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Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment

AUSTIN T. FRAGOMEN, JR.*

Love ye therefore the stranger

DEUTERONOMY 10:19

We are commanded to honor and fear our parents. We are commanded to obey the prophets. A man may honor and fear and obey without loving. But in the case of strangers we are commanded to love them with the whole force of our heart's affection.

MAIMONIDES

INTRODUCTION

Peoples, races and groups have been in movement as far back as history records; they have drifted from place to place as a result

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of armed conflict, conquests, famines, the opening of new territory and the changing of economic and climatic conditions.¹ Whereas the migratory behavior of early peoples may be characterized as "nations, races and clans in motion,"² recent immigration to the United States has increasingly become identified with individuals and families propelled to our melting pot as a result of adverse economic currents in their homelands. The immigrant could be loosely defined as the "economic refugee."³ His incentive in migrating to the United States is to pursue the great American dream of success and self-betterment through diligence and perseverance. He wishes to extricate himself from desperate and hopeless poverty in a cultural and economic context which affords no opportunity for advancement. He wishes to embark upon a new life in America, the land of opportunity.

Our economy has traditionally served as a giant magnet drawing the less fortunate from all over the world. The incentive to come is great. Expense, temporary personal hardship or even peril are no deterrent. Once the alien makes the determination that he must come to the United States, desire turns to compulsion, and if he cannot immigrate lawfully pursuant to the restrictive and complex provisions of the amended Immigration and Nationality Act, (hereinafter referred to as the Act) he explores other possibilities of migration.⁴ He may attempt to enter the United States surreptitiously across the Mexican or Canadian border; he may seek a tourist visa or temporary work visa misrepresenting his intention

1. For analysis of contemporary migration movements of peoples as a result of civil turmoil, war, pestilence and oppression, see FRAGOMEN, *The Refugee: A Problem of Definition*, 3 CASE W. RES. J. INT'L L. 45 (1970).

2. 14 ENCYCLOPEDIA AMERICANA 713-15 (Americana Corp. Chicago, Ill. 1957).

3. For discussion of the concept of the new migrant as an "economic refugee," see A. FRAGOMEN, *THE ILLEGAL ALIEN: CRIMINAL OR ECONOMIC REFUGEE* (Monogram, Center for Migration Studies 1973).

4. The Immigration & Nationality Act, as amended, 8 U.S.C. §§ 1001 *et seq.* (1970) permits immigration to the United States of persons who have close family relations (United States citizen or permanent resident alien) and job skills in short supply. In 1965, the traditional system of "sponsorship" by an interested party in the United States was abolished. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911, amending 8 U.S.C. § 1151 (1964).

For a general flavor of the complexity of the law, see I, II & III C. GORDON & H. ROSENFELD, *IMMIGRATION LAW & PROCEDURE* (rev. ed. 1975).

to be a bona fide visitor; in conjunction with his tourist visa application, he may present false evidence of financial support, false evidence of employment or false letters of invitation from non-existent relatives; he may "purchase" a fake passport bearing a counterfeit visa; he may come as a crewman aboard a ship and, when granted shore leave, never return to the vessel.⁵

Essentially, new migrants fall into two categories, persons who immigrate lawfully as permanent resident aliens and persons who are in the United States without proper documentation. In the latter category are (a) persons who enter the United States lawfully as visitors, temporary workers, students, or in other valid nonimmigrant categories, and subsequently violate the conditions of their admission by accepting unauthorized employment, or remaining in the country beyond the period of time authorized by the Immigration and Naturalization Service, (hereinafter referred to as the Service), (b) persons who enter the United States by avoiding or evading the normal inspectional process at a designated point of entry, and (c) persons who gain entrance through the use of fraudulent documents. These persons are termed "illegal aliens", "illegal migrants", or more properly, "aliens without proper documentation."⁶ Approximately 450,000 aliens lawfully immigrate to the United States each year.⁷ There are no precise statistics available as to the number of aliens without proper documentation who enter the country each year. However, the Service located approximately 800,000 deportable aliens in the United States during fiscal year 1974.⁸

The Service estimates that at the present time there are approximately 12 million aliens without proper documentation.⁹ Obviously, this creates a monumental law enforcement problem. Aliens without proper documentation are literally everywhere. Not only

5. For detailed analysis of the current stimulus to migrate to the United States and the myriad methods, both lawful and unlawful, for doing so, see *Hearings on Illegal Aliens, Before the Subcomm. on Immigration, Nationality and International Law of the House Comm. on the Judiciary*, 92d, 93d & 94th Congs. (1972-75).

6. "Illegal alien" is a particularly imprecise term since it connotes unlawful entry into the United States. Consequently, in the interest of clarity, this term will be avoided. The concept of an "illegal migrant" is rooted in the belief that in spite of an absence of proper immigration status, the majority of the undocumented aliens are here to remain since the Immigration & Naturalization Service does not have the wherewithal to remove them.

7. See 1967-74 INS ANN. REP.

8. 1974 INS ANN. REP.

9. U.S. NEWS & WORLD REPORT, July 22, 1974, at 27.

do they permeate the area near the Mexican border, but they are located in metropolitan areas throughout the country. Since the majority of these aliens are from countries where a language other than English is the native tongue, and since many of them are foreign in appearance, for instance Latin-Americans who ethnically have a mixture of native Indian lineage, Orientals, etc., there is a great predilection on the part of the government to concentrate law enforcement efforts on segments of the populace manifesting these characteristics. Since United States citizens of such minority groups are often down-trodden themselves, there is no hue and cry concerning the government's questionable police tactics.

Thus, juxtaposed are the interest of the society as a whole to stem the flow of aliens without proper documentation and the right of all persons—the citizen, the permanent resident alien, and the alien without proper documentation—to be free from abhorrent police practices characteristic of a totalitarian state. Striking the proper balance is a delicate procedure. Individuals' rights must be observed, but, at the same time, the enforcers of the law must not be rendered impotent.

The presence of great numbers of aliens without proper documentation within the United States is a phenomenon of current vintage, dating to the Act of October 3, 1965,¹⁰ which for the first time imposed numerical limitations upon Western Hemisphere immigration. That Act restructured immigration to permit only persons with close family relations and job skills in short supply to immigrate.¹¹ This was the logical consequence of a law adumbrated by ever increasing severity and restrictiveness.¹² The evolution has been dramatic. During the first one hundred years of America's history, the immigration policy was one of essentially unim-

10. Act of Oct. 3, 1965, 79 Stat. 911.

11. A numerical ceiling of 120,000 persons was placed upon the number of immigrants per year from independent countries in the Western Hemisphere and a ceiling of 170,000 persons for natives of the Eastern Hemisphere. The old system of no numerical restriction for the Western Hemisphere and per country limitations for the Eastern Hemisphere was abolished.

12. Higham, *American Immigration Policy in Historical Perspective*, 21 LAW & CONTEMP. PROB. 213 (1956). See generally J. HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* (1955). For a recent survey with a restrictionist point of view, see M. BENNETT, *AMERICAN IMMIGRATION POLICIES* (1963).

peded immigration. The gates were wide open and the borders were left unguarded.¹³ It was not until August 3, 1882 that Congress enacted the first general law regulating immigration.¹⁴

13. Available for public distribution by the INS is the following leaflet: INS, DEVELOPMENT OF IMMIGRATION & NATURALIZATION LAWS AND SERVICE HISTORY (Prepared by L. Paul Winings, Form M-67 —).

14. This excluded paupers, criminals and other aliens deemed undesirable due to health conditions; furthermore, it formalized procedures for the admission of immigrants and concurrently ushered in a head tax of fifty cents. F. AUERBACH, THE IMMIGRATION AND NATIONALITY ACT 6 (Common Council for American Unity, Inc., New York, N.Y. 1953). The same year witnessed the enactment of the first Chinese exclusion law which, with numerous extensions in subsequent years, remained on the books until its ultimate repeal in December of 1943. In 1891, updated legislation provided for the exclusion of additional categories of aliens on health grounds and of persons convicted of crimes involving moral turpitude; the solicitation of labor was also forbidden.

Unlike the nature of this article (which articulates the nature and extent of fourth amendment rights which attach to aliens by virtue of their presence within the United States' borders), legislation such as the 1891 law aimed at excluding the alien before the nature of his rights derived by mere presence could ever become a litigable question. The attitude that an alien who seeks admission to this country may not do so under any claim of right is one that, although never having been properly explained, is firmly entrenched in our Constitution.

This proposition has been affirmed and re-enforced by the decisions of the Supreme Court. Exemplary is the case of *United States ex rel. Knauff v. Shaughnessy*, where Justices Douglas and Clark did not participate with Justices Black, Frankfurter and Jackson dissenting. In the view of the Court, as expressed by Mr. Justice Minton,

. . . an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. . . .

The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.

In a case decided in 1952, Mr. Justice Douglas, in a dissenting opinion in which Mr. Justice Black concurred, agreed that

[t]he power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power to establish a uniform Rule of Naturalization. U.S. Const., Article I, Sec. 8, Clause 4. The power of deportation is therefore an *implied* one. The right to life and liberty is an *express* one. Why this *implied* power should be given priority over the *express* guarantee of the Fifth Amendment, has never been satisfactorily answered. *Harisiades v. Shaughnessy*, 342 U.S. 580, 599 (1952).

What Douglas has said of the power to deport may also be said of the power to admit or exclude aliens. But he has not said it, nor has any member of the court so uttered. The constitutional law with respect to the power to deport aliens is simply that it is plenary; this power is in no way restricted by the Bills of Rights, except for the right to procedural due process. However, recently a district court judge has held that under certain circumstances, deportation may constitute a cruel and unusual punishment proscribed by the eighth amendment. For a treatment of these and other cases,

Now, with waiting lists for qualified intending immigrants from the Western Hemisphere running in excess of two years, with the narrow definition of family ties necessary to establish eligibility to apply for immigration, and with rigid interpretation by the Department of Labor as to job skills in short supply, coupled with the

see M. KONVITZ, *CIVIL RIGHTS IN IMMIGRATION* 3 (1953).

In 1897, Congress passed a bill which provided for a literacy test for immigrants. This was vetoed by President Cleveland and strikingly similar proposals were subsequently rejected by Presidents Taft and Wilson. But in 1917, a persistent Congress passed over President Wilson's veto, the Immigration Law of 1917, Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 which monitored immigration rather strictly and put new teeth into the government's power to exclude and deport. Higham, *American Immigration Policy in Historical Perspective*, 21 *LAW & CONTEMP. PROB.* 213, 228 (1956). It included the problematical literacy test for aliens over 16 years of age and even more controversially instituted an Asiatic barred zone which in effect denied entry as immigrants to most Asian peoples. The exclusion law of 1918 followed shortly. To the delight of the restrictionist school, it barred from entrance a plethora of groups which advocated the overthrow of the government, the primary organizations excluded being alien anarchist societies. Act of Oct. 16, 1918, ch. 186, 40 Stat. 1012. See also R. DEVINE, *AMERICAN IMMIGRATION POLICY* (1957).

In 1921, the United States undertook its first radical change of course in its immigration policy. Prior to that marking point, essentially any person who was in good physical and mental health, not functionally illiterate, of good and sufficient moral character (nonturpitudinous) and not racially ineligible for naturalization could enter the country legally. But during the First World War, a reaction against immigration commenced and rapidly mushroomed. This reaction led to widespread public interest which was articulated in the form of a demand for restrictions.

The resultant fear, to some extent an unfounded paranoia, stemmed from recurring beliefs that this country had been admitting immigrants more rapidly than it could assimilate them and from the fear that following the war the United States would be inundated with immigrants desirous of extricating themselves from the distresses of Europe. F. AUERBACH, *THE IMMIGRATION & NATIONALITY ACT* 7 (1955). Accordingly, in May of 1921, Congress enacted a provisional law restricting the absolute number of immigrants. Because this piece of legislation assigned each country, except those in the Western Hemisphere, a definite quota, it was commonly known as the Quota Act. Though intended as an emergency measure, the Quota Act remained in force for about 3 years. Act of May 19, 1921, ch. 8, 42 Stat. 5. In 1924, the permanent Immigration Act of 1924 was passed. Act of May 26, 1924, ch. 190, 43 Stat. 153. It went into effect July 1st, and, in conjunction with the Act of February 5, 1917, regulated American immigration until the effective date of the new Immigration and Nationality Act of December 24, 1952.

The Act of 1952, sometimes referred to as the McCarran-Walter Act after its sponsors in the House and Senate, perpetuates the immigration policies of the earlier statutes with some significant modifications. For a comprehensive analysis of the purposes behind the act, see Besterman, *Commen-*

growing economic disparity between the "have" and "have-not" nations, the number of aliens without proper documentation continues to grow.¹⁵

Although under the Act there are three federal agencies primarily responsible for the administration of the immigration laws, it is the Service whose officers are "administrative policemen." They are empowered to interrogate, search for and arrest aliens. Within the Service itself, they constitute the level of command responsible for the first-line enforcement of the law.¹⁶

The specific delegations of enforcement power to Service officers are very broad indeed, although it is now clear that such delegations are subject to the rigorous dictates of the fourth amendment whenever exercised beyond the border.¹⁷ The road to judicial ap-

tary on the Immigration & Nationality Act, printed as a preface to Title 8 U.S.C.A. (1970). See also F. AUERBACH, *IMMIGRATION LAWS OF THE UNITED STATES* (2d ed. 1961).

15. For backlogs of visa availability, see U.S. DEP'T OF STATE, *VISA OFFICE BULL.* (Aug. 1975). The only family relationship through which a citizen or permanent resident alien can bestow a benefit upon an alien are parent, child, son, daughter, brother and sister.

16. On June 10, 1933, the Bureaus of Immigration and Naturalization were consolidated as the Immigration and Naturalization Service of the Department of Labor under a Commissioner of Immigration and Naturalization. On May 20, 1940 the President submitted to Congress a reorganization plan whereby the INS was transferred from the Department of Labor to the Department of Justice. All of the Secretary of Labor's powers then vested in the Attorney General. The other two prominent agencies are the Bureau of Security and Consular Affairs of the Department of State and the Department of Labor. F. AUERBACH, *IMMIGRATION LAWS OF THE UNITED STATES* 37-39 (2d ed. 1961).

17. Statutory powers given to Service officials as a means of enforcing the immigration laws are found in the Immigration & Nationality Act §§ 287(a) (1-4), 8 U.S.C. § 1357 (1970).

Section 287 (a) (1) gives power to INS officers to interrogate without a warrant any alien or anyone believed to be an alien as to his or her right to remain in the United States, subject to the superimposed test that the belief as to alienage be based upon founded suspicion, which is the same test as promulgated in *Terry v. Ohio*, 392 U.S. 1 (1968). Mere Mexican or Chinese appearance alone does not constitute the requisite founded suspicion. *United States v. Brignoni-Ponce*, 95 S. Ct. 2574 (1975).

Section 287(a) (2) gives these same officers power to arrest any alien who is attempting to enter the country at the border in violation of the law. The section also authorizes officers to arrest aliens within the United States who they have *reason to believe* are present illegally and are likely to escape before a warrant can be issued. These rules are subject, however, to the mandate that the arrestee be promptly taken before a hearing officer with proper authority to examine.

Section 287(a) (3) provides that within a reasonable distance from any external boundary of the United States (by regulation of the Attorney General this has been deemed to be 100 miles), INS officials are empowered to board any vessel within U.S. territorial waters or any aircraft, conveyance or vehicle for the purpose of searching for aliens (not contraband in the

proval of regular fourth amendment restrictions upon "alien searches" has been a rugged one. Nevertheless, the standards now definitively apply and the de-prostitution of the amendment seems imminent in both the Mexican border regions and urban centers.¹⁸ In light of the foregoing, it is apparent that the Service's power to interrogate, search for aliens without a warrant, and make arrests is in an extremely delicate balance with the rights of aliens who as persons physically present within the confines of the United States are entitled to fourth amendment protection.¹⁹

The intent of this article is to outline the clearly emerging constitutional standards which the Supreme Court has said attach to the broad powers granted to immigration officials. Historically, there was never any constitutional logic supporting the position that the fourth amendment's protections should not apply to immigration-related searches removed from the actual border. Recent judicial decisions support this conclusion.²⁰

To be discussed in detail will be the evolution of the idea that nonfrontier line searches and interrogations are subject to fourth

first instance). While the statute makes no mention of a reasonableness requirement as a precondition to commencing such a search, it is now the law, set forth in the landmark *Almeida-Sanchez v. United States* decision, that "probable cause" is required for these searches if removed from the border or its functional equivalent. 413 U.S. 266 (1973). This section further provides that within 25 miles of an external boundary, INS officers shall have access to private lands (but not dwellings) to patrol the border to prevent entry of illegal aliens.

Section 287(a) (4) grants power to make arrests for felonies committed and cognizable under any law of the United States with respect to alien regulation, providing the arrested person is promptly charged by a proper official. In spite of the interwoven restrictions upon INS behavior, both customs and immigration officials still have wide latitude and are virtually unrestricted by the fourth amendment at the border or the functional border.

See 8 C.F.R. §§ 287.1-3 (1975) for a more detailed treatment of the above provisions. Also, for a scholarly discussion of the minor limitations upon intrusive body-cavity searches at the actual border see Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

18. Fragomen, *Legislative and Judicial Developments—Judicial Decisions of Interest*, 24 INT'L MIGRATION REV. 459 (1975).

19. *Id.*

20. Such has been the position taken by the Service for quite some time. It is based upon the belief that the United States' sovereign power to protect its borders extends virtually without limits to all areas reasonably said to be border areas. *Harisiades v. Shaughnessy*, 324 U.S. 580 (1952).

amendment restrictions.²¹ In spite of even the recent pronouncements of the Supreme Court, it is still apparent that there are a few loose ends in the totality of the decisions. Furthermore, it is still common practice, particularly with urban immigration officers and certain reviewing administrative judges, to be insensitive to the decisions and dicta of the Court as they relate to "blanket" searches and unfounded interrogations conducted by these officials.²² Urban "alien search" techniques and procedures shall be examined. The discussion and analysis will indicate that a large proportion of immigration operations are unconstitutional and, furthermore, morally dangerous in that they institutionalize fear, suspicion and contempt against a variety of ethnic and religious groups.

All Service enforcement systems will have to adjust their techniques to be as effective as possible within the dictates of the fourth amendment. This can be done only by creative, dedicated and civic-minded police work. The primary duty lies with the Attorney General and other administrators of the immigration laws who can take it upon themselves to promulgate newer and more detailed search and seizure procedures which focus upon following up responsible leads, obtaining specific search warrants and fortifying actual border areas. With respect to these methods, there exists a greater constitutional latitude to search.

In addition to traditional law enforcement procedures, the Service supports the enactment of legislation to help control the influx of aliens without proper documentation.²³ The necessity for legislation must be considered in a context of the efficacy of traditional law enforcement mechanisms. Legislation aimed at an already non-favored segment of the populace, which arguably would result in additional minority group discrimination, should only be considered

21. See generally Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

22. As is oftentimes the case when the Supreme Court superimposes constraints upon law enforcement officials, there is a delay in having the new limits take hold of prior enforcement techniques. For recent works on the duty of law enforcement officials to promulgate their own newer rules falling within the newly articulated constitutional limits and a discussion of avoidance of an outdated "atomistic" approach, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) and McGowan, *Rule Making and the Police*, 70 MICH. L. REV. 659 (1972).

23. H.R. 982, 94th Cong., 1st Sess. (1975), the so-called *Rodino Bill* has been favorably reported by the House Judiciary Committee in the form of a "clean bill," designated H.R. 8713. This bill would establish penalties to be imposed upon employees who knowingly employ aliens who do not have legal authority to engage in employment. For support of Service for this proposal, see 1975 *Hearings*, *supra* note 5.

Senator Edward M. Kennedy (D-Mass.) has introduced a similar proposal in the Senate, S. 3827.

as a drastic measure. If the same result could be obtained through enlightened enforcement within the dictates of the fourth amendment, this would be a preferable course of action.

THE EVOLUTION OF FOURTH AMENDMENT RIGHTS OF ALIENS

In order to understand the current state of the law regarding the applicability of fourth amendment protection of aliens, differentiation must be made between three types of searches. They are: (a) searches conducted at the border or at a point which is the functional equivalent of the border, (b) searches conducted in proximity to the border but at a point removed from the border, and (c) searches conducted in areas totally remote from the border, such as urban areas. This division is inherent in section 287 of the Act because this section speaks in terms of the power of an immigration officer to make a warrantless arrest of persons he has reasonable suspicion to believe are aliens. This section traditionally has been used to justify urban area activities. Section 287(a)(3) grants immigration officers much broader power to conduct warrantless searches of vehicles and conveyances in proximity to the border. This section historically has been utilized to support searches in proximity to the border, although, as will be developed later, the distinction is no longer as relevant. Finally, searches at the border have never been predicated upon the authority contained in section 287, but flow directly from the concept of sovereignty.

The fourth amendment provides

[t]he right of the people to be secure . . . against unreasonable searches and seizures shall not be violated and no [w]arrants shall issue but upon probable cause . . . particularly describing the place to be searched.²⁴

Since the first border search statute was enacted in 1789,²⁵ customs officials have been authorized to stop, search and examine any vehicle, person or baggage arriving in the United States on the suspicion that merchandise subject to duty is being concealed or that contraband is being brought into the United States.²⁶ Customs

24. U.S. CONST. amend. IV.

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

26. 19 U.S.C. §§ 482, 1582 (1970).

officials are also empowered to search any vehicle or vessel anywhere in the United States for contraband.²⁷

The constitutional validity of these provisions had never been questioned. Regardless of their intrusiveness upon fourth amendment rights, all searches designated as border searches (customs searches or searches for aliens) were automatically exempt from the requirements of probable cause.²⁸

Customs searches without probable cause originally were conducted only at actual international borders. But in *Carroll v. United States*,²⁹ where the Supreme Court recognized that officials must have probable cause to search those lawfully within the country, such mandate (to conduct searches only upon probable cause) immediately attached to customs officers who by that time had begun to search within the country. The present standard

27. *Id.* § 1581(a). For a complete history of the development of customs laws and border searches see, Note, *In Search of the Border: Searches Conducted by Federal Customs and Immigration Officers*, 5 N.Y.U. J. OF INT'L L. & POL. 93 (1972).

Also, for general histories of the border search concept see Note, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for Aliens Take on a New Look*, 10 CALIF. W.L. REV. 657 (1974); Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968); Comment, *The Reasonableness of Border Searches*, 5 CALIF. W.L. REV. 355 (1968); 1973 WASH. U.L.Q. 889. For the most scholarly treatment see Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968). In the words of the authors:

The border search exception to the Fourth Amendment should be reexamined. Although border searches are differentiable as a class, they are not internally homogeneous. The fact that an individual has recently crossed a border does increase the probability that illicit materials will be found, but at least where intrusive and extended border searches are concerned, the government should not be exempt from normal requirements of probable cause (emphasis added). *Id.* at 1018.

In spite of the above, the authors of this article admit that there is a logical justification for permitting wide latitude to officials to search at the borderline itself, and they admit that less than probable cause is permissible for nonintrusive and nonextended border searches. Searches conducted at the actual border are less reprehensible because an international traveller is prepared to expect a search there (arguably he consents), and since virtually all that cross the line are searched, such a traveller is part of a neutral class of citizens and is therefore less humiliated when his privacy is infringed upon.

28. In dictum, the Supreme Court has discussed two rationales for the constitutionality of the customs provisions. In *Boyd v. United States*, the Court reasoned that border search statutes were historically valid because they were authorized by the same Congress that proposed the fourth amendment, and therefore, these searches were not regarded unreasonable. 116 U.S. 616, 623 (1886). In *Carroll v. United States*, the Court justified the search on grounds of national self-protection. 267 U.S. 132, 154 (1925).

29. 267 U.S. 132 (1925).

definition for the authority of a federal customs officer to search beyond the borderline proper is articulated in some circuits as a "reasonable cause to suspect illegal goods," and in other circuits as a "reasonable certainty that there are illegal goods located on the person or in the place to be searched."³⁰ While the permissible distance from the border in which customs agents can search has been extended in recent years, the fourth amendment standards clearly remain. Whether they are in fact ignored or abused is difficult to ascertain.³¹

In 1875, federal immigration officers were first authorized to search at the border for aliens seeking illegal entry into the United States.³² It was not until 1946, however, that they were granted power under section 287(a) (3) of the Act to search vehicles within a reasonable distance from any external boundary.³³ The Attorney General, acting on the authority given him by Congress, prescribed "reasonable distance" to be within 100 air miles of the border.³⁴ Under the statute, which conspicuously omitted constitutional standards, immigration officers conducted searches without probable cause or suspicion by utilizing a variety of techniques such as permanent checkpoints on heavily traveled roads, temporary checkpoints for limited periods, and roving patrols in areas between checkpoints. Supposedly these random spot checks were limited to places in a vehicle where an alien may be hidden.³⁵ Federal circuit courts of appeal consistently upheld immigration searches conducted away from the actual border.³⁶

30. *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971); *Valdez v. United States*, 358 F.2d 721, 722 (5th Cir. 1966).

31. *United States v. Caraway*, 474 F.2d 25 (5th Cir. 1973). Herein, not only were fourth amendment standards applied, but a concept of unreasonable elasticity to the border was rejected.

32. Act 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 Feb. 5, 1917, ch. 29, § 16, 39 Stat. 874, 886. This basic authority is now incorporated in 8 U.S.C. § 1225(a) (1970).

33. Immigration & Nationality Act § 287(a), 8 U.S.C. § 1357(a) (13) (1970).

34. 8 C.F.R. § 287.1(a) (2) (1975).

35. See *Duprez v. United States*, 435 F.2d 1276 (9th Cir. 1970); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969). *But see United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970).

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

Because immigration officers are also deputy customs officers,³⁷ there was a properly perceived danger that they might abuse their statutory authority to stop a vehicle without probable cause or suspicion. An immigration officer, if unlimited by the fourth amendment at the same time that customs officers were so limited, could circumvent the suspicion standard required of a customs officer by stopping a vehicle for an immigration search and while searching, develop a reasonable suspicion or probable cause to believe that contraband is hidden in the vehicle. He could then switch to his customs officer's hat and make a thorough search of the vehicle. Moreover, even without suspicion, the immigration officer could arrest a person for possession of contraband discovered in plain view.³⁸

Despite criticism by commentators and dissenting judges, these dual role searches were approved prior to recent Supreme Court decisions. Even if there were no dual standard, the fact that immigration officials in border areas could whimsically annoy legal travellers and harass naturalized foreign born citizens based upon the mere appearance of foreign heritage was an insult to the integrity of American liberty. As a result of these searches, highway travel in border areas became a burden; numerous aliens were searched and evidence seized was frequently used to convict both aliens and citizens alike.³⁹

Unfortunately, the judicial development of theories with respect to full-blown searches of vehicles undertaken by both immigration and customs officials tended to minimize the importance of distance from the actual external boundary line. This erosion of the original concept continued until the term "border search" became judicial shorthand for recognizing the power of federal officers to search on almost whimsical suspicion, a far cry from the traditional "probable cause." Not until 1973, in the Supreme Court's landmark deci-

37. The legal basis of this authority is outlined in *United States v. Thompson*, 475 F.2d 1359, 1362-63 (5th Cir. 1973).

38. Objects in plain view of an officer who has a right to be in that position are subject to seizure. *Harris v. United States*, 390 U.S. 234, 236 (1968).

39. Most illustrative of the concern evoked by the dual standard is a dissenting opinion by Judge Browning in *United States v. Almeida-Sanchez*, which is now the law:

If a reason exists for distinguishing searches for aliens from searches for merchandise, no one—including this court—has yet suggested what it might be. Nothing in the words of the Constitution supports the distinction. And no one suggests that the public interest in excluding inadmissible aliens is greater than that in excluding narcotics and other contraband. *United States v. Almeida-Sanchez*, 452 F.2d 459, 464 (9th Cir. 1971) (dissenting opinion), *rev'd*, 413 U.S. 266 (1973).

sion of *United States v. Almeida-Sanchez*,⁴⁰ were standards established.

Searches conducted in the interior of the country were characterized by similarly unbridled discretion on the part of immigration officers. Section 287(a)(1) had authorized interrogation of persons believed to be aliens. This was a sufficiently broad standard to be regarded as *carte blanche* authority to question anyone who appeared or sounded "non-American." Moreover, the Service construed the concept of "interrogation" as not including the asking of casual questions by plain-clothes investigators to elicit whether the person spoke English. Not until 1971, with the decisions of the United States Court of Appeals for the District of Columbia, did a judicially imposed standard curb this broad discretion.⁴¹ Thus, prior to several years ago, fourth amendment rights of aliens were exceedingly constrained. Aliens could be interrogated or arrested virtually anywhere, anytime.

Legislative and judicial permissiveness, resulting in minimal restraint upon immigration officers at the border, within border regions, and in the interior, began to create a variety of social problems. In addition to annoying unassuming travellers and legal aliens by infringing upon their fourth amendment rights, the random stopping and questioning of persons at the border, near the border, in metropolitan areas, and in public places created an attitude of suspicion and contempt against certain groups in our society. Average citizens began to see themselves as self-appointed immigration officers. Without any founded suspicion, they began to accuse their neighbors of illegal status, copying from the institutionalized techniques of the Service. There was something about the unrestricted authority to search that de-Americanized the spirit of America which was to accept and encourage the "tired and the poor" of less fortunate nations. Perhaps many of these persons had come to America to escape such police state tactics in their homelands.

THE BORDER SEARCH

Almeida-Sanchez—Limiting the Border Search Area

Section 287(a)(3) of the Act empowers immigration officers to

40. 413 U.S. 266 (1973).

41. *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972).

search vehicles for aliens within close proximity to the border. As previously mentioned, proximity to the border is defined by regulation as within 100 miles.

For the first time, in *Almeida-Sanchez*, the Supreme Court definitively limited the scope of the term "border search," and thereby restricted the use of roving immigration patrols to search vehicles for aliens, by holding that such warrantless searches were only permissible at border crossing points or the functional equivalent thereof.⁴² In that case, a Mexican citizen with a valid work permit was stopped by a roving immigration patrol in the early hours of the morning on an isolated road twenty-five miles north of the border.⁴³ While searching the vehicle for aliens pursuant to powers apparently granted under section 287(a)(3), without a warrant or probable cause, the border patrol officers found marijuana under the rear seat of the vehicle. Following a denial of his motion to suppress the "tainted" evidence, defendant was convicted for possession of marijuana.⁴⁴ A divided Ninth Circuit later reaffirmed the constitutionality of the statute and the constitutionality of the search. A divided Supreme Court reversed, holding that the warrantless search, made without probable cause or consent, violated the fourth amendment.⁴⁵ The effect of the decision was to apply the strictures of the fourth amendment to a historically exempt search situation. There never has existed, however, any historical logic for *excluding* its applicability in the first instance. The plurality opinion distinguished the case at bar from the line of automobile exceptions to "searches upon warrant" based upon the doctrine of *Carroll v. United States*.⁴⁶ In that case the court held

42. 413 U.S. at 272-75.

43. Defendant was stopped on Highway 78 near the town of Glamis, California. Although the road did not run directly from the border, it was often used by aliens who were illegally entering the United States. But, as on most highways in this portion of the country, most travellers are "legal" passers-by.

The officers had received an official bulletin informing them that aliens sometimes had been found sitting behind the back seat rest with their legs folded under a hollow back seat. *Id.* at 286 (dissenting opinion).

44. The majority held the search valid under 8 U.S.C. § 1357(a), (c) (1970) and 8 C.F.R. § 287.1(a)(2) (1975); *United States v. Almeida-Sanchez*, 452 F.2d 459, 460-61 (9th Cir. 1971).

45. 413 U.S. at 266. Justice Stewart delivered the opinion of the Court in which Justices Douglas, Brennan, Marshall and Powell joined. Justice Powell filed a concurring opinion. Justice White filed a vigorous dissenting opinion in which Chief Justice Burger and Justices Blackmun and Rehnquist joined.

46. 267 U.S. 132 (1925). The Court approved the National Prohibition Act's provision for warrantless searches of vehicles when there was "prob-

that a stop and search of a mobile vehicle can be made without a warrant. However, the *Almeida-Sanchez* facts did not fall under that exception since as a condition to making warrantless automobile searches under *Carroll*, there must be probable cause in the first instance.⁴⁷ The court also distinguished the facts in *Almeida-Sanchez* from the administrative search and inspection cases, particularly *Camara v. Municipal Court*,⁴⁸ which permit a standard of less than probable cause to implement the enforcement of health and welfare regulations. To comply with the conditions of this second exception, an area warrant⁴⁹ or consent⁵⁰ is required; neither of which was obtained here.

The entire Court directly recognized and restated the traditional validity of a "true border" search which can still be conducted without either probable cause or a warrant. Such a search, however, must take place at the frontier line or its functional equivalent. Functional equivalency is determined by whether it is likely that traffic which did not cross the border would arrive at that particular point.⁵¹ The search of Almeida-Sanchez's automobile occurred

able cause for believing" they contained illegal alcoholic beverages. *Id.* at 155-56.

47. See *Chambers v. Maroney*, 399 U.S. 42, 48-52 (1970).

48. 387 U.S. 523 (1967).

49. *Camara v. Municipal Ct., id.*, and *See v. City of Seattle*, 387 U.S. 541 (1967), are cases initially approving the use of area search warrants based on less than traditional probable cause and introducing a balancing test to determine whether an official intrusion of an individual's rights is reasonable.

50. The Court distinguished *United States v. Biswell*, 406 U.S. 311 (1972) and *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), which involved gun control and liquor inspections. Individuals who enter into those highly regulated businesses are aware of the use of inspections and are deemed to have consented to them.

51. As examples of functional equivalents, the plurality cited (and this is still the test) an established station near the border, a point marking the confluence of two or more roads that extend from the border, or an airport receiving nonstop flights from Mexico. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1971). This test makes it clear that any time fixed or roving interrogations or searches are conducted at points removed from the above functional borders, the fourth amendment applies in its plenitude.

In *Almeida-Sanchez*, the plurality stated that fixed checkpoints can be considered the functional equivalents of the border only if they are at the border, or very near to it, or if they are the first practical place where searches can be made after crossing the border, due to inescapable conditions of the terrain. Distance on the road from the border was stressed

neither at the border nor at its functional equivalent. Thus, the plurality disagreed with the lower court's holding that the search was valid under section 287(a) (3) maintaining that the statute cannot authorize searches by roving immigration patrols not made at the border or its functional equivalent, unless supported by probable cause or a warrant. The *Carroll* distinction between warrantless searches at the border which are justified on the ground of national self-protection and those occurring in the interior, which require probable cause, was considered to be controlling.⁵²

Justice Powell, in his concurring opinion, recognized both the necessity of safeguarding a constitutionally protected right and "the seriousness and legitimacy of the law enforcement problem with respect to enforcing . . . valid immigration and related laws."⁵³ He alluded to an oft-applied balancing approach that would allow a search to be based on an area warrant issued on less than traditional probable cause.⁵⁴ As will be analyzed later, such an approach would gravely undermine the constitutional strictness of the plurality's decision. Under Justice Powell's approach, the border patrol could obtain advance judicial approval of its decision to conduct roving or fixed searches on a particular road or road network for a reasonable period of time. In *Almeida-Sanchez*, since the roving patrol did not have a search warrant of any kind, Justice Powell concurred in finding the search unconstitutional.⁵⁵

by the plurality. Apparently the dissent would hold that any fixed checkpoint away from the border, or any roving patrol for that matter, should be considered the functional equivalent of the border. It would continue to consider the term "border," as was traditionally done, to include all checkpoints within the administratively-defined reasonable distance of 100 air miles. *Id.* at 288-89 (dissenting opinion).

52. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. *Carroll v. United States*, 132, 153-54 (1925).

53. *Almeida-Sanchez v. United States*, 413 U.S. 266, 275 (1973) (concurring opinion).

54. Using a *Camara* style approach, Justice Powell reasoned that an area warrant is appropriate because of consistent judicial approval of these non-border searches, absence of a reasonable alternative to solve this serious problem, and the limited nature of the intrusion on those being searched. *Id.* at 279. How a full-blown search of an automobile without prior notice can be considered only a mild intrusion is difficult to comprehend.

55. The government's position in the case was that *Camara*, which re-

The dissent contended that section 287(a)(3) was validly applied and that under the instant circumstances the stop complied with the governing fourth amendment standard of "reasonableness." In border regions with high concentrations of illegal aliens, the dissent argued, all searches by Service officials are "reasonable."⁵⁶ Justice White noted that the Court has generally broadened the reasonableness standard when authorizing statutes have permitted searches of the kind challenged herein, and that the instant statute represents Congress' considered judgment, in accordance with its duty to propose "constitutional" legislation, that proper enforcement of immigration laws in border areas requires random searches of vehicles without a warrant or probable cause.⁵⁷ Since Congress believed that the statute comported with the reasonableness standard, and since a number of courts of appeal traditionally have upheld these statutory searches in the immigration arena, the dissent refused to invalidate the search.

In the aftermath of *Almeida-Sanchez*, there was a great deal of confusion in border areas and elsewhere as to what the Supreme Court had mandated with respect to factual issues not directly before the Court. Apparently, even the dictum was not sufficient to provide cohesive guidelines. In *United States v. Byrd*,⁵⁸ a roving immigration patrol had stopped the defendant forty-five miles north of the Mexican border shortly after midnight along a road

quires public health inspectors to obtain an area warrant after they are refused entry, should not apply because an immigration officer needs to search a mobile vehicle instantly when he stops it. *Id.* at 269.

Although the Supreme Court has not directly placed the constitutional imprimatur on the area-search warrant in the immigration context, it is possible that it will do so in the future. The dissenting Justices would approve a search based on an area warrant. *Id.* at 288. If such were the rule, issuance of broad and indefinite area warrants would permit vehicles to once again be stopped without probable cause or founded suspicion in border areas, and the pre-*Almeida* standards would, in effect, be reinstated. *Id.* at 287-89.

56. 413 U.S. 266 (1973) (dissenting opinion). Cf. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (governing standard under fourth amendment is reasonableness).

57. *Almeida-Sanchez v. United States*, 413 U.S. 266, 291 (1973) (dissenting opinion). The dissent viewed the illegal alien problem as similar to gun control, *United States v. Biswell*, 406 U.S. 311 (1972), and liquor, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and would allow the same solution—a warrantless search without probable cause.

58. 483 F.2d 1196 (5th Cir. 1973).

on which numerous previous violations had occurred. Without further suspicion, an officer inspected the rear seat for aliens, as per traditional procedure, and detected the odor of marijuana which later was found in the trunk. The district court had refused to exclude the evidence because of a two-pronged analysis. First, the court found that the stop was justified by section 1357(a) and its accompanying regulations.⁵⁹ Secondly, it found that in the course of the valid vehicle search for aliens, the officers acquired probable cause to believe customs laws were being violated which permitted them to complete the search for contraband. The Fifth Circuit, in a properly reasoned application of *Almeida-Sanchez*, concluded that only "border" searches can be made without a warrant or probable cause. Although the instant search was one conducted near the border, the court found that it had not been made *at* the border or its functional equivalent. Since the officers did not have probable cause to stop the vehicle and search in the first place, the court reversed and held the search to be unconstitutional.⁶⁰

Applying the same rules, but with a slightly different result, the Ninth Circuit in *United States v. Bugarin-Casas*⁶¹ addressed itself to a factual situation in which a roving immigration patrol, while passing through a high violation area, stopped the defendant after dawn on an interstate highway within fifteen miles of the functional border. The arresting agents became suspicious because the driver, apparently a Mexican, was alone and his station wagon was riding low in the rear; their suspicion became greater since the model being driven was one with an expansive compartment in which hidden illegal aliens had previously been found. When an agent looked through the rear window of the stopped vehicle, he saw distinctively wrapped packages of marijuana in plain view through a large crack in the floor board. Although the court affirmed the defendant's conviction for possession, it disregarded the prosecution's theory, reliance upon section 287(a)(3). Instead, the court substituted without hesitation a "founded suspicion" test which is presently the law for immigration related stops for interrogation purposes, as propounded in the case of *United States v. Brignoni-Ponce*.⁶²

59. The accompanying regulations can be found in 8 C.F.R. § 287.1(9)(2) (1975).

60. 483 F.2d at 1201. In reaching its holding, the court rejected the government's argument that the fact that the road on which this stop was made ran directly from the border was a controlling distinction from *Almeida-Sanchez* under the facts of the instant case.

61. 484 F.2d 853 (9th Cir. 1973).

62. 95 S. Ct. 2574 (1975).

Probably the best reasoned opinion interpreting *Almeida-Sanchez* is the Second Circuit decision of *United States v. Barbera*.⁶³ In that case, the court found that where immigration officers had boarded a bus in the vicinity of the border and had interrogated the defendant, a passenger on the bus, for no ostensible reason, the arrest was unlawful since it had not occurred at the border or a functional equivalent thereof. The bus had originated within the United States at a point several miles from the border. It had traveled approximately 25 miles essentially parallel to the border when the encounter with the immigration officers occurred. The court found this not to be a functional equivalent of a border point since the bus had not come directly across the border and since the defendant could just as easily have been a United States citizen who boarded the bus within the United States.

Soon after *Almeida-Sanchez*, two courts of appeal decided cases in which the defendants relied upon *Almeida-Sanchez*. In both cases, however, the alleged illegal searches had not been conducted by "roving" immigration patrols. In *United States v. Ragusa*,⁶⁴ the Ninth Circuit improperly interpreted *Almeida-Sanchez* when it approved a search without a warrant and without probable cause. In justifying its decision, the court stated that *Almeida-Sanchez* applies only to roving searches and implied that the instant search was valid because the fixed checkpoint where the search was conducted, though distant from the borderline, was the functional equivalent of the border.

63. *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975). In *Barbera*, Judge Oakes lucidly presents the sensitive issues in this delicate area of the law:

What is at issue here is the balance to be struck between the Fourth Amendment's protection from unreasonable searches and seizures and the Government's conceded right to protect the integrity of its borders. The problem of illegal immigration is one of national concern. The adverse economic impact caused by illegal aliens is substantial and well documented. But to respond to this problem by watering down the probable cause requirements of the Fourth Amendment is most surely to take the lowest constitutional road. It would be dangerous precedent indeed for an economic problem, regardless of its magnitude, to provide the basis for the erosion of constitutional principles; much the more so when alternative solutions to the economic problem have been insufficiently explored by other Branches of the Government. *Id.* at 301-02.

64. Criminal No. 73-1314 (9th Cir. July 11), *cert. denied*, 414 U.S. 1075 (1973).

A final case to be considered before the *Brignoni-Ponce* group which seemed to be more deferential to the language of *Almeida-Sanchez* was *United States v. King*.⁶⁵ In *King*, the defendant was convicted of possession of marijuana after being stopped and searched at a checkpoint ninety-eight air miles from the border. The Tenth Circuit, while it should not have had any trouble in determining that the fixed checkpoint was not the functional equivalent of the border, was unable to so decide. But despite its uncertainty, the court did state that even at distant *fixed* checkpoints *Almeida-Sanchez* required probable cause or consent to conduct a warrantless search, unless a particular fixed checkpoint was the functional equivalent of the border. While *Almeida-Sanchez* only decided the necessary question relative to roving patrol searches, implicit within the decision was an underlying philosophy which would extend the same rationale to fixed checkpoints. Any doubt was resolved when the Supreme Court recently ruled that *Almeida-Sanchez* does extend to the fixed checkpoint search as well as the roving patrol.⁶⁶

Since the language of these decisions establishes the principle that only searches at borderlines or their functional equivalents can be conducted without full fourth amendment limitations upon police power, traditional probable cause standards now apply to all immigration-related searches outside of this privileged zone. With respect to the judicially created concept of the border's "functional equivalent," determination of its parameters is not an overly onerous burden. The question merely requires a court to ascertain whether a substantial percentage of persons who reach a certain point would necessarily have crossed the border or have originated in the United States.

In spite of the previously mentioned broad language of the majority decision, and in spite of the lower court cases dealing with mere stops and interrogations, the Supreme Court has not addressed itself to the standards to be applied to Service officers' powers to conduct interrogations anywhere in the continental United States pursuant to section 287(a)(1). The *Almeida-Sanchez* decision was restricted to an interpretation of section 287(a)(3). Moreover, the court did not take an absolute stand on the concept of the area-warrant, which, if constitutional, would effectively ne-

65. 485 F.2d 353 (10th Cir. 1973). The court directed the trial court to reinstate the judgment and sentence only if it found the checkpoint to be the functional equivalent of the border. *Id.* at 361.

66. The court held that fourth amendment rights are not mere second class rights, but belong in a category of indispensable freedoms. 485 F.2d 353 (10th Cir. 1973).

gate the decision. However, the fundamental principle has clearly been established that the broad authority of section 287(a)(3) can only be interpreted consistently with the fourth amendment, if the authority is deemed to extend to searches beyond the border or its functional equivalent.

Brignoni-Ponce—Fourth Amendment Limits on Service Interrogation Procedures

On June 24, 1975, the Supreme Court augmented its judicial scrutiny over the Service when it handed down the decision of *United States v. Brignoni-Ponce*.⁶⁷ For the first time the Court set forth constitutional standards regulating the "interrogation" powers of Service officials. The Court's holding was that the fourth amendment does not allow a roving patrol (and by implication a border patrol at a fixed checkpoint) to stop a vehicle away from the actual border or its functional equivalent and question its occupants about their citizenship or immigration status when the only ground for suspicion was that the occupants appeared to be of Mexican ancestry. *Brignoni-Ponce* built upon the foundation of *Almeida-Sanchez*⁶⁸ by saying that in the same areas where Service officials are restricted in their search operations, they are now limited in their interrogation authority.

The Service posited two sources of statutory authority for stopping cars without warrants in border areas. Section 287(a)(1) of the Act authorizes any officer or employee of the Service, without a warrant, to interrogate any alien or person believed to be an alien as to his right to be in or to remain in the United States. The government contended that, at least in areas contiguous to the Mexican border, a person's appearance of Mexican ancestry alone justified belief that he or she is an alien, and that such appearance alone

67. 95 S. Ct. 2574 (1975).

68. The court in *Almeida-Sanchez* held 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 equivalent. 413 U.S. at 272-75. Under the rule enunciated in *Almeida-Sanchez*, it was necessary for the Immigration Service to demonstrate that either the search took place at the border or at the functional equivalent thereof. Functional equivalency was determined by whether there was any access to the particular point where the stop took place that would have originated in the United States and not necessitated the automobile crossing the border. *Id.*

satisfied the requirement of the statute. Section 287(a)(3) of the Act authorizes agents to conduct warrantless searches for aliens within the territorial waters of the United States or within a reasonable distance from any external boundary of the United States.

The Court in *Brignoni-Ponce* forthrightly enunciated the rule that the fourth amendment applies to all seizures of a person including seizures which fall short of a traditional arrest and involve only a brief detention.⁶⁹ Under this standard, which the court in *Brignoni-Ponce* found applicable to immigration "seizures," short stops may be justified on facts that do not satisfy the probable cause standard as applied to an arrest or an extensive search of a private vehicle for illegal aliens.⁷⁰ It is only necessary that the arresting officer be able to point to specific and articulable facts which, when taken together with the rational inferences from these facts, reasonably warrant a belief that the person is an alien. A border patrol must, therefore, have reasonable suspicion to justify roving border patrol stops at points that do not meet the functional equivalency criteria.

The Supreme Court noted that the broad Congressional power over immigration authorizes Congress to admit aliens on condition that they submit to reasonable questioning about their right to be in the country, but that this power cannot diminish the fourth amendment rights of citizens who may be mistaken for aliens. The Court concluded that for the same reason the fourth amendment prohibits stopping vehicles at random to search for aliens without proper documentation, it also forbids stopping or detaining persons away from the actual border for questioning about their citizenship on less than a "reasonable or founded suspicion" that they may be aliens.⁷¹

69. As stated in *Terry v. Ohio*, 392 U.S. 1 (1968), whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person, and the fourth amendment requires that such seizure be reasonable.

In a concurring opinion in *Brignoni-Ponce*, Mr. Justice Douglas, while agreeing with the result reached, sharply disagreed in the rationale. He quoted his own remarks from his dissent in *Terry*:

The infringement of any "seizure" of a person can only be "reasonable" under the fourth amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge that the person seized has committed, is committing or is about to commit a crime. *United States v. Brignoni-Ponce*, 95 S. Ct. 2574, 2583-84 (1975).

70. See *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

71. *United States v. Brignoni-Ponce*, 95 S. Ct. 2574, 2577-78 (1975).

The Court concluded that the effect of its decision was to limit the exercise of authority granted by both sections 287(a)(1) and 287(a)(3). Nevertheless, the true focus of the opinion was section 287(a)(1), because the contested procedure in *Brignoni-Ponce* was not an automobile search but an initial interrogation of the defendant's passengers whose testimony later was sought to be utilized to convict the defendant of alien smuggling.⁷² The Court concluded that except at the border or its functional equivalent, officers on roving patrol may stop vehicles for interrogations of drivers only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain illegal aliens.⁷³

The Court pointed out that any number of factors may be taken into account to determine whether there is reasonable suspicion to stop a car for interrogation purposes in the border area. The list of factors may include the characteristics of the area in which the vehicle is encountered, proximity to the border, usual patterns of traffic on particular roads and previous experience with alien traffic.⁷⁴ Officers may also consider information about recent illegal border crossings in the area, drivers' behavior such as nervousness or confusion, aspects of the vehicle itself and even the characteristic appearance of persons themselves, such as mode of dress and haircuts. However, reliance by immigration officers on the single factor of apparent Mexican ancestry of the occupants cannot, without more, furnish founded suspicion that the occupants were aliens.⁷⁵

If interpreted strictly, the *Brignoni-Ponce* decision could be limited only to interrogations made by roving search patrols in border areas (just as *Almeida-Sanchez* taken strictly only applied to roving patrols). It would involve a strained logic, however, to conclude that the Court meant to exclude the "founded suspicion" test from interrogations conducted at fixed checkpoints removed from the border, or to suggest that the test was inapposite to urban

72. *Id.* at 2582. In the words of the Court, the only issue presented for decision in *Brignoni* was "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." *Id.* at 2578 (emphasis added).

73. *Id.* at 2584.

74. *Id.*

75. *Id.*

immigration interrogations. Through this decision, the Court has extended the rights of aliens and native-born Americans alike to be free from unreasonable searches and seizures.

The two basic principles established in *Brignoni-Ponce* have universal applicability to all situations where aliens or other persons are to be temporarily "seized," interrogated, and perhaps arrested. First, foreign appearance alone will not justify a reasonable belief that a person is an alien.⁷⁶ As the Court pointed out, large numbers of native-born and naturalized citizens have physical characteristics identified with Mexican ancestry. This rationale would apply to Orientals and to other groups as well. For instance, in New York City,⁷⁷ although there are a number of "aliens without proper documentation" of Hispanic descent, there are a multitude of Hispanic-blooded Americans who were born and raised here and over one million Puerto Ricans who are native-born United States citizens. These people could wrongfully be mistaken for and "seized" as aliens unless the requirement of "founded suspicion" were applied.

Secondly, the Court firmly established the principle that to merely stop and interrogate one believed to be an alien constitutes a seizure of the person within the meaning of the fourth amendment, and therefore must be predicated on reasonable suspicion.⁷⁸ In this context, it is also interesting to note that the United States Court of Appeals for the District of Columbia in the case of *Cheung Tin Wong v. INS*⁷⁹ applied the same rationale. The court held

76. *Id.*

77. In *Brignoni-Ponce*, the Court gives a breakdown of the number and percentages of Mexican-Americans in the states of Texas, Arizona, New Mexico and California. 95 S. Ct. at 2583 n.12.

78. See *Terry v. Ohio*, 392 U.S. 1, 6 (1968). Although Justice Douglas concurs in the result reached in *Brignoni-Ponce*, he generally is fearful of the reduced standard of founded suspicion and thus is disturbed that it should spread to immigration searches. In Justice Douglas' words, "[t]he nature of the test permits the police to interfere as well with a multitude of law abiding citizens whose only transgression may be a nonconformist appearance or attitude." 95 S. Ct. at 2584 (concurring opinion). See also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

Police power exercised without probable cause is arbitrary. To say that the police may accost citizens at their whim and may detain them upon reasonable suspicion is to say, in reality, that the police may both accost and detain citizens at their whim. *Id.* at 395.

79. 468 F.2d 1123 (D.C. Cir. 1972). This case held that Service officers working in an urban area such as Washington, D.C. must have reasonable suspicion that a person is an alien before he or she can be interrogated. To do more detailed interrogation, the officer must acquire a reasonable suspicion that said person is an illegal alien. To arrest pursuant to statu-

that although a particular interrogation of an Oriental alien in the greater Washington D.C. area was lawful, an interrogation predicated upon Oriental appearance alone would not have been proper and that a reasonable suspicion standard applies to all interrogations conducted pursuant to section 287(a)(1).

Shortly before the *Brignoni-Ponce* decision, the United States Court of Appeals for the Second Circuit passed upon a related situation in *United States v. Barbera*.⁸⁰ In that case Service officers conducted a "roving patrol" of a bus stopped at the depot in Malone, New York. Appellee, an alien who had allegedly entered the United States through Canada, was detained by the border patrol when he failed to respond to questions regarding his citizenship.⁸¹ The bus had originated in Massena, New York, and Malone was the first stop. Appellee moved to suppress a bus ticket and passport seized from him in connection with the interrogation. The United States District Court for the Northern District of New York granted appellee's motion to dismiss and the government appealed.⁸² The granting of the motion to dismiss was subsequently affirmed.

In its decision, the Court of Appeals drew a variety of proper implications from *Almeida-Sanchez*. It held that the bus station in Malone, although very near the Canadian border, could not be said to be its functional equivalent because there were a series of roads leading to the bus station that did not come directly from Canada. Thus the "immune" border search and interrogation concept was inapplicable.⁸³ The court further held that while the Service officer's presence in the public vehicle itself was permissible, the initial interrogation, that is the very first question, could only be asked if there were "founded suspicion" that the appellee

tory authority, an INS officer must have probable cause. Furthermore, Oriental appearance alone is neither probable cause nor reasonable suspicion.

80. 514 F.2d 294 (2d Cir. 1975).

81. The government's position in *Barbera*, as presented in its brief on appeal is that the general "mild" questioning of Barbera by Officer Cowan was actually not a seizure in the constitutional sense of the word. Thus said the government, this "banter" between law officer and citizen is not subject to the fourth amendment. Brief for Appellant at 6, *id.*

82. The government appealed under 18 U.S.C. § 3731 (1970).

83. See Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968); Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968).

was an alien.⁸⁴ The court in *Barbera* decided that since the bus on which Barbera was travelling was away from the actual border, any apparent seizure of his person, however slight, could only be effectuated consistent with constitutional standards. The court, in a bit of a quandary as to what standard to apply to mere interrogations, alluded to the "founded suspicion" test and urged the Supreme Court to decide the pending *Brignoni-Ponce* case to set the standards officially.⁸⁵

84. A case with facts similar to *Barbera* was recently decided by the Second Circuit. In *United States v. Salter*, Civil No. — (9th Cir. Aug. 15, 1975) Service officials began interrogating a man and two Jamaican women in a Buffalo bus station. The immigration officials acquired "reasonable suspicion" that the three persons were aliens when one of the women pronounced Buffalo as "Boofalo." However, the crucial issue which was never raised by counsel was whether the appearance of one man and two women together in a bus station which was not the functional equivalent of the border, created a reasonable suspicion that the parties were committing criminal acts or that they were aliens illegally present in the country.

Because counsel for appellant never questioned the validity of the initial encounter, the Second Circuit was not obliged to resolve it and the court proceeded to properly decide the case with respect to the standards to be applied after the initial encounter. But with respect to the initial encounter, so important in the immigration-related searches, the court had the following to say:

"In addition to possible considerations of waiver, we would not want to resolve this troublesome issue in a case where there was an inadequate record below and where the point was not briefed by either side on appeal." *Id.* at — n.7.

85. *United States v. Brignoni-Ponce*, 95 S. Ct. 2574 (1975). On the same day as its opinion in *Brignoni-Ponce* the Court decided *United States v. Ortiz*, 95 S. Ct. 2585 (1975), and *Bowen v. United States*, 95 S. Ct. 2569 (1975). These cases extended *Almeida-Sanchez* specifically to fixed checkpoints. Earlier, the Court dealt with *Peltier v. United States*, 95 S. Ct. 2313 (1975). However, rather than laying out the entire law in the body of the decision, the Court, in *Brignoni-Ponce* made some significant points in footnotes. For example, while the Court directly faced the question presented, it continued to duck the elusive issue of the validity of the nonspecific area warrant presented:

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 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. 95 S. Ct. at 2580 n. 7.

Another note indicates that, at least for now, the Supreme Court does not have to lay out the permissible urban interrogation procedures. *Id.* at 2582 n.9. In the *Bowen* and *Peltier* decisions, the Court concluded *Almeida-Sanchez* was not retroactive. *But see* Douglas' dissent in *Peltier*:

I agree with my Brother Brennan that *Almeida-Sanchez* was a reaffirmation of traditional Fourth Amendment principles and that the purposes of the exclusionary rule compel exclusion of the unconstitutionally seized evidence in this case. I adhere to my view that a constitutional rule made retroactive in one case must be applied retroactively in all (citations omitted). It is largely a matter of

The foregoing cases, taken together, significantly restate the law. However, they do lend themselves to differing interpretations. One could argue that each decision should be viewed strictly and that each time the Supreme Court speaks, it eliminates only the particular mode of searching or interrogating raised by the facts. Thus, *Almeida-Sanchez* would preclude only roving patrol searches without probable cause and clearly not until *United States v. Ortiz*,⁸⁶ were fixed checkpoint automobile searches without probable cause invalidated. Following this logic, *Brignoni-Ponce* addressed itself only to roving interrogations. Thus, nonfounded fixed checkpoint interrogations, even if conducted away from the actual border, could still be constitutionally permissible.⁸⁷

The better position would be to extrapolate general pronouncements from the words and tone of the Court which could be applied to all immigration arrest procedures. Under this approach, *Almeida-Sanchez* and *Ortiz* restricted "immune" border searches to the actual border or its functional equivalent. Any other searches or seizures were to be conducted pursuant to traditional interpretations of the fourth amendment. This is obviously a substantial restriction of the language of section 287(a)(3). Thus, *all* nonborder searches within the country, including metropolitan areas, are subject to probable cause standards. The *Brignoni-Ponce* decision mandated the application of the *Terry* test of founded suspicion to all immigration interrogations within the country, whether conducted by roving patrols or at fixed checkpoints and whether performed near the border or in the interior of the country. Therefore, even though urban immigration officers are not alluded to in the *Brignoni-Ponce* decision, they are not permitted to "rove the subways or the streets of New York and interrogate at will."⁸⁸

chance that we held the Border Patrol to the command of the Fourth Amendment in *Almeida-Sanchez* rather than in the case of this defendant. Equal justice does not permit a defendant's fate to depend upon such a fortuity. 95 S. Ct. at 2320.

86. 95 S. Ct. 2585 (1975).

87. See the concurring opinion of Mr. Justice Rehnquist:

I wish to stress however, that the Court's opinion is confined to full searches and does not extend to fixed checkpoint stops for the purpose of inquiring about citizenship. . . . I do not regard such stops as unreasonable under the Fourth Amendment, whether or not accompanied by "reasonable suspicion." *Id.* at 2589-90.

88. To Mr. Justice Douglas, even the standard of "founded suspicion" is too permissive for urban or border area interrogations.

Whenever Service officers are enforcing the Act within the United States anywhere away from the actual functional border, they are subject to *Terry* standards in conducting interrogations or "mild seizures" under section 287(a)(1). In the arrest of aliens, there must be probable cause which may properly flow from a lawfully conducted interrogation.

The law for the border area has now been settled. Situations will continue to arise which will result in further refinement, particularly in situations where the alien is not in a vehicle. However, the recent Supreme Court decisions will have a profound effect upon the development of the law in immunizing aliens from immigration enforcement policies in urban areas.⁸⁹

THE CONSTITUTIONALITY OF URBAN "ALIEN SEARCH" PROCEDURES

There are strict and sophisticated laws which govern the internal operations of the Service. Yet our law enforcement officers have the broadest powers of all Federal agencies. When we hire, we want men not too far left or right. We don't want alien haters nor do we want social workers.⁹⁰

In urban centers not adjacent to the Mexican or Canadian borders, the broad powers exercised by immigration officers also have been subject to controversy.⁹¹ The major issues, as in border areas, have centered around the effects of the constitutional "probable cause" and "founded suspicion" standards upon the general wording of the authorizing statute. Specifically, in nonborder urban centers, the statutory authority of section 287(a)(1) is the provision that is generally subject to attack. In addition, in the districts contiguous to the border, section 287(a)(3) is also a statute often contested in the courts. Section 287(a)(3) is generally not relied upon in urban areas by the Service because there is no rationale for searching automobiles in these areas. There can be no reasonable belief that a motor vehicle in New York City is carrying concealed aliens.

Unquestionably, the leading case regarding section 287(a)(1) interrogations in urban settings is the decision by the United States

89. See generally, McGowan, *Rule Making and the Police*, 70 MICH. L. REV. 659 (1972), on the difficult task of constitutionalizing law enforcement procedures.

90. In a candid interview on Aug. 12, 1975, with Mr. Henry Wagner, Assistant District Director for Investigations at New York, Immigration & Naturalization Service, the positions of the Service referred to herein were set forth. Mr. Wagner made it clear that the attitude of the Service was one in complete compliance with the law, and the Service's position of being "moderate in enforcement" was made clear.

91. See note 22 *supra*.

Court of Appeals for the District of Columbia in *Cheung Tin Wong v. INS*. After pointing out that the Service investigator's attention had been drawn to two individuals by their distinctively Oriental appearance and clothing, the court stated:

We do not intend to in any way suggest that the appearance of being Oriental is any respect "suspicious", and we wish to state in unequivocal terms that we could *never* condone stopping or questioning an individual simply because he looked to be of Oriental descent.⁹²

From this decision, it is clear that in urban areas appearance of foreign ancestry is not alone sufficient to begin the interrogation of a suspected alien. In this particular case, it is instructive to evaluate the facts which the court found to have justified the suspicion to interrogate in the first place. Specifically, in the vicinity of a Chinese restaurant, one Chinese gentleman stopped a taxi which was headed down the street and another entered the back seat of the cab. The companion who had hailed the cab bent over by the front door and appeared to be giving the cab driver instructions. The court held that it was unlikely that an American citizen of Oriental descent would be incapable of speaking English well enough to give directions to a cab driver for himself.⁹³

These circumstances suggesting a distinct inability to speak English plus an Oriental appearance were held sufficient grounds for the urban investigator's "founded suspicion" that the person was an alien. Section 287(a) (1) thus empowered the investigator to interrogate the potential alien as to his right to be in or remain in the United States. This section makes no distinction between a lawful permanent resident and an alien without proper documentation.

Arguably, the validity of this decision would be questionable in contemporary New York where there are thousands of Chinese as well as other Oriental peoples. Although a large portion of these people are citizens, oftentimes they live and work in an insular community (particularly Chinatown) and thus speak English poorly. In addition, many United States citizens from Puerto

92. 468 F.2d 1123, 1127 (D.C. Cir. 1972) (emphasis added).

93. *Id.* In order to become a naturalized U.S. citizen, the applicant must pass an English language test. In reality the test is so simplistic that it would not be at all unlikely that a naturalized citizen would have difficulty conversing with a cab driver, particularly if it were necessary to give the cab driver any directions.

Rico and other Hispanic lands cannot adequately speak English. Even in the District of Columbia, this decision certainly represents the outer parameters of "founded suspicion."

The court further refined urban officials' powers to forcibly detain, for purposes of further interrogation, a person found to be an alien. The court enunciated the principle that when a reasonable suspicion that a person is an alien turns into a reasonable belief that he is in the country illegally, an investigator is authorized to engage in "forcible detention of a temporary nature for the purpose of detailed interrogation."⁹⁴ The court in *Cheung Tin Wong* quoted the holding in *Au Yi Lau v. INS*:

We hold that immigration officers in accordance with the Congressional grant of authority found in section 287(a)(1) may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country.⁹⁵

Utilizing the standards developed in *Terry v. Ohio*, such detentions are to be judged from case to case by individual analysis of the particular facts.⁹⁶

The District of Columbia Circuit Court, in dealing with permissible techniques to be utilized by urban immigration officials, has interpreted section 287(a)(1) to embody two related but separate concepts. First, an immigration officer must have some suspicion that a person is an alien—either a permanent resident, a nonimmigrant, an alien without proper documentation, or any other type of noncitizen status—in order to interrogate him or to ask him any question whatsoever as to his right to be in or remain in the United States. It would seem, however, that if one of the key elements of the fourth amendment is to prevent the harassment of innocent people by the police authorities, then an encounter consisting of only a casual question designed to elicit responses evidencing a heavy accent, no knowledge of the English language or unfamiliarity with the neighborhood, must still be based upon "founded suspicion."⁹⁷ Among the detailed law enforcement procedures of the New York District of the Service is a rule which prohibits, as a

94. For a more detailed discussion of this two-pronged analysis of the consecutive requirements for more detailed interrogation, see cases cited note 35 *supra*. See also *Cheung Tin Wong v. INS*, 468 F.2d 1123, 1126-27 (D.C. Cir. 1972); *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971).

95. *Cheung Tin Wong v. INS*, 468 F.2d 1123, 1126-27 (D.C. Cir. 1972). See 72 COLUM. L. REV. 593, 602 (1972), where the author points out that even temporary detentions by the Service for interrogation are a device that can be used to harass innocent people.

96. 392 U.S. 1 (1968).

97. See note 95 *supra*.

matter of policy, the utilization of such "ruse" techniques in which immigration officials ask innocent questions of a suspected alien without the necessary "founded suspicion." Based on the response, the officials acquire the requisite "founded suspicion" for further interrogation. However, the Service believes that these procedures are constitutional, and that nothing as a "matter of law" prevents these activities. Certainly, *Cheung Tin Wong* would not justify "fishing-expedition" encounters and would not distinguish such encounters from "interrogation." Definitionally, an interrogation must begin with the first question, and founded suspicion must be based upon reasonably articulable facts or the fourth amendment will be rendered meaningless. The effect of the Service's narrow conception of the law was manifest in previous enforcement efforts, now fortunately abandoned, wherein immigration officers would position themselves at subway steps or other public places in areas believed to contain a high concentration of "illegal aliens." Special attention would be given to areas such as Chinatown or to Jackson Heights and Corona, New York, where Hispanic persons reside. "Ruse-type" questions would be asked to determine whether the person spoke English, which would arguably then give officers the necessary "founded suspicion." The practical application of these standards can be quite difficult. Sometimes the interrogation would be based on the foreign appearance, mannerisms, wearing apparel and other similar facts of the subject or subjects. These techniques constituted a clear infringement of fourth amendment rights since it was this very type of police-state tactic which the writers of the fourth amendment wished to prohibit. There was no reasonable suspicion to justify the asking of the first question. Nor would sufficient "founded suspicion" be furnished by phone calls from concerned neighbors or neighborhood associations reporting the presence of "illegal aliens" in their neighborhood. Such people obviously do not have the necessary expertise to make such a judgment.

The second concept in the District of Columbia Circuit's interpretation of section 287(a)(1) is the right of the immigration officer to forcibly detain the alien and further question him once he has reasonable suspicion that the alien is illegally in the United States. The *Brignoni-Ponce* decision appears to support the *Cheung Tin Wong* standard since in *Brignoni-Ponce* the Court clearly mandated that the standard of "founded suspicion" applies to interrogation

of aliens. It should be noted, though, that the Court specifically refrained from ruling on the applicability of the decision to *Cheung Tin Wong* within every situation.⁹⁸

In major urban areas, the Service's exercise of its section 287(a)(1) power has been rather tempered within the last one or two years because of concern about the constitutionality of certain practices and procedures. Nevertheless, many of the present policies and concepts of the Service fall within the gray areas of the law. With due respect for the opposite view of the Service, many of these policies do not withstand the scrutiny of the newer dictates of the fourth amendment. The major area of difference concerns the question of when an "interrogation" within the meaning of section 287(a)(1) ensues. It is the position of the Service that an officer is permitted to ask a casual question of a person who appears to be an alien on mere appearance alone. The plain-clothed officer does not identify himself and the Service takes the position that any person has the right to decline to answer, to tell the officer to "leave him alone" or to refuse to cooperate in any other manner. Under such circumstances, the officer will not be authorized to take any additional action.⁹⁹ However, if the alien unwittingly approached the officer in the first instance and conducted himself in such a manner as to provide founded suspicion, interrogation would be proper.¹⁰⁰

At present, the law enforcement effort of the Service has shifted emphasis. More reliance is now placed upon specific leads concerning the whereabouts of particular illegal aliens and obtaining sophisticated information from other federal agencies. In most cases, these sources provide the requisite probable cause or founded suspicion to constitutionally apprehend aliens. In addition to the issuance of specific arrest warrants by administrative bodies and the issuance by courts of warrants to search premises for particular persons, warrants have even been issued to arrest persons in their apartment building. The untested concept of the "general area warrant" proposed for border areas¹⁰¹ has not been employed by the Service in an urban setting.

The major areas in which the Service has not deferred to the case analysis discussed above are in its primary procedures for in-

98. In *United States v. Brignoni-Ponce*, the Court stated that it is not necessarily deciding at this point the constitutional "standard" for urban encounters. 95 S. Ct. 2574 at 2581-82 nn. 8 & 9.

99. See note 90 *supra*.

100. *Id.*

101. *Id.*

terrogations conducted mainly at places of business and restaurants.¹⁰² The Service believes that once the officer has received permission from the employer to go on the premises, any person thereon is "free game" for purposes of interrogation. This position contradicts the constitutional rule requiring "founded suspicion" that a particular person is an alien before the officer may ask the first question.¹⁰³ Just as in the *Barbera* case, even though the officer rightly had access to the public place (a public bus), his power to begin to interrogate a specific individual could be invoked only upon obtaining "founded suspicion" that the person is an alien. The rule set forth in *Barbera* applies to any person about to be interrogated at his place of employment by a Service official. Furthermore, the employer has no right to consent to interrogation of his employees since it is the employees' fourth amendment rights that are in question.¹⁰⁴ Contrariwise, the constitutional requirements of the fourth amendment might be satisfied if Service officials, having been granted permission to be on the premises, simply listened for clues which provided a reasonable suspicion that certain workers were aliens. However, it is doubtful that foreign appearance of an employee of a Chinese restaurant, for instance, alone would be sufficient to constitute a reasonable assumption that the employee is an alien; many United States citizens of Chinese ancestry also work in these restaurants. The same is true of Spanish-appearing persons working in factories.

Apartment house searches by Service officials in New York City are presently conducted in accordance with traditional standards. However, there is one interesting area of questionable constitutionality. It is the practice of the Service to have either (1) a warrant for the arrest of a particular individual or (2) a fairly reliable clue, insufficient to obtain a warrant, but adequate to support a section 287(a)(1) interrogation. The officers knock at the door of an apartment, ask for the particular individual sought, and question the other inhabitants of the apartment concerning their alien status.¹⁰⁵ With no other articulable facts, it is doubtful that

102. *Id.*

103. Fragomen, *Legislative and Judicial Development—Constitutional Right of Aliens upon Arrest*, 21 INT'L MIGRATION REV. 69 (1973).

104. In *Barbera*, it certainly could not be said that the bus driver could have consented to searches of the passengers on his bus.

105. See note 90 *supra*.

the mere presence on the premises of someone believed to be an alien without proper documentation is sufficient to result in "founded suspicion" that any person at that location might also be an alien.

What emerges from the section 287(a)(1) standards as applied in an urban area such as New York City is the concept that it will take time before these constitutional decisions make themselves felt upon law enforcement officials. There are a variety of interpretations as to the exact scope of court decisions and judicial limitations upon immigration search procedures. Understandably, the Service takes a very narrow view of the limits, particularly when the Supreme Court cases do not directly concern interrogations of aliens in urban area.¹⁰⁶ Nevertheless, it is clear that the hypothetical position taken by the Service regarding its "ruse" questioning procedures, and its nonapplication of *Cheung Tin Wong* and *Brignoni-Ponce* standards to mass interrogations conducted at public places are very serious and clear-cut violations of the applicable constitutional law and should be eliminated nationally by the Service as a matter of law and not merely local policy. The New York District Office of the Service has taken a middle of the road position; it is optimistic that its view will be upheld but has yielded on some important issues. For example, due to the refinement of its procedures, the Service has administratively abandoned dragnet type round-ups and unfounded interrogations.¹⁰⁷

106. *Id.*

107. Illustrative of the emerging standards is a recent decision by a United States District Court in Illinois, *Illinois Migrant Council v. Alva Pilliod*, Civil No. 74C-3111 (E.D. Ill. July 29, 1975). The court summarized the law relating to street encounters and area control procedures used for apprehending illegal aliens. With respect to the street encounters, the court held that the only workable and constitutionally responsive test which has to be met before a Service official can make even the briefest seizure of a person suspected of being an alien is "whether there are specific, articulable facts and reasonable inferences to be drawn that a person is an alien *illegally* in the country." *Id.* at 36 (emphasis added). This is considerably stronger language than that used in *Cheung Tin Wong* which required only a reasonable suspicion by an official that a person was an alien. In the present case, however, the court refrained from providing a strong list of articulable factors and still permitted the Service to look at the "totality of circumstances."

The court also held that the area control operations utilized in this case were invalid. The government did not assert that it had a warrant or probable cause, but suggested there was consent by the searched parties. Rejecting this, the court held that it would be "hypocrisy" to hold that knocks on the doors of the dormitories and individual residences produced consent "voluntarily given and not the result of duress or coercion." *Id.* at 35. Nor could the government successfully assert that the plant supervisor could consent to the interrogations of the workers.

In deciding that a preliminary injunction was a proper remedy against

Section 287(a) (2), the other significant section of the Act regarding urban procedures, authorizes any officer or employee of the Service without a warrant

to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion or expulsion of the aliens, or to arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest¹⁰⁸

Essentially this section sets forth the basic authority for arrest without a warrant in two situations: (1) Where an alien enters or attempts to enter the United States in the presence of an officer, and (2) where the officer has reason to believe than an alien is illegally in the United States and is likely to escape before a warrant can be obtained. Due to the mobility of aliens, the vast majority of arrests are without a warrant. Thus, as a practical matter, it becomes difficult to challenge the validity of most arrests by officers, particularly when the officer proceeded in accordance with constitutional standards properly in the first instance. Obviously, if the officer does not make an arrest at the time he has reason to believe an alien is illegal, the alien will be gone and a future arrest rendered impossible.

The phrase "reason to believe" in this section of the statute must be construed identically with the constitutional standard of probable cause. Probable cause generally results from an interrogation of the alien, an inspection of his documents, or both. If any of the elements is missing, the arrest is unlawful. Thus, if there is no reason to believe the alien will flee, a warrant must be ob-

an agency functioning in a quasi-police capacity, the court required the complainants to show that a particular official policy was illegal. The court gave significant emphasis to the inconsistencies in the Service Handbook and eventually decided that the Service's publications distributed to its officers constituted sufficient illegal official pronouncements to grant the injunctive relief.

108. 8 U.S.C. § 1357(a) (2) (1970); see note 22 *supra*. In *Valerio v. Mulle*, 148 F. Supp. 546 (E.D. Pa. 1957), a warrantless search was upheld when an officer, upon examining the papers of an alien, realized that his visa had expired and feared that such alien would escape immediately. In *Taylor v. Fine*, 115 F. Supp. 68 (S.D. Cal. 1953), immigration officers armed without warrants arrested illegal entrants on plaintiff's ranch and were victorious in a civil damage suit instituted against them.

tained to effectuate an arrest. Too frequently, in spite of specific information received from reliable informants, warrants are not obtained unless the Service has previously obtained information concerning this particular individual. For instance, suppose that an ex-friend, estranged spouse, or previous employer, whose reliability cannot be questioned, informs the Service that a "Jose Gonzalez," who is in the United States illegally from Colombia, lives at a "such-and-such" address. In most cases, a warrant would not be obtained to interrogate that person¹⁰⁹ even though he may be present at that address weeks later. Under such circumstances, it cannot be contended that there is a likelihood of escape. In such a case, arrest without a warrant would be improper. Arguably, the Service's policy appears to be predicated upon a belief that presence in the United States is so important to an alien, that if he were let free while the officer obtained a warrant, he would probably flee. The Service is no more justified in arresting an alien without the formal procedure of a warrant than is any other law enforcement agency.¹¹⁰

However, since the majority of arrests do not occur as the result of reliable information about a particular individual, and thus an officer's authority to arrest would not even be activated unless an interrogation procedure were first employed, the key to constitutionalizing urban administrative procedures lies in stricter deference to the statutory language of section 287(a)(1) and the various cases decided thereunder.

In spite of various disagreements, there are strong indicators from

109. See note 90 *supra*.

110. *Id.* Among other items discussed in the interview was the question whether prior employment of illegal aliens by an employer could furnish reasonable suspicion that there were illegal aliens presently on his premises. The INS asserts that in such cases it always gets permission from the employer to enter the premises but that it need not do so. Furthermore, the isolated cases of employer obstinacy were discussed. It turns out, however, that most employers, even when presently there is no law with respect to them, realize that it is in their best interests to cooperate with the Service. Mr. Wagner also discussed the fact that the administration took faithful execution of the law very seriously, but that isolated illegal searches might occur occasionally when certain young officers go out and try to make a name for themselves. He likened this behavior to a young attorney trying to establish his reputation.

The Service concedes that exploitation of the alien is not a particularly accurate charge. Rather, the employer of illegal aliens makes large profits and therefore exploits the American consumer since the latter pays more for the goods than a normal mark-up would justify.

The power of the INS to issue their own administrative arrest warrants was discussed, and furthermore, the Service contended that its use of section 287(a)(3) was restricted to searches of vessels in New York Harbor on probable cause or pursuant to a warrant.

the courts that even after the internal alterations in service procedures, there remain unconstitutional techniques being utilized. There are effective means to enforce the Act within urban areas such as New York City within constitutional parameters. The final steps toward effective fourth amendment protection would be to require strict adherence to *Cheung Tin Wong* and *Brignoni-Ponce* in all interrogations, and to insist that arrest be utilized where specific information is available.

SUGGESTED FUTURE ACTION

With immigration law enforcement officials beginning to act within the ambit of the fourth amendment, which is now rather well-defined and clearly profiled, a variety of techniques emerge that promise to be effective. In border areas, assuming the broadest interpretation of the recent decisions,¹¹¹ the most effective although expensive means of regulating alien flow would be to fortify the actual border. Admittedly, this might require pouring massive funds into the establishment of additional border checkpoints and the utilization of sophisticated equipment along most of the 2,000 mile Mexican border.¹¹² If constitutional mandates are followed, however, such expense is no longer optional. If the Constitution only permits officers to function with broad powers at the border itself,¹¹³ then that is where the Service must concentrate its operations. Furthermore, in border areas the Service could also spend significantly more time and effort cultivating specific leads and tips and could also integrate into its procedures increased acquisition of specific warrants to search vehicles. Of course, "heads-up" investigation would still permit a roving patrol to find "founded suspicion" or "probable cause," but such would have to be done within the guidelines of the fourth amendment. In summary, now that the courts have spoken, the duty lies with law

111. For purposes of this discussion, it must be assumed that the narrow position taken in Mr. Justice Rehnquist's concurrence in *United States v. Ortiz*, 95 S. Ct. 2585 (1975), is incorrect and that the holdings of the cases do in fact prohibit unfounded interrogations even at fixed checkpoints.

112. For a detailed discussion of the situation at the border and the difficulties of patrolling same, see Appendix in *United States v. Brignoni-Ponce*, 95 S. Ct. at 2591.

113. See *United States v. Brignoni-Ponce*, 95 S. Ct. 2574 (1975).

enforcement officials and administrators to constitutionalize their own procedures.¹¹⁴

The same suggestions apply to urban areas where immigration officials are likewise restricted by the command of the fourth amendment.¹¹⁵ Particularly in their interrogations of persons believed to be aliens, urban investigators ought to spend virtually all of their time pursuing specific leads. They must take special precautions not to choose a specific employment site and then proceed to interrogate all workers without "founded suspicion."¹¹⁶ Although this may be more expensive, more time consuming and somewhat less effective, it is essential to preserve the fourth amendment rights of all.

The use of area search warrants, unless strictly applied, would virtually undo the entire progression and expansion of fourth amendment rights during the past four years. Area search warrant procedures for nonborder searches are not an acceptable method for balancing the interests of the individual and the government.¹¹⁷ An area warrant would be used by both roving patrols and fixed checkpoints operating within a reasonable distance from the border.¹¹⁸ In fact, in a place such as New York, a city of 8 million which is not more than 15 miles from the "sea frontier" at its furthest point, all New Yorkers would be subject to area warrant searches. There would be prior application for a warrant, and supposedly this is sufficient to establish limitations on discretion of the officers.¹¹⁹ This could allegedly be accomplished by limiting the area and time period of operation and the intensity of the search. It has been suggested that the warrant could also require a return of information to enable the Service and the magistrate to assess the productivity of searches in particular areas.¹²⁰ Justice Powell suggested several relevant factors that may be used to determine area "probable cause."¹²¹ Specific criteria for probable cause could also be developed and published by the Director of the

114. See note 89 *supra*.

115. See note 90 *supra*.

116. *Id.* This is exactly the procedure used in New York City, and to the extent that it disregards the holding in *Cheung Tin Wong* it is an improper one.

117. For a contrary view, see 27 VAND. L. REV. 523, 534 (1974).

118. *Id.* at 535.

119. *Id.* at 534.

120. See *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 196, 202 (1973).

121. These were frequency of illegal aliens, proximity to the border, geographic characteristics, and probable degree of interference with innocent persons. *Almeida-Sanchez v. United States*, 413 U.S. 266, 283-84 (1973) (Powell, J. concurring).

Domestic Control Division of the Service or by the Attorney General.¹²² In spite of these procedural suggestions, the area warrant is simply a subtle mode of returning to the pre-*Almeida-Sanchez* unlimited discretion.¹²³ When an area warrant is used, no matter how specifically drawn or how fairly issued, all innocent persons who happen to fall into the area become subject to what otherwise would be unconstitutional searches. The area warrant is a mere ceremony that causes delay and expense, and it could become a rubber stamp procedure in the hands of an unconscientious magistrate.¹²⁴ There is not enough reason to believe that an issuing magistrate is significantly less disinterested in apprehending aliens than a Service official, and in most cases, he is far less knowledgeable. If officers were to violate the area warrants' provisions, it is said they would be subject to a civil damage suit in tort for specific damages.¹²⁵ However, even compliance with the terms of the proposed area warrant would result in a plethora of "legal searches" which would also be highly objectionable.

The danger in this procedure would also exist if immigration officers authorized to conduct area warrant searches in proximity to the border could abuse their "two-hat" status by using their initial stops of vehicles in search of aliens for the purpose of searching the vehicle to find contraband.¹²⁶ If the immigration officer's actual purpose for stopping the vehicle is to make a search in his customs officer's role, and he used the area warrant to validate the initial stop, the suspicion standard would be circumvented and the developing check on customs officers' discretion would be weakened substantially. Moreover, since the flow of illegal narcotics is more

122. This division of the Justice Department is responsible for border patrol operations.

123. See case cited note 35 *supra*.

124. See *See v. City of Seattle*, 387 U.S. 541, 548 (1967) (Clark, J. dissenting).

125. See *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 411-27 (1971) (Burger, C.J. dissenting). Professor Wright espouses an intermediate position that would exclude evidence when official violations are flagrant and use tort remedies when violations are minor. See Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 *TEX. L. REV.* 736 (1972).

126. For an example of nonabuse of the "two-hat" standard see *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963).

critical than the illegal alien problem and since immigration officers uncovered \$5,000,000 worth of drugs in 1971, to discontinue the dual role of immigration officers would only force the Treasury Department to hire more customs officers.¹²⁷ However, this "two-hat" problem with the area search warrant could be avoided by restricting immigration officers to seizing contraband found in plain view during their immigration search, and to authorize a more intensive search only if they have or acquire probable cause after the initial stop.¹²⁸

The above suggestions, of course, refer to modes of enforcing the immigration law by means of police work.¹²⁹ It also has been suggested that legislative action be taken which would create criminal and civil sanctions¹³⁰ upon employers and other groups which harbor illegal aliens.¹³¹ It is doubtful that such laws would have a permanent beneficial effect on the problem because they will also be circumvented in time. In addition, the potential for abuse and exploitation of aliens and discrimination against persons with foreign appearance, surnames or accents would be encouraged.¹³² Moreover, the underlying assumptions of the proposed "sanctions bill" are highly questionable since there is no evidence that aliens without documentation have any adverse effect on the economy or other aspects of the society. In fact, they may be contributing positively to the economic structure.¹³³

Notwithstanding consideration of pending legislation, the fourth amendment remains, and enforcement of the Act will have to be done constitutionally.¹³⁴ To that extent, the judiciary has clearly

127. 1971 ATT'Y GEN. ANN. REP. 152.

128. In *Fernandez v. United States*, 321 F.2d 283 (9th Cir. 1963), the officer had probable cause when he smelled marijuana coming from the hood of the car.

129. See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

130. H.R. 8713, 94th Cong., 1st Sess. (1975), was favorably reported by the House Judiciary Committee July 30, 1975. This is the successor bill to H.R. 982, 93d Cong., 1st Sess. (1973). See note 23 *supra*.

131. Fragomen, *Poor Immigrants Discriminated Against*, MIGRATION TODAY, Sept. 1, 1973, at 1.

132. *Id.*

133. Fragomen, *Illegal Aliens: Prejudice and Facts*, MIGRATION TODAY, March ___, 1975, at 6. See also other articles in MIGRATION TODAY, March ___, 1975. For the proposition that there is no negative economic impact, see Piore, *Restrictions Aren't the Answer—The Illegals*, THE NEW REPUBLIC 7 (1975).

134. See note 90 *supra*. The INS while recognizing that prior to *Almeida-Sanchez* there appeared to be no constitutional limits upon their procedures, now realize that there are very strong constraints upon officers' abilities to interrogate and to take aliens into their custody.

recognized the necessity of strict application of constitutional standards over political and social expediency.

CONCLUSION

It has been noted that while the proposed legislation to combat the problem has become recognized as increasingly complex,¹³⁵ there have also arisen parallel "restraints" on the powers of law enforcement officials through the vehicle of the fourth amendment. Apparently, as we approach the realization that so long as the United States remains the richest nation in the world immigrants will flock here, we simultaneously realize that we cannot tear down the country's infrastructure of rights to combat this phenomenon. We are confronted with the realization that even if our sophisticated immigration law enforcement activities have approached their capacities, we cannot attempt to prop up the system by unconstitutional means. Weakening the fourth amendment prior to *Almeida-Sanchez*¹³⁶ was morally unfair, and pragmatically ineffectual. Armed search patrols with power to cordon off whole areas and require each individual to identify himself might be more effective—but are we willing to accept the storm trooper concept in order to control immigration? No immigration official, no matter how zealous would agree to such a solution.

It has been noted and documented that the fourth amendment began its spread with respect to vehicle searches for aliens in border areas and has extended to urban interrogations and arrest procedures. In the future, law enforcement officers should comply with the judicial restrictions imposed upon them by channeling their efforts into activities that are constitutionally permissible in the alien search field. These include pursuit of tips and leads, acquisition of search and arrest warrants, actual border fortification, and the utilization of intricate detection equipment. Of course, the concept of the area warrant must be rejected if any of the theory that has been developed is to persevere. The constitution permits little more. These methods are probably as effective as possible in this area. With a strong fourth amendment, the enforcement officials would grow far more circumspect in exercising their

135. See note 133 *supra*.

136. 413 U.S. 266 (1973).

powers and a major exception to our right to be free from unreasonable searches and seizures would be abolished.

No further criminalizing of the sociological phenomenon of human migration should occur. That approach is counter productive and unlikely to increase the effectiveness of present regulatory procedures.¹³⁷ A proposed course to follow would be the offering of a "blanket amnesty" to all aliens presently in the United States. This would serve to deinstitutionalize inquisitional behavior against certain groups. The substantial money saved could be invested in detailed border fortification and better monitoring of the immigration status of aliens currently entering the United States with valid temporary visas.¹³⁸

Within the past year, the news media has been calling attention to the presence of alien workers without proper documents. From New York to Los Angeles, a mood of suspicion has emerged. Hundreds of thousands of persons are suspected of having illegal status only because of ethnic characteristics such as color and accent. Public attitude necessarily affects administrative procedures because the law is enforced by persons who are both public servants and members of the public.

By emphasizing the extreme importance of strict adherence to the law in providing constitutional protection for aliens, the judiciary will prevent the development of enforcement policies which reflect a xenophobia in the public. If the Service assiduously applies these pronouncements, a healthy balance will have been reached. The Service will be free to pursue its worth objectives in a constitutional manner, which will be done without offending individual or group integrity and privacy.

137. See note 133 *supra*.

138. Since a substantial portion of the Service budget is allocated to the location of "illegal aliens" already present in the United States by regularizing their status, enforcement manpower could be reallocated to the border and other points of entry.