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THE REQUIREMENT OF INDIVIDUALIZED SUSPICION: AN END TO INS FACTORY SWEEPS?

International Ladies' Garment Workers' Union, AFL-CIO v. Sureck
681 F.2d 624 (9th Cir. 1982), cert. granted, 103 S. Ct. 1872 (1983)

CATHY ANN POHL, 1984*

The problem of growing numbers of illegal aliens¹ entering and remaining in this country is one of national concern.² It is estimated that there are between three and six million illegal aliens currently in this country.³

In an attempt to locate illegal aliens, the Immigration and Naturalization Service⁴ has been conducting a series of searches through factories commonly called factory sweeps.⁵ These searches have been carried out under the authority of section 1357 of the Immigration and Naturalization Act which empowers immigration officers without a warrant "to interrogate any alien or person believed to be an alien as to

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1. "Illegal alien" refers to aliens who have entered this country and/or are found to be in this country in violation of the laws of the United States. Any alien who enters the country without inspection, aliens who overstay their visas and passes, and any others who enter or remain in the United States in violation of immigration, and other laws are illegal aliens. ILGWU v. Sureck, 681 F.2d 624, 626 n.1 (9th Cir. 1982). See also United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

2. Congressional hearings on the problem showed that the influx of illegal aliens has an adverse impact on the national labor market because they:
   1) Take jobs which would reasonably be filled by American workers;
   2) Depress the wages and impair the working conditions of American citizens;
   3) Compete with unskilled and uneducated American citizens . . . ;
   4) Increase the burden on American taxpayers through added welfare cost;
   5) Reduce the effectiveness of employee organizations; and
   6) Constitute for employers a group of workers highly susceptible for exploitation.


4. Hereinafter referred to as the INS.

5. Factory sweeps are also called "factory surveys" and the terms will be used interchangeably throughout this Comment. See infra note 119 for a description of a typical factory sweep.
his right to be or to remain in the United States. . . ."6 The Act has given immigration officers broad statutory enforcement powers to prevent unlawful entry and to detect and arrest aliens who enter or remain in the country illegally.7 Recent court decisions, however, reflect growing judicial awareness of the potential conflict between the breadth of the Act and the constitutional protections afforded by the fourth amendment.8 Recognizing that aliens and illegal aliens alike are protected by the Constitution,9 courts are beginning to address the issue.

The United States Court of Appeals for the Ninth Circuit recently addressed the constitutionality of factory sweeps under the fourth amendment. In *International Ladies' Garment Workers' Union, AFL-CIO v. Sureck*,10 the Ninth Circuit decided that the factory surveys were seizures recognized under the fourth amendment.11 Further, the Ninth Circuit determined that the sweeps did not comply with the reasonableness standard12 required by the fourth amendment for detentive

6. 8 U.S.C. §1357(a)(1980) [hereinafter referred to as section 1357 or the Act] reads in part:
(a) 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...

. . .

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

8. The fourth amendment of the Constitution provides:
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.
9. *U.S. CONST. amend. IV."
10. 681 F.2d 624 (9th Cir. 1982).
11. *Id.* at 629-35.
12. Reasonableness under the fourth amendment derives its meaning from the fourth amendment's wording that "the right of the people [is] to be secure . . . against unreasonable searches and seizures. . . ." *U.S. CONST. amend. IV.* (emphasis added). The Constitution does not prohibit all searches and seizures, but only those which are unreasonable. *Elkins v. United States*, 364 U.S. 206, 222 (1960). *See generally Leagre, The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 396-403 (1963). In order to assess reasonableness, it is necessary:

'[f]irst to focus upon the governmental interest which allegedly justifies official intrusion
questioning. The court held that to be reasonable, the detention must be based on a specific and individualized suspicion that the alien is illegally in this country.

This case comment will analyze the Ninth Circuit decision in light of current fourth amendment law. It will be shown that the fourth amendment required the result reached by the Ninth Circuit. The comment also will address the implications and problems the Sureck decision creates for the INS in their attempt to enforce immigration laws at a time when the problem of illegal aliens in this country is rampant.

**Historical Background**

*Supreme Court, INS, and Fourth Amendment Law*

There are three general types of situations in which Immigration and Naturalization Services agents conduct searches and seizures: (1) searches and seizures conducted at United States’ borders; (2) searches and seizures conducted near the borders; and (3) searches and seizures which occur in the interior. Recent decisions have laid some guidelines with which the INS must now comply in conducting upon the constitutionally protected interests of the private citizen, for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails. . . .'

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple 'good faith on the part of the arresting officer is not enough.'

If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.

Terry v. Ohio, 392 U.S. 1, 20-22 (1968) (citations omitted).

13. 681 F.2d at 644.
14. Id.
15. See supra note 2 and accompanying text.
16. Searches at the border have generally been referred to by the courts as "checkpoint" operations. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 422 U.S. 891 (1975). A checkpoint is described as a stop at a specific location at the border. Blinking lights and big signs forewarn cars of the upcoming station. All cars are initially stopped for a minute or two. If an agent so decides, a car may be directed to a secondary stop where further questions are asked. 428 U.S. at 545-46.
17. Searches near the border often are called "roving patrol" stops. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).
18. Searches which occur in the interior are often referred to as area control operations. Factory sweeps are a part of INS area control operations. IGLWU v. Sureck, 681 F.2d 624, 626 n.2
searches and seizures at and near United States borders so that an alien's fourth amendment rights are protected. However, in order to understand the current state of the law regarding fourth amendment protection and the statutory authority provided by the Act, a general understanding of the protections afforded by the fourth amendment is necessary.

The fourth amendment provides that people have a right to be secure in their persons against unreasonable searches and seizures. In addition, the fourth amendment requires a warrant before a search may be conducted. Further, the fourth amendment provides that a warrant will not be issued unless probable cause exists and the person or thing to be searched or seized is described with particularity.

Prior to 1968, the fourth amendment guarantee against unreasonable seizures was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The meaning of a "seizure" under the fourth amendment was analogous to the meaning of a technical arrest which consisted of the person being booked, photographed, fingerprinted and held over for an arraignment and preliminary hearing. Such an arrest or seizure could only be constitutional if probable cause existed. This requirement of probable cause was deemed absolute.

In 1968, in Terry v. Ohio, the Supreme Court established an important exception to the above rule. In Terry, a police officer approached two men and asked their names. When the men "mumbled something" after being questioned, the officer grabbed Terry and "patted down" his outer clothing. A gun was found and Terry was subsequently arrested and charged with possessing a concealed weapon.

(9th Cir. 1982). For a general description of area control operations, see Chapman, supra note 2, at 134-35.


20. U.S. Const. amend. IV.

21. "Probable cause exits where: 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed [by the person to be arrested]'" Brinegar v. United States, 338 U.S. 160, 175-76 (1949), quoting Carroll v. United States, 267 U.S. 132, 162 (1924).

22. U.S. Const. amend. IV.


24. Id. at 208; See also Terry v. Ohio, 392 U.S. 1, 16 (1968).

25. 442 U.S. at 207. See supra note 21 for a definition of probable cause.

26. 442 U.S. at 208.

27. 392 U.S. 1 (1968).

28. Id. at 6-7.
Terry appealed the denial of his motion to suppress the evidence on grounds that it was illegally seized.

The Supreme Court held that the evidence was not illegally seized and in so doing established two very significant departures from the traditional fourth amendment analysis. First, the Court defined the parameters of a seizure under the fourth amendment. Terry established that a “seizure” does encompass detentions which are less intrusive than a full blown arrest. When an officer, by means of physical force or show of authority, has in some way restrained the liberty of a person it may be concluded that a seizure has occurred.

Secondly, Terry established an exception to the rule that fourth amendment seizures must be based on probable cause. The Terry Court sets forth a test for reasonableness where no probable cause exists. If an officer has specific and articulable facts which give rise to a reasonable inference that criminal activity has been, is, or is about to be committed and that the person might be armed and dangerous, he may “seize” the person on that basis without a showing of probable cause. One basis for this departure from the probable cause requirement was the need for police officers to be able to search someone believed to be dangerous. The Court, nevertheless, reasoned that the Terry stop is an intrusion and must be tested by the fourth amendment proscription against unreasonable search and seizure.

Several years later, in Dunaway v. New York, the Supreme Court held that the Terry exception to the probable cause requirement could not be extended to situations where:

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\text{[t]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go";}\]

29. When evidence is obtained in violation of the fourth amendment, it may be suppressed or inadmissible. See Wong Sun v. United States, 371 U.S. 471 (1963).
30. 392 U.S. at 8.
31. 392 U.S. at 18 n.15. The Court stated, “It is quite plain that the Fourth Amendment governs ‘seizures’ of the person which do not eventuate in a trip to the station house and prosecution for a crime — ‘arrests’ in traditional terminology.” Id. at 16.
32. Id. at 19 n.16.
33. Id. at 20. The Court stated: “[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” Id. at 21. (footnote omitted). The Court further stated that anything less than this specific and articulable belief would invite intrusions which simply are impermissible under the fourth amendment. Id. at 22.
34. Id. at 30. See supra note 12 for a description of the reasonableness standard.
35. Id.
indeed he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody.\textsuperscript{37}

First, the Dunaway Court determined that the defendant had clearly been seized.\textsuperscript{38} The State argued that such a seizure should be justified by mere reasonable suspicion,\textsuperscript{39} instead of probable cause. The Dunaway Court reasoned that Terry was not intended to lower the level of suspicion from probable cause to a "reasonable suspicion" where the intrusion is indistinguishable from an arrest.\textsuperscript{40}

One year later, the Supreme Court was again faced with determining what constitutes a seizure invoking fourth amendment protection. Justice Stewart, in his plurality opinion in United States v. Mendenhall\textsuperscript{41}, set forth the proposition that where one voluntarily cooperates with the authorities and feels free to leave, then he has not been seized for fourth amendment purposes.\textsuperscript{42} If a seizure has not been found by the Court, then the fourth amendment analysis ends. If, however, a seizure has been found, then the second part of the analysis is whether the seizure was constitutional.

Thus, when faced with a claim of an unreasonable search or seizure, the two important fourth amendment issues the court must address are: (1) whether a seizure has occurred and (2) whether the level of suspicion required should be probable cause or a lesser Terry type standard. As will become clearer when examining the border search cases, fourth amendment law requires a balancing process. The more intrusive the seizure, (i.e., an arrest as seen in Dunaway), the higher the

\textsuperscript{37}. Id. at 212.
\textsuperscript{38}. Id.
\textsuperscript{39}. Id. at 211-12.
\textsuperscript{40}. Id. at 216. See also United States v. Sanchez-Jaramillo, 637 F.2d 1094, 1098 (7th Cir.), cert. denied, 449 U.S. 862 (1980), where the court stated that Terry granted police "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual."
\textsuperscript{41}. 446 U.S. 544 (1980).
\textsuperscript{42}. Id. at 559-60. (Only Justice Rehnquist expressly joined Justice Stewart in the portion of the opinion that expressed this view (Part II-A). However, Justice Blackmun, and Justice Powell did not indicate disagreement with this view.). In Mendenhall, a woman was stopped at the airport by Drug Enforcement agents. They identified themselves as agents and asked to see her identification and to see her plane ticket. The officers did not wear uniforms and did not display weapons. Id. at 555. They asked her a few other questions and then asked her to accompany them to the DEA office. The Court, in a plurality decision, found that under the test of whether one would feel free to leave, no seizure occurred. Id. at 559. See also United States v. Anderson, 663 F.2d 934, 940 (9th Cir. 1981) (where the following five factors were found to indicate that a person would not feel free to leave: (1) presence of five DEA agents, one police officer and four deputy sheriffs; (2) physical escort to the terminal from the plane; (3) placement in a small room; (4) testimony from plaintiff that they were told to leave the plane rather than requested; and (5) constant presence of the officers, even on trips to the bathroom.). See generally Preiser, Confrontations Initiated by the Police On Less Than Probable Cause, 45 ALB. L. REV. 57 (1980).
level of suspicion required. Additionally, the more crucial the governmental or policy needs for the enforcement are, (i.e., in Terry the policeman’s safety), the more likely that the Court will lower the level of suspicion required for making the detention or seizure.

The Supreme Court on Border Searches

Against this background of fourth amendment law, the Supreme Court considered in several cases the constitutionality of searches and seizures at and near the borders within the context of the fourth amendment. These cases interpret section 1357, which empowers the INS to question, without a warrant, an alien or anyone believed to be an alien. The border search cases provide some guidance for the lower courts in analyzing the INS interior control operation. This is largely because the border search cases reflect the Court’s view of the nature of the balancing process between the degree of the seizure of the alien, the level of suspicion required for the seizure, and the governmental need for controlling illegal immigration.

Stationary Searches and Seizures Conducted Near the Border

In 1976, the Supreme Court in United States v. Martinez-Fuerte held that cars at checkpoint operations may be stopped on less than reasonable suspicion of illegal alienage. The checkpoint operation consisted of a permanent immigration stop where all cars were inspected visually and, then, some were waved on and others were waved over to a second point where brief questions were asked. Large signs forewarned drivers that they would be approaching an immigration stop. The Court stated that although the stops were “seizures” recognized under the fourth amendment the need for making these stops was great. Further, the Court reasoned that the invasion of privacy caused by the stops was minimal, and relied on its view that the

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46. Id. at 547.
47. Id. at 556.
48. Id. at 557-58. The Court stated:
Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. This objective intrusion — the stop itself, the questioning, and the visual inspection — also existed in 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 the lawful travelers — is appreciably less in the case of a checkpoint stop.
Id. at 558.
49. Id. at 562. The Court noted, “one's expectation of privacy in an automobile and of free-
expectation of privacy in a car is less than in one's home.\textsuperscript{50}

The \textit{Martinez} Court allowed the stops on even less suspicion than that required in \textit{Terry}.\textsuperscript{51} Nevertheless, the Court did find that the short stop of the car constituted a seizure and, therefore, the Court was required to determine the constitutionality of the seizure. Clearly, the reduced constitutional protection at checkpoints was based largely on the minimal intrusion of such stops.

\textit{Roving Searches and Seizures Conducted Near the Border}

In 1973, the Court in \textit{Almeida-Sanchez v. United States}\textsuperscript{52} held that the stopping of a car by border patrols twenty-five miles from the border required probable cause or a warrant. In \textit{Almeida}, the Border Patrol stopped the defendant twenty-five miles north of the United States-Mexico border. The car was stopped on the basis of the driver's Mexican appearance. After the car was stopped because of the driver's appearance, his car was thoroughly searched and marijuana was found. It was undenied "that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search — not even the 'reasonable suspicion' found sufficient for a street detention and weapons search in \textit{Terry v. Ohio}.'"\textsuperscript{53}

The Court determined that border searches could be conducted without probable cause, but only if the search was at the border or its "functional equivalent."\textsuperscript{54} The \textit{Almeida} Court recognized the need for the federal government to have power to control the influx of illegal aliens into this country.\textsuperscript{55} Hence, the Court determined that searches could be made at the border or its functional equivalent on less than probable cause.\textsuperscript{56}
Since in *Almeida* the stop was made away from the border, the Court determined that probable cause was required. The Court reasoned that the fourth amendment protects all travellers from the indignity and inconvenience of a search on the offchance that an agent will find an illegal alien.

In *United States v. Brignoni-Ponce*, the Court applied *Terry* in the context of roving border patrol stops. The facts in *Brignoni* showed that the INS border Patrol Officers observed a car containing three occupants who appeared to be of Mexican descent. The car was being driven near the border when the officers stopped the car and questioned the three people, learning that two of them were illegal aliens. The Court ruled that officers may stop a vehicle away from the border if they have a reasonable suspicion that the vehicle contains illegal aliens. The *Brignoni* Court held, however, that even the *Terry* standard of specific and articulable facts, together with reasonable inferences from those facts, was not present. In this case the officers relied solely on the Mexican appearance of the people stopped. The *Brignoni* Court reasoned that this alone did not satisfy the standard that there be a reasonable suspicion that the person stopped is an illegal alien.

The *Brignoni* Court weighed the governmental interest in controlling the influx of illegal aliens against the intrusion of a roving patrol stop and determined that the governmental interest warranted a reduced standard. *Brignoni*, however, reserved the question of whether a car could be stopped only on the grounds that there was an alien in it, when the agents had no specific suspicion that any party in the automo-

57. *Id.* at 273.
58. *Id.* at 274, (citing *Carroll v. United States*, 267 U.S. 132, 153-54 (1924)).
60. *Id.* at 886.
61. *Id.* The Court suggested, however, that such factors as: (1) driver's behavior, i.e., driving erratically to avoid the officer; (2) aspects of the vehicle itself (compartments visible where an alien might hide); (3) the vehicle appearing heavily loaded might warrant a reasonable suspicion. *Id.* at 885.
62. The degree of intrusion of a roving border patrol stop is best explained in *United States v. Ortiz*, 422 U.S. 891 (1975). In *Ortiz*, the Court stated: [T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion. *Id.* at 894-95.
63. *Id.* at 881-82. The Court weighed the fact that 85% of the aliens illegally in this country are from Mexico and there were an estimated several million illegal aliens in this country against the intrusion of the stop. *Id.* at 878-79.
bile was an illegal alien.  

Recently, in United States v. Cortez, the Court held that roving border stops are permissible only if all the circumstances lead to a reasonable particularized inference that the person stopped is engaged in wrongdoing. Thus, Cortez appears to answer the question left open by the Brignoni Court.

Uncertainty Among the Circuits: Interior Stops and Factory Sweeps

Since the Supreme Court has not ruled on the question of what level of suspicion is necessary before the INS may conduct a factory sweep or other interior stop, lower courts have been applying the law set forth in the border search cases with varying results. While the Supreme Court has not clearly delineated the standard to be applied even in the border cases, one recurring principle in those cases and other fourth amendment cases is that a balance must be reached between the level of suspicion an officer must have before making the stop and the degree of intrusion which the stop entails.

The United States Court of Appeals for the District of Columbia Circuit has been one of the first jurisdictions to address the issue of the constitutionality of section 1357 in urban settings. The District of Columbia Court of Appeals ruled in Yam Sang Kwai v. INS that an immigration officer has statutory authority to question a person whom he reasonably believes is an alien as to his right to be in the United

64. Id. at 884 n.9. See Note, Reasonable Suspicion of Illegal Alienage As a Precondition to "Stops" of Suspected Aliens, 52 CHi-KENT L. REV. 485, 497 (1975) [hereinafter cited as Reasonable Suspicion], where the author suggests "[w]hile Brignoni-Ponce reserved the question of whether the suspicion must be of illegal alienage... the language used in the text continued to phrase the standard in terms of illegal alienage."

65. 449 U.S. 411, 418 (1981). In Cortez, INS agents had been observing for some time footprints in the sand of about 8-20 people near the Mexican border. They observed one recurring footprint which bore a distinctive V-shaped design. The agents surmised that a person was guiding illegal aliens into the country over the path marked to a point where they could be picked up by a vehicle. From the number of prints the agents determined that a vehicle large enough to carry 8-20 people would be used. They then staked out the area and stopped a vehicle for questioning. The petitioners argued that the officers did not have adequate cause to make the investigatory stop. Id. at 415-16. The Supreme Court held on these facts there was sufficient individualized information to make the stop. Id. at 421-22.

66. Id. at 421-22. Thus some courts interpret Cortez as requiring a belief of illegal alienage particularized to the person stopped, before any stop may be made. Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011 (N.D. Ill. 1982). This appears to be a correct reading of Cortez. The Cortez Court states "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." 449 U.S. at 418, quoting Terry v. Ohio, 392 U.S. 1, 21 n.18 (1968) (emphasis in original).


States as long as no detention occurs. In holding that section 1357 gives to immigration officers the right to interrogate people reasonably believed to be of alien origin, the District of Columbia Circuit reasoned that the minimal invasion was justified by the special needs of immigration officers to make such inquiries. However, the District of Columbia Circuit qualified this position in Au Yi Lau v. INS, stating that when there is a forcible detention, the agent must then have reason to believe that the alien is in this country illegally.

In a recent decision, the District of Columbia Circuit determined that a search warrant to enter commercial premises to search for illegal aliens need not be specific or individualized as to the persons sought. In Blackie's House of Beef, Inc., v. Castillo, a restaurant owner brought two separate actions against the INS. The INS had received information that Blackie's restaurant employed illegal aliens. The information provided to the INS included an affidavit from an apprehended alien claiming to have worked at Blackie's, an informant who said Hispanics were employed there and who named two illegal aliens, and three anonymous phone calls stating that Blackie's was employing illegal aliens. The INS had also apprehended two illegal aliens who were carrying wage statements from Blackie's. A warrant was issued under the rules of criminal procedure and the INS entered the restaurant and seized fifteen employees, ten of whom were illegal aliens. The court held that since the INS can stop and question pursuant to their statutory mandate of section 1357, it was inappropriate to issue a warrant under criminal procedure. A second warrant was issued and again deportable aliens were located.

70. Id. at 686.
71. Id. at 687. The dissent argues, however, that the invasion of the stop was neither minimal nor mere questioning. The dissent states that where guards are posted at the door one is not free to leave and hence, mere questioning becomes detainment. Id. at 691. See generally, Note, Temporary Detentions of Aliens for the Purpose of Interrogation Are Subject to the Terry Doctrine, 72 Colum. L. Rev. 593 (1972) [hereinafter cited as Temporary Detention].
73. Id. at 223. The Eighth Circuit also applied the District of Columbia standard. Shu Fuk Cheung v. INS, 476 F.2d 1180 (8th Cir. 1973).
75. Id.
76. Id. at 1213.
77. Id. at 1213-14.
78. The warrant for the first seizure was conducted pursuant to Rule 41 of the Federal Rules of Criminal Procedure, not the statutory mandate of section 1357.
79. 659 F.2d at 1228.
80. Id. at 1217-18. The authority for the second warrant was from the INS general statutory authority to question aliens suspected of entering the country illegally. Id.
In neither case did the warrants specify the persons to be seized. The court held that the second warrant under the authority of section 1357 was constitutional even though no specific person was named. The Blackie's court determined that while the lower standard required was not comparable to that of administrative warrants, the warrant did not require the specificity set forth in a criminal situation. The Blackie's court reasoned that the legislative intent of section 1357 was to give the INS authority to question aliens without too much restraint so that enforcement of immigration laws would be effective. The court, emphasizing the governmental need to enforce immigration laws, determined that to require greater specificity would render the INS powerless.

The Seventh Circuit has found that section 1357 should be read as not allowing any type of stop based solely on alienage. In Illinois Migrant Council v. Pilliod, several individuals and the Illinois Migrant Council brought a class action suit seeking injunctive relief against the INS. The complaint alleged that the INS conducted a pattern and practice of harassment in violation of the plaintiffs' first, fourth, and fifth amendment rights. The district court found that the INS had stopped a car and threatened the occupants with jail if they did not show a satisfactory alien green card, and that the INS had stopped individuals solely on the basis of their Mexican appearance and had asked for identification. The facts also showed that the INS, without warrants, entered cottages owned by the Del Monte plant at 4:30 a.m. and demanded that the sleeping occupants get up and show identification. The INS also went into Del Monte plants and questioned people. The Seventh Circuit affirmed the district court, ruling

81. Id. at 1227.
82. Id. at 1218. Administrative warrants are generally issued for the purpose of routine inspections for building code violations and the like. See Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). The Blackie's court determined that the "neutral standards" (meaning no particularized suspicion is required) of administrative searches was not apparent here because the warrant was issued to inspect specific violations. 659 F.2d at 1218. See Note, Search and Seizure, 22 Harv. Int'l L.J. 670 (1981).
83. Id. at 1218. The Blackie's court reasoned that because the detention and deportation of illegal aliens is not criminal law enforcement, and no criminal sanctions are imposed by law upon a knowing employer of illegal aliens, the warrant was issued to aid the INS in its statutory mandate, not police in criminal law enforcement. Id.
84. The Blackie's court provides a fairly extensive discussion of the legislative intent of section 1357, and utilizes the legislative intent to reach its ultimate holding. Id. at 1220 n.10.
86. Id.
87. Id. at 1065. Included in the charges of harrassment were illegal searches, seizures, arrests, interrogatories, detentions and mass raids. Id.
that section 1357 does not permit these type of stops and searches.\textsuperscript{88} Further, the court held that the statute must be construed in a manner consistent with the fourth amendment.\textsuperscript{89}

An injunction was granted and the INS was prohibited from “arresting, detaining, stopping and interrogating . . . unless they possess a valid warrant, have probable cause to search without a warrant, or have a reasonable suspicion based on specific articulable facts that such person is an alien unlawfully in the United States.”\textsuperscript{90} The Seventh Circuit suggested that this injunction would not prevent casual conversation between an INS agent and an alien as long as the alien is not detained.\textsuperscript{91} Further, the injunction prohibited the INS from entering dwellings, houses or dormitories without a warrant.\textsuperscript{92}

Subsequent to the Seventh Circuit case, the INS moved to modify the preliminary injunction arguing that it should be allowed to use administrative warrants under the Blackie’s standard, which requires only specific evidence of a violation of the immigration laws on the premises to be searched.\textsuperscript{93} They would not then be required to show evidence as to the specific persons being sought. The court held that the INS may not conduct investigatory stops based solely on the suspicion that the person stopped is an alien.\textsuperscript{94} The district court ruled that the INS may stop and detain an alien only where there is a reasonable suspicion that he is unlawfully in this country.\textsuperscript{95} Citing \textit{Terry v. Ohio}\textsuperscript{96} and \textit{United States v. Cortez},\textsuperscript{97} the court held that there must be some specific objective manifestation that the person stopped is or is about to be engaged in criminal activity.\textsuperscript{98} The court reasoned that to allow investigatory stops of aliens on lesser grounds would subvert the fundamental principal of fourth amendment jurisprudence.\textsuperscript{99} The court further held that

\begin{itemize}
\item \textsuperscript{88} \textit{Id.} at 1066.
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at 1067. The injunction was modified slightly. The modification allowed for stopping and questioning by agents as long as no detention occurred. Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977).
\item \textsuperscript{91} 540 F.2d at 1070 n.10.
\item \textsuperscript{92} \textit{Id.} at 1072.
\item \textsuperscript{93} Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011, 1020 (N.D. Ill. 1982).
\item \textsuperscript{94} \textit{Id.} at 1019.
\item \textsuperscript{95} Relying heavily on the wording by the Court in \textit{United States v. Brignoni-Ponce}, 422 U.S. 873 (1975), the court reasoned that investigatory stops were only allowed where there was a reasonable suspicion that the persons are aliens \textit{illegally} in this country. \textit{Id.} at 1017-18 (emphasis added). \textit{See supra} note 62.
\item \textsuperscript{96} 392 U.S. 1 (1968).
\item \textsuperscript{97} 449 U.S. 411 (1981).
\item \textsuperscript{98} 531 F. Supp. at 1017.
\item \textsuperscript{99} \textit{Id.} Deciding that such a standard is necessary the court said:
\item If the INS had this [unchecked] power, it would be able to arbitrarily 'seize' a large
it would not allow the INS to obtain warrants to search dwellings "under the relaxed probable cause standard of Blackie's House of Beef." 100

The Third Circuit has adopted a different approach than the District of Columbia Circuit. In Lee v. INS, 101 the Third Circuit held that the standard to be applied is whether the stop and interrogation are reasonably related in scope to the justification of their initiation. 102 Rather than adopting the District of Columbia Circuit approach of determining whether the encounter was "mere questioning" or a "forcible detention," the focus for the Third Circuit is whether the circumstances the agent described passed the threshold of reasonable suspicion. 103 In Lee, there were several factors leading up to the suspicion. An INS officer, on an unrelated assignment, saw two men walking across a parking lot. A restaurant was located there, which the officer knew from prior experience, had employed illegal aliens. The two men attracted attention because they were speaking Chinese and wore white shirts typical of kitchen help. The Third Circuit determined that the factors described by the agent gave rise to individualized suspicion that Lee was in the country illegally. 104

However, the Third Circuit in a later decision, Babula v. INS, 105

category of persons, many if not most of whom are presumably engaged in no wrongdoing. That is the sort of general seizure, not linked to specific facts which give rise to an inference that the specific individual seized is engaged in criminal activity, which the fourth amendment prohibits.

Id. This point is further demonstrated in Ybarra v. Illinois, 444 U.S. 85 (1979). In that case, officers detained and searched all the patrons of the bar. In holding the search of Ybarra unconstitutional, the Court noted, "... a search or seizure of the person must be supported by probable cause particularized with respect to a person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search another. ... " Id. at 91.

100. 531 F. Supp. at 1023. While Blackie's dealt with warrants for commercial premises and Pilliod dealt with warrants to search dwellings, the Pilliod court suggests that even if given a warrant to search the premises, the warrant does not then permit a seizure of persons on the premises. Id. at 1020. There is some uncertainty, however, as to whether Pilliod extends to factory situations equally. While Pilliod's facts involved factory surveys, the emphasis of the court was on the search of the dwellings. But the initial injunction in Pilliod was directed at factory control operations as well as searches of dwellings, dormitories, and street encounters. Id. at 1020.

101. 590 F.2d 497 (3d Cir. 1979).
102. Id. at 502.
103. Id.
104. Id.
105. 665 F.2d 294 (3d Cir. 1981). In Babula, the INS conducted a factory survey looking for illegal Polish aliens. The INS had received a tip that seven named illegal aliens were employed at a factory. INS records, however, indicated that six of the seven were not subject to deportation. Id. at 295. Upon entry the INS learned that the seventh person no longer worked there. The INS questioned workers even though they no longer had any suspicion about any specific individual. Ten workers were arrested. Id. at 295.
held that an individualized suspicion was not necessary. The facts in Babula showed that the agents had reason to believe that only some of the workers were illegal aliens. Moreover, the one specific individual they did suspect no longer worked there. The INS checked out the H & H factory and determined that it was a feasible location for an area control operation. They then had six agents go to the factory to look for aliens in violation of their immigration status. Three agents were posted at the exits of the factory "to prevent anyone from leaving" and three entered the factory. Upon entry, the agents spoke with the general manager and asked about the seventh person on the list believed to still be working there. After learning that he no longer worked there, the agents with no information as to any other named individuals, began questioning the workers about their citizenship status and whether they had the proper papers. The Third Circuit determined that where agents believed some people were illegal aliens working in a factory, the "milieu" suspicion was constitutionally sufficient to allow INS to stop and question all workers.

Thus, jurisdictions which have addressed the questioning of persons by an immigration officer have reached varied results. The District of Columbia Circuit approaches the issue by first examining whether the stop is detentive. If it is, then the court determines whether there is a reasonable, articulable suspicion that the questioned person is an alien illegally in the country. However, after the Blackie's decision it appears the District of Columbia Circuit might require less than individualized suspicion. The Seventh Circuit appears to handle the problem similarly to the District of Columbia Circuit, at least with re-

106. Id. at 296.
107. Id.
108. Id. In effect, when the INS went into the factory they had no specific suspicion that anyone was an illegal alien.
109. Id. at 294.
110. The milieu concept is essentially that suspicion about the milieu in which the workers are found is enough suspicion to warrant questioning of the group. Id.
111. Id. at 296-97. However, the Third Circuit noted that "although questioning without individualized suspicion raises serious constitutional concerns, we think that the facts of this case present one of these instances where such questioning is permissible." Id. at 297.
113. See 659 F.2d 1211 (D.C. Cir. 1981). The Blackie's court dealt with the issue of warrants to search premises for illegal aliens and held that specificity in search warrants was not necessary. Id. at 1225. Rather the court held only some 'quantum of individualized suspicion' as to the persons sought is required. Id. Therefore, there is a question as to whether the District of Columbia Circuit would extend their reasoning to detentive stops of illegal aliens, thus requiring only some quantum of suspicion, not an articulable and specified suspicion. The Third Circuit, however, allowed stops to be made with only some quantum of suspicion. Babula v. INS, 665 F.2d 293, 296-97 (3d Cir. 1981).
spect to its approach to detentive versus non-detentive questioning. By contrast, the Third Circuit appears to afford less weight to the nature of the stop and does not require an individualized suspicion that the person detained is an illegal alien.\textsuperscript{114} The Ninth Circuit in \textit{International Ladies’ Garment Worker’s Union v. Sureck}\textsuperscript{115} determined that detentive questioning requires an individualized suspicion as to each person detained.\textsuperscript{116}

\textbf{INTERNATIONAL LADIES’ GARMENT WORKERS’ UNION, AFL-CIO v. SURECK}

\textit{Facts of the Case}

This suit was brought by several employees\textsuperscript{117} and the International Ladies’ Garment Workers’ Union\textsuperscript{118} against the INS challenging the constitutionality of three separate factory sweeps.\textsuperscript{119} The factory sweeps challenged by the Union and the employees were conducted for the purpose of locating illegal aliens.\textsuperscript{120} The appellants sought injunctive relief from the INS’s practice of conducting factory sweeps.\textsuperscript{121}

Three particular factory sweeps were challenged, two at the same factory and one at another. The agents had obtained search warrants\textsuperscript{122} to enter the factory for the first two sweeps and the owner’s consent for the third.\textsuperscript{123} The search warrants did not state any particu-

\textsuperscript{114} Id. at 297.
\textsuperscript{115} 681 F.2d 624 (9th Cir. 1982).
\textsuperscript{116} Id. at 643.
\textsuperscript{117} Two of the appellants were United States citizens and two were resident aliens. 681 F.2d at 627.
\textsuperscript{118} The International Ladies’ Garment Workers’ Union alleged it represented thousands of garment workers, the majority of whom are of Latin ancestry. \textit{Id.} at 627-28.
\textsuperscript{119} \textit{Sureck} sets forth a description of a typical factory sweep: The typical factory sweep begins when the INS receives information that a particular work place may be employing illegal aliens. In order to verify the information, the INS places the suspected location under visual surveillance to determine whether it appears the factory employs illegal aliens. If their information is verified, the agents are then instructed to request permission of the work place owner or manager for INS to enter and question the employees. The ultimate goal is to arrest those found to be in the country illegally. If consent is not given then a warrant is obtained.

The INS then enters the factories and stations agents at all exits and entrances. The remaining agents proceed through the factory questioning workers as to their citizenship status. While the agents are told to be courteous and cause as little disruption as possible, the sweeps often begin with cries of “LaMigra” (the immigration) and people running to hide. The agents are instructed to question all workers although the INS admits that such a task is often not possible. \textit{Id.} at 626.
\textsuperscript{120} Id. at 627.
\textsuperscript{121} Id. at 626.
\textsuperscript{122} The INS admitted during oral argument that the warrant only justified the initial entry into the work place. The detentive questioning was therefore considered warrantless. \textit{Id.} at 629 n.8.
\textsuperscript{123} Id. at 627.
lar names.\textsuperscript{124} After entry the INS placed agents at all the exits,\textsuperscript{125} and at two of the factories agents questioned only some of the workers.\textsuperscript{126}

The United States District Court for the Central District of California granted summary judgment in favor of the INS.\textsuperscript{127} First, the district court found that INS's warrants were valid because they contained sufficient particularity as to the person to be seized and they were based upon sufficient probable cause.\textsuperscript{128} In the alternative, the district court found that the appellants lacked a sufficient privacy interest in their workplace to contest the surveys pursuant to warrant or consent.\textsuperscript{129} On the issue of whether the INS detention and questioning of workers during the survey was appropriate, the district court found for the INS.\textsuperscript{130} The court held that the workers were not arrested, detained or seized in a manner invoking the fourth amendment and that the INS properly conducted the questioning pursuant to section 1357(a)(1).\textsuperscript{131} Finally, the court found that even if a seizure did occur by placement of agents at factory exits, the degree of intrusion was so minimal that no fourth amendment violation occurred.\textsuperscript{132}

\textit{The Ninth Circuit Opinion}

The Ninth Circuit reviewed the summary judgment findings of the district court \textit{de novo}.\textsuperscript{133} The issues before the Ninth Circuit were: (1) whether factory surveys constitute a seizure cognizable under the fourth amendment; (2) what standards must be met for the seizure to be constitutional under the fourth amendment; and (3) whether the INS

\textsuperscript{124} Id. at n.5.
\textsuperscript{125} Id. at 626-27.
\textsuperscript{126} Not all the workers were questioned because of a shortage of INS manpower. Id. at 627.
\textsuperscript{127} Id. at 628.
\textsuperscript{128} Id.
\textsuperscript{129} The Ninth Circuit stated that the district court's finding that the plaintiffs did not have a legitimate privacy interest in the factory premises was significant, but they never actually addressed the issue. Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} In reviewing the case \textit{de novo}, the court explained that the parties agreed that none of the material facts were in dispute. The court further explained the test to be applied in reviewing the grant or denial of a summary judgment motion. The test which the Ninth Circuit applied was that summary judgment would be proper only if there was no genuine issue of any material fact or when viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law. Id. at 629.
met the standards during the factory sweeps that were the subject of the litigation.

The Factory Sweep Constituted a Seizure

The INS contended that the facts did not present a detention or seizure which would invoke the objective standard required by the fourth amendment.134 The INS argued that the test should be whether a person would feel free to leave.135 In rejecting the INS argument, the court held that a custodial detention as seen in Dunaway v. New York136 did not exist because none of the workers were physically restrained, hand-cuffed, or placed into custody until the agents had sufficient probable cause to suspect that the employee was illegally in the country.137 However, the procedures used by the INS to carry out the operation, such as the number of agents employed and the execution of the sweep itself138 led the Ninth Circuit to find that a seizure of the work force occurred thus invoking fourth amendment protection.139

Constitutional Standard For a Factory Sweep

The Ninth Circuit then addressed the constitutional standard applicable to the INS conduct. The court held that an individualized suspicion of illegal alienage is required for sufficient protection of fourth amendment rights.140 The Ninth Circuit using the language of two very recent Supreme Court cases, United States v. Cortez141 and Michigan v. Summers,142 determined that the Court had intended that

134. Id.
135. Id. The INS further contended that the four named plaintiffs circulated throughout the factory and could not have reasonably felt detained by the INS. Id. at 630. The INS also discounted the placing of agents at the doors by arguing that the only encounter the plaintiffs had with an agent was when an agent asked them one to three questions. Id.
136. 442 U.S. 200, 211 (1979) (where the petitioner was actually escorted to the police station and placed in an interrogation room).
137. 681 F.2d at 630.
138. The court found that the following factors indicated a seizure occurred: (1) the agents were stationed at all the exits; (2) the investigators' authority was announced verbally and the badges of the INS were displayed; (3) some agents carried handcuffs and used them to detain those suspected of being in this country illegally; (4) the element of surprise with which the operation unfolded and the disruption of the work environment, and the methodical execution of the operation with a line of agents proceeding down each row of workers which could easily appear threatening. Id. at 634.
139. Id.
140. Id. at 643.
142. 452 U.S. 692 (1981). In Summers, the Court upheld as constitutional the seizure of a person who was leaving his home as police officers arrived to execute a search warrant to check the premises for drugs. Id. at 705. Summers set forth three criteria for reasonableness of a nonarrest seizure: (1) the intrusion must be limited in time and extent; (2) it must be justified by law
seizures must be based on some reasonable suspicion of illegal or criminal activity. In deciding that the fourth amendment constitutionally requires a reasonable suspicion of illegal alienage, the court recognized that its decision limited the statutory authority of section 1357(a)(1). The Ninth Circuit reasoned that to hold otherwise would weaken the fourth amendment's protection of both citizens and aliens in this country. Further, the Ninth Circuit reasoned that to allow INS to randomly question people without specific facts giving rise to an individualized suspicion of illegal alienage would grant the INS impermissible discretion to detain persons and question them at whim.

The court further refused to adopt the Third Circuit's holding that a "milieu" standard is acceptable for constitutional purposes. The INS, citing United States v. Martinez-Fuerte, contended that the governmental interest in enforcement of the immigration laws permits it to question workers on a less than individualized suspicion. The Ninth Circuit rejected the INS argument. The court reasoned that where a detention is as frightening and intrusive as a factory sweep, a reasonable individualized suspicion that each worker is an illegal alien is required.

Thus, the Ninth Circuit held that the INS had not met the requirements of the standard of individualized suspicion nor a reasonable suspicion of illegal alienage in carrying out the factory sweeps. The INS had set forth the following facts to articulate their suspicion: (1) the factories were garment factories known to employ large numbers of enforcement concerns; (3) it must be related to the person seized by articulable facts which create a sufficient basis for believing the person is involved in criminal behavior. For a discussion of the implications of the Summers decision, see Note, Gauging the Reasonableness of Nonarrest Seizures: The Emerging Rule of Michigan v. Summers, 46 ALB. L. REV. 631 (1981).

143. 681 F.2d at 635.
145. Id. The Supreme Court stated in Brignoni that section 1357 authorizes Congress to admit aliens on the condition that they will submit to reasonable questioning about their right to be and remain in this country but this power cannot diminish the fourth amendment rights of citizens who may be mistaken for aliens. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).
146. Id. See Delaware v. Prouse, 440 U.S. 648 (1979) (where random stopping of cars for license checks was held violative of the fourth amendment).
149. 681 F.2d at 641. In Martinez-Fuerte, the Court lowered the level of suspicion required because the governmental need for enforcing immigration laws was great when compared to the minimal intrusion of a checkpoint operation. 428 U.S. at 557 (1976).
150. 681 F.2d at 640-41.
illegal aliens; (2) the INS had arrested other illegal aliens outside the premises who said others were employed there; (3) upon entry the people shouted "LaMigra" (immigration agents) and began running and hiding; and (4) the INS knew that 78 illegal aliens had been previously apprehended there. Recognizing that this decision may hinder INS efforts to seek out illegal aliens in work forces, the court nevertheless maintained that the factors set forth by the INS leading to the sweeps were not constitutionally sufficient to warrant the seizure.

ANALYSIS

The Seizure

The Ninth Circuit first determined that the factory sweep constituted a seizure for fourth amendment purposes. The court applied the test for a seizure set forth in United States v. Mendenhall, Terry v. Ohio, and by the Ninth Circuit itself in United States v. Anderson, and properly found that a seizure had occurred. Terry and Mendenhall stand for the proposition that if a person reasonably feels restrained in his liberty by a show of force or authority, a seizure has occurred. By stationing agents at each door of the factory and by displaying immigration badges, the INS clearly made a show of force and authority constituting a seizure for fourth amendment purposes. Undoubtedly, a person who knew or suspected that there were guards at all doors would not feel free to leave. The Ninth Circuit does suggest that casual personal intercourse might be possible between a person and INS investigators; however, the questioning during the factory sweep was not of this nature.

The standard in Sureck for what constitutes a seizure differs from the District of Columbia standard. The District of Columbia Circuit has taken the position that "mere questioning" by an officer based only on a belief that the person is an alien, is not a seizure and is constitutionally permissible. If, however, the agent "forcibly" detains the

151. Id. at 643.
152. Id. at 644. The court thus reversed the summary judgment granted in favor of the INS and remanded the case to the district court for further proceeding not inconsistent with the decision. Id. at 645.
155. 663 F.2d 934 (9th Cir. 1981).
157. 681 F.2d at 630 n.9.
158. Id.
person, he must believe that the person is an illegal alien. Moreover, if a person is “merely questioned” and attempts to flee, a forcible detention arises.\textsuperscript{160} The distinction between “mere questioning” and “forcibly detaining” is not a clear one.\textsuperscript{161} As a New York district court, in \textit{Marquez v. Kiley},\textsuperscript{162} pointed out, a rule which says that a casual encounter can occur between the INS, armed with a badge and a gun to enforce immigration laws, and an alien, without the alien feeling detained is unrealistic.\textsuperscript{163} The Ninth Circuit correctly recognized that where there are INS agents questioning workers in a factory, a seizure has occurred.

In \textit{Sureck}, the INS strenuously argued that no seizure or forcible detention occurred. However, even if no agents were stationed at the doors, as the \textit{Marquez} court points out, it is difficult to imagine that the workers would feel free to leave. Moreover, if they did decide to leave or refuse to answer, they would then, at least under the District of Columbia Circuit’s formulation, have provided a reason to forcibly detain them.\textsuperscript{164} Thus the concept of voluntarily submitting to questioning is rendered meaningless because as soon as the person walks away the INS has grounds to forcibly detain him.\textsuperscript{165} The Ninth Circuit suggested that the whole purpose of putting guards at the door was to secure the workforce and if a person fled, he would then be detained.\textsuperscript{166} The \textit{Sureck} court further noted that if the INS did not surround the factory in order to apprehend those attempting to flee, “the total

\textsuperscript{160} Id.
\textsuperscript{161} See \textit{Reasonable Suspicion, supra} note 64, at 495.
\textsuperscript{162} 436 F. Supp. 100 (S.D.N.Y. 1977).
\textsuperscript{163} Id. at 114. The \textit{Marquez} court states:

\begin{quote}
[W]hatever theoretical appeal there may be to a rule which permits casual, voluntary questions upon suspicion of alienage alone, but requires suspicion of illegality for detention, is in our view substantially undermined by the realities of the matter. It is in the nature of an oxymoron to speak of ‘casual’ inquiry between a government official armed with a badge and a gun and charged with enforcing the nation’s immigration laws, and a person suspected of alienage. This is particularly so in the context of area control operations as described at trial. In such situations a suspect alien is suddenly confronted by INS officers who have just driven up in an automobile, left the car and directly approached, and immediately queried as to his nationality. For a constitutional rule in these matters to depend on the ‘voluntary cooperation’ of the suspect is to impose a gloss upon real life. When it is further considered that refusal to cooperate or an attempt to evade such a ‘casual encounter,’ indeed, even the appearance of nervousness, may well be held to provide reasonable grounds to suspect unlawful presence and therefore to authorize forcible detention. . . .
\end{quote}

\textit{Id.} at 113-14. See also \textit{Yam Sang Kwai v. INS}, 411 F.2d 683, 691 (D.C. Cir.), \textit{cert. denied}, 396 U.S. 877 (1969) (Wright, J., dissenting) (dissent maintains that there are no distinguishable factors between mere questioning and forcible detention).
\textsuperscript{165} \textit{See \textit{Temporary Detention, supra}} note 71, at 597.
\textsuperscript{166} 681 F.2d at 632.
number of apprehensions would doubtless be reduced."¹⁶⁷ The deter-
mination that a seizure had occurred was, therefore, a proper one.

Reasonableness of the Seizure

Having determined that a seizure occurred, it became necessary to
determine whether the seizure was reasonable under the fourth amend-
ment. The Ninth Circuit, in determining that the seizure was unre-
asonable, held that the INS must have an individualized suspicion that
the person seized is an illegal alien.¹⁶⁸ Accordingly, the Ninth Circuit
decision would appear to prohibit a factory sweep where the only sus-
picion an agent has is that there are a few illegal aliens working in the
factory.

The Ninth Circuit, in its holding that the sweep was unreasonable
under the fourth amendment, emphasizes two points. First, the court
specifically states that its decision is not limited to a discussion of the
rights of aliens.¹⁶⁹ It reasons that innocent citizens and legal resident
aliens employed at factories deserve the same rights to be free of the
indignity of arbitrary government intrusions which the fourth amend-
ment guarantees all individuals.¹⁷⁰ To protect those rights it is abso-
lutely necessary that the INS have an individualized suspicion as to
each person detained. The second point emphasized by the court is
that without the requirement of an individualized suspicion, detentive
questioning of aliens would be impermissibly random. The court aptly
states that the intrusive and frightening nature of these searches based
on nothing more than inarticulate hunches cannot be constitutional
under the fourth amendment.¹⁷¹

The intrusiveness of the factory sweep can certainly be discerned
from the facts described in Sureck. Where agents in uniform unexpect-
edly went into a workplace and placed guards at all the exits, workers
would naturally become distracted and frightened. Certainly, the im-
age of an officer with hand-cuffs proceeding down a row of workers,
with some expressing their fears by screaming "LaMigra," is a frighten-
ing one, even to the innocent worker. The Ninth Circuit correctly
perceived that a factory sweep is highly intrusive and therefore rejects
the notion that United States v. Martínez-Fuerte¹⁷² allows factory

¹⁶⁷. Id.
¹⁶⁸. Id. at 643.
¹⁶⁹. Id. at 639.
¹⁷⁰. Id.
¹⁷¹. Id. at 644.
sweeps on less than individualized suspicion.\textsuperscript{173}

The \textit{Sureck} court standard of individualized suspicion stands in direct conflict with the Third Circuit standard in \textit{Babula v. INS}.\textsuperscript{174} The Third Circuit maintains that a factory sweep can be reasonable merely based on a "milieu" suspicion that some illegal aliens are employed at the factory.\textsuperscript{175} The Third Circuit never actually discusses the degree of detention that the workers suffered while being questioned during the sweep. Because the Third Circuit relies heavily on the reasoning of \textit{Martinez-Fuerte}, the necessary implication is that the court viewed the factory sweep as very unintrusive. Indeed, the \textit{Babula} court says that the questioning done by the officers was no more intrusive than the questioning of persons in a car.\textsuperscript{176} The primary distinction that appears between the \textit{Sureck} sweep and the \textit{Babula} sweep, is that in the former not all workers were questioned, while in the latter they were. While arguably there is less arbitrariness in a sweep where all workers are questioned, the degree of intrusiveness and fright is no different. A worker during a factory survey has no way of knowing that all or a few workers will be questioned. Thus the Ninth Circuit, as opposed to the Third Circuit, recognizes that because of the intrusive nature of a factory sweep, individualized suspicion is constitutionally required.

The Seventh Circuit decision in \textit{Illinois Migrant Council v. Pilliod}\textsuperscript{177} also recognized that where a detention occurs such as in a factory sweep, a specified and individualized suspicion is required. The Third Circuit, while claiming to be in agreement with the Seventh Circuit, clearly represents a significant departure from both the Ninth and the Seventh Circuits. The Third Circuit reasoned that \textit{Pilliod} involved late night searches of dwellings, while the Third Circuit decision dealt with the issue of searches of factories and thus the decisions were reconcilable. First, the Seventh Circuit opinion did address the issue of stopping aliens on less than individualized suspicion in situations other than searches of dwellings and held these to be unconstitutional.\textsuperscript{178} The Seventh Circuit held that any situation, where there is a detention requires more than a vague suspicion of illegal alienage.\textsuperscript{179} Second,

\begin{itemize}
\item \textsuperscript{173} 681 F.2d at 640-41.
\item \textsuperscript{174} 665 F.2d 293 (3d Cir. 1981).
\item \textsuperscript{175} \textit{Id.} at 296. It is worth noting who the injured parties are in \textit{Babula} and \textit{Sureck}. In \textit{Babula}, the plaintiffs were all illegal aliens. In \textit{Sureck}, the injured parties were two United States citizens and two legal resident aliens. One might wonder whether this factor had any bearing on the respective results.
\item \textsuperscript{176} \textit{Id.} at 296.
\item \textsuperscript{177} 540 F.2d 1062 (7th Cir. 1976).
\item \textsuperscript{178} \textit{Id.} at 1070-71 n.10.
\item \textsuperscript{179} \textit{Id.}.
\end{itemize}
even if the Seventh Circuit decision did not deal with searches other than dwellings, it might be argued that the search of one’s workplace, where one spends a majority of his day and has a routinized workday, is not a place where a person might expect such a type of disruption. Hence, the Third Circuit’s reasoning that when the INS deals with any situation except one involving the sanctity of private dwellings, individualized suspicion is not required, suggests that it has not examined the nature of a search such as a factory sweep. Unlike the Ninth Circuit, the Third Circuit has not considered what the nature of a person’s fright, anxiety, and concern might be when agents come in and interrupt and disturb the flow of the workplace.

The Sureck stance better protects the concerns voiced in the fourth amendment. Fourth amendment law entails a balancing of the degree of the intrusion with the suspicion required. For an arrest, with its accompanying high degree of intrusion, probable cause is required. A roving border stop requires a reasonable particularized suspicion that the person is an illegal alien, which is a lower standard than probable cause. For a checkpoint operation, which is regarded as less intrusive than either an arrest or roving border stop, the Supreme Court has held that even less than reasonable suspicion is constitutionally sufficient. It would seem apparent that a factory sweep must fall closest to the roving border patrol in intrusiveness. The Ninth Circuit correctly recognizes this similarity. A roving border patrol was found intrusive because they operate at night and are unexpected stops which might frighten motorists. Similarly, factory sweeps are unexpected and unfold with chaos and disruption of the workplace. In addition, because factory sweeps are on the interior and not near the border, added elements of surprise are present.

In contrast, the Third Circuit appears to have glossed over the degree of intrusiveness involved in a factory sweep. Analogizing the factory sweep to the check point operation found minimally intrusive in United States v. Martinez-Fuerte, the Third Circuit determined that less than reasonable individualized suspicion is required, hence adopt-
ing the milieu standard. In its attempt to set forth a gauge of what is or is not intrusive, the Martinez Court spoke of the elements of fright, unanticipatedness, and routinized nature of the operation as determinants for the level of intrusiveness. The higher the degree of intrusion, the higher the standard of reasonable suspicion required. Clearly the Ninth Circuit better recognized the Martinez distinctions of intrusiveness. The Sureck court correctly states that the factors of no surprise, short duration and minimal disruption present in a checkpoint operation do not exist in a factory sweep.

The question presented in both Sureck and Babula rests on whether the suspicion that there are a few illegal aliens in a factory is enough to detain and question the whole group. The notion that the suspicion must be individualized is clearly demonstrated in Ybarra v. Illinois. In Ybarra, police arrived at a bar with a warrant to search for one person suspected of dealing drugs. The officers detained and searched all the patrons of the bar including Ybarra. The Court held that the search of Ybarra was unconstitutional. Ybarra, while not factually similar, sets forth a principle that the fourth amendment protects against guilt by association. A close reading of Ybarra suggests that a suspicion that a few illegal aliens might be present is not constitutionally sufficient to detain the group. The Third Circuit appeared to ignore the principle set forth in Ybarra, since the practical effect of Babula is guilt by association in a factory sweep operation.

The approach taken by the Ninth Circuit is more in keeping with the balancing approach laid out by the Supreme Court. Fourth amendment law, as applied by the Supreme Court, suggests that a highly intrusive seizure requires a higher, more specified degree of suspicion. Therefore the Ninth Circuit’s approach, in contrast to the Third Circuit’s, is consistent with fourth amendment law.

Implications of the Sureck Opinion

Fourth amendment law required the result reached by the Ninth Circuit, however, the decision creates enormous difficulties for INS law

189. 428 U.S. at 557-59.
190. 681 F.2d at 640-41.
192. Id. at 88-96.
193. Id. at 91. See also United States v. Heredia-Castillo, 616 F.2d 1147, 1149 (9th Cir. 1980) (where the legitimate stop of one individual did not give rise to an individualized suspicion as to his passenger).
enforcement. Sureck raises two important questions, namely: (1) whether a factory sweep can ever be done in a non-detentive fashion; and, (2) whether the requirement of an individualized suspicion means that the INS can never carry out a factory sweep unless it believes that every person working in the factory is an illegal alien.

The first of these questions was specifically left unanswered by the Ninth Circuit. The court stated, “Assuming a factory survey could be, or would be performed in a non-detentive atmosphere, it is not appropriate in this case for us to provide the INS with a list of justifying factors for such a hypothetical survey.” The court seems to imply that a factory survey could never be accomplished in a non-detentive fashion.

It is difficult to imagine a set of factors short of a list of names and an informant’s tip of illegal alienage that would satisfy the Ninth Circuit’s standard for a constitutional factory sweep. The District of Columbia Circuit in Blackie’s House of Beef v. Castillo points out the irony of a ruling like that of the Ninth Circuit. First, the Blackie’s court suggests that, even if the agent had the first names of suspected aliens, he would still have to question those appearing to be aliens in order to find the named individuals. In doing so, the agent will create the same intrusive atmosphere that the Ninth Circuit found constitutionally inferior. Second, the Blackie’s court suggests such a requirement would have the effect of leaving the INS free to combat only isolated instances of illegal immigration but powerless to combat the much more serious problem of congregations of illegal aliens at one central place. As a matter of policy the Blackie’s court’s reasoning makes good sense; however, as a matter of constitutional protection it is clear that the fourth amendment cannot be compromised.

Certainly, in most fourth amendment cases there is a balancing by the court of fourth amendment protections and law enforcement needs. A proper consideration of the Sureck court was the concern that innocent and unsuspecting aliens were being subject to such INS

194. The Ninth Circuit recognized that it might create problems by stating, “We recognize that our decision today may hinder INS efforts to seek out illegal aliens in workplaces.” 681 F.2d at 644.
195. Id. at 643 n.23.
197. The Blackie’s court points out that illegal aliens are fugitives from the law and hence, getting vital statistics on them from files in the United States is impossible. 659 F.2d at 1225. In addition, the court states that the likelihood that an illegal alien would ever use his real name is slim. Id.
198. Id.
operations. The fourth amendment specifications, as suggested earlier, are intended to protect people from such unwarranted intrusions. Therefore, it would seem a balance between enforcement needs and fourth amendment protections require that protection of fourth amendment rights be weighed heavily as the Ninth Circuit correctly did.

To address the dilemma raised by the Blackie's court, bills which seek to prohibit an employer from knowingly hiring an illegal alien have been introduced in Congress since 1951. One such bill, the Immigration Reform and Control Act of 1982, passed the Senate in the summer of 1982. The bill set forth fairly tough criminal sanctions against employers who knowingly employ illegal aliens. However, the lame-duck session of the 97th Congress came to a close and the bill died.

Since bills have been introduced repeatedly in Congress suggesting that the answer to the dilemma lies in punishing employers who knowingly hire illegal aliens, it can be assumed that future bills will be introduced. The question therefore arises as to whether such legislation actually will lessen or end the illegal alien problem in this country.

It is known that Mexican aliens continue to come to this country illegally for social and economic reasons. Mexico's high unemploy-
ment\textsuperscript{206} and poor economic condition make coming to the United States a better alternative to the alien than remaining in Mexico, even if it means doing so illegally.\textsuperscript{207} Employers have been very willing to hire illegal aliens because they work longer hours and receive lower wages than the resident workers.\textsuperscript{208}

Perhaps if legislation were passed which did penalize employers, they would be more reluctant to hire illegal aliens and reduce some of the incentive for the illegal alien entering this country. However, critics of the legislation suggest that the bill will have a discriminatory impact, particularly on people of Hispanic appearance.\textsuperscript{209} The suggestion is that employer sanctions will cause employers to deny people with accents or foreign appearance employment because of the risk that they may be in the country illegally.\textsuperscript{210}

Further, it has been suggested that employers may feel even with fines, it is financially better to employ illegal aliens who are cheaper laborers.\textsuperscript{211} One further concern is how such violations would be detected.\textsuperscript{212} The INS may again be faced with enforcement problems but of a slightly different nature.

\textbf{CONCLUSION}

The \textit{Sureck} decision reflects the growing difficulties of reconciling fourth amendment protection with law enforcement needs.\textsuperscript{213} The long-term results of the decision suggest that the INS will have to curtail if not cease their factory sweep operations. Certainly the Ninth Circuit has perceptively and correctly reasoned that a factory sweep is so intrusive that it must occur only when the most stringent requirements for the protection of fourth amendment rights are met. While the problem of growing numbers of illegal aliens in this country is of

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\textsuperscript{206} Id. at 663-64. \\
\textsuperscript{207} See \textit{Goodpaster}, supra note 2, at 703-08. \\
\textsuperscript{208} \textit{Employer Sanctions}, supra note 204, at 666. \textit{See also Undocumented Mexican Alien}, supra note 200, at 817. \\
\textsuperscript{209} See \textit{Goodpaster}, supra note 2, at 703-08. \\
\textsuperscript{210} Id. \\
\textsuperscript{211} Id. \\
\textsuperscript{212} A question arises as to how the INS would know that an employer was hiring illegal aliens. Conceivably, the INS would still have to enter the factory to determine if illegal aliens had been hired. \\
\textsuperscript{213} The Supreme Court expressed the problem well when it said "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." \textit{Almeida-Sanchez} v. United States, 413 U.S. 266, 273 (1973). 
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concern, it cannot weigh more heavily than protection of the rights of innocent and unsuspecting factory workers.