AN INTRODUCTION TO SEARCH AND SEIZURE UNDER THE IMMIGRATION REFORM AND CONTROL ACT OF 1986

I. INTRODUCTION

The Simpson-Rodino Act, or the Immigration Reform and Control Act of 1986[1] (hereinafter "IRCA", or the "Act"), has been regarded as one of the broadest reforms in immigration law. Signed into law on November 6, 1986, the IRCA works as an adjunct to the already problematic Immigration and Naturalization Act of 1952[2] (hereinafter the "INA").

The Act itself has two independent arms, each with a different purpose. The enforcement arm seeks to control illegal immigration by imposing sanctions on employers who hire illegal immigrants. It will have a broad impact upon both illegal aliens and, for the first time, the employers who hire them. The amnesty arm is intended to legalize aliens who have been in the country for at least five years preceding 1986.

The purpose of the Act is to control immigration to the United States. Unlike past attempts to control immigration, the means adopted for achieving its purpose are significantly disturbing: the imposing of strict sanctions upon those persons who employ illegal aliens. These sanctions apply to all employers and those who pay for or provide employment services.

Two provisions under the IRCA generate cause for concern because of their constitutional ramifications. The first provision allows for INS officers, agents or representatives of the Department of Labor to inspect employers' records without a warrant.[3] The sec-

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1. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 339 (codified at 8 U.S.C. § 1324 (1988)).

2. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163.

3. 8 U.S.C. § 1324a(b)(3)(1988).

The Act provides that:

> After completion of such form in accordance with paragraphs (1) and (2), the person or entity must retain the form and make it available for inspection by officers of the Service or the Department of Labor during a period beginning on the date of the hiring, recruiting, or referral of the individual and ending—
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> (A) in the case of the recruiting or referral for a fee (without hiring) of an individual, three years after the date of the recruiting or referral, and
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> (B) in the case of the hiring of an individual—
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> (i) three years after the date of such hiring, or

ond provision permits the INS or any administrative law judge "reasonable access" to evidence of any person under investigation.[4] These two provisions may strengthen the already questionable authority of INS officers pursuant to INA Section 287 to arrest and interrogate aliens without the safeguard of a warrant.

The purpose of this paper is to provide an introduction to the case law analyzing the impact of the IRCA's enforcement arm upon the Fourth Amendment protections against unlawful search and seizure as extended to illegal aliens, particularly in light of the INS's authority to conduct warrantless searches.

II. EMPLOYER SANCTIONS UNDER THE IMMIGRATION REFORM AND CONTROL ACT

A. *Prohibition of Unlawful Employment of Aliens*

The Act authorizes the imposition of sanctions for two types of violations. The first consists of a violation of the reporting requirement: every employer must verify that each employee is legally authorized to work. To further ensure the Act's effectiveness, Congress also implememted civil and criminal sanctions for failure to comply with the reporting requirements.

The sanctions provided for by the Act consist of civil fines and criminal penalties. Employers, recruiters, and referral agencies are subject to fine or penalty if they knowingly hire, recruit, or refer aliens not authorized to work, or if they fail to comply with the Act's employment verification procedures[5]. For purposes of the Act, an unauthorized alien is a person who is not lawfully admitted to the United States for permanent residence, not authorized by the INS to by employed in the United States, or one who has not maintained his or her nonimmigrant status which provided original authorization for employment in the United States.[6]

The Act is not retroactive. Thus, it does not affect those employers who may have hired illegal immigrants prior to passage of the Act. Therefore, an employer may knowingly continue to employ an illegal alien who was hired prior to November, 6, 1987.[7]

(ii) one year after the date the individual's employment is terminated,

whichever is later.

4. 8 U.S.C. § 1324a(e)(2)(A) (1988).

The Act provides that:

In conducting investigations and hearings under this subsection—

(A) immigration officers and administrative law judges shall have reasonable access to examine evidence of any person or entity being investigated[.]

5. 8 U.S.C. § 1324a (1988).

6. 8 U.S.C. § 1324a(h)(3) (1988).

7. The IRCA grandfather provision states that:

Section 274A(a)(1) of the Immigration and Nationality Act shall not apply to the

B. *Employment Verification System*

The second sanctionable action is a violation of the verification requirements of IRCA. All employers, recruiters and referral services must verify whether or not each employee recruited, hired or referred for employment after November 6, 1987 is an unauthorized alien. They must inspect any two documents, such as a Social Security card and driver's license or alien documentation.[8] The purpose of such inspection is to determine the individual's identity and the individual's authorization to work in the U.S.[9]

An employer must verify the status of each employee, regardless of whether the person is a U.S. citizen or an illegal alien. An employee must complete the new INS I-9 immigration form. The I-9 form information of every employee must be recorded for three years from the date of hire, or one year from the date that employee is terminated, whichever is longer. The Act further requires that the employer verify the content of the I-9 form under oath.[10]

The civil sanctions for failing to satisfy the reporting requirements increase with each subsequent violation. The first violation results in a fine of $250 to $2,000 for each unauthorized illegal alien employed. The second violation yields a fine of $2,000 to $5,000 for each unauthorized alien employed. The third violation results in a fine of $3,000 to $10,000 for each unauthorized employee.[11] Further violation may result in $3,000 in sanctions for each unauthorized alien employed and six months in jail.[12]

Sanctions are levied for failure to comply with the separate reporting requirements of the Act. Noncompliance yields $100 to $1,000 in fines for each violation.[13] These two requirements constitute a significant change from previous immigration law, which imposed no sanctions on employers who hired illegal aliens.

Criminal penalties are imposed for three types of offenses. The first involves sanctions for unlawful harboring, transporting or encouraging aliens illegally to enter the U.S. Repeated offenses result in fines "in accordance with Title 18 United State Code, or imprisoned not more than five years or, both."[14] The second area of offense is for pattern and practice violations, which are "regular, repeated and intentional activities" and not "isolated, sporadic or

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hiring, or recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act.

8. 8 U.S.C. § 1324a(b)(1)(B) (1988).
9. 8 U.S.C. § 1324a.(b)(4) (1988).
10. 8 U.S.C. § 1324a(b)(2) (1988).
11. 8 U.S.C. § 1324a(e)(4) (1988).
12. 8 U.S.C. § 1324a(f)(1) (1988).
13. 8 U.S.C. § 1324a(e)(5) (1988).
14. 8 U.S.C. § 1324(a)(2) (1988).

accidental acts."[15] Penalties may also be levied for perjury, especially for false statements made by an employer or an employee on their INS forms.

III. PRE-IRCA FOURTH AMENDMENT PROTECTIONS AGAINST INS SEARCH AND SEIZURE OF ILLEGAL ALIENS

Prior to the passage of IRCA, the Immigration and Naturalization Act of 1952 vested the INS with the authority to search and seize illegal aliens by three primary methods: 1) border patrol for external boundaries, 2) interrogation, and 3) arrest.[16] Furthermore, enforcement searches extend to two types of areas: 1) border patrols and 2) area control operations/urban searches.

As previously stated, Section 287 of the INA of 1952 also permitted INS officers to arrest or interrogate without a warrant. The subsequent passage of the IRCA did nothing to curtail this unnecessarily broad grant of authority. Section 287 of the INA provides in pertinent part that:

> (a) [a]ny officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power *without warrant*—
> (1) to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States;
> (2) to arrest any alien. . .in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . .[17]

The authority for warrantless searches pursuant to Section 287 pertains only to searches at the border of the United States or its "functional equivalent." Examples of "functional equivalents" are an established station near the border, an airport receiving traffic from abroad, or an area forming the intersection of two or more roads that extend from the border.[18] Section 287 does not authorize the Border Patrol to search beyond a border and enter employers' premises, neither to arrest nor to interrogate. In addition to permitting warrantless searches, Section 287 creates the secondary problem of not requiring the INS to have probable cause for its initial inquiry. This broad grant of authority presents a conflict

15. H.R. Rep. No. 682, 99th Congress., 2nd Sess., Part I at 59 (1986).

16. INA § 287(a), Pub. L. No. 82-414, 66 Stat. 163 codified at 8 U.S.C. § 1357(a) (1988).

17. *Id.* (emphasis added).

18. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973). The Supreme Court held that, absent probable cause or consent, the search of the plaintiff's car on a road that at all points lies at least twenty miles or more north of the U.S.-Mexico border, was in violation of the Fourth Amendment right to be free of unreasonable search and seizure.

with the protections against warrantless search and seizure afforded under the Fourth Amendment.

The Fourth Amendment grants two primary rights: 1) the right of persons and their premises to be free from unreasonable search and seizure; and 2) the right to have a warrant issue upon oath or affirmation of probable cause.[19] The Fourth Amendment further requires individualized reasonable suspicion of criminal activity in order to justify a warrantless search and seizure. Section 287, however, requires an agent only to believe that the person being questioned is an alien, with or without any reasonable suspicion of criminal activity. Courts have developed a two tier analysis to restrain Section 287 to the confines of the Fourth Amendment.

The first tier is based upon Section 287(a)(1), which allows an agent to question anyone he believes to be an alien about his right to be in the United States. The second tier is based on Section 287(a)(2), which allows an agent to detain anyone he reasonably believes to be in the country illegally and to arrest such person if the agent believes the person is likely to escape. Inevitably, however, this authority raises the issue of where to draw the line between mere questioning, which requires a lower standard of suspicion, and detentive questioning, which requires a higher standard.

A. Interrogation vs. Seizure Prior to IRCA

The dividing line between a consensual encounter with an officer and the detentive questioning which amounts to a seizure is sufficiently vague to have generated a volumious body of case law.

The Supreme Court stated in *Terry v. Ohio*[20] that not every encounter between a citizen and a police officer constitutes a seizure for Fourth Amendment purposes. However, the Court further stated that, barring exigent circumstances, all seizures, including a detentive type of questioning which falls short of a traditional arrest but restrains a person's freedom to walk away, must be founded upon an objective rationale that justifies the intrusion.[21]

In *United States v. Mendenhall*,[22] the Supreme Court employed a totality of the circumstances approach in examining the issue of when a consensual encounter becomes a seizure. The Court recognized that a seizure does not require a show of physical force, but

19. U.S. CONST. amend. IV provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrant shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

20. 392 U.S. 1 (1968).

21. *Id.* at 16; *see also United States v. Mendenhall*, 446 U.S. 544, 551 (1980).

22. 446 U.S. 544 (1980).

may occur through a display of official authority which compels compliance with the intrusion. Specifically, a person has been "seized" within the meaning of the Fourth Amendment when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[23] Factors which the Court considered illustrative of a Fourth Amendment violation include: 1) threatening presence of several officers; 2) display of weapons by the officers; 3) some physical touching of the individual by officers; and 4) use of language or a tone of voice indicating that compliance with the request might be compelled.[24]

Although *Mendenhall* seems to clarify the line between a consensual encounter and a seizure, the distinction does not automatically yield any additional protection for the individual engaged in such an encounter. In fact, *Mendenhall* may yield more severe consequences for the detainee, since its holding suggests that the protective factors must be established before the individual may invoke the protection of the Fourth Amendment. In other words, under *Mendenhall*, the Fourth Amendment protections against unreasonable searches and seizures do not attach when a reasonable person has an objective belief that he or she is being detained and cannot walk away, but only upon later judicial recognition of that belief. This concept runs contrary to the belief that the status quo under the Fourth Amendment is one of nonintervention.[25]

Voluntariness is another issue which must be considered in determining when contact between an officer and an individual constitutes mere questioning or the more intrusive seizure. In *Schneckloth v. Bustamonte*,[26] the Supreme Court stated that the voluntariness of the encounter is determined from the totality of the circumstances and that consent does not have to be knowing and intelligent, only voluntary.[27] As a result, the State did not bear the burden of demonstrating that the defendant knew that he or she had the right to consent,[28] only that the consent was freely and voluntarily given. The individual's knowledge of the right to withhold consent presented one factor to be considered, but did not by itself suggest involuntariness on the part of the person interrogated.[29] The Supreme Court stated that the voluntariness of the encounter is

23. *Id.* at 555; *see Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

24. 446 U.S. at 555.

25. *United States v. Martinez-Fuerte*, 428 U.S. 543, 572 n.2 (1976) (Brennan, J., dissenting). *See also Terry v. Ohio*, 392 U.S. 1,9 (1968): "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every person, free from all restraint or interference of others, unless by clear and unquestionable authority." *citing Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

26. 412 U.S. 218 (1973).

27. *Id.* at 221, 227.

28. *Id.* at 227; *see also LaDuke v. Nelson*, 762 F.2d 1318, 1328 (9th Cir. 1985).

29. *Id.* at 227.

determined from the totality of the circumstances and that consent of the individual does not have to be knowing and intelligent, only voluntary.[30]

With its acknowlegement that the individual's right to walk away may constitute the dividing line between mere questioning and a seizure, the Court has rather naively failed to recognize what an individual may actually perceive as the consequences of his failure to answer an officer's questions. Aside from an individual's ignorance of his right to walk away, lower courts have suggested that an alien's refusal to respond to questions may provide INS officers with the requisite suspicion to pursue investigative questioning, thereby justifying further detention.[31]

Although, on a legally abstract level, an alien has the right not to respond to questions posed by an INS officer, on a practical level, that opportunity is much more restricted. *Babula v. I.N.S.*[32] afforded the Third Circuit the opportunity to discuss and clarify the more realistic implications of an alien's failure to respond to INS questioning. However, the Court failed to adequately address the issue by stating that "each [alien] could remain silent and refuse to produce evidence of his identity, although this too would justify an agent's further suspicion of illegal alienage."[33]

More recently, in *LaDuke v. Nelson*[34], the Ninth Circuit listed additional factors that may be considered in determining whether consent is voluntarily given. These factors mark an improvement over those described in *Mendenhall* in that they take into account the cultural and language disparity between the individual being questioned and the officer posing the questions. The Court stated that consent was not voluntarily given where, incident to a farm and ranch house check by the Immigration and Naturalization Service, 1) the INS agents uniformly failed to advise occupants of their right to refuse; 2) the occupants had inherent fear of uniformed officers because of their Mexican heritage; 3) the occupants had limited ability to use English and limited educational backgrounds; 4) checks occurred in early morning or late evening hours; 5) and the occupants knew of the power which the INS had in dealing with

30. *Id.* at 221, 227.

31. *See, e.g. Babula v. I.N.S.*, 665 F.2d 293, 298 (3rd Cir. 1981) (knowledge of agents that some of the employees spoke Polish fluently and spoke English with difficulty); *Marquez v. Kiley*, 436 F.Supp. 100, 114 (S.D.N.Y. 1977) (speaking Spanish); *Illinois Migrant Council v. Pilliod*, 398 F.Supp. 882, 898 (N.D. Ill. 1975), aff'd 540 F.2d 1062 (7th Cir.), modified as to remedy, 548 F.2d 715 (7th Cir. 1976) (en banc)(names that are called out during questioning are those that sound Latin or Asian which are discerned from payroll records).

32. 665 F.2d 293 (3rd Cir. 1981.)

33. *Id.* at 298.

34. 762 F.2d 1318 (9th Cir. 1985).

them as opposed to average citizens.[35] Courts have typically relied on similar factors as probative on the factal question of the voluntariness of consent to search.[36] However, if the Supreme Court's decision in *I.N.S. v. Delgado*[37] is at all indicative of its current posture then such factors appear to have a minimal effect on the Court's determinations.

1. *Automobile and Border Enforcement Cases*

Border patrols constitute one of the two areas of enforcement granted to the INS pursuant to Section 287. Initially, the courts displayed the most promise in safeguarding Fourth Amendment protections when search and seizure cases have been in an automobile or roving border patrol context. However, the current trend of the Supreme Court has been to lessen those constitutional safeguards which the Ninth Circuit had previously found worthy of protection.

Section 287(a)(3) of the INA grants INS border officers the authority to board and search, without a warrant, any vessel, aircraft, or other conveyance or vehicle in which they reasonably believe aliens are being brought to the United States.[38] The same section also permits the INS to have access to private lands within a distance of twenty-five miles from any external boundary of the United States, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the U.S. Such warrantless access does not authorize random or roving searches where access cannot be prevented, such as employers' premises.

United States v. Brignoni-Ponce[39] marks the first occasion where the Supreme Court acknowledged the friction existing between the Fourth Amendment and the INS's authority to effect searches pursuant to Section 287 without the safeguard of a warrant. In *Brignoni-Ponce*, the Court held that the Fourth Amendment did not allow a roving Border Patrol to stop a vehicle near the Mexican border and question its occupants concerning their immigration status and citizenship where the occupants' Mexican ancestry furnished the only ground for suspicion that the occupants were aliens.[40] The Court further listed several factors to employ when determining whether reasonable suspicion existed: 1) the character

35. *Id.* at 1329.

36. *See e.g. Scheckloth v. Bustamonte*, 412 U.S. 218 (1973) ("traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling"; failure to inform of right to refuse consent probative on consent.)

37. 466 U.S. 241 (1984).

38. INA § 287(a)(3), Pub. L. No. 82-414, 66 Stat. 163 (codified at 8 U.S.C. § 1357(a)(3) (1988).

39. 422 U.S. 873 (1975).

40. *Id.* at 884.

of the area; 2) the usual traffic patterns and prior experience with alien traffic; 3) information regarding recent illegal border crossings; 4) the driver's behavior; 5) the appearance of the vehicle; and 6) the characteristic appearance of persons living in Mexico.[41]

Brignoni-Ponce itself appears a mixed blessing. While the Court indicated that "apparent Mexican ancestry" cannot furnish reasonable grounds of illegal alienage,[42] the Court went on to state that the likelihood of Mexican ancestry is a relevant factor in creating a reasonable suspicion.[43] This admission, however, appears inconsistent with the Court's caveat that congressional power over aliens could not be allowed to diminish the Fourth Amendment rights of citizens mistaken for aliens,[44] a significant consideration (especially) in a nation where more than a substantial portion of the population is Latino or appears to have some seed of Mexican ancestry.[45]

While *Brignoni-Ponce* provided some erosion of the INS's authority to conduct warrantless searches, its holding is limited primarily to the issue of Mexican ancestry as reasonable suspicion. By refraining from deciding the issue of whether a warrant could validly issue for a entire area based upon area conditions, the Court fell short of extending the protection it found lacking in the roving patrol context to the identical potential for abuse that exists in factory sweep contexts.

The Ninth Circuit reaffirmed the holding of *Brignoni-Ponce* in *United States v. Martinez-Fuerte*.[46] The facts of *Martinez-Fuerte* involve three individuals stopped at the San Clemente checkpoint pursuant to an area warrant. The Ninth Circuit held the warrant invalid and reversed the subsequent convictions because the warrant failed to specify any individuals, and thereby gave the Border Patrol agents an overly broad grant of authority to stop anyone at their discretion, constituting the same brand of misconduct that the Supreme Court reprimanded in *Brignoni*.

The Supreme Court later reversed the Ninth Circuit's holding and upheld the warrant despite the absence of any reasonable suspicion by the Border Patrol agents.[47] Although the Court recognized

41. *Id.* at 884-886.
42. *Id.* at 886.
43. *Id.* at 887.
44. *Id.* at 884.
45. *cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 573 n.4 (1976) (Brennan, J., dissenting):

> Even if good faith is assumed, the affront to the dignity of American citizens of Mexican ancestry and Mexican aliens lawfully within the country is in no way diminished. The fact still remains that people of Mexican ancestry are targeted for examination at checkpoints and that the burden of checkpoint intrusions will weigh heaviest on them.

46. 514 F.2d 308 (9th Cir. 1975).
47. 428 U.S. 543 (1976).

the usual necessity of reasonable suspicion as a prerequisite to a constitutional search and seizure, it rationalized this requirement by stating that "the Fourth Amendment imposes no irreducible requirement of such suspicion."[48] The Court further justified its holding in viewing the expectation of privacy in an automobile as being less than that in a dwelling.[49] Moreover, by distinguishing checkpoints from roving patrols, as in *Brignoni-Ponce*, the Court upheld the constitutionality of selective referrals to the secondary check area solely on the basis of Mexican ancestry. In effect, the Court trimmed back some of the protections enunciated in *Brignoni-Ponce* by allowing suspicion of Mexican ancestry to constitute reasonable suspicion of illegal alienage and thereby justify further detention.[50]

In *United States v. Cortez*,[51] the Supreme Court again reversed a Ninth Circuit decision which overturned a conviction resulting from a stop based solely upon a profile of an individual. Examing "the whole picture," the Court found that the detaining officers had met the *Brignoni-Ponce* requirement of founded suspicion.[52] On this level, *Cortez* marks a further step from the protections initially propounded in *Brignoni-Ponce*.

If *Brignoni-Ponce* stands for the proposition that Mexican ancestry alone does not constitute reasonable suspicion for detentive questioning,[53] then the Court's decision in *Cortez* reduces the level of required suspicion by suggesting that a particular ancestry, coupled with other factors, may provide a constitutionally valid basis for a stop. One possible ramification of this less rigid standard is the likelihood that in a factory sweep context where there is a large number of Latinos, the reduced standard announced in *Cortez* may permit a more frequent number of government intrusions upon citizens of Latin descent or aliens lawfully within this country, based on the belief that within such a large number of Latinos, the possibility of illegal alienage among them is correspondingly large. It is this type of extended reasoning which the *Brignoni-Ponce* Court found so constitutionally offensive.[54]

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48. *Id.* at 561.
49. *Id.* at 561.
50. In his dissent, Justices Brennan described the majority holding as a "marking the continuing evisceration of Fourth Amendment protections against unreasonable search and seizures" and a "defacement of Fourth Amendment protections." The dissent further found the majority's decision to be contrary to earlier Supreme Court holdings and to what they decribed as the Fourth Amendment status quo of "nonintrusion."
51. 449 U.S. 411 (1981).
52. *Id.* at 417-18.
53. 422 U.S. 873, 884 (1975).
54. *See* text accompanying note 40, *supra*.

2. *Factory Sweeps*

Area control operations constitute the second area of enforcement granted to the INS under Section 287 of the INA. Area control operations involve the concentration of INS personnel in areas thought to contain a high incidence of undocumented aliens. Similarly, a factory survey is an operation that concentrates on a factory or worksite believed to have a large proportion of illegal aliens among its work force.[55] To effect a survey, however, the INS must be lawfully on the employer's premises, which requires either a valid search warrant or the owner's voluntary consent which is much easier to obtain.

In *I.N.S. v. Delgado*,[56] the Supreme Court had an opportunity to lessen the impact of Section 287 of the INA upon the Fourth Amendment in a factory sweep context. The issue before the Court was whether INS agents, moving systematically through a factory and inquiring as to the citizenship status of workers while other agents were stationed at each exit, did not effect a search and seizure of the entire work force in violation of the Fourth Amendment. Writing for the majority, Justice Rehnquist, in a manner indicative of the Court's continued erosion of Fourth Amendment protections,[57] held that the factory surveys did not result in a seizure of the entire work force, and the individual questioning of the employees did not amount to a detention or seizure under the Fourth Amendment.[58]

Delgado involved three surveys conducted by the INS at garment factories in Los Angeles. Two of the searches were conducted pursuant to a search warrant and one pursuant to the owner's consent. As a result of the surveys, two U.S. citizens claimed that their Fourth Amendment right to be free from unreasonable seizures had been violated. At the beginning of the surveys, several agents positioned themselves near the building's exits, while other agents dispersed throughout the factory to question most, but not all, employees at their work stations. The agents displayed badges, car-

55. According to the INS assistant district director in Los Angeles, "surveys account for one-half to three-quarters of the illegal aliens identified each day in the Los Angeles area." In the Los Angeles district alone, "over 20,000 illegal aliens were arrested during the factory surveys in one year." *See also I.N.S. v. Delgado*, 466 U.S. 210 n.2 (1984) (Powell, J., concurring): "The solicitor General informs us that the figure in text refers to 1977. For the country as a whole, the INS estimates from its internal records that in 1982 factory surveys accounted for approximately 60 percent of all illegal aliens apprehended by INS in nonborder locations."

56. 466 U.S. 210 (1984).

57. The Court relied on the same standard employed in *United States v. Martinez-Fuerte*: "The intrusion into the Fourth Amendment interests of the employees, on the other hand, is about the same as it was in *Martinez-Fuerte*." 466 U.S. at 224.

58. The case has been heavily criticized on the seizure issue. *See* Note, *Constitutional Law—INS Raids of Garment Factories—The Fourth Amendment and Expediency*, 18 Creighton L. Rev. 151, 151-153 (1984).

ried walkie-talkies, and were armed. Moving systematically through the factory, the agents approached employees and, after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a U.S. citizen, the agent moved on to another employee. If the employee gave an unsatisfactory answer or admitted that he was an alien, the employee was asked to produce his papers. During the survey, employees were free to walk around within the factory.[59]

Notwithstanding the impact of the *Delgado* holding, one commentator has observed that the Court's decision is not surprising in light of the isolated instances of questioning that took place.[60] The plaintiffs voluntarily responded to the agent's questions and two of the plaintiffs actually left the building without any interference from the agents.[61]

Predictably, the Court's holding in *Delgado* overturned an earlier Ninth Circuit ruling in *International Ladies' Garment Workers' Union v. Sureck*.[62] In *Sureck*, the court ruled that the work force at a plant was seized for the duration of an INS survey because the stationing of agents at the doors of the buildings was such that a reasonable person would have believed he was was not free to leave.[63] The court found that the agents had created a detentive environment by their verbal authority, badges, use of the element of surprise, the sustained disruption of the working environment, and questioning of selected individuals based upon their clothing, facial appearance, hair color and styling, demeanor, language, and accent.[64] Although the court admitted that Section 287 of the INA authorized the INS to question any alien or person believed to be an alien as to his right to be or remain in the United States, pursuant to the Fourth Amendment, an individual could be questioned only on the basis of a reasonable suspicion or probable cause that that par-

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59. 466 U.S. at 213.

60. Marsh, *Brief Encounters of the "Alien" Kind—Challenges to Factory Sweeps and Detentive Questioning: I.N.S. v. Delgado*, 15 Southwestern U. L.Rev. 484 (1985).

61. 466 U.S. at 219 n.7. No information is available as to whether the plaintiffs left the building before or after they had been questioned.

The factual situation in *Delgado* is inapposite to the events that may prevail during an I.N.S. sweep. *See e.g. International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 626 (9th Cir. 1982): "I.N.S. agents enter the workplace by stationing agents at exits and entrances in order to prevent persons from leaving the workplace. The remaining agents proceed through the factory, questioning workers as to their citizenship status. While the officers and agents are instructed to be courteous and cause as little disruption as possible, the survey process often begins with workers' cries of 'la migra' (the immigration), followed by attempts by some workers to hide or run from I.N.S. officers conducting the survey. Disruption of the workplace usually occurs. . ." (footnote omitted).

62. 681 F.2d 624 (9th Cir. 1982) rev'd sub nom. *I.N.S. v. Delgado*, 466 U.S. 210 (1984).

63. *Id.* at 634.

64. *Id.* at 634.

ticular employee was an illegal alien.[65]

IV. STATUS OF FOURTH AMENDMENT PROTECTIONS UNDER THE IRCA

Although the Ninth[66] and Seventh[67] Circuits have demonstrated a commitment to safeguarding the protections under the Fourth Amendment, the trend of future Supreme Court decisions may follow the analytic framework of *Delgado*. One possible ramification of the *Delgado* framework is the permissive detention of aliens based primarily on some indication of Mexican ancestry. Relying on the standard in *Martinez-Fuerte*, the INS may presumptively use suggestions of Mexican ancestry to substitute for a reasonable suspicion of illegal alienage and thereby justify detentive questioning. Although the *Martinez-Fuerte* Court reached this conclusion in a check point context, the subsequent ruling in *Delgado* suggests that the standard is not dissimilar when applied in a factory survey context.

Part of this justification lies with the Court's belief that an employee has no greater expectation of privacy in the work place than an individual in a vehicle on a public highway. It seems inconceiveable that the *Brignoni-Ponce* Court required individualized reasonable suspicion to justify the detention of an automobile, while in *Delgado*, the Court did not require the same standard for what amounted to a seizure of an entire work force.

The decision in *Delgado* further failed to adequately consider the issue of voluntary consent. Although the Court's conclusion may be understandable given the facts of the case, its adjudication of the issues appears so conclusory as to prevent a contrary holding given a different factual situation. The Court in *LaDuke v. Nelson*[68] indicated a number of factors that may preclude voluntary consent. *Delgado* relied on *Martinez-Fuerte* to conclude that a seizure had not occurred given the actions of the INS agents, regardless of the objective belief of the individuals being questioned. In effect, *Delgado* eliminated any consideration of cultural or language differences between the individuals questioned and the agents when determining whether consent was voluntarily given.

Another issue to be dealt with is the lack of reasonable suspicion of criminal activity sufficient to justify detentive questioning in a factory survey. *Terry v. Ohio* overlaps the Fourth Amendment by

65. *Id.* at 641.

66. *See e.g. International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 715 (9th Cir. 1982), *sub nom. I.N.S. v. Delgado*, 466 U.S. 210 (1984); *United States v. Cortez*, 595 F.2d 505 (9th Cir. 1979), rev'd 449 U.S. 411 (1981).

67. *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976), modified *en banc*, 548 F.2d 715 (7th Cir. 1977).

68. 762 F.2d 1318 (9th Cir. 1985).

requiring individualized reasonable suspicion to constitutionally justify a seizure. The narrow holding of *Terry*, however, concerns the balancing test used to determine the reasonableness of the intrusion upon the individual.[69] Reasonableness is determined by application of a traditional balancing test, weighing the need for the intrusion against the severity of the invasion caused by the intrusion.[70] If the application of this balancing test to immigration enforcement activities results in a lower standard of objective justification for INS actions, then we may conclude that illegal aliens constitute a greater risk to the public than other criminals who would receive the full protection of the Fourth Amendment, even though illegal alienage carries no implication of criminal activity. Another equally offensive conclusion is that INS seizures are less objectionable when visited upon illegal aliens.

Furthermore, the IRCA imposes criminal sanctions on employers who violate its provisions. Given the possibility of criminal punishment, it would hardly be inequitable to require a criminal standard of probable cause for the INS to effect a warrantless search of the employer's premises.

V. CONCLUSION

The passage of IRCA has greatly expanded the powers of the INS beyond the protections enumerated under the Fourth Amendment. The Ninth and Seventh Circuits generally have been vigilant in protecting against further erosion of constitutional safeguards by invalidating INS searches in contravention of these principles. However, the Supreme Court has demonstrated its preference to uphold INS authority pursuant to the INA and IRCA over the rights of business owners and workers to be free from unwanted or unwarranted seaches and seizures. The courts should recognize that a higher standard than the civil, administrative standard is needed to fairly protect against the criminal sanctions imposed under IRCA. These safeguards would impose only a minimal burden upon the INS, require minimal digestion for the courts, and would protect against the intrusions that the Framers thought an indispensible part of our Constitution.

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69. 392 U.S. at 21.
70. *Id.* at 21.