

Winter 1991

## Fourth Amendment--The Constitutionality of a Sobriety Checkpoint Program

Bryan Scott Blade

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>



Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Bryan Scott Blade, Fourth Amendment--The Constitutionality of a Sobriety Checkpoint Program, 81 J. Crim. L. & Criminology 800 (1990-1991)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## FOURTH AMENDMENT—THE CONSTITUTIONALITY OF A SOBRIETY CHECKPOINT PROGRAM

**Michigan Department of State Police v. Sitz, 110 S. Ct. 2481  
(1990)**

### I. INTRODUCTION

In *Michigan Department of State Police v. Sitz*,<sup>1</sup> the United States Supreme Court held that a Michigan sobriety checkpoint program was consistent with the requirements of the fourth amendment.<sup>2</sup> The Court, applying the balancing test announced in *Brown v. Texas*,<sup>3</sup> held that the state had a legitimate interest in preventing drunk driving, the sobriety checkpoint sufficiently advanced the public interest, and the intrusion on individual motorists was slight.<sup>4</sup>

This Note argues that Chief Justice Rehnquist, who wrote the majority opinion for the Court, correctly applied the *Brown* balancing test. Specifically, this Note argues that the Michigan sobriety checkpoint program was sufficiently effective to advance the public interest. The arrest rate realized with the Michigan program compares very favorably with the arrest rate of the border checkpoint upheld by the Supreme Court in *United States v. Martinez-Fuerte*.<sup>5</sup> Moreover, the Court understated the effectiveness of the sobriety checkpoint program by undervaluing its deterrent effect. This Note further concludes that the checkpoint's intrusion on individual liberty is slight and indistinguishable from the intrusion upheld in *Martinez-Fuerte*.

This Note also contends that Justice Brennan, in his dissent, incorrectly demanded an individualized suspicion requirement. Such a requirement was abandoned when the Court upheld the bor-

---

<sup>1</sup> 110 S. Ct. 2481 (1990).

<sup>2</sup> *Id.* at 2488.

<sup>3</sup> 443 U.S. 47 (1979). See *infra* notes 33-34 and accompanying text for a discussion of the *Brown* balancing test.

<sup>4</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2488.

<sup>5</sup> 428 U.S. 543 (1976). See *infra* note 31 and accompanying text for a discussion of the case.

der checkpoint in *Martinez-Fuerte*. The sobriety checkpoint at issue in this case is sufficiently similar to the border checkpoint in *Martinez-Fuerte* to allow the abandonment of the individualized suspicion requirement with respect to the Michigan sobriety checkpoint program.

## II. FACTS

### A. BACKGROUND

Early in 1986, the petitioners, the Michigan Department of State Police and its Director, established a sobriety checkpoint pilot program.<sup>6</sup> The Director appointed a Sobriety Checkpoint Advisory Committee, made up of representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute, to create guidelines setting forth appropriate checkpoint procedures, site selection, and publicity.<sup>7</sup> Under the guidelines, checkpoints were to be set up at selected sites along state roads.<sup>8</sup> All vehicles passing through a checkpoint were to be stopped and their drivers briefly examined for indications of intoxication.<sup>9</sup> If a checkpoint officer detected signs of intoxication, then the officer was to direct the motorist to a designated location out of the traffic flow where another officer examined the motorist's driver's license and car registration.<sup>10</sup> If the field tests and the officer's observations indicated that the motorist was intoxicated, then the officer was to arrest the motorist.<sup>11</sup> Motorists who showed no signs of intoxication were allowed to continue on their way immediately.<sup>12</sup>

The Saginaw County Sheriff's Department carried out the only sobriety checkpoint conducted under the program prior to the Supreme Court decision.<sup>13</sup> The entire operation lasted one hour and fifteen minutes, during which time one hundred twenty-six vehicles passed through the checkpoint.<sup>14</sup> The checkpoint officers detained two drivers for further field sobriety testing, one of whom was subsequently arrested for driving under the influence of alco-

---

<sup>6</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2483-84.

<sup>7</sup> *Id.* at 2484.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* The examining officer was to conduct further sobriety tests at this time if the situation so warranted. *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* The average delay for each vehicle was approximately 25 seconds. *Id.*

hol.<sup>15</sup> On the day before the operation of the Saginaw County checkpoint, respondents<sup>16</sup> filed a complaint seeking a declaratory judgment and injunctive relief from potential subjection to the checkpoints in the Circuit Court of Wayne County.<sup>17</sup>

B. HISTORY OF FOURTH AMENDMENT PROTECTION AGAINST SEARCHES AND SEIZURES OF INDIVIDUALS IN AUTOMOBILES

The Supreme Court has indicated that an individual in an automobile is not entitled to the same level of privacy as an individual in the home.<sup>18</sup> The Court has held that stopping a vehicle and detaining its occupants is a "seizure" within the meaning of the fourth amendment.<sup>19</sup> Yet, it has also held that a stop and seizure of a moving automobile can be made without a warrant.<sup>20</sup> However, the Court noted in *United States v. Almeida-Sanchez* that roving patrol searches of vehicles required consent or probable cause to be "reasonable" under the fourth amendment.<sup>21</sup>

The Court extended the rule announced in *Almeida-Sanchez* two years later in *United States v. Ortiz*.<sup>22</sup> Although the Court required consent or probable cause under the facts of *Almeida-Sanchez*, it also indicated that a different standard might apply if the vehicle inspec-

---

<sup>15</sup> *Id.* An officer in an observation vehicle pulled over a third motorist who drove through the checkpoint without stopping. The officer subsequently arrested the motorist for driving under the influence of alcohol. *Id.*

<sup>16</sup> The respondents were "licensed drivers of the State of Michigan who regularly travel throughout the state in their automobiles." *Sitz v. Department of State Police*, 170 Mich. App. 433, 437, 429 N.W.2d 180, 181 (1988).

<sup>17</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2484. The petitioners agreed to delay further implementation of the checkpoint program pending the outcome of this litigation. *Id.*

<sup>18</sup> *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

<sup>19</sup> *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). The fourth amendment provides in pertinent part:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>20</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973) (citing *Carroll v. United States*, 267 U.S. 132 (1925)).

<sup>21</sup> *Id.* at 269-70. A roving patrol search occurs when officers patrolling in vehicles, as opposed to stationed at fixed checkpoints, randomly stop and search a motorist's vehicle.

<sup>22</sup> 422 U.S. 891 (1975). The Court held that at traffic checkpoints where officers stopped all oncoming traffic, the officers could not search private vehicles without consent or probable cause. *Id.* at 896-97.

tion was for a purpose other than discovering illegal aliens.<sup>23</sup>

The Supreme Court first dealt with the use of roadblocks as a police enforcement technique in *United States v. Brignoni-Ponce*.<sup>24</sup> In *Brignoni-Ponce*, two border patrol officers on roving patrol decided to stop a vehicle to determine if it was transporting illegal aliens.<sup>25</sup> The Court held that although probable cause was not necessary for such a stop, the border patrol officers could not arbitrarily stop motorists.<sup>26</sup>

In *Delaware v. Prouse*,<sup>27</sup> the Court dealt with a situation similar to that in *Brignoni-Ponce*.<sup>28</sup> In *Prouse*, the police stopped a vehicle and detained its driver to check the driver's license and vehicle registration.<sup>29</sup> The Court held that a roving patrol officer needed "articulable and reasonable suspicion" before he was permitted to stop an automobile and detain the driver to check his driver's license and vehicle registration.<sup>30</sup>

---

<sup>23</sup> Brief for Petitioner at 30, *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990) (No. 88-1897) [hereinafter Petitioner's Brief]. The *Ortiz* Court asserted:

Nor do we suggest that probable cause would be required for all inspections of private motor vehicles. It is quite possible, for example, that different considerations would apply to routine safety inspections required as a condition of road use. 422 U.S. at 897 n.3.

<sup>24</sup> 422 U.S. 873 (1975). In contrast to *Almeida-Sanchez* and *Ortiz*, where the Court dealt with intrusive searches, the Court in *Brignoni-Ponce* addressed what fourth amendment standard should be applied to determine the constitutionality of vehicle seizures made by roving patrols for the purpose of briefly questioning the occupants about their citizenship and immigration status. Petitioner's Brief, *supra* note 23, at 31.

<sup>25</sup> *Brignoni-Ponce*, 422 U.S. at 875. The officers had no reason to believe that the car was carrying illegal aliens. *Id.* at 885-86.

<sup>26</sup> *Id.* at 882. The Court noted that officers on roving patrol could stop vehicles "only if they were 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." *Id.* at 884. The Court reached its decision by balancing the state's interest in preventing illegal immigration and the effectiveness of the border stops in combating illegal immigration against the brief delay and minimal intrusion imposed on drivers. *Id.* The Court indicated that other considerations might apply in a different context:

Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters. *Id.* at 883 n.8.

<sup>27</sup> 440 U.S. 648 (1979).

<sup>28</sup> Petitioner's Brief, *supra* note 23, at 33.

<sup>29</sup> *Prouse*, 440 U.S. at 655. The stop at issue in *Prouse* was totally random and carried out with no suspicion of wrongdoing. *Id.* at 650-51.

<sup>30</sup> *Id.* at 663. The Court indicated that its holding might not apply in all contexts:

This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

Later, in *United States v. Martinez-Fuerte*,<sup>31</sup> the Court found permanent checkpoints on major highways near the Mexican border consistent with the fourth amendment, because the permanent checkpoints stopped all vehicles and questioned the occupants in an effort to uncover illegal aliens.<sup>32</sup> Finally, in *Brown v. Texas*,<sup>33</sup> the Supreme Court summarized the relevant factors to be considered when determining the constitutionality of seizures which are less intrusive than traditional arrests. The Court held that a determination of the constitutionality of such seizures involved "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."<sup>34</sup>

### C. THE TRIAL COURT DECISION

To decide the constitutionality of Michigan's sobriety checkpoint program, the trial court employed the test announced by the Supreme Court in *Brown*;<sup>35</sup> the Michigan Court of Appeals later described this test as "balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints."<sup>36</sup> Applying the *Brown* test to the evidence before it, the trial court concluded that "although there is a grave and legitimate state interest in curbing drunk driving, the sobriety checkpoint program did not significantly further the public interest in curbing drunk driving and subjectively

---

*Id.* (footnote omitted).

<sup>31</sup> 428 U.S. 543 (1976). The consolidated cases in *Martinez-Fuerte* concerned criminal prosecutions for offenses relating to the transportation of illegal aliens. The defendants were arrested at a permanent checkpoint operated by the Border Patrol some distance from the Mexican border. Each defendant sought to exclude certain evidence obtained at the checkpoint on the ground that the operation of the checkpoint was incompatible with the fourth amendment. *Id.* at 545.

<sup>32</sup> *Id.* The Court held that the governmental interest in curbing illegal immigration outweighed the minimal intrusion made on motorists. *Id.* at 562.

<sup>33</sup> 443 U.S. 47 (1979). In *Brown*, a state statute made it a crime for a person to refuse to identify himself or herself to a police officer who had lawfully stopped the person and requested the information. *Id.* at 49. The defendant, who was detained and "searched" pursuant to the state statute, challenged the constitutionality of the statute under the fourth amendment. *Id.* The Court held that application of the state statute violated the fourth amendment, because "the officers lacked any reasonable suspicion to believe [defendant] was engaged or had engaged in criminal conduct." *Id.* at 52 (footnote omitted).

<sup>34</sup> *Id.* at 50-51.

<sup>35</sup> See *supra* notes 33-34 and accompanying text.

<sup>36</sup> *Sitz v. Department of State Police*, 170 Mich. App. 433, 439, 429 N.W.2d 180, 182 (1988).

intruded on individual liberties."<sup>37</sup> Accordingly, the trial court ruled that the sobriety checkpoint program violated the fourth amendment of the United States Constitution and article 1, section 11, of the Michigan Constitution.<sup>38</sup>

#### D. THE APPEAL

The Michigan Department of State Police appealed the trial court's decision, claiming the court erred in finding that the sobriety checkpoint program did not significantly further the public interest in curbing drunk driving and that it subjectively intruded on individual liberties.<sup>39</sup> The Michigan Court of Appeals affirmed this decision, concluding that the trial court's findings were not clearly erroneous.<sup>40</sup> The court of appeals agreed with the trial court that the *Brown* balancing test was the correct test to determine the constitutionality of the sobriety checkpoint program.<sup>41</sup> While the court of appeals acknowledged that the state had a "serious and legitimate interest in curbing drunk driving,"<sup>42</sup> it could not find clearly erroneous the trial court's findings that sobriety checkpoints were not an effective means of combating drunk driving<sup>43</sup> and that they subjectively intruded on individual liberties.<sup>44</sup>

The Michigan Supreme Court denied the petitioners' application for leave to appeal, and the United States Supreme Court granted certiorari.<sup>45</sup>

---

<sup>37</sup> *Id.* at 439, 429 N.W.2d at 183.

<sup>38</sup> *Id.* at 437, 429 N.W.2d at 181-82. Article I, Section 11, of the Michigan Constitution provides in pertinent part:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, support by oath or affirmation.

MICH. CONST. art. I, § 11. The Michigan Court of Appeals did not consider whether the program violated the Michigan Constitution. Accordingly, that issue was not before the Supreme Court. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2484 (1990).

<sup>39</sup> *Sitz*, 170 Mich. App. at 439-40, 429 N.W.2d at 183.

<sup>40</sup> *Id.* at 440-41, 429 N.W.2d at 183. The Court of Appeals noted that the findings of fact by the trial court could not be set aside unless they were found to be clearly erroneous. *Id.* at 440, 429 N.W.2d at 183 (citation omitted). A finding of fact is clearly erroneous "when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Id.* (citation omitted).

<sup>41</sup> *Id.* at 439, 429 N.W.2d at 182.

<sup>42</sup> *Id.* at 440, 429 N.W.2d at 183.

<sup>43</sup> *Id.* at 440-41, 429 N.W.2d at 183.

<sup>44</sup> *Id.* at 444, 429 N.W.2d at 185.

<sup>45</sup> 110 S. Ct. 46 (1989).

## III. SUPREME COURT OPINIONS

## A. MAJORITY OPINION

Writing for the majority,<sup>46</sup> Chief Justice Rehnquist initially asserted that *Martinez-Fuerte*<sup>47</sup> and *Brown*<sup>48</sup> were the relevant authorities for the case at hand.<sup>49</sup> Recognizing that a fourth amendment "seizure" occurs whenever a vehicle is stopped at a checkpoint,<sup>50</sup> the Chief Justice concluded that the relevant question thus became whether such a seizure is "reasonable" under the fourth amendment.<sup>51</sup> Chief Justice Rehnquist noted that the instant action only challenged the use of sobriety checkpoints generally; therefore, the Court needed to address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by the checkpoint officers.<sup>52</sup>

Chief Justice Rehnquist reiterated the concerns of the trial court and the Michigan Court of Appeals regarding the seriousness of the drunken driving problem and the state's legitimate interest in curbing it.<sup>53</sup> The Chief Justice agreed with the trial court's and the Court of Appeals' findings that the "objective" intrusion<sup>54</sup> on motorists stopped at a sobriety checkpoint was slight.<sup>55</sup> Chief Justice

---

<sup>46</sup> Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, O'Connor, Scalia, and Kennedy joined. Justice Blackmun, who concurred with the judgment only, stated that he was pleased that the Court was finally stressing this troubling aspect of American life. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2488 (1990) (Blackmun, J., concurring).

<sup>47</sup> 428 U.S. 543 (1976). The Court in *Martinez-Fuerte* utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens. See *supra* notes 31-32 and accompanying text for a discussion of the case.

<sup>48</sup> 443 U.S. 47 (1979). The trial court and the Michigan Court of Appeals utilized the *Brown* three-pronged balancing test to conclude that the sobriety checkpoint program violated the fourth amendment. See *supra* notes 33-34 and accompanying text for a discussion of the case.

<sup>49</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2485.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* Chief Justice Rehnquist pointed out that detention of motorists for more extensive field sobriety testing may need to satisfy an individualized suspicion standard. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> An objective intrusion involves the stop itself, the questioning, and the visual inspection. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

<sup>55</sup> *Id.* at 2486. Chief Justice Rehnquist based this conclusion on the Court's finding in *Martinez-Fuerte* that the objective intrusion was slight for a motorist subjected to a brief stop at a highway checkpoint for illegal aliens. *Michigan Dep't of State Police*, 110 S. Ct. at 2486 (citing *Martinez-Fuerte*, 428 U.S. at 558). Chief Justice Rehnquist found no difference between the levels of intrusion on motorists stopped at a sobriety checkpoint or a highway checkpoint for illegal aliens, noting that the stops seem identical to the law-abiding motorist, except for the nature of the questions asked by the checkpoint officers. *Id.*



Rehnquist, however, did not agree with the Court of Appeals' determination that the "subjective" intrusion<sup>56</sup> on motorists was substantial.<sup>57</sup> He pointed to the Court's decision in *Martinez-Fuerte*,<sup>58</sup> noting that the intrusion resulting from the sobriety checkpoint stop was indistinguishable for constitutional purposes from the checkpoint stops that the Court had upheld in *Martinez-Fuerte*.<sup>59</sup>

Chief Justice Rehnquist next concluded that the Court of Appeals erred in determining that the sobriety checkpoint program failed the "effectiveness" prong of the *Brown* balancing test.<sup>60</sup> He argued that the language from *Brown* indicated that an evaluation of the effectiveness of a law enforcement practice "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."<sup>61</sup> Chief Justice Rehnquist pointed out that of the one hundred twenty-six vehicles detained during the operation of the Saginaw County checkpoint program, two drunk drivers were arrested.<sup>62</sup> Chief Justice Rehnquist noted that the 1.5 percent arrest rate for the Saginaw County sobriety checkpoint program compared very favorably to the 0.5 percent detection rate of illegal aliens hidden in vehicles stopped in *Martinez-Fuerte*.<sup>63</sup> Accordingly, the Chief Justice could see no justification for reaching a different result in the instant

---

<sup>56</sup> A subjective intrusion generates concern or even fright on the part of lawful travelers. *Martinez-Fuerte*, 428 U.S. at 558.

<sup>57</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2486. Chief Justice Rehnquist pointed out that the Court of Appeals had agreed with the trial court's conclusion that the checkpoints had the potential to generate fear and surprise in motorists, because the record failed to show that approaching motorists would be aware of the option to make U-turns or turnoffs to avoid the checkpoints. *Id.* Thus, the Court of Appeals determined that the subjective intrusion from the checkpoint was unreasonable. *Sitz v. Department of State Police*, 170 Mich. App. 433, 443-44, 429 N.W.2d 180, 184-85 (1988).

<sup>58</sup> 428 U.S. 543 (1976). In *Martinez-Fuerte*, the Court held that the subjective intrusion of a checkpoint stop for detecting illegal aliens was not unreasonable under the fourth amendment. *Id.* at 558. The Court pointed out that a checkpoint stop and search was far less intrusive than a roving-patrol stop, noting that roving-patrols often operated at night on seldom traveled roads, while at checkpoint stops the motorist could see that other vehicles were being stopped and would be much less likely to be frightened or annoyed by the intrusion. *Id.* (citing *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975)).

<sup>59</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2487.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 2488. The Court, in sustaining the constitutionality of the checkpoints in *Martinez-Fuerte*, held that the record provided a "rather complete picture of the effectiveness of the San Clemente checkpoint." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

case.<sup>64</sup>

In conclusion, Chief Justice Rehnquist noted that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."<sup>65</sup> Accordingly, the Chief Justice held that the sobriety checkpoint program was consistent with the fourth amendment and reversed the decision of the Michigan Court of Appeals.<sup>66</sup>

#### B. JUSTICE BRENNAN'S DISSENTING OPINION

Justice Brennan, joined by Justice Marshall, dissented from the majority opinion and argued that the Court had misapplied the *Brown* balancing test by "undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving."<sup>67</sup>

Justice Brennan criticized the majority for creating the impression that the Court usually engaged in a balancing test to determine the constitutionality of all seizures, notably those relating to police stops of motorists on public highways.<sup>68</sup> Justice Brennan pointed out that in most cases, the police must possess probable cause for a search to be held reasonable.<sup>69</sup> He noted that only when a seizure is "substantially less intrusive"<sup>70</sup> than a typical police arrest is the balancing test appropriate.<sup>71</sup>

Justice Brennan agreed with the majority that an initial stop of a car at a checkpoint under the Michigan State Police sobriety checkpoint policy was sufficiently less intrusive than an arrest to allow the reasonableness of this seizure to be determined through the balancing test.<sup>72</sup> Nevertheless, he argued that some level of individualized suspicion was a core component of the protection the fourth amendment provided against government action.<sup>73</sup> Justice Brennan

---

<sup>64</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2488.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (Brennan, J., dissenting). Justice Brennan supported his argument by referring to Parts I and II of Justice Stevens' dissenting opinion in this case. *Id.* (Brennan, J., dissenting). See *infra* notes 84-91 and accompanying text for a summary of Parts I and II of Justice Stevens' dissenting opinion.

<sup>68</sup> *Id.* at 2488-89 (Brennan, J., dissenting).

<sup>69</sup> *Id.* at 2489 (Brennan, J., dissenting).

<sup>70</sup> *Id.* (Brennan, J., dissenting) (citing *Dunaway v. New York*, 442 U.S. 200, 210 (1979)).

<sup>71</sup> *Id.* (Brennan, J., dissenting).

<sup>72</sup> *Id.* (Brennan, J., dissenting) (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

<sup>73</sup> *Id.* (Brennan, J., dissenting).

pointed out that the Court's holding that no level of suspicion was necessary for the police to stop a car for the purpose of preventing drunk driving potentially subjected the general public to arbitrary and annoying conduct by the police.<sup>74</sup>

Justice Brennan also rejected the Court's reliance on *Martinez-Fuerte* as support for the contention that the suspicionless stops were justified.<sup>75</sup> He pointed out that in *Martinez-Fuerte*, the suspicionless stops were justified because the heavy traffic flow prevented officers from studying individual vehicles to determine if they were carrying illegal aliens.<sup>76</sup> Justice Brennan noted that "[t]here [has] been no showing in this case that there [is] a similar difficulty in detecting individuals who are driving under the influence of alcohol, nor [is] it intuitively obvious that such a difficulty exist[s]."<sup>77</sup> Accordingly, Justice Brennan concluded that the constitutional balance weighed in favor of protecting the public against even the "minimally intrusive" seizures involved in this case.<sup>78</sup>

#### C. JUSTICE STEVENS' DISSENTING OPINION

Justice Stevens, joined in part by Justices Brennan and Marshall,<sup>79</sup> dissented, arguing that the "net effect of sobriety checkpoints on traffic safety [is] infinitesimal and possibly negative."<sup>80</sup> Justice Stevens argued that a higher arrest rate could have been achieved using more conventional means, adding that a Maryland study conducted over several years showed that of 41,000 motorists passing through sobriety checkpoints, only 143 persons were arrested.<sup>81</sup> Justice Stevens also argued that little if any relationship existed between sobriety checkpoints and a reduction in the number of highway fatalities, pointing to a Maryland study comparing a county using sobriety checkpoints and a control county.<sup>82</sup> Based

---

<sup>74</sup> *Id.* (Brennan, J., dissenting).

<sup>75</sup> *Id.* (Brennan, J., dissenting).

<sup>76</sup> *Id.* (Brennan, J., dissenting) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)).

<sup>77</sup> *Id.* (Brennan, J., dissenting).

<sup>78</sup> *Id.* at 2490 (Brennan, J., dissenting).

<sup>79</sup> Justices Brennan and Marshall joined Justice Stevens' dissenting opinion, but only in Parts I and II. *Id.* at 2490 (Stevens, J., dissenting).

<sup>80</sup> *Id.* (Stevens, J., dissenting).

<sup>81</sup> *Id.* at 2491 (Stevens, J., dissenting) (footnotes omitted). Justice Stevens argued that even if the 143 arrests represented a net increase in drunk driving arrests, this number would be largely insignificant in relation to the 71,000 such arrests made by the Michigan State Police without the sobriety checkpoints. *Id.* (Stevens, J., dissenting).

<sup>82</sup> *Id.* (Stevens, J., dissenting). The results of the study showed that alcohol related accidents decreased by 10% in the checkpoint county and by 11% in the control county. Fatal accidents in the control county fell from 16 to 3, while fatal accidents in the check-

upon this evidence, Justice Stevens noted that the Court had misapplied the *Brown* balancing test by overvaluing the law enforcement interest in using sobriety checkpoints and undervaluing the individual's interest in freedom from random, unannounced investigatory seizures.<sup>83</sup>

Justice Stevens argued in Part I of his dissent that the sobriety checkpoints in the instant case were not analogous to the border stops upheld by this Court in *Martinez-Fuerte*.<sup>84</sup> Initially, Justice Stevens argued that since the border stops were fixed, a motorist had the opportunity to avoid the search, while no such opportunity was available in the case of the temporary sobriety checkpoint.<sup>85</sup> The degree of surprise and fear inherent in the temporary sobriety checkpoints, argued Justice Stevens, distinguished them from the border stops in *Martinez-Fuerte* and made them more intrusive.<sup>86</sup>

Justice Stevens also distinguished the border stops upheld in *Martinez-Fuerte* and the sobriety checkpoint in the present case with respect to the degree of discretion exercised by police officers.<sup>87</sup> Justice Stevens pointed out that with a permanent checkpoint, there is no room for discretion in either the timing or the location of the stop.<sup>88</sup> Yet, with temporary sobriety checkpoints, Justice Stevens argued that police officers would exercise "extremely broad discretion in determining the exact timing and placement of the roadblock."<sup>89</sup>

In Part II of his dissenting opinion, Justice Stevens criticized the Court's determination regarding the degree to which the sobriety checkpoints advanced the public interest.<sup>90</sup> Justice Stevens pointed

---

point county actually doubled from the prior year. *Id.* at 2491-92 (Stevens, J., dissenting).

<sup>83</sup> *Id.* at 2492 (Stevens, J., dissenting).

<sup>84</sup> *Id.* (Stevens, J., dissenting). Justice Stevens conceded that "a border search, or indeed any search at a permanent and fixed checkpoint, [is] much less intrusive than a random stop." *Id.* (Stevens, J., dissenting). However, he argued that the sobriety checkpoint was analogous to the random investigative stops that the Court held unconstitutional in *Brignoni-Ponce* and *Prouse* and not to the border stop upheld in *Martinez-Fuerte*. *Id.* at 2493 (Stevens, J., dissenting).

<sup>85</sup> *Id.* at 2492 (Stevens, J., dissenting).

<sup>86</sup> *Id.* (Stevens, J., dissenting).

<sup>87</sup> *Id.* (Stevens, J., dissenting).

<sup>88</sup> *Id.* (Stevens, J., dissenting).

<sup>89</sup> *Id.* (Stevens, J., dissenting) (footnote omitted). Justice Stevens also argued that a check for a driver's license or for identification papers at an immigration checkpoint was much more readily standardized than a search for signs of intoxication at a sobriety checkpoint. He asserted that a Michigan officer at a sobriety checkpoint had unlimited discretion to detain a motorist on the basis of the slightest suspicion. *Id.* at 2493 (Stevens, J., dissenting).

<sup>90</sup> *Id.* at 2495 (Stevens, J., dissenting). Justice Stevens argued that immigration stops were necessary because transporting illegal aliens did not necessarily impair a motorist's driving ability. As such, an officer could not detect a smuggler simply by observing his

out that there was "a complete failure of proof on the question whether the wholesale seizures have produced any net advance in the public interest in arresting intoxicated drivers."<sup>91</sup>

Justice Stevens, in Part III of his dissenting opinion, criticized the Court for giving no weight to the citizen's interest in being free from unannounced suspicionless seizures.<sup>92</sup> Justice Stevens argued that sobriety checkpoints are "elaborate, and disquieting, publicity stunts."<sup>93</sup> Justice Stevens suggested that the case was driven by symbolic state action, which he argued was "an insufficient justification for an otherwise unreasonable program of random seizures."<sup>94</sup> Accordingly, Justice Stevens concluded that the sobriety checkpoint program violated the fourth amendment.

#### IV. ANALYSIS

##### A. CHIEF JUSTICE REHNQUIST'S CORRECT APPLICATION OF THE *BROWN* BALANCING TEST

An evaluation of the strength of the majority's opinion turns on an analysis of Chief Justice Rehnquist's application of the *Brown* balancing test.<sup>95</sup> Initially, the Chief Justice correctly emphasized the grave public concern with the nation's drunk driving problem, finding that this weighed heavily in favor of upholding the sobriety checkpoint program.<sup>96</sup>

---

driving ability. On the other hand, Justice Stevens argued that an officer could detect an intoxicated motorist without a sobriety checkpoint by observing his or her driving ability, since if intoxication did not affect driving ability it would not be illegal to drive while intoxicated. Accordingly, Justice Stevens argued that sobriety checkpoints did not advance the public interest to the extent that immigration stops did. *Id.* at 2496-97 (Stevens, J., dissenting).

<sup>91</sup> *Id.* at 2495 (Stevens, J., dissenting) (emphasis omitted).

<sup>92</sup> *Id.* at 2497 (Stevens, J., dissenting).

<sup>93</sup> *Id.* at 2498 (Stevens, J., dissenting).

<sup>94</sup> *Id.* at 2499 (Stevens, J., dissenting).

<sup>95</sup> According to the Court in *Brown*, the determination of the constitutionality of a seizure less intrusive than a traditional arrest "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). Justice Brennan, in his dissent, acknowledged that the *Brown* test was the appropriate standard in the present case, noting that "the initial stop of a car at a roadblock under the Michigan State Police sobriety checkpoint policy [was] sufficiently less intrusive than an arrest" to allow application of the *Brown* balancing test. *Michigan Dep't of State Police*, 110 S. Ct. at 2489 (Brennan, J., dissenting). Justice Stevens did not dispute the use of the *Brown* test. However, he argued that a correct application of the *Brown* test to the facts of the case led to the conclusion that the sobriety checkpoint program violated the fourth amendment. *Id.* at 2494-95 (Stevens, J., dissenting).

<sup>96</sup> *Id.* at 2485-86. The Chief Justice noted that drunk drivers cause an annual death toll of over 25,000, nearly one million personal injuries, and more than five billion dollars in property damage. *Id.* (citing 4 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON

Relying on data pertinent to the Michigan sobriety checkpoint program, Chief Justice Rehnquist properly argued that the Michigan program was sufficiently "effective" to advance the public interest under the second prong of the *Brown* balancing test. Justice Stevens, however, erred in his analysis of the program's effectiveness, because he incorrectly focused on the low arrest rate achieved under an older Maryland program; Justice Stevens relied on the Maryland results to demonstrate that the Michigan sobriety checkpoint program was not an effective means of combatting drunk driving.<sup>97</sup> In so doing, he ignored the fact that the 1.5 percent arrest rate realized under the Michigan program<sup>98</sup> compared very favorably with the 0.5 percent arrest rate realized in one of the border stops upheld in *Martinez-Fuerte*.<sup>99</sup> In *Martinez-Fuerte*, the Court concluded that the "record . . . provides a rather complete picture of the effectiveness of the San Clemente checkpoint."<sup>100</sup>

More recently, in *National Treasury Employees Union v. Von Raab*,<sup>101</sup> the Court upheld an employee drug testing program where five employees out of 3,600 tested positive for drugs.<sup>102</sup> The Court pointed out that:

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, and of motorists who are stopped at the checkpoints we approved in *United States v. Martinez-Fuerte* . . . . Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its

---

THE FOURTH AMENDMENT § 10.8(d), at 71 (2d ed. 1987)). Neither Justice Brennan nor Justice Stevens disputed the majority's grave concern for the drunk driving problem in this country.

<sup>97</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2491 (Stevens, J., dissenting). Justice Stevens noted that of the 41,000 motorists passing through 125 different checkpoints under the Maryland program, only 143 persons (0.3%) were arrested. *Id.* (footnote omitted). He argued that "it seems inconceivable that a higher arrest rate could not have been achieved by more conventional means." *Id.* (footnote omitted). This preoccupation with the arrest rate is curious. Intuitively, a low arrest rate should not necessarily constitute evidence of ineffectiveness, especially when the ultimate goal of the program is to keep drunk drivers off the highway. Logically, if the checkpoint program successfully deterred drunk drivers from taking to the highways, there would be fewer drunk drivers to arrest. Accordingly, a low arrest rate at a checkpoint may constitute evidence that the program is successfully keeping drunk drivers off the roads.

<sup>98</sup> See *supra* text accompanying notes 14-15 and 63.

<sup>99</sup> The record in one of the consolidated cases in *Martinez-Fuerte* indicated that of the 146,000 vehicles passing through the checkpoint, 820 were referred to a secondary inspection area where border officers discovered 725 illegal aliens in 171 vehicles. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

<sup>100</sup> *Id.*

<sup>101</sup> 109 S. Ct. 1384 (1989).

<sup>102</sup> *Id.* at 1394-95.

occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.<sup>103</sup>

The Court in *Von Raab* analogized the drug testing program to the search of all passengers boarding commercial airlines,<sup>104</sup> and concluded that "[w]hen the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity the scheme for implementing this interest, is more logically viewed as a hallmark of success."<sup>105</sup>

Furthermore, when proving the effectiveness of the sobriety checkpoint program, the Michigan Department of State Police did not need to show the checkpoint was the only practical alternative.<sup>106</sup> Accordingly, Justice Stevens inappropriately evaluated the effectiveness of the checkpoint program in comparison to other potential police procedures when he argued that a higher arrest rate could have been achieved through use of more conventional police techniques.<sup>107</sup> Such an approach "violates the principle that such less-restrictive-alternative arguments are inapplicable in the search and seizure context."<sup>108</sup> In fact, the Supreme Court rejected a less-restrictive-alternative argument in *Martinez-Fuerte* when it argued that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."<sup>109</sup> More recently, in *Skinner v. Railway Labor Executives Association*,<sup>110</sup> the Court again rejected the "less-restrictive-alternative" analysis when it noted that:

We have repeatedly stated, however, that '[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' It is obvious that '[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' because judges engaged in *post hoc* evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [Government] might have been accomplished.'<sup>111</sup>

---

<sup>103</sup> *Id.* at 1395 (citation omitted) (footnote omitted).

<sup>104</sup> *Id.* at 1395 n.3. During the airport searches discussed in footnote 3, officials found 42,000 firearms out of approximately 19.5 billion searches of persons and luggage. The success rate was approximately 0.0002%. Petitioner's Brief, *supra* note 23, at 51.

<sup>105</sup> *Von Raab*, 109 S. Ct. at 1395-96 n.3.

<sup>106</sup> *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2487 (1990).

<sup>107</sup> *Id.*

<sup>108</sup> Petitioner's Brief, *supra* note 23, at 53-54.

<sup>109</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 n.12 (1976), noted in Petitioner's Brief, *supra* note 23, at 54.

<sup>110</sup> 109 S. Ct. 1402 (1989).

<sup>111</sup> Petitioner's Brief, *supra* note 23, at 54-55 (citing *Railway Labor Executives Ass'n*, 109 S. Ct. at 1419 n.9) (citations omitted).

Thus, Justice Stevens ignored the weight of authority when he argued, via analogy to the Maryland program, that Michigan's 1.5 percent arrest rate for the sobriety checkpoint program indicated a failure of the program and that more conventional police methods would produce a more effective result. When compared with the 0.5 percent arrest rate in *Martinez-Fuerte*, the 0.14 percent success rate in *National Treasury Employees Union*, and the 0.0002 percent success rate for airline passenger searches, the 1.5 percent arrest rate realized by the Michigan sobriety checkpoint program provided complete evidence of an effective checkpoint program.

Moreover, neither Chief Justice Rehnquist nor Justice Stevens gave enough weight to the potential deterrent effect of the sobriety checkpoint program. The Michigan Court of Appeals relied on the testimony of Dr. Lawrence Ross as evidence that the deterrent effect was minimal.<sup>112</sup> Dr. Ross argued that the deterrence value of the program depended upon its arrest rate and that a low arrest rate corresponded with little or no deterrence value.<sup>113</sup> Interestingly, Dr. Ross's own scholarly writings indicated that the evidence regarding sobriety checkpoints was encouraging and that the potential for this enforcement technique should be considered high priority.<sup>114</sup> Furthermore, Dr. Ross testified that sobriety checkpoints did produce a short-term deterrent effect.<sup>115</sup> The Michigan Court of Appeals, however, argued that a short-term deterrent effect was insufficient to show effectiveness and required the State to prove a

---

<sup>112</sup> *Sitz v. Department of State Police*, 170 Mich. App. 433, 441, 429 N.W.2d 180, 183 (1988). Dr. Ross testified that while studies showed a short-term deterrent effect resulting from various programs against drunk driving, the statistics eventually returned to normal. Ross' explanation for this result was that the initial publicity led people to think that the chances of being caught were high. Ross argued that once people learned of the low arrest rate, their behavior would return to normal. *Id.*

<sup>113</sup> *Id.* However, this does not necessarily make intuitive sense. Consider the case of airline passenger searches. Although only approximately 0.0002% of all airline passengers are arrested for carrying illegal firearms, *see supra* note 104, it is doubtful that anyone would argue that the low arrest rate corresponds with little or no deterrence value. Airline passengers considering whether or not to transport firearms are deterred by the fact that they must pass through a search point, not by the knowledge that only 42,000 firearms were discovered out of 19.5 billion searches of passengers. Similarly, an intoxicated individual deciding whether or not to drive is not concerned with the percentage of individuals arrested who pass through a sobriety checkpoint. Rather, an intoxicated individual is more concerned with whether or not she will have to pass through a checkpoint. If not, she may determine that she can drive carefully enough to avoid drawing attention to herself, subjecting all others on the road to great danger. However, with the prospect of passing through a checkpoint, the individual may not be able to avoid scrutiny regardless of how carefully she thinks she can drive. As such, she will be less likely to take to the roads.

<sup>114</sup> Petitioner's Brief, *supra* note 23, at 47.

<sup>115</sup> *Id.*



long-term deterrent effect.<sup>116</sup> Yet, one may persuasively argue that "such a requirement is without support in either logic or Fourth Amendment jurisprudence."<sup>117</sup> Accordingly, since the sobriety checkpoint program has an arrest rate higher than the border stops upheld in *Martinez-Fuerte* and has the potential to generate a greater deterrent effect than recognized by the Court, Chief Justice Rehnquist correctly held that the program was sufficiently effective to advance the public interest as required under the *Brown* test.

In accordance with the *Brown* test, Chief Justice Rehnquist next weighed the severity of the drunk driving problem and the interest served by the checkpoint program against the severity of the intrusion on individual liberty. The Chief Justice correctly concluded that the severity of the intrusion was slight and that the balancing of interests weighed in favor of the constitutionality of the sobriety checkpoint program.<sup>118</sup> Chief Justice Rehnquist agreed with the trial court and the Michigan Court of Appeals that the objective intrusion was slight since motorists were stopped only very briefly at the checkpoint.<sup>119</sup> However, the Chief Justice disagreed with trial court's and the Michigan Court of Appeals' holding that the subjective intrusion was substantial.<sup>120</sup> He appropriately argued that the lower court's had exaggerated the degree of fear and surprise generated by a checkpoint.<sup>121</sup>

This same criticism is applicable to Justice Stevens, who was also preoccupied with the potential fear and surprise associated with a sobriety checkpoint. Justice Stevens' argument that the subjective intrusion from such a checkpoint was substantial<sup>122</sup> ignored the Court's decisions in *Martinez-Fuerte* and *Ortiz*.<sup>123</sup> In *Martinez-Fuerte*, the Court commented that "the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—[is]

---

<sup>116</sup> *Sitz*, 170 Mich. App. at 440-41, 429 N.W.2d at 183.

<sup>117</sup> See Petitioner's Brief, *supra* note 23, at 53. Petitioner further argued that "[t]he facial constitutionality of innovative law enforcement techniques does not depend upon an advance empirical demonstration of long-term deterrent effect." *Id.*

<sup>118</sup> *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2488 (1990).

<sup>119</sup> *Id.* at 2486. Chief Justice Rehnquist could see no difference in the objective intrusion of the sobriety checkpoints in the given case and the objective intrusion of the border stops upheld in *Martinez-Fuerte*. He noted that both stops would seem identical to the average motorist except for "the nature of the questions the checkpoint officers might ask." *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2492-93 (Stevens, J., dissenting). There was no testimony from the individual respondents or any other witness that the sobriety checkpoint generated fear or surprise. Petitioner's Brief, *supra* note 23, at 66.

<sup>123</sup> 422 U.S. 891 (1975).

appreciably less in the case of a checkpoint stop."<sup>124</sup> In *Ortiz*, the Court also argued that checkpoint stops were far less intrusive than roving patrols.<sup>125</sup> Both decisions are instructive, because the checkpoints which the Court found less intrusive than the border stops closely resemble the sobriety checkpoint at issue here. As with the traffic checkpoint in *Ortiz*, the checkpoint here is such that a motorist can see that the police are stopping other vehicles as well as other visible signs of the officers' authority. As Chief Justice Rehnquist asserted, the sobriety checkpoint at issue here was not more subjectively intrusive, and thus was no different for constitutional purposes than the border stop in *Martinez-Fuerte*.<sup>126</sup> Therefore, the Chief Justice correctly applied the *Brown* balancing test when he noted that "the balance of the State's interest in preventing drunk driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."<sup>127</sup>

B. JUSTICE BRENNAN'S INAPPROPRIATE CALL FOR A THRESHOLD  
LEVEL OF INDIVIDUALIZED SUSPICION

Justice Brennan agreed with the majority that the *Brown* balancing test was the appropriate standard to apply in the instant case.<sup>128</sup> However, he argued that the majority had ignored the fact that "[s]ome level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action."<sup>129</sup> Justice Brennan rejected the majority's reliance on *Martinez-Fuerte*, in which the Court upheld a checkpoint program that subjected the public to suspicionless seizures.<sup>130</sup> Justice Brennan argued unpersuasively that the Michigan State Police sobriety checkpoint policy was sufficiently different from the program in *Martinez-Fuerte* to preclude any reliance on the prior holding.<sup>131</sup>

---

<sup>124</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976). The Court made this statement when comparing a checkpoint stop and a roving-patrol stop.

<sup>125</sup> *Ortiz*, 422 U.S. at 894-95. See *supra* note 58 for an explanation of the *Ortiz* Court's reasoning.

<sup>126</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2487.

<sup>127</sup> *Id.* at 2488.

<sup>128</sup> See *supra* note 72 and accompanying text.

<sup>129</sup> *Michigan Dep't of State Police*, 110 S. Ct. at 2488 (Brennan, J., dissenting). Justice Brennan argued that "[b]y holding that no level of suspicion is necessary before the police may stop a car for the purposes of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police." *Id.* (Brennan, J., dissenting).

<sup>130</sup> *Id.* (Brennan, J., dissenting).

<sup>131</sup> *Id.* (Brennan, J., dissenting).

Both the border stops and the sobriety checkpoint involved very brief stops, a short period of questioning, and the channeling of suspicious motorists to a secondary investigation area. As such, Chief Justice Rehnquist correctly argued that both stops would seem identical to the average motorist except for "the nature of the questions the checkpoint officers might ask."<sup>132</sup>

Justice Brennan also argued that even if the two programs were comparable, this did not permit the abandoning of the individualized suspicion requirement in this case.<sup>133</sup> He stated that there was no justification for a suspicionless seizure in the instant case, since drunk drivers could be detected without the use of a sobriety checkpoint.<sup>134</sup> However, the Court in *Martinez-Fuerte* also justified abandoning the individualized suspicion requirement upon the perception that "such a requirement would largely eliminate any deterrent to the conduct of well-disguised smuggling operations."<sup>135</sup>

The same argument applies to a sobriety checkpoint. The requirement of individualized suspicion in the instant case eliminates any deterrent effect upon the intoxicated individual who believes he or she can drive carefully enough to avoid drawing attention to himself or herself. Without the individualized suspicion requirement, the intoxicated individual faces the chance of being stopped despite how carefully he or she is able to drive. Therefore, Justice Stevens incorrectly distinguished the sobriety checkpoint from the border stop in *Martinez-Fuerte* to arrive at the conclusion that the sobriety checkpoint violated the individualized suspicion requirement.

## V. CONCLUSION

The Court's decision upholding a sobriety checkpoint program paves the way for law enforcement officials to implement a promising technique for combating drunk driving. Importantly, the Court accomplished this task without a radical departure from fourth amendment jurisprudence. Rather, the Court arrived at its decision through a consistent application of the case law on automobile searches and seizures.

The Court correctly applied the balancing test enunciated in *Brown* and properly held that the equities weighed in favor of upholding the constitutionality of the Michigan sobriety checkpoint

---

<sup>132</sup> *Id.* at 2486.

<sup>133</sup> *Id.* at 2489 (Brennan, J., dissenting). Justice Brennan argued that in *Martinez-Fuerte*, the suspicionless stops were justified because the traffic flow was too heavy to allow a particularized study of individual vehicles. *Id.* (Brennan, J., dissenting).

<sup>134</sup> *Id.* (Brennan, J., dissenting).

<sup>135</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

program. The arrest rate realized in the Michigan program compared favorably with similar "seizures" upheld by the Court. Furthermore, both the majority and dissenting opinions undervalued the effectiveness of the checkpoint program by failing to give appropriate weight to the deterrent potential of the sobriety checkpoint program.

Finally, the Court properly concluded that the subjective intrusion on individual liberty was slight in light of the substantial drunken driving problem confronting this country. The Court correctly rejected Justice Stevens' unsupported preoccupation with the potential fear and surprise generated by the checkpoint, clearing the way for law enforcement officials to combat more effectively drunken driving.

BRYAN SCOTT BLADE