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COMMENTS

FACTORY RAIDS AND THE FOURTH AMENDMENT: BALANCING LAW ENFORCEMENT AND CONSTITUTIONAL GUARANTEES IN *ILGWU v. SURECK*

I. INTRODUCTION*

The Supreme Court of the United States will soon decide whether Fourth Amendment standards will prohibit certain tactics used in the enforcement of immigration laws by the Immigration and Naturalization Service. This Comment will argue that the tactics in question cannot withstand constitutional scrutiny; to uphold these tactics would simply deny well-entrenched precedent and run afoul of public policy. If the Court affirms the lower court's decision, factory workforces will be protected from unreasonable searches and seizures.

II. UNREASONABLE SEARCH AND SEIZURE: THE *TERRY* STANDARD

The Fourth Amendment proscribes "unreasonable searches and seizures" thus mandating the "right of the people to be secure in their persons, houses, papers, and effects."¹ This proscription "protects people, not places"² whenever an individual may harbor a reasonable "expectation of privacy."³ The Fourteenth Amendment makes this right applicable to the several States.⁴

* Special thanks to Susan L. Formaker (UCLA School of Law, J.D. '84) for her patience and support.

1. The Fourth Amendment provides in full:

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 Warrants 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.

U.S. CONST. amend. IV.

2. *Katz v. United States*, 389 U.S. 341, 347 (1967).

3. *Id.* at 361.

4. *Mapp v. Ohio*, 367 U.S. 643 (1961).

*Terry v. Ohio*⁵ remains a seminal case in its interpretation of what constituted an unreasonable search. Whenever a police officer "accosts" an individual and prevents that individual from walking away, a Fourth Amendment seizure has occurred.⁶ In assessing the reasonableness of the search, one must "' focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'"⁷ The appropriateness of the search depends on the justification of the particular official intrusion as reasonably warranted by specific and articulable facts in conjunction with rational inferences from those facts.⁸

The *Terry* court per Chief Justice Warren warned that this Fourth Amendment scheme

becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?⁹

A less objective test would invite an abridgment of Fourth Amendment guarantees based solely on "inarticulate hunches."¹⁰

III. IMMIGRATION SEARCHES AND SEIZURES

Border searches and seizures conducted by the Immigration and Naturalization Service ("INS" or "Service") do not need to be supported by probable cause or a reasonable suspicion of a violation of the immigration laws because of the "longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country. . . ."¹¹ All other non-border searches and seizures generally comply with Fourth Amendment standards delineated in *Terry*.¹²

5. 392 U.S. 1 (1967).

6. *Id.* at 16.

7. *Id.* at 20-21 quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1966).

8. *Id.* at 21.

9. *Id.*

10. *Id.* at 22.

11. *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

12. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

A. *Border Searches and Seizures*

In *Almida-Sanchez v. United States*,¹³ petitioner, a Mexican citizen and holder of proper immigration documentation (a valid work permit in this case) was subjected to a warrantless search of his automobile by the Border Patrol twenty-five air miles north of the Mexico border. Acting without probable cause, the patrol officers uncovered marijuana, possession of which resulted in the petitioner's conviction of a federal crime. The Government justified the search on the basis of § 287(a)(3) of the Immigration and Nationality Act ("Act")¹⁴ which calls for warrantless searches of automobiles and other vehicles within a reasonable distance from the United States border. The Attorney General defines "reasonable distance" as within 100 air miles from any external boundary of the United States.¹⁵ The search was upheld by the Court of Appeals relying on the Act and the Attorney General's regulation. The Supreme Court reversed the decision.

The Government, relying on *Carroll v. United States*,¹⁶ maintained that the Border Patrol's warrantless search fell under the narrow exception to the warrant requirement. The Court in *Carroll* established that a stop and search of a moving automobile can be made without a warrant as "it is not practical to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant is sought."¹⁷ But the *Carroll* decision did not dispense with the need for probable cause; the Court merely approved a portion of the Volstead Act that provided for warrantless searches of automobiles only when officers had probable cause to believe the vehicle in question carried ille-

13. 413 U.S. 265 (1973).

14. 66 Stat. 233, 8 U.S.C. § 1357(a) provides in part:

Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States

15. 8 C.F.R. § 287.1, which defines "reasonable distance," provides in relevant part:

(a)(2) Reasonable distance. The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

16. 267 U.S. 132 (1925).

17. *Id.* at 153.

gal alcoholic beverages.¹⁸ Therefore the Government's reliance on the *Carroll* doctrine fails as their stop and search of petitioner's automobile was not based on probable cause; the Border Patrol had no evidence as to petitioner's alienage or immigration status and accordingly could not lawfully stop and search petitioner's automobile pursuant to the dictates of the Act.

The Government's second argument was based on the doctrine of administrative probable cause as embodied in *Camara v. Municipal Court*.¹⁹ The *Camara* Court held that in the enforcement of community health and safety regulations, administrative inspections could be made on less than probable cause.²⁰ But the Court maintained the necessity for either consent or a warrant supported by particular physical and demographic characteristics of the areas to be searched.²¹ *Almeida-Sanchez* rejected this analogy between the Border Patrol's search and administrative inspections because the Court in *Camara* sought to prevent those searches that rested on no more than the "discretion of the official in the field."²² The search in *Almeida-Sanchez* proceeded without a warrant, consent or probable cause. Such "unfettered discretion" is the exact evil proscribed by *Camara*.²³

The Government's final argument relied upon the statutory authority for warrantless searches within a reasonable distance from the border as embodied in the Act and Attorney General's ruling.²⁴ But the Court countered that "no Act of Congress can authorize a violation of the Constitution," and it was the Court's duty to interpret the statute in a "manner consistent with" the Fourth Amendment.²⁵ Thus, a warrantless search at the border or at its functional equivalent is permissible "because of the national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."²⁶ But the search of petitioner's automobile on a California road twenty-five miles north of the Mexico border by a roving patrol cannot be afforded the reasonableness of a warrantless search at the border or its functional equivalent. Without probable cause, the warrantless search of petitioner's automobile violated the Fourth Amendment guarantee against unreasonable searches and seizures.

18. *Id.*

19. 387 U.S. 523 (1967).

20. *Id.* at 534-536, 538.

21. *Id.*

22. *Id.* at 532-533.

23. 413 U.S. at 270.

24. See note 15, *supra*.

25. 413 U.S. at 272.

26. *Id.* quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925).

*United States v. Ortiz*²⁷ extended the *Almeida-Sanchez* rejection of warrantless searches by roving patrols to non-border checkpoint searches. The checkpoint in *Ortiz* stood sixty-two air miles north of the Mexico border on the principal highway between Los Angeles and San Diego and was clearly marked as such. When it is in operation (it closes when there is a personnel shortage or bad weather), officers screen all of the northbound traffic. If an officer becomes suspicious as to the citizenship status of the occupants of an automobile, he will stop the vehicle and question accordingly. If the officer is unsatisfied with the responses, or if the responses enhance the suspicion, he will search the automobile for any hidden undocumented aliens.²⁸

Granting that the differences between a roving patrol and a checkpoint are relevant in the determination of the reasonableness of the initial detention, the Court argues that there is no difference in the actual search.²⁹ The invasion of privacy, likelihood of embarrassment and the offensiveness of sporadic searches are not mitigated by the greater regularity of the stops.³⁰ Additionally, as the record indicates that only about three percent of the automobiles that pass this checkpoint are actually stopped, it is apparent that the officers rely on a high degree of discretion approaching "official arbitrariness."³¹ Such a random stop and search cannot stand a consistent with the Fourth Amendment.³²

B. *Non-border Searches and Seizures*

United States v. Brignoni-Ponce,³³ decided five days after *Almeida-Sanchez*, addressed the issue of whether a roving patrol may stop a vehicle near the border and question its occupants relying solely on the apparent Mexican ancestry of those occupants.³⁴ Two officers in a parked patrol car stationed near a closed checkpoint on Interstate Highway 5 south of San Clemente observed the respondent driving northbound. As the road was dark, the officers shined their headlights on the passing traffic. The officers pursued the respondent's car and stopped it relying only on the apparent Mexican descent of the respondent and the two passengers; they arrested all three and charged the respondent with two counts of knowingly transporting undocumented aliens

27. 422 U.S. 891 (1975).

28. *Id.* at 893-894.

29. *Id.* at 895.

30. *Id.*

31. *Id.* at 896.

32. *Id.*

33. 422 U.S. 873 (1975).

34. *Id.* at 876.

in violation of § 274(a)(2) of the Act.³⁵ The respondent was convicted of both counts.³⁶

The Court held that the Border Patrol must act on a reasonable suspicion to justify roving patrol stops³⁷ in spite of a strong governmental interest in controlling undocumented immigration.³⁸ Some of the factors that may provide a reasonable suspicion are the characteristics of the border area, proximity to the border, usual pattern of practice on the particular road, and the officers' previous experience with undocumented traffic.³⁹ Other relevant factors include information pertaining to undocumented border crossings in the area, driver's behavior, aspects of the vehicle itself (that is, if it looks as though persons could be hidden within), and the appearance of the driver or occupants such as style of dress or haircut which may indicate alienage.⁴⁰ But, as the officers relied on the single factor of apparent Mexican ancestry of the occupants, the stop of the vehicle was not based on a reasonable suspicion of undocumented alienage. Such a factor "standing alone does not justify stopping all Mexican-Americans to ask if they are aliens."⁴¹

While the Court in *Almeida-Sanchez* limited the roving patrol unit to a probable cause standard, here, the Court acknowledged that other traffic-checking practices involved a limited intrusion that do not need to be justified by probable cause.⁴² Where *Almeida-Sanchez* prohibited a roving patrol to search a vehicle for undocumented aliens simply because it was in the general vicinity of the border as violative of the Fourth Amendment, *Brignoni-Ponce* holds that a roving patrol need not base a stop on probable cause if the officers are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the vehicle is carrying undocumented aliens.⁴³

*United States v. Martinez-Fuerte*⁴⁴ carved-out one major exception to the reasonable suspicion standard of *Brignoni-Ponce*. The Court held that stops for brief questioning routinely conducted at permanent checkpoints need not be authorized by a warrant and do not have to meet traditional Fourth Amendment

35. Act, § 274(a)(2), 66 Stat. 228, 8 U.S.C., § 1324(a)(2).

36. 422 U.S. at 875.

37. *Id.* at 882.

38. *Id.* at 878.

39. *Id.* at 884-885.

40. *Id.* at 885.

41. *Id.* at 887.

42. *Id.* at 880.

43. *Id.* at 884.

44. 428 U.S. 543 (1976).

standards.⁴⁵ But the Court limited its holding specifying that any further intrusion beyond the original stop of the vehicle must be based on consent or probable cause.⁴⁶

Dissenting, Justice Brennan could not “square” this decision with *Ortiz*, *Brignoni-Ponce* and *Almeida-Sanchez* because it “virtually empties the [Fourth] Amendment of its reasonableness requirement by holding that law enforcement officials manning fixed checkpoint stations who make standardless seizures of persons do not violate the Amendment.”⁴⁷ Brennan emphasized that even less-than-probable cause intrusions that follow the *Terry* rationale must be measured by objective standards.⁴⁸ The exception created by *Martinez-Fuerte*, argues Brennan, would “inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for no other reason than that they unavoidably possess the same ‘suspicious’ physical and grooming characteristics” of undocumented Mexican aliens.⁴⁹

IV. ILGWU v. SURECK

In *International Ladies’ Garments Workers’ Union v. Sureck*,⁵⁰ the Court of Appeals held that the INS’ implementation of factory surveys rose to a seizure cognizable under the Fourth Amendment⁵¹ and that before INS investigators can detain and question a workforce, they must articulate objective facts and rational inferences from those facts that warrant a reasonable suspicion that each person is an undocumented alien in the United States.⁵²

A. Statement of the Case

The case arose out of three factory surveys. Two were conducted at the Southern California Davis Pleating Company (“Davis”) on January 4, 1977 where seventy-eight undocumented aliens were apprehended. On September 27, 1977, thirty-nine undocumented aliens were apprehended at Davis. Both surveys were conducted pursuant to search warrants issued under Fed. R. Crim. P. 41.⁵³ INS officers conducted the third survey on October

45. *Id.* at 566-567.

46. *Id.* at 567.

47. *Id.* at 568.

48. *Id.* at 569.

49. *Id.* at 572.

50. 681 F.2d 624 (9th Cir. 1982), cert. granted sub nom., *INS v. Delgado*,—U.S.—, 103 S. Ct. 1872 (1983).

51. *Id.* at 634.

52. *Id.* at 639.

53. The search warrants did not state the names of particular persons sought, but only that officers had reason to believe that undocumented aliens were on the Davis premises in violation of 8 U.S.C., § 1324-1325. *Id.* at 627 n.5.

3, 1977, at a firm known as Mr. Pleat. Forty-five undocumented aliens were apprehended after the owner gave consent to the INS officers to question the workforce.⁵⁴

The four appellants underwent questioning by INS officers. Three appellants were questioned at the Davis surveys and one at the Mr. Pleat survey. All four appellants possessed current immigration status.⁵⁵ As each factory had from 200 to 300 workers (as did Mr. Pleat at the time of the survey) and INS personnel was limited, INS officers selected those who were to be questioned using a number of "multisensory" factors.⁵⁶ These factors included: the type of clothing worn by a worker, hair coloring and style, demeanor as in anxiety or fright, and language or accent.⁵⁷

B. *Factory Surveys*

The surveys conducted by INS focused on workplaces rather than residential areas as part of its "Area Control" operations⁵⁸ which are designed to allow INS investigators to locate large numbers of undocumented aliens.⁵⁹ This new focus became one of necessity as the agency's resources are limited and past experience shows a greater success in apprehending undocumented aliens who are employed in various factories, usually within the garment industry.⁶⁰ At the time of the litigation, Los Angeles District Offices of the INS were conducting up to four factory "sweeps" or surveys per week; sometimes as many as 100 undocumented workers were located and apprehended in a single factory.⁶¹

A typical survey begins when the INS receives information that names a factory where undocumented aliens may be working. Sometimes the informant remains anonymous. The INS verifies the "tip" by placing the named factory under visual surveillance. By observing the workforce as it enters and leaves the factory, INS determines whether or not the information is correct. If the tip is verified, the INS agents proceed to request permission from the factory manager or owner to question workers who are suspected of being undocumented with eventual arrest and deportation to result from such questioning. The INS notes that about ninety percent of the factory managers or owners allow agents to question the suspected workers. Only ten percent deny agents permis-

54. *Id.* at 627.

55. Appellants Labonte and Miramontes were resident aliens and appellants Delgado and Correa are United States citizens. *Id.*

56. *Id.* at 627 n.6.

57. *Id.*

58. *Id.* at 626.

59. *Id.* at 626. n.2.

60. *Id.* at 626.

61. *Id.*

sion thus forcing INS to obtain search warrants.⁶²

Once either a search warrant or permission to proceed is obtained, INS agents station themselves at points of egress and ingress thus preventing any escape of the workforce. With the factory secured in this fashion, the remaining agents enter the premises and question members of the workforce as to whether they possess the proper documentation to remain in the United States. Such questioning is usually disruptive; cries of "*la migra*" (the immigration) erupt from some workers and some attempt to flee or hide from the INS. Accordingly, each worker is not questioned though the agents are instructed to question all personnel.⁶³

C. *Fourth Amendment Seizure*

INS maintained that the test for a Fourth Amendment seizure requires the Court to ask whether a reasonable, innocent person in the position of the appellants would feel free to leave during the factory survey.⁶⁴ INS argued that the appellants circulated freely throughout the factories and could not have reasonably felt detained by the agents. As the appellants complained of only one encounter with agents who did not display a weapon or uniform and did not ask more than three questions of each appellant, INS concludes that the agents stationed at the exists must be discounted in the analysis. Applying these facts to the test, INS contends that no Fourth Amendment seizure occurred during the raids.⁶⁵

The Service reminded the Court of the *Terry* assertion that "not all personal intercourse between policemen and citizens involve 'seizures' of persons."⁶⁶ The Court agreed with the Service that the surveys did not rise to the level of an arrest.⁶⁷ But INS procedures could not be characterized as mere questioning either; the surveys intruded upon the privacy and security interests of the workforce to such an extent that a seizure did occur.⁶⁸ Relying on *United States v. Anderson*,⁶⁹ the Court quoted the following test:

[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.⁷⁰

62. *Id.*

63. *Id.* at 627.

64. *Id.* at 629.

65. *Id.* at 630.

66. 392 U.S. at 19 n.16.

67. *Dunaway v. New York*, 442 U.S. 200, 207 (1979).

68. 681 F.2d at 630.

69. 663 F.2d 934 (9th Cir. 1981).

70. *Id.* at 939, quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Justice Stewart's opinion).

The Court scrutinized the following INS tactics as revealed by the record: (1) INS agents announced verbally their authority and displayed badges which acted as a constant reminder of their authority; (2) agents who were stationed at the exits indicated that departures were to be prevented; (3) some agents used handcuffs on suspected undocumented workers; (4) the survey created a disruption due to the element of surprise; and (5) the methodical questioning of the workforce created a threatening presence.⁷¹ Applying the *Anderson* test to these facts, the Court found a seizure of the workforce implicating the Fourth Amendment.⁷²

D. *Brignoni-Ponce: Reasonable Suspicion Standard*

Although the Court in *Brignoni-Ponce* explicitly reserved the question of whether the Border Patrol may make non-vehicular, non-border seizures of persons reasonably believed to be undocumented aliens,⁷³ the detentive questioning of workers on a "suspicion of alienage alone would diminish the privacy and security interests of both citizens and aliens legally in this country."⁷⁴ Without objective facts giving rise to a suspicion that persons are undocumented aliens, random detentive questioning of all those who appear to be aliens cannot withstand constitutional scrutiny.⁷⁵

E. *Brignoni-Ponce: Individualized Suspicion Standard*

INS argued that even if a seizure occurred, the intrusions were minimal and outweighed by the substantial law enforcement involved.⁷⁶ Maintaining that the surveys were less intrusive than those permitted in *Martinez-Fuerte*, the same governmental interest in enforcing the immigration law should make permissible INS questioning on less than an individualized suspicion. Conversely, the appellants asserted that *Martinez-Fuerte* was a limited holding that did not apply to roving patrols which factory surveys more closely resemble.⁷⁷

Agreeing with the appellants, the Court recognized the important law enforcement interests involved, but distinguished *Martinez-Fuerte* noting that surveys are as intrusive as roving patrols.⁷⁸ While the objective intrusion of the stop itself is similar in a roving patrol and a permanent checkpoint, the subjective intru-

71. 681 F.2d at 634.

72. *Id.* at 632.

73. 422 U.S. at 884 n.9.

74. 681 F.2d at 639.

75. *Id.*

76. *Id.* at 640.

77. *Id.*

78. *Id.*

sion—concern or fright on the part of documented persons—is much greater with roving stops. The surprise nature of the roving patrols and the high degree of discretion used by the officers help create the greater intrusion. Factory surveys, therefore, more closely resemble the roving patrol in their disruptive and random nature.⁷⁹ Thus the Court rejects the argument that *Martinez-Fuerte* allows factory surveys to include questioning of persons on less than a particularized or individualized suspicion of each worker questioned.⁸⁰

F. *INS Failed to Meet Fourth Amendment Standard*

In applying the appropriate standard to the facts of this case, the Court could not justify the detentive questioning by the INS during the factory surveys.⁸¹ INS argued that the agents possessed a reasonable suspicion based on: (1) the known employment of undocumented aliens in the garment industry (of which the factories in question belonged); (2) prior to the Davis survey, undocumented aliens were arrested outside the factory who stated that other undocumented aliens were employed at Davis; (3) upon the entry of INS agents, employees shouted "*la migra*" and many started to flee or hide; and (4) by the second Davis survey, INS had already apprehended seventy-eight undocumented aliens from the first survey.⁸²

The Court could not justify the surveys as constitutional based on these facts used by the INS to create a reasonable suspicion. The surveys involved a seizure on the entire workforce and therefore the INS required individualized suspicion of undocumented alienage of *each* worker detained *prior* to the execution of the surveys. The INS factors created no such prior individualized suspicion.⁸³

V. DISCUSSION

A. *INS Reaction to ILGWU v. Sureck*

After the decision, the affected INS regions⁸⁴ changed the factory survey tactics condemned by the Court to comply with the ruling. In a memorandum from the Commissioner of Enforcement for the INS to the Associate Regional Commissioners for the Western and Northern regions, new guidelines were issued that

79. *Id.*

80. *Id.* at 641.

81. *Id.* at 643.

82. *Id.*

83. *Id.* at 644.

84. Only those regions within the 9th Circuit were affected: the Western Region and four states of the Northern Region of the INS.

were to be followed by INS agents in future factory surveys where agents:

- 1). Will not be stationed at factory exist (either doors or windows) where their presence can be observed by the occupants within the factory;
- 2) Will not detain any persons leaving the premises unless they have a reasonable suspicion that any such person is an alien *illegally* in the United States. One factor, among others, which could lead an officer to suspicion of illegal alienage is a person obviously fleeing or hiding from the officers entering the factory;
- 3) Will enter the factory, whether with consent or a warrant, only from a single entrance and will not display badges or handcuffs while doing so. Once inside the factory, officers will not detain any person for questioning except when that person is reasonably suspected of being an illegal alien. Informational questioning is operationally permissible only when the officer does nothing affirmative to indicate that the person is being detained. One factor, among others, which could lead an officer to suspect illegal alienage is the individual's reaction to the officer's presence upon obtaining knowledge of that fact. Someone who thereafter flees, hides or reacts with obvious distress usually creates the necessary reasonable suspicion, permitting subsequent detentive questioning. The mere fact that an individual refuses to speak with an officer does not, in and of itself, create such a reasonable suspicion.
- 4) Will write a report and evaluation after each factory survey is conducted. In the evaluation, officers will indicate the number of persons questioned, the number of persons apprehended and the number of persons believed to be aliens who would otherwise be questioned but for adherence to these guidelines. Officers will also note the number of persons who successfully fled from the factory and thereby evaded apprehension. Officers will note any unusual incidents, problems or other items of interest.
- 5) Will use extreme caution in conducting factory survey operations, due to the absence of the protection afforded them by the visual presence of officers at the exits. If, at any point in time, the officers believe themselves to be in jeopardy, they will immediately withdraw from the operation.⁸⁵

The first three changes, if followed by INS agents, would result in a non-seizure of the workforce, require a reasonable suspicion of undocumented alienage based on factors other than mere appear-

85. Memorandum from Commissioner of INS Enforcement to Associate Regional Commissioners (1982) (unpublished).

ance of Mexican descent, and remove the threatening atmosphere usually created by the display of badges and handcuffs.

These changes will also undermine the successful nature of factory surveys; as noted earlier, INS concentrated its resources on workplaces rather than on residential areas as a response to a limited budget. Past successes showed that large numbers of undocumented aliens could be apprehended within certain industries, most notably within the garment industry.⁸⁶ The memorandum implicitly predicts this reduced success; INS does so in its fourth guideline where INS agents are instructed to note the number of persons who would have been apprehended *but for* the *ILGWU v. Sureck* decision. Why would the Service expend its energies keeping such a record?

If the Service merely wanted to monitor the change in success of its factory surveys, a simple comparison of pre-*Sureck* numbers and post-*Sureck* numbers would suffice. This “but for” notation may serve another purpose. A comparison of gross numbers may result from factors other than the *Sureck* decision. Changes in frequency of the surveys may impact upon the success rate dramatically thus attenuating the cause-and-effect connection between *Sureck* and fewer arrests of undocumented aliens. A “but for” count will keep the cause-and-effect intact for later analysis.

The creation of such a record by INS will be used on appeal to the Supreme Court; INS must argue that the *Sureck* decision has so undermined the enforcement of the Act that the immigration laws are left as form without substance.⁸⁷ Though INS may be stifled in some of its enforcement, could such an argument call for a reversal of *Sureck*? Is law enforcement by the INS so crippled as to make *Sureck* an unwanted extension of past Fourth Amendment doctrine?

B. *Enforcement of Immigration Laws*

Chief Justice Burger, concurring in judgment only in *United States v. Ortiz*,⁸⁸ expressed concern over the Court rendering INS “powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000-mile southern boundary.”⁸⁹ He maintained that the Court was unable or unwilling to act reasonably in balancing Fourth Amendment rights and the “literal safety of the country.”⁹⁰

In an appendix to his opinion, Burger quoted extensive seg-

86. 681 F.2d at 643.

87. See IMMIGRATION LAW REPORT, Vol. 1, number 17, at 133 (November 1982).

88. 422 U.S. 891, 899 (1975).

89. *Id.* (footnote omitted).

90. *Id.*

ments of Judge Turrentine's opinion in *United States v. Baca*⁹¹ where "the illegal alien problem" and "the law enforcement problem" outline the dangers of unchecked immigration and the difficulty of enforcing the country's immigration laws.⁹² Indeed abuses of the undocumented worker in "sweatshops" have produced outcry from both the courts and human interests groups; but do the problems created by undocumented immigration warrant a weakening of Fourth Amendment guarantees?⁹³ Some have recommended that employers and not the undocumented workers should feel the brunt of the law by imposing sanctions on those who employ undocumented workers.⁹⁴ Of course, the concept of employer sanctions is not without its controversy: the discriminatory potential against documented minorities has been publicized by civil rights groups and other experts in the field of immigration.⁹⁵ But must we concern ourselves with other ways to strengthen enforcement of the Act? Should discussion of Fourth Amendment rights stand clear of such practical and statutory pursuits? Though such discussions are important in general, the more specific issue of enforcement of the Act versus constitutional guarantees must remain as the focus. If Congress creates statutory safeguards to offset the waning police power of the INS, it will do so in response to judicial interpretation of constitutional dictates.

C. *Balancing of Interests*

In balancing constitutional guarantees against law enforcement, we are usually confronted with the competing interests of individual rights and governmental pursuit of public order. But when the Constitution is threatened with curtailment for the sake of statutory fulfillment, the argument for curtailment must go beyond the fear of the enervation of legislation. Justice Stewart addressed this balancing of interests in his opinion in *Almeida-Sanchez v. United States*:⁹⁶

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pres-

91. 368 F. Supp. 398 (S.D. Cal. 1973).

92. 422 U.S. 891, 900 (1975).

93. See Comment, *Blackie's House of Beef, Inc. v. Castillo: A Need For a Closer Look at Administrative Probable Cause*, 17 NEW ENG. L. REV. 1373, 1395 (1982).

94. See Comment, *Illegal Immigration: Short-Range Solution of Employer Sanctions*, 49 Miss. L.J. 659, 681-687 (1978).

95. *Id.*

96. 413 U.S. 266, 273 (1973).

sure that counsels a resolute loyalty to constitutional safeguards.

This “resolute loyalty” to the Fourth Amendment must stand in the case of factory surveys in spite of the strong interest in controlling immigration: “Good faith on the part of law enforcement officials . . . has never sufficed [in the Supreme Court] to substitute as a safeguard for personal freedoms or to remit our duty to effectuate constitutional guarantees. Indeed, with particular regard to the Fourth Amendment,” simple good faith is not enough.⁹⁷ Good faith cannot replace the safeguards of the *Sureck* decision.

Notwithstanding the difficulty of balancing the need for enforcing our immigration laws and maintaining the integrity of the Fourth Amendment, current case law has delineated a relatively clear standard. As we have seen, *Terry* and its immigration progeny—*Almeida-Sanchez*, *Ortiz* and *Brigoni-Ponce*—have upheld constitutional standards while allowing for reasonable law enforcement tactics. The *Sureck* decision merely extends case law to its logical conclusion: the seizure of an entire workforce must fall under Fourth Amendment scrutiny. Such seizures cannot override constitutional safeguards solely because law enforcement will be hampered. Indeed, if factory raids are performed because they are cheaper than other types of enforcement activities, the INS should look to Congress for the resources that are badly needed and not to the creation of exceptions to the Fourth Amendment. But INS resources are at the heart of their appeal of *Sureck*; the decision is extraordinary only in the fact that it prohibits a very successful tactic used by the Service. Certainly, the Ninth Circuit’s reasoning follows precedent clearly and without strained logic. In fact, the Court recently applied its own decision in *Sureck* to a seizure of *one person* by the border patrol.⁹⁸ The Court’s message was the same: without probable cause or proper warrants, a seizure of a person or persons is not reasonable and cannot be sustained. To hold otherwise would render the Fourth Amendment form without substance.

VI. CONCLUSION

The wealth of this country has created a haven for those who suffer from the pains of poverty, but this is neither a recent nor limited phenomenon. Each generation sees a new immigrant group: the Jews and Italians of the early 1900’s, the South and

97. 428 U.S. at 573 n.4 (Brennan dissenting).

98. *Benitez-Mendez v. I.N.S.*, 707 F.2d 1107 (9th Cir. 1983), where Fourth Amendment standard which was articulated in *Sureck* had not been met because the seizure of petitioner by the border patrol was not based on probable cause.

Central Americans of the mid-1900's. History has also shown the benefits as well as the problems created by such immigration. Congress has long wrestled with the question: how do we reap the benefits of immigration without incurring the accompanying problems of unchecked immigration? Congress may never discover an answer to this conundrum.

In the meantime, we have a population rapidly growing in the number of undocumented aliens.⁹⁹ Can the Constitution withstand its expanding role in the protection of these immigrants? Of course, such a question is rather academic because we should ask the more relevant question: can *we* withstand this expansion of the Constitution? Can we afford *not* to have it expand? The *Sureck* decision indeed expands the Fourth Amendment in the protection of the undocumented alien but it does so primarily for the protection of those who are citizens or who possess proper immigrant status. We must keep in mind that any law enforcement which inherently involves the alienage of a group of persons as one indication of possible immigration law violation can be arbitrarily abused.¹⁰⁰ If Mexican ancestry becomes a target for INS

99. Between October 1, 1982 and October 1, 1983, the United States government apprehended a record 1,078,469 undocumented aliens from Mexico *alone*. Between October 1 and December 1, 1983, another 366,696 were apprehended. Notwithstanding these large numbers, the INS estimates that only one out of four undocumented aliens is arrested and deported. L.A. Times, April 1, 1984 § 1, at 1, col. 1 (citing INS statistics).

100. This remains especially true because of the staggering growth of undocumented immigration from Mexico. The following shows the number of undocumented aliens who were apprehended between 1974 and 1983:

<u>Fiscal Year</u>	<u>Total</u>	<u>Change From Previous Year</u>
1974	604,829	28%
1975	563,635	-6
1976	795,202	18
1977	779,007	-.02
1978	826,505	6
1979	849,362	3
1980	723,602	-15
1981	783,987	8
1982	778,869	-.5
1983	1,078,469	38

Id. at 4, col. 1 (source: INS). See also Comment, *Equal Protection for Undocumented Aliens*, 5 CHICANO L. REV. 29 (1982) for a discussion of the legal ramifications of being an undocumented alien in the United States. For a discussion of the political

agents, the Fourth Amendment's reasonableness clause will suffer a blow that cannot be tolerated.

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[Editor's Note: At press time, the Supreme Court reversed the Ninth Circuit decision in *ILGWU v. Sureck*. *INS v. Delgado*, No. 82-1271, slip op. (April 17, 1984).]

nature of immigration reform, see Comment, *Interest Group Politics and U.S. Immigration Policy Towards Mexico*, 1 *LA RAZA L.J.* 76 (1983).