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The Fourth Amendment: In Search of Illegal Aliens Immigration and Naturalization Service v. Delgado

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CONSTITUTIONAL LAW

THE FOURTH AMENDMENT: IN SEARCH OF ILLEGAL ALIENS

IMMIGRATION AND NATURALIZATION SERVICE V. DELGADO

104 S. Ct. 1758 (1984)

INTRODUCTION

Throughout the nation's history, illegal immigration has generated considerable debate. Particularly important is the problem of illegal immigration from Mexico. The importance is due to the potential impact on Mexico/United States relations, and the sheer numbers involved.¹

Many people believe that immigrants are primarily responsible for the United State's economic problems.² As a result, much attention is being focused on the immigration issue.³ In order to combat illegal immigration the trend is to toughen up immigration policies and extend the authority of the Immigration and Naturalization Service (INS).⁴ One way INS authority is exercised is through "area control operations" known as "factory surveys." Such surveys are INS procedures in which agents arrive unexpectedly at factories or

¹Estimates of the number of illegal aliens present in the United States range from 4-12 million. The INS cites a figure of 8.2 million of which 5.2 million are estimated to be Mexicans. However, these estimates have been criticized as being excessively high by as much as several millions. Cornelius, *Illegal Mexican Migration to the United States: Recent Research Findings*, reprinted in *SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW* 65 (1980).

²Note, *The Factory Raid: An Unconstitutional Act?*, 56 S. CAL. L. REV. 605, 609-10 (1983). This remains the subject of much debate with authorities on both sides debating whether illegal aliens contribute more or less than what they take from the American economy. For example studies conducted at The Massachusetts Institute of Technology (M.I.T.) and the City of San Diego conclude that aliens contribute more through taxes and services than what they receive in benefits. The M.I.T. study noted that only five percent of illegal Mexican aliens drew unemployment or welfare benefits. All paid state and local taxes and two-thirds paid social security and federal income taxes. In the San Diego study the illegal aliens contributed \$49 million per year for income taxes while using health, education and welfare benefits of \$2 million.

³According to some, there is evidence that the courts have been heavily influenced by reports that illegal aliens are taking jobs which otherwise would go to unemployed American Workers. *Id.* discussing *U.S. v. Ortiz*, 422 U.S. 891, 903 (1975), (Burger C.J., concurring) (effect of illegal alien problem on American labor).

⁴The INS derives its authority from the Immigration and Naturalization Act of 1952 §287(a), 8 U.S.C. §1357(a) (1982). The act in relevant part provides,

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

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . .

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

shops where large numbers of illegal aliens are suspected of working. Several agents surround the workplace while others enter and interrogate some or all the workers as to their right to be in the country. If the answers are unsatisfactory or if the worker fails to produce any documentation requested, he is arrested and possibly deported.⁵

Factory surveys are criticized by some legislators and scholars as being futile efforts which strive toward unbeneficial goals.⁶ Another criticism is that the surveys are targeted toward one particular group, Mexicans, and that as a result the constitutional rights of Hispanic Americans are endangered.⁷

In *Immigration and Naturalization Service v. Delgado*⁸ the Supreme Court addressed the issue of whether an INS factory survey violated the workers' fourth amendment right to be free from unreasonable searches and seizures.⁹ The Court held that neither the entire workforce nor any individual workers had been seized as a result of the factory surveys.¹⁰ Since no seizures occurred and the encounters were purely consensual, the Court did not need to determine whether the seizures would have been reasonable under the Fourth Amendment.¹¹

In order to fully understand the ramifications of the Court's decision it is necessary to examine the particular facts of the surveys and recent

⁵Note, *supra* note 2, at 605. A deportation is a civil proceeding. *Harisiades v. Shaughnessy* 342 U.S. 580, 594 (1952). However, some argue that such proceedings should provide the safeguards of criminal proceedings as they are quasi-criminal in nature. Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases*, 14 SAN DIEGO L. REV. 151, 160 (1976). The Reagan Administration supports factory surveys. In 1981 it began its own version of surveys aimed at illegal aliens working in high paying jobs which presumably could be filled by American workers. The program was known as "Project Jobs". Note, *supra* note 2, at 611.

⁶American Enterprise Institute for Public Policy Research, *Should Immigration Policy be Changed?* 6 (1980). See also, *Target: Illegal Aliens*, Newsweek, May 10, 1982 at 45.; *Dragnet for Illegal Workers*, Time, May 10, 1982 at 16.

A major criticism of the surveys is that removed workers are not deterred by the deportation. According to one source, three months after a major INS operation, eighty percent of the workers deported were back at the same jobs because of the economic incentive and the ease of re-entry. L.A. Times, Aug. 1, 1982 at §1, col. 6.

A second criticism points out that most illegal aliens take jobs which American workers do not seek since it involves disagreeable work for low pay. Treviso, *Operation Jobs*, Hispanic Bus. Monthly, May 1982, at 13, 15 (describing a job which involved slaughtering 30,000 chickens a day).

⁷United States Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration*, 82-86 (1980) [hereinafter cited as *The Tarnished Golden Door*]. The constitutional issues are the fourth amendment right to be free from unreasonable searches and seizures, and the fifth amendment's equal protection clause. In *Hernandez v. Texas*, 347 U.S. 475 (1954), the Supreme Court ruled that Mexican Americans are a recognizable, distinct class which may not be singled out for different treatment.

⁸104 S. Ct. 1758 (1984).

⁹*Id.* at 1762. The fourth amendment to the Constitution reads:

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.

¹⁰104 S. Ct. at 1763.

¹¹*Id.* at 1765.

developments of fourth amendment seizure law.

In January and September of 1977 two INS factory surveys were conducted at the Southern California Davis Pleating Company (Davis Pleating).¹² The two surveys were conducted after the INS obtained search warrants from federal magistrates upon probable cause that the factories employed illegal aliens.¹³ However, neither warrant identified any particular alien by name.¹⁴ The INS conducted a third survey at a second location, the Mr. Pleat Factory, in October of 1977.¹⁵ The INS did not use a search warrant but instead obtained the factory owner's consent.¹⁶ The surveys, conducted by surprise, began with several agents guarding the exits while the remainder infiltrated the factory to question workers. The agents were armed and carried handcuffs and walkie-talkies. They displayed their badges while they moved systematically through the factory questioning employees about their citizenship.¹⁷ Workers who failed to provide satisfactory answers or documentation were handcuffed and led away in front of other workers.¹⁸ Significant testimony indicated that the surveys created an atmosphere of fear and intimidation resulting in widespread disturbance among workers.¹⁹

Respondents were four employees questioned during the surveys.²⁰ All

¹²*Id.* at 1760.

¹³*International Ladies Garment Workers v. Sureck*, 681 F.2d 624, 629 (9th Cir. 1981), *rev'd sub nom. Immigration and Naturalization Service v. Delgado*, 104 S. Ct. 1758 (1984). The INS surveys were based on search warrants obtained under FED. R. CRIM. P. 41, *Sureck*, 681 F.2d at 627. In a 1978 decision, a federal court held that the use of such warrants was not permissible, since Rule 41 warrants authorized only the search for property that is evidence of a crime and not persons. *The Tarnished Golden Door*, *supra* note 7, at 88 citing *Blackie's House of Beef v. Castillo*, 467 F. Supp. 170 (D.D.C. 1978), (*Blackie's I*). The court of appeals affirmed *Blackie's I* noting that since INS investigations are civil in nature Rule 41 should not be the basis of warrants. Note, *Fourth Amendment Warrant Standards for Immigration Search of Business Premises for Undocumented Aliens: A New Hybrid Probable Cause?* 13 RUTGERS L. J. 607, 620-21 (1982), (Discussing *Blackie's House of Beef v. Castillo*, 659 F.2d 1211, 1228 (D.C. Cir. 1981)). The result of these decisions has been INS's use of civil administrative warrants based on flexible probable cause requirements. Such warrants eliminate the requirement of individualized suspicion in favor of a balancing approach between the need for the search and its intrusiveness. *Id.* at 621-23.

¹⁴The warrants were challenged as defective at the court of appeals level yet that court did not address the question as it decided the case as a fourth amendment violation. *Sureck*, 681 F.2d at 629. The Supreme Court did not address the warrant issue in its decision. However, in light of the discussion of earlier cases the INS should have proceeded under a hybrid administrative warrant. A federal court suggested that administrative warrants might be used to search commercial establishments but only to grant the INS access to the facility. *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1020 (N.D. Ill. 1982) *The Pilliod* Court rejected the use of warrants to search and seize persons on the premises. *Id.* at 1020.

¹⁵*Delgado*, at 1760.

¹⁶*Id.* The Court did not address the effect of an employer's consent and its effect on the rights of workers. One commentator suggests that such consent should only permit INS agents to enter the premises. It should not authorize the INS to seal off exits or question individuals about whom the INS initially lacked reasonable suspicion. Note, *supra* note 2, at 624. Consent is reluctantly given by owners who realize that refusal creates an adversary relationship in which they will receive the "regular attention" of the INS. *Id.* at 619 n. 89.

¹⁷*Delgado*, 104 S. Ct. at 1760.

¹⁸*Id.* at 1770. (Brennan, J. dissenting).

¹⁹*Id.* See also *The Tarnished Golden Door* *supra* note 7, at 83, (Describing the surveys as "traumatic" experiences).

²⁰*Delgado*, 104 S. Ct. at 1761.

were of Hispanic descent and either American citizens or permanent resident aliens.²¹ The International Ladies Garment Workers Union (ILGWU) also brought suit and the actions were consolidated in the United States District Court for the Central District of California.²² The district court entered summary judgement for the INS rejecting the workers' arguments that the surveys were conducted under faulty warrants and that the seizures violated their fourth amendment right to be free from unreasonable searches and seizures.²³ The Mexican American Legal Defense Fund and the American Jewish Committee filed an amicus curiae brief claiming fifth amendment equal protection violations as a result of the surveys, however the District Court did not address the issue.²⁴

The respondents appealed the district court's grant of summary judgement. The court of appeals for the Ninth Circuit reversed the district court ruling and entered summary judgement for the workers.²⁵ While it recognized the statutory authority of the INS to question aliens or those believed to be aliens, the court held that under the fourth amendment the individual employees could be questioned only if there existed a reasonable suspicion that the particular employee was an illegal alien.²⁶ The appellate court held that the entire workforce had been seized as a result of agents being stationed at the doors.²⁷ The fact agents were stationed at the doors is vital because the appellate court felt that a reasonable person would believe that he was not free to leave.²⁸

²¹*Id.* at n. 1.

²²*International Ladies' Garment Workers v. Sureck*, 681 F.2d 624, 627 (9th Cir. 1982). The labor union was the exclusive representative of production and maintenance employees at the Davis and Mr. Pleat garment factories. It based its standing to sue on behalf of its members under the Labor-Management Relations Act of 1947, 29 U.S.C. §§ 141-87. The union alleged injury to itself and its workers, the majority of whom were of Latin descent, as a result of the surveys. *Id.* at 627-28. The district court dismissed the Union's suit.

²³*Id.* at 628. The district court, in its summary judgment, noted that the search warrant contained sufficient particularity as to the persons to be seized and was based upon sufficient probable cause. Alternatively, it found that appellants lacked a sufficient privacy interest in their workplace to contest the surveys. The court held that the INS properly conducted the questioning pursuant to statutory authority 8 U.S.C. § 1357(a)(1). The court added that even if a seizure had occurred, by placing agents at factory exits, the degree of intrusion was too minimal for a fourth amendment violation to exist. *Id.*

²⁴*Id.* at 628, n. 7. The appellate court did not address the fifth amendment since it decided a fourth amendment violation existed.

²⁵*Id.* at 644-45.

²⁶*Id.* at 638. The court held that the INS questioned persons on a suspicion of alienage alone which was impermissible. *Id.* at 639.

²⁷*Id.* at 630-31. If an agent's conduct amounts to a seizure the fourth amendment is introduced to protect against unreasonable seizures. If no seizure occurs, then there is no need to determine its reasonableness. A court must first determine whether or not a seizure has taken place.

²⁸*Id.* at 631-32. This reasonable person standard is the one courts use to determine whether a seizure has occurred under the fourth amendment. The appellate court noted circumstances that might indicate a seizure. For example, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 631. (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart J.)).

The United States Supreme Court reversed the court of appeals grant of summary judgement for respondents. The Court held that no seizures of any kind took place and thus it was not necessary to satisfy the reasonableness requirement of the fourth amendment.²⁹ The majority reasoned that the fourth amendment does not restrict all contact between citizens and law enforcement officers but was designed to prevent only "arbitrary and oppressive police conduct toward individuals."³⁰

The Court referred to *Terry v. Ohio*³¹ a landmark case in the area of fourth amendment law which held that a seizure existed only when an officer had restrained the liberty of an individual through "physical force or a show of authority."³² The Court in *Terry* held that the officer's action in stopping and frisking an individual was a reasonable search and seizure. The Court reasoned that the officer acted for his own protection "where he had reason to believe that he was dealing with an armed and dangerous individual."³³ *Terry's* true impact on fourth amendment law is that it "created a marked exception to the absolute fourth amendment requirement that probable cause must accompany all searches and seizures."³⁴

The Court has recognized that fourth amendment protections apply to encounters which do not involve arrests, even those involving only a short detention.³⁵ The test used to determine a seizure is "if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."³⁷

The *Delgado* majority noted that there had never been a decision whether the mere questioning of an individual could be a seizure under the fourth amendment.³⁸ However, it relied on its recent decision in *Florida v. Royer*³⁹ to

²⁹*Delgado*, 104 S. Ct. at 1760. See *supra* note 9 for the text of the fourth amendment.

³⁰*Id.* at 1762.

³¹*Terry v. Ohio*, 392 U.S. 1 (1968).

³²*Id.* at 19 n. 16. The *Terry* case dealt with a "stop and frisk" of an individual by a police officer who suspected that the individual was about to commit a robbery. *Id.* at 4-7. The Court ruled that the "stop and frisk" was a form of search and seizure and thus was governed by the fourth amendment protections. *Id.* at 16-19.

³³*Id.* at 27. None of these factors were present in the *Delgado* case.

³⁴Comment, *The Erosion of Probable Cause*, 13 N.C. CENTRAL L. J. 212, (1981). The *Terry* exception created a reasonable standard which was intended to be a narrow exception for dangerous law enforcement situations. However, it has been greatly expanded and the author contends that the probable cause standard is being replaced by the "reasonable suspicion standard." This result was not intended by the *Terry* court yet is consistent with the Burger Court's dislike of the exclusionary rule and its attempts to circumvent it by lowering overall standards for constitutional searches and seizures. *Id.* at 213.

³⁵*Terry*, 392 U.S. at 13-14.

³⁶*United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

³⁷*Id.*

³⁸*Delgado*, 104 S. Ct. at 1762.

³⁹*Florida v. Royer*, 103 S. Ct. 1319 (1983). DEA officials questioned respondent after matching him to a drug courier profile commonly used in DEA investigations and found that an impermissible search and seizure took place.

conclude that questioning a person as to his identity does not constitute a fourth amendment seizure.⁴⁰

The *Delgado* court cited *Brown v. Texas*⁴¹ as an example of impermissible questioning which violated the fourth amendment. Police officers watched the defendant as he met with another man in an alley frequented by drug users. The men quickly separated as the officers approached. The police then requested that the defendant identify himself as required under a Texas statute.⁴² When the defendant refused to comply, the officers physically detained, frisked and then arrested him.⁴³ The Supreme Court unanimously overturned the conviction since an unreasonable search had taken place. The Court rejected the State's contention that the officers acted upon the required suspicion that the defendant was engaged in criminal activity. The Court stated, "[t]he flaw in the State's case is that none of the circumstances . . . justified a reasonable suspicion that he was involved in criminal conduct."⁴⁴ The Court further held, "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest in crime prevention and appellant's right to personal security and privacy tilts in favor of freedom from police interference."⁴⁵ The Court emphasized that the seizure took place when the officers "detained appellant for the purpose of requiring him to identify himself." It also reiterated the principle that fourth amendment protections apply to all seizures no matter how brief the detention.⁴⁶

The Court seemed to distinguish *Delgado* by classifying the survey encounters as purely consensual.⁴⁷ Apparently the Court would have found

⁴⁰*Id.* at 1326. Justice Rehnquist did not explain in *Delgado* why no seizure occurs under such circumstances. However, in *Royer* the Court explained that questions pertaining to one's identity were permissible because without more they do not amount to such a show of authority that a reasonable person would not believe he was free to leave. *Id.*

⁴¹443 U.S. 47 (1979).

⁴²*Id.* at 48.

⁴³*Id.* at 49.

⁴⁴*Id.* at 51-52. The Court was concerned with the potential for abuse which law enforcement officers have when detaining persons. It emphasized that only "specific objective facts" would justify stopping the individual to protect society's legitimate interests. Alternatively, officers must act pursuant to a plan having "explicit, neutral limitations" on the officer's conduct. *Id.* at 51.

⁴⁵*Brown*, at 52. Some commentators believe that the balancing approach is the trend in the Court's fourth amendment jurisprudence. Note, *Fourth Amendment Warrant Standards for Immigration Search of Business Premises for Undocumented Aliens: A New Hybrid Probable Cause?* 13 RUTGERS L. J. 607, 614 (1982). Its advantages are that courts can apply it to a variety of fact patterns and courts have "greater flexibility in responding to new situations." *Id.* Commentators warn about the disadvantages of the approach. First, neither law enforcement officers nor private individuals are given "clear or sufficient guidelines." *Id.* Second, it is a subjective test involving intuitive considerations. Thus, the holdings in cases using the approach are often conclusory. Third, because the approach favors case by case evaluations, there is "less conformity and predictability of decisions." *Id.* at 615. Finally, increasing weight is given to governmental interests as the role of government expands in society. The result is that the balance shifts in favor of the government at the expense of the individual's fourth amendment protections. Another danger is that a court may rely on its own social preferences to justify a predetermined objective, such as crime control. *Id.*

⁴⁶*Brown*, 443 U.S. at 50.

⁴⁷*Delgado*, 104 S. Ct. at 1763-64.

seizures to exist if the workers had refused to answer and the agents had taken further action. The majority noted that most people cooperate with police and do so unaware that they need not respond or even listen to the questions. The Court still considered such encounters consensual.⁴⁸

The Court felt that in *Delgado* it was not the show of authority which produced the cooperation. In fact the Court rejected contentions that a substantial show of authority existed.⁴⁹ For example, respondents relied on the stationing of INS agents at the exits to evidence the show of authority. The majority dismissed this contention by concluding that nothing in the record showed that this was done to prevent workers from leaving.⁵⁰ According to the majority, the "obvious purpose" was to "insure that all persons in the factories were questioned."⁵¹ The Court accepted this conclusion despite an incident related by respondent Miramontes in her deposition. She stated that during the October survey at Mr. Pleat, an INS agent stationed at the exit attempted to prevent a worker from leaving the premises.⁵² The Court dismissed it as an "ambiguous, isolated incident" which failed to provide a basis for relief.⁵³

Another incident demonstrating a show of authority by INS agents occurred during the September survey at Davis Pleating. Respondent Delgado was approached by an agent who asked questions about Delgado's citizenship. Delgado responded that he was from Mayaguez, Puerto Rico. The agent stated that they would be coming back to check him out because he spoke English too well.⁵⁴

The *Delgado* majority felt that the court of appeal's decision in favor of respondents conflicted with the Third Circuit's ruling in *Babula v. Immigration and Naturalization Service*.⁵⁵ *Babula* also dealt with factory surveys used to search for illegal aliens. The appellate court held that questioning of workers by INS agents was minimally intrusive and thus permissible. The agents were justified as they acted upon tips from "reliable" sources and indications that il-

⁴⁸Classifying such encounters as consensual hardly seems realistic. Undoubtedly most citizen/police encounters are voluntary. However, just because officers have not used impermissible methods to obtain an answer does not imply consent. The facts should be examined to see if compliance resulted from some show of authority. This is particularly important as few people are aware of their rights in such situations. *Delgado's* specific facts are relevant in that respondents belong to a group which historically has experienced poor relations with law enforcement, and as members of a lower socio-economic group they are less likely to be aware of their rights.

⁴⁹*Id.* at 1763.

⁵⁰*Id.* at 1762-63.

⁵¹*Id.* at 1763. It hardly seems realistic to believe that agents would have permitted a person to leave unless the agent was sure the individual would return. In light of the reasonable person standard the INS's purpose was irrelevant if a reasonable person did not feel free to leave.

⁵²*Id.* at 1764 n. 6.

⁵³*Id.*

⁵⁴*Id.* at 1770. The majority dismissed this as a harmless observation while the dissent viewed the harassment as "a final reminder of who controlled the situation." *Id.* (Brennan, J., dissenting).

⁵⁵665 F.2d 293 (3rd Cir. 1981).

legal aliens were present.⁵⁶

The Court analogized *Babula* to *Delgado* but significant factual differences existed. One difference was that in *Babula*, the INS had the names of seven, allegedly illegal, Polish aliens.⁵⁷ In *Delgado* the agents had search warrants but as the majority conceded, neither warrant identified a particular alien.⁵⁸ Another difference was that in *Babula* two of the petitioners questioned had attempted to run away from the agents.⁵⁹ In *Babula* all workers were questioned but in *Delgado*, as in most surveys, it was only those of Mexican descent who were questioned.⁶⁰ Another difference is that workers in *Delgado* were aware that agents were stationed at the exits whereas those in *Babula* were not.⁶¹

Although *Delgado* was decided by a seven to two vote, two of the seven justices indicated reservations about joining the majority. Justice Stevens' opinion noted that since a trial had not been held in the case the Court was required to construe the facts in favor of the petitioners.⁶² Justice Stevens wrote,

Because I agree that this record does not establish that there is no genuine issue of fact in the question whether any of the respondents could have reasonably believed that he or she had been detained in some meaningful way, I join the opinion of the Court.⁶³

Justice Powell expressed reluctance as well in his concurring opinion. He stated, "I find the question of whether the factory surveys conducted in this case resulted in any fourth amendment 'seizures' to be a close one."⁶⁴ His difficulty lay with the question of whether the respondents reasonably believed themselves detained. He resolved the difficulty by relying on *United States v. Martinez-Fuerte*⁶⁵ and concluded that in *Delgado*, "any seizure that may have taken place was permissible."⁶⁶

Martinez-Fuerte dealt with INS stops of automobiles at fixed checkpoints

⁵⁶*Id.* at 296. The holding of the case is not surprising as the plaintiffs were illegal aliens.

⁵⁷*Id.* at 294. Prior to the actual survey six were found to be undepotable. Agents relied on actually one name which was still more than what agents in *Delgado* relied upon.

⁵⁸*Delgado*, 104 S. Ct. at 1760.

⁵⁹*Babula*, 665 F.2d at 297.

⁶⁰*Id.* at 296-97. It is unlikely that in *Babula* the agents reasonably expected all workers of being illegal aliens. The agents in *Delgado* admitted that their questioning was not based on reasonable suspicions of illegal alienage. The equal protection rights of Hispanic Americans are threatened if the basis of interrogations has become a person's apparent ancestry. *Delgado*, 104 S. Ct. 1770-72 (Brennan, J. dissenting).

⁶¹*Babula*, 665 F.2d at 298 n. 2.

⁶²The case was decided on summary judgments at both the district and appellate levels. See notes 20-28 *supra* and accompanying text.

⁶³*Delgado*, 104 S. Ct. at 1765 (Stevens, J. concurring). This was the only reason which Justice Stevens gave for concurring in the result.

⁶⁴*Id.* at 1765 (Powell, J. concurring).

⁶⁵428 U.S. 543 (1976).

⁶⁶*Delgado*, 104 S. Ct. at 1765.

away from the Mexican border. The stops were made to question the occupants about their citizenship.⁶⁷ The Court held that the warrantless stops were seizures but upheld them as reasonable.⁶⁸ Central to the determination was a balancing of the governmental and societal interests with the degree of disturbance of the individual's privacy interest.⁶⁹ The Court noted that the stops were brief and were not likely to generate fright on the part of travelers.⁷⁰ The Court reasoned that because they were public and regularized activities vesting little discretion in the officers the questioning was proper despite "the absence of any individualized suspicion" that a particular car contained illegal aliens.⁷¹

Justice Powell considered the government interest even greater in *Delgado's* factory surveys. He noted that the surveys "strike directly" at the illegal alien problem.⁷² The intrusion of a factory survey was seen as minimal as that in *Martinez-Fuerte*.⁷³ It was through the comparison of *Delgado* and *Martinez Fuerte* that Justice Powell joined the majority.

The facts of *United States v. Brignoni-Ponce*⁷⁴ provided a more accurate analogy to those of *Delgado*. *Brignoni-Ponce* concerned roving border patrols rather than fixed checkpoints. The issue was whether roving patrols could stop a vehicle in an area near the border and question the occupants when the only ground for suspicion was that the occupants appeared to be of Mexican ancestry. In a unanimous opinion, the Court held that such detentions were seizures.⁷⁵ The Court found the agent's conduct impermissible because,

Except at the border and its functional equivalents, officers may stop vehicles only if they are aware of specific articulated facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.⁷⁶

The Court further held, while recognizing the "broad congressional power over immigration" that,

. . . this power cannot diminish the Fourth Amendment rights of citizens

⁶⁷*Martinez-Fuerte*, 428 U.S. at 545.

⁶⁸*Id.* at 556.

⁶⁹*Id.* at 555.

⁷⁰*Id.* at 558-60.

⁷¹*Id.* at 562.

⁷²*Delgado*, 104 S. Ct. at 1766. The surveys permit relatively few agents to apprehend large numbers of illegal aliens.

⁷³*Id.* at 1766-67. Justice Powell noted that employees were free to continue working and were stopped for shorter periods than during the checkpoint stops in *Martinez-Fuerte*. Justice Powell felt that any element of surprise or fear was minimized by the systematic and public nature of the surveys.

⁷⁴422 U.S. 873 (1975).

⁷⁵*Id.* at 878. The Court does not explain why the border stops were seizures, other than to reiterate the definition of a seizure as a situation in which, "a police officer accosts an individual and restrains his freedom to walk away." However, the Court sets out the balancing test used to determine the reasonableness of the seizure and determines that in this situation the seizure was not reasonable.

⁷⁶*Id.* at 884.

who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning on less than a reasonable suspicion that they may be aliens.⁷⁷

The Court conspicuously reserved the question of whether border patrol agents could stop persons believed to be aliens without reason to suspect them of being illegally in the country. However, the Court did emphasize that reliance upon a person's apparent ancestry was insufficient to justify stopping and questioning an individual.⁷⁸

The "crucial distinction" between the *Martinez-Fuerte* and *Brignoni-Ponce* cases as related by Justice Brennan in his dissenting opinion in *Delgado* was that there was a "lesser intrusion upon the motorist's Fourth Amendment interests caused by the fixed checkpoint operation."⁷⁹ In *Martinez-Fuerte* the Court observed,

[The] objective intrusion — the stop itself, the questioning, and the visual inspection — also existed in the roving patrol stops. But we view checkpoint stops in a different light because the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop.⁸⁰

The Court in *Martinez-Fuerte* emphasized that the stops would not frighten motorists as would the roving patrols because the element of surprise was absent and the operations both appeared to involve and actually did involve less discretionary enforcement activity.⁸¹ It was the element of surprise and discretion, according to Justice Brennan's dissent, which made *Brignoni-Ponce* analogous to *Delgado*. The factory surveys were sprung upon unsuspecting workers creating widespread fear and anxiety. In addition the dissent noted that "there are no . . . guarantees that the privacy of lawful workers will not be substantially invaded by the factory surveys or that the workers would not be frightened by the INS procedures."⁸²

⁷⁷*Id.*

⁷⁸*Brignoni-Ponce*, 422 U.S. at 884.

⁷⁹*Delgado*, 104 S. Ct. at 1773 (citing *Delaware v. Prouse*, 440 U.S. 648, 656 (1979)).

⁸⁰*Martinez-Fuerte*, 428 U.S. at 558.

⁸¹*Id.* at 559.

⁸²*Delgado*, 104 S. Ct. at 1773 (Brennan, J. dissenting). In order to safeguard the worker's interests Justice Brennan suggested that the INS:

(a) adopt a firm policy of stopping and questioning only those workers who are reasonably suspected of being illegal aliens, or

(b) to develop a factory survey program that is predictably and reliably less intrusive than the current scheme under review. To further the second objective Justice Brennan suggested the use of administrative warrants and to have surveys "tailored in duration and manner so as to be substantially less intrusive." *Id.* at 1774-75.

According to Justice Brennan, the majority erred in its insistence "upon considering each interrogation in isolation" as if respondents had been questioned in a setting similar to that of an officer and a mere passerby on a street corner.⁸³ In Justice Brennan's view, the Court began with an "unrealistic" factual assessment and reached an "equally fanciful conclusion" that the respondents acted voluntarily in answering. To believe that a worker could ignore the surrounding events and have the "temerity" to believe he could refuse to answer was in Justice Brennan's view "simply fantastic."⁸⁴

The dissent agreed with the majority that no seizure of the entire workforce occurred, because in all the surveys the employees were generally free to work and move throughout the factory. However, Justice Brennan found the conduct of the survey relevant to the question of the seizure of individual workers.⁸⁵

Inherent in the facts of *Delgado* is a tension between the individual's fourth amendment rights and society's interest in curbing illegal immigration through the mandate given to the INS by Congress. In balancing the interests of the two the Court has come down squarely on the side of law enforcement. The apparent philosophy is that the ends justify the means. As Justice Brennan put it, "the Court has become so mesmerized by the magnitude of the problem that it has too easily allowed Fourth Amendment freedoms to be sacrificed."⁸⁶

According to Justice Brennan, the country's own immigration policies contribute substantially to the problem. He cited congressional committee reports which have concluded that there exists a serious lack of resources to impose an effective policy.⁸⁷ Supporters of change in immigration practices charge the INS with using band-aid solutions to cure a problem of epidemic proportions. Many believe that the best solution is to impose sanctions against employers who recruit and hire illegal aliens.⁸⁸

⁸³*Id.* at 1769.

⁸⁴*Id.* at 1770. The dissent viewed the Court's reluctance to find a seizure as "understandable." Such a finding would have required the Court to "[justify] the [seizure] on the basis of objective criteria as required by the Fourth Amendment." *Id.* at 1771. A seizure will only be found reasonable if it was made on the basis of a particularly strong suspicion using objective criteria that the person seized was engaged in illegal activities. The INS admitted that it did not selectively question persons on any reasonable suspicion that they were illegal aliens. Thus had the Court found a seizure to exist it probably would not have survived the fourth amendment challenge.

⁸⁵*Delgado*, 104 S. Ct. at 1767-69.

⁸⁶*Id.* at 1775.

⁸⁷*Id.* If the resources used to conduct the surveys and other inland operations were devoted to improving border operations, the problem could be attacked at its source without sacrificing the rights of innocent citizens and resident aliens.

⁸⁸*Id.* at 1772-73 n. 5 (Powell, J., concurring). Mexican Americans generally are opposed to sanctions against employers. They fear it would lead to a reluctance to hire anyone of Mexican ancestry for fear that the person might be an illegal alien. SELECTED READINGS ON U.S. IMMIGRATION POLICY AND LAW 133 (1980).

Criticism has also been directed at the source of INS authority, Section 287 of the Immigration and Nationality Act of 1952 (ACT).⁸⁹ The Act vests the INS with a broad, unrestricted scope of authority. Opponents point out that it was enacted in 1952 during an era of protectionism by a strong Caucasian majority.⁹⁰ The most significant criticism of the Act is that it is constitutionally "threadbare" as it has little or no regard for the Constitution's Fourth Amendment and equal protection guarantees.⁹¹

Congress should formulate modern policies with respect to immigration. It should enact a new immigration statute which offers clear guidelines necessary to carry out these policies while protecting the rights of innocent persons. Until then, the possibility remains that courts sympathetic to law enforcement objectives will continue to formulate such policies as *Delgado* demonstrates.⁹²

CRISTINA NAVARRO

⁸⁹8 U.S.C. § 1357(a) (1982) (*see note 4 supra* for relevant portions of statute).

⁹⁰Note, *supra* note 2, at 635-36.

⁹¹*Id.*

⁹²The trend of the present Supreme Court has been to remove the technical barriers from the path of law enforcement. Thus, the *Delgado* opinion should hardly surprise those who recognize the conservative ideology of the Court and its willingness to sacrifice individual rights for what it views as being the good of society as a whole.