BORDER SEARCHES REVISITED: THE CONSTITUTIONAL PROPRIETY OF FIXED AND TEMPORARY CHECKPOINT SEARCHES

*By Ken Keller**

> In a society that presses towards sameness and safeness, these all too perishable qualities [independence, creativity, boldness, and high spirits] must be given some help—they must be fostered and nourished. . . . If I choose to get in my car and drive somewhere, it seems to me that where I am coming from, and where I am going, are nobody's business. . . . I think I am entitled to look for the distant light . . . without finding myself staring into the blinding beam of a police flashlight.[1]

Introduction

The Fourth Amendment[2] protects the people against unreasonable searches and seizures by requiring generally both a showing of probable cause and a warrant from a neutral magistrate before a search and seizure may be judged reasonable.[3] This guarantee of protection marks the right of privacy as one of the most unique values of our civilization.[4] The basic right to freedom from unreasonable searches and seizures is so strong that it has been stated that "it is better to maintain the right and permit the convicted defendant to go free, than to sustain the conviction and thereby deny the right."[5]

There is an exception to the requirements of the Fourth Amendment applicable to "border searches"[6] of persons and vehicles.[7] As

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1. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1172 (1966).

2. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." U.S. CONST. amend. IV.

3. *See* Johnson v. United States, 333 U.S. 10, 13-17 (1948).

4. *See* Weeks v. United States, 232 U.S. 383, 391-92 (1914).

5. United States v. Law, 190 F. Supp. 100, 103 (S.D. Cal. 1960).

6. Border search is a term of art used "to distinguish official searches which are reasonable because made solely in the enforcement of Customs laws from other official

a result of this exception, customs and immigrations officials are exempt from the usual probable cause and warrant requirements imposed upon searches and seizures.

Prior to 1973, the United States Supreme Court had consistently refused to review lower court decisions dealing with the constitutionality of such searches.[8] In 1973, however, the Court granted certiorari to two Ninth Circuit cases, *United States v. Johnson*[9] and *Almeida-Sanchez v. United States*,[10] which both dealt with border search problems. Although the government dropped its appeal in *Johnson*,[11] the decision in *Almeida-Sanchez* eroded the well-established validity of inland border searches by roving units of the Border Patrol which the courts of appeal had articulated.[12] The majority of the Court held that such searches conducted at random within one hundred air miles of the border were unconstitutional unless based upon probable cause.[13] After rendering the *Almeida-Sanchez* decision, the Court remanded several cases[14] dealing with the constitutional propriety of border searches conducted some distance from the international border at fixed and temporary checkpoints, a question which was neither ad-

searches made in connection with general law enforcement." Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966). "One point upon which all the courts agree is that the term 'border search', as presently used, is a misnomer. The phrase may once have designated the geographic area to which the courts felt the Constitution confined the extraordinary authority to the Border Patrol. Now it is merely judicial shorthand used to describe the power of border agents to search without probable cause." Comment, *In Search of the Border: Searches Conducted By Federal Customs and Immigration Officers*, 5 N.Y.U. J. INT'L LAW & POL. 93, 103 (1972).

7. See text accompanying notes 36-51 *infra*. *See generally* Winfrey, *Border Searches: An Exception to Probable Cause*, 3 ST. MARY'S L. REV. 87 (1917); Rempe III, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 457 (1968); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968).

8. *E.g.*, Alexander v. United States, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); Lane v. United States, 321 F.2d 573 (5th Cir.), *cert. denied*, 377 U.S. 936 (1963); Witt v. United States, 287 F.2d 389 (9th Cir.), *cert. denied*, 366 U.S. 950 (1961); King v. United States, 258 F.2d 754 (5th Cir. 1958), *cert. denied*, 359 U.S. 939 (1959).

9. 425 F.2d 630 (9th Cir. 1970), *cert. granted*, 400 U.S. 990 (1971).

10. 452 F.2d 459 (9th Cir. 1971), *cert. granted*, 406 U.S. 944 (1972).

11. United States v. Johnson, 425 F.2d 630 (9th Cir. 1970), *cert. granted*, 400 U.S. 990, *petition dismissed pursuant to Supreme Court Rule 60*, 404 U.S. 802 (1971).

12. For a description of the developments in the courts of appeal, see Note, *In Search of the Border, Searches Conducted by Federal Customs and Immigrations Officers*, 5 N.Y.U. J. INT'L LAW & POL., 93 (1972).

13. See text accompanying notes 54-74 *infra*.

14. *E.g.* Miller v. United States, 414 U.S. 896 (1973), *vacating*, 477 F.2d 595 (5th Cir. 1973); United States v. Bowen, 413 U.S. 915 (1973), *vacating*, 462 F.2d 347 (9th Cir. 1972).

dressed nor answered in *Almeida-Sanchez*.[15]

This note will include a brief discussion of alien immigration and related law enforcement problems, the border search exception, the *Almeida-Sanchez* decision, and, finally, an evaluation of the analyses of those courts which have considered the constitutionality of border searches conducted at fixed and temporary checkpoints inland from the border. In so doing, it will attempt to determine whether the provisions of the Fourth Amendment are applicable to such inland checkpoint searches.

The Illegal Alien and Related Law Enforcement Problems

The Illegal Alien Problem

Through legislative action[16] the United States has placed limits upon the number of persons who may legally immigrate into the country in a given year. These limitations reflect the national interest in protecting the American labor market from an unrestricted influx of foreign labor.[17]

Under this policy of limited immigration, the law has established an annual quota of 120,000 persons who may immigrate to the United States from the independent countries of the Western Hemisphere. Immigrants from the Republic of Mexico in the fiscal year of 1972 totalled 64,040 or approximately fifty-four percent of the total immigration quota.[18]

According to a Department of Justice report, there are an estimated one million illegal aliens residing in the United States, of whom eighty-five percent are thought to be Mexican citizens.[19] Since 1970, the number of illegal Mexican aliens has been growing at a rate in excess of twenty percent per year.[20] The state of California has calculated that in 1971, when approximately 595,000 Californians were unemployed (7.4 percent of the state's labor force), there were between

15. Mr. Justice Powell in his concurring opinion in *Almeida-Sanchez* states, "[n]or does this case involve the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent. 413 U.S. 266, 276 (1973) (Powell, J., concurring).

16. *See* 8 U.S.C. § 1151(a) (1970).

17. *See* Karnuth v. United States, 279 U.S. 231 (1929).

18. 1972 IMM. & NAT. SERV. ANA. REP. 2, 28 [hereinafter cited as 72 Report]. DEPARTMENT OF JUSTICE, SPECIAL STUDY GROUPS ON ILLEGAL IMMIGRANTS FROM MEXICO, A PROGRAM FOR EFFECTIVE AND HUMANE ACTION ON ILLEGAL MEXICAN IMMIGRANTS 6 (1973) [hereinafter cited as *Crampton Rpt.*].

19. *Crampton Rpt., supra* note 18, at 6.

20. CAL. STATE SOCIAL WELFARE BOARD, ISSUE: ALIENS IN CALIFORNIA 12, 150 (1973) [hereinafter cited as *Aliens*].

200,000 and 300,000 illegal aliens in California, earning an aggregate total of $100 million per year in wages.[21]

Because the majority of illegal Mexican aliens are unskilled or low-skilled workers, they tend to compete with other minority groups in this country. As a result of this competition, and the fact that the percentage of unskilled or low-skilled jobs is declining relative to other job categories, the unemployment problems associated with this labor market have been compounded considerably.[22] In addition, illegal aliens pose potential health hazards,[23] burden public assistance programs,[24] and exacerbate the United States' balance of payments problems.[25]

The Law Enforcement Problem

The yearly influx of illegal aliens into the United States also presents a significant law enforcement problem. The Immigration and Naturalization Service (INS) has the burden of controlling the entry of aliens along the Mexican-American border which extends for almost 2000 miles from the Gulf of Mexico to the Pacific Coast.[26] Within the INS, the task of preventing the illegal entry of aliens and the apprehension of those who have entered illegally is assigned to the 1700-person Border Patrol.[27]

In an attempt to maximize the effectiveness of its limited personnel, the Border Patrol deploys a large percentage of its agents directly upon the physical boundary between the United States and Mexico.[28] However, such deployment is not infallible, for it is physically impossible to maintain continuous surveillance over vast stretches of the border.[29] In addition, the Border Patrol, pursuant to statutory authority,[30] has conducted three types of inland searches for illegal aliens:[31] 1)

21. *Hearings on Illegal Aliens Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1 at 150 (1971) [hereinafter cited as *Hearings*].

22. *Crampton Rpt., supra* note 18, at 12.

23. Immigration and medical officers in Los Angeles, for example, have discovered that the illegal alien population in the Los Angeles barrio is infected with a high incidence of typhoid, tuberculosis, tapeworms, venereal disease and hepatitis. United States v. Baca, 368 F. Supp. 398, 403 (S.D. Cal. 1973), *quoting* L.A. Times, Sept. 16, 1973, pt. II, at 1.

24. *Aliens, supra* note 20, at 35 & 43.

25. *Hearings, supra* note 21, at 208.

26. *72 Report, supra* note 18, at 1.

27. IMMIGRATION AND NATURALIZATION SERVICE, THE BORDER PATROL; ITS ORIGIN AND ITS WORK 1 (1965).

28. *Id.* at 10.

29. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 293 (1973) (White, J., dissenting).

30. 8 U.S.C. § 135 (1964); see note 38 *infra* and accompanying text.

31. 413 U.S. at 268.

searches at permanent checkpoints maintained at certain nodal intersections;[32] 2) searches at temporary checkpoints established from time to time at various places; and 3) searches carried out by roving patrols. The purpose of such searches is to question "vehicle occupants believed to be aliens, as to their right to be, or to remain, in the United States, and also to search such vehicles for illegal aliens."[33] During 1972, these inland checking operations located over 39,000 deportable aliens, of whom approximately 30,000 had entered the United States by illegally crossing the border at a place other than a port of entry.[34]

In recognition of the illegal alien and related law enforcement problems Congress and the courts have given "almost continuous attention . . . to the problem of immigration and excludability of certain defined classes of aliens. The pattern has generally been one of increasing control. . . ."[35] Such "attention" resulted in the development of the border search exception to the Fourth Amendment.

The Border Search Exception

Beginning with the first border search statute enacted in 1789,[36] Congress has granted customs officials the authority to stop and examine any vehicle, person or baggage arriving in the United States on *suspicion* that merchandise is concealed which is subject to duty or which cannot be legally imported into the United States.[37] Similarly,

32. The primary factors in selecting the site of a permanent checkpoint are:

1. A location on a highway just between the confluence of two or more roads from the border. Such a site minimizes the inconvenience of commuter or urban traffic while permitting the checking of a large volume of traffic with a minimum number of officers.

2. Terrain and topography which restrict passage around the checkpoint.

3. Safety factors such as unobstructed view of oncoming traffic to provide a safe distance for slowing and stopping the vehicles to be inspected with sufficient area for vehicles not requiring inspection to pass. United States v. Baca, 368 F. Supp. 398, 406 (S.D. Cal. 1973).

33. 413 U.S. at 294 n.6 (White, J., dissenting).

34. *72 Report, supra* note 18, at 1-8. In the fiscal year 1972, 398,000 aliens who had entered the United States without inspection were located by INS officers; and of the 39,243 deportable aliens located through checking operations, about one-third, 11,586, had been assisted by smugglers. Ninety-nine percent of all aliens illegally entering the United States by land had crossed the border with Mexico. *Id.*

35. Kleindienst v. Mandel, 408 U.S. 753, 761-62 (1972).

36. Act of July 31, 1789; ch. 5, 1 Stat. 43 (1789) which provided "[t]hat every collector, naval officer and surveyor, or other person specially appointed by either of them for that purpose, shall have full power and authority, to enter any ship or vessel, in which they have reason to *suspect* any goods, wares or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares, or merchandise." (emphasis added).

37. 19 U.S.C. § 482 (1964) provides:

"Any of the officers or persons authorized to board or search vessels may stop, search and examine, as well without as within their respective districts, any vehicle,

immigration officials have statutory authorization to conduct searches for illegally entered aliens within a reasonable distance, currently defined as 100 air miles, from the border without probable cause to believe illegal aliens are present.[38] In 1971, immigration and customs search activities were merged when Border Patrol agents became empowered to act as customs agents.[39] At first, it was thought that the standards for determining the validity of searches made by the Border Patrol would be difficult to reconcile since Border Patrol agents in pursuit of illegal aliens were empowered to make warrantless searches within one hundred miles of the border, whereas warrantless searches by customs agents sixty to seventy miles from the border were ruled illegal.[40] The Fifth Circuit Court of Appeals in *United States v. McDaniel* addressed this issue of what standard should be applied to the two searches:

> [The] Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer. The agents testified that they had planned to wear their immigration hats that night, but we find nothing in the statutes that would preclude them from later donning their customs hat during a proper border search.[41]

Although the *McDaniel* court's metaphorical analysis is not unassailable, the Fifth Circuit's "two hats" approach has been consistently upheld and followed in recent years.[42]

Practically, the border search exception is justified by the "peculiar and difficult law enforcement problems that are necessarily presented by the effective policing of our extensive national boundaries."[43] Conceptually, the courts have based their validation of border searches

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beast, or person, on which or whom he or they shall *suspect* there is merchandise which is subject to duty or shall have been introduced into the United States in any manner contrary to the laws whether by the person in possession or charge, or by, in, or upon such a vehicle or beast or otherwise. . . ." (emphasis added).

38. Under 8 U.S.C. § 1357(a) (1964):

"Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have the power without warrant . . .

3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance or vehicle. . . ." Reasonable distance is defined 8 C.F.R. § 287.1 (1967) as 100 air miles from any external boundary, or any shorter distance fixed by the district director.

39. 36 Fed. Reg. 13,410 (1971).

40. *See* comment, 51 J. URBAN LAW, 535, 558 (1974).

41. 463 F.2d 129, 134 (5th Cir. 1972).

42. *See, e.g.*, United States v. Settles, 481 F.2d 1272 (5th Cir. 1973); United States v. Wright, 476 F.2d 1027 (5th Cir. 1973); United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973).

43. King v. United States, 348 F.2d 814, 818 (9th Cir.), *cert. denied*, 382 U.S. 926 (1965). See text accompanying notes 26-35 *supra*; United States v. Glaziou, 402 F.2d 8, 12 (2d Cir. 1968); Morales v. United States, 378 F.2d 187, 190 (5th Cir. 1967).

on the nation's inherent sovereign power to protect its territorial integrity against the intrusion of unauthorized persons or things. The United States Supreme Court in *Carroll v. United States* upheld the warrantless search of an automobile by prohibition agents, stating:

> Travellers may be 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. . . .[44]

Although *Carroll* spoke of stopping travellers only "in crossing an international boundary", courts have held that a border search need not be conducted solely at a point of entry.[45] To be classified as a border search, it must be "reasonably certain" from an examination of all the circumstances surrounding the search that any contraband found aboard a vehicle was there at the time of entry.[46]

However, recent cases appear to have shifted their emphasis away from reasonable certainty that the contents of a vehicle were present at the time of entry. The rule, as set forth in *United States v. Weil*, now seems to be that

> if customs agents are reasonably certain that the parcels have been a) smuggled across the border and b) placed in a vehicle, whether the vehicle itself crossed the border or not, they may stop and search the vehicle. Similarly, if agents are reasonably certain that a person has crossed the border illegally, and has then entered a vehicle on this side of the border, we think they may stop and search the vehicle and person. They can assume that he may have brought something with him.[47]

This formulation suggests that in order to justify a search of an automobile at any other place than the immediate border area, the border

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44. 267 U.S. 132, 154 (1925). *See* Boyd v. United States, 116 U.S. 616, 623 (1886).

45. *See, e.g.*, Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966); United States v. Mejias, 452 F.2d 1190, 1192-93 (9th Cir. 1971); Castillo-Garcia v. United States, 424 F.2d 482, 484-85 (9th Cir. 1970).

46. In *Alexander, supra*, the court stated that "[w]here . . . a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of the search was aboard the vehicle at the time of entry into the jurisdiction of the United States." 362 F.2d at 382.

47. 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971).

agents must have reason to believe that parcels or individuals are being brought illegally into this country. In short, a degree of reasonable cause to search is required, though less than the traditional probable cause.[48]

It was against this history[49] that the United States Supreme Court on June 21, 1973, in *Almeida-Sanchez v. United States*,[50] took the first step toward curtailing the theretofore unbridled authority of the Border Patrol to stop and search vehicles within 100 miles of the border without a warrant or traditional probable cause.

The Almeida-Sanchez Decision

Defendant Almeida-Sanchez, a Mexican citizen, was travelling on a highway about 25 air miles north of the Mexican border when he was stopped by a roving Border Patrol unit looking for aliens illegally entering the United States. The agents stopped him even though they had neither a warrant nor probable cause to believe that the defendant's car was carrying illegal aliens.[51] Although the defendant quickly produced a valid work permit, the agents nevertheless proceeded to remove the back seat of his car. Instead of finding illegal aliens, the officers discovered 162 pounds of marijuana. The trial court denied defendant's motion to dismiss on the grounds that it was the product of an illegal search[52] and Almeida-Sanchez was convicted of transporting illegally imported marijuana. The Court of Appeals for the Ninth Circuit affirmed his conviction.[53]

By a 5-4 majority, the United States Supreme Court overruled the lower courts' decisions and held that such searches cannot be conducted if the roving Border Patrol unit has neither a warrant nor probable cause to stop the automobile in question.[54] In so holding, the majority distinguished the search in question from that which the Court had up-

48. Decisions of the Courts of Appeal of the Second, Fourth and Fifth Circuits convey the same impression. *See* Stassi v. United States, 410 F.2d 946, 951-52 (5th Cir. 1969); United States v. Glaziou, 402 F.2d 8, 13 n.3 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969); United States v. McGlone, 394 F.2d 75, 78 (4th Cir. 1968). *See also* Harris v. United States, 400 U.S. 1211 (1970).

49. For a more thorough discussion of the border search exception see note, *In Search of the Border, Searches Conducted by Federal Customs and Immigrations Officers*, 5 N.Y.U. J. INT'L LAW & POL. 93 (1972); Winfrey, *Border Searches: An Exception to Probable Cause*, 3 ST. MARY'S L.J. 87 (1971); Note, *Search and Seizure at the Border: The Border Search*, 21 RUTGERS L. REV. 513 (1967).

50. 413 U.S. 266 (1973).

51. *Id.* at 268.

52. *See, e.g.*, Weeks v. United States, 232 U.S. 383 (1914) (products of illegal search excluded from evidence in criminal prosecution).

53. 425 F.2d 459 (9th Cir. 1971).

54. 413 U.S. at 273.

held in *Carroll v. United States*.[55] In *Carroll* there was probable cause for the search based upon personal contact and prior surveillance of the defendants. In *Almeida-Sanchez*, the search was made at random and the agents had no reason to believe that the petitioner's car was any more likely to be carrying aliens than any other vehicle travelling in the area. Hence, the search of the "petitioner's car was [not] constitutional under any other decision of the Court involving this search of an automobile."[56]

The Court further disregarded the government's reliance upon cases dealing with administrative inspections in which similar searches had been upheld.[57] In *Camara v. Municipal Court*,[58] the United States Supreme Court had held that administrative inspections to enforce health and welfare regulations could be made on less than probable cause to believe that particular dwellings were the sites of particular violations.[59] However, the Court insisted that the inspectors obtain either the consent of the occupant or a general area-wide warrant.[60] The search in *Almeida-Sanchez* was both warrantless and based upon the unfettered discretion of the patrolmen. Thus, the search "embodied precisely the evil the Court saw in *Camara* when it insisted that the 'discretion of the official in the field' be circumscribed by obtaining a warrant prior to the inspection."[61]

The Court also distinguished its opinions in the cases of *Colonnade Catering Corp. v. United States*[62] and *United States v. Biswell*[63] in which it upheld warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the Government.[64] In those cases "the businessmen engaged in such federally licensed and regulated enterprises accept[ed] the burdens as well as the benefits of their trade."[65] Almeida-Sanchez, however, was not a businessman engaged in a "regulated or licensed business" but was a private citizen lawfully travelling upon a public highway. Therefore, the prosecution's reliance upon such inspections for the search in question was unfounded.[66]

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55. *Id.* at 269-70. See text accompanying note 45 *supra.*

56. 413 U.S. at 269.

57. *Id.* at 270-72.

58. 387 U.S. 523 (1967). *Accord*, See v. Seattle, 387 U.S. 541 (1967).

59. 387 U.S. at 534-36, 538.

60. *Id.*

61. 413 U.S. at 270, *quoting* Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967).

62. 397 U.S. 72 (1970).

63. 406 U.S. 311 (1972).

64. *See* Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77; United States v. Biswell, 406 U.S. 311, 312 n.1, 315-16.

65. 413 U.S. at 271.

66. *See Id.* at 270.

The Court refused to uphold the search solely upon the statutory authority granted to the Border Patrol to conduct roving searches, even though the government demonstrated that the highway in question was a common route for illegally entered aliens to travel, and one on which 195 aliens had been apprehended in the previous year.[67] Although the Court recognized the government's power to exclude aliens from this country and the difficulty of "deterring unlawful entry by aliens across long expanses of national boundaries,"[68] such power, in the Court's opinion, only allows the government to make routine roving searches of individuals and conveyances at the border itself or its "functional equivalent."[69] The Court found that

> the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border, was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of 'unreasonable searches and seizures.'[70]

The Court's analysis in *Almeida-Sanchez* ended the trend established by lower federal courts toward condoning expansions of government agents' power to conduct warrantless searches based solely upon statutory authority.[71] With the broad discretion of the Border Patrol eliminated, at least with respect to searches conducted by roving patrols, "[t]he one hundred mile zone is now like any other area inside the national boundaries; the agents must have probable cause to stop and search automobiles."[72] Lower courts must now for the first time apply familiar Fourth Amendment principles to determine the constitutionality of searches at points near the border but not at the border itself or its functional equivalent. The policy underlying this change was succinctly stated by Mr. Justice Stewart writing for the majority in *Almeida-Sanchez*:

> The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.[73]

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67. *Id.* at 273 n.5.

68. *Id.* at 273.

69. *Id.* Searches conducted at the functional equivalent of the border include, for example, a search at "an established station near the border, at a point marking the confluence of two or more roads that extend from the border . . . [or] a search of passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City. . . ."

70. 413 U.S. at 273.

71. *Id.* at 268.

72. Note, *Right to be Free from Warrantless Searches at the Border, Almeida-Sanchez v. United States*, 51 J. URBAN LAW 556, 562 (1974).

73. 413 U.S. at 273.

Although the Court in *Almeida-Sanchez* declared that searches conducted by roving units of the Border Patrol pursuant neither to a warrant nor probable cause were unconstitutional as noted above,[74] the decision did not consider the constitutional propriety of similar searches conducted at fixed or temporary checkpoints inland from the border. However, several lower federal courts have directly considered this issue in light of the *Almeida-Sanchez* decision and have relied heavily upon the Supreme Court's analysis.

Fixed and Temporary Inland Checkpoint Searches

Pre-*Almeida-Sanchez*

Prior to the United States Supreme Court's decision in *Almeida-Sanchez*, there was no indication from any of the lower federal courts that searches conducted inland from the border at fixed and temporary checkpoints were unconstitutional.[75] On the contrary, in the three circuits involved in enforcing the immigration laws along the Mexican border, thirty-five out of thirty-six appellate judges who had considered the constitutional propriety of searches conducted at fixed or temporary inland checkpoints had upheld such searches.[76] This judicial response did not rest on a comprehensive, critical analysis of the differences between searches conducted at international boundaries and those conducted at a distance from the border; rather, the law concerning such searches developed on a case-by-case basis. The decisions were based upon the aforementioned statutory provisions which, as noted above,[77] authorize immigration officials to conduct warrantless searches of vehicles for illegal aliens within one hundred air miles of an international boundary. Under the "two hats" doctrine articulated in *McDaniel*, once a vehicle has been validly stopped for an immigration search, if the Border Patrol/customs agents detect circumstances supporting the belief that customs laws are being violated, they may don their customs hats and complete the search to determine if contraband is being transported.[78]

Prior to the 1971 merger of search authorizations of the Border Patrol and customs agents, in *Contreras v. United States*,[79] an immigration inspector made a routine check for illegal aliens at a fixed checkpoint about 72 miles north of the Mexican border. Spotting a paper sack in the back seat of the detained automobile, the inspector peered

74. See note 15 and accompanying text *supra*.
75. See text accompanying notes 79-92 *infra*.
76. 413 U.S. 266, 298-99 n.10 (White, J., dissenting).
77. See note 38 and accompanying text *supra*.
78. United States v. Byrd, 483 F.2d 1196, 1198 (5th Cir. 1973).
79. 291 F.2d 63 (9th Cir. 1961).

into the bag and saw a quantity of marijuana. In view of the fact that the car was stopped for the purpose of checking the nationality of its occupants, the Ninth Circuit Court of Appeals reversed the defendant's conviction, stating that there was

> no logical connection between the examination of the sack and the determination of the appellants' citizenship, or the citizenship of any other occupant of the car. . . .
>
> If the search cannot be justified as a reasonable means of determining the citizenship status of the car's occupants, it cannot be justified in any other way under the rubric of "probable cause."[80]

In 1963, two years after *Contreras*, the Ninth Circuit Court of Appeals once again faced the question of the constitutional propriety of fixed checkpoint searches in *Fernandez v. United States*.[81] Appellant was stopped at a fixed checkpoint 60 to 70 miles north of the Mexican border and questioned as to his citizenship and point of origin. When he replied that he was an alien from Mexico, the Border Patrol directed him to pull over to the side of the road for further questioning. At this point, one of the immigration officials smelled an odor, which he thought was marijuana, emanating from under the hood of the appellant's car. The officers ordered the appellant to open the hood under which they discovered five packages of marijuana. At the trial, the investigating officer testified that he had previously discovered an alien concealed under the hood of a car.

In upholding the appellant's conviction, the court held that the initial detention of the appellant was proper under the statutory provisions concerning immigration searches.[82] In addition, the court felt that clearly there was probable cause for making the search of the appellant's car without a warrant since, having smelled the odor of marijuana coming from the vehicle in the appellant's possession, it was reasonable for the inspector to conclude that a crime was being committed.[83] Although the court in *Fernandez* was able to distinguish *Contreras* on this basis,[84] i.e., that the officer had probable cause, clearly there was an-

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80. *Id.* at 66.

81. 321 F.2d 283 (9th Cir. 1963).

82. 8 U.S.C. § 1357(a), 321 F.2d at 285-86 (1970). *Accord*, Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967). *Cf.* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970).

83. 321 F.2d at 287. The development of alien searches at fixed checkpoints followed a similar pattern in the Tenth Circuit. *See* United States v. Anderson, 468 F.2d 1280 (10th Cir. 1972); United States v. McCormick, 468 F.2d 68 (10th Cir. 1972); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969). But the Fifth Circuit created an expandible border concept that had only tangential relationship to the law emerging from the Ninth and Tenth Circuits. *See* United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972); Marsh v. United States, 344 F.2d 317 (5th Cir. 1965).

84. The court distinguished *Contreras* since in the present case the inspector was familiar with the odor of marijuana and when he smelled such an odor emanating from

other distinction, that of the size of the area searched, which later courts have deemed significant.

In *Valenzuela-Garcia v. United States*,[85] immigration officers had fruitlessly searched the appellant's car at the border itself. He was stopped once again at a fixed checkpoint 48 miles from the border and was asked to open the trunk of his car, when, as the agent later testified, the appellant appeared to be extrmely nervous. Upon inspection, the officer noted that although the floor of the trunk was dirty, the side panels "were clean or had been moved."[86] Upon a closer inspection, the officer found packages of marijuana in a six-inch space behind the side panel.

The Ninth Circuit Court of Appeals reversed the appellant's conviction, finding that it was unlikely that the inspector could have maintained any reasonable belief that an alien was secreted in the six-inch space between the trunk panel and the car wall.[87] The court felt that the appellant's nervousness and the lack of dust on the trunk panels were not sufficient probable cause to indicate that an offense was being committed.[88] Hence, the court held that the search was unconstitutional.[89]

At the time of the United States Supreme Court's decision in *Almeida-Sanchez*, the original stop and brief detention at a fixed or temporary inland checkpoint for the purpose of limited inquiry as to the person's citizenship were constitutionally permissible.[90] Similarly, the courts were willing to uphold any search of an area sufficient to conceal an alien.[91] But, if the search went beyond that reasonably related to the discovery of aliens, probable cause was required to validate a warrantless search.[92]

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under the hood of the car, he had reasonable grounds to believe that the appellant was in possession of marijuana. 321 F.2d at 287 n.7.

85. 425 F.2d 1170 (9th Cir. 1970).

86. *Id.* at 1171.

87. *Id.* at 1172.

88. *Id.*

89. *Accord*, United States v. Lujan-Romero, 469 F.2d 683 (9th Cir. 1971) (search of two foot lockers); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969) (search of jacket); United States v. Winer, 294 F. Supp. 731 (W.D. Texas, 1969) (search under the seat of a small automobile).

90. *See* United States v. Barron, 472 F.2d 1215 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973); United States v. Oswald, 441 F.2d 44 (9th Cir. 1971).

91. See text accompanying notes 85-89 *supra.*

92. Even after the *Almeida-Sanchez* decision, the Tenth Circuit appears to follow the test developed by the Ninth Circuit prior to *Almeida-Sanchez*: the initial stop at the checkpoint and inquiry as to citizenship may be made without a warrant or probable cause; but if the officer is going to search beyond what is in plain view, he must have probable cause or be at the functional equivalent of the border. This latter requirement is derived from *Almeida-Sanchez*. *See* United States v. Bowman, 487 F.2d 1229 (10th

Post-*Almeida-Sanchez*

Since the United States Supreme Court's decision in *Almeida-Sanchez* that searches conducted by roving patrols, with neither a warrant nor probable cause to believe a crime was being committed, are unconstitutional, several lower federal courts have attempted to apply the reasoning of *Almeida-Sanchez* to determine the constitutional propriety of searches conducted at fixed and temporary checkpoints inland from the border. Though a brief fixed checkpoint search is probably *less* offensive than a roving patrol search, and being asked to stop at a fixed checkpoint is potentially less traumatic than being flagged over on a lonely road in a sparsely populated area,[93] the border agent at a fixed checkpoint still retains a good deal of discretion to single out and search certain travellers.[94] Thus, defendants have challenged such searches as being unreasonable under the Fourth Amendment.[95]

The Fifth Circuit Court of Appeals in *United States v. Speed*[96] rejected the contention that a roving patrol differs from a fixed checkpoint with regard to border searches.[97] Immigration officers stopped the appellants at a temporary checkpoint located 70 miles from the border. The Border Patrol frequently used this location because it has proven particularly effective in the past in revealing illegal aliens and contraband. The highway on which this checkpoint was located ran north to south through a sparsely populated area.

The *Speed* court held that the Border Patrol's search was essentially identical to the search conducted in *Almeida-Sanchez*, notwithstanding the fact that the search was conducted at a temporary checkpoint. For the search to be constitutional, the court held that

> [the] searching officer must know or have a reasonable suspicion

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Cir. 1973); United States v. King, 485 F.2d 353 (10th Cir. 1973); United States v. Maddox, 485 F.2d 361 (10th Cir. 1973).

93. United States v. Bowen, 500 F.2d 960, 964 (9th Cir. 1974).

94. *Id.* In United States v. Newman, 490 F.2d 993, 995 (10th Cir. 1974), an immigration agent, who was stopping cars *700 miles* from the border, admitted that he was "just indiscriminately stopping cars." Clearly the fact that the search took place 700 miles from the border precludes consideration that this was a border search. However, this case does lend an insight into the arbitrary nature often existent in the detention of people at fixed and temporary checkpoints. The agent himself testified that the appellant did not possess any characteristics which led him to believe that they were of Mexican descent, that he had never seen their truck before, that there had been no prior surveillance, nor any suspicious behavior. Although the agent's activity was not "per se" unreasonable, it could not be escalated to frustrate the Fourth Amendment. To do so "would effectively authorize the search of each and every vehicle passing through this checkpoint with a border state license plate and sufficient capacity to conceal a human body; the inherent potential for abuse . . . is virtually unlimited." *Id.*

95. See text accompanying notes 96-109 *infra.*

96. 489 F.2d 478 (5th Cir. 1973).

97. *Id.* at 480.

> that the very individual or the thing to be searched has itself just crossed the border. Judicial notice or even proof of many illegal acts in the area in which the search takes place is not enough.[98]

The only connection to the border which could justify this search was the statutory power granted to the Border Patrol to conduct such searches and the fact that similar searches in the area had produced evidence of illegal activity, that is, the illegal importation of marijuana. Since "[n]either a Congressional statute nor praise for the results of a certain investigative technique can justify an otherwise illegal search,"[99] the court declared the search unconstitutional. Essential to its holding was the fact that

> [h]ere there was too great an interference with internal, domestic highway traffic to justify the search as a border search in spite of the fact that the road eventually crossed the border. We are not willing to subject every resident of the area between the . . . checkpoint and the border to virtually unrestricted searches whenever they use their automobiles.[100]

Although the Ninth Circuit has not totally disregarded the distinction between roving patrol searches and those conducted at fixed and temporary checkpoints, it has held that fixed checkpoint searches, though conducted within a "reasonable distance" from the border, are not necessarily exempt from the traditional Fourth Amendment requirement of a warrant or probable cause.[101] In the case of *United States v. Bowen*,[102] the appellant was stopped at a fixed checkpoint 49 miles from the Mexican border, located between the population centers of Imperial Valley and Indio.[103] At this checkpoint, the operations entailed stopping for inquiry approximately 75 percent of all vehicles travelling north, and detaining for further inspection 10-15 percent of all vehicles stopped. During the first ten months of 1973, immigration officers apprehended approximately 730 deportable aliens at this checkpoint.[104]

The government in *Bowen* attempted to justify the search of the appellant's camper with arguments similar to those presented in *Almeida-Sanchez*,[105] but the court felt that "[t]he opinion in *Almeida-*

98. *Id.*
99. *Id.*
100. *Id.*
101. United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974).
102. *Id.*
103. Imperial Valley has a population of 3,400 people; Indio has a population of 17,400 people. CALIF. ROSTER, 1973-74, at 101.
104. United states v. Baca, 368 F. Supp. 398, 413 (S.D. Cal. 1973).
105. The government in *Almeida-Sanchez* had sought to justify roving patrol searches on the basis of 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1(a). "Here [in Bowen] the government seeks to justify the fixed checkpoint search by reference to the same statute and regulation as the court in Almeida-Sanchez." 500 F.2d at 965.

Sanchez leaves little doubt that traditional Fourth Amendment standards apply to fixed checkpoint searches as well as roving patrol searches."[106] Hence, unless the search in question took place at the border or its "functional equivalent", it was unconstitutional. The search was not at the border itself. Nor was it at the "functional equivalent" of the border, that is, at a location where virtually everyone searched has just come from the other side of the border.[107] The checkpoint was located 49 miles north of the border with several significant population centers and highways lying between it and the border. Thus, the "border patrol agents had no reason to believe that virtually all or even most of the cars passing through their checkpoint had recently, or ever, crossed the border."[108] The court held that the search violated the Fourth Amendment since it was not conducted at the functional equivalent of the border,[109] authorized by a warrant, nor prompted by circumstances giving the agent probable cause to believe that a crime was being committed.

Possible Justification for Inland Searches at Fixed and Temporary Checkpoints Which Meet Fourth Amendment Requirements

The courts which decided *Bowen* and *Speed* did not attempt to analyze thoroughly the issue of the possible justification of fixed checkpoint searches through a comparison with certain other types of searches which courts have found to be constitutionally permissible.[110] The *Bowen* dissent did argue that "[a] careful analysis of areas where such searches have been upheld as reasonable within the meaning of the Fourth Amendment demonstrates persuasive reasons for the same approach in testing the constitutionality of stops and searches at fixed

106. 500 F.2d at 962-63.

107. Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973).

108. 500 F.2d at 966. Moreover the court held that the search could not be justified under the pre-*Almeida-Sanchez* case authority. There was neither the continuing surveillance from the border nor the dependable intelligence from other sources necessary to satisfy the *Alexander* test (see text accompanying notes 45-47 *supra*) nor the reasonable certainty that the vehicle contained either recently smuggled goods or aliens necessary to satisfy the *Weil* test (see text accompanying notes 47-48 *supra*). 500 F.2d at 965-67.

109. *But see* United States v. Baca, 368 F. Supp. 398, 417 (S.D. Cal. 1973) where the court stated that this checkpoint was situated at a point with one of the lowest volumes of traffic on that highway, thus tending to cause little intrusion and inconvenience to travellers, as well as scarcely impeding the goal of safe driving. Furthermore, it lay only 36 miles from the border and it had been estimated that over one half of the vehicles reaching the checkpoint came directly from Mexico. Accordingly, the checkpoint was considered to be at the functional equivalent of the border.

110. The *Bowen* court did consider the question of whether vehicle inspection stops could be the basis for justification of inland border searches, but its consideration of this issue was limited. 500 F.2d at 964.

checkpoints."[111] Yet, such a careful analysis offers little, if any, possible justification. Four types of constitutionally approved searches based upon less than traditional probable cause have been proposed as analogies which would justify searches at fixed checkpoints: 1) stop and frisk; 2) airport searches; 3) vehicle inspection stops; and 4) administrative inspections.

Stop and Frisk

In *Terry v. Ohio*,[112] the United States Supreme Court held that a police officer may conduct a limited "patdown" search for weapons when he has reasonable grounds for believing that criminal conduct has taken or is taking place and that the person he searches is armed and dangerous. "The sole justification [for such a] search . . . is the protection of the police officer and others nearby."[113]

In justifying such a search the Court applied a test that balanced the interests of the individual in being free from invasions of his personal privacy against the interests of society in assuring the safety of its law enforcement officers. However, searches for illegal aliens hidden in the trunks of automobiles clearly cannot be justified by claiming that such a search is for the "protection of the police officer and others nearby." Justice Powell, in his concurrence in *Almeida-Sanchez*, recognized this difference between the stop and frisk and the roving patrol search and stated that "[n]othing in *Terry* supports an exception to the [Fourth Amendment] warrant requirement in the cases of border searches.[114] To hold otherwise would invite police behavior specifically condemned by the Fourth Amendment.[115] In roving patrol searches, the officer frequently confronts the person on a lonely desert road where his safety obviously may be in danger. Such is not the case when he searches in a well-lit fixed checkpoint. If the *Terry* justification is lacking in the former, as we must infer from the *Almeida-Sanchez* result, it must also be lacking in the latter if the officer's protection is the primary consideration.

Airport Searches

Another example of a judicially-approved search based upon less than traditional probable cause is the limited search to which *all* persons

111. *Id.* at 971 (Wallace, J., dissenting).

112. 392 U.S. 1 (1968). *Accord*, Adams v. Williams, 407 U.S. 143 (1972); Sibron v. New York, 392 U.S. 40 (1968).

113. 392 U.S. at 29.

114. 413 U.S. at 280 (Powell, J., concurring); *cf.* United States v. Davis, 482 F.2d 893, 905 (9th Cir. 1973) (*Terry* inapposite to validity of preboarding screening of airline passengers and luggage).

115. Comment, *Applying Constitutional Standards to Airport Security Searches*, 5 LOYOLA U.L.J. (Chicago) 186, 201 (1974).

are subjected prior to entering airline boarding areas.[116] In justifying such searches, courts have balanced distinct and competing policy interests. The government, the airlines and the travelling public have a significant interest in preventing airline highjackings.[117] The threat to life and property associated with highjackings is substantial. The highjacking problem is further complicated by the difficulty of ferreting out potential highjackers before they commit the crime.[118] Balanced against the public interest is the individual's interest in freedom from unreasonable searches and seizures guaranteed by the Fourth Amendment. Courts have justified airport searches by finding that the prevention of possible loss of life is of greater importance than an individual's freedom from a limited search.[119] With regard to border searches, the public and government are basically interested in restricting the influx of illegal aliens for economic reasons.[120] The illegal alien problem, unlike the highjacking problem, involves little, if any, possibility of loss of life if the alien is not apprehended at the time of his entry.

One of the primary judicial criteria for the justification of airport searches is that the essential purpose of the search must not be to detect contraband or to apprehend criminals, but "to deter persons carrying weapons or explosives from seeking to board the plane."[121] In contrast, "the primordial purpose of a search by Customs officers [and under the "two hats" doctrine, immigration officers as well] is . . . to *seize contraband* property unlawfully imported or brought into the United States."[122] Hence, the criterion used by courts to justify airport searches is noticeably absent in searches at fixed and temporary checkpoints inland from the border. A comparison between the two is, therefore, of questionable validity.

Vehicle Inspection Stops

A third type of search which courts have upheld when based upon

116. *See generally* Comment, *Airport Searches: Fourth Amendment Anomolies,* 48 N.Y.U. L. REV. 1043 (1973); Comment, 5 LOYOLA U.L.J. (Chicago) 186 (1973).

117. *See, e.g.,* United States v. Epperson, 454 F.2d 769, 771-72 (4th Cir.), *cert. denied,* 406 U.S. 947 (1972).

118. United States v. Moreno, 475 F.2d 44, 49 (5th Cir. 1973).

119. 454 F.2d at 772. Nevertheless, such searches have been called "probably the most widespread and most constant violations ever of the Fourth [Amendment] . . . ." Comment, 48 N.Y.U.L. REV. 1043, 1043 (1973).

120. See text accompanying notes 16-25 *supra.*

121. United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973).

122. Alexander v. United States, 362 F.2d 379, 382 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966) [emphasis added]. *See, e.g.,* Klein v. United States, 472 F.2d 847 (9th Cir. 1973); The Atlantice, 68 F.2d 8 (2d Cir. 1933); United States v. Baca, 368 F. Supp. 398, 406 (S.D. Cal. 1973).

less than probable cause is that of routine, random vehicle inspections conducted at fixed and temporary roadblocks.[123] Motor vehicles may be stopped for safety and other regulatory inspections,[124] for weighing,[125] and to check the validity of the operator's driver's license.[126] Courts do not consider contraband found incident to such stops to be the subject of an illegal search.[127]

State v. Severance[128] was a test case which challenged the constitutionality of the practice of road checks by the state police in which all motorists in one lane of traffic were stopped for routine inspections to ascertain whether the operator had a valid license and the motor vehicle was duly registered. Rather than justifying such a practice by claiming, as previous courts had done,[129] that a motor vehicle license is a privilege, not a right,[130] the court held that a road check for the good faith purpose of inspecting motor vehicle licenses and registration certificates is a constitutionally valid method of enforcing *public safety* so long as the road check is not used as a subterfuge for uncovering evidence of other crimes.[131] Essential to the holding was the steadily increasing number of violations and fatal accidents involving unlicensed drivers. The court felt that holding such searches illegal would seriously impair the objective of promoting public safety and responsible automobile operation.[132]

Motor vehicle and driver licensing laws are grounded upon safety considerations and apply to all vehicles and drivers within the state. Since violations of such laws are as likely to occur in one place as another, a state acts reasonably to achieve the laws' public safety purpose

123. *See, e.g.*, United States v. Croft, 429 F.2d 884, 886 (10th Cir. 1970); People v. Washburn, 265 Cal. App. 2d 665, 670, 71 Cal. Rptr. 557, 581 (2d Dist. 1968); State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968). *But see* Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973) in which the Supreme Court of Pennsylvania held that the routine check of a motor vehicle to determine whether it and its operator were properly licensed violates the Fourth Amendment. *See generally* Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865, 882 (1973), where upon balancing the interests involved the author concluded that such stops may be unconstitutional; Comment, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974).

124. 49 U.S.C. § 304 (1970); 49 C.F.R. § 396.5 (1970).

125. Commonwealth v. Abell, 275 Ky. 802, 122 S.W.2d 757 (Ky. App. 1938).

126. See cases cited note 123 *supra*.

127. *Id.*

128. 108 N.H. 404, 237 A.2d 683 (1968).

129. State v. Smolen, 4 Conn. Cir. 385, 394, 232 A.2d 339, 342-44 (App. Div.), *pet. for certification for appeal denied*, 231 A.2d 283 (Conn. 1967), *cert. denied*, 389 U.S. 1044 (1968).

130. 108 N.H. at 407-08, 237 A.2d at 685-86.

131. *Id.* at 686.

132. *Id.* at 407, 237 A.2d at 685.

when it establishes vehicle inspection checkpoints at locations scattered throughout the state. As the *Severance* court recognized, if states could not so act, enforcement of their motor vehicle and licensing laws would be seriously impaired.

The factors which have led courts to uphold vehicle inspection stops are not present in inland border searches. First, as was previously discussed,[133] the illegal alien problem in and of itself does not involve immediate danger to life.[134] While a community does have an interest in protecting its economic resources from depletion by illegal aliens, such an economic interest is not sufficient to cause courts to restrict Fourth Amendment rights. Secondly, the Ninth Circuit Court of Appeals has rejected the argument that the laws prohibiting illegal immigration will be rendered unenforceable should the courts deny the state the power to stop and search automobiles for illegal aliens at fixed checkpoints inland from the border without probable cause or warrant.[135]

Those lawfully within this country are entitled to use public highways without interruption unless there is probable cause to believe that their vehicles are carrying contraband.[136] It seems unreasonable to allow border searches without probable cause within one hundred miles of the border merely because the government asserts that inspections conducted solely at the border are inadequate to effectuate the purposes of the immigrations and customs statutes.[137] No estimates have been made of the incremental costs of the intensified border inspections which would be needed to secure the same level of detection presently achieved through a combination of border and inland searches. Nor has there been a study of the extent to which illegal aliens who are not picked up at other than inland border searches undermine or defeat the basic purpose of congressional regulation of alien entry. Until such determinations have been made, one cannot conclude that inland searches at fixed and temporary checkpoints are a necessary element of the most effective means of achieving the desired level of security.

Administrative Inspections

The fourth and final attempted justification for inland checkpoint searches is drawn from the administrative search exception to the Fourth Amendment's requirement sanctioned by the United States Supreme Court in *Camara v. Municipal Court.*[138] The Court in *Camara*

133. See text accompanying note 132 *supra.*
134. See text accompanying notes 16-25 *supra.*
135. United States v. Bowen, 500 F.2d 960, 967 (9th Cir. 1974).
136. Carroll v. United States, 267 U.S. 132, 154 (1925).
137. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973).
138. 387 U.S. 523 (1967). *Accord,* See v. Seattle, 387 U.S. 541 (1967).

approved the grant of area warrants to search buildings whose occupants had refused admission to a housing inspector who was looking for evidence of housing code violations. The Court held that such warrants may issue even when there is not probable cause to believe that a particular building contains such violations, so long as the general characteristics—such as the nature of the building or the condition of the entire area—indicate that violations may be present.[139] The Court relied upon three factors in relaxing the probable cause requirement of the Fourth Amendment: 1) a long history of judicial and public acceptance of the practice; 2) the likelihood that there was no other acceptable way of promoting the public interest involved; and 3) the limited invasion of privacy occasioned by inspections which were neither personal in nature nor aimed at the discovery of evidence of crime.[140]

Inland checkpoint searches for aliens do not evidence all three of these factors. The first factor appears to be satisfied, for the history of public reaction to such searches indicates no sizeable protest against the practice. Likewise, judicial reaction has been one of almost total acceptance until 1973.[141] Notwithstanding this history of public and judicial acceptance, application of the two remaining *Camara* factors to checkpoint searches reveals certain problems with the traditional acceptance of inland searches.

Control over entry of aliens is considered to reflect a policy of major public importance and, correspondingly, the illegal entry of aliens is a serious problem.[142] Because the government has never attempted to establish the feasibility or test the effectiveness of less drastic alternatives to these invasive searches, it is impossible to gauge the adequacy of alternative technique of control.[143] It is possible that intensification of inspections directly at the border and/or penalization of employers who hire aliens without valid work permits could achieve the same level of effectiveness as the combination of border and inland searches. Until such a determination is made it cannot be said with certainty that there is no other way of promoting this important public interest than by searches conducted at inland checkpoints.

The third factor emphasized by the *Camara* Court was the limited nature of the inspections which were neither personal nor directed at the discovery of incriminating evidence. It is doubtful that a search

139. 387 U.S. at 534-39. *See generally* LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1 (1967).

140. 387 U.S. at 537.

141. See text accompanying notes 75-92 *supra.*

142. See text accompanying notes 16-25 *supra. See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972).

143. See text following note 137 *supra.*

by Border Patrol agents at an inland checkpoint can be characterized as an administrative one directed primarily to regulation and as only incidental to the detection of crime.[144] Illegally transporting a person into the United States *is a crime* punishable by a $2000 fine and five years imprisonment.[145] When the agent questions a motorist as to his right to be in the United States and searches his vehicle for aliens, he is attempting to establish the commission of a crime.

Although the administrative search exception does not justify inland border searches at fixed and temporary checkpoints, the *Camara* decision does suggest a viable and potentially less intrusive alternative to this procedure.

The Area Warrant Alternative

Mr. Justice Powell, concurring in *Almeida-Sanchez*, suggested that the *Camara* decision may indicate an alternative technique for the utilization of the Border Patrol to control illegal alien traffic.[146] The technique—use of area warrants—might reconcile the seriousness of the immigration problem with the necessity of safeguarding persons against unreasonable searches and seizures in a manner compatible with prior decisions of the Court.[147] Justice Powell noted that

> [n]othing in the papers before [the Court] demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct . . . searches on a particular road . . . for a reasonable period of time.[148]

Although the use of area warrants would entail some administrative inconvenience for law enforcement officers, inconvenience alone is not adequate reason for abrogating the warrant requirement. Nor would the inconvenience of such a procedure "frustrate the governmental purpose behind the search."[149]

A warrant requirement would provide a crucial safeguard against overreaching governmental action by interposing between the Border Patrol and the individual an impartial magistrate who would determine when, where, how long and to what extent searches may be conducted. In considering his decision to issue a warrant, a magistrate would weigh several factors: 1) the frequency that illegal aliens are reasonably be-

144. *Cf.* Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

145. 8 U.S.C. § 1324 (1970).

146. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 282-85 (1973) (Powell, J., concurring). This technique was, in dictum, approved by a majority of the Justices and therefore may be indicative of how the law in this area is likely to develop. *Id.* at 285-89 (White, J., dissenting, joined by Burger, C.J., and Blackmun & Rehnquist, JJ.).

147. *Id.* at 275 (Powell, J., concurring).

148. *Id.* at 283.

149. *Id. quoting* Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

lieved to be transported across a particular area near the border; 2) the proximity of that area to the border; 3) the topography of the area; and 4) the possible interference with individual rights when the search is viewed as a whole.[150] In addition, the magistrate could draw the warrants to authorize the searches in an area for only a limited period of time. Experience drawn from an initial search or series of searches over a limited period of time would be highly relevant in considering applications for renewal of a warrant.[151]

The determination of whether a warrant should be issued for an area, then, would require the court to balance the legitimate interests of law enforcement with an individual's Fourth Amendment rights *prior* to the search.[152] Such a determination would necessarily be made, as prescribed by the Fourth Amendment, by a neutral and detached magistrate instead of being decided by the officer "engaged in the often competitive enterprise of ferreting out crime."[153] Such a procedure seems preferable to that advocated by those opposing the extension of *Almeida-Sanchez* to fixed and temporary checkpoint searches. The opponents argue that the reasonableness of a search "should be determined in the first instance by the trial court *after* hearing all of the evidence."[154] Such a procedure allows border agents to stop and search motor vehicles at their complete discretion which, in the words of *Camara*

> is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.[155]

Justice Powell, as well as the majority in *Almeida-Sanchez*, failed to consider the extent to which evidence obtained in immigration searches may be used in other types of criminal prosecutions. Such a consideration is important since the majority of cases arising under the Border Patrol's search for aliens result in prosecutions for violations of the narcotics laws.[156]

One solution to this problem would be to allow the introduction of evidence found during inland checkpoint searches in criminal prose-

150. *Id.* at 283-84 (Powell, J., concurring). In reviewing the search as a whole the judge would consider the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

151. *Id.* at 283 n.3.

152. *Id.* at 284.

153. Schmerber v. California, 384 U.S. 757, 770 (1966), *quoting* Johnson v. United States, 333 U.S. 10, 13 (1948).

154. United States v. Bowen, 500 F.2d 960, 973 (9th Cir. 1974) (Wallace, J., dissenting).

155. Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967).

156. Sutis, *The Extent of the Border*, 1 HAST. CON. LAW. Q. 235, 249 (1974).

cutions for crimes related to illegal entry while barring the introduction of such evidence in prosecutions for other crimes. Such a rule would allow heavy penalties to be inflicted on the basis of searches conducted without probable cause in certain cases, but at least it would prevent federal agents from using area warrants to pursue other law enforcement goals under the guise of searching for aliens. Such a solution would destroy the dual nature of the border agents authority since discovery of evidence of violation of the narcotics laws would not be admissible in a prosecution for transporting illegal aliens. Lower federal courts do not appear willing to allow such an erosion of the border agents' authority. Even in light of the *Almeida-Sanchez* decision, courts have held that once a vehicle has been validly stopped for an immigration search, if immigration officers, in the course of searching for aliens, detect circumstances supporting the belief that the customs laws are being violated, the officers may "don their customs hats" and complete the search for contraband.[157]

Another possible solution to the problem would be to ensure that the warrants would be drawn in a manner which limits the scope of the search to areas in which aliens reasonably could hide. This would preclude the agents from searching glove compartments or under seats on the pretext of looking for illegal aliens. Similarly, imposing strict time limitations upon warrants would curtail the number of exhaustive stops and searches under the guise of searching for illegal aliens.[158] Finally, if a magistrate realizes that the sole reason behind and the result of a warrant is the apprehension of narcotics law violators, the issuance of the warrant should be denied altogether.

Conclusion

Fixed and temporary checkpoint searches of persons and property inland from the border involve a tension between this country's right to protect itself from the illegal entrance of persons or contraband and the individual's right to be free from unreasonable searches and seizures. The inconvenience of being required at the border to state one's place of birth and to declare what objects are being brought into this country is minimal and the procedure appears to be reasonable in light of the opposing interests of the individual and the government. However, protection of individual rights demands imposition of a limit on the blanket permission which Congress and the courts may afford to the Border Patrol to invade one's privacy at checkpoints inland from

157. *See, e.g.*, United States v. Byrd, 483 F.2d 1196, 1198 (5th Cir. 1973); United States v. Wright, 476 F.2d 1027, 1030 (5th Cir. 1973); United States v. Thompson, 475 F.2d 1359, 1364 (5th Cir. 1973).

158. Sutis, *The Extent of the Border*, 1 HAST. CONST. L.Q. 235, 250 (1974).

the border. In order to proceed further and actually search an automobile for illegal aliens, there must be more than mere suspicion on the part of border agents that a crime *might* be taking place. Otherwise, many innocent people are subject to arbitrary search and undue inconvenience, particularly if a customs official reacts negatively to a particular person's attitudes or appearance, orders a search and thus abuses his discretion.

It appears that the lower federal courts still adhere to the "two-hats" theory of the border agents' authority which allows an agent to act both as an immigration and customs agent. Yet courts are beginning to realize that the law concerning fixed and temporary checkpoint searches must be brought into harmony with Fourth Amendment principles. Analysis reveals that such searches cannot be justified by analogy to other types of searches which the United States Supreme Court has condoned when based upon less than traditional probable cause. Although the use of area warrants could provide a solution to inland border search problems, careful consideration of factors related to the issuance of such warrants and the extent to which customs officials will be allowed to search for contraband during an area warrant search will be required to ensure compliance with constitutional requirements.

Mr. Justice Jackson, upon his return from the Nuremberg trials, stated:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensible freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[159]

The power of the Border Patrol to search and seize motor vehicles at fixed and temporary checkpoints inland from the border has for too long remained uncontrolled. Subjecting such searches to the requirements of the Fourth Amendment will reaffirm our commitment to the supremacy of the rights of the individual as guaranteed by the Constitution.

159. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).