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SEARCH AND SEIZURE

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The Supreme Court decided four fourth amendment cases this past term dealing with stops and searches by immigration authorities near, but not directly at, the United States border. Continuing an approach taken two years earlier in 1973,[1] the Court's decisions in *United States v. Ortiz*[2] and *United States v. Brignoni-Ponce*[3] restricted the discretion of the Border Patrol to stop and search vehicles for illegal aliens by requiring the standard of probable cause for immigration searches at fixed checkpoints, and the standard of at least "reasonable suspicion" of immigration violations for routine Border Patrol "stops" of vehicles to inquire about citizenship and immigration status. In *United States v. Peltier*[4] and *Bowen v. United States*,[5] however, the Court refused to give retroactive application to these stricter standards for border area stops and searches. The significance of the latter two decisions may go well beyond the retroactivity question, for, in his dissent, Justice Brennan, joined by Justice Marshall, expressed considerable apprehension that the reasoning of the Court cast serious doubt on the future of the exclusionary rule as a means to enforce fourth amendment rights.

STRICTER STANDARDS FOR BORDER SEARCHES

The stops and searches in the cases noted herein all were conducted by the Border Patrol under the authority of section 287 of the Immigration and Nationality Act.[6] Under this section, agents of the Immigration and Naturalization Service have the power, without warrant, "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States."[7] They may also, without warrant, "within a reasonable distance from any external boundary of the United States . . . board and search for aliens any vessel within the territorial waters of the United States and any railway car, conveyance or vehicle. . . ."[8] "Reasonable distance" is defined as within 100 air miles of the border.[9]

Pursuant to this statutory authority the Border Patrol maintains both fixed checkpoints and roving patrols throughout the Southwest border area. The purpose of the checkpoints is to give border patrol officials a chance to observe traffic passing through the area. If an officer suspects that a vehicle may be carrying illegal aliens, he may stop it to inquire about the citizenship of the driver and passengers. If his suspicion is not abated, the officer may conduct a search of the car to determine if illegal aliens are hidden somewhere inside.[10] To more thoroughly canvass the border area for illegal aliens, the Border Patrol also operates roving patrols which stop and search vehicles throughout the region.

Prior to the Supreme Court's decision in *Almeida-Sanchez v. United States*,[11] the circuit courts in the southwest border area usually upheld these immigration stops and searches if "a founded suspicion"[12] existed for the belief that a particular vehicle was

[1] Almeida-Sanchez v. United States, 413 U.S. 266 (1973). The Court held that except at the border, or its functional equivalents, roving patrols could not search vehicles without a warrant or probable cause.

[2] 422 U.S. 891 (1975).

[3] 422 U.S. 873 (1975).

[4] 422 U.S. 531 (1975).

[5] 422 U.S. 916 (1975).

[6] Immigration & Nationality Act § 287, 8 U.S.C. § 1357 (1970).

[7] *Id.* § 1357(a)(1).

[8] *Id.* § 1357(a)(3).

[9] 8 C.F.R. § 287.1(a)(2) (1975). The Attorney General promulgates these regulations.

[10] 422 U.S. at 894. Agents normally check in the trunk, under or behind seats, and even under the hood or flooring, *Id.* at 894 n.1.

[11] 413 U.S. 266 (1973). *See* note 1 *supra*.

[12] The phrase comes from Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966). "A *founded suspicion* is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." *Id.* at 415 (emphasis added). The case did not involve a border search, but the Ninth Circuit frequently cites the language of the decision in its border area search cases. The Fifth Circuit used the phrase "reasonable suspicion." United States v. Wright, 476 F.2d 1027, 1030 (5th Cir.), *cert. denied*, 414 U.S. 839 (1973). The Tenth Circuit upheld

involved in violating the immigration laws.[13] But, the Ninth and Tenth Circuits sometimes upheld the actions of the Border Patrol even when no "founded suspicion" existed for a stop or search.[14] Apparently even the circuit court judges themselves disagree on what standards their decisions actually required.[15]

The Border Patrol's right to search vehicles on less than the traditional fourth amendment standard of probable cause was challenged in *Almeida-Sanchez.* Before the Supreme Court, the Government argued that immigration searches did not require probable cause to be constitutional. In support of its argument the Government cited cases approving automobile searches without warrants,[16] administrative searches without probable cause,[17] and the language of section 287 which specifically exempts the warrant requirement and makes no mention of probable cause.[18] The Court rejected all three arguments, noting that automobile searches still require probable cause;[19] that administrative searches require a general administrative warrant in the absence of consent;[20] and that since "no Act of Congress can authorize a violation of the Constitution"[21] section 287 must be construed to allow warrantless searches by roving patrols only on a showing of probable cause.[22]

The Government's policy argument was also rejected:

> It is not enough to argue . . . 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 pressures that counsels a resolute loyalty to constitutional safeguards.[23]

The Court's decision this past term in *United States v. Ortiz*[24] picks up where *Almeida-Sanchez* left off two years ago. The factual context in *Ortiz* involved three illegal aliens who were found hidden in the trunk of Ortiz's car during a search conducted by the Border Patrol at a fixed checkpoint near San Clemente, California. Ortiz was later convicted of transporting illegal aliens.[25] He appealed and the Ninth Circuit reversed, relying on its earlier decision in *Bowen v. United States*[26] that the requirement of probable cause for roving patrols outlined in *Almeida-Sanchez* also extends to searches at fixed checkpoints.

In its argument before the Supreme Court, the Government maintained that fixed checkpoint searches were less intrusive than roving patrol searches and that the Border Patrol officials stationed at such checkpoints had less discretion in choosing which cars to search.[27] Therefore, the Government contended, searches at fixed checkpoints fell within the fourth amendment's requirement of reasonableness even though conducted without probable cause. The Court, however, found that the Border Patrol officials at fixed checkpoints in fact exercised considerable discretion in deciding which cars to stop.[28] It also rejected the argument that the searches were significantly less intrusive.[29] Speaking for the Court, Justice Powell said:

> A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a

stops and searches if they were "within a reasonable distance" (100 miles) of the Mexican border. United States v. Anderson, 468 F.2d 1280, 1282 (10th Cir. 1972).

[13] United States v. Hart, 506 F.2d 887 (5th Cir. 1975); United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974); United States v. McCormick, 468 F.2d 68 (10th Cir. 1972), *cert. denied,* 410 U.S. 921 (1973).

[14] Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969). The Fifth Circuit apparently always required at least "reasonable suspicion." *Peltier,* 422 U.S. at 546 (Brennan, J., dissenting). *But see* Bowen v. United States, 422 U.S. at 919 n.1. "There was some ground for confusion about the state of the law in the Fifth Circuit at the time *Almeida-Sanchez* was decided."

[15] United States v. Bowen, 500 F.2d 960, 968, 978, 981, 982 (9th Cir. 1974), *aff'd,* 422 U.S. 916 (1975); United States v. Peltier, 500 F.2d 985, 988, 991 (9th Cir. 1974), *rev'd,* 422 U.S. 531 (1975).

[16] Carroll v. United States, 267 U.S. 132 (1925).

[17] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Camara v. Municipal Court, 387 U.S. 523 (1967).

[18] Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973).

[19] *Id.* at 269.

[20] *Id.* at 270.

[21] *Id.* at 272.

[22] Only searches within the United States are affected. The right to search at the border itself, or at its functional equivalents continues to be maintained without any requirement of warrant or probable cause. *Id.* at 272–73.

[23] *Id.* at 273.

[24] 422 U.S. 891 (1975).

[25] 8 U.S.C. § 1324(a)(2) (1970) makes it unlawful to knowingly transport illegal immigrants.

[26] 500 F.2d 960 (9th Cir. 1974), *aff'd,* 422 U.S. 916 (1975).

[27] 422 U.S. at 894.

[28] Fewer than 3 per cent of the vehicles passing through fixed checkpoints in 1974 were searched. *Id.* at 896.

[29] Since so few cars are singled out, the Court felt motorists might find the searches especially offensive. *Id.* at 895.

> lawful search. We are not persuaded that the differences between roving patrols and traffic checkpoints justify dispensing in this case with the safeguards we required in *Almeida-Sanchez.*[30]

Thus, probable cause is now required before a vehicle search for illegal aliens may be conducted.[31]

The Court was unwilling to extend the strict standard of probable cause used for searches to routine vehicle *stops* by roving border patrols. In *United States v. Brignoni-Ponce,*[32] Border Patrol agents stopped the defendant's car just north of the then closed San Clemente checkpoint. During the brief questioning the agents discovered that two of the passengers were illegally in the country, and Brignoni-Ponce was charged with transporting illegal aliens.[33] Since the patrol stopped the car solely "because the occupants appeared to be of Mexican descent," Brignoni-Ponce moved at trial to suppress the testimony of the aliens as the fruit of an illegal seizure.[34] The trial court denied his motion. His conviction was appealed[35] and considered by the Ninth Circuit in light of the Supreme Court's reasoning in *Almeida-Sanchez* and the circuit court's decisions in *Peltier*[36] and *Bowen.*[37]

The court first examined the nature of the stop. Because the patrol that stopped Brignoni-Ponce had been parked on the exit side of the San Clemente checkpoint observing the traffic *after* it passed through the checkpoint area, the court reasoned that the stop more closely resembled a roving patrol stop than one at a fixed checkpoint.[38] This determination was important since the court had decided earlier in *Peltier* and *Bowen* that only in cases involving searches by roving patrols would the probable cause requirement of *Almeida-Sanchez* be applied retroactively.[39]

Having thus disposed of the retroactivity question, the court next considered the constitutional question of whether probable cause should be required for roving patrol stops as well as for searches. It noted that the Tenth Circuit had earlier held that the probable cause requirement applies only to searches, not to stops.[40] But the Ninth Circuit was not persuaded:

> We cannot adopt the approach taken by our brothers on the Tenth Circuit. . . . Under the Tenth Circuit's view, immigration officals could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without warrant, without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.[41]

Such stops, the court felt, would be inconsistent with the reasoning in *Almeida-Sanchez.* The court further noted that the word "stop" had been used in conjunction with the word "search" in *Almeida-Sanchez,* and that the Supreme Court quoted extensively from *Carroll v. United States*[42] on the public's right to "free passage" on the highways, free of stops and searches unless officials have probable cause to believe that a vehicle is engaged in illegal activity.[43]

The actual holding of the Ninth Circuit, however, was stated in terms of "founded suspicion" rather than "probable cause." Declaring it to be the "law of the circuit" that stops be accompanied by a "founded suspicion,"[44] the court then held that Mexican ancestry alone did not amount to such "founded suspicion."[45] On appeal to the Supreme Court, the Government challenged only the "founded suspicion" requirement.[46]

The Supreme Court agreed with the circuit court's decision that the stop was more like a roving patrol stop than one at a fixed checkpoint. It also considered

[30] *Id.* at 896.

[31] The Court listed a number of factors to be considered in determining the existence of probable cause: number of persons in the car, behavior of the occupants, ability of the occupants to speak English, nature of the vehicle, and indications that the car is heavily loaded. *Id.* at 897. The Court did not give extra weight to any of the factors nor attempt to identify which one or combination would provide a sufficient basis for probable cause.

[32] United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[33] 8 U.S.C. § 1324(a)(2) (1970).

[34] 422 U.S. at 875.

[35] 499 F.2d 1109 (1974), *aff'd,* 422 U.S. 873 (1975).

[36] 500 F.2d 985 (9th Cir. 1974), *rev'd,* 422 U.S. 531 (1975).

[37] 500 F.2d 960 (9th Cir. 1974), *aff'd,* 422 U.S. 916 (1975).

[38] 499 F.2d at 1110.

[39] *Id.*

[40] United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973).

[41] 499 F.2d at 1110–11.

[42] 267 U.S. 132 (1925).

[43] 499 F.2d at 1111.

[44] *Id.* at 1112. The circuit court had used this phrase in previous cases: United States v. Bugarin-Casas, 484 F.2d 853, 854 (9th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974); United States v. Mallides, 473 F.2d 859, 861 (9th Cir. 1973). *But see* United States v. Miranda, 426 F.2d 283 (9th Cir. 1970), upholding a stop at a fixed checkpoint with no mention of the suspicion requirement.

[45] The court had earlier dealt with the question of ancestry as a basis for suspicion in United States v. Mallides, 473 F.2d 859 (9th Cir. 1973). "[C]onduct does no become suspicious because the skins of the occupants [of a vehicle] are nonwhite." *Id.* at 861.

[46] The Government did not question the retroactive application of *Almeida-Sanchez* in this case. 422 U.S. at 876.

such stops to be "seizures" under the fourth amendment[47] but felt that the intrusion was "minimal."[48] In addition, it pointed out the valid public interest in checking the entry of illegal aliens.[49] The problem was one of finding the proper balance "between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[50] Using basically the reasoning of *Terry v. Ohio*[51] and *Adams v. Williams*[52] the Court in *Brignoni-Ponce* decided that border area *stops* are permissible on less than probable cause because of the difficulty of maintaining sufficient control at the border itself, the seriousness of the illegal alien problem,[53] and the minimally intrusive nature of the stop. But, there must be a "reasonable suspicion" based on the "officer's observations" that a particular vehicle contains illegal aliens before any vehicle may be detained.[54]

The effect of this decision, in Justice Powell's words,

> is to limit exercise of the authority granted by both § 287(a)(1) and § 287(a)(3). Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.[55]

The stop must be brief and limited in scope. Any *search* or significant detention "must be based on consent" or meet the higher standard of probable cause.[56]

The individual officer is allowed to "assess the facts in light of his experience detecting illegal entry and smuggling."[57] Since the officer in *Brignoni-Ponce* justified the stop of the vehicle solely on the basis of the apparent Mexican ancestry of its passengers, the Court agreed with the court of appeals that there was no "reasonable suspicion" for the stop. However, the Court conceded that a "Mexican appearance might be a relevant factor to be considered."[58]

There were no dissents in either *Ortiz* or *Brignoni-Ponce*, although three Justices in *Ortiz* and four in *Brignoni-Ponce* concurred begrudgingly in the results only, and Justice Rehnquist, while joining with the opinion of the Court in both cases, pointed out that, in his opinion, neither decision cast any doubt on the constitutionality of routine immigration stops at fixed checkpoints,[59] port of entry border searches, agricultural inspections, highway roadblocks or similar stops, "whether or not accompanied by 'reasonable suspicion.'"[60]

Chief Justice Burger, with Justice Blackmun joining his concurring opinion, felt the Court's decisions would seriously impair the effectiveness of the Immigration Service in dealing with the illegal alien problem.[61] He expressed the hope that the Court would reconsider its position in future cases, feeling that otherwise

> history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.[62]

Justice White, joined by Justice Blackmun, agreed with the Chief Justice that the effect of the decisions would be to severely hamper the work of the Immigration Service. However, he observed that the system had been "notably unsuccessful" anyway, and that "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. . . ."[63] Congress and the executive branch should be dealing with the policy issues involved. He suggested in particular that Congress consider making it unlawful to employ illegal aliens.

Justice Douglas joined the opinion of the Court in *Ortiz*, but only the result in *Brignoni-Ponce*. He felt the standard of reasonable suspicion promulgated in *Brignoni-Ponce* was not stringent enough, but had "brought a state of affairs where police may stop citizens on the highway on the flimsiest of justifications."[64] He was particularly distressed that

[47] *Id.* at 878.
[48] *Id.* at 880.
[49] *Id.* at 879.
[50] *Id.* at 878.
[51] 392 U.S. 1 (1968).
[52] 407 U.S. 143 (1972).
[53] *See* 422 U.S. at 900 app. (Burger, C. J., concurring).
[54] 422 U.S. at 881.
[55] *Id.* at 884 (footnote omitted).
[56] *Id.* at 882.
[57] *Id.* at 885.
[58] *Id.* at 887.
[59] 422 U.S. at 898 (Rehnquist, J., concurring). *Stops* at fixed checkpoints are not covered by any of the Supreme Court's decisions.
[60] *Id.* at 899; U.S. at 422 (Rehnquist, J., concurring).
[61] He stressed his concern by appending an exerpt from United States v. Baca, 368 F.Supp. 398 (S.D. Cal. 1973), which detailed the complexities of the illegal alien problem. 422 U.S. at 900 app. (Burger, C. J., concurring).
[62] 422 U.S. at 899 (Burger, C. J., concurring).
[63] *Id.* at 915.
[64] *Id.* at 890.

the Court made no attempt to identify what combination of factors would actually meet its test of reasonable suspicion.

While the Court's opinions in *Almeida-Sanchez* and *Ortiz* make it clear that probable cause to search is necessary for both roving patrols and officials at fixed checkpoints, the strong dissents in *Almeida-Sanchez* and the reluctant concurring opinions in *Ortiz* indicate that the issue is far from closed. Furthermore, the Court specifically left open the question of the constitutionality of an area-wide search warrant system suggested by Justice Powell in *Almeida-Sanchez.*[65] In addition, the Court has specifically exempted searches at the "functional equivalents" of the border from the probable cause requirement.[66] Yet, it has made no attempt to carefully define what it means by that phrase and the courts of appeals seem to be developing varying interpretations.[67] Until these issues come directly before the Court, it is difficult to predict the long-range significance of the probable cause requirement of *Almeida-Sanchez* and *Ortiz.*

The decision to allow *stops* on less than probable cause creates additional uncertainty in this area. In *Almeida-Sanchez* and *Ortiz* the seriousness of the illegal alien problem was not sufficient to overcome the "Constitution's protections of the individual."[68] On the other hand, in *Brignoni-Ponce,* reasonable suspicion, not the traditional constitutional protection of probable cause, was considered acceptable because the "public interest demands effective measures to control the illegal entry of aliens at the Mexican Border."[69]

It is probably true, as the Court maintains, that a stop is less intrusive than a search.[70] It is also true that the standard of reasonable suspicion, based on "articulable facts" offers more protection to citizens than the unlimited discretion the government urged the Court to allow Border Patrol officials. But as Justice Douglas points out,[71] the Court has failed to sufficiently articulate the standard of reasonable suspicion it now requires. Will the fact that a Mexican-American drives along a southwestern highway close to the border in a stationwagon "riding low" and with a "spare tire in the back seat"[72] be enough to arouse a reasonable suspicion that he is violating immigration laws? Would the suspicion be warranted if the driver were not Mexican-American? Justice Jackson phrased it well in his dissent in *Brinegar v. United States:* "[T]he extent of *any* privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit."[73] Although Justice Jackson was specifically referring to the probable cause requirement in *Brinegar,* it is hard to see how the situation will be different in the context of immigration stops made on the basis of "reasonable suspicion."

Controlling the entry of illegal aliens is clearly a problem of some magnitude. One system of dealing with it has now been curtailed by the Court. But that does not mean that other workable, perhaps better, solutions cannot be developed.[74] Habit and official

[65] 413 U.S. at 275–85. Justice Powell, in his concurring opinion, suggested that some type of area wide warrant system similar to that used in administrative searches might provide a more workable balance between the rights of citizens and the mandate of the Border Patrol to police border areas against the entry of illegal aliens. He felt area warrants could be issued for "reasonable period[s] of time," based on the general likelihood of current illegal activity in the area, rather than a more stringent standard of probable cause that a particular vehicle was involved in violations of the immigration laws. Such a system, he maintained, has the advantage of requiring the Border Patrol to "obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads," yet it would not "frustrate" the government's purpose in conducting the searches. *Id.* at 283.

[66] 422 U.S. at 896-97; 413 U.S. at 272.

[67] In *Almeida-Sanchez,* Justice Stewart gave two examples to illustrate the phrase: "an established station near the border, at a point marking the confluence of two or more roads that extend from the border," and international airports. 413 U.S. at 273. The Ninth Circuit has defined it as a "place . . . where virtually everyone searched has just come from . . . the border." United States v. Bowen, 500 F.2d 960, 965 (9th Cir. 1974). But, the Fifth Circuit has upheld searches at fixed checkpoints as far as seventy-five miles from the border as "functional equivalents" of a border search. United States v. Hart, 506 F.2d 887 (5th Cir. 1975).

[68] 413 U.S. at 273.

[69] 422 U.S. at 878.

[70] *Id.* at 880. The stop usually takes less than a minute according to the government, and only requires an answer to one or two questions and, perhaps, the production of immigration papers.

[71] *Id.* at 890.

[72] Both factors have been considered evidence of reasonable suspicion in circuit court decisions. United States v. Bugarin-Casas, 484 F.2d 853 (9th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974) (riding low); United States v. Wright, 476 F.2d 1027 (5th Cir. 1973) (spare tire in the back seat).

[73] 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) (emphasis added).

[74] The area warrant system has yet to be tested. Justices White and Blackmun and the Chief Justice have also suggested making it unlawful to hire illegal aliens. 422 U.S. at 900 (Burger, C. J., & Blackmun, J., concurring); 422 U.S. at 915 (White & Blackmun, JJ., concurring). See also Professor Amsterdam's suggestion for the development of police-made rules for searches and seizures.

expediency should not take precedence over constitutional rights. As Professor Amsterdam once noted:

> [T]he history of the destruction of liberty... has largely been the history of the relaxation of those [procedural] safeguards in the face of plausible sounding governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society.[75]

Retroactivity and the Exclusionary Rule

When constitutional standards change, courts are faced with the problem of whether to apply the new standards retroactively or prospectively.[76] If the new standards reflect a "sharp break"[77] with past precedent the courts frequently give them merely prospective effect.[78] A "sharp break" with precedent is not the only factor considered, however. Since 1965 the Supreme Court has attempted to develop specific criteria to aid in the determination of whether a new rule should be applied prospectively or retroactively.[79] In *Linkletter v. Walker*[80] the Court said retroactivity must be determined on a case by case basis by "looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[81] In *Stovall v. Denno*[82] the *Linkletter* approach was further refined into a three pronged test which focuses on: (1) the purpose the new rule is to serve; (2) the extent government officials have relied on previous standards; and (3) the effect retroactive application will have on the administration of justice.[83]

Under this test the Court tends to give primary consideration to the purpose of the new rule.[84] If the purpose is to correct "an aspect of the criminal trial that substantially impairs its truth-finding function,"[85] the Court favors retroactive application of the new standard.[86] If, on the other hand, the new rule will not avert a "clear danger of convicting the innocent,"[87] the Court seldom applies it retroactively.[88]

After analyzing the purpose, the Court considers the factors of reliance and the effect on the administration of justice. In most cases, if officials have acted in "good faith," believing that their conduct was acceptable under previous constitutional standards, the Court is unlikely to apply its new standards retroactively.[89] This is particularly true if application of the new standards would result in large numbers of new trials for defendants convicted under the old standards.[90] But, neither extensive reliance nor a disruptive effect on the administration of justice will prevent a new rule from being applied retroactively if the Court determines that it affects the vital "truth-finding" function of the trial.[91]

In fourth amendment cases, the Court's consideration of the purpose of new exclusionary rule standards has consistently led to a denial of retroactivity.[92] The Court's purpose in extending the exclusionary rule in most cases is to deter unlawful police conduct.[93] But, once a search has taken place, the Court has concluded, there is no deterrent value

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Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 410–40 (1974).

[75] Amsterdam, *supra* note 74, at 354.

[76] For purposes of this note the term prospective includes retroactive application in the case in which the new principle is first announced.

[77] Milton v. Wainwright, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting). Justice Stewart suggested that to be nonretroactive a decision must overrule clear past precedent or alter a long established practice that has been generally relied upon. *Id.* at 381–82 n.2. Other decisions have spoken in terms of "a clear break with the past," Desist v. United States, 394 U.S. 244, 248 (1969), or "an avulsive change" in the law, Hanover Shoe Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499 (1968).

[78] *See, e.g.*, Desist v. United States, 394 U.S. 244 (1969); Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

[79] Linkletter v. Walker, 381 U.S. 618 (1965).

[80] *Id.*

[81] *Id.* at 629.

[82] 388 U.S. 293 (1967).

[83] *Id.* at 297.

[84] Desist v. United States, 394 U.S. 244, 249 (1969).

[85] Williams v. United States, 401 U.S. 646, 653 (1971).

[86] *See, e.g.*, Arsenault v. Massachusetts, 393 U.S. 5 (1968) (right to counsel at arraignment and preliminary hearing); Barber v. Page, 390 U.S. 719 (1968) (requirement that every effort be made to have witnesses present at trial before transcript of preliminary hearing testimony may be substituted for the physical presence of the witnesses).

[87] Tehan v. Shott, 382 U.S. 406, 416 (1966).

[88] *See, e.g.*, Michigan v. Payne, 412 U.S. 47 (1973); Williams v. United States, 401 U.S. 646 (1971); Desist v. United States, 394 U.S. 244 (1969).

[89] DeStefano v. Woods, 392 U.S. 631 (1968).

[90] Desist v. United States, 394 U.S. 244 (1969). The number of potential retrials may not be a significant consideration if the Court feels prospectivity is clearly indicated for other reasons. *Id.* at 252.

[91] Williams v. United States, 401 U.S. 646, 653 (1971).

[92] *See, e.g.*, Williams v. United States, 401 U.S. 646 (1971); Desist v. United States, 394 U.S. 244 (1969); Fuller v. Alaska, 393 U.S. 80 (1968).

[93] Mapp v. Ohio, 367 U.S. 643 (1961). The Court has also spoken of the "imperative of judicial integrity" in its exclusionary rule decisions, Elkins v. United States, 364 U.S. 206, 222 (1960), but some scholars have maintained that this is mere rhetoric and that the control of unlawful police conduct is the major purpose of the rule. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 669–71 (1970).

to be gained by applying the new standards retroactively.[94] Furthermore, because the reliability of evidence taken in an illegal search is seldom questioned,[95] new applications of the exclusionary rule rarely have any effect on the "truth-finding" function of a criminal trial. Thus, one major justification for the retroactive application of a new constitutional standard is absent in exclusionary rule cases.

The Court's examination of the factors of reliance and the effect on the administration of justice have also pointed to prospective application of new exclusionary rule standards. The Court has usually approved official conduct exercised in reliance on previous standards, maintaining that its own "periodic restatements" of fourth amendment tests "fully justified reliance on their continuing validity"[96] —even when some change in the standards was "foreshadowed" in previous cases.[97] In addition, since the guilt of the defendant is often apparent in cases involving the suppression of evidence because of official misconduct,[98] the Court has been particularly unwilling to give retroactive effect to new exclusionary rule standards which would inevitably entail new trials for considerable numbers of defendants whose convictions were validly obtained under the old standards.

Given this history of reluctance to apply new fourth amendment standards retroactively, the Court's decisions in *United States v. Peltier*[99] and *Bowen v. United States*[100] are not surprising. In both cases the Court refused to give retroactive effect to the probable cause standard announced earlier in *Almeida-Sanchez*—a decision which would have invalidated the defendants' convictions because the evidence used against them was admittedly obtained in searches conducted without probable cause.

In *Peltier* the defendant's car was stopped by a roving patrol for a routine immigration search, and 270 pounds of marihuana were found in his trunk. The Government conceded that the search had been conducted without warrant and had not been supported by probable cause.[101] The defendant's motion to suppress was denied on the basis that prior decisions allowed border officials to search under these circumstances.

The Ninth Circuit reversed[102] Peltier's conviction after concluding that *Almeida-Sanchez* should be applied retroactively to roving patrol searches admittedly illegal under the *Almeida-Sanchez* standards. The majority maintained that the *Almeida-Sanchez* decision made no "sharp break" with the Supreme Court's previously espoused fourth amendment standards,[103] but rather continued the approach first enunciated in *Carroll v. United States*.[104] Nor did *Almeida-Sanchez* disrupt long accepted and relied upon practices within the circuits.[105] While conceding that dicta in previous cases might imply otherwise, the court felt that all of its pre-*Almeida-Sanchez* decisions were based on the standard of probable cause or reasonable certainty.[106] Thus, the majority of the court concluded, no question of "new law" was presented and an analysis based on the criteria of *Stovall* was unnecessary. Peltier was

> entitled to the benefit of the rule announced in *Almeida-Sanchez*, not because of retroactivity but because of fourth amendment principles never deviated from by the Supreme Court.[107]

The Supreme Court, in a five-to-four decision reversed the Ninth Circuit. Justice Rehnquist, speaking for the Court, first reviewed past dispositions of

[94] Linkletter v. Walker, 381 U.S. 618, 637 (1965). "The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved."

[95] *Id.* at 638. "[T]here is no likelihood of unreliability . . . present in a search-and-seizure case."

[96] Desist v. United States, 394 U.S. 244, 250–51 (1969).

[97] *Id.* at 248. In spite of the fact that the Court admitted that its decision to subject electronic surveillance to traditional fourth amendment standards (Katz v. United States, 389 U.S. 347 (1967)) had been "foreshadowed" in earlier decisions, the Court refused to give that decision retroactive effect as it was still "a clear break with the past."

[98] In *Peltier*, after the motion to suppress was denied, the defendant stipulated that he had in fact "knowingly possessed" the marihuana found in his car. 422 U.S. at 531.

[99] 422 U.S. 531 (1975).

[100] 422 U.S. 916 (1975).

[101] *Peltier*, 422 U.S. at 533.

[102] 500 F.2d 985 (9th Cir. 1974), *rev'd*, 422 U.S. 531 (1975).

[103] *Id.* at 988.

[104] 267 U.S. 132 (1925).

[105] *Peltier*, 500 F.2d at 988. The "sharp break" and "disruption of long established practice" criteria were suggested by Justice Stewart in Milton v. Wainwright, 407 U.S. 371, 381–82 n.2 (1972), as preconditions to retroactivity analysis. *See* note 77 *supra*.

[106] 500 F.2d at 988. The court's review of prior decisions included reference to United States v. Miranda, 426 F.2d 283 (9th Cir. 1970), in which the court upheld an immigration stop and search without probable cause or warrant. The case was dismissed as a singular exception.

[107] 500 F.2d at 989. There were six dissenters who were not convinced that Justice Stewart's approach, *supra* note 105, to the retroactivity question was the proper one to be applied in this case. But, even if it were the appropriate test, they disagreed that it justified retroactive application of the rule of *Almeida-Sanchez*. They felt *Almeida-Sanchez*

the retroactivity problem in cases involving the exclusionary rule:

> It is indisputable . . . that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the fact-finding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.[108]

The denial of retroactivity in exclusionary rule cases, he observed, explained a great deal about both the exclusionary rule and retroactivity analysis.[109] The history of the exclusionary rule cases showed that the rule is meant to serve as a deterrent to unlawful police conduct and as a means of preserving the "imperative of judicial integrity."[110] The "teaching" of the retroactivity cases, however, was that neither purpose is normally served by retroactive application of new exclusionary rule standards.[111] The decision in *Peltier*, therefore, depended on whether the factors of deterrence and judicial integrity were of sufficient importance to require that the evidence seized by the Border Patrol be suppressed.[112]

Stressing that the Border Patrol had conducted the search "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval,"[113] the majority of the Court maintained that the Border Patrol's conduct had conformed to the "prevailing . . . constitutional norm"[114] at the time of the search. Although those constitutional standards were overruled in *Almeida-Sanchez*, the Court concluded that, given the purpose of the exclusionary rule and the history of the circuit court decisions in border area search cases,

> nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it requires that the evidence . . . be suppressed, even if . . . [the] respondent's fourth amendment rights were violated by the search of his car.[115]

In *Bowen v. United States*[116] the defendant's camper was stopped for a routine immigration search at a fixed checkpoint. Upon opening the camper doors the Border Patrol officers smelled marihuana, and a search of the vehicle uncovered 356 pounds of the plant. While probable cause to search for marihuana existed once the odor was detected,[117] the initial stop and request to search for aliens were made without any evidence of probable cause.

The Ninth Circuit held that the rule in *Almeida-Sanchez* for searches conducted by roving patrols should also be applied to searches at fixed checkpoints.[118] But, it refused to reverse Bowen's conviction because the search of his car took place before the decision in *Almeida-Sanchez* was handed down.[119]

The Supreme Court agreed with the Ninth Circuit on the retroactivity issue.[120] The same reasons that led to the decision not to give *Almeida-Sanchez* retroactive effect in *Peltier* applied equally well to Bowen's case:

> [T]he Border Patrol reasonably relied on the decisions of the courts of appeals in performing the search in this case and others like it and in these circumstances the purpose of the fourth amendment exclusionary rule would not be served by applying the principle of *Almeida-Sanchez* retroactively.[121]

In a dissenting opinion to both *Peltier* and *Bowen*, Justice Brennan strongly protested the Court's decisions.[122] In the first part of his dissent, Justice

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clearly disrupted a practice "widely relied upon" in the circuit and established a new rule which had not previously been "foreshadowed." *Id.* at 990–93.

[108] 422 U.S. at 535 (footnote omitted).

[109] *Id.* at 536.

[110] *Id.*

[111] *Id.* at 537.

[112] *Id.* at 539.

[113] *Id.* at 534.

[114] *Id.* at 542.

[115] *Id.*

[116] 422 U.S. 916 (1975).

[117] *Id.* at 919 n.1.

[118] 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975).

[119] There were six dissenting judges. Four concurred with the majority insofar as the decision generally denied retroactive effect to the rule in *Almeida-Sanchez*. But they dissented from that part of the holding which denied Bowen himself the benefit of the court's extension of the probable cause requirements to searches at fixed checkpoints. *Id.* at 981–84. Two other judges dissented from the retroactivity ruling altogether, feeling that only decisions of the Supreme Court itself should be considered in deciding whether the Court has made a "sharp break" with old law. *Id.* at 984.

[120] The Court felt the constitutional question of whether probable cause was necessary for searches at fixed checkpoints should not have been reached by the circuit court as the case could have been disposed of on the retroactivity question alone. "The district courts and courts of appeals should . . . , when issues of both retroactivity and application of constitutional doctrine are raised . . . [decide] the retroactivity issue first." 422 U.S. at 920.

[121] *Id.* at 919.

[122] 422 U.S. at 554; 422 U.S. at 921. Justice Brennan was joined by Justice Marshall. Justice Stewart joined only part one of Justice Brennan's dissent in *Peltier*. He dissented without opinion in *Bowen*. Justice Douglas dis-

Brennan maintained that no issue of prospectivity was involved in either *Peltier* or *Bowen*. He contended that *Almeida-Sanchez* set no new rule, and that the Court merely applied traditional fourth amendment standards and construed section 287 accordingly.[123]

He disputed the Court's conclusion that prior to the *Almeida-Sanchez* decision the Border Patrol had justifiably relied on section 287 for authority to conduct immigration searches without probable cause. That section, he maintained, only exempted the Border Patrol from the *warrant* requirement. It did not expressly dispense with the need for probable cause.[124]

Nor did Justice Brennan agree with the majority that a long line of decisions in the circuit courts had consistently approved immigration searches without probable cause:

> [T]he approval by courts of appeals of this law enforcement practice was short-lived, less than unanimous, irreconcilable with other rulings of the same courts, and contrary to the explicit doctrine of this Court in *Carroll* . . . and other cases.[125]

The majority, he concluded, had simply abandoned the essential requirement of a "sharp break" in the law before a decision was to be granted prospective application.

Failure to consider the "sharp break" test in prospectivity questions resulted in a "travesty of justice"[126] for the individual defendant who was not given the benefit of long established constitutional principles. In addition, Justice Brennan feared that the Court's willingness to grant prospective application to a rule which did not differ substantially from previous standards would create an atmosphere in which law enforcement officials would feel free to "disregard the plain purport"[127] of the Court's decisions and wait until a given procedure was specifically held unconstitutional before altering their conduct.[128]

In part two of his dissent, Justice Brennan criticized the Court's "presumption"[129] of prospectivity in cases involving the exclusionary rule. He felt the Court had ignored the principle that decisions of prospective application were to be made on a case by case basis[130] and created instead a class of cases in which prospectivity is "the rule and not, as heretofore, the exception."[131]

In section three, the most significant part of his dissent, Justice Brennan vigorously protested the majority's "revision"[132] of the exclusionary rule. Rather than an objective determination of whether evidence was *in fact* seized unconstitutionally, the Court, under the majority's conception of the exclusionary rule, would have to inquire first into the "subjective knowledge"[133] of the officer and the inferences he should have drawn from the existing law, and based on that inquiry then determine whether suppression would "comport with either the deterrence rationale of the exclusionary rule or the 'imperative of judicial integrity.'"[134] Not only would this approach change the essential character of the rule as the Court had traditionally applied it, but it would add a "new layer of factfinding"[135] to the Court's consideration of motions to suppress and focus the Court's attention unduly on the behavior of the police instead of the guilt or innocence of the defendant.[136]

Justice Brennan contended that the Court's reformulation was based on the erroneous assumption that the exclusionary rule was meant to deter unlawful conduct by punishment of the individual official involved in unconstitutional searches. The exclusionary rule does not operate to deter by punishment of individual officials, he maintained. Its purpose is to deter by "removing an inducement to violate fourth amendment rights."[137] With a strong exclusionary rule, law enforcement officials have little incentive to violate fourth amendment rights. Without the rule, or with the majority's weakened form of the rule, he felt the Court would actually encourage officials to be stretching their interpretations of what constitutes proper conduct under the fourth amendment and to be "opting *invariably*"[138]

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sented with an opinion applicable to both *Peltier* and *Bowen*. He maintained that a "constitutional rule made retroactive in one case must be applied retroactively in all." 422 U.S. at 543.

[123] Immigration and Nationality Act § 287, 8 U.S.C. § 1357 (1970).

[124] 422 U.S. at 545.

[125] *Id.* at 547.

[126] *Id.* at 549.

[127] *Id.* Justice Brennan was quoting from Desist v. United States, 394 U.S. 244, 277 (1969) (Fortas, J., dissenting).

[128] 422 U.S. at 549.

[129] *Id.* at 550.

[130] Linkletter v. Walker, 381 U.S. 618, 629 (1965).

[131] 422 U.S. at 550.

[132] *Id.* at 552.

[133] *Id.* at 553.

[134] *Id.* (footnote omitted).

[135] *Id.* at 560.

[136] *Id.* at 561.

[137] *Id.* at 557. *See* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431–32 (1974).

[138] 422 U.S. at 559.

for the interpretation that gives them the most latitude.

Although he admitted that the reformulation applies only in the context of retroactivity cases as yet, Justice Brennan noted that the Court had spoken in general terms which he doubted would be limited to retroactivity cases. He predicted that

> when a suitable opportunity arises, today's revision of the exclusionary rule will be pronounced applicable to all search-and-seizure cases.[139]

One troublesome aspect of the *Peltier and Bowen* decisions is the Court's conclusion that the Border Patrol relied on a consistent line of circuit court decisions upholding its authority to search without probable cause. Yet, as evidenced by the disagreement among members of the Supreme Court itself,[140] as well as among members of the circuit courts,[141] the border area search cases cannot easily be characterized as a long line of consistent decisions. In some cases immigration searches were upheld as long as they were within a reasonable distance of the border;[142] in others, the courts required "adequate grounds for a reasonable suspicion that illegal aliens may be concealed within the vehicle";[143] and, in still other cases, unless the search could be characterized as a "border search,"[144] probable cause was the only acceptable standard.[145] In addition, much of the language seemingly supporting searches without probable cause or reasonable suspicion comes from dicta rather than the actual holdings of the cases.[146] Thus, although perhaps the "tenor" of the decisions was that probable cause was not required for immigration searches, a strong argument can be made that the Border Patrol should not have relied heavily on these circuit court decisions.

Particularly since the Supreme Court specifically held in *Carroll v. United States*[147] that automobile searches without warrant must meet the standard of probable cause to be constitutional, it is unfortunate that the Court chose to sanction the Border Patrol's reliance on ambiguous courts of appeals decisions. However, Justice Brennan's assertion that the Court abandoned the "sharp break" test may be overstating the case since the "sharp break" element is at least implicit in the Court's consideration of the reliance question. The Court is not just concerned with the fact of reliance, but with whether a retroactive application of a new standard will *adversely* affect a party who has relied on an earlier standard. If the new standard is not significantly different than the old it is unlikely that the problem of detrimental reliance will arise. While there is considerable room for disagreement with the Court's conclusion that the Border Patrol justifiably relied on the circuit court decisions, the fact that the Court stressed the issue of reliance is some evidence that it felt the *Almeida-Sanchez* decision did make a break with past precedent.[148]

The real basis for the decisions in *Peltier* and *Bowen* might not have been the theoretical constructs of reliance on, or sharp break with, past case law, however. The Court simply may have been reluctant to free either of these two admittedly guilty defendants or other incarcerated prisoners whose convictions would be overturned if *Almeida-Sanchez* were given retroactive application. Some support for this proposition is found in Justice Rehnquist's pointed references to Peltier's confession of guilt after losing on his motion to suppress.[149] The same sort of

[139] *Id.* at 552.

[140] United States v. Peltier, 422 U.S. 531, 545–47 (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 275, 285 (1973).

[141] Bowen v. United States, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975); United States v. Peltier, 500 F.2d 985 (9th Cir. 1974), *rev'd*, 422 U.S. 531 (1975).

[142] Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1969).

[143] United States v. Wright, 476 F.2d 1027, 1030 (5th Cir. 1973).

[144] The term "border search" refers to searches *incident* to a border crossing, although the search itself may not actually take place at the border. If there is reasonable certainty that a car contained contraband or illegal aliens at the *time of entry*, a search of the vehicle at some point distant from the border can be characterized as a "border search." Almeida-Sanchez v. United States, 452 F.2d 459, 463 (7th Cir. 1971) (Browning, J., dissenting), *rev'd on other grounds*, 413 U.S. 266 (1973).

[145] United States v. Klandis, 432 F.2d 132 (9th Cir. 1970).

[146] 422 U.S. at 540; 500 F.2d at 988 n.3.

[147] 267 U.S. 132 (1925).

[148] There is somewhat more support for Justice Brennan's contention that the Court has created a class of cases in which prospectivity is the rule and not the exception. 422 U.S. at 550. The Court's interpretation of the *Stovall* criteria seem to make prospectivity a foregone conclusion inexclusionary rule cases, even if the decision is ostensibly on a case by case basis.

[149] "When respondent's motion to suppress the evidence was denied after a hearing, he stipulated in writing that he 'did knowingly and intentionally possess, with intent to distribute, the marijuana concealed in the 1962 Chevrolet which he was driving on February 28, 1973.'" 422 U.S. at 532. Justice Rehnquist also pointed out in a footnote that this stipulation contained a proviso that it would not have been entered into if the motion to suppress had been granted. *Id.* at 532 n.1. He referred to the stipulation again in support of this point that evidence seized illegally is still reliable. "[The evidence] was sufficiently damning on the issue of respondent's guilt or innocence that he stipulated in writing that he was guilty of the offense charged." *Id.* at 539.

consideration may have entered the majority's decision in *Bowen* as well, for the Court in previous decisions[150] has openly questioned the wisdom of applying new constitutional standards retroactively when the effect is to let the "criminal go free because the constable has blundered."[151]

Whatever subliminal reasons may have influenced the Court to deny retroactivity in *Peltier* and *Bowen*, the specific language of the Court in *Peltier* may signal a change in the Court's approach to the exclusionary rule. Heretofore, evidence was excluded if the Court determined that it was in fact seized unconstitutionally, regardless of what the officer knew.[152] However, dissatisfaction with this practice has grown significantly in the past few years.[153] Critics of the rule have stressed that society has a strong interest in discovering the truth based on *all* reliable evidence,[154] and that there is no proof that the possible exclusion of evidence has any deterrent effect on police behavior.[155] The language of the *Peltier* decision seems to indicate that the Court recognizes and agrees with these criticisms. Taken literally, Justice Rehnquist's words imply that evidence will not be excluded unless it can be shown that the police clearly knew they were violating a defendant's fourth amendment rights:

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed *only* if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the fourth amendment.[156]

This approach to the exclusionary rule assumes that the individual officer cannot be deterred by what he does not specifically know, and that the "imperative of judicial integrity" will not be compromised by the use of evidence that was seized unconstitutionally as long as the policeman didn't know he was acting improperly. However, it has been asserted that the police are only secondarily concerned with conforming their conduct to the constitutional standards set forth by the Supreme Court,[157] and, if necessary, will even lie in order to make sure evidence they uncover is admissible under the exclusionary rule.[158] Placing emphasis on what the policeman knew may actually encourage this practice.

Of course, what the officer "should have known" is also part of the Court's "new test" for excluding evidence. This will prevent the police from pleading ignorance in situations of blatant violations of fourth amendment standards. But, until the Court clearly defines what criteria will be used to determine that the police "may be properly charged with knowledge"[159] that their conduct was unconstitutional, the test is of little value in less obvious search and seizure cases. In the border area search cases, for example, Justice Brennan pointed out that the Border Patrol, a national organization, might easily have been charged with knowledge that automobile searches require probable cause to be constitutional under the Supreme Court's decisions.[160] Yet, it could also be argued that the Border Patrol could have inferred from the circuit court decisions that immigration searches were simply an exception to this standard. Thus, the attitude of a particular court toward the exclusionary rule may make a significant difference under the *Peltier* approach to the rule. If the majority is unhappy with the rule and wants to avoid excluding evidence, it will be possible for the court to limit extensively the application of the rule by repeatedly finding that the police reasonably inferred from existing law that their conduct was constitutional. The fact that the Court in *Peltier* spoke in general terms may indicate its intention to use a "revised" exclusionary rule in just such a way.

[150] Gosa v. Mayden, 413 U.S. 665, 685 (1973); Linkletter v. Walker, 381 U.S. 618, 637 (1965).

[151] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[152] 422 U.S. at 522 (Brennan, J., dissenting).

[153] *See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411 (1970) (Burger, C. J., dissenting); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

[154] Oaks, *supra* note 153, at 735.

[155] *Id.* at 672.

[156] 422 U.S. at 542 (emphasis added).

[157] J. SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1967).

[158] Oaks, *supra* note 153, at 708, 739.

[159] 422 U.S. at 542.

[160] *Id.* at 553 n.1. (Brennan, J., dissenting).