.S.C. § 1357(a)(1) (1970). The Ninth Circuit stated that since the stop was by a roving patrol, based solely on the statutory authority, it was controlled by *Almeida-Sanchez*. In affirming *Brignoni-Ponce*, the Supreme Court read the reasonable suspicion principle into the stop section of section 1357(a)(1), just as *Almeida-Sanchez* had required probable cause for the search part of that statute.
91. United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5030 (U.S. June 30, 1975).
92. The Government makes a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one

caused by such stops was both brief and modest, requiring at most the production of a document evidencing the right to be in the United States. Further, the Court found the analogy to *Terry* and *Adams*—allowing limited seizures based on less than probable cause where there was an important governmental interest at stake and the intrusion was minimal—persuasive.[93] Thus, the Court held that where a roving patrol officer had a "reasonable suspicion,"[94] he might stop an automobile briefly and investigate the circumstances that provoked the suspicion.[95] The officer could question the driver and passengers about their citizenship and immigration status, and he could ask them to explain suspicious circumstances. Any further detention, however, would have to be based on consent or probable cause.[96]

Given the holdings of *Terry* and *Adams*, the decision in *Brignoni-Ponce* seems correct. If a citizen may be briefly detained on the street for a limited interrogation, drivers of automobiles may certainly be stopped[97] by the Border Patrol for brief questioning. The logical result of not applying *Terry* and *Adams* to automobile stops is that a border official would be unable to stop and investigate[98] potentially criminal

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million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country. Whatever the number, these aliens create significant economic and social problems competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.

Id.

93. *Id.* at 5031.

94. 43 U.S.L.W. 5028, 5031 (U.S. June 30, 1975). Justice Powell adopted the term "reasonable suspicion" for this investigatory stop standard.

95. Arguably, an automobile stop is such an interference with a person's expectation of privacy and right of free passage that it cannot be allowed absent probable cause to arrest and search him. The difficulty with this line of reasoning is that a pedestrian also has a considerable expectation of freedom of movement and passage, but his rights can be interfered with under the stop and frisk rationale. The expectation of unimpeded passage does not appear to be significantly greater in an automobile than on foot. *See* Weisgall, *supra* note 74, at 238. *But see* Note, *supra* note 83, at 872-82.

96. United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5031 (U.S. June 30, 1975). The Court never discussed whether *Carroll* and the other automobile search cases precluded the stopping of automobiles without probable cause. Apparently, the Court assumed that the *Carroll* doctrine was controlling only as to the search itself. Additionally, *Brignoni-Ponce* was limited to investigative stops by immigration officers in the border area and did not reach the question of investigatory stops by police officials within the interior of the United States. The logic of *Terry*, *Adams*, and *Brignoni-Ponce*, however, would seem to compel the Court to reach a similar conclusion as to police investigatory stops.

97. In light of the recent case of United States v. Robinson, 414 U.S. 218 (1974), query whether the officers would, if probable cause to arrest or search developed, be limited to places where aliens are likely to be secreted. If traditional border law is still enforced, contraband found in places where an alien could not be hidden would not be admissible evidence.

98. In a concurring opinion, Justice Rehnquist noted that the Court did not determine the constitutional appropriateness of motor vehicle stops, agricultural inspections, or highway roadblocks to apprehend known fugitives. 43 U.S.L.W. 5028, 5038 (U.S. June 30, 1975). Justice Powell, in the majority opinion, limited the *Brignoni-Ponce* decision in a similar manner. *Id.* at 5031 n.8. The status of these types of inspections is somewhat uncertain, however. While criminal investigatory stops, conducted by the state police, are controlled by a reasonable suspicion standard, United States v. Fisch,

activity involving a moving automobile while he would be free to investigate the same activity if it occurred on foot. Few things would be more likely to discourage effective border law enforcement than a rule such as this. While the rationale of the reasonable suspicion doctrine appears constitutionally sound, it must be sufficiently defined to ensure that its application does not transgress fourth amendment proscriptions.

In *Brignoni-Ponce*, the Supreme Court began to define the parameters of the reasonable suspicion standard. The Court noted that no one factor can give rise to a reasonable suspicion.[99] Rather, there must be a series of objective, articulable facts which, in their particular

474 F.2d 1071 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973); United States v. Leal, 460 F.2d 385 (9th Cir.), *cert. denied*, 409 U.S. 889 (1972); Fields v. Swenson, 459 F.2d 1064 (8th Cir. 1972); United States v. James, 452 F.2d 1275 (D.C. Cir. 1971), the fourth amendment may also limit license and safety checks by the police. Since failure to possess a license, or operating an unsafe automobile, can lead to prosecution, the distinction between such stops and the criminal investigatory stop of *Brignoni-Ponce* is not as clear as appears at first glance. Arguably such automobile license checks are analogous to the administrative inspection authorized by *Camara v. Municipal Court*, 387 U.S. 523 (1967), but in contrast to building inspections, automobile license checks are both personal in nature and aimed at the discovery of a violation of law. An automobile license check is not conducted by special inspectors, but by police officers whose primary responsibility is crime detection and prevention. Moreover, if the stopping procedure affords sufficient discretion to the police, the stop may well focus on particular suspects. Consequently, although physically limited, the vehicle license check may still be more intrusive than the systematic area housing inspection in *Camara*. *See* Commonwealth v. Swanger, 453 Pa. 107, 114, 307 A.2d 875, 879 (1973).

In *Swanger*, the Pennsylvania supreme court held that a single automobile may not be stopped for an automobile license check without probable cause. The court's rationale seemed to apply equally to fixed checkpoint stops. *See id.* at 114, 307 A.2d at 878-79. Two circuit courts have also expressed grave doubts as to whether fourth amendment requirements do not apply to license checks. United States v. Cupps, 503 F.2d 277, 280 (6th Cir. 1974) (dictum); United States v. Nicholas, 448 F.2d 622, 626 (5th Cir. 1971). *See* Note, *supra* note 83, at 680-89, 695-96. The majority of courts, however, have reached the opposite conclusion. *See* United States v. Turner, 442 F.2d 1146 (8th Cir. 1971); United States v. Berry, 369 F.2d 386 (3d Cir. 1966); People v. Washburn, 265 Cal. App. 2d 665, 71 Cal. Rptr. 577 (Ct. App. 1968). *See generally* Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666 (1974). Perhaps the answer to this dilemma lies in simply refusing to recognize such inspections as being within the ambit of the fourth amendment. Justice Rehnquist points toward such an approach in his concurring opinion in *Brignoni-Ponce*, where he implies that such automobile checks are a condition upon the right of vehicular use of the highway. 43 U.S.L.W. at 5038. This premise assumes that driving is a privilege which might be constitutionally prohibited altogether, and therefore driving may be constitutionally conditioned on the right of the police to stop automobiles without justification. *See* Cady v. Dombrowski, 413 U.S. 433, 440-41 (1973); *cf.* People v. Frank, 61 Misc. 450, 452-53, 305 N.Y.S.2d 940, 943 (Sup. Ct. 1969); Andrews, *supra* note 52, at 669-90. *But see* Graham v. Richardson, 403 U.S. 365 (1971) ("[T]his Court has rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a "right" or as a "privilege." *Id.* at 374); Note, *supra* at 680-88.

99. *See* United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5031 (U.S. June 30, 1975); Weisgall, *supra* note 74, at 225. The impact of *Brignoni-Ponce* upon the other border circuits is uncertain. The Fifth Circuit appears to have already adopted a reasonable suspicion standard. *See* United States v. Wright, 476 F.2d 1027 (5th Cir.), *cert. denied*, 414 U.S. 821 (1973). The Tenth Circuit's position is quite different. In United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973), the Tenth Circuit held that without probable cause or suspicion, immigration officers may detain any motorist for the purpose of determining his nationality. The court stated that *Almeida-Sanchez* does not apply to investigatory stops, at least at fixed checkpoints. *Id.* at 1231. *Brignoni-Ponce* clearly invalidates the *Bowman* rule in roving patrol situations. Dictum in *Ortiz*, however, may indicate that the *Bowman* rule is the correct procedure as to searches at fixed checkpoints. *See* text accompanying notes 113-15 *infra*.

context, affirmatively suggest that violations of immigration laws are occurring.[100] The *Brignoni-Ponce* Court outlined some general factors that might be taken into account in deciding whether there is reasonable suspicion to stop a vehicle in the border area. Officers may consider the characteristics of the area in which they encounter the vehicle,[101] its proximity to the border,[102] and the usual pattern of traffic on the particular road in question.[103] Additionally, the driver's behavior may be relevant,[104] as may aspects of the vehicle itself.[105] In delineating these standards, Justice Powell stated that an officer's experience could be a factor in determining whether an investigatory stop was justified.[106] Thus, suspicious activity combined with the prior experience of the officer may be sufficient to develop a reasonable suspicion.[107] Applying this multiple-factor analysis, the Court held that

100. *See* United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5031 (U.S. June 30, 1975). The facts should *affirmatively* suggest criminal activity. Thus, it is at least questionable whether the fact pattern in Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), see text accompanying notes 76-77 *supra*, is sufficient to meet the reasonable suspicion standard. It is difficult to see how simply driving in the predawn darkness is sufficient to create a reasonable suspicion. *See* Note, *supra* note 79, at 432.

101. 43 U.S.L.W. 5032; *see* United States v. Vital-Padilla, 500 F.2d 641 (9th Cir. 1974) (remote, little traveled, rough, winding road); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974) (remote, desolate area, suitable only for ranching).

102. 43 U.S.L.W. at 5032; *see, e.g.*, United States v. Nunez-Villalobos, 500 F.2d 1023 (9th Cir. 1974) (1 mile from the border); United States v. Martinez-Tapia, 499 F.2d 1244 (9th Cir. 1974) (1¼ miles from the border); United States v. Mora Chavez, 496 F.2d 1181 (9th Cir. 1974) (600 feet from the border); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974) (300 yards from the border). *But see* United States v. Torres-Urena, 513 F.2d 540 (9th Cir. 1975) (observation of a man loading cardboard boxes on a pickup truck ¼ mile from the border not sufficient for a reasonable suspicion).

103. *See, e.g.*, United States v. Rodriguez-Alvarado, 510 F.2d 1063 (9th Cir. 1975) (rough, bumpy road in an area with a high incidence of smuggling activity); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974) (seldom used road 50 miles from the border); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974) (traveling on very rough, rarely used dirt road can help create a reasonable suspicion).

104. 43 U.S.L.W. at 5032; *see* United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974) (attempting to evade Border Patrol officers). *See also* United States v. Laird, 511 F.2d 1039 (9th Cir. 1974) (merely tripping a sensor device on a narrow road near the border may give rise to a reasonable suspicion).

105. 43 U.S.L.W. at 5032; *see, e.g.*, United States v. Ojeda-Rodriguez, 502 F.2d 560 (9th Cir. 1974) (where a vehicle has crossed the border, is scratched up, weighted down, and weaving from side to side, a reasonable suspicion has been established); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (a low-riding station wagon was sufficient to create a reasonable suspicion where that particular vehicle had a compartment in which aliens could be hidden); United States v. Barron, 472 F.2d 1215 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973) (an automobile traveling at 1:40 a.m. and appearing to be carrying a heavy load is sufficient to justify a stop).

106. 43 U.S.L.W. at 5032; *see* United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974) (alien smuggling techniques and the border agent's experience are factors in determining whether there is a reasonable suspicion); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974) (border agent's familiarity with the immigration modus operandi of "lead car-load car," where a scout car is placed in front of the automobile carrying the illegal aliens, could be taken into account in deciding whether there were sufficient grounds for reasonable suspicion).

107. *See, e.g.*, United States v. Vital-Padilla, 500 F.2d 641 (9th Cir. 1974); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974).

the mere observation of three Mexican-appearing individuals slumped in an automobile was insufficient for a reasonable suspicion.[108] While large numbers of native born and naturalized citizens do have the physical characteristics identified with Mexican ancestry, Justice Powell noted that only a relatively small portion of them, even in the border area, are aliens.[109] The Court indicated that a Mexican appearance must be combined with other factors if a reasonable suspicion is to be justified.[110] Thus, no one fact, or even several factors, will be sufficient to create a reasonable suspicion unless these indicia suggest that criminal activity is occurring.

Aside from the general guidelines suggested by the *Brignoni-Ponce* Court, little can be said about the substantive aspects of the reasonable suspicion doctrine. It is clear, however, that the objective operative facts that constitute a reasonable suspicion must meet the requirements of *Terry* and *Brignoni-Ponce*. These facts must be such as to give a border agent at least an articulable belief that violations of border laws are occurring. Further refinement of the substantive limitations and scope of this new investigatory stop rule will undoubtedly be left to the lower federal courts.

The Application of Almeida-Sanchez to Fixed Checkpoints: United States v. Ortiz

In *United States v. Ortiz*,[111] the Supreme Court determined that the principles of *Almeida-Sanchez* applied to fixed checkpoint searches. Border Patrol officers stopped Ortiz's vehicle for a routine immigration search at a fixed traffic checkpoint near San Clemente, California.[112] They discovered aliens concealed in the automobile's trunk, and Ortiz

108. 43 U.S.L.W. at 5032. In an opinion concurring in the judgement, Justice Douglas rejected the reasonable suspicion standard enunciated by the Court and reaffirmed his position, originally announced in Terry v. Ohio, 392 U.S. 1 (1968), opposing the concept of stops based on less than probable cause. Justice Douglas argued that the suspicion test should be limited to the prevention of violent crime. *See* 43 U.S.L.W. at 5037. He also objected that the Court, while specifying a series of factors that could be considered in establishing a reasonable suspicion, failed to indicate what combination was necessary to satisfy the test. This, he argued, allowed the police to use any of the enumerated factors to legitimize a stop, even where its probative value would be insignificant. *Id.* at 5038.

109. 43 U.S.L.W. at 5032.

110. Whether a Mexican appearance should be a factor at all is questionable. Since most of those passing near the border will be either American citizens or Mexican nationals with valid entry papers, including nationality as a factor may simply increase the chances of harrassment and unnecessary stopping of innocent persons. A Mexican appearance is, at best, a highly subjective suspicion factor, and the better rule seems to be that announced in United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974), which stated that the apparent ethnic background of persons in an automobile is a neutral fact, which does not help to justify a stop or a search. *Id.* at 856.

111. 43 U.S.L.W. 5026 (U.S. June 30, 1975).

112. *Id.*

was subsequently tried and convicted of illegal alien smuggling. Thus, the Court was faced with *Almeida-Sanchez*'s effect on searches conducted without probable cause at fixed checkpoints. Justice Powell, delivering the opinion of the Court, noted that the government did not contend that the stop was based on probable cause or that the checkpoint was the functional equivalent of a border; the only issue to be decided was whether vehicle searches at fixed checkpoints, like the roving patrol search in *Almeida-Sanchez*, must be based on probable cause.[113] Justice Powell agreed with the government's contention that fixed checkpoint searches are less offensive than roving patrol searches, because they are less intrusive and more certain. He stated, however, that while such differences would be significant in determining the propriety of a stop, they did not provide justification for a search.[114] The greater regularity attending a fixed checkpoint stop did not mitigate the invasion of privacy that the subsequent search entailed.[115]

Additionally, the Court stated that the checkpoint search did not limit "to any meaningful extent" the officer's discretion to select vehicles for a search. Like officers on a roving patrol, fixed checkpoint agents were free to search vehicles at random, since no justification for a decision to search a particular vehicle was required.[116] The Court found that such a high degree of discretion was not consistent with the fourth amendment.[117] Justice Powell stated that the search of an automobile was a substantial invasion of privacy and that probable cause

113. *Id.*
114. *Id.* at 5027.
115. *Id.*
116. *Id.*
117. *Id.* In several footnotes to *Ortiz*, Justice Powell indicated that for fourth amendment purposes not every type of automobile inspection is necessarily a search, *id.* at 5027 n.1, 5028 n.3, and he noted that the exact parameters of a search remained undefined. *Id.* at 5028 n.3. Justice Powell suggested that limited inspections might not constitute a search. Somewhat surprisingly, his examples parallel the immigration searches such as the one condemned in *Almeida-Sanchez*. *See id.* at 5027 n.1. If Justice Powell is indicating that the Border Patrol is not precluded under the fourth amendment from conducting limited alien inspections, then several problems arise.

First, *Almeida-Sanchez* held that although immigration searches are more limited in scope than the ordinary automobile search, they still fall within the protections of the fourth amendment. Merely to refer to an identical enforcement procedure as an inspection gives that procedure an administrative facade, but it does not change its nature as a search. Where law enforcement officials are gathering evidence for prosecution of a serious crime, such as alien smuggling, the procedure can hardly be called an inspection.

Second, although Justice Powell indicated that certain types of searches might be constitutionally acceptable if they were limited in scope, *see id.* at 5028 n.3, limiting the scope of an alien search does not change the nature of the intrusion. Additionally, narrowing the inspection procedure to a few areas within the vehicle will not necessarily protect constitutional rights or restrict the intrusion to those specific areas. The history of immigration searches indicates that the limitations placed on the scope of such searches are frequently unworkable and subject to abuse by zealous border officials. *See* text accompanying notes 35-41 *supra*. Such an inspection standard would violate the principles of *Almeida-Sanchez* and return the circuits to pre-*Almeida-Sanchez* standards. Even assuming that Justice Powell is not referring to alien inspections, but simply pointing to routine safety checks, similar problems exist. *See* discussion note 98 *supra*.

remained the prerequisite to such an intrusion.[118] Consistent with the principles of *Almeida-Sanchez*, the Court held that probable cause was required for alien searches at fixed checkpoints removed from the border or its functional equivalents.[119]

In light of *Almeida-Sanchez*, the Court's decision in *Ortiz* was inevitable. Probable cause, not reasonableness, has always been the minimum standard for a lawful automobile search. This standard is required in the search context both to protect the individual's right to privacy and to limit the discretion of law enforcement authorities.[120] The characteristics of a fixed checkpoint search restricts neither the extent of intrusion into privacy nor the discretion of the official to search.

The *Ortiz* decision leaves open the question of whether stops at fixed checkpoints without either probable cause or suspicion would be constitutionally permissible. The apparent rationale supporting such a position is that a fixed checkpoint stop is a lesser degree of intrusion than a roving patrol stop since it is more certain and less frightening.[121] Thus, even reasonable suspicion would not be required for a fixed checkpoint stop. But this rationale is spurious. Regardless of the location of the stop, the same constitutionally protected interests are violated. A traveler within the United States has at least two constitutionally recognized interests. First, he has the right to travel domestic roads unimpeded by official interference, provided he obeys the necessary safety laws.[122] Additionally, he has the basic fourth amendment right to be protected from unreasonable searches and seizures.[123] When a government agent stops a traveler either at a checkpoint or on a roving patrol, both of the traveler's rights are violated. Therefore, the reasonable suspicion standard should be required for fixed checkpoint stops as it is for roving patrol stops.

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118. 43 U.S.L.W. at 5027. *See* text accompanying notes 9-19 *supra*.

119. *Id.* at 5028.

120. *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970); Carroll v. United States, 267 U.S. 132, 153-54, 155-56 (1925); *cf.* United States v. Martinez-Fuerte, 514 F.2d 308, 321 (9th Cir. 1975).

121. United States v. Ortiz, 43 U.S.L.W. 5026, 5027 (U.S. June 30, 1975); *see* United States v. Hart, 506 F.2d 887, 895 (5th Cir.), *vacated*, 43 U.S.L.W. 3683 (U.S. June 30, 1975) ; United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975).

122. Since 1849, the Court has consistently held that persons within the boundaries of the United States have the right to pass through every part of the nation without interruption. Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849). The right to interstate travel has been grounded alternatively on either the privilege and immunities clause of article IV, section 2, Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871), or the privileges and immunities clause of the fourteenth amendment. Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Crandall v. Nevada, 73 U.S. 618, 629-31 (1867); *see* Carroll v. United States, 267 U.S. 132, 154 (1925). *See generally* Note, *Municipal Self-Determination: Must Local Control of Growth Yield to Travel Rights?*, 17 ARIZ. L. REV. 145 (1975).

123. *See* text accompanying notes 9-19 *supra*. *See also* Note, *supra* note 83, at 866-67.

The principal argument advanced for allowing checkpoint stops without any supporting standard of suspicion is that these procedures can be characterized as reasonable because they are more certain to occur than stops executed by roving patrols. Arguably, the certainty factor reduces the degree of intrusion to a constitutionally acceptable level since warning signs and lights notify the traveler before he reaches the checkpoint that he will be stopped and possibly searched.[124] This is to be contrasted with the roving patrol stop where the traveler may be pulled over at any time with no advance warning.[125]

This analysis fails, however, for several reasons. First, the certainty factor in checkpoint stops is questionable.[126] Not every car traveling through a checkpoint is stopped.[127] In fact, many, if not most, are simply waved through by the immigration staff.[128] The traveler approaching a fixed checkpoint is no more certain of actually being stopped and questioned than he is of being stopped and interrogated by a roving patrol. Second, even if all vehicles were subjected to an immigration stop and interrogation at fixed checkpoints, the element of certainty does not provide a basis for the elimination of constitutional protections. Certainty only affects the traveler's state of mind; it eliminates the shock of a stop by a roving patrol. Predictability does not change the nature of the seizure procedures or the rights violated[129] —interference with the traveler's freedom of movement and intrusion upon his privacy still occur.[130] If mere certainty rendered a stop constitutional, checkpoint stops on any road would be permissible, provided

124. [A] permanent checkpoint does not have the constitutionally frightening aspect of a roving patrol, halting vehicles at random and searching their interiors for illegal aliens. By definition and operation, a permanent checkpoint is permanently situated so that all travelers may have knowledge of its location, and, thus may avoid the checkpoint if they choose to travel by another route. United States v. Hart, 506 F.2d 887, 895 (5th Cir.) *vacated*, 43 U.S.L.W. 3683 (U.S. June 30, 1975).

125. *Id.*; *see* United States v. Bowen, 500 F.2d 960, 963-64 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975).

126. United States v. Bowen, 500 F.2d 960, 963-64 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975); *see* United States v. Martinez-Fuerte, 514 F.2d 308, 313 (9th Cir. 1975).

127. United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975).

128. Usually the officer at the "point"—between lanes of traffic—surveys the oncoming vehicles, looking for those which "break the pattern" of the traffic. Sometimes Border Patrol agents stationed along the highway have alerted the point agent to give special scrutiny to a particular vehicle. In any event, the officer at the point makes a discretionary decision whether to wave an automobile through after it has slowed. If, for some reason, a vehicle arouses the agent's suspicion, he will divert it to a secondary inspection area where the travelers will be detained for interrogation and a possible search. United States v. Martinez-Fuerte, 513 F.2d 308, 313 (9th Cir. 1975); *see* United States v. Baca, 368 F. Supp. 398, 406-07 (S.D. Cal. 1973).

129. *See* Andrews, *supra* note 52, at 711-12; Comment, *Searching for Hijackers: Constitutionality, Costs, and Alternatives*, 40 U. CHI. L. REV. 383, 406 (1973).

130. Predictability of a checkpoint stop may allow the traveler to prepare for it. He is forced, however, to take additional precautions to protect his privacy. In effect, this means that objects he may not wish to have subjected to official scrutiny, no matter how innocent, cannot be carried with him on a trip anywhere near the border.

the government could establish a reasonable need for such procedures. Such a standard would vitiate the fourth amendment. The right to live without having to adjust to invasions of privacy, regardless of the foreseeability of the intrusion, is a basic fourth amendment principle.[131]

Finally, the certainty rationale does not comport with prior Supreme Court investigatory stop decisions. The Court has constantly reiterated that the fourth amendment requires a balancing of interests—those of the government must be weighed against those of the individual; the mere reasonableness of the government procedure is not sufficient. It is axiomatic that this balancing test must be considered in light of the probable cause and warrant requirements of the fourth amendment.[132] *Terry, Adams,* and *Brignoni-Ponce* indicate that where the government intrusion involves a preliminary investigatory stop that may result in prosecution for a serious crime, such as illegal alien smuggling, the balance must be struck in favor of the individual.[133]

If governmental action will result in an interference with a person's freedom of movement, the mere showing that the governmental need is great, or that the procedure is reasonable, is not sufficient. If the primary requirement of the fourth amendment were reasonableness, rather than probable cause or a warrant, the government, at least theoretically, could justify any intrusion merely by claiming its actions were reasonable. In order to prevent this type of arbitrary intrusion, the fourth amendment requires that any seizure of a person, no matter how inoffensive, be justified by some specific, articulable facts. The need of the government can reduce the amount of justification required, but it cannot completely eliminate it.[134] Law enforcement offi-

131. *See* Andrews, *supra* note 52, at 711-12; Note, *supra* note 129, at 406.

132. Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring); *see* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1968). The Court has consistently read the reasonableness standard of the fourth amendment as being defined and limited by the probable cause and warrant requirements. But if these standards always control fourth amendment considerations, the Court may face serious difficulties in upholding automobile license stops, vehicle safety inspections, and such administrative procedures as agricultural checkpoints. Such procedures have been held not to require probable cause, warrant, or even reasonable suspicion. *See* discussion note 98 *supra.* Applying fourth amendment standards to these inspections would either render them ineffective or eliminate them entirely. One possible solution to this dilemma is to simply hold that such administrative checks are not within the ambit of the fourth amendment. This may be the approach the Court will eventually take. *See* United States v. Ortiz, 43 U.S.L.W. 5026, 5028 n.3 (U.S. June 30, 1975). Chief Justice Burger, concurring in the judgments in *Brignoni-Ponce* and *Ortiz,* indicated another possible solution. The Chief Justice apparently feels that the fourth amendment forbids *only* unreasonable searches and seizures, and the probable cause and warrant limitations are to be read in this light. *Id.* at 5033. Thus, the crucial test is whether a particular search is *unreasonable*—if it is, then either probable cause or a warrant is required. *But see* text accompanying notes 133-34 *infra.*

133. *See* United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5031 (U.S. June 30, 1975); Adams v. Williams, 407 U.S. 143, 149 (1972); Terry v. Ohio, 392 U.S. 1, 20-22 (1968).

134. *See* Sibron v. New York, 392 U.S. 40, 64 (1968); Terry v. Ohio, 392 U.S. 1,

cials must still establish, through probable cause, warrant, consent, or reasonable suspicion that there was justification for taking the action at issue.[135] Thus, the mere reasonableness of a particular police procedure in any criminal investigatory stop situation is not the crucial test for permitting the intrusion.

The logic of *Terry* and *Brignoni-Ponce* command that, regardless of the procedure used, there must be, at a minimum, a reasonable suspicion justifying the seizure before law enforcement authorities may single out a vehicle for an investigatory stop.[136] Having left open the question of investigatory stops at fixed checkpoints, the Court did not address the applicability of the reasonable suspicion doctrine in this context. While the use of the doctrine at fixed checkpoints raises new practical considerations,[137] the basic rationale justifying the reasonable suspicion doctrine would seem equally applicable to fixed checkpoint stops.

UNRESOLVED ISSUES IN BORDER ZONE SEARCH LAW

This section will consider two issues left unresolved by the most recent cases handed down by the Supreme Court: what constitutes a search at the functional equivalent of a border, and the constitutional

20-22 (1968); LaFave, *supra* note 79, at 51-56, 68-72; Weisgall, *supra* note 74, at 227-29. *Cf.* Chambers v. Maroney, 399 U.S. 42, 51 (1969). The Court has indicated, however, that there might be a limited number of situations where an investigative stop will not have to be justified by articulable facts. United States v. Ortiz, 43 U.S.L.W. 5026, 5028 n.3 (U.S. June 30, 1975); *see* discussion note 98 *supra*.

135. United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5031 (U.S. June 30, 1975); Sibron v. New York, 392 U.S. 40, 64 (1968); Terry v. Ohio, 392 U.S. 1, 20-22, 26-27 (1968); *see* LaFave, *supra* note 79, at 51-57; *cf.* Camara v. Municipal Court, 387 U.S. 523, 537 (1967). *See also* Adams v. Williams, 407 U.S. 143, 149 (1972); Chambers v. Maroney, 399 U.S. 42, 51 (1969).

136. The Ninth Circuit reached this conclusion in United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974) (holding that reasonable suspicion is necessary for a stop at a fixed checkpoint). *See* United States v. Bowen, 500 F.2d 960, 962-67 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975).

137. It will be extremely difficult for a Border Patrol officer to establish a reasonable suspicion when glancing at an automobile that is moving rapidly through a fixed checkpoint. There are at least two possible solutions to this problem. First, it would be possible to position an officer equipped with a radio ahead of the fixed checkpoint. He would then survey the oncoming vehicles and notify the agents at the fixed checkpoint to give special scrutiny to a particular vehicle. If there were sufficient factors present to arouse the reasonable suspicions of the checkpoint agents, the automobile could then be stopped. A quite similar system is now used at some fixed checkpoints, but the procedure has not been limited by the reasonable suspicion standard. See United States v. Martinez-Fuerte, 514 F.2d 308, 313 (9th Cir. 1975).

Alternatively, a screening procedure might be employed. Under this system, vehicles would be required to slow down, but not stop, as they passed the fixed checkpoint. This would give the checkpoint agents the opportunity to examine the vehicles carefully and stop those that were reasonably suspicious. This solution, however, assumes that the slowing of a vehicle does not constitute a seizure for fourth amendment purposes. A recent Ninth Circuit opinion seems to indicate that such a procedure might be constitutionally acceptable. *See* United States v. Evans, 507 F.2d 879 (9th Cir. 1974) (the mere diversion of an automobile through a traffic checkpoint where the Border Patrol agents could see two aliens lying in plain view on the floor behind the front seat does not constitute a stop and does not violate any constitutionally protected expectations of privacy). *But cf.* United States v. Martinez-Fuerte, 514 F.2d 308, 315 (9th Cir. 1975).

validity of a law enforcement technique that has been used increasingly by border officials, Justice Powell's area search warrant.

Functional Equivalents of the Border

In *Almeida-Sanchez,* Justice Stewart, writing for the majority, pointed out that it is undoubtedly within the power of the federal government to exclude aliens from the country by conducting searches and inspections at the borders.[138] While the search's permissible degree of intrusiveness was left open to question, Justice Stewart indicated that the traditonal fourth amendment requirements of probable cause and a warrant would not be necessary at the border or its functional equivalent.[139] He offered two examples of what could be considered the functional equivalent of a border. One situation was an established checkpoint near the border, as at the confluence of two or more roads that extend from the border.[140] Another example was the search of the passengers and cargo of an airplane after a nonstop flight from a foreign country.[141] Aside from these two limited examples, no other indication was given as to what could be considered a functional equivalent of a border. Neither *Brignoni-Ponce* nor *Ortiz* addressed the functional equivalent issue,[142] and the problem of giving substance to this term has been left to the lower federal courts.

The delineation of what constitutes a functional equivalent of a border is obviously a crucial factor in the development of border zone search law. The problem most frequently presented is whether fixed and temporary checkpoints constitute such a functional equivalent. For example, in *United States v. Bowen,*[143] the government argued that a fixed checkpoint at any location within the border zone is the functional equivalent of the border.[144] The Ninth Circuit rejected this argument, stating that *Almeida-Sanchez* clearly indicated that the functional equivalent of a border search occurs only at a site where virtually everyone has just crossed the border.[145] Such was not the case at the

138. 413 U.S. 266, 272 (1973).
139. *Id.*
140. *Id.* at 273. A search at the border might not be feasible because of the surrounding terrain. Additionally, there are the advantages of time, expense, and efficiency in having a station at the confluence of two roads leading from the border.
141. *Id.*
142. Since *Brignoni-Ponce* was a reasonable suspicion case, the functional equivalent issue was not raised. 43 U.S.L.W. 5028, 5029 (U.S. June 30, 1975). In *Ortiz,* the government did not claim that the San Clemente checkpoint was the functional equivalent of a border. United States v. Ortiz, 43 U.S.L.W. 5026 (U.S. June 30, 1975). However, in United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974), the Ninth Circuit held that the San Clemente checkpoint was not the functional equivalent of the border.
143. 500 F.2d 960 (9th Cir. 1974), *aff'd in part,* 43 U.S.L.W. 5024 (U.S. June 30, 1975).
144. 500 F.2d at 963-64.
145. *See* 413 U.S. 266, 272-73 (1973).

Bowen checkpoint, where a significant number of those stopped were domestic travelers.[146]

The standard applied in *Bowen* provides a reasonable basis for the development of a definition of the functional equivalent of a border. It is consistent with Justice Stewart's main concern in his functional equivalent suggestion—that all travelers subjected to search must have just crossed an international boundary. His examples indicate that fixed checkpoint searches must be conducted at points where travelers searched are coming directly from the border.[147] Thus, when Justice Stewart is referring to a functional equivalent, he means the equivalent of a point of access to the United States.[148]

The functional equivalent exception is based solely on the border search exception,[149] and thus, it is valid only so long as it is utilized in a manner consistent with the underlying reasoning of that exception. In evaluating the application of the functional equivalent doctrine, the principle justification for the border search exception must be considered—the nation's need to protect itself from the importation of contraband and the influx of illegal aliens. This is of such magnitude that the fourth amendment rights of international travelers can be severely limited at the border.[150] Those who enter the United States are regarded as a suspect class[151] subject to a thorough border search upon

146. 500 F.2d at 965. In United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973), the district court concluded that all fixed checkpoints in California were functional equivalents of the border. *Bowen*, of course, overruled this decision. In two subsequent cases, the Ninth Circuit reaffirmed *Bowen*, holding two other fixed checkpoints not to be the functional equivalents of a border. United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974) (San Clemente checkpoint); United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974) (Ocotillo checkpoint); *see* United States v. Martinez-Fuerte, 514 F.2d 308, 315 (9th Cir. 1975). *See also* United States v. Barbera, 514 F.2d 294 (2d Cir. 1975) (holding that although the city of Malone, New York, was the confluence of three highways which extended either from the Canadian border or roads transversing the border, this did not make the entire city of Malone the functional equivalent of the border).

147. *See* 413 U.S. 266, 273 (1973).

148. In contrast, the *Almeida-Sanchez* dissent would allow immigration searches within a border zone extending at least 100 miles from any international boundary. If the dissent's position is to be accepted, then one is left with the question whether the Border Patrol can establish a temporary checkpoint in downtown Tucson, Arizona or on the streets of San Diego, California. The possibility of this sort of occurrence—clearly unacceptable under Justice Stewart's point of entry examples—clarifies the difference between the *Almeida-Sanchez* majority and the border zone search of the dissenters.

149. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973). An alternative justification for the border zone search is that when a person leaves the country he is deemed to have implicitly consented to a border search upon his return. Thus, he can reasonably expect to be searched at the point where he enters the nation, whether at an airport, landing pier, or border checkpoint.

150. *See id.*

151. Boyd v. United States, 116 U.S. 616, 623 (1886); Witt v. United States, 287 F.2d 389, 391 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); Landau v. United States Attorney, 82 F.2d 285, 286 (2d Cir.), *cert. denied*, 298 U.S. 665 (1936); Barnett, *History of Border Search Law*, 1 AM. CRIM. L.Q. 36 (1936); Comment, *Fourth Amendment*, *supra* note 23, at 464-65; Note, *supra* note 29, at 93-95; Comment, *The Border Search*, *supra* note 23, at 513-15.

entry.[152] This rationale requires that the border search be conducted where it is virtually certain that those searched will be persons who have crossed the border; it cannot include persons who are merely traveling on roads near the border.[153] This limitation should be equally applicable to any search at the functional equivalent of a border.[154] Justice Stewart's two examples of a functional equivalent support this rationale and should provide an important outer limit on this doctrine.

Although rejecting checkpoint searches as functional equivalents of a border, the *Bowen* Court noted, in dictum, that the *Alexander* and

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152. Ittig, *supra* note 23, at 330; Note, *supra* note 24, at 1012-13.

153. United States v. Bowen, 500 F.2d 960, 965-67 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975). Both the Ninth Circuit, in United States v. Bowen, *supra*, and the Tenth Circuit, in United States v. King, 485 F.2d 353, 358-59 (10th Cir. 1973), have, however, read *Almeida-Sanchez* as indicating that the "functional equivalent of a border search" is the appropriate standard. *See* discussion note 154 *infra*.

154. The functional equivalent issue has caused some degree of conflict among the border circuits. In United States v. King, 485 F.2d 353 (10th Cir. 1973), the court was faced with a fact situation similar to *Bowen*. In *King*, the appellant was stopped 100 miles north of the Mexican border at the checkpoint near Truth or Consequences, New Mexico. *Id.* at 355-56. When the resulting search uncovered marijuana, King was arrested. *Id.* at 356. On the validity of the checkpoint search, the Tenth Circuit, following reasoning similar to that of *Bowen*, noted that while individual sentences in *Almeida-Sanchez* might be read to indicate the contrary, the import was clear that "a search at a fixed checkpoint of an automobile for aliens without warrant and without probable cause, ninety-eight miles away from the external boundary, is unlawful, unless [a search at] the particular fixed checkpoint be in fact the functional equivalent of a border search." *Id.* at 359.

The Tenth Circuit remanded the case to the district court for a factual determination as to whether the checkpoint was the functional equivalent of a border search. The decision to remand is a distinctly different procedure from that adopted in *Bowen* and other Ninth Circuit decisions. For example, in United States v. Heinrich, 499 F.2d 95 (9th Cir. 1974), the court simply found that a fixed checkpoint 72 miles north of the border was not a functional equivalent of the border.

In United States v. Hart, 506 F.2d 887 (5th Cir. 1975), *vacated*, 43 U.S.L.W. 3683 (U.S. June 30, 1975), the Fifth Circuit held that permanent border stations are the functional equivalents of the border. Rejecting the rationale of such cases as *Bowen* and *King*, the court stated that the proximity of the checkpoint to the border, the permanent nature of the checkpoint, and the hours of operation determine whether a fixed checkpoint is the functional equivalent of a border. *Id.* at 895. The checkpoint was located 20 miles north of the border on Interstate 10, a road that runs parallel to, but does not directly come from, the border. The court did not indicate why the *Bowen* or *Almeida-Sanchez* criteria were not relevant to determining whether a fixed checkpoint was the functional equivalent of a border. To the extent the certainty of the search was considered a factor in determining whether the fixed checkpoint was the border's functional equivalent, application of the *Hart* analysis to alien searches has been thrown into considerable doubt by *Ortiz*. *Ortiz* may be read to indicate that the certainty of a fixed checkpoint search is not relevant in determining what is the functional equivalent of a border. *See* 43 U.S.L.W. 5026, 5027 (U.S. June 30, 1975). The Supreme Court vacated *Hart* and remanded the case to be considered in light of *Ortiz* and *Brignoni-Ponce*. 43 U.S.L.W. 3683 (U.S. June 30, 1975).

From these circuit decisions, three possible definitions of the functional equivalent of a border can be discerned: (1) the Fifth Circuit *Hart* definition, which includes the standards mentioned above; (2) the stricter *Almeida-Sanchez* standards for a functional equivalent of a border, based on the principle that only those who have crossed an international boundary and who are at a geographic point of access, may be searched; and, (3) the *Bowen-King* definition which apparently applies *Almeida-Sanchez* standards to fixed checkpoint searches but finds the extended border search exceptions of *Weil* and *Alexander* to fall within the functional equivalent standard. See text accompanying notes 155-65 *infra*.

Weil contraband search exceptions might qualify as functional equivalents.[155] The continued validity of these cases is questionable. While the language of *Almeida-Sanchez* is somewhat confusing on this point,[156] the Court's two examples of functional equivalents indicate that Justice Stewart means a search at the *functional equivalent of a border*—a geographic point of access—not the functional equivalent of a border search.[157] The former implicitly requires that the search be conducted at a location that is equivalent to the border and that the search fulfill the function of a border search. A search which is equivalent to a border search, however, embodies only the second criterion.[158]

When both the *Weil* and *Alexander* search exceptions are examined, it is clear that they do not meet the requirements of *Almeida-Sanchez*. *Weil*, the more doubtful of the two decisions, held that it was not necessary for a vehicle to have crossed the border to be subject to a border search; all that was required was that the border agent have a reasonable certainty that the vehicle contained contraband or illegal aliens that had been smuggled across the border.[159] Neither the requirement that the vehicle has crossed the border nor that the search has taken place at a point where it is certain that all those searched have just crossed the border are met by the *Weil* standards.[160] Thus, it cannot be considered a search at the border or its functional equivalent, and traditional fourth amendment requirements, as reaffirmed in *Almeida-Sanchez* and *Ortiz*, should be applied to those searches falling within the *Weil* exception. It should be noted, however, that the *Weil* criteria, while not justifying a search, would likely provide a sufficient basis for reasonable suspicion justifying an investigatory stop.[161]

Neither reasonable certainty nor probable cause is required for an *Alexander* search, which can be characterized as a deferred assertion by the border officer of his right to search any vehicle crossing the border that he has *any* reason to suspect.[162] The *Alexander* rule encom-

155. 500 F.2d at 965-66.
156. *See* 413 U.S. at 272-73.
157. *Id.*
158. The Ninth Circuit, in *Bowen*, adopted this standard. 500 F.2d at 965-67. In King v. United States, 485 F.2d 353 (10th Cir. 1973), the Tenth Circuit adopted a similar approach. See discussion in note 154 *supra*.
159. 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).
160. The right of the government to protect itself from the smuggling of contraband or aliens by searching without probable cause only arises when the vehicle and the traveler are entering the United States. See text accompanying notes 149-54 *supra*.
161. This assumes that the *Weil* standard is being used in the context of an investigatory stop for illegal aliens. The Supreme Court has not ruled on whether the reasonable suspicion standard can be used for suspected contraband violations, but there appears to be no reason why the Court would not find the investigative stop procedure equally applicable to situations involving suspected customs violations. The Court has indicated that investigative stops are permissible where possession of narcotics is suspected. *See* Adams v. Williams, 407 U.S. 143, 146 (1972).
162. *See* 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); Note,

passes the basic border search requirement that the traveler and conveyance have actually crossed the border.[163] It does not necessarily follow, however, that the *Alexander* search is a search at the functional equivalent of a border. An *Alexander* search is validated by surveillance alone,[164] and the privilege to search without probable cause continues through time and space, providing surveillance is maintained. Thus, a border search could theoretically occur in downtown Omaha, Nebraska. In contrast, Justice Stewart's functional equivalent is a geographic point of access, and *Almeida-Sanchez* would appear to require that the government either conduct a search at these locations or forego its search privilege. Surveillance cannot be allowed to vitiate fourth amendment rights within the United States; mere suspicion of a border violation cannot validate a search in Omaha that should have taken place in Nogales, Arizona. If, as has already been suggested, the *Alexander* search can be considered nothing more than a deferred right of the border agent to carry out a border search, it is difficult to see why the search must be deferred at all.[165] Despite *Bowen* dicta to the contrary, the *Alexander* search exception should not survive in

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supra note 23, at 58-59. *See generally* Carroll v. United States, 267 U.S. 132 (1925); Contreras v. United States, 291 F.2d 63 (9th Cir. 1961); Andrews, *supra* note 52, at 687-90.

163. Neither of the Fifth Circuit border search exceptions can be considered valid after *Almeida-Sanchez*. *See* United States v. Martinez, 481 F.2d 214 (5th Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (*Alexander*-type search requiring reasonable suspicion that custom laws are being violated); United States v. Salinas, 439 F.2d 376, 379 (5th Cir. 1971) (*Weil*-type search requiring reasonable suspicion of possession of unlawfully imported merchandise). These cases require only that the driver of the vehicle under observation be suspected of violating the border laws. Neither search standard requires that the vehicle have actually crossed the border.

164. To stay within the *Alexander* exception, the border agents must maintain surveillance adequate to create a reasonable certainty that conditions have not changed since the vehicle crossed the border. That is, any contraband on the vehicle at the time of the search had to be present at the time of the border crossing. If the surveillance from the border was constant, then at least an argument could be made that the *Alexander* search is indistinguishable from one at the border. But the Ninth Circuit cases indicate that the *Alexander* standard is more honored in the breach than in the observance. Surveillance need not be constant, but only reasonable. United States v. Terry, 446 F.2d 579 (9th Cir. 1971), *cert. denied*, 404 U.S. 946 (1971). *See* Ittig, *supra* note 23, at 335-40; Note, *supra* note 23, at 58; Note, *At the Border of Reasonableness: Searches by Customs Officials*, 53 CORNELL L. REV. 871, 875-76 (1968). *See also* United States v. Mejias, 452 F.2d 1190 (9th Cir. 1971) (contraband sewn in suitcase lining could not have been implanted during lapse in surveillance); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (extended border search following only broken surveillance where the amount of material found—165 pounds of marijuana—rendered it impossible that the contraband would have been placed in the vehicle within the 15 minutes the automobile was free from surveillance).

165. The proffered justification for the delayed *Alexander* search is that it is vital to border law enforcement to apprehend the ringleaders of a smuggling operation. United States v. Martinez, 481 F.2d 214, 218 (5th Cir. 1973). However, the "primordial purpose" of customs searches is "not to apprehend persons, but to seize contraband property imported or brought into the United States." Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). Statutes impose a duty upon customs and immigration agents to seize contraband. When the search is ancillary to the apprehension of conspirators, the border laws become an instrument of arrest and prosecution, not of confiscation. *See* Note, *supra* note 23, at 71.

the light of *Almeida-Sanchez* and *Ortiz*. In contrast to the *Weil* exception, where factors giving rise to a reasonable suspicion are likely to exist, the *Alexander* criteria requires only that the vehicle have crossed the border. No articulable degree of suspicion is required to justify an *Alexander* search. Thus, it is doubtful that the *Alexander* criteria could meet even the reasonable suspicion standard, thereby justifying an investigatory stop.

Area Search Warrants

In his concurring opinion in *Almeida-Sanchez*,[166] Justice Powell recognized both the problems the government faces in controlling the entry of illegal aliens and the need for maintaining a proper regard for fourth amendment rights. As a suggested means of reconciling these interests, he proposed the use of area warrants, much like those approved in *Camara v. Municipal Court*.[167] Since illegal transportation of aliens on certain roads is predictable and roving patrol searches are planned in advance or carried out according to a predetermined schedule,[168] Justice Powell suggested that the Border Patrol be allowed to obtain advance judicial approval of roving searches in a particular area for a reasonable period of time.[169] He noted that while the use of an area search warrant would entail some governmental inconvenience, it would not frustrate the purposes of the searches.[170]

Regardless of their effectiveness as a law enforcement tool, Justice Powell's suggested area search warrants must be considered in light

166. 413 U.S. 266, 275 (1973). For a comprehensive analysis of Justice Powell's opinion, see Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L.J. 355 (1974). *See also* Note, supra note 1, at 198-204.

167. 387 U.S. 523 (1967). Both the *Brignoni-Ponce* and *Ortiz* Courts carefully noted that they did not decide the constitutionality of area search warrants permitting roving patrol stops, United States v. Brignoni-Ponce, 43 U.S.L.W. 5028, 5031 n.7 (U.S. June 30, 1975), and searches or similar procedures under an area warrant at fixed checkpoints. United States v. Ortiz, 43 U.S.L.W. 5026, 5028 n.3 (U.S. June 30, 1975). A majority of the Court, however, has stated that it would uphold such area search warrants, at least as to roving patrol searches. *See* discussion note 171 *infra*. It would seem likely that the Court would be willing to support investigatory stop warrants for roving patrols. The dictum of *Ortiz*, indicates that warrants validating investigatory stops at fixed checkpoints would also be upheld. *See* 43 U.S.L.W. 5026, 5027 (U.S. June 30, 1975); text accompanying notes 113-15 *supra*. *But see* United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975) (holding such warrants to be unconstitutional). Whether the Supreme Court would uphold warrants validating searches at fixed checkpoints is not certain, but since the Court feels that a fixed checkpoint search is no more intrusive than a roving patrol search, it is likely that such a procedure would be found constitutionally acceptable.

168. 413 U.S. at 283.

169. *Id.*

170. *Id.* Roving patrols armed with area search warrants would provide an additional enforcement tool for the Border Patrol. However, since the problem of illegal alien entry appears to be increasing despite the best efforts of the Border Patrol, the effectiveness of roving patrols as an enforcement procedure is at least questionable. *See* United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973); DEPARTMENT OF JUSTICE SPECIAL STUDY GROUP ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS 6 (1973).

of traditional fourth amendment requirements.[171] It must be determined whether the governmental interest is so great[172] and the intrusion and its consequences so limited,[173] that the area search warrant can be justified as an exception to constitutional standards. Powell's area warrant would not require probable cause in the traditional sense;[174] instead, it would require generalized knowledge about a geographic area,[175] and the information required for the area warrant would be based on the deposing agent's experience with a particular locale.[176] The warrants would allow agents to stop a vehicle and search any of its compartments in which an alien reasonably might be expected to hide.[177] Moreover, the warrant could apparently be issued for the use of several roving patrol searches over a period of weeks

171. The *Almeida-Sanchez* Court was divided on the constitutionality of area search warrants. 413 U.S. at 270 n.3. The opinion seems to indicate that at least one other member of the majority, besides Justice Powell, would support the area search warrant. Regardless of the position of the majority, the four dissenters noted that they believed Powell's area search warrants to be within fourth amendment standards, and they expected that such warrants would be issued by the district courts. *Id.* at 288. It would appear that border area search warrants, based on standards resembling those outlined by Justice Powell, would be upheld by the present court.

172. United States v. United States Dist. Court, 407 U.S. 297 (1972).

173. See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

174. Justice Powell suggested that the following would be relevant factors in determining whether there was probable cause to issue the 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.

413 U.S. at 283-84. Both Justices Powell and White recognized that these were not the traditional criteria for probable cause. *Id.* at 283-84, 288.

Recently, immigration officials have made use of these criteria in applying for area search warrants authorizing immigration searches at fixed checkpoints on major highways. *See* United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975). But it is not at all clear whether the standards set down by Justice Powell are also to be used in determining the validity of area search warrants in distant metropolitan areas. It is apparent in Justice Powell's opinion that he contemplated searches near the border:

> Depending upon the circumstances, there may be probable cause for the search to be authorized only for a designated portion of a particular road or such cause may exist for a designated area which may contain one or more roads or tracks. Particularly along much of the Mexican border, there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities—by virtue of their isolated character—for the smuggling of aliens.

413 U.S. at 284 n.4. There is a considerable difference between a roving patrol stop and search of an occasional vehicle on a backroad near the border and the interference with general traffic caused by a fixed checkpoint on a major state highway between large urban areas. *See* United States v. Martinez-Fuerte, *supra* at 322.

175. 413 U.S. at 282.

176. *Id.*

177. *See* Warrant of Inspection Applications and Affidavits of Border Patrol Agents filed in the United States District Court for the District of Arizona, on file in the office of the *Arizona Law Review*. Such warrants have since been invalidated in the Ninth Circuit by United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975). *See* text accompanying notes 189-95 *infra*.

or even months.[178]

Justice Powell's area search warrant standards constitute a major departure from the traditional protection extended to a traveler's fourth amendment rights as established by the automobile search cases.[179] This departure was justified by analogizing to the principles developed in *Camara* and *United States v. United States District Court*,[180] which indicate that in limited circumstances a standard less than probable cause may be sufficient to justify the issuance of search warrants. *United States District Court* involved the right of the government to protect domestic security through the use of electronic eavesdropping. The Court found that the significant governmental interest in the prevention of revolution or domestic violence supported a limited infringement on potential subversives' fourth amendment rights.[181] Thus, warrants could be obtained to conduct such surveillance based on less than traditional probable cause standards.[182] The Court indicated, however, that in the case of ordinary criminal activity, such warrants might not be permissible.[183]

Following the reasoning of *United States District Court*, the validity of area search warrants is dependent on a balancing of the interests involved and the means utilized by the government. The major governmental interest in border security is the protection of American labor markets from an influx of foreign labor and the prevention of the importation of contraband.[184] While the severe consequences of inadequate border security are well publicized, it remains to be seen whether a majority of the Court would consider them to be of the same magnitude as street violence and revolution.

What is most troubling about the proposed area search warrants is the rationale that enforcement needs alone can justify intrusions on constitutional rights. This notion has been repeatedly rejected by the

178. Almeida-Sanchez v. United States, 413 U.S. 266, 284 n.3 (1973) (Powell, J., concurring). In one case, the warrant was limited in duration to 10 days, but it had been renewed 26 times for 10-day periods. *See* United States v. Martinez-Fuerte, 514 F.2d 308, 312 (9th Cir. 1975).

179. *See* text accompanying notes 9-19 *supra*; Martinez-Fuerte v. United States, 514 F.2d 308 (9th Cir. 1975).

180. 407 U.S. 297 (1972).

181. *Id.* at 319-23.

182. *See Id.* at 321-24.

183. *Id.* at 322.

184. At least arguably, the governmental interest in stopping the flow of narcotics into the United States may be greater than its interest in preventing the smuggling of illegal aliens. The threat to both human life and the social fabric of the nation posed by drug abuse has long been recognized. *See* S. JEFFEE, NARCOTICS—AN AMERICAN PLAN 12-22 (1966); E. SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA 43-66 (1963). Indeed, the necessity of interrupting illicit drug traffic is one of the major reasons behind the border search exception. *See* Ittig, *supra* note 23, at 871; authorities cited notes 23-25 *supra*.

Supreme Court,[185] which has consistently held that governmental infringements on constitutional liberties are to be allowed only when the government can establish that its interest is sufficiently compelling and that its purpose is achieved by using the least drastic means possible;[186] and even then only the minimum amount of constitutional infringement necessary to satisfy the government need will be permitted.[187] Even assuming that a sufficient governmental interest exists, applying the rationale of *United States District Court*, it has not been established that the area search warrant is either the least drastic or only available method of solving border security problems.[188]

In *United States v. Martinez-Fuerte*,[189] the Ninth Circuit adopted the least drastic means test[190] and found that fixed checkpoint inspec-

185. Justice Stewart's majority opinion in *Almeida-Sanchez* puts this idea to rest:

> It is not enough to argue, as does the government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

413 U.S. 266, 273 (1973).

186. *See* Andrews, *supra* note 52, at 672.

187. Where less offensive alternatives are available, the Court has generally held that those alternatives are to be used. *See* United States v. United States Dist. Court, 407 U.S. 297 (1971) (warrant is to be preferred over use of warrantless electronic search where the warrant is available and there is no compelling reason why the government should not obtain one before the search); Sherbert v. Verner, 374 U.S. 398, 406-09 (1963); Andrews, *supra* note 52, at 671-72. *See also* Note, *supra* note 166, at 362.

188. It may be that reliance on the present level of border inspection is inadequate. However, no estimates have been made of the extra costs of an intensified border inspection program to achieve the same level of detection previously achieved by a combination of border, checkpoint, and roving patrol searches. *See* Note, *supra* note 1, at 202. The government has argued that it is impossible to maintain an effective "immigration watch" on the border. Yet, the entire California border, for example, is guarded by only 30 agents. Oral arguments on March 1, 1975, United States v. Peltier, 16 CRIM. L. REP. 4194, 4197 (1975). Moreover, there has been no adequate study of the effectiveness of the stops in achieving an apprehension ratio comparable to pre-*Almeida-Sanchez* standards. Additionally, there is no data available on whether extra funding of other Immigration Service programs might not also increase the detection of illegal aliens and achieve the same or better apprehension ratio than the present search system. Until these alternative methods have been given some consideration, there is no reason to conclude that area search warrants are the only effective method of achieving the desired level of border security. For example, during the month of February 1975, over 20,000 illegal aliens were discovered within a few days by immigration officers who swept through the barrios of Los Angeles. *Id.*

Perhaps the greatest deterrent to illegal alien smuggling would be the passage of the Rodino bill, now pending in Congress, which criminalizes the knowing employment of an illegal alien. H.R. 982, 93d Cong., 1st Sess. (1973). In his concurring opinion in *Ortiz* and *Brignoni-Ponce*, Justice White noted that the entire immigration inspection system had been "notably unsuccessful" in deterring the heavy flow of illegal aliens into the nation and indicated that no immigration procedure would be effective as long as it was lawful for business firms and others to hire illegal aliens. The answer to the illegal alien problem, he suggested, lay with Congress and the executive branch, rather than the courts. 43 U.S.L.W. 5038 (U.S. June 30, 1975).

189. 514 F.2d 308 (9th Cir. 1975).

190. The court also found area search warrants, as suggested by Justice Powell, constitutionally unacceptable because they did not meet the *Carroll* probable cause standards or even the reasonable suspicion standard. No specific or articulable facts were suggested for justifying the stopping of defendant's automobile. *Id.* at 315. Although the warrant was limited to a stop and inquiry procedure, the court's analysis would apply equally to a warrant for a search.

tions, authorized by area search warrants, were unconstitutional.[191] The court noted that in *Camara* there was no other way to discover certain dilapidations that violated the housing code than to conduct routine periodic inspections. But, the *Martinez-Fuerte* court observed that any analogy between *Camara* and the immigration stop and search situations as inapposite[192] since the influx of illegal aliens could be stemmed in ways that infringed on fourth amendment rights far less than area search warrants.[193] The court suggested that one possible solution would be to intensify the patrols directly on the border.[194] Conceding that such a program would be costly, the court stated that fiscal considerations were not a proper basis for the abrogation of constitutional rights. Thus, checkpoint searches, even those supported by area search warrants, were found violative of fourth amendment requirements.[195]

In balancing the competing interests involved in the issuance of area search warrants, consideration also must be given to the extent of the possible governmental intrusion into protected rights. In *Camara*, the Court allowed administrative searches of dwellings because the infringement on privacy was slight and the penalties involved were minimal.[196] Thus, abrogation of the probable cause requirement was less objectionable than in situations involving criminal sanctions. But stops and searches by roving immigration patrols are not slight infringements on fourth amendment rights. Such searches are a greater intrusion on the rights of privacy and travel than the infringement caused

191. *Id.* at 322. The checkpoint agents were acting under a "warrant of inspection" which allowed the officers to stop motor vehicles for the purpose of making routine inquiries to determine the nationality of occupants of the vehicles and to inspect the vehicles for aliens. Martinez-Fuerte and two female passengers were stopped at the immigration checkpoint and checked for proper identification. Martinez-Fuerte, an immigrant, was lawfully within the country, but the two female passengers admitted being citizens of Mexico, illegally within the United States. Martinez-Fuerte was then arrested and charged with transporting illegal aliens.

192. *Id.* at 316.

193. *Id.* at 316-18.

194. *Id.* at 318-19. The court also held that even if Justice Powell's standards were applied, see discussion note 174 *supra*, the use of area search warrants at the San Clemente checkpoint was not permissible. 514 F.2d at 321-22. First, the frequency with which illegal aliens passed through this checkpoint was far too low to make operation of the checkpoint reasonable. Additionally, the checkpoint was 66 miles from the border—Justice Powell, the court felt, envisioned roving patrols much nearer the border. Further, the court noted that the geographical characteristics in Justice Powell's test necessitated an essential nexus with the Mexican border. *Id.* at 322. In *Martinez-Fuerte*, there was no nexus with the border. Finally, the court concluded that in this case the actual degree of interference with the rights of innocent persons was intolerable. Although the duration of a stop, and even the detention for immigration questioning, was brief, the concentration of illegal alien traffic in relation to the general traffic on the highway was too small to justify the intrusion. *Id.*

195. 514 F.2d at 322; *cf.* United States v. Bowen, 500 F.2d 960, 965-66 (9th Cir. 1974), *aff'd in part*, 43 U.S.L.W. 5024 (U.S. June 30, 1975).

196. 387 U.S. 523, 537 (1967).

by a limited health and safety inspection of one's dwelling.[197] Additionally, the consequences flowing from a successful border search are more drastic than the results of a *Camara* health and safety inspection. In *Camara*, the Court emphasized that a major consideration for allowing warrants based on less than probable cause was that the search was administrative in nature and lacked a dominant criminal purpose.[198] It can be argued that the practice of simply deporting aliens rather than prosecuting them gives these search operations a quasi-administrative effect. Generally, however, search warrants are aimed at the discovery of evidence of a crime, and the government does seek to prosecute all smugglers of illegal aliens.[199] Thus, the search is aimed at discovering evidence of the criminal activity of the alien smuggler, a felony punishable by a prison sentence and a fine.[200] Further, in many search cases, those searched were arrested for contraband possession, not immigration law violations. Indeed, in some immigration search cases the government agents seemed more interested in drug violations than in discovery of aliens.[201] Thus, the area search warrants could be used to circumvent the accepted rule that, absent the

197. The automobile trunk may be inspected, United States v. Barron, 472 F.2d 1215, 1217 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973); United States v. Elder, 425 F.2d 1002, 1004-05 (9th Cir. 1970), the hood may be lifted, United States v. Miranda, 426 F.2d 283, 284 (9th Cir. 1970), the vehicle's back seat removed, United States v. Ojeda-Rodriguez, 502 F.2d 560 (9th Cir. 1974); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); United States v. Almeida-Sanchez, 452 F.2d 459, 461 (9th Cir. 1971), *rev'd*, 413 U.S. 266 (1973), and any large crates or containers may be opened. United States v. Daly, 493 F.2d 395 (5th Cir. 1974).

198. 387 U.S. at 537-38. Additionally, *Camara* involved a practice that not only had been accepted for more than 150 years, but also had been previously upheld by the Supreme Court in Frank v. Maryland, 359 U.S. 360 (1959). In contrast, roving patrol searches had enjoyed only brief lower court approval. *See* Note, *supra* note 166, at 362. The *Camara* court also based its decision on the fact that there was no other acceptable way of promoting an important public interest. 387 U.S. at 537. This second *Camara* standard was advanced by Justice Powell to justify the use of area search warrants. He defined the government's need as the "absence of other methods for vindicating the public interest," 413 U.S. at 278, and stated that the government had made a convincing showing that "roving patrols were the only feasible means of apprehending certain classes of border crossers." *Id.* at 276. But neither the concurring opinion nor the government, in its brief, considered any alternatives to the roving patrol search. Literal acceptance of a need standard might permit the use of the most effective enforcement technique once a problem assumes sufficient public interest, without regard to important countervailing interests. The potential threat to constitutional rights from such a rationale is considerable.

199. United States v. Martinez-Fuerte, 514 F.2d 308, 319-20 (9th Cir. 1975); Note, *supra* note 1, at 203. *See, e.g.*, United States v. Barragan-Martinez, 504 F.2d 1155 (9th Cir. 1974); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Vital-Padilla, 500 F.2d 641 (9th Cir. 1974); United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), *aff'd*, 43 U.S.L.W. 5028 (U.S. June 30, 1975).

200. 8 U.S.C. § 1324(a) (1970). Those engaged in illegal alien smuggling may receive up to five years imprisonment and a fine of $5,000.

201. *See, e.g.*, United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971), *rev'd*, 413 U.S. 266 (1973); United States v. Miranda, 426 F.2d 283, 284 (9th Cir. 1970); Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970). Violations of the customs laws are generally felonies and the penalties can be substantial. A person may receive up to 15 years imprisonment or be fined up to $25,000 or both. 21 U.S.C. § 960(b)(1) (1970).

Weil and *Alexander* exceptions, an automobile search for contraband requires traditional probable cause. Justice Powell's area warrant would return the border circuits to what amounts to pre-*Almeida-Sanchez* search law.

An additional difficulty caused by the area search warrant is glossed over in Justice Powell's opinion. In approving a limited area search warrant in *United States District Court,* Justice Powell noted that a basic protection still afforded those who were under electronic surveillance was that such warrants had to be individually approved by an impartial magistrate.[202] The root concept of any search warrant is that it provides a second level of protection, the interposition of the mediating judgment of a neutral and detached magistrate to bolster the basic protection of probable cause required to justify any intrusion on fourth amendment interests.[203] In the area search warrant context, however, the protection provided by the interposition of the mediating judgement of a magistrate would be eroded because the warrant would be a blanket authorization for border patrol agents to stop all cars and to detain and search cars at their discretion.[204] Thus, the area search warrant does not meet the minimal warrant standards established by Justice Powell in *United States District Court.*

CONCLUSION

The final effect of the border zone search cases is uncertain. Undoubtedly, the stricter search and seizure standards imposed by these decisions will limit the effectiveness of immigration and contraband stop and search procedures.[205] But in balancing the effectiveness of

202. 407 U.S. 297, 316 (1972). *See generally* Aguilar v. Texas, 378 U.S. 108 (1964). The area search warrants proposed by Justice Powell contain many of the objectionable features of the infamous writs of assistance which were anathema to the colonists of Massachusetts in 1761. These writs were warrants empowering British customs officials and their deputies to search at will wherever they suspected they might find imported goods on which no customs duty had been paid, and to break open any receptacles or packages suspected of containing such smuggled goods. N. LASSEN, HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1937). The primary vices of the writs of assistance were: (1) that the warrants could be issued without sufficient cause; (2) the persons and places were not particularly specified; and (3) the warrants left too much to the discretion of the bearer.

In Boyd v. United States, 116 U.S. 616 (1886), the Supreme Court noted that the writs of assistance were considered: "The worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law that ever was found in an English law book; since they placed the liberty of every man in the hands of every petty officer." *Id.* at 625. The parallel between the vices of the writs of assistance and area search warrants is obvious. *See* United States v. Martinez-Fuente, 514 F.2d 308, 320-21 (9th Cir. 1973).

203. United States v. United States Dist. Court, 407 U.S. 297, 316 (1972).

204. United States v. Martinez-Fuerte, 514 F.2d 308, 316 (9th Cir. 1975).

205. Arguably however, such restrictions will simply increase the overall number of convictions while reducing the number of people stopped and searched where the border agents have no reason even to suspect that they have violated the immigration laws. There is no indication that the use of the immigration search without probable cause

law enforcement techniques against individual rights, the Court has struck the balance, as it has in the past, in the favor of constitutional guarantees. The import of *Almeida-Sanchez, Ortiz,* and *Brignoni-Ponce* is clear: the fourth amendment is not controlled by geography, and a traveler's constitutional rights are not vitiated as he approaches the border. The most difficult aspect of the developing border zone search law remains, however. The lower federal courts must ensure that the constitutional guarantees announced in these decisions are protected, while still giving recognition to the legitimate needs of border officials.

or warrant appreciably increases the arrest and conviction rate of smugglers as opposed to a system where the border agents must have at least a reasonable suspicion before they stop an automobile and probable cause before they search.