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ANALYSIS OF SUPREME COURT DECISIONS RELATING TO EXTENDED BORDER SEARCHES FOR ILLEGAL ALIENS

E. JEREMY HUTTON
LEGISLATIVE ATTORNEY
AMERICAN LAW DIVISION
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Introduction

The United States Government has power to search all automobiles and to inspect papers of all persons crossing over its borders to determine the citizenship of such persons and prevent entry of illegal aliens. At the border, neither a warrant nor probable cause is needed to support such searches, and Immigration Officers are empowered to board and search any vessel, aircraft or other vehicle in which they believe aliens are being brought into the United States.[1/] However, the mere inspection of persons entering the Country did not prevent the entry of hundreds of thousands of aliens--over 650,000 in 1973 alone.[2/]

To deal with this problem, Congress, in 1946, expressly authorized immigration officers to conduct warrantless searches beyond the border areas to apprehend illegal aliens who had not been detected at the border. The statute authorizing extended border searches by the Bureau does not specifically limit the distance from the border at which motor vehicles and other conveyances can be searched but provides:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--
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> ...
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> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle...for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States...3/

1/ 8 U.S.C. §1225(a); Marsh v. United States, 344 F.2d 317, 324 (5th Cir. 1965); United States v. Beecher, 347 F. Supp. 1039, 1042 (D.Mass.1971).
2/ 1973 Immigration and Naturalization Service Annual Report 8.
3/ 8 U.S.C. §1357(a)(3).

In its regulations, the Immigration and Naturalization Service has defined "reasonable distance" to be "within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director."[4/] However, in "unusual circumstances" and with the approval of the Commissioner of Immigration and Naturalization, this distance may be extended beyond the 100 mile limit.

Until recently, no distinction was made by the courts between the level of suspicion necessary for border searches or extended border searches or between the level of suspicion necessary to stop a car and search it. In both cases, the standard of suspicion necessary was less than probable cause.[5/]

Almeida-Sanchez v. United States

The Supreme Court first considered the issue of the constitutionality of extended border searches in 1973 in Almeida-Sanchez v. United States,[6/] a case which, by its failure to achieve a consensus, failed to end the uncertainty concerning Fourth Amendment standards for nonborder searches and, with the resulting conflict among circuits, led to the necessity for consideration of four cases in the 1974-75 term. The petitioner in the Almeida-Sanchez case was a Mexican citizen who held a valid work permit, and who was stopped by the U.S. Border Patrol twenty-five air miles north of the Mexican border on a road which did not cross the border and came no nearer than twenty miles to it at any point. Although it was conceded by the Government that there was no

4/8 C.F.R. §287.1(a)( ) (1975).
5/United States v. McDaniel, 463 F.2d 129,132-133 (5th Cir. 1972); United States v. Wright, 476 F.2d 1027 (5th Cir. 1973).
6/413 U.S. 266 (1973).

probable cause to suspect the petitioner had committed a crime, the Border Patrol conducted a thorough search of his car and discovered marihuana under its rear seat possessed in violation of federal law. In a 5-4 decision, the Supreme Court reversed the Ninth Circuit Court of Appeals and held that the warrantless search made without probable cause or consent, violated the Fourth Amendment.

Justice Stewart's opinion for the Court appeared to distinguish between "roving patrols" and established border stations. In the latter circumstance, the federal government was found to have the power to exclude aliens by routine searches of individuals or vehicles seeking to cross the border without probable cause or a search warrant "in certain circumstances...not only at the border itself, but at its functional equivalents as well."[7/] Examples of permissible warrantless searches away from the border given by the Court were searches made "at an established station near the border, at a point marking the confluence of two or more roads that extend from the border"[8/] and a search of passengers and cargo arriving in the United States after a nonstop flight from a foreign country. However, the majority held that a "roving patrol" could not stop an automobile and conduct a warrantless search unless there was probable cause to believe that a crime was being committed. The evidence in the Almeida-Sanchez case was ordered suppressed. and the conviction reversed. No consideration was given to the question of what distance would be considered "reasonable" for such searches.

Justice Powell, who had joined with four other members of the Court to form the majority in Almeida-Sanchez, wrote a concurring opinion which

7/ 413 U.S. at 272.
8/ 413 U.S. at 273.

increased uncertainty as to the meaning of the Court's opinion by finding that, under certain circumstances not met in this case, roving patrols would be constitutional thus negating the Court's emphasis on the needs for established stations. His opinion seeks to reconcile law enforcement needs with constitutionally protected rights. Using language of the Court's opinion in Camara v. Municipal Court,[9/] (1967), in which it found that the probable cause requirement could be met for periodic housing inspection by basing the request for a search warrant on knowledge of an area rather than of specific buildings, Justice Powell argued that roving border searches could be sustained on the basis of the same knowledge of an area rather than of specific vehicles or persons. As justification for the search, the concurring opinion noted the impossibility of patrolling the entire border with fixed stations and the high concentration of illegal aliens present in the area. The search of an automobile was found to be "far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building."[10/] In a conclusion supported by the four dissenting Justices (Justices Burger, White, Blackmun and Rehnquist), Justice Powell states that:

> on appropriate facts the government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles....[11/]

His opinion suggests that the interests of protecting individual rights and yet serving law enforcement needs could best be met by giving the Border Patrol authority to obtain area search warrants similar to those available to the building inspectors in Camara which would be "justified by experience

9/ 387 U.S. 523 (1967).
10/ 413 U.S. at 279.
11/ Id. at 281.

with obviously non-mobile sections of a particular road or area embracing several roads."[12] He concluded:

> Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time. According to the Government, the incidence of illegal transportation of aliens on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule. The use of an area warrant procedure would surely not "frustrate the governmental purpose behind the search." ...It would of course entail some inconvenience, but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement....[13]

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

> (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.[14]

The concurring opinion stressed that the "novelty" of the type of search conducted by roving patrols does not lessen the importance of prior judicial determination as to the nature and scope of the search.

12/Id. at 282.
13/Id. at 283.
14/Id. at 283-284.

The dissenting opinion by Justice White, agreed with Justice Powell's observation that searches by roving patrols if authorized by an area search warrant issued on less than probable cause required for the traditional search would satisfy Fourth Amendment requirements but disagreed with his opinion and the majority holding that either a warrant or probable cause was required in the circumstances of this case. To hold otherwise was seen as conflicting with the legislative judgment in the enactment of section 1357 of title 8:

> that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border.15/

The decision left the status of roving patrol searches in border areas in doubt. While five members of the Court held such a warrantless search without probable cause to be invalid, one member of the majority, with the support of the four dissenters, would permit such searches if authorized by an area search warrant issued on a showing of less than the traditional grounds of due process. The four member minority would permit such searches without either warrants or probable cause. Thus a majority of the Court would appear to support the constitutionality of "roving" patrols if prior judicial approval is given to the nature and scope of the search by issuance of an area search warrant.

The confusion caused by uncertainty over the meaning of Almeida-Sanchez is best shown by the split decisions in several cases decided

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15/Id. at 294.

after the Supreme Court case by the Ninth Circuit Court of Appeals, the court hearing most cases concerning illegal aliens. The attempted resolution of these cases by the Supreme Court in the 1974-75 term which raised fundamental issues involving balancing of individual constitutional rights against the societal interests in controlling the increasingly severe problem of illegal aliens, will be the focus of the remainder of this report.

United States v. Peltier; Bowen v. United States: the Retroactivity Issue

One of the issues left unresolved by Almeida-Sanchez, on which two circuits reached differing conclusions, was whether that case's holding, that warrantless roving patrol border searches were unconstitutional unless there was a showing of probable cause, should apply to cases decided prior to or on which appeals were pending at the time of the decision. The Court of Appeals for the Ninth Circuit held, in a 7-6 decision involving a roving patrol stop seventy miles north of the Mexican border made without probable cause in which a large quantity of marihuana was seized, that the ruling of Almeida-Sanchez should be applied to similar cases pending on appeal on the date the Supreme Court's decision was announced.[16/] This decision was in conflict with a similar case decided by the Fifth Circuit Court of Appeals.[17/] The Ninth Circuit found that Almeida-Sanchez followed traditional Fourth Amendment standards and was not a new doctrine. Therefore, the appellant was entitled to benefit of the rule. The dissenters would have ruled that Almeida-Sanchez did establish a new constitutional rule, because it overruled long accepted and widely relied upon administrative practice. Therefore, they would apply retroactivity standards established in Stovall v. Denno[18/] and let the conviction stand.

16/ United States v. Peltier, 500 F.2d 985 (9th Cir.1974).
17/ United States v. Miller, 492 F.2d 37 (5th Cir. 1974).
18/ 388 U.S. 293, 297 (1967).

The Supreme Court, in its first decision of the 1974-75 term relating to border searches, agreed with the conclusions reached by the dissenting Court of Appeals opinion in Peltier and refused to apply Almeida-Sanchez to any cases resulting in convictions prior to June 21, 1973, the date on which it delivered its opinion in that case, even if an appeal from conviction was pending at that time.[19/] This 5-4 decision provided an opportunity for a major debate on limitations on application of the exclusionary rule, the expansion of which had been one of the controversial hallmarks of the Warren Court. The majority opinion found that the Supreme Court had given retroactive effect to cases involving application of the exclusionary rule only in cases where the manner in which the evidence was seized raised serious question as to the reliability of the evidence or the accuracy of guilty verdicts in past trials. The Court announced the following rule for determination of when the exclusionary rule need not be applied even though it is subsequently found that the manner in which the evidence was seized violated the suspect's constitutional rights :

> ...if the law enforcement officer reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.... [T]he "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.[20/]

The majority opinion by Justice Rehnquist, in which he was joined by Chief Justice Burger and Justices White, Blackmun and Powell, observed that

19/United States v. Peltier, __U.S.__(no.73-2000,June 25, 1975), 43 L.W. 4918.
20/Id.at _ ,43 L.W. at 4920.

since Almeida-Sanchez had been the first case involving roving border searches decided by the Supreme Court, the police, who seized reliable evidence to support drug charges but without probable cause to stop the appellant initially, were not blameworthy in relying on numerous Court of Appeals decision and on statutory authority supplied by the "Immigration and Nationality Act of 1952." The primary purpose of the exclusionary rule, which was seen by this opinion to discourage willful or negligent conduct depriving a defendant of some constitutional right and to instill a greater degree of care toward the rights of the accused, was found not to be served by suppressing the evidence in the Peltier case.

Justice Brennan's dissenting opinion, in which he was joined by Justice Marshall and, in the first section, by Justice Stewart, disputed the majority's conclusion that Almeida-Sanchez represented a departure from traditional application of the Fourth Amendment. The case was found to have "plainly applied familiar principles of constitutional adjudication announced fifty years ago in Carroll v. United States, 267 U.S. 132, 153-154 (1925), and merely construed 8 U.S.C. §1357 (a)(3) so as to render it constitutionally consistent with that decision."[21/] The dissenters could find no express congressional or administrative approval for random roving patrol searches or any law that would exempt the Border Patrol from observing probable cause requirements since the law was seen as dispensing with the warrant requirements only in searches made a reasonable distance from the border. Opinions of the Courts of Appeals approving the roving patrol searches were seen as temporary aberrations and not, as the majority opinion had asserted, reflecting a long-standing practice since the first

21/ Id. at __, 43 L.W. at 4923.

case on point in the Ninth Circuit was not decided until 1970, with the second, Almeida-Sanchez,[22] decided by a divided court in a decision later overturned by the Supreme Court. In the portions of the dissenting opinion with which Justice Stewart did not join, Justice Brennan with Justice Marshall turned their fire on what they saw as the Court's distortion of the exclusionary rule which they stated indicates that the Court is moving toward abandonment of the exclusionary rule in search and seizure cases. What they see as the Court's new interpretation of the exclusionary rule was criticized as being difficult to comprehend or justify but which would appear to permit use of the rule only in situations in which the law enforcement officer knew or should have known that the search violated the Fourth Amendment. If this test had been applied in Almeida-Sanchez, Justice Brennan argues, then the conviction of the appellant would have been affirmed because there was no way that the police officers could have known that the searches by roving patrols were unconstitutional. They fear that application of such a test would stop the development of Fourth Amendment law since direct precedent would have to be shown for relief to be granted. The dissenting opinion provided a defense of the exclusionary rule, arguing that reliance upon states of mind would increase uncertainty and lead to a result seen certain to cause "slow strangulation" of the rule, that no effective alternative has been found to remove the inducement to violation of Fourth Amendment rights which acceptance of illegally seized evidence by the Government provides.[23] The exclusionary rule was seen as being designed to discourage law enforcement officers

22/ United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); United States v. Almeida-Sanchez, 452 F.2d 459 (9th Cir. 1971).
23/ United States v. Peltier, __ U.S. __, 43 L.W. at 4927.

from "invariably opting for the choice that compromises Fourth Amendment rights."[24/]

While the statute involved was found to be silent as to probable cause requirements, Justice Brennan argued that the Court could have as easily found that silence indicated that the long-established precedent that an automobile could be stopped and searched without a warrant only for probable cause was to be followed, which was the result the Court reached in Almeida-Sanchez but refused to apply to cases then awaiting appeal. By permitting the exclusionary rule to be applied only in situations in which the police knew or should have known seizure of evidence would violate Fourth Amendment standards, the Court is accused of demeaning the adjudicatory process by requiring courts to review subjective states of mind.

Justice Douglas' separate dissenting opinion agreed with the other dissenting opinion that Almeida-Sanchez had reaffirmed traditional Fourth Amendment principles and that a constitutional rule made retroactive in one case must be applied retroactively in all. However, he stressed the unfairness in not applying the rule of Almeida-Sanchez to Peltier since it was "largely a matter of chance that the Border Patrol" had been held to be restricted by the Fourth Amendment in the former case rather than in the Peltier's case.[25/]

In the other case on the retroactivity of Almeida-Sanchez decided by the Court in the 1974-75 term, Bowen v. United States,[26/] the Court ruled by 5-4 margin that the principles of Almeida-Sanchez should not have been applied

24/ Id. at __, 43 L.W. at 4928.
25/ Id. at ___, 43 L.W. at 4922..
26/ _U.S._ (docket No. 73-6848, June 30, 1975), 43 L.W. 5024.

retroactively to a fixed point traffic search. In that case, the petitioner had been stopped at a traffic checkpoint thirty-six air miles from the Mexican border in January, 1971, where, when searching his camper for illegal aliens, the Border Patrol found a large quantity of marihuana. The Court of Appeals affirmed his conviction rejecting claims that the search had been unlawful,[27/] but the the Supreme Court, in an earlier decision, vacated the verdict and remanded the case for reconsideration in light of Almeida-Sanchez, which had been decided while the Bowen case was awaiting review.[28/] Upon reconsideration of the case, a sharply divided Court of Appeals found that while the principles of Almeida-Sanchez would apply to searches at traffic checkpoints in addition to roving patrols covered by that decision, the rule was not applicable to searches conducted prior to the date of the Supreme Court's decision in that case, and the petitioner's conviction was affirmed.[29/] The same five member majority joined in an opinion by Justice Powell finding that the principles regarding retroactivity set forth in Peltier controlled in this case, and that the Court of Appeals had erred by prematurely extending Almeida-Sanchez to traffic checkpoints since the Supreme Court had not decided the question at that time. Justices Douglas, Brennan and Marshall dissented for the same reasons expressed in Peltier and Justice Stewart announced his dissent without an opinion.

United States v . Brignoni-Ponce; United States v. Ortiz: Is Probable Cause Necessary for Questioning at Checkpoints Away from Border?

The primary questions raised by Almeida-Sanchez pertain as to how far that decision would be applied: Since it seems to stress the difference

27/462 F. 2d 347 (9th Cir. 1972).
28/ 413 U.S. 915 (1973).
29/500 F. 2d 960 (9th Cir. 1974).

between roving patrol and fixed checkpoints, would different standards of probable cause be required to justify stops for fixed checkpoints in border areas than for roving patrols in the same areas? Would temporary fixed checkpoints be accorded the same privileges as permanent checkpoints or would they be considered in the same category as roving patrols? Would Almeida-Sanchez be applied to require the Border Patrol to have probable cause to believe a person was an illegal alien before merely stopping him to question him as to nationality in border areas? Could a lesser standard of suspicion be applied in certain situations, such as mere questioning near border areas, than probable cause? Would foreign appearance alone constitute sufficient cause to stop and question a person as to his nationality? In United States v. Brignoni-Ponce,[30/] the Court examined the issue of whether the Border Patrol can use a roving patrol to stop cars and question occupants about their citizenship and immigration status in areas near the border. In that case, a fixed checkpoint south of San Clemente, California, had been closed because of inclement weather. In place of the checkpoint, the Border Patrol stationed a patrol car off the highway from which two officers observed traffic. The respondent was stopped because he and his car's occupants appeared to be of Mexican descent. Upon questioning, the officers learned that the occupants of the car were aliens who had entered the country illegally. The respondent was charged and convicted of knowingly transporting illegal aliens.

30/ U.S. (June 30, 1975, Docket No. 74-114), 43 L.W. 5028.

On review, the Court of Appeals found that the stop resembled a roving patrol, applied the ruling of Almeida-Sanchez and held the Fourth Amendment, as interpreted in Almeida-Sanchez , forbids stopping a vehicle, even for the limited purpose of questioning its occupants unless the officers have a "founded suspicion "that the occupants are aliens illegally in the country.[31/] Mexican ancestry, while it could be considered with other factors in forming a degree of suspicion sufficient to make a stop, did not alone support the warrantless stop of the automobile.

The Supreme Court unanimously affirmed the Court of Appeal's reversal of the petitioner's conviction but split on theories to support its decision. Justice Powell's decision for the Court, which was joined by Justices Brennan, Stewart, Marshall and Rehnquist, applied a balancing test to determine the reasonableness of the warrantless search, finding that the Fourth Amendment applies to all seizures of persons including brief detentions short of arrest and requires such seizures to be reasonable. The balancing test to be applied was defined:

> As with other categories of police action subject to Fourth Amendment constraints, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary influence by law enforcement officers.[32/]

31/ United States v. Brignoni-Ponce, 499 F. 2d 1109 (9th Cir. 1974).
32/ Id. at ___, 43 L. W. at 5030.

After discussing evidence presented of the public interest in controlling the large-scale illegal entry of unauthorized aliens at the Mexican border, the difficulty in enforcing the law along a long border, the use of illegal aliens as a source for cheap labor and comparing these public concerns with the interference with individual liberty involved in stopping and questioning persons suspected of being illegal aliens, the Court concluded that the search involved constituted a "modest intrusion." In view of the limited nature of the intrusion, the Court found that stops of this nature could be justified on a finding of less than probable cause and applied the standard set forth in Terry v. Ohio, 33/ the case upholding a State "Stop and Frisk" law permitting a limited search on less than probable cause. It concluded:

> In this case ... because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in Terry, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation'...The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on on probable cause. 34/

While the Court found that brief border stops, like stop and frisk stops, could be made if the officer has reasonable suspicion to believe that he has apprehended an illegal alien or a person transporting illegal aliens, a test that would usually require less evidence than to establish probable cause, the

33/ 392 U.S. 1 (1968).
34/ United States v. Brignoni-Ponce, ___ U.S. ___ (June 30, 1975), 43 L.W. at 5031.

Court refused to give the Government the broad discretion it had sought. It found that current regulations permitting such random stops within a hundred mile area from the border would substantially interfere with legitimate traffic, an infringement of individual freedom not justified by the relatively small percentage of the population engaged in illegal entry or transportation of illegal aliens. In dictum, the Court seems to reach beyond the automobile stops to also place restraints on stopping and questioning individuals:

> For the same reason that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens. 35/

In further defining limitations on roving border patrols, originally set forth in Almeida-Sanchez, the Court held that, except for searches actually made at the border or its functional equivalent, roving patrols

> may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. 36/

As examples of factors that could be considered in determining whether there were sufficient enough circumstances to permit a border officer to make a brief stop to question a person or persons the Court stated that consideration should be given to: the characteristics of the area in which the vehicle had been encountered (its proximity to the border, usual traffic patterns, past experience with alien traffic), information about recent illegal crossings made

35/ Id. at __, 43 L.W. at 5032.
36/ Ibid.

in the area, the behavior of the driver, characteristics of the vehicle (whether it is of the type that would facilitate the hiding of persons, whether it appears to be heavily loaded) and the officer's assessment of the facts in light of his past experience. While foreign appearance, in light of other circumstances, could be a factor to be considered, the Supreme Court, in affirming the Court of Appeals' decision and reversing the respondent's conviction, held that foreign appearance alone is insufficient to create the reasonable belief necessary to stop a person away from the border and question him as to his nationality. Factual circumstances contributing to this holding were the brief period that officers had to observe the respondent and the large number of Mexican-Americans and legally present Mexican aliens in the area. Even though the officers did apprehend illegal aliens, the stop was illegal because they could cite no other reason for initially stopping their vehicle other than their appearance.

Despite its restriction on methods employed by the Border Patrol, the Court offered suggestions for corrective legislation. The majority opinion echoed the point first raised in Almeida-Sanchez of the possibility of area search warrants. In a footnote, the Court seemed to go out of its way to indicate that since there was no warrant involved in this case, the Court would not have to consider the issue of "whether a warrant could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens."[37/]

37/ Id., note 7 at __, 43 L.W. at 5031

Chief Justice Burger, joined by Justice Blackmun, concurred only in the result reached by the Court. His opinion complained that the Court's interpretation of the Fourth Amendment would leave the Immigration and Naturalization Service "powerless to stop the tide of illegal aliens and dangerous drugs that daily and freely crosses our 2,000 mile southern boundary."[38/] In commenting on the Court's balancing test, the Chief Justice expressed the fear that:

> history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable--or unwilling--to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country. 39/

The concurring opinion warned that in the absence of legislative action, presumably to permit area search warrants, the United States border could be protected only by a massive force of guards. The opinion concluded with the view that the Court had not given adequate weight to the needs of society in balancing its interest against the rights of individuals. An appendix accompanying the Chief Justice's opinion provided a comprehensive report on the law enforcement problems created by illegal aliens.

Justice Douglas' concurring opinion reached the opposite conclusion to that of the Chief Justice. He recalled his dissent to the "suspicion test" when it was first articulated in Terry and called the adoption of a standard permitting less than probable cause to justify a search in this case as well as in Terry

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38/ Id. at __, 43 L.W. at 5033.
39/ Ibid.

"an unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police."[40] Justice Douglas would either discontinue use of the "suspicion test" or limit its application to violent crimes. His opinion warned:

> ...[B]y specifying factors to be considered [in applying the "suspicion test" without attempting to explain what combination is necessary to satisfy the test, the Court may actually induce the police to push its language beyond intended limits and to advance as a justification any of the enumerated factors even where its probative significance is negligible.[41]

In another concurring opinion, Justice White joined by Justice Blackmun followed the theme set by the Chief Justice's opinion by lamenting what they saw as the Court's "dismantling" of machinery to intercept illegal aliens. However, they saw this result as possibly beneficial to law enforcement as the system of border patrols was seen as being

> notably unsuccessful in deterring or stemming this heavy flow [of illegal aliens], and its costs, including added burdens on the courts have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.[42]

The whole problem of illegal aliens was seen as one best left to the President and Congress to solve.

40/ Id. at ___, 43 L.W. at 5037.
41/ Id. at ___, 43 L.W. at 5038.
42/ Ibid.

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

Also decided on the last day of the 1974-75 term was United States v. Ortiz,[43/] which presented the issue of whether vehicle searches at traffic checkpoints away from the border, similar in nature to roving patrol searches, must be based on probable cause. In that case, the respondent's car had been stopped at a routine traffic checkpoint and three aliens were found concealed in the trunk. At the time the motor vehicle was stopped, the officers had no reason to believe that it contained illegal aliens. The checkpoint, which screened all traffic when open, was sixty-two air miles from the Mexican border at a place which could not be considered to be the functional equivalent of a border. However, the checkpoint was frequently closed due to inclement weather, heavy traffic and personnel shortages. When open, drivers and passengers were asked questions about their citizenship and, if anything suspicious was observed, the officers might "inspect" areas in which aliens could hide. Similar operations had been conducted at other permanent traffic checkpoints, but where traffic was heavy, only random stops were made.

43/ ___ U.S. ____ (Docket no. 73-2050, June 30, 1975), 43 L.W. 5026.

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

Justice Powell's opinion for the Court, in which he was joined by Justices Douglas, Brennan, Stewart, Marshall and Rehnquist, found that there is no difference between a roving patrol and a traffic checkpoint removed from the border and its functional equivalents so far as probable cause requirements are concerned to conduct a search of private vehicles. While the lighting and warning given might make a difference with regard to the propriety of the stop, which is less intrusive than a search, it made no difference as to the search itself which could result in the same degree of embarrassment to the parties concerned as a roving search despite the greater regularity of the stop itself. Furthermore, the Court found that the officers' discretion was not significantly more limited than that of the roving patrol since only three percent of the passing cars were actually stopped with no more than ten or fifteen percent of these actually searched, thus leaving the officer with substantial discretion to determine which cars he would search, a determination which would never have to be justified. The Court concluded:

> This degree of discretion to search private automobiles is not consistent with the Fourth Amendment. A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search ...We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in Almeida-Sanchez. We therefore follow that decision... 44/

Once again, the Court specifically stated, in a footnote, that it had not ruled on the possibility of area searches because there had been no warrant in this case and the Government had not attempted to obtain one. In the same note, the Court indicated that the scope of its holding may be limited by declaring:

> Not every aspect of a routine automobile "inspection" ...necessarily constitutes a "search" for purposes of the Fourth Amendment. There is no occasion in this case to define the exact parameters of an automobile "search."45/

Justice Rehnquist, in his concurring opinion, stated that the Court's analysis of the distinction between roving and fixed checkpoint searches was correct but questioned the soundness of the rule in Almeida-Sanchez. He stressed the limited nature of the Court's opinion by pointing to the fact that it applied only to full searches not mere stops to question about citizenship which

> involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the important national interest in controlling illegal entry. 46/

44/ Id. at __, 43 L.W. at 5027-5028.
45/ Id., note 3 at __, 43 L.W. at 5028.
46/ Id. at __, 43 L.W. at 5028.

He would find such stops to be reasonable whether or not accompanied by "reasonable suspicion" and would limit the Court's requirement for suspicion to instances where a search is actually made. He announced that his understanding of the Court's decision in Ortiz is that such stops would not be prohibited if unaccompanied by a search.

Chief Justice Burger's concurring opinion in Brignoni-Ponce and Justice White's concurring opinion in that same case, which were both joined by Justice Blackmun, were announced as applicable to Ortiz.

Conclusion: Possible Effects of Border Search Cases on Law Enforcement

All that can be said with assurance about the extended border search cases is that further litigation will be necessary before we will be able to fully appreciate the full implications of these holdings for law enforcement, particularly with regard to future application of the exclusionary rule. When one is left with three members of the Court who fear that the decisions will result in dismantling of law enforcement efforts to intercept illegal aliens[47/] and three who fear that the decisions will lead to dilution of Fourth Amendment guarantees,[48/] thus inviting abuses by law enforcement officers, it is difficult to disagree with Justice Douglas' observation:

> Ultimately the degree to which the suspicion test actually restrains the police will depend more upon what the Court does henceforth than upon what it says today.[49/]

47/ Chief Justice Burger and Justices White and Blackmun.
48/ Justices Douglas, Brennan and Marshall.
49/ United States v. Brignoni-Ponce, supra, at __, 43 L.W. at 5038.

There is probably some truth to both views. Under the ruling in Almeida-Sanchez, the border patrol will not be able to make random searches of motor vehicles without a warrant or probable cause away from the border or its functional equivalent. However, stops to question persons regarding their nationality will apparently be permissible within a reasonable distance from the border for less than probable cause so long as certain factors can be shown to show a reasonable suspicion. Searches of automobiles at fixed stations will no longer be permitted for less than probable cause but the brief intrusion upon individual liberty involved in questioning persons in circumstances which could be described as suspicious, would apparently be permitted.

While these rulings will limit the wide discretion border patrol officers exercised in the past and may, to some degree, hinder their operations, there are several factors in these decisions which could lead to the conclusion that law enforcement efforts may have been aided in the long run. First, officers will be permitted to make a stop to question suspects for less than probable cause. While they can no longer make random stops just because the person looks foreign, other factors such as the location of the automobile and the experience of the officer, which should not be difficult for the experienced law enforcement officer to develop, may be shown which will justify the stop.

Second, a majority of the Court appears to favor legislative authorization of area search warrants. Should Congress enact legislation authorizing such stops, the Border Patrol may be able to operate in areas in which high concentrations of illegal aliens have been found without much interference from courts.

Third, the exclusionary rule, which had been the prime weapon of the Warren Court to restrict police actions which were found to violate individual rights, appears to have been restricted in its application to such an extent that, as previously noted, several Justices fear that the Court is moving to accomplish its demise. While the Court formerly permitted retroactive application of the rule unless its decision marked a sharp break with precedent, retroactive application will be permitted only when the manner in which the evidence was seized might make it unreliable or might affect the accuracy of past guilty verdicts. A new factor given weight by the Court in determining application of the rule is the evaluation of the intent of the law enforcement officer, i.e., whether he reasonably believed in good faith that his conduct was in accord with law. By making such subjective considerations a determining factor in application of the rule, the Court seems to be increasing the circumstances in which evidence technically seized in violation of Fourth Amendment or other constitutional rights will be admissible as evidence thus decreasing the utilization of the exclusionary rule as a deterrent to such activity.

The Court still has not considered cases involving warrantless stops and searches for illegal aliens in areas away from the border, but present law only authorizes such searches to be made "within a reasonable distance from any external boundary of the United States."[50/] Should Congress widen the Border Patrol's authority to include internal areas shown to have large numbers of illegal aliens, or possibly permit area search warrants, the grounds may have been established in these cases for upholding such laws.

50/ 8 U.S.C. §1357(a)(3).

While neither civil libertarians nor law enforcement officials may be completely satisfied by these cases, subsequent cases may well show that the latter fared better through the Court's modification of probable cause requirements and limitation in application of the exclusionary rule. Although Chief Justice Burger complained that we may be judged as "prisoners of our own traditional and appropriate concern for individual rights,"[51/] these cases will be shown as continuing the tradition of balancing those individual rights against societal interests.

51/ United States v. Brignoni-Ponce, supra at ___, 43 L.W. at 5033 .