THE EXTENT OF THE BORDER

*By Robert W. Sutis**

Each year, hundreds of thousands of aliens enter the United States illegally. In fiscal year 1972 alone, the Immigration and Naturalization Service located 398,000 such aliens.[1] To curb this illegal traffic, the federal government employs over 1,700 Border Patrol agents, 1,400 of whom work at the southern border where the bulk of the traffic takes place.[2] But patrolling the country's borders is a difficult assignment. Since canvassing of the 3,987 mile Canadian border and the 1,945 mile Mexican border is impossible solely from permanent border stations, the government employs a variety of traffic operations, and in some cases uses electronic monitoring in order to curb the illegal entry of aliens.[3] Yet, even though the modest success of the traffic operations has not been sufficient to meet the flood of illegal alien traffic, the statute under which detection of alien traffic by traffic networks was instituted, the Immigration and Nationality Act[4] (hereinafter INA) was recently denied efficacy in most instances by *Almeida-Sanchez v. United States.*[5] An examination of the holdings, theories, and effects of this decision seems required.

Background

Before examining the case, one must first acknowledge the power of the federal government to exclude aliens.[6] "Jurisdiction over its own territory to that extent is an incident of every independent na-

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1. Brief for United States at 28, Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

2. *Id.* at 22.

3. *Id.* at 26. The Border Patrol located 39,243 deportable aliens through alien traffic checking operations in fiscal year 1972.

4. 8 U.S.C. § 1357(a)(3) (1970).

5. 413 U.S. 266 (1973).

6. The Japanese Immigrant Case, 189 U.S. 86, 97-99 (1903); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893). *See* United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933).

tion."[7] Indeed, "[i]t is necessarily exclusive and absolute."[8]

In attempting to detain illegal alien traffic, the federal government maintains checkpoint stations and "line watches"[9] along our borders, and thus manages to exercise at least a modicum of control over the entry of illegal aliens and merchandise into the country. Case law has recognized this activity to be a valid exercise of the government's power.[10]

In addition to such operations, the government conducts checkpoint searches at the functional equivalents of the border, those points within the country which are analogous to points along the border. Airports which receive non-stop flights originating from another country (for example Mexico City to Los Angeles flights), as well as points where two or more roads leading from Mexico converge in the United States fall under the definition of functional equivalents. Searches at such points are also permissible.[11]

Although the Fourth Amendment generally requires both a showing of probable cause and a warrant from a neutral magistrate[12] before a search may be judged reasonable,[13] border searches are well recognized exceptions to these requirements.[14] Whether conducted along the border or at its functional equivalent, neither a warrant need be secured nor probable cause shown in searches for illegal aliens or merchandise.

However, the government also employs a system of roving border patrols to conduct searches of automobiles and other vehicles at points away from but near the border. Congress sanctioned this procedure under provisions of the INA[15] which permit officers of the

7. The Chinese Exclusion Case, 130 U.S. 581, 603 (1889).

8. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

9. Line watches consist of surveillance along the international boundary line by electronic monitoring and by Border Patrol officers on foot, in vehicles, or in observation aircraft.

10. Carroll v. United States, 267 U.S. 132, 154 (1925); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

11. Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); Kelly v. United States 197 F.2d 162 (5th Cir. 1952).

12. "[T]he right of the people to be secure in their persons . . . and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause . . . ." U.S. CONST. amend. IV.

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

14. Henderson v. United States, 390 F.2d 805 (9th Cir. 1967) required no probable cause for ordinary search of one's clothing, a real suspicion for a strip search, and full showing of probable cause for a body cavity search upon entry into the United States.

15. 8 U.S.C. § 1357(a)(3) (1970) provides: "Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . within a reasonable distance from any external boundary

Immigration and Naturalization Service to search *without warrant*, any vehicle for *aliens*[16] within a reasonable distance from any external boundary of the United States. The "reasonable distance" is loosely defined to be within one hundred air miles from any external boundary of the United States.[17]

The conflict that arises from roving border patrol searches should be immediately observable: how may the rights of citizens, residents and legally admitted aliens be safeguarded against arbitrary and capricious searches of their vehicles at points within this one hundred mile border zone? Conversely, if such searches are not permissible within Fourth Amendment requirements, how can the federal government effectively combat the illegal entry of aliens in the United States? The issue, then, is "whether and under what circumstances the Border Patrol may lawfully conduct roving searches of automobiles in areas not far removed from the border for the purpose of apprehending aliens illegally entering or in the country."[18]

Almeida-Sanchez v. United States

The United States Supreme Court was afforded opportunity to comment in the case of *Almeida-Sanchez* v. *United States*.[19] Almeida-Sanchez was a Mexican citizen holding a valid United States work permit. His automobile was stopped twenty-five miles north of the Mexican border on State Highway 78 in California. The road is predominantly an east-west highway which nowhere reaches the Mexican border. The United States Border Patrol, which stopped Almeida-Sanchez' car, had no search warrant, nor any probable cause to stop or search the car;[20] nonetheless, the marijuana they discovered was used to convict him of illegally importing narcotics.[21] Based

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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, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . . ."

16. *Id.* This statute refers only to searches for aliens. Searches under customs laws for illegal merchandise will be only tangentially considered in this article. See text accompanying note 68 *infra*.

17. 8 C.F.R. § 287.1(a)(2) (1973) provides: "Reasonable distance. The term 'reasonable distance', as used in the Immigration and Nationality Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section."

18. Almeida-Sanchez v. United States, 413 U.S. 266, 276 (1973).

19. *Id.*

20. *Id.* at 268.

21. 21 U.S.C. § 176(a) (1970).

on section 1357 (a) (3) of the INA and the regulations thereunder,[22] the Ninth Circuit Court of Appeals upheld the search,[23] and denied Almeida-Sanchez' claim that the warrantless search was unconstitutional under the Fourth Amendment and that the evidence should have been excluded. The Supreme Court reversed, holding that since probable cause was lacking the search could not be justified on the basis of any special rules applicable to automobile searches; that it could not be justified by analogy to administrative inspections as there was no warrant, probable cause, or consent; and that the search was not a border search or a search conducted at a functional equivalent of the border.

The majority[24] opinion, emphasizing that the right of the individual under the Fourth Amendment is paramount,[25] required an affirmative answer to one of four questions before the Almeida-Sanchez search could be held valid.

Was the search conducted at a border point or functional equivalent thereof? Only then could the case come within the border search exception to warrant and probable cause requirements under the Fourth Amendment. The Border Partol would have had to intercept the vehicle crossing some point along one of the externa boundaries of the United States or along some constructive border point—a functional equivalent.[26] The Court restricted the operation of INA to the functional equivalents of the borders.[27]

Was the search conducted with the consent of the parties to the search? Consent may preclude the finding of an unconstitutional search if the consent is freely given,[28] since the person consenting waives his objection to a search that might not otherwise be reasonable. The issue generally is whether the person searched freely and voluntarily gave his consent or whether he peacefully submitted to the pressure and force of the investigating officer.[29]

Was the search conducted pursuant to a valid warrant? In order to obtain a valid search warrant the investigating officer must compile a set of facts which when presented to the issuing magistrate represent probable cause,[30] generally defined to exist "where the facts and cir-

22. 8 C.F.R. § 287.1 (1973).

23. 452 F.2d 459 (9th Cir. 1971).

24. 413 U.S. 266 (1973) Justices Brennan, Douglas, Marshall, and Stewart comprised the majority. Justice Powell concurred in a separate opinion. Chief Justice Burger and Justices White, Blackmun and Rehnquist dissented.

25. *Id.* at 273.

26. *Id.* at 272.

27. *Id.* at 272-75.

28. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

29. *Id.* at 222; Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

30. Dumbra v. United States, 268 U.S. 435 (1925). For requirements as to par-

cumstances are sufficient unto themselves to warrant a man of reasonable caution to believe an offense has been or is being committed."[31]

Finally, was the search conducted without a warrant but within an exception to the warrant requirement? The Court admits that is well "settled that a stop and search of a moving automobile can be made without a warrant."[32] However this exception to the warrant requirement is a narrow one. While the Court in *Carroll v. United States*[33] recognized that a moving automobile presents a situation "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought,"[34] a full showing of probable cause is required to validate a search of the vehicle under the standard of reasonableness.[35]

Answering all four inquiries in the negative, the Court struck down the search and excluded the evidence.[36] Absent interception of aliens crossing at some border point or functional equivalent, a search for aliens may be conducted by the Border Patrol only with consent, with a warrant, or upon a full showing of probable cause to support a warrant under the *Carroll*[37] doctrine.

The majority opinion written by Justice Stewart, is certainly the most predictable when traditional legal principles are applied to the facts of *Almeida-Sanchez*. It applies well-documented and supported legal theory to the case in reaching a sound conclusion that, above all,

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ticularity, see Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) and as to issuance by a neutral magistrate, see Cooledge v. New Hampshire, 403 U.S. 443 (1971).

31. Berger v. New York, 388 U.S. 41, 55 (1967).

32. Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973).

33. 267 U.S. 132 (1925).

34. *Id.* at 153.

35. Chambers v. Maroney, 399 U.S. 42 (1970). Regarding full warrantless searches of the *person* incident to custodial arrest for traffic offenses, see Gustafson v. Florida, 94 S. Ct. 488 (1973) and United States v. Robinson, 94 S. Ct. 467 (1973). The effects of these two recent decisions do not bear significantly upon this paper. Section 1357(a)(3) of the Immigration and Nationality Act is expressly confined to searches of vessels, vehicles, aircraft and the like: the *Robinson* and *Gustafson* opinions are expressly limited to searches of persons. While the cases may prognosticate an extension to the full warrantless search of vehicles, they are for now limited to searches of persons.

36. See text following note 25 *supra*. The evidence was excluded on the force of the exclusionary rule, which denies admissibility to unconstitutionally acquired evidence. Weeks v. United States, 232 U.S. 383 (1914). However, it should be noted that the continued viability of this doctrine is open to some doubt. United States v. Calandra, 94 S. Ct. 613 (1974); Gustafson v. Florida, 94 S. Ct. 488 (1973); United States v. Robinson, 94 S. Ct. 467 (1973).

37. 267 U.S. 132 (1925).

safeguards the rights of the indivdual under the Fourth Amendment by narrowly construing the function of the Border Patrol under section 1357 (a) (3) of the INA.

However, consonant with the rule that the Court will hold as narrowly as possible under the facts presented to it,[38] the Court glosses over the larger problem in *Almeida-Sanchez*. The opinion fails to offer any useful solution to the problem of aliens illegally entering the country at innumerable points along the border where the government is tactically unable to police their entry. The opinion ignores the possibility of alternative schema for such utilization of the Border Patrol that would satisfy the requirements of the Fourth Amendment and still provide a practical means for effectively curtailing the illegal entry of aliens into the country. The Court offers no substitute after dramatically curtailing the usefulness of the Border Patrol by severely restricting its area of operation. The effect, then, is a void in the ability of the federal government to prevent illegal entry of aliens.

Dissenting Opinion

An examination of the dissenting opinion,[39] which would uphold the search and admit the evidence derived from it, is necessary to an understanding of the theme of this note. The dissent holds that the considered judgment of Congress is controlling in the implementation of standards for vehicular searches by the Border Patrol for illegal aliens at points away from the border;[40] that the enactment of section 1357(a)(3) of the INA is a legitimate exercise of congressional power;[41] and that searches incident to the statute are valid subject only to the proviso that the statute "be exercised in a manner consistent with the standards of reasonableness of the Fourth Amendment."[42] Despite the apparent logic of the position, grave dangers in the opinion's application become apparent upon closer examination.

The Fourth Amendment imposes the standard of reasonableness upon constitutional searches. This standard is multi-faceted,[43] but

38. *See* German Alliance Insurance Company v. Home Water Supply, 226 U.S. 220 (1912); American Book Company v. Kansas, 193 U.S. 49 (1904).

39. 413 U.S. 266 (1973). Chief Justice Burger and Justices White, Blackmun and Rehnquist joined in the dissent.

40. *Id.* at 292.

41. *Id.* at 293.

42. *Id.* at 297.

43. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches); Cupp v. Murphy, 412 U.S. 291 (1973); Terry v. Ohio, 392 U.S. 1 (1968) (stops, frisks and detentions); Chambers v. Maroney, 399 U.S. 42 (1970) (vehicle searches); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Camara v. Municipal Court, 387 U.S. 523 (1967) (regulatory searches).

generally requires a warrant issued by a magistrate upon probable cause. The dissenting opinion, stressing that border searches are an exception to the Fourth Amendment strictures, views the border not merely as a jagged line that separates the United States from Mexico and Canada, but rather as a zone that stretches out from the border into the interior of the United States.[44] Justice White finds this penumbra concept necessary and justified because: (1) Congress enacted the statute in order to inhibit the free flow of aliens illegally entering the country[45] and (2) the considered judgments of the courts of appeal most closely associated with the issues, the Fifth, Ninth, and Tenth Circuits, have approved the statute.[46] His opinion would give the Border Patrol complete license to search for aliens within this gray zone, limiting only the *extent* of such searches; the scope of a valid search would be circumscribed by the bounds of reasonableness under the Fourth Amendment.[47] This reasonableness would appear to be reasonable cause to suspect that the vehicle searched carried illegal aliens,[48] and would thus be synonymous with that traditionally required of searches conducted at the border or at functional equivalents.[49]

Looking to the case law under INA which the dissent cites with approval, the grave consequences of their position becomes apparent. Two elements are essential to note in consideration of the cases: (1) those *persons' vehicles* that may be subjected to search, and (2) the scope of permissible searches.

Under the dissent's opinion, *any* vehicle passing through a permanent or temporary checkpoint may be subjected to at least a cursory search. The government asserts that selection of those vehicles to be searched is based on "the number of persons in the vehicle, the way the car is riding (for example, low in the rear), the size of the vehicle (for example, pick-up truck or van), and the *apparent nationality of the occupants*,"[50] and cites *United States v. McDaniel*,[51] to illustrate that any person's vehicle is subject to search at checkpoint stations.

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44. Almeida-Sanchez v. United States, 413 U.S. 266, 294 (1973). See text accompanying notes 15-17 *supra*.

45. *Id.* at 292.

46. *Id.* at 295. *See* Note, *Border Search in the Ninth Circuit: Almeida-Sanchez —A Borderline Decision*, 23 HASTINGS L.J. 1309 (1972) for a discussion of the Ninth Circuit approach to *Almeida-Sanchez*.

47. 413 U.S. at 297.

48. *Id.* at 294, 297.

49. Blefare v. United States, 362 F.2d 870 (9th Cir. 1966).

50. Brief for United States at 24 n.20, Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (emphasis added).

51. 463 F.2d 129 (5th Cir. 1972).

The defendants in *McDaniel* were stopped at a permanent checkpoint about eight miles north of the Mexican border. Having determined that McDaniel and his companions were United States citizens, the agent had the defendants open the trunk of their car. The agent observed that one of the defendants was nervous and overly talkative while the other was silent. When the agent opened the trunk, he spotted four large burlap bags partially covered with a Mexican newspaper. Defendant McDaniel responded that the bags contained alfalfa. The agent requested McDaniel to open the bags, discovered they contained marijuana, and arrested the defendants for violation of narcotics law. The evidence was admitted under the rationale that the car was reasonably stopped and the trunk opened pursuant to an authorized border search for aliens, and that the burlap bags were opened under the authority of a search for illegal merchandise granted by custom laws.[52]

McDaniel involved a search conducted at a permanent checkpoint station. However, under the auspices of section 1357 (a) (3) of the INA, the dissenters in *Almeida-Sanchez* would apply identical standards to roving searches conducted within the one hundred mile border zone.[53]

The dissent cites with approval *Roa-Rodriquez v. United States*,[54] in which two inspectors of the Immigration and Naturalization Service were maintaining traffic surveillance on a through highway in Truth or Consequences, New Mexico, ninety miles north of the Mexican border. Defendants Rodriquez, a United States citizen, and Venega, a Mexican national holding a valid nonresident alien border crossing card, were traveling north in a car bearing Arizona license plates. "There was no suspicious conduct by the occupants of the car . . . and there was no hot pursuit from the border."[55] The immigration officers "had no reason to stop the car except for their observation of the occupants and the license plates."[56]

The court held that the stop of the car and search of the trunk for aliens were proper.[57]

Thus, under the dissent's opinion, untold numbers of persons would be subject to detention by the Border Patrol and at least cursory searches anywhere within one hundred miles of the border Any Chicano, for

52. *Id.* at 133-134.

53. 413 U.S. 266, 298 (1973).

54. 410 F.2d 1206 (10th Cir. 1969).

55. *Id.* at 1208.

56. *Id.*

57. *Id.* at 1209, the court excluded the evidence of heroin upon subsequent search in the pockets of a jacket located in the trunk as outside the scope of a search for aliens.

instance, travelling in the evening in a southern border state other than where his car is registered would be legally obligated to stop and submit to a search of his car. It is doubtful that the framers of the Fourth Amendent intended such a consequence.[58] It is clearly unreasonable that anyone's vehicle might be searched without warrant simply because it lies within one hundred miles of the border. The need of the government to search and the right of the individual to travel freely must be balanced before reaching such a result.

Extrapolating further, if the *Rodriquez* case holds and the government admits[59] that the nationality of the passengers of a vehicle is a primary element in the agent's decision to stop and search a vehicle near the southern border, what then is the basis for patrolling the northern border states? What vision springs up in the minds of the Border Patrol to allow the agents to distinguish out-of-state travellers from Canadians illegally entering the country? What test exists for distinguishing a resident of Vancouver or Montreal from a citizen of Seattle or New York City? What basis exists to allow de facto discrimination against Chicanos in the southern border states? Is the disproportionate number of aliens crossing the southern border as opposed to the northern border sufficient justification? Does this really satisfy the strict test under the Fifth Amendment due process clause[60] which arises when the fundamental interest is the right to freedom from unreasonable searches and the suspect classification is race?[61]

An examination of the *extent* of permissible searches approved by case law, moreover, amplifies the importance of rejecting the dissenting opinion. Clearly the hood,[62] trunk[63] and the backseat[64] of vehicles are within the purview of the search as they are considered compartments where aliens could hide. The issue then becomes to what extent these areas may be searched. A search purely for aliens

58. *Compare* James Madison's instruction that "independent tribunals of justice . . . be led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights" I Annals of Cong. 439 (1789), *with* the recent broad definition of privacy in Katz v. United States, 389 U.S. 347 (1967).

59. See text accompanying note 50 *supra.*

60. U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

61. Shapiro v. Thompson ,394 U.S. 618 (1969) requires generally the application of the strict scrutiny test when fundamental liberties are infringed. The right of privacy is a fundamental liberty: Roe v. Wade, 410 U.S. 113 (1973); Katz v. United States, 389 U.S. 347 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Wolf v. Colorado, 338 U.S. 25 (1949). The rigid scrutiny test is imposed upon statutes which discriminate on the basis of race: Lee v. Washington, 390 U.S. 333 (1968); Brown v. Board of Educ., 349 U.S. 294 (1955); Hernandez v. Texas, 347 U.S. 475 (1954).

62. Fernandez v. United States, 321 F.2d 283, 285 (9th Cir. 1963).

63. Fumigalli v. United States, 429 F.2d 1011, 1013 (9th Cir. 1970).

64. Almeida-Sanchez v. United States, 413 U.S. 266, 286 (1973).

would appear to stop at a cursory inspection of the compartments under the Border Patrol agent's role as immigration officer.[65] However, the Border Patrol agent also wears the hat of the customs officer[66] which he may don at any time,[67] greatly expanding his powers.

By statute,[68] a customs officer may search any vehicle or person[69] he *suspects* of possessing illegal merchandise, or any trunk or envelope which he has *reasonable cause to suspect* of containing illegal merchandise. The meaning of this authority in conjunction with the agent's power as an immigration officer has been illustrated in *United States v. McDaniel*[70] and is further delineated in *United States v. DeLeon.*[71]

In *United States v. DeLeon,* defendant's car was stopped at a checkpoint ten miles north of the Mexican border. To facilitate a search for aliens, defendant was requested to open his trunk. He did so and the officer discovered a false bottom. The agent punched a small hole in the false bottom and "detected what he thought to be the smell of marihuana. Opening the false bottom, the agent found three one-pound packages of heroin and a pistol;"[72] this evidence was admitted at trial to support the indictment for possession and illegal importation of heroin. A false bottom on a car near the border and the agent's awareness of narcotics smuggling in the area was sufficient cause to "suspect" that the vehicle contained illegal narcotics and subsequently to search for them.[73]

65. United States v. DeLeon, 462 F.2d 170 (5th Cir. 1972).

66. *Id.*

67. United States v. McDaniels, 463 F.2d 129 (5th Cir. 1972).

68. 19 U.S.C. 482 (1970) provides: "Search of vehicles and persons. 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, 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 law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle beast, or otherwise, he shall seize and secure the same for trial."

69. *See* Note, *Search and Seizure at the Border—the Border Search,* 21 RUTGERS L. REV. 513 (1967) (discussion of Blefare v. United States, 362 F.2d 870 (9th Cir. 1966) involving the use of rectal probe, saline solution and polyethylene tubes to facilitate search for narcotics).

70. 463 F.2d 129 (5th Cir. 1972).

71. 462 F.2d 170 (5th Cir. 1972).

72. *Id.* at 171.

The agent wearing the two hats of the immigration and the customs officer clearly has extensive power subject only to his discretion and judgment. The interposition of a neutral magistrate between his decision to search and his actions in the field, so central to the concept of reasonableness under the Fourth Amendment,[74] is absent in this situation.

According to the dissenting opinion in *Almeida-Sanchez*[75] then, the Border Patrol would be permitted to stop almost any vehicle[76] within one hundred miles of the border, on the authority of a routine check for aliens.[77] Once the car is stopped, a search for aliens involving opening the hood,[78] the trunk[79] and inspection of the backseat of the car might be conducted.[80] Any suspicious object in these compartments would then be subject to a more thorough search either upon a showing of probable cause to arrest[81] or upon a mere "reasonable suspicion" of violation of custom laws.[82] These grave infringements upon individual freedom approach the severity of general warrants in the discretion of the investigating officer long held to be abhorrent to our system.[83] It is questionable whether such a license in the hands of the Border Patrol is desirable or necessary to carry out the government's interest in stopping of illegal entry of aliens.

Concurring Opinion

Justice Powell's concurring opinion provides possible relief from the harsh effects upon individual freedoms under the dissent's opinion and from the inability of a government to effectively control illegal alien traffic under the majority's opinion.[84]

In *Almeida-Sanchez*, the search was not conducted pursuant to

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73. *Id.*

74. Wong Sun v. United States, 371 U.S. 471, 481-82 (1963); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

75. 413 U.S. 266 (1973).

76. *Compare* Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970) *with* Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969).

77. United States v. McDaniel, 463 F.2d 129, 132 (5th Cir. 1972).

78. Fernandez v. United States, 321 F.2d 283, 285 (9th Cir. 1963).

79. Fumagalli v. United States, 429 F.2d 1011, 1013 (9th Cir. 1970).

80. Almeida-Sanchez v. United States, 413 U.S. 266, 286 (1973).

81. Chimel v. California, 395 U.S. 752 (1969).

82. United States v. McDaniel, 463 F.2d 129, 133 (5th Cir. 1972). *See also* note 69 *infra* containing text of 19 U.S.C. § 482 (1970).

83. Stanford v. Texas, 379 U.S. 476 (1965); Marron v. United States, 275 U.S. 192 (1927).

84. A majority of the Court would agree with Justice Powell's approach. All four dissenting Justices seem to approve it. Almeida-Sanchez v. United States, 413 U.S. 266, 288-89 (1973). The Justices in the majority are split. *Id.* at 270, n.3.

any warrant nor was there any probable cause to search.[85] Justice Powell points out that except in certain limited circumstances[86] both probable cause *and* a warrant are required to satisfy the Fourth Amendment's proscription against "unreasonable searches and seizures." Since the case fell within none of the established warrant and probable cause exceptions, none of the prior decisions of the Supreme Court would support the search in *Almeida-Sanchez*. Justice Powell agrees, therefore, with the majority that the search was illegal and the evidence inadmissable.[87]

The importance of the Powell opinion is not his holding on the facts of *Almeida-Sanchez* but the alternative he presents, a proposal for utilization of a roving Border Patrol to control illegal alien traffic. He maintains that sufficient probable cause might exist and that a warrant procedure is available under accepted standards that would allow the Border Patrol to carry out vehicular searches for aliens in the future.

Probable Cause

Justice Powell admits that probable cause in the sense of specific knowledge on the part of the government concerning a particular automobile or its passengers is lacking in all but rare cases.[88] However, he finds an operational equivalent of probable cause that would be sufficient under the Fourth Amendment to jusify area searches by the Border Patrol.[89] Justice Powell's proposal is not novel, but rather is borrowed from the probable cause requirement in the context of searches to identify housing code violations, with an analogy to the landmark case concerning housing code violation inspections, *Camara v. Municipal Court.*[90] Rather than requiring specific knowledge that a particular home contained housing code violations, the Court there permitted general knowledge, an "appraisal of conditions in the area as a whole"[91] to satisfy the requirement of probable cause.

Similar considerations to those which allowed the Court in *Camara* to alter the traditional standard of probable cause also exist in the case of roving Border Patrol searches.[92] First, both area code

85. *Id.* at 268.

86. Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973). See text accompanying notes 32-35 *supra.*

87. Almeida-Sanchez v. United States, 413 U.S. 266, 275-276 (1973).

88. *Id.* at 276.

89. *Id.* at 279.

90. 387 U.S. 523 (1967).

91. *Id.* at 536.

92. Almeida-Sanchez v. United States, 413 U.S. 266, 278-279 (1973).

enforcement inspections[93] and roving border region searches[94] have received judicial approval. Secondly, the searches would only be conducted in areas where the concentration of illegal alien traffic or code violations was high or likely.[95] In addition, "it is doubtful that any other canvassing technique would acheive acceptable results"[96] for code inspections, and probably for alien searches. Of added significance to the possibility of probable cause in area searches for aliens is the fact that the judiciary has established that a search of one's car is far less intrusive on Fourth Amendment rights than a search of one's home.[97] Thus, if the balancing of the extent of invasion versus the purpose for the search indicates that probable cause based on general knowledge of the area satisfies the strictures of reasonableness under the Fourth Amendment in regard to search of homes for code violations,[98] so too should vehicle searches for aliens be permitted when the same balance of interests exists.

Justice Powell suggests four factors which would be relevant in determining whether probable cause existed for the Border Patrol to search the area in question:

> (i) [T]he frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, it's duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.[99]

The opinion points out, however, that mere probable cause alone could not justify a search of vehicles by the Border Patrol.[100]

Warrant Procedure

The Court has long held that a search of private property without proper consent is "unreasonable" unless it has been authorized by a

93. *See* Frank v. Maryland, 359 U.S. 360, 367-71 (1959), but note that the case was expressly overruled in Camara v. Municipal Court, 387 U.S. 523, 528 (1967) to the extent it provided for warrantless searches.

94. *See, e.g.*, United States v. McDaniel, 463 F.2d 129 (5th Cir. 1972); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Roa-Rodriquez v. United States, 410 F.2d 1206 (10th Cir. 1969).

95. Camara v. Municipal Court, 387 U.S. 523, 536, 538 (1967).

96. *Id.* at 537.

97. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970).

98. Camara v. Municipal Court, 387 U.S. 523, 536-38 (1967).

99. Almeida-Sanchez v. United States, 413 U.S. 266, 283-284 (1973).

100. *Id.* at 282.

valid search warrant.[101] To overcome this requirement, it must be demonstrated that the search falls within certain limited exceptions.

Justice Powell's concurring opinion indicates again that none of the major exceptions is applicable here.[102] Area searches do not fall within the warrantless "pat down" for weapons in *Terry v. Ohio*,[103] because there is no reasonable belief that criminal conduct has or is taking place and that the passenger of the car is armed and dangerous to the patrol officer or to others nearby. Clearly inapplicable are the congressionally authorized warrantless searches of federally regulated businesses where the dealer accepts this inspection as a burden of doing business.[104] Also inapplicable are the automobile search cases, where the warrantless search of the vehicle must be supported by probable cause arising from specific knowledge about the automobile searched;[105] otherwise, the exception based on the mobility of the car would not apply.[106]

The necessity for a warrant to satisfy the Fourth Amendment is analogous to the warrant requirement enunciated in *Camara*[107] and *See v. City of Seattle*.[108] *Camara* points out that the test of whether a warrant is necessary for such searches is "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[109] No such frustration need arise in roving searches for aliens. Inconvenience alone does not justify a warrantless search.[110] "According to the government, the incidence of illegal transportation of aliens on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule."[111]

The requirement of a warrant brings with it a crucial safeguard against overreaching governmental action. By requiring a warrant, there is interposed between the governmental official and the individual an issuing magistrate who determines when, where, how long, and to what extent searches may be conducted. His presence becomes

101. Agnello v. United States, 269 U.S. 20 (1925). Carroll v. United States, 267 U.S. 132 (1925) requires that a warrant be secured for search of a car if at all reasonably practicable.

102. Almeida-Sanchez v. United States, 413 U.S. 266, 282 (1973).

103. 392 U.S. 1 (1968).

104. United States v. Biswell, 406 U.S. 311 (1972) (sale of guns); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (sale of liquor).

105. See text accompanying notes 32-34 *supra*.

106. *Id.*

107. 387 U.S. 523 (1967).

108. 387 U.S. 541 (1967).

109. Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

110. United States v. United States District Court, 407 U.S. 297, 321 (1972).

111. Almeida-Sanchez v. United States, 413 U.S. 266, 283 (1973).

the essence of the standard of reasonableness under the Fourth Amendment, because he determines whether searches may be initiated and if such searches are to continue. The power to balance the need of the government to search and the right of the individual to resist that search rests upon the magistrate as a neutral arm of the government. This fundamental realization makes the requirement of a warrant essential except in rare instances.

Effects

The Powell opinion thus fills the void left by the majority opinion, and yet safeguards the rights of individuals which would be left in doubt by the dissenting opinion. The approach provides for a warrant system with a neutral magistrate authorizing roving border patrol searches only upon a showing of probable cause, involving a consideration of the degree of incidence of alien traffic in the area to be searched.[112] Such a requirement protects the rights of individuals from searches in most areas and yet allows the government to carry out its responsibility by authorizing limited searches of vehicles in areas where illegal alien traffic is prevalent. Secondly, the magistrate would consider the proximity of the area to the border,[113] presumably requiring a greater showing of cause as the distance from the border increased. This effectively balances the government's interest in apprehending illegal aliens at or near the border with the right of the individual to be more protected as he moves more comfortably into the country. Thirdly, the magistrate would examine the topography of the area with an eye to its size and value for alien traffic along with its road system and use.[114] This condition limits the scope of the search significantly by restricting the execution of the warrant to a particular site or perhaps even to a particular section of a road or highway. Finally, the magistrate must consider the possible interference with individual rights when the search is viewed as a whole.[115] This important safeguard includes inspection of the number of people who might be searched, the probability of apprehending aliens, and duration of the search. The issuing magistrate could deny warrants where the real objective is the apprehension of narcotics law violators, where the executing officer could not set forth sufficient probable cause to obtain a warrant on the narcotics charge itself.

Since most of the cases arising under the Border Patrol's search for aliens resulted in prosecutions for violations of narcotics laws, the

112. *Id.* at 283-84.
113. *Id.*
114. *Id.* at 284.
115. *Id.*

opinion may work a hardship on the government's attempted elimination of narcotics smuggling.[116] Indeed, the serious drug problem in the country may have been the unstated motivation behind the dissenters' decision to uphold the extensive powers of the Border Patrol under their interpretation of the statute at issue in *Almeida-Sanchez*.[117] Whatever effect the Powell opinion may have on the Border Patrol's role as customs officer, the opinion would appear to suggest an effective method for the government to employ in curbing illegal alien traffic. Only if issuing magistrates, because of carelessness or lack of responsibility, allow the issuance of warrants to become a rubber stamp procedure may those lawfully within the country suffer any infringement on their rights of privacy. Fraudulent and exhaustive searches of vehicles will be conducted only if the magistrates repeatedly issue warrants realizing that the sole reason behind and result of the warrant is apprehension of narcotics law violators. The random, intrusive searches permitted at the discretion of the Border Patrol agent would be eliminated and the number of exhaustive stops and searches for narcotics under the guise of searches for aliens would be curtailed.

In sum, the Powell opinion is a common sense, pragmatic approach. It applies accepted legal opinion to novel problems in order to arrive at a tailored and practical solution. Specifically, the opinion presents a workable means for the apprehension of illegal aliens that would not significantly interfere with those individual rights of privacy that are so central to the concept of liberty.

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116. Any hardship worked by this opinion should be more than off-set by the recent cases of United States v. Robinson, 94 S. Ct. 467 (1973); and Gustafson v. Florida, 94 S. Ct. 488 (1973) where extensive power for searches of persons was recently granted.

117. 413 U.S. 266 (1973).