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Border Crossings, Internal Checkpoints, and the Fourth Amendment in the Southern District

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BORDER CROSSINGS, INTERNAL CHECKPOINTS, AND THE FOURTH AMENDMENT IN THE SOUTHERN DISTRICT†

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I. INTRODUCTION

On March 18, 1966, the 89th Congress of the United States divided California into four judicial districts: the Northern, Eastern, Central, and Southern Districts of California.¹ Congress defined the Southern District as comprising of Imperial and San Diego counties.²

† Special writing project: 50th Anniversary of the United States District Court for the Southern District of California

1. Act of Mar. 18, 1966, Pub. L. No. 89-372, 80 Stat. 75 (providing for the appointment of additional circuit and district judges).

2. *Id.* at 76.

Together, these counties account for the entire border between California and Mexico.³

Along this border lie six United States Ports of Entry (POE).⁴ At each POE, United States Customs and Border Protection (CBP) screens foreign visitors, returning American citizens, and imported cargo entering the United States.⁵ The largest of these ports is in San Ysidro, positioned between San Diego and Tijuana. The San Ysidro POE is not only the largest POE in California, it is also the busiest land border crossing in the world; thousands of people cross into the United States through San Ysidro every day.⁶

In addition to managing the ports of entry, CBP is tasked with maintaining internal traffic checkpoints directed at deterring illegal immigration and smuggling activities that may have gone undetected at official border crossings.⁷ Unlike POEs, these checkpoints are situated in the interior United States and affect domestic as well as international travelers. Several checkpoints in the Southern District are situated on major highways and therefore regulate a high volume of traffic. While drivers are usually waived through these checkpoints and only delayed a moment, drivers can be stopped, questioned, and

3. According to the United States Geological Survey, the length of the international boundary between California and Mexico is estimated to be 140.4 miles, while the length of the entire U.S.-Mexican border is estimated at 1,933 miles. Janice C. Beaver, *U.S. International Borders: Brief Facts*, CRS REPORT FOR CONGRESS, <https://www.fas.org/sgp/crs/misc/RS21729.pdf> (last updated Nov. 9, 2006).

4. The San Ysidro Port of Entry, Otay Mesa Port of Entry, Tecate Port of Entry, Calexico West Port of Entry, Calexico East Port of Entry, and Andrade Port of Entry. See *Locate a Port of Entry*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/contact/ports/CA> (last visited Mar. 19, 2016).

5. See *At Ports of Entry*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/border-security/ports-entry> (last visited Mar. 18, 2016).

6. *John Rhoades Federal Judicial Center Historical Walking Tour*, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA, <https://www.casd.uscourts.gov/Court%20Info/Lists/General%20Court%20Information/Attachments/10/Southern%20District%20of%20California%20Walking%20Tour%20Brochure.pdf> (last visited Mar. 19, 2016) (“over 14 million vehicles and 40 million people legally enter the U.S. each year” through the San Ysidro Port of Entry).

7. *San Clemente Station*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california/san-clemente-station> (last visited Mar. 19, 2016).

delayed for much longer if the CBP officer on duty suspects illegal aliens might be in the car.

The Southern District's border with Mexico, and the resulting federal law enforcement presence, has largely influenced the District's criminal docket. Over the past fifty years, the judges of the Southern District have presided over thousands of cases brought about by law enforcement efforts at ports of entry and internal checkpoints. In several instances, these cases reached the Supreme Court and became seminal decisions in the Court's Fourth Amendment jurisprudence.⁸ The legal doctrines that came out of these cases continue to impact the lives of the millions of people who live and travel in United States border regions, as well as the lives of the hundreds of thousands of people who travel into the United States every day.⁹ It is fitting then, that an historical review of the Southern District includes an exploration of these cases and the District's unique characteristics that produced them.

This article focuses on Fourth Amendment cases out of the Southern District involving (1) vehicle searches at the border, and (2) vehicle stops at internal checkpoints.

II. GAS TANKS AND SPARE TIRES: SEARCHING VEHICLES AT THE BORDER

The Fourth Amendment to the United States Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”¹⁰ The Supreme Court has long held that “[w]here a search is undertaken by law enforcement officials . . . reasonableness generally requires the obtaining of a judicial warrant,”¹¹ and “[i]n the absence of a warrant, a

8. *E.g.*, *United States v. Flores-Montano*, 541 U.S. 149 (2004); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

9. *See generally* *Border Crossing/Entry Data: Query Detailed Statistics*, BUREAU OF TRANSPORTATION STATISTICS, http://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (last updated Sept. 2015).

10. U.S. CONST. amend. IV.

11. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995).

search is reasonable only if it falls within a specific exception to the warrant requirement.”¹²

One of these specific exceptions is for searches conducted at the border — CBP officers may search those seeking entry into the United States without a warrant, or even reasonable suspicion.¹³ As Chief Justice Rehnquist explained, “[t]he Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border. Time and again, [the Court has] stated that ‘searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border.’”¹⁴ Thus, CBP officers have broad authority to conduct routine searches of entrants and their luggage without any requirement of reasonable suspicion, probable cause, or a warrant.¹⁵ The Government’s border search authority, however, is not limitless. The Supreme Court has recognized that some searches may be so intrusive or destructive as to require reasonable suspicion,¹⁶ but the Court has never precisely defined the dimensions of such searches.¹⁷

As a result of the broad authority granted CBP, alien and drug smugglers often go to great lengths to avoid detection, hiding illicit drugs, and even human beings, in hidden vehicle compartments. In 2004, the Supreme Court decided a case involving the search of a vehicle’s fuel tank at the Otay Mesa POE.¹⁸ At issue was the extent of the Government’s authority to conduct suspicionless border searches of vehicles.¹⁹

12. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (citation omitted) (holding that officers must generally secure a warrant before conducting a search of a cell phone under the warrant exception for search incident to arrest).

13. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

14. *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004) (quoting *United States v. Ramsey*, 431 U.S. 606, 616 (1977)).

15. *Montoya de Hernandez*, 473 U.S. at 538.

16. *Flores-Montano*, 541 U.S. at 152, 156.

17. *See United States v. Cotterman*, 709 F.3d 952, 963 (9th Cir. 2013).

18. *Flores-Montano*, 541 U.S. at 149.

19. *See id.*

A. United States v. Flores-Montano

On February 12, 2002, at approximately 4:00 p.m., Manuel Flores-Montano attempted to enter the United States at the Otay Mesa POE driving a 1987 Ford Taurus station wagon.²⁰ At a secondary inspection station, Customs Inspector Jovito Pesayco tapped the station wagon's gas tank and noticed that the tank sounded solid.²¹ Subsequently, a mechanic under contract with Customs removed the gas tank from the vehicle.²² Inspector Pesayco discovered that the top of the gas tank was sealed with bondo.²³ Upon removing the seal, Inspector Pesayco found thirty-seven kilograms of marijuana bricks.²⁴ The removal procedure and search of the tank, including a twenty to thirty minute wait for the mechanic, took approximately one hour to complete.²⁵

Two weeks later, Mr. Flores-Montano was indicted on federal drug charges.²⁶ District Judge Irma Gonzalez²⁷ was assigned to his case.²⁸ On June 4, 2002, Mr. Flores-Montano moved to suppress the

20. *Id.* at 150; Government's Response and Opposition to Defendant's Motion to: Suppress Evidence Based on Alleged Non-Routine Border Search Together with Statement of Facts, Memorandum of Points and Authorities, and Attached Declarations and Motion Exhibits, United States v. Flores-Montano, 2002 WL 34387315 (S.D. Cal. June 10, 2002) (No. 02CR0536-IEG).

21. Government's Response and Opposition, *supra* note 20.

22. *Flores-Montano*, 541 U.S. at 151.

23. Government's Response and Opposition, *supra* note 20 ("Bondo is a putty like substance that hardens and is used to seal openings and adhere to surfaces.").

24. *Id.*

25. *See Flores-Montano*, 541 U.S. at 151.

26. *Id.* at 151 ("[a] grand jury for the Southern District of California indicted [Mr. Flores-Montano] on one count of unlawfully importing marijuana, in violation of 21 U.S.C. § 952, and one count of possession of marijuana with intent to distribute, in violation of § 841(a)(1)"); Indictment, United States v. Flores-Montano, 2002 WL 34387316 (S.D. Cal. Feb. 27, 2002) (No. 02CR0536-IEG).

27. "Nominated by President George H. W. Bush and confirmed by the U.S. Senate in 1992, Gonzalez became the first Mexican-American woman in the nation to be appointed as a United States District Judge. Judge Gonzalez's parents grew up on opposite sides of the Arizona-Mexico border, her father a citizen of the United States and her mother a citizen of Mexico." *Nine Alumni Honored with Lifetime Achievement Awards*, THE UNIVERSITY OF ARIZONA JAMES E. ROGERS COLLEGE OF LAW (Oct. 22, 2015), <https://law.arizona.edu/lifetime-achievement-awards-2015>.

28. *See* Indictment, *supra* note 26.

thirty-seven kilograms of marijuana recovered from his gas tank.²⁹ Relying on a recent decision by a divided Ninth Circuit panel,³⁰ Judge Gonzalez granted Mr. Flores-Montano's motion, holding that "the search of the gas tank . . . was 'non-routine' and therefore reasonable suspicion was required to justify the search."³¹ A Ninth Circuit panel summarily affirmed Judge Gonzalez' ruling,³² and the United States appealed.³³

The issue before the Supreme Court was whether the Fourth Amendment forbade the search of the fuel tank absent reasonable suspicion.³⁴ In a unanimous decision delivered by Chief Justice Rehnquist, the Court held that the search of the fuel tank did not require reasonable suspicion.³⁵ The Court discussed the Government's broad border search authority and emphasized that the Government has a "paramount interest" in protecting its territorial integrity.³⁶ As an illustration of that interest, the Court pointed to evidence of frequent attempts to smuggle contraband into the United States by concealing it in fuel tanks:

Over the past 5 ½ fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry . . . Of those 18,788, gas tank drug seizures have accounted for 4,619 of the vehicle drug seizures, or approximately 25% . . . In addition, instances of persons smuggled in and around gas tank compartments are discovered at the ports of entry of San Ysidro and Otay Mesa at a rate averaging 1 approximately every 10 days.³⁷

Mr. Flores-Montano argued that the suspicionless disassembly of his fuel tank was an invasion of his privacy and a significant

29. *United States v. Flores-Montano*, No. 02CR0536-IEG, 2002 WL 34110168, at *1 (S.D. Cal. June 20, 2002), *aff'd*, 2003 WL 22410705 (9th Cir. Mar. 14, 2003), *rev'd*, 541 U.S. 149 (2004).

30. *See United States v. Molina-Tarazon*, 279 F.3d 709 (9th Cir. 2002).

31. *Flores-Montano*, 2002 WL 34110168, at *1.

32. *United States v. Flores-Montano*, No. 02-50306, 2003 WL 22410705, at *1 (9th Cir. Mar. 14, 2003), *rev'd*, 541 U.S. 149 (2004).

33. *See United States v. Flores-Montano*, 541 U.S. 149 (2004).

34. *Id.* at 150.

35. *Id.*

36. *Id.* at 153.

37. *Id.* at 153-54 (citation omitted).

deprivation of his property interests because the process could have damaged his vehicle.³⁸ Chief Justice Rehnquist responded, “[w]e have long recognized that automobiles seeking entry into this country may be searched . . . It is difficult to imagine how the search of a gas tank, which should be solely a repository for fuel, could be more of an invasion of privacy than the search of the automobile’s passenger compartment.”³⁹ Chief Justice Rehnquist then noted:

[Mr. Flores-Montano] does not, and on the record cannot, truly contend that the procedure of removal, disassembly, and reassembly of the fuel tank in this case or any other has resulted in serious damage to, or destruction of, the property. According to the Government, for example, in fiscal year 2003, 348 gas tank searches conducted along the southern border were negative (*i.e.*, no contraband was found), the gas tanks were reassembled, and the vehicles continued their entry into the United States without incident.⁴⁰

Accordingly, the Court concluded that the Government has the authority, absent reasonable suspicion, to remove, disassemble, and reassemble a vehicle’s fuel tank at the border.⁴¹

B. United States v. Cortez-Rocha

Several months after the decision in *Flores-Montano*, the Ninth Circuit expanded on the Supreme Court’s ruling in a similar case out of the Southern District regarding the search of a vehicle at the border.⁴² On February 16, 2003, Julio Cortez-Rocha entered the United States at the Calexico Port of Entry⁴³ driving a 1979 Chevy pickup.⁴⁴ Before reaching the primary inspection booth, a narcotics detector dog⁴⁵ alerted to the rear area of Mr. Cortez-Rocha’s truck.⁴⁶

38. *Id.* at 154.

39. *Id.*

40. *Id.* at 154-55 (citation omitted).

41. *Id.* at 155.

42. *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005).

43. Now named the Calexico West Port of Entry.

44. *Cortez-Rocha*, 394 F.3d at 1118.

45. Narcotics detector dogs have been used at the border since 1987, when, following an alarming increase in narcotics seizures, U.S. Border Patrol

Mr. Cortez-Rocha was referred to secondary inspection where a customs inspector placed a density meter against the side of the truck's spare tire.⁴⁷ The meter registered a high reading and the customs inspector removed the tire from underneath the truck.⁴⁸ The customs inspector then proceeded to cut the tire open.⁴⁹ Inside, he found ten brick shaped packages containing approximately forty-two kilograms of marijuana.⁵⁰

Mr. Cortez-Rocha was arrested and indicted for the illegal importation and possession of marijuana with intent to distribute.⁵¹ Mr. Cortez-Rocha moved to suppress the marijuana, arguing it was obtained in violation of the Fourth Amendment.⁵² On May 27, 2003, District Judge Thomas J. Whelan⁵³ held a hearing on Mr. Cortez-Rocha's motion.⁵⁴ At the hearing, the Government chose not to argue

implemented its first canine program. The program consisted of four canine teams. Today, the Customs and Border Protection Canine Program plays a much larger role in "protecting the United States from those that would do her harm." After crossing into the United States, but before reaching primary inspection, vehicles are often approached by CBP canine teams. These canines are taught to detect the odors of controlled substances, such as marijuana, as well as concealed humans. *Canine Program History*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/canine-program/history-3> (last visited Mar. 18, 2016).

46. *Cortez-Rocha*, 394 F.3d at 1118.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Judge Whelan worked as a deputy district attorney for twenty-one years before being appointed by Governor George Deukmejian to the San Diego Superior Court in 1990. Only six months after his appointment, Judge Whelan presided over the infamous double homicide trial of Betty Broderick, who shot her ex-husband, a prominent attorney, and his new young bride in their home. After eight years as a superior court judge, Whelan was nominated by President Bill Clinton to fill a vacancy in the U.S. District Court for the Southern District of California. Judge Whelan assumed senior status in 2010. *District Judge Thomas J. Whelan*, DAILY JOURNAL JUDICIAL PROFILE, 1999 (on file at U.S. Courts Library, San Diego).

54. Brief for Appellee United States, *United States v. Cortez-Rocha*, 394 F.3d 1115 (9th Cir. 2005) (No. 03-50491), 2004 WL 5469226, at *4.

that the search was based upon reasonable suspicion.⁵⁵ Instead, the Government argued that the search was a routine border search that did not require reasonable suspicion.⁵⁶ At the time of the hearing, the Supreme Court had not decided *Flores-Montano*, but the Ninth Circuit had already affirmed Judge Gonzalez' decision holding that the search of a gas tank is a "non-routine" border search. In that context, Judge Whelan denied the motion to suppress and found that cutting open the truck's spare tire *was* a routine border search, and thus did not require reasonable suspicion.⁵⁷ Mr. Cortez-Rocha then entered a conditional plea of guilty, preserving his right to appeal Judge Whelan's denial of his motion to suppress.⁵⁸

While Mr. Cortez-Rocha's appeal was pending before the Ninth Circuit Court of Appeals, the Supreme Court handed down its opinion in *Flores-Montano*. Subsequently, the Ninth Circuit affirmed Judge Whelan's decision, reasoning that while the Supreme Court indicated in *Flores-Montano* that certain border searches may be so destructive as to be unreasonable, "the search of a vehicle's spare tire, which neither damages the vehicle nor decreases the safety or operation of the vehicle, is not"⁵⁹

As a result of *Flores-Montano* and *Cortez-Rocha*, it is clear today that CBP has the authority to search hidden vehicle compartments, and even cut open spare tires, at the border without reasonable suspicion, so long as the procedure does not significantly damage or destroy the vehicle.⁶⁰ *Flores-Montano* and *Cortez-Rocha* have undoubtedly led to the apprehension and prosecution of many drug and alien smugglers in the Southern District. Naturally, however, while many smugglers continue to hide contraband in their vehicles, others have become more innovative.

In recent years, some drug smugglers have attempted to avoid contact with CBP altogether. These smugglers have resorted to using

55. *Id.*

56. *Id.*

57. *Id.*

58. *United States v. Cortez-Rocha*, 394 F.3d 1115, 1118 (9th Cir. 2005).

59. *Id.* at 1119. Interestingly, Circuit Judge Stephen Trott went on to discuss terrorist exploitations of border vulnerabilities and the September 11 terrorist attacks to highlight the importance of border security in the 21st century. *Id.* at 1123-24.

60. *See United States v. Flores-Montano*, 541 U.S. 149 (2004); *Cortez-Rocha*, 394 F.3d 1115.

maritime vessels, ultralight aircraft, and even elaborate cross-border tunnels to smuggle drugs into the United States.⁶¹ Since taking firm control of the Baja California smuggling corridor in 2006, Joaquin Guzman, also known as El Chapo, and his Sinaloa Cartel have been attributed with the construction of several elaborate drug tunnels between Mexico and the Southern District.⁶² According to United States Attorney for the Southern District Laura Duffy, drug cartels “have spent years and tens of millions of dollars trying to create a secret underworld of passages so they can move large quantities of drugs.”⁶³ These sophisticated tunnels can cost upwards of one million dollars to build and require the use of professional engineers and architects.⁶⁴

As recently as October 21, 2015, a Homeland Security Investigations (HSI) agent working undercover discovered a half-mile drug tunnel between Tijuana and San Diego.⁶⁵ The tunnel featured a ventilation system, electric lighting, and a rail transportation system capable of moving large loads of drugs across the border.⁶⁶ According to the San Diego Union Tribune, this tunnel was only one of eighty cross-border smuggling tunnels discovered by United States authorities between 2010 and 2015.⁶⁷

It seems that border security will remain a relevant issue in the Southern District for years to come. As smuggling tactics continue to evolve, and as new technologies continue to challenge our perceptions of privacy, the judges of the Southern District will undoubtedly continue to play a vital role in the future of search and seizure law at the border.

61. Liam Dillon & Ian Lovett, *Tunnel for Smuggling Found Under U.S.-Mexico Border; Tons of Drugs Seized*, N.Y. TIMES (Oct. 31, 2013), http://www.nytimes.com/2013/11/01/us/tunnel-for-smuggling-found-under-border-tons-of-drugs-seized.html?_r=0.

62. Sandra Dibble, *Major Drug Tunnel Shut Down at Otay Mesa*, SAN DIEGO UNION TRIB., (Oct. 22, 2015, 12:18 AM), <http://www.sandiegouniontribune.com/news/2015/oct/22/otay-suspected-drug-tunnel-mexico-otay-mesa/>.

63. Dillon & Lovett, *supra* note 61.

64. *Id.*

65. Dibble, *supra* note 62.

66. *Id.*

67. *Id.*

III. THE SECOND LINE OF DEFENSE: RESOLVING UNCERTAINTY AT INTERNAL CHECKPOINTS IN THE 1970S

While CBP personnel work diligently to prevent illegal immigration and drug trafficking at the border, some illegal aliens and illicit drugs unavoidably make it into the United States undetected. As a second layer of defense, CBP operates several internal border checkpoints throughout the Southern District. In operation since at least 1927, these checkpoints have played a vital role in deterring illegal immigration throughout the Southern District's history.⁶⁸ In 1973, Judge Howard Turrentine⁶⁹ gave a detailed description of typical checkpoint operations:

When the checkpoints . . . are in operation, an officer standing at the "point" in full dress uniform on the highway will view the decelerating oncoming vehicles and their passengers, and will visually determine whether he has reason to believe the occupants of the vehicle are aliens (i.e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped (if the traffic at the checkpoint is

68. See *United States v. Baca*, 368 F. Supp. 398, 406-07 (S.D. Cal. 1973).

69. A native San Diegan, Judge Turrentine served the community as a judge for four decades. Judge Turrentine graduated from law school in 1939, and in 1940, began his legal career as an Assistant City Prosecutor in San Diego. However in the spring of 1941, he was called to active duty in the United States Navy, where he served through the end of World War II. Following the war, Turrentine entered private practice before being appointed to the Superior Court in 1968 by then Governor Ronald Reagan. Two years later President Richard Nixon appointed Judge Turrentine to the U.S. District Court for the Southern District of California. Judge Turrentine rose to chief judge in 1982 and assumed senior status in 1984. While senior status entitled him to work a reduced schedule, Judge Turrentine continued to work an active calendar for twenty-three years. Judge Turrentine retired in 2007 due to his declining health and passed away on August 20, 2010. He is remembered not only for his breadth of knowledge, but also for his compassion. A former law clerk recalled a case in which "two USC students who were facing a four-year sentence for smuggling. Judge Turrentine suspended their sentence on condition they maintain a B average at USC, which they did . . . 'He could have destroyed their lives, but he realized these were kids who had made a mistake. That was the kind of real justice that he was involved in besides putting people behind bars.'" Caroline Dipping, *Judge Spent 40 Years on Bench*, SAN DIEGO UNION TRIB., (Aug. 24, 2010, 10:46 AM), <http://www.sandiegouniontribune.com/news/2010/aug/24/judge-spent-40-years-on-bench/2/?#article-copy>.

heavy, as at the San Clemente checkpoint,⁷⁰ the vehicle will be actually directed off the highway) for inquiries to be made by the agent. If the agent does not have reason to believe that the vehicle approaching the checkpoint is carrying aliens, he may exchange salutations, or merely wave the vehicle through the checkpoint.

If, after questioning the occupants, the agent then believes that illegal aliens may be secreted in the vehicle (because of a break in the “pattern” indicating the possibility of smuggling) he will inspect the vehicle by giving a cursory visual inspection of those areas of the vehicle not visible from the outside (i.e. trunk, interior portion of camper, etc.).⁷¹

In the early years of the modern Southern District Court, the constitutionality of these checkpoint operations was called into question following the Supreme Court’s decision in *Almeida-Sanchez v. United States*.⁷²

A. *Almeida-Sanchez v. United States*⁷³

On June 25, 1970, Condrado Almeida-Sanchez was convicted of transporting illegally imported marijuana after a jury trial in the Southern District in front of then newly reassigned⁷⁴ Central District Judge Irving Hill.⁷⁵ Mr. Almeida-Sanchez appealed his conviction, arguing that the search of his vehicle by a roving patrol north of the

70. The San Clemente checkpoint is located on the northbound lanes of Interstate 5, approximately sixty-six miles north of the San Ysidro Port of Entry. All motorists travelling up the coast from San Diego to Los Angeles must pass through the San Clemente checkpoint. See *San Clemente Station*, U.S. CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california/san-clemente-station> (last visited Mar. 19, 2016).

71. *Baca*, 368 F. Supp. at 406-07.

72. *Id.* at 408.

73. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

74. Following the 1966 judicial redistricting, Judge Irving was reassigned to the newly created Central District, but he continued to preside over his remaining Southern District cases. See generally Act of Mar. 18, 1966, Pub. L. No. 89-372, 80 Stat. 75.

75. Brief for the United States, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (No. 71-6278), 1972 WL 135753, at *4.

Mexican border, absent probable cause, consent, or a warrant, violated his right to be free from unreasonable searches and seizures.⁷⁶ The Ninth Circuit affirmed his conviction, but in a plurality decision, the Supreme Court reversed, finding that the search of Mr. Almeida-Sanchez's vehicle was not a border search or its "functional equivalent," and thus, because it was executed without a warrant, probable cause, or consent, it violated the Fourth Amendment.⁷⁷

The search at issue in *Almeida-Sanchez* did not occur at an internal checkpoint, but the language and reasoning of the plurality appeared to cast doubt on whether searches conducted at internal checkpoints were considered border searches for immigration purposes, and thus permissible absent a warrant or probable cause.⁷⁸

B. United States v. Baca

In the late summer and early fall of 1973, the Ninth Circuit remanded several cases to the Southern District to consider the impact of the *Almeida-Sanchez* decision.⁷⁹ At the time, there were more than twenty cases pending in the Southern District that raised legal questions potentially affected by the Supreme Court's decision.⁸⁰ To sift through this uncertainty, the judges of the Southern District ordered "that a comprehensive factual hearing be held to evaluate the consequences, if any, of *Almeida-Sanchez* on the checkpoints operated by the Border Patrol within this District."⁸¹ With this somewhat uncommon procedural posture, the cases were consolidated,⁸² and on November 19, 1973, Judge Turrentine began what would be a three-

76. *Almeida-Sanchez*, 413 U.S. at 267.

77. *Id.* at 275.

78. *Baca*, 368 F. Supp. at 408.

79. *Id.* at 401.

80. *Id.*

81. *Id.* at 401-02.

82. Order Consolidating Cases, *United States v. Baca*, 368 F. Supp. 398 (S.D. Cal. 1973) (Nos. 14654, 14964, 15803, 15850, 15813, 15991, 14344, 15410, 16245, 15666, 15463, 15847, 15046, 15650, 16360, 15606, 15651) (the issues under consideration were felt throughout the entire court — the consolidated cases came from every District Judge: Judge Turrentine, Judge Schwartz, Judge Nielsen, Judge Thompson, and Judge Enright).

day evidentiary hearing to help evaluate the impact of *Almeida-Sanchez* on checkpoint operations in the Southern District.⁸³

Over the course of the three-day hearing, the parties called six witnesses⁸⁴ and submitted over sixty exhibits for the court's consideration.⁸⁵ Among the exhibits admitted were several INS Border Patrol reports, numerous photos of checkpoints and Border Patrol activities in the District, detailed maps of San Diego and Imperial counties, a copy of the Border Patrol Handbook, a 1972 report on traffic volumes, and transcripts from a 1971 congressional sub-committee hearing on illegal aliens.⁸⁶ The evidentiary hearing concluded on November 21, just before for the Thanksgiving holiday, and two weeks later Judge Turrentine filed an extensive opinion detailing the factual findings and legal conclusions of the court.⁸⁷

Judge Turrentine began his opinion by discussing "the illegal alien problem."⁸⁸ He acknowledged that many illegal Mexican aliens are "industrious, proud and hard-working people" who enter the United States as a result of poor economic conditions in Mexico.⁸⁹ At the time he wrote the opinion, the "estimated . . . per capita income of the poorest 40 percent of the Mexican population, the strata most likely to leave their homeland in search of employment in the United States, [was] less than \$150 per day."⁹⁰ But while Judge Turrentine acknowledged the economic externalities that had fueled illegal immigration in the Southern District, he did not ignore the

83. *Baca*, 368 F. Supp. at 402.

84. Four of the witnesses were called by the government; two were called by the defense. Interestingly, one of the witnesses for the defense was Southern District Magistrate Judge Harry McCue. Minutes of the Almeida-Sanchez Hearing, United States v. *Baca*, 368 F. Supp. 398 (S.D. Cal. 1973) (Nos. 14654, 14964, 15803, 15850, 15813, 15991, 14344, 15410, 16245, 15666, 15463, 15847, 15046, 15650, 16360, 15606, 15651).

85. *Id.*

86. *Id.*

87. *See Baca*, 368 F. Supp. at 398.

88. *Id.* at 402-03.

89. *Id.* at 402.

90. *Id.*

consequences of such increased⁹¹ illegal immigration.⁹² Judge Turrentine found that illegal immigration from Mexico caused “suffering by the aliens who are frequently victims of extortion, violence and sharp practices, displacement of American citizens and legally residing aliens from the labor market, and irritation between two neighboring countries.”⁹³

After detailing the extent and effects of the increase in illegal immigration in the Southern District, Judge Turrentine then turned to what he dubbed the resulting “law enforcement problem” — how does the United States best enforce its immigration laws without infringing upon the rights of the people?⁹⁴ In this second section of the opinion, Judge Turrentine reviewed some of the tools used by Border Patrol to ebb the flow of illegal immigration, particularly in the Southern District where, while only encompassing three percent of the total land borders in the United States, thirty percent of all deportable alien apprehensions occur.⁹⁵ Ultimately, his review focused on the use of internal traffic checkpoints. In a detailed accounting, Judge Turrentine described the history of the checkpoints, their purpose, the criteria used to select their locations, how they are operated, and their ultimate impact on illegal immigration.⁹⁶ In a resolute tone, Judge Turrentine concluded his factual review by stating, “[t]he evidence before this court clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol in the absence of the checkpoints”⁹⁷

With these factual findings as a backdrop, Judge Turrentine then turned to the ultimate task at hand: determine what impact, if any, the *Almeida-Sanchez* decision had on the constitutionality of operations at internal checkpoints in the Southern District.⁹⁸ This, however, was no easy task. The *Almeida-Sanchez* plurality indicated that only a border

91. “Since 1970, the number of illegal Mexican aliens in the United States who have been apprehended has been growing at a rate in excess of 20 percent per year.” *Id.*

92. *Id.*

93. *Id.* at 403.

94. *Id.* at 403-08.

95. *Id.*

96. *Id.* at 406-08.

97. *Id.* at 408.

98. *See id.*

search rationale could justify warrantless searches by immigration officers without probable cause.⁹⁹ But the plurality made clear that border searches could take place not only at the border, but also at its “functional equivalents.”¹⁰⁰ Unfortunately, the plurality never clearly defined the parameters of functional equivalency.

Aware of the murky nature of this concept, Judge Turrentine forged forward, acknowledging that it was the District Court’s obligation to give substance to the term “functional equivalency.”¹⁰¹ Drawing inferences from examples given by the Supreme Court, Judge Turrentine ultimately deduced that “under *Almeida-Sanchez*, border searches are those which take place at the first effective point of entry subject to the tests of intrusiveness and reasonable relation to the end pursued and to due consideration for geographic characteristics and available manpower resources.”¹⁰² Measured against these criteria, Judge Turrentine analyzed the particular characteristics and operating procedures of each checkpoint in the Southern District.¹⁰³ Having given due consideration to each checkpoint, Judge Turrentine concluded that each qualified as “the functional equivalent[s] of the border for immigration purposes.”¹⁰⁴

Judge Turrentine’s concerted attempt to clarify the proper application of the Fourth Amendment at fixed internal checkpoints has played a significant role in the development of this area of the law. While his legal conclusions did not bind other courts, his factual findings have been continually cited in cases and law review articles regarding the Fourth Amendment at internal checkpoints.¹⁰⁵ In fact, only three years after Judge Turrentine handed down the *Baca* opinion, the Supreme Court decided another checkpoint case originating with Judge Turrentine in which the Court cited the *Baca*

99. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973).

100. *Id.*

101. *Baca*, 368 F. Supp. at 409.

102. *Id.* at 415.

103. *See id.* at 409-18.

104. *Id.* at 415-18.

105. *E.g.*, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); Alfredo Mirandé, *Is There A “Mexican Exception” to the Fourth Amendment?*, 55 FLA. L. REV. 365 (2003).

findings and finally brought some clarity to the Fourth Amendment's application at internal checkpoints.¹⁰⁶

C. *United States v. Martinez-Fuerte*

In *United States v. Martinez-Fuerte*, the Supreme Court considered “whether a vehicle may be stopped at a fixed checkpoint for brief questioning of its occupants even though there is no reason to believe the particular vehicle contains illegal aliens.”¹⁰⁷ Writing for the majority, Justice Powell weighed the public interest in controlling the flow of illegal aliens with the Fourth Amendment interests of individual travelers:

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 . . . These checkpoints are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens who succumb to the lure of such highways. And the prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols.

A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens. In particular, such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly.

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to free passage without interruption, and arguably on their right to

106. See *Martinez-Fuerte*, 428 U.S. 543.

107. *Id.* at 545.

personal security. But it involves only a brief detention of travelers during which all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.¹⁰⁸

In support of his analysis, Justice Powell continually referenced Judge Turrentine's *Baca* findings.¹⁰⁹ In the opening section of the opinion, Justice Powell directly quoted Judge Turrentine's description of operations at the San Clemente checkpoint.¹¹⁰ Later, Justice Powell cited the immigration and law enforcement statistics compiled by Judge Turrentine, as well as the economic conditions he highlighted as contributing factors to the increase in illegal immigration from Mexico.¹¹¹ Justice Powell also referenced Judge Turrentine's findings regarding checkpoint location criteria.¹¹² With this information in hand, the Court found in favor of the government's interest and held that "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment" and "may be made in the absence of any individualized suspicion at reasonably located checkpoints."¹¹³

The Supreme Court, with the aid of the *Baca* findings, eliminated the uncertainty surrounding checkpoint operations. Today, *Martinez-Fuerte* remains the leading case on stops at internal checkpoints. As a result, those traveling in border regions across the United States are subject to vehicle stops at fixed checkpoints, regardless of whether there is reason to believe the vehicle contains illegal aliens.¹¹⁴ While many people view these checkpoints as an unnecessary hassle, they remain a valuable tool for law enforcement personnel.

IV. CONCLUSION

This brief survey of Fourth Amendment cases adjudicated in the Southern District over the past fifty years represents only a small

108. *Id.* at 557-58 (quotations omitted) (citations omitted).

109. *Id.* at 546, 551, 553, n.9.

110. *Id.* at 545-46.

111. *Id.* at 551-53.

112. *Id.* at 553.

113. *Id.* at 562, 566.

114. *See id.* at 566.

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portion of the District's rich history. However, these few cases tangibly impact the lives of millions of people every day, and thus, are worth remembering.

*Seve Gonzales**

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