# The Burger Court Opinion Writing Database

## *United States v. Ortiz*

422 U.S. 891 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University




Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1975
PERSONAL

Re: Nos. 73-2050 - United States v. Ortiz
74-114 - United States v. Brignoni-Ponce
73-6848 - Bowen v. United States

Dear Lewis:

I'm sorry to "let you down" on the Border Search cases. There is, of course, no Court opinion resolving these troublesome issues. And the vexing aspect of the plurality opinion in Almeida-Sanchez is that it has been followed by an unemployment figure exceeded only by the number of illegal aliens reliably estimated to be in the United States.

I argue for no nexus between the two except that they coincide. I add to that what I said in some dissenting opinions over the past 20 years, that we are becoming an "impotent society." With a shocking rise in crime, both in prosperity and recession, we are constantly -- and blandly -- telling the society we serve "you can't get there from here."

Here, as elsewhere, the key lies in the irrational, monolithic, mechanical application of the Suppression Doctrine, fulfilling Cardozo's prophecy on it once a month if not more.

You have my vote on the Border cases if you link it with a sane, selective use of exclusion -- as in England, Israel, and every other civilized country in the world save ours!

Regards,

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 17, 1975

Re: 73-2050 - United States v. Ortiz
74-114 - United States v. Brignoni-Ponce

Dear Bill, Byron and Harry:

I have Bill's memorandum of June 16 and I confess I am still "gagging" from Almeida-Sanchez. On the other hand, you have pulled some of the thorns and that helps.

There are still too many sweeping generalizations in Lewis' opinion for me to join it. For example, at p. 6: "A search, even of an automobile, is a substantial invasion of privacy." This is "law review" language that I can't accept, and it will inevitably be thrown in our teeth as a constitutional holding even though it is a meaningless generalization in context.

I will now do a close job on Lewis' opinion -- which I did not do previously because I had no thought it could be salvaged. I'll try to get that to you pronto.

In all events I will write that police can set up check points in any "border zone"; that if every occupant of an auto cannot respond in Englis they can be stopped and required to prove identity by usual indicia.

For me, this is an English-speaking country and non-English speakers must expect to put up with some inconvenience if they want sanctuary in our borders. Twelve million illegals are too much for me!

Regards,

WEB

Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1975

Re: No. 73-2050 - United States v. Ortiz

Dear Bill:

Please show me as joining your concurrence but I may join only the judgment, thereby limiting my concurrence.

I will act as soon as Lewis' "whole package" is clear to me.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 25, 1975

Re: No. 73-2050 - United States v. Ortiz

Dear Bill:

I am writing separately in the above and I think it better to have that stand alone, so please withdraw my "join" of June 23.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 25 1975

Recirculated: _____

No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

Like MR. JUSTICE WHITE I can, at most, do no more than concur in the judgment. As the Fourth Amendment now has been interpreted by the Court it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens -- and dangerous drugs -- that daily and freely crosses our 2,000 mile southern boundary.[1/] Perhaps these

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1/ The Court today recognizes that as many as twelve million illegal aliens are present in this country at this time. Ante, at 5, and n. 4. See also, U.S. News and World Report, 27, July 22, 1974; U.S. News and World Report, 77, December 9, 1974. By all indications the problem will increase in the future, not abate. United States v. Baca, 368 F. Supp. 398, 402-03 (S.D. Cal. 1973). In the Baca case Judge Turrentine conducted a thorough review of the entire problem and the present government response. Appended to this opinion is an excerpt from Judge Turrentine's Baca opinion describing the illegal alien problem and the law enforcement response.

To: The Chief Justice
Mr. Justice Brennan
Mr. Just[illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

Marshall

2nd DRAFT From:

# SUPREME COURT OF THE UNITED STATES 4-22

Circulated:

Recirculated:

Nos. 73–2050, 73–6848, AND 74–114

United States, Petitioner,
73–2050 *v.*
Luis Antonio Ortiz.

John Lee Bowen,
Petitioner,
73–6848 *v.*
United States.

United States, Petitioner,
74–114 *v.*
Felix Humberto Brignoni-Ponce.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April —, 1975]

Memorandum of MR. JUSTICE DOUGLAS.

These cases arise from Government activity aimed at halting the illegal entry of aliens across the Mexican border. All are variations of the factual pattern presented in *Almeida-Sanchez* v. *United States*, 413 U. S. 266, where we invalidated the search of an automobile, stopped 25 miles from the border by a roving patrol. In 73–2050, the defendant's car was stopped and searched at the San Clemente immigration checkpoint. In 74–114, the defendant's automobile was stopped just north of the checkpoint by a patrol car. The car was not searched, but its occupants were arrested when they could not produce papers demanded by the immigration officer. In 73–6848, the defendant's automobile was

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1975

Dear Lewis:

RE: UNITED STATES V. ORTIZ, 73-2050
UNITED STATES V. BRIGNONI-PONCE, 74-114
BOWEN V. UNITED STATES, 73-6848

If your memoranda in these cases become opinions for the Court, I vote as follows:

In UNITED STATES V. ORTIZ, 73-2050, please join me.

In UNITED STATES V. BRIGNONI-PONCE, 74-114, I shall file a separate statement concurring in the result.

In BOWEN V. UNITED STATES, 73-6848, I shall dissent for reasons stated in my dissent in UNITED STATES V. PELTIER, 73-2000.

William O. Douglas

Mr. Justice Powell

cc: The Conference

Wm Brennan
Oct 74

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Supreme Court of the United States
Washington, D. C. 20543

May 28, 1975

RE: Nos. 73-2050 United States v. Ortiz
74-114 United States v. Brignoni-Ponce
73-6848 Bowen v. United States

Dear Lewis:

If your proposed memoranda in the border search case become opinions for the Court, I vote as follows:

I join No. 73-2050, United States v. Ortiz. I join Parts I and III of No. 74-114, United States v. Brignoni-Ponce and also Part II if you will delete n. 3 at p. 4. That note seems inconsistent with the view of Section 287(a)(3) that I expressed in my dissent in Peltier. I cannot join No. 73-6848, Bowen v. United States in light of my dissent in Peltier. I would appreciate your adding at the foot of your Bowen, "Mr. Justice Brennan dissents and would reverse substantially for the reasons expressed in his dissent in No. 73-2000, United States v. Peltier."

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Wm. Doyle 6-74

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 28, 1975

No. 73-2050, U. S. v. Ortiz

Dear Lewis,

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-24-75

Recirculated: _____

No. 73-2050 - United States v. Ortiz and
No. 74-114 - United States v. Brignoni-Ponce

Mr. Justice White, concurring in the judgment.

Given Almeda-Sanchez v. United States, 413 U.S. 266 (1973), with which I disagreed but which is now authoritative, the results reached in these cases were largely foreordained. The Court purports to leave the question open, but it seems to me, my Brother Rehnquist notwithstanding, that under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion. In any event, the Court has thus dismantled major parts of the apparatus by which the nation has attempted to intercept millions of aliens who enter and remain illegally in this country.

The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-26-75

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

Nos. 73–2050 AND 74–114

United States, Petitioner
73–2050 *v.*
Luis Antonio Ortiz.

United States, Petitioner,
74–114 *v.*
Felix Humberto Brignoni-Ponce.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1975]

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the judgment.

Given *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), with which I disagreed but which is now authoritative, the results reached in these cases were largely foreordained. The Court purports to leave the question open, but it seems to me, my Brother REHNQUIST notwithstanding, that under the Court's opinions checkpoint investigative stops, without search, will be difficult to justify under the Fourth Amendment absent probable cause or reasonable suspicion. In any event, the Court has thus dismantled major parts of the apparatus by which the Nation has attempted to intercept millions of aliens who enter and remain illegally in this country.

The entire system, however, has been notably unsuccessful in deterring or stemming this heavy flow; and its costs, including added burdens on the courts, have been substantial. Perhaps the judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
USTICE THURGOOD MARSHALL

May 28, 1975

Re: No. 73-2050 -- U.S. v. Ortiz

Dear Lewis:

I agree with your memorandum in this case and would join it as an opinion of the Court.

Sincerely,

TM.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 9, 1975

Re: No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

Dear Lewis:

I am still unable to join your proposed opinions for these cases. I remain where I was at the time of our conference.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 26, 1975

Re: No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

Dear Byron:

If it is all right with you, please join me in your opinion concurring in the judgment. I am also joining the Chief.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 26, 1975

Re: No. 73-2050 - United States v. Ortiz
No. 74-114 - United States v. Brignoni-Ponce

Dear Chief:

Please join me in your opinion concurring in the judgment. I am also joining Byron.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 13, 1975

For file: 40
73-2050 USA Q.T.
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Border Search Cases

MEMORANDUM TO THE CONFERENCE:

I thought it might be helpful if I shared with you this memorandum on the latest decision relating to the border search cases we considered in February. In United States v. Martinez-Fuerte, et al, Nos. 74-2462, 74-2568, 74-2714 (March 5, 1975), a panel (2 to 1) of the Ninth Circuit invalidated the "warrant of inspection" issued by the District Court to authorize the operation of the fixed checkpoint at San Clemente.

The warrant there considered authorized agents "to stop northbound motor vehicles for the purpose of making routine inquiries to determine the nationality and/or immigration status of the occupants," and also "to conduct a routine inspection of said vehicles for the presence of aliens." The latter authorization appears to have been interpreted by the Government to empower agents to search trunks and other places where persons might hide. But the validity of that authorization was not an issue in these appeals,* and the court noted that subsequent warrants limited the agents to a stop and inquiry procedure.

The Ninth Circuit's opinion indicates that the warrant was issued for ten-day periods and had been renewed 26 times.

*In each of the three cases considered by the Ninth Circuit the stop and inquiry, without search, revealed that the automobile contained illegal aliens. In United States v. Guillen, No. 74-2714, a subsequent search of the trunk revealed additional illegal aliens. The court assumed in that case that the initial discovery provided probable cause to inspect the trunk, and therefore did not consider that search to have been conducted pursuant to the warrant's "inspection" authorization.

Wm Brennan
DC 74

The District Court required the compilation of statistics relating to the operation of the checkpoint, and the Ninth Circuit opinion summarizes this data. These indicate that an average of 1,200 vehicles pass through the San Clemente checkpoint per hour and that at peak times the figure increases to 2,500. By the Ninth Circuit's calculation, this suggests that over 10-1/2 million automobiles pass through that checkpoint annually.

The more interesting figures are those compiled during an eight-day period in June of 1974. Over that period approximately 145,960 vehicles passed through the checkpoint during periods in which it was operating. Presumably all of that number were required to slow down to allow the officer at the "point" to scan the vehicle and its occupants and determine whether further inquiry was warranted. But only 820 of the almost 146,000 vehicles were "stopped" and referred to a secondary area for questioning regarding citizenship and immigration status. And of the 820 "stopped", 202 were "inspected".

The Ninth Circuit suggested that it was unable to ascertain exactly what an "inspection" was. But it apparently is something less than a search. The court noted that deportable aliens were discovered in "plain view" in 169 of the 202 vehicles so "inspected". The court further indicated that agents searched portions of the vehicles in which aliens might hide in 33 instances, each allegedly with the consent of the driver, and discovered illegal aliens in two of the automobiles so searched.* In total, agents discovered 725 deportable aliens in 171 vehicles during the eight-day period in question.

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*I would suppose that in virtually all of the 169 instances in which the initial questioning revealed illegal aliens in "plain view" the agents conducted a further search of the automobile. See note 1, supra. In those cases the subsequent search would appear to be supported by concrete probable cause and justifiable under more traditional Fourth Amendment principles. I assume, therefore, that the 33 instances identified as searches are cases in which the initial inquiry does not itself reveal the presence of illegal aliens but does suggest the need to inquire further. Whether "probable cause" or "founded suspicion" existed in these cases would be a matter to be determined on the facts of the particular case.

Relying primarily on these statistics, the Ninth Circuit determined that the "inspection warrant" system was invalid. Judge Duniway noted that of the nearly 146,000 automobiles passing through the San Clemente checkpoint only 171, or 0.12%, were found to contain illegal aliens. He considered this to be too low an incidence to justify what he viewed as an "intolerable" degree of interference imposed on the motorists passing through the checkpoint:

> "Roughly 999 of every 1,000 cars passing through the checkpoint carry only persons who are lawfully within the country and under Carroll are entitled 'to use the public highways [and] have a right to free passage without interruption.' Although the duration of a stop and even a detention for immigration questioning may be brief, the concentration of illegal alien traffic is too small. We cannot countenance the cumulative intrusion of stopping ten million cars per year where only one out of 1,000 passing cars may contain aliens illegally within the country."

Judge Duniway devoted a major part of his opinion to my concurrence in Almeida, viewing it, I must say, with little enthusiasm. In addition to finding that the checkpoint authorization would not meet the general standards outlined in my Almeida concurrence, Judge Duniway's opinion held flatly:

> "The requirements of the Fourth Amendment apply with full vigor at immigration checkpoints. A stop, even a 'fleeting stop' is subject to Fourth Amendment protections". (pp. 10, 11 printed opinion)

Judge Carter, dissenting, viewed the case quite differently, and I am inclined to agree with the essence of his opinion. The undisputed facts clearly indicate that (i) the checkpoint was used with restraint and discrimination; (ii) only a minute fraction of the motoring population was inconvenienced in any way except by being required to slow down - hardly an "intolerable inconvenience" to motorists who are accustomed - as we all are - to stop and yield signs and occasionally being stopped for license checks; and (iii) of the vehicles stopped for brief questioning as to nationality and immigration status, one out of every five (20%) was found to be transporting aliens - an extraordinarily high percentage of successes.

It is to be remembered that this opinion invalidates a simple stop and inquiry procedure. What I said in Almeida applied to full searches by roving patrols. Indeed, as I indicated at our Conference, I would not be inclined to extend my Almeida standards to authorize searches at a checkpoint 66 miles from the border and on a highway with this level of traffic. I would require some more particularized "cause" to justify an actual search of the private portions of automobiles stopped at a fixed checkpoint. But there is a controlling difference, in my view, between a checkpoint warrant authorizing searches and one limited to routine questions which any motorist should be willing to answer. There simply is no comparison between the degree of "intrusiveness" of a search and a stop only to inquire as to nationality and immigration status.

Judge Duniway, by relating the number of vehicles in which aliens were found during the period in question to the total number of vehicles passing the checkpoint, concludes that the results do not justify the "intolerable" inconvenience imposed upon motorists. I do not consider discovery of 725 deportable aliens during the course of a part-time operation of the checkpoint over eight days to be an inconsequential result. This operation apprehended nearly 100 aliens per day. Moreover, these figures do not take into account the number of smugglers and aliens "deterred" from attempting to go northward, a factor emphasized by Judge Turrentine in his district court opinion in United States v. Baca, 368 F. Supp. 398 (S.D. Cal. 1973).*

* * * * *

The situation in the Ninth Circuit is further confounded by the decision of another panel in United States v. Evans,

*Judge Turrentine's opinion in Baca, which is printed in the petition for cert. in No. 73-2050, contains the most exhaustive statement of the facts with respect to this problem. Its findings differ from the opinion of Judge Duniway in significant respects. The latter thought that "the influx of illegal aliens could conceivably be stemmed in various ways" other than by use of checkpoints. Judge Turrentine, on the other hand, concluded that "the evidence presented . . . clearly establishes that there is no reasonable or effective alternative method of detection and apprehension available to the border patrol. . . ." See Pet. for Cert. in No. 73-2050, at 20a. That opinion also provides an additional indication of the importance of the San Clemente checkpoint, revealing that in fiscal year 1973 over 12,000 deportable aliens were apprehended there. Id., at 25a.

507 F.2d 879, 880 (CA9 1974). In Evans, no constitutional defect was found where motor traffic was simply diverted into a zone where it could be observed by officers. In that case, an automobile had been "waived through" a fixed checkpoint without being required to pull over. As the automobile passed, however, an officer noticed aliens lying in the space between the front and back seats and the car was then stopped. The appellant argued that the "slow down", which allowed the officer to look into the automobile,was itself a violation of Fourth Amendment rights since it was conducted without a warrant or probable cause. The Ninth Circuit panel rejected that contention, holding that there is no constitutional objection to a warrantless "diversion of motor traffic into a zone where it can be observed by officers." Id., at 880.

In view of these two recent cases, following those pending before this Court, the law of the Ninth Circuit is in a state of shambles. Martinez-Fuerte, which was decided after Evans, mentions the latter only in a footnote and purports to distinguish that case on the ground that it did not involve a stop. When one attempts to rationalize the two, the result seems to be as follows: Under Evans, government agents may erect a checkpoint anywhere and, without a warrant of any kind, compel traffic to slow down sufficiencly to allow an effective visual inspection of vehicles and their occupants. If that inspection arouses "founded suspicion" the vehicle can be stopped for inquiry, and if probable cause exists it can then be searched. Yet Martinez-Fuerte applies the Fourth Amendment with full vigor even to a "fleeting stop," and invalidates a warrant authorizing operation of a fixed checkpoint at an appropriate place and resulting stops for the limited purpose of inquiring into nationality and immigration status. In short, a slow down anywhere for visual inspection is valid, whereas a fleeting stop for questions is invalid even when authorized by a checkpoint warrant. The purposes of both procedures are identical and the degree of intrusion is likely to be indistinguishable.

If immigration officers in CA9 find little rationality in these distinctions, they are not alone.

* * * * *

In view of the foregoing, and the present inconclusiveness of our tentative votes at the Conference on the cases that have been argued, it occurs to me that perhaps we should relist these cases for a further Conference discussion. If a Court cannot be assembled, the cases presumably should be set for reargument early next fall and some thought should be given as to what stays, if any, should be entered pending final resolution.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1975

Border Search Cases

Dear Chief:

In a conversation today with Chief Judge John Brown of the Fifth Circuit, he again expressed the hope that we will be able to decide the Border Search Cases this Term.

Judge Brown stated that the Fifth Circuit Court of Appeals is holding some 15 to 20 cases, awaiting our decision. He emphasized, however, that the more serious problem is the backup of cases in the United States prosecutors' offices in the Southern and Western Districts of Texas. It is estimated that some 200 prosecutions are being postponed pending our decision.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Wm Brennan
OCT 74

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 23, 1975

No. 73-2050, 73-6848, 74-114 - Border Search Cases

MEMORANDUM TO THE CONFERENCE:

In view of the circulation of a memorandum on these cases by Bill Douglas, I thought perhaps I should say that I am working on a memorandum as requested by the Chief Justice. As I plan to attend the Fifth Circuit Conference the early part of next week, it will be another ten days before I can circulate my memorandum.

L.F.P., Jr.

SS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1975

OK

Border Search Cases

MEMORANDUM TO THE CONFERENCE:

In accordance with the request of the Chief Justice, I have prepared memoranda in the above cases - which I now circulate.

For your convenience, I summarize my conclusion in each case:

No. 74-114 U.S. v. Brignoni-Ponce. This was a stop (not a search) by a roving patrol. The only basis for the stop was the apparent Mexican ancestry of the occupants of the car. I concluded that reasonable grounds for suspicion (one of which may be the appearance of Mexican ancestry) is required for a stop by a roving patrol. As there was no basis for suspicion other than the appearance of the occupants, I concluded the stop was unlawful. I would affirm.

No. 73-2050 U.S. v. Ortiz. This was a search at an established checkpoint (San Clemente) without probable cause and without either a specific or an "area" warrant. I concluded that our prior decision in Almeida-Sanchez is controlling, and that the search is unlawful. It was unnecessary in this case to determine whether an "area" type warrant for a particular checkpoint would validate searches. As I agreed with CA9 that Almeida-Sanchez was controlling, I would affirm.

No. 73-6848 Bowen v. U.S. This also was a search at a checkpoint without warrant or probable cause. The search occurred prior to our decision in Almeida-Sanchez. Primarily

on the authority of Peltier, I would hold that Almeida-Sanchez should not be applied retroactively. Accordingly, I would affirm.

The principal issue that would not be resolved by the foregoing cases is whether a mere stop for questioning as to citizenship may be made at an established checkpoint without particularized grounds of suspicion. There are substantial differences in the circumstances attendant upon stops at established checkpoints and those that may exist in random stops by roving patrols. We are holding No. 74-993 Janney v. U.S. (among others) which presents the established checkpoint stop issue.

Lewis

L.F.P., Jr.

ss

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: May 24, 1975

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 73-2050

| | |
|---|---|
| United States, Petitioner, *v.* Luis Antonio Ortiz. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. |

[May —, 1975]

Memorandum of MR. JUSTICE POWELL.

Border Patrol officers stopped respondent's car for a routine immigration search at the traffic checkpoint on Interstate Highway 5 at San Clemente, California, on November 12, 1973. They found three aliens concealed in the trunk, and respondent was convicted on three counts of knowingly transporting aliens who were in the country illegally. The Court of Appeals for the Ninth Circuit reversed the conviction in an unreported opinion, relying on dictum in its opinion in *United States* v. *Bowen,* 500 F. 2d 960 (CA9 1974), aff'd, *post* p. —, to the effect that our decision in *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973), required probable cause for all vehicle searches in the border area, whether conducted by roving patrols or at traffic checkpoints. We granted certiorari. 419 U. S. 824 (1974).

Nothing in this record suggests that the Border Patrol officers had any special reason to suspect that respondent's car was carrying concealed aliens. Nor does the Government contend that the San Clemente checkpoint is a functional equivalent of the border. Brief for the United States, at 16. The only question for decision is whether vehicle searches at traffic checkpoints, like the roving-patrol search in *Almeida-Sanchez,* must be based on probable cause.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1975

PERSONAL

Border Search Cases

Dear Chief:

Although I am grateful for the vote in Bowen, I am quite disappointed that you think we have not "found the key" to the proper resolution of Brignoni-Ponce and Ortiz.

I write primarily to suggest that we are unlikely to find five votes for any "key" more to your liking. This is a judgment (with which you may disagree entirely) based on my having devoted more time to the study of these cases than to any other assignment you have given me this year.

The drafts which I have circulated are in accord on principle with Fourth Amendment precedents, the most recent of which is Almeida-Sanchez. In one respect, however, it can be said that I have departed somewhat from precedent. In Brignoni-Ponce, I proposed a "reasonable suspicion" standard for random stopping and questioning of occupants of vehicles by roving patrols. This affords more leeway to law enforcement officers than any prior Fourth Amendment case with which I am familiar, although I drew heavily on Terry and Adams.*

I do not believe that the "reasonable suspicion" standard will unduly handicap officers on roving patrol.

*In those cases, as you will recall, the investigating officers had reasonable grounds to believe that the suspects were armed and that they might be dangerous. This is a considerably higher requirement than the "reasonable suspicion" which I propose in Brignoni-Ponce.

I invite your attention particularly to Part IV of my Brignoni-Ponce opinion (p. 10-12) for the "factors [that] may be taken into account in deciding whether there is a reasonable suspicion to stop a car in the border area". With this portion of my opinion in mind, I further invite you to read Bill Douglas' concurrence, circulated June 5, in which he attacks the "reasonable suspicion" proposal.

It is thus evident that, so long as the composition of the Court remains as it is now, the resolution I propose is likely to be the closest to your tentative views. Putting it differently, we have the same 5 to 4 split that decided Almeida-Sanchez, except that Bill Douglas would require an even higher standard than I propose. Absent a change in the personnel of the Court, it is unrealistic to think that the result will be different at any future Term - unless Justices Brennan or Marshall retreat from my position to that of Bill Douglas.

It is also entirely speculative whether a change in Court composition will create a new majority.* We hope there will be no change for many years; we have no idea which Justice will be the first to leave; and we certainly have no idea as to the views of the Justice who might fill a vacancy.

Of course, we do not have to agree on a Court opinion. But examples that come to mind (e.g., Metromedia) have hardly been satisfactory to the bench or bar. The Border Search Cases present an especially pressing problem, with courts and U.S. Attorneys in four states awaiting definitive guidance. I am sure we all would regret further delay or a fractured Court.

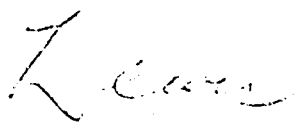
As you know, we also have pending here cases which present the validity of random stops for questioning at established checkpoints. These are perhaps the most important of all of these cases. I confirm what I said at Friday's Conference, namely, that I have carefully considered the

*I do not imply that the possibility of a future change affects any of our judgments. I am merely exploring whether it is realistic to think the present situation will change.

issue, and will vote to affirm the right of the border patrol officers to make such stops - without requiring reasonable suspicion - at the established checkpoint. Potter expressed the same view at Conference, and has confirmed it to me personally. I think there is a vast difference between the circumstances of the regularized stops at established checkpoints (which are quite analogous to stopping vehicles for license checks), and the random stops by roving patrols at any time of day or night on any road or highway within a hundred miles of the border.

You may recall Bill Rehnquist's statement that he might consider joining me if I made clear that we were implying no view with respect to stops by state and local officers for such purposes as checking driver's licenses, auto registration, weighing trucks or enforcing agricultural quarantines. I attach a proposed new footnote to be added to Brignoni-Ponce. I do not know whether this will satisfy Bill.

Sincerely,



The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 16, 1975

Brignoni-Ponce and Ortiz

Dear Bill, Potter and Thurgood:

You may recall that at our Conference on June 6, (when these cases were discussed) Bill Rehnquist indicated that if the opinions were clarified in certain respects, he might reconsider his position.

I followed up with Bill and he identified two particular concerns: (i) that our opinions would not apply to state regulation of highway use, such as enforcement of laws with respect to driver's licenses, truck weights and the like; and (ii) that we not foreclose a different decision with respect to stops for questioning at established checkpoints.

In my view, the draft opinions as circulated left open both of these issues, as neither was addressed. Bill, however, has a different view, and he rejected as inadequate some minor language changes I suggested. He then submitted counter-proposals that were quite lengthy.

As the result of negotiations, I submitted the changes which are now reflected in the pages of Brignoni-Ponce and Ortiz which I enclose herewith for each of you. Without committing himself, Bill has indicated an inclination to join us if we adopt these changes. Prior to seeing my counter-proposals Bill had conferred with the Chief Justice, Byron and Harry with inconclusive results. I do not think my proposals have been seen by these gentlemen, as Bill thought it best to know first whether we would submit them to the Conference.

I am willing to make these changes in the draft opinions. They certainly do not affect the result of the holdings or change the basic rationale. I expect all of us would come out at about the same place on the right of the states

reasonably to govern highway usage. There may be differences between us as to mere stops at established checkpoints. Although Byron expressed the view that our decision in Brignoni-Ponce would necessarily foreshadow a similar holding with respect to all other stops, I do not agree with him. In any event, the changes which are necessary to satisfy Bill will still leave each of us free to decide the fixed checkpoint stop issue as we deem proper.

In sum, I think we have a chance now to bring these cases down. We will have settled conclusively the "search" issue at fixed checkpoints as well as by roving patrols; and we also will have settled the "stop" issue with respect to roving patrols. These decisions will go far toward resolving the doubt which now overhangs the entire Border Patrol operations.

In view of time constraints as well as the importance of a resolution, I suggest that the four of us meet to discuss the situation. If agreeable, perhaps we could convene in Bill Brennan's office at say 11:00 a.m. today if this is convenient. If Mary Fowler will let Sally Smith know, she will advise Thurgood and Potter.

Sincerely,

Lewis

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall

lfp/ss
Enc.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1975



Cases Held for No. 73-2050 United States v. Ortiz

MEMORANDUM TO THE CONFERENCE:

No. 74-5114 Larios-Montes v. United States

Although the events in this case occurred near a checkpoint, and we listed it as a hold for Ortiz, it has more in common with United States v. Brignoni-Ponce. Officers at a checkpoint saw two cars turn onto the highway just north of them. It was shortly after midnight, no other cars had passed the checkpoint for some 40 minutes, and these two cars appeared to be traveling together. The first car, which had a passenger of apparent Mexican descent, slowed at the stop sign and turned north. The second car "skidded" around the corner with no pretense of stopping. The agents saw three persons in the front seat and several others in the rear, who were apparently crouching to avoid being seen. The car was also riding low to the ground. The agents suspected that this was a "lead car-load car" type operation engaged in smuggling aliens. They pursued both cars and stopped them for questioning. Petitioner, the driver of the first car, was arrested when his passenger admitted to being an alien illegally in the country. CA9 held that the evidence obtained in the stop was admissible under its "founded suspicion" doctrine. I agree that the circumstances were sufficiently suspicious to support a stop for questioning, and will vote to deny this petition.

No. 74-6014 Hart, Bylund, and Dixon v. United States
No. 74-6016 Arnold v. United States

These petitions represent two CA5 judgments on two occurrences at the Sierra Blanca established checkpoint east

Wm. D.
6-74

1, 2, 4, 5, 6

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

3rd DRAFT

From: Powell, J.

# SUPREME COURT OF THE UNITED STATES

No. 73-2050

Circulated: _____

Recirculated: JUN 23 1975

United States, Petitioner, v. Luis Antonio Ortiz. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[May —, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

Border Patrol officers stopped respondent's car for a routine immigration search at the traffic checkpoint on Interstate Highway 5 at San Clemente, California, on November 12, 1973. They found three aliens concealed in the trunk, and respondent was convicted on three counts of knowingly transporting aliens who were in the country illegally. The Court of Appeals for the Ninth Circuit reversed the conviction in an unreported opinion, relying on dictum in its opinion in *United States* v. Bowen, 500 F. 2d 960 (CA9 1974), aff'd, *post* p. —, [illegible] in *Almeida-Sanchez* v.

The draft opinion in No. 74-114, United States v. Brignoni-Ponce, is in the print shop. I will recirculate it, with the latest changes, as soon as it is ready.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1975

Re: No. 73-2050 - United States v. Ortiz

Dear Brethren:

I have already confided to you, at greater length than you probably thought was desirable, my thoughts in connection with United States v. Brignoni-Ponce. I would suggest a somewhat similar approach in Ortiz. I think the same considerations apply, and that we would accomplish something if we could get some changes in Lewis' present draft which would save in substance, as well as in form, the question of the validity of a stop at a fixed checkpoint. To this end, I would propose the following changes:

(1) An addition to go after the last sentence in present footnote 1, page 3, to make it clear that the description of inspections contained in the first sentence of that footnote does not necessarily mean that every such inspection is a "search"; for example, I would think if a car is lawfully stopped, the Border Patrol officer might lie on the ground and look under the chassis without that action constituting a search:

"To the extent that the various facets of such inspections constitute 'searches' for purposes of the Fourth

See my additions to N. 3 on p 6

> Amendment, we held in Almeida-Sanchez, supra, that when conducted by roving patrols away from the border they are subject to a requirement of probable cause."

(2) A replacement for the present sentence on page 4, beginning on the seventh line from the bottom, in order to draw a sharper distinction between a stop and a search:

> "While these differences between a roving patrol and a checkpoint would have a good deal of significance in determining the propriety of the stop, which is a far lesser intrusion than a search, Terry v. Ohio, supra, they do not appear to make any difference in the search itself. The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails."

(3) A replacement for the two consecutive sentences beginning on the fifth line from the bottom of page 5 and ending on the fourth line from the top of page 6, in order to focus the Fourth Amendment analysis of this case on the evils of a search under these conditions, and not on a more generalized concept of Fourth Amendment rights which could include a stop as well:

> "The imperative of the Fourth Amendment is that a law enforcement officer's

> reasons for breaching a citizen's protected privacy in conducting a search must be judged against an objective standard."

Again, I not only do not know your respective reactions to these proposals, but I know nothing of Lewis' reactions. If, mirabile dictu, they should prove agreeable to all concerned, I would suggest a separate concurring statement in Ortiz something like that which I suggested in Brignoni-Ponce.

Sincerely,

WJW

The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 16, 1975

Re: No. 73-2050 - United States v. Ortiz; and No. 74-114 United States v. Brignoni-Ponce

Dear Chief, Byron and Harry:

This will bring you up to date on my discussions with Lewis in these cases.

I submitted to him all of the material which I had submitted to you with my letters of June 10th in these cases, including the letters themselves. He responded by making the changes now contained in the attachments to this letter in the respective circulating opinions in these cases. After reviewing these changes, I decided that so far as I was concerned he had accommodated virtually all of the substance of my requests as outlined in my letters to you of June 10th, and I told him that if he would make one additional change (which appears on the attachments) I would so advise each of you. He made the change, and for the reasons outlined in my letters of June 10th I am now inclined to join the recirculations with the sort of concurring statements outlined in pages 3-4 of my letter of June 10th respecting Brignoni-Ponce.

I should add that in response to my letters of June 10th I received generalized encouragement from the Chief and from

Harry, and something less than that from Byron. I had the uneasy feeling that you, Byron, feel I am about to sell my soul for a mess of pottage, and of course you may be right.

I guess that what I would appreciate receiving from each of the three of you at this point is an answer to these two questions:

> (1) Would you be agreeable to joining the recirculations through the medium of a concurring statement such as I outlined on pages 3-4 of my letter of June 10th in Brignoni-Ponce, and a similar concurring statement in Ortiz?
>
> (2) If your answer to the previous question is in the negative, would you prefer that I not join them on the basis outlined in the previous question?

Sincerely,

WJB

The Chief Justice

Mr. Justice White

Mr. Justice Blackmun

6/23/75

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 6/23/75

Recirculated: _____

No. 73-2050, United States v. Ortiz

MR. JUSTICE REHNQUIST, concurring:

I joined the dissent of my Brother White in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and recognize that the present decision is an extension of the unsound rule announced in that case. I nonetheless join the opinion of the Court, because a majority of the Court still adheres to Almeida and because I agree with the Court's analysis of the significance of the Government's proffered distinctions between roving and fixed-checkpoint searches.

I wish to stress, however, that the Court's opinion is confined to full searches, and does not extend to fixed-checkpoint stops for the purpose of inquiring about citizenship. Such stops involve only a modest intrusion, are not likely to be frightening or significantly annoying, are regularized by the fixed situs, and effectively serve the