

In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

LUIS ANTONIO ORTIZ; and

John Lee Bowen,

Petitioner,

v.

UNITED STATES

No. 73-2050

No. 73-6848

Washington, D. C.
February 18, 1975

Pages 1 thru 79

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UNITED STATES,

Petitioner,

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LUIS ANTONIO ORTIZ; and

JOHN LEE BOWEN,

Petitioner,

v. No. 73-6848

UNITED STATES

Tuesday, February 18, 1975

The above-entitled matter came on for argument at 10:57 o'clock a.m.

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

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Department of Justice, Washington, D. C. 20530
For the United States

[Continued . . .]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-2050, United States versus Luis Antonio Ortiz consolidated with No. 73-6848, John Lee Bowen versus the United States.

Mr. Evans, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.

ON BEHALF OF THE UNITED STATES

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

The question in these cases which were consolidated for oral argument is whether the principles of Almeida-Sanchez should be applied to invalidate a warrantless search of a vehicle for the presence of concealed aliens when conducted at a border patrol check point rather than by officers on a roving patrol.

Each case also presents a retroactivity issue that need be reached by the Court only if it disagrees with our contentions with respect to the principle issue and on that issue our contention is that check point searches in the Mexican border area may properly be conducted without a warrant and without particular knowledge about any specific vehicle that is to be searched.

QUESTION: And without regard to the location of the check point, the fixed check point.

MR. EVANS: Correct.

QUESTION: And that is the factor on which these two cases are distinguishable from the one just argued?

MR. EVANS: Correct. It is also the basis on which these cases are distinguishable from the next which raises an issue on the merits -- a slightly different variety -- variant of Almeida-Sanchez in which a roving patrol officer stopped but did not search an automobile.

QUESTION: What's that, you say it is irrelevant where it was -- where the check point is?

MR. EVANS: Well, it is not irrelevant in the broad sense of the reasonableness.

QUESTION: Well, doesn't it have to be, within the statute it should be a reasonable distance from the border, I think.

MR. EVANS: It has to be within a reasonable distance of the border under the statute and within 100 miles from the border under the regulation implementing the statute.

QUESTION: When was the regulation adopted?

MR. EVANS: I am not sure.

QUESTION: Soon after the statute or --

MR. EVANS: I believe it was adopted shortly after the statute was passed.

The search in the Bowen case was conducted two and a half years prior to this Court's decision in Almeida-Sanchez

at a check point on California State Highway 86 about 36 miles north of the Mexican border and a picture of that check point appears in -- on page 2a of our reply brief in Ortiz.

It was 10:00 o'clock in the evening on a week night and traffic was light. When Bowen approached the check point in a camper truck, the officers stopped him and asked him for his citizenship and then, as a routine matter, they asked him to open the rear of the camper to permit them to check for the presence of concealed aliens.

As soon as Bowen did so, Agent Ortmeier smelled marijuana coming from the camper. He thereupon entered the camper with a flashlight and saw in the forward part of the camper on a mattress what appeared to be, in his words, either a bed roll or a person.

When he investigated, he found that the objects were actually two backpacks and as he approached the mattress, he saw stacked underneath the mattress kilo bricks of marijuana in cellophane-wrapped packages.

After Bowen was arrested and a full search of the camper was conducted, the officers found 356 pounds of marijuana in the camper and 158 benzedrine tablets in a jacket on the front seat of the camper.

Bowen was prosecuted and convicted for the drug offenses based upon the evidence seized from the camper and the Ninth Circuit initially affirmed the convictions,

stating simply that the search and seizure were plainly lawful.

This Court thereafter remanded the case for further consideration in light of Almeida-Sanchez and the Court of Appeals again affirmed in a two-part en banc opinion.

In part one, the Court, splitting seven to six, ruled that the search of a vehicle for aliens at a check point may not be conducted in the absence of probable cause or a warrant unless the check point is at the functional equivalent of the border.

It also held that the check point in this case was not at the functional equivalent of the border.

In part two of the opinion, however, the Court held that the ruling in part one should not be applied to exclude the evidence seized from Bowen's camper because the search took place prior to this Court's decision in Almeida-Sanchez at a time when the settled law in the Ninth Circuit was that such check point searches were valid.

The search in Ortiz took place after this Court's decision in Almeida-Sanchez but before the Ninth Circuit's decision in Bowen. It occurred at the border patrol check point on interstate route 5 near San Clemente, California, about 62 miles north of the Mexican border and a picture of that checkpoint appears on the prior page in the appendix to the reply brief.

QUESTION: Mr. Evans, when was your reply brief

filed?

MR. EVANS: I believe it was filed on Friday.

QUESTION: I don't have it.

MR. EVANS: Well, it is for lack of -- this is the San Clemente check point. Sorry that it was -- the brief was filed too late to reach you.

QUESTION: How about the Highway 86 check point? Where on Highway 86 was the check point?

MR. EVANS: It is approximately 36 air miles north of the Mexican border.

QUESTION: North of Brawley?

MR. EVANS: Let me take a look at the map so I can -- do you have copies of these maps that we had lodged with the Court for distribution to each Justice?

QUESTION: [Several voices] I don't.

MR. EVANS: These were lodged, not Friday but when our brief was first filed.

This is a map that shows the --

QUESTION: February 17th. That was yesterday, wasn't it?

MR. EVANS: Pardon me?

QUESTION: This reply brief is stamped "February 17th."

MR. EVANS: Well, my understanding, Mr. Justice, was that it was filed in the Court on Friday. I don't know

when -- when the -- when it was received here.

QUESTION: It says, "Filed February 17th," which was yesterday, a holiday.

MR. EVANS: There have been mistakes before. I -- judging from what I am told. I didn't personally deliver them but I understand --

QUESTION: Very well, but I have no problem with them.

MR. EVANS: This is a map that shows the check points in the southern district of California. The one of San Clemente is right over here.

This is a little bit awkward, I'm afraid.

The one involving the Bowen case is right over here. It is bordered on the east by farmland leading to the Salton Sea and on the east by desert -- I -- excuse me --

QUESTION: It is between Brawley and Indio.

MR. EVANS: I don't know the names of the towns but I think that is correct.

QUESTION: Do you know how far from the border?

MR. EVANS: It is approximately 36 miles, air miles from the border., meaning from the twin cities of Mexicali and Calexico.

QUESTION: Now, when you describe this as a fixed check point, the signs in the arch over the highway are permanent, more or less, are they not?

MR. EVANS: That is correct with respect to the San Clemente checkpoint. There is an overhead support for permanent signs which have lights that can be turned on or off depending on whether the checkpoint is in operation.

QUESTION: Well, that is to the right of your picture. It seems to be a little bit off the highway.

MR. EVANS: Yes. That is what is called the "secondary inspection area." It is also the site of a State of California truck weighing station.

QUESTION: Port of entry.

MR. EVANS: Not the port of entry. I'm sorry.

QUESTION: No, but California's inspection --

MR. EVANS: That's right. It is the state highway inspection facility for weighing trucks.

QUESTION: Now, the federal inspection is initially made on the highway itself?

MR. EVANS: That is correct.

QUESTION: At stop signs.

MR. EVANS: The cars are funneled into two lanes ordinarily with one officer standing right behind the stop sign and one officer standing on an [inaudible] here.

QUESTION: So, Mr. Evans, some of those cars may then be shunted off to the --

MR. EVANS: That is correct. At San Clemente the prior practice had been that the point officer -- or the

practice as it has been operated for some time is that the traffic slows down to roughly five miles an hour and the officer standing at the point, as it is called, visually suveys the approaching traffic and when something arouses his suspicion about a particular automobile, he refers it to the secondary area, where there are additional officers to make inquiry of the occupants of the vehicle and if it seems appropriate at the time, to conduct a search of the vehicle.

QUESTION: Well, now, looking at the next page, at the Highway 86 check point, apparently everything automatically is funneled off to what --

MR. EVANS: That is correct.

QUESTION: -- apparently is a secondary point.

Is there a reason for that?

MR. EVANS: Well, the traffic is far lighter on Highway 86 and as a consequence, the officer at the point -- there he is -- now, to go back for a second, the point officer at San Celmente almost never says anything to the passengers in the vehicles. He either waves them through or refers them to secondary. The officer here, however, talks -- according to the record -- to about 75 percent.

QUESTION: The officer where?

MR. EVANS: I'm sorry. There's a small hut.

QUESTION: Oh, yes, I --

MR. EVANS: You can see it on the island there

between the road --

QUESTION: But the car has to go off to that side.

MR. EVANS: It goes off to the side. The officer there ordinarily, in about 75 percent of the cases, will lean over, say "Good morning, this is an Immigration check point. What is your citizenship, please?"

And after a response, the car is ordinarily waved through although in about 10 or 15 percent of the cases the automobile is subjected to a search.

Now, the Ortiz search, which took place at the San Clemente check point, there is not all that many facts in the record. The facts were stipulated. We know that the search occurred at the check point when Ortiz approached it in a 1969 Chevrolet. He was referred to the secondary inspection area and the officers there opened the trunk of the car and found three Mexican aliens who were present in this country illegally.

Ortiz was prosecuted and convicted of transporting these aliens knowing them to be in the United States.

QUESTION: Now, Mr. Evans, are these later photographs in your reply brief, are these photographs of the actual car and the people in it?

MR. EVANS: No, I should explain that the photographs appearing in the -- the first two photographs are not photographs that appear in the record of this case. They

are official border patrol photographs. We inserted them so that the Justices could see roughly what it is we are talking about in terms of a check point.

The other photographs were all introduced into evidence in the Ortiz --

QUESTION: Well, look at 5-a for example.

MR. EVANS: Yes.

QUESTION: Is that an alien?

MR. EVANS: That is an actual -- that is an illegal alien, an actual photo --

QUESTION: No, this is as they opened the trunk or this is -- what? It looks like the front of a car.

MR. EVANS: It is not clear to me whether they take these pictures anticipating that they are going to find someone in the hood or whether they go through some routine afterwards. I just --

QUESTION: Well, 5-a is someone under the hood, isn't it?

MR. EVANS: That is correct and the next page shows her emerging from the hood.

QUESTION: Yes. But none of those are exhibits in either one of these cases, are they?

MR. EVANS: Yes, they are. All the photographs appearing from pages 3-a through the end are photographs that were introduced in evidence in the consolidated proceeding in

the District Court of which the Ortiz case was a part.

QUESTION: That is Baca?

MR. EVANS: Baca was the first alphabetized name under which the --

QUESTION: Baca, that was in the Judge Turrentine --

MR. EVANS: Exactly.

QUESTION: And are these photographs beginning with 3-a and continuing through 14 -- 13a -- do they involve the parties in this, at these checking stations?

MR. EVANS: No, they do not, they were introduced --

QUESTION: Are the cars involved in either one of these cases?

MR. EVANS: They do not.

QUESTION: I didn't think so.

MR. EVANS: They were submitted to the District Court --

QUESTION: As examples.

MR. EVANS: As examples, precisely. Not particularly typical examples, either, I would say.

QUESTION: No.

MR. EVANS: This is not the typical manner in which aliens are apprehended by the border patrol.

QUESTION: And are these just posed models, or don't you know?

MR. EVANS: No, no, these are -- the record reflects

that these are the actual vehicles and the actual persons who were apprehended.

As I say, I don't know whether the -- at what point the photographs were taken. Obviously there is no way for me to know that but my understanding is that these are all real cases and there is testimony with respect to each of these photographs in the hearing. The --

QUESTION: The 5-a for example --

MR. EVANS: The 5-a for example.

QUESTION: The photographer would say, now you stay right there while I get a --

MR. EVANS: Well, he may have. I don't know what the -- they may have been asked if they were willing to cooperate. I just don't know how these things were arranged.

This case, the one with the woman inside the hood of the car, was a case that arose at the San Clemente checkpoint, the same place that the Ortiz case arose.

The same for the prior page, 3-a and 4-a, which shows a trunk of an automobile that has been specially designed to contain --

QUESTION: Right.

MR. EVANS: -- illegal aliens in a special compartment and that also arose at the San Clemente checkpoint.

QUESTION: None of these vehicles was involved in either one of these two cases.

MR. EVANS: That is correct. These are not -- these are not parties in this case.

QUESTION: What is the significance, Mr. Evans, of your comment a moment ago that this is not typical?

MR. EVANS: Well, the cases in which aliens are found hidden in compartments makes up a relatively small portion of the number of aliens who were apprehended by the border patrol at their check points.

QUESTION: And ordinarily if they are in the vehicle, you can see them.

MR. EVANS: Ordinarily -- it is hard to say "ordinarily" because it is with regularity. There are compartment cases. But the more likely manner of apprehension is from the vehicle itself by apprehending aliens sitting visibly in the passenger compartment.

Actually, the principal purpose, I thought it might be useful to include these photographs to show that it is not unusual, at least it happens with some regularity that human beings are hidden in trunks in hoods in compartments that seem too small to contain them or, indeed, even under a car, as the last photograph in the reply brief shows.

QUESTION: Is it in one of these records or in the record of some other case that I am recalling that some -- that it has not been unknown that some persons being smuggled in died from suffocation?

MR. EVANS: It appears in this record on a number of occasions, dying of asphyxiation. There are occasions when, in this record, when aliens apparently were either pushed or jumped from moving vehicles approaching a check point to their death.

It is a dirty business and people do die.

QUESTION: Are you going to get into why the service needs check points?

MR. EVANS: I certainly am.

Mr. Justice White, our principal contention in this case is that there are significant differences between roving patrols and check points, in terms not only of the governmental need, not only the nature of the intrusion or the nature of the circumstances in which intrusion occurs, but also in terms of the amenability of the operation to a meaningful warrant procedure.

These differences, in our view, make it possible for the Court to do here what it was unwilling to do in Almeida-Sanchez, and that is, consistently with the Fourth Amendment to give effect to the Congressional judgment reflected in Section 287(A)(3) of the Immigration and Nationality Act, that searches of vehicles for aliens within a reasonable distance of the border may reasonably be conducted without warrants and without specific facts casting suspicion on a particular vehicle to be searched.

I'd like to start by discussing the governmental need involved in these operations.

In some respects, the public interest is quite analagous -- similar, identical for that matter to that involved in the circumstances that were before this Court in Almeida-Sanchez except perhaps that the problem has intensified.

At the time of the Baca hearing which is the consolidated District Court proceeding of which the Ortiz case was a part, it was estimated that there were about one million aliens present in this country illegally.

Current estimates place the figure much higher, ranging from five million to 12 million.

Of the deportable aliens who are apprehended in this country, some 90 percent are Mexican nationals and about 98 percent of those who have entered clandestinely, without inspection, have -- are all Mexican nationals.

QUESTION: Does the record show what proportion are uncovered at a fixed check point?

MR. EVANS: Well, the figures are not broken down in that detail. The record shows that in Fiscal Year 1973, more than 55,000 illegal entrants were apprehended in border patrol traffic checking operations which in that period would have included to a certain extent roving patrol operations.

But that was always a far less significant

proportion of the apprehensions, that is, roving patrols accounted for far less -- far fewer apprehensions so you can think in terms, I think, roughly of 50,000 out of the -- it was about 13 percent as I recall from the record of the total number of deportable aliens apprehended by the border patrol for the whole year.

The social cost that is associated with the presence of these many millions of illegal entrants is also enormous and it, too, is intensified, particularly in this present period of high unemployment.

The District Court related one estimate that as long ago as 1971, when nearly 600,000 Californians were unemployed, between 200,000 and 300,000 illegal immigrants were employed in that state earning \$100 million of wages.

And the group of American citizens and lawful resident aliens who were the hardest hit by the presence of illegal entrants are the group of unskilled or slightly skilled workers who, in any event, find it difficult to find employment.

The Court also found that illegal immigrants pose a potential health hazard of the high incidence of communicable disease which is not treated because these persons have not presented themselves for inspection at the border and in some states, the District Court noted, the public assistance resources of the communities are devoted in large part to

illegal immigrants and their families.

We think that the public interest in the effective enforcement of the immigration laws is obvious.

The traffic check point system plays a substantially greater role in the border patrols enforcement scheme than do roving patrols. Roving patrols are themselves important, as we have argued -- as we argued in Almeida-Sanchez and as Mr. Fry will tell you shortly but they have always been essentially supplementary to the check points themselves which are the heart of the enforcement effort.

The record shows that most of the inland movement of illegal aliens is on the major highways leading north from the border and it is there that the check points are placed.

Apart from the line watch which is the patrol of the physical boundaries, the check points are the principal deterrent to illegal entry and the record demonstrates what the concurring and dissenting opinions recognized in Almeida-Sanchez, that the line watch itself is simply incapable of controlling the unauthorized entries across our 2,000 miles of border.

QUESTION: One of these is 62 miles from the border. Are there any further from the border than that?

MR. EVANS: The farthest from the border is the Truth or Consequences check point in New Mexico which is 98

miles from the border. There are none beyond the 100-mile limit.

QUESTION: Well, that is part of the regulations.

MR. EVANS: The regulation specifies 100 miles.

QUESTION: Well, are there any others between 62 and 98?

MR. EVANS: Yes, they vary. Most of them are beyond 25 miles, in part because in most cases it is strictly beyond the California area.

QUESTION: Well, put it the other way. Most are within what distance?

MR. EVANS: All of them are within 100. It is hard for me to say what most are within. There is a wide variety outside the 25-mile range.

The border patrol agents testifying in the consolidated District Court proceeding testified that their interviews with apprehended aliens and their intelligence sources in Mexico made it plain that the check points were the principal deterrent to unlawful entry.

QUESTION: But in some circumstances, I gather, the check point away from the border is not to supplement but to --- but is a substitute for a traffic check at the border.

MR. EVANS: Well, there -- Mr. Justice White, there are situations and there is a recent case in the Fifth Circuit that --- in which the situation is close to this --

where there are ports of entry on the border that close down at night and the check point located 10 or 12 miles from the border operates at night.

Now, if that is a substitute for the port of entry, I would say it is. But they don't -- the function of the border patrols' traffic check point is not to perform the function, the identical function it performed at the border, that is, a full customs and Immigration search and inspection. It is just not -- that is not what they are doing. Their job is to only look for illegal immigrants and not at all for -- I mean, they are designated as customs officers so that they can make appropriate seizures and arrests when their investigations lead to discoveries of narcotics.

But they are not -- or the discovery of any illegal contraband but they are not -- that is not their principal function. Their principal function is one of looking for aliens and they don't perform the full inspection services that are performed at the border itself.

QUESTION: Yes, but there are some places, I gather, you can cross the border legitimately and not be subject to an inspection, right at the border.

MR. EVANS: If there are, I am not aware of them. I don't believe that is the case.

QUESTION: Well, what about at night?

MR. EVANS: Well, it is not legitimate to cross

the border when the port of entry is down.

QUESTION: You just don't cross.

MR. EVANS: Well, you are not --

QUESTION: You have a check point?

MR. EVANS: Well, there is --

QUESTION: You have the check point inland.

MR. EVANS: There is the check point inland. Now, in this particular case that I am referring to, in the Fifth Circuit, the highway on which the check point was located was one that parallels the border, wandering further or closer but the check point itself was quite close to these two ports of entry that were closed at night.

QUESTION: Well, does the port of entry perform any function that relieves the burdens on what happens at the border?

MR. EVANS: Well, that -- it doesn't really. It performs a very similar function with respect to those who are determined to enter without inspection but as to those -- I mean, the function of the port of entry is to inspect those who enter lawfully and present themselves for inspection to determine whether they lawfully can enter this country and whether they are bringing anything that needs to be declared.

But the purpose of the inland check points is to determine whether someone has entered without inspection or has exceeded the limits of his entry permit.

QUESTION: I take it, at the border there is some, there is very heavy commuter traffic at some point.

MR. EVANS: That's right.

QUESTION: And the border patrol people just don't interrupt that flow of traffic, do they?

MR. EVANS: Now, that is in the border area of the United States.

QUESTION: Yes.

MR. EVANS: Now, so far as the extent to which the officers at the ports of entry in busy ports check every vehicle or check every person -- I don't know the answer to that. I don't think they check necessarily everybody but they -- I suppose they have some superficial inquiry made of everybody. But the border patrols --

QUESTION: But if you weren't reluctant to interrupt that flow of heavy commuter traffic, you might not need a check point in the interior.

MR. EVANS: No, I don't think that is correct because the check points, Mr. Justice White, are not designed so much to get to apprehend or deter the entry through the port. What they are concerned with is the 98 percent who enter without inspection.

There are a very small number who enter lawfully and then violate the terms of their entry permits. It is really the entrance without inspection that the inland check

points are designed to apprehend.

QUESTION: Mr. Evans, in this connection, the 72-hour passes are good up to 25 miles, as I understand it.

MR. EVANS: That is correct.

QUESTION: And am I correct also in understanding that this is one of the reasons, perhaps the principal reason why these check points are located beyond the 25-mile area?

MR. EVANS: Yes, it is a combination of that and, as I indicated, the urban congestion in the immediate border areas, particularly in California. But that is correct. In order to control not only those who come across lawfully with visitor's cards to control their unlawful exceeding of the 25-mile limit, which is a very successful effort because very few people do, it is also designed in order to prevent the use of forged or illicit visitor's cards which are used very widely by smuggling operations in the area and one of the reasons why a check point within 25 miles could accomplish nothing in this respect at least, is that everybody would flash a look-alike card and the officer would have no way beyond, you know, apart from a very intensive investigation, to determine whether it was really legitimate.

And so to that extent, Mr. Justice White, I suppose it does relieve some of the pressure because there are a number of people who do enter with visitor's cards to which

they are not entitled but which are look-alikes and to that extent they are intercepted if they carry them with them, which they ordinarily do not. They ordinarily mail them back to Mexico for further use but if they carry them with them, they are intercepted further on.

QUESTION: Is a heavy-volume port-of-entry like San Isidro open 24 hours a day?

MR. EVANS: I don't -- yes, I gather it is.

QUESTION: Mr. Evans, turning to the procedure at San Clemente check point for a moment, possibly you covered this, looking at this picture, the large stop signs, is every single vehicle stopped?

MR. EVANS: There is some dispute between the litigants here as to whether they are or not. The records in the consolidated District Court proceeding just doesn't speak to the question, at least not clearly. The District Court's findings were that the most that a motorist is subjected to is a fleeting stop.

We are informed by the border patrol here that -- that with the exception of those vehicles that are referred to secondary, very few come to a full stop except when traffic is light and they are curious. I mean, the sign does say "stop" and they may stop but the officer wants to keep the traffic moving and he motions with one hand and then the other and then generally waves them through at four or five

miles per hour.

We may be disputed on that point by the other side but I have no way of answering other than what I said.

I have referred to some of the smuggling that goes on with respect to the transportation of illegal entrants. The record shows that those smuggling operations have been designed specifically to evade the check points and that an alien who pays \$200 to \$300 for transportation to an inland job market is paying for a safe trip through a check point.

One witness stated that without the check points the smugglers would be out of business immediately.

Indeed, the mere cost of -- that a smuggler -- the mere price that a smuggler charges is a very significant deterrent to many of the persons who otherwise would be tempted to come to this country.

As Judge Turrentine found, the average per capita income of the poorest 40 percent of Mexican nationals is in the range of \$150.

There is another difference between checkpoints and roving patrols that we think is significant and this is the circumstances in which the intrusion occurs.

In both cases, of course, a vehicle is -- search of a vehicle is limited to those places in which an alien or a person could reasonably be concealed. That usually means the trunk. Sometimes they look in the hood for the reason

that these pictures demonstrate.

Sometimes they look under the car with a mirror and occasionally they will have to do what they did in the case of Almeida-Sanchez, which is to look under the back seat, particularly if there is something about the trunk that makes them think there is a compartment there or if the driver does not have a key to the trunk.

Unlike a roving patrol, however, in which an officer patrols a large area stopping vehicles by pursuit with siren and a flashing light, often at night, checkpoints are stationary and their procedure is more regularized and the Fifth Circuit in the decision that I mentioned earlier stated, in upholding a warrantless non-probable cause search of a vehicle for aliens at a permanent checkpoint in Sierra Blanca, Texas -- "A permanent checkpoint," the Court said, "does not have the constitutionally-frightening aspect of a roving patrol. Similarly, there is less flexibility in the operation of a checkpoint and less discretion is vested in the officer himself who is limited to a single location which has been established by senior officials of the Border Patrol."

That decision, I think, is subject to important self-limiting constraints. There is a very severe shortage of man-power. The officials who are responsible for locating these checkpoints are highly motivated to place them in those spots in which they can operate most effectively.

QUESTION: Mr. Evans, could the same car have to pass through on the same road more than one checkpoint? One at 25 miles, another 62 miles --

MR. EVANS: I don't believe so. My understanding is that the aim is to cover every road leading north but -- now, let me take that back. There are a couple of east-west-type roads in which there are, I think, more than one -- or there are more than one in the vicinity. I am really not quite clear but I am confident that that is not the normal procedure. There is usually one checkpoint for each major artery and there will be less-often operated checkpoints at the less significant arteries.

QUESTION: Mr. Evans, could you spare that map --

MR. EVANS: Sure.

QUESTION: -- for a moment.

MR. EVANS: I also have another one if you are interested.

QUESTION: Incidentally, there don't seem to be any of those maps in our court file.

QUESTION: Do you have any of them?

MR. EVANS: I don't -- the one that I showed you before is the one of Southern California. This one shows all 47 of the Border Patrol checkpoints and I -- if there has been some problem with having the maps delivered here I will see to it this afternoon that enough copies are supplied.

QUESTION: Is there any chance that they were delivered in, actually, one of the held cases rather than the one --

MR. EVANS: No, they were submitted together with our brief in Ortiz and they were lodged, as I understand it, with that brief.

QUESTION: Should opposing counsel receive them?

MR. EVANS: Yes, certainly.

QUESTION: Well, your brief in Ortiz has a filing date of today.

MR. EVANS: That is the reply brief.

QUESTION: The reply brief.

MR. EVANS: Well, again, I am told that --

QUESTION: Perhaps I am wrong.

MR. EVANS: It is my understanding that that brief was filed on Friday. I don't know whether it was inadvertently not stamped or whether for some reason the delivery didn't take place, but my understanding was that it was and it was served on counsel on Friday, I should add, although counsel were en route from California.

I was saying that the decision to locate a check-point is not one that is the decision of a cop on the beat and the Fifth Circuit aptly stated it again in that same case. The case's name, by the way, is Hart and it was decided January 15th, 1975.

The Court stated "At permanent checkpoints the commitment of time, money, personnel and the administrative decision for location of the search are all presumably such as to remove, to a large extent, the individual arbitrariness that might be available to roving agents."

And we believe that the combination of these three factors, the greatly increased need for checkpoints that are less frightening aspect of the intrusion contemplated and the reduced discretion of the officers, at least with respect to the place of the search themselves distinguish checkpoint searches from roving patrol searches and should make it possible for the court to honor the congressional judgment that warrantless searches of vehicles for aliens, if conducted within a reasonable distance of the border, are necessary for the protection of our border against unauthorized entries and are reasonable under the Fourth Amendment.

Indeed, we think that checkpoint searches bear a very close resemblance to the searches that are, in fact, made at the border, far more --

QUESTION: Are these made at the 100 miles under the regulations, [inaudible], in every case?

MR. EVANS: No, no. There may certainly be -- if a checkpoint were established in downtown San Diego, I don't think --

QUESTION: You could sustain it.

MR. EVANS: I don't think we would try to. It would be havoc, as the evidence shows with respect to a checkpoint even outside the city but near major commuter and shopping areas.

We suggest that the analysis of Mr. Justice White's dissent in Almeida-Sanchez, that Congress contemplated the border for purposes of immigration law enforcement as a zone rather than as a line is particularly apt here, though the Court didn't accept that analysis in the context of a search conducted by roving patrol officers pursuing and stopping a passing vehicle, we believe a different result is appropriate here because the facts make the operation so much more closely resembling the operations at the border itself.

QUESTION: Well, I gather from some of the things you say in your reply brief, particularly on page 9 of the Ortiz brief, this in the line of what I was asking awhile ago, indicates that it is perhaps impractical to really do the job at the border at certain points, such as in the Chula Vista.

MR. EVANS: Mr. Justice White, that is correct, except that what we are talking about here is impractical to do the job of protecting the borders other than the ports of entry. The Border Patrol's line watch just can't control unauthorized entries at other than a port of entry.

That is the job that can't be done at the border.

The job at the inspection station is being done. When people present themselves for inspection they are inspected and they are admitted or not admitted but that job is --

QUESTION: Your traffic control, or your traffic check you suggest here just can't be done without creating havoc?

MR. EVANS: At -- in the border area.

QUESTION: Yes.

MR. EVANS: I am not talking about the port of entry. Again, I am referring to over the border on this side of the line but in the urban area around the border as it is in the case of San Diego area.

QUESTION: So the reason why the line was at the border, say, here in the southern California area, the reason why that isn't effective and you must supplement it is just because of evasion.

MR. EVANS: Essentially that is correct. If everybody presented -- if every person who sought entrance to this country presented himself for inspection at the border, there would be no serious problem with illegal entrance in this country.

QUESTION: Oh, I understand that but you seem to think that somebody by making a traffic check 30 or 40 miles inland can find something out from the flow of traffic that he couldn't find out at the border.

MR. EVANS: No, he could find it out at the border if he had a way of patrolling the entire 2,000 miles of the border.

QUESTION: I know, but just let's assume that particular -- at that particular port of entry. Now, why is the border check 30 miles inland any better for you than the traffic check at the border?

MR. EVANS: Because --

QUESTION: Other than for because of evasion.

MR. EVANS: Well, because those who have evaded the inspection station at the border, the record shows, move north to job markets in automobiles.

QUESTION: So if it is an automobile we must check. Even if it is the same traffic, we'd like to check it twice.

MR. EVANS: Well, in certain circumstances, it is going to be the same traffic that passed through the inspection point but in most cases the aliens who are found are aliens who have not come across in a vehicle. They have walked across or have -- across.

QUESTION: That is all right. That is a thing the United States has stressed before. I just hadn't run into this other, the idea that --

MR. EVANS: The argument in the reply brief is addressed to the suggestion that we should move our

checkpoints closer to the border, not at the border. They are suggesting at one point in their brief, our adversaries are, that these checkpoints can't be justified so far from the border and our suggestion is that we cannot physically do the job near the border. There are too many roads. There is too much traffic. There is too much local traffic. They just can't be checked effectively.

QUESTION: When you say "checkpoint," you don't mean, though, the port of entry at San Ysidro.

MR. EVANS: That's right.

QUESTION: You mean something like San Clemente.

MR. EVANS: Exactly. At the checkpoints -- at the port, at the entrance to the country -- the usual phrase is port of entry and that is how I have used those terms so far.

QUESTION: Most of these -- most illegal aliens, in fact, have not come through ports of entry. They have come across the border --

MR. EVANS: Correct.

QUESTION: -- at some place where there was not a port of entry.

MR. EVANS: Almost 100 percent.

QUESTION: Almost invariably.

MR. EVANS: Yes.

QUESTION: And they have prearranged rendez vous points with smugglers.

QUESTION: Often.

MR. EVANS: Very frequently now.

QUESTION: And the smugglers then transport them to the labor markets which are well beyond San Diego and often in the northern part of California and other places.

MR. EVANS: As far as Chicago. It is not at all uncommon for truckloads of illegal entrants to be destined for Chicago. There are -- they are found in New York. It is all over. It is not --

QUESTION: So you are saying that if you had 1,000 checkpoints on this 2,000-mile border itself, you wouldn't solve this problem.

MR. EVANS: Well, if you had 1,000 checkpoints --

QUESTION: On the border itself.

MR. EVANS: On the border itself it wouldn't solve the problem of illegal entry. The estimates in the testimony in the District Court by the senior officers in the Border Patrol sector, that it would take just an enormous army to control the potential of unlawful entry, if there is someone there when they try the first time, as one officer said, they'll bounce off and try somewhere else.

QUESTION: Right.

MR. EVANS: And he estimated it would take 21,000 men to cover his sector of 145 miles.

QUESTION: Mr. Evans, since I have interrupted you,

let me come back to the legal problem. I understand the Government's position and that is that no warrant procedure of any kind is necessary for a fixed checkpoint. But let's assume for the moment that the Court does not accept that position.

What about a warrant procedure authorization by a district judge for the maintaining of a checkpoint after the judge has been convinced that facts and circumstances justify it?

MR. EVANS: Mr. Justice Powell, our principal contention, as you have indicated, is that no warrants were needed. If we lose that, we consider it essential that the Court make it plain -- if it can properly do so -- that a warrant could properly be issued.

We have had very serious problems with respect to the checkpoint -- with respect to the checkpoint warrants that have been issued in the Ninth Circuit following its decision in Bowen and then in Brignoni-Ponce, which is the next case.

Some judges think that warrants are not permitted by the Fourth Amendment. As Mr. Patton indicated, one of the principal checkpoints in California has been closed for quite a long time now because one judge said that he didn't think he had authority to issue a warrant.

QUESTION: Which one was that?

MR. EVANS: This is Temecula, which is the second one over, I believe, from the ocean.

QUESTION: If this Court said that the district judges had authority, that would solve that problem.

What other problems are there?

MR. EVANS: Right. There are other problems. We have found that nearly all the magistrates and judges have been requiring statistical showings for particular checkpoints that are just simply impossible to meet.

These checkpoints are designed as deterrents and the more effective they are as deterrents, the fewer the apprehensions there are going to be and as a consequence, we have had to shut down essential but less frequently-travelled checkpoints because -- in three cases -- because the warrants were refused on the grounds these statistics were inadequate.

QUESTION: Well, why did you shut them down because of the refusal of the warrant when your contention is you don't need the warrant?

MR. EVANS: Well, the Ninth Circuit has ruled that we cannot --

QUESTION: This is after post-Bowen.

MR. EVANS: This is post-Bowen. We didn't start warrant procedure the / until they decided Bowen, which held that checkpoints could not be -- checkpoint searches could not be conducted

without warrants and then Brignoni-Ponce, which was soon followed by a decision that said that checkpoint stops could not be conducted without warrants.

QUESTION: Mr. Evans, have any of these refusals taken into account the distance of a particular checkpoint?

MR. EVANS: I am sure they --

QUESTION: I don't mean the traffic through it, but--

MR. EVANS: Yes.

QUESTION: -- the distance from the border?

MR. EVANS: I don't know from personal experience or even from talking to those who do.

QUESTION: Do you think that would be a relevant consideration?

MR. EVANS: I think it would be, certainly I think the whole geographic situation is relevant.

There is another problem we have had and that is that the warrants have been issued in every case for 10 days at the most and that 10-day period makes it necessary repeatedly to get approval of the same warrant even though its operation, procedure and location have not changed a whit.

QUESTION: What kind of a warrant are you referring to now, exactly?

MR. EVANS: Well, the warrants that have been issued in the Ninth -- that is another problem. The Ninth Circuit warrants have been limited solely to warrants authorizing the

stopping of vehicles for purposes of inquiring as to the citizenship of the occupants.

There has been no authority granted to conduct the kind of searches the Border Patrol considers are essential to its enforcement scheme and these warrants say nothing more, essentially, than "You are commanded to conduct a checkpoint and you are authorized to stop any northbound vehicle during your hours of operation to inquire as to the citizenship of the occupants."

QUESTION: I take it there is no suggestion from the Ninth Circuit Court of Appeals that you need anything in the nature of a warrant for the port of entry stop.

MR. EVANS: That is correct.

QUESTION: And complete search.

MR. EVANS: That is correct. Well, there are some limits as to body cavity searches, for example.

QUESTION: Well, is there some suggestion in Bowen that the warrants would not be authorized?

MR. EVANS: Bowen left the issue open. It stated we do not have to reach that issue, much as this Court left it open in Almeida-Sanchez but there have been, as I have said -- we've lost a checkpoint in essential district -- that is actually an essential district although it was treated in this manner.

QUESTION: Well, I don't want to read your private

notes in your map that I've borrowed from you ---

MR. EVANS: That's okay.

QUESTION: -- but I --

MR. EVANS: I have no previous expectation of privacy with respect to the map.

QUESTION: But you have these checkpoints numbered six and eight, you have a note beside them, "Not sought." That means a warrant wasn't sought?

MR. EVANS: That is it exactly. Now --

QUESTION: Have you closed those down or are you still operating them?

MR. EVANS: No, those have been closed down and the reason they were closed down and there are -- I forget the number now -- I have the total number --

QUESTION: Well, you have five and -- five and --

MR. EVANS: There's a total of six warrants in the six checkpoints in the jurisdiction of the Ninth Circuit that have been shut down because the responsible officials of the United States Attorney felt that there was not an adequate showing to make to the magistrates to meet the requirements that they had established.

QUESTION: Or that the warrant was refused.

MR. EVANS: Then the warrant was not refused.

QUESTION: But their warrants were refused.

MR. EVANS: And warrants were refused in another

four, one of which was on the grounds that it was improper to grant such a warrant. The others -- the other three were on the ground that it was inadequate -- that there was an inadequate showing.

In nine of the checkpoints, generally the largest and most important I would say, there have been warrants issued for nine of them and they have been continuous, more or less, but of course with roughly --

QUESTION: Are they Ninth Circuit checkpoints?

MR. EVANS: Pardon me?

QUESTION: Are they Ninth Circuit checkpoints?

MR. EVANS: Yes, these are all Ninth Circuit.

Now, in the Fifth and Tenth Circuits, the checkpoints have been operated without warrants, pursuant to the procedure that had been followed in the past because those circuits have, up until recently, the Fifth Circuit hadn't ruled on it. It has now ruled that permanent checkpoints are lawful, at least upheld one and its decision can certainly be read broadly enough to uphold the rest and the Tenth Circuit, while it held in King and Maddox that the principals of Almeida-Sanchez should apply to roving -- to checkpoints, what it said was -- in essence -- was that you can't conduct a checkpoint search without warrant, without probable cause unless it is at the functional equivalent of the border.

It remanded to the District Court to define that term which it didn't attempt to do and that was the 98 miles from the border checkpoint involved and so at least that circuit is completely open.

We haven't contended for that definition of functional equivalence here. We think the Ninth Circuit correctly read that phrase but at least that circuit hasn't ruled that that checkpoint or the others within it are unlawfully operated so we have been operating them without warrants.

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

Mr. Sevilla.

ORAL ARGUMENT OF CHARLES M. SEVILLA, ESQ.

ON BEHALF OF RESPONDENT ORTIZ

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

I think Mr. Evans has outlined adequately the facts of this case and the issues involved but I would like to address immediately some of the statements which we take issue with.

First of all, in comparing a roving to a fixed check, we have to look at the nature of the intrusion involved.

In each case, we are involved with a search which takes place because of the unfettered exercise of discretion by a Border Patrol officer at a checkpoint who decides without

any criteria whatsoever that he is going to select the car, refer it to secondary and conduct a full search of the car. And that --

QUESTION: You mean there are searches, stops and searches, which you would consider lawful at the port of entry, I take it?

MR. SEVILLA: No question about that.

QUESTION: But if they are 10 miles or 20 miles or 30 miles interior, then they require a warrant, you say.

MR. SEVILLA: Then I would have a question because the question would then be, is this the functional equivalent of the border.

Now, the Government has cited the Hart case for the proposition that the Fifth Circuit says that, well, all check points are valid but that is not true. The Fifth Circuit said that the Sierra Blanca checkpoint, located some 10 miles north of the border, was the functional equivalent of the border and we would say that if a checkpoint is the functional equivalent of the border, no warrant is necessary because, obviously, the same type of powers would emanate for a functional equivalent checkpoint as a point of entry.

Now, with some limitations which is for body searches.

QUESTION: Well, what criteria do you suggest for the determination of functional equivalence?

MR. SEVILLA: Well, I think the Hart case listed several. It should be the first functional point of entry.

Now, the Sierra Blanca checkpoint -- we have two checkpoints -- pardon me, two ports of entry on the Texas-Mexico border which were closed down and the checkpoint located some 10 miles north in between those two checkpoints was the first functional point of entry for all of the people traversing through that area and I think that is a legitimate --

QUESTION: But if they had been opened and not closed down on the border, then what?

MR. SEVILLA: Than it would not be the functional equivalent of the border in --

QUESTION: What you are really saying --

MR. SEVILLA: -- [inaudible] recognized except by not opening it for a checkpoint --

QUESTION: -- is, it is, in effect, a substitute for closed border.

MR. SEVILLA: That is true but it is not necessarily so because we only have two ports of entry such as in California and the southern district; one in Calexico and one in San Ysidro.

Now, the functional equivalent of the border could also just say somewhere between those two points or somewhere between the Calexico port of entry and the Yuma port of entry where there is really no port of entry involved, but yet there

are, say, rural roads which are leading from the border in which a lot of border traffic traverses so that can also be the functional equivalent of the border.

QUESTION: You are suggesting that if a checkpoint would pick up traffic that reasonably might not go through a port of entry, it is the functional equivalent of a border.

MR. SEVILLA: That is true but it would have to bear the criteria such as, it should be reasonably related to the border in terms of distance. I don't think -- for instance, in this case we are talking about a checkpoint 66 miles north of a port of entry.

This checkpoint at San Clemente is 66 miles north of the San Ysidro port of entry and I'd really take issue with the Government's contention that they don't want to disrupt commuter traffic. That is exactly what is involved at the San Clemente checkpoint where some 10 million cars traverse north from San Diego to Los Angeles and a very few, as we say, a trickle of traffic, emanates from the border and goes through San Clemente and we must also look to the fact that 99.9 percent of the vehicles, according to a statistical sample, taken from Border Patrol affidavits, 99.9 percent of the vehicles contain no immigration law violators at all so I think these are relevant criteria in assessing the reasonableness of the checkpoints in this case.

I would also, getting back to the distinction

between a roving and a fixed checkpoint, we have got to look, one, there is unfettered discretion exercised by the officer at the point.

Now, there is a discrepancy as to whether a stop takes place. I would simply rely on the pictures submitted by the Government in this case.

It says, "All traffic stop here." There is a Border Patrolman with a stop sign a mile down the road that says, "All traffic prepare to stop" and in the Government's opening brief, it makes allusion to the Baca hearings where the Court specifically laid out all of the procedures to notify the oncoming traffic that they are going to be stopped ahead.

Now, for those individuals who are lucky enough to pass the unfettered discretion of the point officer and make it through, that is fine but then there is a significant amount of traffic that is referred, based on no articulable basis except, as the Government says, the "ESP powers or the sixth sense powers" of the point officer.

In the exercise of his sixth sense, he refers some cars over to the secondary for a full search of the trunk, the hood area and under the front seat.

I might add that this is conducted by armed officers in uniform who, as the consolidated hearings made plain, are not administrative officers. They are law enforcement

officers carrying 357 magnums and when a car is referred to the secondary area, one officer approaches the passenger side. One officer approaches the driver's side and orders the individual out, orders him to open his trunk, orders him to open the hood and then the inspection of the interior may take place so this is hardly a situation where the protection of the Fourth Amendment should be abandoned and as this Court said in Calandra, the need for deterrence and hence the rationale for excluding evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search and that is exactly what is involved here.

The victim of the search in this case was Mr. Ortiz. A search took place which was unlawful after Almeida-Sanchez made it clear that probable cause was required for a search not at the functional equivalent of the border and not authorized by a warrant.

Nevertheless, the search took place. Evidence was discovered which led to the conviction of Mr. Ortiz.

With respect to the issue of the card holders, initially Mr. Evans said, well, they are not the problem but in addressing Justice Powell he said, "Well, they are the problem. That is one of the key criteria for the establishment of a checkpoint."

Our brief makes quite clear that the INS has

represented to the Congress of the United States that you can't equate the problems of the I186 cardholders with the surreptitious entrance because the I186 cardholders treasure the card that gives them the right to enter the United States.

They enter at a port of entry. They do not use smugglers because they can enter legally and further, INS statistics also reveal that all checkpoint operations in Fiscal 1973 accounted for .003 percent of the people who had I186 cards.

It is simply not a problem at the checkpoints.

Of the over over half-million illegal aliens captured in 1973, I think something less than 5,000 were I186 cardholders abusing their privilege. They are not the problem.

And the Government has two problems with that argument.

Checkpoints were not established to control I186 cardholders because, as the decision of the Tenth Circuit in Roa-Rodriguez makes clear, I186 cardholders up until just a few years ago could travel up to 150 miles north of the border so therefore, a checkpoint up until very recently when that restriction was brought down to 25 miles, a checkpoint was utterly useless in monitoring that type of traffic.

Further, the Government has a bootstrap argument with I186 cardholders because it is the Government that is issuing those cards and it would be rather ironic reasoning

to allow the Government to conduct these massive roadblocks based on the issuance of cards which they have a perfect right either not to issue at all or to issue in a more restrictive manner.

But I don't think the Il86 card rationale applies at all in this case.

And I might also add when we are talking about the distinction between a roving and a fixed checkpoint, that the Bowen Court, of course, found a significant degree of discretion with the point officer in selecting whom he would select for the more intrusive-type search and it is certainly not a modest intrusion for an individual to be travelling 55 miles an hour on an interstate freeway, perhaps never having even come close to the border and then to be ordered off the freeway by an armed officer and this intrusive sort of search conducted.

In this case, there is no evidence that Mr. Ortiz ever went closer than 50 miles north of the border. The only evidence in the stipulated facts trial is that Mr. Ortiz picked up three aliens in Oceanside, California whom he knew to have entered within three years.

That is the only time and place nexus which connects this search to the border, unlike the Almeida-Sanchez case where the officers at the time they conducted the search knew that Almeida-Sanchez had just come from the

border.

And this is sort of typical of the blanket dragnet type of search and seizure policy that goes on at the checkpoints.

Another problem I have with the Government's information, relying on the INS-provided map is in the first map I am sort of glad the Court doesn't have the map because it is really inaccurate.

The Government says that there are 12 checkpoints in the southern district of California. The testimony by the two agents who ran all the checkpoints in the southern district of California indicated that there were nine such checkpoints.

The Government has indicated in the maps to this Court that three agricultural stations located on the Arizona-California border are immigration checkpoints established by the INS.

Another one, one located in Tecate, California, number four, simply does not exist.

And so that is unfortunate that took place but the record clearly reflects that there are nine and where they are located.

Now, I might further add that if this Court sees fit to apply the probable cause standard to the search that took place in this case as it should, since it is directly -- the analogy is clear to Almeida-Sanchez and Carroll versus

the United States but not all checkpoints are immediately going to collapse. This checkpoint is simply unreasonable. It doesn't come close to meeting the requirements of a functional equivalent, 99.9 percent of the traffic, according to INS statistics, contains no immigration law violators, 96 percent of those searched at this checkpoint are not violating any law.

It is really a massive intrusion and sort of a blanket ---

QUESTION: Mr. Sevilla.

MR. SEVILLA: Yes.

QUESTION: Let me get this clear, Mr. Sevilla. We are talking about -- I can't keep these two cases straight --

QUESTION: San Clemente.

QUESTION: We are talking about the San Clemente.

MR. SEVILLA: Yes.

QUESTION: This is the one 62 miles --

MR. SEVILLA: 62 or 66 --

QUESTION: Well, whate er --

MR. SEVILLA: It is 62 miles on 66 road. That is correct.

QUESTION: You said that a certain percentage were searched. Is there a search of the person or is it just of the cars?

MR. SEVILLA: It is not of the person. It would

be of the car area ostensibly where an alien could be hidden but of course, since INS officers are also customs officers, sometimes their delineation between where they can search for aliens and where they can search for contraband becomes confused and we have cases where aliens are -- where the INS officer is searching for an alien in a jacket or in a package of cigarettes.

I have cited those cases in the brief.

And that is the unreasonable distinction between the powers. I think, as a customs officer is guided by probable cause when he is dealing with the situation not at the functional equivalent of the border, so should an immigration officer.

QUESTION: But wherever it is the functional equivalent, he may make any search without a warrant, short of the --

MR. SEVILLA: Short of a body cavity search, I would say so. There may be some limitation as to the extent of the search but certainly the search for aliens would be unquestioned at the functional equivalent of the border and I would submit that the Fifth Circuit has already found two of the checkpoints on the map submitted to the court to be the functional equivalent of the border and so it is really an unwarranted inference to believe that declaring the unreasonable checkpoint at San Clemente illegal, that that would have

a domino effect on other checkpoints. We are only dealing with the San Clemente checkpoint.

Now, the Government's theory which it brings to this Court, for the first time I might add, since it didn't bring it before the District Court or the Court of Appeals, is that there is a functional equivalent of probable cause in this area.

Now, Justice Powell is the only member of this Court who has spoken to the relatively-unstructured concept of the functional equivalent of probable cause but I might just go over the five criteria that Justice Powell talked to and demonstrate how the Government has not addressed any of those.

Number one, there was a warrant requirement because this is the concept where certainly a judicial officer should make the determination and not a border patrolman standing 66 miles north of the border determining a legal concept such as the functional equivalent probable cause.

Second, the distance from the border, 66 miles in this case and the geographic characteristics.

The geographic characteristics in this area, we have an interstate freeway where commuter traffic between San Diego and Los Angeles is interrupted. This is not the -- I do not believe this is what Justice Powell was talking to in his concurring opinion because after the mention was made of geographic characteristics there was a footnote to the

problem along the border and that is that there are vast areas, rural, desert areas where there are no points of -- ports of entry and yet there are means for aliens to surreptitiously enter.

This isn't the situation here. Here we have a checkpoint north of the second largest city of California and north of about 18 other cities along the coast and just south of Los Angeles so it has nothing to do, really, with border enforcement and as a matter of fact, the only people who would be coming from the border on I-5, many of them of course, would have gone through the San Isidro port of entry.

The most important criteria that Justice Powell talked to was the interference with the rights of the innocent and I won't repeat the 99.9 percent figure again as to the people who are violating the law when they pass through the checkpoint so on these criteria certainly there is no functional equivalent of probable cause and when the Government says, oh, we have had a problem getting a warrant for this checkpoint, well, it is no wonder.

They certainly haven't established a functional equivalent of probable cause unless that is to be a really meaningless concept because if it is functional and equivalent, there should be some probability that the people going to that checkpoint are violating the law. That is what

probabilities are all about but in this case it is less than 1/10th of a percent of the vehicles going through the checkpoint.

I must -- I've got two minutes before lunch. I'll try to make that time deadline.

I might address myself to the Camara concept which the Government has also sought to take refuge under.

In Camara the intrusion was that of an administrative clerk who went to a home to look for housing code violation.

The first people who were found in violation were not prosecuted for felonies as Mr. Ortiz was, which carries a maximum penalty of five years per alien. As a matter of fact, as a matter of course, they weren't prosecuted at all.

Whereas the Government can now make a claim to this Court that the transporters of aliens are not prosecuted when they are found, as a matter of course they must be. They have to be prosecuted and so we have a strict law enforcement procedure going forth.

As Magistrate McCue testified at the consolidated hearings, two magistrates in our district in 1972 and 1973 handled 7,000 immigration violations which were really transportation of alien charges --

MR. CHIEF JUSTICE BURGER: We'll resume there right after lunch.

MR. SEVILLA: Thank you, your Honor.

[Whereupon, a recess was taken for luncheon from
12:00 o'clock noon to 1:00 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Sevilla.

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

I believe I was discussing the criminal investigative nature of the San Clemente checkpoints and discussing Magistrate McCue's testimony which is reflected in our brief concerning the thousands of prosecutions in our district for transportation of illegal aliens based upon the arrest of persons by immigrations officers on highways in the interior of the State of California.

If I may rely on our brief with respect to the details as to that testimony, I would like to discuss -- after discussion with the Petitioner -- my allusion to the three checkpoints located on the border between Arizona and California located in the map number one provided by the Government.

QUESTION: We don't have that map.

MR. SEVILLA: Maybe that is just as well. The Government asserts that the three checkpoints which are rather clearly delineated as being in the El Centro sector on this map are, in fact, in Arizona.

However, I would point out that these three checkpoints are California agricultural stations which the Petitioner informs me that an Immigration officer is stationed at this California agricultural station to check for aliens so I don't want to leave any misrepresentations in the record.

However, I would state that this is one of the problems when the Government goes outside the record to supply this Court information in a non-adversary proceedings, especially when one of the parties is supplying the information.

The Government had its opportunity at the consolidated hearings to provide this information and I think they should stick with that record.

The Government makes a big point about the need of the checkpoints. The question in this case is not whether or not searches for illegal aliens can take place at all. It is whether they can take place with probable cause or based upon a warrant or based upon the functional equivalent of probable cause or based upon a checkpoint at the functional equivalent of the border.

But in addition to those alternatives, the Border Patrol has at least eight or nine other programs which they use to capture illegally-entering aliens. That includes the line watch, roving patrols near the border, the farm

investigations, transportation terminal checking procedures, metropolitan investigations and I'll stop at metropolitan investigations because in a 20-day period in the City of Los Angeles a handful of Immigration inspectors swept through evidently a barrio in Los Angeles area and captured 20,000 illegal aliens. That is more --

QUESTION: What percentage is that of the total entries -- entrants is that, would you say?

MR. SEVILLA: Well, by comparison, an entire year at the San Clemente checkpoint, between 12 and 16,000 were captured. About a half a million total were captured in Fiscal '73 but in a 20-day working period, the INS was able to capture 20,000 in the City of Los Angeles, which sort of detracts from the theory that the Government will be unable to discover illegal aliens once they have crossed the border which is, of course, the first line where the Border patrol should be watching with increased vigor. I might also point to the record which establishes that the entire California-Mexico border, during a typical day is guarded by 30 Border Patrol agents and there are nine inland checkpoints in the Southern District of California which take away, obviously, a significant amount of manpower from the border.

At San Clemente there are 47 Border Patrol agents assigned there for a full day activity and you can multiply that by a factor of nine although I am sure there are lesser

numbers assigned to the other checkpoints.

QUESTION: Well, from what you are saying now and what you have in your briefs and other briefs on this score, I take it that you think that they aren't doing their job very well.

MR. SEVILLA: Well, they have a significant problem. There is a massive intrusion of illegal aliens. I am saying that there is no need to dismantle the Constitution to discover illegal aliens when there are so many alternatives available and I ---

QUESTION: Well, now, when they go through the barrio, presumably, it is a grand sweep, a dragnet.

MR. SEVILLA: Well, if an ---

QUESTION: Can an alien move to suppress the evidence of his illegal presence in the country by reason of the fact that he was seized in an illegal search?

MR. SEVILLA: He very probably could but as this Court pointed out in Terry versus Ohio, any law enforcement officer can approach any resident of this country and ask him a question, "Where are your papers?"

QUESTION: Well, do you think ---

MR. SEVILLA: A person doesn't have to answer, but if he answers and says, "I don't have any papers," that provides a basis for excluding him from the country.

The point is that there are other viable

alternatives such as the industrial checks, the boat and stow-away checking, et cetera as well as the doctrine of founded suspicion to stop a car which we have on our warrant and that is -- those cases are cited in the brief. That involves roving Border Patrol cars in the border area looking for suspicious-looking cars and if there is an articulable basis to stop the car, it is permitted.

In addition, there is the governmental agency interplay involving the IRS, Social Security and HEW which allows the agencies to detect the aliens once they have made it to the cities and are now applying for governmental benefits and, of course, the greatest deterrent of all would be passage by Congress of the Rodino Bill which would make the knowing employment of an illegal alien unlawful and there is where the real deterrent rests.

It is up to Congress and I think that given the significant burdens of the Border Patrol, nobody is denying that. It is up to Congress to give them the constitutional tools with which to deal with the problem.

QUESTION: Mr. Sevilla.

MR. SEVILLA: Yes.

QUESTION: If I understand what you are now saying, you disagree with the findings that were made by the District Court in the consolidated hearing I have before me at page 18-a of the petition for the writ in which the district judge

said the primary reason for their operation, that is, the checkpoint, is that they effectively deter large numbers of aliens from illegally entering the country.

Do I understand that you controvert that finding?

MR. SEVILLA: I certainly do and I think the record reflects that. In that consolidated hearing, of course, the Border Patrolman said, we believe it is a deterrent.

But I think the record reflects that, the fact that the Immigration Commissioner indicated that there are some 10 million illegal aliens here today shows that the checkpoints are an obstacle but an easily-evaded obstacle.

QUESTION: Right, but one must consider alternatives and the district judge also found on page 20a that there is no reasonable or effective alternative method of detection and apprehension available to the Border Patrol.

I understand you disagree with that, also.

MR. SEVILLA: Well, I not only disagree with it, your Honor, but the Ninth Circuit in the Bowen case said that the Government is not going to be rendered helpless if they strike the type of search activity that took place in this case.

There are alternatives. I have outlined just a few of them and I am sure the imaginative use of other alternatives would be --

QUESTION: Is it your position that there is no substantial evidence to support those findings of the District Court?

MR. SEVILLA: I would say that is true. For instance, I cite in the brief the statistic that San Clemente checkpoint captures only five percent of the illegal alien traffic going through it. With that efficiency ratio it is hardly deterrent to illegal aliens passing through that area.

In closing, I would just state Mr. Nasatir is going to address the retroactivity question with respect to checkpoints but on page 12 and 13 of the reply brief of either petitioner, there is a statement concerning the appearance of persons of Mexican residence.

The Petitioner has asserted that Border Patrol officers using their sixth sense powers of extrasensory perception can determine merely by a quick visual glance at a person coming in a vehicle on an interstate highway whether that person is an illegal alien from Mexico or a lawful permanent resident from Mexico or a Mexican-American citizen and they can make that distinction sufficiently clear to cause a referral to secondary basically only where there is a reasonable suspicion of unlawful alienage.

If we read the characteristics that the Government asserts on page 12 and 13 describing the illegal Mexican aliens, I think it would be safe to say, as the Ninth Circuit

has said -- and it has taken judicial notice -- that it is impossible, based on an appearance of an individual to tell whether he is here legally or illegally and, in fact, of course, the Imperial County is 52 percent Mexican-American in the southern district.

San Diego County, which has a population of a million and a half is 13 percent Mexican-American. Los Angeles has the largest Mexican-American population in the northern hemisphere outside of Mexico City.

Now, these people have a right to uninterrupted travel and not to be referred to secondary because some Border Patrolmen think they may be illegal aliens.

Thank you.

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

Mr. Nasatir.

ORAL ARGUMENT OF MICHAEL D. NASATIR, ESQ.,

ON BEHALF OF BOWEN

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

First of all, I would like to make the record perfectly clear that this Petitioner does not concede that Section 1357 is the only statute or is a statute upon which the Border Patrol could rely upon for these checkpoints and it certainly is not a basis for reliance in terms of the clear past precedent of this Court and is not a basis

for reliance in terms of the clear past precedent of this Court and is not a basis of reliance even under the statutory scheme.

Section 1225a of Title VIII supplied the Border Patrol with the right to search at the border.

Section 1357, which is the section that Justice White referred to in the argument on the first case, Peltier, is merely a statute which enables the Border Patrol to board vehicles within a reasonable distance from the border without a warrant.

Neither of these statutes, it is clear from a mere reading of them, requires a dispensation with traditional reliance upon probable cause.

QUESTION: What permits the dispensing with it at the border?

MR. NASATIR: Section 1225a of Title VIII, your Honor, which is cited at --

QUESTION: So your position -- your position is that the statute itself does -- on its face or any other way -- doesn't purport to authorize non-probable cause searches.

MR. NASATIR: That is correct.

QUESTION: Anywhere.

MR. NASATIR: Anywhere.

QUESTION: At the border or any place else.

MR. NASATIR: No, sir, because Section 1225a,

presently Section 1225a, which is cited at page 22 of the brief in Brignoni-Ponce, footnote 11, is the statute which enables Immigration officers to board and search cars in which they believe aliens are being brought into the country. This is the enabling statute which allows them to search at the border.

1357 merely allows what Justice Stewart found in Almeida-Sanchez, a search within a reasonable distance from the border which I think commonsense would have told the Immigration and Naturalization Service at the time does not mean that the necessity of probable cause is dispensed with, merely reasonable distance from the border and certainly not some 45 to 50 miles from the border as was the case in Bowen or some 60 miles, as was the case in Ortiz.

So certainly we do not concede that this statute, either on its face or any reasonable interpretation of it by lawyers for the Immigration and Naturalization Service trained in the law to advise these officers to conclude that the probable cause requirement imposed by the Fourth Amendment since the inception of this country could be dispensed with.

And I hope that the record is perfectly clear as to that lack of a concession and in fact, a reading of the statutes, of both statutes, would show that 1225a enabled them to search at the border still with -- if they believe aliens are coming in and 1357 allows them to search within a

reasonable distance from the border if they have probable cause.

They can search it without a warrant in both cases, certainly.

Every Fourth Amendment case, of course, turns upon its facts and in this case, the facts of Mr. Bowen are those that every citizen in the United States, I submit, who chooses to travel in a hunting and fishing agricultural area of Highway 86 -- in Almeida-Sanchez, if you will remember, after he was stopped, Mr. Almeida-Sanchez identified himself as a resident of Mexico. He told the Border Patrol that he picked up a car at the border, that he had just come from Mexico and that he intended to return to the border on this trip.

Mr. Bowen was stopped. He identified himself as an American citizen, a citizen of the United States.

The officer testified there was no evidence that he had come to Mexico, no one had seen him come to Mexico. He wasn't asked questions whether he was coming to Mexico. He was merely ordered to open the back of his camper.

Also in Bowen, as distinguished from Almeida-Sanchez, even, an even stronger fact, Mr. Bowen was driving a camper which we all know is, to some people, their home on wheels, especially their vacation home.

The Border Patrolman in Bowen, as far as he knew,

could have discovered Mr. Bowen's wife or his children sleeping in the back and disturbed them. He could have discovered a guest of Mr. Bowen sleeping in the back or doing any of the other private things which we know are done in campers, including toilet habits or any other private thing you do in your house.

There was nothing in the nature of Bowen's car, nothing in the nature of his appearance, racial or otherwise, and nothing in the nature of his statements to the Border Patrol which would indicate anything other than he was a vacationing traveller in this recreation area next to the Salton Sea which is a prime fishing area in the Southern California area.

The nature of this search, as shown by the Bowen facts, is that that of an arbitrary one, giving complete discretion to the Border Patrol.

As I stated before, there is no showing whatsoever that Bowen or his vehicle had ever been to Mexico. Of course, a reasonable interpretation of the Border Patrol's power in this case, that is, functional equivalent of the border, would have provided this nexus but they didn't have it here.

They had a regulation enacted by the INS itself which said that, well, what is reasonable is 100 miles and I think we can all agree where that 100 miles was picked from.

It's an arbitrary figure, having nothing to do with nexus to the border or functional equivalent.

Commonsense would tell us that when Congress enacted a statute in light of the Fourth Amendment, and in light of the Carroll line of cases from this Court and without express authorization, that Congress never meant to waive the probable cause requirements of the search and without this statutory justification, without reasonable reliance, certainly this case presents no retroactivity question.

It presents no retroactivity question because it doesn't overrule clear past precedent because what is the precedent if it is not the statute as I have already argued.

The precedent is merely a self-serving regulation enacted by the Immigration and Naturalization Service but was this a precedent for the Immigration and Naturalization Service?

If you would see the record in the Baca hearings, you would see that these checkpoints have been in existence since 1925. Now, from 1925 to 1946 when Section 1357 was enacted, there was no statutory authorization for these checkpoints whatsoever.

The Immigration and Naturalization Service took it upon themselves to stop and search travellers anywhere within --

QUESTION: That depends on whether you think 1225 is empowering people to search vehicles applies only to the

border.

MR. NASATIR: I think a fair reading of 1225 is just that, your Honor.

QUESTION: Well, that is what I say. That is the way you interpret it.

MR. NASATIR: Yes, and I think that is the way that reasonable minds would have interpreted that in light of the probable cause requirement of the Fourth Amendment and this Court's Carroll line of cases.

Not only does --

QUESTION: What's the "Carolina" cases? Oh, it's the Carroll line of cases. I see. I see.

MR. NASATIR: Yes, your Honor, beginning with the Carroll case as cited by this Court --

QUESTION: I see. I misunderstood you.

MR. NASATIR: -- in 1925. Just the opposite, really, is true. The clear past precedent was Carroll and an opposite result was compared with -- was compelled by Carroll. Certainly the past precedent was not clear even in the Ninth Circuit.

As you can see, every case before 1970 in the Ninth Circuit not only discussed the stop of these travellers on the highway but discussed probable cause also and each and every case prior to 1970 required a discussion of that probable cause to justify that search and they did that in

each and every case.

In 1970, Fumagalli came along and in 1970, when Almeida-Sanchez was searched, that lawyer took that case to this Court and it was then decided.

So certainly, the precedent in the Ninth Circuit was far from clear, as is so ably pointed out by Justice Huffstедler in her dissent in the Bowen case.

QUESTION: What about the majority opinion, if it is so clear?

MR. NASATIR: The majority opinion, I fear, was mistaken in the fact that they mistook the Fumagalli line of cases as clear past precedent when you --

QUESTION: You are painting a picture here of consistency in the Ninth Circuit and yet you have a substantial number of votes of the present circuit judges the other way.

QUESTION: I believe that a close reading of the cases leading up to Fumagalli showed that probable cause was required up until Fumagalli, certainly until -- not the beginning of the line of cases even cited by the Ninth Circuit, your Honor, was in 1963.

If you want to -- that is the beginning of even the cases which discussed probable cause and required probable cause in their discussions in order to affirm the opinions upon which the Ninth Circuit relied.

But not only that, your Honor. I think, as the

final arbiter of constitutional rules this Court must be looked to as the Court which defines constitutional principles.

Certainly, the Ninth Circuit cannot be the definer of constitutional principles because the Tenth Circuit, right next door, might define them differently and that would lack uniformity. Anyone who looked to the Supreme Court for guidance in this case would have found Carroll and would have found probable cause certainly controlled the statute.

The Ninth Circuit also spoke to the fact that this was a long-established widely-relied upon practice as defined by previous decisions.

Now, the previous decisions, I submit, that were talked about in Milton versus Wainwright, were the decisions of this Court, not the decisions of the lower court.

But, secondly of all, this is not a widely-relied-upon practice. No other law enforcement agency in the United States but the Immigration and Naturalization Service relied upon this practice.

The Immigration and Naturalization Service enacted a regulation which, I submit, had the drafters of that regulation been -- and not haphazard, would have found the Carroll line of cases which limited searches without warrants to reasonable distances from the border and then and only

then with probable cause.

QUESTION: Mr. Nasatir, we are talking here, I take it, about the retroactivity of the Ninth Circuit decision in Bowen.

MR. NASATIR: We are talking here about the retro-- the lack of retroactivity analysis even having to be made, your Honor, because clear past precedent supported the fact that -- always has supported the fact -- clear past precedent from this Court.

have
QUESTION: Well, I heard that part of the argument, I think. What I was trying to direct your attention to was, the focus isn't on the retroactivity of any decision of this Court but on a decision of the Ninth Circuit.

MR. NASATIR: The Ninth Circuit held, your Honor, that Bowen was not entitled to the benefit of the decision outlying checkpoints. What I am saying to this Court is, that Bowen is entitled to the benefit of the Carroll line of cases and the cases that have always held that the Fourth Amendment applies to searches well within our borders.

QUESTION: Don't you see some difficulty -- and I would think perhaps if you see some difficulty, it might just as well help your client as hinder him -- in carrying over retroactivity analysis that has been applied in decisions of this Court down to Courts of Appeals decisions and presumably ultimately to the District Court so that you have different

rules presumably in every judicial district in the United States.

MR. NASATIR: I do see that difficulty, your Honor.

QUESTION: How would you propose that it be solved?

MR. NASATIR: I would propose first that it be solved by having no retroactivity analysis at all, by declaring that that has always been the law, as was declared in Almeida-Sanchez, clearly, and that checkpoint searches are certainly no different than Almeida-Sanchez.

QUESTION: Well, that is fine for your particular case but all that would give us is a case-by-case analysis not just of our own precedents but ultimately of the Courts of Appeals decisions and presumably then the Courts of Appeals are going to have to analyze the District Courts' decisions to see whether they should be retroactive from a particular time.

I think perhaps something more than that just urging that here the thing should be nonretroactive may be required.

MR. NASATIR: Well --

QUESTION: I think, as I have understood your argument, you at least partially address Mr. Justice Rehnquist's question by saying that the court to look to is this Court and only this Court --

MR. NASATIR: That is precisely what I was saying.

QUESTION: And that is what Judge Hufstedler said in her separate opinion that otherwise something will be one way in one circuit, one way in another, one way in one district of a circuit, one way in another.

MR. NASATIR: That is correct, your Honor.

QUESTION: The only place where retroactivity -- where you even get into the question is if you see that this Court had overruled a long-settled previous precedent or practice.

MR. NASATIR: That is exactly my argument and I --

QUESTION: The difficulty is that Bowen isn't a decision of this Court.

QUESTION: Well, even the Government concedes, as I understand it, that -- that Bowen -- that the Court of Appeals was wrong in saying that Bowen was not entitled to its judgment. The Government quarrels with its judgment, the Court of Appeals judgment, but says that if the judgment is correct, Bowen would have been the beneficiary of it.

MR. NASATIR: That is correct.

QUESTION: But not because it should be retroactive.

MR. NASATIR: No, your Honor, because it has always been the law. That is my point and also, of course --

QUESTION: It is the Government's point.

MR. NASATIR: No, it is not the Government's point.

What the Government's point is, is because Bowen was the litigant in the Ninth Circuit and because the Ninth Circuit found -- because the Ninth Circuit decided the Bowen case, that that should be the basis for all decisions in the Ninth Circuit.

I submit, certainly, if that is the judgment of this Court, that certainly Bowen should receive the benefit but of course, if the judgment of this Court is that Bowen is decided today nationwide, then Bowen should also receive the benefit of that decision.

But what I am really urging is that Bowen should receive the benefits of this decision, not only for those two reasons but also for the reason that Bowen is the beneficiary of this Court's first opportunity to review border checkpoint cases in the light of its past decisions under Carroll and I think under all three of those focusses of analysis, Bowen gets the benefit of the decision.

The -- once more in the retroactivity analysis, I think what you are also looking at is reasonable reliance. Now, the Ninth Circuit made a big point of the fact that the INS relied upon Ninth Circuit opinions.

I have already pointed that from 1925 to 1946 the INS relied on nothing, not statute, not decision, nothing to establish these checkpoints.

at

It has also pointed out /page 74 of the brief and I

believe it is Brignon -- excuse me, the brief in Ortiz, that the INS stopped and searched a citizen one month after the Bowen decision was decided in the Ninth Circuit outlawing that very practice, without a warrant and without probable cause. That is at page 74 of the Ortiz brief.

So certainly they are not relying on the Ninth Circuit, either for the prior justification before this statute or for the subsequent justification. The INS is just stopping and searching people without authority or certainly not relying upon the Ninth Circuit.

If it could be argued the INS stopped Sanchez-Pedrosa, which is the case a month after Bowen was decided in the Ninth Circuit, if it is argued that way, then, of course, they are waiting for this Court to decide Bowen finally and that would show that they originally should have looked to the Carroll decision in making their judgments in drafting the regulations.

The point is made in the Amicus brief, your Honor, that this case should be decided, not on the retroactivity analysis for another reason, that this Court should control the applicability of its constitutional decisions and I think that is a very, very important point because what you are deterring here by that kind of analysis is future drafting of regulations in a haphazard manner. What you are encouraging by that kind of analysis is the drafting of regulations

carefully and prudently looking at all the law, especially including the law as announced by this Court.

Had that been done by the persons -- and we are not looking at law enforcement, Justice Burger -- you noted "reasonable reliance by law enforcement officers."

That is not all you are deterring in this case. The only authority for these officers to conduct these searches was a regulation drafted by their own people at the INS.

What you are deterring and would be deterring in the future by a nonretroactivity analysis and deciding whether retroactivity applies on a case-by-case basis is careful, prudent drafting of regulations which guides these law enforcement officers and I think that is a practice you want to encourage and I think a practice you want to deter is haphazard drafting without research or without authority.

Even under the traditional retroactivity analysis, this case differs from the prior Court's decisions.

This case will not have nationwide application as did all of the other cases where nonretroactivity was ordered. This case deals with the INS, the INS only.

The smallness of that law enforcement agency is well apparent from the Government's briefs and from the Petitioner's brief in all of these cases.

Nor will it disrupt state, local and federal courts

all over the country or law enforcement authorities.

Certainly, this analysis would aid in that conclusion and aid you to see that this, in the first instance, is not a retroactivity case because of the prior law of this Court and, second, that even if you consider it under the traditional analysis, the extent of the reliance is much smaller.

The effect on courts and administration of justice is much smaller and certainly no one can say that this is reasonable reliance by the Immigration and Naturalization Service on clear past practice.

The cases on retroactivity have, as I see it, fallen into two categories. Number one, where you have overruled cases, like Rabinowitz and Goldman, in one of your retroactivity cases.

But, number two, where you have ordered law enforcement officers to do something that they have never been required to do before, such as Miranda. You have got to give warnings now is what you said in certain cases.

And neither of those two cases --- those two types of cases, has anything to do with this situation where, as we have already pointed out, clear law did not support the regulations issued by the Justice Department nor did a fair reading of the statutes and as I say, when you talk about law enforcement in a situation like this, you are talking about not only the officer in the field but those who are advising

him.

MR. CHIEF JUSTICE BURGER: Thank you.

I believe your time is entirely used up, Mr. Evans.

Mr. Sevilla and Mr. Nasatir, you accepted the appointment of this Court to appear in these cases and acted at our request.

On behalf of the Court, I thank you for your assistance to the Court and, of course, your assistance to your clients.

MR. NASATIR: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 1:29 O'clock p.m., the case was submitted.]

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