BYU Law Review

Volume 1977 | Issue 2 Article 6

5-1-1977

Constitutional Law-Fourth Amendment-Immigration Checkpoint Stops for Questioning Are Reasonable Without Individualized Suspicion-United States v. Martinez-Fuerte

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CASE NOTES

Constitutional Law—FOURTH AMENDMENT—IMMIGRATION CHECKPOINT STOPS FOR QUESTIONING ARE REASONABLE WITHOUT INDIVIDUALIZED SUSPICION—*United States v. Martinez-Fuerte,* 428 U.S. 543 (1976).

The instant case was a consolidation of two cases, both involving the constitutionality of stops for questioning at permanent immigration checkpoints removed from the Mexican border. The United States Supreme Court granted certiorari to resolve conflicting decisions of the Fifth and Ninth Circuits.

The Ninth Circuit case, *United States v. Martinez-Fuerte,*[1] consolidated three cases involving routine stops at the San Clemente, California, checkpoint to inquire about citizenship and illegal alienage,[2] pursuant to which all defendants were arrested for illegally transporting Mexican aliens.[3] Because of the large volume of traffic at that checkpoint, a "point" officer screens traffic as it proceeds through the checkpoint lanes and selects a small percentage of the cars for referral to a secondary questioning area.[4] None of the challenged stops at San Clemente involved suspicion based on any articulable facts; the illegal alienage of the defendants' passengers was discovered during questioning after discretionary referral to the secondary area. The Ninth Circuit held such stops to be inconsistent with the fourth amendment because they were not justified by founded suspicion that the defendants' automobiles actually contained illegal aliens.[5]

In the Fifth Circuit case, *Sifuentes v. United States,*[6] the defendant was stopped at the Sarita, Texas, checkpoint where *all*

1. 514 F.2d 308 (9th Cir. 1975), *rev'd,* 428 U.S. 543 (1976).

2. Amado Martinez-Fuerte was convicted of illegally transporting aliens after his pretrial motion for suppression of evidence was denied. *Id.* at 309-10.

United States v. Jiminez-Garcia and United States v. Guillen were heard by a different judge and defense motions for suppression were granted. 428 U.S. at 549 n.4.

3. The Immigration and Nationality Act provides that any person transporting an alien who he knows is illegally in the United States is guilty of a felony. 8 U.S.C. § 1324(a)(2) (1970). Three of the defendants in the Ninth Circuit case were also charged with conspiracy to commit the offense, a violation of 18 U.S.C. § 371 (1970). 428 U.S. at 548-49.

4. A full description of the checkpoint and procedure is set forth in the Court's opinion. 428 U.S. at 545-47. Fewer than one percent of the cars are stopped for questioning. *Id.* at 563 n.16.

5. 514 F.2d at 314-16. The circuit court reversed the conviction of Amado Martinez-Fuerte and affirmed the orders to suppress evidence in the other two cases. *Id.* at 322.

6. 517 F.2d 1402 (5th Cir. 1975) (mem.), *aff'd,* 428 U.S. 543 (1976).

cars are stopped and subjected to brief inquiry about citizenship. Sifuentes' car contained four illegal aliens who were slumped down in their seats and not visible to the officer until he approached the car. The officer's questions revealed the passengers' status as illegal aliens.[7] Sifuentes was convicted of illegally transporting aliens, and the Fifth Circuit affirmed.[8]

The Supreme Court, affirming the conviction in *Sifuentes* and reversing the decision in *Martinez-Fuerte,* held that checkpoint stops for questioning are constitutional under the fourth amendment even if not justified by individualized suspicion and that permanent checkpoint operation does not require the advance authorization of a judicial warrant.[9]

I. BACKGROUND

A. *Historical Development of Immigration Search and Seizure Law*

1. *Statutory law*

Immigration search and seizure law has always had a statutory basis. The first act restricting immigration in 1875 contained search and seizure provisions and guidelines.[10] These searches and seizures were limited to national borders until 1946, when immigration officers were first empowered to conduct warrantless searches "within a reasonable distance" from the border.[11] The current authorization, the Immigration and Nationality Act of 1952,[12] adopts this same "reasonable distance" standard for searches away from the border.[13] Specifically, the Act now empowers officers of the Immigration and Naturalization Service

7. 428 U.S. at 550.

8. Sifuentes' conviction in the District Court for the Southern District of Texas was affirmed without a published opinion. United States v. Sifuentes, 517 F.2d 1402 (5th Cir. 1975). The Fifth Circuit relied on its holding in United States v. Santibanez, 517 F.2d 922 (5th Cir. 1975). *See* 428 U.S. at 550.

9. 428 U.S. at 545.

10. The Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477 (implied repeal 1917), authorized inspection by the collector of the port to search ships for undesirable aliens, such as felons or prostitutes, if he had reason to believe they were on board.

11. Act of Aug. 7, 1946, ch. 768, 60 Stat. 865 (amending Act of Feb. 27, 1925, ch. 364, 43 Stat. 1014, 1049) (repealed 1952). The 1925 Act had authorized the search of vehicles or conveyances in which the officer believed aliens were entering the country. The 1946 Act deleted the language "in which he believes aliens are being brought in to the United States" and substituted "within a reasonable distance from any external boundary of the United States."

12. Pub. L. No. 414, 66 Stat. 163 (1952) (codified in various sections of 8 U.S.C.).

13. 8 U.S.C. § 1357(a)(3) (1970).

(INS) without a warrant not only to board any vehicle or conveyance within a reasonable distance from the border to search for aliens, but also to interrogate anyone believed to be an alien concerning his right to be in the country.[14] Pursuant to a regulation promulgated by the Attorney General, a reasonable distance was defined to be within 100 miles of an external boundary of the United States.[15]

2. Early judicial determinations

The INS power to search and interrogate away from the border without a warrant or probable cause has long been recognized by the courts. But the only Supreme Court statement on the subject prior to 1973[16] was dictum in a 1925 Prohibition Act case[17] recognizing a probable cause exception at the border:

> Travellers may be so stopped [on the chance of finding something illegal in each automobile] in crossing an international boundary . . . . But those lawfully within the country . . . have a right to free passage without interruption or search unless there is known to be a competent official authorized to search, [and] probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[18]

While that statement indicated a limitation on the government's power to search or seize once a person is within the country,[19] it

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14. 8 U.S.C. § 1357(a) (1970):

(a) Powers without warrant.

Any officer or employee of the Service authorized under regulations . . . shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be . . . in the United States;

. . . .

(3) within a reasonable distance from any external boundary . . . to board and search for aliens any vessel . . . conveyance, or vehicle . . . and within . . . twenty-five miles from any such external boundary to have access to private lands, but not dwellings . . . .

15. 8 C.F.R. § 287.1(a)(2) (1977). This provision has been in effect without material changes since 1947. 12 Fed. Reg. 2744 (1947) amended the then current regulation by adding a section that defined "within a reasonable distance from any external boundary" to mean "within a distance not exceeding 100 air miles from any external boundary."

16. In 1973 the Supreme Court decided Almeida-Sanchez v. United States, 413 U.S. 266 (1973). For facts and holding, see notes 25 & 27 and accompanying text *infra*.

17. Carroll v. United States, 267 U.S. 132 (1925).

18. *Id.* at 154.

19. In 1925 when the statement was made, immigration law did not provide for searches and seizures away from the border. *See* note 11 and accompanying text *supra*. Customs search statutes, however, did authorize searches and seizures away from the border. *See* notes 41-44 and accompanying text *infra*.

has been cited by circuit courts in validating immigration or customs searches both at and away from the border.[20]

Circuit courts consistently upheld the constitutionality of warrantless immigration searches and seizures conducted away from the border within the 100 mile administrative limit.[21] The justification for the searches and seizures, although not generally articulated, appears to have been that the statutory authorization provided a presumption of reasonableness under the fourth amendment.[22] While the probable cause requirement for warrants was imposed on other warrantless searches and seizures to ensure reasonableness, border searches conducted by customs or immigration officials were treated as a statutory exception to a probable cause requirement.[23] Greater law enforcement discretion was thus authorized for immigration and custom officials.

3. Almeida-Sanchez *and its progeny*

Current case law relies in part on distinctions between the three basic modes of INS law enforcement operation away from the border: First, permanent checkpoints are established where major roads from the border converge; second, temporary check-

20. *E.g.*, United States v. McDaniel, 463 F.2d 129, 132 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973); United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968); Thomas v. United States, 372 F.2d 252, 254-55 (5th Cir. 1967).

21. *E.g.*, United States v. Wright, 476 F.2d 1027 (5th Cir.), *cert. denied*, 414 U.S. 821 (1973) (search for aliens upon reasonable suspicion is constitutional within a reasonable distance of the border); United States v. Anderson, 468 F.2d 1280 (10th Cir. 1972) (stop and search for aliens within 100 air miles of border is reasonable); United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972), *cert. denied*, 413 U.S. 919 (1973) (held search 7 miles from border to be reasonable as authorized but withheld blanket approval of the 100-mile limit); Mienke v. United States, 452 F.2d 1076 (9th Cir. 1971) (immigration searches within 100 miles of border do not violate fourth amendment); Fernandez v. United States, 321 F.2d 283 (9th Cir. 1963) (stop for questioning within 100 miles was constitutional); United States v. Correia, 207 F.2d 595 (3d Cir. 1953) (right to interrogate, 8 U.S.C. § 1357(a)(1) (1970), is constitutional); Kelly v. United States, 197 F.2d 162 (5th Cir. 1952) (search for aliens at checkpoint north of Florida Keys constitutional under the 1946 Act).

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

23. *See generally* Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U.J. INT'L L. & POL. 93 (1972); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

points are periodically established on other roads near the border; and third, roving patrols operate along roads that smugglers of aliens may use to circumvent checkpoints.[24] The fourth amendment protections applicable to these searches and seizures have become a subject of increasing interest since the Supreme Court first ruled on an INS search procedure away from the border.

In *Almeida-Sanchez v. United States,*[25] the Supreme Court disallowed the exception to a probable cause requirement for a warrantless immigration search by a roving patrol away from the border. The government had claimed statutory justification for the warrantless search without probable cause, relying on part of the Immigration and Nationality Act of 1952.[26] The Court held this statutory probable cause exception to be inconsistent with the fourth amendment for searches occurring at points away from the border or its "functional equivalents."[27]

Several subsequent Supreme Court decisions clarified[28] and extended traditional fourth amendment protections to other immigration search and seizure situations. In *United States v. Ortiz,*[29] the Court extended the probable cause requirement announced for roving patrol searches in *Almeida-Sanchez* to permanent checkpoint searches away from the border.[30] The same day, the Court held in *United States v. Brignoni-Ponce*[31] that reasona-

24. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976).

25. 413 U.S. 266 (1973). The border patrol stopped and searched a car without probable cause on a road twenty-five miles north of the border and parallel to it. *Id.* at 268. (The circuit court opinion reported the distance as 50 miles.) The Ninth Circuit had upheld the search as valid based on 8 U.S.C. § 1357 (1970), the 100-mile distance outlined by federal regulation, and its prior decisions. 452 F.2d 459, 460-61 (9th Cir. 1971).

26. The government relied on 8 U.S.C. § 1357(a)(3) (1970). Note 14 *supra.*

27. "Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well." 413 U.S. at 272.

Although functional equivalent was not defined, the Court gave two examples of places away from the border that might be considered functional equivalents: An international airport and an established stop near the border where two or more roads from the border converge. *Id.* at 273.

28. In United States v. Peltier, 422 U.S. 531 (1975), the Court declared that the *Almeida-Sanchez* probable cause requirement was not to be applied retroactively to roving patrol searches. *Id.* at 534-35. In Bowen v. United States, 422 U.S. 916 (1975), the *Almeida-Sanchez* standard was held to be nonretroactive in relation to permanent checkpoint searches. *Id.* at 918-19.

29. 422 U.S. 891 (1975).

30. *Id.* at 896-98. The Court again required the search to be at a functional equivalent of the border for an exception to the probable cause standard. It did not articulate further guidelines to determine functional equivalency. The search in *Ortiz* occurred at the San Clemente checkpoint. *Id.* at 896-97.

31. 422 U.S. 873 (1975).

ble suspicion[32] was required to justify a stop for questioning by a roving patrol.[33] The stop, a seizure under the fourth amendment, was limited to questioning about illegal alienage; no search was involved. Among the many questions not yet addressed by the Supreme Court, and explicitly reserved in *Ortiz*, was that of the applicable constitutional standards for stops at permanent checkpoints away from the border.[34]

The change in immigration search and seizure law requiring some form of individualized suspicion (*i.e.*, probable cause or reasonable suspicion) for INS searches and stops for questioning away from the border has generally not been liberally applied by those circuit courts which, by virtue of their geographical locations along the southern border, deal with Mexican aliens. The Fifth and Tenth Circuits have construed the Supreme Court decisions narrowly[35] and allowed checkpoint stops without individual-

32. The Supreme Court in *Brignoni-Ponce* called the standard "reasonable suspicion" and defined it as "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion." *Id.* at 884. The circuit court decision required "founded suspicion." 499 F.2d 1109, 1111 (9th Cir. 1974). The two standards, founded suspicion and reasonable suspicion, are equivalent. Both originate from the standard established in Terry v. Ohio, 392 U.S. 1 (1968), sometimes referred to as articulable suspicion.

33. 422 U.S. at 882-84. The stop was made by a patrol car near the San Clemente checkpoint. The checkpoint was not operating due to inclement weather, and the patrol car had picked out Brignoni-Ponce's car because its occupants were of Mexican ancestry. Questioning revealed the occupants' illegal alienage. No challenge was made to the Ninth Circuit's characterization of the stop as a roving patrol rather than a permanent checkpoint stop. *Id.* at 874-75. The Court also specifically declared that apparent Mexican ancestry alone was insufficient to establish reasonable suspicion. *Id.* at 886-87.

34. 422 U.S. at 897 n.3.

35. The Tenth Circuit limited the precedent's effect by characterizing functional equivalency as a question of fact for the district courts. They found checkpoints 98 miles from the border to be functional equivalents. United States v. King, 485 F.2d 353, 357-60 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361, 363 (10th Cir. 1973).

Although the Fifth Circuit applied the probable-cause-to-search requirement of *Almeida-Sanchez* to roving patrols and temporary checkpoints, United States v. Speed, 489 F.2d 478, 480 (5th Cir. 1973), *vacated on other grounds*, 422 U.S. 1052, *rev'd* 520 F.2d 322 (5th Cir. 1975), it declined to extend it to mobile checkpoints (those that alternate between two and three fixed locations), United States v. Cantu, 504 F.2d 387, 389 (5th Cir. 1974), or permanent checkpoints, United States v. Hart, 506 F.2d 887 (5th Cir.), *vacated*, 422 U.S. 1053 (1975), *aff'd*, 525 F.2d 1199 (5th Cir. 1976) (after review in light of *Ortiz* and *Brignoni-Ponce*).

The Fifth Circuit further limited the Supreme Court decisions by analyzing the search or seizure in two steps. The first was to ascertain whether the initial stop was constitutionally valid. Then the subsequent search was examined for constitutional justification. If the initial stop was valid (as were checkpoint stops without reasonable suspicion), then a search for *aliens* did not require probable cause. United States v. Cantu, 510 F.2d 1003 (5th Cir. 1975). The court stated: "Once they had stopped the car, [valid under the statute and 100-mile regulation,] they were empowered to search for aliens." *Id.* at

ized suspicion.[36] The Ninth Circuit, however, has required a form of individualized suspicion for all searches and seizures occurring away from the border.[37]

B. The Reasonableness Standard of the Fourth Amendment

The recent concern of the courts with delineating constitutional safeguards for immigration searches away from the border calls for a closer analysis of the protection guaranteed by the Constitution. The text of the fourth amendment[38] establishes both a substantive protection, that a citizen's right to be secure against unreasonable searches and seizures shall not be violated, and a procedural safeguard, that no warrant shall issue but upon

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1004. Any search for *contraband,* however, required probable cause. United States v. Santibanez, 517 F.2d 922 (5th Cir. 1975).

The Fifth Circuit continued to recognize searches for aliens at permanent checkpoints without probable cause after *Ortiz* because the court determined the checkpoints to be "functional equivalents." *E.g.,* United States v. Hart, 525 F.2d 1199, 1200 (5th Cir. 1976) (checkpoint was on the interstate 20 miles north of and parallel to the border). *Accord,* United States v. Alvarez-Gonzalez, 401 F. Supp. 931 (S.D. Tex. 1975); United States v. Fuentes, 379 F. Supp. 1145 (S.D. Tex. 1974), *aff'd mem.,* 517 F.2d 1401 (5th Cir. 1975).

36. United States v. Santibanez, 517 F.2d 922, 923 (5th Cir. 1975); United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973).

The constitutionality of checkpoint stops without founded suspicion continued to be upheld by the Fifth Circuit in United States v. Coffey, 520 F.2d 1103 (5th Cir. 1975) (per curiam), after remand by the Supreme Court for consideration in light of *Brignoni-Ponce* and *Ortiz.* 422 U.S. 1054, *vacating* 509 F.2d 574 (5th Cir. 1975) (mem.).

37. The Ninth Circuit required probable cause for checkpoint searches before the Supreme Court's *Ortiz* decision by holding most permanent checkpoints not to be "functional equivalents." *See* United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974); United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), *aff'd on other grounds,* 422 U.S. 916 (1975). Functional equivalency was limited to locations "where virtually everyone searched has just come from the other side of the border." 500 F.2d at 965.

Stops for questioning at checkpoints were sanctioned only upon founded suspicion. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974), *aff'd,* 422 U.S. 873 (1975); United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). The court did, however, recognize stops if founded suspicion developed as a car "rolled through" a checkpoint. United States v. Evans, 507 F.2d 879, 880 (9th Cir. 1974), *cert. denied,* 422 U.S. 1057 (1975).

The court also invalidated a judicially authorized checkpoint warrant as violative of the fourth amendment. United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975), *rev'd,* 428 U.S. 543 (1976). *Cf.* United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974) (stop at a temporary checkpoint is unauthorized).

38. The fourth amendment provides:

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

U.S. CONST. amend. IV.

probable cause. The substantive protection applies to all searches and seizures: whether warrantless or authorized by a warrant, they must be reasonable. The procedural requirement specifies the standards for issuing a warrant that ensure the reasonableness of the search or seizure. While the fourth amendment's substantive protection is generally afforded in terms of the warrant requirement, the Constitution does not mandate warrants in all situations; it only prohiibits unreasonable searches and seizures. The standard of reasonableness for warrantless searches and seizures is therefore not specified in the amendment but is left for interpretation. The lack of clarity in this standard is aptly illustrated by the many warrantless INS search and seizure procedures that were once considered reasonable because of the statutes and regulations authorizing and defining them, but are now reasonable only when additional protection is afforded by elements of the warrant requirement. Courts have generally required that warrantless intrusions conform to one of the warrant requirements, the probable cause standard, in order to ensure reasonableness.[39] For this reason, the probable cause and reasonableness standards have come to be regarded by many as equivalents.

It is not axiomatic, however, that the substantive protection in warrantless situations should be ensured by the same procedural safeguards required for warrants. The historical setting, recent scholarship, and some judicial authority all support the position that the fourth amendment's procedural protections, particularly probable cause, are not always necessary for a reasonable warrantless search or seizure.

1. The historical setting and congressional enactments

The authors of the fourth amendment apparently considered certain warrantless searches to be reasonable without probable cause. A customs search statute authorizing a warrantless search based only upon the customs officer's belief that goods subject to duty were on board a ship[40] was passed by the same Congress that

39. *See, e.g.*, United States v. Ortiz, 422 U.S. 891, 896 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 269-70 (1973); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Henry v. United States, 361 U.S. 98, 101-02 (1959); Carroll v. United States, 267 U.S. 132, 149, 154 (1925).

40. The Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29 (repealed 1790), authorized customs officials to search any ship in which they had "reason to suspect" goods subject to duty were concealed. The Act specified issue of a warrant on oath or affirmation if they had "cause to suspect" the goods were concealed in a "particular" building or dwelling.

resolved to submit the Bill of Rights to the states for ratification.[41] This statute was replaced in 1790 by another statute with expanded provisions not even requiring the officer's belief.[42] Similar customs search authorization, including some expansions, has continued to the present.[43]

Passage of the first customs statute by the same Congress that drafted the Bill of Rights, when viewed in light of English writs of assistance,[44] argues persuasively against applying warrant requirements to *all* warrantless searches and seizures. These writs of assistance were general area warrants, and their use has been widely recognized as one of the primary grievances leading to the American Revolution.[45] The probable cause and particularity requirements outlined in the fourth amendment for warrants were designed to protect citizens from the abuses of these writs. Although the first customs act passed by Congress authorized warrantless searches conditioned only on the officer's belief that goods subject to duty were on the ship, Congress apparently considered the problem of a general area warrant to be eliminated by limiting these warrantless searches to vessels. In order to search buildings or dwellings for goods subject to duties, the statute required a warrant meeting what later became fourth amendment standards.[46]

Statutory authorization for warrantless searches and seizures at the border on less than probable cause has not been limited to

41. A joint resolution, passed by two-thirds of both houses of Congress, proposed twelve articles, ten of them forming our current Bill of Rights, to be ratified by the state legislatures as constitutional amendments. Resolution, 1 Stat. 97 (1789). The ten were ratified by 1791. Amendments to the Constitution, 1 Stat. 21, n.a (1789).

42. Act of Aug. 4, 1790, ch. 35, § 31, 1 Stat. 145 (repealed 1799).

43. Act of Mar. 2, 1799, ch. 22, 1 Stat. 627 (repealed 1922). Section 54 contained essentially the same provisions as § 31 of the 1790 Act. Section 46 of the statute authorized the discretionary search of a person's baggage when he arrived in the country. Sections 105 and 106 also extended these powers to entries made in the western districts by vessels, boats, and carriages. The Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231 (expired 1822), made the powers more explicit for land travel and specifically stated a warrant was not necessary.

Current statutory authority allows search of persons and baggage pursuant to regulations issued by the Secretary of the Treasury, Tariff Act of 1930, 19 U.S.C. § 1582 (1970), and search of vessels, vehicles, and beasts, when the officers suspect goods subject to duty, 19 U.S.C. § 482 (1970) (Act of July 18, 1866, ch. 201, § 3, 14 Stat. 178).

44. These writs authorized constables to break and enter houses, shops and any "other place" to seize prohibited or uncustomed goods. 13 & 14 Car. 2, c. 11, § 5 (1662). *But see* Dickerson, *Writs of Assistance as a Cause of the Revolution,* in THE ERA OF THE AMERICAN REVOLUTION 40, 43-49 (R. Morris ed. 1939). Dickerson argues that the practice, not the statute, made the writs "general warrants."

45. Dickerson, *supra* note 44, at 40.

46. *See* note 40 *supra.*

customs searches. Similar broad authority has been granted for immigration searches and seizures.[47] Throughout its history, Congress has neither required a warrant nor considered probable cause necessary to ensure reasonableness in customs and immigration searches and seizures of statutorily limited scope.

2. Judicial authority and the reasonableness standard for warrantless searches and seizures

The judiciary has also treated the reasonableness standard as partially independent of the warrant requirements in certain warrantless situations when legitimate law enforcement interests would be impaired by adherence to that standard. In *Terry v. Ohio,*[48] the Supreme Court created the "reasonable suspicion" standard based on the fourth amendment's reasonableness language for a specific factual setting, stop and frisk, where both a warrant and probable cause were considered inappropriate.[49] This lesser standard of individualized suspicion also required judicial limitations on the extent of the intrusion to ensure reasonableness; judicial review of the facts against an objective standard was still required to ensure meaningful application of the fourth amendment protections. *Brignoni-Ponce* extended the reasonable suspicion standard to another warrantless law enforcement procedure, a stop for questioning by a roving patrol.

In addition to the Supreme Court decisions applying the lesser standard of reasonable suspicion to certain warrantless situations, some members of the Court have stressed the importance of looking beyond the warrant requirements to the reasonableness requirement in order to give greater recognition to law enforcement needs. Chief Justice Burger, for example, opined:

> Perhaps these decisions [*Brignoni-Ponce* and *Ortiz*] will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness. In that sense history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable— or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.[50]

47. *See* notes 10-12 and accompanying text *supra.*
48. 392 U.S. 1 (1968).
49. *Id.* at 8-9, 21-22, 30-31.
50. United States v. Ortiz, 422 U.S. at 899 (Burger, C.J., concurring).

State and lower federal courts have also authorized certain seizures without probable cause when the law enforcement interest is sufficient. Stopping automobiles at roadblocks[51] and various checkpoints[52] has been judicially recognized as reasonable despite the intrusion on many innocent travelers. The requirement that all vehicles stop is one of the factors that courts have sometimes considered to ensure reasonableness in these situations.[53] Additional protection is afforded by limiting the extent of the stop; probable cause has been required for intrusions exceeding the authorized purpose of the stop.[54]

On the other hand, this concern for law enforcement interests has sometimes resulted in a dilution of the fourth amendment probable cause requirement for warrants. This divorce of probable cause from the reasonableness requirement for warrants evidences confusion in the application of the fourth amendment's substantive and procedural protections. In *Camara v. Municipal Court*,[55] for instance, the Supreme Court required a warrant for administrative housing inspections. The Court distorted the probable cause requirement, however, because that requirement was considered satisfied simply upon showing the reasonableness of the search.[56] This reasonableness involved no individualized suspicion. In addition, the *Camara* warrant can be issued for an area as well as a specific dwelling and thus presents an apparent conflict with the fourth amendment's mandate that a "warrant

51. *E.g.*, United States v. Millar, 543 F.2d 1280 (10th Cir. 1976) (roadblock for drivers license check on freeway); United States v. Jenkins, 528 F.2d 713 (10th Cir. 1975) (random stops for drivers license checks); City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959) (roadblock for drivers license check); People v. Euctice, 371 Ill. 159, 20 N.E.2d 83 (1939) (roadblock immediately following felony commission); Commonwealth v. Mitchell, 355 S.W.2d 686 (Ky. 1962) (roadblock for license and registration check); Williams v. State, 226 Md. 614, 174 A.2d 719 (1961) (roadblock after felony commission).

52. *E.g.*, Stephenson v. Department of Agr. & Consum. Servs., 329 So. 2d 373 (Fla. Dist. Ct. App. 1976) (agriculture inspection station for trucks).

53. *See, e.g., id.* at 377; Commonwealth v. Mitchell, 355 S.W.2d 686, 687-88 (Ky. 1962).

54. *See, e.g.*, Wirin v. Horrall, 85 Cal. App. 2d 497, 504, 193 P.2d 470, 474 (1948) (general search for evidence of crimes by roadblock without a warrant is illegal); City of Miami v. Aronovitz, 114 So. 2d 784, 788-89 (Fla. 1959) (stop for license check does not convey power to search); Stephenson v. Department of Agr. & Consum. Servs., 329 So. 2d 373, 376 (Fla. Dist. Ct. App. 1976) (statute required consent or warrant for a search); Commonwealth v. Mitchell, 355 S.W.2d 686, 687 (Ky. 1962) (stops cannot have an ulterior motive). *Cf.* United States v. Millar, 543 F.2d 1280, 1282-83 (10th Cir. 1976) (probable cause, developed after the stop, justified the issuance of a warrant to search trailer).

55. 387 U.S. 523 (1967).

56. The Court stated: "But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

shall issue" only upon probable cause supported by a particularized description of the subject of the search or seizure.[57] This holding particularly illustrates confusion over the fourth amendment's protections because it overruled Supreme Court precedent that administrative housing inspections (searches) were reasonable without a warrant.[58]

3. Recent scholarship

Legal commentators have recognized the difference between the warrant and reasonableness requirements of the fourth amendment. The differences between warrant and warrantless situations are considered to be important for application of these fourth amendment standards. Historically there has been a shift of emphasis on these standards. The concern at the time of the drafting of the fourth amendment was with overly general warrants, not with warrantless searches and seizures.[59] Thus, current reliance on the warrant as a "touchstone" of reasonableness under the fourth amendment has caused one scholar to claim that the courts have "stood the Fourth Amendment on its head."[60] Ironically, the warrant requirements, originally imposing a more rigorous control on the issuance of a warrant, have been eviscerated in some warrant situations to meet law enforcement needs, while the warrant requirements have been applied to other situations (that were originally reasonable without warrants) in derogation of law enforcement interests.

In an attempt to establish sound doctrine for searches or seizures both with and without a warrant, legal scholars have pointed to the importance of the distinction between the fourth amendment's warrant and reasonableness requirements. While legal commentators acknowledge the historical reversal from protection from warrants to protection by warrants,[61] they are di-

57. For the complete text of the fourth amendment, see note 38 *supra.*

In *Martinez-Fuerte* the Court suggests that the greater intrusion on privacy when searching a private residence and the traditional warrant requirement for such searches may have been the reason for the Court requiring a warrant in *Camara.* 428 U.S. 564-65.

58. *See* Frank v. Maryland, 359 U.S. 360 (1959). The dissent in *Camara* claimed that the decision was a prostitution of the fourth amendment and that better protection would be afforded if it were authorized as a reasonable warrantless search. 387 U.S. at 546-55 (Clark, J., dissenting).

59. *See* notes 44-45 and accompanying text *supra.*

60. T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-24, 38-46 (1969).

61. *E.g.,* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 367 (1974).

vided on the appropriate application of the reasonableness doctrine to warrantless intrusions.[62] One suggestion, a sliding scale of safeguards that vary with the intrusiveness of the search or seizure, holds some promise,[63] but harbors potential problems.[64] In spite of the diversity of recommendations, scholars generally consider a greater focus on the fourth amendment's reasonableness requirement independent of the warrant requirements to be desirable.[65]

II. INSTANT CASE

In the instant case, the Court defined the protection afforded by the fourth amendment as freedom from arbitrary and oppressive interference into privacy and personal security by law enforcement officials,[66] and declared that weighing the public interest against the fourth amendment interests of the individual is the procedure to be followed in establishing constitutional safeguards.[67] This balancing was used to resolve the question whether to require reasonable suspicion to validate the stop for questioning, a seizure under the fourth amendment.[68] The Court found a strong public interest in authorizing stops without reasonable suspicion, since the traffic on major routes is too heavy for an officer to have more than a brief opportunity to observe any single car and develop the requisite suspicion. Thus, the checkpoint's deterrent effect on smugglers of aliens would be lost if reasonable suspicion were required.[69] In addition, the Court noted that while such stops intrude on a right to free passage and, to a more limited extent, on the right to personal security, the magnitude of this intrusion is less than for roving patrol stops.[70]

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62. One scholar recommends categorizing searches and seizures by fact situation so that standards of reasonableness can be delineated. E. GRISWOLD, SEARCH AND SEIZURE: A DILEMMA OF THE SUPREME COURT 47-52 (1975). Another proposes administrative rules by police departments that outline procedures for searches and seizures that are reviewed for reasonableness. Amsterdam, *supra* note 61, at 416-17.

63. *See* Amsterdam, *supra* note 61, at 390-93.

64. *See id.* at 375-76, 393-94. *See also* E. GRISWOLD, *supra* note 62, at 39-42.

65. *See generally* Amsterdam, *supra* note 61, at 414-18; E. GRISWOLD, *supra* note 62, at 49-52; T. TAYLOR, *supra* note 60, at 46-50.

66. 428 U.S. at 554. The Court supported this definition by citing *Brignoni-Ponce, Ortiz,* and *Camara.*

67. 428 U.S. at 555. As authority for the balancing analysis, the Court cited *Brignoni-Ponce* and *Terry* and described the balancing and resultant protections used in *Almeida-Sanchez* and *Brignoni-Ponce.*

68. 428 U.S. at 556.

69. *Id.* at 556-57. For the facts the Court relied upon to establish the magnitude of the illegal alien problem, see *id.* at 551-54.

70. *Id.* at 557-60. While the objective intrusion is the same, the Court considered the

In delineating the constitutional protections required, the Court declared that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion."[71] The Court granted wide discretion to the field officers in selectively referring cars to the secondary inspection area at San Clemente, noting that even if the referrals made are based upon apparent Mexican ancestry, there is no constitutional violation.[72] The individual's protection was guaranteed by limitations on the intrusiveness of the stop and the nature and location of the checkpoint. The Court relied on the fact that location of fixed checkpoints is a high level administrative decision in which factors such as inconvenience to the public are considered.[73] The Court rejected the argument for a warrant requirement[74] because the stop had sufficient constitutional protections without a warrant[75] and did not involve the search of a dwelling.[76]

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difference in the subjective intrusion between a checkpoint and a roving patrol to be a significant distinction. The elements of this subjective intrusion were described as concern over authority to stop, fright, and surprise. *Id.* at 558-59. The stigmatizing effect, occurring when only a few cars are referred for secondary questioning at the San Clemente checkpoint, was considered not to involve fright but to actually further some fourth amendment protections by minimizing the intrusion on others. *Id.* at 560. The Court saw a minimized intrusion as being a furtherance rather than a violation of protection. The dissent viewed this as a convolution of fourth amendment guarantees. *Id.* at 572 n.2 (Brennan, J., dissenting).

71. *Id.* at 560-61 (citations omitted). For authority the Court cited *Camara*, where area warrants were authorized without particularized knowledge of individual dwellings.

72. 428 U.S. at 563. The Court's reasoning was that due to the minimal intrusion not requiring individual justification, wide discretion was necessary. The Court accepted the government's assertion that apparent Mexican ancestry is not the sole criterion for referral and supported this by figures indicating far fewer cars are referred for questioning than would contain persons of Mexican ancestry based on population percentages in Southern California. *Id.* at n.16.

The dissent points out that this fails to take into account the percentage of the population with apparent Mexican ancestry that drive cars as compared to the population at large. This arbitrariness and potential discrimination is challenged by the dissent as being unreasonable under the fourth amendment. *Id.* at 571-73 & n.4.

73. *Id.* at 559, 565-66. The Court also emphasized the possibility of poststop judicial review of checkpoint location as an additional safeguard.

74. The Ninth Circuit decision dealt entirely with the warrant issue. *See* note 37 *supra*. Sifuentes used the warrant requirement as an alternate theory to attack the constitutionality of the stop in this case. 428 U.S. at 564.

75. 428 U.S. at 565-66. The protections of a warrant considered to be already provided were assurance of authority, control of officer discretion, and prevention of hindsight distorting the reasonableness evaluation.

76. *Id.* This factual difference was used to distinguish the case from *Camara*. *See* notes 55-56 and accompanying text *supra*. The fourth amendment has been held to provide greater protection of homes than automobiles. McDonald v. United States, 335 U.S. 451 (1948).

III. ANALYSIS

The instant case marks a reversal in the Court's trend to require either probable cause for warrantless searches or reasonable suspicion for warrantless stops by the INS away from an international border. Although there is some justification for this different treatment because the seizure in the instant case is either less intrusive or made under more controlled conditions than the immigration searches or seizures previously considered by the Court, the absence of a requirement of individualized suspicion in this case raises important questions about both the nature of an individual's fourth amendment guarantee and the appropriate procedural safeguards to ensure the inviolability of that guarantee in warrantless situations.

Accordingly, this case note will focus on certain fourth amendment procedural standards of protection and on analytical frameworks for determining the reasonableness of these standards.[77] The analysis will first examine the efficacy of two alternative procedural requirements that the Court could have applied to ensure the reasonableness of interrogatory checkpoint stops under the fourth amendment. Next, it will analyze the Court's balancing approach and show that this method of determining reasonableness fails to ensure the inviolability of individual fourth amendment rights. Finally, an alternative analytical framework for determining reasonableness will be proposed that ensures protection of these individual rights without unnecessarily hindering law enforcement interests.

A. Alternative Procedural Requirements to Ensure Reasonableness

1. The checkpoint warrant proposal

A checkpoint warrant is a general warrant authorizing seizures at a specific checkpoint for a limited period of time. The warrant is issued after review by a federal magistrate of an INS affidavit setting forth the grounds for suspecting illegal aliens in the traffic passing through that checkpoint.[78] This area warrant

77. This case note will not address the questions raised by the decision concerning which situations should be included in the Court's holding (*i.e.*, temporary checkpoints, nonimmigration checkpoints) or the necessary limitations and clarification that should come from future decisions.

78. For details of the procedure, see United States v. Martinez-Fuerte, 514 F.2d 308, 310-12 (9th Cir. 1975), *rev'd*, 428 U.S. 543 (1976).

requires no individualized probable cause, but rests any protection it affords on the judicial officer's conclusion that the probable incidence of immigration violations at the checkpoint justifies stops for questioning.

The Court had ample authority for sanctioning a checkpoint warrant procedure. A warrant had been issued for the San Clemente checkpoint,[79] and the warrant requirement was urged as an alternative by defendant Sifuentes.[80] Such a procedure first found expression in *Camara*[81] for administrative housing inspections and was recommended in *Almeida-Sanchez* by Justice Powell as an alternative in the context of immigration searches and seizures.[82]

The Court, however, rejected a checkpoint warrant in the instant case, claiming that fourth amendment rights could be protected without it. The Court distinguished *Camara*,[83] in that

79. A copy of the "warrant of inspection" is set forth in full in the circuit court's opinion. 514 F.2d at 311 n.2.

The warrant was not a requirement mandated by the courts. The rationale for obtaining the warrant appears to have been the Ninth Circuit's statement in United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974), requiring a permanent checkpoint search to be based on probable cause. This attempt to justify checkpoint operation by a warrant was apparently premature because the Supreme Court criticized the Ninth Circuit for the statement. The decision in *Bowen* allowed the checkpoint search because the standard of *Almeida-Sanchez* was held to be nonretroactive. The *Bowen* court, however, also decided that absent probable cause permanent checkpoint stops and searches would be unconstitutional under *Almeida-Sanchez*. For a discussion of the *Almeida-Sanchez* standard, see text accompanying notes 25-27 *supra*. Although the Supreme Court affirmed the decision, it chastized the Ninth Circuit for deciding the latter issue because the nonretroactivity holding was sufficient to dispose of the case. Bowen v. United States, 422 U.S. 916, 920-21 (1975). In any event, the warrant failed to survive judicial review in the Ninth Circuit. 514 F.2d at 332.

80. Note 74 and accompanying text *supra*.

81. Notes 55-57 and accompanying text *supra*.

82. Such a warrant procedure was outlined as a possibility for roving patrols. 413 U.S. at 283-84 (concurring opinion). Justice Powell proposed the warrant as a way to balance legitimate government needs and constitutionally protected rights. *Id.* at 275. He then suggested four criteria to consider in issuing the warrant: First, known or reasonably believed frequency of illegal alien traffic; second, proximity to the border; third, geographical considerations; and fourth, probable degree of interference with rights of innocent persons. *Id.* at 283-84.

The area warrant proposal received support from legal writers following *Almeida-Sanchez*. *See, e.g.*, Leahy, *Border Patrol Checkpoint Operation Under Warrants of Inspection: The Wake of* Almeida-Sanchez v. United States, 5 CAL. W. INT'L L.J. 62, 63-67, 69-70 (1974); Note, *Fourth Amendment Applications to Searches Conducted by Immigration Officials*, 38 ALB. L. REV. 962, 975 (1974); Note, *The Extent of the Border*, 1 HAST. CONST. L.Q. 235, 245-50 (1974); 27 VAND. L. REV. 523, 534-35 (1974). *But see* Note, Almeida-Sanchez *and Its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214, 242-47 (1975); Note, *Area Search Warrants in Border Zones:* Almeida-Sanchez *and* Camara, 84 YALE L.J. 355, 361-71 (1974).

83. *See* notes 55-57 & 76 and accompanying text *supra*.

the seizure in the instant case did not involve the search of a dwelling and the notification function of a warrant[84] was not needed. More importantly in the present context, the Court considered judicial review of the administrative decision on checkpoint location to be a sufficient substitute for judicial review of field officer's discretion.[85]

While the Court's latter reason attempts to satisfy a well known purpose of the warrant requirement, mere review of checkpoint location will not fully control law enforcement discretion. There are two types of discretion involved in border patrol stops for questioning: Discretion as to *where* cars are stopped and discretion as to *which* cars are stopped. The Court's protection removes the former from absolute law enforcement control, but the decision eliminates arbitrariness[86] in the exercise of the latter only when *all* cars are stopped. At San Clemente there was no administrative or judicial control of field officer discretion in selecting the cars to be stopped. An area warrant would likewise fail to eliminate arbitrariness in the exercise of this discretion, since it does not control the manner of checkpoint operation.

Furthermore, while the Court properly rejected the area warrant procedure, its reasons for doing so overlooked the fundamental flaw with an area warrant: Such a warrant ignores the fourth amendment's procedural warrant requirements that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." Probable cause and particularity are individualized requirements that are violated by the general authorization pro-

84. One of the purposes of a warrant established by the Court in *Camara* was to assure the citizen that the inspector was duly authorized to inspect and to define for the citizen the limits of the inspection. 387 U.S. at 532-33. This notification function appears to take on greater significance when the warrant is issued on less than traditional probable cause.

The notification function was performed at the checkpoint by the officers' uniforms and the clearly visible signs. 428 U.S. at 546, 565.

85. This view represents a change in the Court's position, since the Court in *Almeida-Sanchez* was particularly concerned with field officer discretion. 413 U.S. at 270. For a discussion of the judicial control necessary to curb this discretion, see Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

86. The primary concern of courts in warrantless searches and seizures has been the evil of unbridled law enforcement discretion. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973); Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967); Beck v. Ohio, 379 U.S. 89, 97 (1964).

vided by an area-type warrant.[87] Authorizing such a warrant would maintain the confusion between the fourth amendment's substantive reasonableness guarantee and the procedural probable cause requirement—a confusion that has beset the courts for years.[88] The area warrant is thus a step in the direction of writs of assistance.[89]

2. The individualized suspicion requirement

An alternative safeguard the Court could have applied is an individualized suspicion requirement. Mandating individualized suspicion in permanent checkpoint stops would have been the next logical step in the Court's trend of requiring individual justification for INS searches and seizures away from the border.[90] This would require a field officer to justify the stop of any particular car by articulable suspicious facts and resulting inferences.

Both types of law enforcement discretion would be controlled by this requirement. Individual justification of each stop eliminates the arbitrariness from discretionary selection of cars. Moreover, judicial review of law enforcement discretion in locating checkpoints ensures that the location is reasonable. While a checkpoint still involves some intrusion on the rights of innocent motorists, the inconvenience of driving through the checkpoint is not arbitrary because of congressional authorization and judicial review.

The Court declined to apply an individualized suspicion requirement because it found both law enforcement and individual interests to be different for permanent checkpoint stops than for stops made by a roving patrol.[91] Individual interests at permanent checkpoints were found to be different because checkpoint stops are subjectively less intrusive[92] than roving patrol stops; furthermore, the permanence of checkpoint location is a partial restraint on arbitrariness. Law enforcement interests at permanent checkpoints were perceived to be more compelling, since the checkpoints are central to all INS enforcement procedures away from the border. These interests were considered to be significant

87. *See generally* Note, *Area Search Warrants in Border Zones:* Almeida-Sanchez *and* Camara, 84 YALE L.J. 355 (1974).

88. *See* notes 39, 44-45, 55-58, & 60 and accompanying text *supra.*

89. *See* notes 44-45 and accompanying text *supra.*

90. The dissent urged this requirement. 428 U.S. at 574-75 (Brennan, J., dissenting).

91. For an argument that the Court's factual analysis on these points was the main flaw in the opinion, see 14 SAN DIEGO L. REV. 257 (1976).

92. *See* note 70 and accompanying text *supra.*

enough in the checkpoint context to obviate application of the more stringent reasonable suspicion standard applied in the roving patrol situation.[93] Moreover, a reasonable suspicion would be harder to develop at a checkpoint than on roving patrol because officers only view the car as it makes a "fleeting stop."[94] Further, it appears that no lesser standard of individualized suspicion could have been established to provide constitutional protection[95] and still permit operation of the checkpoint.[96] Since the Court

93. *See* notes 31-32 and accompanying text *supra.*

94. This raises the question whether or not a "fleeting stop" or a "roll-through" would be a seizure and subject to fourth amendment scrutiny. There was a factual dispute as to whether or not a "fleeting stop" was made in the instant case. The Court assumed it to be a seizure. 428 U.S. at 546 n.1. The Ninth Circuit had recognized stops based on founded suspicion developed as cars "rolled through" a checkpoint. United States v. Evans, 507 F.2d 879, 880 (9th Cir. 1974), *cert. denied,* 422 U.S. 1057 (1975).

95. An individualized suspicion standard must be objective if judicial review is to ensure constitutional protection. When the Court established the reasonable suspicion standard in *Terry* it declared:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an *objective standard:* would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

392 U.S. at 21-22 (emphasis added).

This objective control is required to give protection similar to a warrant or probable cause determination that requires a neutral judicial officer. *See* Coolidge v. New Hampshire, 403 U.S. 443, 449-51 (1971).

In order to be a lesser standard of individualized suspicion, the standard could only be authorization of the stop on more tenuous articulable facts. But the more tenuous the facts, the closer it approximates unfettered discretion. One potential lesser standard that illustrates this difficulty is reliance on apparent Mexican ancestry. While Mexican ancestry is relevant to illegal alienage along the southern border, the majority of people with such ancestry are citizens or legal aliens and would be subjected to these seizures arbitrarily. Thus, this standard would not curb arbitrariness any more than leaving the discretion with the field officer. Reliance on Mexican ancestry alone has universally been held insufficient for establishing founded suspicion. *E.g.,* United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975); United States v. Del Bosque, 523 F.2d 1251, 1252 (5th Cir. 1975); United States v. Bugarin-Casas, 484 F.2d 853, 855 (9th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974); United States v. Mallides, 473 F.2d 859, 861-62 (9th Cir. 1973).

In the instant case, the majority condoned referrals to the secondary questioning area made "largely on the basis of apparent Mexican ancestry." 428 U.S. at 563. Since no justification was required for checkpoint stops, no facts needed to be relied on and the Mexican ancestry dictum was not essential to the Court's opinion. The majority implicitly recognized the inadequacy of such grounds by attempting to mitigate concern with reliance on Mexican ancestry by quoting statistics to demonstrate such ancestry was not the only basis for referral. *Id.* at 562-64 nn. 15 & 17. The dissent took particular exception to this part of the opinion and pointed out many of the inadequacies and dangers of reliance on Mexican ancestry. *Id.* at 573 & n.4.

96. The checkpoint ceased operation after the Ninth Circuit held the checkpoint

found the illegal alien problem to be serious, a loss of the deterrent effect that permanent checkpoints have on alien-smuggling operations[97] was considered to be too high a price for the protection that reasonable suspicion would afford individual rights.

While an individualized suspicion requirement protects individual rights and marshalls much judicial precedent, the Court properly recognized that it is not mandated by the Constitution.[98] Although the fourth amendment's warrant requirements of probable cause and particularity require individualized justification, the reasonableness requirement for warrantless situations makes no such demand. Theoretically, any control on law enforcement action that would guarantee a person's security against unreasonable searches and seizures could satisfy the reasonableness requirement for warrantless intrusions without individualized suspicion. Thus an individualized suspicion requirement is a part of the reasonableness protection for warrantless searches and seizures only when necessary to ensure individual rights.

B. The Court's Balancing Analysis

One analytical framework the Court has used to determine the reasonableness of warrantless searches and seizures is the balancing of public interests against individual interests.[99] The objective of this balancing analysis is to determine which procedural requirements should apply to the search or seizure. In previous decisions, this balancing analysis has resulted in procedures that are outgrowths of the fourth amendment's procedural warrant requirements.[100]

The balancing analysis in the instant case, however, resulted

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warrant to be invalid and required founded suspicion. Bernsen, *Search and Seizure on the Highway for Immigration Violations: A Survey of the Law,* 13 SAN DIEGO L. REV. 69, 73 (1975) (Bernsen is General Counsel for the Immigration and Naturalization Service).

97. *See* note 69 and accompanying text *supra.*

98. *See* 428 U.S. at 561. The traditional viewpoint has been that reasonableness is equivalent to probable cause or an individualized suspicion variant in warrantless situations. This viewpoint is reflected in the dissent's accusation that the majority decision "empties the Amendment of its reasonableness requirement." *Id.* at 568.

99. *E.g.,* United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 21 (1968); Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967). *Accord,* United States v. Bowen, 500 F.2d 960, 973 (9th Cir. 1974) (Wallace, J., dissenting); United States v. Fuentes, 379 F. Supp. 1145, 1150 (S.D. Tex. 1974), *aff'd mem.,* 517 F.2d 1401 (5th Cir. 1975).

100. *Brignoni-Ponce* and *Terry* imposed the reasonable suspicion standard. Notes 48-50 and accompanying text *supra.* Although *Camara* did not require individualized suspicion as a result of the balancing, it did require the formalities of a warrant. Notes 55-56 and accompanying text *supra.*

in a determination that no individualized suspicion was required to ensure reasonableness. The Court did not denominate its analysis as a determination of reasonableness but simply declared that constitutional safeguards were determined by weighing "the public interest against the Fourth Amendment interest of the individual."[101] The balance struck in the instant case was the first time the Court has permitted a warrantless intrusion without any of the procedural safeguards required for warrants.[102] This pure reasonableness determination relies on checkpoint location and limitations on the extent of the seizure's intrusiveness to guarantee constitutional rights.

While the Court's determination reflects the realization that a reasonableness determination does not automatically dictate the infusion of aspects of probable cause, the method it adopted in determining reasonableness fails to guarantee individual rights as the Court defined them in the instant case. The Court stated that the amendment's guarantee "prevent[s] arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."[103] This widely articulated standard[104] is in harmony with the acknowledged purpose of the amendment to control unfettered law enforcement discretion.[105] The difficulty with the Court's analysis is that the resulting controls on the extent of intrusiveness ensure that the seizure is not oppressive but do not control arbitrariness. Oppressiveness is curtailed by confining the stop to brief questioning concerning the motorist's right to be in the country and requiring probable cause to justify further inquiry or search.[106] But the only control on arbitrariness is the nature of permanent checkpoint operation and location. Judicial review of this administrative decision fails to control the arbitrariness involved in selecting any given car for questioning.

The efficacy of judicial review as a control on discretion is seriously impaired by the precedent established in this case. If the San Clemente checkpoint, located on the freeway between

101. 428 U.S. at 555.

102. *See id.* at 556.

103. *Id.* at 554.

104. Similar language was used to define the protected right in United States v. Ortiz, 422 U.S. 891, 895 (1975), United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), Camara v. Municipal Court, 387 U.S. 523, 528 (1967), Schmerber v. California, 384 U.S. 757, 767 (1966), and Wolf v. Colorado, 338 U.S. 25, 27 (1949).

105. *See* note 86 and accompanying text *supra.*

106. *See* 428 U.S. 557-60, 566-67.

two of California's largest cities is reasonable, it is unlikely that any checkpoint location within the 100-mile limit can be successfully challenged. While the location was chosen to minimize interference with traffic along the route,[107] the traffic volume is so large that only a small percentage of the cars can be stopped by referring them to a secondary questioning area.[108] Because the discretion of field officers in selecting cars is unlimited, there is no control on arbitrariness. On the other hand, had the decision been limited to approval of the Sarita checkpoint, the precedent would not have condoned such arbitrariness for the simple reason that the Sarita checkpoint involved the stop of every car.

The Court justified this unfettered discretion by weighing oppressiveness against arbitrariness: "As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol Officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."[109] Although the Court claimed this advanced fourth amendment protections by subjecting fewer people to the stops and facilitating traffic flow,[110] it distorted its definition of the individual's protected interest. Thus, the balancing analysis is valid only if the Court foregoes its own definition of the individual's fourth amendment rights or holds those rights to be violable.

Establishing reasonableness by balancing interests has the danger that individual rights may be extinguished by a strong public interest. Admittedly the public interest in this case is strong because of the extent of the illegal alien problem[111] and the possibility that the checkpoint would cease operation if a more stringent standard had been required.[112] Yet the fourth amendment guarantees that the "right" (not merely an interest) to be

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107. *Id.* at 562 n.15.

108. In an eight-day period, 146,000 cars passed through the checkpoint, only 820 were referred for questioning, and 171 contained illegal aliens. *Id.* at 554.

109. *Id.* at 563-64.

110. *Id.* at 560. The dissent claimed that such a rationale failed to consider freedom from intrusion to be the norm and thus "stands the Fourth Amendment on its head." *Id.* at 572 n.2.

111. The illegal alien problem is serious. In fiscal year 1963 the INS apprehended 38,361 deportable aliens. By 1973 the number had risen to 498,123. United States v. Baca, 368 F. Supp. 398, 404 (S.D. Cal. 1973). By 1975 the number of deportable aliens apprehended had risen to 596,796, of which 579,448 were Mexican aliens. [1975] INS ANN. REP. 103.

The San Clemente checkpoint alone apprehends approximately 17,000 illegal aliens per year. United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

112. *See* note 96 *supra.*

secure from unreasonable searches and seizures "shall not be violated." To define reasonableness as the weighing of personal against public interests will not ensure inviolability. If arbitrariness is an evil of unreasonable searches and seizures, as the Court suggests,[113] the balancing in this decision failed to cure that evil. Acknowledgement of law enforcement interests should not result in abrogation of fourth amendment rights.[114] This possible erosion of individual rights argues strongly against a determination of reasonableness by weighing individual interest against public interests.[115]

C. An Alternative Proposal to Determine Reasonableness

A close analysis suggests that reasonableness under the fourth amendment has two aspects: First, the reasonableness of authorizing the search or seizure without a warrant; and second, the reasonableness of the search or seizure procedural safeguards. The essence of the proposed analytical framework is to examine each of these questions separately and thereby segregate the impacts of public and individual interests in the reasonableness determination. The first examination takes public law enforcement interest into account in determining whether a warrant is required. The second takes the individual's fourth amendment right into account by scrutinizing the search or seizure procedural requirements to ascertain whether sufficient safeguards are present to guarantee that right. The consideration of public interest and individual rights in separate reasonableness determinations ensures that public interest cannot extinguish individual rights in the balance.

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113. *See* notes 86 & 103-04 and accompanying text *supra*.

114. The Court refused to abridge constitutional rights for law enforcement necessity in *Almeida-Sanchez*. "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. at 273.

In United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975), the Ninth Circuit used similar reasoning: "[T]he government argues that fixed-checkpoint searches, even if not the functional equivalent of border searches, should be upheld simply because they are urgently needed. . . . The short answer to this argument, however, is that necessity alone cannot override the Fourth Amendment's prohibition against unreasonable searches and seizures." *Id.* at 967.

115. This possible erosion is undoubtedly one of the reasons many argue for the equivalency of reasonableness and warrant requirements for warrantless searches and seizures. Individualized suspicion requires articulable reasons for incursions on any individual's rights. Such reasons are subject to review by a neutral magistrate to ensure that the facts and resulting inferences were reasonable. With this impartial review, the individual rights are not as susceptible to extinction by considerations of public interest.

The examination of the reasonableness of authorizing a search or seizure without a warrant should begin by recognizing that a warrant should be required whenever feasible. If requiring a warrant defeats law enforcement interests, Congress or the courts could authorize a reasonable search or seizure without it. But if a warrant requirement is only an inconvenience to law enforcement objectives, reasonableness would demand a warrant. Clearly, any search or seizure pursuant to a warrant is still subject to the reasonableness requirement for procedural safeguards. Provided the intrusion is not unreasonable per se,[116] the procedural requirements mandated by the Constitution, probable cause and particularity, will ensure reasonableness. Since these requirements always apply to a warrant, area or general warrants are precluded. Thus, a properly issued warrant will provide adequate protection of individual rights.

Warrantless searches and seizures, however, demand closer analysis of the reasonableness of procedural safeguards. Since no procedure is specifically mandated, courts should scrutinize available procedures to ensure that an individual's fourth amendment rights are not abrogated. This necessitates clearly ascertaining the substance of this right.[117] Freedom from arbitrary and oppressive intrusions on privacy and personal security, the definition the Court used in the instant case, establishes a substantial and well-recognized standard.[118]

The procedural safeguards necessary to ensure reasonableness will be more stringent as the oppressiveness or the arbitrariness of the intrusion increases. Although increasing the strictness of the standard in proportion to the extent of intrusion suggests the potential for endless classification,[119] it appears that warrantless searches and seizures could easily be limited by the courts to three categories.

The first category includes searches and seizures which, absent exigent circumstances, would require a warrant. An example

116. A search or seizure that is unreasonable per se would be one that "shocks the conscience" of the court. Rochin v. California, 342 U.S. 165, 172 (1952) (administration of an emetic to recover swallowed capsules).

117. Since the precise nature of an individual's right is not explicit in the language of the amendment, it must be divined by the Court. Any concrete characterization of the right guaranteed by the fourth amendment is therefore fraught with peril. But this has not been and should not be an insurmountable barrier. If the definition becomes inadequate to fully protect individual rights, it can be rectified by the Court through a more careful delineation of the standard.

118. *See* notes 103-04 and accompanying text *supra*.

119. *See* note 64 and accompanying text *supra*.

is the stop and search of a moving vehicle.[120] Such intrusions should be strictly held to the probable cause requirement to protect individual fourth amendment rights. The second category of searches and seizures, represented by the brief detention and frisk in *Terry* or the roving patrol stop for questioning in *Brignoni-Ponce,* is of sufficiently limited intrusiveness that the reasonable suspicion standard would prevent arbitrary and oppressive intrusions. The third category involves searches or seizures of yet more limited intrusiveness such that those limitations on intrusiveness, combined with controls on the circumstances under which the search or seizure is permitted, are sufficient to preclude arbitrariness and oppressiveness. In this third category, individualized suspicion would not be required. Under this analysis, law enforcement interests are given greater effect than under an inflexible requirement of individualized suspicion in every warrantless situation. New categories should be acknowledged only upon establishing a very substantial distinction between the safeguards available and the oppressive or arbitrary nature of the search or seizure.

Applying this analysis to the instant case results in greater protection of individual rights than was afforded by the Court's analysis. The reasonableness of authorizing the seizure without a warrant has been established by statute and accepted by the Court.[121] Thus, law enforcement interests have been recognized and accommodated in the proper context. The next question is whether or not the procedural safeguards are adequate. The seizures in the instant case were not oppressive, since they did not involve an arrest or search of the person, or a search or seizure of his possessions.[122] They merely constituted a brief detention for questioning. Controls on arbitrariness, however, differ between the two checkpoints. Since *all* cars are stopped at the Sarita checkpoint, the arbitrariness of selective referral is not present. That seizure is therefore reasonable without further safeguards.

120. *See, e.g.,* United States v. Ortiz, 422 U.S. 891 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Chambers v. Maroney, 399 U.S. 42 (1970); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

121. The Court decisions beginning with *Almeida-Sanchez* have never questioned the statutory authorization to search or seize without a warrant.

122. It could be argued that the officer's view into the car was a search. But this is not sufficiently intrusive to be oppressive. Such a search occurs wherever a law enforcement officer is authorized to be, thus discretion is controlled by checkpoint location. The holding in *Brignoni-Ponce* precludes this type of search for officers on roving patrol absent the justification of founded suspicion.

The potential for abuse of discretion in the referral system at San Clemente, however, violates freedom from arbitrary intrusions. Such discretionary selection would be constitutionally sound only when more adequate safeguards, such as reasonable suspicion, are provided.

Requiring reasonable suspicion would in all likelihood render the San Clemente checkpoint inoperable.[123] This is a serious consequence in view of the legitimate law enforcement interest in controlling illegal aliens. On the other hand, the precedent of permitting law enforcement interests to result in the abrogation of constitutional rights could have far reaching repercussions. The Court should not reach to such lengths to protect law enforcement interests.[124]

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123. In fact the San Clemente checkpoint ceased operation when the Ninth Circuit imposed the founded suspicion requirement. *See* note 96 *supra*. Even under a founded suspicion requirement, however, the checkpoint may still be able to function by allowing founded suspicion to develop as cars roll-through or make a fleeting stop. *See* note 94 and accompanying text *supra*.

124. These law enforcement interests are more appropriately protected by legislation that provides alternative law enforcement measures. The fourth amendment creates difficulties with current enforcement measures only when they are performed away from the border or its functional equivalents, because those crossing the border have different rights as compared to those within the country. In Carroll v. United States, 267 U.S. 132 (1925), the Court said cars could be arbitrarily 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." *Id.* at 154 (emphasis added). This power at the border was reaffirmed in United States v. Brignoni-Ponce, 422 U.S. 873, 883-84 (1975), and Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). Thus Congress could deal with the illegal alien problem by eliminating or reducing the need for checkpoints away from the border.

There are two reasons for checkpoints away from the borders: First, many aliens enter at unpatrolled locations, and second, the border pass system is abused. If these reasons for removed checkpoints were obviated, then law enforcement interests would not suffer unduly by eliminating permanent checkpoints.

Two possible alternatives exist that might remove that rationale for permanent, removed checkpoints. First, increased patrolling might be a solution to the illegal alien problem. Effective patrolling of the 2000 mile border is, however, a physical impossibility. Increased patrols have not proven productive in the past. *See* United States v. Baca, 368 F. Supp. 398, 405 (S.D. Cal. 1973). Moreover, such patrolling may be prohibitively expensive (the Ninth Circuit took judicial notice of this fact in the instant case, 514 F.2d at 318). Second, concerted efforts could be made to reduce the abuses of the border pass system. While border passes, authorized by INS regulations, 8 C.F.R. § 212.6 (1977), could be granted in fewer cases or discontinued altogether, there are serious diplomatic and economic drawbacks to such a proposal.

Since better employment is a primary reason for illegal alien entry, an alternative law enforcement technique could focus on reducing that incentive. One method would be to impose criminal penalties on employers of illegal aliens. *See* CAL. LABOR CODE § 2805(a) (West Supp. 1976) (this statute was upheld by the United States Supreme Court in DeCanas v. Bica, 424 U.S. 351 (1976), *rev'g* 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974)). Current federal law specifically excludes employment from the punishable offenses consti-

V. CONCLUSION

The Court made significant strides in fourth amendment jurisprudence by its break with the tradition that reasonableness in a warrantless situation requires elements of probable cause. This advancement, however, is not without its perils, the most significant of which is the balancing of public interests against individual interests to determine which searches and seizures are reasonable. The proposed alternative analytical framework, with its emphasis on the individual's fourth amendment right to be free from arbitrary and oppressive intrusions, suggests a method of averting misuse of the precedent.

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tuting harboring illegal aliens. 8 U.S.C. § 1324(a) (1970). To date, efforts to amend this provision to include employment have been unsuccessful. *See, e.g.*, H.R. 982, 94th Cong., 1st Sess., *Hearings on H.R. 982 Before the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 3 (1975) (an earlier bill, H.R. 982, 93d Cong., 1st Sess., passed the House, 119 CONG. REC. 14,208-09 (1973), but died in the Senate). Former INS Commissioner Chapman has suggested that monetary penalties for employment might decrease the problem. Chapman, *A Look at Illegal Immigration: Causes and Impact on the United States*, 13 SAN DIEGO L. REV. 34, 40 (1975). Chief Justice Burger, on the other hand, has expressed uncertainty as to the efficacy of this remedy. United States v. Ortiz, 422 U.S. at 900 (concurring opinion).

In any event, legislative action is the appropriate channel for vindication of law enforcement interests in the present context.