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ROVING BORDER SEARCHES FOR ILLEGAL ALIENS: AVOIDING THE EXCLUSIONARY RULE

Each year hundreds of thousands of illegal aliens enter the United States without detection. In 1972, Immigration and Naturalization officials were able to locate 398,000 such aliens within our nation's borders. In the same year, the number of illegal aliens living in the United States was conservatively estimated by the Justice Department at over one million. Although this overwhelming alien infiltration is a problem faced at each of our international borders, the greatest influx is from Mexico. Approximately eighty-five percent of our current illegal alien residents are Mexicans.

The primary reason for the huge Mexican exodus is disparity in wages between the United States and Mexico. In the cities of Mexicali and Tijuana the average daily wage is $3.40, and wages are substantially lower in the interior of Mexico. The average yearly income of the poorest forty percent of Mexicans, those most likely to flee to the United States, is less than $150 per year.

The illegal alien intrusion has experienced no abatement. In fact, the illegal ingress is growing at a rate of twenty percent a year. The number of illegal Mexicans is most apparent in California, where in 1971 with California's unemployment rate at 7.4 percent of its labor force, there were between 200,000 and 300,000 illegal aliens earning a total of one hundred million dollars per year in wages.

While the alien problem constitutes a crushing burden upon the population of the southwestern states, the dilemma has also reached crisis proportions in other parts of the nation. In

3. See generally, appendix to United States v. Ortiz, 422 U.S. 891, 900 (1975). Unfortunately, Mexican employment statistics are unlikely to improve since 45 percent of Mexico's population is under 15 years of age and thus soon ready to enter the labor market.
Chicago, for example, there are at least 75,000 illegal Mexican residents. Currently, the Immigration and Naturalization Service estimates that there are as many as ten or twelve million aliens illegally in the country.

The reasons for the increased concern over illegal aliens stem not only from the recent upsurge in their number, but also because of their effect upon the already depressed job market in the United States. This disastrous effect has been compounded because most of the illegal Mexican aliens constitute unskilled labor, and thus are in competition with the already hard-hit minority group work force.

Enforcement of immigration laws is frustrated by an extensive border and inadequate manpower. In addition, search and seizure is a key element of the enforcement effort. Although the exclusionary rule may be applied in a variety of contexts, this article will deal solely with its application in search and seizure cases involving roving United States Border Patrols acting in the capacity of customs and immigration officials.

I. ENFORCEMENT EFFORTS

Prior to 1973, customs searches and immigration searches did not receive identical treatment in the courts. The authority of customs officials to search persons seeking entrance into the United States with or without a warrant or probable cause was established in 1789. Comparable authority of immigration officials was not recognized until 1875. While the law seems to

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7. INS ANN. REP. iii (1974), cited in United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). Congress has attempted to limit entry into this country. 8 U.S.C. § 1151(a) (1970) states that with the limited exception of immediate relatives of United States citizens, the number of lawful immigrants shall not exceed a total of 170,000 in any fiscal year.
8. The exclusionary rule is enforced as against four major types of constitutional violations in both state and federal criminal proceedings: searches and seizures violating the fourth amendment; confessions obtained in violation of the fifth and sixth amendments; identification testimony obtained in violation of these same amendments; and evidence which is obtained by methods so shocking that its admission would violate the due process clause. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 666 (1970) [hereinafter cited as Oaks].
9. The decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) changed the requirements in this area.
10. Act of July 3, 1789, ch. 5 § 24, 1 Stat. 29, 43.
be in a quagmire with respect to warrant and probable cause requirements in extended border searches, it is presumed that searches at the border or its functional equivalent are exceptions to the requirements of warrant or probable cause:

Although the Fourth Amendment generally requires both a showing of probable cause and a warrant from a neutral magistrate before a search may be judged reasonable, border searches are well recognized exceptions to these requirements. Whether conducted along the border or at its functional equivalent, neither a warrant need be secured nor probable cause shown in searches for illegal aliens or merchandise.

It is worth noting, however, that even though searches at the border or its functional equivalent do not require warrant or probable cause, they are still required to be "reasonable."

12. Although there is some disagreement as to what constitutes the proper "border area," it is generally conceded that such border searches are not limited to the actual checkpoint station at an international boundary. Depending upon the circumstances, fixed checkpoint searches away from the border can be considered "functional equivalents" of regular border searches. 6 A.L.R. Fed. 317, § 4(a). The Supreme Court, in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) included as "functional equivalents" searches at established stations near the border, e.g., at the confluence of two roads which extend from the border, or initial points of entry into the United States such as airports handling non-stop international flights. See also Note, Border Searches Revisited: The Constitutional Propriety of Fixed and Temporary Checkpoint Searches, 2 Hastings Const. L. Q. 251 (1975).

In King v. United States, 348 F.2d 814 (9th Cir. 1965), cert. denied, 382 U.S. 926 (1965), it was held that border searches could take place at points geographically removed from the border so long as there was apparent "change of condition" of the vehicle or person subsequently searched after its entry into the country. The King rule was applied in Alexander v. United States, 362 F.2d 379 (9th Cir. 1966), cert. denied 385 U.S. 977 (1966), where customs officers acted upon a tip from an informant and placed defendant's vehicle under surveillance as it crossed the border, and followed it into the city of Nogales where it was finally stopped and searched. Heroin was found. The court held that such a search was actually a "border search" because the vehicle had been in almost constant view of government officials — thus no probable cause or warrant was required. See generally Note, Fourth Amendment Applications to Searches Conducted by Immigration Officers, 38 Albany L. Rev. 962 (1974).

13. Sutis, The Extent of the Border, 1 Hastings Const. L. Q. 235, 236 (1974) [hereinafter cited as Sutis]. That is, the law makes no distinction between customs and immigration searches which take place at the border — both are subject to relatively little restraint. Immigration searches at the border are authorized by 8 U.S.C. § 1225(a), which states:

Immigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States.

Despite the firm-establishment of search and seizure power at the border, the real problem exists when such searches take place at points removed from the border, whether they are random roving Border Patrol searches or fixed checkpoint searches. The authority of customs officials to search vehicles at locations removed from the border was established in 1789, whereas the comparable immigration power was not recognized until 1946. The question of whether these extended border searches require a warrant or probable cause has been the subject of much controversy recently in the Supreme Court.

II. CUSTOMS V. IMMIGRATION SEARCHES

The current dilemma which faces the Supreme Court is a result of historically conflicting standards for immigration and customs searches. Generally, immigration officers have been subjected to less rigid standards.

The case law governing customs searches beyond the border requires that customs officers have "probable cause" or "reasonable certainty" in order to search a vehicle. The Fifth and Ninth Circuits, where most of the case law occurs, demand that customs officers have such "reasonable certainty" that the vehicle in question had contraband in it when it crossed the border or that it was placed in the vehicle after it crossed the border.

While customs searches are directed toward merchandise, immigration searches deal primarily with stopping illegal aliens from entering the country. According to statute, immigration officers are authorized to search any vehicle within a "reasonable distance" from the border. Such distance has been set

15. 1 Stat. 29, 43.
16. Act of August 7, 1946, ch. 768, 60 Stat. 865. Immigration officials were given the power to search vehicles within a "reasonable distance" of the border.
18. The government's authority to conduct such relatively unfettered immigration searches is predicated upon 8 U.S.C. § 1357(a)(3) (1970), which states:
   (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant —
   (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such
by the Attorney General as within one hundred miles of the international border.\textsuperscript{19} Prior to \textit{Almeida-Sanchez v. United States},\textsuperscript{20} immigration officials were generally permitted to conduct roving border searches at random and without warrant or probable cause. There existed a "general suspicion" of all vehicles traveling on public highways leading away from the border, and immigration officials needed no specific reason to stop and search a vehicle for an illegal entrant.\textsuperscript{21}

These unequal standards created havoc for the courts because customs officials routinely disguised their contraband searches as immigration searches, thus circumventing the probable cause requirements in customs searches. This was caused by the fact that Border Patrol agents often act in a dual capacity as both customs and immigration agents,\textsuperscript{22} and are often able to protect seized contraband from the devastating effect of the exclusionary rule even though they had no warrant or probable cause. While conducting a legal immigration search on less than probable cause, the Border Patrol agent would simply seize any contraband found as the fruit of a valid search.

This rather deceitful procedure evidences the impracticality of trying to maintain different standards for customs and immigration searches. In \textit{United States v. McDaniels},\textsuperscript{23} the Fifth Circuit Court of Appeals admitted evidence of contraband seized by customs officers on a so-called immigration search. The court rather jocularly described such procedure:

It appears that Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer. The agents testified that they had planned to wear their immigration hats that night, but we find nothing in the statutes that

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\item external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; \ldots
\item 19. 8 C.F.R. § 287.1 (1973).
\item 20. 413 U.S. 266 (1973).
\item 23. 463 F.2d 129 (5th Cir. 1972). \textit{See also United States v. DeLeon}, 462 F.2d 170 (5th Cir. 1972).
\item 24. 463 F.2d at 134.
\end{itemize}
would preclude them from later donning their customs hats during a proper border search. [Emphasis added.]

The use of such tactics by Border Patrol officials certainly in itself necessitated a reexamination of probable cause requirements for immigration searches.

The underlying reason why the Court has been reluctant to tighten the reins on immigration searches was a fear that the exclusionary rule would thereupon make any attempt to control the illegal Mexican influx nearly futile. The exclusionary rule's inescapable effect has made the rule's continued efficacy in such searches questionable.

III. VITALITY OF THE EXCLUSIONARY RULE

A. Adoption

On the federal level, the Court first suggested in Boyd v. United States that the best method of protecting the public's fourth amendment right to be free from unreasonable searches and seizures would be to exclude illegally obtained evidence and thus hopefully deter law enforcement officials from overstepping their constitutional confines. One authority has stated that two types of justifications existed for the exclusionary rule, one normative and one factual. The normative justification is the evil of government participation in illegal conduct. The factual justification lies in the contentment that by excluding illegally obtained evidence, a reduction in search and seizure violations will necessarily follow. The exclusionary rule became substantive federal law in 1914 and was finally extended to the states in 1961.

The decision in Elkins v. United States stressed that the exclusionary rule was not designed as an affirmative remedy for citizens deprived of their fourth amendment rights, but rather only as a means of promoting respect for such rights by those who enforce them:

25. 116 U.S. 616 (1886).
27. Id. at 668.
28. In Weeks v. United States, 232 U.S. 383 (1914), the exclusionary rule was declared federal law. In Mapp v. Ohio, 367 U.S. 643 (1961), the rule was expressly mandated as applicable to state courts as well, although it had already been widely accepted as such.
[T]he rule is calculated to prevent, not repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effective available way — by removing the incentive to disregard it.30

Since its adoption, the actual effectiveness of the rule's deterrent purpose has been dubious, at the very least.31 Some critics comment that instead of curbing unlawful searches and seizures, the rule's principal result has been the creation of a shield for the guilty. In sum, the Court decided that the exclusionary rule was the best means of protecting constitutional guarantees, although it often releases known criminals due to the exclusion of decisively relevant evidence.

B. Current Standing

Recently, the exclusionary rule has suffered a barrage of assaults by the courts. Courts have become increasingly hesitant to extend the rule's application. In United States v. Calandra,32 the Court refused to apply the exclusionary rule in grand jury proceedings. The Court stated:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.33

The Calandra Court proceeded to point out that the exclusionary rule offers little protection for many citizens because in order to have standing to invoke the rule, the unlawful search victim must show threatened incrimination by the government.34 If the government does not threaten incrimination, the victim has no affirmative rights under the rule.

In Michigan v. Tucker,35 the Court stressed that since the only purpose of the exclusionary rule is to deter unlawful

30. Id. at 217.
31. For a pointed criticism and statistical analysis of the exclusionary rule's deterrent effect, see Oaks, supra note 8. See also Horowitz, Excluding the Exclusionary Rule — Can There Be An Effective Alternative?, 47 L.A. BAR BULL. 91 (1972).
33. Id. at 348.
34. Id.
searches, the rule loses its purpose if the search was conducted in good faith by government law enforcers:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in a willful, or at the very least, negligent conduct which has deprived the defendant of some right. . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.\textsuperscript{36}

The exclusionary rule's shortcomings became quite apparent when the Court, in \textit{Almeida-Sanchez v. United States},\textsuperscript{37} decided to require probable cause for immigration searches.

\textbf{IV. The Almeida-Sanchez Break}

The dispute over probable cause for roving border searches in immigration cases peaked in the \textit{Almeida-Sanchez} case. In a five-to-four decision, the Court chose to tighten the standards for such searches, thereby broadening the effect of the exclusionary rule. Almeida-Sanchez was a Mexican citizen holding a valid United States work permit. A roving Border Patrol officer stopped the defendant's automobile on a California highway twenty-five miles north of the Mexican border. The east-west highway did not intersect with the border. The Border Patrol conceded it had neither a search warrant nor probable cause\textsuperscript{38} when the vehicle was stopped while conducting an alleged immigration search,\textsuperscript{39} the officers proceeded to search for aliens underneath and behind the rear seat, but found instead a cache of marijuana. The evidence became the basis of a conviction for a federal crime.\textsuperscript{40}

The government cited 8 U.S.C. § 1357(a)(3),\textsuperscript{41} which simply authorizes external boundary searches within a "reasonable distance" from the international border, in support of the roving border search. As noted earlier,\textsuperscript{42} such distance has been interpreted as within one hundred air miles of the border. The

\textsuperscript{36} Id. at 447.
\textsuperscript{37} 413 U.S. 266 (1973).
\textsuperscript{38} Id. at 268.
\textsuperscript{39} The government argued that such search was under the authority of 8 U.S.C. § 1357(a)(3) (1970). For the text of the statute, see note 19.
\textsuperscript{40} That is, an express violation of 21 U.S.C. § 1760 (1971).
\textsuperscript{42} 8 C.F.R. § 287.1 (1973).
lower court held that this statute authorized immigration authorities to conduct such inland searches without warrant or probable cause.

A second argument of the government was that such roving searches are analogous to administrative inspections discussed in *Camara v. Municipal Court*. In *Camara*, the Court held that administrative inspections to enforce community health and welfare regulations could be made on less than probable cause. The Court, however, did require that prior to inspection the inspector must obtain either consent or a warrant supported by particular physical and demographic characteristics of the areas to be searched.

In reversing the lower court's decision to admit the contraband into evidence, the Supreme Court in *Almeida-Sanchez* refused to accept either argument by the government. The majority held that the search in question was unreasonable under the fourth amendment, and thus inadmissible under the exclusionary rule. The *Almeida-Sanchez* Court said that even though warrantless automobile searches have been upheld in the past, it does not necessarily follow that probable cause need not exist:

> [B]ut the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search.

The Court held that simply because the statute in question does not explicitly call for probable cause, it does not necessarily follow that it may be disregarded.

Secondly, the Court failed to accept the validity of the analogy between roving Border Patrol searches and administrative inspections under *Camara*. The majority decision found these cases inapposite because even though administrative searches could be initiated on less than probable cause, a warrant was still required. The Court found unacceptable an unfettered discretion for immigration officials at the border.

The search [of the Border Patrol] thus embodied precisely the evil the Court saw in *Camara* when it insisted that the

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43. 387 U.S. 523 (1967).
44. Id. at 537-38.
46. 413 U.S. at 269.
“discretion of the official in the field” be circumscribed by obtaining a warrant prior to inspection.47

Unfortunately, the majority opinion makes little effort to appreciate the magnitude of this country’s illegal alien influx problem. The court comments that it is not enough for the government to argue the seriousness of the illegal alien problem.48 Granted, the Court should not assume the legislative function, but it might have suggested an alternative procedure. Rather, the Court rests upon the premise that the fourth amendment rights of citizens must be protected. One authority comments:

[C]onsonant with the rule that the Court will hold as narrowly as possible under the facts presented to it, the Court glosses over the larger problem in Almeida-Sanchez. The opinion fails to offer any useful solution to the problem of aliens illegally entering the country at innumerable points along the border where the government is tactically unable to police their entry. The opinion ignores the possibility of alternative schema for such utilization of the Border Patrol that would satisfy the requirements of the Fourth Amendment and still provide a practical means for effectively curtailing the illegal entry of aliens into the country. The Court offers no substitute after dramatically curtailing the usefulness of the Border Patrol by severely restricting its area of operation. The effect, then, is a void in the ability of the federal government to prevent illegal entry of aliens.49

Although favoring the exclusion of the contraband in light of the facts in Almeida-Sanchez, Justice Powell in his concurrence suggested a method by which the repugnant effect of the exclusionary rule may be avoided. Justice Powell contended that an equivalent of probable cause already exists in most of these roving border searches.50 He states that an examination of the circumstances surrounding such immigration searches forms a basis for probable cause.

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

47. Id. at 270.
48. 413 U.S. at 273-74.
49. Sutis, supra note 13 at 240.
50. 413 U.S. at 279.
whose automobiles are searched — persuades me that under appropriate limited circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.\textsuperscript{51}

While Justice Powell might require a lesser showing of probable cause, he does not believe that such searches are an exception to the warrant requirement. He refused to accept the majority's interpretation of \textit{Carroll v. United States}\textsuperscript{53} as calling for no warrant in these searches. He noted that the justification for a warrantless search was the ability of an automobile to quickly leave the court's jurisdiction, and that even though \textit{Carroll} allowed warrantless searches, it required probable cause in the sense of specific knowledge about a particular automobile.\textsuperscript{53} This is a rigid type of probable cause and not the kind that exists in random roving border searches. Thus, Justice Powell believed that most roving border searches do not constitute an exception to the warrant requirement.

While . . . my view is that on appropriate facts the Government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles, it does not follow that the warrant requirement is inapposite. The very fact that the Government's supporting information relates to criminal activity in certain areas rather than to evidence about a particular automobile renders irrelevant the justification for warrantless searches relied upon in \textit{Carroll} and its progeny. [Emphasis added.]

\textsuperscript{51} \textit{Id.} These three criteria were adopted from the decision in \textit{Camara v. Municipal Court}, 387 U.S. 523 (1967). In \textit{Camara}, which involved searches for housing code violations, the Court held that a warrant may be issued even if there is no probable cause for believing that the particular building contained code violations, so long as general characteristics, including the nature of the building and of the area indicate that violations may exist.

Thus, what Justice Powell suggests is that the equivalent of probable cause is actually less than probable cause in the traditional sense. Justice Powell contends, however, that it is constitutionally sufficient. See dissent in \textit{Almeida-Sanchez v. United States}, 413 U.S. at 288-89, for an analysis of Justice Powell's alternative. For a detailed criticism of Justice Powell's proposal, see Note, \textit{Area Search Warrants in Border Zones}, 84 \textit{Yale L.J.} 355 (1974). The author argues that an application of the three criteria does not achieve probable cause.

\textsuperscript{52} 267 U.S. 132 (1924).


\textsuperscript{54} 413 U.S. at 281-82.
Thus, he maintained that even though probable cause might exist in such roving border searches, a warrant was still required unless the probable cause was directed at the particular automobile in question. Since the immigration officers in Almeida-Sanchez had not obtained a warrant, Justice Powell concurred with the exclusion of the seized evidence.

An alternative is suggested by Justice Powell to help immigration officials avoid the effect of the exclusionary rule. Since he believed that a search warrant is mandatory for most roving Border Patrol searches, he suggested the use of an "area-wide warrant." Such area-wide warrants constitute "advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time." Such a procedure would allow roving border searches if certain minimal area conditions existed. The use of such area-wide warrants would facilitate the needs of the Immigration and Naturalization Service, and at the same time provide some judicial control over the arbitrary actions of border agents. Seemingly, the only possible danger in Justice Powell's alternative could come from imprudent judges who would simply act as a rubber stamp in the issuance of such area warrants.

Justice White's dissent in Almeida-Sanchez fails, as does the majority opinion, to suggest a workable solution which protects both immigration and fourth amendment interests. The only limitation which the dissent would impose upon the immi-

55. Id. at 283. Justice Powell also adopted the use of such "area warrants" from Camara v. Municipal Court, 387 U.S. 523 (1967), which used such procedure in the context of administrative searches for housing code violations.


Camara's standards for administrative inspections may not properly be applied to the roving alien search in Almeida-Sanchez. Using area search warrants in the context of these INS searches would expand Camara. There is good reason for seeking to limit rather than to extend the application of Camara.

See also, Note, Border Searches: Beyond Almeida-Sanchez, 8 U. CALIF. DAVIS L. REV. 163, 182 (1975), which states that unlike administrative searches in Camara, immigration searches often result in criminal prosecutions. Thus, immigration officials should at least be held to the degree of reasonable suspicion required in Terry v. Ohio, 392 U.S. 1 (1968).

57. Sutis, supra note 14, at 250. The author applauded Justice Powell's alternative procedure as "a workable means for the apprehension of illegal aliens that would not significantly interfere with those individual rights of privacy that are so central to the concept of liberty."
igration officers is in the extent of their search. The only real check upon such searches would be under a vague "reasonableness" test under the fourth amendment. The dissent's assertion of almost unlimited immigration search power within one hundred miles of the border encroaches upon fourth amendment rights to nearly as great an extent as the majority opinion interferes with our national immigration policy.

In hindsight, the split caused by the Almeida-Sanchez decision can be seen as signaling the future abrogation of its rather harsh precedent. The Court's 1974-75 Term was responsible for four decisions which leave the vitality of Almeida-Sanchez in doubt.

V. The Post Almeida-Sanchez Court

In United States v. Peltier, the first in a series of roving border patrol search cases, the Court avoided a direct confrontation with the Almeida-Sanchez rule by relying upon the retroactivity argument. The Court held that Almeida-Sanchez would not be applied retroactively (the Peltier search occurred before the Almeida-Sanchez decision) because its new constitutional doctrine did not greatly aid in the "truth-finding function." The Court said that unless a new constitutional doctrine related to fact-finding, it should only be accorded prospective application. The Court stated that since the officers had acted

58. Generally, the scope of a valid search is governed by the grounds of reasonableness under the fourth amendment. Historically, the courts have felt that searches for illegal aliens should not be as intrusive as searches for contraband because of stricter probable cause requirements for customs agents. It was held in Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967), that an immigration officer is authorized to search any vehicle compartment (e.g., a trunk) in which aliens might hide. Numerous cases have held that such officers may not search compartments where no alien could hide. See Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970), where search of six-inch space behind trunk panel was invalidated; Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969), which struck down search of jacket; United States v. Horte, 179 F. Supp. 913 (S.D. Cal. 1959), which held search of cigarette package was invalid.

59. 413 U.S. at 297.

60. The four recent decisions concerning such immigration searches include: United States v. Peltier, 422 U.S. 531 (1975); Bowen v. United States, 422 U.S. 916 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975).

61. 422 U.S. 531 (1975). The facts in Peltier parallel those in Almeida-Sanchez in that the defendant Peltier was stopped by a roving Border Patrol on an immigration search near the Mexican border. Immigration agents had no probable cause in the traditional sense.

62. Id. at 535.
in good faith under the law existing prior to *Almeida-Sanchez*, it would be unfair to apply that decision retroactively:

The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

The *Peltier* dissent cautioned that even though the majority opinion did not actually overrule *Almeida-Sanchez*, it certainly did signal the deterioration of that decision's strict probable cause requirements.

But . . . I have no confidence that the new formulation is to be confined to putative retroactivity cases. Rather, I suspect that when a suitable opportunity arises, today's revision of the exclusionary rule will be pronounced applicable to all search and seizure cases.

The decision in *United States v. Brignoni-Ponce* represents a further departure from the *Almeida-Sanchez* ruling, and to date probably the most workable solution to the roving border search problem. In *Brignoni-Ponce*, the defendant's automobile was stopped by a roving Border Patrol near San Clemente, California. The only justification offered by the immigration officers for the vehicle stop was that the vehicle's occupants appeared to be of Mexican descent. After

63. *Id.* at 537. The *Peltier* Court relied upon the handling of a similar retroactivity issue in *Linkletter v. Walker*, 381 U.S. 618, 636-37 (1965), where the Court refused to apply the exclusionary rule promulgated in *Mapp v. Ohio*, 367 U.S. 343 (1961) retroactively:

Mapp had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to Mapp has already occurred and will not be corrected by releasing the prisoners involved.

64. 422 U.S. 531, 551-52 (1975). The handling of the retroactivity issue by the *Peltier* majority has come under heavy criticism from other sources as well. Most commonly it is seen as merely a weak means of avoiding enforcement of *Almeida-Sanchez*. See generally Note, Retroactivity — Application of the "New Rule" Threshold Test Before Determining the Retroactivity of *Almeida-Sanchez*, 53 TEXAS L. REV. 586 (1974).


66. *Id.* at 875.
questioning the occupants, the officers arrested them as illegal aliens. The Court ultimately refused to admit the evidence of the illegal status of the passengers, but did formulate a new procedure of critical importance to border searches.

First, the *Brignoni-Ponce* Court distinguished between "limited stop" of an investigative nature by immigration officials and the more intrusive, full-scale search of a vehicle. In the former type of situation, the investigating officer may, if he has reasonable suspicion, question the occupants about their citizenship and immigration status and also have them explain any suspicious circumstances. However, in order to further detain the vehicle the officer must either obtain the consent of the occupants or have probable cause. The real success of such a procedure is evidenced by the fact that the officer will not be allowed to conduct a full-scale search unless information gained on such a limited investigatory stop supplies the officer with probable cause. This safeguard allows for the protection of innocent highway users from the humiliation of a full-scale search, while at the same time freeing the hands of immigration officers to detect those illegal aliens who would hide behind fourth amendment guarantees.

The Court stated that the "reasonable suspicion" to initially stop a vehicle can be gained from specific articulable facts, together with inferences from those facts which reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country. The Court stated that in all situations, the reasonableness of such suspicion will be assessed in light of the officer's experience in detecting illegal entry. Factors which may be considered include the characteristics of the area in which the officer encounters the vehicle, its proximity to the border, and the usual patterns of traffic on the border.

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67. *Id.* at 886-87. In applying the Court's new test to the facts in this case, it was held that the evidence of the illegal status was a "fruit" of an illegal search.
68. *Id.* at 879-80.
69. *Id.* at 880. The Court refused to allow immigration officials unfettered discretion in their searches, as had been the case prior to *Almeida-Sanchez*. The *Brignoni-Ponce* Court justified its position by stating:
   To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officials.
70. 392 U.S. 1, 21 (1968), cited in 422 U.S. at 880.
road.\textsuperscript{71} Also, previous experience with alien traffic can supply the requisite suspicion for such a limited stop, including the driver's behavior, such as erratic driving or attempts to evade officers, suspicious aspects of the vehicle such as large hidden compartments in certain station wagons, or vehicles which appear to be heavily loaded or have an extraordinary number of passengers.\textsuperscript{72} Mode of dress and haircut are also relevant in arriving at such "reasonable suspicion."\textsuperscript{73} The \textit{Brignoni-Ponce} Court refused to admit the evidence of illegal alien status, holding that the fact of Mexican ancestry by itself was insufficient to supply the officers with such "reasonable suspicion."

The reason for this relaxation of probable cause for immigration investigatory stops was a recognition by the Court of the important governmental interest at stake and the minimal nature of such an intrusion upon the public. Justice Powell, in writing for the majority, concluded that the intrusion caused by such investigative stops was at best modest, since all that need be produced by the suspect was a document showing that he has a right to be within the United States.\textsuperscript{74}

The Court adopted this two-step investigatory procedure (\textit{i.e.}, stop and search) by analogy from \textit{Terry v. Ohio},\textsuperscript{75} where it was held that a "pat-down" search for weapons — for the protection of the investigating officer — was permissible even if only based upon a reasonable suspicion and not probable cause:

\begin{quote}
[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.\textsuperscript{76}
\end{quote}

\textsuperscript{71} 422 U.S. at 884-85.
\textsuperscript{72} Id. at 885.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 880.
\textsuperscript{75} 392 U.S. 1 (1968).
\textsuperscript{76} Id. at 27. The Court in \textit{Brignoni-Ponce} at 881 used a quotation from \textit{Adams v. Williams}, 407 U.S. 143, 145-46 (1972), to justify its use of such a limited investigatory procedure:

\begin{quote}
The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, \textit{Terry} recognizes that it may be the essence of good police work to adopt an intermediate response. \ldots A brief stop of a suspicious individual, in order to
As a result of the *Brignoni-Ponce* decision, the Court seems to have met with at least partial success the problems in enforcing critical immigration laws while at the same time protecting fourth amendment guarantees. The limited stop alternative in *Brignoni-Ponce* is not as likely to be abused as is the "area-wide warrant" procedure in the *Almeida-Sanchez* concurrence, because under the limited stop method, each fact situation is to be judged on an individual basis. Under the area-wide warrant procedure, only evidence of criminal activity in a certain area is required, rather than evidence pertaining to a particular vehicle. The limited stop method is also not threatened by possible abuse that a "rubber stamped" area warrant might be.

Furthermore, by requiring probable cause for full-scale immigration searches and allowing for the limited stop procedure, the ability and likelihood of customs officials to disguise their searches under immigration standards is greatly reduced. As noted earlier, it was common practice (pre-*Almeida-Sanchez*) for a Border Patrol agent, acting as both a customs and immigration official, to stop a vehicle without probable cause, claim to be making an immigration search, and seize any contraband discovered. While the *Almeida-Sanchez* decision completely cured such abuse by making the standards for customs and immigration searches the same, the *Brignoni-Ponce* decision still effectively deters such abuse because it requires reasonable suspicion on immigration grounds.

**VI. CONCLUSION**

The Court’s concern over roving immigration searches should not be limited to such superficial issues as those of the *Almeida-Sanchez* and *Brignoni-Ponce* decisions. The Court has unfortunately become unduly burdened with such problems as the degree of probable cause necessary to effectuate a valid immigration search, which are actually only symptoms of a broader problem — the efficacy of the exclusionary rule in the criminal system.

While it is not the purpose of this article to advocate an
abrogation of the exclusionary rule and suggest a substitution of a more equitable means of deterring unlawful police searches, there are a few proposed alternatives which should be mentioned. Two of which the major ones are an administrative recovery plan and the ALI Model Code of Pre-Arraignment Procedure.

A. Administrative Recovery Plan

A plan for recovery through an administrative agency was espoused by Chief Justice Burger in his dissent in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, where he proposed the creation of an administrative agency to afford compensation and restitution to persons whose fourth amendment rights have been violated. The Chief Justice relied upon the tort theory of respondeat superior to base such a remedy. Through the creation of such a tribunal, private citizens would have an affirmative cause of action against the government for illegal police conduct. Such a remedy is, of course, unavailable under the current exclusionary rule. Burger predicted that if such a remedial scheme was adopted on the federal level, the states would be quick to follow.

B. ALI Model Code of Pre-Arraignment Procedure

The ALI Code, in its section on motions to suppress evidence, includes a "substantial test" as an alternative to the exclusionary rule. The Code only allows an exclusion of evidence obtained if the violation by the official is substantial or if the exclusion is otherwise required by the state or federal constitution. Certain violations are deemed substantial per se:

78. 403 U.S. 388 (1971).
79. 403 U.S. at 423. For an in-depth discussion of a similar administrative remedy, see Horowitz, *Excusing the Exclusionary Rule — Can There Be An Effective Alternative?*, 47 L.A. Bar Bull. 91 (1972). In computing money damages for illegal searches, the author compares the computation of such an intangible loss to that of "pain and suffering."
80. 403 U.S. at 423-24.
81. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2, Determination of Motions to Suppress Evidence.
82. Id. at § 290.2(2).
A violation shall in all cases be deemed substantial if it was gross, wilful and prejudicial to the accused. A violation shall be deemed wilful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it. 83

If an alleged violation is not deemed substantial per se, the ALI Code suggests that the court consider all of the circumstances, including the extent to which privacy was invaded, the extent to which the violation was wilful, and whether, but for the violation, the evidence seized would have been discovered. 84 Unless the court concludes that the illegal search meets the "substantial test," suppression of the evidence will be denied.

The purpose behind the ALI Code's section on motions to suppress evidence is to invite the courts to admit illegally seized evidence when the violation is minor, not wilful, and does not reflect either agency policy or general indifference to fourth amendment rights. 85 The Chief Justice also mentioned the "substantial test" in his dissent in Bivens. 86

These are by no means the only proposed alternatives. Variations are endless, but it seems that these two proposals represent diverse methods of effectuating a workable replacement for the exclusionary rule. If the courts do not deem it necessary to make such a drastic revision of the criminal justice system, they must continue to deal with the individual problems created by the exclusionary rule. The purpose of this article was

83. Id. at § 290.2(3).
84. Section 290.2(4) of the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE states in full:

(4) Circumstances to Be Considered in Determining Substantiality. In determining whether a violation not covered by Subsection (3) is substantial, the court shall consider all the circumstances including:
(a) the extent of deviation from lawful conduct;
(b) the extent to which the violation was wilful;
(c) the extent to which privacy was invaded;
(d) the extent to which exclusion will tend to prevent violations of this Code;
(e) whether, but for the violation, the things seized would have been discovered; and
(f) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him.
86. 403 U.S. at 424-25.
to illuminate one such problem — the constitutionality of roving immigration searches. Unless the Court wishes to continue to deal with such endless dilemmas, it will have to accept a comprehensive revamping of the exclusionary rule. The proposal of the American Law Institute represents the basis of a workable substitute.

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