Recent Developments

ALIEN CHECKPOINTS AND THE TROUBLESOME TETRALOGY: *UNITED STATES v. MARTINEZ-FUERTE*

INTRODUCTION

In a 7 to 2 decision,[1] the Supreme Court has ruled Border Patrol agents may stop vehicles at fixed checkpoints and briefly question the occupants even though no reason exists to believe the vehicle contains unlawfully entered aliens.[2] The Court also held that a judicial warrant is unnecessary to operate a checkpoint.[3] In resolving a split among the courts of appeals,[4] the Supreme Court has completed a significant phase of search and seizure law which began with the seminal case of *Almeida-Sanchez v. United States*.[5]

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1. Mr. Justice Powell wrote the opinion for the majority. Mr. Justice Brennan wrote the dissenting opinion in which Mr. Justice Marshall concurred.

2. United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976). The case was decided together with Sifuentes v. United States, *id.* All references to parties and their briefs are to the principal case only.

3. 96 S. Ct. at 3086.

4. *Compare* United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975) (routine checkpoint operations unconstitutional), *with* United States v. Santibanez, 517 F.2d 922 (5th Cir. 1975), and United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973) (routine checkpoint operations constitutional).

5. 413 U.S. 266 (1973). For a detailed discussion of procedural strategies arguably available in deportation hearings when an alien has been illegally arrested, see Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases*, 14 SAN DIEGO L. REV. 151 (1976).

Almeida-Sanchez held that Border Patrol officers on roving patrol may not search vehicles without consent or traditional probable cause.[6] In *United States v. Ortiz*,[7] the Supreme Court extended this holding to searches at fixed checkpoints. The same day *Ortiz* was decided,[8] the Court ruled on the constitutionality of a law enforcement practice less intrusive than a search—a brief stop and inquiry about the detainee's citizenship. That case, *United States v. Brignoni-Ponce*,[9] held that Border Patrol officers on roving patrol may stop vehicles and question the occupants only if the officers have reasonable suspicion that the vehicle contains aliens unlawfully present.[10] In *Martinez-Fuerte*, which involved traffic checking procedures at the San Clemente, California, checkpoint, the Supreme Court refused to require that investigative stops and inquiries be based on reasonable suspicion.[11]

One difficulty with *Martinez-Fuerte* is its inconsistency with previous rulings. The dissenting Justices declared the holding could not be reconciled with *Almeida-Sanchez, Ortiz,* and *Brignoni-Ponce*.[12] However, the majority accepted the Government's contention that checkpoint stops[13] are significantly different from roving

6. 413 U.S. at 273. The case was the subject of much discussion in the periodicals. *E.g.*, Note, Almeida-Sanchez *and Its Progeny: The Developing Border Zone Search Law*, 17 ARIZ. L. REV. 214 (1975); Note, *Area Search Warrants in Border Zones:* Almeida-Sanchez *and* Camara, 84 YALE L.J. 355 (1974).

7. 422 U.S. 891 (1975).

8. The decision was handed down on June 30, 1975, the last day of the Supreme Court's term. Similarly, *Martinez-Fuerte* was announced on the final day of this year's term, July 6, 1976.

9. 422 U.S. 873 (1975).

10. *Id.* at 884. Reasonable suspicion requires a quantum of suspicion less than that of probable cause. It is based on "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. See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968).

11. 96 S. Ct. at 3084 (1976).

12. *Id.* at 3088 (dissenting opinion).

13. Routine procedures at the San Clemente checkpoint are twofold. All traffic is funnelled into two lanes and brought to a stop at the checkpoint through the use of flashing red lights and signs. A "point" officer, stationed between the two lines of traffic, surveys each vehicle and either waves it through or refers it to a secondary inspection area off the highway where other officers make further visual inspection and question the occupants about their citizenship. The average length of this secondary inspection is three to five minutes. Only a small percentage of vehicles are referred to the secondary area. *Id.* at 3077.

Routine operations in *Sifuentes* involved the checkpoint near Sarita, Texas. The checkpoint is located on U.S. Highway 77, more than sixty-five miles from the border. Traffic checking procedures differ from those at San Clemente in that all passing motorists, except for recognized local inhabitants, are stopped for brief inquiry. *Id.* at 3079.

patrol stops in the two aspects which control the reasonableness balance: With the former, the law enforcement need is greater, and the intrusion on fourth amendment[14] interests is lesser.[15]

The thesis of this Comment is that the foregoing contention cannot withstand careful examination. The Government's need to conduct routine checkpoint operations is no greater than its need to conduct roving patrol operations. With the former, the intrusion on fourth amendment rights is as onerous, and the overall burden on lawful traffic is more considerable. In addition, the Court made several questionable factual assumptions and altered the traditional allocation of the burden of proof with respect to warrantless law enforcement conduct. This Comment will summarize the factual context of the case, examine the Ninth Circuit's holding, which the Supreme Court reversed, and analyze the Supreme Court's decision.

THE ILLEGAL IMMIGRATION PROBLEM

Scope of the Problem

The current annual quota for foreign immigrants is 290,000—120,000 of which are allocated for Western Hemisphere countries, including Mexico.[16] The Immigration and Naturalization Service has estimated that 250,000 immigrants enter unlawfully every year.[17] The number of undocumented aliens currently residing in this country has been estimated to be as high as 12 million,[18] but is now placed by the Service at 8.2 million.[19] Between 65 and 85 percent

14. U.S. CONST. amend. IV reads:
> The right to the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

15. Brief for Petitioner at 17, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

16. 8 U.S.C. §§ 1101(a)(27) & 1151(a) (1970). *See also* Jensen, *U.S. Economy Eroded By "Silent Invasion,"* San Diego Union, June 28, 1976, § A, at 1, col. 1.

For a thorough discussion of the procedure for obtaining an immigrant visa, see Comment, *How to Immigrate to the United States: A Practical Guide for the Attorney*, 14 SAN DIEGO L. REV. 193 (1976).

17. Jensen, *supra* note 16. As recently as 1970, the figure was 40,000. *Id.*

18. United States v. Martinez-Fuerte, 96 S. Ct. at 3079.

19. Jensen, *supra* note 16.

are from Mexico.[20]

In fiscal 1975 Service officers located 766,600 deportable aliens.[21] Of these, 680,392 were Mexican;[22] 667,689 of the deportable aliens entered the country by crossing the border surreptitiously. Ninety-nine percent of these entries were made across the 2,000 mile-long Mexican border.[23] Once inside the country, undocumented aliens seek to travel inland to labor market areas, often employing the services of professional smugglers.[24] Opinions differ sharply about whether these aliens' enjoyment of public services and eventual employment within the United States adversely affect the economy.[25]

Primary responsibility for prevention of illegal entry and apprehension of illegal entrants falls on the service branch known as the United States Border Patrol. Formed in 1924, the Border Patrol is comprised of 1700 officers, 80 percent of whom are assigned to the Mexican-American border area.[26] The Border Patrol has two basic functions: preventing illegal entry by a linewatch and detecting aliens by traffic checking and other inland operations.[27]

The Border Linewatch

Although common sense dictates that the best place to concentrate enforcement efforts is at the border itself, the Government and the Supreme Court have concluded that stopping the influx of

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20. *Compare id., with* United States v. Martinez-Fuerte, 96 S. Ct. at 3080.
21. 1975 INS, ANNUAL REPORT 13. This number represented a slight decrease from the 788,145 aliens located in 1974, the first such decrease in more than ten years. *Id.*
22. *Id.*
23. *Id.*
24. United States v. Martinez-Fuerte, 96 S. Ct. at 3080.
25. *E.g.*, one study done by a private consulting firm in Washington, D.C., estimated that undocumented aliens cost at least $13 billion annually in public services and in lost wages, unemployment, and welfare benefits for American citizens who would otherwise be employed. Jensen, *supra* note 16. In contrast are the results of a Department of Labor Study released November 19, 1975, which concluded that: "The involvement of illegals in taxpaying is much more pronounced than their use of tax-supported systems." The study indicated that 77 percent of the undocumented aliens sampled pay social security taxes, and 73 percent pay federal income taxes. In addition, only 0.5 percent received welfare benefits; 1.3 percent received food stamps; 3.9 percent received one or more weeks of unemployment benefits, and 7.6 percent were parents with children in public schools. Forty-four percent made hospitalization payments, while 27.4 percent used federal hospitals or clinics. Los Angeles Times, Nov. 21, 1975, pt. I, at 8, col. 2.
26. United States v. Ortiz, 422 U.S. 891, 906 (1975).
27. *See id.*

undocumented aliens at the border is impossible.[28] The Court stated in *Brignoni-Ponce*:

> The Mexican border is almost 2,000 miles long, and even a vastly reinforced Border Patrol would find it impossible to prevent illegal border crossings. Many aliens cross the Mexican border on foot, miles away from patrolled areas, and then purchase transportation from the border area to inland cities, where they find jobs and elude the immigration authorities.[29]

Even though the Border Patrol maintains electronic sensors,[30] fences, and personnel along the border, "it remains relatively easy for individuals to enter the United States without detection."[31]

Inland Checkpoints

The Border Patrol's inland traffic checking operations consist of roving patrols and fixed checkpoints of a permanent or temporary nature.[32] There are seventeen permanent and thirty temporary checkpoints located in California, Arizona, New Mexico, and Texas.[33] The Government states checkpoint operations have

> always been the single most important element of the enforcement plan, in terms both of apprehending illegal entrants and of deterring unauthorized entry. . . . [A]lthough roving patrol operations have historically been an important part of the Border Patrol's traffic checking program, they have always been essentially supplementary to the checkpoints themselves which are the heart of the enforcement effort.[34]

28. Brief for Petitioner at 17-18, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

29. 422 U.S. at 879.

30. The Border Patrol also utilizes "Chekar" devices in areas both near to and removed from the immediate border. These devices are imbedded underground in highways and send out a signal when a vehicle or any large mass of metal passes over it. United States v. Shields, 534 F.2d 605, 606 n.1 (5th Cir. 1976). In *Shields*, Border Patrol officers stopped a car which had tripped a Chekar implanted near Hebronville, Texas, more than sixty-five miles from the Mexican border. The court held the stop was unconstitutional because there was no reasonable suspicion to believe the car contained undocumented aliens. *Id.* at 608.

31. United States v. Martinez-Fuerte, 96 S. Ct. at 3080.

32. *Id.* The statutory authority for traffic checking operations is conferred by 8 U.S.C. §§ 1357(a)(1) & (a)(3) (1970). Under current regulations the authority conferred by § 1357(a)(3) may be exercised within 100 miles of the border. 8 C.F.R. § 287.1(a)(2) (1976).

33. These fall within the jurisdiction of six different federal judicial districts. Brief for Petitioner at 39, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

34. *Id.* at 19-20.

Traffic checkpoints are located on major and minor highways leading away from the border. The Government contends the checkpoints must be operated more than twenty-five miles from the border because many illegal aliens abuse the use of border passes authorizing travel within twenty-five miles of the border during a seventy-two hour period.[35] Other factors affecting location are the terrain surrounding the highway, concentration of traffic, confluence of roads leading away from the border, and safety of conducting a traffic slowdown.[36]

The San Clemente checkpoint is the primary checkpoint in southern California,[37] and the busiest of all the Service's checkpoints. Approximately 10 million cars pass through the checkpoint annually.[38] Although traffic along Interstate 5 is said to be lightest at the location of the checkpoint,[39] the checkpoint is forced to close down during peak traffic hours.[40] The surrounding geography was an additional determinant of the checkpoint's location because of the difficulty in traveling around it. The presence of Camp Pendleton Marine Corps Base on the east and the Pacific Ocean on the west marked the area as "a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north."[41] The distance from the border, sixty-six road miles, ensures that unlawful entrants cannot use border passes, but also dictates that most motorists passing through are lawfully within the country.

The Ninth Circuit's Holding

A divided panel of the Ninth Circuit held that Border Patrol officers, absent a valid warrant, must have founded suspicion in order to stop a vehicle at a checkpoint.[42] The court considered this to be

35. United States v. Martinez-Fuerte, 96 S. Ct. at 3080. Nonimmigrant visitors may obtain these cards by filling out form I-186. 8 C.F.R. § 212.6 (1976). In addition, certain classes of aliens may obtain Registration Receipt Cards (green cards), form I-151, to be used in lieu of immigrant visas. *Id.* § 211.1(b).

36. United States v. Martinez-Fuerte, 96 S. Ct. at 3080.

37. The checkpoint is actually located at San Onofre, five miles south of San Clemente. It is on Interstate 5, the major highway connecting California's two largest cities, San Diego and Los Angeles. It is located sixty-six road miles north of the border. *Id.* at 3077.

38. *Id.* at 3081.

39. United States v. Baca, 368 F. Supp. 398, 415 (S.D. Cal. 1973).

40. United States v. Martinez-Fuerte, 96 S. Ct. at 3081 n.10. Because of this factor and of occasional bad weather and manpower shortages, the checkpoint is operable only about 70 percent of the time. *Id.* at 3081.

41. United States v. Baca, 368 F. Supp. 398, 415 (S.D. Cal. 1973).

42. United States v. Martinez-Fuerte, 514 F.2d 308, 315 (9th Cir. 1975).

"the logical, and predictable, next step in the development of search and seizure doctrine under *Almeida-Sanchez v. United States* . . . ."[43] The court began by examining the intrusion on fourth amendment interests created by checkpoint stops. It noted that even a fleeting stop was subject to fourth amendment protection and that the minimal requirement for stopping a vehicle within the jurisdiction of the Ninth Circuit had long been founded suspicion.[44] The court discerned no substantial distinction between a stop of a vehicle at a checkpoint and a roving stop.[45]

The majority rejected the Government's argument that checkpoint operations were necessary for successful enforcement of the immigration laws.[46] Applying the doctrine of less onerous alternatives, the majority stated "given the present border patrol manpower, there are simply two [*sic*] few fingers to plug the many leaks in the dike . . . ."[47] Additional alternatives noted by the court were eliminating the green card and border pass programs and inducing Congress to impose sanctions on employers who hire undocumented aliens.[48]

The court had previously held routine stops at San Clemente require a founded suspicion. United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974). The Government then obtained a "warrant of inspection" to operate the checkpoint during the summer of 1974. The *Martinez-Fuerte* court devoted much of its opinion to the issue of whether "the warrant of inspection somehow transforms otherwise unreasonable seizures into constitutional ones." 514 F.2d at 315. The court noted the supporting affidavits contained no particularized facts about individual vehicles and that the warrant did not interpose the mediating judgment of a magistrate, for it authorized the stopping of vehicles and detention of motorists solely at the discretion of the Border Patrol officers. The court concluded the warrant could not be justified under established fourth amendment principles. *Id.* at 315-16.

43. 514 F.2d at 314.

44. United States v. Jaime-Barrios, 494 F.2d 455 (9th Cir. 1974); United States v. Ward, 488 F.2d 162 (9th Cir. 1973); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973); Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). No substantial difference exists between the requirements of founded suspicion and reasonable suspicion. United States v. Rocha-Lopez, 527 F.2d 476, 477 (9th Cir. 1975).

45. Indeed, the court did not specifically deal with the contention that checkpoint stops are less intrusive so as to require less protection under the fourth amendment. The court stated simply that investigative checkpoint stops involved "precisely the unconstitutional conduct" it had condemned in cases dealing with checkpoint searches and roving patrol stops. 514 F.2d at 315.

46. *Id.* at 318.

47. *Id.*

48. *Id.* at 319.

More significant than the court's rejection of the Government's necessity argument was its suggestion that *even if* routine checkpoint operations were necessary to apprehend undocumented aliens, they would not be constitutional. The court rejected the notion that "somehow the asserted need to conduct such immigration seizures and searches establishes adequate cause to disrupt the normal flow of traffic on a major highway."[49]

The Ninth Circuit's decision differs from that of the Supreme Court in four ways. First, the lower court found no constitutional difference between the seizure occasioned by an investigative checkpoint stop and that occasioned by a roving stop. Second, the court was not persuaded by the Government's argument that routine checkpoint operations were necessary to enforce the immigration laws. Third, the court found the rate of undocumented alien apprehension at the checkpoint to be miniscule in comparison with the volume of legitimate traffic which passes through the checkpoint. The court noted that of 145,960 vehicles which passed through the checkpoint during an eight-day period, 820 were referred to the secondary inspection area. Of these, 171 contained undocumented aliens. Thus only .12 percent of the vehicles passing through were found to contain undocumented aliens.[50]

Finally, and most significantly, the Ninth Circuit employed an entirely different mode of constitutional adjudication. The core of its inquiry was the intrusion on fourth amendment rights caused by checkpoint seizures. The court did not employ a balancing test under which the asserted government need is initially viewed in parity with the protected private interests. Rather, the court implied that consideration of the argument of law enforcement need was beyond the scope of judicial review.[51] As authority for this approach the Ninth Circuit quoted the Supreme Court, which had stated in *Almeida-Sanchez*:

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement

49. *Id.* at 318. The court stated "the mere fact that protecting a constitutional right will impose a heavy burden on the federal fisc is not a proper ground for our failure to protect that right." *Id.* at 318-19. After this decision, the Border Patrol abandoned most of its checkpoint operations in California and Arizona. Brief for Petitioner at 24-25, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

50. 514 F.2d at 313-14.

51. The court asserted: "It is not our business to tell the executive how to enforce the laws, nor to tell the Congress what laws to enact." *Id.* at 318.

> stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.[52]

THE SUPREME COURT'S HOLDING

Summary of the Opinion

The Supreme Court's holding was limited to permanent traffic checkpoints.[53] The Court held that Border Patrol officers may stop all vehicles on the highway even without any measure of suspicion that a particular vehicle contains undocumented aliens.[54] The Court also held that officers may selectively refer vehicles to a secondary area for further visual inspection and for questioning about citizenship, again in the absence of any quantum of suspicion.[55] The Court restricted this random investigative conduct to the stop and brief detention of a vehicle for questioning of the occupants, stating that a search or any further detention of the vehicle and its passengers must be based either on consent or on probable cause.[56]

The Court conceded that checkpoint stops are "seizures" within the meaning of the fourth amendment.[57] However, it found the interference with fourth amendment interests "quite limited" and outweighed by the "great" law enforcement need to make checkpoint stops.[58] The Court concluded that the overall degree of interference with legitimate traffic was less than that caused by random roving patrol stops.[59] Finally, the majority held the warrant requirement of the fourth amendment inapplicable because checkpoints display visible manifestations of the field officer's legitimate authority and because the decision to "seize" is not entirely in the field officers' hands but rather is shared by higher ranking officials.[60]

Critical Analysis and Evaluation

The Supreme Court's decision is based on nine distinct proposi-

52. *Id., citing* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).
53. 96 S. Ct. at 3080.
54. *Id.* at 3084.
55. *Id.* at 3085.
56. *Id.* at 3087.
57. *Id.* at 3082.
58. *Id.*
59. *Id.* at 3083.
60. *Id.* at 3086.

tions. Five are factual, and four are theories of law. These will be discussed separately, beginning with the factual propositions.

The Necessity of Checkpoint Operations

The core of the Government's argument, and a recurrent theme throughout the opinion, is the law enforcement need to apprehend undocumented aliens enroute to labor market areas in the interior. The contention that checkpoint operations are necessary to further this need is based on two sub-propositions: Checkpoint operations are an effective means of apprehending undocumented aliens and deterring unlawful entry, and no reasonable, less intrusive alternatives exist.

Effectiveness of Checkpoint Operations

In general, the Government's claim that checkpoint operations impose an "effective obstacle"[61] and deter unlawful entry cannot be substantiated by the facts.[62] The number of undocumented aliens in the country and the present rate of unlawful entry belie these claims.[63] The statistics cited by the Court do not complete the picture. For example, the Court noted that over 17,000 were apprehended at the San Clemente checkpoint in 1973,[64] but failed to mention that approximately 320,000 traverse Interstate 5 each year.[65] Thus only about 5 percent of the undocumented aliens passing through the checkpoint are apprehended.[66]

Part of the problem is the conceded inability of the Border Patrol to operate the checkpoints on a full-time basis.[67] Thus in addition to the vast numbers who slip through undetected, many undocumented aliens, by chance or device, pass the checkpoint while it is inoperative. The Court's conclusion that in the absence of checkpoint operations the highways "would offer illegal aliens a quick and safe route into the interior"[68] is rendered hollow by the fact that with checkpoints in operation the same holds true for 95 percent of the traveling aliens.

61. Brief for Petitioner at 20, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).
62. *See* Brief for Respondents at 34-36, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).
63. *See* text accompanying note 17 *supra.*
64. 96 S. Ct. at 3081.
65. Brief for Respondents at 36 n.18, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).
66. *Id.*
67. *See* note 40 *supra.*
68. 96 S. Ct. at 3082.

Alternatives to Checkpoints

The Supreme Court noted that 55,300 deportable aliens were apprehended in fiscal 1973 through traffic checking operations.[69] That number, however, represents a mere 8 percent of the total number of deportable aliens apprehended during that year. *More than 600,000* deportable aliens were apprehended by enforcement operations *other than* traffic checking programs.[70] To support the argument that checkpoints are necessary is at best difficult.

The Court said: "Our previous cases have recognized that maintenance of a traffic checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border."[71] It is also true, however, that the internal flow of undocumented aliens cannot be controlled effectively by traffic checkpoints. Moreover, in fiscal 1973 the number of unlawful entrants apprehended at the border was more than three times the number located by traffic-checking programs.[72] Thus the converse of the Court's statement is better supported by the facts: Maintenance of the linewatch operations is necessary because the inland migration of unlawful entrants cannot be controlled.

This realization leads to two important observations. First, it appears a decision affirming the Ninth Circuit and precluding routine checkpoint operations would have forced the Border Patrol into a more effective allocation of its manpower. Current manpower allotments support this assumption. For example, during a typical day shift in California, only thirty officers are devoted to patrolling the entire California-Mexican border.[73] This number could be supplemented by the forty-seven officers employed for a twenty-four hour operation of the San Clemente checkpoint alone.[74] Thus a shutdown of the checkpoints would permit greater concentration of

69. *Id.* at 3080.
70. Brief for Respondents at 35 n.17, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976). Because the 8 percent figure includes *all* traffic checking operations, the percentage of the total apprehended at checkpoints is even smaller. *Id.*
71. 96 S. Ct. at 3082.
72. 175,511 aliens were apprehended at the border. *Id.* at 3080.
73. Brief for Respondents at 38, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).
74. *Id.*

manpower at the border, where far more illegal entrants are apprehended.[75]

Second, the decision to allocate manpower is an administrative one which should be left to the executive and legislative branches. By straining to justify, in terms of law enforcement need, the annual seizure of millions of lawful motorists, the Court has played a major role in an administrative decision which the facts and circumstances show to be unsound. Mr. Justice White described this problem succinctly in his concurring opinion in *Brignoni-Ponce* and *Ortiz*:[76]

> Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country. This problems, which ordinarily law enforcement has not been able to solve, essentially poses questions of national policy and is chiefly the business of Congress and the Executive Branch rather than the courts.[77]

Although the facts clearly indicate the effectiveness of alternative alien-detection programs, the Court gave summary treatment to consideration of the less-restrictive-means doctrine.[78] The majority's consideration of alternatives is contained entirely in footnote 12 of the opinion. The note contains several important revelations which deserve separate discussion.[79]

Footnote 12 begins by stating:

> The defendants argue at length that the public interest in maintaining checkpoints is less than is asserted by the Government because the flow of illegal immigrants could be reduced by means other than checkpoint operations. As one alternative they suggest legislation prohibiting the knowing employment of illegal aliens.

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75. The Ninth Circuit reached the same conclusion. 514 F.2d at 318.

76. The concurring opinion applied to both cases.

77. United States v. Ortiz, 422 U.S. 891, 915 (1975). By joining in the majority opinion for *Martinez-Fuerte*, Mr. Justice White apparently ignored his own cogent advice. This is particularly surprising in light of his statement in *Ortiz* that "under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion." *Id.*

78. The other immigration law enforcement programs, which account for the apprehension of more than 90 percent of all deportable aliens located, include linewatch operations, public transportation inspections of buses, trains, and aircraft, metropolitan patrols, industrial checking, farm and ranch checking, and a boat patrol and stowaway inspection program. In addition, many aliens are apprehended by other law enforcement agencies and turned over to the Service. Brief for Respondents at 28, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

79. One such revelation involves the burden of proof and is dealt with in the text accompanying note 138 *infra*.

> The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers.[80]

First, it is no more elaborate to argue such alternatives as imposing sanctions on employers[81] than it is to argue the necessity of checkpoint operations given the demonstrated inefficiency of the latter. Second, the Court ignored the fact that alternative law enforcement programs currently employed account for well over 90 percent of the apprehensions of undocumented aliens.[82] The logic of the less-restrictive-alternative arguments in the present context *does not* bar the exercise of all search and seizure powers, but only of those which unnecessarily sanction intrusive and arbitrary conduct. The Court continued in the footnote:

> In any event, these arguments tend to go to the general proposition that all traffic-checking procedures are impermissible, a premise our previous cases reject.[83]

Nowhere did respondents' brief argue that all traffic-checking procedures should be impermissible. Respondents cited as one reasonable alternative the roving patrol car observations presently conducted by Border Patrol officers in areas near the border.[84] Respondents also cited approvingly a traffic-checking procedure which was utilized by the Border Patrol and which made use of the San Clemente checkpoint as a base of operation to receive calls and con-

80. 96 S. Ct. at 3082 n.12.

81. Several bills designed to make unlawful or otherwise limit the employment of aliens have been considered in Congress during recent years, but none has been enacted. The "Rodino Bill," H.R. 982, 93d Cong., 1st Sess. (1973), was passed by the House of Representatives on May 3, 1973, but never acted upon by the Senate. Brief for Respondents at 31 n.12, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976). For discussion of the status of the various congressional bills penalizing the knowing employment of undocumented aliens, see *Recent Developments in Immigration Law 1976*, 14 SAN DIEGO L. REV. 301, 303-07 (1976).

It is also possible for individual *states* to enact comparable legislation. *See, e.g.*, CAL. LABOR CODE § 2805 (West Supp. 1976). The United States Supreme Court has recently upheld the California statute against a claim of federal preemption. DeCanas v. Bica, 96 S. Ct. 933 (1976). For an analysis of the *DeCanas* decision, see Recent Development, *Preemption in the Field of Immigration:* DeCanas v. Bica, 14 SAN DIEGO L. REV. 282 (1976).

82. *See* text accompanying note 69 *supra.*

83. 96 S. Ct. at 3082 n.12.

84. Brief for Respondents at 28, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976). These can lead to stops if facts warranting reasonable suspicion exist. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

duct reasonable suspicion stops.[85] Respondents' position was not that all traffic checking procedures are unconstitutional; rather, they challenged only those allowing stops of vehicles in the absence of any suspicion that undocumented aliens were within.

Impracticality of Imposing a Requirement of Reasonable Suspicion

The Supreme Court stated:

> 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 particularized study of a given car that would allow it to be identified as a possible carrier of illegal aliens.[86]

In most instances a stationary officer would lack sufficient time to observe articulable facts about a given vehicle as it approaches the checkpoint. The same is not true in the cases of referrals to the secondary area. Once a vehicle is compelled to slow down and come to a stop at the fingertips of the point officer, that officer and others would ordinarily be able to observe articulable facts that might warrant reasonable suspicion.[87] Assuming *arguendo* the legality of stopping all motorists, there is no reason referrals to the secondary inspection area for interrogation should be allowed on less than reasonable suspicion. The Court ignored this possibility of compromise and held that further detention and questioning could be made on a discretionary basis.[88]

The fundamental flaw in the impracticality argument is the notion that the inconvenience of constitutional standards sanctions their abuse. The logic of the argument could be employed to defeat all constitutional restrictions on law enforcement practices. This was made clear by the dissenting opinion:

> There is no principle in the jurisprudence of fundamental rights which permits constitutional limitations to be dispensed with merely because they cannot be conveniently satisfied. Dispensing with reasonable suspicion as a prerequisite to stopping and inspecting motorists because the inconvenience of such a requirement would make it impossible to identify a given car as a possible carrier of

85. Brief for Respondents at 39-40 n.22, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976). Under this procedure, officers on roving patrol near the checkpoint made calls to the checkpoint to ascertain whether vehicles under their suspicion had been stopped previously. If an officer received such information, which was kept on a rolodex, he would stop the car. *Id.*

86. 96 S. Ct. at 3082.

87. *Id.* at 3090 (dissenting opinion).

88. *Id.* at 3085.

> aliens is no more justifiable than dispensing with probable cause as prerequisite to the search of an individual because the inconvenience of such a requirement would make it impossible to identify a given person in a high-crime area as a possible carrier of concealed weapons.[89]

The Minimal Degree of the Intrusion

The majority conceded that the routine checkpoint investigative stops intruded on a motorist's rights to "free passage without interruption"[90] and to personal security under the fourth amendment.[91] However, the Court contended the intrusion was minimal and of a nature different from that of the roving patrol stops which *Brignoni-Ponce* required to be based on reasonable suspicion.[92] The contention that investigative checkpoint stops are so less intrusive than are roving patrol stops, and thus do not require reasonable suspicion, must be carefully examined.

The majority analyzed the effects of the intrusion in terms of an objective-subjective distinction.[93] Admitting that the objective aspects of routine checkpoint operations are identical to those of roving patrol investigations, the Court stated:

> But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop.[94]

The Court continued by quoting from *Ortiz*:

> Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.[95]

Trying to assess the nature of the official intrusion in terms of the subjective impact on individuals is almost impossible. Who but that individual can accurately assess the actual impact of the detention? The Court can deal only in terms of supposition and probabilities

89. *Id.* at 3091.
90. Carroll v. United States, 267 U.S. 132, 154 (1925).
91. 96 S. Ct. at 3082.
92. *Id.* at 3082-83.
93. *Id.* at 3083.
94. *Id.*
95. *Id., quoting* United States v. Ortiz, 422 U.S. 891, 894-95 (1975).

when attempting to measure the subjective impact of law enforcement conduct. The Court advanced no explanation about why motorists who are brought to a stop in the middle of a highway by flashing red lights, signs, and an armed Border Patrol officer would be less frightened or annoyed than those who are signaled to pull over by an officer in a patrol car.[96]

Aside from the factual distinctions between roving patrols and checkpoints and from suppositions about their different impact,[97] the law enforcement activity is clearly identical in all significant aspects and suffers from the same constitutional infirmities. In both instances motorists and their passengers may be subject to interference with their passage in the form of detention and interrogation.[98] The difference is not in the nature of the intrusions but only in the surrounding factual context in which they are carried out. Given the teaching of *Brignoni-Ponce* that such conduct when pursued on a causeless basis is unreasonable,[99] it is too late to argue the minimal intrusiveness of the law enforcement activity. Because law enforcement conduct is the subject of the fourth amendment's proscription of unreasonable searches and seizures, that conduct should control the outcome of all cases involving highway searches and seizures.

Interference with Lawful Traffic

As in *Brignoni-Ponce*,[100] the Supreme Court considered the "overall degree of interference with legitimate traffic."[101] While noting

96. That checkpoints display visible signs of authority probably does not lessen the impact of the intrusion. Motorists who are stopped by roving patrols are given notice of the officers' authority by the appearance of the car, flashing signal light, and the uniformed attire of the officers. The difference in the display of authority by roving patrols and the San Clemente checkpoint is largely quantitative—at the latter there are more officers, more flashing red lights, and usually several patrol cars within sight. Such a showing of authority may be *more* frightening or annoying to motorists who are stopped.

97. As the dissenting opinion noted, even if some significant differences in the subjective aspects of checkpoint stops did exist, a need remains for "some principled restraint on law enforcement conduct." 96 S. Ct. at 3089 (dissenting opinion).

98. The majority was certainly aware of the similarity between checkpoint investigative stops and roving stops. In describing the intrusion caused by routine checkpoint stops, the Court quoted a passage from *Brignoni-Ponce* describing roving patrol detentions. *Id.* at 3082-83, *quoting* United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975).

99. 422 U.S. at 882.

100. *Id.* at 882-83.

101. 96 S. Ct. at 3083.

that random roving patrol stops subjected border area residents to "potentially unlimited interference with the use of the highways,"[102] the majority asserted that with respect to causeless checkpoint stops "the potential interference with legitimate traffic is minimal."[103] The reasons offered were the motorists' knowledge of the location of the checkpoints and the activity of Border Patrol officers. The latter was said to be less discretionary and less abusive than that occasioned by roving stops.[104]

The two reasons advanced are not persuasive. That motorists know or can obtain knowledge of a checkpoint's location does not minimize its interference with their travel. If they desire to exercise their constitutional right to uninterrupted travel,[105] they will be stopped and possibly detained for questioning and further inspection. The second contention, that there is less room for discretionary and abusive activity at checkpoints, even if true,[106] is not germane to a discussion of the overall interference with legitimate traffic. Lawful motorists are nonetheless subjected to a causeless seizure within the meaning of the fourth amendment.

Manifestly the overall degree of interference with lawful motorist traffic is significantly *greater* in the case of checkpoint stops than in that of roving stops. Routine checkpoint procedures entail a stopping of *all* vehicles passing through, while roving patrol stops impede only those who are pursued and pulled over. In addition, the location of the checkpoints guarantees that most of the vehicles stopped will not contain undocumented aliens. Roving patrol operations take place mainly in the immediate border area, whereas most checkpoints are positioned away from the border in the interior. Thus, all motorists commuting on the highways may be stopped, even though only a small percentage are transporting undocumented aliens. This mass interference is particularly aggravated at San Clemente, where the checkpoint interrupts the traffic flow of the major artery between California's two largest cities, San Diego and Los Angeles.[107]

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102. *Id.*
103. *Id.*
104. *Id.*
105. *See* Carroll v. United States, 267 U.S. 132, 154 (1925). *Cf.* Shapiro v. Thompson, 394 U.S. 618 (1969); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).
106. *See* text accompanying notes 125-30 *infra.*
107. The Ninth Circuit stated: "We cannot countenance the cumulative

The *Martinez-Fuerte* majority said:

> [C]heckpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest.[108]

It is not clear how the "regularized manner" in which checkpoint procedures are conducted affects discretionary activity. All vehicles passing through the checkpoint must come to a stop, and the point officer has complete discretion to choose which ones are to be referred to the secondary inspection area.[109] It is difficult to see how this subjective choice of individuals for further detention, which need not be based on any quantum of suspicion, can be limited by the routine manner in which vehicles are stopped. Under the Supreme Court's holding, no controls are imposed on or standards govern the selective referral by Border Patrol officers. The law enforcement conduct at issue thus remains completely discretionary in the full sense of the term.[110]

The majority also stated:

> [S]ince field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving patrol stops.[111]

Officers on roving patrol perhaps have a better opportunity for abusive practices than do those at checkpoints where there are probably other officers, motorists, and better lighting. However, the fact cannot be ignored that certain features of checkpoint stations might

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intrusion of stopping ten million cars per year where only one out of every 1000 passing cars may contain aliens illegally within the country." United States v. Martinez-Fuerte, 514 F.2d at 322.

108. 96 S. Ct. at 3083.

109. At most checkpoints other than San Clemente, the point officer conducts the inquiry himself, but retains discretion to refer vehicles to a secondary area for further questioning. Brief for Petitioner at 52 n.19, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

110. The majority made the remarkable comment 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." 96 S. Ct. at 3084. As the dissenting opinion noted, such an assertion stands the fourth amendment on its head as it begins from the starting point that causeless, random intrusions are generally permissible, and any lessening of the intrusions therefore "advances" fourth amendment interests. *Id.* at 3089 n.2 (dissenting opinion). The majority's view is consistent with its perverse treatment of fourth amendment interests throughout the opinion.

111. *Id.* at 3083.

conceivably be used to increase the potential for abuse.[112] In any event, the possibility of abusive law enforcement activities should not be given undue significance.[113] The reasonableness inquiry is focused not on the extremities of police misconduct but rather on the routine operations defended by the Government. Their constitutionality depends on the intrusive nature of the stop, detention, and interrogation which they entail and which should have controlled the outcome of the case.

No Quantum of Suspicion for Checkpoint Seizures is Required

The Supreme Court noted that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," but also stated "the Fourth Amendment imposes no irreducible requirement of such suspicion."[114] As authority the Court cited *Camara v. Municipal Court*,[115] in which administrative building inspections were allowed absent a suspicion that a particular structure violated a local housing code.

The holding in *Camara* is no authority for condoning official investigatory conduct absent any degree of particularized cause or suspicion. *Camara* permitted building inspections which are "neither personal in nature nor aimed at the discovery of evidence of crime."[116] More importantly, the *Camara* inspections may occur only after issuance of a judicial warrant based on some quantum of cause to believe a particular building might violate the housing code. As the Court stated:

> [I]t is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied *with respect to a particular dwelling*.[117]

The holding in *Camara* taught the wisdom and practicality of a compromise between traditional fourth amendment requirements

112. The presence of more officers and the existence of a building or other structure where an individual may be hidden from public view might operate to further oppressive law enforcement practices.
113. The author assumes hopefully that the incidence of repressive Border Patrol practices is negligible.
114. 96 S. Ct. at 3084.
115. 387 U.S. 523 (1967).
116. *Id.* at 537.
117. *Id.* at 538 (emphasis added).

and public law enforcement interests—not subjugation of the former to the latter. Thus although traditional probable cause was not required, some lesser quantum of proof was. Though suspicion about the specific nature of the violations was not required, the Court did require suspicion of violations in a specific building.[118] In sum, *Camara* was written neither to countenance absolute abandonment of cause or suspicion nor to condone the arbitrary investigative conduct involved in *Martinez-Fuerte*. No judicial authority exists to support the random "dragnet-like procedure"[119] occasioned by checkpoint operations.[120]

An additional reason advanced for abandoning the requirement of any articulable suspicion was the lesser fourth amendment interests individuals have in the operation of their vehicles. The Court noted it was dealing

> neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. . . . As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence.[121]

Apparently, deemphasis of the valid fourth amendment interests enjoyed by motorists made their eventual abrogation easier. How-

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118. The Court stated as examples the nature of the building, the passage of time, and the condition of the area as a whole. *Id.*

119. United States v. Martinez-Fuerte, 96 S. Ct. at 3089 (dissenting opinion).

120. As additional authority for the abandonment of individualized suspicion, the Court cited Almeida Sanchez v. United States, 413 U.S. at 283-85 (1973) (Powell, J., concurring); *id.* at 288 (White, J., dissenting); United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); and Carroll v. United States, 267 U.S. 132, 154 (1925). 96 S. Ct. at 3084. Reference to *Biswell* and *Colonnade*, cases which involved administrative inspections of firearm and liquor dealers, is misplaced. The Supreme Court pointed out in *Almeida-Sanchez*: "A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . . . The businessman in a regulated industry in effect consents to the restrictions placed upon him." 413 U.S. at 271.

The Court's citation of *Carroll* was in reference to the oft-quoted language which authorizes the stopping of all travelers *at the international boundary* for purposes of "national selfprotection." 267 U.S. at 154. The language immediately preceding this passage in *Carroll* is much more on point to the issue of random *inland* stops: "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." *Id.* at 153-54.

121. 96 S. Ct. at 3084 (citations omitted).

ever, the differences between a person's privacy interest in his home and interest in the ownership and operation of his automobile should not affect protection of the latter. The Supreme Court had previously stated that:

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.[122]

Further, as the Court recognized in *Carroll v. United States*,[123] motorists have a constitutional interest which the private home dweller does not—the right to free passage on the highway without interruption.[124] The interests in privacy and freedom enjoyed by travelers on the highway are both important and constitutionally protected. That they are qualitatively distinguishable from the interests a person has in his home should have played no part in the Court's decision.

Checkpoint Stops Need not be Authorized by a Warrant

By allowing investigatory seizures without any showing of cause or suspicion, the Supreme Court rendered inapplicable the warrant requirement of the fourth amendment.[125] This requirement had previously been explained by the Court:

> The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[126]

Under the Court's holding, Border Patrol officers need not assess any evidence or draw any inferences, because no cause for their actions is necessary. The magistrate, who traditionally makes his own determination of cause or suspicion, thus has no role in the decision.[127]

122. Terry v. Ohio, 392 U.S. 1, 8-9 (1968). *See also* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

123. 267 U.S. 132 (1925).

124. *Id.* at 153-54. The Court had previously stated that the fourth amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." Katz v. United States, 389 U.S. at 350.

125. 96 S. Ct. at 3086.

126. Johnson v. United States, 333 U.S. 10, 13-14 (1948).

127. Viewed as an exception to the warrant requirement, checkpoint

One proposition the majority offered in rationalizing its bypass of the warrant requirement deserves comment. The Court stated that the discretionary activity of the patrol officers was lessened by the decision of higher ranking officials concerning the location of the checkpoints.[128] Noting the purpose of the warrant requirement to substitute a magistrate's judgment for that of the field officer's, the majority asserted:

> But the need for this is reduced when the decision to "seize" is not entirely in the hands of the officer in the field, and deference is to be given to the administrative decisions of higher ranking officials.[129]

Although higher-ranking officials might determine the location of the checkpoints, the Court conceded that "Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved."[130] The precise location of a checkpoint bears little relation to the issue of unhampered discretion. All major and most minor roads leading into the interior will be blocked by traffic checkpoints at some spot. It is probably small comfort to lawful motorists who are stopped and possibly detained further to know that the place of their detention could have been a few miles away and that it was chosen by a higher-ranking official.

There is an even more fundamental defect in the Court's reasoning. The warrant procedure does not contemplate a distinction within the executive branch between field officers and administrative officials, but instead between the executive on the one hand and the judiciary on the other.[131] The perversion of such a rudimentary principle evidences the extent of the Court's disregard for fourth amendment rights.

Selective Referrals Made upon the Basis of Race are Permissible

In a broadly-sweeping passage the *Martinez-Fuerte* Court stated:

> We further believe that it is constitutional to refer motorists se-

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stops appear to be the most broadly based in terms of investigative scope and the least justified in terms of exigent circumstances.

128. 96 S. Ct. at 3083.

129. *Id.* at 3086.

130. *Id.* at 3085.

131. In United States v. United States Dist. Court, 407 U.S. 297, 317 (1972), the Court stated: "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates . . . . [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks."

> lectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.[132]

There can be no doubt that Latin Americans who reside lawfully within the country and whose appearance reflects their ancestry will bear the brunt of the decision.[133] The Court has given Border Patrol officers carte blanche to make selective interrogations based upon nothing more than the apparent ethnicity of the detainee. The potential for abuse is enormous in light of the large number of Latin Americans residing lawfully in the southwest, particularly in southern California.[134] In *United States v. Mallides,* the Ninth Circuit took judicial notice that

> there is a large Mexican-American population in the Oceanside[135] area. . . . [I]t is impossible to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers.[136]

In another case the Ninth Circuit noted that Los Angeles has the largest Mexican population of any city on the continent, with the exception of Mexico City.[137]

In addition to condoning the type of arbitrary law enforcement conduct precluded by the fourth amendment, the Supreme Court approved enforcement procedures which may deprive Latin Americans of the right to equal protection.[138] Although discriminatory action based on the criterion of race traditionally invokes close judicial scrutiny,[139] the Court's summary treatment of this issue indi-

132. 96 S. Ct. at 3085.
133. *Id.* at 3089-901 (dissenting opinion).
134. The Court cited 1970 census figures showing that 16 percent of California's population, over three million people, were Spanish speaking or Spanish surnamed. *Id.* at 3085 n.16. Approximately 52 percent of the inhabitants of the Imperial Valley, located in southern California, are Mexican-American. Brief for Respondents at 42, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).
135. Oceanside is eighteen miles south of San Clemente.
136. 473 F.2d 859, 860 (9th Cir. 1973).
137. Fernandez v. United States, 321 F.2d 283, 286 (9th Cir. 1963).
138. While the fourteenth amendment provides that no state may deprive a person of equal protection of the laws, the due process clause of the fifth amendment should impose the same restriction on federal authorities. *See* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).
139. *See* Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); McLaughlin v.

cates that it did not seriously consider the consequences of mass encroachments on the right to equal protection under the laws.[140]

Allocation of the Burden of Proof

The Government's success with its unsubstantiated claim of law enforcement need may have resulted from the majority's tampering with the traditional burden of proof regarding warrantless law enforcement activities. Although the Court made no specific mention of who had the burden of proof, the final sentence of footnote 12 is revealing:

> The *defendants do not suggest persuasively* that the particular law enforcement needs served by checkpoints could be met without reliance on routine checkpoint stops.[141]

The statement is noteworthy enough for its lack of factual support.[142] More importantly, however, it seems to imply the Court's willingness to impose on the detainee the burden of proving that law enforcement needs could be better served through other means.

Such an allocation of the burden of proof would indeed be novel doctrine. The Court's suggestion that respondents did not show persuasively that law enforcement needs could be met without the use of warrantless, causeless programs runs counter to the long-standing principle that the Government must prove the need for an exception to the warrant requirement.[143] Respondents established to the satisfaction of the Court that the law enforcement conduct at issue constituted a seizure under the fourth amendment and that their rights to privacy and personal security had been impinged. They also established the seizures had been based on standardless, random law enforcement practices. Given these considerations, the Government should have been compelled to prove the need for conducting such operations.

Conclusion

The *Martinez-Fuerte* decision is troublesome in five significant aspects. The first two relate to the procedure the Supreme Court uti-

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Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

140. *See* Brief for Respondents at 42-44, United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

141. 96 S. Ct. at 3082 n.12 (emphasis added).

142. *See* text accompanying note 69 *supra.*

143. Vale v. Louisiana, 399 U.S. 30, 34 (1970); Chimel v. California, 395 U.S. 752, 762 (1969); United States v. Jeffers, 342 U.S. 48, 51 (1951); MacDonald v. United States, 335 U.S. 451, 456 (1948).

lized in reaching its decision; the remainder involve substantive fourth amendment doctrine.

The most significant procedural point is the demonstrated inefficiency of the Court as a fact-finding body when it is faced with complex and contradictory statistics. Drawing empirical conclusions about the need and effectiveness of traffic-checking operations in the present context of rampant unlawful immigration is a difficult task. The Court's failure to adequately perform this task was an inevitable result of its decision to cite only those statistics which appeared to support its conclusion. In addition, the Court cast a confusing shadow over established evidentiary procedure by trifling with the allocation of the burden of proof with respect to the constitutionality of warrantless law enforcement practices.

Substantively, the Supreme Court has sacrificed the principles of the fourth amendment for the expediency of an operation which unjustifiably burdens millions of law-abiding motorists annually, employs discretionary and standardless official detention and interrogation, and which is of nominal value when viewed in the context of reasonable and less restrictive alternatives. Further, the Court rejected the clear doctrinal background established by *Almeida-Sanchez*, *Brignoni-Ponce*, and *Ortiz*, fashioning an opinion inconsistent with those precedents. Finally, *Martinez-Fuerte* provides a dangerous potential for massive discrimination against a large ethnic minority group residing lawfully in the country. The sanctioning of selective referrals to secondary inspection areas on nothing more than an individual's ethnic appearance is perhaps the most frightening result of *Martinez-Fuerte*. It is hoped that one day this final aspect will be a catalyst for an overruling of *Martinez-Fuerte* by a more enlightened Supreme Court.

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