

LIBRARY  
SUPREME COURT, U. S.

In the

# Supreme Court of the United States

C. 3

United States,

Petitioner

v.

Amado Martinez-Fuerte Et Al;

and

Rodolfo Sifuentes,

Petitioner,

v.

United States

No. 74-1560

No. 75-5387

Washington, D. C.  
April 26, 1976

Pages 1 thru 68

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

HOOVER REPORTING COMPANY, INC.

Official Reporters  
Washington, D. C.

546-6666

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE  
MAY 3 4 12 PM '76

tofi

IN THE UNITED STATES SUPREME COURT

-----X  
 UNITED STATES, :  
 :  
 :  
 Petitioner :  
 :  
 v. : No. 74-1560  
 :  
 AMADO MARTINEZ-FUERTE ET AL; :  
 :  
 and :  
 :  
 RODOLFO SIFUENTES, :  
 :  
 :  
 Petitioner, :  
 :  
 v. : No. 75-5387  
 :  
 UNITED STATES :  
 :  
 :  
 -----X

Washington, D. C.

Monday, April 26, 1976

The Above-entitled matter came on for argument at  
10:05 o'clock a.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
- THURGOOD MARSHALL, Associate Justice
- HARRY A. BLACKMUN, Associate Justice
- LEWIS F. POWELL, JR., Associate Justice
- WILLIAM H. REHNQUIST, Associate Justice
- JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BALLARD BENNETT, ESQ., 214 Henson Building, Weslaco, Texas  
78596 (Appointed by this Court) For Sifuentes

[continued ....]

## APPEARANCES: [Continued]

MARK L. EVANS, ESQ., Assistant to the Solicitor General,  
Department of Justice, Washington, D. C. 20530 For the  
United States

CHARLES M. SEVILLA, ESQ., Federal Defenders of San Diego,  
Inc., 925 First Avenue, San Diego, California 92101  
(Appointed by this Court) For Martinez-Fuerte

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE:</u>
BALLARD BENNETT, ESQ.	3
MARK L. EVANS, ESQ.	20
CHARLES M. SEVILLA, ESQ.	50
<u>REBUTTAL ARGUMENT OF:</u>	
MARK L. EVANS, ESQ.	69

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in 74-1560, United States against Martinez-Fuerte and 75-5387, a consolidated case.

Mr. Bennett, you may speak whenever you are ready.

ORAL ARGUMENT OF BALLARD BENNETT, ESQ.

ON BEHALF OF SIFUENTES

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

The case of Rudolfo Sifuentes, in which I am a court-appointed counsel, involves a question of whether the border patrol can stop a vehicle at a permanent **checkpoint** many miles from the border for the purposes of interrogating its occupants and visually searching the interior of the vehicle without cause or suspicion of any kind and also without a warrant of any nature.

Now, the Martinez-Fuerte case involves the same question except in that case the **checkpoint** was operating under some nature of a warrant, a warrant of some kind and however, the Government maintained that they have a right to operate these **checkpoints**, to make these stops and inflict these intrusions upon the people passing without a warrant and the fact that they did have a warrant or did not have a warrant was not controlling. That is their initial argument, anyway.

QUESTION: Mr. Bennett, I suppose you would agree

that precisely at the border all of the things that were done here could be done.

MR. BENNETT: Yes, sir, there is no argument about that, as far as I know, your Honor. This could --

QUESTION: The only issue is the distance. Is that it?

MR. BENNETT: Yes, sir. My checkpoint was approximately 70 miles from the border and as I recall -- and the checkpoint that I have in my case is near Sarita, Texas and you probably don't know where Sarita, Texas is but it is in the ranch country south of Houston between Houston and Brownsville.

The San Clemente checkpoint is about 65 miles from the border.

In between both the checkpoint and the border in both of those areas there are large metropolitan establishments. Of course, they have got San Diego in California and in the Lower Rio Grande Valley, which is what they call this area, we have a string of towns -- I believe we have got about 320,000 people that live in this area between the border itself and the checkpoints.

QUESTION: How large is Brownsville itself?

MR. BENNETT: Your Honor, I would guess Brownsville to be about 80,000 people.

QUESTION: And that is south of the checkpoint here

in your case?

MR. BENNETT: Yes, your Honor. Yes, your Honor. It certainly is. The Highway 77, on which the checkpoint is located, originates in Brownsville. It goes from Brownsville through San Benito through Harlingen through Raymondsville.

Now, the rest of the other valley cities are off back to the west and roads constantly feed in to this Highway 77.

Now, when it gets to Raymondsville, a few miles outside, then it hits the ranch country and that is the -- the valley is not really a valley. It is an alluvial belt and they have very -- a great deal of agriculture. It is highly intense cultivation of row crops.

But when you get into this country where they have the checkpoint located, it is in the ranch country. The King Ranch is on both sides but it is not right there where the checkpoint is but the King Ranch is broken up into various divisions and there is one -- several divisions to the north and there is at least one or two to the south and it is in a remote area.

Now, the valley is like a three-necked bottle -- and I am speaking, of course, of the Rio Grande Valley. There are only three ways to get out of there by automobile going north.

QUESTION: When you speak of the valley, Mr. Bennett, how far up the Rio Grande does this go?

MR. BENNETT: Well, the area that I am talking about,

this area where they have a lot of farming and a lot of people, the 320,000 or so, consists generally of four counties; three counties starting down at the mouth of the river and then going up northwest. The river runs in a northwest direction.

There would be three counties running along there and then one county sits on top of -- Cameron County which is on the coast --

QUESTION: To the north of --

MR. BENNETT: North of there. Now, Highway 77 runs through Cameron County. It runs through Willacy County, which is the next county up and then it goes on up into Kennedy County and this checkpoint is about eight-tenths of the way up into Kennedy County.

Kennedy County is a huge county. It has got about 1,500 square miles so there is really no connection between this checkpoint and the border. The traffic coming by there comes out of the valley and there is no assurance whatsoever that any of these cars have recently come across the border.

We maintain that there is no substantial distinction between a stop by roving patrol and a stop at a checkpoint. We feel that the reasoning of the Brignoni-Ponce case should be controlling and should be extended to the checkpoint stops.

It is our contention that these intrusions can be characterized in, it's sort of a three-pronged attack.

First, there is the stop itself. Now, at Sarita,

every car coming down that road except vehicles containing the local inhabitants, are stopped.

Now, whether you call that taking them into custody short of traditional arrest or whether you call it a seizure or however you characterize it, the fact remains that once you come within the sight of that checkpoint, then you are in the custody of the Border Patrol agent on duty.

QUESTION: You are stopped and then what happens? Each car is stopped except those whose occupants are recognized as local residents.

MR. BENNETT: That is right.

QUESTION: There is a stop and then what happens?

MR. BENNETT: All right, the first thing that happens is the agent approaches close enough to the car to be able to see down in that car. He does that deliberately for that purpose and the third thing is an interrogation.

QUESTION: Of whom? Of the driver and all the occupants?

MR. BENNETT: Of the occupants and the driver. Now, this interrogation is open-ended. It can be simply, "Are you all United States citizens?" "Yes, we're all United States citizens," and they go on. Or -- there are no regulations. It is completely in the discretion of the Border Patrol officer and he can ask you, "Well, you say you are a United States citizen. Where were you born?" It can have a little more



pursuance to it. "Where are you living now?" "How long have you lived there?" "What is your occupation?" "Where are you going?" "Why are you going there?"

You see, when you are talking about a man's citizenship, practically anything that he has done could be pertinent. So --

QUESTION: Is there anything in the record that shows the average length of the stop?

MR. BENNETT: Not in my record, no, sir.

QUESTION: Not in your record.

MR. BENNETT: The only people that would know that would be the Border Patrol and they didn't offer any --

QUESTION: Well, what happens if the people say, "It's none of your business."

MR. BENNETT: Well, that is the point, your Honor. At that stop, when you are stopped, you are there and I believe Mr. Justice White, in the Terry case, in his concurring opinion, was talking about up in Cleveland when they ask you about a crime, you don't have to answer. You can walk away.

Well, you don't walk away from these checkpoints. These men are there. They have got guns. You are there until they tell you you can leave.

QUESTION: Well, there is nothing in the record that shows what would happen if he didn't answer.

MR. BENNETT: If he didn't.

QUESTION: Could he be arrested?

MR. BENNETT: Yes, your Honor, I believe he could.

QUESTION: Why?

MR. BENNETT: Well, he would be --

QUESTION: What would the charge be?

MR. BENNETT: They would just take and bring you back and question you about your -- why did you run through there? Why didn't you stop?

QUESTION: I didn't say he ran through. I said he stopped.

MR. BENNETT: Yes, sir.

QUESTION: And the officer asked him, "Are you an American citizen?" and he said, "It is none of your business." What happens?

MR. BENNETT: Well, I think the --

QUESTION: You think? Do you know?

MR. BENNETT: No, sir. I must rely on what I know is in common sense. The officer would tell him that it was his business and he would keep him there and interrogate him.

Now, whether he would eventually charge him with an offense I don't know, but I do know that he wouldn't continue on down the road, which is probably what he wanted to do when he started out on his trip.

People coming out of the valley, if they get far enough north to pass this checkpoint, are going a substantial

distance and it can be anticipated that they would like to get on their way and when you are stopped, you have the -- you are facing the possibility of being detained for some time if they want to take you over to secondary and question you.

That is what happened in the Sifuentes case.

QUESTION: Does the record show how many cars or what percentage of the cars that are stopped are taken over to secondary? It doesn't show in here, does it?

MR. BENNETT: No, sir, not in my case, it doesn't. Now, the San Clemente --

QUESTION: I know, they are --

MR. BENNETT: -- checkpoint is operated in somewhat different fashion sometimes.

QUESTION: They make one stop out of 20, I see.

MR. BENNETT: Yes, sir. Yes, sir, that is correct.

QUESTION: And what were the facts in your case? I am sure you are going to get to them.

MR. BENNETT: Well, the facts in my case were that the Defendant came up to this checkpoint in the early morning hours. They stopped him on a routine basis.

QUESTION: By "early morning hours," what time of day?

MR. BENNETT: At 2:00 or 3:00 or 4:00 in the morning.

QUESTION: It says 3:00 a.m. in the record.

MR. BENNETT: Yes, sir.

QUESTION: And the checkpoint operates 24 hours a day at that point.

MR. BENNETT: Yes, sir, it does, unless they have to close it down for --

QUESTION: Weather.

MR. BENNETT: -- fog or some reason but it tries to operate 24 hours a day and the officer walked out and walked up to the car and started talking with the driver. As he got close to the car, he looked down and in the -- lying down on the front seat was one man and on the back seat lying down were three men. He couldn't see these men at all until he got right on it. If he had been standing off to the side observing the traffic passing by he would not have seen the three men lying down on the seat and --

QUESTION: They were lying down as if asleep, I think the record shows.

MR. BENNETT: Right. Yes, sir. So he asked them -- first of all, he determined that the driver was an American citizen, which he was. The driver is a native of the town I live in. He has lived there all his life.

Next, he asked these aliens and he didn't get satisfactory response from them so he took the driver and the aliens to what they called secondary. The aliens were taken in the van which I believe is shown in the photograph that the Government has attached to their brief and the driver was

separated and taken off and interrogated at another place separate from the agents'.

QUESTION: In your statements a few minutes ago, Mr. Bennett, you said something to the effect that there was nothing to indicate that this car had been recently in Mexico or had come to Mexico. Now, suppose there was something to indicate that it had probably just been in Mexico.

What effect would you say that would have?

MR. BENNETT: Well, sir, that's -- when you say "Probably just been," you mean that it has come directly from the Border?

QUESTION: Well, suppose on the windshield or somewhere on the car was a sticker about some rodeo that had just been completed the day before, as an example.

MR. BENNETT: Well, the -- any sticker or anything like that could not be observed, your Honor, until after the stop had been made. If there was some indication, then --

QUESTION: Well, maybe the sticker was a bright orange which the patrol guards could recognize at any distance, 100 feet or less.

MR. BENNETT: Yes. Well, I could answer it in this way. I think that the Government has a right to stop people if they have reasonable suspicion that they may have been committing a --

QUESTION: That was decided last term.

MR. BENNETT: Yes, sir. I don't know if just coming from Mexico would be sufficient to --

QUESTION: Now, let me pursue that, though. Suppose, on every car that came by the precise border, a great, large orange piece of paper as big as your hand would be pasted on the windshield and the law would require -- regulations would require you to keep that on your car for 48 hours after you had come across the border from Mexico, every car that passed the border.

MR. BENNETT: Yes, sir.

QUESTION: Anything unconstitutional about that?

MR. BENNETT: No, sir, I don't see anything unconstitutional in it offhand.

QUESTION: Could they then route these cars with the orange sticker on them for inspection 65 miles north of the border?

MR. BENNETT: Well, yes, sir, I think they could. The theory that you might be going on is that that is the continuation of a border search.

Now, of course, they have border searches up in St. Louis because that is better than having to stop and go through everything. But the vice of this checkpoint is, and what we are complaining of is that they are stopping all these people who don't have any relation to the problem that they are searching. They are the ones that get the --

QUESTION: Let's get back to my bright orange sticker, the color of this pen. With that bright orange sticker, then, you say -- as far as you are concerned, there would be no constitutional barrier to stopping every car that carried that sticker.

MR. BENNETT: Well, now, you said for a period of time.

QUESTION: Forty-eight hours.

MR. BENNETT: How would you -- would they stop and look on the -- would they date the sticker and put the time and they stop and look at that?

QUESTION: Yes, if after 48 hours the driver hadn't taken the trouble to take it off which, on my hypothetical regulation, he would be permitted to do.

MR. BENNETT: I would say that -- I really, offhand don't see any strong objection on constitutional grounds. It would be infinitely preferable to stopping everybody that happens to come by this point on the chance that they might have come from the border which -- when the indications are, the chance is that they probably didn't come from the border and I think that, reasoning on a consent basis, if you want to cross the border, you have to consent to this reasonable regulation.

I feel that a constitutional justification might be made in that context.

QUESTION: Mr. Bennett.

MR. BENNETT: Yes, sir.

QUESTION: In Texas, does the state highway patrol system periodically undertake to check driver's licenses?

MR. BENNETT: Yes, sir, it does.

QUESTION: They have got to stop people for that purpose.

MR. BENNETT: Yes, sir, it does.

QUESTION: Is that unconstitutional?

MR. BENNETT: I do not necessarily think that it does. I have been through three of those in the last few years. One of them was obviously what it purported to be, a driver's license check. They had state -- what you would call state troopers or Department of Public Safety men standing on each side and they had, apparently, a checklist and they looked and they asked you for your driver's license. They wanted to see your windshield wipers work. They watched your lights.

The two others were obviously subterfuges that they were using just to stop you so they could look at you for some reason. In fact, in one of them, I was fumbling around in my pocketbook trying to find my driver's license -- which I can never find when I need it -- and the man said, "Aw, well, forget it" and turned around and walked off and went back to the next car.

Now, I would say that that is obviously unconstitutional but there is one basic --



QUESTION: What is unconstitutional?

MR. BENNETT: To stop you as a subterfuge --

QUESTION: When the objective is legitimate. Is that the point you are making?

MR. BENNETT: Yes, I think that if they are legitimately checking your driver's license and making an administrative check of your car, I see --

QUESTION: Is it your view that the objective in this case is illegitimate?

MR. BENNETT: No, but it is the -- the idea is to see if people have committed crimes and here --

QUESTION: Is it <sup>un</sup>lawful to drive in Texas without having a valid driver's license?

MR. BENNETT: Yes, sir, it is and they will give you a ticket, presumably, if you don't have it and sometimes you will have it and don't have it on you and they will give you a ticket and you will have to go show up and they will dismiss the charge.

QUESTION: Well, what is the Constitutional distinction?

MR. BENNETT: The Constitutional distinction, as I see it, your Honor, is that these checkpoints have been here for nigh on to 20 or 30 years. The people that live down in the valley have been going through there every time that they want to leave this country and these driver's license things are done

on a routine basis and they are not -- they are not near as likely to be oppressive.

These checkpoints, as I said in the brief, they are Orwellian devices. You are down there and you have got to go through there and let them look at you.

QUESTION: Mr. Bennett, in your case where you rummaged for your driver's license and they were not really looking for driver's licenses, you say it is obviously unconstitutional. Suppose they had been informed that a bank robber was to be found in that area and they are just checking cars for the suspects. Would that be permissible or impermissible?

MR. BENNETT: Yes, sir, I think, as I pointed out in my brief, I think that you can put up road blocks in the case of an emergency in an exigent situation.

I think society has that power to protect itself. But that is not what we are talking about here.

QUESTION: Well, would it be an emergency if the crime had been committed months before but they just had reason to believe that perhaps the suspect was in the area?

MR. BENNETT: No, sir, I don't think so.

QUESTION: They could not do it then?

MR. BENNETT: I would say that they could not put up a block just on the belief that they might sieve up some person in this net.

QUESTION: But they could do it on the belief they might find people without driver's licenses?

MR. BENNETT: Well, they can check in the driver's license situation. The only way they have of seeing if you are driving without a driver's license is to ask you when you are driving if you have got a driver's license. But that is not the only way they can apprehend the smugglers of illegal aliens, your Honor.

QUESTION: It is no part of your case here, Mr. Bennett, is it, that these stops were pretextual -- similar to your experience the second time you were stopped.

MR. BENNETT: No, sir, it is certainly not part of my case because my man had aliens that were prosecuted and sentenced.

QUESTION: Well, in your case, in any event, they -- what was found was what they were purportedly looking for.

MR. BENNETT: Yes, but they could -- one of my points is that they could be used for other purposes.

QUESTION: But it is not your point that they are now being used for other purposes.

MR. BENNETT: In this instance, no, sir.

QUESTION: Mr. Bennett, you have mentioned or emphasized, as I understand your argument, that the intrusion of the stop -- suppose instead of stopping your client, he had been brought down to a speed of, say, five miles an hour and

the officer had detected the presence of these individuals lying on the floor of the back area. Would that be a constitutional violation?

MR. BENNETT: Well, that gets into a grey area. I would say I don't think stopping a man and taking him into custody is a grey area but I feel that that is and there again, it is just what the Court wants to let the federal officials, how far they want to let them intrude into our lives. What --

QUESTION: Do you think we might draw a distinction between a stop and, say, a slow-down to --

MR. BENNETT: I think you might, your Honor.

QUESTION: But the slow-down, if I understand my brother Powell's question, in your case would have eventuated ultimately in a stop and in an arrest.

MR. BENNETT: That is right.

QUESTION: The slow-down, and just go through --

MR. BENNETT: Yes, sir .

QUESTION: -- would have -- no point in --

QUESTION: Why not put them in places where they are going to slow down anyway? I have run across, I believe, cases where they were doing this up in Oklahoma where they have an expressway where they have to stop and pay a toll on it and they have Border Patrol agents sitting there watching them as they go through and I don't think that is unconstitutional.

I have gone over my time. I thank the Court.

QUESTION: Very well, Mr. Bennett.

Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.

ON BEHALF OF THE UNITED STATES

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

These consolidated cases involve four separate prosecutions. In addition to the one involving Mr. Sifuentes and involving a stop at the Sarita checkpoint in Texas, there were three separate cases growing out of three stops at the San Clemente checkpoint, which is the same checkpoint that was involved in last year's Ortiz decision.

Like the Sarita checkpoint, the San Clemente checkpoint is 60 or more miles from the -- air miles from the border. The San Clemente checkpoint, as you will probably recall, is on Interstate 5 between San Diego and Los Angeles.

Each of them is operated essentially around the clock except where weather or manpower prohibits or, in the case of San Clemente, if the traffic gets too heavy to be controlled effectively and in each of the cases here, each of the court cases, illegal aliens were discovered riding in the passenger compartment of the vehicles that were stopped.

In one of the cases involved in the San Clemente checkpoint the officers, after discovering the illegal aliens in the passenger compartment, searched the trunk of the

automobile and found additional aliens.

The broad issue in all four of the cases is whether Border Patrol officers may lawfully stop northbound vehicles at a fixed checkpoint in the border area for the limited purpose of inquiring about the citizenship and immigration status of the visible occupants in the absence of an articulated reasonable suspicion that the car is carrying aliens who may be illegally in the country.

The Texas case and California cases differ in two respects. First, with respect to operating procedure.

The Sarita checkpoint, as Mr. Bennett mentioned, is customarily operated by stopping for this limited inquiry almost everyone who passes with the exception of local residents or other persons whom the officer recognizes and those persons are simply waved through.

At San Clemente, by contrast, a very small proportion of the passing vehicles are actually stopped for inquiry. The figures at the time of the hearing in the Baca case, which you remember was a consolidated proceeding in the Southern District of California concerning all the checkpoints there, estimated that roughly three percent of the vehicles then were being stopped.

The current figures, including figures under the warrant that I'll mention in a moment, during the period involved here in San Clemente indicate that the percent was

even smaller, perhaps one-half of one percent.

At San Clemente, unlike the other checkpoints in the Border Patrol's network, the point officer -- that is, the officer who stands observing traffic as it approaches -- does not ordinarily question the occupants of the vehicle. Because of the heavy traffic, when a vehicle is to be stopped for inquiry it is referred off the highway to a secondary area where other officers make the inquiries.

Sarita, like most of the checkpoints aside from San Clemente, is operated differently. The officer on the point generally makes the stops and asks any questions that he wants to ask right then and there and the only time a person is referred over to the side of the highway is if suspicious circumstances warrant further inquiry.

The other difference, aside from operating procedure is that the stops at San Clemente were authorized by a warrant issued by a federal magistrate upon a showing of area-type probable cause. There is no warrant for the stops at the Sarita checkpoint.

In our view, these differences between the two checkpoints should not produce different results but they do account for somewhat different arguments addressed to the two checkpoints.

The analytical framework for these cases, we think, is drawn from this Court's decision last term in Brignoni-Fonce,

which also involved Border Patrol stops for inquiry but which involved stops on roving patrol.

I think it is fair to say that all the parties agree that a checkpoint stop and inquiry procedure is, although a seizure under the Fourth Amendment, something like a street encounter involving a brief detention short of traditional arrest and that it is therefore to be tested under the general reasonableness requirement of the Fourth Amendment.

I think it is also fair to say that the parties agree that reasonableness -- the test of reasonableness depends upon a balance between the law enforcement need to conduct a particular activity on the one hand and the nature and scope of the intrusion on the other hand.

The Court, in Brignoni-Ponce, concluded on the basis of precisely such a balance that it was not reasonable to conduct roving patrol stops in the absence of articulable suspicion focused on the particular vehicle to be stopped and the real question here -- again, I think everyone agrees -- is whether the analysis in Brignoni-Ponce leads to a different result in this case.

QUESTION: Last term in those two cases, Brignoni-Ponce and, what was the other, Ortiz or the one that involved retroactivity -- Ortiz, I think it was -- it was settled that there could not be a stop even for interrogation by a roving patrol except upon reasonable suspicion.



MR. EVANS: That's correct.

QUESTION: It was further settled that there could not be a stop and search at a fixed checkpoint. Is that correct?

MR. EVANS: Without probable cause or consent, correct.

QUESTION: Without the ordinary probable cause where search or consent is -- so this is the sole remaining issue.

MR. EVANS: That is right. Originally, there were four elements to the Border Patrol's traffic checking operations, all of which grew out of the statute which authorized them to make stops and searches within 100 miles of the border looking for aliens.

QUESTION: And after Almeida-Sanchez, Ortiz and Brignoni-Ponce, this one is --

MR. EVANS: This is what is left and it is, we think, at once the single most important aspect of the traffic-checking program and also by far the least intrusive aspect.

In our view, the Court's analysis leads to a different result in this case because, as I just indicated, I think, the stops involved in a checkpoint stop and inquiry procedure is substantially less-intrusive and substantially more essential to the effective control of illegal immigration.

As we read the decision in Brignoni-Ponce, the decision turned essentially on two controlling considerations.

First, the Court perceived that the roving patrol authority sought would permit Border Patrol officers to engage in unlimited stops anywhere within a 100-mile zone -- anywhere within a zone of 100 miles from the Mexican border which itself is 2,000 miles long, day or night, on city streets, desert roads, busy highways.

Every motorist anywhere within the zone would be potentially subject to limitless interference.

Second, the Court concluded that the nature of the illegal alien traffic was such that it tends to generate articulable grounds for identifying violators and that a requirement of reasonable suspicion for roving patrol stops would allow the government an adequate opportunity to carry out its objective of protecting the public interest.

The Court, in short, so stated it was not convinced that the legitimate needs of law enforcement required the degree of interference with lawful traffic that it believed would be occasioned by the authority that was sought in Brignoni-Ponce.

Well, neither of these considerations is applicable here. The authority sought for checkpoint officers would give them no roving mandate to move about this zone of 100 miles from the border to stop any car that they happened to see.

Strategically, each of the checkpoints is located at, first of all, it is a fixed location. It is not ordinarily mobile. Some of them do move from one to another location but

on essentially the same road and not -- there is no roving aspect to it. The officer has no discretion of his own to decide where are cars to be stopped or no authority to pursue a car except one that goes through a checkpoint without stopping.

There is no interference here with city traffic. There is very little interference with commuter traffic.

Each of these checkpoints is placed strategically at a -- almost by a self-limiting process in a place where the least amount of interference with lawful traffic would be required in order to check what the Border Patrol considers to be an essential route to ensure that no -- to try to ensure that none of the passing cars contain aliens who don't belong in the country.

QUESTION: Mr. Evans, who determines the location of the checkpoints?

MR. EVANS: By and large they are determined by relatively high level Border Patrol officials in the field. There are nine sectors that the Border Patrol has in the southwest area and ordinarily the chief patrol agent in the sector will determine the location of a checkpoint.

If it is a major checkpoint it is not established without consultation with higher officials, either in Washington or in the regional office of the Immigration Service.

QUESTION: Did you say how long the San Clemente checkpoint had been in operation?

MR. EVANS: I believe it has been in operation for at least 35 years. It wasn't always exactly where it is. At another point it was further -- I think further south, but it has been at its present location for a somewhat shorter time but it has, in effect, always been a checkpoint at that location since around 1940.

QUESTION: Well, take this one in Texas, if you have got the checkpoint, why don't the people go around it?

MR. EVANS: On other roads?

QUESTION: Yes.

MR. EVANS: Well, because other roads are covered as well. At least, that is the aim of the Border Patrol.

QUESTION: Covered by how?

MR. EVANS: By checkpoints. By other checkpoints. The aim is to cover -- this is one of the three major roads leading out of the border in that area.

QUESTION: Yes, but the one that we are talking about, the Texas one, was a checkpoint on each one of those three roads and there are only three roads out.

MR. EVANS: Well, there are essentially three roads out and there are checkpoints, yes.

QUESTION: On each one of the three.

MR. EVANS: The same is true, I should add, of the California areas. The San Clemente checkpoint is on the major interstate highway. But there are also checkpoints on the

routes that might be used to avoid the San Clemente checkpoint.

In short, on this question of the scope of the discretion given the officers to initiate encounters, the degree of the potential interference with lawful traffic that would be occasioned by permitting these stops at checkpoints is substantially reduced over that the Court thought would be involved in the roving patrol situation.

It is true that the officer would retain discretion at the checkpoint, particularly at checkpoints where the traffic is heavy, as at San Clemente, to select certain cars for an inquiry but there is no discretion as there was in Ortiz to select cars for search randomly.

Of course, a car could be searched if probable cause developed but there is no authority claimed here to make that kind of invasion.

There is, in effect, no substantial invasion of privacy which is what the Court referred to in Ortiz as being involved in a search of a vehicle's trunk.

Brignoni recognized that the intrusion occasioned by a stop and inquiry is minimal. It is modest.

What was significant in Brignoni was the extent of the potential interference with the lawful traffic, not the nature of the intrusion, which is not trivial. It is certainly very limited. Moreover, I should mention, although I don't know that it is necessarily controlling but it adds to the nature of

the kind of interference that is involved that I think most people would feel somewhat less frightened or less concerned about stopping at a regular checkpoint where there were floodlights. It is lit. It is usually on a fairly large highway. There are other people travelling through. There is no -- no one is being pulled over to the side of the road by a flashing red light from behind with a siren. And to a certain extent I think that minimizes the -- what might otherwise be viewed by some people as an offensive aspect of the operation.

But even more important, in our view, is not the intrusiveness which we think -- and I think it is incontestable -- is relatively slight -- but the controlling consideration in our view is that the checkpoint officer, unlike a roving patrol officer, simply is seldom in a position because of the nature of the operation to observe a vehicle for a long enough period or close enough before a stop to see suspicious signs suggesting illegal activity.

A roving patrol officer can follow a vehicle for as long as he believes necessary in order to determine whether to make a stop on the basis of articulated suspicion but a checkpoint officer only has a brief second or two to look at an oncoming car and the decision simply cannot in most instances be made if there is something suspicious about the car and I should mention I think it is quite significant that our California Respondents concede this in their brief. They say that in the

one second or two available to an officer it is not likely that he will be able to find anything about a car that would be -- rise to the level of reasonable suspicion.

Now, at most of these checkpoints, as I have mentioned, stops are made of everybody. At San Clemente, there is a very strong effort to avoid interference with the many thousands of cars that pass through the checkpoint and the effort is made there to select out those that seem to be somehow worthy of further inquiry.

QUESTION: The highway is the main highway between San Diego and Los Angeles.

MR. EVANS: That is correct.

QUESTION: The two biggest cities in California.

MR. EVANS: That is right.

QUESTION: What is it, about midway between the two cities?

MR. EVANS: It is about midway and the -- it's been -- the Baca court found that it was at the point of lowest traffic volume anywhere on that road between the two cities.

QUESTION: But still very high traffic density --

MR. EVANS: Yes.

QUESTION: -- compared to most highways.

MR. EVANS: Absolutely, and by far the highest traffic density of any of the Border Patrol checkpoints.

QUESTION: Right. Right.

MR. EVANS: The effort is made there to try to select out those that warrant inquiry.

QUESTION: It is not done on a random basis, though.

MR. EVANS: It is to a limited extent but the officers, you know, by the nature of things, don't want to waste their time and don't want to waste the time of the travellers and their effort is to try to identify which cars for one reason or another look suspicious to them.

Now, to say that doesn't mean that they are necessarily --

QUESTION: There is a reasonable suspicion.

MR. EVANS: That it may not rise to a reasonable suspicion. That is right. And they are trained and many of them are very experienced and they tend to call it a "sixth sense." I think in most instances it could be articulated.

QUESTION: Well, including among other things the complexion, I suppose, of the driver and the passengers.

MR. EVANS: I think it necessarily enters into it. I don't -- the record shows in the Baca case that it is not a controlling consideration in any case but I think it would affront common sense to say that they -- if they are looking for illegal Mexican aliens that they should ignore the facial features of the occupants of the vehicle but the effort is made to separate out the ones that in their experience lead them to think maybe there is something wrong with that car. Sometimes



it is articulable. Sometimes it may not be. I suspect that in most instances if they were forced to articulate it, they could articulate it but first of all, I am not certain that would rise to the level of reasonable suspicion.

Certainly it would not rise to the level of reasonable suspicion as the Ninth Circuit has interpreted that phrase and there is a sense, I suppose -- there is a certain amount of sixth sense that the officers claim to be exercising that they can just tell, but they can't tell why, they refer to it as, they just thought it warranted further inquiry.

And I think it also should be said that, although randomness plays less and less a part of these checkpoints, just because of the volume of traffic, there is a sense that there ought to be some risks to any, even the most well-disguised operation, there ought to be some risk of apprehension detection there and to a certain extent, I suppose, there is a certain amount of randomness that goes into the stops and particularly if the traffic is light they may stop a higher proportion of the cars even though they might not believe that the particular car they are stopping is suspicious.

Now, at the other checkpoints, as I have said, the practice has been to stop virtually all the cars that come by, varying a little bit with the traffic and, as I said, if anybody is recognizable as a local resident or someone who habitually travels the area he is obviously not going to be stopped.

The point is that because of the nature of the checkpoint operation, it is just not a situation like it was in Brignoni. If a reasonable suspicion requirement is imposed on checkpoint stops, it means that the government will not have an adequate ability to enforce the law at these checkpoints. They will not be able to carry out their responsibilities and protect the public interest and I think the likely consequence of a reasonable suspicion requirement would be that the checkpoints would have to be closed down because they simply couldn't be operated in the effective way.

Now, one of the amicus briefs suggests that the Border Patrol hasn't tried using spotter vehicles on either side or spotters of some sort to alert checkpoint officers that something suspicious may be coming up but I really wonder if that is less intrusive. I mean, if you can picture a line of Border Patrol vehicles waiting a mile down the road from the checkpoint and falling into place behind each approaching vehicle and looking at it and seeing whether it is suspicious and alerting the officer to stop it, it seems to me that is much more intrusive than a brief stop with a question or two about the citizenship of the occupants than there is to have a car riding alongside you for a mile. I think that would offend most people a lot more than a stop.

And what is the magic of the stop? I don't know what it is. The Ninth Circuit has held itself in an opinion --

I believe Judge Hufstedler was on the panel -- that diverting a car and slowing it down to a slow speed is not a constitutional violation of any sort. The name of that case is United States against Evans, quite appropriately.

QUESTION: Well, what happened in that case? Was that all it was, they were slowed down to a slow speed and then went on?

MR. EVANS: What happened was, it was a checkpoint like Sarita, except that it was set up so that the cars would come slightly off the road and pass by the officer and --

QUESTION: At a slow rate of speed.

MR. EVANS: At a slow rate of speed. I mean, they were told, the signs generally say "Slow" and there are traffic cones and he approached in his vehicle at a relatively slow rate of speed and the officer waved him on and as he went through, the officer looked down and saw a human being or two lying on the floorboard of the back seat.

He gave chase and stopped the car and the Defendant's argument was, you had no right to be where you were when you saw this person lying on the floor of the car and the Court of Appeals said, We hold -- and as a matter of fact, the Court of Appeals panel in this case reaffirmed the holding, that there is no constitutional violation in diverting cars to a position where officers can see inside them.

QUESTION: And there, from what they see, there might

arise a reasonable suspicion. Is that what the Ninth Circuit said?

MR. EVANS: That was probable cause, probably, but, yes, they said that might well rise to reasonable suspicion.

His argument was -- he conceded we had sufficient cause to make the stop after the officer saw the person in the back seat. He argued that he --

QUESTION: He conceded at that point it was at least reasonable suspicion.

MR. EVANS: That is right.

QUESTION: Which Ninth Circuit case?

QUESTION: Evans.

MR. EVANS: This is United States against Evans, which is cited in our brief and is also cited in the opinion of the Court of Appeals.

QUESTION: In 507 Federal Second.

QUESTION: Yes.

MR. EVANS: Yes.

Well, we conclude from all this that for the reasons I have indicated that the stops and checkpoints ought to be permitted under the reasonableness test of the Fourth Amendment in the absence of an articulated, particularized suspicion focused on the vehicle to be stopped. Both the Fifth and the Tenth Circuits have so held. The Ninth Circuit, of course, has ruled against us on this issue.

QUESTION: And those would be the only three circuits involved, would they?

MR. EVANS: That is right.

QUESTION: There are no checkpoints in the northern part of our country?

MR. EVANS: Well, there are no established checkpoints that I know of. I think there is some traffic checking that goes on in the northern, you know, the Canadian border areas, but --

QUESTION: I know -- of course, at the border, they are all --

MR. EVANS: I am talking about inland. There is some traffic checking inland, too, although so far as I know there is nothing approaching what goes on in the southwest.

QUESTION: So these three circuits are the circuits involved.

MR. EVANS: That is right. There are some decisions out of other circuits bearing on some of these issues. There is a Second Circuit decision involving a check by a Border Patrol officer of a bus coming from or in the Canadian border area where he found a person who he took off the bus and --

QUESTION: There was a petition for certiorari in that case here. What happened? Is it pending, or --?

MR. EVANS: If there was a petition, I didn't work on the opposition. I don't remember the petition being filed.

We lost the case and I can't see why anybody would petition. Certainly we didn't.

QUESTION: Well, maybe I am thinking about another similar case.

MR. EVANS: Now, we recognize that the existence or nonexistence of a prior judicial judgment as to the reasonableness of the particular operation may well bear upon the reasonableness balance itself, although we think that the nature of the stops are sufficiently non-intrusive and the need for them is sufficiently great that there is no need to worry about the nonexistence or existence of a warrant.

We recognize its relevance and our view, to start with, is that there is no need for a warrant in context of fixed checkpoints.

First, because the intrusion is so relatively innocuous that the procedure just doesn't present the kind of dangers that the warrant procedure is designed to protect against. This is not a search, at least not without probable cause. There is no electronic eavesdropping here. I mean, this is relatively trivial.

I think, Mr. Justice Stewart, you asked earlier if there was anything in the record to indicate the average length of the stops.

There is something in the record as to the average length of the stops at the San Clemente checkpoint.

QUESTION: I know that.

MR. EVANS: That was three to five minutes, which appears in the application for the warrant. Although there is nothing in the record to so indicate, we were told that stops at most other checkpoints consumed a total of less than a minute but as a way of gauging how long for routine inquiries, no longer than about five seconds per occupant, so if you take the time he sees the checkpoint till the time he leaves, if there are even three or four people in the car, it is likely to be less than a minute unless something suspicious arises that warrants further view or further investigation.

QUESTION: I am not sure I understood that statistical data -- those statistical data in the San Clemente record because you keep saying -- repeating in your brief that the stop here involves no more intrusion and certainly no more time than a stop for a traffic light or a stop sign which, as we know, is generally a matter of a second -- less than a minute.

And yet the indication is that the average stop is from three to five minutes, which is considerably longer. But do I understand that that three to five minute period is of those that are put over into secondary?

MR. EVANS: That is right. The ones who are referred off the highway at San Clemente, because of the referral off the highway, take a little longer than the other checkpoints do. It may take three to five minutes at other checkpoints if

someone for some reason gives rise to suspicion but at San Clemente, the initial inquiry is made by an officer at the secondary area and so there is necessarily a referral and it takes a little bit longer, but it is not, essentially, a long delay.

QUESTION: So, it is substantially longer than a stop sign or a traffic light.

MR. EVANS: Well, it is substantially longer.

QUESTION: Okay.

MR. EVANS: I don't think it is substantially more intrusive.

QUESTION: No.

MR. EVANS: In any event --

QUESTION: I was inquiring about the length of it.

MR. EVANS: Yes, it is longer than that at San Clemente, but I should indicate that of the 99 or more percent of the cars that are not stopped at San Clemente for inquiry, at least -- there is some dispute and it is continued from last terms' cases about whether the vehicles are actually stopped -- We are told that they are waved through unless they are going to be referred over, unless they are curious. Sometimes they will stop at the stop sign. Even though the officer is waving them on, they will stop. But even if they were stopped, their stop is instantaneous and the District Court in Baca referred to it as fleeting. That is not even a traffic light stop. So what is --



QUESTION: That is more like a toll booth stop.

MR. EVANS: Yes, if that. And they don't even extract money from you at the checkpoints.

QUESTION: No.

QUESTION: And again, length of time we are talking about.

MR. EVANS: Yes.

Well, a second reason why we think warrants would be unnecessary in the context of checkpoint stops is that the stationary nature and the regularized procedure of the operation makes it, in a sense, unnecessary to have repeated renewals of warrants for one particular checkpoint, which is the procedure that was followed for some time at San Clemente and other checkpoints in the Ninth Circuit after the Ninth Circuit ruled that we could not operate them without warrants.

Unlike a roving patrol which, in each case I assume would be essentially unique, a checkpoint does not change substantially from day-to-day or even from year-to-year and in our view, judicial scrutiny can most appropriately await an occasion in an adversary criminal proceeding where the reasonableness of its operation can be determined and once determined, one way or the other, there is an opportunity for appeal by either side and that ultimate resolution of that checkpoint would stand. I mean, that would be the end of it. Either you would know that checkpoint was reasonable without precluding

other people from challenging it or you would know that it was unreasonable, in which case the government would have no choice but to close it down. But it is a single spot. It is not a unique, special situation requiring advance approval of a judge because each time it comes to the judge for approval, the judge says, "Well, I already looked at this last week. No reason to go through this all again."

And I think that minimizes at least the need for a warrant of the kind that Mr. Justice Powell suggested in the concurring opinion in Almeida-Sanchez.

QUESTION: Although in Sifuentes, there was a warrant.

MR. EVANS: No. In Sifuentes, it was the Texas case. There was no warrant.

QUESTION: Martinez-Fuerte.

MR. EVANS: That is correct. There was a warrant.

QUESTION: That's your case.

MR. EVANS: And as I said, the warrants in the Ninth Circuit were obtained because the Ninth Circuit ruled we could not operate the checkpoint without warrants and so we began seeking warrants and they were granted, generally, without too much difficulty, by --

QUESTION: Then you still lost in the Ninth Circuit.

MR. EVANS: That is right.

Moreover, the warrant procedure in the context of checkpoints we think has substantial problems of workability.

And again, in this very essential aspect of our case, I think the California Respondents, although they are not -- well, the California Respondents in effect, concede that it would be unworkable. At least, they agree it would be very difficult. They say that is the price to be paid, but I think it enters into the question of whether, indeed, it should be paid.

First of all, there is a problem of coordination. All of these checkpoints are -- almost all these checkpoints are correlated with others that are nearby, as I was responding to Mr. Justice Marshall before. A checkpoint does not stand on its own. It is coordinated with other checkpoints in the area so that there is no easy way for a person intent on violating the immigration laws of avoiding detection.

It doesn't always work but that is the aim and if one magistrate says checkpoint A is okay but the other magistrate says checkpoint B is no good, well, that is just like having no checkpoint at all because everybody is going to go up where checkpoint B is located.

The second thing is the need for flexibility. The checkpoints we have here don't face this problem because these are permanent checkpoints in the sense that they are operated roughly around the clock all year and there is no question about their operation except if the weather is bad or manpower is short.

But there are other checkpoints that can't be operated all the time or there is no need to operate them all the time and experience has shown that Border Patrol agents, the supervisory officials need to have that flexibility to establish a checkpoint that perhaps hasn't been used regularly but the effect of a warrant requirement, because you have to know well in advance whether you are going to use it may be to limit the use of the checkpoints only to the major ones which, in the long run, serve very little purpose because the secondary routes would then become flooded.

And third, and I think I mentioned this a second ago in this context, there is no established procedure for Appellate review of a denial of a warrant and the Government would have little recourse if a magistrate or a judge refused to grant a warrant and that happened to us during the period of the warrant procedure in the Ninth Circuit. We had several warrants denied and we were unable to do anything about it and the checkpoint had to be shut down.

Of course, if the ruling were to occur in an adversary proceeding, there would be no question about review.

Well, if we are wrong about the need for a warrant and we need one, that would affect only the Texas case. If we can only operate these checkpoints with warrants, the Texas case is a loser but the San Clemente stops were authorized in advance by a warrant precisely, I think, of the sort that was

envisioned by Mr. Justice Powell's concurring opinion in Almeida-Sanchez.

We think it was superfluous here but there was a prior judicial approval of the very operation that led to the stops and inquiries and subsequent arrests of these cases in California and we think this represents an additional basis for concluding that the stops here were reasonable.

The Court of Appeals in the Ninth Circuit in this case, and our California Respondents would give the warrant no weight because in their view it is unlawfully broad but their argument has a kind of Catch 22 flavor about it because they argue on the one hand that you need reasonable suspicion to make a stop and if you don't have reasonable suspicion, then it is essential that you have a warrant. But then they say that in order to get a warrant, you have to have probable cause.

What this is really saying, I think, is -- as the Court stated in Wyman against James, a warrant is just out of place here, but if we have lost that point, the warrant is in place here, this is the only kind of warrant that can be issued. It requires an analysis and a weighing of the basic agency decision to conduct a checkpoint.

Now, Mr. Justice Powell's suggestion in his concurring opinion in Almeida-Sanchez was for a warrant that would authorize roving patrol searches over precisely the kind of area that was involved in Brignoni-Ponce, although a

magistrate would, in advance, limit the area and the four dissenting justices, although dissenting as to the need for the warrant, agreed that that would be consistent with Fourth Amendment requirements.

This warrant is substantially more limited, authorizing only stops, not searches and limited only to a specific location and not to any roving, extended aspects.

It is true that the focus of a warrant of this sort is necessarily less precise than it would be the case for more conventional crime but the special problems of enforcement in this respect, as they are detailed in Mr. Justice Powell's concurring opinion we think justifies an unconventional solution and in this context I think one can say that a warrant is sufficiently precise if it identifies the place where the operation is to take place, remembering at all times here that we are talking about stops and brief inquiries, that it identifies the purpose and the scope of the operation and that, as narrowly as is feasible, it limits the class of vehicles to be subjected to it.

In this case, the class is northbound vehicles on Interstate 5, which is not a very narrow class, but it is as narrow as is feasible.

In any event --

QUESTION: That would be several million people a year, I suppose.

MR. EVANS: That is right.

QUESTION: Maybe some of them the same people, but --

MR. EVANS: The Court of Appeals used the figure of 10 million which I think is an accurate reflection of the number of vehicles that pass that point annually, although the checkpoint is operated only about 60 percent of the time which is perhaps a little bit less and the figures would indicate that only something less than half of that actually pass through during the period when the checkpoint is in operation.

QUESTION: It's pretty close to a general warrant, isn't it?

MR. EVANS: Well, it is close in the sense that it is somewhat general, but it is not close in the sense of what is being authorized. There is no search being authorized here, no books and papers are being rummaged through. This is a very limited operation, as I -- you know, as I indicated.

Most of the people aren't even affected substantially. They just go right through, even if they do make a brief, fleeting stop and the small proportion who are subjected to a stop for secondary inquiry are not subjected to any substantial invasion of their privacy.

QUESTION: Why is San Clemente not operated 24 hours a day?

MR. EVANS: It ordinarily is but there are manpower shortages or whatever that sometimes preclude its operation

around the clock. I think if there were no manpower problems and if the weather stayed good at all times and the traffic never got heavy, as it does frequently at that point, they would operate it around the clock. They would like to. That is their aim. But there are various reasons why it can't always be done.

QUESTION: It seems to me it is one of the most important ones in the structure and --

MR. EVANS: Well, it is. But you see, to a certain extent, Mr. Justice Blackmun, it is a deterrent and shutting it down for a few hours is not going to increase substantially its deterrent value because the persons who are intent to travel that was illegally don't know, necessarily, when it is down.

Now, you know, I think the briefs reflect some of the evidence that was developed in the consolidated proceedings in the Southern District of California that there were scouting operations, there were what are called "load houses" where illegal aliens are kept until a scout has told -- has called back and said the checkpoint is down.

But there are, you know, ways of meeting that problem, too, and they will frequently open the checkpoint unexpectedly after shutting down and catch, as the record indicates, an enormous number of people who were trying to get through at that point.

It has been referred to by the Border Patrol people



I have talked to as really a game. It is like a chess game. They are trying to outguess their adversary, in effect.

QUESTION: Do you -- is it reasonable to assume that you agree with Mr. Bennett that if there is something to indicate that the car has just come from Mexico, that there is a suspicion that would support a stop?

MR. EVANS: I think that if there is reason to believe that a vehicle had just crossed the border you have what would amount to a functional equivalent of a border search.

The example that you were posing to Mr. Bennett may not be a realistic one, Mr. Chief Justice, because if the car came through at a point where officers could put a sticker on it, it has been subjected to an inspection. We don't have any problem with people who come through where they can be inspected. That car has been subjected to the scrutiny that ordinarily goes with coming into this country.

It is the cars that don't come through. Now, those cars are usually on this side of the border and they are left in remote areas for people who cross the border in remote areas to drive away in and those cars --

QUESTION: People who cross the border on foot.

MR. EVANS: Illegally, that's right, clandestinely. You know, if we were in a position to put a sticker on the car, we wouldn't need to search it later because we have already inspected it.

QUESTION: Well, one of the factors is time. There was a period shown by one of the records in one of the cases here where they stopped every car crossing the border and it became an international incident with Mexico protesting --

MR. EVANS: That's right.

QUESTION: And employers on the American side protesting.

MR. EVANS: I think in that event, as I say, if that were a problem and if that were to be done, if it were clear -- the Ninth Circuit rules themselves hold -- if there is a reasonable certainty that you have got a person or a vehicle containing things or persons has just crossed the border, you can conduct what amounts to a border search wherever you find them.

QUESTION: Does this record anywhere show any current estimate as to the number of illegal aliens in the country? Some of your prior cases have reflected 10 or 11 million.

MR. EVANS: This record is a little stale at this point. At the Baca hearing in the District Court in California the estimate was somewhat less than a million but there are recent estimates that have been given in testimony by Commissioner Chapman of the Immigration and Naturalization Service to Congress that have indicated that the current estimate is closer to six to eight million and as you indicate, there have been various estimates and some put it as high as 12 million. Some of those figures are reflected in a report that the House

Judiciary Committee made recently with respect to legislation dealing with making it a crime to knowingly hire illegal aliens.

I'd like to reserve, if I may, the balance of my time.

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

Mr. Sevilla.

ORAL ARGUMENT OF CHARLES M. SEVILLA, ESQ.

ON BEHALF OF MARTINEZ-FUERTE

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

In the position of Respondent I would like to reply to some of the points made by Mr. Evans during his argument.

First, I think a brief statement as to what happens at the checkpoint again is in order. Last year Mr. Evans and I disagreed on this point and we disagree again. I think if one looks at the photograph provided by the government in the reply brief to Ortiz, you can see what the oncoming traffic faces at the San Clemente checkpoint.

That is, two armed law enforcement officers standing in the middle of the highway in front of stop signs which say clearly "Stop" and overhead there are two additional signs saying "Stop."

This is what is called the primary stop, what the Baca court said is the "fleeting stop" and it is this where the officer, without any guideline, regulation or rule makes a decision whether or not he is going to let that individual whom

he has stopped and sees momentarily pass on his passage northward or is to be referred to the secondary area for the interrogation as to the right of the individuals to be in the United States.

QUESTION: Now, does that happen to every car?

MR. SEVILLA: That happens to every car when the checkpoint is running.

QUESTION: It does.

MR. SEVILLA: The point officer makes a stop or the functional equivalent of a stop and then decides whether or not he is going to allow that person to go forward.

QUESTION: And he does that with every car.

MR. SEVILLA: With every car.

QUESTION: And that is the so-called "fleeting stop."

MR. SEVILLA: That is the fleeting stop. Then he selects --

QUESTION: About one out of 20.

MR. SEVILLA: Whatever the figures -- whatever car he wants to have further inspected. The car is referred to the secondary area off the road and during this time, between 60 -- during the average time of the secondary stop, between 60 and 100 other cars will be waved through and they will look to the right and see the one victim being interrogated by the law enforcement officers as to the right to be here. That stop, as Mr. Evans indicated, is approximately three to five minutes.

There are approximately 1,200 cars going through this checkpoint every hour and therefore if you break it down it is about 100.

QUESTION: What is the problem if he stops and he sees two people laying down hidden on the floor? What problem is there with that?

MR. SEVILLA: With the stop, the initial intrusion without any factual basis?

QUESTION: No, I said after he stops and he sees that, certainly there is no complaint about him going to the secondary area after that, is there?

MR. SEVILLA: If you justify -- if you can justify the initial intrusion, but it seems to me the Fourth Amendment requires --

QUESTION: My point was --

MR. SEVILLA: -- a factual basis for the stop.

QUESTION: You were talking about just being run over on the side. But once he does stop him and once he sees illegal aliens or what appear to be illegal aliens or for some reason, somebody laying down on the floor and sends them over to secondary, the only complaint there is the stop.

MR. SEVILLA: Yes. And without a factual basis to allow the point officer to be in a position to see that, I would submit that it is arbitrary, capricious and unconstitutional. If the whole purpose of the amendment is to have a

factual predicate for a seizure, then without a factual predicate for the seizure, it seems to me it would be unjustified to stop a person who is going 55 miles an hour on an interstate highway, 66 miles north of the border without any connection to the border at all.

QUESTION: They could stop him for a red light.

MR. SEVILLA: Yes, I know. The government has alluded that this is the equivalent of a red light.

Well, at a red light you don't have armed law enforcement officers inspecting your physiognomy, your interior of your car and deciding whether or not they want to refer you --

QUESTION: Well, you could.

MR. SEVILLA: They could.

QUESTION: A police officer could stand at the stop sign and look into your car and there is nothing in the world wrong with that.

MR. SEVILLA: I agree. I agree absolutely.

QUESTION: And if he saw contraband in there, he could operate accordingly, couldn't he?

MR. SEVILLA: That is correct, but that is not what is happening --

QUESTION: Which is to lock you up.

MR. SEVILLA: That is not what is happening in these cases and I would submit that the whole purpose of the stop procedure is to allow the officers to look at the individuals,

to seize them momentarily and make a decision as to whether they are going to allow the person free passage on.

QUESTION: Your only point is the stop.

MR. SEVILLA: The only point is the stop.

QUESTION: That you are objecting to.

MR. SEVILLA: Well, that is the beginning of the whole intrusion. The stop -- I object to the initial stop and of course we would, perforce, object to the intrusion that follows being referred off the highway and interrogated for three to five minutes, but I would object to both.

QUESTION: You don't object to the guard looking in the car, do you?

MR. SEVILLA: At a stop sign somewhere in the city, any officer can look at traffic, just as any citizen can but they can't put up a roadblock to stop all the northbound traffic 66 miles north of the border and above 19 communities and some two million inhabitants just to stop people to see if they look like citizens or lawful residents.

After all, there are a lot of legal citizens and residents of brown skin who have a right to proceed northward and if we are talking about the right to have this fleeting stop, what is going to be the factor that the officer grasps on to decide whether to wave someone to secondary? It is going to be --

QUESTION: When you see somebody laying down in the

back of the car hiding.

MR. SEVILLA: Well, if you can see that, but the more typical case is just going to be the random, arbitrary decision to refer someone off to secondary.

QUESTION: In this case, that is what he did see, didn't he?

MR. SEVILLA: Not in my case, no.

QUESTION: No, but in the record --

MR. SEVILLA: There is no record on what he saw.

QUESTION: In the Texas case he saw three of them.

MR. SEVILLA: Laying down after the initial stop, correct.

QUESTION: But he had to do something then, didn't he?

MR. SEVILLA: Well, it may have allowed for further investigation but that is not the factors in my case and, again, I would just hark back to my point that without a factual predicate under Brignoni-Ponce, there is no basis for stopping an individual who is proceeding away from the border.

QUESTION: Where was the illegal passenger in your case?

MR. SEVILLA: There were two women and they were seated upright in the passenger compartment.

QUESTION: Mr. Sevilla, I take it from what you have said that your argument would be the same if you represented a



non-Mexican who had been subjected only to the fleeting stop.

MR. SEVILLA: Oh, yes. Yes. But the point is that --

QUESTION: But you probably wouldn't be in Court.

MR. SEVILLA: We probably wouldn't. The names of these cases, I think, tell something about what goes on at the checkpoints. In Almeida-Sanchez --

QUESTION: Well, I understand that, but the answer to my question is, that if you represented a non-Mexican who had been stopped for five seconds, you would make the same constitutional argument.

MR. SEVILLA: Yes, but there is more to it. If I was representing a non-Mexican individual, he would not be just stopped at the primary point, he would be waved off the road and subjected to the interrogation.

QUESTION: No, you -- perhaps I haven't stated the question correctly. I am assuming a case in which the only intrusion -- to use your words -- is a five-second detention. Then you are waved on.

This is your client. He is a non-Mexican. He was waved on. He was going 60 miles an hour, as you have said. He was brought to a stop for five seconds. He asks you to represent him. Would you make the same arguments you are making here today?

MR. SEVILLA: Constitutionally, I would make the same arguments. Practically, I wouldn't take the case.

QUESTION: Well, what kind of case would you have?

MR. SEVILLA: What's that?

QUESTION: All you would have was the Plaintiff's case.

MR. SEVILLA: That is all we would have and that is the whole point of the Fourth Amendment is to protect those intrusions so these people do not have to sue the government for a five-second stop. There is no forum unless there is a factual predicate upon which an officer bases his decision.

QUESTION: I understand that, but you are saying, in effect that the constitutional intrusion is that initial five-second stop that gives us an opportunity to take a look.

MR. SEVILLA: That is the beginning. That is the constitutional intrusion. The facts of our case, of course, are more aggravated than that. That is the beginning of the intrusion, certainly.

QUESTION: Yes, I understand.

QUESTION: So you would have a Plaintiff's case under Bivens.

MR. SEVILLA: We would have a plaintiff's case but as we stated in Ortiz to this Court, we quoted Anthony Amsterdam's article, there is no lawyer in the world that would take a case like that and that is why the Fourth Amendment requires some protection for the innocent citizenry who travels northward into California.

No one is going to take a suit like that. We have to have a reasonable basis, a factual predicate for the actions of the officers.

QUESTION: Counsel, you should read some of the petitions for certiorari in this Court and you would find that your statement is not supported.

MR. SEVILLA: I have probably written a few, your Honor.

QUESTION: Yes, I think just the statement that "No lawyer in the world would take a case like that" is slightly broad.

MR. SEVILLA: Well, if it was a temporary restraining order to prevent the officers from doing that in the form of a class action, we would have a case.

QUESTION: Suppose the client wanted you to bring a 1983 damage suit against the officer for delaying him?

QUESTION: That is what I said.

QUESTION: Right.

MR. SEVILLA: Right.

QUESTION: You wouldn't take the case.

MR. SEVILLA: As a practical matter, he would have a claim but it would be de minimus unless it was a class action, of course and then they could hand out five-dollar bills to every one they stopped.

QUESTION: I have two questions, if I may, very

briefly. I'll ask first, as I understand your theory, it applies to just a slow-down. We talk about a stop, but even if they just slow them down to ten miles an hour to look in the car without any reason for separating them out. That is --

MR. SEVILLA: That is a lesser intrusion. It is still an intrusion without a factual purpose.

QUESTION: Well, why is it lesser? They look in the windows both times, whether they stop or not. I mean, you don't rely on the conversation aspects of the stop. It is just the --

MR. SEVILLA: That is an extension of the intrusion, certainly.

QUESTION: So they are slowing down -- they are slowing up to look in -- is the same as the stop to look in, under the --

MR. SEVILLA: Basically, yes.

QUESTION: And under your theory, do I correctly conclude that the random stop that Mr. Bennett discussed to ask if there were a driver's license in the operator's possession would be equally invalid.

MR. SEVILLA: Absolutely not. That is not the case here at all.

QUESTION: What is the difference?

MR. SEVILLA: Well, as the Court pointed out in Brignoni-Ponce, Border Patrol officers don't have anything to do with regulating highway usage and also, the only way you can

enforce the law with respect to traffic safety and individuals carrying a license is to stop the individual on the road and see if they have a driver's license. There are numerous alternatives to deterring and apprehending illegal aliens in this country once they have intruded into the interior of the country so there are a number of alternatives to the police power of the states regulating highway usage and safety which are not analagous by any means to this case and as the Court said in Brignoni, that is not the issue in these Border Patrol stop cases. That is not the issue.

QUESTION: Now, your statement just now was, "once they have intruded," so you want to give them the first bite. Are there alternatives to keep them out in the first place?

MR. SEVILLA: Yes. Well, as the Baca hearings show, there has to be some commitment by Congress to solving this problem. The Government attorneys make a very persuasive pitch to the Courts to solve the problem and as Justice White concluded, the Courts can't solve the problem alone. We need some help from the legislative branch.

For one thing, in the Baca hearings, and as you will see in our brief, there are only 30 people, 30 Border Patrolmen on a typical day shift covering the entire California-Mexican border -- 30 people for about 125 to 140 miles of border. That is an impossible situation. They haven't got enough men to respond to their sensor alerts on the border. They haven't got

enough money to repair the fences that are down in the high flooding areas. They can't even replace fences and one of the agents testified in the Baca hearing that the appropriations to get the fences repaired have been stricken in Congress every year and, of course, the major deterrent, even as the Border Patrol officials concede, the major deterrent is going to be to pass legislation to cut off the magnet for the illegal alien entering this country, and that is employment and this Court can't legislate that legislation.

It has to come from Congress and if they are not concerned about the problem enough to solve it, I don't think that we should dilute the protections of the Fourth Amendment to solve a law enforcement problem which Congress has control over but has not deemed it fit, at this point at least, to try to solve it and I think unless they go to that alternative, we shouldn't take the lowest constitutional road to solve the problem, as Justice Judge Oakes said in the Second Circuit in the Border Patrol stop case in United States versus Barbera.

So there are other circuits, also, that have looked at this problem and you will note the only lengthy written opinions which rule on this issue are the ones that hold that the Fourth Amendment protections apply because those are the only ones that can be written that are easy to write. The other ones are a one-line opinion saying, "It appears reasonable."

"The stop is not reasonable without a factual predicate giving the officers a reasonable suspicion to believe that illegal activity is afoot" and that is the language directly out of Terry versus Ohio where "reasonableness" is defined.

The only way that we can take the factual predicate away is if we are in a purely administrative atmosphere such as Camera. This Court held in Almeida-Sanchez that the administrative analogy does not apply and it doesn't apply here, either. We are in the same situation.

QUESTION: What is the present status of that employment legislation?

MR. SEVILLA: Well, as I understand it, Senator McClellan, who is the head of the Immigration Subcommittee in the Senate, has decided to hold the first meeting of his Subcommittee in seven years to consider the Rodino Bill or a Rodino-type bill.

The Rodino Bill has passed the House several times, as I understand it. It has never been brought to the Floor of the Senate and as I understand it -- and I read in the paper about a month or two ago that Senator McClellan has decided to call a meeting of the Subcommittee.

And I think that is where the answer lies. No matter what the decision this Court makes in these cases, the illegal alien problem is not going to go away. When Border Patrol powers were in full flower, the problem was as great as it is

today and I made an estimate in our brief that up 20 percent of Mexico was currently residing in this country, if you take accepting the Border Patrol's figures.

That, of course, came about with Border Patrol powers in full flower. It is an ineffective deterrent. They can get through -- San Clemente, for example, is only open seventy percent of the time and ninety-five percent of the aliens traversing through that checkpoint get through. It is -- San Clemente is an ineffective deterrent, as are all Border Patrol checkpoints.

And the other point, the irony of this case is that Brignoni-Ponce involved the same area, the San Clemente checkpoint. In that case, rather than standing in the middle of the highway, the officers, of course, were seated in a car perpendicular to the roadway, saw Mr. Brignoni, thought he was a Mexican-looking individual, pulled out and stopped him.

The only difference in this case is that the officer was standing in the middle of the road and I can't believe that that difference is of constitutional significance when peoples' rights are at stake and especially when the discretion, which is unbridled at this point, for a point officer to decide to take people off the road is so subject to possible abuse because we are dealing with sensitive factors such as the racial appearance of an individual and in Southern California, we have a substantial Mexican-American population who are validly



residing there.

For the Government to say, well, the point officer only stops or lets through the local inhabitants is unreal.

It is unrealistic to believe that a point officer is going to know the 1.5 million residents who are in southern -- south of the San Clemente checkpoint.

QUESTION: When you referred to Senator McClellan's committee which had not met for seven years --

MR. SEVILLA: Yes.

QUESTION: And it is now going to meet, is that to consider the legislation that relates to making it a criminal act to employ an illegal alien knowingly?

MR. SEVILLA: That is my understanding, yes.

QUESTION: That hasn't anything to do with the fences and the other deficiencies in our border situation, has it?

MR. SEVILLA: No, but that is certainly something for Congress to act upon if they want to solve the problem.

If the Government considers it a problem, as I said before, it seems to me that they should be acting upon it rather than the Government attorneys coming to the courts to ask for a dilution of traditional Fourth Amendment protection.

And if I might say something about the warrants since my time is just about up; this is a warrant, perhaps not against the entire American nation, but it is a warrant against the entire population of Southern California.

The warrant was unlimited. It was perpetual. It did not even attempt to meet Justice Powell's four factors in Almeida-Sanchez for the functional equivalent of probable cause because it couldn't. Ninety-nine point nine percent [99.9] of the vehicles, not the people, the vehicles going through the checkpoint contained no aliens at all, no illegal aliens and, of course, the figure would be higher for the number of people traversing that checkpoint.

That in no way could be deemed the functional equivalent of probable cause.

Second, there is no nexus to the border. There is -- if we are talking about the equation for functional equivalency which was not even attempted to be met in this warrant. There is no nexus to the border. It is 66 miles from the border and as we point out in our brief, we attached a little appendix here to show where the border is at the bottom and some 66 miles north of the border up near the San Clemente area is the checkpoint along I-5, the major route north for Southern California and it is above some, oh, 19 major communities, including San Diego and Oceanside.

So this warrant, as the Court below indicated, does not even approach Mr. Justice Powell's criteria. The magistrate merely concluded that there was cause to believe that massive immigration violations were taking place.

Without even citing a particular statute he just said

"There is probable cause to believe that violations of Title VIII were taking place," and we say, consider a warrant which indicated that there was probable cause to believe that Title 18 violations were taking place in an area.

It is much too wide. It is not the type of warrant that is for a location near the border to form as a stopgap for areas where there is no Border Patrol port of entry where people can be checked.

In our brief, we do include the alternatives because the Government pitches its case on the need -- we point out that there are numerous alternatives. The Border Patrol has about ten other programs other than traffic checks. They include farm and ranch checking, airport terminal checking, industrial checking.

We point out in our brief that in twenty days in Los Angeles the Border Patrol captured 12,000 illegal aliens in twenty days -- seventy agents in a twenty-day working period captured 12,000 in the Los Angeles area just walking along the street and asking people for their identifications.

That is a much more efficient way of doing things than stopping the ingress of the entire Southern California population into the Los Angeles area and points northward.

QUESTION: Do you think that is a constitutionally permissible intrusion, walking along the street and stopping any passerby and asking for his identification?

MR. SEVILLA: As long as its --

QUESTION: Isn't that what happened here at this checkpoint?

MR. SEVILLA: As long as there is no seizure of the individual. At the checkpoints there are seizures taking place. You cannot go anyplace. If you try to run the checkpoint you are going to be flagged down and arrested and if you don't answer, you are going to be detained until you come up with an answer that satisfies the officer at the checkpoint.

If someone is walking along the street and is simply asked a question, as long as there is no seizure according to, I think it was Justice White in Terry versus Ohio, there is probably no problem. We are just asking a question.

There are many situations where officers simply ask questions of individuals that don't --

QUESTION: They have to slow them down to ask questions, don't they?

MR. SEVILLA: Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Evans, you have just one minute left.

REBUTTAL ARGUMENT OF MARK L. EVANS, ESQ.

MR. EVANS: I'll make it brief. It is quite misleading to say that 99.9 percent of the vehicles contain no aliens; 99.8 percent of them aren't referred over -- or about

99 percent of them aren't referred over for secondary inspection.

Of those that are, the figures under the warrant of issue here show that 21 percent were, in fact, found with illegal aliens in it.

Mr. Chief Justice, on the status of the legislation, what used to be HR 982 in the House has now been made up into a clean bill called HR 8713 which was reported to the House by the Judiciary Committee on September 24, 1975 in report number 94-506.

The Senate has been -- one of the stumbling blocks in this legislation in the past, Senator Eastland, Chairman of the Senate Judiciary Committee has recently introduced his own version of the bill, it is S3074 which, at Sections 12 and 13 make it unlawful to knowingly employ illegal aliens.

Although the bill as submitted by Senator Eastland does not have criminal penalties, it has a civil penalty structure.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:29 o'clock a.m., the case was submitted.]