



10-1974

United States v. Brignoni-Ponce

Lewis F. Powell Jr.

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(North of San Diego) Held

Supplemental
Memo from
Cert Pool
attached
at back

At a fixed check-point, 65 miles
north of border which was closed
due to bad weather (i.e. cars were
not routinely being stopped), a
car with Mexicans was seen to
pass. Agts followed, stopped
car & questioned Resp - who was
an alien unlawfully in U.S.
There was no search of car.

See my note on
last page.

Add to Almeida-Sanchez
memos that are
filed with 73-1896.

SG, urging imp. of this case,
says A-S does not apply as there
was no search. A-S was decided
under 1357(a)(3). But 1357(a)(1)

Preliminary Memo authorizes

Summer List 18, Sheet 2

No. 74-114

UNITED STATES

v.

BRIGNONI-PONCE

Border Service officers to
interrogate w/o warrant, any
persons believed to be an
alien. There is no
Cert. to the CA 9 Timely
(Goodwin) (en banc) geographic
limitation on
this statute.
Federal/Criminal (See PC note on
last page)

Summary: Prior to the decision in Almedia-Sanchez, Border Patrol
agents observed traffic from the site of a fixed checkpoint 65 miles
north of the Mexican border. The checkpoint was closed because of
inclement weather. When they observed a car with occupants of Mexican
descent pass by, they followed and stopped it and, when questioning
revealed that the passengers were aliens illegally in the U.S., they
arrested the occupants.

(This case will be controlled by
outcome of Quano & Sanchez 73-820)

Resp, the driver of the car, was convicted of transporting illegal aliens in violation of 8 U.S.C. 1324(a)(2) and sentenced to 4 years imprisonment in a trial occurring before Almeida-Sanchez with his motion to suppress having been denied by the USDC. On appeal, after the decision in Almeida, the 9th Circuit en banc reversed the conviction holding that the motion to suppress should be granted based on this Court's decision in Almeida since the decision applied retroactively to roving patrols as in the present case and since Almeida applies to Border Patrol stops of autos even though not accompanied by a search so that "founded suspicion" was required for the stop despite the language of 8 U.S.C. 1357(a)(1). The SG now seeks cert to review the 9th Circuit's holding arguing that Almeida is limited to border searches pursuant to 8 U.S.C. 1357(a)(3) and does not apply to require a "founded suspicion" in order to stop an auto to interrogate suspected aliens as to legality of their presence in the U.S.^{1/}

Facts and Contentions: Petr's sole argument is that Almeida is limited to auto searches pursuant to 1357(a)(3) and does not apply to auto stops pursuant to 1357(a)(1). Section 1357(a)(1)

1/ The SG recognizes that the immediate case presents the same question as to the retroactivity of Almeida that is presented in his petition in United States v. Peltier, No. 73-2000. However, because of the urgency of resolution of the "stop/search" question presented in the immediate case, he specifically notes that he does not present or urge the nonretroactivity question in the immediate case. [Pet. 8-9, n.3].

generally provides that an authorized Border Service officer has the power without warrant "...to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." Unlike §1357(a)(3) construed in Almeida, it does not specifically apply to searches and it contains no limit to a reasonable distance from the border.

The SG points out that the decision in the instant case is in direct conflict with the 10th Circuit's decision in United States v. Bowman, 487 F.2d 1229 limiting Almeida to §1357(a)(3) searches and holding it inapplicable to §1357(a)(1) stops. He states that many cases are pending in which this point of law will be crucial and that the uncertainty resulting from the split as to standards governing such stops has seriously undermined the Border Service's effectiveness.

On the merits, he points out that Justice Powell's concurring opinion in Almeida recognized that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause..." to conduct vehicle searches. 413 U.S. at 279. While he concedes that the stop in the instant case is a seizure under the Fourth Amendment, he argues that the intrusion involved in a stop to determine legality of presence is sufficiently de minimis not to require prior judicial supervision and that the presence of suspected aliens in the general area of the Mexican border is a sufficient circumstance to justify the stop. Cf.

Terry v. Ohio, 392 U.S. 1, 22. He points out that 12,000 deportable aliens were apprehended at the fixed checkpoint in question in this case during 1973.

The 9th Circuit specifically rejected the result in Bowman and held that Almeida applies to such stops focusing on language in the decision referring to both stops and searches. See 413 U.S. at 268, 272, 274. It reasoned that the government under its argument would be free to conduct stops anywhere in the country [since §1357(a) (1) contains no distance limit] without real limit on their power to do so. It reasoned that the correct standard for such stops by border patrol agents is the same as that for police stops generally -- reasonable or founded suspicion -- and that the presence of persons of Mexican descent 65 miles from the Mexican border does not meet this standard. Cf. Au Yi Lau v. INS, 445 F.2d 217, 223 (D.C. Cir. 1971). Resp, who has filed a motion to proceed IFP, argues generally as per the CA, noting that a contrary decision would make all Mexican Americans subject to such searches, and concluding that the case is not certworthy because Bowman was so obviously wrong whereas the 9th Circuit here was so obviously correct.

Discussion: There is a direct and irreconcilable conflict between this case and Bowman. The point is of substantial importance both in the daily operation of the Border Service and

in a substantial number of lower court cases where the question is controlling. The case thus appears certworthy. On the merits, the decision below is supported by the language and logic of Almeida and a narrow reading of the holding there is required to reach the Bowman result.

There is a response.

9/17/74

O'Neill

Op. in Pet.

Here is yet another Almeida-Sanchez issue, not mentioned in my Hendrix memo. It is another conflict between CA9 and CA10, this time over the application of A-S to stops rather than searches. Anticipating your view on the subject, I would recommend that this be granted to reverse CA9. But in any event, this should be discussed along with the other A-S cases.

As Ron commented, "Oh, what a tangled web we weave ..."

Penny

Supplemental Memo

Summer List 18, Sheet 2

No. 74-114

UNITED STATES

Cert. to the CA 9
(Goodwin) (en banc)

Timely

v.

BRIGNONI-PONCE

Federal/Criminal

Summary: This memo supplements the pool memo in the case. It is not clear from the papers in this case precisely what evidence was sought to be excluded in the motion to suppress. The implication from the petition is that it is statements of the passengers at the time of the stop although it may also include statements of resp himself at the time of the stop. [Pet. at 4]. The CA opinion

indicates the statements of both the resp and the passengers.
[Pet. at 6a].

The facts thus may raise the question presented on somewhat similar facts in United States v. Guana-Sanchez, No. 73-820 in which cert has been granted. Assuming arguendo that the stop was a violation of Fourth Amendment rights, did the respondent driver have standing to move to suppress the statements of the passengers? Although the 9th Circuit did cite in its opinion the 7th Circuit decision in Guana-Sanchez [Pet. 6a], there is no indication in that opinion nor in any of the papers in the case that the government ever raised below or intends to raise here the standing question with regard to the respondent's motion to suppress the statements of the passengers.

It can be argued that the absence of standing to assert third party rights (if the Court in Guana-Sanchez finds no standing) is jurisdictionally fatal to the respondent's motion to suppress and hence can be raised sua sponte by the Court. See FCC v. N.B.C., 319 U.S. 239, 246; U.S. v. Storer Broadcasting Co., 351 U.S. 192, 197. If third party standing is not a jurisdictional defect, then the failure of the government to raise the question here or below would preclude review under this Court's Rules 23(1)(c) and 40(1)(d)(2). Although this Court has never specifically passed on whether the absence of standing to

raise a third party's Fourth Amendment rights in an attack on a conviction is a jurisdictional defect, it appears that it ought not to be so treated inasmuch as there is a constitutional "case or controversy" and the lack of standing to assert one particular constitutional argument in an attack on a criminal conviction does not affect jurisdiction over the appeal. There is no controlling law on the question.

9/19/74

O'Neill

The Guana-Sanchez problem is not necessarily a standing problem. Instead I think it more likely a question of how far the exclusionary rule extends. This case is dependent on the outcome of Guana-Sanchez. This factor, along with the SG's reluctance to rely on the retroactivity issue — pool memo at 2 n.1 — demonstrates that the gov't is more interested in establishing a principle than in winning a case.

Moreover, the petition shows that the difference between the CA9 rule and the gov't position is ~~smaller~~ smaller than originally appeared. CA9 says that the Mexican ~~alien~~ lineage of a car's occupants does not furnish a "founded suspicion" that they are illegal aliens. The SG doesn't ask for carte blanche to ~~stop~~ every car, but only authority to stop on "reasonable belief" that the occupants are aliens. It finds that "reasonable belief"

(over)

Conference 10-7-74

Court	CA - 9	Voted on	19...	
Argued	19...	Assigned	19...	No. 74-114
Submitted	19...	Announced	19...	

UNITED STATES, Petitioner

vs.

FELIX HUMBERTO BRIGNONI-PONCE

(In Folder)

8/13/74 Cert. filed

*Border Check
Point on their
highway is physically
not effect. This involved
an effective physical
location. Since 12000 aliens
were stopped here one year.
This was per A.S. & may
involve different considerations.*

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.		✓											
Powell, J.		✓											
Blackmun, J.		✓											
Marshall, J.		✓											
White, J.		✓											
Stewart, J.													
Brennan, J.		✓											
Douglas, J.		✓											
Burger, Ch. J.		✓											

Pass

Excellent Summary
memo

Recommend Grants in:
Peltier or Miller
Bowen
Ortiz
Hold all others.

Almeida-Sanchez Cases: Summary and Recommendations

- Hold* 73-1856 Foerster v. United States - Fixed checkpoint on Interstate 5.
Hold 73-1896 Hendrix v. United States - Fixed checkpoint on State Hwy 86.
not on list 73-2000 United States v. Peltier - Roving Patrol (Retroactivity Q)
Granted 73-2050 United States v. Ortiz - Fixed checkpoint on Interstate 5.
Granted 73-6848 Bowen v. United States - Fixed checkpoint on Hwy 86. Pre-A.S.
73-6851 ~~xx~~ Rodriguez-Hernandez v. United States - Pre-A.S. = Identical to Brignoni-Ponce
74-114 United States v. Brignoni-Ponce Pre-A.S.
[Miller v. United States, No. 73-6975, has not yet been circulated and is not on the Oct. 7 conference list. The clerk tells me that ~~it is not~~ it is not scheduled for listing before Oct. 25, but he could circulate it sooner if the Justices want it.]

Retroactivity of Almeida-Sanchez in Roving Patrol Cases: Peltier and Miller are identical in all material respects except the CA results. Both cases were pending on appeal when A-S was decided. Either case would serve the purpose of settling the issue, but Peltier has a slight edge since it has already been listed.

Fixed Checkpoint Issues: The choice is between Bowen and Ortiz. Bowen has the advantage of presenting both fixed-checkpoint issues in a single case: applicability and retroactivity. Unfortunately, the SG decided ~~not~~ to cross-petition in Bowen, and the issue of A-S applicability to fixed-checkpoint cases will wash out if the Court decides in Peltier/Miller that A-S is not retroactive for roving patrol cases. Ortiz squarely presents the issue on applicability (on the SG's petition) but if the Court applies A-S retroactively in Peltier/Miller, it would still be necessary to ~~decide~~ take Bowen to resolve the conflict between CA9 and CA10 on retroactive application ~~in~~ ⁱⁿ fixed-checkpoint searches. Accordingly, I would recommend ~~taking~~ taking both Bowen and Ortiz and consolidating them for argument. [I do not think the weird retroactivity issue in Ortiz merits special consideration. It would be unworthy alone.]

Holds: Foerster and Hendrix will be squarely governed by the disposition in ~~Bowen~~ Bowen and/or Ortiz; both are fixed checkpoint searches that occurred before the date of A-S. ~~Rodriguez-Hernandez~~ Rodriguez-Hernandez will be governed either by Peltier/Miller or by Bowen/Ortiz. CA5 did not decide in that case whether the search was a roving patrol or a fixed checkpoint, and the facts are apparently ambiguous. Thus it might ~~require~~ require a factual remand if ~~the~~ A-S is held retroactive to ~~roving~~ roving patrols but either inapplicable or nonretroactive to fixed checkpoints.

I would also recommend ~~holding~~ holding Brignoni-Ponce. Either Guana-Sanchez or Peltier/Miller could dispose of the case. (That is, if Guana-Sanchez holds that a driver cannot suppress ^{the} testimony of his passengers, ~~then the court would have to decide whether to remand~~ or if Peltier/Miller results in a holding that A-S is nonretroactive, the Court would have no occasion to reach the issue the SG is so concerned about.)

pc

Deary E

DISCUSS

CA 9
appointment

High

November 15, 1974 Conference
List 3, Sheet 2

No. ~~3~~ 74-114

UNITED STATES

v.

BRIGNONI-PONCE

Motion of Resp for
Appointment of Counsel

On October 18, the Court granted cert to CA 9 in this case to review a question involving border patrol searches. The Court also granted resp's motion to proceed IFP.

Resp now moves that Federal Defenders of San Diego, Inc. be appointed to represent him in this Court. Federal Defenders is a community defender organization and was appointed to represent resp in the USDC and CA. The organization is not funded by grant, but relies exclusively on payments under the Criminal Justice Act.

Grant
DB

Mr. John J. Cleary, Executive Director of the organization and a member of the Bar of this Court, would present oral argument on behalf of resp.

DISCUSSION: While the motion is framed in terms of seeking appointment for the organization as counsel to represent resp, the practice in this Court in similar cases has been to appoint Mr. Cleary.

There is no response.

11/14/74

Ginty

PJN

VB.

MOTION

[illegible]

of two memos (1974 FEB 2)
in each
of four files
FILE MEMO

Border Search Cases

This file memo, dictated primarily to focus certain facts and issues more clearly in my mind, is rough and incomplete. There are helpful cert memos in each case, and also the bench memo prepared by David.

The four border search cases are as follows:

No. 73-2000 United States v. Peltier - roving patrol stopped and searched 70 miles from border. The search and conviction in DC occurred before Almeida-Sanchez. Sole question is retroactivity.

No. 74-114 United States v. Brigoni-Ponce - nighttime stop 58 miles north of the border, for purpose of questioning. This stop occurred pre-Almeida-Sanchez, but the SG in this argues only the substantive question as to the "stop".

No. 73-6848 Bowen v. United States - stop and search at fixed checkpoint 49 miles north of border. This is the "key" CA9 decision, holding 7 to 6 that Almeida-Sanchez is applicable to fixed-checkpoint searches. But by 7 to 6 vote, Almeida was held to create a new constitutional rule as to fixed checkpoints, and therefore not retroactive to searches prior to June 21, 1973.

No. 73-2050 United States v. Ortiz - a post A/S stop and search at a fixed checkpoint (3 aliens were found),

66 miles north of the border. This is the "cornerstone" checkpoint operating continuously. This case also presents a potential issue of retroactivity: whether the decision should apply to invalidate searches conducted prior to the 9th Circuit's en banc decision in Bowen.

Facts Common to All Cases

Section 287(a) [i.e., 8 U.S.C. 1357(a)] is relied upon by the government in all cases. This was the statute before us in A/S, authorizing immigration service officers without a warrant:

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

* * * *

(3) within a reasonable distance from any external border of the United States, to board and search for aliens any . . . vehicle, . . ."

An Immigration Service regulation defines "reasonable distance" to mean within 100 miles from any external boundary.

There was no warrant and no "probable cause", in a Fourth Amendment sense, in any case. Nor does the government contend that any of these stops or searches was the "functional equivalent" of a border search.

Significant Facts and Issues

Peltier

The question presented is whether A/S is to be applied retroactively.

Respondent's vehicle was stopped and searched by a roving patrol, 70 miles north of the border, several months prior to to our decision in A/S. 270 pounds of marijuana were found. The District Court, acting prior to A/S, denied a motion to suppress. Respondent was found guilty and sentenced prior to A/S, but CA9 - 7 to 6 en banc - reversed the judgment, holding that A/S must be applied retroactively to cases pending on appeal.

The rationale of CA9's opinion would apply A/S retroactively certainly to all cases not finally litigated.* Judge Goodwin's opinion stated that A/S neither overruled past precedent of the Supreme Court nor disrupted long-accepted practice. The SG argues, however, that A/S "was a departure from existing law". The SG states that this was recognized in Justice White's opinion in A/S, as well as in my opinion.**

*It is not clear to me that the rationale would not also apply even to habeas corpus proceedings with respect to cases decided years before.

**Justice White, at 413 U.S. 298, said that "the clear rule of the Circuit (CA9) is that conveyances may be stopped and examined for aliens without warrant or probable cause. . . ." In footnote 10, Justice White stated that in the "20 courts of appeals cases I have noted, . . . 35 different judges of three courts of appeals found inspection of vehicles for illegal aliens, without warrant or probable cause, to be constitutional.

The SG also argues that A/S was a new application of the evidentiary exclusionary rule, and overruled past precedent in the Courts of Appeals as well as long-established administrative practice of the immigration authorities.

Finally, the SG argues, persuasively, I think, that a retroactive application of A/S would not further the purposes of the exclusionary rule: that is, it would not deter future violations of the Fourth Amendment.

Ortiz

This is a major fixed checkpoint case, involving a stop and search at the San Clemente checkpoint - the cornerstone of the Immigration Service network. Respondent is a smuggler. He was stopped and three aliens were found concealed in the trunk of his car. No question of retroactivity is involved. In view of the confusion resulting from A/S, some 20 cases pending in the Southern District of California were consolidated in the fall of 1973 for a comprehensive factual hearing, presided over by Judge Turrentine. After "extensive evidence" was submitted, the district judge filed a comprehensive opinion in which the relevant facts relating to the magnitude of the problem are summarized - rather dramatically. See the SG's petition for certiorari in 73-2050 (Ortiz). The DC found these fixed checkpoints to be the functional equivalent of a border search.

But CA9, 6 to 7, in U.S. v. Bowen, held to the contrary, and applied the rationale of A/S to fixed checkpoints. Accordingly, CA9 - relying on Bowen - reversed the District Court in this case.

The arguments pro and con are well set forth in the opinions of Judge Goodwin (for seven judges) and Judge Wallace (for eight judges) in Bowen, No. 73-6848. These opinions should be reread prior to Conference.

On appeal, the SG substantially abandons the argument that these fixed checkpoints - remote from the border - are the functional equivalent of a border search. Rather, the SG's principal argument is that - based on the facts applicable to this particular area of California - there is "an area-wide equivalent of probable cause for the limited-vehicle searches conducted at fixed checkpoints." The special conditions in this area, allegedly giving rise to the "equivalent of probable cause" include the following:

(i) high concentration of aliens illegally in the U.S.

(ii) policing national boundaries with Mexico present "peculiar and difficult law enforcement problems".

(iii) traffic checkpoints are essential to effective enforcement of immigration laws.

(iv). the checkpoint operations are conducted primarily for administrative rather than prosecutorial

purposes, as virtually no aliens are prosecuted (only the smugglers).

(iv) the checkpoint searches involve only a modest intrusion upon privacy.

(vi) checkpoint searches have consistently been approved by courts of appeals and employed for many years.

An interesting question (especially in view of my concurrence in A/S) is the feasibility of an area warrant procedure addressed to specific checkpoints. Respondents' brief(pp. 66-69) argues that such procedure is feasible, and emphasizes that such warrants "are currently issued in various federal districts throughout southwestern United States."

The SG's brief (p. 38 et seq.) argues that a warrant procedure for checkpoints would be unworkable primarily because of (i) the necessity of coordination between the 17 permanent and 30 temporary checkpoints in California, Arizona, New Mexico and Texas, within six different federal judicial districts, and (ii) the tendency of district judges - based on experience to date - to limit the warrants merely to stopping (in many instances) and to limit the periods to 10 days.

Comment: Although there is obvious force to the government's reluctance to endorse a general area-type warrant or specific checkpoints, I am not yet persuaded that this procedure is not feasible - especially if we laid down some fairly broad guidelines. In this connection, I wonder if anything is to be gained from an analogy to authorization in the wiretap cases. To be sure, this is pursuant to congressional legislation.

Bowen

Like Ortiz, this is a fixed checkpoint case. Indeed, CA9's opinion in this case is the controlling 9th Circuit authority applying (by 7 to 6 vote) A/S to fixed checkpoints on the same rationale as the Court adopted with respect to roving patrols.

But this case has a retroactivity question not present in Ortiz: CA9 held, again 7 to 9 (but with a different lineup) that, in view of long-established precedent in the 9th Circuit to the contrary, the court's decision in Bowen should not be applied retroactively.

It will be recalled that in Peltier, decided May 9, 1974, CA9 applied A/S retroactively to a roving patrol case, but in Bowen CA9 distinguished - for purposes of retroactivity - between roving patrols and fixed checkpoints.

With respect to the latter, CA9 concluded that long-established authority in the Circuit, as well as administrative conduct, had established fixed checkpoints as the principal means of controlling immigration.

Comment: The single most important issue, as I view it, to be decided in these four cases is the validity of searches at fixed checkpoints. The most exhaustive appellate court consideration of that issue is in Bowen, whereas the district court decision that is most helpful on the facts is in Ortiz. I suppose we could decide the substantive Fourth Amendment issue in Ortiz which is squarely presented there. We could then confine our decision of Bowen to the retroactivity issue.

Humberto Brignoni-Ponce

This case, significantly different from the foregoing, involves only a "stop" with no search.

Immigration officers were stationed at a fixed checkpoint 65 miles north of the border, but which happened to be closed due to bad weather. The officers observed passing cars, and followed respondent's car because its occupants appeared to be Mexicans. The three occupants spoke no English and had no identification papers. When questioned in Spanish, it appeared that two of them - the passengers - were Mexican

citizens ~~xxx~~ illegally in the United States. Respondent was prosecuted and convicted for transporting aliens, but the Court of Appeals - again sitting en banc and again by a 7 to 6 vote - reversed the conviction.

CA9 found no distinction between a "stop" and a "search" in the application of the rationale of A/S. It recognized that A/S involved only a search, but pointed to language (dictum) that appeared to apply the same principles to a stop.

It was conceded that there was no probable cause, and CA9 concluded there was not even "a founded suspicion".

The government, essentially, makes two arguments:

(i) That there exists in fact an area-wide equivalent of probable ~~xxxx~~ cause that justifies a brief stop of a vehicle in the Mexican-border area; and

(ii) Advance judicial approval is not necessary to insure the reasonableness of a brief investigative stop of a vehicle in this area.

The latter point, which is of considerable interest to me, is buttressed to some extent at least by the Court's decision in Terry v. Ohio, 392 U.S. 1, 17-18. The SG's brief (p. 25) states that the Immigration Service "informs us that a stop for questioning at a checkpoint ordinarily takes no more than about 5 seconds per occupant and that even a roving-patrol stop for questioning usually consumes no more than a minute. Such stops involve no search unless the officers have a particularized probable cause.

The SG also points out that courts have upheld routine warrantless stops of vehicles for license and registration checks. See SG's brief p. 28 and cases cited in note 19.

Comment: This type of stop is easier to reconcile with the Fourth Amendment and our cases than a search, especially if the stop occurs at a fixed checkpoint. The situation is somewhat less clear, and the government's position weaker, where the stop appears to be altogether random by a roving patrol. Having in mind the customary checking of licenses that goes on in Virginia at regular intervals, when officers at checkpoints stop most cars and check driver's licenses, the procedure here involved differs only in that the stops are confined to automobiles occupied by persons who appear to be Mexicans. There may be an Equal Protection Clause issue, but it is difficult for me to see a Fourth Amendment distinction.

L.F.P., Jr.

Argued 2/18/75

Nighttime stop 58 miles from border,
~~stop~~ Check point was temporarily closed, & patrol
car stopped Ruck. No search, when two
passengers could not identify themselves or speak
English, they were arrested as aliens.

SG (in addition to its "area-wide
equivalent of probable cause") argued this
a brief stop is analogous to a Terry stop.

SG relies on 1357(a)(3) [stop & search
within 100 miles of border]

Very limited intrusion - less than
minute.

Frey (for S.G.)

Doesn't assert a right to stop
cars anywhere - depends on ~~circumstances~~ circumstances

Relies primarily on 1357(a)(3) - rather
than on 1357(a)(1).

Frey (cont)

J. Stewart suggested Terry authorize
"stops" anywhere

J. White says Terry requires
reasonable suspicion.

Relies on Camera as supporting
view that "particularized suspicion"
as to a particular object of "stop"
is not required in area authorized
by 1357(a)(3). Camera & Terry
in combination, relied upon by SG

Terry requires articulated
"particularized suspicion" - but the
statute here reflects Congressional
judgment that in border
areas no particularized susp. is
necessary.

Cleary (for Brignoni-Ponce)

Under Terry there must be
(i) suspicion circumstances, and
(ii) particularized suspicion.

Responding to my Q, Cleary expressed view that a warrant procedure for checkpoints is "conceptually feasible". Rule 41 would have to be amended. Conceder warrant would be ex parte but its ~~to~~ validity could be challenged on suppression motion. He emphasized "proximity" to border.

Rule 41 prescribes procedure for search warrant. Limited to 10 days.

No basis on "appearance" alone is sufficient for a stop.

Trey could obtain warrants, but there are problems.

The Chief Justice

Reverse

Douglas, J.

Out

Brennan, J.

Affirm

Stewart, J.

Affirm

*Case submitted on
basis ~~and~~ of being
a wrong patrol.*

*Exactly like A/S except
there was a stop only
& no search.*

*No probable cause
- no founded suspicion*

There is a difference
bet. a stop for
questioning &
for search.

Stop is OK

Almeida is
different - it was
a search.

No issue here
as to whether one
who is stopped

Reverse

Powell, J. Affirm

See my memo pp 8, 9.

~~Not participating~~

Affirm. memo 2/27/75

Blackmun, J. Reverse

Relies on 1357a of Act
William speaks
language of Act.

Rehnquist, J. Reverse

Squarely within statute.

MEMORANDUM

TO: Mr. Justice Powell DATE: May 8, 1975
FROM: Penny Clark

No. 74-114 U.S. v. Brignoni-Ponce

Here is a draft opinion along the lines we have discussed. I am still fairly uncomfortable with it, and I will outline my current thoughts about its weak points.

I have tried to write as strong a case as I can for the area probable cause and search warrant theories, but the more time I spend on them, the less I am convinced. As written now, the entire discussion of Camara is rather mechanical. At the least, it needs to be smoothed out, with less obvious emphasis on the precise "factors" relied on in Camara. But more basically, it seems to me that what we should be talking about is not so much the use of area-wide "probable cause" for stopping cars in the border area, but simply the constitutional reasonableness of taking special measures to control and monitor cars and people entering the country. I could be quite happy with a rule that draws the line between stops and searches: saying that because of the minimal intrusiveness of a stop for questioning and the strong public interest in protecting the border, the Border Patrol may reasonably treat the border as a zone rather than a line and stop motorists for questioning - but it may not search either the vehicles or their occupants without consent or probable

cause. This line of reasoning could be based squarely on the Government's power with respect to aliens and the border, with, at most, a brief comparison to Camara. I would then dispense entirely with the warrant discussion, saying only that the Border Patrol's interference with persons near the border must be reasonable, and leaving open two avenues of challenge to the manner and degree of surveillance. ^(?) motions to suppress in criminal cases and ⁽²⁾ actions for injunctive relief on behalf of persons subjected to regular stops.

I think this may be a better practical solution for two reasons. First, it would dispense entirely with the need to distinguish between roving patrols and checkpoints, drawing the line in both instances between questioning and searches. Second, I continue to doubt that a warrant procedure would add significantly to the protection of motorists in the border area. It seems unrealistic to suppose that a warrant would limit in any significant way a roving officer's discretion to stop any car he pleases or to harass certain kinds of people (long-hairs, Mexicans, whatever). I also think that a warrant requirement's primary effect may be what the Government fears: simply making it too expensive or impractical to conduct roving patrols. The Border Patrol seems currently to stay out of the cities, operating its roving patrols mostly in rural areas, and since they have only limited resources, I think it's safe to assume that they deploy the patrols in the areas where they catch the most illegal aliens -

probably the same areas in which they could obtain warrants. Moreover, we still haven't worked out the dilemma whether a person stopped under an area warrant could challenge its validity in a motion to suppress and if so, whether the result wouldn't be just as many challenges to "area probable cause" as the Government would face in the absence of a warrant.

I do not think the analysis I suggest would be inconsistent with your prior position on the warrant clause. Primarily, we are not here concerned with searches or arrests, the two areas where the warrant clause has been most active. The stop for questioning is far less intrusive, and we are dealing in almost every case with an automobile (and in all other cases with an equally mobile human). For these reasons, I think the analysis you used in U.S. District Court is consistent with dispensing with the warrant here, especially since the only possible warrant is the area warrant, which provides far less protection to individuals.

This approach would require a vote to reverse rather than affirm, or at the least, a vote to vacate and remand for decision whether on these facts the stop was reasonable.

If you would prefer to stick with the "founded suspicion" doctrine and an area probable cause requirement, I would strongly urge that you show this opinion to the key Justices before you circulate. From talking with Justice White's clerks, I get a strong impression that he will not budge from his

Only
to
vacate
&
reversed.
CA9 held
no founded
suspicion
altho
it
was reported
to apply A/S
which
required
probable cause
for a search.
See Penney's draft p 3

position in Almeida-Sanchez that the Border Patrol can stop any car near the border without probable cause, founded suspicion, or a warrant. Since a stop for questioning is much less intrusive than a search, and not governed by any of this Court's prior Fourth Amendment cases, he will not feel bound by Almeida-Sanchez. Even if you can count on Stewart, Rehnquist, and the Chief Justice to agree that stops are illegal without either founded suspicion or an area warrant, I see no possibility for a majority on the dual proposition that an area warrant is required and that it would be sufficient to justify a stop for questioning. Justice Douglas ~~had~~ has declared his position, and he would not even agree with us that a stop may be made on something less than probable cause. Justice Brennan may not take such a radical stance, and might agree with us that "founded suspicion" is enough to justify stops for questioning, but I gather he too would disagree that an area warrant can substitute for individualized cause. Bill Bryson tells me that Justice Marshall is almost certain to follow Brennan in this area.

My inclination would be to settle for establishing the first proposition in this case, that a stop may be made on less than probable cause, but that a "founded suspicion" is required. There may be a fair chance of getting a majority on that point (Brennan, Marshall, Stewart and perhaps Blackmun). Then, in any subsequent case (and we may expect to get some out of CA9 rather soon) that squarely tests the adequacy

of an area warrant to justify stops without individualized
 cause, I would think you would have a good chance of lining
 up a different majority for the proposition that a stop under
 an area warrant is constitutional. (White, Rehnquist,
 Blackmun and the Chief Justice). What I fear is that by
 circulating the entire opinion now, you would risk getting
 no majority on either part because both sides ^{would} see a lot to
 disagree with. By suggesting that an area warrant would be
 adequate (dictum in this case, of course) this opinion could
 scare Brennan and Marshall away from the part they otherwise
 might agree on. And until Justice White confronts a square
 holding that some cause is required for a stop, he is unlikely
 to accede to the suggestion that the Border Patrol must
 justify its operations to anyone. I think it not unreasonable
 to suppose that if Justice White writes separately, we run
 a risk of losing all three votes that were with him in
Almeida-Sanchez. In short, it appears that there aren't enough
 "swing votes" in the Fourth Amendment area to forge a compromise
 majority. I think the best we can hope for is a two-stage
process. I think we could try for it by circulating an opinion
 that contains Parts I-III, and an ending along these lines:
 the Government asserts that there is "area probable cause"
 for stops of this nature in the border area; we need not decide,
 for even if there were, a warrant would be required (basing
 this conclusion primarily on the extra-sensitivity of area-
 wide assessments that affect many people) and none was obtained
 in this case.

P.C.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1975

Border Search Cases

MEMORANDUM TO THE CONFERENCE:

In accordance with the request of the Chief Justice, I have prepared memoranda in the above cases - which I now circulate.

For your convenience, I summarize my conclusion in each case:

No. 74-114 U.S. v. Brignoni-Ponce. This was a stop (not a search) by a roving patrol. The only basis for the stop was the apparent Mexican ancestry of the occupants of the car. I concluded that reasonable grounds for suspicion (one of which may be the appearance of Mexican ancestry) is required for a stop by a roving patrol. As there was no basis for suspicion other than the appearance of the occupants, I concluded the stop was unlawful. I would affirm.

No. 73-2050 U.S. v. Ortiz. This was a search at an established checkpoint (San Clemente) without probable cause and without either a specific or an "area" warrant. I concluded that our prior decision in Almeida-Sanchez is controlling, and that the search is unlawful. It was unnecessary in this case to determine whether an "area" type warrant for a particular checkpoint would validate searches. As I agreed with CA9 that Almeida-Sanchez was controlling, I would affirm.

No. 73-6848 Bowen v. U.S. This also was a search at a checkpoint without warrant or probable cause. The search occurred prior to our decision in Almeida-Sanchez. Primarily

on the authority of Peltier, I would hold that Almeida-Sanchez should not be applied retroactively. Accordingly, I would affirm.

The principal issue that would not be resolved by the foregoing cases is whether a mere stop for questioning as to citizenship may be made at an established checkpoint without particularized grounds of suspicion. There are substantial differences in the circumstances attendant upon stops at established checkpoints and those that may exist in random stops by roving patrols. We are holding No. 74-993 Janney v. U.S. (among others) which presents the established checkpoint stop issue.

Lewis
L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 13, 1975

Border Search Cases

MEMORANDUM TO THE CONFERENCE:

I thought it might be helpful if I shared with you this memorandum on the latest decision relating to the border search cases we considered in February. In United States v. Martinez-Fuerte, et al, Nos. 74-2462, 74-2568, 74-2714 (March 5, 1975), a panel (2 to 1) of the Ninth Circuit invalidated the "warrant of inspection" issued by the District Court to authorize the operation of the fixed checkpoint at San Clemente.

The warrant there considered authorized agents "to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants," and also "to conduct a routine inspection of said vehicles for the presence of aliens." The latter authorization appears to have been interpreted by the Government to empower agents to search trunks and other places where persons might hide. But the validity of that authorization was not an issue in these appeals,* and the court noted that subsequent warrants limited the agents to a stop and inquiry procedure.

The Ninth Circuit's opinion indicates that the warrant was issued for ten-day periods and had been renewed 26 times.

*In each of the three cases considered by the Ninth Circuit the stop and inquiry, without search, revealed that the automobile contained illegal aliens. In United States v. Guillen, No. 74-2714, a subsequent search of the trunk revealed additional illegal aliens. The court assumed in that case that the initial discovery provided probable cause to inspect the trunk, and therefore did not consider that search to have been conducted pursuant to the warrant's "inspection" authorization.

The District Court required the compilation of statistics relating to the operation of the checkpoint, and the Ninth Circuit opinion summarizes this data. These indicate that an average of 1,200 vehicles pass through the San Clemente checkpoint per hour and that at peak times the figure increases to 2,500. By the Ninth Circuit's calculation, this suggests that over 10-1/2 million automobiles pass through that checkpoint annually.

The more interesting figures are those compiled during an eight-day period in June of 1974. Over that period approximately 145,960 vehicles passed through the checkpoint during periods in which it was operating. Presumably all of that number were required to slow down to allow the officer at the "point" to scan the vehicle and its occupants and determine whether further inquiry was warranted. But only 820 of the almost 146,000 vehicles were "stopped" and referred to a secondary area for questioning regarding citizenship and immigration status. And of the 820 "stopped", 202 were "inspected".

The Ninth Circuit suggested that it was unable to ascertain exactly what an "inspection" was. But it apparently is something less than a search. The court noted that deportable aliens were discovered in "plain view" in 169 of the 202 vehicles so "inspected". The court further indicated that agents searched portions of the vehicles in which aliens might hide in 33 instances, each allegedly with the consent of the driver, and discovered illegal aliens in two of the automobiles so searched.* In total, agents discovered 725 deportable aliens in 171 vehicles during the eight-day period in question.

*I would suppose that in virtually all of the 169 instances in which the initial questioning revealed illegal aliens in "plain view" the agents conducted a further search of the automobile. See note 1, *supra*. In those cases the subsequent search would appear to be supported by concrete probable cause and justifiable under more traditional Fourth Amendment principles. I assume, therefore, that the 33 instances identified as searches are cases in which the initial inquiry does not itself reveal the presence of illegal aliens but does suggest the need to inquire further. Whether "probable cause" or "founded suspicion" existed in these cases would be a matter to be determined on the facts of the particular case.

Relying primarily on these statistics, the Ninth Circuit determined that the "inspection warrant" system was invalid. Judge Duniway noted that of the nearly 146,000 automobiles passing through the San Clemente checkpoint only 171, or 0.12%, were found to contain illegal aliens. He considered this to be too low an incidence to justify what he viewed as an "intolerable" degree of interference imposed on the motorists passing through the checkpoint:

"Roughly 999 of every 1,000 cars passing through the checkpoint carry only persons who are lawfully within the country and under Carroll are entitled 'to use the public highways [and] have a right to free passage without interruption.' Although the duration of a stop and even a detention for immigration questioning may be brief, the concentration of illegal alien traffic is too small. We cannot countenance the cumulative intrusion of stopping ten million cars per year where only one out of 1,000 passing cars may contain aliens illegally within the country."

Judge Duniway devoted a major part of his opinion to my concurrence in Almeida, viewing it, I must say, with little enthusiasm. In addition to finding that the checkpoint authorization would not meet the general standards outlined in my Almeida concurrence, Judge Duniway's opinion held flatly:

"The requirements of the Fourth Amendment apply with full vigor at immigration checkpoints. A stop, even a 'fleeting stop' is subject to Fourth Amendment protections". (pp. 10, 11 printed opinion)

Judge Carter, dissenting, viewed the case quite differently, and I am inclined to agree with the essence of his opinion. The undisputed facts clearly indicate that (i) the checkpoint was used with restraint and discrimination; (ii) only a minute fraction of the motoring population was inconvenienced in any way except by being required to slow down - hardly an "intolerable inconvenience" to motorists who are accustomed - as we all are - to stop and yield signs and occasionally being stopped for license checks; and (iii) of the vehicles stopped for brief questioning as to nationality and immigration status, one out of every five (20%) was found to be transporting aliens - an extraordinarily high percentage of successes.

It is to be remembered that this opinion invalidates a simple stop and inquiry procedure. What I said in Almeida applied to full searches by roving patrols. Indeed, as I indicated at our Conference, I would not be inclined to extend my Almeida standards to authorize searches at a checkpoint 66 miles from the border and on a highway with this level of traffic. I would require some more particularized "cause" to justify an actual search of the private portions of automobiles stopped at a fixed checkpoint. But there is a controlling difference, in my view, between a checkpoint warrant authorizing searches and one limited to routine questions which any motorist should be willing to answer. There simply is no comparison between the degree of "intrusiveness" of a search and a stop only to inquire as to nationality and immigration status.

Judge Duniway, by relating the number of vehicles in which aliens were found during the period in question to the total number of vehicles passing the checkpoint, concludes that the results do not justify the "intolerable" inconvenience imposed upon motorists. I do not consider discovery of 725 deportable aliens during the course of a part-time operation of the checkpoint over eight days to be an inconsequential result. This operation apprehended nearly 100 aliens per day. Moreover, these figures do not take into account the number of smugglers and aliens "deterred" from attempting to go northward, a factor emphasized by Judge Turrentine in his district court opinion in United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973).*

* * * * *

The situation in the Ninth Circuit is further confounded by the decision of another panel in United States v. Evans,

*Judge Turrentine's opinion in Baca, which is printed in the petition for cert. in No. 73-2050, contains the most exhaustive statement of the facts with respect to this problem. Its findings differ from the opinion of Judge Duniway in significant respects. The latter thought that "the influx of illegal aliens could conceivably be stemmed in various ways" other than by use of checkpoints. Judge Turrentine, on the other hand, concluded that "the evidence presented . . . clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the border patrol. . . ." See Pet. for Cert. in No. 73-2050, at 20a. That opinion also provides an additional indication of the importance of the San Clemente checkpoint, revealing that in fiscal year 1973 over 12,000 deportable aliens were apprehended there. Id., at 25a.

507 F.2d 879, 880 (CA9 1974). In Evans, no constitutional defect was found where motor traffic was simply diverted into a zone where it could be observed by officers. In that case, an automobile had been "waived through" a fixed checkpoint without being required to pull over. As the automobile passed, however, an officer noticed aliens lying in the space between the front and back seats and the car was then stopped. The appellant argued that the "slow down", which allowed the officer to look into the automobile, was itself a violation of Fourth Amendment rights since it was conducted without a warrant or probable cause. The Ninth Circuit panel rejected that contention, holding that there is no constitutional objection to a warrantless "diversion of motor traffic into a zone where it can be observed by officers." Id., at 880.

In view of these two recent cases, following those pending before this Court, the law of the Ninth Circuit is in a state of shambles. Martinez-Fuerte, which was decided after Evans, mentions the latter only in a footnote and purports to distinguish that case on the ground that it did not involve a stop. When one attempts to rationalize the two, the result seems to be as follows: Under Evans, government agents may erect a checkpoint anywhere and, without a warrant of any kind, compel traffic to slow down sufficiently to allow an effective visual inspection of vehicles and their occupants. If that inspection arouses "founded suspicion" the vehicle can be stopped for inquiry, and if probable cause exists it can then be searched. Yet Martinez-Fuerte applies the Fourth Amendment with full vigor even to a "fleeting stop," and invalidates a warrant authorizing operation of a fixed checkpoint at an appropriate place and resulting stops for the limited purpose of inquiring into nationality and immigration status. In short, a slow down anywhere for visual inspection is valid, whereas a fleeting stop for questions is invalid even when authorized by a checkpoint warrant. The purposes of both procedures are identical and the degree of intrusion is likely to be indistinguishable.

If immigration officers in CA9 find little rationality in these distinctions, they are not alone.

* * * * *

In view of the foregoing, and the present inconclusiveness of our tentative votes at the Conference on the cases that have been argued, it occurs to me that perhaps we should relist these cases for a further Conference discussion. If a Court cannot be assembled, the cases presumably should be set for reargument early next fall and some thought should be given as to what stays, if any, should be entered pending final resolution.

L. F. P.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1975

FILE COPY
PLEASE RETURN
TO FILE

Border Search Cases

Dear Chief:

In a conversation today with Chief Judge John Brown of the Fifth Circuit, he again expressed the hope that we will be able to decide the Border Search Cases this Term.

Judge Brown stated that the Fifth Circuit Court of Appeals is holding some 15 to 20 cases, awaiting our decision. He emphasized, however, that the more serious problem is the backup of cases in the United States prosecutors' offices in the Southern and Western Districts of Texas. It is estimated that some 200 prosecutions are being postponed pending our decision.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

5/28/75

Breguoni - Ponce
74-114

Justice Brennan will join entire
opinion if we add this note
- in substance - to page 11.

These cases are merely illustrative. Our
citation of them does not imply a new of the
merits of ~~the~~ particular decisions.
Each case must turn on the facts of
its particular circumstances.

I tentatively
agreed to
this. LJP

and
change note 3 to read as
follows:

3. We cannot accept respondent's contention
that, even though § 287(a)(3) does not mention
probable cause, its legislative history establishes
that Congress ^{meant to} ~~implicitly~~ condition ~~the~~ immigration
officers' authority to board ~~and~~ and search vehicles
on probable cause to believe that they contained
aliens. The legislative history simply does not
support this contention.

OK
LJP

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 28, 1975

74-114

RE: Nos. 73-2050 United States v. Ortiz
74-114 United States v. Brignoni-Ponce
73-6848 Bowen v. United States

Dear Lewis:

If your proposed memoranda in the border search case become opinions for the Court, I vote as follows:

I join No. 73-2050, United States v. Ortiz. I join Parts I and III of No. 74-114, United States v. Brignoni-Ponce and also Part II if you will delete n. 3 at p. 4. That note seems inconsistent with the view of Section 287(a)(3) that I expressed in my dissent in Peltier. I cannot join No. 73-6848, Bowen v. United States in light of my dissent in Peltier. I would appreciate your adding at the foot of your Bowen, "Mr. Justice Brennan dissents and would reverse substantially for the reasons expressed in his dissent in No. 73-2000, United States v. Peltier."

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 28, 1975

No. 74-114, U. S. v. Brignoni-Ponce

Dear Lewis,

I agree with your memorandum in
this case and would join it as an opinion of
the Court.

Sincerely yours,

P.S.
✓

Mr. Justice Powell

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 28, 1975

Re: No. 74-114, U.S. v. Brignoni-Ponce

Dear Lewis:

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely,

JM.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.


May 28, 1975

RE: No. 74-114 United States v. Brignoni-Ponce

Dear Lewis:

After our discussion please note me as joining
you in full your opinion in the above.

Sincerely,

A handwritten signature in blue ink, appearing to be "Bill", written in a cursive style.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1975

Dear Lewis:

RE: UNITED STATES V. ORTIZ, 73-2050
UNITED STATES V. BRIGNONI-PONCE, 74-114
BOWEN V. UNITED STATES, 73-6848

If your memoranda in these cases become opinions for the Court, I vote as follows:

In UNITED STATES V. ORTIZ, 73-2050, please join me.

In UNITED STATES V. BRIGNONI-PONCE, 74-114, I shall file a separate statement concurring in the result.

In BOWEN V. UNITED STATES, 73-6848, I shall dissent for reasons stated in my dissent in UNITED STATES V. PELTIER, 73-2000.

William O. Douglas

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHIEF JUSTICE
JUSTICE WILLIAM O. DOUGLAS

June 5, 1973

Dear Lewis:

RE: United States v. Brigioni-Fucci, 76-136

If your memorandum in this case becomes an opinion of the Court I shall file the enclosed statement concurring in the judgment.

WILLIAM O. DOUGLAS

Hr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1975

Re: 74-114 - United States v. Brignoni-Ponce
73-2050 - United States v. Ortiz
73-6848 - Bowen v. United States

Dear Lewis:

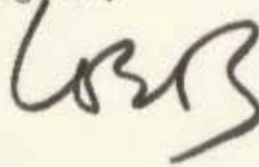
To keep you informed, my present view is that
73-6848, Bowen v. United States, should be affirmed.

As to 74-114, United States v. Brignoni-Ponce,
and 73-2050, United States v. Ortiz, I am not yet persuaded
to affirm.

I am glad you now avoid the "area search warrant"
approach but I fear we may not have found the key I need to
resolve this problem.

As of now, in the latter two cases, I am close to
where I was at Conference.

Regards,



Mr. Justice Powell

Copies to the Conference

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1975

PERSONAL

Border Search Cases

Dear Chief:

Although I am grateful for the vote in Bowen, I am quite disappointed that you think we have not "found the key" to the proper resolution of Brignoni-Ponce and Ortiz.

I write primarily to suggest that we are unlikely to find five votes for any "key" more to your liking. This is a judgment (with which you may disagree entirely) based on my having devoted more time to the study of these cases than to any other assignment you have given me this year.

The drafts which I have circulated are in accord on principle with Fourth Amendment precedents, the most recent of which is Almeida-Sanchez. In one respect, however, it can be said that I have departed somewhat from precedent. In Brignoni-Ponce, I proposed a "reasonable suspicion" standard for random stopping and questioning of occupants of vehicles by roving patrols. This affords more leeway to law enforcement officers than any prior Fourth Amendment case with which I am familiar, although I drew heavily on Terry and Adams.*

I do not believe that the "reasonable suspicion" standard will unduly handicap officers on roving patrol.

*In those cases, as you will recall, the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. This is a considerably higher requirement than the "reasonable suspicion" which I propose in Brignoni-Ponce.

I invite your attention particularly to Part IV of my Brignoni-Ponce opinion (p. 10-12) for the "factors [that] may be taken into account in deciding whether there is a reasonable suspicion to stop a car in the border area". With this portion of my opinion in mind, I further invite you to read Bill Douglas' concurrence, circulated June 5, in which he attacks the "reasonable suspicion" proposal.

It is thus evident that, so long as the composition of the Court remains as it is now, the resolution I propose is likely to be the closest to your tentative views. Putting it differently, we have the same 5 to 4 split that decided Almeida-Sanchez, except that Bill Douglas would require an even higher standard than I propose. Absent a change in the personnel of the Court, it is unrealistic to think that the result will be different at any future Term - unless Justices Brennan or Marshall retreat from my position to that of Bill Douglas.

It is also entirely speculative whether a change in Court composition will create a new majority.* We hope there will be no change for many years; we have no idea which Justice will be the first to leave; and we certainly have no idea as to the views of the Justice who might fill a vacancy.

Of course, we do not have to agree on a Court opinion. But examples that come to mind (e.g., Metromedia) have hardly been satisfactory to the bench or bar. The Border Search Cases present an especially pressing problem, with courts and U.S. Attorneys in four states awaiting definitive guidance. I am sure we all would regret further delay or a fractured Court.

As you know, we also have pending here cases which present the validity of random stops for questioning at established checkpoints. These are perhaps the most important of all of these cases. I confirm what I said at Friday's Conference, namely, that I have carefully considered the

*I do not imply that the possibility of a future change affects any of our judgments. I am merely exploring whether it is realistic to think the present situation will change.

issue, and will vote to affirm the right of the border patrol officers to make such stops - without requiring reasonable suspicion - at the established checkpoint. Potter expressed the same view at Conference, and has confirmed it to me personally. I think there is a vast difference between the circumstances of the regularized stops at established checkpoints (which are quite analogous to stopping vehicles for license checks), and the random stops by roving patrols at any time of day or night on any road or highway within a hundred miles of the border.

You may recall Bill Rehnquist's statement that he might consider joining me if I made clear that we were implying no view with respect to stops by state and local officers for such purposes as checking driver's licenses, auto registration, weighing trucks or enforcing agricultural quarantines. I attach a proposed new footnote to be added to Brignoni-Ponce. I do not know whether this will satisfy Bill.

Sincerely,

Lewis

The Chief Justice

lfp/ss

Footnote 8, for p. 9 in Brignoni-Ponce. (The note reference would appear after the word "Amendment" at the end of the long paragraph).

8. Our decision is based on an assessment of the Border Patrol's function, its statutory authority for stopping vehicles, and the character of stops for questioning in the border areas. We imply no view as to issues that may arise with respect to state and local law enforcement practices of stopping vehicles for such purposes as checking driver's licenses and auto registration, weighing trucks, or enforcing agricultural quarantines.

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.⁷ We conclude that in the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the government. Roads near the border carry not only

⁷ Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to interference with their use of the highways, solely at the discretion of Border Patrol officers who seek to enforce laws having nothing to do with the regulation of highway use.² The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a) (3) to mean within 100 air miles from the border. 8 CFR § 287.1 (1974). That, however, is not enough, at least in ~~these~~ these circumstances. If we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. Yet the cases in which border area stops have been considered establish that ~~bases~~ bases for reasonable suspicion are available ~~with~~ to Border Patrol officers. As we discuss in Part IV, infra, the nature of the violations which are here involved naturally generate articulable grounds for differentiating between violators and nonviolators. Even though the intrusion involved in Border Patrol stops is admittedly modest, we do not think it "reasonable" under the Fourth Amendment to make such stops on a random basis when means are available to protect law-abiding residents from indiscriminate official interference.

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. See *Almeida-Sanchez, supra*, at 275 (Mr. Justice POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

Footnote 7a/

Our decision in this case is based on an assessment of the Border Patrol's function, the importance of the governmental interests served by its stops, the character of its stops, and, as discussed below, the availability of alternatives to indiscriminate stops unsupported by reasonable suspicion. The decision is also one which concerns stops having nothing to do with an inquiry whether highway users and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, agricultural quarantines and similar matters.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1975

Cases Held for No. 74-114 U.S. v. Brignoni-Ponce

MEMORANDUM TO THE CONFERENCE:

No. 74-993 Janney v. United States
No. 74-6150 Coffey and Sparks v. United States

These two cases are exactly like No. 74-6016, Arnold v. United States, and the petition of Bylund and Dixon in No. 74-6014, discussed in the memo of cases held for United States v. Ortiz. In each case the petitioner was stopped at the Sierra Blanca checkpoint and, in the course of questioning, Border Patrol officers discovered evidence that provided probable cause for a search. In each case CA5 relied on its decision in Hart. If the Court wants to review the functional equivalency issue, in hopes of reaching the stop question, these cases should be held. If the Court vacates and remands in the other cases, I think these petitioners should receive the same treatment. I might add that these Sierra Blanca cases are the only petitions presently before us that potentially present the issue of stops for questioning at checkpoints. I was in error in my memorandum of May 23, in suggesting that several pending petitions presented this issue. Our options, if we want to settle this remaining issue, are to grant one of these petitions despite the "functional-equivalency" hurdle, or to wait for a petition that presents the issue cleanly. My current inclination is to vacate and remand these petitions and wait.

No. 74-5062 Quiroz-Reyna v. United States
No. 74-5307 Baca v. United States

These petitions involve stops conducted prior to the date of decision in Almeida-Sanchez. None of the present

cases will decide whether the principles of Brignoni-Ponce should be applied retroactively. I believe, however, that the rationale of Peltier and the lower-court decisions prior to Almeida-Sanchez would lead to a conclusion that the Government reasonably could have continued making such stops at least until the date of decision in Almeida-Sanchez. Because we are not deciding the retroactivity question, it would seem appropriate to vacate these judgments and remand to the courts of appeals in light of Peltier, Bowen and Brignoni-Ponce, but I could also vote to deny the petitions if that is the consensus.

The remaining cases represent stops for questioning upheld by the courts of appeals on "reasonable suspicion." In light of the decision in Brignoni-Ponce, the only issues raised by these petitions will be the application of that standard to the facts of each case. For your convenience, I will outline the facts in each case, and indicate how I intend to vote.

No. 74-5422 Madueno-Astorga and Lopez-Saenz
v. United States

This petition challenges two separate incidents. In the first (Madueno-Astorga), Border Patrol agents saw Petitioner's car on an Interstate Highway 10 miles from the border, at 6:50 a.m. They said that the car had a large trunk and a heavy-duty suspension system, and appeared to "drift" on curves. They concluded that it must be heavily loaded, so they stopped it. There were no other suspicious circumstances preceding the stop. Vacate and remand under Brignoni-Ponce.

The second incident (Lopez-Saenz) occurred in the early morning hours less than half a mile from the Mexican border, in an area "heavily used by alien and narcotic smugglers." The officer tried to stop a Ranchero pick-up (not Petitioner's vehicle). It tried to run him off the road, but he finally stopped it. The driver jumped out and fled, leaving the pick-up in a ditch. Within 2 to 4 minutes (and before the officer discovered that the pick-up contained marijuana), another Ranchero pick-up came by. The driver (Petitioner) appeared to be Mexican. The officer stopped the pick-up

suspecting it might be associated with the first vehicle, and found marijuana in plain view. Petitioner does not claim standing to challenge the stop of the first pick-up, but contends that there was no reasonable basis for the officer to suspect that he was associated with it. Deny.

No. 74-6003 Alvarez-Garcia v. United States

Petitioner and a codefendant were traveling, about 5:15 a.m., in closely-following cars near the border. They were traveling slowly, and the trailing car did not take opportunities to pass the lead car. Petitioner was driving the lead car. Border Patrol officers followed them and noticed that the trailing car was riding low, despite new shock absorbers. It also appeared to have control problems on curves, leading the officers to believe it was heavily loaded. The officers stopped the rear car and found marijuana, then stopped Petitioner's car, which also had new shock absorbers but was not riding low. Deny.

No. 74-6061 Rocha-Lopez v. United States

Border Patrol officers saw Petitioner (a Mexican-American) at 6:40 a.m. on a road 1-1/2 miles from the border in an area "notorious for smuggling." The officers testified that normal traffic at that hour is light and that they can identify most drivers as local residents. They did not recognize Petitioner. When Petitioner saw the agents, he jammed on his brakes, reducing his speed to 10 mph. On these facts he was stopped. Vacate and Remand.

No. 74-6086 Gonzalez-Diaz v. United States

Border Patrol officers were on patrol in a "notorious smuggling area" 7-1/2 miles from the border at 2:30 a.m. They stopped to investigate an unusually-placed rock beside the road and saw footprints, leading them to believe that aliens had been picked up there. Petitioner then drove by in a Pontiac sedan of a sort often used for smuggling aliens. He was Mexican, a stranger to the officers, and he was traveling 20 mph in a 55 mph zone. They followed him for a short distance and stopped him. Vacate and remand.

No. 74-6259 Gonzales v. United States

A Border Patrol officer was on patrol at 5:20 a.m. 1-1/2 miles from the border on a road that parallels the Rio Grande. The area between the highway and the river is sparsely populated and is often used by smugglers. The officer saw Petitioner's truck top a levee, coming from the border, and turn its headlights on. The officer became suspicious and signaled the vehicle to stop. Petitioner tried to run him off the road, but the officer finally succeeded in stopping the truck. Deny.

L.F.P.
L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1975

PERSONAL

Re: Nos. 73-2050 - United States v. Ortiz
74-114 - United States v. Brignoni-Ponce
73-6848 - Bowen v. United States

Dear Lewis:

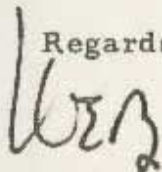
I'm sorry to "let you down" on the Border Search cases. There is, of course, no Court opinion resolving these troublesome issues. And the vexing aspect of the plurality opinion in Almeida-Sanchez is that it has been followed by an unemployment figure exceeded only by the number of illegal aliens reliably estimated to be in the United States.

I argue for no nexus between the two except that they coincide. I add to that what I said in some dissenting opinions over the past 20 years, that we are becoming an "impotent society." With a shocking rise in crime, both in prosperity and recession, we are constantly -- and blandly -- telling the society we serve "you can't get there from here."

Here, as elsewhere, the key lies in the irrational, monolithic, mechanical application of the Suppression Doctrine, fulfilling Cardozo's prophecy on it once a month if not more.

You have my vote on the Border cases if you link it with a sane, selective use of exclusion -- as in England, Israel, and every other civilized country in the world save ours!

Regards,



Mr. Justice Powell

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

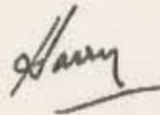
June 9, 1975

Re: No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

Dear Lewis:

I am still unable to join your proposed opinions for these cases. I remain where I was at the time of our conference.

Sincerely,



Mr. Justice Powell

cc: The Conference



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1975

Re: No. 74-114 - United States v. Briqnoni-Ponce

Dear Fellow Losers:

At this stage of the Term, it seems to be the common understanding that we have two choices in this case and in Ortiz, both of which represent extensions of Almeida-Sanchez in which we dissented. The first choice is to continue our votes to reverse the Court of Appeals, and thereby under Conference practice during the past few months to require the cases to go over for reargument next fall. The other choice is to try to persuade Lewis to make some modifications in his draft opinion in exchange for the four of us concurring either in the opinion or in the result.

I think the second choice has much to be said for it for at least two reasons. First is that if we follow the first option we are apt in the long run to find that it will become a Court opinion in spite of our disagreement with it, and as presently drafted it has a good deal of potential for spill-over into areas quite different from Border Patrol searches. The basic conception of the opinion, as I now read it, is that even though the governmental interest is significant, and the intrusion produced by a stop is minor, the interest of innocent citizens in using the highway is such that even this

OK
minor intrusion will not be permitted under the Fourth Amendment. I am hopeful that Lewis may be amenable to changing some of the language in his opinion so as to shift its emphasis in a way that would confine the result more to the particular situation of the Border Patrol, and leave open not merely in form but in substance the question of the propriety of stops where the stop is related to inquiring as to whether conditions imposed by law for operating a vehicle on a public highway have been met.

The second reason why I think it wise to pursue the second alternative is that it does seem to me that we all have institutional responsibility for getting these cases decided this Term. I don't think any of those who have voted to join Lewis are about to change, and so the changes will have to come from us. If it were a case of a numerically evenly divided Court, it could well be argued that there is no more reason for us to alter our views than for those on the other side to alter theirs, but here there is a five man majority in support of Lewis' present position.

Feeling as I do, I want to take this opportunity to sound out each of the three of you on the proposed changes in the draft opinion which are attached to this memorandum. I include a partial rewrite of pages 8 and 9 of the May 24th circulation, together with a typed footnote "7a" following revised page 9, and an insertion on page 11 of the phrase "give rise" to the present word "add" in the eighth line on that page.

I have no idea whether these changes would be satisfactory to Lewis, and I am quite sure they might produce some objections on the part of others who have joined his present draft. But here we do have some bargaining strength. Lewis has proposed to me a somewhat pro forma footnote which would go on page 9 of the present draft and read as follows:

"Our decision is based on an assessment of the Border Patrol's function, its statutory authority for stopping vehicles, and the character of stops for questioning in the border areas. We imply no view as to issues that may arise with respect to state and local law enforcement practices of stopping vehicles for such purposes as checking driver's licenses and auto registration, weighing trucks, or enforcing agricultural quarantines."

While this adequately reserves these issues in form, I do not regard it as being nearly as satisfactory as the proposed changes in language which I have incorporated in the attachments to this memorandum. I have heard enough discussions in three and a half years of Conference to realize that a simple footnote in a case saying, "We do not decide this question," is not always thought by everybody who joins the opinion to mean exactly what it says, and I would like to make sure that the opinion itself is structured in such a way as to genuinely reserve these issues.

If that is done, I would propose something very generally along the following as a concurring statement for as many of the four of us as agree with it, probably to be issued in the name of the Chief Justice, as our senior and mentor, or in Byron's name, if he were willing, since he authored the dissent in Almeida-Sanchez:

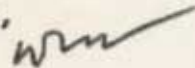
"We dissented from the Court's decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and we are of the view that the Court's decision in this case represents a still further extension of departures taken in that case. Nonetheless, because a majority of the Court adheres

to Almeida, and believes that this case should be similarly resolved, we [join in the Court's opinion] [concur in the result].

"We think it quite important to point out, however, that the Court's opinion and reasoning deal only with the type of stop involved in this case. We think that just as travelers entering the country may be stopped and searched without probable cause and without founded suspicion 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,' Carroll v. United States, 267 U.S. 132, 154 (1925), a strong case may be made for those charged with the enforcement of laws conditioning the right of vehicular use of a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications prescribed by applicable law for such use. See Cady v. Dombrowski, 413 U.S. 433, 440-441' (1973); United States v. Biswell, 406 U.S. 311 (1972). We regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision." *Same w/nt fixed c/p stops*

I would appreciate receiving your reaction to this very rough and tentative proposal.

Sincerely,



The Chief Justice
Mr. Justice White
Mr. Justice Blackmun



June 16, 1975

Brignoni-Ponce and Ortiz

Dear Bill, Potter and Thurgood:

You may recall that at our Conference on June 6, (when these cases were discussed) Bill Rehnquist indicated that if the opinions were clarified in certain respects, he might reconsider his position.

I followed up with Bill and he identified two particular concerns: (i) that our opinions would not apply to state regulation of highway use, such as enforcement of laws with respect to driver's licenses, truck weights and the like; and (ii) that we not foreclose a different decision with respect to stops for questioning at established checkpoints.

In my view, the draft opinions as circulated left open both of these issues, as neither was addressed. Bill, however, has a different view, and he rejected as inadequate some minor language changes I suggested. He then submitted counter-proposals that were quite lengthy.

As the result of negotiations, I submitted the changes which are now reflected in the pages of Brignoni-Ponce and Ortiz which I enclose herewith for each of you. Without committing himself, Bill has indicated an inclination to join us if we adopt these changes. Prior to seeing my counter-proposals Bill had conferred with the Chief Justice, Byron and Harry with inconclusive results. I do not think my proposals have been seen by these gentlemen, as Bill thought it best to know first whether we would submit them to the Conference.

I am willing to make these changes in the draft opinions. They certainly do not affect the result of the holdings or change the basic rationale. I expect all of us would come out at about the same place on the right of the states

reasonably to govern highway usage. There may be differences between us as to mere stops at established checkpoints. Although Byron expressed the view that our decision in Brignoni-Ponce would necessarily foreshadow a similar holding with respect to all other stops, I do not agree with him. In any event, the changes which are necessary to satisfy Bill will still leave each of us free to decide the fixed checkpoint stop issue as we deem proper.

In sum, I think we have a chance now to bring these cases down. We will have settled conclusively the "search" issue at fixed checkpoints as well as by roving patrols; and we also will have settled the "stop" issue with respect to roving patrols. These decisions will go far toward resolving the doubt which now overhangs the entire Border Patrol operations.

In view of time constraints as well as the importance of a resolution, I suggest that the four of us meet to discuss the situation. If agreeable, perhaps we could convene in Bill Brennan's office at say 11:00 a.m. today if this is convenient. If Mary Fowler will let Sally Smith know, she will advise Thurgood and Potter.

Sincerely,

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall

lfp/ss
Enc.

MEMORANDUM FOR
THE CHIEF JUSTICE

June 23, 1975

Re: No. 74-714 - United States v. Brigance-France

Dear Sir:

Please show me as joining your concurrence
but I may join only the judgment, thereby limiting my
concurrence.

I will act as soon as Lewis' "whole package"
is clear to me.

Regards,

W.H.

Mr. Justice Robinson:

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1975

Re: No. 74-114 - United States v. Brignoni-Ponce

Dear Bill:

I am writing separately in the above and I
think it better to have that stand alone, so please
withdraw my "join" of June 23.

Regards,

W B

Mr. Justice Rehnquist

Copies to the Conference

June 19, 1975

Cases Held for No. 74-114 U.S. v. Brignoni-Ponce

MEMORANDUM TO THE CONFERENCE:

No. 74-993 Janney v. United States
No. 74-6150 Coffey and Sparks v. United States

These two cases are exactly like No. 74-6016, Arnold v. United States, and the petition of Bylund and Dixon in No. 74-6014, discussed in the memo of cases held for United States v. Ortiz. In each case the petitioner was stopped at the Sierra Blanca checkpoint and, in the course of questioning, Border Patrol officers discovered evidence that provided probable cause for a search. In each case CA5 relied on its decision in Hart. If the Court wants to review the functional equivalency issue, in hopes of reaching the stop question, these cases should be held. If the Court vacates and remands in the other cases, I think these petitioners should receive the same treatment. I might add that these Sierra Blanca cases are the only petitions presently before us that potentially present the issue of stops for questioning at checkpoints. I was in error in my memorandum of May 23, in suggesting that several pending petitions presented this issue. Our options, if we want to settle this remaining issue and to grant one of these petitions despite the "functional-equivalency" hurdle, or to wait for a petition that presents the issue cleanly. My current inclination is to vacate and remand these petitions and wait.

No. 74-5062 Quiroz-Reyna v. United States
No. 74-5307 Baca v. United States

These petitions involve stops conducted prior to the date of decision in Almeida-Sanchez. None of the present

cases will decide whether the principles of Brignoni-Ponce should be applied retroactively. I believe, however, that the rationale of Peltier and the lower-court decisions prior to Almeida-Sanchez would lead to a conclusion that the Government reasonably could have continued making such stops at least until the date of decision in Almeida-Sanchez. Because we are not deciding the retroactivity question, it would seem appropriate to vacate these judgments and remand to the courts of appeals in light of Peltier, Bowen and Brignoni-Ponce, but I could also vote to deny the petitions if that is the consensus.

The remaining cases represent stops for questioning upheld by the courts of appeals on "reasonable suspicion." In light of the decision in Brignoni-Ponce, the only issues raised by these petitions will be the application of that standard to the facts of each case. For your convenience, I will outline the facts in each case, and indicate how I intend to vote.

No. 74-5422 Maduena-Astorga and Lopez-Saenz
v. United States

This petition challenges two separate incidents. In the first (Maduena-Astorga), Border Patrol agents saw Petitioner's car on an Interstate Highway 10 miles from the border, at 6:50 a.m. They said that the car had a large trunk and a heavy-duty suspension system, and appeared to "drift" on curves. They concluded that it must be heavily loaded, so they stopped it. There were no other suspicious circumstances preceding the stop. Vacate and remand under Brignoni-Ponce.

The second incident (Lopez-Saenz) occurred in the early morning hours less than half a mile from the Mexican border, in an area "heavily used by alien and narcotic smugglers." The officer tried to stop a Ranchero pick-up (not Petitioner's vehicle). It tried to run him off the road, but he finally stopped it. The driver jumped out and fled, leaving the pick-up in a ditch. Within 2 to 4 minutes (and before the officer discovered that the pick-up contained marijuana), another Ranchero pick-up came by. The driver (Petitioner) appeared to be Mexican. The officer stopped the pick-up

suspecting it might be associated with the first vehicle, and found marijuana in plain view. Petitioner does not claim standing to challenge the stop of the first pick-up, but contends that there was no reasonable basis for the officer to suspect that he was associated with it. Deny.

No. 74-6003 Alvarez-Garcia v. United States

Petitioner and a codefendant were traveling, about 5:15 a.m., in closely-following cars near the border. They were traveling slowly, and the trailing car did not take opportunities to pass the lead car. Petitioner was driving the lead car. Border Patrol officers followed them and noticed that the trailing car was riding low, despite new shock absorbers. It also appeared to have control problems on curves, leading the officers to believe it was heavily loaded. The officers stopped the rear car and found marijuana, then stopped Petitioner's car, which also had new shock absorbers but was not riding low. Deny.

No. 74-6061 Rocha-Lopez v. United States

Border Patrol officers saw Petitioner (a Mexican-American) at 6:40 a.m. on a road 1-1/2 miles from the border in an area "notorious for smuggling." The officers testified that normal traffic at that hour is light and that they can identify most drivers as local residents. They did not recognize Petitioner. When Petitioner saw the agents, he jammed on his brakes, reducing his speed to 10 mph. On these facts he was stopped. Vacate and Remand.

No. 74-6086 Gonzalez-Diaz v. United States

Border Patrol officers were on patrol in a "notorious smuggling area" 7-1/2 miles from the border at 2:30 a.m. They stopped to investigate an unusually-placed rock beside the road and saw footprints, leading them to believe that aliens had been picked up there. Petitioner then drove by in a Pontiac sedan of a sort often used for smuggling aliens. He was Mexican, a stranger to the officers, and he was traveling 20 mph in a 55 mph zone. They followed him for a short distance and stopped him. Vacate and remand.

No. 74-6259 Gonzales v. United States

A Border Patrol officer was on patrol at 5:20 a.m. 1-1/2 miles from the border on a road that parallels the Rio Grande. The area between the highway and the river is sparsely populated and is often used by smugglers. The officer saw Petitioner's truck top a levee, coming from the border, and turn its headlights on. The officer became suspicious and signaled the vehicle to stop. Petitioner tried to run him off the road, but the officer finally succeeded in stopping the truck. Deny.

L.F.P., Jr.

Brignoni-Lonce holds

74-993

^{Janney} ckpt ^{stop} + plain smell - post A-S
"functional equivalent" holding - relies
on Hart

retro

74-5062

Stop at ^{temp} ckpt - ^{leading to cause for search} pre AS - ^{conv. aff'd} 10 mi. from border

retro

74-5307

pre AS ckpt stop + search. conv. aff'd

get petu

74-5422

^{"fs" doctrine - aff'd by CA9}
2 stops ^{or} developed suspicion
~~Madison Col~~

74-6003 - stop upheld on CA9 "founded suspicion" doctrine

74-6061 - stop ~~of~~ on "founded suspicion" - upheld by CA9

74-6086 - stop upheld on ^{CA9} "founded suspicion"

74-6150

~~search~~ ^{stop} at ckpt post A-S; susp. for search.
Sierra Blanca - cite to Hart

74-6259 - Stop on suspicion - CA5 (no opn) - "real suspicion"

CHAMBERS DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner,	}	On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
v.		
Felix Humberto Brignoni-		
Ponce.		

[May —, 1975]

Memorandum of MR. JUSTICE POWELL.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search ~~these~~ cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two agents were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The agents questioned respondent and his two passengers about their citizenship and

learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 18 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez v. United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, with neither a warrant nor probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the facts of this case were more like a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.¹ The court held that 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. The court refused to find that Mexican ancestry alone furnished such a "founded suspicion" and held that respondent's motion to suppress should have been granted.² *United*

¹ For the Court of Appeals' purposes, the distinction between a roving patrol and a fixed checkpoint was controlling. The court previously had held that the principles of *Almeida-Sanchez* applied retrospectively to the activities of roving patrols but not to those of fixed checkpoints. See *United States v. Peltier*, 500 F. 2d 985 (CA9 1974), *rev'd*, — U. S. — (1975); *United States v. Bowen*, 500 F. 2d 960 (CA9 1974), *aff'd*, — U. S. — (1975).

² There may be room to question whether voluntary testimony of a witness at trial, as opposed to a government agent's testimony

ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a)(3) of the Act, 8 U. S. C. § 1357 (a)(3) (1970), authorizes agents, without a warrant,

"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"

The Border Patrol uses this section for authority to stop moving vehicles and question the occupants about their citizenship, in the absence of cause to believe that they may be aliens or that the vehicle may be carrying concealed aliens.³ But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra*, at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U. S. 721 (1969); *Terry v. Ohio*, 392 U. S. 1, 16-19 (1968). "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry v. Ohio, supra*, at 16, and the

³ We cannot accept respondent's contention that the legislative history of § 287 (a)(3) establishes that Congress implicitly conditioned immigration officers' authority to board and search vehicles on a belief that the vehicles contain aliens. The statute's predecessor was amended in 1946 expressly to eliminate the "belief" requirement and to substitute for it the geographical limitation that appears in § 287 (a)(3). See Act of Feb. 27, 1925, 43 Stat. 1049-1050; Act of Aug. 7, 1946, 60 Stat. 865.

Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to the Fourth Amendment, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free of arbitrary interference by law officers. *Terry v. Ohio*, *supra*, at 20-27; *Camara v. Municipal Court*, 387 U. S. 523 (1967).

The Government has made a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.* Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcom. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1-5 (1971-1972). The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States v. Baca*, 368 F. Supp. 398, 402 (SD Cal.

*The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcom. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pt. 5, at 1323-1325 (1972). The higher estimate appears in the 1974 Annual Report of the Immigration and Naturalization Service, at iii.

1973).⁵ The border with Mexico is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland metropolitan centers, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in automobiles, often assisted by professional "alien smugglers." The Border Patrol's traffic checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and making the cost of illegal transportation more expensive.

Against these valid public interests we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for the United States, at 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.⁶ According

⁵ This estimate tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year. In 1970, for example, 80% of the deportable aliens arrested were from Mexico. See INS, 1970 Annual Report, at 95. In 1974, the figure was 92%. INS, 1974 Annual Report, at 95.

⁶ In this case the officers did search respondent's car, but because they found no more incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have

to the Government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Ibid.*

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In *Terry v. Ohio*, *supra*, the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, 392 U. S., at 19 n. 16, but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger. *Id.*, at 21, 27.

We elaborated on *Terry* in *Adams v. Williams*, 407 U. S. 143 (1972), holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun. We said,

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his

probable cause to believe they will find illegally present aliens or contraband. Brief for the United States, at 25.

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances, the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to believe that the suspect has committed a crime or that he possesses contraband or evidence linking him to a crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The public interest justified the limited searches and seizures in those cases as a method of preventing crime. In this case as well, 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 illegal entry, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to accept the Government's argument and dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.⁷ Roads near the border carry not only

⁷ Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to

aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two sizeable metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border, 8 CFR § 287.1 (1974). Thus, if we approved the Government's position in this case, Border Patrol agents could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. We cannot hold that such broad and unlimited discretion is "reasonable" under the Fourth Amendment.

The Government also has contended that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens to ask about

decide 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. See *Almeida-Sanchez, supra*, at 275 (Mr. Justice POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst v. Mandel*, 408 U. S. 753, 765-767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, agents on roving patrol 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.

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Agents may consider the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. See *Carroll v. United States*, 267 U. S. 132, 159-161 (1925); *United States v. Jaime-Barrios*, 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974). They also may consider information about recent illegal border crossings in the area. The driver's behavior may be rele-

vant, as erratic driving or obvious attempts to evade officers can add to a reasonable suspicion. See *United States v. Larios-Montes*, 500 F. 2d 941 (CA9 1974); *Duprez v. United States*, 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may provoke suspicion. For instance, agents say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States v. Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the agent may see persons trying to hide when he passes. See *United States v. Larios-Montes*, *supra*. The Government also says that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for the United States in *United States v. Ortiz*, at 12. In all situations the agent is entitled to assess the facts in light of his experience detecting illegal entry and smuggling. *Terry v. Ohio*, *supra*, at 27.

In this case the agents relied on a single fact to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.⁸ We cannot conclude that the agents had reasonable grounds to believe that the three occupants were aliens. At best the agents had only a fleeting glimpse of the persons in the moving car, illumi-

⁸ The Government in its brief has also argued that the location of the stop should be considered in deciding whether the agents had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At the suppression hearing the agents gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented the broader justification to the Court of Appeals. We therefore decline to give any weight to the location of the stop in this case.

nated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car contained aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and ~~while~~ even in the border area a relatively small proportion of them are aliens.* The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it is not enough to justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

* The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) registered ^{as} aliens. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, ^{and} ~~and~~ 379,951 (or 20.4%) registered as aliens. Bureau of the Census, ¹⁹⁷⁰ Subject Reports: Persons of Spanish Origin 2 (1970); INS, ¹⁹⁷⁰ Annual Report, at 105. These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS, 1974 Annual Report, at 105, and we may assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see Bureau of the Census, *supra*, at 7, may have an appearance similar to persons of Mexican origin.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner,	} On Writ of Certiorari to the	
v.		United States Court of Ap-
Felix Humberto Brignoni- Ponce.		peals for the Ninth Circuit.

[May —, 1975]

Memorandum of MR. JUSTICE POWELL.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 18 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez v. United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, with neither a warrant nor probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the facts of this case were more like a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.¹ The court held that 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. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.² *United*

¹ For the Court of Appeals' purposes, the distinction between a roving patrol and a fixed checkpoint was controlling. The court previously had held that the principles of *Almeida-Sanchez* applied retrospectively to the activities of roving patrols but not to those of fixed checkpoints. See *United States v. Peltier*, 500 F. 2d 985 (CA9 1974), *rev'd*, — U. S. — (1975); *United States v. Bowen*, 500 F. 2d 960 (CA9 1974), *aff'd*, — U. S. — (1975).

² There may be room to question whether voluntary testimony of a witness at trial, as opposed to a government agent's testimony

States v. Brignoni-Ponce, 499 F. 2d 1109 (CA9 1974). We granted certiorari and set the case for oral argument with Nos. 73-2050 and 73-6848. 419 U. S. 824 (1974).

The Government does not challenge the Court of Appeals' factual conclusion that the stop of respondent's car was a roving-patrol stop rather than a checkpoint stop. Brief for the United States, at 8. Nor does the Government challenge the retroactive application of *Almeida-Sanchez*, *id.*, at 9, or contend that the San Clemente checkpoint is the functional equivalent of the border. The only question presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. For the reasons that follow, we affirm the decision of the Court of Appeals.

II

The Government claims two sources of statutory authority for stopping cars without warrants in border areas. Section 287 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(1) (1970), authorizes any officer or employee of the Immigration and Naturalization Service, without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the area adjacent to the Mexican border, a person's apparent Mexican

about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. See *United States v. Guana-Sanchez*, 484 F. 2d 590 (CA7 1973), writ dismissed as improvidently granted, — U. S. — (1975). But, since the question was not raised in the petition for certiorari, we do not address it in this case.

ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a)(3) of the Act, 8 U. S. C. § 1357 (a)(3) (1970), authorizes agents, without a warrant,

"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"

The Border Patrol uses this section for authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.* Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (1974). But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra*, at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U. S. 721 (1969); *Terry v. Ohio*, 392 U. S. 1, 18-19 (1968). "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has

* We cannot accept respondent's contention that the legislative history of § 287 (a)(3) establishes that Congress implicitly conditioned immigration officers' authority to board and search vehicles on a belief that the vehicles contain aliens. The statute's predecessor was amended in 1946 expressly to eliminate the "belief" requirement and to substitute for it the geographical limitation that appears in § 287 (a)(3). See Act of Feb. 27, 1925, 43 Stat. 1049-1050; Act of Aug. 7, 1946, 60 Stat. 865.

'seized' that person," *Terry v. Ohio, supra*, at 16, and the Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to the Fourth Amendment, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free of arbitrary interference by law officers. *Terry v. Ohio, supra*, at 20-27; *Camara v. Municipal Court*, 387 U. S. 523 (1967).

The Government has made a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.⁴ Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1-5 (1971-1972). The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States v. Baca*, 368 F. Supp. 398, 402 (SD Cal.

⁴The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pt. 5, at 1323-1325 (1972). The higher estimate appears in the 1974 Annual Report of the Immigration and Naturalization Service, at iii.

1973).⁵ The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers." The Border Patrol's traffic checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and making the cost of illegal transportation more expensive.

Against these valid public interests we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for the United States, at 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.⁶ According

⁵ This estimate tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year. In 1970, for example, 80% of the deportable aliens arrested were from Mexico. See INS, 1970 Annual Report, at 95. In 1974, the figure was 92%. INS, 1974 Annual Report, at 95.

⁶ In this case the officers did search respondent's car, but because they found no other incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have

to the Government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Ibid.*

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In *Terry v. Ohio*, *supra*, the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, 392 U. S., at 19 n. 16, but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger. *Id.*, at 21, 27.

We elaborated on *Terry* in *Adams v. Williams*, 407 U. S. 143 (1972), holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun. We said,

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his

probable cause to believe they will find illegally present aliens or contraband. Brief for the United States, at 25.

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.⁷ Roads near the border carry not only

⁷ Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (1974). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. We cannot hold that such broad and unlimited discretion is "reasonable" under the Fourth Amendment.

The Government also has contended that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens to ask about

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. See *Almeida-Sanchez, supra*, at 275 (MR. JUSTICE POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst v. Mandel*, 408 U. S. 753, 765-767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol 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.*

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous

* As noted above, we reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. The facts of this case do not require decision on the point. *Infra*, at 12.

experience with alien traffic are all relevant. See *Carroll v. United States*, 267 U. S. 132, 159-161 (1925); *United States v. Jaime-Barrios*, 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974). They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can add to a reasonable suspicion. See *United States v. Larios-Montes*, 500 F. 2d 941 (CA9 1974); *Duprez v. United States*, 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States v. Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See *United States v. Larios-Montes*, *supra*. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for the United States in *United States v. Ortiz*, at 12. In all situations the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling. *Terry v. Ohio*, *supra*, at 27.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.* We cannot conclude that ~~there~~ there

* The Government in its brief also has argued that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented

were reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.¹⁰ The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it is not enough to justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

¹⁰ The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens. Bureau of the Census, Subject Reports: Persons of Spanish Origin 2 (1970); INS, 1970 Annual Report, at 105. These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS, 1974 Annual Report, at 105, and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see Bureau of the Census, *supra*, at 7, may have an appearance similar to persons of Mexican origin.

~~2nd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

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This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

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learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 18 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez v. United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, ~~with~~ ^{without} ~~either~~ ^{or} a warrant ~~and~~ ^{or} probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting

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en banc, held that the ~~facts of this case were more like~~ ^{more closely resembled} a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.¹ The court held that 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. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.² *United*

¹ For the Court of Appeals' purposes, the distinction between a roving patrol and a fixed checkpoint was controlling. The court previously had held that the principles of *Almeida-Sanchez* applied retrospectively to the activities of roving patrols but not to those of fixed checkpoints. See *United States v. Peltier*, 500 F. 2d 985 (CA9 1974), *rev'd*, — U. S. — (1975); *United States v. Bowen*, 500 F. 2d 960 (CA9 1974), *aff'd*, — U. S. — (1975).

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The Government does not challenge the Court of Appeals' factual conclusion that the stop of respondent's car was a roving-patrol stop rather than a checkpoint stop. Brief for the United States, at 8. Nor does ~~the Government~~ challenge the retroactive application of *Almeida-Sanchez*, *id.*, at 9, or contend that the San Clemente checkpoint is the functional equivalent of the border. The only ~~question~~ presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. For the reasons that follow, we affirm the decision of the Court of Appeals.

II

The Government claims two sources of statutory authority for stopping cars without warrants in ~~border~~ ^{the} areas. Section 287 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(1) (1970), authorizes any officer or employee of the Immigration and Naturalization Service, without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the areas adjacent to the Mexican border, a person's apparent Mexican

about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. See *United States v. Guano-Sanchez*, 484 F. 2d 590 (CA7 1973), writ dismissed as improvidently granted, — U. S. — (1975). But, ~~since the question was not raised in the petition for certiorari, we do not address it in this case.~~

ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a) (3) of the Act, 8 U. S. C. § 1357 (a) (3) (1970), authorizes agents, without a warrant,

"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"

The Border Patrol ~~uses this section for~~ authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.² Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (1974). But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra*, at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

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III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U. S. 721 (1969); *Terry v. Ohio*, 392 U. S. 1, 16-19 (1968). "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has

² We cannot accept respondent's contention that the legislative history of § 287 (a) (3) establishes that Congress implicitly conditioned immigration officers' authority to board and search vehicles on a belief that the vehicles contain aliens. The statute's predecessor was amended in 1946 expressly to eliminate the "belief" requirement and to substitute for it the geographical limitation that appears in § 287 (a) (3). See Act of Feb. 27, 1925, 43 Stat. 1049-1050; Act of Aug. 7, 1946, 60 Stat. 855.

'seized' that person," *Terry v. Ohio, supra*, at 18, and the Fourth Amendment requires that the seizure be "reasonable." As with other categories of police action subject to the Fourth Amendment, the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free of arbitrary interference by law officers. *Terry v. Ohio, supra*, at 20-27; *Camara v. Municipal Court*, 387 U. S. 523 (1967). constraints, from

The Government has made a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.⁴ Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1-5 (1971-1972). The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States v. Baca*, 368 F. Supp. 398, 402 (SD Cal. makes

⁴ The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pt. 5, at 1323-1325 (1972). The higher estimate appears in the 1974 Annual Report of the Immigration and Naturalization Service, at iii.

1973).⁵ The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers." The Border Patrol's traffic checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and ~~making~~ the cost of illegal transportation ~~more expensive~~.

this Against ~~these~~ valid public interests, we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for the United States, at 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.⁶ According

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⁶ In this case the officers did search respondent's car, but because they found no other incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have

to the Government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Ibid.*

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In *Terry v. Ohio*, *supra*, the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, 392 U. S., at 19 n. 16, but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger. *Id.*, at 21, 27.

We elaborated on *Terry* in *Adams v. Williams*, 407 U. S. 143 (1972), holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun. ~~We said,~~

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his

probable cause to believe they will find illegally present aliens or contraband. Brief for the United States, at 25.

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.⁷ Roads near the border carry not only

⁷ Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (1974). ~~Thus, if~~ we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. We cannot hold that such broad and unlimited discretion is "reasonable" under the Fourth Amendment.

and other

That, however, is not enough.

The Government also ~~has contended~~ that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens ~~to ask~~ about

contends

for questioning

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. See *Almeida-Sanchez, supra*, at 275 (Mr. Justice POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst v. Mandel*, 408 U. S. 753, 765-767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol 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.*

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous

* As noted above, we reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. The facts of this case do not require decision on the point. *Infra*, at 12.

See *Cheung Tin Wong*
v. INS, — U.S. App.
D.C. —, 468 F.2d
1123 (1972); *Au Yi Lau*
v. INS, — U.S. App.
D.C. —, 445 F.2d
217, cert. denied,
404 U.S. 864 (1971).

experience with alien traffic are all relevant. See *Carroll v. United States*, 267 U. S. 132, 159-161 (1925); *United States v. Jaime-Barrios*, 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974). They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can add to a reasonable suspicion. See *United States v. Larios-Montes*, 500 F. 2d 941 (CA9 1974); *Duprez v. United States*, 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States v. Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974); The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See *United States v. Larios-Montes*, *supra*. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for the United States in *United States v. Ortiz*, at 12. In all situations the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling. *Terry v. Ohio*, *supra*, at 27.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.² We cannot conclude that ~~there~~

The Government ~~in its brief~~ also ~~has argued~~ that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented

United States v. Wright, 476 F. 2d 1027 (CA5 1973).

this

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There were reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.¹⁰ The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it is not enough to justify stopping all Mexican-Americans to ask if they are aliens.

does

The judgment of the Court of Appeals is

Affirmed.

the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

¹⁰ The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens. Bureau of the Census, Subject Reports: Persons of Spanish Origin 2 (1970); INS, 1970 Annual Report, at 105. These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS, 1974 Annual Report, at 105, and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see Bureau of the Census, *supra*, at 7, may have an appearance similar to persons of Mexican origin.

5/24/75

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner,	}	On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
v.		
Felix Humberto Brignoni- Ponce.		

[May —, 1975]

Memorandum of MR. JUSTICE POWELL.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 18 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez v. United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the stop in this case more closely resembled a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.¹ The court held that 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. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.² *United*

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II

The Government claims two sources of statutory authority for stopping cars without warrants in the border areas. Section 287 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(1) (1970), authorizes any officer or employee of the Immigration and Naturalization Service, without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the areas adjacent to the Mexican border, a person's apparent Mexican

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Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (1974). The Border Patrol interprets the statute as granting authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.² But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra*, at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

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The Government makes a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.* Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1-5 (1971-1972).

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identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.⁷ Roads near the border carry not only

⁷ Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.3 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that a large majority of traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (1974). That, however, is not enough. If we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law. We cannot hold that such broad and unlimited discretion is "reasonable" under the Fourth Amendment.

The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about

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. See *Almeida-Sanchez, supra*, at 275 (Mr. Justice POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst v. Mandel*, 408 U. S. 753, 765-767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol 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.⁶

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous

⁶ As noted above, we reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. See *Cheung Tin Wong v. INS*, — U. S. App. D. C. —, 468 F. 2d 1123 (1972); *Au Yi Lau v. INS*, — U. S. App. D. C. —, 445 F. 2d 217, cert. denied, 404 U. S. 884 (1971). The facts of this case do not require decision on the point. *Infra*, at 12.

experience with alien traffic are all relevant. See *Carroll v. United States*, 267 U. S. 132, 159-161 (1925); *United States v. Jaime-Barrios*, 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974). They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant, as erratic driving or obvious attempts to evade officers can add to a reasonable suspicion. See *United States v. Larios-Montes*, 500 F. 2d 941 (CA9 1974); *Duprez v. United States*, 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States v. Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974); *United States v. Wright*, 476 F. 2d 1027 (CA5 1973). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See *United States v. Larios-Montes*, *supra*. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for the United States in *United States v. Ortiz*, at 12. In all situations the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling. *Terry v. Ohio*, *supra*, at 27.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.⁹ We cannot conclude that this

⁹The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the

furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.¹⁰ The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

car's occupants. It is not even clear that the Government presented the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

¹⁰ The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,267 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens. Bureau of the Census, Subject Reports: Persons of Spanish Origin 2 (1970); INS, 1970 Annual Report, at 105. These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS, 1974 Annual Report, at 106, and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see Bureau of the Census, *supra*, at 7, may have an appearance similar to persons of Mexican origin.

pp 4, 11

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner,	} On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
v.	
Felix Humberto Brignoni- Ponce.	

[May —, 1975]

Memorandum of Mr. JUSTICE POWELL.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 18 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez v. United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the stop in this case more closely resembled a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.¹ The court held that 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. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.² *United*

¹ For the Court of Appeals' purposes, the distinction between a roving patrol and a fixed checkpoint was controlling. The court previously had held that the principles of *Almeida-Sanchez* applied retrospectively to the activities of roving patrols but not to those of fixed checkpoints. See *United States v. Peltier*, 500 F. 2d 985 (CA9 1974), *rev'd*, — U. S. — (1975); *United States v. Bowen*, 500 F. 2d 960 (CA9 1974), *aff'd*, — U. S. — (1975).

² There may be room to question whether voluntary testimony of a witness at trial, as opposed to a government agent's testimony

ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a) (3) of the Act, 8 U. S. C. § 1357 (a) (3) (1970), authorizes agents, without a warrant,

"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"

Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (1974). The Border Patrol interprets the statute as granting authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.³ But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra*, at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U. S. 721 (1969); *Terry v. Ohio*, 392 U. S. 1, 16-19 (1968). "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry v. Ohio, supra*, at 16, and the

³ We cannot accept respondent's contention that, even though § 287 (a) (5) does not mention probable cause, its legislative history establishes that Congress meant to condition immigration officers' authority to board and search vehicles on probable cause to believe that they contained aliens. The legislative history simply does not support this contention.

Fourth Amendment requires that the seizure be "reasonable." 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 interference by law officers. *Terry v. Ohio*, *supra*, at 20-27; *Camara v. Municipal Court*, 387 U. S. 523 (1967).

The Government makes a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.⁴ Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1-5 (1971-1972).

The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States*

⁴The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pt. 5, at 1323-1325 (1972). The higher estimate appears in the 1974 Annual Report of the Immigration and Naturalization Service, at iii.

v. *Baca*, 368 F. Supp. 398, 402 (SD Cal. 1973).⁸ The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers." The Border Patrol's traffic checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.

Against this valid public interest we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for the United States, at 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.⁹ According

⁸ This estimate tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year. In 1970, for example, 80% of the deportable aliens arrested were from Mexico. See INS, 1970 Annual Report, at 95. In 1974, the figure was 92%. INS, 1974 Annual Report, at 95.

⁹ In this case the officers did search respondent's car, but because they found no other incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.¹ Roads near the border carry not only

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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. See *Almeida-Sanchez, supra*, at 275 (MR. JUSTICE POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

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IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol 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.⁹

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns

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In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican an-

^{*}The Court of Appeals decisions cited throughout this section are merely illustrative. Our citation of them does not imply a view of the merits of particular decisions. Each case must turn on the totality of the particular circumstances.

fn 9 added

cestry of the occupants.¹⁰ We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.¹¹ The likelihood that any given

¹⁰ The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

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person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

Citechecking changes throughout
1, 8, 9, 10, 12

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: _____

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-114

United States, Petitioner, v. Felix Humberto Brignoni- Ponce.	} On Writ of Certiorari to the United States Court of Ap- peals for the Ninth Circuit.
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[May —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises questions as to the United States Border Patrol's authority to stop automobiles in areas near the Mexican border. It differs from our decision in *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973), in that the Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status.

I

As a part of its regular traffic checking operations in southern California, the Border Patrol operates a fixed checkpoint on Interstate Highway 5 south of San Clemente. On the evening of March 11, 1973, the checkpoint was closed because of inclement weather, but two officers were observing northbound traffic from a patrol car parked at the side of the highway. The road was dark, and they were using the patrol car's headlights to illuminate passing cars. They pursued respondent's car and stopped it, saying later that their only reason for doing so was that its three occupants appeared to be of Mexican descent. The officers questioned respondent and his two passengers about their citizenship and

learned that the passengers were aliens who had entered the country illegally. All three were then arrested, and respondent was charged with two counts of knowingly transporting illegal immigrants, a violation of 8 U. S. C. § 1324 (a)(2). At trial respondent moved to suppress the testimony of and about the two passengers, claiming that this evidence was the fruit of an illegal seizure. The trial court denied the motion, the aliens testified at trial, and respondent was convicted on both counts.

Respondent's appeal was pending in the Ninth Circuit Court of Appeals when we announced our decision in *Almeida-Sanchez v. United States*, *supra*, holding that the Fourth Amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border and its functional equivalents. The Court of Appeals, sitting en banc, held that the stop in this case more closely resembled a roving-patrol stop than a stop at a traffic checkpoint, and applied the principles of *Almeida-Sanchez*.¹ The court held that 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. The court refused to find that Mexican ancestry alone supported such a "founded suspicion" and held that respondent's motion to suppress should have been granted.² *United*

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² There may be room to question whether voluntary testimony of a witness at trial, as opposed to a government agent's testimony

States v. Brignoni-Ponce, 499 F. 2d 1109 (CA9 1974). We granted certiorari and set the case for oral argument with Nos. 73-2050 and 73-6848. 419 U. S. 824 (1974).

The Government does not challenge the Court of Appeals' factual conclusion that the stop of respondent's car was a roving-patrol stop rather than a checkpoint stop. Brief for the United States, at 8. Nor does it challenge the retroactive application of *Almeida-Sanchez*, *id.*, at 9, or contend that the San Clemente checkpoint is the functional equivalent of the border. The only issue presented for decision is whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. For the reasons that follow, we affirm the decision of the Court of Appeals.

II

The Government claims two sources of statutory authority for stopping cars without warrants in the border areas. Section 287 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(1) (1970), authorizes any officer or employee of the Immigration and Naturalization Service, without a warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." There is no geographical limitation on this authority. The Government contends that, at least in the areas adjacent to the Mexican border, a person's apparent Mexican

about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure. See *United States v. Guana-Sanchez*, 484 F. 2d 590 (CA7 1973), writ dismissed as improvidently granted, 420 U. S. 513 (1975). But since the question was not raised in the petition for certiorari, we do not address it.

ancestry alone justifies belief that he or she is an alien and satisfies the requirement of this statute. Section 287 (a)(3) of the Act, 8 U. S. C. § 1357 (a)(3) (1970), authorizes agents, without a warrant,

"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 . . ."

Under current regulations, this authority may be exercised anywhere within 100 miles of the border. 8 CFR § 287.1 (a) (1975). The Border Patrol interprets the statute as granting authority to stop moving vehicles and question the occupants about their citizenship, even when its officers have no reason to believe that the occupants are aliens or that other aliens may be concealed in the vehicle.³ But "no Act of Congress can authorize a violation of the Constitution," *Almeida-Sanchez, supra*, at 272, and we must decide whether the Fourth Amendment allows such random vehicle stops in the border areas.

III

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. *Davis v. Mississippi*, 394 U. S. 721 (1969); *Terry v. Ohio*, 392 U. S. 1, 16-19 (1968). "[W]henver a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person," *Terry v. Ohio, supra*, at 16, and the

³ We cannot accept respondent's contention that, even though § 287 (a)(3) does not mention probable cause, its legislative history establishes that Congress meant to condition immigration officers' authority to board and search vehicles on probable cause to believe that they contained aliens. The legislative history simply does not support this contention.

Fourth Amendment requires that the seizure be "reasonable." 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 interference by law officers. *Terry v. Ohio*, *supra*, at 20-21; *Camara v. Municipal Court*, 387 U. S. 523, 536-537 (1967).

The Government makes a convincing demonstration that the public interest demands effective measures to control the illegal entry of aliens at the Mexican border. Estimates of the number of illegal immigrants in the United States vary widely. A conservative estimate in 1972 produced a figure of about one million, but the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country.* Whatever the number, these aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation. See generally Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pts. 1-5 (1971-1972).

The Government has estimated that 85% of the aliens illegally in the country are from Mexico. *United States*

*The estimate of one million was produced by the Commissioner of the INS for the Immigration and Nationality Subcommittee of the House Judiciary Committee. Hearings on Illegal Aliens before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 13, pt. 5, at 1323-1325 (1972). The higher estimate appears in the 1974 Annual Report of the Immigration and Naturalization Service, at iii.

v. *Baca*, 368 F. Supp. 398, 402 (SD Cal. 1973).⁶ The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities. Others gain entry on valid temporary border-crossing permits, but then violate the conditions of their entry. Most of these aliens leave the border area in private vehicles, often assisted by professional "alien smugglers." The Border Patrol's traffic checking operations are designed to prevent this inland movement. They succeed in apprehending some illegal entrants and smugglers, and they deter the movement of others by threatening apprehension and increasing the cost of illegal transportation.

Against this valid public interest we must weigh the interference with individual liberty that results when an officer stops an automobile and questions its occupants. The intrusion is modest. The Government tells us that a stop by a roving patrol "usually consumes no more than a minute." Brief for the United States, at 25. There is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.⁷ According

⁶ This estimate tends to be confirmed by the consistently high proportion of Mexican nationals in the number of deportable aliens arrested each year. In 1970, for example, 80% of the deportable aliens arrested were from Mexico. See INS, 1970 Annual Report, at 95. In 1974, the figure was 92%. INS, 1974 Annual Report, at 94.

⁷ In this case the officers did search respondent's car, but because they found no other incriminating evidence the validity of the search is not in issue. *Almeida-Sanchez* changed the Border Patrol's practice of searching cars on routine stops, and the Government informs us that roving patrols now search vehicles only when they have

to the Government, "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Ibid.*

Because of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. In *Terry v. Ohio*, *supra*, the Court declined expressly to decide whether facts not amounting to probable cause could justify an "investigative seizure" short of an arrest, 392 U. S., at 19 n. 16, but it approved a limited search—a pat-down for weapons—for the protection of an officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous. The Court approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that "the police officer . . . be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a belief that his safety or that of others is in danger. *Id.*, at 21, 27.

We elaborated on *Terry* in *Adams v. Williams*, 407 U. S. 143 (1972), holding that a policeman was justified in approaching the respondent to investigate a tip that he was carrying narcotics and a gun.

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his

probable cause to believe they will find illegally present aliens or contraband. Brief for the United States, at 25.

identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.*, at 145-146.

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. In both *Terry* and *Adams v. Williams* the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. The limited searches and seizures in those cases were a valid method of protecting the public and preventing crime. In this case as well, 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." 392 U. S., at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops.¹ In the context of border area stops, the

¹ Because the stop in this case was made without a warrant and the officers made no effort to obtain one, we have no occasion to decide whether a warrant could be issued to stop cars in a designated

reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million, is located on the border. Texas has two fairly large metropolitan areas directly on the border; El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities is lawful and that relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term "reasonable distance" in § 287 (a)(3) to mean within 100 air miles from the border. 8 CFR § 287.1 (a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

omission

We are not convinced that the legitimate needs of law enforcement require this degree of interference with law-

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. See *Almeida-Sanchez, supra*, at 275 (Mr. Justice POWELL, concurring); *Camara v. Municipal Court*, 387 U. S. 523 (1967).

ful traffic. As we discuss in Part IV, *infra*, the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not "reasonable" under the Fourth Amendment to make such stops on a random basis.⁸

The Government also contends that the public interest in enforcing conditions on legal alien entry justifies stopping persons who may be aliens for questioning about their citizenship and immigration status. Although we may assume for purposes of this case that the broad congressional power over immigration, see *Kleindienst v. Mandel*, 408 U. S. 753, 765-767 (1972), authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to

⁸ Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses, vehicle registration, truck weights, and similar matters.

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.

IV

The effect of our decision is to limit exercise of the authority granted by both § 287 (a)(1) and § 287 (a)(3). Except at the border and its functional equivalents, officers on roving patrol 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.⁹

Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. See *Carroll v. United States*, 267 U. S. 132, 159-161 (1925); *United States v. Jaime-Barrios*, 494 F. 2d 455 (CA9), cert. denied, 417 U. S. 972 (1974).¹⁰ They also may consider information about recent illegal border crossings in the area. The driver's behavior may be rele-

⁹ As noted above, we reserve the question whether Border Patrol officers also may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. See *Cheung Tin Wong v. INS*, — U. S. App. D. C. —, 488 F. 2d 1123 (1972); *Au Yi Lau v. INS*, 144 U. S. App. D. C. 147, 445 F. 2d 217, cert. denied, 404 U. S. 884 (1971). The facts of this case do not require decision on the point. *Infra*, at 12.

¹⁰ The court of appeals decisions cited throughout this section are merely illustrative. Our citation of them does not imply a view of the merits of particular decisions. Each case must turn on the totality of the particular circumstances.

vant, as erratic driving or obvious attempts to evade officers can support a reasonable suspicion. See *United States v. Larios-Montes*, 500 F. 2d 941 (CA9 1974); *Duprez v. United States*, 435 F. 2d 1276 (CA9 1970). Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens. See *United States v. Bugarin-Casas*, 484 F. 2d 853 (CA9 1973), cert. denied, 414 U. S. 1136 (1974); *United States v. Wright*, 476 F. 2d 1027 (CA5 1973). The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide. See *United States v. Larios-Montes*, *supra*. The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut. Reply Brief for the United States in *United States v. Ortiz*, at 12-13. In all situations the officer is entitled to assess the facts in light of his experience detecting illegal entry and smuggling. *Terry v. Ohio*, *supra*, at 27.

In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants.¹¹ We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a

¹¹ The Government also argues that the location of this stop should be considered in deciding whether the officers had adequate reason to stop respondent's car. This appears, however, to be an after-the-fact justification. At trial the officers gave no reason for the stop except the apparent Mexican ancestry of the car's occupants. It is not even clear that the Government presented the broader justification to the Court of Appeals. We therefore decline at this stage of the case to give any weight to the location of the stop.

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SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* BRIGNONI-PONCE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 74-114. Argued February 18, 1975—Decided June 30, 1975

The Fourth Amendment does not allow a roving patrol of the Border Patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status, when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. Except at the border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country. Pp. 4-13.

(a) Because of the important governmental interest in combating the illegal entry of aliens at the border, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, an officer, whose observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, may stop the car briefly, question the driver and passengers about their citizenship and immigration status, and ask them to explain suspicious circumstances; but any further detention or search must be based on consent or probable cause. Pp. 4-8.

(b) To allow roving patrols the broad and unlimited discretion urged by the Government to stop all vehicles in the border area without any reason to suspect that they have violated any law, would not be "reasonable" under the Fourth Amendment. Pp. 8-9.

(c) Assuming that Congress has the power to admit aliens on condition that they submit to reasonable questioning about their right to be in the country, such power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens.

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fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens.²² The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.

The judgment of the Court of Appeals is

Affirmed.

²² The 1970 census and the INS figures for alien registration in 1970 provide the following information about the Mexican-American population in the border States. There were 1,619,064 persons of Mexican origin in Texas, and 200,004 (or 12.4%) of them registered as aliens from Mexico. In New Mexico there were 119,049 persons of Mexican origin, and 10,171 (or 8.5%) registered as aliens. In Arizona there were 239,811 persons of Mexican origin, and 34,075 (or 14.2%) registered as aliens. In California there were 1,857,287 persons of Mexican origin, and 379,951 (or 20.4%) registered as aliens. Bureau of the Census, Subject Reports: Persons of Spanish Origin 2 (1970); INS, 1970 Annual Report, at 105. These figures, of course, do not present the entire picture. The number of registered aliens from Mexico has increased since 1970, INS, 1974 Annual Report, at 105, and we assume that very few illegal immigrants appear in the registration figures. On the other hand, many of the 950,000 other persons of Spanish origin living in these border States, see Bureau of the Census, *supra*, at 1, may have a physical appearance similar to persons of Mexican origin.

Syllabus

The Fourth Amendment therefore forbids stopping persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens. Pp. 9-10.

499 F. 2d 1109, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined. REHNQUIST, J., filed a concurring opinion. DOUGLAS, J., filed an opinion concurring in the judgment. WHITE, J., filed an opinion concurring in the judgment, in which BLACKMUN, J., joined.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 25 1975

Recirculated: _____



No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

Like MR. JUSTICE WHITE I can, at most, do no more than concur in the judgment. As the Fourth Amendment now has been interpreted by the Court it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens -- and dangerous drugs -- that daily and freely crosses our 2,000 mile southern boundary. ^{1/} Perhaps these

^{1/}

The Court today recognizes that as many as twelve million illegal aliens are present in this country at this time. Ante, at 5, and n. 4. See also, U.S. News and World Report, 27, July 22, 1974; U.S. News and World Report, 77, December 9, 1974. By all indications the problem will increase in the future, not abate. United States v. Baca, 368 F. Supp. 398, 402-03 (S.D. Cal. 1973). In the Baca case Judge Turrentine conducted a thorough review of the entire problem and the present government response. Appended to this opinion is an excerpt from Judge Turrentine's Baca opinion describing the illegal alien problem and the law enforcement response.

decisions 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.

Given today's decisions it would appear that, absent legislative action, nothing less than a massive force of guards could adequately protect our southern border.^{2/} To establish hundreds of checkpoints with enlarged border forces so as to stop literally every car and pedestrian at every border checkpoint, however, would doubtless impede the flow of commerce and travel between this country and Mexico. Moreover, it is uncertain whether stringent penalties for employment of illegal aliens, and rigid requirements for proof of legal entry before employment, would help solve the problem, but that remedy has not been tried.

I would hope that when we next deal with this problem we give greater weight to the reality that the Fourth Amendment prohibits only "unreasonable searches and seizures" and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the

^{2/} For example, testimony in the Baca hearings revealed that a complement of 21,000 officers would be needed to control adequately the 75 miles of border in the El Centro sector alone.

individual with the needs of society. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968); Elkins v. United States, 364 U.S. 206 (1960); United States v. Biswell, 406 U.S. 311 (1972).

APPENDIX

THE ILLEGAL ALIEN PROBLEM

The United States through legislative action has determined that it is in the best interests of the nation to limit the number of persons who can legally immigrate into the country in any given year. These controls reflect in part a Congressional intent to protect the American labor market from an influx of foreign labor. *Karnuth v. United States*, 279 U.S. 231 (1929); § 201(b) of the *Immigration and Nationality Act of 1952*, 66 Stat. 163, as amended by the Act of October 3, 1965, 79 Stat. 911, 8 U.S.C. § 1151(a).

Under this policy of limited admission, 385,685 new immigrants entered the United States legally during fiscal year 1972. Since July 1, 1968, the law has established an annual quota of 120,000 persons for the independent countries of the Western Hemisphere. Included within this quota are immigrants from the Republic of Mexico who in fiscal year 1972 totalled 64,040. 1972 Annual Report, *Immigration and Naturalization Service*, p. 2.

Currently illegal aliens are in residence within the United States in numbers which, while not susceptible of exact measurement, are estimated to be in the vicinity of 800,000 to over one million. Department of Justice, Special Study Group on Illegal Immigrants from Mexico, *A Program for Effective And Humane Action on Illegal Mexican Immigrants*, 6 (1973), [hereinafter cited as *Cramton Rpt.*].

Of these illegal aliens, approximately 85 percent are citizens of Mexico. *Cramton Rpt.* at 6. They are industrious, proud and hard-working people who enter this country for the purpose of earning wages, accumulating savings, and returning or sending their savings home to Mexico.

Since 1970, the number of illegal Mexican aliens in the United States who have been apprehended has been growing at a rate in excess of 20 percent per year. *Cramton Rpt.* at 6.

The increasingly large numbers of Mexican nationals seeking to illegally enter this country reflects the substantial unemployment and underemployment in Mexico—fueled by one of the highest birth rates in the world. Moreover, Mexican employment statistics are not likely to improve dramatically since fully 45 percent of Mexico's population is under 15 years of age and, therefore, will soon be attempting to enter the labor market.

Further prompting Mexican nationals to seek employment in the United States is the fact that there is a significant disparity in wage rates between this country and Mexico. In Mexicali and Tijuana, both Mexican cities bordering the Southern District and each with a population in excess of 400,000, the average daily wage is about \$3.40 per day. The minimum wage is even lower for workers in the interior of Mexico. The average worker in Mexico, assuming he can find work, earns in a day as much as he can make in only a few hours in the United States.

In addition, it is estimated that the per capita income of the poorest 40 percent of the Mexican population, the strata most likely to leave their homeland in search of a better life in the United States, is less than \$150 per year.

The manpower needs of the United States generated by World War II resulted in many Mexicans being imported into this country and becoming familiar with employment opportunities and practices in the United States. See *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 595 (1970).

The opportunities available to Mexican aliens have traditionally been in agriculture. While still true in many parts of the United States Southwest, in recent years the pattern has changed and more and more illegal aliens are obtaining employment in service and manufacturing sectors of our economy. These aliens are increasingly found in virtually all regions of the country and in all segments of the economy. State Social Welfare Board, *Issue: Aliens in California*, 12 (1973) [Hereinafter cited as *Aliens in California*].

The nature of the change in employment opportunities available is demonstrated by one estimate that 250,000 illegal aliens are employed in Los Angeles County where agricultural opportunities are known

to be limited. *Hearings on Illegal Aliens Before Subcomm. 1 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 208 (1971) [Hereinafter cited as *Hearings on Illegal Aliens*].

Other estimates of the impact of illegal aliens in California suggest that in 1971, when 595,000 Californians were unemployed (7.4 percent of the State's labor force), there were between 200,000 and 300,000 illegal aliens employed in California earning approximately \$100 million in wages. *Hearings on Illegal Aliens* at 150.

Since the majority of Mexicans are unskilled or low skilled workers they tend to compete with Mexican-Americans, blacks, Indians, and other minority groups who, due to the declining percentage of jobs requiring low or no skills, are finding it increasingly difficult to obtain gainful employment. *Cramton Rpt.* at 12.

Illegal aliens compete for jobs with persons legally residing in the United States who are unskilled and uneducated and who form that very group which our society is trying to provide with a fair share of America's prosperity.

In addition, illegal aliens tend to perpetuate poor economic conditions by frustrating unionization, especially in such occupations as farm work.

Illegal aliens pose a potential health hazard to the community since many seek work as nursemaids, food handlers, cooks, housekeepers, waiters, dishwashers, and grocery workers. Immigration and medical officials in Los Angeles, for example, have discovered that the illegal alien population in Los Angeles' barrio is infected with a high incidence of typhoid, dysentery, tuberculosis, tapeworms, venereal disease and hepatitis. *L.A. Times*, Sept. 16, 1973, pt. II, at 1.

In some states illegal aliens abuse public assistance programs. In some instances entire families who en-

lured the country illegally have been admitted in the western states, states in California at 25, 32.

Another aspect of the problem created by illegal aliens is that employed aliens tend to send a substantial portion of their earnings in remittances or friends in Mexico. This outflow of United States dollars creates a balance of payments problem to the extent of \$1 billion a year. Hearings on Illegal Aliens, Vol. 3 at 55.

The net effect of this silent invasion of illegal aliens from Mexico is suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries.

THE LAW ENFORCEMENT PROBLEM

Given that illegal aliens are a significant problem in American life, especially for those minority groups who are considered as economically depressed, and that Congress has decided that all but a relatively few aliens are to be permanently excluded, then we must analyze what law enforcement problems exist. In this regard, the following findings of fact are made:

The illegal alien problem is one faced primarily in the Southwestern Region of the United States.

This problem along the Mexican-American border has existed for some time with the original responsibility for guarding the integrity of the border being assigned to the U.S. Army, along with the Department of Treasury and Labor, who had about 20,000 men assigned to the border between Brownsville, Texas, and San Diego, California, in 1922. National Geographic Magazine, "Along Our Side of the Mexican Border" (July, 1929).

Currently the burden of controlling the entry of aliens and stemming the flow of illegal aliens along the Mexican-American border is assigned to the INS.¹

This border extends for almost 2,000 miles from the Gulf of Mexico to the Pacific Coast.

Along this border there were over 152 million legal entries at authorized ports of entry during fiscal 1972, of which over 91 million were made by aliens, with over 39 million legal entries being made at the three ports of entry in Southern California (Calexico, San Ysidro and Tecate) of which over 24 million were made by aliens. Immigration and Naturalization Service, *1972 Annual Report*, 25.

Of these entries made by aliens, the large portion were made by visitors with official permission to enter the country who had been issued temporary "border passes" such as I-186 cards (issued to residents of Mexico), which authorize the holder to travel within an area no further than 25 miles from the border and for a period of time not to exceed 72 hours. See 8 C.F.R. § 212.6.

These temporary border passes (I-186) are issued to simplify procedures needed for entry, and the issuing process recognizes the inter-relationship of contiguous communities along both sides of the border. *Hearings on Illegal Aliens*, pt. 1, 192.

In fiscal 1973 approximately 208,000 I-186 cards were issued and it is estimated that over two million such cards are currently in circulation. *Hearings on Illegal Aliens*, pt. 1, 173.

Within the INS, the U.S. Border Patrol, which was first established in 1924, has the primary function of preventing the illegal entry of aliens and the

¹ The notation "INS" when used herein has reference to the Immigration and Naturalization Service.

apprehension of those who have entered illegally and those who smuggle these illegal entrants.

The Border Patrol has approximately 1,700 agents, who are well-trained law enforcement officers, and of these about 80 percent are assigned along our southern border with Mexico.

A "deportable alien" is a person who has been found to be deportable by an immigration judge, or who admits his deportability upon questioning by official agents.

The number of deportable aliens apprehended by the Border Patrol (which makes the great majority of apprehensions) nationally has grown from 38,861 during fiscal 1963 to 498,123 in fiscal 1973; of this number 128,889 were found by Border Patrol agents working in the Chula Vista sector which includes 70 miles of the border in San Diego County, and 23,125 were located by agents in the El Centro sector which includes the Imperial County of California and 75 miles of the Mexican-American border.

The Border Patrol agents have the power to apprehend illegal aliens since by regulation the Attorney General has designated Border Patrol agents to be immigration officers and authorized them to exercise powers and duties as such officers [8 C.F.R. § 103.1 (i)]; immigration officers have been given certain functions by statute § 101(a)(17) of the Immigration and Nationality Act of 1952, 66 Stat. 163; as amended by the Act of October 3, 1973, 79 Stat. 911, 8 U.S.C. § 1101(a)(17), which provides that an officer of the INS shall have the power, without a warrant, to stop and interrogate any alien or person believed to be an alien as to his right to remain or to be in the United States. See *Au Yi Lau v. I.N.S.*, 445 F. 2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864.

Sec. 287(a)(3) of the 1952 Immigration Act includes authority for an immigration officer within a

reasonable distance from the border of the United States to board and search any conveyance or vehicle; "reasonable distance" as used in that section of the Act means within 100 air miles from any external boundary of the United States, 8 C.F.R. § 287.1(b).

Immigration officers also are authorized to conduct inspection of aliens seeking admission or readmission to, or the privilege of passing through, the United States, and also are authorized and empowered to board and search any vehicle or like conveyance in which they believe aliens are being brought into the United States. Sec. 235(a) of the 1952 Immigration Act, 8 U.S.C. § 1525(a).

The deployment of Border Patrol agents along the border is intended to maximize the effectiveness of the limited number of personnel, with the first line of defense being called the "line watch." The line watch consists of agents being placed immediately upon the physical boundary where experience has shown that large numbers of illegal aliens can be detected attempting entry. A large number of agents so assigned are primarily concerned with responding to sensor alarms (electronic detection equipment) which are located at strategic positions. These agents also respond to citizen complaints concerning the suspected presence of deportable aliens.

In fiscal 1973, there were 175,511 deportable aliens apprehended throughout the nation by agents assigned to the line watch, with 69,147 being apprehended in the Chula Vista sector and 5,908 in the El Centro sector.

While the Border Patrol would like to apprehend all deportable aliens right on the border by agents on the line watch, inspections at regular points of entry are not infallible and illegal crossings at other than legal ports of entry are numerous and recurring with the maintenance of continuous patrol over these

vast stretches of the border in Southern California being physically impossible, for the approximately 145 miles of boundary creates physical barriers to effective patrol and man-made devices such as fences and electronic devices are in large part ineffective.

Increased manpower on line watch would not make that activity appreciably more effective as was demonstrated in 1969 during "Operation Intercept" wherein many more agents were stationed immediately on the border, and yet, the number of illegal aliens apprehended by agents operating inland was not significantly different from like periods when such additional manpower was not located at the boundary.

Once the aliens negotiate their way through the port of entry or walk across the border at a place other than an official port of entry, they find transportation inland either in public conveyances, or private vehicles with increasing numbers being transported by professional smugglers. A few have been known to walk some distance inland and be apprehended after having walked as far north as Julian, California, which is over 60 miles from the border.

After crossing the line watch some illegal aliens seek employment in the Southern District, but the vast majority attempt to proceed to Los Angeles County and further northward.

Once the illegal alien gets settled in a big city far away from the border it becomes very difficult to apprehend him, and, therefore, the Border Patrol attempts to contain the illegal entrant within this district. *Aliens in California* at 7. With this objective in mind, they have (pursuant to their statutory authority discussed above) established, since at least 1927, strategically located traffic inspection facilities, commonly referred to as checkpoints, on highways and roads, for the purpose of questioning vehicle occupants believed to be aliens, as to their right to be, or

to remain, in the United States, and also to search such vehicles for aliens illegally therein. Immigration and Naturalization Service, *Border Patrol Handbook* 9-1 (1972) [hereinafter cited as *Handbook*].

The primary objective of the checkpoints is to intercept vehicles or conveyances transporting illegal aliens, or nonresident aliens admitted with temporary border passing cards (Form I-186), with particular attention being paid to vehicles operated by smugglers or transporters destined for the interior in violation of 8 U.S.C. § 1324.

The selection of the location of a checkpoint is determined by factors relevant to the interdiction or interception of deportable aliens who have succeeded in gaining entry in an unlawful manner or are proceeding beyond the immediate border area in violation of conditions of their admission as border crossers, 8 C.F.R. § 212.60. The primary factors in selecting a checkpoint site are:

1. A location on a highway just beyond the confluence of two or more roads from the border, in order to permit the checking of a large volume of traffic with a minimum number of officers. This also avoids the inconvenience of repeated checking of commuter or urban traffic which would occur if the sites were operated on the network of roads leading from and through the more populated areas near the border.

2. Terrain and topography that restrict passage of vehicles around the checkpoint, such as mountains, desert, and as in the case of the San Clemente checkpoint, the Camp Pendleton Marine Base.

3. Safety factors: an unobstructed view of oncoming traffic, to provide a safe distance for slowing and stopping; parking space off the highway; power source to illuminate control signs and inspection area, and bypass capability for vehicles *not* requiring examination.

4. Due to the travel restrictions of the Form I-186 nonresident border crosser to an area 25 miles from the border (unless issued additional documentation) the checkpoints, as a general rule, are located at a point beyond the 25 mile zone in order to control the unlawful movement into the interior of such visitors, *Handbook*.

Strategic sites that meet the foregoing enumerated criteria are selected for "permanent checkpoints." These are sites equipped to handle a large volume of traffic on what would be a 24-hour basis except in case of manpower shortage, poor weather, or where traffic becomes excessive causing a potential safety hazard. *Handbook* at 9-3.

Other traffic checkpoints, known as "temporary checkpoints" are maintained on roads where traffic is less frequent. The placement of these sites will be governed by the same safety factors as involved in permanent site placement and are usually located where the terrain allows an element of surprise. Operations at these temporary checkpoints are set up at irregular intervals and intermittently so as to confuse the potential violator. *Handbook* at 9-3.

When the checkpoints, whether permanent or temporary, are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i.e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is heavy, as at the San Clemente checkpoint, the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens,

It may indicate violations, or merely state the vehicle through the checkpoint.

If after questioning the occupants the agent does believe that illegal aliens may be located in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling), he will inspect the vehicle by giving a primary visual inspection of three areas of the vehicle not visible from the outside (i.e., break, interior portion of window, etc.).

At the point of location of the alien now in regular use few aliens have reached the border on foot, with 99% having entered a vehicle of one type or another. Approximately 12% of all apprehensions of the possible aliens throughout the nation are made at checkpoints.

In the United States, during fiscal 1973, approximately 50,000 deportable aliens were apprehended by Border Patrol agents working traffic checking operations. In the Santa Yoba sector the number for that period was 2,540, while in the El Centro sector the total was 3,875. During fiscal 1973, a total of 4,870 of the above were victims apprehended at the checkpoints and a majority of these were those who were in violation of the terms of temporary border passes (Form I-326).

The placement of the checkpoints and their operations are coordinated between the law enforcement located in this district and with Border Patrol activities in the rest of Arizona. In actual operation the checkpoints, be they "permanent" or "temporary," have the same basic operating mode. Typically, about one-half mile to one mile south of the checkpoint is the first notice-

* Apprehensions include those actually made at the checkpoints as indicated by these figures, but they are a representation of the total activity of these checkpoints and the majority of apprehensions indicated therein are made at the checkpoints (A. T. 97A, 204).

tion that the checkpoint is ahead. The notice is in the form of a black on yellow sign indicating "STOP AHEAD" which has floodlights for nighttime illumination, *Handbook* at 9-9. Next, about 200 yards from the checkpoint is another sign cautioning the traffic to slow down or to be careful; this sign usually has flashing yellow lights attached. For the fifty yards directly south of the checkpoint there are placed traffic cones evenly spaced along each side of the highway. The actual checkpoint has a sign indicating to the traffic to stop, with official Border Patrol vehicles parked on each side of the stop zone showing the official Border Patrol emblem and/or the designation U.S. OFFICERS. At this point the agents assigned at the "point," in their official uniform, conduct checking and inspection operations. Beyond the checkpoint is usually a sign indicating "THANK YOU."

While a large number of apprehensions are made at the checkpoints each year, as related above, the primary reason for their operation is that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have, because they form an effective obstacle and are located on all major routes north out of the border region.

The deterrence aspect of these traffic checkpoint operations is amply demonstrated by the fact that the illegal alien has to resort to the employment of professional smugglers to provide transportation around or through these checkpoints.

Some of these smuggling operations have developed into sophisticated and involved operations with the following general *modus operandi*:

1. Contact is made between the smuggler and the alien prior to the latter's leaving Mexico.

2. The aliens then make entry on foot, with possibly the aid of a "guide," or by use of temporary border passes. Then they enter vehicles approximately 2 or 20 miles inland after having passed through the Border Patrol's line watch activities.

3. To get through the traffic checkpoint they might use a "drop house," which acts as a staging area to keep the aliens awaiting inclement weather, or any event that might cause the checkpoint to close down temporarily. Or, they may use a "decoy" vehicle, which is a vehicle loaded with illegal aliens which it is anticipated will be stopped at the checkpoint and would therefore occupy the agents so that other vehicles could pass through without inspection. They even use "scout cars" to probe those roads where temporary checkpoints are maintained, so as to advise other vehicles whether it is safe to proceed.

4. The "load" vehicles themselves can be of any type of conveyance and the methods used to secret aliens inside them are varied and often show some originality. Unfortunately, sometimes these are very dangerous to the aliens themselves, for it has been reported that it is not at all unusual for an alien to die from asphyxiation while concealed in an automobile trunk or a tank car.

5. The cost of the transportation provided to the aliens is approximately \$225 to \$250 for each alien for the trip through the checkpoint on to the Los Angeles area. Since smuggling operations are almost exclusively "cash and carry" businesses and the average income among Mexican nationals who may wish to seek residence here illegally is quite small, then this cost tends to act as a very significant deterrent in and of itself. The checkpoints are the major reason for such a high price and if they were discontinued for any length of time it would be one more encouragement to illegal immigration.

The deterrent impact of these checkpoints has been noted on several occasions when they resumed operation unexpectedly and a great number of aliens were apprehended.

The evidence presented before this court clearly establishes that there is no reasonable or effective alternative methods of detection and apprehension available to the Border Patrol, in the absence of the checkpoints for even a geometric increase in its personnel or line watch would not leave any control over those admitted as temporary visitors from Mexico.

Of the approximately half million illegal aliens apprehended in fiscal 1973, virtually none were prosecuted, unless they presented counterfeit or altered documents or aided in smuggling endeavors.

This district has only 3% of the total length of land borders, and yet, fully 30% of all apprehensions of deportable aliens made in the United States are made within this district.