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Search and Seizure on the Highway for Immigration Violations: A Survey of the Law

SAM BERNSEN*

The Immigration and Nationality Act enumerates 18 deportable classes,\(^1\) ranging from aliens who were inadmissible at time of entry or entered without inspection, to aliens who, after entry, were convicted of certain crimes or who performed or failed to perform certain acts. Of the 788,145 deportable aliens discovered in fiscal year 1974 by the Immigration and Naturalization Service (INS), 693,084, or 87.9\%, entered without inspection.\(^2\) The next largest categories were 55,485 temporary visitors and 12,687 crewmen,\(^3\) most of whom had remained beyond the period of their authorized stay and some of whom had violated the terms of their temporary admission by engaging in unauthorized employment. Illegal aliens located by INS may be permitted to depart voluntarily or may be forced to depart under an order of deportation.\(^4\) By far the largest

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3. Id.

number are allowed to leave voluntarily without deportation proceedings; they are chiefly Mexicans who entered without inspection.\(^5\)

The enforcement powers which enable INS to apprehend massive numbers of illegal aliens are expressly spelled out by statute.\(^6\) Without a warrant, immigration officers are authorized to interrogate any person they believe to be an alien about his presence in the United States and to arrest him if they have reason to believe he is in the country unlawfully and likely to escape before a warrant can be obtained. When needed, warrants can be issued by district directors and specified senior officials of INS to whom the statutory authority of the Attorney General has been delegated.\(^7\) In addition, immigration officers are empowered, without a warrant, to search any vehicle within a reasonable distance from any external boundary of the United States. The regulations define a reasonable distance as 100 air miles.\(^8\) To prevent illegal entry, immigration officers also have access to private lands, but not dwellings within 25 miles of any external boundary.\(^9\)

\textit{Almeida-Sanchez and the Prohibition Against Warrantless Searches by Roving Patrols}

For about 50 years, patrol agents of INS in the southwest have been stopping and searching vehicles near the border for illegal aliens.\(^10\) In the course of such operations smugglers and narcotics are frequently found. Until June 21, 1973, challenges to the legality of vehicle searches for illegal aliens were unsuccessful. On that day, the Supreme Court in \textit{Almeida-Sanchez v. United States},\(^11\) in a five to four decision, held that warrantless, non-border searches of vehicles by roving patrols without probable cause or consent vi-

\(^{5}\) In fiscal year 1974, voluntary departure under safeguards was authorized for 657,169 aliens. Actual deportations pursuant to formal expulsion proceedings numbered 18,824. See 1974 INS Ann. Rep. 85-86, tables 24 & 24A.


\(^{8}\) Id.


\(^{10}\) The border patrol of the INS was established by the Act of Feb. 27, 1925, ch. 364, 43 Stat. 1014, 1049-50. In 1946, it was represented to Congress that the legal right to stop and search vehicles within a reasonable distance from the borders should be conferred by law. The result was express statutory authority, Act of Aug. 7, 1946, ch. 768, 60 Stat. 865, which was codified into the Immigration and Nationality Act § 287(a), 8 U.S.C. § 1357(a) (1970).

\(^{11}\) 413 U.S. 266 (1973).
olated the fourth amendment. Justice Powell’s separate concurring opinion was necessary to establish a majority.

Less than a year later the Ninth Circuit, which has jurisdiction over the southwestern border states of California and Arizona, decided en banc seven to six that the *Almeida-Sanchez* prohibition against warrantless searches by roving patrols also applies to vehicle searches for illegal aliens at highway checkpoints near the border, but not retroactively.\(^\text{12}\) In that case, *United States v. Bowen*, the Government had argued that there are constitutional differences between roving patrols and fixed checkpoints.

First, since checkpoints generally involve a stop and inspection of every car passing through they provide much less opportunity for the unfettered discretion of the police officer that was condemned in *Almeida-Sanchez* . . . . Second, being stopped on a lonely road at night in a sparsely populated part of the country . . . is more burdensome to the traveller than a stop at an identified and lighted checkpoint.\(^\text{13}\)

The court stated that

\[\ldots\text{even conceding that a fixed checkpoint might be less of an imposition on domestic travellers than a roving patrol search, we are able to find nothing in the opinion of the court in *Almeida-Sanchez* which suspends Fourth Amendment standards in dealing with immigration searches at fixed checkpoints.}^{\text{14}}\]

In *United States v. Hart*,\(^\text{15}\) the Fifth Circuit disagreed, holding that the operational differences between roving patrols and permanent checkpoints are substantial.

Hardly had the ink dried on *Bowen* when the Ninth Circuit ruled that routine vehicle *stops* at a traffic checkpoint require a founded suspicion that the vehicle may contain illegal aliens.\(^\text{16}\) This was promptly followed by a Ninth Circuit holding that a roving patrol-type *stop* violated fourth amendment standards because it was not based on a founded suspicion.\(^\text{17}\) Two weeks later in a temporary

\begin{itemize}
  \item 12. United States v. Bowen, 500 F.2d 960 (9th Cir. 1974).
  \item 13. Id. at 964.
  \item 14. Id. On June 20, 1975, the Supreme Court affirmed the holding in *Bowen* that *Almeida-Sanchez* is not to be applied retroactively to checkpoints, but stated that the Ninth Circuit’s ruling that *Almeida-Sanchez* applied to checkpoints was unnecessary. *Bowen v. United States*, 95 S. Ct. 2569 (1975).
  \item 15. 506 F.2d 887 (5th Cir. 1975).
  \item 16. United States v. Juarez-Rodriquez, 498 F.2d 7 (9th Cir. 1974).
  \item 17. United States v. Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974).
\end{itemize}
checkpoint case the court declared that vehicle ***stops*** for immigration interrogation near the border cannot be made without at least a reasonable belief founded upon "articulable" facts that one or more of the people to be interrogated are aliens illegally in the country.\textsuperscript{18}

Faced with the rapid succession of Ninth Circuit decisions outlawing warrantless, non-border stops of vehicles for immigration interrogation and search, the Government reluctantly decided to adopt the procedure expounded by Justice Powell in his concurring opinion in *Almeida-Sanchez*. His answer to the problem was an area warrant under which border patrol agents would obtain advance judicial approval to conduct roving searches on a particular road or roads for a reasonable period of time. Justice White, writing for the four dissenters in *Almeida-Sanchez*, agreed with Justice Powell that searches based on area warrants would satisfy the fourth amendment. Justice White expected that such warrants, although unnecessary, would be readily issued. A footnote to the majority opinion stated that the justices who joined in it were divided on the constitutionality of area warrants, indicating that at least six justices regarded them as constitutional.\textsuperscript{19}

Notwithstanding the Government's contention in *Bowen* that roving patrol and checkpoint operations were constitutionally distinguishable, warrants were requested in order to continue the operation of all traffic checkpoints within the jurisdiction of the Ninth Circuit. Initially, some warrants authorized routine inspection of vehicles, but later limited the authority of patrol agents to stop and inquire. The warrants recited that they were based on probable cause to believe that mass immigration violations were occurring at the checkpoints. They ran for ten day periods at the end of which renewal requests were granted. A separate warrant had to be obtained for each checkpoint. Some district judges refused to issue warrants because they felt that probable cause standards had not been met. Nevertheless, under the warrant procedure, border patrol agents were able to operate the checkpoints although they found the procedure cumbersome.\textsuperscript{20}

\textsuperscript{18} United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974).
\textsuperscript{19} 413 U.S. at 270 n.3.
\textsuperscript{20} Additional manpower had to be used to compile and maintain complex statistics needed to make returns on the warrants and to support renewal applications. Frequently, checkpoints had to be closed down for short periods because further data was demanded from patrol agents or a judicial officer was not immediately available. The only alternative to the warrant procedure was to discontinue checkpoint operations in areas known to be saturated with illegal aliens who were using the highways to move from the border to jobs in the interior.
Inevitably, a number of defendants arrested at the San Clemente checkpoint and criminally charged with unlawful transportation of illegal aliens\(^2\) challenged the validity of the warrants. On March 5, 1975 a panel of the Ninth Circuit in a split decision held that a warrant does not transform an otherwise unreasonable seizure into a constitutional one.\(^2\) The court stated:

> Although the inspection warrant and its supporting affidavits contain conclusory allegations of probable cause to believe that the immigration laws are being violated at the San Clemente checkpoint, that is not sufficient. These are not "specific and articulable facts" which would justify the stopping . . . .

> Search warrants provide no substitute for probable cause.\(^2\)

The Government filed a petition for a writ of certiorari.

As a result of *Martinez-Fuerte*, checkpoint operations have been discontinued in California and Arizona. But in New Mexico and Texas, which are within the jurisdiction of the Tenth and Fifth Circuits respectively, checkpoints are being operated without warrants. The Tenth Circuit in *United States v. Bowman*\(^2\) held that the *Almeida-Sanchez* decision does not challenge the right of immigration officials to make routine inquiries as to an individual's nationality and that a brief stop of an automobile for that purpose is constitutional. The Fifth Circuit agreed.\(^2\)

The question of the retroactivity of the *Almeida-Sanchez* decision also became the subject of conflicting opinions. The Fifth Circuit ruled the decision was prospective as to roving patrols.\(^2\) The Ninth Circuit held the decision was retroactive.\(^2\) In *United States v. King*\(^2\) and *United States v. Maddox,*\(^2\) the Tenth Circuit declared that *Almeida-Sanchez* is retroactive as to checkpoints. The Ninth Circuit disagreed.\(^2\) The Supreme Court resolved the retroactivity questions in *United States v. Peltier*\(^2\) and *Bowen v.*

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\(^{22}\) *United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975).

\(^{23}\) Id. at 315.

\(^{24}\) 487 F.2d 1229 (10th Cir. 1973).

\(^{25}\) *United States v. Hart*, 506 F.2d 887 (5th Cir. 1975).

\(^{26}\) *United States v. Miller*, 492 F.2d 37 (5th Cir. 1974).

\(^{27}\) *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974).

\(^{28}\) 485 F.2d 353 (10th Cir. 1973).

\(^{29}\) 485 F.2d 361 (10th Cir. 1973).

\(^{30}\) *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974).

\(^{31}\) 95 S. Ct. 2313 (1975).
By five to four decisions in both cases, the Court held that the principle of Almeida-Sanchez is not to be applied retroactively either in roving patrol or traffic checkpoint searches. Pointing out that the border patrol had reasonably relied on the decisions of the courts of appeal in performing the searches, the Supreme Court stated that the purpose of the exclusionary rule would not be served by giving the rule retroactive effect.

"FUNCTIONAL EQUIVALENT"

Some of the difficulty generated in the wake of Almeida-Sanchez appears to stem from the two different "functional equivalent" concepts expounded by some of the justices. The majority opinion set forth a functional equivalent of the border, and the concurring opinion postulated a functional equivalent of probable cause. Justice Stewart, acknowledging for the Almeida-Sanchez majority that the power of the Federal Government to exclude aliens could be effectuated at the border by routine inspections and searches (i.e., without warrant and without probable cause), declared that such searches may take place not only at the border itself but at its functional equivalent as well. He explained:

For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.

There has never been any question about the two examples given. At a number of land border locations, persons seeking to enter from Canada undergo immigration and customs inspection some distance south of the international boundary: for example, Newport, Vermont—7 miles south of the border; Cannons Corner, New York—2.8 miles south of the border; Rouses Point, New York, on Route 9B—1 mile south of the border. With regard to airports, many in the interior of the country have been officially designated as ports

32. 95 S. Ct. 2569 (1975).
33. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). The validity of border searches without probable cause or consent was recognized by the Supreme Court 50 years ago in Carroll v. United States, 267 U.S. 132 (1925). In that case, the Court stated:
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. Id. at 154.
34. 413 U.S. at 272-73.
of entry for arrival of aircraft from foreign countries.\textsuperscript{35} Border inspections are also conducted many miles inland at certain seaports such as Albany, New York and Baton Rouge, Louisiana.\textsuperscript{36}

To consider the impact of \textit{Almeida-Sanchez} on more than 20 cases pending in the Southern District of California, the judges of that district in a general order directed that a comprehensive factual hearing be held to evaluate the consequences of that decision on checkpoints. The cases involving this issue were consolidated and a comprehensive opinion was prepared by District Judge Turrentine.\textsuperscript{37} Referring to Justice Stewart's phrase, "functional equivalent" as "enigmatic" and labeling it a "slippery concept," Judge Turrentine proceeded to analyze the operation of each traffic checkpoint in his district. His purpose was to determine whether any were located at the functional equivalent of the border. If so, a warrant for that checkpoint would not be required. Judge Turrentine concluded that under \textit{Almeida-Sanchez}, border searches are those which take place at the first effective point of entry subject to the tests of intrusiveness, reasonable relation to the end pursued, due consideration for geographic characteristics, and available manpower resources. Measuring each checkpoint against the "border search" definition of \textit{Almeida-Sanchez}, he found that all the checkpoints in his district are within the constitutionally permissible zone and are the functional equivalent of the border.

\textsuperscript{35} \textit{See} 8 C.F.R. § 100.4(c)(3) (1975).
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{United States v. Baca}, 368 F. Supp. 398 (S.D. Cal. 1973). Judge Turrentine made a detailed review of checkpoint operations, describing the importance of their role in the overall law enforcement design for patrol of the border. He cited the large numbers of illegal aliens and their transportation by professional smugglers. The illegal alien problem, he noted, is found primarily in the southwest. Pointing out that in the United States during fiscal year 1973, approximately 55,300 deportable aliens were apprehended by border patrol agents on traffic checking operations, he stated:

While a large number of apprehensions are made at the checkpoints each year, as related above, the primary reason for their operation is that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have, because they form an effective obstacle and are located on all major routes north out of the border region.

The deterrence aspect of these traffic checkpoint operations is amply demonstrated by the fact that the illegal alien has to resort to the employment of professional smugglers to provide transportation around or through these checkpoints. \textit{Id.} at 407.
The Ninth Circuit Court of Appeals entertained a different view. In Bowen, the court stated that a search is a functional equivalent of a border search only if it takes place at a location where virtually everyone searched has just come from the other side of the border, or if it can be said with reasonable certainty that the vehicle searched contained either goods which have just been smuggled or a person who had crossed the border illegally. The Ninth Circuit has not found that any of the checkpoints in the Southern District of California are located at the functional equivalent of the border.

In United States v. Lonabaugh, where the search took place at the Brownsville airport, only two miles from the border, the Fifth Circuit stated:

> But the question of what is the functional equivalent of a border is more complex and will have to be decided on a case by case basis. Proximity to the border is not the only standard for determining whether a search is the functional equivalent of a search at the border.

The court held that

> There must be some substantial connection with the actual or suspected border crossing by the person or thing to be searched. In other words, the searching official must know or have a reasonable suspicion that the very individual or thing to be searched has itself just crossed the border.

Lonabaugh involved a customs seizure, but was not incident to a customs inspection.

However, when confronting the immigration checkpoint question in United States v. Hart, the Fifth Circuit rejected the idea that every vehicle must be shown to have probably crossed the border to be legally stopped at a permanent checkpoint. The court referred to the “functional equivalent of the border” as a new aphorism which has arisen from Almeida-Sanchez. Long before Almeida-Sanchez, the court noted that it had implicitly treated permanent checkpoints as functional equivalents of the border because of factors such as proximity to the border, the permanent nature of the checkpoint, and the hours of operation.

The Second Circuit, in United States v. Barbera, was faced with a case involving the seizure of an alien’s passport after he

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38. 500 F.2d at 965-66.
39. 494 F.2d 1257 (5th Cir. 1973).
40. Id. at 1261.
41. Id.
42. 506 F.2d 887 (5th Cir. 1975).
43. Id. at 895.
44. 514 F.2d 294 (2d Cir. 1975).
was removed from a bus at a depot ten miles from the Canadian border because he did not understand English. The seizure was declared invalid because the depot was not at the functional equivalent of the border and therefore the seizure could not be justified as a consequence of a border search. The bus had travelled solely within the United States and the roads leading into the depot did not have a sufficient nexus with the border.

The concept of "functional equivalent of probable cause" was postulated by Justice Powell for the issuance of area warrants in the context of roving patrol searches near the border. He believed that the housing violations in Camara v. Municipal Court\textsuperscript{46} were analogous to the immigration violations in the southwest. Camara held that general knowledge of housing violations in an area, rather than in a specific building, met the probable cause requirement for warrant issuance where there was a long history of judicial and public acceptance, absence of alternative methods for abating dangerous conditions, and limited invasion of privacy. Having determined that special conditions near the southwest border provide an area-wide functional equivalent of probable cause, Justice Powell set forth the standards that would have to be met for warrant issuance under that concept.\textsuperscript{46}

The Ninth Circuit, in Martinez-Fuerte,\textsuperscript{47} found that Justice Powell's administrative inspection analogy in housing violations was not pertinent to roving patrol searches on highways for illegal aliens. The court concluded that Justice Powell's premise was unsatisfactory, and went on to state that even if it agreed with his premise, it would nevertheless find that the San Clemente checkpoint does not meet his standards for issuance of area warrants. Justice Powell had sketched four standards; frequency with which illegal aliens are transported within a particular area, proximity of the area to the border, geographic characteristics, and degree of interference with rights of innocent travelers, taking into account the scope of the proposed search and concentrations of illegal alien traffic in relation to the general traffic.\textsuperscript{48} The court found that the frequency with which illegal aliens passed through the check-

\textsuperscript{45} 387 U.S. 523 (1967).
\textsuperscript{46} Id. at 538.
\textsuperscript{47} 514 F.2d 308 (9th Cir. 1975).
\textsuperscript{48} Id. at 317-18.
point was far too low to make its operation reasonable, and that San Clemente, which is sixty-five miles from the border, is too far away, particularly since the checkpoint is on a major interstate highway between the two largest cities in California.\textsuperscript{49} The court also found that the degree of interference with innocent travelers at the checkpoint was intolerable, as 999 out of every 1000 cars passing the checkpoint carry only persons who are lawfully within the country and entitled to use the public highways without interruption.\textsuperscript{50}

\textbf{RECENT SUPREME COURT DECISIONS}

On June 30, 1975, the Supreme Court handed down its decisions on vehicle stops for interrogation by roving patrols\textsuperscript{51} and on vehicle searches at traffic checkpoints.\textsuperscript{52} The opinions of the Court were delivered by Justice Powell without dissent, but not without several reluctant concurrences. In \textit{Brignoni-Ponce}, the Court held that a roving patrol may not constitutionally stop a vehicle near the southwest border and question its occupants when the only ground for suspicion is that they appear to be of Mexican ancestry.\textsuperscript{53} Concluding that \textit{random} stops, regardless of how modest the interference is with personal liberty, are unreasonable under the fourth amendment, the opinion went on to explain the conditions under which a non-border stop of a vehicle may be properly made without a warrant and without probable cause. The opinion is instructive and furnishes valuable guidance.

Recognizing the valid public interest in effective measures to control illegal entry, Justice Powell stated that the interference with individual liberties which results when an officer stops an automobile and questions its occupants must be weighed against that public interest. He noted that roving patrol stops usually consume no more than a minute and that there is no search of the vehicle and the occupants. He pointed out that the inspection is limited to those parts of the vehicle that can be seen by standing alongside the vehicle and that the occupants are required to respond to only one or two brief questions and possibly produce a document evidencing their right to be in the United States.\textsuperscript{54} Drawing on

\textsuperscript{49} Id. at 321-22.
\textsuperscript{50} Id. at 322.
\textsuperscript{51} United States v. Brignoni-Ponce, 95 S. Ct. 2574 (1975).
\textsuperscript{52} United States v. Ortiz, 95 S. Ct. 2585 (1975).
\textsuperscript{53} United States v. Brignoni-Ponce, 95 S. Ct. 2574, 2582-83 (1975).
\textsuperscript{54} Id. at 2579-80.
**Terry v. Ohio** and **Adams v. Williams**, Justice Powell stated that in appropriate circumstances, the fourth amendment allows a properly limited search on facts that do not constitute probable cause. He observed that in both *Terry* and *Adams*, the officers had acted on the basis of a reasonable suspicion that the suspects were armed and dangerous, thus justifying a limited search and seizure as a valid method of protecting the public and preventing crime. Finding similarly appropriate circumstances with respect to roving patrol stops, in light 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, the Court held that

... when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.

Elaborating on the “reasonable suspicion” test, the Court explained that

... 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.

The *Brignoni-Ponce* opinion concluded with an extensive list of factors which may be taken into account in deciding whether there is reasonable suspicion: (1) characteristics of the area, including its proximity to the border, the unusual patterns of traffic, and previous experience with alien traffic; (2) information about recent illegal border crossings in the area; (3) the driver’s behavior, such as erratic driving or obvious attempts to evade the officer; (4) aspects of the vehicle itself, whether it is of a type frequently used for transporting concealed aliens, is heavily loaded, carries an extra-

55. 392 U.S. 1 (1968). In *Terry v. Ohio*, the Court approved a pat down for weapons for protection of a police officer investigating suspicious behavior of persons he reasonably believed to be armed and dangerous.
56. 407 U.S. 143 (1972). In *Adams v. Williams*, the Court held that a policeman was justified in approaching a person to investigate a tip that he was carrying narcotics and a gun. The tip came from an informant whose credibility had not been established and whose information was not shown to be based on personal knowledge.
58. Id. at 2582.
ordinary number of passengers, contains persons trying to hide, or is transporting persons with the characteristic mode of dress or haircut typical of residents of Mexico. However, it was noted that each case must turn on the totality of the circumstances. In a significant footnote to Brignoni-Ponce, the Court expressly reserved the question whether border patrol officers may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country.

In United States v. Ortiz, the Supreme Court held that the differences between a roving patrol and a checkpoint do not justify dispensing with probable cause to conduct searches at traffic checkpoints. The court stated that while the differences would be significant in determining the propriety of a stop, they do not appear to make any difference in the search itself. The decision rejected the Government's arguments that the location of the checkpoint limits the officer's discretion in deciding which cars to search and that the circumstances surrounding checkpoint stops lack the frightening aspects of roving patrol stops. With respect to these contentions, the Court noted that only three percent of the cars are stopped and that the few motorists singled out for search of their cars may find it offensive. Left undecided by Ortiz were a number of questions. Must checkpoints and roving patrols be considered the same for all purposes? How far can a checkpoint "inspection" go before it constitutes a "search?" Can a warrant be issued for checkpoint searches based only on information about the area as a whole?

The Supreme Court also expressly refrained from deciding the question whether border patrol officers may lawfully stop motorists for interrogation at an established checkpoint without reason to believe that a particular vehicle is carrying aliens. However, in the absence of a Supreme Court position on the question, and in the presence of the Ninth Circuit's decisions that checkpoint stops require "founded suspicion" and that checkpoint warrants are invalid, INS has refrained as of this writing from resuming such operations in California and Arizona. In New Mexico and Texas, border patrol officers continue to stop motorists at traffic check-

59. Id.
60. Id. n.9.
61. 95 S. Ct. 2585 (1975).
62. Id. at 2588.
63. Id. at 2589.
64. United States v. Esquer-Rivera, 500 F.2d 313 (9th Cir. 1974); United States v. Juarez-Rodriguez, 498 F.2d 7 (9th Cir. 1974).
65. United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975).
points but make no vehicle searches unless they have probable cause. In the meantime, INS is carefully evaluating the impact of the Brignoni-Ponce and Ortiz decisions on its enforcement activities.66

66. Relevant to the question of conducting any type of legal checkpoint operations in the Ninth Circuit is that Court's position that vehicle slowdowns are constitutional. In United States v. Evans, 507 F.2d 897 (9th Cir. 1974) defendant's automobile was waved through a checkpoint because of its innocent appearance. While the car rolled by without stopping, a border patrolman saw two persons of Mexican appearance lying on the floor. He pursued the vehicle, stopped it, and found the illegal aliens. The Ninth Circuit, holding that the evidence had not been discovered by an unconstitutional stop, rejected the theory that the mere divergence of motor traffic into a zone where aliens hiding behind the back seat can be observed by officers violates any constitutionally protected expectations of privacy.