

LIBRARY
PREME COURT, U. S.

RECEIVED
SUPREME COURT, U. S.
MARSHAL'S OFFICE

LIBRARY
SUPREME COURT, U. S.

In the
Supreme Court of the United States

CONRADO ALMEIDA-SANCHEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

No. 71-6278

Washington, D. C.
March 28, 1973

Pages 1 thru 50

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - X
In the Matter of: :
CONRADO ALMEIDA-SANCHEZ, :
Petitioner, :
v. : No. 71-6278
UNITED STATES, :
Respondent. :
- - - - - X

Wednesday, March 28, 1973

The above-entitled matter came on for oral argument
at 11:30 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JOHN J. CLEARY, ESQ., Fifth Avenue Financial Centre,
2550 Fifth Avenue, Suite 809, San Diego, Calif.,
92103; On behalf of the Petitioner.

PHILIP A. LACOVARA, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D. C.; 20530;
On behalf of the Respondent.

ORAL ARGUMENT OF:PAGE

John J. Cleary, Esq.,
On behalf of the Petitioner

3

-- Rebuttal --

44

Philip A. Lacovara, Esq.,
On behalf of the Respondent.

17

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 71-6278, Almeida-Sanchez against the United States.

Mr. Cleary.

ORAL ARGUMENT OF JOHN J. CLEARY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CLEARY: Mr. Chief Justice, and may it please the Court:

The issue in this case concerns the application of the Fourth Amendment to interior searches.

More specifically, the petitioner contends that the nature and extent of this search permitted by Immigration regulation is in conflict with the Fourth Amendment, the Carroll decision and the litany of precedent following that decision.

Basically, can the Government authorize a regulation that permits a search of an automobile on a highway without a warrant, and more specifically, without probable cause?

That is the issue.

Q Does the issue invoke necessarily the constitutional validity of the statute?

MR. CLEARY: No, Your Honor, I think that this Court under its general mandate, if it could construe the statute so as to find it constitutional, would do so.

However, I think the regulation would fall.

The question is what is reasonable distance. And I think the Court would have to make it eminently clear what reasonable distance is to adjudicate this particular issue.

Q Would we fix that, Mr. Cleary, in terms of 37½ miles, or would we say a reasonable distance in the context of the geographical area in which it occurred? Which way would we phrase that?

MR. CLEARY: Your Honor is really faced with a tough decision in that area and I would suggest that in reviewing the Glazu decision, where it was a pier search, Judge Browning in his dissent in this case called it a substantial equivalent.

I would, if the Court would permit, suggest a decision that has a judicial import and not a legislative one so as to try to quantify it.

That decision -- after reading the decisions in this case and many others, I would suggest would be that distance necessary for the customs to make the first practical contact with the entrant after crossing the border.

Now, with that definition, you can apply it so as to take care of the situation where the man flies from Acapulco to Chicago, or the man is in the immediate proximity of the area and he outruns the border inspector.

But at the other end of the scale, which I would contend that this continuous surveillance technique, and as modified in the Alexander case, called a substantial continuous

surveillance, because you can have some interruption, my suggested rule would be a one-shot rule, meaning that if the law enforcement officers allow the person to pass through customs and he clears it, then any search thereafter must be based upon probable cause.

If the Government, having reliable informants, and having, say, corroboration under Draper or the other decisions of this Court, will then contend that they can arrest the person once into the interior if further information has been corroborated, would have probable cause and wouldn't need the subterfuge of a border search.

So, I would suggest to the Court that a definition of border search is possible, to quantify it, I think, is next to impossible because I could be searched all right now under the existing regulation if I got into an automobile and were to drive to National Airport on the ground that I might be from a country, say of Ireland or some other basis, and they were looking for other Irish people in the vehicle.

Q Had your client passed through Customs here, Mr. Almeida-Sanchez?

MR. CLEARY: There was some question there, Your Honor -- in that one Mr. Justice Rehnquist, because the first statement was on being inquired of it, he said, "I picked up the car in Calexico," which is in the interior of the United States, whereas another statement of the Customs man when he stopped him

said, "I came from Mexicali," could have meant he was born in Mexicali, and, of course, as his Immigration card was marked indicated that he did have some residence in Mexicali, but there is no evidence, I would contend in this record, of a border entry.

And, again, the point it we have to look a venitio at the stop on the highway. That officer did not know whether the man had cleared the border and made the stop. This was just a random sampling, using his own rule of thumb, whatever discretion, whim, caprice, he had in stopping an automobile.

Q Your statement of the rule, I thought, was -- had as a part of the rule that when a man has cleared Customs then there were to be certain limits -- probable cause limits. And I was wondering how that rule would apply to this particular case.

MR. CLEARY: In this case, since there was no border entry observed, the only way that vehicle could be stopped on the highway, consistent with the Carroll decision, is upon probable cause.

Q You say the burden of proof then is on the Government to show that he had not come through Customs, rather than the burden of proof on him to show that he did?

MR. CLEARY: I think the burden of proof would be on the Government, Mr. Justice Rehnquist, if they were seeking, one, an exemption of the warrant requirement, and two, an

exemption of the probable cause requirement. I think that would be eminently fair.

Q If he didn't come through Customs, then wouldn't his strong position be that he is just a local fellow who was out for a ride and he had never been to Mexico in his life?

MR. CLEARY: Well, Your Honor, that would possibly be his contention but the more important issue is the stopping of the vehicle to make this type of search.

What is not before the Court right now is an interstitial area known as the founded suspicion situation, where a vehicle might be briefly detained on the highway so that the officer can make some initial questions or check of the man. That's not an issue here.

And if I could point out two other serious aspects of this case. The Government in its total candor, which has always been the position, has cited to you not only the rule that permits up to 100 air miles, but 287.1 S v points out that the Immigration director can go beyond the 100 mile limit if he so desires. So that the 100 mile is not a stop.

And the second point --

Q Well, that certainly, I think, you already conceded would take care of the situation where an airplane flies non-stop from London to St. Louis.

MR. CLEARY: Yes, Your Honor, in the sense of not permitting a search, though, of this random search as they are

now interpreting it.

Q Well v has all sorts of steaming safeguards, doesn't it? It's got the district director has to forward a complete report with respect to the matter to the commissioner and justify anything more than 100 miles.

MR. CLEARY: If I can point out another serious constitutional defect in the regulation, is that this Court in Coolidge v. New Hampshire struck down an attorney general acting with another hat as justice of the peace, issuing out his own search warrant.

Does it not seem anomalous to this Court that here we have the Attorney General defining what is reasonable distance, or what is the exempted area of the Fourth Amendment.

And so, for the Executive to take that type of role in cutting down a Fourth Amendment application, and, as I point out to the Court, the Fourth Amendment does not have, first of all, an exception in it for the border.

But this Court, in the Carroll case, held that as the Fourth Amendment will be interpreted at the time of its adoption, certainly border searches are proper, but if I were counsel for the establishment in 1776 in this country and was thinking of ways in which to draft legislation or rules to authorize a writ of assistance, I wouldn't do a better job than what we have right here in this regulation.

And I would suggest to the Court that it is not the

authority of the Executive to so limit, define, contract, the Fourth Amendment. It applies throughout the United States and I think it is the function of this Court to uphold it.

Q Does not the regulation by its terms apply to border crossers?

MR. CLEARY: No, Your Honor, it applies to you can search any vehicle, meaning anyone's vehicle, Your Honor's vehicle could be down the highway and technically under this regulation you could be stopped and not only you questioned, but your vehicle searched, and the trunk opened up. And in the case we have in point, to show you how far they have gone, under the seat, and there are even Ninth Circuit cases where they have looked in paper bags for aliens and the court held that, of course, that was not a proper place to look for aliens, or in four-inch crevices and in other places. But it shows the potential for abuse in such searches.

I would further point out, and I would like to cite to the Court an additional authority, a Ninth Circuit opinion written by Judge Hoffstedler. It is U.S. v. Mallides, M-a-l-l-i-d-e-s, its slip opinion only, 721898, and it was decided on the 22nd of January. And there, six Mexican-appearing individuals driving down a highway in a Chrysler automobile stared straight ahead as a patrol car passed them. They were stopped and they were interrogated, and the court there reviewed that this was, of course, an improper stop.

And the reason I raise this is that such a regulation, or its implementation, can be clearly discriminatory in its application. That is to say, even the Government's brief at page 24 in the footnote in the last line points out that these stops on a random sampling are made on apparent nationality.

Well, I don't know how one can physically observe one's nationality other than to use certain racial or color characteristics.

Q How else would you do it at the border between Mexico and the United States, though?

MR. CLEARY: Your Honor, at that border between Mexico and the United States, there are a great deal of Mexican-American people. There are a lot of people here legally.

I think that the stop for aliens -- and that's a reasonable alternative in this case -- is to apply the protective and preventative measures at the border.

If you look at our border, there is just holes in the fence all the way along. The Government contends there is 2,000 miles of border. There is 4,000 on Canada. And they've got 1400 out of their 1700 border patrol officers down on the Mexican border.

The question is -- and I think appropriately -- they are stopped at the border. And if we don't have, so to speak, a preventative policing of the border then we should not allow the pious pragmatism of the Government to lay back and claim

inherent exceptions to the Fourth Amendment to stop all vehicles.

Q Is there any estimate of how many people it would take to cover that 2,083 mile border, the kind of mechanism you are suggesting?

MR. CLEARY: I have made suggestions, Your Honor, to our U.S. Attorney. In fact, one of the suggestions I made was that we are having how many of our Armed Forces returning from Vietnam, and one of the suggestions I had is that, properly be armed and brought into an auxiliary capacity, could be an excellent device to act as a constabulary, something every other country in the world has but our own.

And, in any event, I do not see the advantages of place in this. Now, the essential question is, why should we even have a border patrol at all. I mean that's a very serious moral question. And I can't answer that. I am only in the legal framework now. But if you are asking for ways in which to supply that manpower, I would suggest, notwithstanding the fact I might not be philosophically in line with that type of policing, I would say that that resource would be available.

I further would point out that one of the other problems in these types of searches is, we are not dealing with a minor intrusion. We are not dealing with a licensing requirement. We are dealing with a serious look for evidence, evidence of a crime.

The Government has cited the See, Camara, Colonnade

and Biswell decisions.

I would suggest to the Court that those are readily distinguishable.

Q Would you give me the spelling of Mallides, please, and the date again, January what?

MR. CLEARY: January 22nd, Your Honor. It is M-a-l-l-i-d-e-s. And if the Court would like an analysis of border searches in a recent opinion by Judge Dunaway, I would cite U.S. v. Petersen, P-e-t-e-r-s-e-n. That's 72-2123, and that was decided 18th of January and is also in a slip opinion.

In this case, there was not a momentary detention, and the possibility for a subterfuge for something other than just an alien check, as in this case, is just paramount.

I would point out that in dealing with the Camara and See cases, we had situations where a warrant was required. It was held not only was a man's residence protected to a certain degree, even though the probable cause requirement could be dropped, but also a business.

In the Colonnade and Biswell cases, I would tender to the Court four basic distinctions. First, the group involved in that area is a self-defined target group, that is to say, men who have chosen their particular occupation, firearms or the liquor business. Two, that in this business venture, there is not the justifiable expectation of privacy one would expect in an automobile. And when the statute and regulation here says

vehicle, that would include also van. It would include camper, which is kind of like a quasi-home and a mobile home, which might be a person's only home on the highway.

Second of all, I would indicate that the searches in Colonnade and Biswell were of business establishments during daylight hours.

In this case, it was a shortly after midnight stop on a highway. It's very personal in nature when you start to go through a man's vehicle, which this Court with Justice Jackson, in Brinegar, has defined as one of the effects, the automobile itself that he was driving on a highway.

I would daresay that there are reasonable alternatives to the rule that is posed here.

The first one is greater registration requirements. There is now a requirement that aliens register in January. I would suggest that one, on employers -- if registration was required by employers, it would be a great way to alleviate the burden of the illegal aliens in this country.

Sometimes we don't consider cause and effect. Why are these aliens here? And a little application of common sense logic would indicate that if we had some type of registration or kind of control in that area, we might alleviate some of the problems.

Second one, on welfare.

Third, I would suggest even licensing activities.

One of the best detectives for aliens in our area happens to be the California Department of Motor Vehicles, because people come in and don't have this evidence and it is determined that they are here illegally.

Q Mr. Cleary, as long as you've got into these practical things, you probably, since you live down there, recall that, at one point, they tried making a search of every car coming across the border and provoked, as you will recall, an international incident. Mexico wouldn't stand for it and a great many other people wouldn't.

There are practical difficulties that are hard to cross over, aren't there?

MR. CLEARY: Yes, Your Honor, and I am not trying to indicate that. I am saying that, given the balancing of the interests here, that at the border when Operation Intercept was in operation on Customs it backed up things a long ways.

I might add to the Court that they've been substantially improved at the Tiajuana border they have a very expeditious way of processing. However, I think the answer lies in applying the border search at the border.

And, further, on the doctrine of pragmatism, I would suggest to the Court its own opinion in United States v. U.S. District Court. In that case, this Court, where the Government contended a very strong issue, national security, this Court not only, of course, required the probable cause for wire tapping,

but even went further and said, "We are not going to allow you to use that pragmatic approach to excuse even the warrant requirement."

And all we are asking for here is once a vehicle is in the interior and it is on the highways, should not the Government be required to have at least probable cause?

Some of the other reasons why this Court should be concerned with this particular rule because of the dichotomy that exists as between contraband and aliens.

On one hand, the introduction of this noxious control substance, be it marijuana, heroin or any of the other narcotics, is a national interest, a super concern, in fact, in my humble opinion, far more important than the question of a man from another country seeking a better way of life in our country, and that under the application of the law as it now stands there must be probable cause once the vehicle clears the border area or the immediate border area.

And, as Judge Browning points out, in his dissent, this strange dichotomy -- and I might point out to the Court that the statute used here is not as liberal as the Customs statutes which are 19-482 and 19-1581. They are far more liberal. Yet the Circuit and other Circuits have held to allow those statutes to operate without probable cause would fly in the face of the Fourth Amendment. But for aliens, we make an exception.

I feel that that's not a fair balancing of the issue.

Second, I would point out that we can sometimes, in our Federal system, learn from the States.

Chief Justice Roger Trainer, California Supreme Court, a well known national jurist familiar with criminal law, wrote well on this decision when dealing with sheriffs who tried to justify a border search for a vehicle. In fact, they might have had something that might have almost amounted to founded suspicion, when the man had a dented fender. And in People v. Gale, cited here in the Government's brief, the court held that such a search would be intolerable and took the Carroll decision of this Court to find by State officers couldn't do it.

So, on one hand, we have State officers who can't conduct such searches, but on the other hand we have Federal officers with this unlimited power.

Q Well, but isn't that a consequence of the fact that the Federal Government has the explicit control of the borders in the example you give?

MR. CLEARY: Yes, Your Honor --

Q The Government can't permit each one of the border States to have its own customs control, could they?

MR. CLEARY: No, sir, that is correct. I only contend that a border search requires a border entry. And in this case a border entry was not established, and also the type of search conducted here on the highways would apply anywhere in the United States when it almost covered the majority of the existing

population in these United States.

And, although the Government does point out that it would not exercise that power to conduct searches, say, in Times Square, New York City, the Fourth Amendment does not rely upon the good will of the Executive. It is an absolute bar, and that if there was some type of nexus shown with the border prior to the stop, a different situation might exist.

And, I might also point out to the Court we are not dealing with the founded suspicion situation. We are not dealing with the Terry v. Ohio situation or Adams v. Williams situation where there was a stop and a protective frisk for the officer involved, which is certainly an eminently reasonable type of situation.

With the Court's permission, I would like to reserve time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cleary.

Mr. Lacovara.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LACOVARA: Mr. Chief Justice, and may it please the Court:

The case before the Court presents some very important Fourth Amendment issues as counsel for the Petitioner has just brought out, but as some of the questions from the bench indicate there are important practical issues at stake here too.

And I think it is important for the Court to keep both sets, theoretical and practical, of these issues carefully in mind in tending to the arguments and in resolving the dispute between the parties.

First of all, it is important, I think, to give a little background on what the facts of this particular case are.

The case -- the search and seizure issue -- arose originally on stipulated facts, on a motion to suppress, and it was stipulated that two border patrol agents, members of the uniformed service of the Immigration and Naturalization Service, with the responsibility for controlling illegal entry of aliens into the United States, were conducting a roving patrol on a State highway, Highway 78 in the southeastern part of California.

In order to clarify the stipulated facts and to give the Court some further sense of the topography, we have included in our brief a map of the area involved to indicate the inter-relationship of the points involved.

And if I may respectfully direct the Court's attention to the map which we had the Army Map Service prepare, rather quickly, I confess, so that it would be compact and yet would focus on the important areas in question.

Q This is for illustrative purposes, I take it, Mr. Lacovara.

MR. LACOVARA: Yes, sir.

I would suggest that, if necessary, this would be a

subject of judicial notice, since these are indisputable geographical features.

But we are just trying to clarify what the stipulated facts are. The stipulation was that Highway 78 on which this stop took place just south of Glamis, California, is about the only north-south highway in Southern California leading away from the Mexican border that does not have an established checkpoint on it, and for that reason it is frequently patrolled by the Border Patrol.

Well, Highway 78, of course, as an even numbered highway, generally runs east and west, and we have included this map to show that the portion of the highway involved here where it runs near the Mexican border, although it never touches the border, runs generally northeasterly.

Q Doesn't California number the highway? It is not a U.S. number, is it?

MR. LACOVARA: Yes, sir, but I believe the California system is the same as the general Federal system.

In any event, down in the lower left-hand corner, the case begins, according to the stipulated facts. That's the border crossing point at Calexico, California, the sister city of Mexicali, Mexico, the point from which petitioner conceded he, at least, began his journey. He said that he picked up the automobile that was stopped and searched across the border in Calexico. He said he was driving up to Blythe, California, which

is in the extreme right -- top right-hand corner of the map; the little yellow area is the town of Blythe.

The only road that leads through this approximately 120 mile drive, across mountains and generally desolate desert, is Highway 78, and, as the Court can see, Glamis is circled almost on the center of the map. Although it is shown as a town, the Atlas -- this is not in the record but, I believe, also might be a subject of official notice -- the official Atlas lists the population of Glamis at somewhere between 10 and 100 people.

But, the point that I am trying to suggest is that this is a desolate area. This was conceded at the trial. At the trial on the merits, the border patrol agents testified, as did petitioner, and it was brought out that this was desert country, the highway is partially unpaved and the stop took place sometime after midnight --

Q And where on the road was it, west of Glamis?

MR. LACOVARA: Just south. So that would be right -- as I interpret the record -- that would be just before he arrived at Glamis.

Q More west than south on the map.

MR. LACOVARA: Yes, but the testimony at the trial was south and that would be consistent, Your Honor, with the idea that he was driving generally from the border area north to Blythe. So, if you look at the map --

Q So, from Calexico, you'd come up 99 up to Brawley Muni, and there get on Highway 78 and start east and then head northeast.

MR. LACOVARA: Yes, sir.

The additional facts in the case, apart from the fact that this is a rather desolate area, according to the stipulation, was that this is a road that is known by border patrol agents to be used by alien smugglers. It was so agreed, and for that reason it is frequently subjected to roving patrols. The volume of traffic on the road is such that it does not -- it is not practical to maintain a permanent checkpoint for aliens trying to enter the interior.

In our brief, we have suggested -- again, this is outside the record -- some statistics showing the actual experience on this road and they are included in a footnote in our brief.

The agents decided to stop this car acting pursuant to the statutory power that Congress conferred in 1946, to stop vehicles and to search them for aliens. And I have to emphasize that this is not a Customs search, and all the Courts of Appeals that have reviewed this issue have distinguished searches for contraband from searches for aliens, as has Congress. So we are talking about a distinction made not by the Attorney General, but by Congress.

The statute enacted in 1946 authorized a search for

aliens within a reasonable distance of the border. The regulation promulgated in 1952, which is printed in our brief, fixes 100 miles as the outside limit for a reasonable distance, except as Mr. Justice Stewart and counsel agree were airport entries in the interior, for example.

Q Could that be that it didn't take much looking to find a person as it would to find a small package?

MR. LACOVARA: Well, we suggested, Mr. Justice, that that's one of the reasons why when you get to the reasonableness balance, the extent of the intrusion that's involved here is much less than it would be if Congress had done the same thing with contraband.

Q I mean once you look in a car and you don't see any other person, should you then turn it loose?

MR. LACOVARA: That's what the border patrol agents must do. All they can do, under their statutory power, is to examine the car for aliens.

And we have cited the statistics in discussing the searches at checkpoints to show that approximately 40% -- excuse me, two million, 20% of the 10 million cars that pass through checkpoints are stopped for interrogation, that is, a request to the driver and the passengers as to whether they are aliens or American nationals.

Only about 20% of the number of cars stopped at checkpoints, about 400,000, is subjected to any search or

inspection, and that is only the trunk area.

Q When he stops you, does he say, "I am searching for an alien, or I am searching for dope"?

MR. LACOVARA: Frequently, he doesn't explain the object of his search.

Q He just says, "I am searching."

MR. LACOVARA: That's right. If he goes beyond looking into areas where aliens, as a practical matter, can be hidden, and have been hidden. We've cited cases, not just speculation, but cases in which aliens have been found hiding under the hoods of cars. We've cited cases in which -- well, in this case --

Q Was it air conditioned?

MR. LACOVARA: Mr. Justice, one of the reasons why the border patrol tries to do this is because the conditions under which aliens are smuggled into the country are beastal. Some of them are smothered in some of the vehicles that they are packed into.

Q Isn't it true that one of the Mexicans, a very small sized person, under the hood, was almost dead when they opened the hood and let him out?

MR. LACOVARA: This happens. There was a recent seizure of a fuel oil truck that was two-thirds loaded with fuel oil and a central compartment had been made and there were 22 Mexican aliens crammed in there and they were standing knee-

deep in flammable oil when the border patrol finally detected them.

These are some of the practical aspects --

Q But merely looking in the car --

MR. LACOVARA: We also have stipulated facts here.

The agreement, and it was later testified to at trial by the border patrol agents, that they had been advised by intelligence bulletins from the border patrol that this particular kind of smuggling technique was being used, that is the rear seats springs of the car were being removed and aliens, perhaps two aliens, could sit between the seat frame and the cushion.

Now, it is not in the stipulated facts, but it was testified to at trial before the suppression motion was renewed and again denied, that when the agents stopped this car they looked in the trunk first, and it was only, if I may --

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

(Whereupon, at 12:00 o'clock, noon, oral argument was recessed to resume at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Lacovara, you may continue.

MR. LACOVARA: Thank you, Mr. Chief Justice.

I was in the process of describing what actually occurred in this case, and had reached the point of describing the stop of the vehicle that petitioner was driving, a car which he said did not belong to him and which he was simply driving up to Blythe, California, to drop off, as a favor to some man he had met in a bar in Mexicali, Mexico.

But the agents, as is customary in inspecting vehicles for aliens, looked first in the trunk of the automobile, which would, of course, be the natural place where aliens are discovered.

Officer Shaw, of the Border Patrol, testified at the trial that when he looked in the trunk he did not see any aliens or any other items, but saw that the plate over the back springs of the car which, of course, was visible from the trunk area, the dividing material between the rear seat and the trunk, was unusual, it was not the standard kind of backing. He said it looked to him like cardboard or some other kind of light board, and he thought that that might indicate that this rear seat had actually been altered, and relying, he testified, on the intelligence bulletins from the Border Patrol, he entered the

cabin of the automobile, removed the rear seat cushion and discovered marijuana.

The petitioner was then placed under arrest and a further search of the car turned up 73 kilobricks of marijuana, 161 pounds.

The Government's position in this case on the legal questions, is that under several decisions of this Court, searches can be conducted as reasonable within meaning of the Fourth Amendment, even though there may not be probable cause to suspect that the object of the search is involved in illegal activity and even if there is no warrant specifically approving that search in advance.

We have relied on several interrelated series of decisions in our brief. We start with the proposition that the basic test under the Fourth Amendment is reasonableness, that generally under the Warrant Clause this implies the two qualifications must be met in order for a search to be reasonable, that is, that there must be probable cause for the search and that probable cause must be adjudicated in advance by a magistrate issuing a warrant.

This Court has held in numbers of cases that neither of those requirements is absolute. We rely primarily on the administrative inspection line of decisions, Camara v. the San Francisco Municipal Court and See v. the City of Seattle, in which this Court specifically upheld the reasonableness of an

area inspection program, requiring access to private homes as well as to private businesses, even without any reason to suspect, much less any probable cause to believe, that a violation was taking place within the particular home or business.

Q The Court in those cases did require that a, quote, warrant, unquote, be secured.

MR. LACOVARA: Yes. With the explicit caveat, Mr. Justice Stewart, that the warrant was being required in accordance with the general presumption that warrants are necessary, unless there are exigent circumstances excusing it.

Mr. Justice White's opinion for the Court in that case pointed out that the object of the traditional inspection under a building or fire code is to detect a rather fixed violation which can't be quickly remedied in a structure which, of course, is not moveable.

The opinion specifically leaves open the conduct of such area inspections even without warrant if they are reasonable under those circumstances, and that exception was taken in the other line of cases that we relied on, Colonnade Catering Corporation and Biswell, in which the Court specifically held that without even suspicion and without a warrant an administrative inspection to enforce regulatory law was valid.

Q I submit that the difference between Colonnade and this case is that there is nothing in this record to show that this man is in the business of hauling illegal aliens.

MR. LACOVARA: That's right, and in -- that's clearly true. We have conceded that these are not licensed activities that we are talking about. But, by the same token, people who own apartments, as Mr. Camara did in Camara v. Municipal Court, are not in the business of living in apartments, but the Court, Mr. Justice, specifically left open the possibility that going through the balancing test, which is at the core of the reasonableness standard of the Fourth Amendment, that it might be reasonable to insist on inspecting his apartment, even though he is not licensed, without a warrant.

Q Yes, but we suspect that this man had an alien.

MR. LACOVARA: No, it was conceded at trial that there was no particular reason to suspect that this car was carrying an alien.

Q Would they stop my car if I was driving through there?

MR. LACOVARA: In that area? Yes, sir.

What we are saying is the focus here as in --

Q Could you stop the President's car?

MR. LACOVARA: Well, if the car were marked as the President's car, there would be --

Q If it wasn't, you could stop it?

MR. LACOVARA: Yes, sir.

Q Nobody is protected.

MR. LACOVARA: The position that we are taking is that the object -- the reasonableness inquiry in this case is the

reasonableness of the stopping of a car under all of the circumstances. Those circumstances include the size of the vehicle -- obviously a motorcycle could not be searched for aliens -- the location of the stop. Is it on a highway which has a permanent checkpoint? Has the car already been stopped? Is it an area that is known to be used by alien smugglers? Is it fairly close to the border?

Q You mean some circumstances could be held to be unreasonable within 100 miles?

MR. LACOVARA: Yes, sir. That's the other thing that I wanted to emphasize. We have explicitly disclaimed in our brief any contention that the mere fact that the search takes place within 100 miles of the border --

Q So the regulation, on its face, may not be valid in all circumstances?

MR. LACOVARA: Well, I would say it is valid on its face because it talks about reasonable distances, and that's a constitutional standard.

Q But then it is defined.

MR. LACOVARA: Up to 100 miles.

Q Didn't you concede that in San Antonio this would not warrant?

MR. LACOVARA: Yes.

Q And how far is San Antonio from the border?

MR. LACOVARA: I can't say exactly.

Q Is part of the circumstance that would make a search within 100 miles of the border reasonable as compared with some unreasonable 100-mile searches would be whether there was some reason to suspect or probable cause to believe that the car had just come from the border?

MR. LACOVARA: No, sir. Again, this was discussed in the colloquy with -- between --

Q Yes, I know, but again you say there is no necessity for that.

MR. LACOVARA: No. Because as we have tried to detail in our brief, and as reported decisions that we've cited make clear, the common alien smuggling technique is not for the car to pass the border, but for the aliens, unlike contraband -- and this is one of the practical distinctions -- unlike contraband, which has to be moved by somebody, the aliens can walk across this almost 2,000-mile border -- even where the Rio Grande is it is frequently fordable -- and meet someone with whom they have advance arrangements a mile or so inside the American border and be transported into the interior.

That's one of the reasons why, as a practical matter, it is not feasible to accept counsel's suggestions to undertake all of these searches on the physical border itself.

I might say --

Q The best thing that could be done would be transporting. He wasn't importing an alien.

MR. LACOVARA: That's right, the same statute, Section 13-24 of Title 8, makes it an offense to smuggle into the United States or transport within the United States an illegal entrant who has not submitted himself to inspection at a port of entry. So it is the same violation.

I would like to say that the statistics that are officially published bear this out. In fiscal year 1972, the Immigration Service discovered 505,000 deportable aliens in the United States. Three hundred and ninety-eight thousand of these, Mr. Justice, had not entered through legitimate ports of entry, that is, they had crossed the border at places where border patrol, border checkpoints are not established. And about -- virtually all of these -- 393,000 were Mexican aliens who had come across the border other than at the approved checkpoints.

Q That's not a legitimate point of entry. Is that a criminal offense in and of itself? If I were in Mexico and walked across the border back to the United States at a point where there was no checkpoint, would I be guilty of a criminal offense?

MR. LACOVARA: It applies to aliens. It applies to any alien who enters the United States other than at a point designated and without inspection commits a misdemeanor.

Q But not everybody who enters the United States.

MR. LACOVARA: No, sir. If you are a citizen --

Q You can walk across anywhere.

MR. LACOVARA: Yes.

Q Going into the circumstances that Justice White was probing at, isn't one of the circumstances that you rely on the fact that this is identified as an habitual smuggling route and road?

MR. LACOVARA: Yes, sir. That we say is one of the important ingredients that District Court --

Q An area in which you have enormous difficulty making checks.

MR. LACOVARA: The border is 2,000 miles long. There are only 1,400 men stationed there. Even if we had the United States Army stationed there, which I suggest would be a much more difficult program to adopt for a variety of reasons than the one that is adopted, it is physically impossible to line every foot of the border to keep people from walking across, and the statistics bear this out. Three hundred and ninety-eight thousand people out of the 505,000 deportable aliens found in the country had crossed at other than the approximately two dozen legitimate ports of entry along the Mexican border.

I should also say in response to the question dealing with the possible criminal aspect of this that we submit that there is justification for relying on this statute as an administrative enforcement mechanism rather than as a criminal enforcement technique.

The basic object of the Immigration laws, of course, is not to put people in jail. These are not malum in se violations. This is part of a Congressional program of regulating entry into the United States and into the interior.

The statistics on prosecution confirm this. As I mentioned, 398,000 people were located in the last fiscal year who have technically violated the misdemeanor statute that I referred to, Section 1325, yet only about 10,000 of them, 2½%, were subjected to any prosecution at all.

Even on the alien smuggling or alien transportation side, Mr. Justice Marshall, statistics show somewhat similar results. About 5800 transporters or smugglers were arrested. The felony prosecution was authorized in only about 10% of those and a misdemeanor prosecution for aiding and abetting --

Q Could you have stopped and searched this car for dope?

MR. LACOVARA: No, sir, not without probable cause.

We have consistently taken that position.

Q But you could stop and search it for an alien.

MR. LACOVARA: If, under all the circumstances, it is a reasonable exercise --

Q And take out the back seat, where he couldn't be laying under the back seat, and find dope.

MR. LACOVARA: Well, what happened in this case was searching for aliens --

Q He saw something that he suspected so then he took the

car apart.

MR. LACOVARA: Well, he didn't take it apart. He removed the rear seat cushion knowing that there had, in fact, been aliens discovered in the past under the rear seat and as soon as he looked in the trunk he saw that there was something different about this rear seat.

Q But he couldn't have done it for dope?

MR. LACOVARA: Not without probable cause. Whether he had probable cause after he looked in the trunk for aliens --

Q After I drive down the road, as the original question I asked you, how do I know what you are searching for? I don't.

MR. LACOVARA: Well, I am not sure that that's a necessary factor under the Fourth Amendment.

Q You are stopping me and I have a right to travel on that public road and mind my own business and not be stopped. You have a right to stop me and you can use the pretext if you so desire to look for an alien and look for anything you want to look for while you are at it.

MR. LACOVARA: No, sir.

Q I understand the only thing you said you can't look in the paper bag for an alien but you can look in anything else.

MR. LACOVARA: There have been three or four or five reported decisions that I have seen over the last 20 years in which Courts of Appeals have said, although you legitimately

stopped this car for aliens and legitimately looked in the trunk for aliens, when you saw something that couldn't contain an alien, since we find you didn't have probable cause to look for contraband, you violated the Fourth Amendment by looking in that jacket or paper bag or small trunk.

So that the courts have applied the distinction that Congress has drawn. Congress has not purported to authorize searches for contraband inside the border on less than probable cause.

Q Do you have any figures, you've been giving these sort of figures, do you have any figures about how many aliens have been discovered in searches like this?

MR. LACOVARA: Yes, sir. We've -- out of 398,000 who entered the country without inspection, which means at other than a border crossing point, in one fiscal year, 1972, 39,000 were discovered -- 39,000 illegal aliens were discovered in traffic checks.

Q Within 100 miles of the border?

MR. LACOVARA: Yes.

Q Does that include those that were discovered at the border?

MR. LACOVARA: No, this is in the traffic checking operation which is inside --

Q These are spot checks within the 100 miles?

MR. LACOVARA: Well, there are three types. The type

that's involved in this case is the least frequently used.

Q That's what I want to know, about this kind of check.

MR. LACOVARA: Well, it varies from station to station, from locale to locale. In some regions up to one-half of the aliens who are discovered in one of the three kinds of traffic checking operations are detected in the roving patrol type.

In other locales --

Q Would it make any difference to you if -- or to the Government in terms of reasonableness, if they only discovered one alien out of every million stops?

MR. LACOVARA: That, of course, is a circumstance that has to be taken into account in appraising what this Court in Camara and See appraised, the general reasonableness of the administrative program. Once you start changing the factors being weighed in the scale --

Q This is a spot checking operation without that -- based on the assumption that every now and then we are going to find an alien, and your claim is that we are going to find them often enough to justify stopping anybody you want to, within that area?

MR. LACOVARA: Yes, sir. In our brief, I mentioned at the outset of my argument, this was not in the record because -- it is not in the record, but we have made the representation that on this road in one fiscal year that 192 aliens were actually discovered as part of the roving patrol, because there

is no fixed or temporary traffic --

Q But you don't know how many out of the 39,000 --
I suppose every officer turns in a report on every stop he makes.

MR. LACOVARA: I believe that's true, but I am not sure.

Q So you don't know how many stops were made?

MR. LACOVARA: I can't give you that statistic. I can say --

Q How much dope was found in the same area?

MR. LACOVARA: We have that statistic in there. At the same time that 192 aliens were discovered, there were five drug seizures.

Q Along with the aliens or separate?

MR. LACOVARA: The statistics that I have don't show whether they were joint or in addition, but I would suggest that that indicates that our experience bears out that the real thrust of this is looking for aliens, rather than -- and as I say, the recorded decisions do not indicate that there has been any abuse of this power.

All of the Courts of Appeals that are concerned with this, the Fifth, the Tenth and in the Ninth, have all specifically upheld this statute and this regulation as a reasonable exercise of Congressional authority under the Fourth Amendment and of administrative interpretation, using the case by case method to

analyze each particular search under it.

Q Was there any checkpoint on this road? I have forgotten.

MR. LACOVARA: No, sir. That was stipulated.

Q So this is, the only kind of a stop on this road is the kind of a stop that was made in this case?

MR. LACOVARA: Yes, sir.

Q So all 192 were seized under --

MR. LACOVARA: Under roving patrols on this road.

And if this kind of inspection program is held unconstitutional, then I must point out that a similar rationale would presumably apply to the checkpoint.

Q The checkpoint is no better within the 100 miles.

MR. LACOVARA: Unless you wanted to say, as in the Palmore case, I might point out, pending before this Court, and also the D.C. Court Reorganization Act, the validity of a spotcheck of an automobile for license and registration under the Fourth Amendment, is before the Court. Counsel in that case is arguing that a universal check at a roadblock would be all right but selectively stopping people would not be. Conceivably, that could be a distinction between roving patrols and fixed checkpoints.

Q You wouldn't make that distinction, would you?

MR. LACOVARA: Well, if the Court invalidated the roving checkpoints, I'd be back here next term making that distinction, I suspect.

Q Mr. Lacovara, you said there were three different methods. One is this roving patrol --

MR. LACOVARA: And the other two involve established checkpoints. One is a permanent checkpoint.

Q At the border.

MR. LACOVARA: No, sir. These are all inside the border, under the authority of this statute, to stop in the interior within a reasonable distance of the border.

Q So one is a roving patrol, the other is an established checkpoint --

MR. LACOVARA: A permanent checkpoint. That's a large capital structure. It is built right across the highway, and it has --

Q Why would it be there rather than at the border?

MR. LACOVARA: I argued that in our brief, because so many people cross at other than the two dozen or so approved ports of entry, that what these permanent checkpoints established at a confluence of roads. And they are also away from the border because there is a lot of ordinary border crossing traffic that goes on legitimately and it would be disproportionately interfering with that kind of legitimate traffic to do all of this kind of inspection at the border. So by the time you get to the permanent or temporary checkpoints within the interior, that local traffic has been filtered out. There are about 13 permanent checkpoints, all but one more than 25 miles

from the border and all less, of course, than --

Q The other one is a temporary checkpoint.

MR. LACOVARA: Well, no, there are 13 permanent checkpoints, 12 of them are more than 25 miles from the border, one is closer, the one at Laredo is closer. And temporary checkpoints can be established from time to time in order to avoid alien smugglers using roads that bypass the established checkpoints.

Q You set it up for a temporary period of time. During the time it is set up, do you check every single vehicle going through there?

MR. LACOVARA: It is the same procedure that's followed at a permanent checkpoint. We've given these statistics in our brief. Approximately 10 million cars passed through temporary and permanent checkpoints in the last fiscal year.

Q At both borders?

MR. LACOVARA: There are measures like this only on the Mexican border because 95% of the immigration problem is at the Mexican border.

The statistics that the Immigration Service has provided indicate that about 10 million cars passed through one or two of these types of checkpoints on -- near the Mexican border. About 2 million, 20%, were stopped only for questioning, "Are you an American citizen?" Of the number stopped, only about another 20%, or 400,000, were subjected to any inspection,

that's looking in the trunk, and only about 2,000, excuse me, 2% of those inspected, or about 8,000 cars over the fiscal year out of 10 million were subjected to searches under the hoods or under the rear seats.

Q Has the provision in the statute with respect to searching the real property been litigated?

MR. LACOVARA: No, sir, not that I have ever seen.

Q And how old is this statute?

MR. LACOVARA: That provision was added in 1952.

Q And the regulation?

MR. LACOVARA: The regulation was added in 1952. The statute that's before the Court on the search vehicles within 100 miles was enacted in 1946.

Q And I take it there is a flexibility among the various districts as to whether to have it 100 or 25 or 5?

MR. LACOVARA: Well, it's flexibility following the factors that are set up in the regulations, considering topography, confluence of arteries, inconvenience to the traveling public, population density and reliable information.

The local district director decides generally where to set these up, but in the case of the permanent checkpoints --

Q What's the local district director's determination in this one?

MR. LACOVARA: Well, in this case, there is no local district determination because this was a roving patrol rather

than a fixed checkpoint.

Q I gather with the roving patrol there is no determination whether it ought to be within a 10 mile area, a 20 mile area or 25 mile area?

MR. LACOVARA: There is not any explicit determination. That is left generally to administrative supervision. In implementing the statute, I would submit that this is like the executive field level discretion that has to be exercised under an arrest statute. The officer has to make his judgment on the spot, subject to some balance --

Q If you told us before, Mr. Lacovara, I did not take note of it, what checkpoints are in the range of this mantle of yours, any at all?

MR. LACOVARA: None, sir. Not that I know of.

There is a checkpoint on Highway 78 to the west of Brawley. That would be off to the left of the map, about 40 miles or more from where this took place. But the stipulated evidence -- and this accords with what I understand the actual experience to be -- is that in that 40 mile, or so, slice of the border, or more, that is represented by this map, there is no permanent or temporary border patrol checkpoint. Highway 78, as you will see from the map, is about the only road that cuts across this desert.

Q That's the one that goes northeast from the circled city.

MR. LACOVARA: Yes, sir. Highway 78 runs through Brawley. It is also called U.S. Highway 99 when it's going through the City of Brawley, but it cuts through Glamis, the town of Glamis.

Q Isn't there a point at Calexico?

MR. LACOVARA: That's a regular border station, that's a port of entry. We are talking in this case about alien checkpoints not at the border. Calexico is one of five ports of entry in Southern California. But the statistics that I suggest to the Court show that 398,000 people, 393,000 of them Mexican aliens, entered at other than one of these border ports of entry.

Q I understood you to say the map did not include any permanent or temporary checkpoint.

MR. LACOVARA: Well it doesn't in the sense that we are talking about permanent and temporary checkpoints as checkpoints beyond the border of the United States established under this statutory authority. It is conceded by both sides that a point on the border -- if someone had crossed at the border and presented himself for inspection as other statutes required, there could have been a routine inspection and thorough -- including search of the person -- without probable cause or without a warrant.

But we are talking here about power of Congress to establish a mechanism for enforcement of the alien smuggling and

illegal entry controls that authorizes some inspections inside the border. And these are the permanent and temporary checkpoints and roving patrols that we are talking about that are implemented under the statute and regulation. Thank you.

REBUTTAL ARGUMENT OF JOHN J. CLEARY, ESQ.,
ON BEHALF OF THE PETITIONER

MR. CHIEF JUSTICE BURGER: Mr. Cleary, we know, of course that a border line is simply a hypothetical line or thin line made by a map maker with a pen. Would it -- is there a constitutional barrier, do you think, for Congress to set up a sanitary zone, as it were, and say that the border is going to be three miles or five miles wide, from the identifiable international boundary, three miles, five miles back. This is boundary, border, as far as the United States Immigration and Customs Services are concerned.

Would that have constitutional problems?

MR. CLEARY: I think it would have constitutional problems. However, it would be a much better posture than what we have here.

Specifically, I think, what Your Honor might be touching upon, which has troubled me greatly about this particular case, is unlike Colonnade and Biswell, where there was detailed statutory scheme set up where Congress outlined the procedure. Here the statute says reasonable distance, and then the Executive, through the INS takes over with regulations and, you know, if they set up this sanitized zone I would say seriously, now, there

might be a case where Congress could create this sanitized area with certain limitations as to the nature of the intrusion that would be conducted, limiting also the operation of these various checkpoints.

The ironic thing about this case is that the checkpoints are little borders, so to speak. If you are stopped on Interstate 5, going towards L.A., at the border, what we call the first stop is just initial check and if you look funny or suspicious or anything out of the ordinary you are kicked over to what they call secondary, and there they can literally take your car apart, and you have little to say at the border.

The question and the ironic thing is when you are stopped at the checkpoints the INS uses the same term, over to secondary with the same limitation. They have created the second border exception.

Now, my only reaction is that it kind of strikes at what the Fourth Amendment is designed to do for the Executive to do that, but I think that Congress as the law maker could sit down and work out certain things.

I think also metropolitan areas would be in a different posture.

Q Well, I was just going to come to that. I suppose at least one of the considerations that moved Congress to give rule-making power, in a sense, to the Service, was that they wanted to have flexibility for the boundary near San Antonio,

Texas, or any other densely populated area, and broader rule for this big open space that we've got on this map. Is that reasonable?

MR. CLEARY: Well, I think that's possibly giving to Congress a little too much credit because the analysis of legislative history is very sparse on this particular statute.

Further, I think this was a response to an exhortation of the Government to include this amendment about reasonable distance. And I feel that the matter was not properly dealt with by Congress in the present posture of this case in that, given the areas though, even open or desolate areas, as they might be called, the person in those areas is no less of a person under our system of Government than, say, someone else. So that the camper in that area who is a transient or the resident in that area, really, because he is so fortuitously located near the border, should not subject him to some type of police surveillance to which it is our contention the Fourth Amendment would prohibit.

In the posture of this case, I would also suggest that like the Carroll decision, where they were looking for alcohol, and not an administrative regulation just eliminating alcohol, here they are looking for aliens. And the alien, himself, one alien, no matter how big or how small, is in violation of the statute, his presence in the country in violation of 1325, as counsel has pointed out. The person carrying him is in violation

of 1324, a felony dealing with either transporting or the bringing in unlawfully of aliens. And further, that a man who comes back a second time after having been deported, is not just a person we are going to slap on the wrist but who is subject to a felony prosecution under 8 USC 1326. This is criminal business.

Further, the other difficulty is, in this particular matter, the scope of the search.

Now, counsel has said that there are few cases litigated about how far the Immigration Service goes. I think there are quite a few. And not only that, at the District Court level, we had a case where the agent, with his unique olfactory senses discovered what he thought was marijuana by sniffing hard in the vehicle. He sniffed so hard that he opened up the suitcase and there it was, narcotics. He went to court. The only trouble was when the motion to suppress was granted it was cocaine in the suitcase rather than marijuana.

Another situation turned upon how far they go in locating aliens. There were two suitcases together, neither one of which would hold an alien, and they searched both trunks, and the Court said well that's not a very good thing. It had to go all the way to the Ninth Circuit. You should have pushed the cases apart before you started to look for an alien because that's all that was physically possible.

And I think that there is a certain amount of

gymnastics that go on to allow legitimate law enforcement inquiry. But I think in this area if there is a reasonable bar as to contraband, a far more serious and more harmful thing to our national interest then that bar should stand also as to aliens.

Q Do you think if Congress had the power to create some kind of a sanitary zone or cordon, they could require everyone in that area, day or night, 24 hours a day, to have a pass?

MR. CLEARY: Well, Your Honor, I can't speak as to the law, but speaking as an American citizen I think that smacks of something that is just so gross with our way of life that I could never understand Congress doing something like that.

Q You don't have that same objection about a passport to leave or enter the country?

MR. CLEARY: No, sir, I don't, but that's at the border and that's if I leave this country but here in this country if I carry something like that, I'd have to start checking out my arm for some type of tatoo. It smacks of a form of government that is so foreign to ours that I doubt whether something like that would ever be adopted by Congress.

Q What specific provision of the Constitution would you think would be the barrier to that?

MR. CLEARY: I am at a loss to respond to Your Honor, Mr. Chief Justice, I couldn't say. It is just --

Q It is not in this case, so we won't -- not directly involved -- so I don't hold you to it, but would you think there is a Fourth Amendment problem there, if people were required to carry and show their passes, that this would be unreasonable?

MR. CLEARY: I think so. I think also Fifth Amendment, going back to the Shapiro case, Shapiro v. Thompson, and all the other ones on the freedom of movement concept.

There is clearly law, and I fully agree with the right of aliens carrying identification cards, the I-151, that's I think legitimate, clearly legitimate. But for an American citizen to carry identification in that type of area, there might be also an Equal Protection argument, that a person who is inside, not in the sanitized zone, why would he not have to carry such an identification.

It is fraught with problems that are not here before you in this particular case. I think there is much ingenuity that could be worked out by Congress that was not handled in this particular case and I think that is one of the troublesome aspects.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Cleary.

Mr. Cleary, you appeared here by appointment to the Court after your colleague unfortunately became incapacitated, and, on behalf of the Court, I want to thank you for your assistance to us and, of course, your assistance to your client.

MR. CLEARY: Thank you so much, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 1:35 o'clock, p.m., the oral argument in the above-entitled case was concluded.)