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ENHANCING THE POWERS OF THE INS: *IMMIGRATION & NATURALIZATION SERVICE V. DELGADO*

IN 1977 the Immigration and Naturalization Service (INS) conducted three factory surveys¹ in the Los Angeles area in search of illegal aliens.² Four of the employees questioned by the INS agents during the surveys brought suit against the INS in the United States District Court for the Central District of California.³ The workers challenged the constitutionality of the factory surveys, claiming that the surveys violated the individuals' fourth amendment rights to be free from unreasonable searches and seizures,⁴ and sought declaratory and injunctive relief. The district court ruled that the workers had no reasonable expectation of privacy in their work places and that the questioning did not constitute a fourth amendment seizure or detention.⁵ The court, therefore, entered judgment for the INS.⁶ The workers appealed to the United States Court of Appeals for the Ninth Circuit. The appeals court concluded that the entire work force was seized for the duration of the survey.⁷ The court

1. The INS uses factory surveys to apprehend illegal aliens in the interior of the country. During a factory survey, INS agents enter a factory pursuant to a warrant or the employer's consent and question workers as to their eligibility to be in the United States.

2. The surveys took place in two different garment factories. The INS obtained warrants in January and September of 1977, allowing agents to conduct surveys of Davis Pleating. The warrants were issued after the INS demonstrated that it had probable cause to believe that Davis Pleating employed a number of illegal aliens. No individual illegal alien was named in these warrants. The third survey was conducted at Mr. Pleat in October 1977, with the employer's consent. The workers received no advance notice of the surveys. Fifteen to 25 INS agents entered the factories. Several agents stationed themselves at the exits while the others proceeded systematically down the rows of workers, asking them questions about their citizenship. INS agents handcuffed and led away those workers suspected of being illegal aliens. The Davis Pleating surveys resulted in the arrest of 78 illegal aliens in the first survey and 39 in the second. Forty-five illegal aliens were arrested in the Mr. Pleat survey.

3. The district court opinion is unreported.

4. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

5. Petition for a Writ of Certiorari, at 47a, *cited in* Immigration & Naturalization Serv. v. Delgado, 104 S. Ct. 1758, 1761, 80 L. Ed. 2d 247, 253 (1984).

6. *Id.*

7. International Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624, 630 (9th Cir. 1982). The court of appeals reasoned that the obvious purpose of INS agents stationed at the exits was to create a captive work force. Furthermore, the court found the INS ques-

further ruled that the surveys violated the fourth amendment because the agents lacked reasonable suspicion that the workers questioned, and so detained, were aliens illegally in this country.⁸ The Supreme Court granted the INS petition for writ of certiorari because the court of appeals decision had serious implications for immigration law and conflicted with a decision reached by the Third Circuit.⁹ *Held, reversed:* Despite the stationing of agents at the exits, a factory survey is not a seizure of the entire work force, nor does the individual questioning of the employees in the detentive atmosphere of the survey result in a seizure. *Immigration & Naturalization Service v. Delgado*, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

I. ILLEGAL IMMIGRATION IN THE UNITED STATES

A. Overview of the Problem

Estimates of the illegal alien population in the United States vary greatly,¹⁰ with figures from two to twelve million.¹¹ Fleeing collapsed economic conditions in their own countries, illegal aliens are drawn to the United States by the promise of vast opportunity.¹² Undocumented aliens generally accept low-status jobs, which pay less than minimum wage and include occupational conditions inferior to those required by United States law.¹³ Fear of detection forces illegal immigrants to accept these conditions, however hazardous, without complaint.¹⁴

tioning tactics highly intrusive because of the large number of agents involved, the manner in which the agents methodically questioned the rows of workers, the agents' verbal announcement of their authority, and the element of surprise in the raid, which resulted in prolonged disruption of the work environment. *Id.* at 630-33.

8. *Id.* at 638. The court of appeals stressed the importance of the illegality element of this standard. An INS agent must have a particularized suspicion that the individual he is about to question is an illegal alien. The mere observation of alienage is not sufficient to justify intrusive questioning about citizenship. *Id.* at 6439-41.

9. The conflicting Third Circuit decision was *Babula v. Immigration & Naturalization Serv.*, 665 F.2d 293 (3d Cir. 1981). The court in *Babula* stated that individualized suspicion is not always a prerequisite to minimally intrusive questioning. The INS agents in *Babula*, the court concluded, were justified in questioning the workers based on suspicions arising from the "milieu" in which the workers were found. *Id.* at 296.

10. *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1436 n.12 (1983) [hereinafter cited as *Developments*]. Differing study methodologies cause the figures, which are based on scanty data, to vary. *Id.*

11. *Immigration & Naturalization Serv. v. Delgado*, 104 S. Ct. 1758, 1766, 80 L. Ed. 2d 247, 260 (1984). Recent Census Bureau statistics suggest that the number of illegal immigrants is less than previously thought. Census Bureau figures place the illegal alien population at between 3.5 and 6 million. CONG. RESEARCH SERV., LIBRARY OF CONG., 96TH CONG., 2D SESS., SELECTED READINGS ON U.S. IMMIGRATION POLICY AND THE LAW 9 (Comm. Print 1980) [hereinafter cited as SELECTED READINGS ON U.S. IMMIGRATION POLICY].

12. COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 36-37 (Comm. Print 1981) [hereinafter cited as U.S. IMMIGRATION POLICY]; *Developments*, *supra* note 10, at 1438; Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 U.C.L.A. L. REV. 615, 625-26 (1981).

13. Fogel, *Illegal Aliens: Economic Aspects and Public Policy Alternatives*, 15 SAN DIEGO L. REV. 63, 66 (1977); Goodpaster, *Illegal Immigration*, 1981 ARIZ. ST. L.J. 651, 676-77 (1981).

14. Goodpaster, *supra* note 13, at 677.

Economists, social scientists, and other commentators have debated vigorously the impact of illegal immigration on the economy.¹⁵ On one side, classical economists argue that the economic effect of illegal immigration is beneficial.¹⁶ Several studies have concluded that illegal aliens only minimally increase unemployment in the United States,¹⁷ while contributing to the economy in taxes and other expenditures.¹⁸ In addition, government-sponsored social programs, funded in part by taxes paid by illegal immigrants and by productivity gains from cheaper alien labor, ensure that unemployed citizens are compensated.¹⁹ Proponents of the opposing view, however, argue that each entering illegal alien necessarily displaces an American worker from an employment opportunity.²⁰ In rebuttal others

15. See *Developments, supra* note 10, at 1441-43 (discussing impact of illegal immigration from classical economic perspective and from instrumentalist model).

16. *Id.* at 1441-42.

17. U.S. IMMIGRATION POLICY, *supra* note 12, at 40-41; *Developments, supra* note 10, at 1442.

18. Goodpaster, *supra* note 13, at 692-93. Some economists believe that illegal aliens spend up to 70% of their earnings in the United States and thereby create employment. *Id.* One study by social scientists David North and Marion Houstoun found that a very high percentage of their sample of illegal immigrants made tax and health benefit payments, 77.3% had social security taxes withheld, and 73.2% paid federal income tax. *Id.* at 696. A 1980 Massachusetts Institute of Technology study of Mexican illegal aliens revealed that they all paid state and local taxes, two-thirds paid social security and federal income taxes, but only five percent received unemployment or welfare benefits. Note, *The Factory Raid: An Unconstitutional Act?*, 25 S. CAL. L. REV. 605, 609 n.25 (1983). A study conducted in San Diego County concluded that the illegal aliens in that county contributed \$49 million per year to federal and state income taxes and received from the city's budget \$2 million in health, welfare, and education benefits. COUNTY OF SAN DIEGO, A STUDY OF THE SOCIO-ECONOMIC IMPACT OF ILLEGAL ALIENS ON THE COUNTY OF SAN DIEGO xxi, 57 (1977). *But see* 127 CONG. REC. S6784-85 (daily ed. June 23, 1981) (statement of Sen. Huddleston arguing that illegal aliens are frequent users of unemployment insurance and welfare systems). Another study by David North in the Los Angeles area in the late 1970s found that illegal aliens made extensive use of the unemployment welfare system. The Los Angeles County unemployment office's practice of thoroughly screening all claims for possible illegal aliens, however, has decreased the amount of money paid to illegal immigrants. *Id.* See 130 CONG. REC. H5783 (daily ed. June 14, 1984) (statement of Rep. Daub). A study of illegal Dominican immigrants in New York City found that 29% received welfare. Another study in Los Angeles revealed that 18.5% of a group of undocumented women received welfare. In Illinois a survey of unemployment insurance applications found that 46 to 51% of the applicants were in this country illegally. *Id.*

19. Goodpaster, *supra* note 13, at 692-93.

20. 130 CONG. REC. H5537 (daily ed. June 11, 1984) (statement of Rep. Lundine). A 1979 government study estimated the displacement rate at 1.2 million. *Id.* See *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1984: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 98th Cong., 1st Sess. 689-90, 696 (1983) (statement of Alan C. Nelson, Commissioner of Immigration and Naturalization Service) [hereinafter cited as *House Hearings, Appropriations for 1984*]; U.S. IMMIGRATION POLICY, *supra* note 12, at 39-40. One INS apprehension tactic, Project Jobs, targeted businesses in nine cities and resulted in the INS apprehending more than 5,000 illegal aliens who earned an average wage of \$4.81 per hour. *Id.* Of those vacated jobs the INS estimates that about 73% were later filled by citizens and lawful aliens, indicating that the jobs held by illegal aliens were, in fact, desired by lawful workers. *Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Fiscal Year 1984: Hearings Before the Senate Comm. on Appropriations*, 98th Cong., 1st Sess. 433 (1983) (statement of Alan C. Nelson, Commissioner of INS) [hereinafter cited as *Senate Hearings, Appropriations 1984*]. See generally Goodpaster, *supra* note 13, at 692-95 (discussing both sides of labor displacement issue).

have suggested that illegal aliens generally take jobs that American workers do not want.²¹

The social impact of illegal immigration also generates differing opinions.²² Those favoring stronger laws against illegal immigration fear cultural nonassimilation²³ or the creation of a new minority poor dependent on government welfare programs.²⁴ Racism, inflamed by the rapidly increasing Latin American and Asian populations in the United States, may underlie these fears.²⁵ Such fears in the past, however, have proved to be of little merit.²⁶

B. Powers of the INS

The INS is entrusted with controlling the flow of illegal aliens to the United States. Its statutory authority derives from the Immigration and Nationality Act of 1952 (INA).²⁷ The INS carries out its duties at the border, near the border, and in the interior of the country.

Section 1357(a)(1) of the INA gives the INS the authority to interrogate any alien or person believed to be an alien in order to determine the individual's eligibility to enter or remain in the United States.²⁸ Interrogation without warrant may be conducted at the border or in the interior of the country.²⁹ Courts also have permitted INS agents to search, without warrant and without probable cause, an individual seeking entrance to the United States at the border or other designated point of entry.³⁰ The search without warrant is predicated on the belief that a person seeking the benefit of entering the United States impliedly consents to any requirements placed on the conferring of that benefit.³¹

21. *Immigration Reform and Control Act: Hearings on S. 529 Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 72-73 (1983) (statement of Henry J. Voss, President Cal. Farm Bureau Federation); U.S. IMMIGRATION POLICY, *supra* note 12, at 40. Mr. Voss estimates that 15% of the hired farm work force consists of illegal aliens because Americans, who have access to various social programs, are not willing to take seasonal jobs away from their place of residence. *Id.* at 73.

22. *Developments*, *supra* note 10, at 1443-44 (surveying various opinions on illegal aliens' effect on the nation's social fabric).

23. U.S. IMMIGRATION POLICY, *supra* note 12, at 41-42; *Developments*, *supra* note 10, at 1443; Comment, *INS Surveys of Business Establishments: Reasonable, Individualized Suspicion of Illegal Alienage*, 78 NW. U.L. REV. 632, 651 (1983).

24. Goodpaster, *supra* note 13, at 700. Because most illegal immigrants are relatively uneducated and speak little English, they are not likely to advance far in the job market. Many illegal aliens keep their children out of the educational system for fear of detection. A continuing flow of illegal aliens might eventually lead to the creation of more minority slums with the associated educational, criminal, and racial problems. *Id.*

25. Note, *supra* note 18, at 610-11; see *Developments*, *supra* note 10, at 1444.

26. *Developments*, *supra* note 10, at 1444.

27. 8 U.S.C. §§ 1101-1425 (1982).

28. 8 U.S.C. § 1357(a)(1) (1982).

29. *United States v. Brignoni-Ponce*, 422 U.S. 873, 877 (1975); see also *infra* notes 56-64 and accompanying text (discussion of *Brignoni-Ponce*).

30. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1978); 8 U.S.C. § 1357(c) (1982); Fragomen, *Searching for Illegal Aliens: The Immigration Service Encounters the Fourth Amendment*, 13 SAN DIEGO L. REV. 82, 97 (1975); see also *infra* notes 47-55 and accompanying text (discussion of *Almeida-Sanchez*).

31. Catz, *Fourth Amendment Limitations on Nonborder Searches for Illegal Aliens: The*

INS methods for apprehension of illegal immigrants near the border consist of permanent checkpoints and roving patrols.³² Permanent checkpoints are placed at intersections of important roads leading away from the border.³³ No warrant is necessary for the INS to conduct brief, routine stops at permanent checkpoints.³⁴ Roving patrols, as their name suggests, monitor a larger area and supplement the checkpoint system.³⁵ An officer on roving patrol may stop a vehicle when he has a reasonable suspicion that the vehicle contains illegal aliens.³⁶ A roving patrol must have probable cause, however, to board and search, without warrant, any vehicle³⁷ within a reasonable distance from the border.³⁸

The INS has recently increased its use of area control operations³⁹ in the interior of the country.⁴⁰ These operations have yielded significant results⁴¹ and account for the greatest percentage of nonborder apprehension.⁴² Area control operations allow the INS to target employers whose use of illegal aliens has the greatest potential economic impact on the surrounding area.⁴³

Immigration and Naturalization Service Meets the Constitution, 39 OHIO ST. L.J. 66, 73 (1978).

32. Note, *supra* note 18, at 615-16 (discussion of INS techniques).

33. *Id.* at 615 n.66.

34. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1975); *see also infra* notes 70-79 (discussion of *Martinez-Fuerte*).

35. Note, *supra* note 18, at 615 n.65.

36. *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 884 (1975).

37. *Id.* at 884; *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

38. A "reasonable distance" as used in 8 U.S.C. § 1357(a)(3) (1982) is 100 miles from the border. 8 C.F.R. § 287.1(a)(2) (1984).

39. *See Goodpaster, supra* note 13, at 688-89. The most common type of area control operation, a factory survey, typically begins with an anonymous tip that informs the INS of a factory employing illegal aliens. A group of 20 to 30 INS investigators enters the factory either by the employer's consent or by warrant. Once the exits are blocked, the agents move systematically through the factory, questioning the workers about their citizenship. Those workers who do not give credible responses or produce papers justifying their presence in the United States are arrested and removed from the factory. *Id.*; *see also* Brief for Respondents at 2-9, *Immigration & Naturalization Serv. v. Delgado*, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (full account of area control operation); *infra* note 94 (listing other types of area control operations).

40. *House Hearings, Appropriations for 1984, supra* note 20, at 696. In 1982 the INS shifted staff from casework to investigation so that 50% of INS investigative resources could be concentrated on area control. *Id.*

41. *Id.* Interior apprehensions increased 11.8% in 1982 as a result of the increased emphasis on area control. *Id.*

42. *Immigration & Naturalization Serv. v. Delgado*, 104 S. Ct. 1758, 1766 n.3, 80 L. Ed. 2d 247, 259 n.3 (1984) (Powell, J., concurring) (citing Brief for Petitioners at 3-4 n.3). INS records indicate that factory surveys in 1982 accounted for approximately 60% of all nonborder apprehensions of illegal aliens. 104 S. Ct. at 1766, 80 L. Ed. 2d at 259.

43. *Authorization/Oversight on the Immigration and Naturalization Service: Oversight Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 23 (1982) (statement of Alan C. Nelson, Commissioner, INS); Note, *supra* note 18, at 611. The INS selects factories suspected of hiring illegal aliens for high paying jobs that would be desirable to American citizens. *Id.* *But see id.* at 611-12. The outcome may not always be as intended. Many of the jobs made available by area controls were not filled by American citizens. In fact, three months after one operation 80% of the illegal aliens apprehended were back at work. *Id.*

C. *INS Enforcement and the Fourth Amendment*

Although the INS enjoys broad powers, the Supreme Court has demanded that INS activities remain within constitutional limitations.⁴⁴ The fourth amendment's guarantee against unreasonable searches and seizures,⁴⁵ in particular, has limited that INS's authority.⁴⁶ The Court's recent line of INS enforcement cases began with *Almeida-Sanchez v. United States*,⁴⁷ which, like the cases following it, dealt with border area operations. The majority⁴⁸ concluded that the roving patrol's search of the petitioner's car without a warrant or probable cause violated the petitioner's fourth amendment right to be free of unreasonable searches and seizures.⁴⁹ Justice Powell, in his concurring opinion, gave greater consideration to the law enforcement problems involved in policing the border area.⁵⁰ An area warrant procedure, Justice Powell suggested, could be used by INS roving patrols.⁵¹

The dissent⁵² agreed with Justice Powell that an area search warrant would satisfy the fourth amendment requirement.⁵³ The dissent disagreed, however, with Justice Powell and the majority's requirement of either a warrant or probable cause.⁵⁴ Thus, five members of the Court in *Almeida-Sanchez*, Justice Powell and the four dissenters, would have allowed roving patrols to stop vehicles and search for aliens under an area search warrant without a showing of probable cause.⁵⁵

The Court again examined roving patrol operations in *United States v. Brignoni-Ponce*.⁵⁶ The majority⁵⁷ concluded that officers on roving patrol

44. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); Comment, *supra* note 23, at 635.

45. See *supra* note 4 for text.

46. Catz, *supra* note 31, at 74.

47. 413 U.S. 266 (1973). In *Almeida-Sanchez* a roving patrol, with no search warrant and no probable cause, stopped a Mexican citizen holding a valid U.S. work permit 25 air miles north of the border. The officer searched the individual's car and uncovered a large quantity of illegally imported marijuana.

48. Justice Stewart delivered the opinion of the Court. Justices Douglas, Brennan, Marshall, and Powell joined. Justice Powell also filed a concurring opinion.

49. *Id.* at 273.

50. *Id.* at 275-76. Justice Powell recognized the virtual impracticability of patrolling thousands of miles of border. Many aliens cross on foot at places other than established checkpoints and are transported by automobiles to the interior of the country. Roving patrols, Justice Powell concluded, are the only effective means of apprehending such aliens. *Id.* at 276.

51. *Id.* at 283. Probable cause for obtaining an area search warrant could consist of the following: (1) the frequency with which illegal aliens are known or believed to be transported through a particular area; (2) the proximity of the area to the border; (3) the number and extensiveness of roads in the area; and (4) the extent to which the operation will interfere with the rights of innocent persons. *Id.* at 283-84.

52. Justice White authored the dissent in which Chief Justice Burger, Justice Blackmun, and Justice Rehnquist joined. *Id.* at 285.

53. *Id.* at 288.

54. *Id.* at 288-89.

55. Catz, *supra* note 31, at 79.

56. 422 U.S. 873 (1975). The defendant in *Brignoni-Ponce* was stopped by a roving patrol because the occupants of his car appeared to be of Mexican descent. Upon questioning the defendant, the patrol learned that the occupants of the car were illegal aliens. The

may briefly stop a vehicle and question its occupants upon reasonable suspicion that the vehicle contains aliens who are illegally in the country.⁵⁸ A reasonable suspicion standard falls below probable cause and requires that the officer have specific articulable facts and rational inferences on which to base his suspicion.⁵⁹ Mexican ancestry alone, the majority concluded, is not sufficient to warrant reasonable suspicion.⁶⁰ In *Brignoni-Ponce*, therefore, the majority, recognizing the important governmental interest in controlling illegal immigration, legitimized a modest intrusion based on facts constituting less than probable cause for arrest, although it continued the requirement of probable cause for more comprehensive searches.⁶¹ The concurring opinions of Chief Justice Burger and Justices Blackmun, White, and Rehnquist⁶² expressed great concern that the decision might hamper INS enforcement capabilities by its requirement of reasonable suspicion for even minimal detention.⁶³ Although concurring, Justice Douglas criticized the Court's use of a less than probable cause standard as an unjustifiable weakening of the fourth amendment.⁶⁴

The Court decided *United States v. Ortiz*⁶⁵ on the same day as *Brignoni-Ponce*. The majority⁶⁶ followed *Almeida-Sanchez* and held that at permanent checkpoints away from the border officers may not search vehicles in the absence of consent or probable cause.⁶⁷ The possibility of area war-

defendant was arrested and convicted of knowingly transporting illegal aliens into the United States. *Id.* at 874-75.

57. Justice Powell delivered the opinion of the Court, in which Justices Brennan, Stewart, Marshall, and Rehnquist joined.

58. *Id.* at 881-82.

59. *Id.* at 880. The Court justified the use of a less than probable cause standard because of the limited nature of the intrusion on the vehicle's occupants. The officers do not search the vehicle, but instead visually inspect only those parts of the vehicle that can be clearly seen from outside the vehicle. They normally detain the occupants for no more than a minute to answer one or two questions and occasionally to produce documents demonstrating the individuals' rights to be in the United States. *Id.*

60. *Id.* at 886.

61. *Id.* at 880-81. The Court concluded that "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.* at 881.

62. The concurring opinion of Chief Justice Burger was joined by Justice Blackmun. Justice Blackmun also joined the concurring opinion of Justice White. Additional concurrences were filed by Justices Rehnquist and Douglas.

63. *Id.* at 887, 899, 914. Chief Justice Burger attached a lengthy appendix to his concurring opinion reported in the companion case, *United States v. Ortiz*, 422 U.S. 891 (1975), detailing the problems of illegal immigration. *Id.* at 900-14. Justice White condemned the majority for "dismantling" the government's means of controlling illegal immigration. *Id.* at 915.

64. *Id.* at 888.

65. 422 U.S. 891 (1975). In *Ortiz* the respondent was stopped by the Border Patrol at a permanent checkpoint 62 air miles from the Mexican border for a routine immigration search. The search revealed three aliens concealed in the trunk. Respondent was convicted of knowingly transporting illegal aliens. *Id.* at 891-92.

66. The composition of the majority was the same in *Ortiz* as in *Brignoni-Ponce*. See *supra* note 57.

67. 422 U.S. at 896-97. Factors that can constitute probable cause include the number of persons in the vehicle, their appearance and behavior, their responses to the officers' ques-

rants for checkpoint searches was left open.⁶⁸ Justice Rehnquist, in his concurring opinion, stated that the Court's opinion applied only to full searches at permanent checkpoints and not to stops for the purpose of questioning the occupants about their citizenship.⁶⁹

The Court's decision in *United States v. Martinez-Fuerte*⁷⁰ enhanced rather than restricted INS enforcement capabilities.⁷¹ The majority⁷² balanced the government's interest against the intrusion on fourth amendment rights and concluded that the government's interest was dominant.⁷³ Although the brief stop of the petitioners by the INS at a permanent checkpoint constituted a seizure, the Court ruled that border patrol officers need not have a warrant⁷⁴ or any individualized suspicion about those persons they stop for brief questioning.⁷⁵ The majority allowed the officers to refer individuals to a secondary area based on Mexican ancestry alone.⁷⁶ The dissent labeled the Court's decision an "evisceration"⁷⁷ and a "defacement"⁷⁸ of fourth amendment protections and urged that the INS be forced to act on at least reasonable suspicion in making checkpoint stops.⁷⁹

As the law now stands, therefore, roving patrols must possess probable cause or a warrant to stop and search a vehicle,⁸⁰ but in stopping and briefly questioning the occupants of a vehicle, a reasonable suspicion of illegal activity is sufficient.⁸¹ Officers at a permanent checkpoint also must have probable cause or a warrant to stop and search a vehicle.⁸² They need not, however, have even a reasonable suspicion to stop individuals

tions, their ability to speak English, the type of vehicle, and signs that the vehicle is overloaded. *Id.* at 897.

68. *Id.* at 897 n.3.

69. *Id.* at 898.

70. 428 U.S. 543 (1976). The respondents in *Martinez-Fuerte* were stopped by the Border Patrol at a fixed checkpoint away from the border. The vehicles drove slowly through the checkpoint, and INS officers selected automobiles for referral to a secondary area, where the respondents' vehicles were stopped and the occupants questioned. Questioning of respondents and the occupants of their cars led to the discovery of illegal aliens. Respondents were convicted of knowingly transporting illegal aliens. *Id.* at 545-50.

71. See Catz, *supra* note 31, at 85.

72. Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White, Blackmun, Rehnquist, and Stevens joined.

73. 428 U.S. at 561-62. The Court found little interference with legitimate traffic as only a small percentage of cars were referred to the secondary area and actually stopped for questioning. The less intrusive nature of the checkpoint stops makes them more acceptable than roving patrols. *Id.* at 558-60.

74. *Id.* at 564-66.

75. *Id.* at 560-64.

76. *Id.* at 563. The Court found convincing government statistics showing that INS agents rely also on other factors. *Id.* at 563 n.16.

77. *Id.* at 567 (Brennan, J., dissenting).

78. *Id.* at 570.

79. *Id.* at 574.

80. See *supra* notes 47-55 and accompanying text (discussion of test set forth in *Almeida-Sanchez*).

81. See *supra* notes 56-64 and accompanying text (discussion of test set forth in *Brignoni-Ponce*).

82. See *supra* notes 65-69 and accompanying text (discussion of test set forth in *Ortiz*).

for brief questioning at the checkpoint.⁸³

Until recently the Supreme Court had offered no such guidance on INS area control practices, although lower courts had struggled with the fourth amendment issues involved in area control operations. In *Illinois Migrant Council v. Pilliod*⁸⁴ an Illinois district court found that the INS practice of stationing agents at factory exits during an area control operation resulted in a seizure of the individual workers under the fourth amendment.⁸⁵ The court held that reasonable suspicion of alienage does not justify seizure of an individual.⁸⁶ In following the Supreme Court's ruling in *Brignoni-Ponce*, the *Pilliod* court held that a brief detention for interrogation is authorized only if INS agents possess reasonable suspicion that the person to be seized is an alien in the country illegally.⁸⁷

In *Babula v. Immigration & Naturalization Service*,⁸⁸ however, the United States Court of Appeals for the Third Circuit upheld the INS practice of factory surveys.⁸⁹ The court recognized the INS statutory authority⁹⁰ to interrogate any alien or suspected alien concerning his right to be or remain in the United States.⁹¹ Citing the Supreme Court's language in *Martinez-Fuerte* indicating that individualized suspicion is not necessarily a prerequisite to a constitutional search and seizure,⁹² the court held that the reliable tip about the factory's employment of illegal aliens in addition to indicia that the factory employed such aliens justified a minimally intrusive interrogation by the INS.⁹³ The court did not decide whether the stationing of agents at the exits resulted in a seizure in violation of the fourth amendment.

II. IMMIGRATION & NATURALIZATION SERVICE V. DELGADO

In *Immigration & Naturalization Service v. Delgado* the Supreme Court

83. See *supra* notes 70-79 and accompanying text (discussion of test set forth in *Martinez-Fuerte*).

84. 531 F. Supp. 1011 (N.D. Ill. 1982). In *Pilliod* plaintiffs alleged that the INS, through its area control operations, had a systematic practice and policy of harrasing the plaintiff class, which consisted of persons of Mexican ancestry in the Northern District of Illinois. *Id.* at 1014.

85. *Id.* at 1018. The court concluded that the purpose of the agents stationed at the exits was to "control" the aliens during the operation. The agents at the exits were instructed to prevent those individuals suspected of being aliens from leaving. *Id.* The INS argued that the agents at the exits did not force the workers to remain. The INS also contended that the workers were not even aware of the agents' presence at the exits. *Id.* at 1018-19.

86. *Id.* at 1019.

87. *Id.* at 1016-17, 1019.

88. 665 F.2d 293 (3d Cir. 1981). *Babula* involved an anonymous tip by which the INS learned that a company employed illegal aliens. An agent was sent to the factory to determine whether an area control operation could be carried out. The agent reported that an operation would be feasible. The INS sent six agents to the factory, three of whom remained stationed at the exits. The agents questioned all the employees about their citizenship. Ten Polish aliens were arrested; six brought suit against the INS. *Id.* at 294-95.

89. *Id.* at 299.

90. 8 U.S.C. § 1357(a)(1) (1982).

91. 665 F.2d at 295.

92. *Id.* at 296 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976)).

93. 665 F.2d at 296.

finally intervened to clarify the constitutionality of the factory survey type of area control.⁹⁴ The Court held that the INS practice violated no fourth amendment rights.⁹⁵ Justice Rehnquist, writing for the majority,⁹⁶ stated that a seizure proscribed by the fourth amendment occurs only when an officer unreasonably restricts the liberty of an individual and not when the officer and individual have a mere consensual encounter.⁹⁷ The Court cited its recent plurality opinion in *Florida v. Royer*⁹⁸ as strongly implying that interrogation about an individual's identity and a request for identification are not, without other action, enough to constitute a prohibited seizure.⁹⁹ The fact that an officer fails to inform a person that he is free not to respond to police questioning, the Court contended, does not eliminate the consensual nature of any subsequent response.¹⁰⁰ The Court relied on the standard set forth in *United States v. Mendenhall*,¹⁰¹ ruling that questioning alone does not result in an unreasonable seizure unless a reasonable person would be so intimidated by the circumstances of the encounter that he would believe that he was not free to leave.¹⁰²

In considering what it viewed as the pivotal factor in the court of appeals decision in this case, the stationing of agents at the factory exits,¹⁰³ the Court concluded that no seizure of the entire work force occurred for two reasons. First, because the employees were at work, they already had restricted their freedom of movement by their voluntary obligations to their employers.¹⁰⁴ The Court found that the INS questioning did not further restrict the employees, who continued to move around the factories performing their jobs.¹⁰⁵ Second, the Court rejected the court of appeals' conclusion that the stationing of agents at the exits indicated an intention to prevent workers from leaving.¹⁰⁶ Instead, the Court concluded, the obvious purpose of positioning agents at the exits was to question anyone

94. Other area control operations focus on outdoor work sites, private homes, apartment buildings, airports, and train stations. *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1014 (N.D. Ill. 1982).

95. 104 S. Ct. at 1765, 80 L. Ed. 2d at 258.

96. Chief Justice Burger and Justices White, Blackmun, Stevens, and O'Connor joined the majority opinion.

97. 104 S. Ct. at 1762, 80 L. Ed. 2d at 254-55.

98. 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983).

99. 104 S. Ct. at 1762, 80 L. Ed. 2d at 255. The Court contrasted mere questioning of an individual with the situation in *Brown v. Texas*, 443 U.S. 47 (1979), wherein the Court held that fourth amendment seizure existed when two policemen physically detained an individual who refused to answer their questions although they had no reasonable basis for suspicion of misconduct. 104 S. Ct. at 1762, 80 L. Ed. 2d at 255.

100. *Id.* at 1762-63, 80 L. Ed. 2d at 255.

101. 446 U.S. 544, 554 (1980).

102. 104 S. Ct. at 1763, 80 L. Ed. 2d at 255.

103. *Id.*, 80 L. Ed. 2d at 256.

104. *Id.*

105. *Id.* The Court acknowledged that the surveys caused some disruption in the factories because, in part, of some workers' attempts to hide, but the Court focused instead on the fact that no one was prevented from moving around the work place. *Id.*

106. *Id.* The Court concluded that the purpose of the agents stationed at the doors was obvious to the workers inside. *Id.* *But see* Brief for Respondents at 4-5, 16-17 (describing disruption caused by stationing agents and recounting fears of workers).

who was leaving and, if necessary, to make arrests based on probable cause of illegal presence in the country.¹⁰⁷ The Court concluded that the stationing of agents at the factory doors did not constitute a seizure of the whole work force because the agents did not prevent workers from moving freely throughout the factory,¹⁰⁸ nor did the mere possibility that the workers would be questioned if they attempted to leave justify a reasonable fear among the workers of seizure or detention.¹⁰⁹

After concluding that the work force as a whole had not been seized, the Court addressed the additional issue of whether individual workers had been seized because they were questioned by agents. The Court stated:

[S]ince there was no seizure of the work forces by virtue of the method of conducting the factory surveys, the only way the issue of individual questioning could be presented would be if one of the named respondents had in fact been seized or detained. . . . [W]e conclude that none were.¹¹⁰

The majority concluded that the questioning of the respondents by the INS agents was nothing more than a brief encounter or classic consensual encounter, rather than a fourth amendment seizure.¹¹¹ Although the respondents described the disruptive psychological atmosphere surrounding the survey,¹¹² the Court only briefly addressed this testimony and concluded that from the beginning of the survey it was obvious that the INS agents were merely questioning people.¹¹³ Because the Court found no seizure or detention by the INS agents, it dismissed any consideration of the court of appeals' reasonable suspicion of illegal alienage standard.¹¹⁴

Justice Powell, in his concurring opinion, found that if a seizure had occurred, it was a reasonable one.¹¹⁵ Justice Powell reached this conclusion by following the reasoning of the Court in *Martinez-Fuerte*,¹¹⁶ balancing the government interest¹¹⁷ against the extent of intrusion on the individual.¹¹⁸ Justice Powell concluded that the significant government in-

107. 104 S. Ct. at 1763-64, 80 L. Ed. 2d at 256.

108. *Id.* at 1763, 80 L. Ed. 2d at 256.

109. *Id.* at 1764, 80 L. Ed. 2d at 257.

110. *Id.*

111. *Id.* at 1764-65, 80 L. Ed. 2d at 257-58.

112. The respondents argued that the psychological environment created by the factory survey made them fear that they were not free to leave. Respondents described the initial entry of the agents, who were wearing badges and carrying handcuffs, walkie-talkies, and police flashlights; the stationing of agents at the exits; and the cries of "la migra" (the immigration) from frightened workers. Brief for Respondents at 3-5, 18, 20.

113. 104 S. Ct. at 1765, 80 L. Ed. 2d at 258.

114. *Id.* at 1764, 80 L. Ed. 2d at 257.

115. *Id.* at 1765, 80 L. Ed. 2d at 258.

116. *See supra* notes 70-79 and accompanying text.

117. 104 S. Ct. at 1766, 80 L. Ed. 2d at 259-60. Justice Powell noted that the number of aliens illegally in this country is between three and six million and that factory surveys are a valuable enforcement technique, as is evident from the arrest through surveys of more than 20,000 aliens in one year in the Los Angeles district alone. *Id.*

118. *Id.* at 1766-67, 80 L. Ed. 2d at 260. Justice Powell stated that the intrusion on the employees was slight. The employees were allowed to continue their work during the survey, they were only asked a few questions, and they had a lesser expectation of privacy in their work place than in their residence. *Id.*

terest made the seizure a reasonable one, which as in *Martinez-Fuerte*, did not require an individualized suspicion.¹¹⁹

Justice Brennan, dissenting in part and concurring in part, was struck by a "studied air of unreality" in the majority's opinion.¹²⁰ Although he agreed with the majority's finding that the positioning of agents at the exits did not result in a continuous seizure of the entire work force,¹²¹ Justice Brennan vigorously refuted the majority's holding that no fourth amendment seizure of individual respondents occurred.¹²² Justice Brennan based his finding of a seizure on several factors. First, he stated that a seizure that does not amount to an arrest can occur¹²³ and that such a seizure can consist of a brief detention for questioning regarding one's identity.¹²⁴ Second, Justice Brennan argued that the test for determining whether a seizure has occurred, as announced in *United States v. Mendenhall*,¹²⁵ is to ask whether, given the surrounding circumstances, a reasonable person would have believed that he was not free to leave.¹²⁶ Applying this test, Justice Brennan concluded that although the respondents were not physically detained, the actions of the INS in carrying out the survey constituted a show of authority that would cause any reasonable person to believe that he was being detained.¹²⁷ Justice Brennan pointed to the respondents' testimony indicating that they were in fact intimidated by the agents' method of questioning and felt compelled to answer.¹²⁸

Justice Brennan criticized the majority's failure to find a seizure.¹²⁹ By deciding as it did, he contended, the majority was able to avoid confronting the reasonableness requirement of the fourth amendment, which

119. *Id.* at 1767, 80 L. Ed. 2d at 260.

120. *Id.* at 1767, 80 L. Ed. 2d at 261. Justice Marshall joined in Justice Brennan's opinion.

121. *Id.* at 1767, 80 L. Ed. 2d at 261. Justice Brennan found no seizure of the work force as a whole because the workers were free to move around the factory and continue working while the survey was being conducted. *Id.* at 1767 n.2, 80 L. Ed. 2d at 261 n.2.

122. *Id.* at 1767-70, 80 L. Ed. 2d 261-65.

123. *Id.* at 1768, 80 L. Ed. 2d at 262 (citing *Terry v. Ohio*, 392 U.S. 1, 16, 19 (1968) (stop and frisk is a fourth amendment seizure)); see also *Dunaway v. New York*, 442 U.S. 200, 207-10 (1978) (individual involuntarily taken to police station seized under fourth amendment even though seizure did not result in arrest).

124. 104 S. Ct. at 1768, 80 L. Ed. 2d at 262.

125. 446 U.S. 544, 554 (1980).

126. 104 S. Ct. at 1768-69, 80 L. Ed. 2d at 262-63. Justice Stewart in his *Mendenhall* plurality opinion indicated that circumstances in which a person might not feel free to leave could include the "threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." 446 U.S. at 554.

127. 104 S. Ct. at 1769, 80 L. Ed. 2d at 263-64. Justice Brennan enumerated the circumstances in *Delgado* that created the oppressive atmosphere. First, the respondents did not know in advance about the survey. The employees were taken by surprise when between 15 and 25 agents entered and systematically moved through the factory questioning workers. Second, those employees who, after questioning, were suspected of being illegal aliens were handcuffed and led to vans outside the factory. Third, INS agents guarded all the exits. Fourth, as the agents carried out their questioning they displayed badges and directed questions at individual workers. *Id.* at 1770, 80 L. Ed. 2d at 264.

128. *Id.* at 1770, 80 L. Ed. 2d at 264-65.

129. *Id.* at 1771, 80 L. Ed. 2d at 265.

in his view the factory surveys could not satisfy. The INS, Justice Brennan concluded, did not have particularized suspicion¹³⁰ warranting interference with the workers' security and privacy.¹³¹

Justice Brennan also disputed Justice Powell's finding of a reasonable seizure.¹³² The factory survey, Justice Brennan argued, is not analogous to the permanent checkpoint stop in *Martinez-Fuerte*.¹³³ Justice Brennan stressed that brief stops for questioning were permitted at fixed checkpoints in *Martinez-Fuerte* only because of the relatively small intrusion involved.¹³⁴ Justice Brennan also addressed Justice Powell's argument that a strong governmental interest justifies intrusion upon individual rights. While conceding that the problem of illegal immigration is significant, he argued that the Court has become so overwhelmed by the problem that it has too easily sacrificed fourth amendment freedoms.¹³⁵ The government, Justice Brennan contended, must assume much of the responsibility for its own failure to stem illegal immigration.¹³⁶ Justice Brennan emphasized his view that the solution to the illegal alien problem lies not with the Court's strengthening law enforcement procedures at the expense of individual rights, but with Congress's taking the initiative to remedy the weaknesses in the Immigration and Nationality Act.¹³⁷

III. CONCLUSION

In *Immigration & Naturalization Service v. Delgado* the Supreme Court held that factory surveys seized neither the work force nor the individual workers. The Court found that the agents stationed at the exits were there merely to question workers, that the workers had no reasonable expectation of privacy in their workplace, and that the questioning of workers by INS agents was a consensual encounter. Justice Powell in concurrence stated that although the INS factory survey may have seized the work force and the workers individually, the seizure was reasonable and, there-

130. *Id.* The Court adopted the particularized suspicion requirement in *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81 (1975). See *supra* note 61 and accompanying text.

131. 104 S. Ct. at 1771, 80 L. Ed. 2d at 265-66.

132. *Id.* at 1765, 80 L. Ed. 2d at 259.

133. *Id.* at 1773-74, 80 L. Ed. 2d at 268-70. Justice Brennan pointed out several distinctions between factory surveys and permanent checkpoints. First, permanent checkpoints are known to motorists in advance; the factory surveys are a surprise to unsuspecting workers. Second, greater unchecked discretion is involved in a factory survey, in which the agents go down rows of workers deciding whom to question, than at a permanent checkpoint, where all motorists are stopped. Third, workers do have an expectation of some degree of privacy in their work community. Finally, workers are not likely to expect factory surveys because acceptance of the practice has no historical precedent. *Id.* at 1773-74, 80 L. Ed. 2d at 269-70.

134. *Id.* at 1773, 80 L. Ed. 2d at 268-69.

135. *Id.* at 1775, 80 L. Ed. 2d at 270.

136. *Id.*, 80 L. Ed. 2d at 271.

137. *Id.* at 1775-76, 80 L. Ed. 2d at 270-72. Justice Brennan blamed the government for its failure to commit adequate resources to patrol the border. He also criticized the Immigration and Nationality Act for allowing American businesses to employ illegal aliens without threat of fines or sanctions. *Id.* Others have commented that much of the blame for illegal immigration lies with the INS's lack of resources and personnel. 130 CONG. REC. H5582 (daily ed. June 11, 1984) (statement of Rep. Shumway).

fore, the agents needed no individualized suspicion of illegal alienage before questioning workers. The dissent concluded that the individual workers were seized by INS methods that engendered fear in the workers and compelled them to answer the agents' questions. Whether the Court will extend its reasoning in *Delgado* to permit the INS to stage area control operations in more private areas, such as dormitories housing factory workers, is yet to be answered.

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