BORDER PATROL CHECKPOINT OPERATION UNDER WARRANTS OF INSPECTION: THE WAKE OF ALMEIDA-SANCHEZ V. UNITED STATES

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The Immigration and Naturalization Service's (I.N.S.) fight to stem the tide of illegal aliens crossing the United States-Mexican border has recently received several setbacks from the federal courts. In *Almeida-Sanchez v. United States*,[1] five members of the U. S. Supreme Court held that a warrantless *search* of an automobile made without probable cause by roving Border Patrol officers violates the Fourth Amendment. In a seven to six decision the Ninth Circuit Court of Appeals, sitting en banc in *United States v. Bowen*,[2] concluded that the decision in *Almeida-Sanchez* also applied to a warrantless, non-probable cause search conducted by the Patrol at a fixed checkpoint forty-nine highway miles north of the Mexican-American border. The Fifth Circuit reached the same conclusion in *United States v. Speed*,[3] where the search was made at a temporary checkpoint.

In reaching its conclusion, the Ninth Circuit was aware of the fact that in the case of *United States v. Bowman*,[4] a panel of the Tenth Circuit had held that *Almeida-Sanchez* does not prevent the Border Patrol from operating fixed checkpoints for the purpose of stopping cars to make routine inquiries as to the nationality of the occupants, even without a warrant.

These cases, however, do not deal the death-blow to the Patrol's practice of stopping cars and making such inquiries, either while on roving patrol or at checkpoints. Although applicable

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1. 413 U.S. 266 (1973). For a good review of the search and seizure problems concerning illegal aliens, see Note, *The Aftermath of Almeida-Sanchez v. United States: Automobile Searches for Aliens Take on a New Look*, 10 CALIF. WEST. L. REV. 657 (1974) [hereinafter cited as 10 CALIF. WEST. L. REV. 657].

2. 500 F.2d 960 (9th Cir. 1974).

3. 489 F.2d 478 (5th Cir. 1973). *See also*, United States v. Felix Humberto Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974).

4. 487 F.2d 1229 (10th Cir. 1973).

only in the Tenth Circuit, the *Bowman Case* approves such an inquiry at a checkpoint even without probable cause or without a warrant. But of greater significance is the fact that there appears to be seven justices of the Supreme Court who are willing to allow the Border Patrol not only to *stop and inquire* under a proper warrant, but also to permit the Patrol to *search* the stopped automobile. The seven Justices include the four dissenters,[5] two of the majority,[6] and Justice Powell in *Almeida-Sanchez.*

I. BALANCING FOURTH AMENDMENT RIGHTS AND GOVERNMENT INTERESTS

Justice Powell, although joining with the majority in holding the search in *Almeida-Sanchez* unconsitutional, concluded that such searches would meet Fourth Amendment standards if conducted under the authority of a warrant. After examining a number of factors relating to the control of the illegal alien traffic into the United States, Justice Powell wrote:

> The conjunction of these factors—consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.[7]

His approach to the solution of the illegal alien problem is one of balancing, for he notes further:

> We are confronted here with the all too familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment.[8]

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5. United States v. Almeida-Sanchez, 413 U.S. 266, 288 (1973). The dissenters were the Chief Justice and Justices White, Blackmun, and Rehnquist.

6. *Id.*, at 270, n.3.

7. *Id.*, at 279.

8. *Id.*, at 275. There is a question as to whether balancing is the correct method of solving Fourth Amendment problems, but it is clear that that approach has been used by the Court in other cases. *See,* Camara v. Municipal

If the courts are to adopt a balancing approach to determine whether a search is reasonable under the Fourth Amendment, they ought to start with a scale fully weighted in favor of the constitutional right asserted; that is, the right to be free from unreasonable searches and seizures. In order for the government to tip the scale in its favor, it should be required to come forward with sufficient reasons why an intrusion upon this right is justified. Our Constitution was adopted to give all citizens and aliens protection from the government. In balancing away these protections the Judiciary ought to examine with care all of the factors which weigh for and against the government. And the Judiciary ought not to permit any greater infringement on these rights than the facts indicate are necessary. As Justice Stewart points out in *Almeida-Sanchez*:

> The needs of law enforcement 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 resolute loyalty to constitutional safeguards.[9]

Justice Powell's balancing leads him to the conclusion that the scale tips in favor of the government, even to the extent of allowing a *search* when the search is done under a proper warrant issued by a judicial officer. The factors he uses to reach this conclusion, however, need to be examined. The fact that there has been "consistent judicial approval"[10] of such roving patrol searches would seem to indicate that the courts which have acquiesced therein have simply concluded that the balance must be struck in favor of the government. A further examination of the balancing process, as discussed hereafter, leads to a different conclusion.

Justice Powell also raises the question of whether there is a "reasonable alternative for the solution of . . . [this] serious problem."[11] There is indeed such an alternative.

The Justice's balancing would permit the Border Patrol to *search* every car in a given area under a proper warrant. That "would declare a field day for the police in *searching* automobiles,"[12] a field day that is not called for here. The Border

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Court, 387 U.S. 523, 536-537 (1967), *and* Terry v. Ohio, 392 U.S. 1, 20-21 (1968).

9. 413 U.S. 266, 273 (1973).
10. *Id.*, at 279.
11. *Id.*, at 279.
12. *Id.*, at 269. (Emphasis added.)

Patrol does not search every car crossing the border, although it has the right to do so.[13] Nor is the Patrol's right to search confined to the border. The Court in *Almeida-Sanchez* expressly approves searches at internal points determined to be "functional equivalents" of the border.[14] Like the border situation, not every car that passes through a checkpoint is searched.

These practices indicate that it is not necessary to *search* every vehicle in order to have an effective defense against the entry of illegal aliens. Thus, a reasonable alternative which is less destructive of Fourth Amendment rights appears. It ought to be utilized. The alternative is to give the Border Patrol the authority by warrant to do nothing more than to *stop* cars at inland points, which are not "functional equivalents" of the border, to make routine inquiries concerning the nationality of the occupants.

While such stops would still involve an interference with the "right to free passage without interruption,"[15] the time, place, and manner for such interruption would be constantly reviewed by a judicial officer. After stopping the vehicle and making inquiry into the nationality of the occupants, if the officer becomes aware of facts which give him probable cause to believe that there may be illegal aliens or contraband in the car, a search then becomes justified.[16]

The extent of the search would then be governed by the facts learned by the officer. If he detects the odor of marijuana, as the officer did in *Bowman*, he may search the car for it. But if the facts discovered relate only to the possibility that the car may be carrying illegal aliens, the search should be confined to those parts of the car capable of carrying such persons.[17] This procedure would be far more consistent with Justice Powell's concern that there only be "a modest intrusion on those whose automobiles are . . . [stopped.]"[18] Furthermore, if the search resulted in the officer finding illegal aliens or contraband in the car, the question

13. Immigration and Nationality Act § 287(a), 8 U.S.C., § 1357(a) (1970).

14. 413 U.S. 266, 272-273 (1973).

15. Carroll v. United States, 267 U.S. 123, 154 (1925).

16. This procedure is in accord with that approved in the *Bowman Case*, 487 F.2d 1229 (10th Cir. 1973), except that the Tenth Circuit did not require a warrant.

17. For a discussion of the scope of the search, see 10 CALIF. WEST. L. REV. 657, *supra* note 1, at 673.

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

of whether he had probable cause to search could be reviewed by a court on a motion to suppress the evidence.

There are two other factors which, when brought into the balancing process, support limiting the Patrol's authority to one of stop and inquiry. Judge Wallace, dissenting in *Bowen*, expresses concern about the immensity of the illegal alien problem and he points out that both Justices Powell and White indicate like concern in *Almeida-Sanchez*. Judge Wallace writes:

> Both Justice Powell and White refer to the Herculean challenges faced by those directed to prevent illegal aliens.[19]

While the Border Patrol may well have a problem on its hands and is exhausting all of its resources, the rest of the government clearly is not doing so. If Congress were really concerned about "stemming the avalanche of persons illegally crossing our borders,"[20] one wonders why Congress has not made it a crime to employ illegal aliens in this country.[21] This alone would probably do more to bring the problem under control than the present methods of searching a limited number of automobiles at or near the border.

Furthermore, although not expressly articulated in these cases, there is discrimination here on the basis of nationality. The likelihood of a person not of Mexican descent being stopped, let alone being searched, is quite remote. And discrimination on the basis of race, national origin, or alienage is considered to be "inherently suspect and subject to close judicial scrutiny."[22] The

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19. 500 F.2d 960 (9th Cir. 1974).

20. *Id.*

21. H.R. 982, 93d Cong., 1st Sess. (1973), which makes it a federal offense to knowingly employ an illegal alien, has passed the House of Representatives and is now in the Senate Judiciary Committee. 119 CONG. REC. S. 8309 (daily Ed. May 7, 1973). The question of why H.R. 982 is bottled up in the Senate has been the subject of several recent articles in the San Diego Evening Tribune. *See* San Diego Evening Tribune, Sept. 26, 1974, at A-14, col. 1, Oct. 3, 1974, at B-2, col. 1, Oct. 10, 1974, at A-13, col. 1. California attempted to solve the problem locally by enacting a statute making it a crime to employ an illegal alien in the state. This statute was held unconstitutional in DeCanas v. Bica, 40 Cal. App. 3d 976, 115 Cal. Rptr. 444 (1974).

22. Graham v. Richardson, 403 U.S. 365, 372 (1971). *See also*, Yick Wo v. Hopkins, 118 U.S. 356 (1886). As noted in the text accompanying note 26, *infra*, the overwhelming majority of cars passing through checkpoints are not stopped. *See also*, United States v. Felix Humberto Brignoni-Ponce, 499 F.2d 1109 (9th Cir. 1974) where the only reason for the stop and search was that the occupant appeared to be of Mexican descent.

government bears a heavy burden in justifying any discrimination on that basis.

Before the scales are tipped in favor of the government, all of the above factors should be considered. The factors to be weighed on the side of the individual who may be subjected to a search are: (1) that his constitutional right to be free from unreasonable searches is involved; (2) that the government desires to infringe upon that right even though the government itself has not been willing to utilize all available methods to solve the illegal alien problem; (3) that even a stop and inquiry procedure will discriminate against American citizens of Mexican descent; and (4) that there is a reasonable alternative to a stop and search program.

On the other hand, recognizing that there is a legitimate governmental interest in the detection of illegal aliens which must be balanced against a limited infringement upon Fourth Amendment rights, a reasonable alternative would be to give the Border Patrol authority to stop and make routine inquiries concerning the nationality of the occupants of a car. This, of course, must occur only under a properly drawn warrant, the need for which should be periodically reviewed by a judicial officer.[23] This type of warrant procedure would indeed be only "a modest intrusion on those whose cars are . . . [stopped]"[24] even though it would not entirely eliminate the discrimination which exists in the stopping of cars occupied by American citizens of Mexican descent. However, a judicially sanctioned warrant procedure, limited to stop and inquiry, would place all citizens and legally admitted aliens on the same footing. It would be improper to conduct a *search* of a car legitimately stopped whether driven by a person of Mexican descent or a non-Mexican unless the officer could show to the court that he had probable cause to do so.

II. WARRANT PROCEDURE IN THE SOUTHERN DISTRICT OF CALIFORNIA

As a result of the decisions in *Almeida-Sanchez* and *Bowen*, which effectively halted the checkpoint operations of the I.N.S. along the California-Mexican border, the I.N.S. applied to the

23. Although Justice Powell's suggested warrant procedure relates only to roving patrols, there is no reason why it should not also apply to checkpoints.

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

Honorable Edward A. Infante, Magistrate, U. S. District Court for the Southern District of California, requesting a warrant to keep open its checkpoint at San Clemente, California. After reviewing the affidavits of two Border Patrol officers, and examining the facts set forth in *United States v. Baca*,[25] relating to the need to maintain such checkpoints, Magistrate Infante issued a Warrant of Inspection. This warrant, which was issued June 22, 1974, gave the Border Patrol the authority:

> (1) to conduct an immigration traffic checkpoint on the northbound lanes of Interstate Route 5, five miles south of San Clemente, California, and;
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> (2) to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants of said vehicles, and;
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> (3) to conduct routine inspection of said vehicles for the presence of aliens, . . .[26]

Magistrate Infante also included in the warrant certain record keeping requirements relating to the number of vehicles passing the checkpoint, the number stopped, the number inspected, and the number of aliens discovered, together with a recapitulation of the number of deportable aliens apprehended. The warrant with the information required was to be returned within ten days.

On the return date a Border Patrol officer reported as follows:

A. The checkpoint was operated for a total of 124 hours and ten minutes during which 145,960 vehicles passed through the checkpoint;

B. 802 vehicles were stopped at the checkpoint for questioning;

C. 202 vehicles were inspected;

D. Aliens were found in 171 vehicles;

E. 725 deportable aliens were apprehended in vehicles stopped at this checkpoint;

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25. 368 F. Supp. 398 (S.D. Cal. 1973). After the Almeida-Sanchez decision, the Ninth Circuit consolidated several cases and remanded them to the District Court for consideration in light of that decision. After a lengthy factual analysis, it was the conclusion of the District Court that searches at the San Clemente checkpoint and other checkpoints were border searches for immigration purposes. The Baca opinion provides an excellent factual analysis of the illegal alien problem.

26. File No. Misc. 399, United States District Court, Southern District of California.

F. No property was seized.[27]

Since June 22, 1974, similar warrants have been issued to the Border Patrol by several of the District Court Judges in the Southern District of California. Magistrate Infante has also continued to issue such warrants. However, these warrants do not give the Border Patrol authority "to conduct routine inspection of said vehicles for the presence of aliens. . . ."[28] Under the new warrants the Patrol's authority is limited to stopping vehicles for routine inquiry concerning nationality. Any *search* of an automobile must then be based upon independent facts learned by the officer that would be sufficient to constitute probable cause.

Operating under the June 22, 1974, warrant, the Patrol stopped and searched a car driven by Amado Martinez-Fuerte through the San Clemente checkpoint.[29] The car carried two persons who admitted to being in the country illegally. The driver was arrested, charged and convicted of inducing entry and transportation of two illegal aliens into the United States. The case is now on appeal to the Ninth Circuit, and among the questions submitted for review is the constitutionality of the warrant.[30]

According to Justice Powell, a constitutional warrant would be one issued after due consideration of a number of relevant factors. In *Almeida-Sanchez* he wrote:

> Although the standards for probable cause in the context of this case are relatively unstructured . . . there are a number of relevant factors which merit consideration: they include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use, and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of

27. *Id.*

28. File No. Misc. 440, United States District Court, Southern District of California. Some of these warrants are also for checkpoints other than the one at San Clemente. Of the five Judges serving the Southern California District, two have held that the warrants are unconstitutional. One Judge has upheld the warrants, while another has issued such a warrant and therefore supports their validity. The fifth Judge has not made his position public.

29. United States v. Amado Martinez-Fuerte, No. 74-2462 (S.D. Cal., filed July 9, 1974).

30. United States v. Amado Martinez-Fuerte, No. 74-2462 (S.D. Cal., filed Aug. 27, 1974).

> the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.[31]

If one views these as general considerations to which a judicial officer should address himself before issuing a warrant, it appears that the testimony in *United States v. Baca*,[32] is sufficient to justify Justice Powell's conclusion that there "exist[s] a constitutionally adequate equivalent of probable cause."[33] But even assuming that there exists probable cause to support some type of a warrant, a balancing of all the relevant factors discussed herein should lead to the conclusion that this probable cause should support no more than the right to *stop and inquire*. In addition to the factors discussed above, there is another very good reason why this conclusion should follow. These are general warrants. The judicial officer who issues them cannot specify which car to search, nor can he command the articles to be seized.[34] Therefore only after the patrol officer has secured sufficient information, following the stop and inquiry, to constitute probable cause, should he be allowed to search. If he does not elicit sufficient information, then no probable cause exists to intrude upon the Fourth Amendment rights of the occupants.

III. CONCLUSION

There appear to be sufficient votes on the Supreme Court to uphold the warrants now being issued in the Southern District of California. While these warrants are now limited to *stop and inquiry*, acceptance of Justice Powell's warrant procedure may give the Border Patrol authority to *search*.

By restricting the warrants to *stop and inquiry* the judicial officers of the Southern District of California are making a fair accomodation between constitutional rights and legitimate governmental interests. A balancing of these interests does not call for any greater infringement upon the right of all citizens "to use the public highways . . . [with] a right to free passage without interruption . . . ."[35]

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31. 413 U.S. 266, 283-284 (1973).

32. 368 F. Supp. 398 (S.D. Cal. 1973).

33. 413 U.S. 266, 279 (1973).

34. *See* 10 CALIF. WEST. L. REV. 657, *supra* note 1, at 662-669. Our abhorence to general warrants is sufficiently understood by all so that further illucidation is unnecessary here.

35. Carroll v. United States, 267 U.S. 123, 154 (1925).

It is hoped that when the Supreme Court is actually faced with the problem it will limit the warrant procedure to one of *stop and inquiry* for the reasons suggested herein. When Border Patrol *searches* are made, adherence to Fourth Amendment values should require that the search be subsequently approved by a judicial officer. It would then be the responsibility of the judiciary to see that there is no greater infringement upon constitutional rights than is necessary to enforce legitimate governmental interests.