AD HOC COMMITTEE ON CHICANO RIGHTS

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FOR IMMEDIATE RELEASE
July 8, 1976
For more information,
Contact Herman Baca

On last news release of July 8, 1976 the Ad Hoc Committee on Chicano Rights made this news release after the opening of the border checkpoints

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It is incomprehensible that in this day and age such a racist act could be passed by the highest court in the land which is supposed to protect the U.S. Constitution. Not since the hysterical imprisonment of Japanese-Americans in concentration camps during World War II has such an infamous act occurred. This act by the Nixon-appointed Court is a far reaching decision of excluding 15 million Mexican-Americans from the protection of the Constitution and the Bill of Rights.. The Supreme Court decision is evidence that America does not consider Mexican-Americans as citizens with the same rights as White America. Once again a helpless minority is being persecuted and made the scapegoat for grave social, economic and political problems which have been created by politicians.

NEWSARTICLES

Checkpoint

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John Stephens, a spokesman for the American Civil Liberties Union, said the ruling shows the court doesn't understand "the problems that minority group presently find themselves faced with."

Both groups feel the checkpoint restricts the freedom of travel of Mexican-Americans and does little to combat the flow of illegal aliens across the border.

Stephens strongly disagreed with the court;s reasoning.

He said the adverse affect the checkpoints has on the freedom of Mexican-Americans "far outweighs any benefit that could be derived by curtailing the inflow of aliens from Mexico."

Stephens believes the checkpoint has never provided the service it is designed to render.

"Everyone knows the checkpoint system doesn't restrain the influx of illegal aliens-- it's primary funtion, the way it was administered before it was closed down, was to intimidate the American-born citizens of Spanish-surnamed descent," he said.

He quoted former commissioner George K. Rosenberg of the Immigration and Naturalization Service as saying the INS "has the only true rapid transit system in Southern California. All we ask when we take them back to Mexico is that they don't beat us back to Los Angeles."

The court's opinion sets a dangerous precedent. There should not be any such thing as a "minimal" infringement of the Constitution and the Bills of Rights, for whatever reason.If the court's decision is to be carried to its logical conclusion, it means that our Constitutional protections can be sacrificed if the court determines that another need takes priorty.

The impact of the reopening of these checkpoints in stemming the flood of illegal aliens is certainly "minimal"---the only way to stop this flow is to crack down on Americans who employ (and exploit) them.

AD HOC COMMITTEE
ON
CHICANO RIGHTS

1837 Highland Ave. Nat'l City, Cal. 92050 (714) 477-3620

July 12, 1976

Estimados,

We have a meeting of the Ad Hoc Committee scheduled for this Thursday, July 15 at 7:00pm at 1022 E. 8th St. National City. This will be a special meeting to discuss the organization's activities and the emergency picket line we held last week to protest the reopening of the San Onofre border patrol station.

As you know CHannel 39 has been preparing a documentary on the Ad Hoc Committeefor several months, and it will be shown this Thursday, after the meeting. The documentary features coverage of the City Council meetings and protests around the killing of Tato Rivera, our recall and election campaign, tardeadas and other activities. We will have several TVs, so be sure to come to the meeting and then stay and watch the special documentary on the movement you have been involved in. Refreshments will be served/

We want to get new members involved so come to the meeting on time and bring some people that have not yet joined. Thursday, 7:00pm, at 1022 E. 8th St.

Gracias,

Herman Baca

Herman Baca
Chairman

SHOULD THERE BE INTERIOR CHECKPOINTS

AND/OR ARE THESE CONSTITUTIONAL ?

Denise Fitzpatrick
Immigration Law
Professor Manulkin
April 27, 1978

Original authority for setting up and maintaining fixed interior checkpoints is derived from section 287 of the Immigration and Nationality Act (INA), a complex and confusing body of legislation enacted by Congress in 1952 and subsequently amended on several occassions, most notably in 1965 and 1976. Section 287 audaciously purports to give any employee of the Immigration and Naturalization Service (INS) designated by the administrative regulations promulgated by the Attorney General's office, the "power without warrant" [emphasis added] to interrogate, arrest and search any alien he may have reason to believe is violating any provision of INA law or regulation. This sweeping power includes the authority to board, and search for aliens, any vessel or vehicle within "a reasonable distance from the external boundary of the United States," (§287 (a)(3)); and the power "to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States," whenever he may have "reasonable cause to suspect" that such a search will disclose grounds for excluding that person from entry into the U.S. [§287(c)].

The administrative rules promulgated to enforce and apply this section of the INA are found at 8 CFR 287.1, wherein the term "reasonable distance" found in §287(a)(3) is arbitrarily defined as "within 100 air miles from any external boundary of the U.S." [8 CFR 287.1(a)(2)]. 8 CFR 287.1(b) describes a set of factors which INS district directors should consider in determining where to conduct the activities authorized by INA

§287(a)(3). It further provides that the Commissioner may, in his discretion, declare a distance of over 100 miles to be "reasonable" based on a report by a district director presenting justification for the director's opinion that special circumstances warrant such an exception. These provisions taken together give INS officials, including Border Patrol agents, a more unlimited and sweeping authority to infringe upon the privacy and security of individuals within the U.S. than is given to any other U.S. administrative or law enforcement agency of which this writer is aware.

Border searches conducted without the usual Fourth Amendment requirements of warrant, probable cause, reasonableness, or consent, particularly in the customs context, have long been recognized as constitutionally valid and a necessary exercise of the government's authority to protect against the importation of contraband goods. [Boyd v. U.S. 116 US 616 (1886), Carroll v. U.S. 267 U.S. 132 (1925)]. This policy is well-articulated in a passage from Carroll:

> Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.
>
> [Id., at 153]

It was in Carroll that the Supreme Court first upheld the warrantless search of an automobile within the borders of the U.S. based on the arresting officer's probable cause for believing that it was transporting contraband. However, the court was careful to narrow the application of its holding with surrounding language

language indicating the uniqueness of the border contraband situation.

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search ... those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.
>
> [Id., at 153-54; note the use of this passage in Almeida-Sanchez v. U.S. 413 U.S. 266, 274 and U.S. v. Martinez-Fuerte 514 F.2d 308, 315 rev'd 428 US 543]

The issue of the validity of searches at a substantial distance from the border, conducted for the purpose of preventing the entry of undocumented aliens into the United States is a relatively new one for the courts. Indeed, it was not until passage of the 1952 INA that the question of searches for people, as opposed to contraband, became an important issue. Furthermore, it appears that it was the promulgation of numerical quota restrictions for immigrants from the Western Hemisphere by the 1965 amendment to the INA (the same year in which the so-called "bracero" program with Mexico was abolished), effectively "closing" the Mexican-American border to a degree previously unprecedented, which prompted serious application of the provisions of the INA noted above. The quota for Mexicans, it should be noted, was made even more restrictive by the 1976 amendment to the INA.

Litigation surrounding interior searches by the INS has arisen almost exclusively in the Federal Courts of the Fifth, Ninth, and Tenth Circuits -- those encompassing the territory

along the 2000 mile U.S.-Mexican border. When the Courts of Appeals of the above-mentioned circuits began to confront the problem of reconciling the implementation of INA §287 and 8 CFR 287.1 via searches conducted at points removed from the immediate area of the actual border with the guarantees of the Fourth Amendment, there were no on point cases to guide their interpretation of the statutes in question. This lead before long to a conflict among the circuits as to the need for Border Patrol Officers to demonstrate probable cause, or reasonable suspicion to conduct the statutorily authorized warrantless searches. (See e.g., Fumagelli v. U.S., 429 F.2d 1011 (9th Cir. 1970); U.S. v. McCormick, 468 F.2d 68 (10th Cir. 1972); U.S. v. McDaniel, 463 F.2d 129 (5th Cir. 1972)).

In 1973, the Supreme Court first reviewed an automobile search for aliens conducted away from the actual border, without benefit of a search warrant or probable cause; a search which clearly did not fall within one of the recognized exceptions to the Fourth Amendment warrant requirement (i.e., those approved in Chimel v. California, 395 U.S. 752 (1969); Warden v. Hayden, 387 U.S. 294 (1967); Terry v. Ohio, 392 U.S. 1 (1968); and Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

In Almeida-Sanchez v. U.S. [413 U.S. 266 (1973)], the Supreme Court reversed Petitioner's conviction on charges of concealing and transporting illegally imported marijuana, finding that, in the absence of consent or probable cause, the search of Petitioner's auto (after he had produced a valid work permit establishing his "legal" status) by a roving border patrol 25 miles north of the Mexican border, on a road which at no point

reached the border, violated his Fourth Amendment right to be free from "unreasonable searches and seizures." [Id. at 273] The Court of Appeals for the Ninth Circuit (at 452 F.2d 459) had upheld Petitioner's conviction based solely on the statutory authority for such searches derived from INA §287(a) and 8 CFR 287.1. However, despite his finding that the evidence obtained from this search should have been suppressed, Justice Stewart, writing for the plurality, did not seriously question the constitutional validity of the statute pursuant to which the search was conducted.

Stewart points out that the auto-search exception to the Fourth Amendment established in Carroll (supra) was not broad enough to encompass a search made without probable cause. He also rejects the government's contention that the roving patrol searches, such as the one in the instant case, are analogous to the administrative inspections to enforce health and safety regulations made on less that normal probable cuase approved in Camara v. Municipal Court (387 U.S. 523 (1967)) and See v. City of Seattle [387 U.S. 541 (1967)]. (Significantly, See held that in the absence of consent to inspect, the inspector should obtain a warrant related to a particular area, though, pursuant to the holding in Camara, he would not be required to show probable cause to believe particular violations would be found in particular dwellings.) Stewart's opinion also rejects reliance on Colonnade Catering Corporation v. U.S. [397 U.S. 72 (1970)] and U.S. v. Biswell (406 U.S. 311 (1972)], which authorized warrantless searches of businesses engaged in activities licensed and regulated by the government, as inapposite to the situation in Almeida-

Sanchez. (Almeida-Sanchez, at 270-272)

Having rejected these analogies to other areas of established law, Stewart proceeds to consider the specific problem presented by the statute in question. Acknowledging that "no Act of Congress can authorize a violation of the Constitution" (Id., at 272), the opinion then attempts to construe INA §287 "in a manner consistent with the Fourth Amendment" [Id.,at 272], despite a clear finding on the facts of the case that the search conducted pursuant to that statute was in violation of the Amendment.

It is at this point that we see the beginning of what has proved through subsequent decisions (discussion of which follows) to be a confused pattern of holdings. These holdings have sought to give the appearance of enforcing the protections of the Constitutio while simultaneuosly deferring to political determinations made by the Congress and Executive branches regarding the policy of how to handle the "problem" of illegal immigration. Rather than forcing the other branches of government to redesign the immigration laws and present the country with a less arbitrary, more rational system for regulating the entrance of aliens into the U.S., the decisions of the Court since Almeida-Sanchez have avoided dealing directly with the apparent contradictions between much of the INA and established interpretations of the U.S. Constitution.

Stewart's opinion in Almeida-Sanchez recognized an inherent tension between the needs of law enforcement and "the Constitution's protections of the individual against certain exercises of official power," and goes on to state that, "It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." [Id., at 273] Nonetheless,

the opinion finds it clearly within the power of the Federal government to exclude aliens (citing Chae Chan Ping v. U.S., 130 U.S. 581 (1889)], and further asserts that routine border searches are a clearly acceptable manner in which to effectuate this power. [Id.,at 272] The opinion then proceeds to set forth what has proven to be only the first in a series of ambiguous standards to be applied in cases involving immigration searches.

> 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 as its functional equivalent as well. [Id., at 272]

In what must be considered an attempt, albeit a feeble one, to clarify this statement, Stewart proposes examples of searches which might be found to comply with this standard, including fixed checkpoints which consider the factors set forth in 8 CFR 287.1(b) for determining what constitutes a "reasonable distance."

Powell's concurring opinion in Almeida-Sanchez, and the dissent filed by Justice White (joined by Burger, Blackmun, and Rehnquist) are notable not only for their demonstration of the court's lack of unity around this delicate issue, but also for the groundwork they lay for later decisions. Both Powell and White give greater weight than did Stewart to the government's contention that it must utilize interior checkpoints and roving patrol operations along the extensive borders of the U.S. to enforce what they perceive to be a "legitimate need of government" [Id., at 275] to deal with the "problem" of illegal entries into the U.S.

While concurring with the plurality opinion that the specific search in Almeida-Sanchez was invalid, Powell's opinion makes it clear that he does not consider this type of search to be necessarily

invalid as a general rule. He finds the search of an auto to be "only a modest intrusion," and declares 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 279]. He goes on to propose that area warrants might conceivably be issued which could authorize the conduct of roving searches "on a particular road .... for a reasonable time," listing a series of factors which might be considered in determining whether such a warrant should issue. [Id., at 283-4]

The dissent in Almeida-Sanchez is perhaps most notable for the extreme deferrence it shows the the assumed wisdom of Congress and the lower courts. He is unwilling to invalidate §287 in the face of the Congress" judgment that the legislation is in compliance with the Fourth Amendment [Id.,at 293], and yet in a final footnote indicates that under other circumstances the regulations could be found invalid in his opinion [Id.,at 299].

The Supreme Court's next attempt to balance immigration searches against consitutional rights came in 1975. U.S. v. Brignoni-Ponce (422 U.S. 873) and U.S. v. Ortiz (422 U.S. 891) affirmed two Ninth Circuit reversals of convictions for knowingly transporting "illegal" aliens. The arrests stemmed from warrantless searches by Border Patrol officers and the two cases were heard and decided on the same days. These cases provided some further refinement and clarification of doctrines announced in Almeida-Sanchez, but also added some new elements to the confusion and ambiguity of the law im this area. Indeed, while attempting to solve certain constitutional problems with the statute involved

and its application, the Court actually created what would appear to be substantial new constitutional difficulties. Although the decisions to affirm in both Brignoni-Ponce and Ortiz were unanimous ones, a multitude of rationales, possible standards, and interpretations of the law and certain constitutional provisions are presented in the seven separate opinions filed between the two cases. (Note that the concurring opinions of Burger found following Ortiz and White, both joined by Blackmun, apply to both cases.)

Powell's plurality opinion in Brignoni-Ponce distinguishes the issue presented in that case from the one considered in Almeida-Sanchez by pointing out that the "Border Patrol does not claim authority to search cars, but only to question the occupants about their citizenship and immigration status." (Brignoni-Ponce, supra, at 874) The key facts of this case which serve to distinguish it from the others herein discussed are: (1) that the arrest in question took place near the Border Patrol's permanent checkpoint at San Clemente, which at the time was closed due to inclement weather, and (2) that the arresting officers admitted openly in testimony that the only reason they pursued and stopped the respondent's car to question him was that the three occupants of the car (as it passed the patrol car in the dark) "appeared to be of Mexican descent." [Id.,at 874-75]

The Ninth Circuit Court of Appeals, in deciding that the testimony regarding the undocumented status of the defendant's two passengers should be suppressed, relied heavily upon Almeida-Sanchez (which was announced while the Brignoni-Ponce appeal was pending) after making a factual finding that the stop involved

here was a roving patrol stop, not a checkpoint stop. (See U.S. v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974)) On appeal to the Supreme Court, the government did not challenge this finding, nor allege that San Clemente should be considered the "functional equivalent" of the border, narrowing the central issue of the case to "whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry" (422 U.S. at 876). The audacity of the government in affirmatively asserting a position that so clearly contradicts all recent Civil Rights legislation and Equal Protection litigation strains one's credulity.

The plurality opinion expands on many of the concepts raised by Powell in his Almeida-Sanchez concurrence. There is an extensive discussion of the statistics on the number of aliens illegally within the United States, the high percentage of these who are estimated to be Mexican, and also a factually unsupported assertion that "these aliens create significant economic and social problems" (Id., at 878) These are used to support the finding of an important and valid public interest which can be weighed aginst "the interference with individual liberty which results when an officer stops an automobile and questions its occupant" (Id.,at 879); an intrusion which Powell still finds to be "modest" (Id., at 880).

Powell relies on Terry v. Ohio (supra)and Adams v. Williams (407 U.S. 143 (1972)) to support the proposition that probable cause need not always be a prerequisite for limited stops and searches. In those cases, however, officers were stopping individuals suspected of carrying dangerous weapons for a brief search as a precaution for the officer's safety.

These cases are thus readily distinguishable from the situation in Brignoni-Ponce. Powell, although taking note of these facts, avoids making a clear distinction between the two situations. In essence, he equates the public interest in protection from crimes involving dangerous weapons with the public interest in preventing the economic "crime" of undocumented entry by aliens into the U.S.

Accepting almost unquestioningly the statistics, theories and facts presented by the government, Powell finds 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, we hold 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 the suspicion."
>
> [Id.,at 881]

A new "test" is thus presented which is presumably designed to give Border Patrol officers a standard by which the judge the reasonableness of proposed immigration stops in the "interior" of the country; and furthermore to more carefully define the limits of the authority granted by INA §287(a)(1) and (3). However, the ambiguity of the "test" makes it difficult to see how it could possibly accomplish either goal:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." [Id., at 884]

A footnote to this passage adds to the confusion by specifically noting that the court has not decided the question of whether

the same standards would apply to persons "reasonably believed" to be aliens, but whom the officer has no reason to believe are illegally within the United States. [Footnote 9, at 884]

In light of the court's general validation of stops similar to the one which gave rise to the instant case, it would appear that the key fact which resulted in affirmance of the Ninth Circuit's holding that the motion to suppress by the respondent should have been granted, was the testimony of the officers that the only reason the car was stopped was because the passengers "appeared to be of Mexican descent." TheSupreme Court deemed this to be insufficient grounds for the stop they find generally unintrusive and potentially valid.

At first glance this would appear to be a positive holding which will help to protect the rights of citizens traveling in border areas. The positive aspects of this holding, however, are quickly mitigated by the court's inclusion of "appearance" as one of several "factors which may be taken into account by officers in deciding whether there is reasonable suspicion to stop a car in the border area." [Id.,at 884-85] In the same breath with which judicial notice is taken of the large number of persons of Mexican descent who are citizens and lawful residents of the U.S., particularly in the states most affected by the immigration searches in question, the Court makes the startling statement that,"The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens." [Id., at 886-87]

The holding that Mexican appearance should not by itself

subject a person to questioning by roving patrols of immigration authorities is at best a perfunctory nod in the direction of the concept of equal protection of the law. This portion of the holding appears to actually invite discriminatory enforcement of the law. By singling out one group of immigrants, one of the largest groups of minority citizens, for special scrutiny by the Border Patrol, the Court denies to the entire class of persons of "Mexican appearance" who happen to travel through areas within 100 miles of the Mexican border, the same degree of Fourth Amendment protection accorded to other groups, be the individuals of those groups lawfully or unlawfully in the U.S. (It may be noted in this context that the 1976 Annual Report of the INS shows that over 10,000 of the deportable aliens located in 1976 were Canadian or British, yet these groups, if traveling in the Mexican border areas, would presumably not receive the same scrutiny as a Mexican born in the U.S., though the stated purpose of the immigration stops is to prevent unlawful entry.)

In U.S. v. Ortiz (supra), the parallel problem of warrantless vehicle searches at fixed checkpoints was resolved in favor of the Fourth Amendment; the Supreme Court affirmed the Ninth Circuit determination that the probable cause requirements Almeida-Sanchez applied to roving patrol searches also applied to traffic checkpoint searches. Inso holding the court rejected the government's arguments that the officer's discretion in deciding which cars to search is more limited at checkpoints than in roving patrol situations and that these stops are inherently less intrusive than roving patrol stops. The court points out that "greater regularity attending the stop does not mitigate the invasion of privacy that

a search entails," and that, "Where only a few are singled out for a search, as at San Clemente (the checkpoint where Ortiz was searched), motorists may find the searches especially offensive." [Id.,at 895] Citing statistics presented by the government itself, Powell notes that officers at checkpoints such as the one at San Clemente "exercise a substantial degree of discretion in deciding which cars to search," witness the fact that only about 3% of the cars which pass such checkpoints are actually stopped and searched [Id., at 896].

Reiterating the factors presented in Brignoni-Ponce which officers may consider in developing a reasonable suspicion to search a particular vehicle, Powell affirms the previous finding that such searches may take place as a general policy. He then distinguishes the instant case on the fact that the officers advanced no particular reasons for suspicion, prior to searching respondent's vehicle, that the vehicle might be transporting undocumented aliens.

Rehnquist's concurring opinion in Ortiz sets the stage for the next Supreme Court decision in this area. He streses that he still feels the rule announced in Almeida-Sanchez to have been an unsound one, but that because of the precedent thereby established he must concur in the Ortiz decision. He then enunciates explicitly one aspect of the holding which is not made especially clear in the plurality opinion - one which significantly narrows possible interpretations of the decision: "the court's opinion is confined to full searches, and does not extend to fixed checkpoint stops for the purpose of inquiring about citizenship." [Id., at 898]

One year after the decision in Brignoni-Ponce and Ortiz were

announced, the court rendered a decision intended to resolve a conflict which had arisen between the Fifth and Ninth Circuits regarding the permissible limits within which checkpoints should operate in their stopping and questioning of individuals who pass through them. The cases of U.S. v. Martinez-Fuerte and Sifuentes v. U.S. [428 U.S. 543 (1976)] were heard and decided together, despite some differences in the fact situations of the two cases. Powell again delivered the opinion of the Court, but this time in the face of a strong dissent by Justice Brennan joined by Justice Marshall.

Martinez-Fuerte involved the prosecutions on the charge of illegally transporting aliens of three different defendants (whose cases had been consolidated for hearing in the Ninth Circuit of Appeals) which resulted from arrests made on three separate occasions at the permanent immigration checkpoint located near San Clemente, California, approximately 66 miles from the Mexican border. All had been deferred to a secondary inspection area for questioning by the "point" agent who screens all traffic passing through the checkpoint. These referrals were made in the absence of any articulate suspicion that these particular defendants were committing any crime. The Ninth Circuit opinion [514 F.2d 308 (1975), rev'd 428 U.S. 543] granted motions to suppress the testimony of the aliens discovered in the defendants' cars during the secondary inspection. A key issue, dealt with at length in that opinion, was the validity of an "inspection warrant" which had been obtained from a U.S. Magistrate authorizing the operation of the San Clemente checkpoint; a warrant of the type suggested by Justice Powell's concurring opinion in Almeida-Sanchez (supra). The

Court of Appeals held that such a warrant could not validate otherwise unreasonable and unconstitutional procedures, which the secondary referral procedure at San Clemente was found to be [514 F.2d at 315].

The Fifth Circuit case, Sifuentes v. U.S., also involved a stop at a permanent checkpoint over 60 miles from the Mexican border which resulted in a conviction of the defendant for illegally transporting aliens. This checkpoint, at Sarita, Texas, was operated without a warrant of inspection, and unlike the situation at San Clemente, it was customary at Sarita to briefly stop all northbound motorists. The Court of Appeals in that case denied defendant's motion to suppress the testimony of aliens found in his car, finding the checkpoint stop to be in compliance with Fourth Amendment requirements. [517 F.2d 1402 (1975), aff'd 428 U.S. 543 (1976)]

The Supreme Court did not seriously consider the question of the area warrant which was the focal point of the Ninth Circuit opinion in Martinez-Fuerte. The majority managed to find that brief stops at permanent checkpoints and referrals to secondary inspection areas on a selective basis were constitutionally valid, even when made without the minimal grounds of reasonable suspicion.

In "balancing" the interests of the government against the individual's interest in freedom from unreasonable "seizure" (the court admits that checkpoint stops are "seizures" within the meaning of the Fourth Amendment), the majority plays down the intrusiveness of such stops with their accompanying questions, the interference with the individual's freedom to travel which results, and gives considerable weight to the government's

interest in preventing the entrance of illegal immigrants. It does so without addressing the question of reasonable alternatives to the checkpoint procedure. The majority seems oblivious to the inconsistency of taking this position without overriding the previous cases, the point is well-made in Brennan's dissent:

> "...the governmental interest relied on as warranting intrusion here are the same as those in Almeida-Sanchez and Ortiz which required a showing of probable cause for roving patrol and fixed checkpoint searches, and Brignoni-Ponce which required at least a showing of reasonable suspicion based on specific articulable facts to justify roving patrol stops"
>
> [428 U.S. at 570]

The majority attempts to rationalize their decision in several ways. In the first place, they find that,

> "A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." [Id., at 557, emphasis added]

Furthermore, checkpoint stops are found by the majority to be less intrusive on the individual than roving patrol stops. Finally, they reject the argument of the defendants arrested at the San Clemente checkpoint that the small percentage of cars referred to secondary inspection, together with the wide discretion given Border Patrol officers in determining who should be stopped for questioning, create a situation of unequal enforcement. The Court finds that:

> "...selective referrals - rather than questioning the occupants of every car - tend

> to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public." [Id., at 560]

Brennan, noting this comment in footnote 2 of the dissent (Id., at 572), asserts that this view "stands the Fourth Amendment on its head."

The majority opinion also cites a series of statistics particularly related to the operation of the San Clemente checkpoint; it is submitted that this data too is "stood on its head" by the majority. It is noted that approximately 10 million cars annually pass through the San Clement checkpoint, and that the checkpoint is not in operation full time. For the specific period during which the California defendants were arrested the government supplied the lower courts with a statistical breakdown of activity there,' which is utilized by the Supreme Court as well. During an eight day period the checkpoint was open for slightly more than 124 hours. In that time, it is estimated that nearly 146,000 cars passed through the checkpoint, only 820 of these were referred to secondary inspection, and a grand total of 171 of the vehicles so selected contained "deportable aliens". The Ninth Circuit Court of Appeals found the operation of the checkpoint to be unreasonable in light of the fact that only .12% of the cars which passed through it were found to contain "illegal" aliens. They futher suggested some possible alternative methods of enforcement which not only would be less intrusive on individuals traveling the highways of California, but would probably be more effective in accomplishing the government's purported goal of excluding immigrants without the proper papers [514 F.2d at 321]. The Supreme Court, on the other hand, uses these same figures to

support the operation's effectiveness, finding a "need for this enforcement technique" [428 U.S. at 562], a need that is strong enough for the Court to ignore its own advice in Almeida-Sanchez that the inevitable tensions between law enforcement needs and the rights of the individual counsel strict enforcement of the safeguards enshrined in the Constitution.

Powell uses these statistics again in a weak attempt to show that the selection of cars to be secondarily inspected is not done on a discriminatory basis. Pointing out the significantly large proportion of persons of Mexican ancestry who may be expected to pass the San Clemente checkpoint during any given period of its operation (based on 1970 census data estimating that roughly 18% of the population of Los Angeles and 13% of the population of San Diego fall into that category), Powell claims that the Border Patrol must not be relying extensively on the "Mexican appearance" factor approved in Brignoni-Ponce as only 820 of the nearly 146,000 cars which passed through the checkpoint during the period monitored, were delayed for secondary inspection, and the number of cars passing there which presumably contained persons of that description was significantly larger. What Powell fails to note in this clever manipulation of figures is the percentage of the 820 cars detained which contained persons of apparent Mexican ancestry. It is entirely conceivable, indeed likely, that in nearly all cases of referrals made to the secondary inspection area "apparent Mexican ancestry" was an important, if not the most significant, factor in selecting cars for such referral. It is most disturbing that Powell does not even consider this possibility in his analysis.

Brennan and Marshall clearly recognize that which Powell chooses to ignore , the fact that,

> " The process will... inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same " suspicious " physical characteristics of illegal Mexican aliens."
> (Id., at 575)

They also correctly point out that,

> " In abandoning any requirement of a minimum of reasonable suspicion, or even articulate suspicion, the Court in every practical sense renders meaningless, as applied to checkpoint stops, the Brignoni-Ponce holding that " standing alone [Mexican appearance] does not justify stopping all Mexican-americans to ask if they are aliens."
> (Id., at 572, citing Brignoni-Ponce Supra.,at 887)

This series of ambiguous and inconsistent decisions has created some difficulties for the lower federal courts. It is they who are left to grapple with concrete definitions of such terms as " functional equivalent " and "reasonable suspicion "; to decide in specific factual contexts what constitutes a " fixed checkpoint " as opposed to a " roving patrol " for purposes of applying the decided cases; to carefully distinguish customs searches from immigration searches, and stops for questioning from stops for search.

One recent California decision which demonstrates some of these problems in a slightly different factual setting is United States v. Sandoval-Ruano [436 F. Supp. 734 (S.D. Cal. 1977)]. The defendant's in that case were arrested by a border patrol agent who was in the process of setting up check point equipment. When he saw the defendant's pick-up truck approaching, the agent turned on the warning light of his patrol car to stop them. As the truck drove past, the agent recognized the vehicle as one in which he had apprehended several "illegal" aliens during the previous week. He then gave

chase, stopped the vehicle, and found that it contained "illegal" aliens.

The principal questions before the court were 1) whether the stop was founded on reasonable suspicion, and 2) whether it took place at a checkpoint (in which case, under Martinez-Fuerte, reasonable suspicion is unnecessary), or more closely resembled a roving patrol stop (making Brignoni-Ponce controlling).

The district court, in an opinion it noted would likely be appealed by the government (436 F. Supp. at 739), found that the point at which the agent first communicates his intention to stop a vehicle is the point at which reasonable suspicion must exist. The court read Martinez-Fuerte to indicate that "the equipment most crucial to the concept of a permanent checkpoint is that which serves the function of giving motorists advance warning."(Id. at 737); As the warning equipment had not as yet been set up, the checkpoint in question (known as S-22) was not in operation at the time of the stop, and the stop more closely resembled one by a roving patrol, requiring founded suspicion.

Despite the fact that this was enough upon which to grant defendant's motion to suppress, the court went on to comment on the nature of the checkpoint, raising the question of which rules apply to "temporary" checkpoints, and indeed, whether the S-22 checkpoint should exist at all. The court interprets Martinez-Fuerte narrowly, saying that its holding " requires a case by case, checkpoint by checkpoint determination of necessity "(Id., at 738) and, that it does not present the Border Patrol with " a blank check authorizing a permanent traffic checkpoint on any route by which the checkpoints on major inland routes approved in Martinez-Fuerte, might be circumvented." (Id,, at 738)

The court then concludes that this checkpoint is unnecessary; that roving patrol stops based on reasonable suspicion would be less intrusive in an area with low traffic volume; that a checkpoint which does not have a permanent status selected by administrative officials with policy-making power is seriously deficient; and that "full advance notice of the nature of the stop is essential" to a proper checkpoint operation. [Id., at 737]

The result reached in this case takes a positive step toward reassertion of Constitutional guarantees dissipated by the recent Supreme Court holdings discussed above. It is nonetheless disturbing that the court was compelled to circumvent artificial distinctions imposed by the Supreme Court to reach the logical and constitutionally sound conclusion that a government agent should not be allowed to stop a car on the road without some articulate, well-founded reason for doing so.

Justice Brennan, in his dissent to Martinez-Fuerte (Supra), designates the decision in that case as one in a series "marking the continuing eviseration of Fourth Amendment protections against unreasonable searches and seizures." (428 U.S. at 567) In the context of immigration checkpoints , continued infringements on the individual's right to be free from such intrusion has become particularly invidious.

The arbitrary manner in which these checkpoints are inevitably operated, the wide discretionary latitude allowed government officials to choose whom and/or what to search and/or seize, and the fact that they intrude primarily into the privacy of innocent parties, (witness the data on page 18 above indicating that nearly 80% of the people deferred to secondary inspection at San Clemente were found wholly innocent) combine to make this law enforcement technique a particularly

obnoxious and ineffective tool.

Furthermore, the Court's opinions avoid recognizing that the "interest" sought to be served by the exclusions of aliens not truly a "legitimate governmental" interest. Rather, the interest best served is that of private sector economies, supported by thinly disguised racism.

The reality of the situtation is that use of the heavy handed enforcement procedure of interior checkpoints is confined almost exclusively to the southwestern United States. This area has close historical and cultural ties with Mexico, which have not been severed by the artificial boundary created in the last century. It is ironic, though not surprising, that as the number of Mexicans allowed to "legally" enter the United States is decreased by successive amendments to the INA, an outraged cry is heard attacking the increased number of Mexicans who enter "illegally"-- as though this was not a natural occurance.

Interior checkpoints are, per se, contradictory to the nation's interests in the free flow of traffic and to the individual's interest in the protection of his right to privacy. Moreover, the arbitrary manner in which they have been operated, with Supreme Court sanctions, has made them a completely intolerable infringement on the constitutional guarantees of equal protection and freedom from unreasonable search and seizure.

Border Patrol agents need no longer worry that their stops must comply with normal 4th Amendment/probable cause standards. In a unanimous decision delivered by Chief Justice Burger Jan. 21st., the U.S. Supreme Court held that for the Border Patrol, the test for the legality of a stop is not probable cause, Instead,"The question is whether, based upon the whole picture, they, as experienced Border Patrol agents, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." U.S. vs. Cortez 41 CCH S. Ct. Bull. B 834

This decision reversed a Ninth Circuit Court of Appeals decision that Border Patrol officers lacked sufficient basis to justify the stop of a pick-up truck driving along an Arizona highway early on a January morning in 1977. Out of this stop 2 men suspected of smuggling undocumented workers were arrested and later convicted.

The new license given to the Border Patrol expands on the earlier Brignoni - Ponce decision which allowed that there are several factors an officer may consider in deciding whether to make a stop on a vehicle. Among these is the fact that the occupants appear to be of mexican descent. Thus, we have the latest in the on-going series of Supreme Court decisions further eroding protection from warrantless stops. This decision particularly effects those of us who live in the southwest, most specifically chicanos and mexican nationals.

The implications of Chief Justice Burgers's opinion are far reaching. Given the reasoning in this case, it is not unlikely that the next step is to allow police officers the same standards as Border Patrol agents. Thus, stops may be effected if, based on an officers general experience, he can surmise that a vehicle may

have been engaged in criminal activity. The standard announced in this decision is even more permissive than the"reasonable suspicion" test, requiring specific articulable facts from which reasonable inferences can be drawn.

Herman Baca, a leading Chicano activist and chairperson of the Committee on Chicano Rights, summed it up well at a January 29th press conference and demonstration condemning the decision:

"The Supreme Court with one sweep of a pen has decreed that the protection of the U.S. Constitution and Bill of Rights no longer applies to the more than 20 million Chicanos/Latinos in the U.S.... No longer will established law procedures such as due process, probable cause, or search warrants need to be followed and according to the U.S. Supreme Court decision, all that law enforcement officials will need now is to rely on their own experience, "sixth sense", or just have a profile of generally suspicious characteristics (mexican looking) or activities, rather than a reasonable suspicion a crime has been committed, when they want to stop suspects."

In conclusion Baca affirmed his committee's rejection of the decision: "If necessary we will advise our people to clog the courts with lawsuits with every denial of civil rights, and if needed we will appeal to every court of human rights in the world, and if needed we will appeal to our people to launch a campaign of civil disobedience."

Checkpoint

NEWSARTICLES

(1)

The decision of the U.S. Supreme Court, permitting the Border Patrol to reopen its highway checkpoints north of the Mexican boundary, signals a renewal of discriminatory law enforcement against American citizens of Latin descent.

The court held, by a 7-2 margin, that the patrol may stop cars, even in the absence of "reasonable suspicion" and force the occupants to produce evidence of citizenship.

The traffic blockades were shut down 15 mouths ago when the U.S. Court of Appeals in San Francisco held that it was a violation of the Fourth Amendment protection against unreasonable search and seizure to halt or detain motorists if there was no probable cause to suspect them of a crime.

In overturning that decision, the Supreme Court majority agreed that it was condoning a "minimal" constitutional invasion, but argued that the "public interest" in slowing the flow of illegal aliens across the border justified the intrusion on motorists's rights.

The decision will, indeed, have only minimal impact on Anglos, who suffer only a brief delay or none at all when they reach the checkpoints. But for Chicanos and others of Latin appearance, the encroachment on their rights is major.

In dissent, Justices William J. Brennan Jr. and Thurgood Marshall charged the majority with approving " a dragnet-like procedure offensive to the sensibilities of free citizens... Every American citizen of Mexican ancestry and every Mexican alien lawfully in this country must know after (this) decision that he travels the fixed-checkpoint highways at the risk of being subjected not only to a stop but also to detention and interrogation. That law in this country should tolerate the use of one's ancestry as probative of possible criminal conduct is repugnant..."

That states the case exactly.

There is no doubt that the four California checkpoints-two near the Salton Sea, one at Temecula and one on Interstate 5 near San Clemente-were effective in apprehending illegal immigrants before their closure in 1973.

But according to INS Comissioner Leonard Chapman, who has a budget of $213 million to enforce immigration laws, with 900 agents assigned to tracking down illegal aliens, concedes that the problem is still out of control and is likely to get worse. Even if we built a wall along our borders, job-seeking aliens aided by professional smugglers probably would manage to get here somehow.

While there are many white-collar workers and professionals among the illegal alien population, the majority are here because there is a demand for them in menial jobs that American citizens - including many who are unemployed - do not want.

Welfare and unemployment insurance programs in our country operate on the premise that Americans should not be forced by circumstance into taking jobs not in keeping with their experience or below their station in life.

But there is also no doubt that their reopening will result in harassment and inconvenience to citizens only because of their physical appearance-and that,on the face of it, is intolerable.

1. Closing the inland border checkpoints.

2. Granting amnesty to all undocumented workers and their dependents.

3. Abolishment of the Walter-McCarran Act.

4. National hearings to be held by the U.S. House of Representatives Judiciary Committee, the Senate Judiciary Committee, and those areas most deeply affected; San Diego, San Antonio, Los Angeles, Chicago, etc. We intend to conduct a campaign to bring these issues to the Mexican-American community nationwide. We are asking people who are harassed or victimized by the INS or border patrol to contact our office.