In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FLEIX HUMBERTO BRIGNONI-PONCE,

Respondent,

No. 74-114

Washington, D. C.
February 18, 1975

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Washington, D. C.,

Tuesday, February 18, 1975.

The above-entitled matter came on for argument at 1:31 o'clock, p.m.

BEFORE:

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

APPEARANCES:

ANDREW L. FREY, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioner.

JOHN J. CLEARY, ESQ., Federal Defenders of San Diego, Inc., 925 First Avenue, Suite 260, San Diego, California 92101; on behalf of the Respondent.

C O N T E N T S

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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 74-114, United States against Brignoni-Ponce.

Before we proceed with your case, Mr. Frey, I want to remedy an oversight. I did not -- I overlooked thanking Mr. Shapery for his assistance to the Court and his client, because you, too, acted at the request of the Court and by the appointment of the Court.

Mr. Frey, you may proceed.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on the government's petition to review the judgment of the Court of Appeals for the Ninth Circuit, reversing respondent's conviction for transporting aliens who were present in this country illegally.

The reversal was predicated on the ground that the stop of respondent's car and the ensuing inquiry as to the nationality of its occupants violated the Fourth Amendment. And that testimony at trial of the aliens who were being transported by respondent was the fruit of the poisonous tree, and that their testimony should have been suppressed.

Respondent was arrested on the evening of March 11, 1973, by two Border Patrol officers who were on duty in a

patrol car stationed at the San Clemente checkpoint. The checkpoint was closed at the time, due to inclement weather, the patrol car was parked at right angles to the highway with its headlights directed toward the highway in such a fashion that it could -- would illuminate the passing cars.

The officers observed respondent's car pass by, containing respondent and two passengers, all of whom appeared to be of Mexican descent. They pursued and stopped the vehicle for what they characterized at the suppression hearing as a routine immigration inspection.

QUESTION: Mr, Frey, do they close these checkpoints whenever the weather is bad?

MR. FREY: They close them for various reasons. There is a concern about the effect of the checkpoint operation on the flow of traffic, and at times when traffic is heavy, for instance on Sunday afternoon, they will normally feel compelled to close the checkpoint down because it's interfering too much with the normal flow of traffic.

QUESTION: Well, it's meant to interfere with traffic, isn't it? That's its purpose.

MR. FREY: Well, the --

QUESTION: "Just wait till Sunday".

MR. FREY: The border patrol -- well, that is a problem, and in our Reply Brief in Ortiz, I have a footnote which indicates what happened when one Sunday, quite unexpectedly,

they kept the checkpoint open, and they caught exceptionally large numbers of illegal entrants on that occasion.

QUESTION: But nobody got home till Monday morning.

MR. FREY: Well, it is a problem, and the Border Patrol believes that it is its responsibility to attempt to balance its interest in apprehending aliens with the interest of motorists on the highway to proceed without a two-hour traffic jam. We try to avoid that kind of an imposition on the traffic.

Now, of course, it does -- there are holes in the system. It is possible for a skilled, knowledgeable smuggler -- and many of the alien smugglers are highly sophisticated; they have drop houses near the border, they have scouts who go ahead and phone back, and so on. It is possible to evade the system; the net is not airtight.

QUESTION: Well, in some prior case, Mr. Frey, I don't recall which one -- not Almeida-Sanchez; something before that -- there was reference to an occasion when this strict border search that Mr. Justice White alluded to was enforced for some period of time, resulted in diplomatic representations by the Mexican Government to the State Department of the United States --

MR. FREY: I'm afraid I'm not familiar with that.

QUESTION: Was that in a case -- you're not

familiar with the case?

MR. FREY: No, I'm not.

I would say, though, that even at the border, the question of how closely they search people's bags, how many people, what proportion of the entrants arriving at a Port of Entry are searched, at Dulles Airport or something, will depend on the volume of people. If there's three 747's just coming in with a large number of people, the checking is going to be somewhat more cursory, more people will probably be passed through by Customs without a careful search of their baggage.

These are accommodations to the exigencies of the situation.

In any event, in this case, they questioned the passengers in English, which they appeared not to understand, and then in Spanish, concerning their citizenship; and they discovered that the passengers had no papers authorizing them to be in the United States.

Respondent and the passengers were then arrested.

The suppression hearing took place prior to this Court's decision in Almeida-Sanchez, and there was a quite cursory exploration of the circumstances surrounding the stop.

QUESTION: Suppression of what?

MR. FREY: Well, there was a motion made by respondent to suppress testimony of the aliens, as the fruit

of an illegal search.

At the time it was, I think, quite clear to everybody under Ninth Circuit law then that that motion had no hope of prevailing at that time; and, as I say, I think it was actually held on the day of trial and denied.

The only inquiry into the particular reason for selecting respondent's car for a stop was made in the form of a couple of leading questions, asking on cross-examination by respondent's counsel.

Now, on appeal, the Court of Appeals first considered the question of whether this was a roving patrol or a checkpoint stop, and decided that it was more properly characterized as a roving patrol; and we haven't challenged that characterization here.

That the site of the roving patrol stops are invalid in the absence of a warrant for particularized founded suspicion.

I don't think it's -- it didn't suggest that a warrant would do, but in this case, of course, there was no warrant.

It considered this conclusion to flow from the decision of this Court in Almeida-Sanchez, and from this Court's reliance on Carroll, which, I point out that Carroll is square with Almeida-Sanchez in the sense that if Carroll involved a roving patrol search, the other cases we have here are not -- are distinguishable from Carroll; one on the

basis that they involve checkpoints which we say are different, and in this case that we are not seeking here the authority to search but simply to stop. And Carroll was not concerned with a pure stop, but, rather, with a search of Mr. Carroll's car.

We submit that there is a substantial constitutionally significant difference between a search of an automobile and a stop for the purpose of briefly interrogating its occupants regarding their right to be in the United States. And that with respect to stops within a reasonable distance of the Mexican border, this Court should honor the congressional judgment that warrantless stops for this limited purpose are reasonable and proper to help enforce vitally important congressional policy to limit the influx of aliens for residence in the United States.

QUESTION: Let's see if I follow you there, Mr. Frey. In other words, if this were in Chicago, you wouldn't be before us? I thought you said --

MR. FREY: Well, to look at the circumstances, we would not -- we do not assert a right to stop cars on a random basis or without particularized suspicion in Chicago.

There is an issue, if we believe that a car contained an alien or if we believed that a pedestrian was an alien, subsection (1) of the statute appears to confer a right to interrogate that person.

I basically rely in this case on subsection (3) rather than on subsection (1) of section 287. That is, I'm relying on the -- I am contending that the stop-and-question authority is necessarily encompassed within the authority that Congress conferred to board-and-search.

And that, although to the extent that it purported to give that authority to search on roving patrols, in Almeida-Sanchez this Court held it invalid, we think that the lesser authority at stake in stopping and interrogating is constitutionally permissible, and that the statute should be upheld in that regard.

Now, I --

QUESTION: You say you rely primarily on (1) or on (3)? I missed that.

MR. FREY: Primarily on (3), within the border area. In other words, our position is that we have a superior or greater right to stop and interrogate within a reasonable distance of the border than we would have outside a reasonable distance of the border.

I think we've tried to make it clear in our brief that we are not saying that we could set up a checkpoint on the road between Omaha and Des Moines and do the same thing.

QUESTION: Well, am I not right in remembering that Terry v. Ohio said, in passing on that opinion, that any policeman can interrogate anybody about anything at any time?

Constitutionally.

MR. FREY: That's true, but we have here more than a simple interrogation. In order to get to interrogate respondent, we had to stop his automobile.

QUESTION: Well, if he were a pedestrian --

MR. FREY: If he were a pedestrian, I think there would be a basis for arguing that you could go up to him and simply say: I'm an officer of the Immigration Service and I --

QUESTION: And, "Did you see a man go by here in a white hat?" or something.

MR. FREY: Indeed, or "Are you a citizen of the United States?"

QUESTION: Or "Are you a citizen of the United States?"

QUESTION: But if you want to do more than that, Terry and those cases would indicate that if a person says, "None of your business, go on", just if it's just an citizen and it's without reasonable suspicion, they couldn't hold a person.

You're suggesting you could not only stop them but you could hold them until you asked the questions?

MR. FREY: That's correct.

When I get into the legal portion of the argument, we're suggesting --

QUESTION: And in Terry, if there were reasonable

suspicion, the officer supposedly could hold them until he finished his questions.

MR. FREY: That's true.

Now, of course, respondent says --

QUESTION: But just with any other citizen, no.

QUESTION: That's right.

MR. FREY: Well, if there were no -- I don't believe that a police officer could forcibly detain just any person.

QUESTION: So you're saying that because you're within a reasonable distance of the border, you do have greater power to stop and interrogate than just with any citizen on the street?

MR. FREY: Absolutely.

QUESTION: Yes.

MR. FREY: Absolutely. And I think the statute makes that distinction, and we rely on (3).

There is an argument about what subsection (1) means, because subsection (1) talks about a belief that the person is an alien; subsection (3) requires no belief of that sort.

I think it would be debatable as to whether we would have the authority, under subsection (1), to forcibly detain somebody within the border area, within a hundred miles, without a belief that he was an alien. There would be some problems under the language of the statute.

QUESTION: And where does (3) give you the power to

forcibly detain somebody?

MR. FREY: Well, (3) gives us the power to stop-and-search, as we construe it.

QUESTION: To board and search?

MR. FREY: To board and search.

QUESTION: Any vessel.

MR. FREY: Well --

QUESTION: And any railway car, aircraft, conveyance or vehicle.

MR. FREY: Well, "vehicle", in this case we're --

QUESTION: "Board and search". I'd thought, rather, that that was referring to the practice, it used to be, when people traveled by ship rather than by airplane or --

MR. FREY: There is --

QUESTION: -- going out beyond Ambrose Light -- out to Ambrose Light, and the Customs officials boarding a vessel out there, beyond our borders.

MR. FREY: Well, the statute is derived from authority at the border with respect to stopped vehicles; but I think it's entirely clear, from an examination of the history of the statute, that this was intended to confer the power to stop a moving automobile, and that was not doubted in Almeida-Sanchez. And I think it's quite clear that the statute already contained the language "board and search" in 1946. What Congress did was it removed from the statute the

requirement that there be a belief that the person be an alien, and it introduced into the statute the right to make this search within a reasonable distance of the border and not simply at the border.

And I think if the Court looks at what Congress did in 1946, I don't think there's any serious question that Congress intended to confer this power. It intended to confer the power to search. We say this is necessarily included within the power to search is the power to stop.

QUESTION: Well, within the border area that you think this special rule applies, are you urging that you must have power randomly to stop, or do you say -- or do you say it's only when an Immigration officer, a Border Patrol officer believes there's something suspicious?

MR. FREY: No, we say that we have the power to stop randomly.

I would like to make a point in connection with Terry, --

QUESTION: Is that --

MR. FREY: -- we say we have the power to stop --

QUESTION: Randomly?

MR. FREY: -- and interrogate randomly.

QUESTION: Randomly, as a deterrent tool.

MR. FREY: As both a deterrent and an affirmation tool.

QUESTION: Which makes irrelevant in this case that they thought -- these looked like Mexicans, they thought there were Mexicans, or anything else?

MR. FREY: I think it's -- I think it's completely irrelevant.

Now, I can picture a case in which the individual stop was, let us say, a 60-year-old lady who was alone in her car and who was clearly Anglo-Saxon, and her car was stopped stimply for the purpose of asking her about her citizenship.

QUESTION: Or if you stop a motorcycle?

MR. FREY: Well, no, I'm not talking about search authority now, I'm just talking about stopping and asking the person in the car what their citizenship is. And such a person might be able to argue that, while it's true that you ought to have random power, --

QUESTION: She might be no more than --

MR. FREY: -- it's hardly reasonable to stop me, -- because she might be; that's true. But of course the conditions in the Mexican border area that justify the power that we are asserting here and that we say make this case distinguishable from Terry's articulated, particularized suspicion at that point; is it applicable to Mexicans?

QUESTION: Would you say it's -- is it in this area, within a reasonable distance of the border, there is the generalized justification to make random searches of anybody

that is equivalent to the particularized justification that the Court found in Terry?

MR. FREY: That's correct.

QUESTION: Is that it?

MR. FREY: That's correct.

QUESTION: Because of its proximity to the border, this now becomes generalized to support a random search of anybody.

MR. FREY: Because of the particular conditions that exist at the Mexican border.

QUESTION: But it's the equivalent of the particularized contra-suspicion --

MR. FREY: It's the equivalent of --

QUESTION: -- with respect to Mr. Terry on the street of Cleveland, Ohio?

MR. FREY: That's correct.

In the case of Mr. Terry, it was obviously necessary for the Court to require specific facts relating to Mr. Terry, because otherwise you would have a rule that would leave the police at liberty, any place in the country, to forcibly detain anybody with no reason at all.

Now, here we're saying there's a substitute.

QUESTION: Well, would another analogy be, say, in the San Diego area, if the police were making a license check for automobile licenses, or for driver licenses?

MR. FREY: We think this is quite analogous to it, to a driver's license check, although we think that the showing of the constitutional equivalent of probable cause that we can show here is far greater than any that can be shown to justify stopping people for a license check. Because we think that what's at stake here is literally the problem of --

QUESTION: But you wouldn't say that in some other city, Memphis, Tennessee, or something, that you could just stop anybody and forcibly detain them while you inquired about his citizenship?

MR. FREY: No, we're not asserting the authority to stop anybody in Memphis, Tennessee, and forcibly detain them. Unless there might be circumstances --

QUESTION: But you are in Southern California, --

MR. FREY: You are in Southern California.

QUESTION: -- to forcibly detain them until you ascertain whether they're citizens or not?

MR. FREY: We are asserting that.

QUESTION: I mean for a brief time, anyway.

MR. FREY: For a brief time. We consider it -- I mean, to call it a forcible detention for most people who drive along the highway, it's a question of stopping the car, the officer comes over, and he says, you know, "What is your citizenship? Are you an American citizen?"

QUESTION: Well, if you're last in line of a hundred

cars, then, and you're in a hurry to get home on Sunday night, that's quite a while.

MR. FREY: That's one of the reasons why the Border Patrol is sensitive to those concerns, and closes the checkpoint. So that it does, it avoids the situation in which you have a hundred cars backed up.

The way the San Clemente checkpoint operates, it does not stop every car. The figure of 99.9 percent that was given to you in the last argument with respect to the number of aliens that are apprehended is a terribly misleading figure, because what was done there was to compare the total flow of traffic across the road with the number of aliens who were caught.

But the vast bulk of the traffic is not stopped. We do not stop every car. On a highway like at San Clemente, where the traffic is extremely heavy, a very small proportion are stopped.

Now, of course, many are required to slow down as they go by the checkpoint. That is an inconvenience. We think that the Constitution does not prohibit our subjecting people to that kind of inconvenience to serve the vital objective that this program is designed to serve.

Now, I think it's important to --

QUESTION: Before you go on with that, let me see if I can track your argument on applying the Terry stop

principles to this situation. You say that within a reasonable distance of the border the officers may stop any car for any reason, just to ask them questions?

MR. FREY: Without any particular reason.

QUESTION: Without a particular reason.

MR. FREY: Yes.

QUESTION: Without probable cause, certainly.

MR. FREY: Or even founded suspicion; right.

QUESTION: Yes. Now then, when it develops at that point that the occupants of the car, or some of them, cannot speak English, are you suggesting that a probable cause then comes into being?

MR. FREY: I think, Mr. Chief Justice, that there is no serious dispute on that. That is, if we're entitled to -- if we were entitled to stop respondent's car, I don't think there's any serious challenge that once they shrug their shoulders and didn't speak English, we had, in effect, probable cause for the ensuing arrest.

The focus of this case is on whether we could stop this car in the first place and get to ask the question; and of course, if we can't stop this car, then we have no way of interdicting the flow through, in our view.

QUESTION: Well, taking that step by step, you wouldn't claim the same right in Des Moines, Iowa, necessarily?

MR. FREY: No, we wouldn't, unless there were special

conditions, that I don't think exist in Des Moines, Iowa.

QUESTION: You're saying that probable cause arises from the inability of these people to speak English, because they are in close proximity to the Mexican border?

MR. FREY: Well, no, but -- well, let me make a distinction, Mr. Chief Justice, there are the distinctions that are constitutionally pertinent and those that are made by the statute.

The statute makes a distinction between the area within a hundred miles of the border and the rest of the country. The interrogation authority that the statute confers, which is nationwide, is restricted to persons who are believed to be aliens.

Now, from the constitutional standpoint, the Court asks us: What is our justification for impeding people in going about their business, for making them stop their cars and roll down their windows and answer a question?

And we are saying that in this case, in this group of cases, the constitutional justification is that there are special problems in the area of the Mexican border; that these problems are enormous; that the traffic check operations are vital to our system of stopping the inflow of illegal entrants from Mexico into the interior labor markets.

That is our constitutional justification, and we rely on Camara, together with Terry. We rely on Camara

for the portion that says we don't need special-focus probable cause when we have shown conditions which we say, in gravity for our society, far outweigh the kinds of things that See and Camara were concerned with: housing codes, whether the basement apartment in an apartment building was being used for a residence.

QUESTION: On what basis was this defendant arrested?

MR. FREY: He was arrested for the offense of transporting -- knowingly transporting aliens who were illegally in the country.

QUESTION: But at what point was he arrested in the entire case?

MR. FREY: After it turned out that the aliens both couldn't speak English, and when they were interrogated in Spanish had no papers whatsoever indicating their right to be in the country.

QUESTION: But they weren't arrested until after that? They weren't arrested just on the fact that they couldn't speak English?

MR. FREY: No. That was -- they were then asked whether they had papers, since, presumably, they might not be able to speak English if they had been lawfully admitted.

QUESTION: Yes.

MR. FREY: But an alien, even if he's lawfully admitted, has a duty to carry out, I think it's a 151 --

QUESTION: Yes. Yes.

MR. FREY: -- and he can be asked for that. The only problem is whether we can walk up to somebody on the street, not knowing that he's an alien but thinking that he might be, and asking him --

QUESTION: But you say you can within an area of near the border?

MR. FREY: We can stop a car.

Now, another point -- I don't think --

QUESTION: Mr. Frey, you said earlier you thought there might be a distinction between the old lady driving a car and these people. And I swear, I don't understand this. In light of what you just told us --

MR. FREY: If I were representing the old lady, I would say that while it's true that the government may have a right --

QUESTION: But you aren't.

QUESTION: That isn't --

[Laughter.]

MR. FREY: Well, I was responding to a question, Mr. Justice Brennan.

QUESTION: Well, you better represent the United States.

MR. FREY: I'm trying my best.

QUESTION: Well, what's the answer?

QUESTION: What is the answer?

What is the distinction?

MR. FREY: The distinction is that --

QUESTION: You're apprehending --

MR. FREY: -- is that -- I'm saying that we have a right to stop anybody. Now the question is, in particular circumstances we might unreasonably exercise that right.

Suppose we had -- suppose someone had gone through the San Clemente --

QUESTION: If you have a right to stop, make random stops -- I don't understand that you can ever --

QUESTION: It can never be unreasonable.

MR. FREY: I don't think it's a matter that -- I don't wish to spend very much time. I can picture an argument being made, which I don't think can be made by respondent, if we had just stopped him at the San Clemente checkpoint, searched his car, interrogated him, and said, "Drive on", and then we followed him and stopped him again two miles down the road; somebody could say that was unreasonable.

We have no isee of anything like that here.

QUESTION: All I'm talking about, you have the officer sitting at the side of the road with the headlights on, the car goes by, it's an old lady in it, and you stop her.

MR. FREY: We would have a right to stop the car, yes.

QUESTION: All right. That's what I thought you said.

QUESTION: Earlier you made a distinction.

QUESTION: Those old ladies can be very suspicious sometimes.

[Laughter.]

MR. FREY: The question -- there is a question apart from the statute and apart from the general-area probable cause, there is a question whether in particular circumstances a search was unreasonable. For instance, if we yank somebody out of a car and put them up against the car and patted him down, for instance, that would be an unreasonable search on our part.

Well, that's all I mean to say on --

QUESTION: Well, as I understand it, you're not even asserting in this case the right to search at all, but just the right --

MR. FREY: No, no --

QUESTION: -- to ask questions; is that it?

MR. FREY: That's it. The right to stop.

QUESTION: Well, I had understood, based upon my reading of the opinion of the Court of Appeals, that you were relying on Section 1357(a)(1), and you now --

MR. FREY: No, they discussed the --

QUESTION: -- have told me of that misunderstanding. I then gather you made a different -- the government made a different argument to the Court of Appeals?

MR. FREY: Well, I'm not certain what the government argued there, but the Court of Appeals was talking about the Bowman case in the Tenth Circuit, and the Bowman case relied on (a)(1). And the Court of Appeals said: Well, if you rely on (a)(1), what you're claiming is a very broad authority of the kind that we're not prepared to say the government has.

And all that I'm saying here is that we are not relying -- we're not saying we could do the same thing any place outside the border area. What's at stake in this case is whether we can do it within the border area.

QUESTION: But in Chicago or in Omaha, or St. Louis, you can -- your people can walk up to anybody ans ask them.

MR. FREY: Yes, but if this --

QUESTION: With or without (a)(1).

MR. FREY: Without a warrant.

QUESTION: But if they say, "Go about your business, I don't want to answer a single question", you're not supposed to hold them.

Here you say you could hold them until you ask them a couple more questions.

MR. FREY: I -- we say we can hold them here.

QUESTION: Yes.

MR. FREY: I don't see that it's fruitful, really, to get into it. We say that this is different.

QUESTION: Well, it was fruitful -- it was so fruitful,

that the Ninth Circuit thought you were -- thought you were wrong.

QUESTION: Unanimously.

MR. FREY: Well, I'm not sure as to what they thought we were wrong, but they would not -- I take it, they would not take issue with our contention that we don't rely on the Bowman analysis that we could do it any place in the country.

We are saying that it does make a difference that we're in the border area here.

Now, the reason the Ninth Circuit thought we were wrong, unanimously, I believe, is a product of a superficial analysis of the issues on their part. And the same superficial analysis, it seems to me, is contained in the respondent's brief. He looks at the Terry case, and he says Terry requires articulated suspicion.

Well, the answer to that is that, as I've said before, there are reasons why you have to have that in Terry. Here we are dealing with a situation where we have a constitutionally acceptable substitute for particularized suspicion.

If you look at the Camara decision, Mr. Justice White there spelled out the factors, the persuasive factors that --

QUESTION: No, the Court did, Mr. Frey.

MR. FREY: The Court did; I'm sorry. It's in your

opinion.

-- spelled out the factors, the persuasive factors that combined to support the reasonableness of the inspections there.

It pointed out that there was a long history of judicial and public acceptance.

Now, we believe that the statute reflects a public judgment that Congress has made on behalf of the people, that we are willing to submit ourselves to this kind of intrusion for the purpose of accomplishing the objective of preventing illegal entrants from gaining access to the interior.

Second, the Court pointed to the public interest that was at stake, and we've heard a lot about that. And the lack of other techniques.

Now, you've heard before that there are other techniques. We, of course, are not going to give up our efforts to detect and return illegal entrants to their homeland, even if the traffic-checking operation is stopped. But we think that the traffic-checking operation is a vital link, we think it's instrumental, not only in the people it catches, which is a substantial number, but in the people it discourages from attempting to gain entry into the United States.

I think I'd like to save a couple of minutes for rebuttal, if I may.

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

Mr. Cleary.

ORAL ARGUMENT OF JOHN J. CLEARY, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I don't mind having my brief called superficial if the en banc Ninth Circuit's reasoning is called superficial.

This case raises a constitutional question of the highest magnitude, and would be the contention of the respondent that Terry vs. Ohio and the analysis in Adams vs. Williams did not effectively answer any of the questions here, because in Terry vs. Ohio there was an interference with the liberty of a person on the street, which was held to constitute a seizure, such as to bring into play the Fourth Amendment. And for such a seizure to take place, there must be objective, articulable facts to justify that seizure.

This Court never reached the issue of interrogation at that point, but held that, under the concept of the protective safety of the officer, the officer could pat down, a minimum intrusion, to determine if that person was armed.

And, I believe Mr. Justice White, in his concurring opinion, pointed out that the man could not be in any way compelled to answer any questions under those circumstances, that it had not been reached, even if there was that reasonable suspicion.

Further, this Court, in Adams vs. Williams, decided that there must be two requirements for such a momentary stop, and relied upon Ninth Circuit precedent, Wilson vs. Porter.

Mr. Justice Rehnquist, speaking for the Court, said: one, there must be suspicion; and, two, facts.

The intrusions in both of those cases involved, one, a person on a street, the other a parked car.

In this case we have a car moving on a highway, an Interstate highway, flagged over by law enforcement officers, at whim or caprice, for whatever reason.

There is a killer who was executed in California, Mr. Chesman, for using the red-light technique of flagging cars over.

I would contend that that intrusion is of a most important magnitude.

I would start off by saying that the government, in this case, has not given you the full flavor of the statutory analysis involved, that we are seeing a gut, a visceral reaction of the govenment saying: We need these things, therefore we're going to have them.

There is a serious obstacle involved, and it's not the checkpoints to alien traffic. It's that our government was founded on a principle, over 200 years ago, in the famous James Otis case in 1761, with the writs of assistance, on that we don't substantiate the hunches, the ESP, the sixth sense of

law enforcement officers.

In that case, the famous writ of assistance case, they asked merely Customs officers to get untaxed goods in the Port of Entry. And although, with the English judges, they did get that right, which of course led to the Fourth Amendment, I am saying that in this particular case we are dealing with a point some 66 road-miles from the border, a lot further in than Boston was from the external territorial limits of the United States.

The Statutory history started in 1862, with the Cooley Trade Act, and in that first statute we had dealing with the regulation a person from outside countries, a racial tone involved, most assuredly, was that we required reasonable cause; the statutory history mounts forward, step by step, there is a reasonable cause, probable cause.

In 1891, the predecessor, as Justice White analogized in his dissenting opinion, we have 1225(a), which is now section 235(a) of the Immigration Act of 1952. That was the right, at the border, to exercise any powers of inspection; and that right was developed on through 1917, and in 1917 it was expanded for the first time to allow boarding and searching of vehicles which they, the officers, believe are bringing aliens into the United States.

In 1925, just like Carroll had done for the law enforcement officer, excused the warrant; so we now have a new

section that pops up, ironically created in an appropriations bill, that gives an except to the warrant under certain circumstances.

That statute in 1925, the source of 287 today, tracks identical language from the original one which says that they, when they believe that the vehicle is bringing aliens into the United States.

In 1946, the Attorney General, in his one-line letter, said: We'd like to have the power to stop and search.

Congress merely gave them the right to continue boarding operations, did not deal with the fundamental question now before this Court, the right to interdict traffic on a highway, moving throughout the United States.

We're dealing with a fundamental right.

In 1952, the limited legislative analysis, which now creates both sections 1357(a)(1) and 1357 -- well, (a)(3) was earlier, but 1357(a)(1). We have there Congress stating: at the border we don't want indiscriminate questioning or harassment of citizens returning to the United States; and would expect that even at the border probable cause would be necessary to question citizens, that they are committing a crime or about to commit a crime.

That's the legislative history behind the Act.

Justice -- Judge Browning, in his dissent in Almeida-Sanchez, referred to the fact that even the legislative history

clearly announced that constitutional requirements will be consistent and interposed upon this statute, and that the Act has to be read in such a fashion.

QUESTION: So is it your argument that at the border there must be probable cause?

MR. CLEARY: No, Your Honor, it is not. I'm saying that --

QUESTION: Well, what is the authority to stop a vehicle, or to stop people at the border and interrogate?

MR. CLEARY: The authority in my mind, Your Honor, would be Boyd vs. United States, 1886, Carroll vs. United States, which indicated --

QUESTION: Yes, well, that's the constitutional authority; how about the statute?

MR. CLEARY: The statutory authority would exist under 1225(a).

QUESTION: How about 1357?

MR. CLEARY: 1357 is the exception to the warrant. That makes no reference to "at the border". If you read each one of those four subsections --

QUESTION: Yes, well, I read them, and on their face -- on its face, the language of 1357(a)(3), it just says you may search.

MR. CLEARY: I read 1357(a)(1) says "at a reasonable distance" --

QUESTION: Yes. Yes.

MR. CLEARY: -- "you may conduct" --

QUESTION: But it certainly includes "at the border"?

MR. CLEARY: Because I think --

QUESTION: Doesn't it include "at the border"?

MR. CLEARY: I would think that it's covered already in 1225(a). And if one traces back the legislative history, back to 1891, you will see that the right to stop at the border was early recognized in our country, in fact with the original Act of 1875.

And so that my contention is that although 1357(a)(1) does give at a reasonable distance from the border, it must be taken in context with the empowering section, which is 1225(a) and this is the excepting for the warrant section. And that in that case, the switch was made in 1946, where the language was changed -- not in 1225(a) --

QUESTION: But you didn't -- "at the border", all you needed was 1225, I take it?

MR. CLEARY: That is correct, Your Honor.

QUESTION: Right, to dispense with either warrant or probable cause.

MR. CLEARY: That is correct. They had medical inspections in the same original legislation.

QUESTION: Yes. Yes.

MR. CLEARY: They talked about the right to examine

a person at the border; and that was the genesis.

QUESTION: Of course, 1225 doesn't say "at the border" either.

MR. CLEARY: Yes, it does. It says: the right to enter the United States, reenter, it says all-inclusive; and if one goes at the earlier legislative sources of this legislation, it will see that it was oriented at the border, and then was expanded, as it has been ex pnded, to today.

And the contention I would make is, in looking at 1357(a)(1) or (a)(3), one should look at 1357(a)(2) and (a)(4), under the concept of sui generis.

And there, the right to arrest an alien for a violation of alien law must require the likelihood of escape; otherwise they have to resort to a warrant.

In the fundamental power to make a felony arrest, which is authorized to an Immigration officer in subsection (4), there is a statement that there must be the likelihood of escape; and, even further, it must be, in a sense -- if I'm not mistaken -- required that the likelihood of escape -- oh, and the first section, section (2) requires "in his presence or view".

I would point out further that one of the most troubling concepts we have here is that this was an application of 1357(a)(1). I heard the Deputy Solicitor General tell me that the Court of Appeals went on 1357(a)(1). I was there at

oral argument en banc.

At that time the government counsel relied upon the escape clause. He could see he was going down on 1357(a)(3), with the other cases, and sought to justify a distinction, and generated 1357(a)(1).

And ironically, you might ask, that a Court which is otherwise split comes down the track unanimous on 1357(a)(1); and the reason why is that -- it applies to all courts, even this Court has different viewpoints; there is sometimes accommodation.

And that the big point to be made in 1357(a)(1) is that with Carroll, and the interpretation in Almeida-Sanchez, even a stop, if one was to scrutinize Supreme Court precedent, requires probable cause. And at least we can do, is under these circumstances, no matter where it might be, require a reasonable suspicion, which was in some way articulated by this Court in Terry vs. Ohio; and it's the same analysis that was used by the D. C. Circuit in the Au Yi Lau case, which is the basis for the Ninth Circuit's adoption of that rule in not adopting the Tenth Circuit's analysis, which of course was asserted by this Solicitor General in saying why there was a confusion on the interpretation of 1357(a)(1).

I would contend that what's before the Court right now is 1357(a)(1).

QUESTION: The Ninth Circuit, it's now settled after

this case, I gather, requires what it calls a founded suspicion for a stop; is that it?

MR. CLEARY: That is -- in fact, Your Honor, it requires a founded suspicion to believe that there's illegal aliens. And what the Court felt was that under Wilson v. Porter, it required, for any interdiction of highway traffic, there must be found a suspicion. They felt that they were bound, then, by that precedent and could not use this euphemism of alien searches to justify this type of conduct, absent a functional equivalent.

I would point out further that the interesting thing in this case is that we have the statute -- and it's a good reason why the government backs away from 1357(a)(1) -- is, one, they can't show actual knowledge of an alien; and the second step is a person believed to be an alien, can they say that a person who appears to be of Mexican descent in the area of Southern California, contiguous with the Republic of Mexico, constitutes some rational basis, reasonable suspicion that that person is an alien.

I would contend, if such ever was the case, that would be rank racism.

QUESTION: Well, I suppose if you're just talking about words, unless you believe the person, subjectively -- subjectively -- believed him to be an alien, you wouldn't stop and ask him. Not -- the statute doesn't say unless there's

a rational grounds for belief that he is an alien; he's believed by somebody to be an alien. And if he weren't believed by the person to be an alien, he wouldn't be stopped and asked, would he?

MR. CLEARY: Well, I think there has to be a belief that the person is an alien, and the question is, can it be purely subjective? That is to say, can the officer use anything whatsoever? And I would have to say that under the Fourth Amendment analysis, there has to be some basis to a reviewing court that that was, in a sense, based upon something and not purely arbitrary; that there has to be something more than a hunch.

QUESTION: But the statute doesn't say that.

MR. CLEARY: The statute does not say that, but the point is that one believed to be an alien would have to be construed, I think, consistent with the Fourth Amendment. And I think that is the position here that we would take that under Terry vs. Ohio, that there must be at least two criteria: one, suspicious circumstances; and, two, objective articulable facts.

And we contend that the Ninth Circuit's construction is consistent with the statute, it implements the statute and at the same time gives validity to the Fourth Amendment.

The more important thing is that the hunch of the officer can be used and abused. In this case we make note of

that because here the only articulable basis given in cross-examination was that the person appeared to be of Mexican descent.

I would suggest to the Court that we are dealing here with a problem in the area of the Mexican border. And that is the analysis.

Well, let us take a look. What do we mean by area of the Mexican border?

Well, we know it's at least 2,000 miles long in one respect, but how far does it go inland?

Well, where is the limitation in 1357(a)(1)? There is none. There is a limitation in 1357(a)(3): reasonable distance.

Now, the government contends: Well, you have to interpolate (3) onto (1), and you come up with a rationale for the action.

I would say -- there's two cases they cited, and I believe the Court does have their reply brief at this time. The first one they cite is Montez-Hernandez, a district court case, appears at pages 14 and 28 of the principal government brief, in a footnote; and there, because of the heavy alien population in Sacramento, California, or Bryte, California, 500 miles from the border, the court upheld the right to stop and interrogate an alien.

So that's one demonstration of how 1357(a)(1) is

used.

The second example cited to us by the government is in their reply brief, on the last page, the last footnote, the Saldana case. There an alien was stopped under 1357(a)(1). What was the distance from the border? It was the Will Rogers Turnpike in Oklahoma, six to seven hundred miles from the border.

Now, the government can say: We're going to be good guys, we'll only go up to a hundred miles.

I don't think that these type of powers, dealing with a serious constitutional question, can be so delegated to the Executive. I think there has to be some intervention, either judicial review or, in the alternative, a warrant.

QUESTION: You think the reasonableness standard must take into account the nature of the country in which the reasonable distance is to be measured? Whether it's open, wild country or whether it's San Antonio, Texas, for example, or some other city?

MR. CLEARY: I certainly agree, Your Honor. I think that one has to consider the geographical territory. I think that was the rationale behind what is called functional equivalent in the border, but again, as an advocate for a particular case, I'm talking about a roving patrol operating some 66 miles north of San Diego, the second largest city on the West Coast, halfway between Los Angeles, which is the

largest city on the West Coast.

And I think that under those circumstances, such a roving patrol can't be condoned, and that this rationale or distinction by saying that distance -- true, if we were talking about the Dicotti checkpoint, which I have never known to exist, No. 4 on government's map in the Ortiz case, if there was a roving patrol up in that area, maybe the right to stop would exist because the area, plus other factors, might give a reasonable or founded suspicion, or even probable cause to stop.

QUESTION: Do you think this officer could have stopped this car and asked the man for his driver's license?

MR. CLEARY: Certainly not a Border Patrol officer, Your Honor. And if it was a -- and this is an important --

QUESTION: Well, let's assume it's a State Patrol officer.

MR. CLEARY: Well, then we have to understand that in the federal system we have, as I am told by this Court so often, a very limited jurisdiction. And if you take the average officer --

QUESTION: Well, I just asked -- I just don't ask you again; how about a State Patrol, Highway Patrol officer, what if he, with no suspicion at all, he was just making a license check, a driver's license check? Could they have stopped him and asked him for his driver's license?

MR. CLEARY: In that case --

QUESTION: And if he didn't have one, he could arrest him.

MR. CLEARY: In that case, YOur Honor, I would point out that that would be inappropriate for several reasons, that analogy.

First, --

QUESTION: Well, let's don't talk about the analogy. How about it's validity under the Fourth Amendment?

MR. CLEARY: His right to stop at random a person for a driver's license check, in my contention, would not be appropriate if it went beyond the scope of that.

No. 2, --

QUESTION: All right. Now, he stops him and asks him for his driver's license, he doesn't have it, and he arrests him for driving without a license. And he objects to the -- the man claims that his Fourth Amendment rights were violated. Is he right or not?

MR. CLEARY: I think he has a right in California, and the reason I would say is that a person arrested for non-possession of a driver's license is not necessarily taken into custody --

QUESTION: Oh, I know, but I asked you about the -- I posed the facts and I asked you the validity under the Fourth Amendment.

MR. CLEARY: And I'm trying to respond, Your Honor. Under the Fourth Amendment, if he didn't have a valid basis for arresting him, he could not make a lawful arrest.

He has the physical power, but you asked it in terms as to whether or not he had the authority under the Fourth Amendment, and my contention is where a man can turn in, submit by mail the fact that he does have a driver's license, indicates that the right of the State in preserving its highways has only one means to check --

QUESTION: I think your answer would be that if California law authorized the arrest on those facts, that it would be all right under the Fourth Amendment?

QUESTION: Fourth and Fourteenth Amendments.

QUESTION: Fourth and Fourteenth Amendments.

MR. CLEARY: The Fourth and Fourteenth.

I would say no, Your Honor, under the Commonwealth vs. Swanger, Pennsylvania, recent analysis which said even a roadblock check for driver's license must have at least founded suspicion. Because otherwise the intrusion on privacy is not justified by the community need.

I would point out again that the traffic situation is totally different, because we have a State officer, and again it's the only means to protect the highways from incompetent drivers; I think that also there's a serious question in this area. I'm not in a position to answer as

this Court is, but I think the case before the Court deals with a right of a federal officer in restricting aliens.

I would further point out that the argument of the government is that this would not apply in New York City or in some of the other larger cities, but would apply in San Diego and in Tucson, for example. And I think, even further, we don't know if the 100-mile limit applies.

I think the arbitrariness of that is that a man's constitutional rights will vary by where he happens to live. I think that people should not be so discriminated against.

I would point out that -- in the brief we have indicated a reference to New York City -- sometimes, that certain sweeps are made, as raised by the Court earlier in questioning; but I think the issue is you cannot pick out certain areas because then you're going to get into the why-ness of the problem.

I think the second thing is that you can justify and excuse some type of Camara analysis. There has been no showing of a warrant in this case.

And I think that that forecloses the use of Camara in this particular situation.

This particular case is rather unique, in the sense of -- I know there's a previous case pending before the Court, Guana-Sanchez; in this case I would point out that, one, the objects of the indictment, Count One and Count Two, the named

individuals are the persons that were seized from the automobile. And in the same way as if he had an unregistered machine gun in the back or controlled substance, he would have standing to object to that.

Further, these people gave testimony against him, and used his own statements.

Third, he got on the stand to deny that testimony;

And, fourth, he was cross-examined by the prosecutor about moneys found in his pocket. So there was a seizure of money at the time of his arrest falling from this, as we would contend, unlawful stop.

I would further point out, as to retroactivity in this case, that we are in a unique posture. And not to be overly technical, we would take advantage of the fact that the government did not assert non-retroactivity in this case.

And we would rely upon that factor, which appears at their brief pages 7 and 8 and on page 9 of the brief, and --

QUESTION: Mr. Cleary, I want to have the benefit of your thinking as to the validity of a warrant procedure for a fixed checkpoint.

MR. CLEARY: Your Honor, I think that the fixed checkpoint could be subject, under the Fourth Amendment concepts, to a warrant. I think that a warrant can be

tailored for a checkpoint based upon an analysis, to use the Court's reference, to four points that were cited in your concurring opinion.

I think, though, that it has to be one that complies with some procedure, either enunciated by this Court in an opinion or that there would have to be some change in, say, Rule 41 of Federal Rules of Criminal Procedure.

There is, we call it a warrant for inspection in our area, and there's some equivocation as to how it works out.

The difficulty comes in trying to make a showing, and often, I feel that there is not a full adversary showing, and we even tried, for example, to get statistics on the aliens coming from the border at the San Clemente checkpoint.

One, the Border Patrol denied us an opportunity to get such statistics.

Two, we've got an action for mandate pending in the Ninth Circuit.

So that the question in this area is that we don't have access to some of this information, and I feel that there should be some substantial showing made to a court -- I don't know what it would be called -- that could allow other parties to contest some of the facts to justify the need.

I think it is conceptually feasible, as I have indicated in our brief, that such a warrant could be established. I think that, as Mr. Sevilla pointed out, one of the key

factors is proximity to the border, in the sense that the Fifth Circuit's analysis might be certainly eminently reasonable in the hard case on Serra-Blanca?, but would be grossly unreasonable in this case.

For example, the reason Mr. Sevilla and I differ with Judge Turrentine, he held every checkpoint in the Southern District of California to be the functional equivalent of the border, even San Clemente; and although one might have a conclusion to be reached, we might differ with the reasoning and the approach to that topic, and yet not foreclose that area that such warrants might be possible, or that it could be considered a functional equivalent.

The second point on retroactivity --

QUESTION: Do you suggest that there would have to be an adversary hearing? Generally you get a warrant ex parte.

MR. CLEARY: Well, Your Honor, I would say that there would be, in a sense, an after-the-fact on a motion to suppress. But that in the ease of criminal justice, that if such notice could be given, I don't know how it would be -- they are renewed usually every ten days, because Rule 41, I think, provides only now for a ten-day limit on a warrant. So that there has to be a return on them.

And that some times -- and I'm trying to reduce litigation -- we can go in and file motions to suppress until

the cows come home. But if sometimes the Court, when it's dealing with such a touchy area, could give notice to the other parties.

And the point I'm trying to suggest right now is: although a warrant is certainly possible, the real answer lies in Congress, in dealing with the alien problem. And that, just like in Biswell and Colonnade, the Congress set forth the search warrant requirement and the other procedures. And I think that they're in an area where that procedure could be adopted. I don't think those two cases apply.

QUESTION: Well, Congress made its -- made the effort in this statute, but you're chewing on that right now, you just want it to go back and have another fruitless job?

MR. CLEARY: No, Your Honor, I think that -- I think if Congress was faced with the thing, they do provide for all viewpoints to be expressed, and I think that there would be a much more workable conclusion established, and I think that some of these things were done at a time when the problems that are now before the Court weren't fully presented to the Congress; and I think that, consistent with our tripartite form of government, we should use different avenues for different results.

Here I'm pleading the Fourth Amendment situation, and the rights of the individual,given the statutory language; but more properly, how they are applied by federal agents.

I would point out further to the Court that one of the most serious concerns in this case was that this defendant, now respondent, was stopped because the three occupants appeared of Mexican descent.

No. 1,The driver is a Spanish-speaking Puerto Rican-American citizen.

No. 2, one is a Mexican from Guadalajara.

But, No. 3, the third one, is a woman from Guatemala.

Now, the concern was: Mexican appearing, alone. And counsel, being sensitive to this area, laid in the record in this case as to the reason for the stop. And I think the Solicitor General properly contended that there could be arbitrariness shown on his power, if this Court were to give him carte blanche power under 1357(a)(1), that even that carte blanche power, exercised in, say, the area of the Mexican border, could be done arbitrarily if done purely on the basis of race. A Yick Wo concept.

Now, first, I would start off, in their government reply brief, they respond to this issue and this issue alone. They contend that I don't have standing because I haven't filed a cross-petition.

I would point out two things. That cuts both ways. They use that argument on page 11 in the Bowen brief; and, No. 2, the analysis I am making here is my conclusion on the last page of my brief says very simply: I want you to uphold

the Ninth Circuit.

I'm not asking you to order the charges dismissed. I'm here defending an opinion. I'm asking for no more than upholding the unanimous action of the Ninth Circuit.

I do believe that under Ballard vs. United States, I can assert any reason to defend that particular opinion.

Now, the interesting aspect was, before I raised the racial discriminatory issue, the government, in five places in its brief, raises "Mexican appearing" as the basis of giving them something, maybe less than reasonable suspicion, but a justification for the stop.

It's our contention that you can't use race alone. Possibly as one of many factors, it can be used. It might be used in many other things.

"Spanish speaking", we have a problem, because I think we have a substantial portion of the citizen population that speaks Spanish and Spanish only.

The analogy I'd like to refer to was an opinion cited by the government in a footnote following up the Au Yi Lau case, the Cheung Tin Wong case, which Judge MacKinnon of the D. C. Circuit said: You will never have suspicion alone based upon Oriental appearance for a stop.

However, suspicion, plus the fact that the man couldn't speak English and was in white clothes, gave justification for a momentary stop.

QUESTION: Well, Mr. Cleary, supposing the Immigration officers, proceeding under 1357(a)(1), to interrogate any alien or person believed to be an alien, what factors does he use in reaching his initiatl determination of believing the person to be an alien? I mean, what would you suggest?

MR. CLEARY: My suggestion, Your Honor, would be a multiplicity, like --

QUESTION: What particular facts?

MR. CLEARY: Okay. The first thing I would use would be, one, the proximity to the border. I would base it upon factors that might lead me to believe that the person was an alien, such as if he didn't speak the language, it might alert me, but would certainly not justify me in stopping the man. I think --

QUESTION: Inability to speak the language, I suppose you'd have a hard time determining that before you actually stopped him.

MR. CLEARY: Before you stopped him, I think the problem would be is that you would have to have some other basis and --

QUESTION: Well, what factors would you suggest taking into consideration in making the initial stop?

MR. CLEARY: My factors would be that the critical aspect is the source of his entry, i.e., --

QUESTION: Well, I thought you were going to give me some factors, from the way you began that sentence.

MR. CLEARY: Your Honor, the only thing I can suggest is that factors would determine in a multiplicity of circumstances. If I followed along the border and I saw footprints running in a mile to a certain bush, I could walk up and I found the man at the bush, I would say that's a factor to believe that that person is an alien, and yet I have to talk to him, I'm not addressing him by his race, and I think I would have a right as a law enforcement officer to stop him.

But to give you something that I could go by physical appearance, in these days where the freedom of the individual is so protected, I can't give you any basis that would justify, on appearance alone, a stop that would rise to the level of founded suspicion.

In Terry vs. Ohio, [illegible] was a man walking back and forth outside the jewelry, sufficient to justify the stop? And the answer was, the Court held it took twenty minutes of watching the conduct, the experienced officer -- and at that time he has probably even probable cause to believe a conspiracy to rob was taking place.

My contention is that you can't use the fact of -- now if he had on, "Made in Mexico" on his back, on his shirt or "Tiajuana", then maybe that might be an appearance factor

that would help out.

But I am hard-pressed to give you any facts that would suit this case, where an officer, at whim or caprice, some 66 miles from the border, could stop a car on the basis of appearance.

I can't say old cars or new cars. In fact, what shocks me is the government, in their reply brief in Ortiz, say that you can tell a Mexican resident because they're thin.

How many fat aliens have I represented?

You can test because they have coarse hands, that they wear coarse clothes, they have their hair cut in a certain way.

I've had my hair cut once or twice in Tiajuana.

The point I'm trying to say is that there are facts, but the facts are difficult. And the reason is, there's a balancing of interest.

QUESTION: What you're really saying is you can't get there from here; aren't you?

You can't stop them, there's no basis for stopping and inquiring.

MR. CLEARY: There's no basis --

QUESTION: You said -- and you have a very broad experience, as we know, Mr. Cleary, if you can't think of any reason, how about these Border Patrol officers who haven't

nearly your breadth of experience or education?

MR. CLEARY: If I was at the San Clemente checkpoint and I saw a car drive by with a Baja, California, license plate, I think I might have a fact to stop a car.

Thank you very much, Your Honors.

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

You have about three minutes left, I think, Mr. Frey.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

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

I think, in effect, you've just heard my opponent say that there is no basis on which we can constitutionally stop cars at the San Clemente checkpoint or any distance in from the border.

Now, we think that just to stop a car and ask people about their citizenship is a limited intrusion. We think this is an important distinction from Camara. The warrant issue, which I was unable to reach in my opening argument, is treated simply: Well, in Camara, warrant was required, and therefore we can't rely on Camara.

Well, of course, in Camara, they were searching what was arguably a home, the power they asserted was the power to search homes and, in See, the power to search business premises, which the Court treated as a home.

Here we are talking about, not a search but a stop,

and not a home but a car.

These factors make a difference, not only in the constitutional reasonableness under the Fourth Amendment, but in the necessity for a warrant.

Now, with respect to the question of whether a warrant is needed, I think that the answer is not simply whether we could get a warrant. We have problems about getting warrants, but that would be true of the border also. We could easily get warrants for the border, we could get warrants that would say where we could set up our Ports of Entry, warrants that would try to describe who we could stop, how we could go about searching people.

There isn't a logical difference between, at least, the checkpoints and the border Ports of Entry, from the standpoint of: could we get a warrant?

I don't think the answer that we could get a warrant is sufficient.

Now, there are problems about our ability to get a warrant.

Roving patrol operations cover immense varieties of operations. There can be an operation like this, totally unexpected, due to bad weather. Now, possibly our San Clemente checkpoint warrant could encompass the authority to make roving patrol stops.

But we have other situations. We have farm checks.

During the harvest season, when we expect it's likely for migrant workers to be moving from farms in the southern area to farms in the northern area, we send a patrol car around on the farm roads. We see a truck drive by, with a group of migrant workers, we may stop and check the citizenship of these people.

There is, in a sense, an issue: suppose that a Border Patrol car is driving along the road and it sees a car drive by, six persons who appear to be Mexicans -- and I think tat to ask the officer to ignore that fact would be to ignore the reasonableness requirement of the Fourth Amendment.

Sitting uncomfortably, nervously, looking away from him, he's suspicious. He can't maybe articulate more than that, which my opponent says is not enough, but the question is: can he just stop the car and say, "I'd like to inquire about your citizenship", and make a brief inquiry of that nature.

Now, we think -- that's not the kind of thing that could be really subjected to a warrant. In effect, Congress has made the judgment, the warrant judgment, that we should be allowed to do this.

And we urge this Court to sustain that judgment, and allow roving patrol stops for interrogation without warrants.

Thank you.

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

Mr. Cleary, you appeared at our request, by appointment, and on behalf of the Court I thank you for your assistance.

MR. CLEARY: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 2:32 o'clock, p.m., the case in the above-entitled matter was submitted.]

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