

Border Searches: Beyond Almeida-Sanchez *

I. INTRODUCTION

Thousands of aliens illegally enter the United States each year by surreptitiously crossing the 2,000-mile United States-Mexico border.¹ The growing number of illegal aliens, coupled with this nation's high unemployment rate, has resulted in calls for a "crackdown" on illegal aliens.² The Government's efforts to stem the "silent inva-

*As this article goes to press, several significant cases were decided by the United States Supreme Court which will bear heavily on the subject discussed herein. While an extensive analysis of these recent cases is better left to another author, a brief note should be made of these important developments.

In *United States v. Peltier*, 43 U.S.L.W. 4919 (June 25, 1975) the Supreme Court refused to give retroactive application to the rule of *Almeida-Sanchez*. *Accord*, *Brown v. United States*, 43 U.S.L.W. 5024 (June 30, 1975).

In *United States v. Ortiz*, 43 U.S.L.W. 5026 (June 30, 1975) the Supreme Court held that *Almeida-Sanchez* applied to searches at fixed checkpoints. Thus the court upheld a Ninth Circuit decision invalidating a search at a fixed checkpoint, not the functional equivalent of the border, conducted without consent or probable cause.

In *United States v. Brignoni-Ponce*, 43 U.S.L.W. 5028 (June 30, 1975) the Supreme Court held that the United States Border Patrol could not stop a vehicle near the Mexican border and question its occupants about their right to be in this country when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. A reasonable suspicion, based on specific articulable facts, together with rational inferences, is required before stopping persons for questioning about their citizenship.

The opinions and reasoning of the Court are consistent with the analysis contained in this article.

¹In fiscal year 1973, 88% of the 655,968 deportable aliens apprehended in the United States were Mexican. Of the aliens who gained entry at points other than points of entry 99% traveled across the Mexican border. 1973 ATT'Y. GEN. ANN. REP. 151 [hereinafter cited as ANNUAL REPORT]; see Note, *The Aftermath of Almeida-Sanchez: Automobile Searches Take on a New Look*, 10 CAL. WEST. L. REV. 657 [hereinafter cited as *Note on Automobile Searches*]. An estimate by Mr. Leonard F. Chapman, Jr., Commissioner of the Immigration and Naturalization Service (INS) of the United States Department of Justice, places the number of aliens illegally residing in the United States between 5 and 7 million. U.S. NEWS AND WORLD REPORT, July 22, 1974, at 27. Commissioner Chapman went on to estimate that at the current rate of infiltration, in a few years we will have 15,000,000 or more, deportable aliens within our borders. *Id.*

²See statement of former Attorney General William Saxbe, *Sacramento Bee*, Oct.

sion"³ of aliens may imperil the Fourth Amendment rights of millions of people, aliens and United States citizens alike.⁴ Therefore, it is important to examine the conduct of immigration stops and searches, especially those made away from the international border.

Until *Almeida-Sanchez v. United States*,⁵ the Immigration and Naturalization Service operations for detecting illegal aliens in areas removed from the actual international boundary had never been scrutinized by the United States Supreme Court. But in that case the Court invalidated "roving patrol" searches of vehicles removed from the border where the searches were warrantless, without consent, and without probable cause.⁶ Lower courts have differed in their interpretation of *Almeida-Sanchez*.⁷ The Supreme Court has granted certiorari to resolve those conflicts and to deal with some of the problems left unanswered by the *Almeida-Sanchez* decision.⁸ This article explores those conflicts and suggests solutions to these and other "border search"⁹ problems. The article first discusses customs and immigration searches prior to the *Almeida-Sanchez* decision, then analyzes *Almeida-Sanchez* and subsequent cases.

31, 1974, at A7, col. 1. Deportable aliens who were employed at the time of apprehension numbered 238,030 in 1973. ANNUAL REPORT, *supra* note 1, at 151.

³See generally *United States v. Baca*, 368 F. Supp. 398, 402-03 (S.D. Cal. 1973). The *Baca* decision provides an interesting factual analysis of the illegal alien problem.

⁴For example, 250,000,000 persons were inspected at U.S. ports of entry during 1973. ANNUAL REPORT, *supra* note 1, at 150. This statistic does not include travelers stopped elsewhere than ports of entry. See *infra* note 100.

⁵413 U.S. 266 (1973).

⁶*Id.* A roving patrol search is a search initiated by officers traveling in a moving vehicle; it is to be distinguished from a search conducted at a stationary checkpoint. See text accompanying note 53 *infra*.

⁷See *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974), applying the *Almeida-Sanchez* reasoning to immigration stops. *Contra*, *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973). See also *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974) invalidating warrantless and causeless searches at permanent checkpoints. *Contra*, *United States v. Hart*, 506 F.2d 887 (5th Cir. 1975). These cases are discussed in text accompanying notes 94-125 *infra*.

⁸*United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974); *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974); *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 302 (1974); *United States v. Ortiz*, (9th Cir. unpublished memorandum), *cert. granted*, 95 S.Ct. 40 (1974).

⁹The term "border search" applies to searches both for contraband (customs searches) and for aliens (immigration searches) unlawfully entering the country. Strictly speaking, it refers only to searches conducted at an international boundary, although searches conducted elsewhere may be treated as border searches and are often referred to as such. See text accompanying note 27 *infra*. This article will discuss only those searches and stops that come under the rubric of border search. See *Illegal Aliens and Enforcement: Present Practices and Proposed Legislation* elsewhere in this volume for treatment of other searches for aliens.

II. CUSTOMS SEARCHES

A. SEARCHES AT THE BORDER

The Fourth Amendment protects the right to be free of unreasonable searches and seizures.¹⁰ As a general rule, police may conduct searches only when they possess a search warrant issued by a neutral magistrate after the latter has read a sworn affidavit based on probable cause.¹¹ Border searches conducted by customs and immigration officers are an exception to this rule, and require neither a warrant nor probable cause.¹² "Mere suspicion" is sufficient to justify a border search.¹³

This right to search has existed since the founding of our republic

¹⁰U.S. CONST. AMEND. IV provides:

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

¹¹Carroll v. United States, 267 U.S. 132, 161 (1925). In *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949), the Court stated that:

Probable cause [to arrest] exists where the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

For a search, the officer must have probable cause to believe that the item specified will be found in the place to be searched. *Cf. Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

¹²See *Witt v. United States*, 287 F.2d 389, 391 (9th Cir. 1961); *Kelly v. United States*, 197 F.2d 162 (5th Cir. 1952). A search that would be unreasonable if conducted in an ordinary case may be legitimate when undertaken by customs officers pursuing unlawfully imported merchandise. *Alexander v. United States*, 362 F.2d 379, 381-82 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

A principal justification for this exception has been found in the events surrounding the adoption of the Fourth Amendment. *See generally Note, Intrusive Border Searches — Is Judicial Control Desirable?*, 115 U. PA. L. REV. 275, 278 (1966) [hereinafter cited as *Note on Intrusive Border Searches*]; Barnett, *A Report on Search and Seizure at the Border*, 1 AM. CRIM. L.Q. 36 (Aug. 1963) [hereinafter cited as Barnett]. In the Act of July 31, 1789, the First Congress sitting in its first session, authorized customs officials to enter and search any vessel in which they had reason to suspect any contraband was concealed. Fifty-four days later the same Congress proposed the Bill of Rights to the states. 1 Annals of Cong. 88, 913 (1789). This sequence of events has traditionally been interpreted as demonstrating that Congress did not intend for the Fourth Amendment's prohibition against unreasonable searches to impair the ability of customs officers to search at the border. *See Carroll v. United States*, 267 U.S. 132, 150 (1925); *Boyd v. United States*, 116 U.S. 616, 623 (1886). *See also United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376 (1971); *United States v. Reidel*, 402 U.S. 351, 361 (1971) (dissenting opinion). No court has yet repudiated the historical argument although it has been challenged by commentators, e.g., *Note on Intrusive Border Searches*, *supra* this note, at 278; *Note, Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007, 1011 (1968) [hereinafter cited as *Note on Border Searches*].

¹³*Cervantes v. United States*, 263 F.2d 800, 803 n.5 (9th Cir. 1959) (dictum). *But cf. Henry v. United States*, 361 U.S. 98 (1959).

lic.¹⁴ Customs officials were then first authorized to stop, search and examine any vehicle, person or baggage introduced into the United States on the suspicion that contraband or merchandise that was subject to duty was being concealed.¹⁵ Current law maintains this customs search authority.¹⁶ Similar legislation authorizes customs officers to search any vehicle or vessel anywhere in the United States for contraband.¹⁷ Courts have construed the statutory language to apply solely to searches at the border,¹⁸ and even those searches have some restrictions.¹⁹ Within these limits, however, the courts have never challenged the constitutionality of searches at the border.²⁰

B. DEVELOPMENT OF "EXTENDED BORDER" SEARCHES

1. THE "BARRIER" CONCEPT

Customs searches without probable cause originally were conducted only at international boundaries.²¹ The border was regarded as a "barrier", and any physical intrusion beyond its boundary constituted a "completed entry."²² The barrier was located between the

¹⁴ Act of July 13, 1789, ch. 5, § 24, 1 Stat. 29, 43. For a discussion of the history of border search legislation, see Barnett, *supra* note 12.

¹⁵ Act of July 31, 1789, ch. 5, § 24, 1 Stat. 29, 43.

¹⁶ 19 U.S.C. § 482 (1970).

¹⁷ 19 U.S.C. § 1581(a) (1970).

¹⁸ *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

¹⁹ A border search must still meet the minimum Fourth Amendment standard of reasonableness. See *Denton v. United States*, 310 F.2d 129, 132 (9th Cir. 1962); Comment, *The Reasonableness of Border Searches*, 4 CAL. WEST. L. REV. 355 (1968). A search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intensity and scope. *Kremen v. United States*, 353 U.S. 346 (1957); *Rochin v. California*, 342 U.S. 165, 172 (1952); *Schmerber v. California*, 384 U.S. 757 (1964). See also *supra* note 13. More than mere suspicion is needed to justify an intrusive body search. See *Henderson v. United States*, 390 F.2d 805 (9th Cir. 1967) (vaginal search); *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966); *cert. denied*, 386 U.S. 945 (1967) (rectal search); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966) (stomach); *Huguez v. United States*, 406 F.2d 366 (9th Cir. 1969) (rectal search). This article will not discuss the intrusive body search cases.

²⁰ Note, *Judicial Limitations on Warrantless Border Searches Made Without Probable Cause Make Fourth Amendment Right of Travellers Uncertain*, 27 VAND. L. REV. 523, 523-25 (1974) [hereinafter cited as *Note on Judicial Limitations on Border Searches*]; Note *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y. U. J. INT'L. L. & POL. 93, 95 (1972) [hereinafter cited as *Note on Federal Customs & Immigration Border Searches*].

The Supreme Court has discussed two rationales for the constitutionality of the causeless customs searches: the historical rationale, discussed *supra* note 12 and in *Boyd v. United States*, 116 U.S. 616, 623 (1886), and the rationale of national self protection discussed in *Carroll v. United States*, 267 U.S. 132, 154 (1925).

²¹ See *Note on Judicial Limitations on Border Searches*, *supra* note 20, at 523.

²² *United States v. Yee Ngee How*, 105 F. Supp. 517, 523 (N.D. Cal. 1952). Customs agents could search defendant each time he disembarked a foreign

international border and this country's interior thoroughfares; within this area customs agents were empowered to search anyone on suspicion that a customs violation was taking place.²³ Once a person had completed entry into the country, officials needed probable cause to search.²⁴ Courts were hesitant to approve searches beyond the barrier.²⁵

2. THE ALEXANDER SEARCH

As the illegal traffic in goods began to increase, the barrier concept became incompatible with the needs of law enforcement.²⁶ Courts began to devise standards which allowed searches at a considerable distance from the international boundary.²⁷ Thus, the "elastic bor-

vessel to enter a United States port, for he passed a "barrier existing between the ship and the city." The court suggested that if the defendant passed through the barrier untouched and entered the city proper, probable cause would have been necessary to initiate a customs search.

²³Persons working within the barrier (e.g., longshoremen) were subject to customs searches regardless of whether they had ever crossed the international border. *United States v. Yee Ngee How*, 105 F. Supp. 517, 523 (N.D. Cal. 1952). *See also* *United States v. McGlone*, 394 F.2d 75, 79 (4th Cir. 1960).

Within the barrier, a general suspicion on the part of customs officers that smuggling was taking place was sufficient to support a search. Suspicion of the specific person searched was not required. *United States v. Yee Ngee How*, 105 F. Supp. 517, 522 (N.D. Cal. 1952). *See also* *Witt v. United States*, 287 F.2d 389, 391 (9th Cir. 1961), in which the court held that there was probable cause to search every person entering the United States, by reason of such entry alone.

²⁴*Carroll v. United States*, 267 U.S. 132 (1925); *see* cases cited *infra* note 25. This oft-cited dictum of *Carroll* was deemed controlling:

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belonging as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

267 U.S. at 153-54.

²⁵Searches conducted at considerable distances from the border were consistently invalidated. *See Note on Federal Customs and Immigration Border Searches*, *supra* note 20, at 95; *Contreras v. United States*, 291 F.2d 56 (9th Cir. 1961) (72 miles); *Plazola v. United States*, 291 F.2d 56 (9th Cir. 1961) (50-60 miles); *Cervantes v. United States*, 263 F.2d 800 (9th Cir. 1959) (70 miles). *But see* *Ramirez v. United States*, 263 F.2d 385 (5th Cir. 1959) (75 miles).

²⁶*See* Comment, *From Bags to Body Searches: The Law of Border Search*, 74 COL. L. REV. 53, 57 (1974) [hereinafter cited as *Comment on Border Search Law*]; *Note on Federal Customs and Immigration Border Searches*, *supra* note 20, at 98.

²⁷*Note on Judicial Limitations on Border Searches*, *supra* note 20, at 525; *Note on Federal Customs and Immigration Border Searches*, *supra* note 20, at 98. *See* *Alexander v. United States*, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S.

der" model, connoting a border area rather than a border line, replaced the barrier concept.²⁸

In *King v. United States*,²⁹ for example, the Ninth Circuit held that border searches would be upheld at points geographically removed from the border so long as it appeared that there had been no "change of condition" of the person or vehicle searched since its entry into this country.³⁰ *Alexander v. United States*³¹ refined the *King* rule by holding that if customs officers, by maintaining surveillance of a suspect, were able to show with "reasonable certainty" that contraband found during the search was in the vehicle at the time it crossed the border, a search based on unsupported suspicion was justified.³² The officer need not be reasonably certain that he would find contraband in the vehicle, but only that any contraband he did find had been in the vehicle when it crossed the border.³³ The *Alexander* search, in short, was a deferred assertion by the customs agent of his right to search any vehicle crossing the border.³⁴ Probable cause to search was required only when the government was unable to assert with reasonable certainty that conditions had not changed since crossing the border, an occasion which usually oc-

977 (1966); *King v. United States*, 348 F.2d 814, 816 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965).

²⁸"No customs search can be made precisely at the border. All must be made somewhere north of the border between Mexico and the United States." *Murgia v. United States*, 285 F.2d 14, 16 (9th Cir. 1960); *cert. denied*, 366 U.S. 977 (1961). *United States v. Yee Ngee How*, 105 F. Supp. 517, 523 (N.D. Cal. 1952) was dismissed as dictum in *Murgia*.

²⁹348 F.2d 814 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965).

³⁰*Id.* at 816.

³¹362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966).

³²*Id.* When the car in which defendant was riding appeared at the border, agents let it pass into the country. The vehicle was then followed and, except for a few minutes when it was lost from sight, was under constant surveillance until it was stopped and searched. The agent discovered heroin in a tool box. *Id.* at 380. The court stated:

The legality of the search (some distance from the border) must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States.

Id. at 382. In *Alexander*, the court held that because the vehicle searched had been kept under essentially constant surveillance, it was reasonably certain that the heroin found had been in the car when the vehicle passed the border. *Id.* at 382-83. See also *United States v. Mejias*, 452 F.2d 1190, 1192-93 (9th Cir. 1971); *United States v. Terry*, 446 F.2d 579 (9th Cir.), *cert. denied*, 404 U.S. 946 (1971); *Castillo-Garcia v. United States*, 424 F.2d 482, 484-85 (9th Cir. 1970).

³³See generally *Comment on Border Search Law*, *supra* note 26, at 58; *Note on Federal Customs and Immigration Border Searches*, *supra* note 20, at 58.

³⁴See *Comment on Border Search Law*, *supra* note 26, at 58.

curred when there was a break in surveillance.³⁵

3. THE WEIL SEARCH

In a second line of cases, the Ninth Circuit treated a search away from the border as a border search when it appeared with reasonable certainty that the vehicle searched contained either goods which had just been smuggled or a person who had just crossed the border illegally.³⁶ The leading Ninth Circuit case upholding this principle is *United States v. Weil*.³⁷ Unlike *Alexander*, *Weil* does not require the vehicle searched to have crossed the border.³⁸ In a sense, *Weil* enlarges the search power of customs officers, since a *Weil* search need not be predicated on a known border crossing. But the focus in *Weil* is upon the suspicion that a customs violation is taking place; customs agents must have a demonstrable and reasonably certain suspicion that a person or vehicle contains contraband before they may

³⁵*Id.* Where there was no surveillance to prove with reasonable certainty that no change of condition had occurred, the search was invalidated. *United States v. Garcia*, 415 F.2d 1141 (9th Cir. 1969) (20 miles, two hours after entry); *Valenzuela-Garcia v. United States*, 425 F.2d 1170 (9th Cir. 1970). *See also* *Castillo-Garcia v. United States*, 424 F.2d 482, 485 (9th Cir. 1970), in which surveillance was broken for periods not exceeding fifteen minutes. The fact that the discovered marijuana weighed 165 lbs., however, obviated any possibility that it had been placed in the vehicle after its entry into this country. And in *Leeks v. United States*, 356 F.2d 470 (9th Cir. 1966), customs agents, coordinated by radio, pursued the suspect in shifts. The court held that there was no break in the continuity of the project of officers following him. *See also* *United States v. Martinez*, 481 F.2d 214, 215-19 n.9 (5th Cir. 1973) (surveillance broken for 35 minutes; held inconsequential in view of fact that it took customs agents more than one hour to unload the 628 pounds of marijuana found in trunk).

³⁶Merchandise is frequently smuggled across the border to vehicles waiting on American soil. Because of this the "change of condition" limitation was thought too restrictive since it precludes searches of automobiles which had never crossed the border. *See* *United States v. Garcia*, 415 F.2d 1141 (9th Cir. 1968).

³⁷432 F.2d 1320 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971). Defendant Looper drove his auto into the United States from Mexico. A customs agent, whose suspicions were aroused by Looper's possession of a credit card issued in the name of another person, searched Looper's car but found no contraband. Later that same day the customs agent was notified that Looper had again re-entered the United States from Mexico. He was alone, his car contained no contraband. The customs agent drove his car along the only north-south road leading from the point of entry to a dirt road which paralleled the border. Fifty minutes after Looper's car left customs it emerged from the dirt road carrying Looper and another person, Weil. The car was stopped, and a search of the trunk revealed two suitcases containing marijuana.

³⁸The court held:

If customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle, whether the vehicle has itself crossed the border or not, . . . (or) if the agents are reasonably certain that a person has crossed the border illegally, and has entered a vehicle on this side of the border . . . they may stop and search the vehicle and person.

Id. at 1323.

initiate an extended border search.³⁹

The Fifth Circuit has not inquired into the condition of the vehicle at the time of entry relative to the time of search;⁴⁰ rather, the validity of an extended border search has turned on whether "the circumstances known to the officer"⁴¹ amounted to "reasonable cause to suspect"⁴² that a customs violation was taking place. Thus, as in *Weil*, the inquiry centers on the suspected commission of a smuggling offense. The "reasonable suspicion" standard, however, requires a lesser degree of certainty than the Ninth Circuit established for a *Weil* search.⁴³ Furthermore, unlike the Ninth Circuit, the Fifth Circuit's requirement of reasonable suspicion appears to also justify an *Alexander*-type search.⁴⁴

III. IMMIGRATION SEARCHES

A. DEVELOPMENT OF IMMIGRATION SEARCH POWERS

The government's power to conduct immigration searches developed quite differently than its customs counterpart. From the nation's founding, Congress authorized customs searches to protect the republic's boundaries.⁴⁵ In contrast, immigration laws with their attendant searches were a product of the social and economic conflicts that arose in the nineteenth century.⁴⁶ It was not until 1875 that immigration officials were authorized to search at the border for aliens seeking entry into the United States.⁴⁷ Moreover, while customs officials have had the power to search locations away from the border since 1789, it was not until 1946 that immigration officials

³⁹The "reasonable certainty" standard requires a showing greater than mere suspicion but less than probable cause. Observed suspicious activity in the vicinity of the border is fundamental to the formation of reasonable certainty. "A plausible explanation for unusual behavior in the absence of tangible proof to the contrary counterbalances suspicion, and may defeat the right to search." *Comment on Border Search Law*, *supra* note 26, at 64. *See Id.* for a thorough discussion of the *Weil* reasonable certainty standard. *See also* *United States v. Peterson*, 473 F.2d 874 (9th Cir. 1973).

⁴⁰*Davis v. United States*, 431 F.2d 693 (5th Cir. 1970); *Marsh v. United States*, 344 F.2d 317 (5th Cir. 1965); *Mansfield v. United States*, 308 F.2d 221 (5th Cir. 1962); *Ramirez v. United States*, 263 F.2d 385 (5th Cir. 1969); *United States v. Rodriguez*, 195 F. Supp. 513 (S.D. Tex. 1960).

⁴¹*Marsh v. United States*, 344 F.2d 317, 325 (5th Cir. 1965).

⁴²*Valdez v. United States*, 358 F.2d 721, 722 (5th Cir. 1966).

⁴³*See Comment on Border Search Law*, *supra* note 26, at 65-67.

⁴⁴*Id.*

⁴⁵*See supra* note 14.

⁴⁶*See Note on Federal Customs and Immigration Searches*, *supra* note 20, at 103; Higham, *Immigration Policy in Historical Perspective*, 21 *LAW. & CONTEMP. PROB.* 213 (1956).

⁴⁷Act of March 3, 1875, ch. 141, § 5, 18 Stat. 477. In 1917 immigration officers were authorized to board and search all conveyances entering the United States. Act of February 5, 1917, ch. 29, § 16, 39 Stat. 874, 876, *as amended*, 8 U.S.C. § 1225(a) (1970).

could search vehicles "within a reasonable distance from an external boundary."⁴⁸ The Attorney General has defined "reasonable distance" as within 100 air miles of any external boundary.⁴⁹ In 1952 Congress granted immigration officers the authority "to have access [without a warrant] to private lands, but not dwellings", within twenty-five miles of any external border.⁵⁰

Acting under statutory authority,⁵¹ immigration officers conducted searches without probable cause⁵² by utilizing (1) permanent checkpoints on heavily traveled roads, (2) temporary checkpoints on less traveled highways, and (3) roving patrols in areas between the checkpoints.⁵³ The federal courts had consistently sustained these types of warrantless and causeless searches for aliens away from the border.⁵⁴ The courts did not require even a "reasonable suspicion" that an immigration violation was taking place.⁵⁵ The vehicle search authority of immigration officers, however, was limited to searching for aliens.⁵⁶ Border patrol agents could search only those parts of the vehicle large enough to conceal aliens.⁵⁷ Only customs agents were empowered to search vehicles for illegally imported contraband.⁵⁸

B. THE MERGER OF IMMIGRATION AND CUSTOMS AUTHORITY

In 1971, immigration searches and customs searches were merged when Border Patrol agents became empowered to act also as customs

⁴⁸ Immigration and Nationality Act, § 287(a)(3), Act of Aug. 7, 1946, ch. 768, 60 Stat. 865, *as amended*, 8 U.S.C. § 1357(a)(3) (1970):

Any officer or employee of the (Immigration and Naturalization) Service . . . shall have the power without warrant . . . within the reasonable boundary of the United States, to board and search for aliens any . . . vehicle for the purpose of patrolling the border to prevent the illegal entry of aliens in the United States . . .

⁴⁹ 8 C.F.R. § 287.1(a)(2) (1964). It is anomalous that the Executive could adopt regulations excusing a warrant leading to prosecution when it does not have the power to issue such warrants. *See Mancusi v. De Forte*, 392 U.S. 364, 371 (1968).

⁵⁰ Act of June 27, 1952, ch. 9, 66 Stat. 163, *as amended*, 8 U.S.C. § 1357(a)(3) (1970).

⁵¹ 8 U.S.C. § 1357(a)(3) (1970). *See supra* note 48.

⁵² *Duprez v. United States*, 435 F.2d 1276 (9th Cir. 1970); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969).

⁵³ *See Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973).

⁵⁴ *See, e.g., United States v. Thompson*, 475 F.2d 1359 (5th Cir. 1973); *Fumagalli v. United States*, 429 F.2d 1011 (9th Cir. 1970).

⁵⁵ Immigration officers were permitted to stop automobiles at random. *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963); *Renteria-Medina v. United States*, 346 F.2d 853 (9th Cir. 1965); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969).

⁵⁶ 8 U.S.C. § 1225(a) (1970).

⁵⁷ *United States v. Lujan-Romero*, 469 F.2d 683 (9th Cir. 1972); *Valenzuela-Garcia v. United States*, 425 F.2d 1170 (9th Cir. 1970); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969).

⁵⁸ 19 U.S.C. § 482 (1970).

officers.⁵⁹ Problems then arose concerning the standards for determining the validity of searches by Border Patrol agents. Causeless searches for aliens were permitted within one hundred miles of the border;⁶⁰ however, searches for contraband made away from the border were permitted only under the "reasonable certainty" standard discussed above.⁶¹ With both the powers of a customs and immigration officer, these agents could use immigration search authority as a pretext for a customs search.⁶² Using his immigration officer's authority, an agent could stop without cause any vehicle within one hundred miles of the border and search any area where an alien might be found. While searching for aliens, the agent might develop reasonable suspicion or probable cause to believe that contraband is hidden in the car. The agent could then switch to his customs authority and make a more thorough search of the vehicle. Even without suspicion, the immigration officer searching for aliens could arrest a person for possession of contraband discovered in plain view.⁶³ Despite criticism from commentators⁶⁴ and dissenting judges⁶⁵ these dual role searches were consistently approved by the courts.⁶⁶

IV. ALMEIDA-SANCHEZ V. UNITED STATES

In 1973 the Supreme Court placed limitations on roving patrols and extended border searches by its decision in *Almeida-Sanchez v.*

⁵⁹36 Fed. Reg. 13410 (1971). See *United States v. Thompson*, 475 F.2d 1359, 1362-63 (5th Cir. 1973) outlining the basis of this authority. For cases upholding the right of immigration officers to act simultaneously as customs agents, see *United States v. Wright*, 476 F.2d 1027 (5th Cir.), cert. denied, 414 U.S. 821 (1973); *United States v. Bird*, 456 F.2d 1023 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973); *United States v. Maggard*, 451 F.2d 502 (5th Cir. 1971), cert. denied, 405 U.S. 1045 (1972).

⁶⁰See text accompanying notes 48-49 *supra*.

⁶¹*Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969).

⁶²In upholding this vast power of Border Patrol officers the Fifth Circuit Court of Appeals explained:

While the Border Patrol agents did not have authority to search the contents of the bags under immigration laws . . . they were empowered under the circumstances to search the bags under the authority of the customs laws. It appears that the Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer. The agents testified that they had planned to wear their immigration hats that night, but we find nothing in the statutes that would preclude them from later donning their customs hat during a proper border search.

United States v. McDaniel, 463 F.2d 129, 133-34 (5th Cir. 1972).

⁶³See *Harris v. United States*, 390 U.S. 234 (1968).

⁶⁴See *Note on Federal Customs and Immigration Border Searches*, *supra* note 20; *Note on Border Searches*, *supra* note 12; *Note, Search and Seizure at the Border — The Border Search*, 21 RUTGERS L. REV. 513 (1967).

⁶⁵See *United States v. Almeida-Sanchez*, 452 F.2d 459, 461 (9th Cir. 1971) (Browning, J., dissenting), *rev'd.*, 413 U.S. 266 (1973).

⁶⁶See *United States v. Thompson*, 475 F.2d 1359 (9th Cir. 1973); *United States v. McDaniel*, 463 F.2d 129 (5th Cir. 1972), cert. denied, 413 U.S. 919 (1973);

United States.⁶⁷ The United States Border Patrol, conducting a "roving" check, had stopped Almeida-Sanchez, who was driving on a state highway in California about 25 miles from the Mexican border. There was no warrant, nor was there probable cause to believe that he was concealing illegal aliens. After determining he was legally within the United States, the Border Patrol agent thoroughly searched the automobile and uncovered 161 pounds of marijuana. On appeal of his conviction for illegally transporting marijuana, the Court, in a 4-1-4 decision, held that a "roving search" made without probable cause or consent violates the Fourth Amendment.⁶⁸

Justice Stewart's plurality opinion rejected all of the Government's asserted justifications for the roving search. The automobile search exception⁶⁹ clearly did not apply because there was no probable cause.⁷⁰ The opinion also rejected the Government's reliance on administrative inspection cases, which permit a standard of less than probable cause to implement the enforcement of health and welfare regulations.⁷¹ Administrative searches require either an area warrant or consent,⁷² and neither was present in this case.⁷³ The Government's primary argument, that the roving patrol was authorized under 8 U.S.C. § 1357(a)(3)⁷⁴ (allowing searches for aliens within a reasonable distance of the border), also failed to win the Court's approval.

All the justices recognized the validity of a warrantless or causeless search at the border or at the functional equivalent of the border.⁷⁵ They also agreed that the instant search was not a border search.⁷⁶

United States v. De Leon, 462 F.2d 170 (5th Cir. 1972); *Fumagalli v. United States*, 429 F.2d 1011 (9th Cir. 1970).

⁶⁷413 U.S. 266 (1973).

⁶⁸The Ninth Circuit opinion affirming the defendant's district court conviction was thus reversed. *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971), *rev'd*, 413 U.S. 266 (1973).

⁶⁹*See Carroll v. United States*, 267 U.S. 132 (1925); *Chambers v. Maroney*, 399 U.S. 42 (1970); *see also Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

⁷⁰413 U.S. at 268.

⁷¹*See Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

⁷²*See also United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

⁷³*But see* Justice Powell's concurring opinion, discussed *infra*, text accompanying note 80, indicating that a roving search based on an area warrant should be upheld.

⁷⁴*See supra* note 46 for the text of the statute.

⁷⁵413 U.S. at 272. The plurality cited as a specific example of a functional equivalent of the border a search made of cargo and passengers of an airplane arriving in a United States city non-stop from a foreign embarkation point. An established traffic checkpoint, by contrast, might be a functional equivalent. *Id.* at 273. The court indicated that a functional equivalent might exist where three factors are present: (1) an established checking station, (2) situated near the border, (3) at a confluence of roads leading directly from the border. *Id.*

⁷⁶*Id.* at 273-75.

The plurality, however, maintained that §1357(a) cannot authorize searches made away from the border or its functional equivalent; §1357(a)(3) was not exempt from the constitutional requirement that a search be based on probable cause.⁷⁷ The court deemed controlling the *Carroll* distinction⁷⁸ between warrantless searches at the border and searches in the interior which require probable cause. While not holding §1357(a)(3) unconstitutional per se, the *Almeida-Sanchez* decision found that the statute could not be constitutionally applied to roving searches unless probable cause existed; a probable cause requirement was grafted onto the statutory provision.⁷⁹

Justice Powell's concurring opinion stressed that the legitimate need of the government to enforce the immigration laws must be reconciled with the strictures of the Fourth Amendment.⁸⁰ While Justice Powell agreed with the plurality that the search in *Almeida-Sanchez* was unconstitutional, he suggested that roving searches would be constitutional if based upon search warrants issued on probable cause to believe that aliens are in the general area specified.⁸¹ According to Justice Powell, the probable cause requirement for area search warrants would be satisfied by information about the general area, without specific knowledge of particular automobiles or persons therein.⁸² He suggested that an area warrant based on the reputation, geographic characteristics and extensiveness of the area, the proximity of the area to the border, and the probable degree of interference with the rights of innocent persons would be constitutional.⁸³ Justice Powell's argument placed heavy reliance on the administrative search cases.⁸⁴ He justified his "functional equivalent of probable cause" by pointing to the consistent judicial approval of non-border searches, the absence of a reasonable alternative for the solution of this serious problem, and the modest intrusion on those whose automobiles are searched.⁸⁵

Justice White, writing the dissent, agreed that Justice Powell's area warrant would be sufficient to uphold searches by roving patrols.⁸⁶ He argued, however, that Justice Powell and the majority were wrong in holding that §1357(a)(3) was unconstitutionally applied.⁸⁷ Jus-

⁷⁷*Id.* at 272.

⁷⁸*See supra* note 24.

⁷⁹This is also the view of the Fifth and Tenth Circuit Courts of Appeal in interpreting *Almeida-Sanchez*. *United States v. Byrd*, 483 F.2d 1196 (1973); *United States v. King*, 485 F.2d 353 (10th Cir. 1973).

⁸⁰413 U.S. at 282.

⁸¹*Id.* at 282-84.

⁸²*Id.* at 283-84.

⁸³*Id.*

⁸⁴*See supra* notes 70-71.

⁸⁵413 U.S. 266, 279.

⁸⁶*Id.* at 288.

⁸⁷*Id.* at 288-89.

tice White noted that the Court has applied a broad Fourth Amendment reasonableness standard where statutes authorized the challenged searches.⁸⁸ Moreover, the statute under scrutiny in *Almeida-Sanchez* represented the Congress' considered judgment that proper enforcement of the immigration laws requires random searches of vehicles without a warrant or probable cause within a reasonable distance of the international border.⁸⁹ Congress' judgment that the statute comported with the Fourth Amendment's reasonableness standard, combined with the traditional sanctioning of these searches by the circuit courts of appeal, made the dissenters unwilling to invalidate the search.

V. THE AFTERMATH OF ALMEIDA-SANCHEZ

After *Almeida-Sanchez* it was clear that roving patrol searches, made without a warrant or any reason to suspect the presence of concealed aliens, are unconstitutional when not made at the border or its functional equivalent. The decision, however, left several questions unanswered and resulted in conflict⁹⁰ among the circuits most concerned with border search problems.⁹¹

A. FIXED CHECKPOINTS

The *Almeida-Sanchez* decision dealt with "roving searches"; it specifically reserved the question of whether a causeless search, conducted at a fixed checkpoint not the functional equivalent of the

⁸⁸The dissent viewed the illegal alien problem as similar to gun control in *United States v. Biswell*, 406 U.S. 311 (1972) and liquor control in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1972) and would allow a warrantless search without probable cause as those cases did.

⁸⁹413 U.S. at 291.

⁹⁰In *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974), the Ninth Circuit held that stops at fixed checkpoints must be based on a "founded suspicion." *Contra*, *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973). The United States Supreme Court will be deciding this case in the near future.

Perhaps the most immediate question arising from *Almeida-Sanchez* is whether or not the decision should be given retroactive effect. In *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974), the Fifth Circuit held that *Almeida-Sanchez* should not have retrospective application. But in *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 302 (1974), the Ninth Circuit, by a 7-6 majority, decided that the *Almeida-Sanchez* rule should be applied to cases pending on appeal when the Supreme Court decision was announced. The Tenth Circuit also has applied *Almeida-Sanchez* to pending cases in which the search occurred prior to the decision in *Almeida-Sanchez*. See *United States v. King*, 485 F.2d 353, 359 (10th Cir. 1973); *United States v. Maddox*, 485 F.2d 361, 363 (10th Cir. 1973). The retroactivity issues are beyond the scope of this article.

⁹¹The Fifth, Ninth and Tenth Circuits handle the vast majority of border search cases.

border, violates the Constitution.⁹² Some recent court of appeal decisions have held such searches unconstitutional.⁹³ For example, in *United States v. Bowen*,⁹⁴ evidence of drug smuggling violations was discovered during a routine search for illegal aliens of a camper truck at a permanent border patrol checkpoint located approximately 36 air miles and 49 highway miles north of the Mexican border. The Ninth Circuit Court of Appeals, *en banc*, overturned the defendant's conviction, holding that *Almeida-Sanchez* applies to fixed checkpoint searches.⁹⁵

Although *Almeida-Sanchez* did not present a question of a fixed checkpoint search,⁹⁶ traditional Fourth Amendment standards should apply to fixed checkpoint searches as well as to roving searches.⁹⁷ Being "red-lighted" to the side of the road may be more traumatic to the average traveler than being required to stop at a well-lighted fixed checkpoint.⁹⁸ Also, fixed checkpoints may argu-

⁹²Justice Powell's concurring opinion and Justice White's dissent explicitly excluded permanent checkpoints from the purview of the *Almeida-Sanchez* decision. 413 U.S. at 275-76.

⁹³*United States v. Speed*, 497 F.2d 546 (5th Cir. 1974); *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974). In both *United States v. King*, 485 F.2d 353 (10th Cir. 1973) and *United States v. Maddox*, 485 F.2d 361 (10th Cir. 1973), the Tenth Circuit Court of Appeals invalidated a warrantless search, without probable cause, of an automobile at a fixed checkpoint, unless a search at that checkpoint could be deemed the functional equivalent of a border search. Both cases were remanded to the district court for determination of that issue.

But see *United States v. Hart*, 506 F.2d 887 (5th Cir. 1975) where a panel of the Fifth Circuit upheld a permanent checkpoint search that was not based upon probable cause. In a short opinion the court distinguished the case at bar from *Almeida-Sanchez* saying, "a permanent checkpoint does not have the constitutionally frightening aspect of a roving patrol" and "permanent checkpoints present less of an opportunity for abuse of discretion on the part of border patrol agents." *Id.* at 895. *But see* text accompanying notes 96-115 *infra*. The court also justified its decision by pointing to the "reasonableness" of the permanent checkpoint, equating reasonableness with the concept of functional equivalency of the border, 506 F.2d at 895-96. The location of the permanent checkpoint in that case, however, may indeed make it the functional equivalent of the border, as defined by *Almeida-Sanchez*.

⁹⁴500 F.2d 960 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974).

⁹⁵*Id.*

⁹⁶*United States v. Almeida-Sanchez*, 413 U.S. 266, 275-76, 288 (1973).

⁹⁷*But cf.* *United States v. Hart*, 506 F.2d 887 (5th Cir. 1975), *supra* note 93.

⁹⁸Warning signals usually alert the traveler to the presence of a checkpoint up ahead. *See* *United States v. Baca*, 368 F. Supp. 398, 407 (S.D. Cal. 1973). The checkpoint is manned by a uniformed, armed Border Patrol officer standing in the middle of the highway. *Id.* As the decelerating, oncoming vehicles approach the officer's position, he visually determines whether or not to refer the vehicle to the secondary position off the highway for interrogation and search. *Id.* at 406. In *United States v. Baca* the court found that at the San Clemente checkpoint, for example, "the average motorist is stopped" although it may be "nothing more than a fleeting stop . . ." *Id.* at 415. The Border Patrol calls the initial stop that takes place in the middle of the highway the "point stop". *Id.* at 406-07. The direction off the highway for further interrogation is called the "secondary stop".

ably offer less discretion to officers since they often involve a stop of every vehicle passing through them.⁹⁹ But the initial stop at a fixed checkpoint, even if less intrusive,¹⁰⁰ should not be the focus of inquiry; instead, attention should be directed to the subsequent search. A search at a fixed checkpoint is of the same scope and intensity as one conducted by a roving patrol. In either situation trunks are opened and occupants must usually disembark.¹⁰¹ The actual search, then, is no less intrusive when conducted at a fixed checkpoint than when it is initiated by a roving patrol. Thus, merely because the search occurs at a fixed checkpoint should not be enough to exempt it from the probable cause standard.¹⁰²

Even conceding that a fixed checkpoint search might be considered less of an intrusion on travelers than a roving patrol search, there is no indication in the *Almeida-Sanchez* opinion that Fourth Amendment standards should be suspended for searches at fixed checkpoints.¹⁰³ Judicial decisions upholding automobile stops for the purpose of checking drivers' licenses and registration are inapposite.¹⁰⁴ These cases were not an adequate ground for sustaining the search in *Almeida-Sanchez* and cannot serve to adequately distinguish a fixed checkpoint search from a roving patrol search.¹⁰⁵

⁹⁹See 413 U.S. at 268.

¹⁰⁰One might argue that roving checkpoint operations located in remote areas close to the border are less intrusive to motorists than checkpoint stops and searches since in the latter situation more of the traveling public may be required to submit to the Border Patrol's operations. For example, it is estimated that ten million vehicles pass through the San Clemente, California checkpoint each year. *United States v. Martinez-Fuerte*, slip opinion, No. 74-2462, (9th Cir. March 5, 1975) at 7.

¹⁰¹See, e.g., *United States v. Cantu*, 504 F.2d 387, 388 (5th Cir. 1974) where a search at a temporary checkpoint resulted in the vehicle's occupants getting out of the car while its back seat was removed and the trunk opened.

¹⁰²See *supra* note 11.

¹⁰³See *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); cf. *United States v. Bowen*, 500 F.2d 960, 964 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974).

¹⁰⁴See, e.g., *United States v. Croft*, 429 F.2d 884, 886 (10th Cir. 1970); *People v. Washburn*, 265 Cal. App. 2d 665, 71 Cal. Rptr. 577, 581 (2d. Dist. 1968); *State v. Smolen*, 4 Conn. Cir. 385, 232 A.2d 339 (App. Div.), *petition for certification for appeal denied*, 231 A.2d 283 (Conn. 1967), *cert. denied*, 389 U.S. 1044 (1968); *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968). *But see Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973).

¹⁰⁵In rejecting the government's reliance on driver's license decisions the court in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974) said:

For example, in *Lipton v. United States*, in which this court upheld a stop by a motorcycle police officer of a youth driving an automobile, we reasoned that there was no way for a police officer to determine that a driver had a valid license permitting him to operate a motor vehicle other than by stopping him and asking him to produce his license. We noted: "* * * A contrary holding would render unenforceable the State statute requiring that automobile drivers be licensed." We are not persuaded that laws prohibiting illegal immigration will be rendered similarly unenforceable should we deny to

Similarly, the administrative search cases¹⁰⁶ do not provide justification for a warrantless, causeless search at a fixed checkpoint. *Camara v. Municipal Court* requires that a warrant be issued even in the administrative context of housing code inspections.¹⁰⁷ Moreover, in upholding statutorily authorized administrative inspections of commercial enterprises, the Supreme Court has emphasized that one who engages in a heavily regulated enterprise assumes both the burdens and benefits of the trade.¹⁰⁸ Although travelers on highways within this nation's borders are licensed and regulated, they are not engaged in such heavily regulated or heavily licensed trades as those in the administrative search cases; they are simply exercising their constitutional right to travel.¹⁰⁹ Furthermore, searches for aliens and their transporters have many of the same characteristics that are found in strictly "criminal" proceedings.¹¹⁰ The relaxed suspicion standards of an administrative search, therefore, should not apply. Finally, one of the primary justifications for allowing the administrative search in *Camara* was that it was the only way to enforce the housing codes.¹¹¹ By contrast, the Border Patrol has numerous alternatives to their use of warrantless and causeless searches at checkpoints that are not the functional equivalent of the border.¹¹²

B. INVESTIGATIVE STOPS

As a practical matter, the operations of Border Patrol agents usually involve a two-step process: (1) the initial stop to investigate a traveler's¹¹³ right to be in the United States, and (2) if probable cause develops during the interrogation, a search of the vehicle and its occupants.¹¹⁴ *Almeida-Sanchez* dealt with 8 U.S.C. §1357(a)(3) which related to searches for illegal aliens; it did not address subsection (a)(1) of that statute authorizing immigration officers, without warrant or probable cause, "to interrogate any alien or person be-

the government the power to stop and search automobiles, without probable cause or warrant, at fixed checkpoints. [citations omitted].

See also text accompanying notes 112, 140 *infra*.

¹⁰⁶ *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967).

¹⁰⁷ *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹⁰⁸ *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

¹⁰⁹ *See Carroll v. United States*, 267 U.S. 132 (1925); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

¹¹⁰ See text accompanying notes 140-48 *infra*.

¹¹¹ 387 U.S. 523 (1967); and see text accompanying notes 103-05 *supra*.

¹¹² See text accompanying notes 175-81 *infra* for a discussion of other methods of enforcing the immigration laws.

¹¹³ Since most non-border immigration stops involve occupants of vehicles, this article directs its attention to vehicular travelers; thus, much of the discussion in this section is inapplicable to pedestrians who enter the United States.

¹¹⁴ *Cf. supra* note 98.

lieved to be an alien as to his right to remain in the United States.”¹¹⁵ Subsection (a)(1) deals with the first part of the two-step process: the initial stop.

1. RECENT CASES

In *United States v. Brignoni-Ponce*¹¹⁶ the defendant was driving in the early morning darkness near the San Clemente border patrol checkpoint located midway between San Diego and Los Angeles. The checkpoint was closed due to inclement weather, but two Border Patrol agents were sitting in a vehicle observing northbound traffic on the interstate highway. The officers observed that the people inside defendant's car appeared to be of Mexican descent. The agents pursued and stopped the car. The sole basis for the stop, according to the agents, was that the occupants appeared to be of Mexican descent. The passengers in the vehicle could not speak English very well and could give no proof of their citizenship. The occupants, along with the defendant driver, were arrested. The Ninth Circuit reversed the defendant's conviction for transporting aliens, holding that warrantless stops of vehicles, “without probable cause and without even a reasonable suspicion that any of the occupants are illegal aliens,” are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*.¹¹⁷

The court acknowledged that *Almeida-Sanchez* involved a search rather than a stop, but held that the Supreme Court's opinion in that case “reflects at least as much concern with the initial stop as with the search.”¹¹⁸ The court concluded that a warrantless stop of a vehicle is permissible only if the officers possess facts constituting a “founded suspicion,”¹¹⁹ not rising to the level of probable cause to arrest, that the individual detained is illegally in the country.¹²⁰

The Ninth Circuit decision accords with a District of Columbia

¹¹⁵ 8 U.S.C. § 1357(a)(1) (1970).

¹¹⁶ 499 F.2d 1106 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974).

¹¹⁷ *Id.* at 1111. The court first held that while this search was conducted near a fixed checkpoint, it was more characteristic of a roving search than a fixed checkpoint search. Thus, the retroactivity rule of *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 302 (1974) applied.

¹¹⁸ 499 F.2d 1109, 1111 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974).

¹¹⁹ The founded suspicion standard is met when there are present articulable facts and circumstances which support the conclusion that the intrusion was not unreasonable. *United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973).

¹²⁰ The founded suspicion approach has been applied in numerous Ninth Circuit cases. See *Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); *United States v. Ward*, 488 F.2d 162 (9th Cir. 1973); *United States v. Mora-Chavez*, 496 F.2d 1181 (9th Cir. 1974); *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974). *But see United States v. Byrd*, 483 F.2d 1196 (5th Cir. 1973) (rejecting a stop on anything less than probable cause). See also *Note on Judicial Limitations on Border Searches*, *supra* note 20, at 530.

Circuit case,¹²¹ but it expressly rejects the Tenth Circuit's holding in *United States v. Bowman*.¹²² In *Bowman*, the Tenth Circuit approved a stop under §(a)(1) noting that the "constitutionality of the provision had been consistently upheld."¹²³ In addition, the court noted, brief detentions of a motorist for the purpose of determining his nationality had also been upheld.¹²⁴ The court did not read the *Almeida-Sanchez* decision as "challenging the right of immigration officials to make routine inquiries as to an individual's nationality;"¹²⁵ thus, it upheld the agents' causeless stop to determine the defendant's citizenship.

2. FOUNDED SUSPICION TO STOP

This writer contends that *Bowman* should be rejected and a standard of founded suspicion be required to stop a moving automobile to determine its occupants' rights to be in this country.¹²⁶ Even if one assumes that Congress intended to authorize causeless investigative stops under 8 U.S.C. 1357(a)(1), *Almeida-Sanchez* teaches that this immigration statute is not exempt from the purview of the Fourth Amendment.

Some seizures of a person based on less than probable cause are constitutional. In *Terry v. Ohio*,¹²⁷ the United States Supreme Court upheld a stop of a stationary pedestrian based on a reasonable suspicion that "criminal activity was afoot." *Adams v. Williams*¹²⁸ applied *Terry* to the seizure of an occupant of a parked car. While "not all personal intercourse between policemen and citizens involves 'seizures' of persons,"¹²⁹ *Terry* makes clear that the Fourth Amendment's prohibition against unreasonable searches and seizures regu-

¹²¹ The Court of Appeal for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purpose of interrogation under circumstances creating a reasonable suspicion, not rising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau v. United States Immigration and Naturalization Service*, 445 F.2d 217 (D.C. Cir. 1971) (later vacated as to one party only), *cert. denied*, 404 U.S. 864 (1971). The reasonable suspicion standard used in *Au Yi Lau* appears to be the equivalent of the Ninth Circuit's "founded suspicion."

¹²² 487 F.2d 1229 (10th Cir. 1973).

¹²³ *Id.* at 1231. See *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963); *United States v. Correia*, 207 F.2d 595 (3rd Cir. 1953); *United States v. Montez-Hernandez*, 291 F. Supp. 712 (E.D. Cal. 1968).

¹²⁴ *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961).

¹²⁵ 487 F.2d 1229, 1231 (10th Cir. 1973).

¹²⁶ The United States Supreme Court will likely decide this issue on certiorari in *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974).

¹²⁷ 392 U.S. 1 (1968).

¹²⁸ 407 U.S. 143 (1972).

¹²⁹ *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

lates automobile stops.¹³⁰ In considering a policeman's encounter with a stationary pedestrian, the *Terry* Court said that a seizure occurs whenever a policeman, by "physical force or show of authority"¹³¹ restrains an individual's "freedom to walk away."¹³² One note writer suggests that if such is the case, then a seizure of the person may be defined as a "restraint on an individual's liberty of movement."¹³³ A stationary individual has not been seized unless he is detained.¹³⁴ A stop of a moving automobile, on the other hand, inevitably restrains a motorist's freedom of movement so that a seizure takes place whenever a policeman directs that the vehicle be stopped.¹³⁵

The seizure of a moving automobile on highways within this country's borders violates a motorist's expected right to be let alone and the right of uninterrupted freedom of movement.¹³⁶ The privacy expectation of a motorist is greater than that of a pedestrian or an occupant of a stationary car due to the vehicle's movement and enclosed nature.¹³⁷ Moreover, while anyone can interrupt the movement of a slowly moving individual (for example, another pedestrian), only police can stop a moving automobile.¹³⁸ The privacy expectations of motorists demand no less than the protection afforded by *Terry*; the reasonable suspicion standard mandated in *Terry* should be the minimum required to sustain automobile stops to question suspected illegal aliens.¹³⁹

One may not escape a "reasonable"¹⁴⁰ or "founded" suspicion requirement by arguing that stops under the authority of subsection 1357(a)(1) are not for the purpose of criminal investigation.¹⁴¹ There are two purposes for these investigatory stops: (a) to locate aliens and deport them,¹⁴² and (b) to detect, arrest and prosecute alien

¹³⁰ For an excellent discussion of non-arrest automobile stops, see Note, *Non-arrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1973) [hereinafter cited as *Note on Automobile Stops*].

¹³¹ *Terry v. Ohio*, 392 U.S. 1, 6-7 (1968).

¹³² *Id.* at 19, n.16.

¹³³ *Note on Automobile Stops*, *supra* note 130, at 866-67.

¹³⁴ *Id.* See also *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

¹³⁵ *Note on Automobile Stops*, *supra* note 130, at 866-67.

¹³⁶ *Cf.* *Carroll v. United States*, 267 U.S. 132, 154 (1925); *Katz v. United States*, 389 U.S. 347 (1967); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹³⁷ See *Note on Automobile Stops*, *supra* note 130, at 878-79.

¹³⁸ *Id.* at 876; *cf.* *United States v. Jackson*, 423 F.2d 506 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970).

¹³⁹ One commentator suggests that probable cause be the rule for automobile stops. See *Note on Automobile Stops*, *supra* note 130.

¹⁴⁰ See *Terry v. Ohio*, 392 U.S. 1, 29-32 (1968); text accompanying note 119 *supra*.

¹⁴¹ *But cf.* the concurring opinion of Justice Powell in *Almeida-Sanchez v. United States*, 413 U.S. 266, 278 (1973).

¹⁴² "The primary objective of the checkpoint is to intercept vehicles . . . transporting illegal aliens, or non-resident aliens with temporary border passing cards

smugglers and repeat-violator aliens.¹⁴³ If a car contains illegal aliens, the driver may be prosecuted under a felony statute and subjected to five years imprisonment for each alien transported.¹⁴⁴ Border patrol agents regard themselves as law enforcement agents rather than administrative officials;¹⁴⁵ moreover, even when not charged with a crime, an illegal alien entrant is given much the same treatment as an accused criminal.¹⁴⁶ Furthermore, unlike *Camara*, where criminal prosecution was the rare exception, the operations of the Border Patrol result in thousands of criminal prosecutions each year.¹⁴⁷ Because immigration stops are criminal in nature, the degree of suspicion required for them should be no less stringent than that required in *Terry*.¹⁴⁸

Should a standard higher than founded suspicion be required to justify a stop? Even though a motorist has a great expectation of

(I-186), with particular attention being paid to vehicles operated by smugglers or transporters destined for inland cities in violation of 8 U.S.C. Section 1327." *United States v. Baca*, 368 F. Supp. 398, 406 (S.D. Calif. 1973).

¹⁴³ *Id.*

¹⁴⁴ 8 U.S.C. § 1324(a)(2) (1970).

¹⁴⁵ Deputy Chief Border Patrol Agent of the Chula Vista section testified at the hearing in *United States v. Baca*, 368 F.2d 398 (S.D. Cal. 1973) that border patrol officers:

- (1) are trained in the use of firearms,
- (2) are law enforcement officers and not mere administrative clerks, and
- (3) are uniformed with a revolver at the waist.

Reporter's Transcript at 255-56, 289.

¹⁴⁶ When an arrest is made at a checkpoint of an illegal alien, the alien is immediately advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Reporter's Transcript at 395, *United States v. Baca*, 368 F.2d 398 (S.D. Cal. 1973). Also:

With the arrest of a smuggler for prosecution, all of the aliens must be held as material witnesses. See *United States v. Carrillo-Frausto*, 500 F.2d 234 (9th Cir. 1974). To these material witnesses who are not officially charged with any crime, the fact that they are jailed, wear prison clothing, shackled with handcuffs and chains when they come to court, and imprisoned alongside convicted felons and others accused of serious felonies, it makes little difference whether the label for processing be termed criminal or administrative. The result is the same — they are treated like criminal defendants.

Brief for Respondent at 28, *United States v. Ortiz* (9th Cir. unpublished memorandum), *cert. granted*, 95 S.Ct. 40 (1974). See *Hurtado v. United States*, 410 U.S. 578 (1973); Henry, *The Wetback as a Material Witness; Pre-Trial Detention or Deposition*, 7 CAL. WEST. L. REV. 175 (1970).

¹⁴⁷ In 1973 INS officers presented about 40,000 cases to United States Attorneys for prosecution, and prosecution was authorized in about 40% of the cases. *Hearing Before Subcommittee on Immigration, Citizenship, and International Law of the Committee on the Judiciary House of Representatives*, 93rd Cong., 1st Sess., 288 (Sept. 1973). *But cf.* Justice Powell's concurring opinion in *Almeida-Sanchez*, where he noted that only three percent of the aliens caught are prosecuted, thus distinguishing immigration searches from "fishing expeditions." 413 U.S. 266, 278. Justice Powell conceded, however, the prosecution rate is no comfort to those aliens who are prosecuted. *Id.*

¹⁴⁸ *Terry v. Ohio*, 392 U.S. 1 (1968).

privacy, the stopping of a motorist is less intrusive than a search. Probable cause is too high a burden to place on Border Patrol officers because they are stopping only to interrogate.¹⁴⁹ The Ninth Circuit's requirement of founded suspicion, based on a balancing approach,¹⁵⁰ is sound.¹⁵¹ Since stops at fixed checkpoints lack the trauma of a roving patrol and are conducted under circumstances evidencing the officer's authorization, founded suspicion should be a sufficient basis to stop and interrogate. Founded suspicion also strikes an appropriate balance for roving patrol stops; the stopping officer must have articulable facts to justify his intrusion on the motorist's rights, yet the government will not have to meet the stringent probable cause standards when attempting to make a limited inquiry.

Certainly no less than founded suspicion should be required of a stop. Allowing stops not based on an articulated evidentiary foundation of illegal conduct leaves the decision of whom to subject to interrogation completely within the discretion of Border Patrol agents, who may exercise that discretion improperly. For example, stops and interrogations may, and often are, based primarily on skin color.¹⁵² This creates a great potential for discrimination against the millions of American citizens and residents of Latin American descent. At present, there are no statutory or administrative regulations stating criteria for making stops and inquiries.¹⁵³ Requiring founded suspicion will eliminate the ability of immigration officers to stop anyone, anywhere,¹⁵⁴ simply on the basis of a hunch or the color of someone's skin. Adopting the founded suspicion requirement, moreover, may partially resolve the problem of the dual authority of Border Patrol officers.¹⁵⁵ A Border Patrol officer would no longer be able to make a causeless immigration stop as a prelude to an intended customs search. In sum, founded suspicion would be a less burdensome standard for the Border Patrol to meet than probable cause but would still protect travelers against indiscriminate stops.

¹⁴⁹ *But cf. supra* note 139.

¹⁵⁰ See *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

¹⁵¹ See *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir.), *cert. granted*, 95 S.Ct. 40 (1974); *Au Yi Lau v. United States*, 445 F.2d 217 (D.C. Cir. 1971) (later vacated as to one party only), *cert. denied*, 404 U.S. 864 (1971).

¹⁵² See *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir.), *cert. granted*, 95 S.Ct. 40 (1974). In *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973), "looking like an alien" was held not to be a fact providing founded suspicion to stop.

¹⁵³ See Brief for Respondent at 54, *United States v. Ortiz* (9th Cir. unpublished memorandum), *cert. granted*, 95 S.Ct. 40 (1974).

¹⁵⁴ By its terms, 8 U.S.C. § 1357(a)(1) (1970) does not limit authority to interrogate to a reasonable distance from the border or 100 air miles.

¹⁵⁵ See text accompanying notes 59-66 *supra*.

C. THE VITALITY OF *ALEXANDER* AND *WEIL*

Another question is the vitality of the *Alexander* and *Weil* line of cases after *Almeida-Sanchez*.¹⁵⁶ Those cases upheld searches away from the border if there was no change of condition after the vehicle crossed the border or if there was a reasonable certainty that the vehicle searched contained a person who had just crossed the border illegally.¹⁵⁷ Recently, the Fifth Circuit, in *United States v. Steinkoenig*,¹⁵⁸ upheld a search of a vehicle located six miles from the border, based on reasonable suspicion that a customs violation was taking place.¹⁵⁹ The vehicle had been parked next to the border and had been under surveillance since that contact with the border.¹⁶⁰ Although the opinion did not directly discuss *Almeida-Sanchez*, it cited *Alexander* as well as other pre-*Almeida-Sanchez* decisions upholding searches where the suspects came in contact with the border and the search was conducted close to the international boundary.¹⁶¹

*United States v. Bowen*¹⁶² more directly addressed upholding the validity of the *Alexander* and *Weil* rules in the wake of *Almeida-Sanchez*. The Ninth Circuit opinion held that the checkpoint in question was not the functional equivalent of the border, but suggested that the *Alexander* and *Weil* cases might be additional examples of functional equivalents, where searches based on less than probable cause would be upheld.¹⁶³ Although the searches conducted in *Alexander* and *Weil* were not conducted at the border, they were still directly related to a recent entry.¹⁶⁴ By defining a search at a func-

¹⁵⁶ See text accompanying notes 31-39 *supra*.

¹⁵⁷ *Id.*

¹⁵⁸ 487 F.2d 225 (5th Cir. 1973). The search took place fifteen minutes after the vehicle had been parked along the Rio Grande River. Surveillance was instigated on the basis of an informer's tip. *Id.* at 228.

¹⁵⁹ *Id.* at 228.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 227-28.

¹⁶² 500 F.2d 960 (9th Cir. 1974), *cert. granted*, 95 S.Ct. 40 (1974).

¹⁶³ A functional equivalent of the border was described thus:

(If) a search takes place at a location where virtually everyone searched has just come from the other side of the border, the search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search.

Id. at 966.

The search in *Bowen* lacked the vital connection between the vehicle stopped and the recent crossing of an international border since several significant population centers and highways, including a major east-west freeway, were between the checkpoint and the border. Thus, under these circumstances, the court found the border patrol agents had no reason to believe that virtually all or even most of the cars passing through their checkpoint had recently, or ever, crossed the border. *Id.*

¹⁶⁴ *Id.*

tional equivalent of the border as one where there is a "vital connection between the vehicle stopped and a reasonable certainty, or even a probability, that its contents had crossed an international border," the opinion indicated that the *Alexander* and *Weil* line of cases still have vitality and that those types of searches would be upheld under the functional equivalent of the border concept.¹⁶⁵

The Ninth Circuit's classification of an *Alexander*-type search as a functional equivalent of a border search makes sense if viewed as merely a deferral of the right to search at the border.¹⁶⁶ Similarly, if there is a reasonable certainty that persons have just crossed the border illegally and entered a vehicle, even if the crossing were not actually observed, the suspects' contact with the border should properly establish the nexus with the border to permit the application of the border search exception. For example, if a Border Patrol officer observes people wearing wet clothing driving away from the Rio Grande River, it seems reasonable to allow the agent to invoke the border search exception and search on less than probable cause.¹⁶⁷ As reasonable as the *Weil* line of cases is, though, it cannot truly be said to be within the Supreme Court's definition of functional equivalent of the border;¹⁶⁸ a *Weil* search need not take place at "an established checking center located at a confluence of roads" leading from the border.¹⁶⁹ But the Court may have intended its definition of a functional equivalent of the border to be broader than the examples suggested in *Almeida-Sanchez*. If that is so, the Court is more likely

to expand its definition of the functional equivalent of the border than it is to strike down the *Weil* and *Alexander* cases.¹⁷⁰

D. AREA SEARCH WARRANTS

1. WARRANTS TO SEARCH

Justice Powell's concurring opinion in *Almeida-Sanchez* suggested that roving patrol searches would be constitutional if based upon area search warrants issued on probable cause to believe that aliens

¹⁶⁵ *Id.* Cf. also *United States v. Anderson*, 509 F.2d 724 (9th Cir. 1975) where the court found that because of the number of men entering and leaving an automobile after it had entered the country, and due to breaks in surveillance, a search approximately 25 miles from the border could not be justified under *Alexander*. *Id.* at 726. Similarly, there was no reasonable certainty that the contraband had just crossed the border illegally. *Id.*

¹⁶⁶ See *supra* text accompanying note 34.

¹⁶⁷ These facts would certainly constitute a founded suspicion which would validate a stop of the vehicle. See *supra* text accompanying notes 126-55.

¹⁶⁸ See *supra* note 75.

¹⁶⁹ *Id.*

¹⁷⁰ For a good discussion of other aspects of the *Weil* and *Alexander*-type searches, see *Comment on Border Search Law*, *supra* note 26, at 68.

are in the area specified.¹⁷¹ Despite its apparent support by a majority of the Court,¹⁷² the soundness of Justice Powell's proposal is questionable. Justice Powell's support for area search warrants stems from consistent judicial approval, the absence of a reasonable alternative, and the modest intrusion on those whose vehicle is searched.¹⁷³ The bases for Justice Powell's conclusion that the balance tips in favor of the government need to be examined.

"Consistent judicial approval" of roving searches is a weak foundation on which to support Justice Powell's suggestion. The simple approval of roving searches by lower courts does nothing to bolster the constitutionality of those searches; the consistent approval of such roving searches would seem to indicate that the courts which have acquiesced therein have simply concluded that the balance must be struck in favor of the government.¹⁷⁴ The *Almeida-Sanchez* decision casts doubt on the wisdom of that prior judgment by the lower courts.

Justice Powell doubts there is a reasonable alternative for the solution of this serious problem, but numerous constitutional approaches exist to aid the INS to prevent illegal entries along our borders. Searches are allowed at the border and its functional equivalents (including *Weil* and *Alexander* searches).¹⁷⁵ Stops for interrogation on grounds amounting to founded suspicion are also permitted.¹⁷⁶ In addition, the INS has put into use electronic sensors along the northern and southern borders.¹⁷⁷ Also, cooperation with other law enforcement agencies results in the apprehension of thousands of illegal aliens each year.¹⁷⁸ Furthermore, the INS could assign to the border

¹⁷¹ 413 U.S. 266, 279 (1973); see text accompanying note 81 *supra*.

¹⁷² The four dissenters in *Almeida-Sanchez*: Chief Justice Burger and Justices White, Blackmun, and Rehnquist made clear their support for Justice Powell's suggestion. 413 U.S. 266, 288. Two of the majority might also support such a search. *Id.* at 270, n. 3.

¹⁷³ *Id.* at 279.

¹⁷⁴ See Leahy, *Border Patrol Checkpoint Operation Under Warrants of Inspection: The Wake of Almeida-Sanchez v. United States*, 5 CAL. WEST. INT. L.J. 62, 64 (1975) [hereinafter cited as Leahy]. Whether roving patrols, or checkpoints, have enjoyed a history of acceptance comparable in length to that of the building inspections involved in *Camara v. Municipal Court* is open to debate. For an argument that they have not, see Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L.J. 355, 361-62 (1974).

¹⁷⁵ See text accompanying notes 156-70 *supra*.

¹⁷⁶ See text accompanying notes 116-25 *supra*.

¹⁷⁷ The Border Patrol has installed electronic detection equipment in certain active areas along the border to signal intrusions. Department of Justice, 1973 ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE (1973), at 9. These sensors along with other mechanical devices were responsible for detecting nearly 80,000 illegal aliens in 1973. See Note on *Automobile Searches*, *supra* note 1, at 668, n. 67.

¹⁷⁸ In 1973, 68,231 violators of immigration laws were turned over to the INS by other law enforcement agencies. ANNUAL REPORT, *supra* note 1, at 151.

many of its officers who are now stationed at checkpoints far removed from the international boundary.¹⁷⁹ And, most importantly, legislation can be passed that would make it a crime to knowingly employ illegal aliens.¹⁸⁰ This list of possibilities is not exhaustive.¹⁸¹ It is clear, though, that there are numerous alternatives to extended border searches based on area warrants.

Justice Powell's third justification, the "limited intrusion on those whose automobiles are searched," likewise is unfounded. The search of a car is a great intrusion;¹⁸² the legitimate need of the government does not minimize the intrusiveness of the search.

Even if Justice Powell's foundation were sound, his area search warrant proposal runs the risk of reinstating pre-*Almeida-Sanchez* searches.¹⁸³ A primary purpose of requiring a neutral magistrate to issue warrants is to protect individuals from arbitrary searches.¹⁸⁴ Generally, the person or object to be seized must be described with such particularity that the officer charged with the execution of the warrant will be left with no discretion regarding the person searched or the property seized.¹⁸⁵ The great flexibility in Justice Powell's probable cause standard, however, increases the parameters in which an officer can search. When a magistrate issues an area search warrant, all he is deciding is that a particular area is suspicious. Under Powell's proposal, the official executing an area warrant need not articulate any further facts to indicate why he stopped and searched particular automobiles. Instead of protecting individuals from arbitrary searches, the area warrant would protect the officer from being accountable for his decisions to search once the warrant has been issued.¹⁸⁶

¹⁷⁹ "Only thirty officers are devoted to patrolling the entirety of the California-Mexican border on a typical day. At the same time, forty-seven officers are needed for the daily operation of the San Clemente checkpoint which is but one of nine checkpoints in California." Brief for Respondent at 40, *United States v. Ortiz* (9th Cir. unpublished memorandum), *cert. granted*, 95 S.Ct. 40 (1974).

¹⁸⁰ The "Rodino Bill", H.R. 982, 93rd Cong. 1st Sess. (1973) which makes it a crime to knowingly employ an illegal alien, passed the House of Representatives and moved to the Senate Judiciary Committee. 119 Cong. Rec. 8309 (daily ed. May 7, 1973). California attempted to solve the problem locally by enacting a statute making it a crime to employ an illegal alien in the state. This statute was held unconstitutional in *DeCanas v. Bica*, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974).

¹⁸¹ The court in *United States v. Martinez-Fuerte*, slip opinion, (No. 74-2462) (9th Cir. March 5, 1975) at 18-19 lists even more possibilities.

¹⁸² See text accompanying note 101 *supra*.

¹⁸³ *Note on Automobile Searches, supra* note 1, at 662-75 contains an excellent discussion of the Powell concurring opinion and its problems.

¹⁸⁴ See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

¹⁸⁵ See generally, La Fave, *The Course of True Law * * * Has Not * * * Run Smooth*, 1966 U. ILL. L.J. 255, 268.

¹⁸⁶ See generally, *Note on Automobile Searches, supra* note 1, at 667.

2. WARRANTS TO STOP

Warrants to stop were issued in the Southern District of California in June of 1974.¹⁸⁷ Under these warrants the Border Patrol's authority was limited to stopping vehicles for routine inquiry concerning nationality. Any search of an automobile must still be based on independent facts learned by the officer which would constitute probable cause.¹⁸⁸

Although one commentator supports these warrants since they are restricted to "stop and inquiry,"¹⁸⁹ this author suggests that they suffer from the same defects as the area search warrants. Issuing a warrant to "stop and inquire" still leaves to the patrolman all of the decisions that should be made by the magistrate. The officer still does not have to demonstrate any suspicion about the particular car being stopped.¹⁹⁰ Any traveler within the area prescribed by the warrant may be stopped at the whim of the officer. Thus, even an area warrant limited to stop and inquiry provides no protection to travelers; on the contrary, the area warrant insulates the decisions of the officer from the scrutiny of the magistrate.

A recent decision by a Ninth Circuit panel endorses the view that area warrants to stop are unconstitutional.¹⁹¹ In *United States v. Martinez-Fuerte*, the court invalidated a "warrant of inspection" authorizing stops at the San Clemente, California checkpoint.¹⁹² In *Martinez-Fuerte*, the defendant's car was stopped at the checkpoint and the defendant was instructed to drive off the highway to a secondary inspection area where an agent questioned him and his two passengers about their right to be in the United States. The defendant produced identification showing him to be lawfully within the United States, but his two passengers admitted being illegally within this country. The court overturned the defendant's conviction for illegally transporting aliens because it found neither probable cause nor founded suspicion for the stop and inquiry.¹⁹³ The inspection warrant was invalidated because it did not contain specific and articulable facts that would justify the stopping of the defendant's

¹⁸⁷ The first area search warrants for illegal aliens were issued in the Southern District of California by Hon. Magistrate Edward A. Infante. Warrants of Inspection, dated June 22 and June 27, 1974. Later renewals of the warrant deleted the authority to "inspect" (search) and limited agents to the stop and inquiry procedure. *United States v. Martinez-Fuerte*, slip opinion (9th Cir. March 5, 1975), at n.3. The warrants have been renewed continuously for 10 day periods. *Id.* at 6.

¹⁸⁸ See Leahy, *supra* note 174, at 69.

¹⁸⁹ *Id.*

¹⁹⁰ *Cf.* text accompanying notes 184-86 *supra*.

¹⁹¹ *United States v. Martinez-Fuerte*, slip opinion (9th Cir. March 5, 1975).

¹⁹² *Id.*

¹⁹³ *Id.* at 10-11.

car.¹⁹⁴ Furthermore, the warrant lacked the mediating judgment of a neutral and detached magistrate because it authorized border patrol agents to stop all cars and to detain for interrogation certain cars at their discretion.¹⁹⁵ The court likened the San Clemente warrant of inspection to the infamous writs of assistance, general warrants which were considered “ ‘the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book’; since they placed ‘the liberty of every man in the hands of every petty officer.’ ”¹⁹⁶ Finally, in invalidating this particular area warrant the opinion rejected Justice Powell’s area search warrant suggestion, using much the same grounds suggested above.¹⁹⁷

Although the *Martinez-Fuerte* court indicated its disapproval of area warrants, it still may be possible to issue a proper area warrant. As one author suggests,¹⁹⁸ if area warrants are to be used, more facts than just the general characteristics of the area should be required to justify the stopping of a particular automobile at a particular time.¹⁹⁹ Facts should be known that would focus suspicion on a particular auto. In addition to knowledge of the area, recent time-related information should be required.²⁰⁰ There must be suspicion that illegal activity is presently going on in the particular area. The use of electronic sensors, for example, could meet this requirement.²⁰¹ With a warning by the sensors, combined with the factors Justice Powell recommended,²⁰² a warrant might be obtained for a specific region likely to be traveled at that time by persons who triggered the sensors.²⁰³ Armed with this warrant, officers could, by way of roving patrol or temporary checkpoint, make limited interrogation of the occupants of vehicles traveling through the specified area. An in-

¹⁹⁴ *Id.* at 12-14.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, quoting from *Boyd v. United States*, 116 U.S. 616, 624 (1886).

¹⁹⁷ *Id.* at 14-18.

¹⁹⁸ *Note on Automobile Searches*, *supra* note 1.

¹⁹⁹ *Note on Automobile Searches*, *supra* note 1, at 663-69.

²⁰⁰ *Id.*

²⁰¹ *Id.*; see also *supra* note 171.

²⁰² The following relevant factors were suggested for consideration in issuing warrants:

- (1) frequency with which the aliens are known or reasonably suspected to be transported in a given area;
- (2) the proximity of the area to the border;
- (3) the geographic characteristics and physical extensiveness of the area, including the number of roads therein and how often they are used;
- (4) the probable degree of interference with the lives of innocent travellers, determined by the proportion of aliens to general traffic, and the scope and duration of the proposed search.

413 U.S. at 283-84.

²⁰³ To save time, arrangements can be made for magistrates to issue warrants orally.

former's tip, also, might suffice to trigger the issuance of an area warrant.

Time-related information may be enough to trigger an area warrant that is supported by other factors, but there is a question whether there is much utility in seeking such warrants at all. The triggering information discussed above serves to focus suspicion on a particular vehicle. It would make more sense to simply apply the founded suspicion requirement and eliminate the attempt to particularize an otherwise vague warrant.²⁰⁴ Unless the warrant, with its time-related information, could be said to be based on information amounting to founded suspicion, the warrant may still be too vague to pass constitutional muster.

VI. CONCLUSION

Almeida-Sanchez signaled a new era for searches away from the border. In placing limits on roving patrol searches, *Almeida-Sanchez* invoked the *Carroll* dictum that "those lawfully within the country . . . have a right to free passage without interruption or search. . . ." There is a continuing tension, however, between efforts to stem the influx of illegal aliens and the precepts of *Carroll* and *Almeida-Sanchez*. As a result, there is uncertainty concerning the precise bounds of allowable enforcement activity away from the border.

The need to enforce the immigration laws cannot be disputed; the increasing number of illegal aliens inside our borders constitutes a national problem. But the notion that law enforcement needs alone justify intrusions on Fourth Amendment rights was put to rest by *Almeida-Sanchez*. Despite the enforcement problems encountered by immigration officials, those lawfully within the country should be protected against unwarranted governmental intrusions. As this article has suggested, it is possible to enforce the immigration laws without depriving individuals of their Fourth Amendment protections. Legislation to prevent the employment of illegal aliens is but one possibility. The Ninth Circuit's requirement of founded suspicion to stop and interrogate suspected aliens likewise serves to protect travelers without unduly hampering law enforcement. Hopefully, the United States Supreme Court will strike a similar balance. To do otherwise may signal a retreat from the principles of *Carroll* and *Almeida-Sanchez* and may subject millions of travelers to undue deprivations of their rights of privacy and free passage.

Paul Rosenthal

²⁰⁴ See, e.g., *United States v. Rodriguez-Alvarado*, 510 F.2d 1063 (9th Cir. 1975) where the triggering of a sensor device was an important element contributing to a finding of founded suspicion.