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Ninth Circuit Review—Border Searches: United States v. Martinez-Fuerte

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by-case basis, using a due process approach, will depend in large part upon a decision of the Supreme Court which may be forthcoming in this area.[25]

The importance of maintaining an overview with respect to these and other recent developments in criminal law is apparent, and applies equally to those in all quarters of our profession. The judiciary must have a strong sense of precedent to provide the necessary continuity in its decisions. This continuity will then be translated into a rational and orderly evolution of case law which forms the heart of our legal system. Similarly, this sense of perspective is a requisite for the practitioner since, in theory, he must be constructively innovative and act as a guide for the court.

One meaningful way to develop such a frame of reference is to examine recent decisions of the appellate court, to dissect the changes which have occurred, and to ponder dictum which may foreshadow change in the future. A circuit review such as the one that follows serves that purpose and will undoubtedly also serve as a source of reference for practitioners, lower courts, professors, and students alike.

II. BORDER SEARCHES: UNITED STATES V. MARTINEZ-FUERTE*

The problems associated with the influx of illegal aliens and contraband into the United States have had a substantial impact on the activities of the United States Border Patrol.[1] Attempts by the Border Patrol to meet these problems through the use of roving patrols and fixed and temporary checkpoints away from the border have been seriously curtailed by a series of Supreme Court and federal appellate court opinions which have limited the Patrol's power to conduct warrantless stops and searches without probable cause or "founded suspicion."[2]

25. United States v. Mandujano, 496 F.2d 1050 (5th Cir. 1974), *cert. granted*, 420 U.S. 989 (1975).

1. For a discussion of the economic and sociological aspects of this problem see United States v. Baca, 368 F. Supp. 398, 402-08 (S.D. Cal. 1973). For a discussion of the broad congressional power over immigration see Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972).

2. The notion of "founded suspicion" was first articulated by the Ninth Circuit in Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966), where the court stated:

> [D]ue regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the

In *United States v. Martinez-Fuerte*,[3] the Ninth Circuit Court of Appeals further limited the Patrol's power by holding that an area search warrant would not make lawful an otherwise unreasonable search.

The area warrant in *Martinez-Fuerte* authorized Patrol agents to stop all cars passing through fixed immigration checkpoints and to detain some of those stopped for questioning. The vehicles which were detained for questioning were selected solely on the agent's discretion, without the need for first establishing the existence of probable cause or founded suspicion.[4] In finding the warrant invalid, the court expressly rejected a suggestion by Justice Powell, advanced in his concurring opinion in *Almeida-Sanchez v. United States*,[5] that an appropriately drawn area search warrant could justify stops made by roving Border Patrol agents.[6] The court also rejected a corollary argument put forth by the Government that a validly drawn warrant could justify stops and searches at a fixed checkpoint away from the border.[7]

In *Almeida-Sanchez*, the Supreme Court held that roving patrol searches by units of the Border Patrol cannot be conducted if the agent has neither a warrant nor probable cause[8] to stop the particular vehicle in question.[9] In a later case, *United States v. Ortiz*,[10] the same require-

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totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.

Id. at 415. In *Wilson*, although the defendant had violated no traffic laws, he was stopped after officers had repeatedly noticed him driving very slowly on the same streets in the early hours of the morning. The standard of "founded suspicion" has been used often by the Ninth Circuit. *See, e.g.*, United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975); United States v. Larios-Montes, 500 F.2d 941 (9th Cir. 1974); United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir.), *cert. denied*, 417 U.S. 972 (1974); United States v. Ward, 488 F.2d 162 (9th Cir. 1973); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

3. 514 F.2d 308 (9th Cir.), *cert. granted*, 96 S. Ct. 35 (1975).

4. *Id.* at 312.

5. 413 U.S. 266, 275 (1973) (Powell, J., concurring).

6. 514 F.2d at 316, 318.

7. *Id.* at 318.

8. Traditionally, probable cause is said to exist when

the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949), *citing* Carroll v. United States, 267 U.S. 132, 162 (1924).

9. 413 U.S. at 274-75, *quoting* Carroll v. United States, 267 U.S. 132, 153-54 (1924). *Almeida-Sanchez* and its effect on the operation of border inspections has recently been reviewed by a number of commentators. *See generally* Note, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for Aliens Take on a New Look*, 10 CALIF. WEST. L. REV. 657 (1974); *The Supreme Court, 1972 Term*, 87 HARV.

ments were held to apply to a search conducted at a fixed Border Patrol checkpoint.[11] Further, in *United States v. Brignoni-Ponce*,[12] the Court held that

> [f]or the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.[13]

As a result of *Almeida-Sanchez* and its progeny, a rule has evolved requiring probable cause, founded suspicion, or a warrant for any stop[14] or search[15] away from the border or its "functional equivalent."[16]

L. REV. 1, 196 (1973); Note, *Border Searches Revisited: The Constitutional Propriety of Fixed and Temporary Checkpoint Searches*, 2 HASTINGS CON. L.Q. 251 (1975); Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L.J. 355 (1974).

10. 422 U.S. 891 (1975).

11. *Id.* at 896-97.

12. 422 U.S. 873 (1975). *Brignoni-Ponce* was decided the same day as *Ortiz*, as was Bowen v. United States, 422 U.S. 916 (1975), which held that the principles of *Almeida-Sanchez* were not to apply retroactively to invalidate searches that occurred prior to the date of that decision. To the same effect is United States v. Peltier, 422 U.S. 531 (1975). For a discussion of the retroactivity of *Almeida-Sanchez* see Note, *Application of the "New Rule" Threshold Test Before Determining the Retroactivity of Almeida-Sanchez*, 53 TEXAS L. REV. 586 (1975).

13. 422 U.S. at 884.

14. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). It should be noted, however, that the Supreme Court has yet to decide the constitutionality of a stop at a fixed checkpoint where there is no probable cause or warrant to make the stop. Presumably *Martinez-Fuerte* gives the Court the opportunity to decide this issue. See notes 72-73, 83-84 *infra* and accompanying text.

15. *See* Bowen v. United States, 422 U.S. 916 (1975); United States v. Ortiz, 422 U.S. 892 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Under the fourth amendment, the general rule is that a warrant is required for a search unless the circumstances of the case fall within one of the narrowly defined exceptions to the warrant requirement. The well-recognized exceptions are: evidence within officers' plain view (Coolidge v. New Hampshire, 403 U.S. 443 (1971)); consent by defendant to a search (United States v. Watson, 96 S.Ct. 821 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973)); and search incident to lawful arrest (Chimel v. California, 395 U.S. 958 (1968)). However, it has been stated that none of the exceptions to the warrant requirement applies to roving automobile searches in border areas. Almeida-Sanchez v. United States, 413 U.S. 266, 282 (1974) (Powell, J., concurring).

16. The same degree of governmental intrusion allowed during a search at the physical border is also allowed at certain locations inland from the border where the first check of persons and materials may occur after entry into the United States. As the Court stated in *Almeida-Sanchez*:

> Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well.

A. Area Search Warrants

Justice Powell, concurring in *Almeida-Sanchez*, recognized the conflict between the Government's legitimate interests in enforcing the immigration laws along "thousands of miles of open border," and an

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413 U.S. at 272. The Court illustrated functional equivalents by reference to 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," and a "search of passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City." *Id.* at 273. As to the latter concept, given the standard of Klein v. United States, 472 F.2d 847, 849 (9th Cir. 1973), that probable cause is presumed from the fact of entry into the United States, airport searches of passengers who arrive on a nonstop flight are justified, but not searches of others in the same area who were not on a nonstop flight. Similarly, the search of mail arriving at points of entry within the United States has been justified as a border search. United States v. Barclift, 514 F.2d 1073 (9th Cir. 1975).

However, the "established station near the border" concept is somewhat more difficult to apply, as evidenced by some disagreement between the circuits as to whether the Border Patrol's fixed checkpoints are functional equivalents of the border.

In United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973), the district court had held that the San Clemente checkpoint and other fixed checkpoints in California were the functional equivalent of the border. However, as stated by the court in *Martinez-Fuerte*, the Ninth Circuit "[has] since overruled that conclusion." 514 F.2d at 315, *citing* United States v. Morgan, 501 F.2d 1351 (9th Cir. 1974) (San Clemente checkpoint not a functional equivalent of border); United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975) (State Highway 86 checkpoint); United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974) (Ocotillo, California checkpoint). *See also* United States v. Heinrich, 499 F.2d 95 (9th Cir. 1974) (Temecula checkpoint).

The Fifth Circuit, however, has decided that the Sierra Blanca, Texas, fixed checkpoint, whose operations are similar to those of the San Clemente and Temecula checkpoints, is the functional equivalent of the border. United States v. Hart, 506 F.2d 887 (5th Cir. 1975). In *Hart*, the court, while noting it had never held unconstitutional a search occurring at a permanent checkpoint, stated that basic to the determination of what is a functional equivalent is the function, location, and permanence of the station. *Id.* at 889.

The La Gloria temporary checkpoint, located in a rural area near El Paso, Texas, 35 miles from the border, was deemed the functional equivalent of the border. United States v. Fuentes, 379 F. Supp. 1145 (S.D. Tex. 1974). The judge, in determining whether the search conducted at the checkpoint was the functional equivalent of a border search, looked at the particular features of the area, including the long stretch of unpatrolled, unsettled border, the practice of aliens crossing the border with temporary border crossing cards (restricting them to an area 25 miles from the border), and the attempted migration north into the United States.

Subsequent to *Hart* and *Fuentes*, however, the Supreme Court in *Ortiz* announced the requirement of probable cause for a search conducted at the San Clemente checkpoint (422 U.S. at 898), thereby ratifying the Ninth Circuit's previous determination that a search at that checkpoint was not the functional equivalent of a border search. Additionally, the Supreme Court affirmed the decision of the Ninth Circuit in United States v. Bowen, 500 F.2d 960 (9th Cir. 1974), which had held that the fixed checkpoint on State Highway 86 was not the functional equivalent of the border. The Supreme Court affirmed the Ninth Circuit's decision without questioning the circuit court's determination that the fixed checkpoint was not a functional equivalent of the border.

individual's constitutionally protected rights.[17] In order to reconcile this conflict, Powell suggested that the activities of the Border Patrol may be validated by an area warrant similar to that postulated in *Camara v. Municipal Court.*[18] Under such a warrant, the traditional definition of probable cause is seemingly transformed: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant."[19]

The majority specifically rejected the notion that *Camara* and other administrative inspection decisions[20] supported the stop and search in *Almeida-Sanchez.*[21] Yet Justice Powell thought that the essential factors justifying a *Camara*-type area warrant were present in situations involving roving Border Patrol searches. First, consistent judicial approval of the search procedure[22] was provided on the appellate level as to roving border patrols. Second, the absence of any reasonable alternative to Border Patrol checks[23] had been held to be a sufficient reason to validate such checks as constitutionally permissible.[24] Finally, the relatively "modest intrusion" occasioned by a stop and search of a vehicle on the highway, which is said to be less intrusive than a search of a person or building,[25] was analogous to the administrative search of

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Bowen v. United States, 422 U.S. 916 (1975). The aspect of permanence, discussed by the Fifth Circuit in *Hart*, would thus seem irrelevant in determining what is a "functional equivalent."

17. 413 U.S. at 275.

18. 387 U.S. 523 (1967).

19. *Id.* at 539. For a discussion of the administrative warrant and the issues associated with its use see Note, *Administrative Search Warrants*, 58 MINN. L. REV. 607 (1974).

20. *See* United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); See v. City of Seattle, 387 U.S. 541 (1967).

21. 413 U.S. at 270-72.

22. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

23. 413 U.S. at 279.

24. *See, e.g.*, United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973).

25. 413 U.S. at 279, *citing* Chambers v. Maroney, 399 U.S. 42, 48 (1970). Justice Powell seemingly ignored the specific requirement of Carroll v. United States, 267 U.S. 132 (1925), that probable cause exist before a search of a particular vehicle may take place; however, his opinions in related cases demonstrate that probable cause must exist. But he has also indicated that in light of the rationale of Terry v. Ohio, 392 U.S. 1 (1968), a stop may be justified on grounds less compelling than would justify a search. Powell has reasoned that because the degree of intrusiveness is slight, the stop of vehicles may be constitutionally permissible where the officer has a reasonable suspicion to believe that the vehicle is carrying illegal aliens. For example, he stated in *Brignoni-Ponce* that

> because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, . . . when an officer's observations lead him reasonably to suspect that a particular

Camara.[26]

Powell then set forth the grounds upon which an area warrant for roving Border Patrol searches might be issued.[27] He noted that the requirements for an area warrant in *Camara* were "generally unstructured."[28] He did, however, list four factors which should be considered in determining if an area warrant should issue:

> (i) the 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, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.[29]

Justice White, dissenting,[30] agreed to the constitutionality of an area

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vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be "reasonably related in scope to the justification for their initiation." 392 U.S. at 29. The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975). *See also id.* at 883. *But see id.* at 888-90 (Douglas, J., concurring).

26. Perhaps the decisive factor in determining when the *Camara* warrant procedure is applicable to a border search is the extent to which the search is "personal in nature" (degree of intrusiveness) or "aimed at the discovery of evidence of a crime" (as opposed to an administrative inquiry). Camara v. Municipal Court, 387 U.S. 523, 537 (1967). *Camara* expressly distinguished between a health official, undertaking an inspection for the purpose of finding violations of the housing code, and " 'one . . . who would search for the fruits or instrumentalities of a crime.' " 387 U.S. at 538, *quoting* Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting), *overruled,* Camara v. Municipal Court, 387 U.S. 523 (1967). Justice Powell in *Almeida-Sanchez* accepted the Government's contention that roving Border Patrol searches "are undertaken primarily for administrative rather than prosecutorial purposes," noting that only 3 percent of the aliens who are apprehended in the United States are prosecuted (413 U.S. at 278), and that violators of the housing code in *Camara* were similarly subject to criminal penalties. *Id.* at 279. However, Justice Powell did not discuss the apprehension of the aliens themselves, as "fruits or instrumentalities of a crime," or the importance of roving Border Patrol searches in apprehending customs violators. A further distinction is that the crime of alien smuggling, which is the basis for most constitutional challenges to Border Patrol searches, carries much heavier penalties than does the typical housing code violation.

27. 413 U.S. at 283-84.

28. *Id.* at 283.

29. *Id.* at 283-84.

30. *Id.* at 285. Chief Justice Burger and Justices Blackmun and Rehnquist joined in Justice White's opinion.

search warrant, but not to its necessity. For White, the problem confronting the Court

> center[ed] on . . . roving patrol[s] operating away from, but near, the border. These patrols may search for aliens without a warrant if there is probable cause to believe that the vehicle searched is carrying aliens illegally into the country.[31]

Under the circumstances of the case, White stated he would uphold the search even without a warrant or probable cause.[32] Relying on the general proposition that the fourth amendment only requires that searches be reasonable, White would have upheld the searches under the broad statutory power given the Border Patrol,[33] which, reflecting congressional intent, indicated that the searches would in fact be reasonable.[34]

B. Martinez-Fuerte

Martinez-Fuerte[35] was convicted by the United States District Court

31. *Id.* at 288.

32. *Id.* If probable cause existed for the search of a particular vehicle, no warrant would be necessary under *Carroll.* Therefore, the area warrant would be useful only in a situation where there is less than probable cause to search a particular vehicle. Justice Powell's concurring opinion failed to note probable cause as a requirement for an area warrant, stating that the issuance of such a warrant may be based upon a "constitutionally adequate equivalent of probable cause." *Id.* at 279. An examination of the *Camara* decision reveals the following language: "If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." 387 U.S. at 539. A "valid public interest," therefore, may be the "constitutionally adequate equivalent of probable cause." Query whether the valid public interest in apprehending murderers, rapists, or drug dealers authorizes the issuance of area warrants for particular parts of an urban area.

33. 8 U.S.C. § 1357(a) (1970) provides in part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
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> . . . .
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> . . . .
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> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any . . . 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 purposes of patrolling the border to prevent the illegal entry of aliens into the United States . . . .

34. 413 U.S. at 293, 294.

35. The action was consolidated for decision with two other appeals. The first involved Jiminez-Garcia who was stopped and detained at the San Clemente, California, checkpoint. United States v. Martinez-Fuerte, 514 F.2d 308, 310 (9th Cir.), *cert. granted,* 96 S.Ct. 35 (1975); see note 37 *infra.* Like Martinez-Fuerte, Jiminez-Garcia was charged with violation of 8 U.S.C. § 1324(a)(2) (1970) (see note 36 *infra*), and of 18 U.S.C. § 371 (1970), for conspiracy to transport an "illegal alien." At his trial, he made a motion to suppress which was granted. 514 F.2d at 310.

The second appeal was brought by the government after a motion to suppress was

for transporting illegal aliens into the United States.[36] He was stopped at a highway checkpoint located near San Clemente, California,[37] pursuant to a warrant issued by a United States Magistrate.[38] This warrant was issued on the finding of " 'probable cause' to believe that mass violations of the Immigration laws" were and are being committed at the checkpoint.[39] The warrant commanded the Border Patrol to conduct an

granted in the case of another defendant, Guillen. *Id.* Guillen's car was stopped at the San Clemente checkpoint where agents found that his two passengers as well as three persons concealed in the trunk were illegal aliens. Guillen was charged with inducing the illegal entry of aliens in violation of 8 U.S.C. § 1324(a)(4) (1970), and 18 U.S.C. § 371 (1970). 514 F.2d at 310.

36. 514 F.2d at 309. Martinez-Fuerte was convicted of violating 8 U.S.C. § 1324(a)(2) (1970) which provides in part:

> (a) Any person, including the owner, operator, pilot, master, commanding officer, agent or consignee of any means of transportation who—
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> . . . .
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> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
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> . . . .
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> any alien, . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States . . . shall be guilty of a felony . . . .

37. The checkpoint was characterized by the Immigration and Naturalization Service, the *Martinez-Fuerte* court noted, as a permanent fixed checkpoint. 514 F.2d at 312. It is located about five miles south of San Clemente on Interstate 5, which is the major highway connecting Los Angeles and San Diego. According to the court, "[w]hen in operation, the checkpoint operates as a roadblock causing all northbound vehicles . . . to slow or come to at least a 'fleeting stop' for an immigration check." *Id.* The check which is made at this point is based solely upon the discretion of the Border Patrol agent who looks into each car as it passes. If that agent's suspicion is aroused he may divert the vehicle to a secondary inspection area where the occupants will be questioned as to their citizenship or immigration status. *Id.* at 313.

38. *Id.* at 310. The warrant directed the Border Patrol to do the following:

> (1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;
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> (2) to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;
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> (3) to conduct a routine inspection of said vehicles for the presence of aliens, and;
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> (4) since the flow of alien traffic occurs at all hours of the day, and since limited operation of the traffic checkpoint would tend to defeat its purpose, the operation of this checkpoint may be conducted at any time of day or night . . . .

Id. at 311 n.2. The warrant was issued upon the magistrate's finding of "probable cause to believe that mass violations of the Immigration laws of the United States . . . have been and are being committed . . . ." *Id.*

39. The warrant was a temporary warrant issued on June 22, 1974 for a period of 10 days. However, it was renewed 26 times for additional 10 day periods, thus prompting the court to observe "[t]he particular warrant before us . . . was simply the first installment in what appears to be a perpetual succession of similar warrants." *Id.* at 312.

immigration traffic checkpoint, authorizing them to check the immigration status of occupants of vehicles traveling the interstate highway leading from the Mexican border to the United States.[40] The Government had "stipulated that there was neither probable cause nor founded suspicion for the stop."[41] Martinez-Fuerte moved to suppress testimony based on observations made at the checkpoint "on the grounds that the stop was made without founded suspicion, probable cause or [a] valid warrant."[42]

In sustaining his contention, the court rejected both the use of the area warrant as a justification for inspection stops,[43] and also the analogy set forth by Justice Powell in *Almeida-Sanchez* between the justification for area warrants and administrative inspection searches.[44] The court found that a stop, even if it can be characterized as a "fleeting stop" is subject to fourth amendment protections.[45]

In finding that the warrant did not legitimize the checkpoint operations, the court relied on principles announced in *Carroll v. United States*:[46]

> [T]hose 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 compentent official authorized to search, probable cause for believing that their vehicles are carrying contraband [,] illegal merchandise [, or illegal aliens].[47]

The *Martinez-Fuerte* court reasoned that despite the existence of a warrant issued on conclusory allegations of probable cause, there must be "specific and articulable facts" which would justify stopping a car in each case."[48] Additionally, although recognizing that "the standard of probable cause may in some cases be a flexible one,"[49] the court stated that where an area warrant is issued on a blanket conclusion of probable

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The court also noted that the "inspection" which was authorized by paragraph 3 (see note 38 *supra*) of the warrant was a euphemism used by the Border Patrol for "searches." 514 F.2d at 311 n.3.

40. It is clear that routine stops at the San Clemente checkpoint require a minimal showing of founded suspicion. United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). See note 2 *supra*; note 79 *infra*.

41. 514 F.2d at 312.

42. *Id.* at 310.

43. *Id.* at 314-16.

44. *Id.* at 316-22.

45. *Id.* at 315.

46. 267 U.S. 132 (1925).

47. *Id.* at 154.

48. 514 F.2d at 315.

49. *Id.* at 316.

cause neither the constitutional safeguard of a warrant "particularly describing the place to be searched, and the persons or things to be seized,"[50] nor the intermediate protection by a magistrate conducting an independent inquiry into the facts surrounding each particular intrusion is satisfied.[51]

Since the warrant was properly found unconstitutional given its lack of standards or guidelines to control the executing officer's discretion,[52] the court need not have determined whether the utilization of an area warrant was constitutionally impermissible. The court held, however, that a warrant, even if properly drawn, would not justify a stop by either a roving patrol or by Border Patrol agents at a fixed checkpoint.

The court focused its attention on an examination of the rationale relied upon by Justice Powell. The Government argued that the administrative inspection doctrine, which authorizes warrantless administrative inspections of those involved in activities closely regulated by the government,[53] should be broadened to authorize the conduct of inspections at the San Clemente checkpoint pursuant to a generalized area warrant. In rejecting this argument, the Ninth Circuit distinguished *Camara* on two grounds. First, the court indicated that the Government failed to make an adequate showing of necessity to justify the need for the warrant and the procedures it authorized.[54] Although recognizing the limitations of any possible solutions given the magnitude of the problem, the court stated that "the mere fact that protecting a constitutional right

50. U.S. CONST. amend. IV.

51. 514 F.2d at 316.

52. In order to satisfy constitutional requirements, a search warrant must be drawn so that nothing is left to the discretion of the officer executing the warrant. *See* Marron v. United States, 275 U.S. 192, 196 (1927); United States v. Sanchez, 509 F.2d 886, 889 (6th Cir. 1975). The role played by the federal magistrate is to perform the task of a neutral and detached reviewer of the application for the warrant, and not to perform as a mere rubber stamp for the party seeking the warrant. United States v. Martinez-Fuerte, 514 F.2d 308, 316 (9th Cir.), *cert. granted*, 96 S.Ct. 35 (1975), *citing* Aguilar v. Texas, 378 U.S. 108, 111 (1964). *See* note 64 *infra.*

53. *See* cases cited in note 20 *supra.*

54. 514 F.2d at 318-19. In noting that the United States had not exhausted the alternatives available to deal with the illegal alien problem, the court made some suggestions as to how to deal with the problem. Among them were intensification of border searches by additional manpower; destroying the economic appeal of illegal alien labor by congressional action to impose sanctions on those employers who employ illegal aliens (*see* DeCanas v. Bica, 96 S. Ct. 933 (1976); elimination of temporary border passes; and elimination of the "commuter system" which allows Mexican nationals to come into the United States to work and then return to Mexico after the working day. 514 F.2d at 319.

will impose a heavy burden on the federal fisc is not a proper ground for our failing to protect that right."[55]

Second, the warrant in *Camara* authorized administrative inspections for housing code violations and not criminal investigations like those which occur at the checkpoint.[56] In *Camara*, the Supreme Court stated that the most effective way to insure compliance with building standards in the municipal codes was through periodic inspections of all structures located in a particular area.[57] Yet, a routine check of automobiles passing through a fixed checkpoint can hardly be considered "administrative" under the *Camara* rationale. The two types of "inspections" are for fundamentally different purposes. The inspection of houses for potential building code violations does not serve the criminal enforcement purposes that are inherent in the stopping of vehicles to determine if aliens are being brought unlawfully into the country.[58] As the court noted:

> That the border patrol checkpoint operations are both personal in nature and aimed at the discovery of evidence of a crime is beyond dispute. Inherent in the government's argument here, and in its argument in *Almeida* . . . is the fallacy that its practice of simply deporting aliens rather than prosecuting them gives its operations a quasi-administrative aspect. Although most aliens are simply deported, it is nonetheless true that the government does seek to prosecute virtually all *smugglers* of illegal aliens. . . . Furthermore, border patrol agents are armed with service revolvers. . . . They are law enforcement officers and cannot rationally be viewed as administrative personnel.[59]

The court then considered whether, assuming Justice Powell was correct, the warrant met the minimum standards outlined by him. In finding that it did not, the court noted, first, that "the frequency with which illegal aliens pass through the San Clemente checkpoint is far too

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55. 514 F.2d at 318-19.

56. *Id.* at 319.

57. 387 U.S. at 535-36. The Supreme Court justified upholding the area warrants on the grounds that:

> First, such programs have a long history of judicial and public acceptance. . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

Id. at 537.

58. *See* Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara*, 84 YALE L.J. 355, 365-67 (1974).

59. 514 F.2d at 320.

low to make operation of a checkpoint reasonable."[60] Second, the checkpoint was located too far from the border to come within Powell's notion that the warrant could be issued to cover an area "reasonably near the border."[61] Third, the geographic characteristics of the checkpoint area did not establish a nexus with the border.[62] Finally, the degree of interference with the rights of innocent persons occasioned by the checkpoint procedures was "intolerable."[63] Additionally, the court did not fail to note that the issuance of the warrant, without there having been probable cause or founded suspicion, gave the border agents "unfettered discretion to stop any or all cars and to divert them for detention and questioning."[64]

Judge Carter, dissenting, stated that "[t]he four dissenters in *Almeida-Sanchez* would have upheld a warrantless search by *roving* patrols on less than probable cause. Clearly, they would uphold a *fixed checkpoint* procedure pursuant to a 'checkpoint' warrant."[65] He then disa-

60. *Id.* at 321. The majority stated that "only .12% of the passing cars were found to contain 'illegal' aliens." *Id.* Judge Carter, in his dissent, disputed this statistic with his own finding that aliens were found to be present in about 21 percent of the vehicles stopped. This led him to conclude that the fruitfulness of the searches will increase as more cars are inspected. *Id.* at 325.

61. *Id.* at 321-22. *See* text at notes 79-80 *infra.*

62. 514 F.2d at 322.

63. *Id.*

64. *Id.* at 321. In this regard, the court compared the issuance of the warrants to the "writs of assistance" which precipitated the Revolutionary War. *Id.* at 320-21. The court explained:

> The primary vices of the writs of assistance . . . were (1) that the warrants could be issued without sufficient cause; (2) that persons and places were not particularly specified; and (3) that the warrants left too much to the discretion of the bearer.
> . . .
> . . . .
> The unmistakably parallel vice of the inspection warrant for the San Clemente checkpoint is that, without having issued on probable cause—or even founded suspicion—focussed on any particular person or vehicle, the warrant purports to authorize agents to do that which they clearly could not do without the warrant: namely, to stop vehicles without cause or founded suspicion.

Id. (footnote omitted).

65. *Id.* at 323. Judge Carter stated that although the majority correctly stated the issues presented by the appeal, they failed to take cognizance of the fact that the views expressed by Powell in *Almeida-Sanchez* were supported by a majority of the Court:

> The most interesting aspect of the majority opinion is its references to Justice Powell's concurrence in *Almeida-Sanchez.* The opinion reads as if Justice Powell stood alone in his views as to the validity of an area warrant. Whether or not Justice Powell was correct in his views is one question, but a breakdown of the votes in *Almeida-Sanchez* indicates that his views were supported by a majority of the Court. We concede that Justice Powell's concurrence did not involve fixed checkpoints.

Id. at 323 (Carter, J., dissenting). After referring to footnote 3 of the majority opinion in *Almeida-Sanchez* (413 U.S. at 270 n.3: "The Justices who join this opinion are divided upon the question of the constitutionality of area search warrants such as described in Mr. Justice Powell's concurring opinion."), Judge Carter stated: "I specu-

greed with the view of the *Martinez-Fuerte* majority that Powell's analogy could not be accepted and concluded that a majority of the Supreme Court would uphold the warrant in question. Although recognizing that the fixed checkpoint at San Clemente might be too far removed from the border to qualify under Justice Powell's standards, Carter attempted nevertheless to justify the application of the warrant to the checkpoint as being reasonable.[66] He sought to demonstrate that the stop and possible search at a fixed checkpoint was less intrusive than the type of intrusion occasioned by a roving border patrol.[67]

He first premised his argument on the fact that roving patrols often stop individuals in "rural, unlighted area[s]." He continued:

> If people could be stopped at any time by roving patrol cars, without any notice, then clearly the *area* in which such stops could occur should be limited to an area quite close to the border, where very few residences or travelers could be found. The same purpose is achieved, however, by a fixed checkpoint which limits the area of possible search to a small, permanent portion of a single road.[68]

Such an argument, however, seems to misconceive the inherent differences between a roving patrol and a fixed checkpoint. It would seem that while the warrant might be valid as to open areas where there is less likelihood of stopping innocent citizens, such justification is lacking at a fixed checkpoint located on the main highway between two major cities.

Second, Carter emphasized that no search was involved in two of the three cases before the court.[69] In an attempt to show the limitations of the use of the warrant in question, Carter pointed out that the *Martinez-Fuerte* majority had itself limited its holding to "stops, diversion and interrogation."[70] Since Justice Powell had referred to " 'roving vehicular *searches*,' "[71] Carter implied that because a stop at a fixed checkpoint

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late that had only Justice Powell been of the view expressed, the footnote would have been unnecessary." 514 F.2d at 323. Carter concluded that

> Justice Powell's concurrence in *Almeida-Sanchez*, when read together with Justice White's dissent, supports the legality of the stop, limited visual inspection, and occasional interrogation of motorists at a fixed checkpoint, pursuant to a warrant issued by a "neutral and detached magistrate" involved in these cases.

Id.

66. 514 F.2d at 324.

67. *Id.*

68. *Id.*

69. *See* note 35 *supra.*

70. 514 F.2d at 324.

71. *Id.* Judge Carter quoted the following statement by Justice Powell in *Almeida-Sanchez*:

> "The conjunction of these factors—consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion

is far less intrusive than the stop and possible search by a roving border patrol, Powell would uphold the two convictions under consideration.[72]

In view of the fact that Powell had implicitly indicated that a stop need not be based on a warrant,[73] Carter failed to explain why, as to the two cases where only a stop occurred, a warrant was needed. Indeed, he noted[74] the holdings of two other circuits,[75] as well as the implication of a prior Ninth Circuit case,[76] that indicate that a warrantless stop at a fixed checkpoint is constitutionally permissible.

C. *Constitutionality and Necessity of Area Search Warrants*

The Supreme Court has not decided whether a stop, with or without a warrant, or with or without probable cause is permissible at a fixed checkpoint.[77] *Martinez-Fuerte* seems to give the Court the opportu-

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on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct *roving vehicular searches* in border areas."

Id. at 323, *quoting* Almeida-Sanchez v. United States, 413 U.S. 266, 279 (Powell, J., concurring) (emphasis by Judge Carter). As to the concept of "a constitutionally adequate equivalent of probable cause" see note 32 *supra.*

72. *See* note 35 *supra.*

73. *See* note 25 *supra* and accompanying text; notes 83-84 *infra* and accompanying text.

74. 514 F.2d at 324.

75. Carter cited United States v. Hart, 506 F.2d 887 (5th Cir. 1975) and United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973). In *Hart,* however, the Fifth Circuit court had held that a fixed checkpoint was the functional equivalent of a border, and thus not only a stop would be constitutionally permissible, but also a search would be constitutionally permissible even without probable cause. See note 16 *supra.* In *Bowman,* the defendant was stopped after officers detected odors of marijuana, and thus the stop was unrelated to the issue of whether the defendant was smuggling illegal aliens.

76. United States v. Evans, 507 F.2d 879 (9th Cir. 1974). There, the Ninth Circuit held that the diversion of a car did not violate any constitutionally protected expectation of the right to privacy. The automobile, which had been waved through an immigration checkpoint at Oak Grove, California, contained two individuals of Mexican descent lying in plain view on the floor of the car behind the front seat. As a result of the observation, the car was pursued, stopped, and searched which resulted in the apprehension of two illegal aliens.

In a per curiam opinion, the court held that the stop was not made in violation of the standards of *Almeida-Sanchez* because the agent saw only what was in plain view and from such observation was able to formulate probable cause to justify the stop. *Id.* at 880. Further, the court summarily rejected the defense argument that diversion of the automobile through the checkpoint violated the defendant's constitutionally protected expectation of privacy. *Id.* From this, Carter concluded that "[s]urely, if a diversion of a car through a checkpoint was not illegal, the slowing of cars at a checkpoint would also not be illegal." 514 F.2d at 324.

77. United States v. Ortiz, 422 U.S. 891, 897 n.3 (1975). There the Court stated that under the facts of the case it

need not decide whether checkpoints and roving patrols must be treated the same

nity to clarify its previous holdings and determine whether the same rules apply to a stop at a fixed checkpoint.

Additionally, the Court, for the first time, will be able to pass judgment on what constitutes a properly drawn area warrant, and the area for which it may be issued. As to this latter point, it is clear from *Almeida-Sanchez* that at least five Justices would uphold as constitutional a properly drawn area warrant,[78] but there is some question as to whether such a warrant would have to be limited in scope to only those areas reasonably near the border. In *Almeida-Sanchez*, the search was conducted at a location approximately 25 air miles from the border. In discussing the inconvenience to the Government in having to first obtain a warrant, Powell's statement that it would be feasible "for the Border Patrol to obtain advance judicial approval," was limited to "*roving searches on a particular road or roads* for a reasonable period of time."[79] Justice White also indicated that the application of the warrant might be limited to roving patrols operating near the border.[80] If these statements can be taken as intimating that a warrant could properly issue only for those areas reasonably near a border and for a reasonable period of time, it would seem clear that the warrant in *Martinez-Fuerte* would have to fail on both grounds.

The Court has given little indication as to what constitutes a properly drawn warrant, except for Justice Powell's concurring opinion in *Almei-*

for all purposes, or whether Border Patrol officers may lawfully stop motorists for questioning at an established checkpoint without reason to believe that a particular vehicle is carrying aliens.

See also United States v. Brignoni-Ponce, 422 U.S. 873, 884 n.9 (1975).

78. The five Justices are Justice Powell, and the three dissenters joining in Justice White's opinion. It would seem, however, that at least one of the Justices in the majority also would uphold the constitutionality of an area warrant. *See* 413 U.S. at 270 n.3; note 65 *supra*.

79. 413 U.S. at 283 (emphasis added). In *Brignoni-Ponce*, Powell, writing for the majority, specifically declined to consider "whether a warrant could be issued to stop cars in a designated area on the basis of conditions in the area as a whole and in the absence of reason to suspect that any particular car is carrying aliens." 422 U.S. at 882 n.7. It should be noted, however, that although the search in *Brignoni-Ponce* occurred near the San Clemente checkpoint, the Court viewed the search as having been conducted by a roving patrol.

In United States v. Ortiz, 422 U.S. 891 (1975), the search occurred at a fixed checkpoint away from the border, and no mention was made in the opinion as to the validity of an area search warrant. Given this and the first two factors that Powell stated must be considered in issuing a warrant (see text accompanying note 29 *supra*), it is possible that the warrant would have to be limited in its application to an area closer to the border than a fixed checkpoint, like San Clemente, which is located some distance from the border and separated by major roads and cities. This should be so notwithstanding that *Ortiz* holds that for purposes of probable cause to search there is no difference between a checkpoint and roving patrols.

80. 413 U.S. at 288. See text accompanying note 31 *supra*.

da-Sanchez where he listed four factors that should be taken into account by an issuing magistrate.[81] These factors, however, would not in themselves seem sufficient to establish the requisite probable cause needed for the issuance of the warrant, without specific facts tending to establish each of the four factors. Thus, the Border Patrol should be required to produce facts, taken from past stops and searches, which would show a basis for inferring the existence of the four factors.[82]

It also has been intimated that a *stop* at a fixed checkpoint, without a warrant or probable cause, might also be constitutionally permissible.[83] The Court has often pointed to the difference in nature between a stop at a fixed checkpoint and a stop by a roving border patrol. A stop at a fixed checkpoint is preceded by notice, occurs on an open highway where many motorists are present during the course of the stop, and presents few of the intimidating and frightening aspects of a stop on a rural desolate road.[84]

A justification for stops at fixed checkpoints also may be found in

81. *See* text accompanying note 29 *supra.*

82. In *Brignoni-Ponce,* Powell indicated that

> the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators.

422 U.S. at 883. A number of factors which may be considered by the issuing magistrate are noted at *id.* at 884-86. *See also* United States v. Ortiz, 422 U.S. 891, 897 (1975). In his dissenting opinion in *Martinez-Fuerte,* Judge Carter indicated that the warrant in question had been issued on the basis of the record in United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973), thereby indicating that the Government, in seeking the warrant, had relied in part on a compilation of those facts which would tend to establish the four factors outlined by Powell. 514 F.2d at 324.

83. In *Brignoni-Ponce,* even though they were dealing with a roving patrol, the Court held that "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." 422 U.S. at 882. Powell went on to state that a reasonable suspicion must exist to justify a roving patrol stop, and thereby left open the question of whether a stop at a fixed checkpoint without prior reasonable suspicion would be permissible. *Id.* In *Ortiz,* Powell stated that a stop at a fixed checkpoint unlike that of a roving patrol is far less intrusive. 422 U.S. at 894.

Further, in *Ortiz,* Justice Rehnquist thought that

> the Court's opinion is confined to full searches, and does not extend to fixed-checkpoint stops for the purpose of inquiring about citizenship. Such stops involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the important national interest in controlling illegal entry. I do not regard such stops as unreasonable under the Fourth Amendment, whether or not accompanied by "reasonable suspicion" that a particular vehicle is involved in immigration violations, . . . and I do not understand today's opinion to cast doubt upon their constitutionality.

422 U.S. at 898-99 (Rehnquist, J., concurring). *See also* United States v. Evans, 507 F.2d 879 (9th Cir. 1974); note 76 *supra.*

Compare these principles with those used by the Ninth Circuit in applying its founded suspicion doctrine. See note 2 *supra.*

84. United States v. Ortiz, 422 U.S. 891, 894-95 (1975).

congressional intent underlying the enactment of the immigration and naturalization laws. For example, Congress has indicated that it is "in the best interest of the nation to limit the number of persons who can legally immigrate into the country in any given year."[85] The primary purpose behind these policies is the congressional desire to protect the American labor market from competition resulting from a great number of foreign laborers.[86] Clearly, by establishing fixed numbers of those who can lawfully immigrate, the congressional intent is undermined if the labor market is flooded by those illegally in the country. One possible solution to the problem of maintaining effective enforcement of the immigration laws, while accounting for each individual's constitutional rights, would be for the Court to include *stops* at a fixed checkpoint within the meaning of a "functional equivalent of a border."[87] These stops would afford Border Patrol agents the needed time to ascertain whether there exists probable cause to further detain the individual, which in turn might provide probable cause to conduct a search.[88]

Although it is clear that a grave problem exists in enforcing the immigration laws, the Court might be limited in its ability to effectuate a lasting and workable remedy. Ultimately, the problem is best left for Congress to resolve, perhaps by enacting legislation that removes the incentive for mass, unlawful immigration into the country.[89] Nevertheless, the Court should not hesitate to take the opportunity to establish standards and guidelines until Congress should deem it necessary to so act.

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85. United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973); United States v. Morgan, 501 F.2d 1351 (9th Cir. 1975); United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974).

86. United States v. Baca, 368 F. Supp. 398, 402 (S.D. Cal. 1973).

87. This view has been accepted by at least one circuit. *See* United States v. Hart, 506 F.2d 887 (5th Cir. 1975); note 16 *supra.*

88. As used in the text, a "detention" at the checkpoint would not be confined to the mere asking of the citizenship or immigration status of the occupants of the vehicle; presumably this would be part of the stop itself. Rather, once the stop has occurred, if there is probable cause or reasonable suspicion that the occupants of the vehicle are either "smuggling" illegal aliens, or are themselves illegally in the country, the Border Patrol agent could then "detain" the vehicle for more extensive questioning which in turn might give rise to probable cause to conduct a search.

89. *See generally* United States v. Ortiz, 422 U.S. 891, 900 (1975) (Burger, C.J., concurring). The actions which Congress could take include comprehensive legislation directed toward the employer of illegal aliens. *See* DeCanas v. Bica, 96 S. Ct. 933 (1976). Such legislation could also include, as a possible means of enforcement, a reporting provision similar to that contained in the Internal Revenue Code. INT. REV. CODE OF 1954, § 7623.